

Reasoned opinion

The EU Committee of the Federal Council discussed the Commission proposal **COM (2010) 379 final** 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 in a public session on 5 October 2010 and comes to the following conclusion:

A. Opinion

The proposal is not compatible with the principle of subsidiarity.

B. Reasons

1. The European Commission presented its proposal for a Directive on 13 July 2010. Its aim is to standardise the procedure for admitting seasonal workers and to define minimum standards that must be met when employing such workers so as to prevent exploitation, drifting into illegality, social dumping and distortions of competition.
2. In its discussion of subsidiarity, the Commission presents four reasons why the Member States cannot adequately achieve these welcome aims. However, none of these reasons make the proposal compatible with the subsidiarity principle.
3. The Commission states initially that the decision of a Member State regarding seasonal workers from third countries could cause distortions of migratory flows throughout Europe. This may be countered by pointing out that according to article 79 paragraph 5 of the Treaty on the functioning of the European Union the Member States themselves are responsible for determining the volumes of admission of third-country nationals. The admission procedure is not therefore a transborder problem that can be solved only by harmonising measures at the European level.
4. The Commission further states that the Schengen area requires such rules. However, the existence of the Schengen area alone does not in any way

overextend the Member States. Otherwise this argument is identical with the one regarding distortion of migratory flows.

5. The Commission claims that there is a need to define uniform minimum standards at the European level to protect against social dumping. Although protection against social dumping is an important aim that should be given increased attention in all European Union measures, in this specific case there is once again no transborder problem. Every Member States may at its own discretion grant seasonal workers the same rights as their own nationals. Austria has done this and thus prevented the exploitation of seasonal workers through wage and social dumping. Moreover, the minimum rights for seasonal workers suggested in the proposal are so low that the possibility of exploitation through wage and social dumping remains. This is also to be seen in the context of the provision on the use of collective agreements (argument: “generally binding”) which, in the light of the judicature of the European Court of Justice, is extremely unclear and unsatisfactory. It must therefore be ensured that collective agreements in Member States – even if they are not legal and administrative instruments in the European sense – are applicable to seasonal workers and the admission procedure. Only in this way can the full equality of seasonal workers with national workers continue to be guaranteed. For that reason, the proposal is not conducive to the achievement of this aim.

6. Finally, the Commission states that uniform rules would facilitate cooperation with non-EU states. This is not an adequate argument for compatibility with the subsidiarity principle. Moreover, the desired effect is clearly disproportionate to the negative effects.

7. In this context, the Committee points out that in its statement on the Stockholm Programme the National Council already clearly rejected the concept of circular migration on which the present proposal is based. The European Commission is urged to take greater account of the experience in the application of this concept and the results of the relevant studies.

8. It is not possible to discuss the proposed Directive in detail as part of the subsidiarity consideration, but it is nevertheless pointed out that the proposal does not conform to current practice in various ways (e.g. different (framework) deadlines); it is costly to administer, bureaucratic and inadequate and unclear in places with regard to sanctions for infringement of labour and employment regulations (e.g. illegal employment). At all events, it gives the individual Member States too little scope to allow adequately for national or regional economic and legal peculiarities. Given the extremely different situations in the individual Member States, no substantial European added value can therefore be seen or expected.

9. The proposed Directive on the whole is not likely to help create a better legal framework for seasonal work by third-country nationals. For the most part it causes more administrative work and undermines the authority of the Member States to decide on the access of third-country nationals to the domestic labour market.

10. The proposed Directive also infringes the subsidiarity principle in a formal sense. Article 5 of Protocol 2 states that any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality. This statement should contain some assessment of the proposal's financial impact and of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation. The reasons for concluding that a Union objective can be better achieved at Union level should be substantiated by qualitative and quantitative indicators. The financial and administrative burdens for governments, local and regional authorities, economic operators and citizens should be minimised and commensurate with the object to be achieved. All of these aspects are absent from the proposed Directive (and in the working document) or are difficult to identify and without substance.

11. It should be noted finally that the legal basis chosen in the proposal (Article 79 paragraph 2a and 2b of the Treaty on the functioning of the European Union) is inadequate, because these provisions do not provide a basis for decreeing European rules that have an impact on the national labour markets, an intention explicitly stated in the proposal.