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The Principle of (In)equality in EU Labour Migration Law

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The principle of (in-)equality in EU labour migration law.

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Abstract

This paper argues that the EU law on labour migration is characterized by unequal rights for third country nationals coming to join the EU's work force, and that this appears as a contradiction with principles of EU law and rights protected by the EU's own Charter of Fundamental Rights. In order to sustain this argument, it compares the legal position of seasonal workers with that of highly skilled workers by contrasting the rights granted to seasonal workers through the Seasonal Workers Directive with those granted to highly skilled workers that fall within the scope of the EU's Blue Card Directive. This comparative study reveals that certain categories of third country national workers are treated differently than others, without there being a legal basis for the difference in treatment in EU law. A further analysis of applicable EU fundamental rights serves to show that EU labour migration law infringes on these rights – and that the EU labour migration law is in need of a thorough and coherent reform.

On 30 September 2016, all Member States except the UK, Ireland and Denmark should have implemented the EU's Seasonal Workers Directive. This Directive aims at harmonizing Member States laws regarding the entry, residence and certain labour rights of seasonal workers, in order to protect them against exploitation. Thus, according to Article 23 of the Directive, third country nationals coming to a Member State as seasonal workers are entitled to equal treatment with nationals of the host Member State. However, the Directive allows Member States to diverge from the principle of equality with regard to certain social benefits, benefits related to education and vocational training. Furthermore, the Directive does not provide for family reunification, as the seasonal workers are not supposed to integrate into the society of the host Member State – even though according to the Directive they may spend as much as nine calendar months per year in the host Member State. The situation of the third country national seasonal worker in the EU will therefore remain precarious even after the implementation of the Seasonal Workers Directive in the national laws of the Member States.

1. The evolution of EU labour migration law

The Seasonal Workers Directive regulates the conditions under which unskilled or low-skilled third-country nationals are allowed to enter the territory of and take up seasonal work in those EU Member States that are bound by the Directive (all Member States except Ireland, the UK and Denmark).¹ The final text of the Directive was adopted two years ago in 2014 – at a time unemployment rates were high and the EU and its Member States were already unable to deal properly with the steady influx of regular and irregular migrants resulting from turmoil in the Middle East and (North) Africa. Why did the Commission find it necessary to insist on the adoption of legislation regulating the entry and stay of unskilled or low-skilled third country nationals for the purpose of joining the EU's work force? And how could the Commission convince the Parliament and the Council to adopt such legislation, which concessions had to be made before these EU institutions could agree on the text of the Directive?

¹ Preamble of Directive 2014/36/EU on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers ('Seasonal Workers Directive'), OJ L 94/375, under 54 and 55.

The Commission's ambitions to regulate the subject of labour migration comprehensively became apparent in 2001, when the Commission proposed a Directive aimed at harmonizing the conditions of entry and residence of labour migrants throughout the EU.² The Member States however were not keen on sharing competences with regard to migration control, and as the Council at that time still would have had to adopt the proposal with *unanimity* (Article 63 EC Treaty pre-Lisbon), the proposal for this comprehensive Directive was withdrawn.³ This is quite extraordinary, as most proposals that are not met with some degree of enthusiasm by the other EU institutions usually end up in a drawer waiting for better times; they are rarely withdrawn.⁴ The Commission consequently abandoned its all-inclusive approach to EU labour migration regulation, and decided on a piecemeal reintroduction of the original proposal. The proposals for Directives, harmonizing the regulating of entry and stay of those categories of labour migrants that were favored by the Member States (highly qualified workers, researchers and students) because of their perceived high value for the labour market and the economy of the host Member States, lead the way both in terms of sequence and in terms of rights, as analyzed in some length in the paragraphs to follow.⁵ Significantly, it was only after the coming into force of the Lisbon Treaty in 2010 that proposals were made for legislation regarding the entry and stay of unskilled third-country national workers for the sake of seasonal labour, together with a proposal for the regulation of intra-corporate transfer of workers, as changes with regard to the decision-making procedure for EU migration legislation made adoption of legislative EU acts in this policy area relatively easier.

The idea that the economy of the EU will benefit from an influx of highly skilled third country nationals was endorsed, and as a result thereof the need for EU legislation providing for preferential migration law regimes for highly skilled third country nationals was accepted by the Member States, which enabled a relatively fast adoption⁶ of the Blue Card Directive regulating the entry and stay of highly skilled third country nationals⁷ and the Directives regulating the entry and stay of students⁸ and researchers.⁹

² Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities, COM(2001)386, OJ 2001 C 332 E/248, see on this proposal and its history also Fudge and Herzfeld Olsson, 'The EU Seasonal Workers Directive: When Immigration Controls Meet Labour Rights', *European Journal of Migration and Law* 16(2014), p. 443

³ Withdrawal of Commission proposals following screening for their general relevance, their impact on competitiveness and other aspects, OJ 2006 C 64/3.

⁴ See Commission Work Programmes for 2011, 2012 and 2013 (respectively COM(2010) 623 final, COM(2011) 777 final and COM(2012) 629 final, as referred to by the Commission with regard to ad hoc withdraw of proposals, in Case C-409/13, Council of the European Union v European Commission, Opinion of Advocate General Jääskinen, para 32; ECLI:EU:C:2014:2470

⁵ E. Guild, 'Equivocal Claims? Ambivalent Controls? Labour Migration regimes in the European Union', in E. Guild and S.Mantu (Eds), *Constructing and Imagining labour migration: perspectives of control from five continents*, Farnham: Ashgate, 2011, p. 216.

⁶ K. Eisele, 'Why come here if I can go there? Assessing the 'Attractiveness' of the EU's Blue Card Directive for 'Highly Qualified' Immigrants', CEPS Paper in Liberty and Security in Europe No. 60 / Brussels, October 2013, p. 4.

⁷ Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ 2009 L 155/17.

⁸ Directive 2004/114/EC of 13 December 2004 of the Council on the Conditions of Admission of Third-country Nationals for the Purposes of Studies, Pupil Exchange, Unremunerated Training or Voluntary service, OJ 2004, L375/12.

⁹ Directive 2005/71/EC of 12 October 2005 of the Council on a Specific Procedure for Admitting Third-country Nationals for the Purpose of Scientific Research, OJ 2005, L289/15.

A similar allure of EU legislation providing unskilled or low-skilled third country nationals with the possibility to enter and stay in an EU Member State was missing, as the immigration of unskilled labour force is often regarded as economically and politically problematic. However, several sectors of the economies of many Member States extensively employed low-skilled or unskilled workers, either from within the EU¹⁰ or from third countries.¹¹ As the population in the EU is expected to age rapidly, also in EU Member States that until now source low-skilled and unskilled workers to Member States in the west,¹² the dependence on third country nationals to be employed in low-skilled or unskilled jobs is expected to grow as well. Therefore, even if the subject of immigration of low-skilled or unskilled workers is a hot potato, it is equally essential for the sustainability of the economic wellbeing of the European Union and its Member States. It is for this reason that the Commission published its proposal for the Seasonal Workers Directive in 2010.

Even though the Directive mentions the protection of the migrant workers against exploitation and consistency with the EU's development policy as policy objectives that are served by the Seasonal Workers Directive, the 2010 proposal clearly had as its focal point the management of migration.¹³ Notwithstanding the focus of the proposed Directive, the 2010 proposal was more liberal with regard to the rights and the scope of the rights granted to third country seasonal workers. The impact assessment on which the proposal was based argues that the economies of the EU Member States need around 100.000 third country national temporary/seasonal workers per year. The proposed Directive contained provisions that aimed at promoting circular migration¹⁴ so as to provide the Member States' economies with the indispensable workforce while preventing the seasonal workers from becoming long-term residents¹⁵ by allowing them to stay for a period up to six months per calendar year - without being permitted to bring their family members with them. On the other hand, the proposal provided for strong guarantees for seasonal workers that left before the expiry of their residence and work permit that they would be allowed to return the next calendar year, by leaving the Member States the

¹⁰ For example, the German-Polish Bilateral Agreement on Seasonal Labour Migration was implemented with great success, see M. Okolski, 'Seasonal Labor Migration in the Light of the German-Polish Bilateral Agreement', in OECD, *Migration for Employment: Bilateral Agreements at a Crossroads*, Paris: OECD, 2004, pp. 203-214.

¹¹ For example, Spain signed bilateral agreements regulating the entry and stay of seasonal workers with countries like Morocco, Senegal, Columbia and Ecuador, K. Lindner and T. Kathmann, 'Mobility partnerships and circular migration: managing seasonal migration to Spain', in J. Gertel and S.R. Sippel (Eds.), *Seasonal Workers in Mediterranean Agriculture: The Social Costs of Eating Fresh*, London: Routledge 2014, p. 122.

¹² Z. Wasik, 'Poland's shrinking population heralds labour shortage', Financial Times, 4 September 2015.

¹³ The Commission, in its Explanatory Memorandum to the Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment, COM(2010) 379, under (1) Context of the Proposal - Grounds for and objectives of the proposal, mentions as the sole objective of the Directive the provision of fair and transparent rules for entry and residence, and safeguards to prevent a temporary stay from becoming permanent.

¹⁴ As such, the Directive was meant to complement and not replace the bilateral or multilateral agreements between Member States and third countries, implementing the Mobility Partnerships with which the EU sought to promote circular migration under the 2005 Global Approach to Migration GAM. The Mobility Partnerships have remained an ineffective tool in migration, development and human rights policy, see s. Carrera and R. Hernandez I Sagrera, 'Mobility Partnerships. 'Insecurity Partnerships' for policy coherence and migrant workers human rights in the EU', in R. Kunz, S. Lavenex and M. Panizzon (Eds.), *Multilayered Migration Governance. The promise of partnership*,. London: Routledge, 2011, pp. 97-115.

¹⁵ Fudge and Herzfeld Olsson (fn. 5), p. 446.

choice between issuing multi-seasonal permits covering up to three seasons or applying a facilitated procedure when such a third country national applies in a subsequent year.¹⁶

The text of the Directive as adopted in 2014 differs dramatically from the 2010 proposal. While this may be due in part to changing circumstances in the field of migration during the legislative procedure leading up to the adoption of the text in 2014, the slimmed-down version of the Directive might not be able to achieve the policy objectives pursued. In particular, the aims of promoting occupational development of seasonal workers and protecting them against exploitation seem to be compromised by more prominence for the policy objective of migration management. Even with regard to the latter the effects of the directive may turn out to be disappointing. This results from a few specific aspects in which the adopted text of the Directive differs from the 2010 proposal: seasonal workers are allowed to stay in the hosting Member State for periods of up to *nine* months per calendar year, and provisions aimed at stimulating 'circular' migration were toned down to afford the Member States more discretion in deciding on how to implement them. However, these particularities of the Directive that are at some length discussed elsewhere in literature,¹⁷ fall outside the scope of the present paper which focuses on the human rights and labour law regime created by the Seasonal Workers Directive.

2. Third-country national workers' rights: cheese and chalk

As already mentioned, the delay in the adoption of legislation on the entry and stay of unskilled third country workers as opposed to the relative speed with which legislation pertaining to immigration and employment of highly skilled was adopted by the European legislator¹⁸ may be seen as an indication of which kind of third country national is welcomed by the EU and its Member States and which kind is not. It seems that not all third-country national workers are regarded as valuable assets on the EU's labour market – and that therefore EU labour migration law intentionally creates different classes of third-country national workers. If there is no legal ground based on which this inequality could be justified, the EU labour migration law infringes on EU law providing for equal treatment of third-country nationals who are authorized to work ex Article 15(3) of the EU Charter of Fundamental Rights. Different treatment of different groups of non-EU citizens as migrant workers would require some justification, in order not to violate the general principle of equal treatment, to which the EU legislator is bound by Article 20 of the Charter. From the EU labour migration law as it stands it is not apparent how this differentiation could be justified. The detailed comparison of different directives on different groups of non EU workers below demonstrates that that justification is lacking.

Without claiming to be exhaustive in its assessment, the following paragraphs analyze the differences in the legal regimes applicable to the entry and stay in EU Member States of seasonal and highly skilled workers by contrasting the substance of the rights granted the Seasonal Workers Directive and the Blue Card Directive. The focus will primarily be on the difference in the content of the principle of equal treatment with Member State nationals, the right to family reunification and intra-EU mobility rights.

¹⁶ Article 12 of the proposed Directive, COM (2010) 379.

¹⁷ For a clear overview of the transformation of the Directive, see Fudge and Herzfeld Olsson, cited above (note 2).

¹⁸ Despite the fact that the Blue Card Directive was adopted before the Lisbon Treaty came into effect, which meant that the Council had to adopt it with unanimity. See also K. Eisele, 'Assessing the 'Attractiveness' of the EU's Blue Card Directive for 'Highly Qualified' Immigrants', CEPS paper in Liberty and Security in Europe, No. 60, Brussels, October 2012, p. 4.

2.1. The Directives' double standards of equal treatment

In the original version of the proposal for the Blue Card Directive¹⁹, the scope of the right to equal treatment with nationals of the Member State was fairly broad, excluding only study grants and procedures for obtaining public housing for Blue Card holders staying less than three years, and social assistance to Blue Card holders that had been granted long-term residence status.²⁰ During the negotiation process, the scope of application for equal treatment only slightly changed. At the stage of adoption it encompassed working conditions, freedom of association, education and vocational training, recognition of diplomas, access to social security, payment of income-related pensions on moving to a third country, access to public goods and services and free access to national territory.²¹ Access to education and vocational training may be made subject to specific prerequisites in accordance with national law. Also, it may be restricted to Blue Card holders and their family members who have their registered place of residence within the territory of the Member State from which they request educational rights. Furthermore equal treatment is not guaranteed with regard to grants and loans supporting secondary and higher education and vocational training. However, this limitation does not affect the essence of the right of access to education under equal conditions with the Member State's own citizens. Finally, the Blue Card holder may have restricted access to public housing, as procedures for obtaining public housing according to the host Member State's national law may provide for additional conditions for Blue Card holders²² Especially when one considers that the Blue Card Directive provides that the Blue Card holder should earn at least 1.5 times the minimum wage of the host country, it is questionable that a Blue Card holder may be entitled to public housing at all. Therefore, this restriction will not have a substantial negative effect on the position of the Blue Card holder in respect of that of a citizen of the host Member State.

In contrast to the proposal for the Blue Card Directive, the Commission's proposal for a Seasonal Workers Directive did not provide for the principle of equal treatment – even though one of the Directive's proclaimed objectives was the protection of the third-country seasonal worker against exploitation.²³ The Directive's draft merely guaranteed '*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*'.²⁴ This was one of the aspects of the proposal that received criticism. In its Note on the Proposal,²⁵ the ILO especially focuses on the difference in treatment between the seasonal workers and the migrant workers falling within the

¹⁹ COM/2007/0637 final

²⁰ Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment {SEC(2007) 1382} {SEC(2007) 1403} /* COM(2007) 637 final, Article 15.

²¹ Article 14(1) of the Blue Card Directive.

²² Article 14 (2) of the Blue Card Directive; see also Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, p. 30, footnote 95; Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 19 June 2008, document number: 9666/08, pp. 21, 22 and 23.

²³ Fudge, 'Migration and Sustainable Development in the EU: A Case Study of the Seasonal Workers Directive', *The International Journal of Comparative Labour Law and Industrial Relations* 31, 3 (2015): pp. 343-344.

²⁴ Article 16 of the Proposal, COM(2010) 379.

²⁵ ILO technical comments on the Proposal for a EU Directive on seasonal employment of migrant workers, http://www.ilo.org/brussels/key-documents/WCMS_168539/lang--en/index.htm, last accessed on 19 December 2016.

scope of the Blue Card Directive, and further on the Seasonal Workers Directive's shortcomings in respect of ILO norms that have been signed by EU Member States with regard to equal treatment of migrant workers in employment and occupation. These norms, codified in the ILO Migration for Employment Convention and the Migrant Workers Convention, are legally binding on the few Member States that have ratified them, but not on the EU.²⁶ While not included in this ILO Note, conventions to which all Member States are signatories also are relevant to the field. These include Convention 111 concerning Discrimination in Respect of Employment and Occupation, according to which the Member States are obliged to pursue policies designed to promote equality of opportunity and treatment in respect of employment and occupation.²⁷

Mainly through activism of the European Parliament, the adopted Directive does provide for equal treatment at least with regard to nine specific categories of rights listed in Article 23. These categories are terms of employment and working conditions, the right to strike and take industrial action, the right to back payment of outstanding remuneration, the right to branches of social security as per Article 3 of Regulation 883/2004 (thus among others sickness benefits, maternity benefits, invalidity benefits, survivors' benefits and family benefits), access to public goods and services, advice services on seasonal work offered by employment offices, education and vocational training, recognition of professional qualifications and tax benefits. As commendable as the introduction of the principle of equal treatment in the Directive may be, the scope of the principle is therefore much more limited than in the Blue Card Directive, as is explained in more detail below.

The possibility for Member States to exclude study and maintenance grants and loans, and procedures for access to publicly subsidized accommodation strengthens the impression that on the surface of things, the right to equal treatment provided for by the Seasonal Workers Directive does look rather similar to its Blue Card Directive peer. However, Member States are given a wider discretionary power in the Seasonal Workers Directive to decide on the exact scope of equal treatment, as the Directive leaves it to the Member States to determine whether they want to exclude access to family benefits and unemployment benefits, to limit access to education and vocational training to that which is directly linked to the specific employment activity, and to limit tax benefits to cases where the registered place of residence of the family members of the seasonal worker for whom he or she claims benefits lies in the territory of the Member State concerned.²⁸ Considering that the Directive does not provide for family reunification, on which the paper will focus below, limiting tax benefits to cases where the registered place of residence of the family members lay within the territory of the concerned Member States is virtually eliminating these tax benefits. Furthermore, limiting access to education and vocational training to that which is directly linked to the specific employment activity would counteract one of the other objectives underlying the Directive: that of development. The proposal for the Seasonal

²⁶ The EU is not bound by ILO Conventions, though the EU and the ILO work together on many issues. The ILO based its comments on the proposal for a Seasonal Workers Directive on two ILO Conventions and two accompanying Recommendations, namely the Migration for Employment Convention (Revised), 1949 (No. 97); Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143); Migration for Employment Recommendation (Revised), 1949 (No. 86); and Migrant Workers Recommendation, 1975 (No. 151). Convention No. 97 has been ratified by 49 States Parties, including ten EU Member States (Belgium, Cyprus, France, Germany, Italy, Netherlands, Portugal, Slovenia, Spain, United Kingdom), while Convention No. 143 has been ratified by 23 States Parties, including five EU Member States (Cyprus, Italy, Portugal, Slovenia, Sweden).

²⁷ Convention concerning Discrimination in Respect of Employment and Occupation, 1958 (No. 111)

²⁸ Article 23(2) of the Seasonal Workers Directive

Workers Directive was launched within the context of the 2009 Stockholm Programme, which highlighted the importance of optimizing the link between migration and development.²⁹ On many occasions, the Commission has emphasized on the contribution circular migration, and circular migrants, can make to the development of the source country ('triple win').³⁰ But what better contribution to development can be made than through education? It is difficult to find a reason why Member States would not want to allow seasonal workers to acquire valuable skills during their stay in that Member States, beside the motive that seasonal workers should not be able to attend whatever education and vocational training they would like as this would help them to climb the skills ladder – and possibly return to the EU with a different residence title. The scope of the right to equal treatment in the Seasonal Workers Directive is therefore considerably more limited than that of the Blue Card Directive.³¹

Finally, the *raison d'être* of the Seasonal Workers Directive is the Member States' need for labour force from third countries, because it is extremely difficult to find national workers in the Member States willing to engage in seasonal work.³² Therefore, the guarantee of equal treatment is *per se* problematic in the seasonal work sector: if there are no national workers to compare with, then what will be the practical content of the right to equal treatment of seasonal workers? It is true that EU citizens from some eastern and southern Member States travel to other Member States to engage in seasonal work there, and through their presence the third country national seasonal worker's right to equal treatment may be given real substance. However, this 'indirect' equalization will not take effect in Member States that are not attractive as host for EU-citizen seasonal workers, and where the labour force in the seasonal work sector will almost entirely consist of third country nationals. Furthermore, options to enforce the limited equal treatment rights in practice have to be considered. EU-citizen seasonal workers can, in addition to judicial enforcement, choose to leave a post where this right is infringed on by the employer, and find a new post with a more compliant, employer. Third country national seasonal workers forgo this opportunities, because their rights to change employment are severely limited, as discussed in more detail below.

2.2. Residence and intra-EU mobility

As mentioned above, the Directive is applicable to 'seasonal work', which the Directive defines as activities depending on the passing of the seasons, further delineated as activities tied to a certain time of the year by a recurring event or pattern of events linked to seasonal conditions during which required labour levels are significantly above those necessary for usually ongoing operations.³³ Though, according to Recital 13 of the Directive, the sectors of seasonal work comprise tourism, the main scope of the Directive's practical application are sectors such as agriculture and horticulture, in particular during the planting or harvesting period.³⁴ Therefore, the Seasonal Workers Directive will mainly apply

²⁹ Seasonal Workers Directive, preamble under (6).

³⁰ See, for example, the website of DG home affairs: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/legal-migration/work/index_en.htm

³¹ E. Guild, 'The EU's Internal Market and the Fragmentary Nature of EU Labour Migration', in C. Costello and M. Freedman, *Migrants at Work: Immigration and Vulnerability in Labour Law*, Oxford: OUP, 2014. .

³² C. Brickenstein, 'Social Protection of Foreign Seasonal Workers: from State to Best Practice', *Comparative Migration Studies* (2015), 3:2, p. 1.

³³ Article 3(b) and (c) of the Seasonal Workers Directive

³⁴ Recital 13 of the Seasonal Workers Directive.

to temporary employment of third country nationals in the agricultural sectors of the EU Member States.

Traditionally, in many (northern-) European countries the production season in the horticultural and agricultural sectors is limited, and runs from April to September due to the low solar radiation levels from October through March.³⁵ However, the seasons of different crops may vary greatly, and one could even argue that the agricultural (harvesting) season of various crops as a whole in many Member States runs from early spring to autumn. In some sectors traditionally regarded as 'seasonal', the season may run for as long as ten consecutive months.³⁶ The 'seasonality' of the scope of the Directive therefore seems to be an expression of the traditional perception of what kind of sector is characterized as 'seasonal', and the EU legislator's wish to combat illegal migration that has for so long troubled these sectors. This regulatory model does not account for the changed nature of the activities involved and as a result thereof the changed labour needs. It seems that there is no objective justification for the maximum duration of legal residence for seasonal workers. Such a justification could, for example, be derived from an apolitical, science based statement determining the duration of certain seasons for which seasonal work is allowed. This would almost certainly result in differences between sectors, but at least this would provide some objective justification. As it stands, the Directive seems to arbitrarily limit the duration of legitimate residence

The unfavourable impression is enhanced by the effects of combining the specific maximum duration of residence (nine months) with the lack of provision for intra-EU mobility in the Seasonal Workers Directive. The Directive as proposed in 2010 would have allowed the Member States to grant seasonal workers up to six months residency per calendar year, and would have provided additionally for seasonal workers to extend their contract or to seek employment as seasonal worker with a different employer.³⁷ With regard to the entry and residence title, the Parliament found fault with the text of the proposal as it disregarded the Schengen acquis. Furthermore, the Parliament suggested an amendment of the maximum duration of stay during a calendar year, and to impose a five to nine month maximum on the Member States. The Parliament motivates the determination of the maximum duration of stay with the need to guarantee that the work is of genuinely seasonal nature. However, labour demand covering 75% of the year can hardly be characterized as being 'genuinely seasonal', nor can nine months be understood to represent a time in which labour levels are significantly above those necessary for usually ongoing operations. The lyrics of the famous song 'Turn! Turn! Turn! (To everything there is a season)'³⁸ do no longer seem to be applicable to our modern-day society as they were in the time of the book of Ecclesiastes. However the EU legislator seems to have missed out on this development. The Seasonal Workers Directive, with its extended maximum duration of stay that has little to do with the seasonality of the work involved, thus seems to be deliberately designed at keeping a low-skilled semi-permanent workforce resident available to EU Member States' economies, while

³⁵ M.H. Jensen and A.J. Malter, *'Protected Agriculture – A Global Review'*, World Bank Technical Paper number 253, Washington DC: The World Bank, 1995, p. 132.

³⁶ L. Medland, 'Misconceiving 'Seasons' in Global Food Systems: The Case of the EU Seasonal Workers Directive', Colloquium Paper No. 25, paper presented at the Global governance/politics, climate justice & agrarian/social justice colloquium 2016.

³⁷ Article 11 of the 2010 proposal

³⁸ "Turn! Turn! Turn!", written by Pete Seeger in the 1950s, was a very successful single by the American folk rock band The Byrds and was released on October 1, 1965, by Columbia Records.

granting this workforce rights that are clearly inferior to the rights of coveted highly skilled workers that the EU is keen to integrate in the host State's society.

This impression is reinforced by an analysis of the difference in the regulation of intra-EU mobility of different categories of third-country national workers. One of the elements in the original proposal for the Blue Card Directive that were aimed at making the EU more attractive for highly skilled workers was the introduction of the right of secondary mobility.³⁹ Thus, the proposal provided for priority in the local labour market whenever Blue Card holders would move to another Member State after having acquired long-term resident status.⁴⁰ However, during the negotiations some of these elements have lost their shine somewhat. Though the Blue Card Holder is allowed to change jobs and move to another Member State according to the adopted Directive, he cannot do so immediately after having been granted the Card by the Member State of first arrival. The Blue Card Holder cannot move to another Member State within the first 18 months⁴¹ of entry; furthermore, the two-year waiting period for equal treatment in employment may start afresh after moving to the second Member State.⁴² For these reasons, the mobility provisions in the Blue Card Directive have received criticism. The Directive treats the internal market as 25 separate states for the sake of the free movement of labour force.⁴³ It seems that the Member States' fear for permanent settlement of third country nationals and the wish to control admission has won out even over their wish to become an attractive destination for highly skilled third country national workers.⁴⁴ Notwithstanding the limitations however, the principle remains that the Directive grants the Blue Card holder the right to move from one Member State to another. If the proposed Recast Blue Card Directive will be adopted, this right will be reinforced as it will reduce the period in which the Blue Card Holder has to stay in the first Member State to 12 months.

The Seasonal Workers Directive does not provide for intra-EU mobility for those third country nationals that have entered an EU Member State benefiting from its provisions; the seasonal worker only has a limited right to change employer within the *same* Member State. The absence of a provision on intra-EU mobility in the proposal of the Seasonal Workers Directive was actually one of the aspects of the Directive that made the adoption of the final text by the Members of the Council less problematic.⁴⁵ Without intra-EU mobility, the prolonged residence of the unskilled seasonal worker remains the sole competence of the Member State that originally admitted him or her, and there would be no risk of the seasonal worker, once admitted, moving to another Member State that would not have admitted him or her in the first place – based on a different assessment of the conditions for admission, or based on the availability of **labour** force within the Member State. The absence of the right to intra-EU mobility for low-skilled third-country nationals confirms that they are not regarded as 'valuable assets' for the Member States' economies. It is a policy objective to retain the highly skilled Blue Card holder anywhere in the European Union as it is regarded as an opportunity cost when the valuable

³⁹ C. Barnard, *EU Employment Law*, Oxford: OUP, 2012, p. 186..

⁴⁰ European Commission, explanatory memorandum to the proposal for the Blue Card Directive, {SEC(2007) 1382}{SEC(2007) 1403}, under 130.

⁴¹ This period will be reduced to 12 month if the Commission's proposal for the Recast Blue Card Directive will be adopted.

⁴² A. Kocharov, 'What Intra-Community mobility for third-country workers?' (2008) 33 *ELRev.* 913 at p. 920-921.

⁴³ E. Guild, *The EU's Internal Market and the Fragmentary Nature of EU Labour Migration*, in C. Costello and M. Freedland, (fn. 33), p. 113.

⁴⁴ S. Peers, E. Guild, D. Acosta Arcazo, K. Groenendijk and V. Moreno-Lax, *EU Immigration and Asylum Law (Text and Commentary_ : Second Revised Edition, Volume 2: EU Immigration Law)*, Leiden: Martinus Nijhoff, 2012, p. 324.

⁴⁵ A. Lazarowicz, 'A success story for the EU and seasonal workers' rights without reinventing the wheel', European Policy Center, Policy Brief 28 March 2014.

Blue Card holder chooses to leave again. In the end, one can never be sure that a third country national with the same high skills will be available and willing to take the place of the departing Blue Card holder. For this reason Blue Card holders are granted intra-EU mobility. However, when one seasonal worker leaves hundreds of third country nationals are waiting to take their place. It seems that seasonal workers are perceived as easily substitutable, and as adding little economic value to the EU economy, and it may be for this reason that the EU legislator has not provided for intra-EU mobility of seasonal workers, treating them differently from Blue Card Holders once again. While possibly justifiable from an economic point of view, this unequal treatment would also require a legal base.

3. Gender-related aspects of the Seasonal Workers and Blue Card Directives

One feature that the Seasonal Workers Directive and the Blue Card Directive do have in common is the collateral negative effect both instruments have on the migration of women. This article argues that the EU labour migration law, and in specific the Seasonal Workers Directive and the Blue Card Directive, make it more difficult for low-skilled or unskilled female migrant workers from third countries to access employment opportunities in EU Member States. The article also argues that by doing so, the EU labour migration law infringes on common values on which the EU is founded⁴⁶, and that the EU by adopting these instruments has failed to fulfill the obligation of the promotion of equality between women and men⁴⁷ and the elimination of gender inequalities,⁴⁸ as the EU seeks to promote through legal instruments such as the Gender Equality Directive.⁴⁹

The Blue Card Directive and the Seasonal Workers Directive do not mention gender, and formally apply indiscriminate of the gender of the applicant. However, where on the surface of things rules and practices appear to be gender-neutral, in practice they may still disproportionately affect one of the genders. Therefore, even if the issue of gender equality is not the first one to spring to mind on analyzing the texts of the EU labour migration law, an examination of the gendered effects of the Directives shows that it is more difficult for prospective female third country national workers to obtain a Blue Card or a Seasonal Workers Permit than it is for male third country nationals.

Traditionally, the term "labour migrants and their families" was used as a synonym for "*male* migrants and their wives and children."⁵⁰ Thus, EU legislation providing EU national workers with the right to bring their direct family along with them when making use of their right to free movement was adopted based on a traditional concept of a family, with the husband as principal breadwinner and the wife as primary caregiver for the dependent children.⁵¹ Further, EU legislation providing for the right to family reunification for third country nationals legally residing in the EU was mostly used to provide the (prospective) wife and children of the third country national with a legal entry into the EU.⁵² Even today,

⁴⁶ Article 2 TEU : equality between women and men.

⁴⁷ Article 3(3) TEU, Article 8 TFEU.

⁴⁸ Article 8 TFEU.

⁴⁹ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ 2006 L 204/23.

⁵⁰ For example, Paragraph 15(3) of ILO Recommendation No. 86 indicates that the family of a migrant worker is defined as his "*wife and minor children*", Migration for Employment Recommendation (Revised) (No. 86), 1949

⁵¹ C. McGlynn, 'Families and European Union Law', in R. Probert (ed.), *Family Life and the Law: Under One Roof*, London: Routledge 2007, p. 248.

⁵² B. Bilecen, 'Guest Worker Families in Europe', in C.L. Shehan (ed.), *The Wiley Blackwell Encyclopedia of Family Studies*,

family reunification is female third country nationals' most used avenue for legal entry into the EU⁵³ – though many of them may enter the labour market after entering an EU Member State under a family reunification scheme.

Currently, the different effects of migration policies on men and women are being studied more intensively, especially within the framework of research on the migration of highly skilled workers.⁵⁴ Evidence has been produced that generally skilled women are more inclined to migrate than men in a similar position.⁵⁵ Surprisingly then, recent research has nevertheless revealed that women form a minority of the migrant workers admitted through highly skilled migration schemes. Available data shows that in some of the 'old' EU Member States only a quarter of the permits issued to highly skilled migrant workers are obtained by women.⁵⁶ This could be an indication that, whereas not directly discriminatory, the rights granted by the EU legislation on entry and stay of highly skilled third country national workers are more readily accessible to male third country national workers than to their female counterparts in a similar position. If this can be corroborated statistically, and no objective justification for the differentiation is available, the legislation would infringe the prohibition to discriminate on grounds of gender by constituting indirect discrimination (Article 21 CFREU).

A reason for the discrepancy in the number of Blue Cards (or similar permits under national law) granted to male and female workers might be found in the criteria for admission as laid down by the Blue Card Directive and similar national legislation of the Member States. One of the criteria for admission according to the Blue Card Directive is the gross annual salary, which must be at least 1.5 times the average gross annual salary in the Member State concerned.⁵⁷ Despite efforts, policies and promises to change this situation, the gender wage gap is still a fact in all of the EU Member States.⁵⁸ For this reason alone, the conclusion can be drawn that highly skilled female potential migrant workers are less likely to fulfill the admission criteria of the Blue Card Directive or similar national legislation of the EU Member States than their male peers.

The Seasonal Workers Directive does not feature the level of the wages of the potential seasonal migrant worker as one of the conditions for applicability of the Directive. The following paragraphs focus on another aspect of the Directive that is inherently disadvantageous for women, namely the fact that seasonal workers are not allowed to bring their family with them. Even though the Directive is equally applicable to male and female seasonal workers, this article argues that indirectly the Directive does

Oxford: Wiley Blackwell, 2016, p. 1013.

⁵³ European Commission, Migration in the EU (infographic), based on Eurostat 10 June 2015; also S. Blinder, 'Non-European Migration to the UK: Family Unification & Dependents', Migration Observatory, Oxford University, 21 March 2016 (this is applicable to the UK, but the same trend is applicable in other Member States of the EU); furthermore Focus Migration, Skilled female labour migration, Focus Migration Policy Brief No. 12, April 2009.

⁵⁴ F. Docquier, B.L. Lowell and A. Marfouk, 'A Gendered Assessment of Highly Skilled Emigration', *Population and Development Review*, 35:2, pp. 297-321.. ; also R. Fincher, L. Foster and R. Wilmot, *Gender Equity and Australian Immigration Policy*, Canberra: Australian Government Publishing Service, 1994.

⁵⁵ L. Cerna and M. Czaika, 'European Policies to Attract Talent: The Crisis and Highly Skilled Migration Policy Changes', in A. Triandafyllidou, I. Isaakyan and G. Schiavone, (Eds.), *High Skill Migration and Recession: Gendered Perspectives*, London: Palgrave, 2016, , pp. 36-38.

⁵⁶ E. Kofman, 'Towards a Gendered Evaluation of (Highly) Skilled Immigration Policies in Europe', *International Migration* Vol. 52(3)2014, p. 122.

⁵⁷ Article 5(3) of the Blue Card Directive.

⁵⁸ <https://www.oecd.org/gender/data/genderwagegap.htm>, last visited on 5 December 2016.

have a discriminatory effect on women, as women are less likely to leave their families behind for (seasonal) employment in the EU.

That the Commission is aware of the fact that potential migrant workers in general are less likely to move if they are not allowed to bring their families with them can be derived easily from an analysis of the applicable provisions of the Blue Card Directive. This Directive contains provisions on family reunification that are more favorable even than the Family Reunification Directive, which regulates the right of 'regular' third country nationals that have reasonable prospects of obtaining the right of permanent residence in the EU. Commendable as that may seem, there are also voices that argue that the provisions on family reunification in EU migration law reinforces (legal) dependence between family members – mostly the dependency of the female on the male – as financial and legal dependence may also lead to psychological dependence of the female on the male inside a family relation.⁵⁹ This argument serves to show that even EU legal instruments on (labour) migration that provide for family reunification may be disadvantageous for the affected female within the family relation. This line of argumentation however falls outside the scope of the present article.

Though holders of Blue Cards are therefore allowed or even stimulated to bring their third country national family members along, independent of the length of their residence in the host EU Member State,⁶⁰ seasonal workers are not able to bring their family with them even when they stay in a Member State for as long as nine months per calendar year, and with the prospect of returning time and again to that Member State for consecutive years. But as the aim of the Seasonal Workers Directive is to stimulate *circular* migration, the seasonal workers are not encouraged to integrate - or even stronger: they are prevented from integrating - into the society of the host Member State. For this reason, the Seasonal Workers Directive does not contain a provision on family reunification. This is one of the particularities of the Directive with which the instrument clearly diverges from ILO conventions and recommendations and other instruments of international law⁶¹ that advocate the right of any migrant worker to bring their family members with them, as referred to before. While these ILO instruments are not formally binding on the EU – though they are binding on some of its Member States – there are also binding provisions of EU law that speak for the right of migrant workers to family reunification, the most important being the right to family life as recognized by Article 7 of the EU Charter of Fundamental Rights.

Within the ambit of family reunification as regulated in other EU legal instruments such as the Citizenship Directive 2004/38, the scope of the right to family life has been more clearly defined by the Court. Thus, the Court has held that the Article contains rights which correspond to those guaranteed by Article 8(1) ECHR, and that the meaning and scope of the former are to be the same as those laid down in Article 7 of the Charter.⁶² Though Article 8 ECHR does not grant foreign nationals a right to choose

⁵⁹ L. Natale, Contribution to the European Commission Public Consultation: Debate on the future of Home Affairs policies: An open and safe Europe – what next?, European Network of Migrant Women (ENoMW), January 2014.

⁶⁰ Article 15 of the Blue Card Directive defines the favourable regime for family reunification that applies to Blue Card Holders. For example, family members of Blue Card holders (as defined in the Blue Card Directive) should be granted a residence at the latest within six months from the date on which the application was lodged. Furthermore, the (normal Family Reunification Directive 2003/86/EC) requirement of the EU Blue Card holder having reasonable prospects of obtaining the right of permanent residence and having a minimum period of residence does not apply to Blue Card Holders.

⁶¹ The UN International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, which has not been ratified by any Member State of the European Union.

⁶² Case C-256/11, Dereci and others v. Bundesministerium für Inneres.

the most suitable place to develop family life, it may give rise to an obligation on the states party to the Convention to let a person enter its territory.⁶³ The Court therefore held in the Rahman case that a Member State's refusal to allow a person to reunite with close members of his family may amount to an infringement of the right to respect for family life, and that this would be an infringement of Article 7 of the Charter, unless the interference is in accordance with the law, motivated by one or more of the legitimate aims under Article 8(2) of the ECHR and proportionate to the legitimate aim pursued.⁶⁴ The legitimate aims of Article 8(2) ECHR being the protection of national security, public safety or the economic wellbeing of the country, the prevention of disorder or crime, the protection of health or morals, and the protection of the rights and freedoms of others, it is difficult to see how the denial of the right to family reunification on an equal footing with other legal third country national workers in the EU is justifiable. The only legitimate aim that could arguably serve as a justification of the interference with the right to family life is the protection of the economic wellbeing of the country. However, it is up to the EU to make the case that it is indeed necessary to deny third country national seasonal workers the right to family life for the protection of the economic well-being of the country. Last but not least, experiences with guest-worker regimes with restrictive family reunification policies in the past have apparently not been taken into account by the Commission when drafting the text for the Seasonal Workers Directive.⁶⁵ It is not clear why the EU assumes that the Directive will not lead to the same tragic results as the temporary work programs before it, where spouses and children preferred to reunite illegally instead of staying apart for nine months a year.⁶⁶

Apart from the issue of what kind of impact the absence of a parent does to the family that stays behind in the country of residence of the seasonal worker, and the question of compatibility with human rights norms, the lack of the right to family reunification in the Seasonal Workers Directive raises questions with regard to the gender-neutrality of the Directive. According to the Directive it is not possible for seasonal workers – male or female – to bring their families with them. Whereas the Directive is thus not directly discriminatory, when one considers that in many societies – and especially in the societies of countries that source unskilled seasonal workers – women have maintained primary responsibility for the direct care of children,⁶⁷ it is obvious that it will be mainly men that are able and willing to leave their families behind for periods up to nine months per calendar year to go and take up seasonal work in one of the Member States of the EU. This particular aspect seems to have escaped the attention of the European Parliament's Committee on Women's Rights and Gender Equality, as

⁶³ J. Vedsted-Hansen, Article 7 – Private Life, Home and Communications, in S. Peers, T. Hervey, J. Kenner and A. Ward (Eds.), *The EU Charter of Fundamental Rights: A Commentary*, Oxford: Hart 2014, p. 167.

⁶⁴ Case C-83/11, Secretary of State for the Home Department v Muhammad Sazzadur Rahman and others, ECLI:EU:C:2012:519

⁶⁵ One European (though not EU) example is the Swiss guest worker programme in the 1960s and 1970s, which had a legal regime that bears resemblance with the Seasonal Workers Directive. Foreign labour force was allowed entry and temporary stay in Switzerland, though the programme did not provide for family reunification. This led to many of the foreign workers illegally bringing their wives (who were later allowed to follow their husbands) and children illegally to Switzerland. It is currently estimated that during the 1970s, up to 15.000 Italian children were living illegally in Switzerland, hiding in migrants' apartments, and unable to attend public schools. S. Wessendorf, 'State-Imposed Translocalism and the Dream of Returning: Italian Migrants in Switzerland', in L. Baldassar and D.R. Gabaccia (Eds), *Intimacy and Italian Migration: Gender and Domestic Lives in a Mobile World*, New York: Fordham University Press 2011, p. 159.

⁶⁶ S. Castles, Guestworkers in Europe: A Resurrection?, *International Migration Review*, Volume 40(4), pp. 742-743.

⁶⁷ OECD, Closing the Gender Gap: Act Now, pp. 199 ff ('Who Cares?') Paris: OECD publishing, 2012 ; also W. Patton (Ed.), 'Conceptualising Women's Working Lives: Moving the Boundaries of Discourse', Rotterdam: Sense Publishers, 2012, pp. 5 and 6

though the Gender Equality Committee emphasizes on the particular vulnerability of women seasonal workers in its Opinion on the 2010 proposal to the EP's Committee on Civil Liberties, Justice and Home Affairs of 27 January 2011, it continues by finding that '*particular mention must be made ... of the need to protect children living in the accommodation provided*' to seasonal workers. However, since there is no right to family reunification for seasonal workers, they will not be able to bring their children along legally. And for those who illegally bring their family with them, the Directive will not offer protection. From this very cursory examination of the gender-related aspects of the Directives indicate that also gender equality and equal opportunity in employment thus seem to be principles that are solely applicable to the EU's own citizens and not so much to third-country nationals.

On a side note, contrary to what may be expected, the 'seasonality' of the kind of employment to which the Seasonal Workers Directive is applicable cannot be considered as discriminatory. Even though work in the agricultural sector, to which the Directive is predominantly applicable, is often associated with strenuous physical activity and therefore men's work, employers active in many branches in the agricultural and horticultural sector would prefer female employees. This is for example the case in the strawberry sector in Spain,⁶⁸ but is documented also with regard to various branches of the agricultural sector in South Africa⁶⁹ and elsewhere.⁷⁰ Not only are women's more delicate hands perceived as more suitable for the production of high-value food, women are often also perceived as more docile than men and therefore easier to handle as employees. Whereas admittedly especially the last factor influencing employers' preferences is debatable, this does not impress upon the fact that nowadays employers in sectors dependent on the passing of the seasons prefer female labour. In this regard the Seasonal Workers Directive can therefore not said to be discriminating, neither directly nor indirectly.

4. One step closer to a Third Country Nationals' Directive?

As some of the weaknesses of the Directive have been debated in politics and academia before the final text of the Directive was adopted in 2014, one may think that the EU legislator settled for this text despite its weaknesses as the Directive would still be able to attain its main policy objective - migration management. A substantive part of this article serves to underpin the argument that third country national workers' rights are traded off for economic gains, and that unequal treatment of categories of third country citizens based on their perceived value for the economy as conceptualized by EU labour migration legislation is most likely infringing on fundamental rights.⁷¹ However, one could also

⁶⁸ S.E. Mannon, P. Petzelka, C.M. Glass and C. Radel, 'Keeping Them in Their Place: Migrant Women Workers in Spain's Strawberry Industry', *International Journal of the Sociology of Agriculture and Food*. 2012, Vol. 19, pp. 87-88.

⁶⁹ A. Reigada, 'Family farms, migrant labourers and regional imbalance', in A. Corrado, C. de Castro and D. Perrotta (Eds), *Migration and Agriculture – Mobility and change in the Mediterranean area*, London: Routledge, 2016, p. 103.

⁷⁰ K. Preibisch and E.E. Grez, 'Re-examining the Social Relations of the Canadian 'Family Farm': Migrant Women Farm Workers in Rural Canada', in B. Pini and B. Leach (Eds), *Reshaping Gender and Class in Rural Spaces*, London: Ashgate, 2011, p. 91.

⁷¹ S. Peers, E. Guild, E. Acosta Arcarazo, K. Groenendijk and V. Moreno-Lax (Eds.), *EU Immigration and Asylum Law* (fn. 14), p. 181; also D.J. Besharov and M.H. Lopez (Eds.), '*Adjusting to a World in Motion: Trends in Global Migration and Migration Policy*', Oxford: OUP, 2016, p. 171. See also the Opinion of the European Economic and Social Committee on the Green Paper on an EU approach to managing economic migration, CESE 694/2005 - SOC/199 (COM(2004) 811 final), Rapporteur: Mr. Pariza Castaños (Spain), 9 June 2005; also S. Carrera and M. Formisano, '*An EU Approach to Labour Migration – What is the Added Value and the Way Ahead?*', CEPS Working Document No. 232, Centre for European Policy Studies, Brussels 2005, p. 11..

argue that the Seasonal Workers Directive in its present form may negatively affect the economies of individual Member States. Whereas it is true that the economies of some Member States need highly skilled workers and that for these reasons Member States EU legislation allowing them to provide a broad range of rights to these workers may be important, the economies and societies of other Member States have a clear need for low-skilled workers. Member States with higher wages and better work conditions in the agricultural sector will be able to attract low-skilled and/or seasonal workers from other Member States, but that also means that the Member States that 'source' seasonal workers for Member States with higher wages and better conditions for seasonal workers will in their turn look to third countries for seasonal labour force. If EU legislation makes it more difficult to attract low-skilled workers from third countries, the already fragile economies of Member States that are a source for seasonal / low-skilled work force for Member States with higher wages will suffer serious damages. Either they will not be able to come by the necessary work force, or whole sectors will become dependent on illegal seasonal migrants – as was the case in Spain before.

The Directive therefore may only slightly contribute to the attainment of the policy objective of migration management. These limited accomplishments do not seem to justify the Directive as such. Possibly, the EU Commission has settled for this directive in spite of its limited reach because it views its adoption as an attainment in itself, with a view to facilitating progress towards the 'horizontal' Directive on the conditions of entry and residence of economically active third-country nationals.⁷²

5. Conclusion

This paper examined the Seasonal Workers Directive and the rights it seeks to grant to low skilled or unskilled migrant labour force coming to work temporarily in EU Member States. It did so by comparing the regime of the Directive with that of the Blue Card Directive which regulates the entry and stay of highly skilled migrant workers. The comparison revealed that the Seasonal Workers Directive, despite the changes made in the text of the Directive during the negotiation process, is still predominantly a migration management tool. And what is more, it is a product of a migration policy that is directed at attracting highly skilled migrants by granting them ample rights, whereas low-skilled migrants – who are already have a weaker position in many regards – are given lesser rights as they are furthermore perceived as 'unwanted'. In case of the seasonal workers, the EU still tries to import labour, not people.⁷³

The promises of fair treatment and protection against exploitation, with which the proposal for the Directive was launched by the Commission, can hardly be made true by the Directive as it came into force in 2014 – and by the widely varying ways in which the Member States are allowed to implement it. The limited personal and substantial scope of the Directive will not be sufficient to address the rights gap between the different groups of third-country national migrant workers in the EU, let alone the rights gap between third-country nationals and EU citizens. Furthermore, and this is an aspect of the Directive that has not been dealt with in academia or politics before, the Directive is less attractive for female than for male third-country citizens because of the fact that the Directive does not allow for family reunification. This being said, the introduction of the principle of equal treatment is a leap forward, and gives reason for optimism. One can thus hope that the Directive will soon after the expiry

⁷² See fn. 4

⁷³ S. Castles, 'Back to the Future? Can Europe meet its Labour Needs through Temporary Migration?' International Migration Institute, University of Oxford, 2006: Working Paper No. 1, p. 3, referring to S. Castles and G. Kosack, *Immigrant Workers and Class Structure in Western Europe*, Oxford: OUP, , 1973.

of the deadline for implementation by the Member States be subject to revision, and that such a revision will see the rights gap closed – or at least bridged – and that this has been the plan of the Commission all along.

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