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The European Seasonal Workers Directive and Lessons
from Outside Europe

FOTIOS BREGIANNIS

St.Nr: 2007060

ANR: 571448

Contents

| | |
|--|----|
| Introduction | 3 |
| a) The proliferation of Temporary Migration Programs (TMPs) – Drivers and questions | 3 |
| b) Methodology | 4 |
| c) Research Questions and Structure | 5 |
| Chapter I – Introduction to non-permanent migration – New questions and challenges | 7 |
| a) Non-permanent migration..... | 7 |
| b) Types of temporary labour migration | 8 |
| c) Basic Distinctive Characteristics of seasonal migration..... | 10 |
| d) State and interstate policy on seasonal migration – additional regulatory questions ... | 10 |
| Chapter II - Seasonal Work in Europe and the Seasonal Workers Directive | 12 |
| a) Temporary Labour Mobility in Europe..... | 12 |
| b) EU migration policy – The second generation of EU migration law | 14 |
| c) The SWD - Procedure of creation..... | 16 |
| d) Scope of the SWD | 18 |
| e) Eligibility..... | 19 |
| f) Rights Safeguarded..... | 19 |
| g) Circularity..... | 20 |
| h) Results – Discussion | 21 |
| Chapter III – The TFWP and the SAWP in Canada | 23 |
| a) Temporary migration programs in Canada | 23 |
| b) Scope – Population | 25 |
| c) Eligibility..... | 25 |
| d) Rights Safeguarded..... | 26 |
| e) Circularity..... | 27 |
| f) Results and Discussion | 27 |
| Chapter IV – The RSE in New Zealand..... | 29 |
| a) Temporary labour migration in New Zealand..... | 29 |
| b) Scope – Population | 30 |
| c) Eligibility – Duration..... | 31 |
| d) Rights Safeguarded..... | 31 |
| e) Circularity..... | 32 |
| f) Results and Discussion | 32 |
| g) The RSE’s travel to Australia | 33 |

| | |
|--|----|
| Chapter V – Common Principles and Innovations..... | 35 |
| a) Scope and Population | 35 |
| b) Eligibility..... | 36 |
| c) Rights Safeguarded..... | 36 |
| d) Circularity..... | 37 |
| Recommendations and Conclusions | 38 |
| BIBLIOGRAPHY | 42 |

Introduction

a) The proliferation of Temporary Migration Programs (TMPs) – Drivers and questions

Temporary labour migration is a trend that has been put in the center of scientific attention during the last years. Critics optimistically speak about a “new era of mobility”, when non-permanent migration will be the dominant form of international worker mobility¹. In fact, technological development and economic drivers have turned social policy towards prioritising temporary migration against permanent migration. This is particularly evident for low-skilled work migration, which is usually separately regulated from high-skilled migration. This trend has led to the designation of specific Temporary Migration Programs (TMPs) throughout the globe. TMPs firstly appeared in the end of the 20th century, although they gained significance after the dawn of the 21st century. Agricultural sector is the dominant user of these programs, because employers at this sector were the first to bargain for the creation and function of TMP labour schemes.

The main drivers behind the proliferation of TMPs are two, while other causes could be also detected. Firstly, there have been *important labour shortages when it comes to low-skilled work*, which could not be filled by the local workforce in most developed countries. Employers at agricultural and hospitality sectors are in need of a low-skilled workforce, while the educated domestic workforce is not attracted by this kind of jobs.. The fact that these jobs are of a seasonal character and depend highly on the weather and climate circumstances makes them even less attractive for qualified employee candidates. Migrant low-skilled workers are recruited to cover this immediate and seasonal need.

The second driver derives from state social policy, more specifically from the states’ usual *option to avoid migrant integration procedures*. Non-permanent migration has an advantage in discharging integration procedures, which are financially costly and socially challenging. TMPs represent a “double-win” solution to enjoy the migrant labour without the burden of migrant integration. National employment policy, that usually prioritises domestic workforce against migrant workers, is also easily attached to TMPs due to the fact that foreign workers have, more or less, the obligation to leave the territory of the host state after the completion of the licensed period. Other factors the literature finds contributing to the proliferation of temporary migration, are the aging of the population, and the fact that also countries of origin encourage

¹ Kaies Samet, *Circular migration between the North and the South: Effects on the source Southern economies*, Social and Behavioral Sciences, vol. 93 (2013), pp. 225 – 242

TMPs for their own benefit (which is translated to remittances as well as the return of experienced workforce)².

b) Methodology

However, the designation and function of TMPs is not a simple matter. It poses essential *regulatory questions and dilemmas*. In this thesis, we categorise these social policy questions referring to TMPs under *four categories*. The first set of questions regards the *actual scope of a TMP and the differentiation from standard migration framework*. In this category, the regulators have to outline whether the program should be restricted to specific sectors or to specific categories of workers. Additionally, a limit could be put regarding the number of seasonal work permits that are allowed to be given during each working season. The second set of questions has to do with the *eligibility criteria and the duration of the program*, which is defined frequently with a reference to a calendar year. In this area, the conditions for an application to work under a TMP and the duration of the license/visa to enter the host country is regulated. Furthermore, the initiative to kick off the application procedure is given to the employer or the employee side. Thirdly, and maybe most importantly, the *level of rights safeguarded for temporary migrant employees* at TMPs has been in the center of discussion. TMPs have been spontaneously accused of promoting a second -less protected- category of migrants, and even of promoting modern slavery. Also, a “nationals first” approach governing the examined programs condemns the seasonal workers into a regulated inferiority. Last but not least, the *facilitation of re-entry and circulation of temporary workforce* is a key regulatory challenge.

In order to study the four categories of questions as mentioned above, it is inevitable to examine the seasonal migration schemes from a legal, ethical human resources and sociological perspective. The legal doctrine helps us reach a conclusion on seasonal migrant legal status and rights enjoyment from a labour law and migration law point of view. The human resources perspective helps us identify the motives behind recruiting seasonal migrant force as well as the best practices in managing seasonal workforce. The sociological perspective reminds the manifold sociological issues arising from seasonal and even more from circular migration, such as the consequences at host countries, at migrants themselves and the countries of origin.

² Ronald Skeldon, *Managing Migration for Development: Is Circular Migration the Answer?*, The Journal of Diplomacy and International Relations, Winter/Spring 2010

c) Research Questions and Structure

R.Q. 1: Temporary and seasonal migration represent a trend in migration policy. Which new problems and questions are brought before us by non-permanent migration? – Chapter 1

Non-permanent migration differs significantly from standard migration. Temporary migration policy touches high-skilled work (mostly the problem of “brain drain”) as well as low-skilled work (seasonal work). This thesis examines the outline and the definitions related to low-skilled work, because TMPs intend to attract low-skilled migrants. Apart from that, low-skilled temporary migrants are in a more vulnerable position and thus in need of urgent scholar attention. The first Chapter summarises the main distinctive issues on non-permanent migration and seasonal employment.

R.Q. 2: How did SWD respond to social policy dilemmas posed by seasonal migration? – Chapter 2

TMPs are published by means of a national law instrument or a decree or through bilateral agreements between the host country and the countries of origin. However the EU Seasonal Workers Directive (SWD) was the recent first attempt to harmonise temporary labour migration among a number of states with divergent migration policy. SWD proved to be challenging in creation and a source of long debates and disagreements among EU Member States. Its implementation faces problems as not a few states have not yet transposed the Directive into their national law. The thesis in view tries to answer to the question of how the four sets of regulatory questions, as mentioned above, were answered by EU during the designation of the SWD (Chapter 2).

R.Q. 3: How had most prominent TMPs outside Europe responded to the same dilemmas? – Chapters 3 and 4

The SWD preparatory period depicted regulatory dilemmas that have been previously faced during the stipulation of TMPs at traditional migration hosting countries. Subsequently, we try to analyse the answers that were given to the same questions in Canada and New Zealand (Chapters 3 and 4 respectively). Canada’s Temporary Foreign Worker Program and the Seasonal Agricultural Workers Program have been the oldest programs in this area and had functioned as a paradigm for most programs. New Zealand’s Registered Seasonal Employer Program has been found as the most successful and has been copied by Australia. Finally, in our conclusions we analyse the motives behind the regulatory choices and we give some policy advice on this debated and sensitive matter.

R.Q. 4: Which are the common practices between SWD and the TMPs examined and which are the differences? Could we identify good practices? – Chapter 5

Furthermore, we try to identify common lines of good practices that may be used by EU in the implementation and evaluation of the SWD. In our fifth Chapter we recognise common patterns as well as diverse practices between the SWD and the TMPs examined. Reviewing the results that the literature study has revealed, we could enumerate certain good practices and recommendations (Recommendations and Conclusions Chapter).

Chapter I – Introduction to non-permanent migration – New questions and challenges

a) *Non-permanent migration*

Migration is a global phenomenon on the rise. According to the United Nations International Migration and Development Report³ the number of people living in a country other than the country of their birth has reached in 2016 244 million marking a 41% increase compared to the year 2000. A 58% of the total migrant population has migrated to a country perceived as developed. At the same report, a close connection between migration and the labour market is found as 72% of the migrants have moved for employment purposes. Furthermore, the impact of the migrant workforce is recognised as very important for the financial development and for the demographic stability of the developed regions⁴. For this reason, migrants in most cases stay permanently in the country of immigration and gradually integrate to the society. According to United Nations Recommendations on Statistics of International Migration (1998), the long-term migrant is “*a person who moves to a country other than that of his or her usual residence for a period of at least a year (12 months), so that the country of destination effectively becomes his or her new country of usual residence*”⁵.

However, the sharp need of migrant workforce may not be stable throughout the working year but in some cases is concentrated and foreseen in particular periods/months of the year⁶. This temporary need of labour can be mostly observed in industries with seasonal nature⁷ (hospitality industry, agricultural industry) or in industries with unstable need of workforce (construction industry) and is satisfied by seasonal migrant workers. The use of seasonal and temporary workforce is not rare also at the supply chains of big corporations⁸. Contrary to standard migrants, seasonal workers usually do not stay in the country of destination and return right after the completion of the working period to the country of origin. This distinct element has been the reason for special regulatory frameworks designed only for seasonal migrants. Non-

³ UN General Assembly, Seventy-first session, Item 21 (b) of the provisional agenda - *Globalization and interdependence*, August 2016

⁴ Marek Kupiszewski, *International Migration and the Future of Populations and Labour Force Resources in Europe*, Springer 2013, pages 1-7

⁵ https://unstats.un.org/unsd/publication/SeriesM/SeriesM_58rev1E.pdf

⁶ Georg Mendez, Alexander Caviedes et.al., *Labour Migration in Europe*, Palgrave Macmillan, 2010, page 59

⁷ Abu Shonchoy, *Seasonal Migration And Microcredit During Agricultural Lean Seasons: Evidence From Northwest Bangladesh*, *The Developing Economies* 53, no. 1 (March 2015): 1–26

⁸ James Brudney, *Decent labour standards in corporate supply chains*, in: Joanna Howe and Rosemary Owens, *Temporary Labour Migration in the Global Era, The Regulatory Challenges*, Hart Publishing, 2016

permanent labour migration is of course beneficial for host countries as it provides the opportunity to respond to rapid increases or declines of labour demand and, contrary to permanent migration, it does not create integration issues. Whereas migration has been the subject of excessive study and research, temporary forms of migration are underresearched in literature⁹.

Temporary migrant flows are not of course something new in the world economy. Already in the medieval years and since technology allowed long distance travelling, a number of migrants chose to move seasonally for employment reasons¹⁰. Recently, non-permanent forms of migration were put in the centre of discussion due to the increasing number of circular migration¹¹ and the adaptation of EU Seasonal Migration Directive (2014/36).

b) Types of temporary labour migration

The common element of all temporary forms of labour migration is the fact that working period is restricted to a small period of several weeks or several months thus sometimes the use of the term “short-term migrants” is used. The dominant yet distinct forms of non-permanent forms of labour migration are *circular* and *seasonal* migration. We must note that *temporary work* is out of the scope of this study as temporary workers are permanently employed by a temporary agency despite the fact that they are sent to a second country (or maybe within the same country) to be utilised by a user employer. The same applies for *posted workers* that are sent for a fixed period to a country different than the country of their initial employment as means of fulfilling a contract between the employer of the posted workers and a third party. These latter two categories have been the subject of ad hoc national and European regulation. Despite the similarity of questions arising for temporary agency work and posting of workers, these two types of non-permanent work belong to the realm of trade law according to fixed theory arguments¹².

Among the types of temporary migration the literature distinguishes circular migration from seasonal migration¹³ based on two differences, although the definitions in view have been the question of long debates¹⁴. Firstly, circular migrants are entitled to re-enter the host country

⁹ Joanna Howe and Rosemary Owens, *Temporary Labour Migration in the Global Era, The Regulatory Challenges*, Hart Publishing, 2016

¹⁰ Elizabeth Mavroudi and Caroline Nagel, *Global Migration, Patterns-Processes and Politics*, Routledge 2016, page 57

¹¹ Kaies Samet, *ibid.*

¹² Gudrun Biffl and Isabella Skrivanek, *The distinction between temporary labour migration and posted work in Austria: labour law versus trade law*, in Joanna Howe and Rosemary Owens, *Temporary Labour Migration in the Global Era, The Regulatory Challenges*, Hart Publishing, 2016

¹³ United Nations Economic Commission For Europe, Meeting Of The 2015/2016 Bureau, *Defining And Measuring Circular Migration*, Final Report, Pages 8-10

¹⁴ European Migration Network, *Temporary and Circular Migration: Empirical Evidence, Current Policy Practice and Future Options in EU Member States* (Brussels , European

according to their choice because they have the right to do so¹⁵ whereas seasonal workers must facilitate legal re-entry each time they wish to return as their right to enter and stay is restricted only to a defined working period. Secondly, circular migrants are usually high-skilled migrants and thus the literature examines the relevant “brain drain” problem when it comes to circular migration. On the other hand, seasonal migration is connected to low-skilled jobs and subsequently different problems follow the implementation of rules regarding seasonal workers, namely the poor working and living conditions.

Despite this traditional differentiation, mixed forms between seasonal and circular migration could be observed. *At our study, we find that TMPs actually try to combine seasonality with circularity.* Achieving circulation of the seasonal workforce is deemed as success of a TMP. Due to this accomplishment, employers would not need to search new workers in order to recover their needs the next working season. Furthermore, a stable circular personnel is more attached to the workplace and gets more easily aligned with the production methods and goals. For example, seasonal workers in agriculture and hospitality acquire technique and skills needed for the work once and for all.

Seasonal migrant workers usually cover the need of fulfilling “three D” jobs (dirty, dull, dangerous) because the large part of domestic labour force is not available for this kind of employment¹⁶. For this reason the research about seasonal work should always take into consideration that seasonal workers may be low skilled workers and thus more vulnerable to exploitation and dangers. Beginning from the thought that seasonal workers are mainly low-skilled workers, we should differentiate the questions regarding seasonal work from the questions regarding “circular migration” which refer to high-skilled workers and the “brain drain” problem¹⁷. In fact the matter of seasonal work has been faced with separate legal instruments and has not been put under the same umbrella with circular migration¹⁸

Other forms of temporary labour migration (that could not be described as seasonal work neither as circular migration) exist but they do not arise social policy questions in the same depth. Such forms are tourist work, student work or trafficking workers. This thesis does not treat these forms of employment because their actual goal is not the employment itself or achieving income for subsistence but the facilitation of tourism, studies or crime activities. Traditionally, these workers are not taken into account at relevant studies¹⁹

Migration Network , 2011) 12 – 29

¹⁵ EU nationals enjoying freedom of movement are most likely to be circular migrants, see Amelie Constant and Klaus Zimmermann, *Circular and Repeat Migration: Counts of Exits and Years Away from the Host Country*, *Popular Res Policy Review* (2011) 30:495–515

¹⁶ Georg Mendez, Alexander Caviedes et.al. page 33

¹⁷ Ronald Skeldon, *ibid.*

¹⁸ United Nations Economic Commission For Europe, *ibid*

¹⁹ Joanna Howe and Rosemary Owens, *ibid.*

c) *Basic Distinctive Characteristics of seasonal migration*

Based on the aforementioned points we could describe the characteristics of seasonal migration as follows:

- Restricted period of work concentrated at several months/weeks of the year.
- Rights to enter and stay only for this restricted period. Re-entry must be authorised in principle separately every time the worker wishes to return.
- Low skilled work and low qualified work.
- Precarious and poorly paid work, increased vulnerability. Often seasonal workers are perceived as part of the informal economy²⁰. The precarity increases in agricultural industry²¹.
- Labour migration with the aim of subsistence (not tourist or student work).

d) *State and interstate policy on seasonal migration – additional regulatory questions*

In our introduction, we specified the four categories of questions on temporary migration, which we examine. Seasonal migration, however, is very complex and represents a dynamic yet loose and unstable factor for the workforce of a country. In order to consolidate particular TMPs, traditional immigration countries face many social policy and regulatory difficulties. Apart from the four basic question sets, we could also refer to other problematic aspects in this chapter, without further analysing them in the next chapters. The additional regulatory questions upon the application of a temporary labour migration could be categorised as follows²²:

- The question of the correct *trade-off* between the labour rights and the economic gains of the domestic economy. This trade-off is regarded as “inevitable” by the literature²³ and it has been the centre of disagreements upon the completion and the content of international trade agreements²⁴. In agricultural industry the question is also connected to achieving “reasonable prices” for agricultural products²⁵

²⁰ Dominique Boels, *The Informal Economy: Seasonal Work, Street Selling and Sex Work*, Palgrave MacMillan, 2016

²¹ Judy Fudge, *Precarious Migrant Status and Precarious Employment : The Paradox of International Rights for Migrant Workers*, 2012, 34 *Comparative Labour Law and Policy Journal*

²² Ricard Zapata-Barrero, Rocio Faundez Garcia and Elena Sanchez-Montijano, *Circular Temporary Labour Migration: Reassessing Established Public Policies*, *International Journal of Population Research* Volume 2012, Article ID 498158

²³ Martin Ruhs, *The potential of temporary migration programmes in future international migration policy*, *International Labour Review*, Vol, 145 (2006), No, 1-2

²⁴ Joanna Howe and Rosemary Owens, *ibid*, pages 12-19

²⁵ Joseph Carens, *Live-in Domestic, Seasonal Workers, and Others Hard to Locate on the Map of Democracy*, *The Journal of Political Philosophy*: Volume 16, Number 4, 2008, page 437

- The *poor protection* temporary migrants enjoy from international or domestic legal frameworks protecting long-term migrants. For example, the UN International Convention on the Protection of All Migrant Workers and their Families (1990) does not apply to temporary migrants.
- The problem of “*invisibility*”: A large part of seasonal migrant workers are undocumented and/or irregular working at informal economy. This fact makes the implementation of a seasonal worker program very difficult.
- The contest of the concept of *temporariness*: State policy should take into account the stable employers’ need for temporary migrants on the one hand and the fact that migrants use seasonal work sometimes as a stepping stone towards long-term migration.
- The question of intense state and government involvement in order to actually apply the programs, especially regarding implementation of fines/punishments against non-compliant employers²⁶.
- The handling of often differentiations in the form, frequency and composition of seasonal workforce that puts a stable policy at stake²⁷.

The undeniable variety of problems and relevant questions has resulted in a contrast of seasonal work programs according to priorities of each state. Dauvergne and Marsden have noticed²⁸ that diverse combinations of the interpretation of temporariness, the regulation of labour markets and the safeguarding of labour and migration rights create an “*ideology of temporary labour migration*” that is distinct at each situation and state.

²⁶ Martin Ruhs, *ibid.*

²⁷ Ronald Skeldon, *Going Round in Circles: Circular Migration, Poverty Alleviation and Marginality*, International Migration Vol. 50 (3) 2012, pages 43-59

²⁸ Catherine Dauvergne & Sarah Marsden, *Beyond Numbers Versus Rights: Shifting the Parameters of Debate on Temporary Labour Migration*, Int. Migration & Integration (2014) 15:525–545

Chapter II - Seasonal Work in Europe and the Seasonal Workers Directive

a) *Temporary Labour Mobility in Europe*

Non-permanent work in Western Europe has its origins back to the so-called “guest worker” programs in the ‘60s and ‘70s. A large population originating initially from southern European countries (Greece, Italy, Spain, Portugal) and later from Turkey and North Africa covered the increasing shortages of low skilled labour in industrial economy. The continuous flows created a tradition of cultural contact between host and origin countries that overcame in importance the simple fact of proximity between European countries²⁹. Although guest-workers’ legal entry and employment was facilitated through temporary visas, most of them gradually acquired citizenship rights and stayed in the host countries. The circulation aim was not achieved due to lack of planning and due to the oil crisis outburst in 1973, which eventually pushed many migrants to stay in the host countries rather than risk a return³⁰. Analysis in a European level turned to how seasonal workers return could be better facilitated³¹. In that sense, new temporary migration schemes, among them seasonal work programs, had to learn from guest-workers’ programs failure in regulating migrants return³².

After the ‘80s, labour shortages in industry ceased to cause policy dilemmas, as large part of guest workers stayed in the host countries and gradually integrated to the society. Furthermore, after south European countries joined the EU, freedom of movement eradicated any effect of temporary work programs for European workers, as the EU nationals were granted the right to move freely within the Union. During the ‘90s the attention turned towards newly emerging migration flows from Eastern and Central Europe. The seasonal character of emigration from this region gradually dominated over the permanent migration.³³

²⁹ Ewa Kępińska and Oded Stark, *The evolution and sustainability of seasonal migration from Poland to Germany: From the dusk of the 19th century to the dawn of the 21st century*, International Review of Economics and Finance, vol. 28 (2013), pp. 3–18

³⁰ Sheena McLoughlin and Rainer Münz, *Temporary and circular migration: opportunities and challenges, I. Addressing demographic challenges: Europe’s new interest in temporary and circular migration*, European Policy Center, Working Paper 35, March 2011

³¹ Frans Bouwen, *Maximizing the Benefits of Circular Migration for the Netherlands in response to the Migration and Development debate*, report prepared by *The Hague Process on Refugees and Migration* Foundation for the Department for the Movement of Persons, Migration and Alien Affairs Netherlands Ministry of Foreign Affairs, The Hague, December 2007

³² Jeroen Doomernik, *Does Circular Migration Lead to “Guest Worker” Outcomes?*, International Migration, vol. 51 (1) 2013, pp. 24-39

³³ See for example the Bulgarian case at Rossitza Guentcheva, Petya Kabakchieva, Plamen Kolarski, *Migration Trends in Selected Applicant Countries, The social impact of seasonal migration in Bulgaria*, European Commission Project, September 2003

A significant part of these migrants were moving for seasonal work and this fact pushed host countries to designate special seasonal work programs. Such programs were created in Germany, France, Britain, Belgium and Switzerland, and later also in Spain, Greece, Norway and the Netherlands by means of bilateral treaties or national legislative measures³⁴. The attention of seasonal work program turned to sectors often employing workers with non-European origin. Agriculture sector and hospitality/tourism are ever since referred as the sectors covering their workforce shortages through seasonal migration. Mushroom industry in the Netherlands, agricultural sector in south Europe³⁵ and hospitality industry in Italy and Spain attract a large number of non-EU seasonal workers. At the same time, agricultural and construction sectors are most prone to labour exploitation and migrant abuse³⁶.

The reason of high seasonal labour demand is that high qualification and education of the European population made these jobs unattractive for the vast majority of European workers. Apart from that, the seasonal and unstable character of the jobs made them even less appealing. European states tackled the problem in principle through general migration law by enlarging the opportunities of legal migration for low skilled workforce. Some of them, however, regulated the issue of seasonal workers' entry, stay and circulation through ad hoc legislative and administrative measures. Germany's seasonal workers program is considered to be the most successful launching circa 300,000 visas per year. France, Italy (where around 80,000 seasonal workers are employed annually), Hungary³⁷ and Slovakia had also adopted their own schemes issuing special permits for seasonal workers³⁸. Gender-based studies have found that the seasonal workforce in Europe shows predominant male participation due to social and cultural reasons that are connected to traditional allocation of gender duties in Eastern Europe³⁹.

The map of seasonal labour programs in Europe prior to the adaptation of the Seasonal Workers' Directive (SWD) depicts a wide variation of rules and social policy options as well as an uncoordinated policy area. Bilateral treaties with countries of origin and domestic migration law created a picture of divergence. Furthermore, only 6 countries kept records of seasonal workers⁴⁰ while many low skilled temporary workers worked at informal sectors.

³⁴ Godfried Engbersen, Marek Okólski, Richard Black and Cristina Panțiru, *Working out a way from East to West: EU enlargement and labour migration from Central and Eastern Europe*, Introduction to *A Continent Moving West? EU Enlargement and Labour Migration from Central and Eastern Europe*, IMISCOE Research, pp. 7-23, Amsterdam University Press, 2010

³⁵ For a detailed depiction see Alessandra Corrado, Carlos de Castro and Domenico Perrotta, *Migration and Agriculture, Mobility and change in the Mediterranean area*, Routledge, 2017

³⁶ Joanna Goodey, *Severe Labour Exploitation - Workers moving within or into the European Union*, European Union Agency for Fundamental Rights, the 'SELEX' project 15 July 2015

³⁷ Robert Tesits and Endre Szenoradzki, *Hungary's experiment in legalizing casual employment*, *International Labour Review*, vol. 149 (2010), no. 1, pp. 121-129

³⁸ European Migration Network, *Temporary and Circular Migration: empirical evidence, current policy practice and future options in EU Member States*, Synthesis Report, September 2011

³⁹ Ewa Kępińska, *Gender Differentiation in Seasonal Migration: The Case of Poland*, *Journal of Ethnic and Migration Studies*, vol. 39 (2013), no. 4, pp. 535-555

⁴⁰ European Migration Network, *ibid.*

Europeanisation of temporary migration policy came in practice to some extent into mobility partnerships with certain states of origin, whose function was rather ambiguous⁴¹. It was in fact after 2000, when newly adopted EU migration rules and the so-called Schengen acquis started in depth affecting national migration policy. The Schengen visa became the document that many seasonal workers acquired to legally enter EU territory for stays not exceeding 90 days.

Still, no Member State had a clear legal definition for temporary or seasonal work apart from temporary agency sector while only 11 Member States applied a definition derived from case law or legal theory⁴². At the same time, CJEU had very slightly been involved to seasonal workers rights. When cases concerning seasonal employment were brought before the Court, which happened only a few times, they were faced under legislation applied for fixed term employees⁴³, working hours⁴⁴ or through provisions being stipulated at a bilateral treaty⁴⁵. Significant ideas were, nevertheless, presented before the Court, acknowledging that seasonal employees are in a vulnerable position and should be cautiously protected from the variations of labour demand⁴⁶.

The ever-increasing integration of economies and labour markets within EU, especially after EU enlargement in 2004 eventually changed the picture. A large percentage of seasonal workers were going to acquire the EU nationality. From thereon, non-EU nationals were dominantly people from Asia and Africa, regions with less cultural and historical ties with Europe than new EU Members. That factor, in combination with others, would transform the character of EU migration policy.

b) EU migration policy – The second generation of EU migration law

When examining the EU social policy and legislation regarding migration and legal employment of third country nationals (TCNs), we should take into account that this field of EU action is rather new. It was not before 1999 and the implementation of Amsterdam Treaty that EU got collectively involved in a policy field that was considered as domestic in a strict sense (and still is strongly considered as such). The Tampere goals in 1999⁴⁷ specified the route of EU migration policy, which was heading towards the inclusion of third country nationals into European economy and growth production of Member States. The demographic gap

⁴¹ Sergio Carrera and Raül Hernández i Sagrera, *The Externalisation of the EU's Labour Immigration Policy Towards Mobility or Insecurity Partnerships?*, CEPS Working Document No. 321/October 2009

⁴² European Migration Network, *ibid.*

⁴³ European Commission versus Luxembourg, Case C-238/14

⁴⁴ Union syndicale Solidaires Isère versus Ministries of Labour and Public Health of France, Case C-428/09

⁴⁵ Kondova case, C-235/99, that referred to bilateral treaty concerning labour migration between EU and the Republic of Bulgaria (before joining the EU)

⁴⁶ Opinion of Mr Advocate General Mancini, delivered on 28 October 1987, Ny Molle Kro Case C-287/86

⁴⁷ Council of the European Union, *Presidency Conclusions of the Tampere European Council, 15-16 October 1999*, SN 200/99, Brussels, 1999

problem as well as the need for skilled and specialised workforce were the factors behind this direction.

Inspired by the Tampere Goals, EU legislator produced the *first generation* of EU migration law instruments between 2001 and 2004. That first generation of EU migration legislation was “right-centered”. Its focus was on serving individual rights of family reunification, the right to work and enjoy education and the right to legally reside at EU territory. However, the difficulties in reaching a consensus were obvious, as Member States were striving to restrict EU competences and keep EU intervention in migration matters as narrow as possible. Legislation on migration issues met a lot of pressure and disagreements on behalf of Member States especially after the migration and refugee flows from Asia and Africa increased.

In contrast to the first, the *second generation* of EU legal instruments on TNC migration has been criticised for being “interest-centered” and incoherent⁴⁸. Even though migrant workers’ rights may be more clearly set in this second generation of migration legal rules⁴⁹, the focus was turned unquestionably towards how migrants could contribute to Member States economic development. EU enlargement in 2004 brought forward additional problems of harmonised migration policy and made the possibility of a consensus even more challenging. The turning point towards the new approach is detected at December 2005 Commission Communication titled “A Policy Plan on Legal Migration”⁵⁰. At this document a new fragmented approach was proposed dividing TCNs migrants into four categories (high skilled employees, remunerated trainees, intra-corporate transferees and seasonal workers), while students and researchers were later added as a fifth category. A distinct legal instrument was proposed for every category to be created between 2007 and 2009. As a result, what we could observe nowadays is a fragmented EU legislative approach rather than a unitary “migration code”⁵¹. Achieving compromise among the Member States has been proved extremely complex when it comes to migration thus the secondary legislation is set by category as by this way a wider consensus is possible.

In contrast to free movement of EU nationals that is provided through EU primary law (Articles 21, 45 TFEU) and is characterised by strong commitment to the right of the individual to move freely within the Union, the rules regulating the movement of third country nationals are more committed to host country needs. This approach is also described as regulation from an

⁴⁸ Sergio Carrera, Anaïs Faure Atger, Elspeth Guild and Dora Kostakopoulou, *Labour Immigration Policy in the EU: A Renewed Agenda for Europe 2020*, CEPS Policy Brief, No. 240, 5 April 2011

⁴⁹ Christof Roos, *EU politics on labour migration: inclusion versus admission*, Cambridge Review of International Affairs, Vol. 28 (2015), No. 4, pp. 536–553

⁵⁰ COM (2005) 669

⁵¹ Iván Martín and Alessandra Venturini, *A Comprehensive Labour Market Approach to EU Labour Migration Policy*, European University Institute, Migration Policy Centre, May 2015

economic and not a human rights point of view. In fact there is no unified piece of EU legislation on migration (resembling to a migration code) but various secondary pieces of legislation regulating specific migration issues (family reunification, legal entry and re-entry of students, scientists and intra-corporate trainees, Blue Card Directive on skilled work). Belonging in this category, the Seasonal Workers Directive (“SWD”) was passed in 2014 (Directive 2014/36).

c) *The SWD - Procedure of creation*

Pursuing to 2005 Policy Plan, in December 2006 the Council of EU encouraged the Commission to further research inflow of temporary workers migrating from third countries with an emphasis on mobility partnerships. The Commission, subsequently, produced a memo recommending, among others, a directive specified to seasonal migration⁵². The proposed Directive held the innovative element of combining labour law and migration law rules⁵³. Costello and Freedland argue that the Seasonal Workers Directive was a retreat to employers’ demand of low-skilled labour, notwithstanding a worker-friendly approach that appeared during negotiations⁵⁴. The minimum content of the instrument under consideration was the facilitation of entry and legal stay, the provision of certain migration and labour law rights, the safeguard of a minimum of living conditions as well as measures towards circulation of seasonal workers to meet cyclical labour needs. The logic of this normative choice remained in principle instrumental, namely the best service of EU labour market interests, despite the catalogue of rights included. Geddes argues that this instrumental pattern pushed research at EU level onto quickly fleshing out the meaning of notions such as “circular migration” and “temporary migration”, in a sense of what he calls as “policy-based evidence making”⁵⁵.

The full draft text of the Directive was published in July 2010⁵⁶ and it was discussed during four meetings of the Committee in late 2011 together with the directive proposed to regulate migration of intra-corporate transferees. However, three years of negotiations were needed in order to achieve consensus on the matter. Extreme divergence of existing national frameworks,

⁵² European Commission, *Circular migration and mobility partnerships between the European Union and third countries*, Memo/07/197, May 2007

⁵³ Judy Fudge and Petra Herzfeld Olsson, *The EU Seasonal Workers Directive: When Immigration Controls Meet Labour Rights*, *European Journal of Migration and Law*, vol. 16, pp. 439-466

⁵⁴ Cathryn Costello and Mark Feedland, *Seasonal Workers and intra-corporate transferees in EU law: capital’s handmaidens?*, in: Joanna Howe and Rosemary Owens, *Temporary Labour Migration in the Global Era, The Regulatory Challenges*, Hart Publishing, 2016

⁵⁵ Andrew Geddes, *Temporary and circular migration in the construction of European migration governance*, *Cambridge Review of International Affairs*, vol. 28:4, pp. 571-588

⁵⁶ European Commission, 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, Brussels, 13.7.2010

differences in legal definitions as well as technical discrepancies of the Proposal text are identified as reasons for that delay⁵⁷. Furthermore, the unique and groundbreaking character of the content of the Directive attempting to combine labour and migration law demanded a lot of debate.

As a result, the discussion that followed up the Directive proposal was vivid and intense. Rapporteur Claude Moraes proposed a number of amendments regarding, among others, the scope of the directive (he considered the scope covering only residents outside EU too restricted), accommodation costs and monitoring mechanisms⁵⁸. The Committee on Legal Affairs questioned the legal basis proposed by the Commission (Article 79, par. 2 TFEU on EU Common Migration Policy) and suggested that the legal basis should be also Art. 153 (1)(a), (b) and (g) on common Employment Policy, a proposition that was in the end rejected. The Committee on Employment and Social Affairs asked for references to ILO Conventions⁵⁹. Extensive discussions were also held regarding the way of facilitation of legal entrance, namely the combination of the Directive with the already existing Schengen acquis when it comes to short term stays not exceeding 90 days. The compromise was found at *a parallel function of both systems*. For stays not exceeding 90 days, the Schengen rules regarding migration law applies and the SWD applies at labour law matters. For stays exceeding 90 days, the SWD is fully applicable. This parallel function of two schemes that were not designed to co-exist led to a complex situation, where multiple paths to a seasonal authorisation under the SWD are provided.

The procedure ended in February 2014, when the Directive passed from the European Parliament with an extended majority (498 for – 56 against - 68 abstentions)⁶⁰. Its entry into force was regarded in 2014 already a success given the complexities that had to be overcome⁶¹. It is worthwhile to mention that the Netherlands had voted against the Directive in the final vote, while the SWD received three TEU Article 3b “yellow cards”⁶².

⁵⁷ Ágnes Töttös, *The Past, the Present and the Future of the Seasonal Workers Directive*, Pécs Journal of International and European Law - 2014/I, pp. 45-60

⁵⁸ Report on 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)0379 – C7-0180/2010 – 2010/0210(COD)), Committee on Civil Liberties, Justice and Home Affairs, Rapporteur: Claude Moraes

⁵⁹ *Ibid.*

⁶⁰ European Parliament, Statistics - 2010/0210(COD) | A7-0428/2013

⁶¹ Alex Lazarowicz, *A success story for the EU and seasonal workers' rights without reinventing the wheel*, European Policy Center, Policy Brief, March 2014

⁶² Alex Lazarowicz, *ibid.*

d) *Scope of the SWD*

Personal restriction

The first and foremost restriction has to do with the personal scope of the Directive. It only applies to residents of countries outside the EU (Art. 2(1)). That provision is a focal choice, as the Directive is intending to create new migration flows towards the European continent and not to transform the already existing migration population. The applicant should reside outside the EU territory at the time of his/her application for an issue of a seasonal authorised entry and stay, with the only exception of the extension application as regulated by Article 15. The SWD is also not applicable for posted workers under the relevant legislation (Directive 96/71) or family members of EU citizens (whose entry is facilitated under Dir. 2004/38).

Sectoral restriction

Already at the 2005 Policy Plan it was referred that seasonal work regulation has to be restricted to certain sectors, such as agriculture, construction and tourism. Even in presence of high unemployment these sectors remain unattractive for the vast majority of European potential employees⁶³. The final text of the Directive (Art. 2(2)) does not contain certain named sectors but gives a general direction defining the seasonal activity as “*an activity that is 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*”. The general definition was chosen because of the variety of climate conditions throughout the continent. Each Member State could categorise specific sectors that would satisfy the mentioned general characteristics. Preamble 13 of the Directive gives an additional hint by referring to “*activities dependent on the passing of the seasons are typically to be found in sectors such as agriculture and horticulture, in particular during the planting or harvesting period, or tourism, in particular during the holiday period*”.

Temporal restriction

The duration of the seasonal work permit of entry and stay is also left to national legislations to set and decide. However, the SWD (Articles 14, 15) marked the limits of an acceptable duration between five and nine months within a period of 12 months (not absolutely a calendar year). The initial permit is renewable but always within the set limits. SWD Preamble 7 is clear when stating that the Directive should avoid “overstaying or temporary stay becoming permanent”.

⁶³ European Commission, *A Policy Plan for Legal Migration*, *ibid*, pp. 7

Numerical restriction

Article 7 inserted a significant right for the Member States to define the volume of seasonal workers that would be allowed to enter and work in their territory. In this way, Member States could just reject or regard as inadmissible an application after the completion of vacancies that the Member State has set for each season intake. Each Member State has the right to put a threshold regarding the maximum number of seasonal workers admitted every working period and reject applications as inadmissible when the number of vacancies is fulfilled.

e) Eligibility

According to Articles 5 and 6, the applicant must have a valid employment contract and a standard sickness insurance (as seasonal workers could be excluded from certain social security benefits). A rather new element SWD introduces to temporary migration is the eligibility also of temporary agencies to provide seasonal workers to EU Member States under the same rules (Preamble 12). The procedure is typically not employer-driven, but employee-driven, as the worker candidate should initiate the procedure before the competent authorities to obtain authorised entry and stay. The fact, however, that an employment contract is a prerequisite for successfully applying mediates of course the employee initiative. The employment contract's minimum content shall contain the place and the type of work, the duration of the employment, the remuneration, the working hours and paid leave arrangements.

In cases when the employer is sanctioned for SWD related abuses or misapplication of SWD rules the procedure of application for future seasonal workers is affected, as the sanctions could possibly be ground for rejection (Article 8(2)).

f) Rights Safeguarded

SWD safeguards a table of migration and labour law rights for seasonal workers. Migration law related rights are the right to enter and stay in EU territory for the licensed period. Apart from that seasonal employees have the right to accommodation provided or arranged by the employer (Article 20). Articles 22 and 23 are of utmost importance regarding other fundamental rights, which, however, are not fully guaranteed. Under Article 22, seasonal workers have the right to move within the territory of the Member State, which allowed their entry, and to perform their work. Freedom of movement within the EU is not guaranteed. Article 23 introduces the labour law rights seasonal workers enjoy. These are the equal treatment with domestic labour force on matters of employment terms, collective action, payment, social security, education, training and professional recognition.

However, Member States have the right to exclude seasonal workers from unemployment benefits, family benefits, certain training and educational rights (such as study grants) and tax benefits. Despite the “second category” status that seasonal workers would inevitably have due to Member States’ discretion to deprive them from several rights, the table seems generally inclusive. The provision of procedural rights to complain (Article 25) is a progressive step, yet its implementation seems challenging. Rijken argues that the table of rights is a very positive step but its efficiency strongly depends on Member States’ willingness to cooperate⁶⁴.

It should be noted that the applicable law arrangements as well as other labour standards are not ad hoc regulated by the SWD text. However, we should take into account that European Labour Law rules are fully applicable to seasonal workers, as they perform their work in EU soil. The “objectively applicable labour law” is the law of the EU State hosting the seasonal workers.

g) Circularity

The question of circularity was of great importance. In this area, the SWD had to unify significantly divergent policies that were connected to each country’s migration policy and more precisely to the level of labour shortages and demographic gaps⁶⁵. The compromise seemed very difficult to reach, a fact that was noticed by the literature⁶⁶. It is found that factors such as language knowledge as well as social and family bonds affect the return decision⁶⁷. The Commission proposal was offering two (but compulsory) ways of facilitating, either a multi-seasonal worker permit for up to three working seasons or a facilitated procedure for seasonal workers already accepted by a second Member State. This proposal was rejected under intense pressure from Member States that preferred to regulate themselves fully the potential of re-entry⁶⁸.

According to Article 16, the seasonal worker could apply for re-entry under an advantageous and less demanding procedure (the extent of procedural exemptions re-entry applicants enjoy is set by the Member States), if she/he had performed seasonal work in EU previously during the latter five years without problems. The re-entry possibility is chronically unrestricted, so

⁶⁴ Conny Rijken, *Legal Approaches to Combating the Exploitation of Third-Country National Seasonal Workers*, *The International Journal of Comparative Labour Law and Industrial Relations* 31, no. 4 (2015), pp. 431–452

⁶⁵ Cecilia Möller, Birgitta Ericsson and Kjell Overvag, *Seasonal Workers in Swedish and Norwegian Ski Resorts – Potential In-migrants?*, *Scandinavian Journal of Hospitality and Tourism*, Vol. 14, 2014, no. 4, pp. 385–402

⁶⁶ Piotr Plewa, *The Politics of Seasonal Labour Migration in Switzerland, France and Spain*, *International Migration*, vol. 51 (6) 2013, pp. 101-117

⁶⁷ Amelie F. Constant and Klaus F. Zimmermann, *The Dynamics of Repeat Migration: A Markov Chain Analysis*, *International Migration Review*, vol. 46 nr. 2 (Summer 2012), pp. 362–388

⁶⁸ Ágnes Tóttös, *ibid.*

the seasonal workforce could constantly come and go. However, no legal rights for standard migration are acquired by circular seasonal employees.

h) Results – Discussion

The efficiency of migration law instruments targeting specific categories of migrants could not be easily measured because of their recent entry into force. Data shows that national strategies still prevail and EU common migration policy is difficult to fully apply, despite the fragmented migration law approach, which would allegedly ensure greater flexibility and thus stronger harmonisation⁶⁹. Especially, the SWD is a newly introduced Directive and its results could not be yet exactly found.

Nevertheless, the ongoing implementation procedure has revealed negative prospects. As for summer 2017 and long after the expiration of transposition deadline has passed (late 2016) 18 EU Member States have transposed the SWD into national law⁷⁰. Most of them made this step during 2016 and 2017 while four of them (Belgium, Spain, Latvia, Sweden) refer to prior legislation as already covering SWD's minimum provisions. Nine countries have not yet transposed the directive. In most of them, considerations regarding the best way to apply the SWD minimum rules were long lasting. In the Netherlands, EU pressure against the government increased, however the SWD has yet to be included in legislative agenda. There is no doubt that the transposition challenge has brought a borderline failure result. There is no specific attempt to explain this outcome, but only the worries that had been expressed beforehand. We could surely give the reason of persistent priority given by the states to national control of migration matters.

Despite the semi-completed transposition procedure, the seasonal permits given under Member States that have already implemented the SWD follow a steady increase from 188,152 in 2014 and 333,362 in 2015 to 458,194 in 2016⁷¹. If we consider the fact that the total number of permits given for remunerated work reasons (including seasonal workers, researchers, Blue Card holders and other employees) was 834,205⁷², we actually find that half of the workers entering EU legally are seasonal workers. In fact seasonal employment has already been the first and foremost way of legal entry in EU Eastern European Member States, where demand

⁶⁹ Tommaso Colussi, *The Impact of the Implementation of Council Directives on Labour Migration Flows from Third Countries to EU Countries*, OECD Social, Employment and Migration Working Papers No. 181, 2016

⁷⁰ <http://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32014L0036>

⁷¹ Data extracted from Eurostat: <http://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do>

⁷² *Ibid.*

for high-skilled work is lower⁷³. Critics argue that number would be even bigger if there had been a legal method to legalise informal migrant workers under the SWD framework⁷⁴. So, we could speak also about a success in putting seasonal and circular migration up to be the dominant route of legal labour migration in EU.

The scope of the SWD is questionable. As it was mentioned during the preparatory procedure, restricting the scope only to residents of countries outside of the EU would not help in facing the irregular labour provided by TCNs already residing inside the EU. However, we should mention that this method (keeping the provisions in effect only for non-domestic residents) is common at TMPs. Despite the restricted scope, the SWD is applicable for hundreds of thousands of seasonal migrants.

The future of the SWD seems doubtful. It is true that the reception of the legal instrument of SWD was mixed, either characterised by a limited positive spirit^{75 76} or by mild⁷⁷ as well as fierce⁷⁸ criticism. No matter how flexible and compromising was the final text of the Directive, the conflicting strategies of the Member States proved to be hardly displaceable. However, the dynamic character of seasonal migration and its unquestionable advantages for Member States and employers may be the driver towards an implementation of the basic SWD guidelines, even if EU institutions should put extreme pressure or even initiate non-compliance procedures. Furthermore, the question of high possibility of precarious and poor conditions imposed on seasonal migrant workers remains vivid⁷⁹. Eitherway, lessons from TMPs functioning outside Europe are crucial given the fact that SWD drew from their record and experience⁸⁰.

⁷³ 80% of the legal Ukrainian migrants in Poland are seasonal workers: extracted from:

Elsbeth Guild, Sergio Carrera and Ngo Chun Luk, *The integration of immigrants and legal paths to mobility to the EU: Some surprising (and encouraging) facts*, CEPS Commentary, January 2017

⁷⁴ Lydia Medland, *Misconceiving 'Seasons' in Global Food Systems: The Case of the EU Seasonal Workers Directive*, International Colloquium on Global governance/politics, climate justice & agrarian/social justice: linkages and challenges, The Hague, 4-5 February 2016, Colloquium Paper No. 25

⁷⁵ Petra Herzfeld Olsson, *Before and after the EUs Seasonal Workers Directive: a Swedish perspective*, Presentation at Uppsala University, 22 June 2016

⁷⁶ Judy Fudge and Petra Herzfeld Olsson, *ibid.*

⁷⁷ Georg Menz, *Framing the matter differently: the political dynamics of European Union labour migration policymaking*, Cambridge Review of International Affairs, Vol. 28 (2015), No. 4, pp. 554–570

⁷⁸ AEDH Communication, *Employment of third country seasonal workers: a useless directive!*, Brussels, February 2014

⁷⁹ Joanna Goodey, *ibid.*

⁸⁰ Mariya Gromilova, *Can the EU Seasonal Workers' Directive Alleviate the Pending Crisis of Climate-Induced Displacement – Lessons from Oceania*, European Labour Law Journal, Volume 6 (2015), No. 4, pp. 292-320

Chapter III – The TFWP and the SAWP in Canada

a) *Temporary migration programs in Canada*

Canada is a country traditionally holding the role of migrant destination since the beginning of the twentieth century. Compelling labour shortages became apparent after the Second World War. Whereas in the '60s and '70s attracting permanent qualified migrant flows was in the center of interest, a turn towards temporary workforce took place in the '80s. This development is explained by a focus on a managed migration strategy, designed to admit low skilled workers as temporary residents and “non-citizens”, in order to save employment vacancies for the domestic workforce. Secondly, a shift of power and decisive role in favour of employers led to inflow of lower cost temporary workers⁸¹. The prioritisation of temporary migration resulted in an increase of temporary flows, which in the long run, and for the first time in 2008, exceeded the number of migration aiming to a permanent stay⁸². In the first years of the 21st century the demand for low-skilled work grew. As a result, the streams for low-qualified labour already existing at Canadian TMPs dominated the discussions and the policy questions.

Canadian economy has the longest story of employing temporary labour migration under centrally planned programs. The first program that belongs in this category was created in 1973 and was titled Non-Immigrant Employment Authorization Program (NIEAP). The term “non-immigrant” indicated that workers should leave Canada right after the completion of the authorisation period, reminding the European term “guest-worker”. The workers did not acquire re-entry rights or citizenship related interests, while their movement rights were severely restricted. The horticulture, agriculture (primarily the tomato industry), hospitality and healthcare sectors got engaged to migrant seasonal workforce mainly from Mexico and the Caribbean islands. Rural areas such as Ontario, Alberta and Nova Scotia are the main hosts of seasonal workers. Additionally, domestic workers from Asia and Africa are also included to temporary migration employment.

Non-permanent migrants have become an essential part of Canadian labour market. During the '90s a proliferation of temporary migrant related programs is well noticed and combined with a polarisation between schemes intending to attract high skilled workers and temporary low-

⁸¹ Kendra Strauss and Siobhán McGrath, *Temporary migration, precarious employment and unfree labour relations: Exploring the 'continuum of exploitation' in Canada's Temporary Foreign Worker Program*, Geoforum, vol. 78 (2017), pp. 199-208

⁸² In 2008 circa 400,000 people entered Canada for temporary reasons. On the other hand, circa 250,000 immigrants entered intending to reside permanently. Data extracted from S. Valiani, *The shifting landscape of contemporary Canadian immigration policy: the rise of temporary migration and employer-driven immigration*. In: Goldring, L., Landolt, P. (Eds.), *Producing and Negotiating Non-Citizenship: Precarious Legal Status in Canada*, University of Toronto Press, 2013, pp. 55–70.

skilled labour programs⁸³. In 2002, the NIEAP gave its place to a *complicated mosaic of programs*.

The *Temporary Foreign Workers Program (TFWP)* is the most important and the most general and inclusive state program in the temporary migration area, as it may be used by employers irrespective their sector, in large extent following elements of former NIEAP. The TFWP is jointly administered by Employment and Social Development Canada (ESDC) and Immigration, Refugees and Citizenship Canada (IRCC, formerly known as CIC). TFWP has two streams – one for high skilled and one for low skilled employees – which differ to an important extent. The program has always been employer-driven, as procedures are carried on employers' initiative. Employers in agriculture and construction sectors have been the main users of the program⁸⁴. Those interested in hiring temporary foreign workforce have to prove that their labour demand (in terms of number, qualifications and job descriptions) could not be covered by domestic employees. This certification step is concluded with a Labour Market Impact Assessment (LMIA) document, previously known as Labour Market Opinion (LMO), issued by the Human Resources and Skills Department of Canada. After 2006, Temporary Foreign Worker Units in major cities in each region, are dedicated to assisting employers in obtaining LMOs and employment authorizations. Right after a positive LMIA, employers could legally proceed to agree employment contracts with foreign workers. The rationale behind this step was that migrant population should only form a supplementary “emergency” pool. Employers must also demonstrate their scheduled plan to be less dependent on migrant work in the future⁸⁵. In 2014, the Canadian government, in a groundbreaking move, modified the TFWP and abolished the maximum limits of seasonal visas per working season.

The *Seasonal Agricultural Workers Program (SAWP)* is the oldest temporary migration program still in force in Canada. It is applied only at the agricultural sector and it is characterised by an innovative tripartite administration, where Canadian government, Canadian employers and origin countries governments fulfill distinctive roles. The program is circumscribed through bilateral Memoranda of Understanding (MOUs), stipulated as international treaties between Canada and countries of origin. The private sector intervenes through the Foreign Agricultural Resources Management Services (FARMS), a non-profit organisation operating mainly in Ontario. The first MOU was agreed with Jamaica in the '60s but the expansion of the program was achieved in 1973, when Mexico became a part of it. MOUs coordinate the number and the dispersion of migrant workers.

⁸³ Judy Fudge and Fiona MacPhail, *The Temporary Foreign Worker Program in Canada: Low-Skilled Workers as an extreme form of flexible labor*, Comparative Labour Law and Policy Journal, vol. 31 (2009-2010), pp. 5-46

⁸⁴ Judy Fudge and Fiona MacPhail, *ibid*.

⁸⁵ W. Zachary Marshall, *Seasonal Agricultural Workers in Canada: Understanding the Socio-Political Issues*, Western University Research Paper, August 2015

Other minor programs are the Live-in Caregiver Program (LCP) and the Project for Occupations Requiring Lower Levels of Formal Training (PORLLFT)⁸⁶. However, these programs are more restricted in practice. For this reason, we examine the TFWP and the SAWP in context. This two program are pioneer at a global level and have been used as examples for other seasonal work schemes.

b) Scope – Population

The workers who are interested in applying for low-skilled tracks have to be more than 18 years old and have to reside outside Canada. The majority of workers licensed under these two TMPs are male. Especially, the SAWP brings annually more than 20,000 workers from Mexico to Canada⁸⁷. The large numbers of workers moving through TFWP and SAWP is explained by the fact that, unlike to other TMPs, there is no maximum limit for seasonal permits per year.

c) Eligibility

Any worker willing to participate in the TFWP has to already come to an employment agreement with an employer, who has fulfilled the relevant administrative steps and has obtained a positive LMIA evaluation. A typical step is also maintaining an advertisement in a medium available across Canada. This mechanism intends to minimise the possibility of deteriorating the rights provided⁸⁸. Right after the positive evaluation from the authorities, he/she has to apply for a TFWP position at the Canadian authorities. The authorities have to evaluate that the TFWP candidate will respect the terms and conditions of the program and that he/she has not the intention to stay after the completion of the licensed period. For this reason, the return flight ticket is being asked as a proof⁸⁹. There is no maximum limit for the number of seasonal visas granted per year. Also activities on behalf of recruitment agencies are not excluded. The maximum duration of a TFWP visa is two years, after an employer-demanded modification held in 2010⁹⁰.

As for the SAWP, the process is more governmentally controlled. Firstly, the exact number of vacancies available is set at the MOUs, as well the seasonal time window. The competent authorities of the states of origin are given around 20 days to select the seasonal personnel. Following the selection, the Canadian Immigration office approves the files of the workers and

⁸⁶ Kristyn Stevens, *Canada's Temporary Immigration System*, Law Now, vol. 34 (2009-2010), pp. 27-29

⁸⁷ Leigh Binford, *From Fields of Power to Fields of Sweat: the dual process of constructing temporary migrant labour in Mexico and Canada*, Third World Quarterly, Vol. 30, No. 3, 2009, pp 503-517

⁸⁸ Immigration and Refugee Protection Regulations, SOR/2002-227, Par. 205 (c)

⁸⁹ Judy Fudge and Fiona MacPhail, *ibid.*

⁹⁰ Andrea Galvez Gonzalez, *Mexican migrant farm workers in Canada. The evolution of temporary worker programs*

issues the seasonal permits⁹¹. The duration of the program could vary from six weeks to eight months within a calendar year.

d) Rights Safeguarded

The employers must prove that they would pay the minimum “prevailing wage” to migrant workers before ensuring a positive LMIA. The minimum hourly wage is set by the authorities at a Province and Territory level. The table in force was published in April 2016 and shows great differences between high skilled and low skilled migrant workers⁹². There are also differences set according to migrant occupational category. The National Occupational Classification (NOC) applies to TFWP and SWAP with a full effect, however, the migrant population remains separately regulated according to the above mentioned points. Employers often complain for the unpredictability of the minimum wage rates⁹³. On the other hand, trade unions have noticed the fact that migrant pay rates are significantly lower than agreed collective agreement pay rates⁹⁴. In practice, the employment conditions of the migrant workers regarding payment are significantly lower than domestic workers.

The workers’ mobility is restricted, as the worker is not allowed to change employer without a written consent issued by the CIC. Family members of low-skilled workers are generally not encouraged to accompany them. This is not the same for high-skilled participants, who enjoy immediate entry rights for the members of their family⁹⁵. Another crucial disadvantage for low-skilled workers is the fact that they do not acquire any rights to apply for permanent stay, whereas high-skilled workers could start a relevant application through the Canadian Experience Class, which facilitates the shift from temporary to permanent status⁹⁶. In fact, temporary migrants are trapped in a “partial citizenship” regime, only having the right to enter during the seasonal working periods⁹⁷. Basok has described this as a phenomenon of post-citizenship that is regularly found at TMPs⁹⁸

⁹¹ The North-South Institute, *Migrant Workers on Canada: A review of the Canadian Seasonal Agricultural Workers Program*, Policy Brief, 2006

⁹² <https://www.cicnews.com/2016/04/updates-labour-market-impact-assessment-requirements-effect-month-047792.html>

⁹³ Judy Fudge and Fiona MacPhail, *ibid.*

⁹⁴ National Union of Public and Government Employees, *The Land of Denied Opportunity? A Review of Canada's Temporary Foreign Workers Program (2007)*, <http://www.nupge.ca/publications/globalization>

⁹⁵ Judy Fudge and Fiona MacPhail, *ibid.*

⁹⁶ <http://www.cic.gc.ca/english/immigrate/cec/apply-who.asp>

⁹⁷ Judy Fudge, *Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers*, *Comparative Labour Law and Policy Journal*, vol. 34 (2012-2013), pp. 95-132

⁹⁸ Tanya Basok, *Post-national Citizenship, Social Exclusion and Migrants Rights: Mexican Seasonal Workers in Canada*, *Citizenship Studies*, Vol. 8, No. 1, March, 2004, 47–64

e) *Circularity*

Around 80% of the SAWP and TFWP workers are re-hired every season⁹⁹. The fact that TFWP and SAWP workers do not acquire migration rights, combined with the fact that employers in agriculture need them every year, leads to an almost perfect circularity. However, despite the circularity of, more or less, the same workforce, the temporary workers find difficulties in integrating to Canadian society. The regulated exclusion from family unification, permanent accommodation, change of employers and training discourages discourse with local communities¹⁰⁰. Phenomena of racism and workers division according to nationality criteria have also been noticed¹⁰¹. Furthermore, social exclusion and lack of social support are evident¹⁰².

f) *Results and Discussion*

TFWP and SAWP have been criticised for introducing a regime of unfree labour. Restrictions on workers' ability to change employers as well as the large debts they incur in order to migrate have been underlined by literature¹⁰³. Arthurs argues that temporary migrants are the most vulnerable category of workers in Canada¹⁰⁴. The ties, which workers acquire with the employer side, pose the danger of establishing a principal-agent relationship. If a worker is dismissed he/she is obliged to return home immediately. This is particularly true regarding the Mexican workers, where the Mexican state has promised the Canadian authorities a "full deportability" possibility¹⁰⁵. This is accompanied in practice to low conditions of work and deprivation of labour standards enjoyment¹⁰⁶. Thus, the environment that is created is characterised by a regulated rather than an irregular inequality¹⁰⁷. It could be also noted that it was partially attempted to justify this exclusion by promoting the idea that migrant temporary workers are themselves ignorant of labour standards¹⁰⁸. That idea was based on the fact that misery and hard

⁹⁹ The North-South Institute, *ibid.*

¹⁰⁰ Alison Taylor & Jason Foster, *Migrant Workers and the Problem of Social Cohesion in Canada*, International Migration & Integration, vol. 16 (2015), pp. 153–172

¹⁰¹ Leigh Binford, *ibid.*

¹⁰² Mervyn Horgan and Sara Liinamaa, *Double Precarity: Experiences of Former Seasonal Agricultural Workers Who Settle in Rural Nova Scotia*, Atlantic Metropolis Centre's Working Paper, July 2012

¹⁰³ Kendra Strauss and Siobhán McGrath, *ibid.*

¹⁰⁴ Harry Arthurs, , *Fairness At Work: Labour Standards For The 21st Century*, Labour Standards Review 2006 <http://www.fls-ntf.gc.ca/en/fin-rpt-chp10.asp>.

¹⁰⁵ T. Basok, D. Belanger and E. Rivas, *Reproducing deportability: migrant agricultural workers in South-western Ontario*, Journal of Ethnic Migration Studies, vol. 40, no. 9 (2014), pp. 1394-1413

¹⁰⁶ J. Hanley, J. Oxman-Martinez, M. Lacroix. S. Gal, *The "Deserving" undocumented?: government and community response to human trafficking as a labour phenomenon*, Labour Capital Society, vol. 39, no. 2 (2006), pp. 78-103

¹⁰⁷ Bob Barnetson, *The Regulatory Exclusion of Agricultural Workers in Alberta*, Just Labour, vol. 14, Autumn 2009, pp. 50-74

¹⁰⁸ Adrian Smith, *Legal Consciousness and Resistance in Caribbean Seasonal Agricultural Workers*, Canadian Journal of Labour and Society, vol. 20 (2005), pp. 95-122

conditions at countries of origin has forced migrant workers to tolerate exploitation in order to keep a minimum standard of living¹⁰⁹.

In May 2007, the Alberta Federation of Labour established its own "Foreign Workers Advocate Office," the goal of which was to help protect the basic human and workplace rights. The government responded to public outcry by intensifying the border controls¹¹⁰ rather than safeguarding or establishing rights for temporary migrants. Criticism has created abolitionist voices calling for ending the TMPs, especially the SAWP. Nevertheless, the mainstream intention is more towards modifying the program and cutting the coercive elements it contains¹¹¹. The last official question against the TFWP was the report on behalf of the Canadian Council of Refugees, condemning poor labour and life standards of temporary employees¹¹²

On the other hand, studies have shown that the two prominent Canadian programs have contributed to some extent to regional growth as well as to growth of countries of origin through remittances¹¹³. The latter element is very important for local economies in Mexico as it is found by recent studies¹¹⁴. This is explained by Preibisch referring to flexibility arrangements that are usual at temporary worker contracts, which would not be possible with the domestic workforce¹¹⁵. He underlines, that employers at TFWP and SAWP have the luxury to pick up employees from a "reserve army of labour" in an extremely liberalised mode.

¹⁰⁹ Leigh Binford, *ibid*.

¹¹⁰ At the Vancouver Airport in June 2008, 80 Mexican workers were denied access to the territory, because their employers were found non-compliant to TFWP rules, *Mexicans Denied Entry at Vancouver Airport, Returned Home*, CBC NEWS, June 25, 2008, at: <http://www.cbc.ca/canada/british-columbia/story/2008/06/24/bc-migrants-tumed-back.htm>].

¹¹¹ Stephanie J. Silverman and Amrita Hari, *Troubling the Fields: Choice, Consent, and Coercion of Canada's Seasonal Agricultural Workers*, *International Migration* Vol. 54 (5) 2016, pp. 91-104

¹¹² Submission by the Canadian Council of Refugees to the Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities, May 2016

¹¹³ Tanya Basok, *Migration of Mexican Seasonal Farm Workers to Canada and Development: Obstacles to Productive Investment*, *The International Migration Review*, Vol. 34, No. 1 (Spring, 2000), pp. 79-97

¹¹⁴ Lidia Carvajal Gutierrez and Thomas G. Johnson, *The impact of remittances from Canada's seasonal workers programme on Mexican farms*, *International Labour Review*, Vol. 155 (2016), No. 2, pp. 297-314

¹¹⁵ Kerry Preibisch, *Pick-Your-Own Labor: Migrant Workers and Flexibility in Canadian Agriculture*, *The International Migration Review*, Vol. 44, No. 2 (Summer 2010), pp. 404-44

Chapter IV – The RSE in New Zealand

a) *Temporary labour migration in New Zealand*

New Zealand is another example of a national economy having emerged through migrant work and integration of migrant population in the 19th and the 20th century. The advantage of easy control over the entrances to the country and the advanced administrative infrastructure have been key factors of the social policy option on migration in New Zealand. Starting from the '60s, the migration flows coming from neighbouring Pacific island states gained a central role in New Zealand's economy¹¹⁶. Concerns about labour shortages at New Zealand's agricultural sector (the most dynamic parts of which are horticulture and viticulture sectors) combined with lack of workplaces for increasing youth workers in Pacific islands set the pace for the creation of migration flows towards Australia and New Zealand. New Zealand got involved into designating temporary migration schemes. The most prominent scheme is the latest one, the Registered Seasonal Employer (RSE) framework, which is generally deemed as successful.

The collaborative spirit among states participating in the Pacific Islands Forum (PIF) made it a good forum for discussing and launching a TMP that could enjoy broad acceptance¹¹⁷. In late 2005, the Ministry of Social Development identified certain regions in need of labour and measured the need up to 4,000-5,000 workers¹¹⁸, a number that was later officially standardised by the RSE. Horticulture and viticulture industries were finding persistent difficulties in recruiting the workers they needed. In the rural area of Central Otago at the South Island, the main region of horticulture and viticulture activities, the employers experienced significant worker need during the harvest periods. The use of informal and undocumented work led to considerations about incorporating the undocumented workforce into a scheme offering legal entry but outside the mainstream migration procedure. A pilot program was launched for a brief period in 2005, which was concluded with success¹¹⁹.

Canadian migration policy strongly influenced the New Zealand's migrant labour policies¹²⁰. The Canadian TFWP and SAWP were used as examples, especially their choice to utilise bilateral agreements (MOUs in Canada) to function as base for the program. The RSE scheme was announced in 2006 and was firstly implemented in the 2007 harvest period. It facilitated

¹¹⁶ Joris de Bres and R. J. Campbell, *Temporary Labour Migration between Tonga and New Zealand*, *International Labour Review*, Vol. 112, No. 6, December 1975, pp. 445-457

¹¹⁷ Joris de Bres and R. J. Campbell, *ibid.*

¹¹⁸ Paul Roth, *Migrant Labor in New Zealand*, *Comparative Labour Law & Policy Journal*, vol. 31 (2009-2010), pp. 67-90

¹¹⁹ Paul Roth, *ibid.*

¹²⁰ Dennis Graham Rockell, *Pacific Island Labour Programs in New Zealand: an aid to Pacific Island Development?*, DPhil Dissertation, Massey University, 2015

the documented entrance of 5,000 workers from 9 Pacific Island states (mainly from Kiribati, Tonga and Tuvalu). This number was not set in stone, as it was increased in the following years. The Government expanded the numerical limit of workers. In 2008, enthusiasm generated by the first year of application led the government to issue 8,000 visas but the economic crisis somehow moderated the labour mobility during the next years. In 2013 the total number is calculated in around 5,500 workers¹²¹. This drop gave its place again to an increase and expansion of the RSE program. In 2016, the visas issues were more than 7,800¹²².

The influence from the Canadian programs are obvious. As we said, bilaterally organised migrant movement was seen as the successful part of the Canadian programs, so the RSE program is organised through agreements between New Zealand and the Pacific states of origin. Apart from that, the RSE program is an employer-driven program that uses temporary migrants as “emergency workforce” only after assuring that the gap could not be filled with domestic workers.

However, the RSE introduced a more detailed employer license procedure, which is thought to have contributed to lowest labour law and human rights abuses compared to the Canadian experience¹²³. Employers willing to participate should follow a long, costly and bureaucratic procedure, under which their compliance with labour standards is evaluated, as well as renew their RSE status every two years. After ensuring the RSE status, employers should apply for an Agreement to Recruit (ATR), an administrative document allocating the number of migrant workers each employer could hire. In order to obtain the ATR document, which is the key to proceed to employment contracts, any employer must prove that she/he could not satisfy the labour need with New Zealander workers. Finally significant administrative fees are applicable. The preliminary procedure and the attached costs initially discouraged small growers and semi-sized employers from participating. Furthermore, the limited number of workers that could enter the country through the RSE framework objectively restricts the applicability of the program. Despite the latter, RSE program enjoyed mass acceptance and appraisal.

b) Scope – Population

The original RSE motivation is to hire employees from the Pacific region. Thus, priority is given to the 9 Pacific countries and only if there are still vacancies available after recruiting

¹²¹ <http://www.dol.govt.nz/initiatives/strategy/rse/information.asp>

¹²² data from Ministry of Innovation, Business and Employment [MIBE]

¹²³ Paul Roth, *ibid.*

Pacific workers, an RSE employer can turn to other nationalities from overseas¹²⁴. This is a result of a general growing emphasis in regional migration and development¹²⁵.

The number of workers that are permitted under the RSE scheme every working season is set annually and it is around 5,000-6,000 workers. The number is then allocated and shared to regions and employers according to labour shortages and availability of domestic workforce.

c) Eligibility – Duration

Nationals from the 9 states, who reside outside New Zealand are eligible to apply for an RSE job. Basic requirements are the minimum 18 years old age and decent health condition. The local governments and communities are actively involved in the procedure of selection of workers. This has been seen as very successful and helpful in the struggle against undocumented work¹²⁶. Hence, reports of abusive phenomena caused by labour agencies activated in countries of origin still show the limits of local communities' contribution¹²⁷. The duration of the RSE visa given to the workers is of maximum seven months, with the exception of Kiribati and Tuvalu nationals who can obtain up to a nine-month RSE visa. After the expiration of the visa, RSE workers have to leave the territory of New Zealand without any right to appeal or apply for permanent residency.

d) Rights Safeguarded

Firstly, employers have to pay half of the worker travel costs, which is also a mechanism to prevent employers from hiring workers from countries farer than the Pacific Islands. Regarding payment for work, the RSE provides for a payment of wage corresponding to minimum 30 hours per week, according to New Zealand minimum wage, which it is regionally set. This means that employers have to pay the RSE workers for 30 hours weekly, even there is no job available for them. Even if this fact constitutes a risk for employers, it guarantees a minimum income for migrant workers. Piece rate payment is the dominant way of defining the exact wage, an employer policy which is usual in agriculture¹²⁸. Another progressive point of the RSE program is that employers are liable for healthcare costs. Furthermore, accommodation and local transport should be also be provided by the employer.

¹²⁴ Graeme Hugo, *Best Practice in Temporary Labour Migration for Development: A Perspective from Asia and the Pacific*, International Migration, vol. 47 (5) 2009, pp. 23-74

¹²⁵ Charlotte Elisabeth Bedford, *Picking Winners? New Zealand's Recognised Seasonal Employers Policy and its Impacts on Employers, Pacific workers and their Island-based communities*, DPhil Dissertation, Discipline of Geography, Environment, Population, University of Adelaide

¹²⁶ J. Gibson, *Preliminary findings from World Bank/ University of Waikato surveys in Vanuatu and Tonga*, presentation to Conference on Pathways, Circuits and Crossroads: New Research on Population, Migration and Community Dynamics, Wellington, 9-11 June 2008

¹²⁷ Paul Roth, *ibid.*

¹²⁸ Rockell, *ibid.*, page 239

However, and despite the unique positive points of the RSE scheme, temporary migrant workers may under no circumstances acquire residency or citizenship rights. Family unification rights are also not attachable. RSE scheme does not contain multiple streams and does not diversify the workers according to their skills, as other TMPs do. Nevertheless, RSE workers have significantly less rights than workers applying for standard migration procedures.

e) Circularity

The RSE employers are encouraged to establish long-term relationships with RSE workers and they prefer recruiting the same workers every year. An innovative element of the RSE program is that it provides for training development either in the countries of origin or in New Zealand¹²⁹. It is difficult to measure circularity due to the small history of the program. However, already data shows that it is clearly achieved to a significant extent¹³⁰. Ramasamy et al. state that circulation is the first thing asked for the program to be regarded as fruitful¹³¹. De Bres and Campbell add that RSE workers have already been promoted at workplace executive positions in some occasions¹³², after consecutive years of service. The fact that circularity is combined to a very low overstay rate is also exceptional¹³³.

f) Results and Discussion

The RSE experience offers some groundbreaking examples of stipulating a TMP. From the almost ten years of its application. Its collaborative approach is appraised as responding well to the specific conditions of the Pacific region. It should be noted that migration in the Pacific is of a distinct character, as it has to face unique challenges, such as the labour mobility newly generated by the climate change¹³⁴. Pacific's distinctive character of culture, and, as a result, of labour sociology explains also the strong attention that is given to workers' pastoral care¹³⁵.

In fact, RSE has brought forward certain ways to overcome worker exploitation such as the obligation to pay wages irrespective the availability of work and the emphasis put on training programs. By doing that it upgraded the productivity levels, as in 2014, RSE workers were

¹²⁹ Graeme Hugo, *ibid.*

¹³⁰ Rockell, *ibid.*, page 255

¹³¹ S. Ramasamy, V. Krishnan, R. Bedford and C. Bedford, *The Recognised Seasonal Employer policy: seeking the elusive triple wins for development through international migration*, Pacific Economic Bulletin vol. 23, no. 3 (2008), pp.171-186

¹³² Joris de Bres and R. J. Campbell, *ibid.*

¹³³ John Gibson and David McKenzie, *Development through Seasonal Worker Programs: The Case of New Zealand's RSE Program*, Forthcoming in Robert E.B Lucas (edited) *International Handbook on Migration and Economic Development*

¹³⁴ Eberhard Weber, *Trade agreements, labour mobility and climate change in the Pacific Islands*, Regulation and Environmental Change, vol. 17 (2017), pp. 1089–1101

¹³⁵ Yvonne Underhill-Sem and Evelyn Marsters, *Labour Mobility in the Pacific: A Systematic Literature Review of Development Impacts*, New Zealand Institute of Pacific Research, January 2017

measured as more productive than other agriculture employees¹³⁶. The RSE has also contributed to local Pacific economies according to scarcely available data¹³⁷. The World Bank in a process to understand RSE's success started a three-year study, which concluded in 2010 that all households of families engaged to the program gained a 35-40% income increase¹³⁸. Scholars agree that the environment RSE has created is non-exploitative¹³⁹. In the case of Tonga, it was found that the poorer families were the most benefited from the RSE program¹⁴⁰. A New Zealand governmental evaluation in 2010 also produced the same positive results¹⁴¹. So, we could safely mention that RSE constitutes an example of a “triple-win” effect. Personal empowerment, work experience, community leadership and local business development are referred as highlights for RSE workers¹⁴².

In spite of the above, workers' rights are once again not fully safeguarded. Non-existence of family rights as well as exclusion from residency rights, notwithstanding the labour mobility restrictions, are, also here, present. Barker notices that the proliferation of programs, such as the RSE, that form a “permanent resident in waiting” population poses a future risk¹⁴³. Danger of abusive behaviour on behalf of labour agencies at countries of origin is also noticed¹⁴⁴. Lack of procedural rights is another one weak part of the program. Rockell underlines that government officials were not in a position to answer on how migrants could legally ask for remedies in case of employer non-compliance¹⁴⁵. Also in New Zealand, the fact that workers are closely tied to the employer forms a base for potential exploitation.

g) *The RSE's travel to Australia*

This thesis does not examine Australian seasonal employment as extensively as in Canada and New Zealand. However, it is of great interest to see in which way the New Zealand RSE program was gradually adopted by Australia, through a designation of a very similar seasonal employment program¹⁴⁶. This would help our study as an example of inter-state policy

¹³⁶ C. Bedford, *New Zealand's Recognised Seasonal Employer Work Policy: Is it Delivering 'Wins' to Employers, Workers and Island Communities?*, In *Talanoa: Building A Pacific Research Culture*, edited by P. Fairbairn-Dunlop, and E. Coxon, 78–89. Auckland: Dunmore Press, 2014

¹³⁷ Charlotte Elisabeth Bedford, *ibid.*

¹³⁸ Rockell, *ibid.*, page 37

¹³⁹ Fiona Barker, *Maximizing the migration policy buck: Uniting temporary labor, development and foreign policy goals in New Zealand*, Policy and Society, vol. 29 (2010), pp. 321–331

¹⁴⁰ John Gibson, David McKenzie, and Halahingano Rohorua, *How pro-poor is the selection of seasonal migrant workers from Tonga under New Zealand's Recognised Seasonal Employer program?*, Pacific Economic Bulletin, Vol. 23 No. 3 (2008), pp. 187-204

¹⁴¹ M. Roorda and H. Nunns, *Final Evaluation of the Registered Seasonal Employer Policy (2007-2009)*, Government public report

¹⁴² Yvonne Underhill-Sem and Evelyn Marsters, *ibid.*

¹⁴³ Fiona Barker, *ibid.*

¹⁴⁴ M. Roorda and H. Nunns, *ibid.*

¹⁴⁵ Rockell, *ibid.*, page 231

¹⁴⁶ Yvonne Underhill-Sem and Evelyn Marsters, *ibid.*

interaction in the field of labour migration. According to this example we could draw thoughts on how TMPs outside Europe may affect the future of the SWD.

The Australian government was closely monitoring the RSE project from the beginning of its function¹⁴⁷. Australian literature called for the adaptation of an analogous system¹⁴⁸. The stratification and collaboration of multiple stakeholders (employers, governments of countries of origin, local communities, social partners) were the key element Australian policymakers tried to incorporate from the RSE model¹⁴⁹. Until then, the Australian labour migration policy was only centrally administered and the issue of seasonal visas (called “457 visas”) was not regulated by a separate ad hoc scheme. The Pilot Seasonal Worker Pilot Scheme (PSWPS – 2009-2011) functioned as transitional step to the Seasonal Workers Program (SWP). Scholars connect the change of policy regarding temporary migration to political change in Australia after the Labour Party controlled government was formed in 2007¹⁵⁰

The SWP Australian agricultural industry admired a quick and effective way to cover labour-intensive vacancies with migrant “emergency workforce”¹⁵¹. However, the results are not yet the same as in New Zealand in terms of workers productivity and skills acquisition due to lack of national monitoring and organisation¹⁵². Monitoring compliance was proved to be more difficult, even though the administrative check for labour standards compliance takes place before the issue of visas¹⁵³. Even the gains for local communities and economy at countries of origin were found smaller than New Zealand, even though not under valuable, and certainly hopeful¹⁵⁴. Differences in context and infrastructure may have caused this divergence in practice.

¹⁴⁷ Nic Maclellan, *Workers for All Seasons? Issues from New Zealand's Recognised Seasonal Employer (RSE) program*, Institute for Social Research Swinburne University of Technology Hawthorn, Australia, May 2008

¹⁴⁸ Peter Mares and Nic Maclellan, *Pacific Seasonal Workers for Australian Horticulture: A Neat Fit?*, Research Note, Asian and Pacific Migration Journal, Vol. 16, No. 2, 2007, pp. 271-288

¹⁴⁹ Richard Bedford, Charlotte Bedford, Janet Wall and Margaret Young, *Managed Temporary Labour Migration of Pacific Islanders to Australia and New Zealand in the Early Twenty-first Century*, Australian Geographer, Vol. 48 (2017), No. 1, pp. 37–57

¹⁵⁰ Derek McDougall, *Australia's engagement with its 'near abroad': a change of direction under the Labor government, 2007–10?*, Commonwealth & Comparative Politics, vol. 49:3 (2011), pp. 318-341

¹⁵¹ Susan Jenkin, *Benefits of the Seasonal Worker Program: an employer's perspective*, Devpolicy Blog from the Development Policy Centre, March 2015

¹⁵² J. Doyle and S. Howes, *Australia's Seasonal Worker Program: Demand-Side Constraints and Suggested Reforms*, 2015, <https://openknowledge.worldbank.org/bitstream/handle/10986/21491/943680WP0Box380nd0Suggested0Reforms.pdf?sequence=1&isAllowed=y>

¹⁵³ Therese MacDermott and Brian Opeskin, *Regulating Pacific Seasonal Labour in Australia*, Pacific Affairs, Vol. 83, No. 2 (June 2010), pp. 283-305

¹⁵⁴ John Gibson and David McKenzie, *Australia's PSWPS: Development impacts in the first two years*, Asia Pacific Viewpoint, Vol. 52, No. 3, December 2011, pp. 361-370

Chapter V – Common Principles and Innovations

In Chapter 2, we monitored the choices SWD has made in the basic policy questions regarding seasonal migration. In Chapters 3 and 4 we presented the most cited and researched TMPs outside Europe. In this Chapter, we examine what the SWD has learned from these two TMPs and at which points the SWD has gone further. We follow our basic reference to the four policy areas as they are stated at the Introduction Chapter.

It has to be noted that SWD did not more than putting broad limits to Member State policy regarding the most sensitive and debated questions of seasonal migration, such as the sectoral scope of the Directive and the duration of seasonal work visas. Admissions limit per year was totally left to national jurisdiction to decide. Of course, migration hosting countries outside Europe did not have to face a complex negotiation and compromising stage before composing the TMPs. New research on how Member States incorporated and specified the SWD guidelines at a national level is definitely needed.

a) Scope and Population

SWD follows the same path by applying the seasonal migration schemes to migrants residing *outside the host territory* and by excluding migrants having already passed the borders. This choice is made to avoid legitimisation of undocumented work, which is usual at seasonal intensive sectors. The scope is also similar as the SWD intends to attract young and low-skilled workers preferably without family ties. SWD also adopts the admissions annual limit policy but it leaves to Member States the decision to specify the limit number.

The first point leads us to the second common policy, the “*nationals first*” policy, which is present at all TMPs as well as in the SWD. Employers have to exhaust all the possibilities of hiring local workforce (EU workforce) in the case of the SWD before contracting migrant workers. The “*nationals first*” policy could not be fully implemented in the case of industries hiring personnel for seasonal intensive workload. Domestic workers are not interested or are not adequate to cover these vacancies. This problem has forced host countries to adapt the prioritisation of employability of national workers to new circumstances.

On the other side, SWD did not implicate governments of countries nor local communities of origin in the same way as the SAWP in Canada and the RSE in New Zealand did. Member States remain eligible for concluding bilateral treaties related to labour migration and, generally, diplomatic relationship and collaboration with sending states was left to be regulated at a national level.

b) Eligibility

SWD's choice of the exact duration of the seasonal work permit is not specified at a European level but only its extreme limits are set (5-9 months). The duration is similar in New Zealand but it is extraordinary in Canada's SAWP, as it can last up to two years.

The SWD introduced, on the other hand, some innovative policy approaches. Traditional TMPs are employer-driven and provide for a procedure initiated and carried away by employers. The SWD did not follow that direction. *The seasonal migrants have the primary obligation to apply* for a seasonal work permit after finding an employer willing to recruit them. The employee candidates are the starters of the procedure and the responsible for the successful issue of a seasonal visa. This approach somehow lessens the paternalistic traditional TMP approach.

A second interesting differentiation has to do with the compliance check and the implementation of labour standards. At the TFWP and the RSE programs, employers have to gain and maintain program membership by proving, among others, the safeguarding of provided labour standards. Thus the control is ex-ante. The SWD opted for a *mostly ex-post control*, as employers are monitored after the entry of seasonal workers.

c) Rights Safeguarded

SWD adopted the strictness in excluding seasonal migrant workers from permanent citizenship rights and equal treatment. Despite the fact that TMPs declared aim is to ensure perfect circulation of the seasonal workforce, the seasonal visa holders do not gain any right to apply for permanent stay, irrespective the consecutive years of service and legal entry. SWD only ensures a faster procedural process for seasonal workers previously worked in the EU. The family unification rights are also severely restricted. We could refer to the problem of "*denizenship*", namely the poor legal status migrants have in the EU, but this problem goes even further for seasonal workers. This policy is explained if we consider the recent conservative and protectionist turn of global capitalist states (USA, UK). New migrant residents should be avoided, according to the current policy trend. For that reason we witness a *formation of a poorly protected and precarious migrant category*, whose inequality is not only maintained but also promoted by the seasonal work schemes. The inequality generated is multilevel. Seasonal workers have inferior legal status not only compared to nationals but also compared

to high-skilled migrants. The workers' rights are seen as administrative burden reminding Max Frisch's famous quote: "We asked for workers. We got people instead"¹⁵⁵.

Another phenomenon, which could be seen as interfering with the other points, is the *legal and practical ties seasonal workers are bound* with the employer side. In fact the workers are absolutely dependent, while any turbulence of the employment relationship could possibly lead to an obligation to immediately return. Labour mobility is not safeguarded. The traditional legal doctrine accepts that the employer side is superior in an employment relationship and that this is the ratio of labour law protection. Keeping this in mind, we could safely suggest that in case of seasonal migrants ad hoc protective measures are needed, that would correspond to their special situation.

However, the most progressive innovation is the intersection of migration law rights and labour law rights under a clear table of seasonal work rights. Traditional TMPs translate labour standards more as employer social obligations and not as personal, non-deprivable rights. An extended "bill of rights" is provided for the first time t Articles 22-24 of the Directive.

d) Circularity

An additional common point could be detected in the strategic element of circularity. Circularity is accomplished through restricted duration of the seasonal visas and sometimes through training programs. SWD follows TMPs objective of migrant worker circulation. Circulative workforce saves from recruitment searching and creates an interest alignment. However, the migrant temporary workforce finds difficulties regarding communication with local population and social cohesion. In Canada, where temporary workers are an integral part of the agricultural economy for more than 40 years, only little progress has been made in this field. Nevertheless, circulation is the key factor of the "triple win effect", which is not restricted to high-skilled workers as studies presented cited show. Circulation helps in reaching long-term increase of migrant household gross income, as countries of origin cannot guarantee the wages offered by host countries.

¹⁵⁵ <http://www.goodreads.com/quotes/31843-we-asked-for-workers-we-got-people-instead>

Recommendations and Conclusions

Having learned from TMPs best practices outside Europe and having conducted the literature research, we could proceed to certain policy recommendations for the future of the SWD. Our recommendations are the following:

a) Ex ante employer control and program membership

RSE experience in New Zealand showed that comprehensive prior to recruitment employer control restricted labour law violations. This has been accomplished through an RSE membership status, renewable every two years. Ex post control is also very important and should not be underestimated or ignored. However, employers could escape measure enforceability and sanctions more easily when they already control the migrant workforce. Even worse, they could intimidate migrants in order to avoid denouncement and remedies. Ex ante control offers preventive ways to monitor employer activity and labour standard compliance.

Program membership for employers in Europe would, additionally, enable a long-term planning and could under circumstances be coordinated at a European level. In the close future the European institutions and the CJEU will evaluate Member States' options in implementing the SWD and will try to impose harmonised policies. The specification of sectors deemed seasonal will be processed and finalised. According to the writer's opinion this harmonisation would be benefited by the introduction of a SWD employer membership system.

b) Involvement of local communities at countries of origin

“Triple-win” objective is well remarked in the SWD, however, the ways local communities would participate in seasonal employment procedures are not indicated. SAWP and RSE programs have utilised local communities' influence, which is an option that is found as very effective. Migrant workers, in essence, represent their communities at host countries since they do not migrate with the intention to integrate to host countries' social and cultural environment. Migrant's remittances and working experience should return to homeland together with them. Involvement of local communities in the selection of emigrants and the following preparation procedure for their movement is vital for maintaining social cohesion and for the workers themselves.

c) Right-centered approach and procedural rights

What is also very crucial to recommend is the designation of seasonal employment schemes under a “rights-based” approach rather than a host country “interest-approach”. We understand that this proposition challenges the very reason the seasonal flows were initially created for, but it is the only way to avoid modern slavery danger and worker exploitation. We also realise that European migration policy has chosen a very different path after the refugee crisis in 2015-2016 and the terrorist attacks in Western Europe. The SWD, nevertheless, laid down a decent directory of labour law and migration law related rights. The challenge in the next years is to enforce at least this catalogue of rights.

Procedural rights are the way to better ensure compliance and worker protection. SWD provides for basic procedural rights, mainly information and access to documentation rights, at Article 18. The procedural rights safeguarded by the SWD refer to the visa and work permit application procedure. Additional procedural rights that would ensure judicial protection and protection from employer abuse should be included. Seasonal workers must have the right to ask for labour inspectorate control in an anonymous fashion and without risking being fired.

d) Abolition of unequal treatment

As we found in this thesis, seasonal migrants face a manifold unequal treatment against domestic workers as well as against standard migrant workers or refugees. In writer’s opinion, the fact that all TMPs and the SWD do not exclude unequal treatment only harms workers’ rights, either domestic or migrants. Payment inequality only on the basis of the status of the stay (permanent or temporary), that is evident at TMPs outside Europe, could not be justified. Social security rights should also be ensured according to the rule of *pro rata temporis*.

The latter particularly noticeable regarding acquisition of permanent residency rights. It is socially and economically unfair for workers constantly coming and going not to have access to permanent residency after consecutive years of seasonal work. It is also understandable that seasonal workers may have family ties that would not want to disrupt during their stay at host country. Humanitarian reasons and respect of the family should lead host countries to accept family unification during the working seasons.

e) Measures to mix seasonal workers with the domestic workforce

Circularity is a goal that is achieved by host countries in a significant extent. On the other hand, reports of racism and lack of social cohesion have shown that, despite circularity, temporary migrants could not mix with the local society at host states. Training programs at host countries,

such as those initiated in New Zealand, would help in acquiring experience and inter-cultural adaptability. Seasonal workers should not be separated from other workers at workplaces. Employers should promote seasonal workers at executive positions. The example of Kiribati workers as executive officials is already successful.

f) Trade union involvement and stratification

A last point, which is usually underestimated, is the trade union responses to seasonal worker flows and the challenge of incorporating this category. The social stratification of workers towards acknowledgement of rights for seasonal workers is not a simple process. This thesis does not touch the subject of how trade unions could contribute to shield seasonal worker rights. Notwithstanding the research needed in this field, we could just notice that an inclusive approach and an open trade union structure, which could embrace seasonal workers as possible members, is of great importance.

g) Conclusions

Finally, we could give certain answers to our Research Questions based on the above analysis.

R.Q. 1: Temporary and seasonal migration represent a trend in migration policy. Which new problems and questions are brought before us by non-permanent migration?

Non-permanent migration is a global trend and social policy at the moment wishes to promote it up to the first form of migration. Already at many countries temporary migration is the foremost mode of accepting legal immigrants. Among the various forms of non-permanent migration, seasonal low-skilled work is the most dynamic and populous stream. The seasonal migrant flows offer the way of simultaneously satisfying labour needs and avoiding migrant integration. Migration policy on seasonal work has been consolidated into Temporary Migration Programs (TMPs) across the globe. Recently, the EU Seasonal Workers Directive (SWD) was the first paradigm of inter-state harmonisation in this field. All regulations on seasonal work are closely attached to the aim of circularity, which is seen as the best option to establish a stable and reliable workforce for all seasons.

The thesis identifies *four main areas of policy options* regarding seasonal work. These are the questions regarding the scope of a potential TMP, the eligibility criteria, the level of rights safeguarded for TMP worker participants and the facilitation of re-entry and circularity. Combined to these four areas of policy options, we could also identify other problems, such as the legal definition of seasonal employment, its distinctive characteristics and the different types and forms that it could acquire.

R.Q. 2: How did SWD respond to social policy dilemmas posed by seasonal migration?

We find that SWD followed the most characteristic options of the TMPs outside Europe in all four fields, although it also introduced some new policy solutions. The European legislator failed to overcome the inequality and inferiority seasonal workers suffer throughout the globe. On the other hand it did produce a clear and promising table of rights. The real challenge is still ahead, as migration policy is the most debated and tempered European subject of the time. The transposition period has already shown the problems of implementing the SWD.

R.Q. 3: How had most prominent TMPs outside Europe responded to the same dilemmas?

The most cited and discussed TMPs outside Europe, namely the TFWP and SAWP in Canada and the RSE in New Zealand, were an inspiration for national TMPs in Europe prior to the SWD, but they have also functioned as a paradigm for the SWD. They introduce employer-driven procedures, however the use of bilateral instruments with countries of origin have produced positive results. These programs do not avoid inequality and have been criticised, mostly the TFWP, for creating a poorly protected worker mass. They also lack of an extended table of migration law and labour law rights. Even under these circumstances, they have contributed to labour mobility and a respective improvement of the workers' standard of living.

R.Q. 4: Which are the common practices between SWD and the TMPs examined and which are the differences? Could we identify good practices?

Finally, we came into recognising six propositions for future regulation on seasonal work. These recommendations have popped out of the experience of the two most prominent TMPs, the New Zealand RSE and the Canadian TFWP and SAWP. These three programs are widely regarded as the most successful, despite criticism regarding poor labour standards and modern slavery cases mostly in Canada. The three programs examined are tools of regional and inter-state development and cooperation through labour mobility.

The need of further research on seasonal migration and the designation of TMPs is evident. High mobility and freedom of international hiring has diminished all barriers. Employers in agricultural sector and other seasonal entrepreneurs are growingly depend on seasonal migrants. The fact that this kind of workforce has less rights and is exposed to vulnerability make new legal instruments in this field necessary. The employer's superiority and possibility of establishing exploitative ties should be legally faced, as the power gap between employers and seasonal workers is enormous. It could be also added that trade unions should work towards an inclusive approach too.

Another issue is the question of social cohesion at agricultural areas constantly depending on workers, who are not even citizens nor local residents. Social policy measures to enhance the rights and social participation of circular workers may prevent social unrest and racism.

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