

UACES 44th Annual Conference

Cork, 1-3 September 2014

Conference papers are works-in-progress - they should not be cited without the author's permission. The views and opinions expressed in this paper are those of the author(s).

www.uaces.org

Preventing exploitation through the seasonal workers directive

Conny Rijken

Introduction

After more than three years of negotiations, the Directive on Seasonal Workers finally entered into force on 26 February 2014. The directive aims to harmonise the entry of Third Country Nationals (TCN) who want temporary employment in the EU. By granting a secure legal status and equal treatment for working conditions and access to appropriate accommodation the directive further aims to prevent TCN from exploitation. In addition it includes an option for circular migration, facilitating the re-entering for seasonal workers to contribute to fighting illegal migration. The directive is typically designed for sectors with a high need for workers during a certain period of the year, e.g. tourism and agriculture. Sectors of which we know are sensitive for exploitative practices. Seasonal workers will be treated equally with EU nationals on core elements i.e. terms of employment and some branches of social security, but are excluded from others. Some guarantees relating to safe and adequate living conditions are adopted, including in such cases the employer provides for the accommodation. In the latter case a situation of enhanced dependency exist making the worker multiple dependent on the employer increasing the risk of abuse and ultimately exploitation.

The paper will assess the extent to which the goals of the Directive are or can be achieved with a specific focus on the aim to prevent exploitation. First the problems the directive aims to meet will be further explained. Thereafter, the long process of adopting the directive is being discussed in which a shift to include more protective measures in the directive becomes visible. Then an assessment will be made whether the directive can indeed be an answer to the problems identified.

What is wrong with seasonal workers?

We all know the examples of seasonal workers who do the harvesting of our vegetables in the South of Spain, picking tomatoes in Italy, strawberries in Germany or working in bars or hotels in touristic areas during the high season. These seasonal workers are often not nationals

of the country in which the work is done, but are either EU citizen from Middle and Eastern Europe or from outside the European Union, Third Country Nationals (TCN). Since the paper focusses on the directive on seasonal workers in which TCN are subjected, the paper only focusses on the situation of TCN. They often find themselves in a vulnerable position which is qualified by many as exploitation or even human trafficking. Before we dive into the specific problems in relation to TCN a few general remarks on these terms. Regardless an internationally adopted definition of human trafficking in Article 3 of the Palermo protocol and in Article 2 of the EU trafficking directive, exploitation nor labour exploitation has been clearly defined and differences on the national levels are multiple.¹ In Spain and Romania for instance only the violation of labour rights of a migrant qualifies as exploitation and sometimes even trafficking whereas in other countries the threshold is much higher. Although interesting, it would go beyond the realm of this paper to further elaborate on the particularities on these definitions. For the purpose of the current paper it is sufficient to realise that such differences do exist and the difficulties to distinguish between exploitative practices, human trafficking and forced labour.²

The abuses and exploitation of TCN while doing the seasonal work have been widely reported. They seem to be an easy target for such practices for several reasons.

First of all, they are in a country only for short period of time, preventing them from building a social network or getting to know the national systems and rules, including the rules that protect them. They are ill-informed about their labour rights and do not become a member of labour organisations or trade unions. For the same reason it is difficult for the labour organisations and trade unions to enter into contact with the workers who stay only during a short period of time.

Second, not only the work is temporary, they are often accommodated in temporary housing facilities that often do not comply with the national standards. Reports on workers accommodated in tents, containers, in shacks build of disposable material, or old caravans are multiple. This is often with the official permission of the local authorities and therefor not illegal. Municipalities are responsible for the monitoring of these forms of housing (at least in the Netherlands) but do not have the capacity to do so nor do they prioritise such monitoring.

Third, seasonal workers are often accommodated on the premises of the employer, especially in the agricultural sector, making them dependent on the employer. These premises are often

¹ C. Rijken (2013), Trafficking in Human Beings for Labour Exploitation: Cooperation in an Integrated Approach, *European Journal of Crime, Criminal Law and Criminal Justice*, 2013(21), issue 1, 9-35,

² K. Skrivankova, *Between Decent Work and Forced Labour: Examining the Continuum of Exploitation*, paper for the Joseph Rowntree Foundation, November 2010, available online at: <http://www.jrf.org.uk>.

located in rural areas with limited options for the workers to participate in social life in the host country. Sometimes, municipalities prefer that they are not accommodated in the centres of the cities but in the outskirts of the city to prevent commotion from neighbours.³ It not only is a burden for the workers to leave the premises if located far away from civilization but also for trade unions, NGOs and inspections to visit these premises.

Fourth, they often work via temporary work agencies, on all inclusive constructions for work, insurance and housing which makes them largely dependent on the agency and creates non-transparent constructions for payment and withdrawals for rent and premiums. The multiple dependency e.g. for housing, transport, work, insurance, from either an employer or an agency might seem an attractive option at first but creates a vulnerability for the workers because if they want to quit the work (e.g. because of not being paid) they might as well lose their house and insurance.

Fifth, and due to the temporary character of the work as well as complicated procedures the workers do not often complain or start an action against an abusive employer. Recent research has shown that receiving compensation, back payment etc. is very difficult especially for people from abroad. The procedures are often complicated and the process and preparation of a case is time consuming. Especially if people have a temporary permit their permit is expired before a procedure can commence.

In this paper it will be scrutinised to what extent these problems in relation to the treatment of third country nationals are met with the newly adopted directive after a short reflection on the adoption of the directive.

Adopting the directive

The proposal for this directive on seasonal employment was tabled on 13 July 2010.⁴ In the proposal the Commission recognised that in the future the EU will remain in need of such workers, and that this gap cannot be filled with EU national workers. More importantly, it recognises that third-country seasonal workers currently face exploitative situations and sub-

³ See for instance; H. Jonson, Housing Labour market conditions and regional migration, Linnaeus University 2012, G. Engbersen et al., Arbeidsmigratie in vierden, 2011, Arbeidsmigranten uit Midden-en Oost-Europa: sociale leefsituatie en arbeidspositie, Erasmus University, available at: http://nicis.platform31.nl/Wat_doen_wij/Onderzoek/Afgeronde_onderzoeken/Welzijn_Integratie/Arbeidsmigrant_en_uit_Midden_en_Oost_Europa_sociale_leefsituatie_en_arbeidspositie?training=EC1107, also: <http://www.houseofrepresentatives.nl/dossiers/housing-eu-labour-migrants>,

⁴ 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 379 final (2010).

standard working conditions which may threaten their health and safety. Especially agriculture, tourism and horticulture are in need of seasonal workers and they turn out to be sectors where work is undertaken by illegally staying TCNs. It furthermore states that ‘swift and flexible admission procedures and securing a legal status for seasonal workers can act as a safeguard against exploitation, and also protects EU citizens who are seasonal workers from unfair competition.’⁵ It particularly aims to contribute to achieving the millennium development goals as well as to eradicate poverty. Since it will be a *temporary* residence permit, it is believed that it will not constitute a brain drain.

After the proposal was tabled in July 2010 more than three and a half years has passed before it was adopted. In the meantime other proposals for entry and stay for TCNs, especially those highly qualified TCNs, were more swiftly adopted (see also the panel-paper of Tesseltje de Lange). This long process of adopting the directive shows the member state’s hesitance to open the market for low skilled TCNs while recognizing the need for such workers.

In the proposal the TCN seasonal worker was allowed to work for a maximum of six months per calendar year as a seasonal worker, finally it was agreed that a seasonal work permit will be granted for a minimum of five months and maximum of nine months in any 12 months period. States can identify sectors where seasonal workers may be employed. The fast track procedure in which an application was to be dealt with within 30 days has been rejected in the final directive. A worker can apply for a permit if he has arranged a contract or if there is a binding job offer that specifies a rate of pay. The explanatory memorandum explains is concerns payment equal to or above a minimum level. However, this was not included in the text of Article 5 of the proposal. During the negotiations and especially with the lobbying of a group of NGOs the equal treatment of TCN granted a seasonal workers’ permit have been extensively discussed. The European Parliament made amendments to the proposal to focus more on the rights of the workers, equal treatment of seasonal workers and nationals and the inclusion of a complaints procedure. These have now been included in Articles 23 and 25.⁶

After political agreement was achieved on 29 October 2013, the directive was formally adopted on 5th of February and entered into force with the publication of the directive in the Official Journal on 26 February 2014.

To what extent does the Directive contribute to prevent exploitative practices?

⁵ Ibid, at 3.

⁶ Concept report responsible commission EP, PE464.980 of 8 June 2011

The multiple goals of the directive are reflected in the directive; managing migration flows, combating exploitative practices, protecting TCN, and stimulating economic development within the EU. This multiplicity also follows from Article 1 of the directive on conditions of entry and stay and on the rights of seasonal workers. It seems to be hard to aim at all these goals at the same time, nevertheless the EU has made an attempt with the current directive.

That the EU did not succeed in all aspects of this aim is the striking absence throughout the directive of any reference to labour exploitation or human trafficking for labour exploitation. Especially with an explicit aim to fight such practices this is remarkable. As mentioned above difficulties to define these practices make it more difficult to use these terms but since the EU has defined human trafficking in its Directive 2011/36,⁷ it has been transposed in all EU member states and combating trafficking has become one of the priorities of the EU it would have been logical to refer to these phenomena. Now that trafficking nor labour exploitation have been mentioned explicitly no provisions have been adopted for the protection of seasonal workers as victims of trafficking once he is employed with an abusive employer. Although there are some provisions guaranteeing that the worker can file a complaint or has a right to back payment, other protective measure for trafficking victims such as guaranteed in directive 2011/36 or directive 2004/81⁸ do not apply. That such a reference is not exceptional is shown by Directive 2009/52, the sanctions directive which in article 13(3) refers to directive 2004/81 for a temporary residence permit in case of complaints of illegally employed persons against the employer.

The further relatedness of the current directive with the sanctions directive⁹ is explicitly recognised in consideration 7 where the sanctions directive is seen as an incentive to prevent overstaying or temporary stay from becoming permanent. It is however highly questionable whether the sanctions directive indeed does have this effect. In the recent second evaluation of the sanctions directive the Commission concluded that regardless the formal transposition of the directive in all Member States, substantial efforts to improve systems of inspections should be achieved to enforce the prohibition of illegal employment and protect irregular migrants having to work under hazardous conditions.¹⁰

⁷ Directive 2011/36 of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, *OJ L* 101, 15.4.2011, p.1.

⁸ Directive 2004/81 Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, *OJ L* 261, 6.8.2004 p. 19.

⁹ Directive 2009/52/EC providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals *OJ L* 168, 30.6.2009, p. 24.

¹⁰ COM(2014)287, 22 May 2014.

Apart from an incentive to prevent overstaying the interrelatedness is also to be found in the joint ambition to prevent the exploitation of TCN; in the sanctions directive through making the existence of an informal market less attractive by sanctioning employers who illegally employ TCN and in the current directive by guaranteeing some rights for TCN seasonal workers.

Access to information

One of the problems identified above is that seasonal workers are temporary in the country and therefore are ill-informed about their rights and are not able to build a social network. Article 11 paragraph 1 on access to information on the application procedure for a seasonal workers' permit, is without any further detailed obligations superfluous. Indeed if the procedure is explained on the website, it might seem easily accessible but only for a limited group of people, namely, those having access to internet, able to find the right website and able to understand the language of the entry-page. Paragraph 2, including an obligation in writing to inform those who have been granted a seasonal workers permit might be of more importance. The information concerns rights and obligations under the directive including on complaints procedures. Especially this last obligation could help a seasonal worker to execute his rights if things go wrong.

In relation to vulnerabilities of seasonal workers Article 23 is actually the core of the Directive as it provides for equal treatment with nationals on terms of employment, including wages, working conditions and hours, leave and holidays, the right to strike and take industrial action, freedom of association, back payment, relevant provisions in applicable collective agreements, some provisions of social security such as education and vocational training and tax benefits but excluding family and unemployment benefits. Equal treatment regarding education and vocational training and tax benefits may be restricted by the member states. Thus in accordance with Article 11(2) the member states are under an obligation to inform the workers on these rights.

Accommodation

Following Article 20 accommodation must be in accordance with an adequate standard of living. If organised by the employer the rent may not be extraordinary, cannot be automatically deducted from the salary, should be based on a rental contract and in accordance with national safety and health standards. Although this is an extremely important issue, as many researches and evaluations have confirmed that especially seasonal workers

live in abominable circumstances it is questionable what this provision will add. An adequate standard of living is one of the fundamental social rights adopted in international and European conventions and charters to which all member states are bound or party to. Just repeating this obligation will not help. What is actually required here is a more intensive monitoring of these places of accommodation. In practice such monitoring is often scattered over various organisations, sometimes delegated to lower levels such as municipalities, or done by private organisations e.g. through self-regulation. That this is not sufficiently done is time and time again proven by cases of labour exploitation that are prosecuted and we know that these cases are just the tip of the iceberg. Thus the effect of Article 20 will be largely depend on monitoring and control. According to Article 24 on monitoring member states should have in place appropriate mechanisms for monitoring and ensure that effective and adequate inspections are carried out based on a risk assessment. In addition member states should set up effective mechanisms through which seasonal workers may seek legal redress and lodge complaints directly or through relevant third parties. Workers should have access to judicial protection against victimisation as a result of a complaint being made. Regardless the comments of the EESC (European Economic and Social Committee) during the negotiations and the plea for including a bigger role to labour inspectors and to train them on focussing on human rights such a stronger position for labour inspectors has not been concretised in the directive.¹¹

Article 24 will not add any substantial obligations for inspections and monitoring as it refers to national legislation. This directive does not bring new obligations for member states on the monitoring of risk areas such as housing or wages and working hours. Furthermore, it is not included in the directive that in case the employer does provide for accommodation that the seasonal worker can never be obliged to make use of such accommodation.

Temporary work agencies and multiple dependency

Temporary work agencies are only addressed in consideration 12 stating that they are subjected to the directive if in accordance with national law they are allowed to enter into direct contracts with seasonal workers. This however completely disregards the actual situation in which agencies often play a crucial role in the hiring of seasonal workers. This role will only be reinforced by the directive now that the seasonal worker needs to have a contract before they can be granted a seasonal worker permit. Many examples have shown

¹¹ Opinion 4 May 2011, CES 0801/2011.

that temporary work agencies often play a dubious role and are not afraid to maximise profits at the expense of their workers.

Within the timeframe of the permit the worker is allowed to change employer, meaning that the permit is not linked to one employer. The explicit aim thereof is that it ‘should reduce the risk of abuse that seasonal workers may face if tied to a single employer ...’ However, there is an escape to this since the permit can also be delivered directly to the employer. It is however not clear if this will then be a permit that is linked to that employer or just a practicality on how a permit can be delivered.

The seasonal worker can choose to work for another employer and extension of the stay, not exceeding the nine months period. The permit can be granted for work with a different employer. Unfortunately, there is discretion for member states to implement this provision as it is not formulated as a strict obligation. This is definitely a missed opportunity for reducing vulnerability. If states decide not to implement the directive in such a way that workers are free to shift from employer the workers are at increased vulnerability. If a permit is linked to one employer it increases dependency from that employer. If the employer is abusive the worker will not only risk losing his job when he complains but losing his right to stay as well. It is regrettable that the option to shift has not been turned into a strict obligation for member states.

Compensation

In Consideration 36 it has been explicitly mentioned that sanctions of violating employers ‘should include, if appropriate, liability of the employer to pay compensation to seasonal workers’. On a first note this looks like an advantage since the employer is obliged through a sanction to pay e.g. unpaid wages, without the need for the employee to start a procedure himself. However, Article 17 articulates the liability to pay compensation in accordance with procedures under national law and not as an automatic consequence of an imposed sanction. As mentioned earlier we know from research that for victims of trafficking finding compensation is extremely complicated also in cases of labour exploitation.¹² In addition the Directive seems to draw from the sanctions directive by enabling third parties with an interest of compliance or competent authority to file a complaint on behalf of the worker. However, this provision (like in the sanctions directive) is optional and dependent on the willingness of

¹² Compact, Findings and Results of the European Action for Compensation for Trafficked Persons, 2012.

member state to implement it. Given the negative evaluation on the adoption of measures to really execute the rights in the sanctions directive there is no reason to believe that many states will create the option allowing third parties to start complaint procedures.

Other aspects

Circumventing

Not directly related to the vulnerability of third country nationals but anyway relevant when assessing the potential of the directive are the provisions giving leeway to member states to actually nullify the effect of the directive. Especially Article 7 on volumes of admission including the option to have a zero-option policy and Article 8 paragraph 3 and Article 15(6), opening the possibility for member states to verify whether the vacancy can be fulfilled by nationals or EU citizen can easily generate such effect. Given the tendency in most of the EU countries (apart from Sweden) to adopt strict migration policies and limiting entries of third country nationals we are not too positive that this directive will open-up possibilities for legal migration for large groups of TCN. Some have voiced that it might have actually have the opposite effect namely an increase in clandestine work as a result of the strict control over the access to seasonal employment.¹³

Situation for short stay (< 90 days)

It has been the explicit aim of the directive to create a procedure in which the residence and work permit are combined and can be applied for in one application. This to avoid the complicated procedures in which a residency permit was granted only when a work permit was granted which was given when the residence permit was given. However, the procedure for the combined permit for seasonal workers does not apply for those staying for a short period (<90 days). Various provisions of the directive point to those who want to stay for a period not exceeding 90 days which is regulated through the Schengen regime as far as it concerns the residence permit. The conditions for admission to work should be in accordance with the directive. On a practical note, the directive will not solve all problems occurring when both a residence permit and work permit are required. Namely, apart from granting a seasonal worker permit it remains an option to grant a seasonal workers permit under the condition of obtaining a long-stay visa or, alternatively, indicating on a long-stay visa that it is issued for the purpose of seasonal work. States should chose for one of the three options. In

¹³ See for instance AEDH (Association Européenne pour la Défense des Drouts de L'Homme): Employment of third country seasonal workers: a useless directive!

addition states can choose that both the worker and the employer need to submit an application or that either one can do so (Art. 12 (3)).

Conclusion

The central question of this paper is to what extent the directive on seasonal workers contributes to the prevention of exploitative practices against TCN. In the assessment made above of the potential of the provisions in the directive to prevent exploitation the vulnerabilities of TCN were taken as the reference points. From the discussion it follows that most of the vulnerabilities are addressed in the directive but have not been dealt with in a satisfactory manner. The numerous escapes created for member states who do not want to grant more elaborate rights or guarantees to TCN is one of the weaknesses in the directive. Furthermore, the directive has not sufficiently addressed the specifics of seasonal workers and the role of temporary work agencies and disregards difficulties to inform seasonal workers on their rights. Additionally, it lacks clear obligations to actually monitor the implementation and secure effective implementation. Similar to the comments in the second evaluation of the sanctions directive it includes the risk of having a formal implementation of a directive without the intended effect. Another point is the concern articulated by some that the directive might have a reverse effect because strict regulation will create an incentive for establishing an informal market lacking control. And finally the directive fully disregards the presence of third country nationals already residing in the EU as the seasonal workers directive does not apply for this category of TCN.

In conclusion it can be said that the directive addresses the right topics to prevent exploitative practices and abuse of TCN, but is largely dependent on the willingness of states to effectively implement the protective measures in national law. Although the future will tell whether states will be successful to that end, reluctance of member states to provide TCN with options to work in the EU mutes optimism.