Globalisation, Fragmentation, Labour and Employment Law
– A Swedish Perspective

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CHAPTER 8

Moves towards Increased Workforce Fragmentation among Labour Immigrants

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The fragmentation of the workforce and its effects for workers and society have been discussed by labour law scholars for quite some time. The emergence of different kinds of more or less precarious employment relationships has been analysed in such terms.1 Globalisation and Swedish EU membership have contributed to this development in different ways – one effect is the increasing presence of migrant workers on the Swedish labour market.2 In this chapter, fragmentation is defined as the division of workers into different groups provided with different sets of rights, obligations and conditions, creating different statuses that affect their abilities to benefit from labour law and the labour and working conditions to which they are entitled.3

From an EU perspective, the tendency towards fragmentation has primarily been discussed in relation to the realisation of free movement provisions in the EU Treaties, in particular regarding the free movement of services. Examples include different regulations for posted workers, temporary agency workers and posted temporary agency workers.\(^4\)

The EU has also contributed to this development through another line of directives treating labour migration from third countries; these directives have been adopted with Article 79 TFEU on immigration in title V, The area of freedom, security and justice, as the legal base.\(^5\)

In this chapter we focus on regulation of labour migration from third countries. We will illustrate how the Swedish legislator’s ambition to create, through a reform in 2008, a single stream of regulation for all labour migrants has been challenged by the negative effects of the reform and by EU law; these development have served to increase fragmentation. The fragmentation is driven partly by 1) the assumption that low-skilled labour migrants are more vulnerable than highly qualified labour migrants, and that therefore specific measures should be taken to compensate for this difference, and partly by 2) a desire to make the EU more attractive to highly qualified labour migrants.\(^6\)

The effects of two EU directives – the Directive on highly qualified employment and the Directive on seasonal work – are discussed here.


The EU Directive on highly qualified employment\textsuperscript{7} was implemented in Swedish law on 1 August 2013. We will describe and analyse some of the decisions taken during the implementation process in relation to issues of fragmentation. The Directive on seasonal workers\textsuperscript{8} is to be implemented in Swedish law in September 2016 and it is still unknown how this will be carried out. Nevertheless, in this chapter we highlight some of the challenges the legislator will likely face during the implementation process, in connection with our theme – fragmentation of the workforce.

1. Purpose and structure

The purpose of this chapter is to show how attempts to shape the law in order to – among other things – safeguard the entitlements of migrant workers have led to a fragmentation of the regulation applicable to labour migrants from third countries. We also categorise these fragmenting measures to see whether they differ depending on the migrant group at which they are aimed, at and if so, whether that tells us something about how these groups are perceived. The introduction of a single stream model of regulation into Swedish law was motivated by the government’s aim to establish a system characterised by efficiency, transparency and flexibility.\textsuperscript{9} We also explore the extent to which the adopted changes have affected these aims.

The chapter is organised in the following way:

First, the Swedish legislation on labour migration from third countries is introduced. The general characteristics are described, explaining how the legislator actually took steps away from fragmentation when the applicable provisions were adopted in 2008, and how the legal framework was structured in order to ensure that labour migrants would be provided with the same sets of rights as domestic workers.

\textsuperscript{7} The Council Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.

\textsuperscript{8} The Directive 2014/36/EU on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers.

\textsuperscript{9} Legislative Bill 2007/08:147, Nya regler för arbetskraftsinvandring 34.
Further it is explained how subsequent measures, taken to counteract abuse of migrant workers, have been in fact shown to lead to fragmentation.

Finally, the chapter provides an analysis of the fragmenting impact of the Directive on highly qualified employees, and the challenges and possible fragmenting impact of the seasonal workers Directive on Swedish single-stream regulation of labour migration.

2. Swedish single-stream regulation of labour immigration

New regulations on labour migration, introduced by a newly appointed liberal government, came into force in Sweden in December 2008. An important characteristic of this regulation was that labour market authorities would no longer control the need for labour in various sectors. Instead, individual employers’ needs for recruitment would serve as the starting point. Consequently, there were no limitations in the act as to branches of the labour market, professions or types of employer, and no labour market tests would be imposed on employers.

Concerning employment conditions, it was emphasised that the regulations on labour migration must obtain legitimacy, and that they were not to be used to displace workers already in the country. A work permit may thus only be granted on the condition that the applicant has been offered an employment that makes it possible for him or her to support themselves and that the wage, insurance and other employment conditions are not worse than according to Swedish collective agreements or customs within the profession or the industry (Aliens Act § 6:2 (1)). Further, to ensure that employment conditions are in line with collective agreements, the Migration Board is to provide an opportunity for trade unions within the field to give their opinions on working conditions (Aliens Ordinance § 5:7a). Thus measures

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10 Legislative Bill 2007/08:147.
11 Legislative Bill 2007/08:147, 1.
12 Legislative Bill 2007/08:147, 34.
were taken both to protect the State from social costs and to safeguard equality with workers in Sweden, while also preserving the Swedish labour market model by involving the trade unions in monitoring employment conditions.

The Aliens Act states that a work permit is to be granted for the duration of the employment, but for a maximum of two years. No minimum threshold for the time period exists. The duration of a permit may be extended, but the total maximum duration is four years. For the first two years, the permit is to be tied to a certain employer and a certain kind of job, but thereafter only to a certain kind of job (Aliens Act § 6:2a). If the employment is terminated before the permit expires, the worker’s residence permit is to be revoked, unless the worker finds another employment within three months (Aliens Act § 7:3 (2)).

In the 2008 legislation, very few provisions were aimed at specific categories of workers. The introduction of the regulation even meant that some existing minor inequalities in treatment of different categories of labour migrants were abolished. Earlier legislation had given some room for differences between qualified and unqualified occupations. Thus, a permanent residence permit could be granted already on the first application to an applicant with “unique qualifications”. This was no longer to be possible. The Government saw no reason to grant permanent residence permits to selected groups right from the moment of immigration. Likewise, permits for seasonal work were no longer to be issued. The Labour Market Board had already decided this before 2008, because any need for seasonal work was supposed to be covered by workers from the EU/EES and Switzerland. With the new regulation, permits for seasonal work were totally abolished. The only differences in treatment (between those who need work permits) remaining in the legislation are special regulations for those participating in so-called international exchange (for example traineeship in agriculture or au pair work) or according to international agreements or agreements with another country (Aliens Act § 6:2 (2)(2)). There is

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13 There is, however, a fairly large number of exceptions from the requirement for a work permit.
14 Legislative Bill 2007/08:147, 18.
also some difference in treatment as regards the location from which the application must be submitted. Applicants who have visited an employer and received an employment offer in a sector of the labour market, where there is supposed to be shortage of labour, may submit their application from within Sweden.

The introduction of the employer-governed labour migration scheme of 2008 led to the issuance of a large number (for Sweden, at any rate) of work permits in a short time.

Table 1. Number of work permits granted 2006–2009.

<table>
<thead>
<tr>
<th>Year</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of permits</td>
<td>6,095</td>
<td>7,567</td>
<td>13,868a</td>
<td>14,002</td>
</tr>
</tbody>
</table>

a. Some of this sharp increase is due to the fact that from 2007, berry-pickers were obliged to have work permits.

In 2010, helpers in agriculture, gardening, forestry and fishing were the largest occupational group, with 4,508 persons. After that followed computing professionals (2,208 persons), workers in industrial kitchens and restaurants (1,049), helpers in kitchens and restaurants (548), civil engineers and architects (525) and cleaners (487). Obviously, most immigrants from third countries were recruited either to fairly highly qualified work or to jobs that required few or no qualifications.

2.1 Reforms aiming to counteract abuse – yet increasing fragmentation

Since the Swedish regulations on labour immigration came into force, its application has received much attention in public debate. Most criticism has targeted the reported gross abuse of certain labour immigrants, for example berry pickers or workers in forestry. It has also been claimed that untrustworthy entrepreneurs have been selling work permits without offering jobs. The regulation was also criticised by a parliamentary committee on circular migration, which made a series of suggestions for increased control of employers.15

15 Legislative Inquiry 2011:28, Cirkulär migration och utveckling, förslag och framåt-
In accordance with guidelines from the government for combating sham employment and abuse of the regulations,16 the Migration Board introduced special requirements for certain categories of employers – first, in the summer 2011, for employers of berry pickers. These requirements meant that employers had to show in advance that they could pay the wages offered. An employer who had previously employed berry pickers had to show that he or she had then paid the wages to which the pickers were entitled. Furthermore, any foreign temporary work agency posting berry pickers to Sweden was obliged to have an affiliate office in Sweden.17

In January 2012, the Migration Board introduced tightened control of certain other businesses “in order to counteract the abuse of people in the Swedish labour market as far as possible and within the framework of current legislation.”18 The tightened control concerned businesses active for less than one year and also businesses within certain trades, namely cleaning, hotels and restaurants, construction, retail stores, farming and forestry, auto repair, service and temporary agency work. In such businesses, employers had to show they could pay the wages offered for at least three months. Employers who had previously employed people from countries outside the EU were obliged to show that they had paid payroll taxes. A company registered in a country outside the EU was to have an affiliate office in Sweden, accountable for employment conditions.19 Because this control was aimed at employers in certain industries, dissimilar treatment of different sectors and state limitation of immigration were (re)introduced to a certain degree. The tightened control resulted in a decrease in the number of permits granted in the areas subject to control.

blickar, 131. Politicians and trade unions have also made suggestions for reform. The most elaborate of these include proposals made by TCO (the Swedish Confederation for Professional Employees) (Memorandum TCO 2012).

17 This declaration is available at the website of the Swedish Migration Agency at www.migrationsverket.se.
18 This declaration was placed on the homepage of the Migration Board in 2012.
19 This regulation was set out on the website for the Swedish Migration Agency in 2014.
Later, in August 2014, further measures were taken to detect and stop abuse of the regulation on labour migration.\textsuperscript{20} However, these measures are similarly aimed at all categories of labour immigrants.

3. The EU – Different provisions for labour immigrants of different sectors

Since 1999, when the EU decided to start harmonising the Member States’ rules for third-country nationals on entry and stay for the purpose of employment in the EU, a number of directives have been adopted in this field. In 2005, the European Commission presented its Policy Plan on Legal Migration (COM (2005) 669 final), where legal measures were proposed to develop non-bureaucratic and flexible tools for a fair, rights-based approach to all labour immigrants, while also attracting specific categories of immigrants needed in the EU.\textsuperscript{21}

The discussions on EU level have led, step by step, to regulation in the so-called Blue Card Directive, the Single Permit Directive 2011/98/EU, the Seasonal Workers Directive, and Directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer (The ICT directive).

These directives pose a challenge to the Swedish legislation because they contain specific entitlements for immigrant workers and treat labour immigrants in different sectors differently. On the other hand, they also allow Member States a major degree of discretion in how to implement the provisions.

In the following we will discuss the effects and possible effects of two of these directives – the directives on highly qualified and seasonal workers, respectively. The two directives are applicable to two extremes of the labour market, and thus they seem particularly interesting for

\textsuperscript{20} Legislative Bill 2013/14:227 Åtgärder mot misbruk av reglerna för arbetskraftsinvandring.

\textsuperscript{21} A number of other directives affecting labour migrants from third countries have also been adopted in addition to the 2005 Policy plan see the website of the European Commission, ec.europa.eu, under the Directorates-General for Migration and Home Affairs.
our analysis: on the one hand, the most privileged and supposedly most desirable part of the labour force, and on the other hand the part of the labour force which is supposedly most vulnerable to exploitation.

3.1 The Blue Card Directive

In May 2009, the Council Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, the EU Blue Card Directive, came into force. The aim of the directive was to attract highly qualified workers from countries outside the EU to contribute to the Lisbon European Council objective of becoming ‘the most competitive and dynamic knowledge-based economy in the world’ (Recital 3).

According to the Directive, an applicant for a Blue Card is to present, among other things, a valid work contract or a binding job offer for highly qualified employment of at least one year in the Member State concerned (Article 5.1). A simplified definition of employment in this sense is considered to be highly qualified if it requires that the applicant has successfully completed three years of higher education or has five years of professional experience.

The gross annual salary is to be at least 1.5 times the average gross annual salary in that Member State, but in certain professions that are in particular need of third-country national workers, the salary threshold is allowed to be at least 1.2 times the average annual salary (Articles 5.3 and 5.5). After two years of legal employment, Member States may grant the persons concerned equal treatment with nationals regarding access to highly qualified employment (Article 12.1). EU Blue Card holders are to enjoy equal treatment with nationals regarding working conditions (Article 14). Favourable conditions for family reunification are also provided. After 18 months of legal residence in the first Member State, the person concerned and family members are allowed

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23 ‘Family members’ are defined in Article 4(1) of Directive 2003/86/EC.
to move to another Member State for the purpose of highly qualified employment (Article 18.1).  
With regard to safeguarding legal employment as well as employment conditions, Member States are given the option to reject an application for an EU Blue Card if the employer has been sanctioned for undeclared work and/or illegal employment (Article 8.5).

The Blue Card Directive was to be implemented by the Member States in June 2011 and was implemented in Sweden on 1 August, 2013. The provisions of the Blue Card Directive, for example concerning the criteria for admission, procedure, labour market access and equal treatment, were afforded a special chapter in the Aliens Act, Section 6a. The implementation implied changes in the legislation, with the consequence of diversified treatment of different groups.

3.1.1 The implementation of the Blue Card and the equal treatment argument

As already mentioned Member States were allowed a major degree of discretion in implementing the Blue Card Directive. In some cases, where Member States were given options, the Swedish Government decided not to use these possibilities, explicitly referring to equality/similarity with existing regulation on labour migration. Thus, the Government decided not to use the option to grant the Blue Card holder equal treatment with nationals regarding access to highly qualified employment after the first two years of employment in Sweden. Instead, the Blue Card – like the national work permit – was to be tied to a certain kind of work. Thus, a change in occupation would require a new application.

Another case where equal treatment with other labour immigrants was used as an argument was the option to introduce control of...
employers. The government decided not to use the option provided for in Article 8.5 to reject an application for a Blue Card if the employer had been sanctioned for undeclared work and/or illegal employment. The definitions of undeclared work and illegal employment were considered unclear and very wide. Because the legislation of 2008 did not contain regulations on rejection of an application in such cases, it was considered inappropriate to introduce this possibility with regard to Blue Card holders.

Thus, whatever the reason, the effect of these measures was equal treatment, in certain respects, of Blue Card holders and other labour immigrants.

A very interesting issue concerning the implementation of the Blue Card Directive in Sweden is the salary thresholds. As already mentioned there are two salary thresholds in the Directive: At least 1.5 times the average gross annual salary and at least 1.2 times the average annual salary. As regards the higher threshold, but not the lower, Member States may require fulfilment of all conditions in applicable laws, collective agreements or practices in the relevant occupational sectors for highly qualified employment (Article 5.4).

The implementation of these provisions on salaries is interesting primarily because the whole idea of state regulation of salaries is alien to Swedish tradition. Wages are considered to be entirely under the purview of the labour market parties. Thus, there is no statutory minimum wage in Sweden. As the organisation Saco\textsuperscript{27} pointed out in the discussions, strongly opposing a development where the state is to decide on wages, the implementation of the Blue Card Directive meant introducing a statutory minimum wage for Blue Card holders.

The decision was to use only the higher threshold, at least 1.5 times the average Swedish gross annual salary (=SEK 44 700 in 2014). The salary, insurances and other employment conditions were also not to be worse than conditions according to Swedish collective agreements or practices in the relevant occupational sectors (Aliens Act § 6a:1 (2) (1 and 2)). The reason was that with the lower threshold, the Directive

\textsuperscript{27} Saco, Swedish Confederation of Professional Associations, is a trade union confederation.
did not allow Member States to use the requirement on fulfilment of all conditions in the applicable laws, collective agreements or practices in the relevant occupational branches. The government considered this an important provision to prevent social dumping, which also ought to apply to the category of workers in question. Thus both the requirement for a salary of 1.5 times the average salary and conditions in accordance with collective agreements were preserved in regard to all Blue Card holders.

3.1.2 Remaining inequalities between Blue Card holders and other labour immigrants

Requirements on Blue Card holders in the Swedish implementation, which differ from those on other labour immigrants, include an offer of employment of at least one year at a salary exceeding 1.5 times the average Swedish gross annual salary. In contrast with other labour migrants, Blue Card holders also have to show that they already have, or have applied for, a comprehensive sickness insurance lasting for three months from the date of entry into Sweden (Aliens Act § 1:3). This is in accordance with Article 5.1e of the Directive, and in addition to the requirement for insurances applicable to all labour immigrants.

The most obvious privilege for Blue Card holders in comparison with other labour immigrants is the permission to move together with family members to another Member State for the purpose of highly qualified employment after 18 months of legal residence in Sweden. Another privilege for Blue Card holders is an extra three months’ work permit in cases where their employment lasts for less than two years (Aliens Act § 6 a:5).

Supposedly, a remaining privilege for Blue Card holders comprises the favourable conditions for family reunification: According to Aliens Act § 6 a:10, family members of a Blue Card holder shall be granted residence permits for the same time as the Blue Card holder. This is not very different, however, from the treatment of family members of labour immigrants encompassed by the general regulation who may be granted residence permits (Aliens Ordinance § 4:4a). Family members may also be granted work permits (Aliens Act § 6:3) which, according to the practice of the Migration Board, are granted if the labour immi-
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grant has been granted a residence and work permit for at least six months.28

A control measure specific to Blue Card holders consists of an obligation for a Blue Card holder to communicate to the Migration Board if 1) the employment is terminated or 2) the salary no longer exceeds the salary threshold for the Blue Card. If this obligation is not fulfilled, the Migration Board may revoke the Blue Card (Aliens Act § 6a:9).

3.1.3 The practical application – effects of the Blue Card regulation in Sweden

In the three years since the provisions of the Blue Card were implemented in Sweden, only eleven applications have arrived at the Migration Board. Out of these applications, seven have been granted. Three of them, however, were granted for the same person, who had changed employers twice; this meant that only five persons had been granted EU Blue Cards. Three of these persons were doctors, and the other persons included a “group leader specialised in technical services” and a sales and operations manager (this application was in fact made by an intra-corporate transferee, because the person was transferred to a branch of his employer). The doctors came from Pakistan, Australia and Iraq, the other two from the US and Brazil, respectively.

The four rejected applications varied: one application was pending while the applicant appealed the rejection of an ordinary work permit. Another must simply have been a mistake: the applicant had received an offer of employment as a cleaner. A third application contained no offer of employment and the fourth applicant appeared to be self-employed.

This very low number of applicants for Blue Cards seems to indicate that the advantages of the Blue Card, in relation to the regular Swedish system, are not substantial enough for immigrants to choose it. Labour immigrants fulfilling the criteria for highly qualified workers may

28 According to the handbook of the Swedish Migration Board (HANDBOK I MIGRATIONSÄRENDE) under the heading Anställning eller internationellt utbyte.
choose to apply for the regular work permit, and this is what seems to be happening.\textsuperscript{29}

\section*{3.2 The Seasonal Workers Directive}

The Seasonal Workers Directive was adopted on 26 February 2014. It shall be implemented into national law by 30 September 2016.\textsuperscript{30} The Directive sets out rules for entry and stay for third-country national seasonal workers. It also establishes a common set of rights to which seasonal workers are entitled during their stay in the EU. The Directive seeks to respond to the needs of Member States for a source of labour to fill the low-skill, seasonal, and typically precarious jobs, which are not attractive to EU residents and citizens, while simultaneously minimising the possibility of ‘economic and social exploitation’ of third-country migrant workers by providing them with the set of rights – including the employment rights – to which resident seasonal workers are entitled. The Directive is also designed to promote circular migration and to ensure that these low-skilled workers do not become permanent residents of the EU.\textsuperscript{31}

\subsection*{3.2.1 Seasonal work in Sweden}

Seasonal labour immigrants, in particular berry pickers, have formed a large part of the total amount of labour immigrants coming to Sweden after the 2008 reform. In 2014 around 2,900 work permits out of in total 12,094 work permits were granted to helpers within agriculture,

\textsuperscript{29} Swedish Migration Agency and European Migration Network, EMN Policy Report 2013, available at the website of EMNsweden.se.


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fishery and related labour.\textsuperscript{32} Most of them have been picking wild berries in the woods but others have been occupied with picking strawberries, fruit and vegetables on farms. The overwhelming majority of the berry pickers come from Thailand. In 2014, 2,668 of the work permits related to agriculture, fishery and related labour were granted to Thai nationals.\textsuperscript{33}

3.2.2 Challenges for the implementation process
In contrast to the Blue Card Directive, the requirements of this Directive as a main rule must be applied to all labour migrants that fulfil the definition of seasonal worker according to the Directive. Different streams for seasonal workers are only acceptable if they are included in bilateral or multilateral agreements (Art 4.1). The Member States, however, are still left with quite a large margin of discretion because the Directive includes a number of optional provisions. The optional clauses are divided into two types, which can be categorised as optional and semi-optional. According to the first category the Member States may carry out the action; it is totally up to the Member State to decide whether or not to implement. According to the second category they shall carry out the action, if appropriate. The obligations connected to the second kind of provisions are quite difficult to grasp.

3.2.3 Scope of the Directive
The Directive implies that a specific seasonal worker stream will be reintroduced into Swedish law. According to the Directive, a seasonal worker is a person whose principal place of residence is in a third country and who stays legally and temporarily in the territory of a Member State to carry out an activity dependent on the passing of the seasons, under one or more fixed-term work contracts concluded directly


between that third-country national and the employer established in that Member State (art 3b). The question of which sectors are dependent on “the passing of the season” is to be decided by the Member States after consultation with the social partners and listed during the implementation phase (Art. 2.2). This can be interpreted to include a very weak obligation – can the list be empty or include only peripheral sectors? In recital 13, however, it is stated that such sectors typically include agriculture and horticulture, in particular during the planting or harvesting period or tourism, in particular during the holiday period. The length of the Swedish list of sectors will probably depend on whether the Government prefers to minimise the practical effect of the Directive because it finds the Directive alien to Swedish norms, or prefers to ensure that all seasonal labour immigrants are treated in the same way. Both choices will lead to fragmentation, either in relation to other labour migrants or in relation to the seasonal workers not covered by the implemented provisions.

Another ambiguity in the Directive makes its future impact on Swedish law even more uncertain. The large majority of berry pickers with work permits in Sweden are employed by temporary employment agencies in Thailand and the question here is whether those workers are covered by the definition in Article 3 (b). Is it possible to say that they have concluded a work contract directly with an employer established in Sweden? According to Swedish law, in order for temporary agency workers to be provided with a work permit, their employer, namely the temporary work agency, must have a branch established in Sweden. This was part of the control package introduced by the Migration Board in 2011 and 2012. The Thai employer is therefore the employer “offering” the Thai worker employment in Sweden. According to recital 12 of the Directive, the Directive should cover direct working relationships between seasonal workers and employers.

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35 This information is available in Swedish at the website of the Migration Agency under specific rules for certain jobs.
The recital continues – “However, where a Member State’s national law allows admission of third country nationals as seasonal workers through employment or temporary work agencies established on its territory and which have a direct contract with the seasonal worker, such agencies should not be excluded from the scope of the Directive”.

From a Swedish perspective the question is whether an established branch fulfils the establishment criteria in recital 12. Because the Swedish Migration Agency treats these agencies like Swedish employers, it seems reasonable to assume that these workers should also be covered by the adopted implementation measures. Another line of different treatment and fragmentation is taking form in this case if the Government chooses not to incorporate the seasonal workers employed by temporary work agencies into the implementation measures. Again, the choice here will probably depend on whether the Government intends to limit the implications of the Directive.

It is worth mentioning that even now, the berry pickers employed by temporary work agencies and those employed by “real” Swedish employers are covered by different employment conditions. The reason is that different collective agreements apply to temporary agency workers and other berry pickers, respectively.\(^{36}\)

### 3.2.4 Conditions and Sanctions

The Member States shall determine a maximum period of stay for seasonal workers (Article 14), between five and nine months in any 12-month period. According to Swedish law the maximum length of stay is two years. The effect of this difference in practice will depend partly on the extent to which Sweden will make it possible for seasonal workers covered by this Directive to apply for a regular work permit from within Sweden. The provisions on rejecting an application in Article 8 and on withdrawal of an authorisation to work in Article 9 are quite extensive. Their purpose is twofold: some of them are supposed to ensure that the seasonal workers will not end up with an unreliable employer, and others are supposed to ensure that seasonal workers will

\(^{36}\text{This information is available in Swedish at the website of the Migration Agency under specific rules for certain jobs.}\)
not replace national workers. The provisions in the two articles are quite similar. They are divided into “shall”, “shall, if appropriate” and “may” clauses. The possible impact of Article 9 will be discussed a bit later. According to Swedish law, a work permit or a residence permit for work may be withdrawn if inter alia the employment is terminated and the labour immigrant has not found a new employment within three months (Aliens Act § 7:3), and shall be withdrawn if the worker has not commenced the work within four months from the first day that the permit is valid or if the employer has failed to apply the conditions prescribed in Aliens Act § 6:2, i.e. the wage and other working conditions in accordance with the relevant collective agreement (Aliens Act § 7:7e). Article 9 of the Directive requires that authorisation for the purpose of seasonal work must be withdrawn if the required documents presented were false or if the worker is staying for purposes other than those for which he or she was authorised to stay. The withdrawal shall take place if appropriate if the employer has been sanctioned in accordance with national law for undeclared work and/or illegal employment OR if the employer’s business is being or has been wound up under national insolvency laws or no economic activity is taking place, or if the employer has been sanctioned under Article 17. Article 17 prescribes a number of sanctions for violating the provisions in the Directive. The Member State may withdraw an authorisation to work if inter alia the employer has failed to meet legal obligations regarding social security, taxation, labour rights, working conditions or terms of employment, as provided for in applicable law and/or collective agreements OR if the employer has not fulfilled obligations under the work contract.

The effect of these optional and semi-optional clauses, if implemented, is that the seasonal worker will be punished with authorisation withdrawal if the employer has violated the law or the business no longer functions as anticipated. In order to mitigate the negative consequences for the worker in these cases of authorisation withdrawal, the Member States, according to Article 17.2, shall ensure that if the authorisation for the purpose of seasonal work is withdrawn pursuant to the provisions mentioned in Article 9, the employer shall be liable to pay compensation to the seasonal worker in accordance with proce-
dures under national law. Any liability shall cover any outstanding obligations, which the employer would have been required to respect if the authorisation for the purpose of seasonal work had not been withdrawn.

In Swedish law there is no similar obligation today. The only possibility for similar action would be to consider dismissal unfair, if the employer dismisses a person because that person’s work permit has been withdrawn. In that case the damages that would be activated in accordance with Sections 38 and 39 in the Act on Employment Protection could be equalised with compensation in accordance with Article 17.2 in the Directive. The Swedish Labour Court turned down such a solution, however, in 1979. According to Swedish law it is a criminal act to employ a migrant worker who lacks the necessary work and/or residence permits (Aliens Act § 20:5). The Labour Court argued that an employer cannot be obliged to employ a person in violation of criminal law. The Labour Court explained, however, that it found this conflict of law situation unsatisfactory because it led to a questionable weakening of employment protection for the migrant worker.37 So far the legislator has not adopted any measures to overcome this conflict of law situation.

Perhaps, during the implementation process, the legislator will minimise the effects of these provisions in the Directive and accordingly implement as few as possible of the may-related provisions in Article 9, arguing that they are alien to the Swedish system. It is unclear, however, if they can be totally avoided. A residence permit according to Swedish law shall be withdrawn if the employer does not fulfil the conditions on wages and other working conditions prescribed in Section 6.2 in the Aliens Act, and therefore it would be surprising if the legislator chose not to apply this provision also to those who would be covered by the provisions implementing this Directive. If they are implemented, the obligations in Article 17.2 in the Directive will be automatically activated. In that case an important difference will emerge between those covered by the provisions implementing the Directive

37 AD 1979 no 90. See also Legislative Inquiry 2010:63 EU:s direktiv om sanktioner mot arbetsgivare, 178.
and other labour migrant groups. The seasonal immigrant workers covered by the provisions implementing this Directive, in contrast to all other labour migrants, will be compensated if the employer’s behaviour leads to a withdrawal of the work permit. It might be challenging, then, to argue that such an important safeguard shall be applied only to seasonal immigrant workers. Such provisions may play a crucial role in strengthening the position of any labour migrant.

3.2.5 **Circular migration**

The last aspect that we would like to highlight in the Seasonal Workers’ Directive is Article 16 on facilitation of re-entry. A Member State is obliged to facilitate re-entry into that Member State of third-country nationals who have been admitted to that Member State as seasonal workers at least once within the previous five years. No such mechanism is presently applicable in Swedish law. However, the Directive is quite unclear regarding how this is to be done. In Article 16.2 a number of optional alternatives for ways to implement the provisions are envisaged, such as the issuance of several seasonal workers’ permits in one single act and an accelerated procedure leading to a decision on the application for seasonal work permits. Still, the phrasing of Article 16.2 indicates that there are other possible ways to implement this requirement. The minimum level is not articulated.\(^{38}\)

It also seems that the suggested alternatives are alien to Swedish traditions – for example, none of them were suggested by the Government-appointed inquiry established to (among other things) propose measures that could facilitate circular migration.\(^{39}\) Facilitating admission measures have only been available so far for specific companies employing a high number, at least 25 per year, of labour migrants.\(^{40}\)

An issue closely related to circular/permanent migration is the right to bring one’s family to the Member State. The fact that Blue Card

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\(^{38}\) Fudge & Herzfeld Olsson 456 (2014).

\(^{39}\) Legislative Inquiry 2011:28 *Cirkulär migration och utveckling – förslag och framåttblickande*.

\(^{40}\) The handbook of the Swedish Migration Board Heading *Tillstånd för arbete – certifiering av arbetsgivare*. No new employers have been certified through this procedure since 1 December 2014.
holders are allowed to bring their family might obviously contribute to their willingness to stay in a country, while the situation for seasonal workers is more problematic. According to present Swedish regulation, as already mentioned, family members may be granted residence permits, but they may be granted work permits only if the labour immigrants’ permit is valid for more than six months. These rules will probably encourage “circulation” on the part of seasonal workers.

4. Concluding remarks

In this chapter we have illustrated how the Swedish legislator has been forced to abandon the ambition of having one single-stream regulation on labour migration. This has been motivated both by an ambition to prevent abuse and obligations to apply new EU requirements. The specific measures adopted in relation to Blue Card holders can be divided, according to their aims, into two groups: protection of the national workforce (the wage threshold) and giving highly qualified workers incentives to come to Europe (family reunification and free movement rights, at least a one-year work permit). The specific measures discussed in relation to low- or medium-skilled workers (the additional controls from 2011 and 2012 and the requirements in the Seasonal Workers Directive) are different. Their purpose is mainly to prevent abuse of workers (control of employers, sanctions) and to counteract illegal employment (controls of employers, withdrawal of provisions).

In implementing the Blue Card Directive the Government could choose whether to implement the optional clauses. It is worth noting that the Government preferred to keep the limited access to the Swedish labour market and safeguard the Swedish model of wage-setting instead of adopting provisions that could facilitate highly qualified workers’ access to the Swedish labour market. Safeguarding the interests of the Swedish labour force and preventing social dumping were considered more important.

An interesting difference regarding the fragmenting measures is that many of the added rights for the Blue Card holders are not labour rights which are supposed to be provided by the employer, but rights which are provided by the State (family reunification, free movement rights...
to other Member States). A comparable measure for the seasonal workers – the provision related to circular migration – is much more vague and difficult to substantiate. It was obviously more demanding for the Member States to agree on giving up border control regarding low-skilled workers. Instead, to a large extent, the specific measures discussed in relation to low- and medium-skilled workers affect the employer. The seriousness of the employers is and is supposed to be controlled in much more extensive ways than the intentions of the Blue Card holder’s employer, and it is the employers who are proposed to pay additional damages if their illegal behaviour leads to a withdrawal of an authorisation for a seasonal worker.

Another difference between the two categories is that many fragmenting measures related to highly qualified workers are connected to the individual worker, either by ensuring that the worker has specific qualifications or by giving the worker specific rights, while the regulation relating to other labour migrants mirror the fact that they are more dependent on others’ behaviour. These differences are of course related to the assumption that highly qualified workers are in a much stronger position due to the difficulty of replacing them, and therefore they have the ability to safeguard their rights while the other groups need the protection of the state. The fact that highly qualified workers, in contrast with other workers, are considered to be a scarce resource also leads to another difference: they must be given incentives to come to an EU Member State.

Finally we think this chapter has clarified that the Swedish regulation on labour migration can no longer be considered transparent and effective; as mentioned, this was one of the goals with the introduction of a single-stream model into Swedish law.

It is evident, however, that these fragmenting measures are not necessarily bad. The principle of regulated migration applies in Sweden and that means that the labour migrant, the job offered and (sometimes) the potential employer must fulfil specific criteria that are not applicable to domestic workers. If those requirements cease to be fulfilled, the labour migrant risks losing the right to stay in Sweden. This implies that when discussing whether labour migrants from third countries are provided with the same set of rights as domestic workers,
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migration law must be taken into account.\textsuperscript{41} Migration law creates different statuses distinct from domestic workers, which will affect the labour migrants’ ability to enforce their labour rights. In order for the State to compensate for the imbalance between domestic workers and labour migrants, special measures alien to Swedish domestic labour market traditions might be taken, such as requirements for certain employment conditions, new structures for monitoring employment conditions or new sanctions against employers that violate rights.

The 2008 Swedish single-stream regulation for labour migration treated all kinds of labour migrants in more or less the same way. However, it turned out that abuse occurred in the low-skill sectors. Weak trade union presence and unemployment in those sectors made labour migrants more vulnerable to abuse.\textsuperscript{42} The two EU directives add a very important differentiating factor as well: in these Directives, the right to stay in a Member State’s territory differs significantly between the Blue Card holders and seasonal workers. This difference is quite important when analysing the different groups’ ability to enforce their rights. If a worker can stay in the territory for only a short time, it will be more difficult to enforce his or her rights. It is evident that it is not only relevant to talk about different statuses regarding domestic workers and labour migrants. The statuses also differ between different labour migrant groups, and it is obvious that quite a complex web of conditions affect migrant workers’ power in more or less foreseeable ways. Therefore, fragmenting measures taken to compensate for those effects must not always be a negative thing; they can sometimes be adopted in order to safeguard equal treatment. Nevertheless, it is not a foregone conclusion that measures solely focused on labour migrants are the most effective ones in the long run.\textsuperscript{43}

\textsuperscript{41} Bridget Anderson, Migration, immigration controls and the fashioning of precarious workers, 24:2 WORK, EMPLOYMENT AND SOCIETY, 300 (2010); Mark Freedland & Cathryn Costello, Migrants at Work and the Division of Labour Law in Cathryn Costello & Mark Freedland eds., MIGRANTS AT WORK, 1, 7 (2014).

\textsuperscript{42} For a general discussion on that theme, see Martin Ruhs, THE PRICE OF RIGHTS 179 (2015).

\textsuperscript{43} Mark Freedland & Cathryn Costello, Migrants at Work and the Division of Labour Law in Cathryn Costello & Mark Freedland eds., MIGRANTS AT WORK, 1, 12 (2014).