Employment and social rights of non-EU labour migrants under EU law: an incomplete patchwork of legal protection

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Overview

• Employment and social rights of non-EU labour migrants in:
  – EU (external) labour migration instruments
  – International agreements concluded by the EU with non-EU countries
  – Not: rights of workers migrating internally within the EU
EU labour migration policy

• EU competence since 1999
  – Shared with Member States (MSs)
  – Attempts for full harmonization failed
    • Member States not willing to give up their own policy completely
    • Despite common challenges: labour shortages; global competition of talents; demographic problems
  – Piecemeal approach leaving leeway to MSs
Employment and social security rights in EU labour migration directives

• Students and researchers (2004-2005)
• Highly qualified workers (2009)
• Illegally staying third-country nationals (2009)
• Single Permit directive (2011)
• Seasonal workers (2014)
• Intra-corporate transferees (2014)
Students and researchers

• Directive 2004/114/EC: third-country students are allowed to work
  – But no provisions on their employment or social rights
• Directive 2005/71/EC: researchers
  – A general equal treatment clause
    • Which does not guarantee rights as such
Highly qualified workers (EU Blue Card)

- Directive 2009/50/EC
  - Tried to streamline migration of highly skilled workers
    - Weak implementation by MSs
  - General non-discrimination clause
  - Specific clause on portability of statutory pensions when moving back to a non-EU-country
Illegally staying third-country workers

• Directive 2009/52/EC:
  – Sanctions and measures against the employers
    • Liability for back payments of outstanding remuneration and of taxes and social security contributions
    • Must be extended to the main contractors or subcontractors
  – MSs must make effective procedures available to claim rights from employers
  – Presumption that the employment relationship had a duration of at least three months
Illegally staying third-country workers

• However: no general equal treatment clause
  – Depends on the national legislation of the MSs
• In practice MSs are mainly interested in the return of the irregular immigrants to their host State
  – Expulsion measures may seriously jeopardize their employment and social rights
Single Permit Directive

• Directive 2011/98/EC
  – Introduces a single application procedure, a single permit for stay and access to employment
    • Does not influence the right to take up employment as such
  – Guarantees a set of rights for third-country national workers legally admitted to the MSs
Single Permit Directive

• Some categories excluded from its scope
  – Posted workers, seasonal workers, ..... 

• Article 12: equal treatment clause
  – In principle for all employment and social rights
  – But limitations possible
    • Unemployment and family benefits
  – Portability of old-age pensions
    • Even in the absence of a bilateral agreement
Seasonal workers

• Directive 2014/36/EU
  – Responds to the need for temporary (seasonal) and low-skilled workforce
  – General equal treatment clause
  – With exceptions possible:
    • Unemployment and family benefits
    • “circular” aspect of labour migration
Seasonal workers

• Portability of pensions (what does it mean in practice?)
• Effective mechanisms to lodge complaints
• Possibility to sanction employers
• But: MSs may tie a migrant worker’s legal status to an ongoing employment relationship, making the migrant worker vulnerable to abuse or denial of rights
Intra-corporate transferees

- Directive 2014/66/EU
  - Very specific scope: temporary cross-border assignments by companies of highly skilled workers
  - Equal treatment provision only guarantees the same rights as posted workers: “hard-core” provisions
  - For social security: reference to existing bilateral agreements
    - Limitations for family benefits: but portability of pensions
Some conclusions on these EU labour migration instruments

• No overall and common EU labour migration policy or legal instruments:
  – Piecemeal approach; policy margins for the MSs
  – Striking exceptions to equal treatment for some social rights
  • But: interesting clauses on portability of pensions
  – What about Private International Law and posted workers?
International agreements concluded by the EU

• Agreement with Turkey
  – Equal treatment provisions and export to Turkey of social security benefits
    • Exceptions: unemployment and family benefits
  – No further social security coordination:
    • aggregation of insurance periods; entitlement to health care when temporarily staying in the home country; waiving of residence clauses (for instance children),...
Agreements with Maghreb countries

• Equal treatment provisions
• But no agreement so far on further social security coordination such as export of benefits
Partnership and cooperation agreements

- large number of agreements
  - In some, strong equal treatment provision on employment conditions
  - In others, weaker formulation
  - No equal treatment provisions on social security rights or on further social security coordination
Towards agreements on social security coordination between EU and non-EU countries?

• So far social security coordination with non-EU countries matter of bilateral agreements concluded by each of the MSs individually
  – Provisions on determination of applicable legislation (avoiding positive or negative conflicts of law); aggregation of insurance periods; export of benefits, ......
Towards agreements on social security coordination between EU and non-EU countries?

- Very fragmented approach
  - More than 350 different bilateral agreements concluded by the MSs with non-EU-countries
  - Still incomplete
  - Differ very much: scope, rights, ......

- Attempt by the EU Commission to strengthen cooperation between MSs in this field (2012)
  - Failed so far
To conclude

• Very fragmented and uncoordinated framework of policy initiatives and legal instruments
  – Despite political ambition to develop a common EU approach to labour migration from non-EU countries
To conclude

• Provisions providing for equal treatment regarding employment and social security rights
  – But with an inconsistent number of exceptions, in particular in cases of short-term migration
To conclude

• Social security coordination with non-EU countries continues to depend mainly on the very fragmented and diverse bilateral agreements concluded by the MSs themselves

• Risk of incomplete protection and loss of rights when returning home

• Need for more developed international standards in this field
Thank you for your attention

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