



13 October 2010

### **COMMISSION PROPOSAL FOR A DIRECTIVE ON THE CONDITIONS OF ENTRY AND RESIDENCE OF THIRD-COUNTRY NATIONALS FOR THE PURPOSES OF SEASONAL EMPLOYMENT**

#### ***Executive Summary***

For the economic performance of Europe, labour migration will be of crucial importance in the years to come. This includes third country nationals migrating to the EU for a temporary residence as seasonal workers. Companies in a variety of sectors across Europe need seasonal workers to cover the increased labour demand in periods when the turnover is above normal. At the same time, they report important difficulties in meeting this demand.

Currently, the admission procedures for employing such workers from a third-country are complex and lengthy. The draft directive proposes a legislative framework that would facilitate these procedures, for instance by putting in place fast-track procedures.

Facilitated admission procedures will not only lead to improved access to seasonal labour for the overwhelming majority of employers that employ seasonal workers on a legal basis. It would also contribute to fighting the exploitation that illegally staying immigrants can be subject to. Against this background, BUSINESSEUROPE generally welcomes the draft directive.

However, BUSINESSEUROPE is concerned with the lack of possibilities for Member States to apply more favourable provisions than those set out in the draft directive. This concerns in particular the maximum duration of stay, which in the directive is set at six months.

In addition, requiring the increased labour demand the employer experience to be *far* above the usual demand constitutes an unclear and harmful restriction. The consequences for not being able to find labour when the demand is above but not necessarily far above the normal situation are still detrimental for the operations of the company.

By contrast, BUSINESSEUROPE support the fact that no obligation to apply a labour market test has been introduced in the draft directive. We wish to underline that the final directive must by no means introduce an obligation for Member States that do not already apply a labour market test to do so.

**I. Introduction:**

1. On 13 July 2010, the Commission adopted a proposal for a directive on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment.
2. The draft directive follows on from the 2005 Commission Communication 'A Policy Plan on Legal Migration' (COM(2005) 669), which provided for the adoption of five legislative proposals on labour immigration between 2007-2009. It forms parts of the EU's efforts to develop a comprehensive immigration policy and should contribute to achieving the goals of the Europe 2020 strategy.
3. The draft directive aims to contribute to effective management of migration flows for the specific category of seasonal temporary migration by enabling a fast-track procedure for the admission of third-country seasonal workers, based on a common definition and common criteria.

**II. General Comments:**

4. In view of the demographic change and the resulting shrinking workforce, there is an increasing need for the EU to come to terms with the lack of labour. This lack is already a pressing reality when it comes to seasonal workers. Employers across Europe report difficulties in finding such employees.
5. Immigration cannot be the only solution to the labour shortage, but it forms a part of the solution. Currently, European companies wishing to employ seasonal workers face large obstacles. The procedures are complex and lengthy. As the need for seasonal workers is by its very nature temporary, long admission procedures seriously hamper the possibilities for companies to cover this need. The seasonal worker is often granted admission only when the need for a larger workforce is coming to an end.
6. BUSINESSEUROPE therefore generally welcomes the draft directive, as it recognises the contribution of labour immigration to the European Union's economic performance and would facilitate the procedures for entry and residence of third-country nationals for the purpose of seasonal employment. Facilitated admission procedures would lead to increased access to seasonal labour for the overwhelming majority of employers, which seek to employ seasonal workers for legal employment. This would in turn help fight the exploitation that illegally staying immigrants can be subject to.
7. An important shortcoming of the directive is that it does not allow Member States with more favourable provisions than those set out in the draft directive to apply them. To avoid imposing legislation that runs counter to the overall objective of the directive, it is imperative that an article on this is added. In addition, certain specific aspects of the draft directive are of concern to BUSINESSEUROPE. These are outlined in section 3.



8. There is an increasing trend towards cross-border deployment of seasonal workers, for instance in hotels or agriculture. For that reason, EU rules on employment of seasonal workers from non-EU countries must address this issue specifically, in order to offer added value. Unfortunately, the draft directive disregards this aspect.

### **III. Specific comments:**

#### Definitions

9. Article 3 lays down the definitions of “a third-country national”, “a seasonal worker” and an “activity depending on the passing of the seasons”. It also defines what is meant by “a seasonal worker permit”, “a single application procedure” and “universally applicable collective agreements”. BUSINESSEUROPE supports that it will be the competence of Member States to define what sectors that meet the criteria for seasonal work.
10. However, the way an “activity depending on the passing of the seasons” is defined is problematic since it calls for labour levels required during the period to be “far above” the levels necessary for usually ongoing operations. The interpretation of “far above” risks setting the limit too high for the increased demand the company must experience for a third-country national to be granted admission as seasonal worker.
11. Not being able to find labour during a period in which labour demand is higher but not necessarily “far above” the usual demand would still be detrimental for the operations of the company. This will work to the detriment of small and medium-sized companies, since their need for extra employees in absolute terms is low. The operations of a large company often span over a field of different activities. It could well be that there is an increased need for labour in some activities, whereas it is business as usual for other activity fields. The relative need for increased personnel would therefore be low. Both examples point to the weakness in the requirement for a labour demand “far above” the usual demand.
12. Consequently, we suggest that the notion on “far above” should be replaced by “above” in Article 3.

#### Conditions for admission

13. The directive does not create a right to admission. By contrast, it sets out grounds for refusal in Article 6. This Article specifies that Member States may verify whether the vacancy concerned could not be filled by nationals or EU citizens, or by third-country nationals lawfully residing in the Member States and already forming part of its labour market.
14. To BUSINESSEUROPE, it is important that such a labour market test should be optional for Member States to apply. The final directive must by no means introduce an obligation for Member States that do not already apply a labour



market test to do so. In some countries, national legislation allows the labour demand of the individual company to be sufficient to grant admission. We therefore support the fact that no obligation to apply a labour market test has been introduced in the draft directive.

15. In countries that do apply a labour market test, it is imperative that employers are involved in the assessment of the need to fill seasonal employment vacancies with third-country nationals.
16. In countries where social partners are consulted, the employers' role in the assessment should be strengthened in relation to that of public authorities as well as trade unions. In the analysis of the labour market demand for seasonal workers, employers are best placed to judge their employment needs.

#### Procedure and permit

17. BUSINESSEUROPE welcomes the fact that Article 9 of the draft directive introduces a single application procedure for work and residence permits. Currently, different authorities could be in charge of these procedures. This is the case in Spain for example, where public authorities at a central level are responsible for issuing work permits whereas public authorities at a regional level are responsible for issuing residence permits. This results in a complex and unnecessarily long procedure.
18. Article 11 sets out the duration of stay for the seasonal worker. It states that the worker is allowed to reside for a maximum of six months in any calendar year, after which he or she shall return to a third country.
19. Concerning the length of the stay, it is essential that Member States that wish to apply more favourable provisions than stated by the directive will be able to do so. In Italy and Spain for instance, the current legislation allows the seasonal worker to stay for nine months. The possibility to set the maximum duration of stay at more than six months should be clearly stated in the directive.
20. BUSINESSEUROPE is also concerned with setting a limit to the duration of stay per *calendar* year. This is not compatible with the activities of companies that experience their increased demand for workforce in a period that spans two calendar years. In the winter tourism sector as an example, such a rule would imply that the seasonal worker would have to return to his or her country of origin on 31 December, just to return a few days later in the new year.
21. This rule would create large difficulties for companies in other sectors as well. As an example, companies in Northern Europe specialised in producing winter tires for cars would be struck as well. Another example could be taken from the agricultural sector, with pruning of wine stocks often beginning in December of one year and harvest ending in autumn the subsequent year. It is clear that the duration of stay must be defined in a more flexible way, starting with a deletion of the link to the *calendar* year.



22. When it comes to facilitation of re-entry, BUSINESSEUROPE generally supports the ambition of the draft directive. However, the restriction to issue three seasonal workers permits covering only up to three subsequent seasons in a multi-seasonal permit is too narrow. If Member States wish to apply more favourable provisions than stated in the directive, they should be able to do so.
23. It is obviously important that the obligations of the work contract are followed by both parties. However, we believe that the sanctions that employers would be subject to if they fail to comply with these obligations needs to be nuanced. It is important to distinguish between different degrees of seriousness of not fulfilling the work contract. Article 12 (2b) sets out that employers who have not fulfilled the obligation of the work contract should not be able to employ seasonal workers for one or more subsequent years. This should only be the consequence for grave or repetitive failures to fulfil the obligations. Differentiating between administrative mistakes and cases where the employer takes advantage of an illegally staying third-country national is needed.
24. The fast-track admission procedure suggested in Article 13 in the draft directive is of outmost importance to BUSINESSEUROPE. For companies experiencing a need for seasonal employment, lengthy admission procedures for third-country nationals are particularly harmful to the operations of the company. By its very nature, seasonal employment requires the extra work force to be available at a certain point in time.

#### Rights

25. BUSINESSEUROPE finds it natural that seasonal workers are entitled to rights concerning working conditions 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. Seasonal workers should not be discriminated against, including in respect of access to medical health services.
26. When it comes to pensions however, the final Directive should respect specific agreements reached between the Member State in question and a third country. BUSINESSEUROPE therefore suggests an amendment to Article 16, specifying that the directive should be without prejudice to existing bilateral agreements concerning pensions.

#### **IV. Conclusion**

26. BUSINESSEUROPE generally supports the draft directive as a growth-promoting directive dealing with the labour shortage of seasonal workers that European companies are currently struggling with. The legislative framework presented has the potential to facilitate admission procedures and thereby counteract the employment of illegally staying immigrants.
27. In view of the lengthy admission procedures companies faces when aiming to employ third-country nationals for seasonal employment, a fast-track procedure is of outmost importance to business. In addition, the proposed single



application procedure for residence and work permits would significantly reduce the complexity of current admission procedures.

28. However, we are concerned with the absence of an article allowing Member States to apply more favourable provisions than stated in the directive. This means that some Member States would have to change their legislation in a way that would constitute a step backwards in relation to the overall objective of the draft directive.

29. In addition, there are certain specific points which we urge the Council, the European Commission and the European Parliament to take into account in the final directive:

- The definition of “an activity depending on the passing of the seasons” is problematic since it requires the labour demand to be “far above” the usual demand. For a company that experiences a labour demand that is above (but not necessarily “far above”) the usual demand, it is still crucial to have this demand met to ensure operations. The formulation “far above” should be replaced by “above” in Article 3.
- Member States that currently sets the maximum duration of stay for the seasonal worker to more than six months should be able to continue to do so. A limitation of duration of stay based on calendar year would create problems for companies for instance in the winter tourism sector where the season spans two calendar years.
- BUSINESSEUROPE welcomes the fact that the use of labour market tests is optional for Member States. By no means should the final directive introduce obligations on Member States to apply such tests. In countries where they are currently used, it is crucial that employers are involved in the assessment of the need to fill seasonal employment vacancies with third-country nationals.