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Joint NGOs statement EU Seasonal Migrant Workers' Directive: Ensure effective Equal Treatment

May 2013

This paper should be read in parallel with the table comparing the Council's and the European Parliament's amendments¹

In view of the on-going triologue on the European Commission's proposed directive on "conditions of entry and residence of third-country nationals for the purposes of seasonal employment", a coalition of NGOs active on migration (see logos above) recall the need to guarantee a uniform and extensive sets of labour rights for third-country workers across the EU.

We warmly welcome and strongly support measures under discussion to create clear working and housing standards in seasonal work and reduce exploitation risks, while helping to meet labour demand in seasonal sectors. We however notice that the current trend of the multiplication of employment statuses leads to the creation of **different sets of rights for different groups of third-country workers** and to the failure of Member States to enforce labour rights.

We urge the European legislator to implement the "equal status for equal work" principle and to ensure that seasonal migrant workers enjoy equal treatment regarding work conditions, social rights and access to legal redress.

The Council and the Parliament should ensure that the Directive:

- establish the necessary conditions for the effective access of seasonal workers to equal treatment regarding, in particular, working conditions, social rights and access to complaint and mediation mechanisms,
- define exactly what is meant by "seasonal work" to prevent social dumping between national and third-country workers in the EU,
- clarify the role of agencies and intermediaries to prevent exploitation and human trafficking,
- ensure the possibility for third-country nationals to apply from within the territory of a Member State,
- retain reference to the employers' obligation to provide accommodation and define the notion of adequate housing,
- reinforce complaint mechanisms and strengthen rules and practices on labour inspections to monitor the conditions under which third-country nationals are recruited and employed, in accordance with ILO standards.

¹ Document 6312/13 of 12 February 2013.

1. Scope of the Directive and definition of seasonal work

(Article 2 – Scope; Article 3 – Definition; Article 4 – more favourable provisions)

We oppose the Council's proposal that foresees that Member States could define the sectors covered by the Directive. A vague definition of sectors would lead to **social dumping**, particularly if seasonal workers do not enjoy rights similar to other EU workers. Social partners must take part in the listing of sectors - a simple consultation is not sufficient to guarantee their involvement in the decision-making process.

Council's definition of seasonal work as an 'activity dependent on the passing of the season' is too vague as it could comprise any increase in labour demand even without any link with seasons. We support the EP's inclusion of the **elements of regularity and predictability**.

We strongly support the EP's formulation on guaranteeing that seasonal migrant workers cannot be posted in another Member State, so that it does not create confusion with Directive 96/71/EC on Posted Workers – which is hard to enforce in practice and creates sub-standard conditions in terms of applicable collective agreement and minimum wage.

We however do not support the exclusion of seasonal workers hired by or through agencies from the scope of the Directive. We note that it is unclear what set of rules would apply to those workers falling under Directive 2008/104/EC on temporary agency work – which does not contain any provision on matters as important as entry, stay, housing, access to public services and social security.

We are concerned that the distinction between different types of third-country seasonal workers according to the way they were recruited would create **different sets of rights and statuses**. Furthermore, employers may abuse these differences to hire workers on a less favourable status.

We strongly support the EP's insertion of the reference to the **European Social Charter** of 18 October 1961 and the European Convention on the Legal Status of Migrant Workers of 24 November 1977. These additions are consistent with the spirit of the Treaties and the idea that social progress is one of the aims of EU policy.

2. Conditions of admission, procedures, renewal and extension

(Article 5 – Criteria of admission; Article 14a – Placement by public employment services; Article 6 – Grounds for refusal; Article 7 – Withdrawal or non-renewal of the permit; Article 9 – Applications for admission)

It is unclear, as the proposal stands, who will be responsible for acting as liaison between employers and applicants in third countries. Private and public employment agencies – both in and outside the EU – are likely to play an important role in that process. We urge the European legislator to **clarify the role of intermediaries**, in order to **limit the risk of exploitation and human trafficking**. A system of licensing agencies and intermediaries should be introduced by Member States, in consultation with social partners.

We strongly support the EP's amendment allowing for an application to be introduced from the territory of a Member State. This proposal would better fit the objective of simplifying the application procedure for seasonal migrant workers. In line with the purported objective of the Directive, allowing applications from the territory of a Member State will help employers to legally hire persons they already know and who are already on the territory of the EU. This may contribute to **reducing illegal employment as well as the risks of fraud and abuse linked to recruitment by some intermediaries**.

We strongly support the EP's addition regarding **inclusion of essential aspects of the contract** or employment relationship in a contract or job offer in order to allow for a proper enforcement of labour regulations. Seasonal work should be in line with provisions of Directive 91/533/EC.

We do not support the Council's demand that Member States verify the risk of irregular migration or the intention to leave at the expiring date, as it is not clear on what basis these considerations could be made, leaving room for arbitrary decisions.

Similarly, we oppose Council's amendment regarding "third-country nationals who are considered to pose a threat to public policy, public security or public health", as it raises questions as to the definition of these

notions, the criteria used to assess such a threat, the authority competent to do such an assessment and the procedural guarantees.

The principle of “Community preference” for Member State nationals should not result in conditions of renewal and extension such as “quotas”, which create uncertainty for seasonal workers and are hard to verify and hence to contest.

3. Sanctions and Complaint mechanisms

(Article 7b – Sanctions; Article 8 – Access to Information and Article 12a – Sanctions against employers; Article 17 – Facilitation of complaints)

We urge the European legislator to ensure that **sanctions against abusive employers are foreseen**, including in the case of subcontracting. It is important that sanctions are consistent with Article 13 of Directive 2009/52/EC on sanctions for employers of third-country nationals. Member States shall ensure that seasonal workers have access to effective mechanisms through which they may lodge complaints against their employers, directly or through third parties designated by Member States, such as trade unions or other associations or a competent authority of the Member State when provided for by national legislation. Member States should determine under which conditions they may grant a permit to stay to migrant seasonal workers presumably victims of particularly exploitative working conditions.

We support the EP’s addition on access to information regarding seasonal workers’ rights and obligations, in particular regarding labour rights, equal treatment, mediation, complaint and redress. This should include precise information on affiliation to and services by trade unions, in collaboration with social partners.

Seasonal workers may be reluctant to introduce complaints because of complicated procedures or in fear of retaliation. Facilitation of complaints should therefore include **support to victims and prevent re-victimisation** of seasonal workers. It is also important to provide for effective and accessible mediation mechanisms and to allow for the direct intervention of third parties such as foreseen by Directive 2009/52/EC.

4. Duration of stay, equal treatment

(Article 11 – Duration of stay; Article 13a – Fees; Article 15 – Rights on the basis of the seasonal worker permit/visa; Article 16 – Rights; Article 16a – Monitoring and inspections; Article 18 – Statistics; Article 19 - Reporting)

We firmly **oppose the extension of the duration of stay from 6 months to 9 months in a 12-month period, which could lead to social dumping and abuses, unless seasonal workers rights are equal to those of nationals occupying similar jobs.**

We support additions stating that seasonal workers should be entitled to be employed by different employers, “including upon the expiry of their contract, and to apply, if necessary, for an extension of their stay.” Effective control of the duration of contract with one employer implies checking that the new employer really differs from the first one (for example in case of several undertakings owned or managed by the same persons).

We also support the EP’s position on the possibility for seasonal workers to stay – within the maximum period – to look for another employer.

Fees for the treatment of applications should be paid by the employer. “Compensation” through lower wages or through any other way at the expense of the seasonal worker should be prohibited.

We urge the European legislator to make sure that rights of third-country nationals performing seasonal work should be equal to those of other seasonal workers.

- **Working conditions:** Equal treatment should regard all terms and conditions of employment and work such as defined by any kind of laws, regulations, collective agreements or contracts or by common practice. Member States must ensure that seasonal workers have access to effective procedures for the payment of outstanding remunerations. Seasonal workers should have access to effective

mechanisms of mediation and complaint. Third parties should be entitled to defend them, in similarity to what is foreseen by Directive 2009/52/EC. These rights include effective access to trade unions, freedom of association and right to strike, in accordance with national legislation.

- **Social security and access to health care:** Access by seasonal workers to any right, public service or provision or to any branch of the social security should be assessed solely on the basis of their resources, needs, health, age, previous periods of work and other similar conditions. In doing this, account should be taken of the periods of work performed and social benefits received in other Member States or in third countries with which the EU or the Member State has concluded relevant agreements or conventions. The EP's amendment ensuring the portability of social security and tax benefits is crucial and should be maintained. We would oppose any blanket derogation to the right to unemployment and other benefits in this Directive. Migrant seasonal workers must access health care on an equal footing with national workers.
- **Education and training:** Third-country nationals employed for the purpose of seasonal work should be included in employers' training and education programmes on an equal footing with other seasonal workers.

Exceptions to the principle of equal treatment must be limited and clearly defined in the Directive.

We support the EP's position on rights on the basis of the seasonal worker permit and visa. Any person in possession of a permit and a visa should be entitled to clear rights on the basis of this Directive. There is no need to include a clause on requirements of national law.

In order to ensure the actual application of these rights, we support the EP's addition on a monitoring and inspection mechanism, in accordance with Member State legislation and relevant ILO conventions.

We support the inclusion of a set of **indicators and benchmarking tools** to ensure the respect of the Directive and in particular migrant seasonal workers' rights. These indicators must be identified in the transposition guidelines. They should be verified through data disaggregated by citizenship in order to monitor progress over time and allow for potential improvements and adjustments. The report by the Commission should include an analysis and assessment of above mentioned figures and, if relevant, proposals for ensuring better protection of seasonal workers' rights. The reporting mechanism should allow for consultation with representatives of employers and workers of the relevant economic sectors, relevant EU agencies such as the FRA, civil society organisations working on migration and other experts.

5. Accommodation

(Article 14 – Accommodation)

We support the EP's reference and definition of the notion of **adequate accommodation**, because it provides fundamental indicators upon which to define adequate accommodation, allows third-country seasonal workers to choose their own accommodation, regulates the cost for accommodation, prevents employers from automatically deducting the rent from the seasonal worker's wage and obliges employers to provide a rental contract separate from the work contract.

We would furthermore encourage the **qualification of this definition with reference to guarantees provided under international human rights standards**. Useful indicators that can be used are to be found, among others, in the UN Committee on Economic, Social and Cultural Rights' General Comment No. 4,² which expands on the provisions of article 11 of the International Covenant on Economic, Social and Cultural Rights. We would welcome the inclusion of indicators that would regulate aspects such as materials with which the accommodation is constructed, fire safety, lighting and ventilation, cooking facilities, refrigeration arrangements, dining facilities and furniture, casual recreational space, bedrooms, washing facilities, laundry facilities, sanitary conveniences, access to water, heating and rubbish disposal.

² The right to adequate housing (Art.11(1)), CESCR General comment 4, accessible at: <http://www.unhcr.ch/tbs/doc.nsf/0/469f4d91a9378221c12563ed0053547e?Opendocument>, accessed on 6th May 2013.