

PART II

GLOBAL ECONOMIC INTEGRATION AND THE REGULATION OF TEMPORARY LABOUR MIGRATION

Seasonal Workers and Intra-corporate Transferees in EU Law

Capital's Handmaidens?

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I. Introduction

This chapter compares and contrasts two recent European enactments on particular forms of temporary labour migration: seasonal work and intra-corporate transfers (ICTs). Both the Seasonal Workers Directive (SWD)¹ and the ICT Directive (ICTD)² were adopted in 2014. They are typical of the EU's piecemeal approach to labour migration, which creates a multiplicity of distinct statuses.³ We frame the comparison in light of our previous work examining the impact of migration law on labour law (section II). By way of general contribution to this collection's themes, we also offer some observations on the challenges of regulating temporary labour migration under current conditions of globalisation (section III), and seek to explain some of the specificities of the EU's role in regulating immigration (section IV).

Then turning in section V to the contrast between the two directives, we aim to compare them in terms of the personal and relational dimensions of the work relations established, and the temporal and transnational aspects. Both seasonal workers and ICTs could be regarded as having a migration status that makes them vulnerable in their work relations. In addition, this vulnerability means they may accept terms and conditions that undercut domestic labour standards. Yet the two directives take starkly divergent approaches to labour rights.

Our analysis reveals striking disparities between the two directives. Most notably, the Seasonal Workers Directive contains some significant labour rights protections for seasonal workers (as Fudge and Herzfeld Olsson have demonstrated)⁴.

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1 Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers (SWD) [2014] OJ L94/375.

2 Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer (ICTD) [2014] OJ L157/1. See also Sebastian Klaus, 'Die ICT-Richtlinie: Ende einer europäischen Odyssee' (2015) *ZAR* 1.

3 These are not the only two statuses created by EU law. For an incisive comparative overview, see Petra Herzfeld Olsson, 'The Development of an EU Policy on Workers from Third Countries: Adding New Categories to the EU Labour Market, Provided with New Combinations of Rights' in Stein Evju (ed), *Regulating Transnational Labour in Europe: The Quandaries for Multi-Level Governance* (Oslo, University of Oslo Institutt for Privatrett, 2014). See generally Cathryn Costello, 'EU Migration and Asylum Law: A Labour Law Perspective' in Alan Bogg, Cathryn Costello, Anne Davies and Jeremias Prassl (eds), *The Autonomy of Labour Law* (Oxford, Hart Publishing, 2014).

4 Judy Fudge and Petra Herzfeld Olsson, 'The EU Seasonal Workers Directive: When Immigration Controls Meet Labour Rights' (2014) 16(4) *European Journal of Migration and Law* 439.

In contrast, ICTs' protections are pegged at those of local workers for remuneration, but otherwise ICTs are assimilated to the position of posted workers. We suggest that these disparities may be understood in light of the different ways in which these two kinds of workers are regarded, valued and treated by the globalised capital corporations or other institutions by which they are immediately or ultimately employed.

II. Migration Law and Labour Law

Migration law has important impacts on labour law. It creates migration *status* that in turn determines, at least in part, labour rights.⁵ Migration status conveys the manner in which migration law creates personal status within the host state.⁶ The move to re-introduce status over contract as a determinant of workers' rights divides the subjects of labour law, as we have observed elsewhere.⁷ Labour standards may be expressly included in the very measures that regulate immigration. The SWD and ICTD are striking recent examples of this more general phenomenon.

Migration law also affects the supply and demand for migrant workers. In that respect, creating an EU status for particular migrant workers is no guarantee that more workers will be granted this status. National authorities have the final say (in principle) about whether to issue such permits. Nonetheless, in the broad sense, migration law is a form of labour market *regulation*.⁸ Thirdly, and relatedly, both the fact of immigration and the features of migration law have an impact on labour standards in both collective and individual labour law.

In our earlier work, in response to the question 'What does labour migration do to labour law?', we posited the following tentative replies:

1. It may affect the supply of workers.
2. It may increase segmentation of the workforce.
3. It may increase demand for migrant workers.
4. It may increase the role of intermediaries in the labour supply chain.

Much, of course, will depend on the context, and, in particular, on the migration laws in question. When we pose the question 'What does migration law do to labour law?' we arrive at several responses. What unites them is the likelihood that migration law creates vulnerability in labour relations. This is not to make any generalisations about migrants themselves, but rather to identify how migration law, as currently designed, tends to alter the work relation. In particular, we note that:

1. It increases the control of employers over the supply of labour, especially by according to them control over migration status.

5 Bridget Anderson, 'Migration, Immigration Controls and the Fashioning of Precarious Workers' (2010) 24(2) *Work, Employment & Society* 300.

6 For an early appreciation of this phenomenon, see Otto Kahn-Freund, 'A Note on Status and Contract in British Labour Law' (1967) 30(6) *Modern Law Review* 635.

7 Mark Freedland and Cathryn Costello, 'Migrants at Work and the Division of Labour Law' in Cathryn Costello and Mark Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (Oxford, Oxford University Press, 2014).

8 This is the central insight of Harald Bauder, *Labor Movement: How Migration Regulates Labour Markets* (Oxford, Oxford University Press, 2006).

2. By creating 'migration status', it introduces a personal (in the sense of status-based) rather than relation-based set of categories into labour law.
3. It may thereby also increase employers' control over local workers.
4. It increases the duties of employers to the state, in turn altering work environments by reason of requirements on employers to monitor migration status.
5. By establishing distinctions based on this migration status, it sets up tensions with non-discrimination law.
6. It may challenge collective worker-protective institutions, increasing tensions between workers, undermining solidarity and solidaristic institutions, including but not confined to trade unions.
7. It increases the temporariness and precariousness of work relations, and workers' dependency on employers.
8. It tends to force workers into particular statuses, such as that of self-employment, by placing lesser restrictions on labour migration into those statuses.
9. It imports into the conduct and regulation of employment relations its own set of offences and sanctions and its own notions of 'illegality'.
10. Depending on how they are regulated, it increases the role of intermediaries in the labour supply chain, and increases triangular labour relations.

When we look at the regulation of seasonal work in particular, we find many extreme forms of these phenomena, in particular, creating tied statuses that confine workers in the lower strata of the labour market. At first glance, ICTs may seem poles apart from seasonal workers. At one pole, we have the impoverished seasonal worker picking berries in the fields and forests (conjuring up images of extreme labour exploitation)⁹; at the other, the elite management consultant or IT professional, moving within the corporate entity, from global city to global city.¹⁰ However, we suggest that these statuses, in particular as defined in the new directives, are not so easily confined to the stereotypical case. In law, the directives do not confine the status to particular sectors, although of course migrants falling under these directives may be clustered in particular economic fields in practice.

Instead, we suggest it may be fruitful at least to begin the discussion with a legal analysis that examines the two statuses across these four dimensions: personal, relational, temporal and transnational. Concerning the first and second dimensions, these migration statuses are designed for workers who have particular roles within employing organisations, so a particular personal status and work relation; thirdly, the temporal dimension of their work relationships is defined by high degrees of employer control, as well as conditions defined by their migration status (defined by both EU and domestic rules and authorisations); fourthly, the inevitable transnational dimension of their migration profile is complex, characterised not by a singular migratory move, but multiple transnational comings and goings over time, which are also limited not only by the workers' choices, but also by migration law, employers and intermediaries.

As its title suggests, this chapter is also informed by the assumption that understanding these forms of status requires sustained attention to the role of the employing organisation. By exploring these, admittedly very different, types of

9 Charles Woolfson, Petra Herzfeld Olsson and Christer Thörnqvist, 'Forced Labour and Migrant Berry Pickers in Sweden' (2012) 28 *International Journal of Comparative Labour Law and Industrial Relations* 147.

10 Jonathan V Beaverstock, 'Transnational Elites in the City: British Highly-Skilled Inter-Company Transferees in New York City's Financial District' (2005) 31(2) *Journal of Ethnic and Migration Studies* 245.

temporary migration side by side we hope to shed some light on the relations between labour and capital under conditions of contemporary globalisation. Migration statuses are designed all too often to benefit employers, not workers (migrant or local). Moreover, restrictive features that are sometimes portrayed as aiming to protect local workers from competition by migrant workers are often more about constructing statuses to benefit employers.

III. Temporary Labour Migration in a Global Context

Moving money and ‘investment’ across borders is relatively easy these days, perhaps selling goods and services less so, but the movement of human beings as autonomous agents is subject to increasing controls. This asymmetry is the hallmark of contemporary globalisation. Earlier eras of globalisation were characterised by relatively free movement of persons.¹¹ And of course, European settler colonialism gave Europeans their choice of many countries of destination, some conveniently deemed by legal fiction to be devoid of inhabitants.

While trade in goods and services is subject to a multilateral regime, only peripheral aspects of movement of persons are covered by the General Agreement on Trade in Services (GATS). Otherwise, the movement of persons is subject to no multilateral regime. Bilateral labour agreements between sending and receiving states proliferate,¹² but the differences between the multilateral regime for goods and services and the more limited regime for migration have become evident particularly following the global financial crisis of 2008.¹³ While the international regime for trade has been relatively successful in curbing protectionist moves, the lack of such a regime for migration has meant an increase in restrictive labour migration policies.¹⁴ Temporary labour migration has been most affected by closure of labour markets, although high-skilled immigration has not been reduced in some countries (eg Canada and New Zealand) where it is seen as a stimulus for economic growth.¹⁵

If we think of globalisation as intensification of transnational activity, the hallmark of our era is that capital is highly mobile, not only financial capital, but also foreign direct investment (FDI). FDI often includes the movement of employing organisations, under a process whereby capital often protects itself in host countries through bilateral investment treaties. Given significant asymmetries between poorer

11 See, eg Kevin O’Rourke ‘The Era of Free Movement: Lessons for Today’, paper presented at Globalization, the State and Society Conference, St Louis, MO, 13–14 November 2003.

12 See Alexander Betts and Lucie Cerna, ‘High-Skilled Labour Migration’ in Alexander Betts (ed), *Global Migration Governance* (Oxford, Oxford University Press, 2011) 64: ‘In 2004, for example, it was estimated that there were around 176 bilateral agreements relating to labour recruitment (OECD 2004). Hatton (2007: 372) argues that the number of bilateral agreements in this area has increased significantly over time, in many cases being tailored to meet the needs of specific economic sectors in the receiving countries.’ Citing Organisation for Economic Co-operation and Development, *Migration for Employment: Bilateral Agreements at a Crossroads* (Paris, OECD, 2004) Annex 1A; Timothy Hatton, ‘Should We Have a WTO for International Migration?’ (2007) 22(50) *Economic Policy* 339. See also Ryszard Cholewinski, ‘Evaluating Bilateral Labour Migration Agreements in the Light of Human and Labour Rights’ in Marion Panizzon, Gottfried Zürcher and Elisa Fornalé (eds), *The Palgrave Handbook of International Labour Migration: Law and Policy* (Houndmills, UK, Palgrave Macmillan, 2015).

13 See Lucie Cerna, James Hollifield and William Hynes, ‘Trade, Migration and the Crisis of Globalization’ in Panizzon et al (eds), *The Palgrave Handbook of International Labour Migration*.

14 Ibid.

15 Ibid.

countries seeking to attract FDI, and richer countries which are the bases for most global capital, a network of bilateral investment treaties (BITs) have been signed, which confer significant institutional protections on global capital. These include investor-state dispute settlement (ISDS), which gives investors the right to trigger private one-shot arbitration to challenge the practices and laws of the host state.¹⁶ The new generation of trade and investment treaties demonstrate that capital qua 'investment' has developed a further set of institutional protections. These new agreements include the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, the Trans-Pacific Partnership (TPP), and one still under negotiation, the Transatlantic Trade and Investment Partnership (TTIP) between the EU and US.¹⁷ Their controversial features include, firstly, their focus on regulatory barriers to trade, meaning that they open up domestic (and EU) laws and practices to scrutiny for their impact on trade and investment. Secondly, they embody an effective merger of trade and investment law.¹⁸ Thirdly and relatedly, these agreements aim to include protections for investors more commonly found in BITs.¹⁹ As Cremona explains, 'The EU Member States have concluded over 1400 BITs and the CETA and TTIP are intended as early steps in developing an EU *acquis* in this field which would ultimately replace many of these bilateral agreements'.²⁰ As she notes, if the EU's aim is to promote good regulation (by encouraging deliberation on regulatory standards which have the potential to distort trade) 'then a strategy which places regulation on the defensive, and a debate couched in terms of whether there are sufficient safeguards protecting the right to regulate, is an essentially reactive stance'.²¹

These agreements do not significantly advance the agenda for more liberalised labour mobility, but rather reflect a strongly pro-trade and investor stance, which leaves workers out of the equation. To put it crudely, TTIP and similar instruments aim to protect the capacity for profit, and provide mechanisms where capital can challenge domestic laws that impact on future profits.

We suggest, tentatively, that some (albeit not all) forms of migration status serve a similar capital-led function. Suffice to state at the outset that different migrant statuses often accrue due to the transnational nature of the employing organisations' activities. Very crudely, some statuses permit workers to be moved as adjuncts to transnational service provision (as posted workers) and investment (as ICTs), and also ensure that those workers' status is kept apart from the regulatory structures of the host state. The divisive impact on the host state's labour market is key. While the worker is merely temporarily present in the host state, the practice of using temporary migrant workers is not.

16 José Alvarez, 'Contemporary Foreign Investment Law: An "Empire of Law" or the "Law of Empire"?' (2009) 60(4) *Alabama Law Review* 943; Marc Jacob, 'Investments, Bilateral Treaties' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford, Oxford University Press, 2014) 1061; Beth Simmons, 'Bargaining over BITs, Arbitrating Awards: The Regime for Protection and Promotion of International Investment' (2014) 66 *World Politics* 12.

17 The Trans-Pacific Partnership (TPP) was negotiated by twelve countries: the United States, Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam.

18 See Sergio Puig, 'The Merging of International Trade and Investment Law' (2015) 33(1) *Berkeley Journal of International Law* 1.

19 Markus Krajewski, 'Modalities for Investment Protection and Investor-State Dispute Settlement (ISDS) in TTIP from a Trade Union Perspective' (2014), <http://ssrn.com/abstract=2519995>.

20 Marise Cremona, 'Guest Editorial: Negotiating the Transatlantic Trade and Investment Partnership (TTIP)' (2015) 52(2) *Common Market Law Review* 351, 356.

21 *Ibid* 359.

Moreover, in the context of ICTs, the employing organisation has already established its transnational network, and moves its workers around it. The workers' passport is not merely that of a state, but of 'Global Inc'. Yet they may be worker-citizens of no particular country, in that their labour rights may be determined according to corporate policy, not real connection to or participation in any particular workplace or country. While posting of workers is parasitic on the employers' *temporary* service provision, ICT status depends on the employing organisation's transnational corporate reach, which may include permanent infrastructure, or may be much more ephemeral and rooted in corporate law fictions. (As will be seen, the ICTD has quite weak provisions to try to ensure the 'host entity' has genuine activity within the EU Member State.)

A further important caveat should inform our assessment of the regulation of temporary migration. Seeking to keep migration temporary by using migration law seems a regulatory strategy with a high risk of failure. Laws regulating migration can have perverse effects. Empirical research has identified various substitution effects whereby migration laws lead to migrants switching categories in response to legal changes.²² One of the strongest unanticipated effects is that regulation that seeks to keep migration temporary may contribute to its permanence. This effect arises as becoming irregular after a period of time does not always induce return, but also encourages permanent settlement in the host country, as return becomes more costly. Institutionalising temporary migration status can end up ruling out the option of coming and going to see how things work out 'back home', and makes migration permanent. This factor is a reminder that the promised 'triple win' offered by temporary labour migration programmes may lead instead to permanent undocumented migration, and a permanent population of exploitable undocumented migrants.

IV. Understanding EU Migration Law: Limits and Potential

The EU initially did not regulate migration from outside the EU into the Member States. However, the creation of a common market was one of its foundational aspects, with labour mobility as a basic feature thereof, ensuring rights of entry and residence not only for workers from other Member States holding the nationality of those states (later refashioned as EU citizens), but also for jobseekers and those engaging in any form of economic activity. Since the Treaty of Amsterdam, the EU has competence to adopt laws on migration and asylum from outside the EU, and to govern the status of so-called 'third country nationals' (or TCNs) in the EU.

The EU has now fairly comprehensively regulated asylum law, and claims that there is a 'Common European Asylum Policy'. Even in that context, though, the determination of who is a refugee and who should face deportation remains with national authorities, albeit that they now apply EU standards (and international refugee law) in so doing. Moreover, recognised refugees have a national status: they do not have

22 The notion of policy effectiveness is a complex one. See Mathias Czaika and Hein De Haas, 'The Effectiveness of Immigration Policies' (2013) 39(3) *Population and Development Review* 487. The various substitution effects identified by the DEMIG study carried out at the International Migration Institute at Oxford are: categorical substitution (category jumping); inter-temporal substitutions (now or never migration); spatial substitution; and reverse flow substitution. See: <http://www.imi.ox.ac.uk/projects/demig>.

intra-EU mobility rights, unlike EU citizens. In contrast, when it comes to labour migration, the EU's competence is limited in that, although it may adopt common rules, the determination of the volumes of admissions remains with the Member States.²³ Furthermore, the principle of 'union preference' is affirmed in the legal instruments, that is, that EU citizens should have preferential access to the EU labour market.²⁴

In terms of its frame of reference, the animating force of EU labour migration policy has been labour market efficiency *and* combatting 'illegal immigration', which is viewed as an exogenous phenomenon (rather than the creation of immigration laws). The ICTD speaks the language of economic efficiency — 'better matching of labour supply with demand' (recital 3) — and the SWD claims 'admissions procedures capable of responding promptly to fluctuating demands for migrant labour in the labour market' (recital 3). Both measures refer to the demographic challenge facing Europe, due to its ageing population (SWD, recital 6). The SWD also emphasises the need to 'prevent overstaying' and the duties of employers under the Employer Sanctions Directive (SWD, recital 7).

Attempts to legislate for a general EU labour admissions policy and migration status valid across the EU have failed. In 2001, the Commission put forward the idea of a common framework for admitting economic migrants from third countries.²⁵ The proposal aimed to rationalise the conditions and procedures for entry and residence of employed and self-employed TCNs. The proposal gained support from the European Parliament, but it failed to do so in the Council.²⁶ Eventually, the Commission abandoned its proposal and reopened discussions with a series of communications,²⁷ a Green Paper on economic migration²⁸ and a policy plan.²⁹

The only general measure on labour migration is the Single Permit Directive.³⁰ Its abbreviated titled (Single Permit) perhaps understates its content, as it aims to establish a single procedure, work and residence permit combined, and a common set of rights. Nonetheless, given that Member States were reluctant to commit to any form of general regulation for labour migration, it is unsurprising that the Single Permit Directive emerged as

23 Treaty on the Functioning of the European Union art 79(5). See also ICTD art 6; SWD art 7.

24 SWD recital 9; ICTD recital 8.

25 European Commission, 'Proposal for a Council Directive on the Conditions of Entry and Residence of Third-Country Nationals for the Purpose of Paid Employment and Self-Employed Economic Activities' COM(2001) 386 final.

26 Council of the European Union, 'Proposal for a Council Directive on the Conditions of Entry and Residence of Third-Country Nationals for the Purpose of Paid Employment and Self-Employed Economic Activities' ST 9862 2002 INIT.

27 European Commission, 'Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on Immigration, Integration and Employment' COM(2003) 0336 final; European Commission, 'Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions — A Common Agenda for Integration — Framework for the Integration of Third-Country Nationals in the European Union' COM(2005) 0389 final.

28 European Commission, 'Green Paper on an EU Approach to Managing Economic Migration' COM(2004) 0811 final.

29 European Commission, 'Communication from the Commission — Policy Plan on Legal Migration' COM(2005) 0669 final.

30 Directive 2011/98/EU of the European Parliament and of the Council on 13 December 2011 on a single application procedure for a single permit for third country nationals to reside and work in the territory of a Member State and on a common set of rights for third country workers legally residing in a Member State [2011] OJ L343/1.

a rather limited instrument.³¹ Some commentators have suggested that its equal treatment guarantee is an ‘empty shell’.³² However, whether that is so really remains up to the Court of Justice of the European Union. If traditional EU anti-discrimination precepts are brought to bear, it may have significant impact in time. In addition, as discussed further below, an expansive reading of the equal treatment guarantee may be bolstered by article 15(3) of the EU Charter of Fundamental Rights, which states that ‘Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union’.

The Single Permit Directive apart, the dominant EU approach to labour migration has been piecemeal, with EU law providing a number of narrow purposive statuses, for students,³³ researchers,³⁴ ‘highly skilled’ workers under the Blue Card Directive,³⁵ and latterly the aforementioned seasonal workers and intra-corporate transferees. These sectoral directives have in common that they do not create a right to first entry to the EU for TCNs, but rather set out conditions under which Member States ought to afford this particular right of residence. Once that status is granted, a set of EU rights follow. This approach is not self-evident. Indeed, the European Trade Union Confederation has questioned the need for the two directives under examination, suggesting that ICTs should be covered (if at all) under the EU Blue Card Directive, and that seasonal workers should be covered under the Single Permit Regime.³⁶ Its hostility to the proliferation of statuses is to ensure equality between local and migrant workers, in particular respect for the principle *lex loci laboris*, whereby the law of the place where work is undertaken should apply to that activity. Evidently, the EU’s internal posted workers regime undermines that principle.

The Blue Card Directive on ‘highly skilled’ immigration lays down the conditions of entry and residence for third-country nationals (and their family members) who will be present in the territory of a Member State for more than three months for the purpose of engaging in highly qualified employment.³⁷ The directive creates a fast-track

31 Sheena McLoughlin and Yves Pascouau, *EU Single Permit Directive: A Small Step Forward in EU Migration Policy*, EPC Policy Brief (Brussels, European Policy Centre, 2012).

32 Ana Beduschi, ‘An Empty Shell? The Protection of Social Rights of Third-Country Workers in the EU after the Single Permit Directive’ (2015) 17 *European Journal of Migration and Law* 210.

33 Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service (Students Directive) [2004] OJ L375/12. Note that a recast version of this directive is currently under negotiation between the Council and Parliament: 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 Research, Studies, Pupil Exchange, Remunerated and Unremunerated Training, Voluntary Service and Au Pairing (Recast)’, COM(2013) 151.

34 Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research (Researchers Directive) [2005] OJ L289/15. Note that a recast version of this directive is currently under negotiation between Council and Parliament. See note 33.

35 Council Directive 2009/50 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (Blue Card Directive) [2009] OJ L155/17. See also Katharina Eisele, *Why Come Here if I Can go There? Assessing the ‘Attractiveness’ of the EU’s Blue Card Directive for ‘Highly Qualified’ Immigrants*, Liberty and Security in Europe Paper No. 60 (Brussels, Centre for European Policy Studies, 2013).

36 ‘It is not understandable why the question of ICT was not dealt with under the “EU Blue Card” initiative and that the intra-corporate transferees are excluded from the framework Directive’: ETUC, ‘Agenda item 9: Seasonal work and intra-corporate transfers’, EC189/EN/9, ETUC Executive Committee, 13–14 October 2010, 2.

37 Blue Card Directive art 1.

procedure for issuing the special residence and work permit to 'highly qualified' third-country workers who have been offered a job in the EU. Again, Member States retain control over the issuing of Blue Cards, and can also introduce their own schemes offering better conditions than the Blue Card.³⁸

The two directives that are the focus of this chapter were both adopted under the EU's ordinary legislative procedure, involving the European Parliament (EP) as co-decision maker.³⁹ While the new increased role of the EP has been used to explain differences between previous and more recent enactments on migration, the active role of the EP is a shared feature of both directives under scrutiny here and cannot explain the differences between the seasonal workers and ICT directives.

Even if EU law creates a migration status, that status is not always valid across the EU. EU statuses differ in terms of whether they confer a *transnational* status. An odd feature of EU immigration status is that it often only allows work or residence (at least in the first instance) in one Member State, the fact that the EU is supposed to constitute an 'Area of Freedom, Security and Justice' notwithstanding. 'Mobility' rights across the EU normally only accrue on naturalisation (which confers EU citizenship), or if migrants stay five years and attain EU Long-Term Resident status. However, that status is subject to many conditions, and poorly implemented in practice.⁴⁰ The Blue Card Directive provides for analogous rights after a shorter time. Otherwise, mobility rights for migrant TCN workers are not usually envisaged. The EU is a single labour market for Europeans, but not non-EU migrants.⁴¹ Indeed, intra-EU mobility was perhaps the most fraught issue in the four years of negotiations on the ICTD.⁴²

A further striking feature is that EU immigration policies do not automatically pre-empt national statuses. If EU law comprehensively regulates a particular status, then Member States' competence to accord that status is limited.⁴³ However, they may still offer analogous status under their own domestic competence. For instance, many states continue to issue national permits to highly skilled workers, in preference to Blue Cards. The implementation studies reveal quite a complex picture with highly varied implementation.⁴⁴ EU law in this field is distinctly unfederal: in federal systems, states' migration control powers tend to be comprehensively pre-empted by federal powers. In

38 Blue Card Directive arts 4(2) and 6.

39 See, eg Christof Roos, 'EU Politics on Labour Migration: Inclusion Versus Admission' (2015) 28 *Cambridge Review of International Affairs* (forthcoming), comparing the Blue Card (2009) and Single Permit (2011); Georg Menz, 'Framing the Matter Differently: The Political Dynamics of European Union Labour Migration Policymaking' (2015) 28(4) *Cambridge Review of International Affairs* 554, comparing the Blue Card and Seasonal Workers directives.

40 Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (Long-Term Residents Directive) [2003] OJ L16/33; European Commission, *Report on the Application of Directive 2003/109/EC Concerning the Status of Third-Country Nationals who are Long-Term Residents* (LTRD Implementation Report), COM(2011)585.

41 Elspeth Guild, 'The EU's Internal Market and the Fragmentary Nature of EU Labour Migration' in Costello and Freedland (eds), *Migrants at Work*.

42 Council of the European Union, 'Proposal for a Directive of the European Parliament and of the Council on Conditions of Entry and Residence of Third-Country Nationals in the Framework of an Intra-Corporate Transfer' (8303/13). See also Alex Lazarowicz, *The Intra-Corporate Transferees Directive: Time to Break the Deadlock*, EPC Policy Brief (Brussels, European Policy Centre, 2013).

43 Case C-542/13 *M'Bodj* [2015] OJ C65/12.

44 European Commission, 'Communication from the Commission to the European Parliament and the Council on the Implementation of Directive 2009/50/EC on the Conditions of Entry and Residence of Third-Country Nationals for the Purpose of Highly Qualified Employment' COM(2014) 287 final. See also Lucie Cerna, 'Understanding the Diversity of EU Migration Policy in Practice: The Implementation of the Blue Card Initiative' (2013) 34(2) *Policy Studies* 180.

contrast, in the EU, there is shared competence over entry and residence for some categories, and Member States retain control over naturalisation. Even where there is a status, it is usually without prejudice to Member States' rights to offer 'more favourable provisions'.⁴⁵ The mere existence of the two statuses under discussion here is thus telling. First of all, the fact of reaching agreement at EU level is itself an achievement, after long negotiation. Both measures seek in the first instance to encourage these forms of migration, and only secondly to address questions of labour rights, in the manner that reflects the highly stratified nature of the migration statuses.

However, EU law may not ultimately allow this stratified approach to labour rights. This is because at least some labour rights are constitutionalised in EU law, and appear in the EU Charter of Fundamental Rights. As well as containing a chapter on 'equality', not only prohibiting discrimination, but positively requiring the EU to secure equality, it also contains a provision on labour rights:

Article 15: Freedom to choose an occupation and right to engage in work

1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.
2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.
3. *Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.* (emphasis added)

The charter sets the conditions for legality of EU legislative measures. In other words, if a directive violates the charter, it is amenable to annulment by the Court of Justice of the EU, or strenuous re-interpretation to avoid that fate.⁴⁶ On this basis, EU migration statuses may be open to challenge if they breach article 15(3) of the EU Charter of Fundamental Rights. Moreover, the charter is applicable to all actions of the Member States 'implementing' EU law. This not only includes direct implementation of the directive, but also acts which cover the same material ground as EU acts, in particular if they would impede the effectiveness of EU law.

To illustrate the potential interactions, recall that many states run seasonal worker programmes for the agricultural sector, often entailing bilateral agreements with particular sending countries. Moving to an EU directive may have unintended legal consequences for these bilateral programmes. While the EU directive will not pre-empt national programmes, it *may* require that they are run in a manner compatible with EU law (if they are treated as falling within the scope of EU law). Currently, some use dubious means to ensure that workers go home at the end of the seasons. One example, which may be atypical, is nonetheless striking: a Spanish programme allegedly admits only *mothers* under 40 as seasonal agricultural workers.⁴⁷ If this programme were deemed to fall within the scope of EU law, then the EU Charter of Fundamental Rights would be applicable, as would the general principles of EU law. For now, suffice to note

45 See, eg ICTD art 4; SWD art 4.

46 For examples of this strong judicial review in action, leading to the annulment or strenuous re-interpretation of EU legislation, see Case C-236/09 *Association Belge des Consommateurs Test-Achats and Others* [2011] ECR I-00773; Case C-293/12 *Digital Rights Ireland and Seitlinger and Others (Data Protection)* [2014] OJ C175/6; Case C-540/03 *European Parliament v Council of the European Union (Family Reunification)* [2006] ECR I-05769.

47 Susan Mannion, Peggy Petrzela, Christy Glass and Claudia Radel, 'Keeping Them in Their Place: Migrant Women Workers in Spain's Strawberry Industry' (2011) 19(1) *International Journal of the Sociology of Agriculture and Food* 83.

that bringing matters of migration status within the scope of EU law may have some transformative legal effects, in particular if the Court of Justice is called upon to consider these questions of status inequality.⁴⁸

V. The Two Directives Compared

This section provides a sketch of the directives' content.

A Personal Scope

Concerning the scope of the directives, the SWD applies to third-country nationals (TCNs) who seek admission for the 'purpose of employment as seasonal workers'. 'Seasonal workers' are defined as TCNs who stay 'legally and temporarily in the territory of a Member State to carry out an activity dependent on the passing of the seasons' under an employment contract.⁴⁹ That employment contract is with the employer in the host state.

'An activity dependent on the passing of the seasons' is defined 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' (article 2(2)). When transposing the directive, Member States must list those sectors that are considered to be seasonal and, if appropriate, the list should be drawn up in consultation with the social partners.

Agency workers are *not* excluded (unlike under the ICTD). Recital 12 provides that, if national law permits, seasonal workers may continue to be agency workers, hired through agencies established on the Member States' territory and which have a 'direct contract' with the seasonal worker. Intra-corporate transfer means:

... the temporary secondment for occupational or training purposes of a third-country national who, at the time of application for an intra-corporate transferee permit, resides outside the territory of the Member States, from an undertaking established outside the territory of a Member State, and to which the third-country national is bound by a work contract prior to and during the transfer, to an entity belonging to the undertaking or to the same group of undertakings which is established in that Member State, and, where applicable, the mobility between host entities established in one or several second Member States.⁵⁰

'Group of undertakings' is defined as 'two or more undertakings recognised as linked in national law' in various specified ways, namely majority shareholding, control, or management (article 3(1)).

The migrant must have a 'work contract' with the undertaking outside the EU, and then move to another 'entity belonging to the undertaking' or 'the same group of entities'. This loose language could facilitate transfers even to shelf companies, it would seem. The 'host entity' must be 'established' in the Member State.⁵¹ In order to combat

48 See also Diego Acosta Arcarazo and Andrew Geddes, 'The Development, Application and Implications of an EU Rule of Law in the Area of Migration Policy' (2013) 51(2) *Journal of Common Market Studies* 179.

49 SWD art 3(b).

50 ICTD art 3(b).

51 This *may* require interpretation in line with freedom of establishment within the internal market context.

potential ‘abuse’, Member States may refuse applications where the ‘host entity’ has as its main purpose facilitating ICTs or does not have a genuine activity (recital 24).

The ICT Directive only covers ‘managers’, ‘specialists’ and ‘trainee employees’ (article 2(1)). Importantly, both the self-employed and agency workers are excluded.⁵² The permit is tied: it allows the transferee only to ‘exercise the specific employment activity under the permit in accordance with national law in any host entity belonging to the undertaking or group of undertakings in the first Member State’ (article 17(c)).

‘Manager’ means a person holding a senior position, who primarily directs the management of the host entity, receiving general supervision or guidance principally from the board of directors or shareholders of the business or equivalent; that position shall include: directing the host entity or a department or subdivision of the host entity; supervising and controlling work of the other supervisory, professional or managerial employees; having the authority to recommend hiring, dismissing or other personnel action.⁵³

‘Specialist’ means a person working within the group of undertakings possessing specialised knowledge essential to the host entity’s areas of activity, techniques or management. In assessing such knowledge, account shall be taken not only of knowledge specific to the host entity, but also of whether the person has a high level of qualification including adequate professional experience referring to a type of work or activity requiring specific technical knowledge, including possible membership of an accredited profession.⁵⁴

‘Trainee employee’ means a person with a university degree who is transferred to a host entity for career development purposes or in order to obtain training in business techniques or methods, and is paid during the transfer.⁵⁵

These definitions are broad, and seem amenable to cover much of the workforce in some economic sectors, in particular those where specialist knowledge and a high level of qualifications are common. The definition of ‘trainee’ too is broad: the notion is not tied to career stage.

The migration statuses under the two directives differ sharply in another respect: ICTs have family reunification rights. In contrast, there are no family reunification rights for seasonal workers.

B Temporal and Transnational Dimensions

There is a difference in terminology between the SWD and ICT status. The ICTD refers to ‘residence’, as opposed to ‘stay’ under the SWD. The Council insisted on amending the original reference to ‘residence’ in the Commission proposal, to ‘stay’.

In the case of seasonal workers, Member States may issue permits ranging from five to nine months in duration within a twelve-month period.⁵⁶ Originally, the EP wanted to limit the time to six months, but some Member States insisted on an outer limit of nine months. As regards circularity, the directive obliges Member States to

52 ICTD art 2(2) states: ‘This Directive shall not apply to third-country nationals who ... (d) carry out activities as self-employed workers; (e) are assigned by employment agencies, temporary work agencies or any other undertakings engaging in making available labour to work under the supervision and direction of another undertaking’.

53 ICTD art 3(e).

54 ICTD art 3(f).

55 ICTD art 3(g).

56 SWD art 14(1).

facilitate the re-entry of seasonal workers who have been admitted at least once every five years.⁵⁷ Facilitation measures, albeit only indicatively listed in the directive, include exemptions from the requirement to submit documentation, the issuance of several seasonal worker permits under a single decision, or accelerated admission procedures.⁵⁸ The Commission had proposed a multi-season permit, but this did not prove politically acceptable.

The Commission had aimed in its proposal to prohibit re-entry of any migrant workers who had previously overstayed. However, the final version treats any migrant worker's violation of previous permits not as a mandatory ground for rejection of further applications, but just as a permissible reason.

The ICTD equally recognises the temporary migration status of those covered by its scope: 'As intra-corporate transfers constitute temporary migration' (recital 17), the maximum duration of an intra-corporate transfer is three years for managers and specialists, and one year for trainees (article 12(1)). A six-month break may be required by Member States between ICT permits (article 12(2)).

The SWD explicitly states that it aims to prevent 'overstaying or temporary stay becoming permanent' and seeks to encourage circular migration, that is, ultimately returning to the home country after periods of temporary (albeit possibly prolonged) seasonal working. The SWD makes no provision for intra-EU mobility of seasonal workers. Conversely, the ICTD lays down rights to intra-EU mobility, somewhat echoing the transnational spirit of the Blue Card Directive. A distinction is drawn between short and long-term intra-EU mobility of ICTs, which is defined by a 90-day cut-off. Underlying this divide was the need to retain compatibility between the directive and the harmonised visa regime concerning authorisations for up to 90 days laid down by the EU's Schengen *acquis*.⁵⁹ Accordingly, Member States are required to issue Schengen visas to ICTs engaging in short-term mobility, while mobility exceeding 90 days is governed by authorisations under national law.

C Labour Rights and Relations

Both forms of workers could be regarded as having a migration status that makes them vulnerable in their work relations, yet the two directives take starkly divergent approaches to their labour rights. The directives were adopted under the EU's ordinary legislative procedure, involving the European Parliament as co-decision maker. As Fudge and Herzfeld Olsson note,

A unique aspect of the negotiations over the Seasonal Workers Directive was the extent to which the European Parliament was unified in its ambition to strengthen the rights of seasonal workers. No such similar concern was evident with respect to the groups of migrant workers that were the subjects of the other immigration directives.⁶⁰

The result is some significant labour rights protections for seasonal workers.⁶¹ ICTs' protections are pegged at those of posted workers in the main,⁶² with only

57 SWD art 12(1).

58 SWD art 12(2).

59 Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) [2009] OJ L243/1.

60 Fudge and Herzfeld Olsson, 'The EU Seasonal Workers Directive' (n 4) 466.

61 Ibid.

remuneration to be ‘not less favourable’ than that for local workers in ‘comparable positions’.⁶³ Moreover, in essence, the ICT is a tied worker. In contrast, the SWD allows seasonal workers to be employed by different employers and to stay (up to the maximum period of nine months) to look for another employer.

The two directives embody different rules regarding TCNs’ right to equal treatment. The Seasonal Workers Directive acknowledges the ‘specially vulnerable nature of third-country national seasonal workers and the temporary nature of their assignment’ at the outset (recital 43). Seasonal workers are thus entitled to equal treatment to local workers with regard to terms of employment, working age, working conditions such as pay and dismissal, working hours and health and safety requirements (article 23(1)(a)). They also enjoy such equal treatment concerning the right to strike and social benefits such as sickness benefits, maternity and paternity leave (article 23(1)(b)). However, family and unemployment benefits may be excluded by Member States (article 23(2)(i)). Seasonal workers are also equally treated with regard to recognition of diplomas (article 23(1)(h)), access to education and vocational training (article 23(1)(g)), including employment services offering advice on seasonal work (articles 23(1)(f), 23(2)(ii)).

At the behest of the European Parliament, the Seasonal Workers Directive also includes a provision on equal treatment to nationals concerning back payments to be made by employers (article 23(1)(c)). It provides for robust sanctions against employers (article 17). However, regarding subcontractors, the use of ‘may’ might undermine the effectiveness of these provisions. Third parties with a legitimate interest in ensuring compliance with the directive can lodge complaints or engage civil or administrative proceedings on behalf of the seasonal worker. It has been suggested that, all in all, these rules go ‘a long way to achieving the kind of rights-based approach to migration advocated by the ILO’.⁶⁴

The ICT Directive takes a significantly different approach to labour rights. ICTs enjoy equal treatment to posted workers with regard to the terms and conditions of employment (article 18(1)), except for remuneration. The directive provides for remuneration:

not less favourable than the remuneration granted to nationals of the Member State where the work is carried out occupying comparable positions in accordance with applicable laws or collective agreements or practices in the Member State where the host entity is established.⁶⁵

Equal treatment to nationals is also provided in relation to freedom of association (article 18(2)(a)), recognition of qualifications (article 18(2)(b)), social benefits (although family benefits may be excluded for transfers not exceeding nine months) (articles 18(2)(c)–(d), 18(3)), and access to goods and services (article 18(1)(e)).

D The Posted Workers Analogy Questioned

Other contributors to this volume have addressed the troubling aspects of posted workers.⁶⁶ As is now well known, the extent to which they are subject to the labour law

62 ICTD art 18(1). See also Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (Posted Workers Directive) [1997] OJ L18/1.

63 ICTD art 18(2).

64 Fudge and Herzfeld Olsson, ‘The EU Seasonal Workers Directive’ (n 4) 459.

65 ICTD art 4(b).

of the host state is constrained by EU legislation⁶⁷ and case law.⁶⁸ Engblom explains the ‘convulsions’ caused by the *Laval* case in Sweden in light of Sweden’s decision to open its labour market and rely on domestic labour laws and collective structures to ensure that demand for migrant workers was dampened, and that high labour standards for all workers in the territory were preserved.⁶⁹ *Laval* undermined that approach. Posted workers need not hold the nationality of an EU Member State. Indeed, the early posted workers cases concerned workers who *did not* have EU mobility rights themselves: the Portuguese workers in *Rush Portuguesa* did not then have EU Treaty rights, due to transitional provisions, nor did the Moroccan workers transferred from Belgium to France in *Van Der Elst*.

The workers in *Van der Elst* were of Moroccan nationality, migrants authorised to live and work in Belgium. By means of asserting its EU mobility rights as a service provider, the employer was able to bring its workforce (a team in that case of four Belgian and four Moroccan workers) with it to another Member State, thereby expanding the scope of its workers’ migration status. Normally, the Moroccan workers would not have EU Treaty rights. If they had, the need to create this category of ‘posted worker’ would not have emerged. The case arose out of an inspection by the French Labour Inspectorate, which found the Moroccan workers did not have French permits.

The posted worker route places workers at the disposal of their employer. As independent workers, the workers in *Van der Elst* could not move to France to seek or take up new employment. Their migration status in France depended on their employer. This exacerbated the workers’ dependency on their employer. Moreover, the fact of posting could have also exacerbated their precarity, as they were not only temporary migrants in Belgium, but also transferred temporarily elsewhere. Thirdly, there is a posted worker protection gap: they were mainly subject to the labour law of Belgium, even though this may not be properly enforced or enforceable in France.

The point of revisiting this seminal posted worker case is to highlight its intimate linkage with temporary transnational service provision. While posted worker status apparently expands the autonomy of migrant workers, offering them added opportunities to work in other Member States without having to seek a new work permit each time, in fact it does so at the cost of additional dependency, precarity and reduction of rights. From a labour law perspective, this is troubling not only for the migrant workers but also local workers. A better approach from a labour law perspective would be not to seek to exclude the TCN migrant worker, but to include them fully, by affording all TCNs lawfully resident in an EU Member State free movement rights. At present, such mobility rights are only offered to those who attain formal EU ‘Long-Term Resident’ status, a status conditional on fulfilment of many conditions, and poorly implemented in practice.

66 See Gudrun Biffl and Isabella Skrivaneck, ‘The Distinction Between Temporary Labour Migration and Posted Work in Austria: Labour Law Versus Trade Law’, Ch 4 in this volume.

67 Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (Posted Workers Directive) [1997] OJ L18/1 as supplemented by Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [2014] OJ L 159/ 11.

68 See especially Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767; Case C-346/06 *Dirk Ruffert v Land Niedersachsen* [2008] ECR I-1989; Case C-319/06 *Commission v Luxembourg* [2008] ECR I-4323.

69 Samuel Engblom, ‘Reconciling Openness and High Labour Standards? Sweden’s Attempts to Regulate Labour Migration and Trade in Services’ in Costello and Freedland (eds), *Migrants at Work*.

The option of full inclusion in the EU labour market by granting equivalent mobility rights to nationals would, somewhat paradoxically, shore up domestic labour law and standards, thereby protecting local workers a lot more than seeking to prevent their entry. The posted worker system is lose-lose, in that the regulatory design means that posted workers are in a weaker bargaining and regulatory position, and so are more likely to undercut.

Returning to the ICT Directive, the analogy with posted workers needs to be questioned. Under the provisions of the ICTD, ICTs are to be treated equally with posted workers as regards the terms and conditions of employment other than remuneration (such as maximum work periods or safety at work). In other words, the terms and conditions of employment in the Member State to which the ICT will be transferred will be governed by the laws of his or her country of origin (the sending third country). According to the ICTD, the reason for this is that the ICTD should not give undertakings established in a sending third country any more favourable treatment than undertakings established in an EU Member State, in line with article 1(4) of the Posted Workers Directive (96/71/EC). This provision provides that '4. Undertakings established in a non-Member State must not be given more favourable treatment than undertakings established in a Member State'.

However, why use the analogy with posted workers at all? It could have been argued that posting is only relevant if the employing organisation is temporarily present in the host state providing services, and that the approach to posted workers depends on the undertakings' *right* to provide those services (in the EU context, derived from the EU Treaty's internal market freedoms). In the ICT context, this premise does not hold. So, on this basis, that commitment to 'no more favourable treatment' is inapplicable: there is no general requirement to treat undertakings alike in *different circumstances*.

Moreover, even if the commitment is applicable, it states non-EU companies should not be treated *more* favourably. However, this is precisely how global companies that can avail of the ICT route are being treated. The directive means that ICT status is regarded as a privilege for the employing organisations, irrespective of whether their employees' work rights are safeguarded according to EU standards at all. This move has also been explained as being required under GATS commitments but, as Herzfeld Olsson has demonstrated, this claim is not accurate.⁷⁰

The workers themselves may well wish to be accorded full equal treatment with local workers, which is a stronger hallmark of the Seasonal Workers Directive. Let us recall again article 15(3) of the EU Charter: 'Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.'

VI. Conclusions

The proliferation of migration statuses is neither obvious nor necessary in EU law. The European Trade Union Confederation urged that seasonal workers and ICTs be brought under the Single Permit regime. The mere fact that these additional statuses exist is itself a result of catering to employer demand, rather than a move to protect workers. However, once the proposals were made, the EU political process led to a strong

70 Herzfeld Olsson, 'The Development of an EU Policy' (n 3).

worker-protective content for seasonal workers. In contrast, ICTs were viewed differently, and indeed their labour rights were not a matter of concern. Rather, the posted workers anomaly has been expanded. The posted workers regime could be viewed as an unfortunate accident. It is a judicial invention that has been developed within the EU internal market to enhance freedom of transnational service provision. To extend that model to employing enterprises based outside the EU is to allow them to import third-country labour standards internally. The rationale of enhancing the commercial freedom originally conceived of, based on the logic of a strong right to intra-EU service provision, has been expanded in a remarkable way to this novel context. The implications for workers' rights remain to be seen. But the divisive impact on European labour markets is apparent.