FORMULA
Free movement, labour market regulation and multilevel governance in the enlarged EU/EEA – a Nordic and comparative perspective

Giving to those who have and taking from those who have not – the development of an EU policy on workers from third countries

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Uppsala

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1 Introduction

Worldwide migration flows have been growing considerably over the past decades. Among the 214 million international migrants estimated in 2010 90 per cent were migrant workers and their families. Foreign born workers comprise about 10 per cent of labour forces in Western European countries. Migration is driven not only by demographic changes, but especially by globalization and the dynamics of capitalist development itself. Mobility of capital and fast evolutions in technology and organization of work require that labour and skills are available where new investments are being made.

Globalisation processes have been both stimulated and regulated not only by “market forces” of capitalism, but also by international systems of rules and monitoring among which the World Trade Organisation (WTO and the General agreements on Tariffs and Trade GATTS) and on services (GATS) are the most visible on the global scene.

Promoting a forward-looking and comprehensive labour migration policy responding in a flexible way to the priorities and needs of European labour markets is correspondingly one of the envisaged roads to increased European competitiveness and economic vitality in the EU strategy 2020 and the Stockholm programme. Similar statements have been repeated by the EU institutions for more than a decade. A new labour market scenario has developed in Europe due to i.a. demographic trends and skill shortages notwithstanding the high levels of unemployment. That has led many European governments to rediscover the benefits of “managed migration”.

3 Taran Prague.
4 Taran Prag 3
Until 1999 the EU starting point was that regulation of labour migration from third countries is a strictly national business. EU although interfered with the member states autonomy in this regard on issues related to the EU and the (WTO/GATS) regimes on freedom to provide services.

Since 1999 the EU has been taken steps in order to harmonise the conditions for entrance by third country nationals to the EU labour market and the conditions guaranteed while here. These initiatives have partly been motivated by trade related considerations and the Commission early underlined that these initiatives would further facilitate the trade in services which had already been committed to under WTO(GATS) and add real meaning to the commitments that the EC and its Member States had undertaken in that context.7

As will be seen this exercise has been more difficult to find the necessary consensus around than the Commission anticipated. The Member States are reluctant to adhere to harmonized rules in this area. Even though it is clear that many Member States need workers from third countries they are not ready to abandon their right to control the inflow of people into their countries.8 Especially not in regard to workers whose contributions to the welfare systems are unsecure.9 Some governments have general problems in receiving public support for labour migration due to high structural unemployment, hostile public opinion and social and political problems emanating from past migration waves connected to modestly successful attempts at their integration.10 Kolb points at the paradox of domestic political forces that prefer rather restrictive immigration policies and that push states towards increasing closure and international economic forces have the opposite effect and push states towards greater openness.11 Businesseurope has been one of the warmest supporters of EU activity in this area in order to promote demand driven and flexible procedures.12

There is a clear conflict between the Commission’s ambition to introduce a fair regulatory system for labour migration and the member states’ wish to stay in control and not risk any burdensome commitments in relation to this workforce. The fears risk generating an EU system which guarantee the strong parts of the third country workforce a generous position while the week one as the seasonal workers is left with practically nothing. We have not seen the final result of this struggle yet, but the indications so far are not that encouraging.

8 Menz Caviedes p
9 H. Kolb Emmigration, Immigration, and the Quality of Membership: On the political Economy of Highly Skilled Immigration Politics, in Labour Migration in Europe (G. Menz and A Caviedes eds.) 2010, p 76-100, p 83.
10 Mentz Caviedas p 18.
11 Kolb, p 78.
It is clear from EU-documents on these issues as well as from national migration policies that it is the highly skilled workers that the EU is most eager to attract. It is therefore not surprising that the directives adopted so far deals with this group. As Mentz puts it "Europe… enters the competition for the best brains". Today the EU has a lesser amount of highly skilled third country nationals working than comparable countries as the USA, Canada and Australia. The ability to attract the highly skilled migrants is considered to be a measure of international strength.

This chapter will focus on labour from third countries and proposed and adopted EU legislation regulating their entrance to EU labour markets and their rights when working there. Hopefully this overview can contribute to the overall picture of the challenges facing the national labour market systems.

2 Freedom to provide services and third country nationals

2.1 The right of third country nationals to move within EU as posted workers

As indicated the regime on freedom to provide services has generated EU rules on third country workers before the new agenda on labour migration was formulated.

The legal starting point is that when a third country national is admitted to one Member State to work that has no effect on that person’s right to work in other Member States. Accordingly the Member States can set up the requirements they find suitable for such mobility.

In 1994 however the European Court of Justice was confronted with the question if and in that case to what extent that starting point was applicable on third country...
nationals legally staying in one Member State and posted by their employer in that Member State to work in another. The Vander Elst case concerned Belgian and Moroccan workers resident in Belgium who were sent to France by their Belgian employer to carry out a service contract. The French labour inspectorate fined the Belgian employer and service provider for employing the third country nationals in France without work permits. In this case the ECJ seemed to be of the opinion that the general principles on freedom to provide services and the included right to temporarily send its workforce to another Member State to carry out the service should also cover the parts of the workforce who were lawfully residing third country nationals. At least in those cases when the employer had received visas for them and they consequently were lawfully in the other Member State which was the case here.

During the last decade the ECJ has dealt with a number of cases where specific requirements have been applied when service providers post third country nationals to another member state. The reasons put forward for these requirements have been the risk of abuse of service provision to gain access to the labour market for third country nationals who are not entitled and the risk of exploitation of the employees who are posted. The ECJ has tried each requirement in relation to the right to provide services and analysed if it would be a necessary and proportionate limitation. In these cases the court has come to the conclusion that this has not been the case and that a simple declaration by the business as to identify, the identity of the posted employees and the place of the posting should be sufficient for the host state to control, as need be, the legality of the posting. This case law confirms what was supposed to have been established in Vander Elst, that the right to provide services contained in the EC Treaty means that businesses based in the EU have the right to move their third country national personnel from one Member State to another to carry out service provision. The requirements surrounding this personal are scrutinized along the same lines as for EU-national posted workers. The ECJ has however not been declaring that the service provider must not be imposed any additional requirements in relation to the third country nationals compared to EU nationals in a transnational posting situation. The decisive criteria is that the obligation does not violate the freedom to provide services. But it is likely that the latest Court findings regarding different notification obligations in relation to posted workers in general would also apply if they were only directed towards third country nationals being posted from an EU-member state.

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20 See for example Hatzopoulos, The Effects of Europeanization, p 154.
22 Elsbeth Guild, European Union and Third Party Service Trades, Four Essays on EU Services, 4. Mode 4 and the EU: EU free movement of services and Member State powers on immigration, (Guild 2007) p 42 f.
23 Guild 2007, p 43.
24 Guild 2007, p 42.
25 Case C-319/06 Commission v Luxemburg, (2008) ECR I-4323 para 81-82; C-515/08, Santos Palhonta judgment 7 October 2010,
2.2 The terms and conditions for the third country nationals being posted by an EU or third country based service provider

When the general situation regarding the terms and conditions of workers being posted to other member states was codified in the posting of workers directive (96/71) in 1996 no distinction was made between third country national workers and national workers. According to the directive the definition of worker is done on a national basis (article 2.2) and the only criteria that must be fulfilled is that there is an employment relationship between the undertaking making the posting/temporary employment undertaking /placement agency and the worker during the period of posting (art 3). It has however been clarified by the ECJ case law that the directive on posted workers applies to all posted workers moving within the EU whether they are EU or legally staying third country nationals.26

The posting directive also includes a provision regulating the relationship between the member states and service providers from third countries. According to article 1.4 in the directive undertakings established in a non-member State must not be given more favourable treatment than undertakings in a Member State. The statement is indeed very general but it seems reasonable to assume that the implications of this provision correspond to the other provisions in the directive. That would implicate that workers being posted by a service provider situated in a third country must be guaranteed the same terms and conditions as workers being posted from EU based service providers. It is however difficult to interpret the provision as preventing the member states from guaranteeing these workers a stronger protection.

2.3 The right for third country based service providers to post workers to the EU according to GATS

The international trade in services is regulated by the WTO General Agreement on Trade in Services GATS which was adopted in 1995. According to GATS a service can be supplied in four different modes; cross border supply, consumption abroad, commercial presence and presence of natural persons (article I.2. GATS). Mode 4 on presence of natural persons is the one which will be discussed here. It includes the movement of natural persons, i.e. workers, from one country to the other. The GATS Annex on movement of natural persons supplying services under the agreement makes it clear that the Agreement shall not apply to measures affecting natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis (art. 2 Annex). Accordingly the persons covered by mode 4 shall only stay on the other members’ territory on a temporary basis. The categories of persons

26 Elsbeth Guild, European Union and Third Party Service Trades, Four Essays on EU Services, 4. Mode 4 and the EU: EU free movement of services and Member State powers on immigration, p 37.
covered today are intra-corporate transferees, business visitors and contractual service suppliers. 27

GATS has divided services into 11 broadly defined sectors and one unqualified. Each sector is also divided into a number of subsectors. 28 Each Member State can choose to commit itself to a limited amount of sectors and subsectors and to a limited extent. In relation to a sector in which a member has made commitments foreign service providers in that sector must to the extent of the commitment be able to act on that national market according to the same conditions as national service providers (art XVI and XVII GATS). GATS also incorporated the national treatment principle which indicates that once a service is allowed access to a certain market, it must be treated similar as domestic services. To do otherwise through discriminatory treatment undermines market access for foreign competitors by distorting competition. 29

The competence in relation to GATS is divided between the EU and the member states. The competence in trade is exclusive EU competence while the competence on migration is not. In reality the Commission has been negotiating GATS with a common EU-bid but the EU member states decide to what extent they commit themselves to this bid. 30 The result is that the GATS commitments among the EU member states differ.

The GATS establishes an international labour migration regime for certain occupations within internal labour markets of multinational business that operate largely outside the discretion of the nation state. 31 The EU commitments in regard to Mode 4 is in general very limited and oriented towards high skilled workers. 32 The potential of the application of Mode 4 is therefore far from being realised. The ILO has raised concerns about Mode 4 permitting differential treatment of workers, leading to discrimination. 33

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27 World Trade Report 2004 Exploring the linkage between the domestic policy environment and international trade, p 46.
28 Business services, communication services, construction, distribution, education, environmental services, financial services, health and social security, tourism and travel, recreational and cultural services, transport, other, World Trade Organisation doc. MTN.GNS/W/120, 10 July 1991.
30 SOU 2006:87 s 231 – SKAFFA ANNAN KÄLLA OCH KOLLA OM LISS ÄNDRAR NGT –KOLLA HALLSTROM
32 Simon Tans, The unwanted service provider: implementation of WTO and EU liberalisation of service mobility in the Dutch legal order, Refugee Survey Quarterly, pp1-29, 2011 p 23 and 26
Sweden has for example only committed itself fully to the teleservices sector while commitments for other sectors are limited. When it comes to Mode 4 Sweden has restricted it commitments even further, to intra-corporate transferees (leaders and specialists), business travellers, and made very few commitments regarding performance of a service according to a contract with a Swedish company.

The EU has also in its commitments on mode 4 ensured wage parity and equal working conditions for GATS migrants: “all other requirements of Community and Member States’ law and regulations regarding….work and social security measures shall continue to apply, including regulations concerning period of stay, minimum wages as well as collective wage agreements”.34

Taking article 1.4 in the posting directive as a starting point this would mean that these workers that would qualify as posted workers must at least be guaranteed the level of pay and working conditions provided for in the posting directive. The GATS regime in itself does not seem to set any limits in this regard.35

2.4 EU agreements with third countries

The EU has also concluded agreements with third countries which include provisions of services.36 In the majority of those agreements the EU has accepted the entry, residence and work of employees of agreement countries in subsidiaries and branches based in the EU where the employees meet the criteria of key personnel without time limits.37

2.5 Conclusion

Both the internal EU freedom to provide services as well as EU agreements with third countries on freedom to provide services can include rights on accession to work for third country nationals in the EU member states. The situations dealt with until now can all be considered to approach work conducted within a regime to provide services. If all categories would qualify as being posted workers is not entirely clear.38

Third country nationals already admitted into an EU member state must be guaranteed the same level of wage and working conditions as EU-nationals when being posted. Workers posted from companies established in a country outside the

34 Tans p 28 , WTO, Council for Trade in Services, 2006, EU Consolidated GATS Schedule, horizontal section
35 See section XX in this chapter, the directive proposal on ICT- the posting level is proposed to be a minimum level.
36 For an overview from 2007 on the different agreements see Elspeth Guild, European Union and Third party service Trades: Four Essays on EU services, in Quaker United nations Office, April 2007, p 11 ff.
38 See for example the EMPL-rapporteur in her comments on the ICT proposal in section XX footnote XX.
EU must according to article 1.4 in the posting directive at least be guaranteed the same level of wage and working conditions as the ones posted from EU-countries. Otherwise these companies could come into a better situation than EU-companies. That would mean that those workers who are admitted to an EU-country through the GATS commitments would also at least be guaranteed the posting directive level when it comes to wage and working conditions.

These conclusions illustrate that the posting directive has implications that go beyond internal EU activities. Implications that can be rather far reaching depending on the outcome of the labour migration project discussed in the following sections.

3 From Tampere to Rosarno

3.1 The political turnabout

Until 1999 the EU was not interested in legal labour migration from third countries. In the special European Council on asylum and immigration in Tampere 1999 this position changed. Thirty years of zero-vision was abandoned.

At Tampere 1999 the European Council acknowledged the need for approximation of national legislations on the conditions for admission and residence of third country nationals, based on a shared assessment of the economic and demographic developments within the Union, as well as the situation in the countries of origin.

The European Council also declared that the EU should safeguard that these workers should be treated fair and granted rights and obligations comparable to those of EU citizens. The need for more efficient management of migration flows at all their stages was however also stressed.

The main reasons put forward for this turnabout was demographic change and skill shortages at both skilled and unskilled levels. A number of Member States had at that point begun to actively recruit third country nationals from outside the Union. The Commission formulated the at that point present challenge in the following way:

39 For an overview of the activities up to that date see B. Ryan, The European Union and Labour Migration: Regulating Admission or Treatment, in Whose Freedom, Security and Justice?: Eu Immigration and Asylum Law and Policy. Hart Publishing, UK, 2007, pp. 489-516, ca pp 500-
41 Precidency Conclusions, Tampere European Council, 15-16 October 1999, Bulletin EU, p 20
42 Precidency Conclusions, Tampere European Council, 15-16 October 1999, Bulletin EU, p 18
43 Tampere conclusions 22-23
In this situation a choice must be made between maintaining the view that the Union can continue to resist migratory pressures and accepting that immigration will continue and should be properly regulated, and working together to try to maximize its positive effects on the Union, for the migrants themselves and for the countries of origin.”

Even though the Tampere Conclusions had been clear of the ambition to develop a legislative framework, the Commission in the following communication did not hide the fact that the Member states had strongly divergent views on the admission and integration of third country nationals. Something the Commission hoped was possible to overcome in an open debate not least by connecting this issue to the reforms the EU economy was undergoing at that time in the framework of the European Economic Strategy.

It also underlined that bringing the issue of labour migration into the discussion on the development of economic and social policy for the EU, would provide an opportunity to reinforce policies to combat irregular work and the economic exploitation of migrants which were fuelling unfair competition in the Union.

“A corollary of an economic immigration policy must be a greater effort in ensuring compliance with existing labour legislation by employers for third country nationals. Equality with respect to wages and working conditions is not only in the interest of migrants, but of society itself which then both benefits fully from the contribution migrants make to economic and social life.”

By now the EU has put forward substantive parts of a legal action program on labour migration. The final adoption of the legal framework is however far from being realized. The strongly divergent views of the Member States on this topic have been quite difficult to overcome. The Commission has tried to capture the need for this exercise through the concepts of managed migration and equality of treatment.

The concept of managed migration is in itself rather problematic – it is not possible as the ILO puts it to turn migration on and off like a water tap. We are talking about human beings and the concept of managed migration seems old fashioned and pre-globalization.

The tension between equal treatment and the management of migration flows has increased during the legislative process. The equal treatment forfeiters have therefore been forced to give up a strict application of the equal treatment principle. Cholewinski and Macdonald however argue that a robust version of the equal treatment principle was never envisaged in the EU context. Something they think is confirmed by the Tampere conclusions and its qualified rhetoric of equality.

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46 Ibid.
49 ILO-p 144f.
50 Newland, 2005, p 15 (I ILO)
51 Macdonald and Cholewinski, The ICRMW and the European Union, 377
In the following sections three aspects of the realization of this program will be dealt with;
- the right to enter and stay on EU territory for different kinds of workers
- the rights guaranteed while exercising the right to be on the territory with regard to
  - free movement,
  - labour market access and
  - working conditions

An overall question is what does “rights and obligations comparable to those of EU citizens” mean? But first a few words on the legal basis for this exercise

3.2 The legal basis

The introduction of Title IV to part III of the EC treaty by the Treaty of Amsterdam in 1997, aimed at the creation of an area of freedom, security and justice and thereby transferred asylum and immigration matters to European Community law. Legal migration was dealt with in article 63.3 and 4 TEC. Until the entering into force of the Lisbon treaty the Council unanimously acted on a proposal from the Commission (or during the first five years at the initiative of the Member States) after consulting the European Parliament (art 67 TEC). This competence has now been transferred to the ordinary procedure ie. the former co-decision procedure where the Council with qualified majority co-decide with the European Parliament.

The relevant provision in the Treaty on the Functioning of the European Union reads:

Article 79
1. The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.
2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas:
   (a) the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification;
   (b) the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States;
   (c) illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation;
   (d) combating trafficking in persons, in particular women and children.
   ……
5. This Article shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed
Article 79 (art 63 in former TEC for the highly skilled) is the legal basis used for the proposals discussed in this section. The proposals concern migration issues related to article 79.2 a and b. Voices have however been raised that also article 154 TFEU should be referred to and thereby include consultations with the social partners. This has yet not led to any results.

3.3 The first attempts to regulate

In a follow up communication to the Tampere conclusions the Commission formulated the bases for a legal framework for admission of economic migrants into the EU. 

• The framework should address the need of the market place particularly for the very highly skilled, or for lesser or unskilled workers or for seasonal labour
• The admission policies must enable the EU to respond quickly and efficiently to labour market requirements…
• The need for greater mobility between member states for incoming migrants because of the complex and rapidly changing nature of the labour market needs
• Persons admitted should enjoy broadly the same rights and responsibilities as EU nationals but that these may be incremental and related to the length of stay provided for in their entry conditions.
• The aim should be to give a secure legal status for temporary workers who intend to return to their countries of origin, while at the same time providing a pathway leading eventually to a permanent status for those who wish to stay and who meet certain criteria.
• The responsibility for deciding on the needs for different categories of migrant labour must remain with the Member States (emphasis added). 

From the beginning it was clear that the decision on the number of people that would be let into the country should remain a national decision:

“Given the difficulties of assessing economy need it would not be the intention to set detailed European targets. The responsibility for deciding on the need for different categories of migrant labour must remain with the Member states”.

The first attempt from the Commission to propose a directive regulating the entry and residence conditions for all third-country nationals exercising paid and self-employed activities failed due to the deep scepticism it generated from some Member States. The support for regulating the self-employed has until now not

52 ETUC, EMPL-rapporteur in ICT, EESC opinion on seasonal work, SOC/392, p 3.3, and on intra-corporate transferees SOC/393 p 1.3
56 COM(2001)386, (drawn back in COM(2005)462) The different positions among the Member States are reflected in Council documents 7557/02 and 13954/03. See also
been strong enough for including them in the forthcoming legislative proposals. They will therefore not be dealt with further in this chapter.

The starting point in the 2001 proposal was that the same principles should apply to all third country workers permitted to an EU country irrespective of if they were highly skilled, intra corporate transferees or seasonal workers. Some distinctions were however made but limited to a minimum. The proposal included a broad horizontal approach.

In the 2001 proposal a work permit should be required for most third country nationals except those exercising delivery of a goods or service up to three months (art 3.2). That means that for example seasonal workers staying for 2 months would require a work permit. The proposal should not apply to third country nationals established within the EU and which were send to another Member State to provide for a service (art 3.3 (a).

In most Member States, the admission of third-country nationals to employed activities was regulated by a dual system of residence permits and work permits. The 2001 proposal aimed to simplify procedures and it was therefore proposed to replace this dual system by a combined title authorising both residence and work with one administrative act, the “residence permit – worker”. The Commission stressed that the proposal aimed to harmonise the end-result (the combined act) and to simplify the procedural steps to be taken by a third-country national wishing to exercise economic activities in the EU.57

According to the proposal the member states should only authorise a third country national to enter and reside in their territory for the purpose of work where a “residence permit – workers” had been issued (art 4). In order to issue such a permit a set of requirements would have to be fulfilled. The most important one was that a valid work contract or binding offer of work in the member state concerned, including a description of the envisaged activities as an employed person and documents proving the necessary skills for those activities, should have been included in the application (art 5.3.b, c, g). The entrance into the country should by other words be demand-driven. The worker or the employer would be able to submit the application for the permit. Important to notice is that if the worker already legally resided within a Member State it should be possible to file the application from within that country.

An important prerequisite in this proposal was that the third-country nationals would not compete with the internal workforce. In the application it should be demonstrated that the job vacancy could not be filled in the short term by citizens of the Union or certain third-country nationals already established in the Union (article 6). This vacancy test could however be abandoned on a national basis when


the annual income offered to a third-country national exceeded a defined threshold (art 6.4). The vacancy test was obviously not required for the high income sector. The idea behind this possibility was that the high-income sector of the European labour market needs less protection and can afford to be more open to global competition.  

Beside the vacancy test another important provision safeguarding the member states’ control of the immigration to their countries was adopted. According to the proposed article 26 the member state were allowed to set a ceiling or suspending or halting the issuing of these permits for a defined period, taking into account the overall capacity to receive and to integrate third country nationals on their territory or in specific regions thereof.

The aim of these rules was to make sure that there was an economic need for the worker or that a beneficial effect of their economic activities could be expected.

The “residence-permit worker” could be valid up to three years with renewal possibilities. After holding such a permit for more than three years the vacancy test would not have to be fulfilled in order to renew the permit (art 7). During the first three years the permit holder should be restricted to the exercise of specific professional activities or filed of activities. After those three years the restrictions would be lifted (art 8). But any changes during the period of the permit compared to the original application, in relation to the work contract or the described activities should have to be reported to and approved by the competent authorities (art 9). If the worker would be unemployed during the validity of the permit he or she should have three months to find a new job before losing the permit if he or she had been legally exercising the activities as employed for less than two years. If the permit holder had been legally exercising activities as employed for more than 2 years the search for a new job could take up to six months (art 10.3).

For seasonal workers the rules regarding the permit looked different already in this proposal. A seasonal worker only could be granted a permit for up to six months in any calendar year, after which they should return to a third country. Member states could though issue up to five permits covering up to five subsequent years within one administrative act. All other rights should however be applied to them mutatis mutandis (art 12).

For intra-corporate transferees the rules also looked a bit different. An intra corporate transfer would take place within a transnational company. A third country national working within a single legal entity would be temporarily transferred into the territory of a Member State, either to the principal place of business or to an establishment of that legal entity. The thinking behind these transfers is that the person being transferred carries with him or her certain knowledge of the company which is necessary for carrying out the tasks in the Member State. Therefore the transferee must have been employed by the company for a certain time (12 month art 2 h) and also must carry with him or her certain

qualifications. The Intra corporate transferee shall either be a key personnel or a specialist (art 14.2). The benefit of such transfers must naturally be limited in time. The maximum period of the stay of an intra corporate transferee was set to 5 years (art 14). These transfers were however liberated from the job vacancy test. But also for this group the other rights should be applied to them mutatis mutandis. (14.1).

A time frame for adopting decisions on applications of permits was included in the proposal. The normal time frame was set to 180 days and 45 days for intra corporate transferees and trainees which were also included in the 2001 proposal.

The permit holder, irrespective of their status, was according to the proposal entitled to a set of rights. Some are movement related and others social rights related. The movement related rights were limited to movement to and within the Member state issuing the permit (art 11.1 a-e). The permit holder should also enjoy equal treatment with citizens of the Union as least with regard to:

1. working conditions, including conditions regarding dismissals and remuneration
2. access to vocational training necessary to complement the activities authorised under the residence permit
3. recognition of diplomas, certificates and other qualifications issued by a competent authority
4. social security including health care
5. access to goods and services and the supply of goods and services made available to the public, including public housing
6. freedom of association and affiliation and membership of an organisation representing workers or employers or of any organisation whose members are engaged in a specific occupation, including the benefits conferred by such organisations (11.1.f)

The proposal opened for two optional restrictions. A member state could condition the right to vocational training to one year stay and the right to public housing to three years stay (11.2).

For those permit holders returning to the third country after the expiry of the permit a right to request and obtain the payment of the contributions made by them and by their employers into public pension schemes is as a main rule provided for. (11.3).

In the communication from 2000 the Commission underlined the importance of ensuring the labour legislation is applied in relation to the third country national workforce (my emphasis). This is envisaged as an important tool in combating illegal migration.

A relative strong enforcement provision was also included in the 2001 proposal according to which the Member States should lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and take all measures necessary to ensure that they were to be

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60 COM(2000)757 p 14-15, 23,
implemented. The penalties provided would have to be effective, proportionate and dissuasive. The Member states should notify these provisions to the Commission by the date specified and should notify it without delay of any subsequent amendment affecting them (art 33).

The MS were discontent with the 2001 proposal of many different and opposing reasons. The development indicates that one of the most important was that some member states were not ready to abandon their competence to decide who to let into the country even though they were aloud to keep quotas and decide how many to let into the country. The proposal was drawn back by the Commission in 2006. This failure was mainly due to the diversities in dealing with these issues among the Member States and its strong political dimension. Ryan has argued that the main problem was that the Commission could not convince the Member States that there were reasons to overcome the diversity of their approaches so as to achieve an EU standard.

The attempt to regulate the conditions for long-term residents which was negotiated in parallel to the above discussed proposal was however easier. And a directive was adopted in 2003. It includes criteria for obtaining long term residence status and the rights provided for when holding that status. A third country national could achieve this status after spending five years legally residing in a Member State. The long term residence directive provides for a comprehensive set of rights and also for an indefinite stay. Equal treatment is provided for regarding conditions of employment and working conditions, including conditions regarding dismissal and remuneration.

A directive on a specific procedure for admitting third-country nationals for the purposes of scientific research was also adopted in 2005. It lays down the conditions of admission of third-country researchers to the Member States for the purpose of carrying out a research project under hosting agreements with research organizations approved for that purpose by the Member State.

One of some Member States’ main concern with the whole labour migration exercise was touched upon in the negotiations on a Constitution for Europe. Germany succeeded in adding a clause to the competence article on migration in order to safeguard that EU-competence in regard to labour migration would “not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self employed”. This clause survived the final

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61 For a discussion of these reasons see B Ryan, 2007, pp 15- 18.
66 Se källa I ryan s 19
negotiations and can now be found in article 79.5 in the Treaty on the Functioning of the European Union. As Ryan argues as a legal matter, this provision did not preclude EU rules concerning the admission of economic migrants. This assumption has also been verified by the development in this regard. Ryan however sees this insertion more like a political statement and that it offered additional evidence of Member States’ reluctance to agree to binding EU standards on that subject.

3.4 The second round
The EU however did not give up the idea to develop common rules on labour migration. In 2004 the European Council adopted the Hague Program where the Commission was invited to present a policy plan on legal migration including admission procedures capable of responding promptly to fluctuating demands for migrant labour in the labour market.

This time the Commission wanted to proceed thoroughly. The Commission adopted a Green paper in January 2005 on an EU approach to managing economic migration. The aim of the Paper was to launch a process of in-depth discussion, involving the EU institutions, Member States and the civil society, on the most appropriate form of Community rules for admitting economic migrants and on the added value of adopting such a common framework. The Commission obviously wanted to make sure that it would not go so far beyond the ambitions of the Member states as it did 2001 in its next legislative initiative. The main purpose of the Green paper was described as to identify the main issues at stake and possible options for an EU legislative framework on economic migration taking into account the reservations and concerns expressed by the Member States during the discussion on the 2001 directive proposal. The Green paper raises a number of questions and put forward a range of alternative proposals on how to meet the challenges. It is quite obvious that the Commission had not at this stage entirely left its conviction of the advantages of a horizontal framework covering conditions on admission for all third-country nationals seeking entry into the labour markets of the EU. The responses from the Member States was however not so encouraging in that respect which the envisaged result – the 2005 policy plan on legal migration clearly shows.

A large number of member States were not in favour of a horizontal approach and the Commission considered proposing a sectoral approach was more realistic. The consultations however emerged some elements, such as the need for EU

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67 see B Ryan p 19
68 Admission criteria are included in the blue card directive and in the proposala on seasonal workers and ICT now being negotiated.
69 European Council 4-5 November 2004, European Council Conclusions, Annex I, § III I.4
70 COM(2004)811 final
common rules regulating at least the conditions of admission for some key categories of economic immigrants, most notably highly qualified workers and seasonal workers.\textsuperscript{73}

In the 2005 policy plan on legal migration the Commission also touched upon the somewhat provocative ambition to attract third country nationals to the EU in order to overcome the demographic challenges while at the same time many member states faced low employment and high unemployment rates. As this whole exercise at this point was closely connected to the fulfilment of the objectives of the Lisbon strategy, the Commission took the opportunity to clarify that priority must be given to actions toward attracting more EU citizens and legally resident migrants to employment. But that labour migration could increase the competitiveness of the EU economy and ensure sustainability and growth.\textsuperscript{74} The Commission was obviously trying to calm the fears that migration policy was intended to replace strategies to reduce national unemployment.

Still in the 2005 action plan the Commission seemed to think they had support for a horizontal instrument which would at least guarantee a common framework of rights to all third-country nationals in legal employment already admitted in a Member state, but not yet entitled to the long-term residence status. The future however showed that that was not the case. This horizontal instrument was also proposed to contain a procedural simplification which would simplify procedures for immigrants and employers. The introduction of a single application for a joint work/residence permit was proposed.\textsuperscript{75}

This 2005 policy plan on legal migration package altogether included proposals on five directives.\textsuperscript{76}

\begin{itemize}
\item A general framework directive on a single permit for work and residence and rights for workers
\item Four specific directives on
  \begin{itemize}
  \item Highly skilled workers;
  \item seasonal workers;
  \item intra-corporate transferees (ICTs);
  \item remunerated trainees.
  \end{itemize}
\end{itemize}

In 2007 as planned two proposals from the plan were presented, the general framework proposal and the proposal on highly skilled workers. In 2010 two sectoral directive proposals on seasonal workers and Intra-corporate transferees were presented. The proposals will be analysed one by one, starting with the directive on highly skilled workers – the only one yet adopted.

\textsuperscript{73} ibid 6-8.
\textsuperscript{74} Ibid 5.
\textsuperscript{75} Ibid p 6.
\textsuperscript{76} Ibid p 6-8.
3.5 The highly skilled workers

As envisaged in the policy plan from 2005 some sector related directive proposals which would include admission criteria gained support from the Member States. Even though it was clear that only some Member States were inclined to attract highly skilled workers it seems that this group has been the one which have gained the broadest support from most actors. High-skilled workers are seldom conceived as a threat to the cohesion of the national society.

The Commission is also of the opinion that the vast majority of Member States need these workers. Attracting high-skilled immigrants is seen as part of the Lisbon strategy to become the most competitive and dynamic knowledge-based economy in the world.

It was therefore no accident that the first sector related directive to be proposed was a directive proposal on the conditions of entry and residence of third country nationals for the purposes of highly qualified employment.

Cerna has thus pointed out that the support varied according to the self-interest of member states, i.e whether they perceived benefits in increased EU legislation. The main support was from the countries lacking a specific national policy on high-qualified migrants. This proposal could help them shifting the balance between their migration groups.

The commission put forward a range of arguments in the explanatory memorandum connected to the proposal pointing out the crucial role these workers would play in enhancing the competitiveness of the European economy.

- the continuous growth of employment in high education sectors in respect to other sectors of the EU economy.
- the increasingly EU need of a highly qualified workforce to sustain its economy.
- the lack of EU attraction by highly qualified professionals in the context of a very high international competition.
- the attractiveness of the EU in relation to the USA and Canada, was suffering from the fact that
  - highly qualified migrants had to face 27 different admission systems,
  - did not have the possibility of easily moving from one country to another for work,

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80 Ibid p 7.
81 See confirmed by ia recite p 3 in the adopted directive.
82 COM(2007)637 final
84 Ibid explanatory memorandum p 3.
lengthy and cumbersome procedures make them opt for non-EU countries granting more favourable conditions for entry and stay.\textsuperscript{85}

The starting point for this proposal was not only to improve the EU’s ability to attract but also to retain third country highly qualified workers. In order to effectively and promptly respond to fluctuating demands for highly qualified immigrant labour – and to offset present and upcoming skill shortages – the proposal also aimed at developing a level playing field at EU level to facilitate and harmonise the admission of this category of workers and by promoting their efficient allocation and re-allocation on the EU labour market.\textsuperscript{86} The generous attitude towards this workforce i.e. illustrated by the ambition to give this workforce means to get long-term status and give them free movement rights is exceptional and signs of their anticipated crucial positive economic input to the EU. These proposals were however intensely discussed during the negotiations which led to new compromises.\textsuperscript{87}

3.5.1 Personal scope

So who would qualify for this attractive status? In order to perform a "highly qualified employment" a person must have higher professional qualifications meaning post-secondary higher education, lasting at least three years or have at least five years of relevant professional experience of a level comparable to higher education qualifications (art 2). Certain categories are excluded from the application of the directive. Most important from our perspective is the fact that seasonal workers and posted workers according to Directive 96/71 are excluded from the scope as well as persons who enter a Member state under commitments contained in an international agreement facilitating the entry and temporary stay of certain categories of trade and investment-related natural persons (art 3). The two first categories were added by the Council and not included in the original proposal from the Commission.

3.5.2 Admission criteria and process

The criteria for admission were in principle the same in the Commission’s proposal and in the adopted text. Important ones are the obligation to present a valid work contract or a binding job offer for highly qualified employment of at least one year specifying a certain wage level and documents attesting the required qualifications (art 5). A relative minimum wage level was motivated by ensuring that the wage criteria would not be emptied by setting a national level which would be too low for a national or EU highly qualified worker to accept.\textsuperscript{88} Something that was strongly opposed by Businesseurope.\textsuperscript{89} The vacancy test was an important part of the proposal which ended up as optional (art 8.2).

\textsuperscript{85} ibid
\textsuperscript{86} Ibid explanatory memorandum p 2.
\textsuperscript{87} Cerna p 26
\textsuperscript{89} At http://www.cebre.cz/dokums_raw/businesseurope.pdf
According to the adopted directive the gross annual salary resulting from the 
monthly or annual salary specified in the work contract or job offer shall not be 
inferior to a relevant salary threshold defined and published for that purpose by the 
member states, which shall be at least 1.5 times the average gross annual salary in 
the Member state concerned. In this regard the MS may require that all conditions 
in the applicable laws, collective agreements or practices in the relevant 
occupational branches for qualified employment are met. For employment in 
professions in particular need of third country national workers the salary threshold 
can be at least 1.2 times the average gross annual salary in the Member State 
concerned. The possibility to derogate from the wage obligations proposed by the 
Commission for workers of less than 30 years of age was however excluded in the 
adopted text. Keeping this provision could have been an advantage for recent 
third country graduates who wanted to stay in a Member State after their studies. 
The lower wage requirement could however have a particular effect on that age 
category. In general it is a clear deficit in the 2005 legal action plan that no 
immediate steps between studies conducted by third country nationals according 
the directive on admission for the purposes of studies (dir 2004/114/EC) and the 
labour migration framework are envisaged. Something that might be dealt with if a 
revision of the study-directive will be initiated. 

The volumes of admission would however also still be up to the member state to 
decide (art 6). This possibility has been criticised for weakening not least the free 
movement related rights in the directive. It would however have been difficult to 
overcome that obstacle not least because of the at that time only proposed, but 
later adopted article 79.5 TFEU. Article 79 is according to article 79.5 not 
supposed to affect the Member States’ right to decide on how many third-country 
nationals to let into the country. 

One of the most important parts of the procedural requirements in order to meet 
the demands – to effectively and promptly respond to fluctuating demands for 
highly qualified immigrant labour and to offset present and upcoming skill 
shortages - was to introduce a fast-track procedure. In the Commission’s original 
proposal the procedure should not last longer than 30 days, in exceptional cases 60 
days. It was clear that the Member State were not ready to speed up their 
procedures that much. In the adopted text the decision shall be taken as soon as 
possible and at the latest within 90 days (art 11.1). Not being able to set a common 
procedural time frame is of course also threatening the ambition to minimize 
internal competition for high skilled workers among the member states. 

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81 Guild 2007 Blue p 5. 
82 Directive 2004/114/EC on the conditions of admission of third country nationals 
for the purposes of studies, pupil exchange, unremunerated training or voluntary 
83 Commission Communication, Delivering an area of freedom, security and justice for 
Europe’s citizens:Action plan implementing the Stockholm Programme, 
84 Guild 2007 Blue p 6-7.
An application can be turned down if the applicant do no meet the conditions, if a required vacancy test is not made or if the volumes determined by the authorities are already filled (art 8). Some other grounds for refusal can also be applicable.

3.5.3 The EU Blue card

If the authorities decide to approve the application the applicant will be issued an EU Blue card (art 7). The idea was to invent something that would sound as attractive as the US Green card. The wording can however not take away the fact that the two cards generate quite different statuses.95

In the Commission proposal the validity of the EU Blue Card should be two years with the possibility to renew it for another two years. If the work contract covered a period less than two years the EU Blue card should be issued for the duration of the work contract plus three months.96 In the adopted text the Member States were granted the right to decide on a standard period between one and four years for the validity of the EU Blue Card. If the work contract covers a shorter period the EU Blue card shall be issued for that period plus three months (art 7.2).

One of the main advantages put forward by the Commission with this proposal was that it would replace 27 admission procedures with one and thereby not only make it more attractive to the migrants to apply for admission to any EU Member State but also to eliminate competition between the EU-member states.97 The flexibility in this provision limits these effects but was obviously necessary to get consensus.

3.5.4 Rights connected to the EU Blue Card

The highly qualified employees shall according to article 14 enjoy equal treatment as regards:

1. Working conditions, including pay and dismissal, as well as health and safety requirements at the workplace
2. Freedom of association and affiliation and membership of an organization representing workers or employers or of any other organization whose members are engaged in a specific occupation, including the benefits conferred by such organizations, without prejudice to the national provisions on public policy and public security
3. Education and vocational training
4. Recognition of diplomas, certificates and other professional qualifications in accordance with the relevant national procedures
6. Without prejudice to existing bilateral agreements, payment of income-related acquired statutory pensions in respect of old age, at the rate applied

95 Guild, 2007 Blue, p 4.
by virtue of the law of the debtor Member State(s) when moving to a third country
7. Access to goods and services and the supply of goods and services made available to the public, including procedures for obtaining housing, as well as information and counselling services afforded by employment offices
8. Free access to the entire territory of the Member state concerned, within the limits provided for by national law.

Some restrictions are allowed with regard to higher education. In the Commission proposal two additional rights were included; the right to social assistance and tax benefits.98

The possibility for any Blue Cards holders family to join the permit holder in a Member State is of course of crucial importance for the likeliness to apply for a permit in that particular member state. The starting point according to article 15 is that the family reunification directive (2003/86) is applicable. There are however very important favourable derogations made from that directive. The right to family reunification is for example not made dependant on the requirement of the EU Blue Card holder having reasonable prospects of obtaining the right of permanent residence and having a minimum period of residence. The decision to grant residence permit for family members shall be taken faster, at the latest within six months compared to 9 month in the 2003 directive and no time limits shall apply in respect of access to the labour market.

The directive also connect certain labour market access rights to a permit. For the EU Blue Card holder that means that after two years the member states may grant the person concerned equal treatment with nationals as regards access to highly qualified employment. The provisions on community preference however continue to apply (art 12.1 and 5).

During the two first years the EU Blue Card holder can only change employer subject to prior authorisation by the authorities. After that period such authorisation is not necessary (art 12.2). Unemployment does not in itself necessarily lead to a withdrawal of the permit. The unemployment period may however not exceed three consecutive months or occur more than once during the period of validity of the EU Blue card (art 13).

3.5.5 Freedom of movement
The holder of the Blue card is entitled to enter, re-enter and stay in the territory of the Member State issuing the permit (7.4.) This can be called the internal aspect of freedom of movement. The external aspect is related to a right to move to another Member State. In the explanatory memorandum to the proposal the Commission underlines the importance of being able to allocate and re-allocate this category of workers on the EU labour market.99 For EU Blue card holders it is possible to move to another MS after 18 months for the purpose of highly qualified employment in order to apply for a new EU Blue card there. The application shall

98 COM(2007)637 art 15.1 f and h.
99 Ibid p 2 and 7.
be presented within one month (art 18). In the original Commission proposal a right to move to another EU MS would arise after two years without having to apply for a new Blue card. This change in the adopted directive is decreasing the effect of the external free movement provision and will as many other adaptations limit the fulfilment of its purpose.\(^{100}\)

Hatzopoulus has thus pointed out that this external movement right will most likely also have a double effect on service provision within the EU: for one thing there will be an increased offer and demand of services and presumably, greater service mobility. This provision will therefore trigger the application of the rules on the free provision of services in situations for which they were not contemplated.\(^{101}\)

The right to movement between the Member States carries with it an important advantage for the EU Blue card holder. It will according to article 16 be possible to cumulate periods in the different Member States if certain requirements are met in order to obtain long-term resident status including all the rights in the long-term residence directive(2003/109).

The EU Blue card holder is also allowed to bring his or her family to the new member state if they were already residing in the first member state (art 19).

### 3.5.6 Effective enforcement

There are no enforcement provisions in the Blue card directive. Accordingly the general principles on effective enforcement of EU directives will apply …..

### 3.5.7 More favourable provisions

The Commissions proposal on highly qualified employment envisaged in principle a minimum directive providing for extensive possibilities for adopting more favourable provisions. The only limitation was the criteria in relation to the entry to the first member state so as not to undermine the scope of the directive.\(^{102}\) In the adopted directive this starting point had changed and more favourable provisions were only accepted in relation to a limited amount of provisions; Article 5(3) in application of Article 18 and Articles 11, 12(1), second sentence, 12(2), 13, 14, 15 and 16(4).\(^{103}\) Surprisingly enough the MS abandoned their right to provide for more generous schemes for highly qualified employment.

### 3.5.8 Conclusions

\(^{100}\) See comments on this in Cerna, 2010 p 26-27.


\(^{103}\) Dir 2009/50/EC art 4.
The success of this directive has been questioned for not dealing with the decisive issues for highly skilled workers when choosing between different foreign countries such as language and wage levels. The compromise also includes a number of provisions giving the Member States such a flexibility that it will limit the perceived advantage of one system for 27 MS. UK, Ireland and Denmark used their right to opt out. They had already their own policies in place. It has been anticipated that the success of the Blue card is likely to be modest. That might be true.

The result is also quite different from the proposal put forward by the Commission in 2001. The vacancy test shall in contrast to the 2001 proposal be applied for this group. The possibility to stay and apply for a new job while being unemployed is more restricted. As is the right to change work during the permit period. On the other hand are relatively generous external free movement and family reunification rights included in this act.

Altogether the result as soon will be seen is although giving this group privileges far beyond what is even thinkable for other groups of labour migrants. The directive has thus justified a questionable disparity in the treatment of those workers and others; something that has raised concerns about potential discrimination.

The highly skilled are …

3.6 The horizontal approach - almost done

3.6.1 Introduction and personal scope

In parallel to the presentation of the proposal on highly skilled employment the Commission presented a horizontal directive proposal on simplified application procedures and a common set of rights for third country workers - the single permit directive.

The proposal was as far as the Commission dared to go with regard to horizontal provisions. The proposal includes rules on facilitating the application procedure for third country national workers and a new set of rights for the third-country workers legally residing in the Member States. Also this proposal is considered to be consistent with and supportive of the objectives of the Lisbon strategy in particular to make the EU a more attractive place to work.

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104 See in Cerna 2010 p 27
105 Cerna 2010 p 27
108 Proposal for a council directive 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 COM(2007)638, Brussels 23.10.2007
Already in the 2005 policy plan on legal migration the Commission explained that the main purpose of the horizontal, single permit, instrument was to guarantee a common framework of rights to all third-country nationals in legal employment already admitted in a Member state, but not yet entitled to the long-term residence status. The Commission continued – this would not only be fair toward persons contributing with their work and tax payments to our economies, but would also contribute to establishing a level playing field within the EU.110

In the Commission proposal on a single permit an additional argument was put forward for equal treatment – it could also help reducing unfair competition emanating from this rights gap, thus serving as a safeguard for EU citizens by protecting them from cheap labour and migrants from exploitation.111

However in the proposed directive the Commission had already abandoned parts of that ambition. Exceptions from the personal scope of the proposal are provided for. Third country nationals who are posted workers in accordance with directive 96/71 are excluded from the scope as they are not considered part of the labour market of the Member State to which they are posted. Intra-corporate transferees, contractual service suppliers and graduate trainees under the European Community’s GATS commitments are not included following the same principle. Seasonal workers are either not covered by the proposal. A decision explained by the specificities and temporary nature of their status.112

In the last published text from the Council the excluded group has grown and now also includes workers posted for any purpose and from any place.113 The long term residents are also excluded in both documents, but not the highly qualified workers.

After the entry into force of the Lisbon Treaty this subject area was included in the ordinary legislative procedure. That means that the Council will co-decide on this proposal by qualified majority together with the European Parliament.114

The European Parliament had considerable problems to decide on a first opinion on this proposal. The different political groups were highly divided. The division however, mainly regarded the personal scope and right oriented parts of the proposal. EMPL argued for a real horizontal instrument which would exclude no group as temporary workers from its scope of application.115 The LIBE rapporteur argued that including seasonal workers and workers posted within their undertaking would need amending the whole original Commission proposal and to further postpone its adoption. The LIBE rapporteur thought that the exclusion of those

112 Ibid p 9 and article 3
113 Council 6491/19 MIGR 22 SOC 114 CODEC 114 art 3.2 ©
114 Commission communication on Consequences of the entry into force of the Treaty of Lisbon for ongoing institutional decision-making orocedures, COM(2009)665
115 A7-0265/2010 EMPL explanatory statement p 40
categories was, in opposition to the EMPL, justified by the Commissions presentation of proposals for directives specific to these categories of workers.\textsuperscript{116}

In the first reading position from the European Parliament the LIBE won the principal battle against the EMPL with regard to the personal scope of the directive. In the EP-position all posted workers should be excluded from the scope, including those posted from a third country.\textsuperscript{117} Additionally au pars, seasonal workers and employees of multinational firms coming to work in their company’s EU offices should be excluded.\textsuperscript{118} The argument put forward for excluding the last two groups was that they will be covered by other new EU directives.\textsuperscript{119} The same argument was put forward for excluding long-term residents and refugees. Important distinctions are of course that these last two groups are already covered by other EU rules and already guaranteed a more far reaching set of rights than what is proposed in the single permit directive while the proposals on seasonal workers and ICT’s include a set of rights below the level in the single permit.

Important to note is that the ILO’s regional office in Brussels has taken some quite interesting steps with regard to the current negotiations on this proposal. The ILO has in good time before important decisions have been taken published notes based on International Labour Standards. In one of those notes the ILO states that it 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, including the specific instruments protecting migrant workers.\textsuperscript{120}

ETUC has also declared its discontent with the exclusion of certain groups from the coverage of the directive. Joël Decaillon, ETUC’s Deputy General explained their position in the following way: “We now have a draft directive which ignores the principle of equal treatment, adds to the number of exemptions and will result in a wide variety of workers’ statutes. This in turn will increase social dumping, the lack of job security, the instability and the vulnerability of groups of workers in Europe and will lead to further competition which is the exact opposite of the spirit in which the immigration package was initially intended”.\textsuperscript{121}

\textsuperscript{116} A7-0265/2010 LIBE explanatory statement p 37.
\textsuperscript{118} Ibid art 3.2.c and d
\textsuperscript{119} See the press release in fn XX and LIBE report explanatory statement
\textsuperscript{121} Stated in a meeting with the European Parliament in December 2010 at: http://www.etuc.org/a/8101. See also the ETUC resolution on Equal treatment and non.discrimination for migrant workers, Brussels 1-2 December 2010 at http://www.etuc.org/a/7954.
It is unlikely that any changes in this regard will take place during the concluding negotiations. The EU hereby risks developing a discriminatory regime for third country workers.

### 3.6.2 Admission procedures

The proposal introduces a single application procedure along with a single residence/work permit (art 4). The Commission stated that the combined permit will create useful synergies and enable Member States to better manage and control the presence of third country nationals on their territories for employment purposes.\(^{122}\)

The single permit would significantly simplify the administrative requirements for third country workers and employers throughout the EU. Moreover, due to its reinforced control function, it complements the Commission’s recent proposal on sanctions against employers of illegally staying third country nationals.\(^{123}\)

According to the proposal the decision on the application shall be taken no later than three months from the date of the application (art 5.2). This time frame is considerably shorter than the 180 days in the 2001 proposal. It is also, according to the proposal, prohibited to issue any additional documents (art 7.2). Decisions regarding the permit shall be open to challenge before the courts in the Member state concerned (art 8.2).

The proposal was not intending to touch upon the competence of the member states to decide on the conditions for admission to the country. The proposal did either not point out who was entitled to apply for the permit or wherefrom. The EP however wanted this issue to be dealt with in the directive and included a requirement according to which the Member States shall determine whether applications are to be made by the third-country national or by his/her employer or by either of the two.\(^{124}\) This solution is also part of the last Council document.\(^{125}\)

In the report the LIBE Committee also proposed to open up for issuing additional documents to the single permit holding all relevant information specific to the right to work. Such a document would according to the explanatory statement facilitate monitoring.\(^{126}\) That proposal did not survive the vote in the European parliament. But is one of the outstanding questions in the Council.

### 3.6.3 Rights connected to the single permit

According to the Commission proposal the right to equal treatment with nationals would at least cover:


\(^{123}\) Ibid p 3. That directive was adopted in 2009, 2009/52/EC.

\(^{124}\) P7_TA-PROV(2011)0115 art 4.1.

\(^{125}\) Council doc 6492/10, 23 February 2010, art 4.1

\(^{126}\) A7-0265/2010, PE439.363v02-00, amendments 50 and 51, article 6.1 and article 7.1a och 1b., explanatory statement p 37.
1. working conditions, including pay and dismissal as well as health and safety at the workplace
2. freedom of association and affiliation and membership of an organization representing workers or employers or of any organization whose members are engaged in a specific occupation, including the benefits conferred by such organizations, without prejudice to the national provisions on public policy and public security
3. education and vocational training
4. recognition of diplomas, certificates and other professional qualifications in accordance with the relevant national procedures
5. branches of social security, as defined in Council <regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community. Regulation (EEC) No 859/2003, extending the provisions of Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by these provisions solely on the ground of their nationality shall apply accordingly
6. payment of acquired pensions when moving to a third country
7. tax benefits
8. access to goods and services and the supply of goods and services made assistance afforded by employment offices.

The original proposal included quite wide possibilities for the member states to restrict the above mentioned rights. Some were related to higher education. Another included a possibility to restrict the right to public housing to those who had the right to stay in the territory for at least three years. Some other opened up for restricting some of the rights, as working conditions, freedom of association, payment of acquired pensions and social security rights except for unemployment benefits, to those in employment. The employment based restricting possibilities went way too far. It would be rather inappropriate if the EU opened up for restrictions relating to the freedom of association that would contradict its protection as a fundamental right. The EP also deleted this possibility in its position as well as the ones on working conditions and fundamentally changed the acquired pension right provision. Other restrictions were added as certain time frames and the possibility to restrict the right to education and vocational training to those in employment or have been employed.128

At the time of the EP decision the Council had come quite far in its negotiations on the text and its position was clear to the EP. The Council’s proposals were also in line with the EP with regard to equal treatment.129

The EMPL however also tried to extend the scope for equality of treatment by amending the part on “working conditions, including pay and dismissal as well as health and safety at the workplace” through adding “working time and leave and

127 It is not acceptable to nationally apply more far reaching restrictions on the right to freedom of association to foreigners in relation to nationals.
128 P7_TA-PROV(2011)0115 art 12.2.a and c and e
129 Council doc 6492/10 MIGR 22 SOC 114 CODEC 114 art
discriminatory procedures, taking into account general collective agreements in force”. Substantial parts of that proposal ended up in a recite in the final EP position.

Before the plenary vote in the EP, the ILO as mentioned send a note informing the EP and Council about the ILO-provisions in this area. They closed the text with recommending that the European Commission’s original clause on payment of acquired pensions abroad would be reinstated in order to guarantee equal treatment to third-country nationals in this important area. The background behind this recommendation was an amendment in the LIBE report opening up for making the provision on payment of acquired pensions abroad conditional on the existence of bilateral agreements in which the reciprocal export of pensions is acknowledged and a technical cooperation established. Something which would have quite unfair consequences for all of those third country nationals moving to countries with no functioning social security schemes at all and therefore has not entered into any bilateral agreements in this field considering that they have been contributing to these pensions in the host country. But finally amendment 70 was not adopted and it is not likely that such proposal would gain sufficient support.

The possibility for any permit holders family to join the permit holder in a Member State is of course of crucial importance for the likeliness to apply for a permit in that particular member state. In the single permit proposal there are no rules deviating from the family reunification directive. The EP has however proposed to open up for restrictions in relation to equal treatment with consequences for family members.

No real labour market access rights are included in the draft. In article 11.d it is provided that the permit holder as a minimum shall be entitled to exercise of the activities authorised under the single permit. Something as the EP in its final report proposed to rephrase in the following way to the “specific professional activity…..in accordance with national law”.

3.6.4 Freedom of movement

According to the single permit proposal the single permit holder should be able to pass through the other member states to enter and re-enter the territory of the Member state issuing the permit, but that’s all in relation to external free movement rights. The Permit holder only has only free access to the territory of the member state issuing the permit (article 11).

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130 EMPL opinion, amendment 8,
131 P7_TA-PROV(2011)0115 recite 14a
133 A7-0265/2010 LIBE report amendment 70.
134 EP art 12,2,e and ea,
135 EP art 11 d.
3.6.5 Effective enforcement

In the Commission proposal there is not specific enforcement rule. In the EP LIBE report amendments 71 and 71 includes proposals in that regard. A new article 12.2b is proposed including an obligation for the Member States to take necessary measures to ensure that any violation of the rights enshrined in the Directive is subject to effective, proportionate and deterrent penalties. A new article 12.2c was also proposed which obliged the member states to ensure that any violation of the rights enshrined in the Directive is subject to legal challenge. Those proposals emanated from the EMPL and did not survive the EP plenary vote. The Council has yet not shown any interest in such provisions. They are accordingly not likely to be included.

3.6.6 More favourable provisions

The Commission left the room free for the Member States to adopt or maintain provisions that are more favourable to the persons to whom it applies (art 13.2). A position supported by the EP and the Council. Besides it was also clarified that the directive shall apply without prejudice to more favourable provisions of Community(Union) legislation, including bilateral and multilateral agreements between the Community, or the Community and its member states, on the one hand and one or more third countries on the other. The same should apply with regard to bilateral or multilateral agreements between one or more member states and one or more third countries.

The EMPL proposed to also include a reference to the European Social Charter and the European Convention on the legal status of migrant workers in this article. Something which gained support in the LIBE-report but was not part of the position adopted by the plenary. In the plenary text there is however a new recite 18a, which was already proposed in the LIBE-report, which states that the Directive should be applied without prejudice to more favourable provisions contained in Union law and international instruments. Thereby is the EMPL aim fulfilled although in a more abstract sense. It is also worth noting that in the LIBE report there is a new recite added, 16b, stating that the Member States should ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of their families, adopted by the United Nations 1990. The proposal did not survive the plenary vote. At this date no Member State has ratified the Convention and it is unlikely that the EU is going to contribute to a change in attitude in that regard.

136 A7-0265/2010 LIBE report amendment 71 and 72.
137 P7_TA-PROV(2011)0115 recite 18a.
3.6.7 Future

Voices from the negotiations indicate that a compromise between the EP and Council is quite close. It is although unclear if the New Presidency intends to give this issue priority in order to as soon as possible get a political statement on a common position.

3.7 The ongoing battle on the 2010 proposals

In July 2010 the Commission adopted two sector related proposals on seasonal work and Intra corporate transferees (ICT). They are directed towards two very different types of workers – one including some of the most vulnerable workers on the labour market and the other including workers with a quite strong position on the labour market. In general they are according to the directive proposals also supposed to be treated very differently. But in at least one aspect there are worrying similarities –both categories are denied a general rights to equal treatment with nationals with regard to working conditions, including pay. The reasons for this choice vary. The proposals have both been heavily criticized, especially the proposal on seasonal workers. But the ground behind the criticism is different. The vulnerable seasonal workers are not provided with the necessary protection. The ICTs on the other hand is a strong group more connected to the highly skilled workers and correspondingly treated generously in many ways. The choice to treat them as posted workers is however quite problematic and will be more discussed further on. But first a few words on the proposals on seasonal workers and its responses.

3.7.1 Seasonal workers

The directive proposal on seasonal workers also aims to contribute to the implementation of the EU 2020 Strategy and to effective management of migration flows for the specific category of seasonal temporary migration. According to the Commission it sets out fair and transparent rules for entry and residence while, at the same time, it provides for incentives and safeguards to prevent a temporary stay from becoming permanent.139 This aim can be contrasted with the ambition to retain the highly skilled workers.140

The Commission points out that EU economies face a need for seasonal work for which labour from within the EU is expected to become less and less available. At the same time there is a more permanent need for unskilled labour within the EU. It is expected to be increasingly difficult to fill these gaps with EU national workers, primarily owing to the fact that these workers consider seasonal work unattractive.141 It is further pointed out that there is significant evidence that certain

141 Ibid p 2-3.
third-country seasonal workers face exploitation and sub-standard working conditions which may threaten their health and safety. The Commission also underlines that in certain branches in which seasonal work is conducted are sectors most prone to work undertaken by third-country nationals who are staying illegally. One unanswered question is of course what this proposal does for helping the illegal migrants.

According to the Commission the proposal is also consistent with and supportive of the objectives of the Commission Communication on promoting decent work for all (COM(2006)249). Setting up 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.

The Commission points out that in respect of the employment-related rights of third country seasonal workers, the proposal complies with the requirement that all EU policies should ensure a high level of human health protection. This remark is rather odd and the question how this proposal takes the human health protection aspect into account is unanswered.

The importance of circular migration and the proposal’s impact on circular migration of seasonal workers between the EU and their countries – seasonal workers will be able to come to a Member State, go back to their countries and then come again to the Member State – would facilitate reliable inflows on remittances and transfer of skills and investment. As this type of migration is temporary, this Directive is not expected to lead to brain drain in emerging or developing countries. It is rather interesting to note that the positive effects of circular migration and negative effects of brain drain is taken into consideration in this proposal dealing with low skilled seasonal workers while they are totally absent in relation to the highly skilled workers.

3.7.1.1 Personal scope

A seasonal workers is a third-country national who retains a legal domicile in a third country but resides temporarily for the purposes of employment in the territory of a Member State in a sector of activity dependant on the passing of the seasons, under one or more fixed-term work contracts concluded directly between the third-country national and the employer established in a Member State (art 3 b). An activity dependant on the passing of the seasons means an activity that is tied to a certain time of the year by an event or pattern during which labour levels are required that are far above those necessary for usually ongoing operations (art 3c).

According to a recital in the proposal such activities are typically to be found in sectors such as agriculture, during the planting or harvesting period, or tourism, during the holiday period (recital 10).

142 Ibid p 3.
143 Ibid p 3.
144 Ibid p 4.
145 Ibid p 3.
The European Parliament has not yet adopted a final report on this proposal. A draft report and a draft opinion have however been presented by the rapporteurs of LIBE and EMPL and the Committee on Women’s Rights and Gender equality has adopted an opinion. The LIBE rapporteur is proposing a range of very important and far-reaching amendments. It seems that he is intending to make sure that the limitations of the personal scope accepted by LIBE in the EP-report on the horizontal single permit proposal will not have the effect of providing the seasonal workers with less strong protection than what might be adopted in the single permit directive.

Both drafts are proposing to specify the relevant economic sectors in article 2 and only open for other sectors with agreement of the social partners. Such a specification would limit the risk of abuse of these permits for work which is not intended to be covered by the directive.

The directive is not supposed to be applied to third country nationals who are carrying out activities on behalf of undertakings established in another Member State in the framework of a provision of services within the meaning of article 56 of the TFEU including those posted by undertakings established in a Member State in the framework of a provision of service in accordance with the posting directive (96/71(art 2.2)). Accordingly it seems that seasonal workers being posted from third countries shall be covered by the directive. The scope corresponds in this regard to the directive on highly qualified employment. But not as it seems to the single permit directive. It is however worth noting that the seasonal worker shall conclude a contract directly with an employer established in a Member state (art 3a).

The EMPL-rapporteur however propose to delete art 2.2 given that it has not yet been clearly established whether and in what way the Posting Directive also applies to third-country nationals it is inappropriate to exclude third-country workers posted by undertakings established in an EU Member State from the scope of this directive. EMPL did not get support from the LIBE-rapporteur on this point. The LIBE-rapporteur on the other hand proposed to make it possible for legally staying third country nationals to apply for a seasonal work permit in that particular Member State. A real important and somewhat surprising proposal is to make it possible for a transitional period of two years to illegally staying third country nationals to apply for a seasonal work permit. This might be very difficult to get a consensus around but reflects the reality. Today many seasonal workers have an irregular status and it is not likely that they have the means to go back to a third country and apply for a seasonal work permit.

146 EMPL amendment 15, LIBE amendment 20.
147 EMPL amendment 14.
148 LIBE amendment 17
149 LIBE amendment 18
3.7.1.2 Application procedure

An application for a seasonal worker permit must, according to the proposal, contain a valid work contract or, as provided for in national law, a binding job offer to work as a seasonal worker. The contract or work offer shall specify the rate of pay and the working hours per week or month and, when applicable, other relevant working conditions (5a). There are different reasons, according to the Commission, for specifying these two conditions. The rate of pay is motivated by a verification that the proposed remuneration is comparable to that paid for the respective activity in the member state concerned. The purpose therefore is twofold—avoiding unfair advantage for the employer and exploitative working conditions for the seasonal worker. The first reason stated for information about the working hours—to ensure that employers only request third-country seasonal workers in case of real economic need—makes the last part of the text “when applicable, other relevant working conditions” reasonable. The other working conditions might not have anything to do with this calculation. This part is also likely to be connected to the requirement that the seasonal worker must have sufficient resources during his/her stay to maintain him/herself without having recourse to the social assistance system of the Member State concerned (art 5.2). A requirement which in itself is rather questionable given not least that they should benefit from pay equivalent to that of EU citizens.150 But, in the explanatory memorandum the Commission continues to mention other reasons as a guarantee of a certain, fixed level of remuneration for the seasonal workers, and, when applicable, other relevant working conditions such as insurances.151 If the specification shall serve as a guarantee it seems very strange that only wage and working time levels has to be mentioned. The working conditions must of course include many other aspects. By this formulation an odd impression that only a very limited set of working conditions is necessary to guarantee for seasonal workers. That must hopefully not have been the intention. The wording will accordingly probably be changed. A third reason for this specification is mentioned by the Commission—it will enable efficient control by the competent authorities before admission. That important aspect makes it even more important that the whole set of working conditions are included in the document.

In relation to the question on what has to be proven when applying for a permit both LIBE and EMPL are very clear. All essential aspects of the contract or employment relationship as laid down in the directive on information of employment conditions (91/533) shall be specified in the contract or job offer.152

In addition the applicant must bring evidence of having, or having applied for sickness insurance for all the risks normally covered for nationals for periods where no such insurance coverage and corresponding entitlement to benefits are provided in connection with, or as a result of, the work contract.

150 Libe amendment 29,
Evidence of having accommodation that ensures an adequate standard of living is also required. If rent is paid for such accommodation, its cost shall not be excessive in relation to the remuneration (art 5 1 d and art 14). In general the requirement of proving an adequate standard of living for the seasonal worker has been welcomed by the EP-committees. LIBE and EMPL are however proposing an amendment to article 14 including a description of what is to be included in an adequate accommodation. The amendment is build upon the definition of adequate housing set by the UN Committee on Economic, Social and Cultural Rights.\(^{153}\) The two Committees also propose that any rent paid for the accommodation must be fixed for the duration of the stay.\(^{154}\)

The grounds for refusal of the permits are quite similar in the Blue card directive and the seasonal proposal. If the conditions are fulfilled the application can still be rejected if no vacancy test can be verified or if the quote is full (art 6.2 and 4). The Member States can however decide if that want to apply a vacancy test or not.

However, there are some additional grounds for refusal included in the seasonal proposal. An application can be rejected if the employer has been sanctioned in conformity with national law for undeclared work and/or illegal employment (art 6.3). And if the seasonal workers has not complied with the obligations arising from the admission decision during a previous stay as a seasonal worker, and in particular with the obligation to return to a third country on the expiry of the permit, he or she shall be excluded from admission as seasonal worker for one or more subsequent years (art 12.2.a). LIBE is here proposing additional grounds for refusal connected to the employer. For example if the employer in previous years has failed to meet its legal obligations regarding working conditions or labour rights as provided for in national law.\(^{155}\)

A successful application will result in a seasonal worker permit. The application shall be dealt with within 30 days (art 13). In order to have sufficient time to process the application and make the necessary checks the LIBE-rapporteur proposes to prolonge this period to 60 days.\(^{156}\) The permit however only deals with stays exceeding three months. The seasonal worker shall be allowed to reside for a maximum of six months in any calendar year. It is clearly outspoken that these workers shall return to a third country immediately when the permit has expired. But the seasonal worker is proposed to have a right to change employer within this 6 month period and also extend the period if it is originally given for a shorter period than 6 months provided that the admission criteria are met (art 11). The commission motivates this last part of the provision by avoiding abuses. Seasonal workers tied to a single employer may face the risk of abuses. The possibility to extend the stay may reduce the risk of overstaying and allow higher earnings and remittances sent by third country seasonal workers which, in turn, can contribute to the development of their countries of origin.\(^{157}\) The seasonal worker is however not

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\(^{153}\) EMPL amendment 23, LIBE amendment 53
\(^{154}\) EMPL amendment 24 LIBE amendment 54
\(^{155}\) LIBE amendment 31
\(^{156}\) LIBE amendment 51
\(^{157}\) COM(2010)379 explanatory memorandum, p 10
allowed to stay in the territory as unemployed. A right which is proposed to be included by an amendment by LIBE.\(^{158}\) Without such a right the right to change employer is of limited value.

The connection to the EU development policy is only made in relation to the seasonal workers. Such arguments are also put forward when motivating art 12. According to the proposal in article 12 the member state shall facilitate the re-entry of the seasonal worker. Two options are given: either issue three seasonal worker permits covering up to three subsequent seasons within one administrative act or provide a facilitated procedure for the seasonal worker when applying to be admitted as a seasonal worker in a subsequent year. The multi-seasonal permits are supposed to be appropriate for sectors where the labour market needs remain stable over a period of time.\(^{159}\)

The purpose of this provision is to promote circular migration of seasonal workers. The reason put forward is that such kind of migration will potentially benefit the country of origin, the EU host country and the seasonal workers him/herself.

Parts of these proposal gains support for example by the ILO, but their success is also dependant on a set of protective measures.\(^{160}\)

This whole proposal smells from a fear of opening any possibility for these vulnerable workers to stay in an EU Member State for a longer period. This perspective can be heavily criticized and has been so. The LIBE rapporteur is for example proposing that the MS shall determine the conditions under which seasonal workers may apply for a longer-term residence permit.\(^{161}\) Using the work of a person year after year without giving him or her a chance to establish in that Member State is far from decent. The right to apply for longer work permits in accordance with national rules would of course be open for this category as for any one else. But it is rather questionable if that is enough.

### 3.7.1.3 Equal treatment?

The 2010-proposals have in regard to working conditions left the equal treatment principle and taken another starting point.

In the seasonal work proposal seasonal workers shall be entitled to 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 Member State to which they have been admitted according to the directive. In those member states where collective agreements are not declared universal applicable the member states can base themselves on collective agreements which

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\(^{158}\) LIBE amendment 45  
\(^{159}\) Ibid p 10.  
\(^{161}\) LIBE amendment 49
are generally applicable to all similar undertakings in the geographical area and in
the profession or industry concerned, and/or collective agreements which have
been concluded by the most representative employers’ and labour organizations at
national level and which are applied throughout national territory.

Not granting the seasonal workers equal treatment has been criticized by the trade
union movement, the ILO\textsuperscript{162} and the EP-rapporteurs and EESC.\textsuperscript{163} The
Commission does not give any understandable explanation to this choice. In the
explanatory memorandum they simply state this part of the article defines the
working conditions, including pay, dismissal and health and safety requirements at
the workplace applicable to seasonal workers in order to ensure legal certainty.
Recitile 20 refers to the specially vulnerable situation of third-country national
seasonal workers and the temporary nature of their assignment. It should therefore
be a need to define clearly the working conditions applicable to such workers in
order to ensure legal certainty by referring such conditions to generally binding
instruments providing effective protection of the rights of third-country seasonal
workers, such as law or universally applicable collective agreements.

It is however difficult to read this article as obliging the member states to include
such rights for seasonal workers in binding instruments. The ILO expresses
concern about the lack of reference to equal treatment with nationals in this article.
They are reminding of that there is such provision included in the Blue card
directive and the single permit proposal as well as in the ILO Convention Nos 97
and 143 on Migrant workers. 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 Discrimination (Employment and
Occupation) Convention, 1958 (No. 111) which addresses non-discrimination with
respect to inter alia conditions of employment. The question whether nationality is
one of the included ground can however be discussed. The ILO however also
point at that 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.\textsuperscript{164}

The ILO also expresses concern over 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. ILO Convention No 98 on collective bargaining, ratified by all member
states, also covers collective bargaining at workplace level by an individual
employer. There is therefore no ground whatsoever to limit the equal treatment for
seasonal workers to collective agreements that have been declared universally
applicable.\textsuperscript{165}

\textsuperscript{162} ILO Note based on International Labour Standards with reference to relevant
regional standards – Proposal for a directive of the European Parliament and the
Council on the conditions of entry and residence of third-country nationals for the

\textsuperscript{163} ILO note and ETUC, LIBE p 44, EMPL amendment 26, EESC Opinion p 4.13.

\textsuperscript{164} ILO Note pp 2-3.

\textsuperscript{165} ILO Note p 3.
The EMPL-rapporteur is extensively dealing with this issue in the draft opinion. According to their proposal seasonal workers shall be entitled to equal treatment with nationals with regard to working conditions, including pay and dismissal, working hours, holidays and disciplinary provisions, as well as health and safety requirements at the workplace, taking account, in addition to legal, administrative and regulatory provisions and collective agreements and contracts, concluded at any level, in accordance with the host Member State’s law and practices, by the most representative employers’ and labour organizations, under the same terms as for nationals of the host Member State.166

This proposal is more extensive than what was achieved in the Blue card directive and what is likely to be included in the single permit directive. EMPL tried to include a similar provision in the single permit but only succeeded in including it in a recitile in the final EP-report. That is of course not negligible. But the end result is still unclear.

The main message on equal treatment regarding working conditions although seems to have a very strong support. And it would of course be extremely worrying if the directive would be adopted without a robust equal treatment provision. It although seems that the EP would not let this principle go.

The extended reference to collective agreements at all levels is also of tremendous importance. The argument from ILO on respect for Fundamental ILO standards is of course not negligible here. Its worth will once again be tested in an EU context.

A general point not discussed so far in relation to any of the proposals is the lack of the reference to conditions of employment in this context. The long-term residence provide for equal treatment regarding: conditions of employment and working conditions, including conditions regarding dismissal and remuneration.

The question is if anything important is excluded by this omission or if it is or is supposed to be the same issues dealt with in the directives but only formulated in different ways. Employment conditions normally include criteria for example for temporary work. Are such rules supposed to be set aside for migrant workers not yet benefitting from long –term residence status or should they be included?

The rest of article 16 is however based on the equal treatment with nationals principle. That regards freedom of association and affiliation and membership of an organization representing workers or of any organization whose members are engaged in a specific occupation, including the benefits conferred by such organizations, without prejudice to the national provisions on public policy and public security. The EMPL rapporteur is however proposing clarifications of the content by adding “including the right to negotiate and conclude collective agreements and the right to strike and take industrial action, in accordance with the host Member State’s national law and practices which comply with Union law”167.

166 EMPL amendment 26
167 EMPL amendment 26.
It also regards provisions in national laws regarding the branches of social security as defined in Article 3 or Council Regulation (EC) No 883/04; payment of statutory pensions based on the worker’s previous employment under the same conditions as nationals of the Member states concerned when they move to a third country; access to goods and services and the supply of goods and services made available to the public, except public housing and counselling services afforded by employment services (art 16.2).

The social security part is motivated by a recognition of that seasonal workers legally working in a member state contribute to the European economy through their work and tax payments; and to serve as a safeguard to reduce unfair competition between own nationals and third-country nationals that may result from possible exploitation of the latter.168

The ILO point in its note on the fact 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 benefits. Provision for such special adjustments has also been laid down in Article 24(4) of Convention No. 102. Similar adjustments therefore could also be foreseen for migrant seasonal workers, not only in respect unemployment benefit but also other benefits such as old age pension.169

Seasonal workers does not have any special rights with regard to family members. It is of course quite cynical that the most vulnerable workers are not allowed to bring their families if they are going to work for a 6-months season if they can be supported during that time. This issue is not really touched upon by any EP-committee.

In the seasonal worker proposal there is only the internal free movement aspect that is covered which is more limited than for Blue card holders. The permit holder shall at least be entitled to enter and stay in the territory of the member state issuing the permit. The permit holder shall also be given free access to the entire territory of the Member State (art15) There is however no right to pass through the other member states to enter the territory where the work is taken place. There is no explanation related to this lacuna. Probably the visa rules for third country nationals can be applied for those workers using other transport facilities than direct flights. Something that seems quite inconvenient. One reason for this difference could be a general fear that this group shall chose to stay in another MS instead without the necessary documents.

3.7.1.4 Effective enforcement

In the seasonal workers proposal two severe sanctions are included. They have already been touched upon in this survey as they are included in the article on grounds for refusal of the application. The provisions are in reality sanctions. They

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169 ILO Note p 5.
are directed towards both the seasonal worker and the employer. A third country national who has not complied with the obligations arising from the admission decision during a previous stay as seasonal worker, and in particular with the obligation to return to a third country on the expire of the permit, shall be excluded from admission as seasonal worker for one or more subsequent years (art 12.2.a)

An employer who has not fulfilled the obligations arising out of the work contract shall be subject to effective, proportionate and dissuasive sanctions. Such employers shall be excluded from applications for seasonal workers for one or more subsequent years (art 12.2.b) According to the explanatory memorandum the exclusion must last at least one year.

Many different reasons make the seasonal workers vulnerable. One of the most important reasons is the short period of their stay and the drastic implications if they loose their job. The EP-rapporteurs has proposed quite far reaching amendments in this regard. It is proposed that monitoring mechanisms are put in place and that adequate inspections should be carried out ensuring that the provisions in the directive on particular regarding rights, working conditions and accommodation, are fully respected during the duration of the stay.\textsuperscript{170}

It can however be difficult for a seasonal worker only permitted to stay in the country for a short time to proceed and sue the employer for not fulfilling the obligations arising out of the work contract. To make enforcement more effective complaints mechanisms should be put in place. The seasonal work proposal therefore includes a provision according to which the member states shall ensure that third parties which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring compliance with this Directive, may engage either on behalf of or in support of a seasonal worker, with his/her approval, in any administrative or civil proceedings provided for with the objective of implementing this directive (art17). The possibility to engage third parties in the process is motivated by that evidence suggests that seasonal workers are often either not aware of the existence of such mechanisms or they are hesitant to use them in their own name, as they are afraid of the consequences in terms of future employment possibilities. A comparable provision is laid down in Article 9(2) of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.\textsuperscript{171}

The EP-rapporteurs are proposing to strengthening this provision and also to include a provision protecting seasonal workers against dismissal or other adverse treatment by the employer as a reaction to a complaint or to any legal proceedings aimed at compliance with this directive.\textsuperscript{172}

\textbf{3.7.1.5 More favourable provisions}

The directive shall according to the proposal apply without prejudice to more favourable provisions of

\begin{footnotesize}
\begin{enumerate}
\item EMPL amendment 31, LIBE amendment 58
\item COM(2010)389 em p 12.
\item LIBE amendment 59 and 60 EMPL 32 and 33.
\end{enumerate}
\end{footnotesize}
- Union law, including bilateral and multilateral agreements concluded between the Union or between the Union and its Member States on the one hand and one or more third countries on the other
- Bilateral or multilateral agreements concluded between one or more Member States and one or more third countries
- The Member States are also entitled to adopt or retain more favourable provisions in relation to articles 13-17 in the directive i.e. the provisions on procedural safeguards, accommodation, movement related rights on the basis of the permit, rights on working conditions etc, and complaints mechanisms.

It is not entirely clear if this provision means that those particular rights dealt with in articles 13-17 can be given a more generous content or if also more rights can be provided for to the seasonal workers.

### 3.7.2 Intra corporate transferees

As indicated earlier the Commission in parallel to the seasonal workers directive presented a proposal on intra-corporate transferees (ICT).

Measures to attract highly qualified third-country nationals, such as key staff of transnational corporations, are part of the broader framework by the EU 2020 Strategy.\(^{173}\)

Today many multinationals wishing to transfer their personnel have run into inflexibility and limitations and there are big differences between Member States in terms of conditions of admission and restrictions of family rights.\(^{174}\) The treatment granted to intra-corporate transferees at EU level, combined with the conditions and procedures regulating such movements, have an impact on the attractiveness of the EU as a whole and influence the extent to which multinational companies decide to do business or invest in a certain area.\(^{175}\)

The directive is specifically aimed at responding effectively and promptly to demand for managerial and qualified employees for branches and subsidiaries of multinational companies by setting up transparent and harmonised conditions of admission of this category of workers, by creating more attractive conditions of temporary stay for intra-corporate transferees and their family and by promoting efficient allocation and re-allocation of transferees between EU entities.

This is also intended to contribute to fulfil the EU’s international trade commitments, including specific rules on intra-corporate transferees.\(^{176}\) Nor the EU-25 Commitments under the General Agreement on Trade in Services (GATS) or Economic Partnership Agreements are intended to cover exhaustively the

\(^{174}\) Ibid p 3.  
\(^{175}\) Ibid p 7.  
conditions of entry, stay and work. The big differences between Member States in terms of entry procedures and temporary residency rights could hamper uniform application of the international commitments which the EU and its Member States have taken on in the WTO negotiations.

The proposal was welcomed by the two EP-rapporteurs working on the file- the EMPL and LIBE rapporteurs. EMPL although have an important objection which will soon be dealt with.

3.7.2.1 Personal scope
Researchers according to the 2005 directive (2005/71), a third-country nationals who already enjoy free movement rights equivalent to those of EU citizens or who are employed by an undertaking established in a third country, as well as third-country nationals posted by undertakings established in a Member State in the framework of a provision of services in accordance with Article 56 of the Treaty and Directive 96/71/EC on the posting of workers are excluded from the scope of the proposed directive (article 2).

The directive is directed towards highly skilled workers. Only managers, specialists or graduate trainees can be admitted an intra-corporate transferee permit (art 5 1 e, d and 11). The proposal has been criticized for being too inspecific in particular in regard to the definition on specialist and managers. It could open for abuse of the directive. The situation must be avoided where de facto all employees in a group can work for up tp three years in a subsidiary in a Member State. The definitions should, according to these voices, also be aligned with the corresponding GATS definitions.

3.7.2.2 Admission procedures
Criteria for admission are i.a.: proving that the different entities between which the transfer shall take place belong to the same undertaking or group of undertakings, that the worker has been employed by the company for at least 12 months prior to the transfer if required by national legislation, that the employer shall take up the required position and has the necessary qualifications and having or having applied for sickness insurance (art 5). The worker must also be provided with a remuneration at the same level as posted workers during the transfer (art 5.2).

If the employer has been sanctioned for undeclared work and or illegal employment there is ground for refusing the application (art 6.3). The application can also be rejected if a quota is filled. No vacancy test is however required.

The Member States shall determine whether the application is to be made by the third country national or by the host entity ie. the entity to which the third country national is transferred (art 10) The application shall be submitted in a single application procedure. Simplified procedures may be available for to groups of

178 Ibid p 7.
179 EESC SOC /393 p 1.5 and 1.8, 4.15, EMPL p 3, amendment 10-14.
180 EESC p 5.1
undertakings that have been recognized for that purpose by Member States for a maximum of three years. The decision on the application should normally be taken within 30 days. For complex applications the deadline may be extended for a maximum of a further 60 days.

An intra-corporate transferee shall be valid for at least one year or shorter (if the duration of the transfer is shorter) and may be extended to a maximum of three years for managers and specialists and one year for graduate trainees.

3.7.2.3 Rights connected to the permit

The intra-corporate transferee permit carries with it both internal and external movement rights according to the proposal. The internal dimension includes the right to enter and stay in the Member State issuing the permit and to free access to the entire territory of that member state. The external dimension is however one of the most far reaching provisions in the proposal. It includes a right to exercise the employment activity covered by the permit in any other entity belonging to the group of undertakings listed in a document that must be included in the application (art 16). It also includes a right to carry out the assignments at the sites of clients of the entities belonging to the group of undertakings listed in the same document. The duration of the transfer in the other Member State or Member States may however not exceed twelve months. The external free movement aspect of the permit is by both the LIBE and EMPL rapporteurs considered to be very important. “This modus operandi will give rise to new and stronger collaborative and sharing mechanisms between Member States, which, as a result, will develop greater levels of mutual trust”. It has however been underlined that in order to avoid wage dumping it is important that the transferee is paid the minimum salary applicable in the state where he/she is actually working. The draft directive suggests that the conditions applicable in the country issuing the permit should apply.

But what kind of status does the ICT:s have? Are they a kind of third country posted workers or are they exercising a kind of free movement of labour. The starting point in the Commission proposal is clear. Intra-corporate transferees shall be entitled to the terms and conditions of employment applicable to posted workers in a similar situation, as laid down by law, regulation or administrative provision and/or universally applicable collective agreements in the Member State to which they have been admitted pursuant to this Directive.

181 Art 10
182 Art 12
183 Art 11
184 Art 13
185 Art 16.1 a.
186 EMPL Draft Opinion, PE464.975v02-00 p 4, LIBE Draft Report PE464.961v01-00 p 21-22.
187 LIBE p 22.
188 See for example EESC SOC/393, p 5.12
In the absence of declaring collective agreements to be of universal application, member States may, if they so decide, base themselves on collective agreements which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or collective agreements which have been concluded by the most representative employers’ and labour organisations at nationals level and which are applied throughout national territory. The formula from art 3.8 the posting directive is obviously used here.

As indicated the two EP rapporteurs do not seem to be totally in consensus on this topic. The EMPL-rapporteur is clear she “fundamentally disagrees with the Commission on what rules should be applied to the Intra Corporate Transferees”. The EMPL rapporteur specifies a number of arguments for this position:

1) it is not clear whether and to what extent the Posting Directive applies to third country nationals
2) in a situation where the posting directive is currently reviewed one can ask what sense it makes to refer to a piece of legislation which does currently not serve its original purpose any longer
3) while the posting of workers directive is meant to ensure the free movement of services, the objective of the ICT-directive is to ensure the free movement of labour.

The Directive should according to the rapporteur follow the principle that third country nationals should be treated equally with Union citizens. The equal treatment principle shall apply in relation to the nationals in the Member State where the ICT is currently working. The EMPL rapporteur is also clear about what kind of collective agreements that shall be taken as a reference point. She rejects the proposal and proposes that the definition of collective agreement shall be “any kinds of collective agreements, concluded at any level, including at company level, in accordance with national legislation and practices of the host Member State, by the most representative social partners.” These two positions are supported by the European Economic and Social Committee. The LIBE is quiet on this topic. This part is technically the responsibility of the EMPL. That did however not hinder LIBE to touch upon these issues with regard to the seasonal workers.

In some other areas as i a freedom of association the ICT:s are guaranteed equal treatment. Due to the temporary nature of their stay, equal treatment with regard to education and vocational training, public housing and counselling services from employment services were considered irrelevant by the Commission.

The proposal contains derogations from the family reunification directive (2003/86) considered necessary in order to set up an attractive scheme for intra-

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189 Art 14.1
190 EMPL p 3.
191 Ibid and amendments 4 and 21
192 EMPL amendments 16, 18, 19, 21.
193 EESC Opinion, SOC/393 p 1.5.
corporate transferees. It provides for immediate family reunification in the first state of residence.195

3.7.2.4 Effective enforcement
There is no general enforcement provision included in the draft. That means that the general EU-law principles on effective enforcement will apply. There is however a provision in the draft clarifying that the Member States may hold the host entity responsible and provide for penalties for failure to comply with the conditions of admission. Those penalties shall be effective, proportionate and dissuasive (art 8)

Another sanction is the previously mentioned provision regarding grounds for refusal. An application for a permit shall be rejected if the employer or the host entity has been sanctioned in conformity with national law for undeclared work and/or illegal employment (art 5.2)

3.7.2.5 More favourable provisions
Beside the general provision which is included in all these draft and directives on union law and different bilateral och multilateral agreements, the draft gives a quite limited room for the Member States to adopt or retain more favourable provisions. That possibility is provided for in relation to articles 3(i) on the definition of family members, 12 on procedural safeguards, 14 on rights and 15 on family reunification.

4 And the respect for the EU Charter on fundamental rights?

5 Concluding remarks
Third country workers are operating and has been operating on the EU labour market for quite some time. Until recently the admission criteria and working conditions for this workforce have been dealt with on mainly a national basis. Since 1999 this starting point is no longer evident. The EU is trying to adopt common rules in this area in order to make the EU labour market more attractive for third country nationals and get a common level playing field.

It is clear that the presence of this workforce in the EU Member States has effects on the national labour markets. Some Member States host large amounts of irregular migrants. They are present on a part of the labour market open to exploitation and corresponding abuse. Many Member States are in parallel opening up their labour markets for third country nationals in order to overcome skill shortages. When EU now is trying to adopt a common playing field the ambition is to facilitate the application processes in order to make it both more attractive and also in many ways at all possible to apply for legally residence in a EU member

195 Art 15 and Ibid p 11
state. The positive effect of this exercise is however depending on if it will be supplemented with robust rights-based approach. One question is if the proposed legal framework fulfills that requirement.

The starting point in the draft and adopted directives is that it is the employers who are in major control of this process as all application processes are demand driven. The worker needs a concrete job offer in order to receive the necessary permit. The governments keep parts of the control through quotas and demands for vacancy tests. There must be a real economic need connected to the admittance.

This working force is more vulnerable to abuse and exploitation than others. Normally they do not have a network that can offer support. If there are no prospects for longer residence the incentives for developing such a network is probably not that strong. The role of the networks is also less evident when the worker risks loosing his or her permit the day a complaint against the working conditions is made.

Still a basic requirement ought to be that the third country nationals are guaranteed the same employment and working conditions as the national workforce. The overview has shown that this is not an evident starting point. Parts of the third country nationals are proposed to be excluded from the legal framework based on equality of treatment with the national workforce. A starting point that has generated a lot of criticism.

One of these excluded groups, the ICT:s, is not supposed to be admitted to the EU labour market on a permanent basis. They are temporarily send to an EU member state to provide a service or more likely to fulfill other tasks. Since they are not admitted to the labour market on a permanent basis they can not be guaranteed more favourable rights than those provided for to EU nationals operating on a temporary basis on another EU member state’s labour market.

The interesting thing however is that almost none of the third country nationals can be said to be operating at the EU labour market on a permanent basis. They are all supposed to go back to a third country after a certain time, even if some forces want at least the highly skilled to remain. Their right to freely operate on the EU Member States’ labour markets while admitted to work here is also very restricted.

The starting point seem to be that it would not be fair to oblige the Member States to treat this part of the workforce more favourable than EU nationals working in similar situations. It is although quite strange that an ICT working in an EU member state for three years should only be guaranteed those core rights provided for in the posting directive while other labour migrants admitted for a shorter period should be guaranteed equal treatment. Giving the posting directive such far reaching implications also seem inadequate. Exporting the already questioned advantages provided for to service providers within EU to all multinational firms regardless of their character risks to contribute to an increase of the part of the labour market not open to competition on the same terms as the rest.
One interesting question is of course if it is reasonable to assume that service providers operating in the WTO/GATS context should be treated according to the same lines as service providers within the EU context?

The seasonal workers are also excluded from the equality of treatment principle. The argument for this decision is unclear. The vulnerability of this workforce makes it even more important that they are guaranteed equality of treatment complemented by effective enforcement mechanisms. Demands for effective monitoring mechanisms and sanctions including protective elements have also been raised. The Commission’s original proposal is characterized by a utility perspective quite alienated from what we normally mean when we talk about social Europe.

The deficits with regard to effective enforcement mechanisms is something which is characterizing this whole package. The Member States seem to have a quite ambiguous attitude to this issue- on the one hand they are afraid that the third country nationals will outcompete the national labour force, on the other hand are they not willing to safeguard that they are competing on equal terms.

Another important element to safeguard competition on equal terms is making it realistic that the workers themselves take steps to act when they are exploited or simply not paid what they are supposed to be paid. Employment protection is therefore crucial as well as a possibility to take another job. The rules on labour market access and periods of admitted unemployment are important to counterweight the risks with demand driven labour migration.

It however seems to be very little support for extending these rights in the proposed and adopted texts discussed in this chapter. In the Commission 2001 proposal those rights were much more generous than those presented after the 2005 policy plan. These rights also differ between the different groups. The highly skilled are guaranteed more generous rules in this regard than what is proposed for the seasonal workers. Interestingly enough this point has not been pursued by the trade unions.

Concludingly we have an emerging legal framework which might facilitate the application procedures for third country workers. If it will not be supplemented by a robust rights-based approach it will be up to each Member State to decide on adopting such rights and effective enforcement mechanisms. Workers forced to compete on a low wage basis will be admitted to some countries and those who are not to others. This might result in a segregated EU-labour market countering a sound development. The risks involved depend on the organization of these structures nationally.