Seasonal employment: conditions of entry and stay of third-country nationals

2010/0210(COD) - 13/07/2010 - Legislative proposal

PURPOSE: to introduce a special procedure for third-country nationals applying to reside in the EU for seasonal employment, and to define the rights of seasonal workers.

PROPOSED ACT: Directive of the European Parliament and of the Council.

BACKGROUND: EU economies face a structural need for seasonal work for which labour from within the EU is expected to become less and less available. As regards future skills shortages, traditional sectors will continue to play an important role and the structural need for low-skilled and low-qualified workers is likely to continue expanding. It should also be pointed out that 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. Further, there is significant evidence that certain third-country seasonal workers face exploitation and sub-standard working conditions which may threaten their health and safety. Lastly, sectors of the economy that are characterised by a strong presence of seasonal workers - most notably agriculture, horticulture and tourism - are repeatedly identified as the sectors most prone to work undertaken by third-country nationals who are staying illegally.

The proposal is part of a comprehensive package of measures, proposed in the Policy Plan on Legal Migration of 2005 and further endorsed by the Stockholm Programme, adopted by the European Council in December 2009.

IMPACT ASSESSMENT : the following options were considered:

- **Option 1 - Status quo.** Current developments in Member States and at EU level would continue within the existing legal framework. Employers will be under certain obligations resulting from the 2009 Directive on employer sanctions as regards notifications to authorities and penalties in the case of illegal employment. The effect of this option would be limited.
- **Option 2 - Directive on entry and residence conditions of seasonal workers and rights**. Common rules would be established, including the definition of seasonal work, and admission criteria. This would help to establish a common legal framework applicable to all employers in the EU and to prevent exploitation. However, seasonal workers would still be faced with diverging and complex procedures for entry.
- **Option 3 - Directive laying down common admission procedures**. In addition to option 2, a single work and residence permit for third-country seasonal workers would be introduced, to be issued in a single procedure. Provisions would be made for facilitating re-entry of a seasonal worker in subsequent seasons. Hiring procedures would be more efficient, and a more predictable workforce would be available for EU employers.
- **Option 4 - Directive on measures to ensure effective return**. Measures would include limitation of the length of stay, and an explicit obligation to return at the end of the period. Overstaying of seasonal workers would be prevented to some extent. Effects on the functioning of the EU labour market would be marginal. Seasonal workers would still be faced with diverging and complex entry procedures.
- **Option 5 - Communication, coordination and cooperation among Member States**. No new legislation would be introduced, but complementary and supporting activities would be undertaken with a view to approximating Member States' practices. Effects would be limited, as the measures

would not be binding; potential seasonal workers and their prospective employers would continue to face an array of different rules for admission and different rights would be granted to seasonal workers during their residence.

The **preferred option is a combination of options 2, 3 and 4**. Common admission standards with simplified entry procedures and the prospect of returning in a subsequent season (options 2 and 3) will provide for flexible admission to endow the EU labour market with the necessary resources. Elements from option 4 should help ensure the return of the seasonal worker and thus prevent overstaying.

LEGAL BASE: Article 79(2)(a) and (b) of the Treaty on the Functioning of the EU.

CONTENT: the proposal establishes a **fast-track procedure for the admission of third-country seasonal workers**, based on a common definition and common criteria, in particular the existence of a work contract or a binding job offer that specifies a salary equal to or above a minimum level. Seasonal workers will be issued with a residence permit allowing them to work for a specified maximum period per calendar year. Provision is also made for facilitating the re-entry of a seasonal worker in a subsequent season. In order to prevent exploitation and protect the safety and health of third-country seasonal workers, legal provisions applying to working conditions are clearly defined. Also, employers are required to provide evidence that the seasonal worker will have appropriate accommodation during his/her stay and that provision is made for facilitation of complaints. To prevent overstaying of third-country seasonal workers, a maximum duration of stay per calendar year is laid down as well as the explicit obligation to return after that period; there is no possibility of status change.

The main provisions are as follows:

Chapter I: General provisions

Purpose:the purpose of the proposal is to introduce a special procedure for the entry and residence of third-country nationals applying to reside in the EU for seasonal employment, and to define the rights of seasonal workers.

Scope: the provisions only apply to third-country nationals who reside outside the territory of the Member States. There is no provision for applications for employment as seasonal workers from within a Member State. The proposal does not apply to third-country nationals posted by undertakings established in a Member State in the framework of a provision of services in accordance with Directive 96/71/EC.

Definitions: the notion of seasonal work is distinguished from regular, permanent work in particular by higher workforce requirements linked to an event or pattern of events, such as the planting or harvesting period in agriculture, or the holiday period in tourism including events, festivals, biennales or long term exhibitions in culture. Member States may determine specific sectors of the economy that meet the criteria for seasonal work.

More favourable provisions: the proposal allows Member States to grant more favourable conditions only in relation to certain specific provisions that concern the procedural safeguards, the level of rights granted to seasonal workers, as well as provisions relating to accommodation and facilitation of complaints.

Chapter II: Admission criteria

Criteria for admission: the proposal sets out the criteria that a third-country national seasonal worker and his/her employer must fulfil. As the admission is demand-driven, a **work contract or a binding job offer** must be presented. They should specify a level of remuneration in order to allow the competent authorities to assess whether the proposed remuneration is comparable to that paid for the respective activity in the

Member State concerned. This is vital in order to avoid an unfair advantage for the employer and exploitative working conditions for the seasonal worker. The work contract must also specify the working hours per week or month. This requirement should:

- ensure that employers only request third-country seasonal workers in case of real economic need (sufficient employment capacities);
- serve as a guarantee of a certain, fixed level of remuneration for the seasonal workers, and, when applicable, other relevant working conditions such as insurances;
- enable efficient control by the competent authorities before admission.

The application must also include evidence that the respective seasonal worker will benefit from appropriate accommodation.

Grounds for refusal: the proposal does not create a right to admission. These provisions lay down the mandatory and possible grounds for refusal as well as for withdrawal and non-renewal, including non-fulfilment of the admission criteria, the existence of quotas and the possibility for Member States to carry out a labour market test. The principle of EU preference, as expressed in the relevant provisions of the Acts of Accession of 2003 and 2005, constitutes EU primary law, and therefore the Directive must be applied in conformity with the Acts of Accession by those Member States that still make use of the transitional arrangements.

Chapter III: Procedure and permit

Access to information: Member States are required to ensure that the relevant information about conditions of entry and residence, including the rights granted to third-country seasonal workers, and about all the documentary evidence necessary for lodging the application are available to prospective third-country seasonal workers and their employers.

Applications: Member States have to determine whether applications are to be lodged by the third-country national or by his or her prospective employer. They are also required to **designate a competent authority** to receive the application and issue the permit. This designation is without prejudice to the role and responsibilities of other national authorities with regard to the examination of and decision on the application. Furthermore, the designation to receive and issue the permit should not prevent Member States from appointing other authorities with which the third-country national or his/her prospective employer can lodge the application (e.g. consular offices) and which have the authority to issue the permit.

The application to reside and work as a seasonal worker must be submitted in a **single application procedure**.

Seasonal worker permit: third-country nationals for whom a positive decision has been taken by the Member State concerned must receive a seasonal worker permit. The residence permit with the indication 'seasonal worker' must allow both the residence and the exercise of the specific seasonal work authorised, without an additional permit, in particular a work permit, being necessary. Accordingly, for periods of stay below three months, Member States must issue a visa that will also entitle the seasonal worker to exercise the specific employment activity for which he/she was admitted.

Duration of stay: the maximum period of stay is **set at six months in any calendar year**. Such strict limitation of the duration of stay should contribute to ensuring that third-country national workers admitted under the Directive are actually employed for work that is genuinely seasonal and not for regular work. Explicit provision is made that within the maximum duration of stay an extension of the contract or a change of employer for seasonal work is possible. This is important because seasonal workers who are tied to a single employer may face the risk of abuse. Also, the possibility of **extending the stay** within the specified period of time may reduce the risk of overstaying.

Facilitation of re-entry: this provision is intended to promote circular migration of third-country national seasonal workers, that is, their movement between a third country and the EU for temporary stay and work in the latter. This kind of migration will potentially benefit the country of origin, the EU host country and the seasonal worker him/herself. Accordingly, Member States have the choice of either issuing multi-seasonal permits or applying a facilitated procedure.

Multi-seasonal permits cover up to three seasons and are thus appropriate for sectors where the labour market needs remain stable over a period of time. A third-country national who did not comply with the obligations linked to a previous stay as a seasonal worker is to be excluded from admission as a seasonal worker for one or more years.

Sanctions: an employer who has not fulfilled obligations resulting from the work contract must be subjected to sanctions and excluded from the possibility to apply for seasonal workers for at least one year.

Procedure: a fast-track procedure (30 days) is provided for examining applications. Procedural guarantees include the possibility of a legal challenge against a decision rejecting an application as well as the requirement for the authorities to give reasons for such decision.

Accommodation: employers of seasonal workers must provide evidence that the seasonal worker will have accommodation ensuring an adequate standard of living. This covers cases where the employer is to provide accommodation and where accommodation is to be provided by a third party.

Chapter IV: Rights

Rights: a seasonal worker permit entitles its holder to enter and reside on the territory of the Member State which has issued the permit and to exercise the employment activity authorised by the permit. The text 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. It also grants rights to third-country seasonal workers by determining fields where equal treatment with own nationals should be ensured in the form of a minimum requirement without prejudice to the right of Member States to adopt or maintain provisions which are more favourable. Accordingly, equal treatment applies in respect of freedom of association and affiliation and membership of an organisation representing workers.

Equal treatment: equal treatment also applies to social security and covers the benefits defined in Regulation (EC) No 883/04 on the coordination of social security systems. Such provisions are intended to establish common rules within the EU; to recognise that third-country national seasonal workers legally working in a Member State contribute to the European economy through their 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.

Complaints: complaints mechanisms should be put in place, open not only to third-country seasonal workers, but also to designated third parties. 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.

Chapter V: Final provisions: this chapter regulates the obligations of Member States concerning sharing the relevant statistical data and the information resulting from transposition of the Directive. It also specifies the reporting obligations of the European Commission and stipulates the date on which the Directive enters into force.

BUDGETARY IMPLICATIONS: the proposal has no implications for the EU budget.