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"THE MOST OPEN SYSTEM AMONG OECD COUNTRIES"

Swedish regulation of labour migration

Abstract

The Swedish legislation on labour migration came into force in 2008, inspired by recommendations of the European Commission. In the regulation, there is a conflict between an employer-governed labour migration with a simplified procedure and protective aims like equal treatment with workers in the country or protection against unemployment. In this article, the author investigates how these aims are balanced against each other, in the regulation, in the regulatory guidelines to migration authorities, in the practical application and in the recent transposition of European Union directives. The author also discusses the consequences of this with regard to the power relation between the employer and the employees.

Keywords

Labour migration • Blue Card Directive • Community/Union preference • Circular migration

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1 Introduction

Labour migration is – both in Sweden and in the rest of the European Union (EU) – seen as an important part of the solution to the problems of economic growth and future welfare caused by an ageing population. Labour migration is also considered a way to vitalise domestic labour markets and economies. Therefore, it has long been debated within the EU how to increase labour migration in a way that is favourable to member states.

In 1999, the EU was given the authority to regulate issues concerning labour from so-called third countries and has since taken steps to harmonise legislation of Member States according to the needs of the labour market, preferably of highly educated labour and seasonal labour for work requiring low or no education. 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. Among the measures proposed was a common framework of rights for all third-country nationals in legal employment and directives applicable to four specific categories of the labour market (Herzfeld Olsson 2012). These categories were highly skilled workers, seasonal workers, intra-corporate transferees (ICT) and remunerated trainees.

In Sweden, new regulations on labour migration came into force in December 2008 (Government bill 2007/08:147), introduced by a newly appointed liberal government. The regulations were clearly inspired by EU discussions, but the government representatives characterised them as more far-reaching than the proposals at EU-level (Malmström & Billström 2008). A couple of years later, in an Organisation for Economic Co-operation and Development (OECD) report – *Recruiting Immigrant Workers: Sweden 2011* – Sweden was said to appear to have the most open labour migration system among OECD countries, given the absence of skill requirements,[1] salary thresholds, and limits on the number of permits issued and the renewability of permits (OECD 2011).

In this article, the author discusses how different interests have been balanced against each other in the Swedish regulations (including the implementation of EU directives). The author also discusses the effects of the regulations and their application on power-relations in the labour market, especially the relation between the employer and the migrant worker. The source materials for the discussion on the regulations are: EU directives on labour migration, Swedish legislation with preparatory works[2] clarifying the aims of the legislation[3] and guidelines issued by the government to the Migration Board. For the discussion of the practical application, the author has used the Migration Board statistics; a survey of applications for work permits, namely an investigation of 106 applications for work permits to do cleaning or care work in January and February 2012 (Calleman 2013); and finally, interviews with Migration Board officials.[5]

2 Balancing different interests

In the EU documents on labour migration, there is a conflict between the demand for labour and 'a simplified and non-bureaucratic

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procedure' on the one hand and 'a fair rights-based approach to all labour immigrants' (Policy Plan on Legal Migration (COM (2005) 669) on the other. In the Swedish regulation, there is a similar conflict between 'an efficient and flexible system for labour immigration' and a requirement for 'equal treatment with workers already in the country' (Government bill 2007/08:147).

The provisions of the EU directives also balance the demand for labour against strivings to protect the labour markets of the EU or the developing countries outside the EU. The Community/Union preference, which has clarified that EU nationals are always to be prioritised for the jobs within the EU, is a means for protection against unemployment within the EU.[6] Certain provisions of the Blue Card Directive aim to protect developing countries against 'brain drain' and 'care drain'. (As the Blue Card Directive targets highly skilled workers by offering benefits in the EU, it also poses a direct risk of causing brain drain and care drain in third countries.)

Further, the EU directives on labour migration express a compromise between the need for labour and harmonisation of EU regulation on the one hand and the sovereignty of Member States, 'the full respect for the competences of Member States, particularly on employment, labour and social matters' (Recital 11 of the Blue Card Directive), on the other hand. Member States are allowed a major degree of discretion in how to implement the directives, which is, of course, of importance for the balancing of interests.

The balancing of aims and interests in the legislation and its application is crucial for the power relations between employers and employees. This refers not only to the material contents of the rules, but also to the mechanisms for enforcing them, the construction of procedures and sanctions, for example the remit of authorities and the possibility to inflict sanctions in cases of breach of the regulation. Not the least, procedural rules may concern the right to appeal a decision by the migration authorities.

In the following, with a focus on how different interests have been balanced, the author will present the Swedish legislation of 2008 and its application, measures taken to counter problems arising from its application, then (briefly) the implementation of EU directives on labour migration that came into force after 2008, challenging some of the characteristics of the Swedish regulation.

3 Conditions for labour immigration according to the Swedish legislation of 2008

According to its preparatory works, the aim of the Swedish legislation on labour migration of 2008 was to ease the recruitment of labour from third countries and improve employers' possibilities of recruiting workers with the appropriate qualifications (Government bill 2007/08:147: 53 and 73). Therefore, the needs of individual employers were to be the basis for the granting of work permits and the state employment agency was no longer to limit labour immigration to certain branches or professions. However, the EU principle of Community/Union preference implying that citizens of member states must be given priority in vacant positions was to be followed (Government bill 2007/08:147: 65).

With regard to the conditions for admission, an applicant for a work permit had previously not been allowed to enter the country until the permit had been granted. This requirement had been introduced in 1967 when the need for labour was diminishing and was then considered a crucial principle to prevent unhealthy competition and social dumping. According to the legislation of 2008, exceptions to this principle could be made if an applicant had visited an employer in Sweden in a branch where there was a shortage of labour and the employer would otherwise be caused trouble (Chapter 5, section 18, paragraph 3 of the Aliens Act). From the list of professions with a great need for more labour, established by the Migration Board (MIGRFS 02/2014), it is clear that shortage of labour is considered to prevail in many professions. Examples are bus drivers, preschool teachers, nurses, taxi drivers and telemarketers.[7]

The Aliens Act states that a work permit is to be granted for the duration of the employment but for a maximum of 2 years. The duration of a permit may be extended, but the total maximum duration is 4 years. For the first 2 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 (Chapter 6, section 2a of the Aliens Act). 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 3 months (Chapter 7, section 3, item 2 of the Aliens Act).

The regulation contains no skill requirements or salary thresholds. Instead, there is a requirement that wages, insurance and other employment conditions of the migrating workers are to be at the same level with conditions for workers already in the country. It was emphasised in the preparatory works that the regulations on labour migration must obtain legitimacy, and that they were not to be used to displace workers already in the country (Government Official Report 2006:87; Government bill 2007/08:147). 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[8] 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 branch (Chapter 6, section 2, paragraph 1 of the Aliens Act).

The issuing of work permits, including the control of wages, insurances and other employment conditions rests with the Migration Board, but in order to ensure that all employment conditions are in line with local collective agreements, the Migration Board is to provide an opportunity for associations of employers or employees (trade unions) within the field to give their opinions on the working conditions (Chapter 5, section 7a of the Aliens Ordinance).

In the preparatory works, there is an emphasis on the positive effects of employer-governed labour migration. Still, there is very little discussion of the employers themselves, although their industry/branch and ability to pay salaries is of the greatest importance for the conditions of labour immigration and for equal treatment with workers already in the country. There is no mention in the legislation or its preparatory works of the repute of presumptive employers in terms of taxes paid or the fulfilment of obligations according to collective or other agreements. There is also no discussion on employers' country of residence; are employers supposed to have their residence in Sweden, or might they also reside abroad? (Workers posted to Sweden are obliged to have work permits.) This issue is crucial, as the protection under labour law of workers posted to Sweden by their foreign employers is very weak and not on an equal footing with workers employed in Sweden. For workers *posted* to Sweden, only certain provisions specified in the Posted Workers' act are applicable.[9] Concerning other issues, the legislation of the country where the posted workers are employed is applicable.

Finally, it was not discussed whether employers could only be legal persons or whether they could also be physical persons. This issue is of importance in the light of the increasing need for personal care and service in private homes (e.g. domestic services or personal assistance), and also of importance from a power perspective, as the protection offered by labour law is often weak in employment in

private homes. Not the least interesting in this context is the absence of trade unions in most such areas of employment (Calleman 2011).

A conclusion with regard to the balancing of different interests is that the regulation gives room for a flexible system for labour immigration and for employers' possibilities to recruit workers with appropriate qualifications. Another conclusion is that the legislation makes migrating workers markedly dependent on their employers. Employers have been given the right to decide not only whether there is a need for labour from outside the EU and (in some branches) whether the need is so great that an applicant may have their permit granted in Sweden, but also to make the decision concerning any extension in the employment. Considering the weak employment protection prevailing in Sweden, employers also decide whether and when the employment is to be terminated. The obligation to stay with the same employer for the first 2 years is an important element in the power relation, as the ability of migrant workers to change employers is critical to whether or not they can actually enforce their rights (Fudge 2012). This requirement alone implies they are not treated equally with workers in the country.

4 A short turnaround time

As the control of wages, insurances and other employment conditions rests with the Migration Board, their power and activities are crucial to the conditions prevailing in labour migration.

The remit of the Migration Board is defined by government guidelines. In the first regulatory guidelines issued to the Migration Board on the application of the legislation of 2008, a *short turnaround time* was given the highest priority. The turnaround time was to be 'as short as possible with respect to the needs of the applicants and the labour market' (Regulatory Guidelines 2009).

In their report to the government concerning 2009, the Migration Board pointed out that the average turnaround time of applications for work permits had been 29 days (Report 2009). Forty-five per cent of cases had been decided within 3 weeks, 59% within 1 month and 97% within 3 months. In 85% of the cases, the employers themselves had requested the opinion of the local trade unions. In the remaining 15% of the cases, the Migration Board had requested such opinions and the turnaround time had consequently been extended by, on an average, 20 days. Thus, in the report, the opinion of the trade unions was discussed only with reference to how it had affected the turnaround time; there was no mention of the contents of these opinions, or of how these had affected employment conditions.

In its report, the Migration Board emphasised that there were no requirements in the legislation for control that the employers paid taxes or fees or fulfilled obligations according to collective agreements or for control regarding economic resources of the company. The Migration Board also pointed to areas where it considered there was a need for reform. One such issue concerned the lack of provisions concerning persons employed abroad, which had led to problems in the application process. Many of those employed abroad retained their salary from their home country, which was often not at the level of Swedish collective agreements. In such cases, the Board added allowances and other benefits to the salary, whereupon it considered that the applicant had reached the level of collective agreements (Report 2009: 5).

The precedence given to flexibility led to the granting of a large number of applications in a short time. In 2009, 14,481 persons were granted work permits, in 2010 to 13,612 persons and in 2011 to 14,722 persons. In 2010, helpers in agriculture, gardening, forestry and fishing was the largest occupational group with 4,508 persons. After that, followed computing professionals (2208 persons), workers in industrial kitchens and restaurants (1049), helpers in kitchens and restaurants (548), civil engineers, architects (525) and cleaners (487).

To conclude, the government's regulatory guidelines obviously gave precedence to a non-bureaucratic and flexible procedure over employment and working conditions. The lack of control over employers implied high risks for immigrants to be paid less than the promised salary or not being offered a job at all. The conclusion from the statistics is that the majority of labour immigrants are not performing jobs that require high qualifications. This means that recruiting people 'with the appropriate qualifications' (one of the aims of the regulations) seems not to have been the primary goal of the majority of employers.[10] It seems more like there is 'a growing demand for those workers who are officially classified as low skilled to perform jobs that are dirty, dangerous and degrading' (Fudge 2014: 2).

5 Reintroducing different treatment of different sectors

Since the Swedish regulations on labour immigration came into force, its application has received much attention in the public debate. One employers' organisation in particular has been very positive about the regulations, claiming that non-EU immigration is necessary for Swedish business to be successful in the face of ever-increasing international competition (Ekenger 2010). The organisation has presented positive reports from companies that have been able to satisfy their recruitment needs, thanks to the new legislation.

Others have criticised the reported gross abuse of certain labour migrants, for example, foreign berry pickers. It has also been claimed that non-serious entrepreneurs have been selling work permits without offering jobs (Lag&Avtal 2010). The Migration Board has been said to grant work permits where the applicants have only been registered with an employment agency (Larsson 2011).

In March 2011, a parliamentary committee presented a report on circular migration (Government Official Report 2011:28). The committee had been given the task of identifying factors influencing migrants' mobility between Sweden and their countries of origin and, as far as possible, eliminating obstacles to that mobility.

The committee touched on the problems concerning the fact that non-serious and criminal employers were exploiting immigrant workers. Besides the consequences for the workers involved, bad conditions for migrating workers could mean that, in the long run, labour migration to Sweden might lose its attraction. The committee made a series of suggestions for increased control of employers and concluded that the government ought to take steps to address the fact that certain employers did not fulfil the promised employment conditions (Government Official Report 2011:28: 131f.).[11]

Probably as a consequence of this criticism, in its guidelines to the Migration Board of 2011, the government repeated its requirement for a short turnaround time, but it also provided the authority with the task of combating sham employment and abuse of the regulations (Regulatory Guidelines 2011: 4).

In accordance with the above, the Migration Board introduced special requirements for certain categories of employers – first, in the summer 2010, 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 earlier employed berry

pickers had to show that he had then paid the wages the pickers were entitled to. Furthermore, a foreign temporary work agency posting berry pickers to Sweden was obliged to have a branch in the country.[12]

In January 2012, the Migration Board introduced tightened control of certain other businesses 'in order to counter the abuse of people in the Swedish labour market as far as possible and within the framework of current legislation.'[13] The tightened control concerned businesses active for less than 1 year and also businesses within certain trades, namely cleaning, hotels and restaurants, construction, retail stores, farming and forestry, auto repair, service and temporary work. In such businesses, employers had to show they could pay the wages offered for at least 3 months. Employers who had earlier employed people from countries outside the EU were obliged to show they had paid payroll taxes. A company registered in a country outside the EU was to have a branch in Sweden accountable for employment conditions.[14] As this control concerned certain branches, dissimilar treatment of different sectors and state limitation of immigration was to a certain degree reintroduced.

Thus, the activities of the Migration Board gave precedence to safeguarding minimum employment conditions over employers' needs for flexible recruitment of labour from third countries, implying a shift in the balancing of interests in the application of the regulation. This shift may have improved the conditions for immigrants that were allowed into the country but to others, it meant they were not granted a work permit. The tightened control resulted in a decrease in the number of permits granted in the areas subject to control. For example, the number of 'helpers and cleaners' decreased from 798 in 2011 to 553 in 2012, and the number of workers in 'housekeeping and restaurants' decreased from 1,323 in 2011 to 861 in 2012. The total number of work permits granted decreased from 16,543 permits in 2012 to 15,357 permits in 2013.

6 Countering the risk for unemployment

The *practical application* of the legislation has important implications for the balancing of different interests.[15] This refers, for example, to balancing the aim of preventing unemployment to other interests. In the preparatory works, it was emphasised that the risk for increasing unemployment would be countered both by the Community/Union preference and by the requirement for employment conditions on a par with Swedish collective agreements.

Concerning the Community/Union preference, interviews with officials showed that the Migration Board requires that the employment offered be advertised for 10 days throughout the EU via the state employment agency and the Eures. There is, however, no requirement that a person in Sweden or the rest of the EU responding to the advertisement must be contacted or interviewed. If a person within the EU applies for the job and the employer prefers a person from a country outside the EU, the employer is free to choose the latter (Interview, Migration Board 2012). This means that there is no substance given to the concept of Community/Union preference.

Concerning employment conditions, the provisions of the Aliens Act specify that the salary, insurance and other employment conditions of migrating workers are to be not worse than conditions following from Swedish collective agreements or customs in the branch. However, these provisions, in fact, cover only *the offers of employment* submitted by the employer to the Migration Board and there are no requirements posed on the *actual employment conditions*: The regulations have no requirement for a binding offer of employment. This means that an employer may offer certain conditions in the application process, but later write something else in the employment contract or pay another wage. This, in turn, creates a risk for dumping of employment conditions.

In the case of an application for *extension* of a work permit, however, the Migration Board does control the employment conditions; if the employment conditions up until the application for extension have not been in accordance with collective agreements, the work permit will not be extended. The control by the Migration Board of *actual* conditions amounts to a control in retrospect, meaning that immigrants might lose their permit if their wages have been too low.

To conclude, the practical application of the regulation on labour immigration has given precedence to a flexible recruitment without actually considering the risks for unemployment in Sweden or the EU and without considering actual employment conditions. The requirement for *formal* equality with workers already in Sweden seems to have given legitimacy to the regulations, while the delivery of *actual* equality has been given very low priority.

7 The trade unions – safeguarding equal treatment?

The trade unions in Sweden have lost some of their power and influence and the relationship between trade unions and employers has changed. Between 2006 and 2008, the share of organised workers in Sweden decreased from 77% to 71%, and simultaneously, the level of organisation among *employers* increased. The general decline in unionisation was to a large extent created by an abolishment in 2008 of state financing of unemployment benefits (Kjellberg 2009).

As previously mentioned, the trade unions are to be consulted by the employer or the Migration Board concerning the employment conditions. In the cases covered by the empirical survey of applications, all applications had been commented on by a trade union and, according to the officials of the Migration Board, they very rarely decide on a work permit without consulting the trade union. However, the comments of the unions only concern *the offer* of employment and their task is limited to deciding whether the wages, other employment conditions and insurance are in line with collective agreements (Chapter 5, section 7a of the Aliens Ordinance). The empirical survey showed other points of view that the trade unions might have, for example, that there is a risk of increasing unemployment within a branch or area or that the employer in question has recently dismissed personnel due to reduced business, are not considered relevant. Likewise, if the trade union has opposed granting a permit because the employer lacks a collective agreement (which means there is no way for the trade union to control wages in the future), the applicant will still be granted a work permit if the conditions offered are not worse than the collective agreement of the branch.

To conclude, the trade unions have only limited influence over formal employment conditions and have very little say about the risks in general for immigrant workers accepting an employment offer. The primary purpose of the government involving trade unions in the process seems to be to give *legitimacy* to the decisions. Thus, the involvement of the trade unions does not alter the fact that flexibility in recruitment is given precedence to equality with workers in Sweden.

8 The implementation of EU regulation concerning labour migration[16]

The discussions on EU level referred to in the first section of this article, have step by step led to regulation in directives. These directives pose a challenge to the Swedish legislation as they treat labour immigrants in different sectors differently and contain more specific entitlements for immigrant workers. On the other hand, they also allow Member States a major degree of discretion in how to implement the provisions.

8.1 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 so-called 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 others, a valid work contract or a binding job offer for highly qualified employment of at least 1 year in the Member State concerned (Article 5.1). 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). For the first 2 years of legal employment, access to the labour market for a blue card holder is to be restricted to employment that meets the requirements for entry, but after this, 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 to move to another Member State for the purpose of highly qualified employment (Article 18.1).

The Blue Card Directive fully respects the competences of Member States, particularly on employment, labour and social matters (Recital 11) and the Member States have the right to determine *the volumes* of admission of third-country nationals for the purposes of highly qualified employment (Article 6.6). Certain measures have been taken in order to protect the labour markets of the EU or developing countries. According to Article 12.5, the *principle of Community preference* is to be observed with regard to access to the EU labour market and Member States are given the option to reject an application for an EU blue card in order to *ensure ethical recruitment* in sectors suffering from a lack of qualified workers in the countries of origin (Article 8.4).

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). An important procedural safeguard is that any decision rejecting an application for an EU blue card or a decision not to renew or withdraw an EU blue card shall be *open to legal challenge* in the Member State concerned (Article 11.3).

The Blue Card Directive was to be implemented by the Member States in June 2011 and was implemented in Sweden on 1 August, 2013 (Government bill 2012/13:148). 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 crucial changes in the legislation having, as a consequence, diversified treatment of different groups.

EU blue card holders were guaranteed the salaries according to the directive, but the Swedish legislation still did not contain any requirements for a binding employment contract or controls of the actual payment. With regard to the directive's requirement for a 'valid work contract or as provided for in national law, a binding job offer for highly qualified employment,…' (Article 5.1 a), the government, however, assessed that the Swedish regulation did correspond to the requirements of the directive (Government bill 2012/13:148: 47).

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 2 years of employment in Sweden. Instead, the blue card – like the national work permits – was to be tied to a certain kind of work and a change in occupation would require a new application. This was considered not to diminish the mobility of the worker or the employers' possibilities to make use of their qualifications (Government bill 2012/13:148: 75f.)

The government also 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 (Government bill 2012/13:148: 59 and 61). The definitions of undeclared work and illegal employment were considered unclear and very wide. As there were no regulations on rejection of an application in such cases in the legislation of 2008, it was considered inappropriate to introduce this possibility with regard to blue card holders.

With regard to the protection of domestic or EU labour markets, the government simply referred to the requirement for *Union preference* in existing legislation and stated that the same was to apply to applications for EU blue cards (Government bill 2012/13:148: 57).

Further, the government decided not to use the option to reject an application for an EU blue card in order to *ensure ethical recruitment* in the countries of origin, as 'there was no reason to believe' that the Blue Card Directive would imply increased recruitment of labour in sectors where there was a lack of qualified labour in the countries of origin (Government bill 2012/13:148: 58f.).[17]

The implementation of the directive had the important consequence for Swedish law that all decisions on work permits could hereafter be appealed. Before the implementation, decisions on work permits by Swedish authorities could only be challenged legally on certain strictly limited conditions, but – as previously mentioned – the directive requires that decisions concerning an application for an EU blue card shall be open to legal challenge in the Member State concerned. This Article concerns only blue card holders but the Swedish government considered that the right to appeal a decision on a work permit should be granted to all labour immigrants, in accordance with existing regulation on labour immigration where the same procedures and the same rights apply to all applicants regardless of their education and salary (Government bill 2012/13:148: 89).[18]

8.2 The Seasonal Workers Directive

In February 2014, the Directive 2014/36/EU on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers (the Seasonal Workers Directive), was adopted, laying down a set of EU rules mainly addressing low-skilled migrants and covering stays between 5 and 9 months. The aim of the directive was to ensure decent working and living conditions for seasonal workers and to prevent overstaying or temporary stay from becoming permanent (Recital 7).

Very briefly, according to the Seasonal Workers Directive, a requirement for admission to seasonal work is a valid work contract or a binding offer to work as a seasonal worker, including the place and type of the work, the duration of employment, the remuneration, the working hours per week or month and the amount of any paid leave (Article 5.1). Member States shall require that these conditions comply with applicable law, collective agreements and/or practice (Article 5.2). Seasonal workers shall be entitled to equal treatment with nationals of the host Member State at least with regard to working conditions, including pay and dismissal, working hours, leave and holidays, freedom of association and the right to strike (Article 23). Member States may, however, restrict equal treatment by excluding family benefits and unemployment benefits (Article 23) and shall require that the seasonal worker will have sufficient resources to maintain himself/herself without having recourse to the social-assistance system of the Member States (Article 6.3).

Within the maximum period accepted, Member States shall allow seasonal workers *one extension of their stay to be employed with a different employer* (Article 15.3). Although this possibility is conditioned, it is important, as the ability of migrant workers to change employers is often critical to whether or not they can actually enforce their rights. Member States shall provide for *effective, proportionate and dissuasive sanctions* against employers who have not fulfilled their obligations under the directive and, in certain cases, the employer shall be liable to pay compensation to the seasonal worker in accordance with procedures under national law (Article 17). Member States shall also ensure that there are effective mechanisms through which seasonal workers may lodge complaints against their employers (Article 25.1). As in the Blue Card Directive, decisions concerning an application shall be open to a legal challenge in the Member State concerned (Article 13.3).

The directive is to be implemented by Member States by September 2016 and seems to make necessary certain changes in the Swedish legislation. The directive differs from the Swedish regulation, for example, in the requirement for a maximum stay of 9 months in a period of 12 months and in giving the workers (on certain conditions) the right to change employers. It also differs in the requirement that the application be accompanied by a valid work contract or a binding job offer and the requirement for effective, proportionate and dissuasive sanctions against employers in the event of breaches of their obligations, including the liability to pay compensation to seasonal workers. It may also be questioned whether in Sweden, in workplaces without trade union representation, there are effective mechanisms through which seasonal workers may lodge complaints against their employers. Finally, it might imply abolition of special provisions on work permits for international exchange (Chapter 6, section 2, paragraph 2 of the Aliens Act), which have previously been used for seasonal work (primarily performed by workers from the Baltic States) but has lost most of its significance since Sweden entered the EU.

8.3 The directive on intra-corporate transfers

The 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) came into force on 28 May 2014 and shall be transposed by Member States by 29 November 2016.

The directive aims to facilitate mobility of ICT within the Union and reduce the administrative burden associated with work assignments in several Member States (Recital 25). Their stay is intended to be temporary: The maximum duration of the ICT shall be 3 years for managers and specialists and 1 year for trainee employees (Article 12).

In order to avoid their exploitation and distortion of competition, the directive lays down a common set of rights for ICT when working in the EU. Member States shall require that all conditions *other than remuneration* in regulations applicable to *posted workers* in the relevant occupational branches are met during transfer (Article 5.4 a). As regards the *remuneration* granted to the third-country nationals, it is to be not less favourable than the remuneration granted to nationals of the Member State occupying comparable positions in accordance with applicable laws or collective agreements or practices (Article 5.4 b).

In the directive, the entitlements of third-country transferees are established both in relation to nationals of the Member State in question and to workers posted by enterprises within the EU. The regulation is complicated and it is difficult to foresee the outcome of the transposition of the directive to Swedish law. The Swedish regulation builds on the idea of equal treatment of labour immigrants with people working in Sweden with regard to employment conditions. The ICT directive, however, states that *undertakings* established in a third country should not be given any more favourable treatment than undertakings established in a Member State (Recital 37), (meaning no more favourable treatment than according to the posted workers directive). This might mean that the transposition of the ICT directive to Swedish law will imply a worsening of the conditions of ICT from third countries. As has been hinted above (section 4), in the practical application of the Swedish regulation, the conditions of transferees have, however, sometimes already been worse than those of their equivalents in Sweden.

9 Increasing state control

Recently, in August 2014, new regulation aiming to detect and stop abuse of the Swedish legislation on labour immigration came into force (Government bill 2013/14:227). This regulation mainly implies controls in retrospect of employment conditions and access for the Migration Board to documents of other authorities. It also implies that employers of labour immigrants are liable on their honour, at the Migration Board's request, to provide written information on the conditions applying to the position. As the employer provides information on their honour, inaccurate information may lead to a fine or imprisonment.

If employment has not commenced within 4 months or if the employment conditions are not met, the residence and work permit shall be revoked (Chapter 7 section 7e of the Aliens Act). If employment is terminated after the Migration Board has started looking into a revocation of the permit, the employee must find a new job within 4 months in order to be allowed to keep her or his residence permit.

This means that, so far, efforts of the government to strengthen the regulations merely imply a control in retrospect and has not addressed the problems of non-binding offers of employment or the lack of sanctions against employers who are breaking the rules. The consequence is that the persons primarily punished are the migrant workers who risk losing their work and residence permits in cases of control. Thus, the new regulation does not affect the balance of interests or the power relation between employer and employee.

10 Conclusions

The Swedish regulation on labour migration of 2008 differs from the regulations in many other countries and – given the absence of skill requirements, salary thresholds, limits on the number of permits issued and the renewability of permits – it has been said to have the most open labour migration system among OECD countries. In this article, the author has discussed how different interests, mainly the need for labour from countries outside the EU and a flexible and non-bureaucratic recruitment of labour on the one hand and equal employment conditions and the protection of labour markets on the other, have been balanced against each other in the Swedish regulations (including the implementation of EU directives). The author also discusses the effects of the regulations and their application on power relations between employer and employee.

With regard to the balancing of interests, the legislation and its application has given precedence to a flexible system for labour immigration and to employers' possibilities to recruit whom they might want over equal treatment with workers in the country. In practice, the Union preference has no impact on the employers' possibilities to recruit from third countries, there are no skill requirements and the regulatory guidelines from the government give precedence to a short turnaround time. At the same time, the regulation tends to make migrating workers markedly dependent on their employers: Employers have been given the right to decide not only whether there is a need for labour from outside the EU and (in some sectors) whether the need is so great that an applicant is to be allowed to have his permit granted in Sweden, but also to make the decision concerning any extension in the employment.

Further, as there is no requirement for a *binding* offer of employment or employment contract to be included in the application for a work permit, the employers are, to a large extent, free to set the wages they wish once the worker has entered the country. As there is no minimum wage legislation in Sweden, in workplaces without collective agreement, only negotiations and the power relation between employer and employee determine the wages.

In trades where the level of organisation is low and in workplaces where there is no union representative (which is often the case where labour immigrants work), the union has very little influence on employment or other conditions. An employer with no collective agreement, who pays less to the immigrant than to other workers, or offers few working hours, does not risk anything. However, migrant workers who complain about employment conditions or turn to the union for support, risk being dismissed and maybe, as a consequence of the dismissal, lose their work and residence permits.

With regard to the effects on the labour market and unemployment, this has, in practice, been ignored. So far, the effects on unemployment may be negligible (as labour immigration is still relatively limited in numbers), but in the long run, increased unemployment and a downward pressure on wages could be the result.

The implementation of EU directives on labour migration will mean different regulations for different sectors of the labour market. As regards the Blue Card Directive, the government has been reluctant, where there was an option, to introduce some of the privileges or protection for highly qualified workers, arguing that the regulation was to be equal to the regulation for other workers. With regard to the protection of labour markets, the government did not use the option to protect developing countries against 'brain drain' and 'care drain'. The implementation of the Blue Card Directive, however, had the important effect of making decisions in Sweden on work permits open to legal challenge.

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Notes

1. According to Fudge (2012) almost all countries use immigration law to create a variety of different migration statuses, some of which are highly precarious, which in turn generate a differentiated supply of labour that, together with migratory processes, produces precarious workers and precarious employment norms.
2. Chapter 6 of the Aliens Act, Chapter 5 of the Aliens Ordinance, Government Official Report 2006:87 and Government bill 2007/08:147.
3. In Sweden, preparatory works are used by the legislator to explain in depth the goals of a piece of legislation and may be used by courts to state the reasons for their decisions.
4. Interviews with Susan Lindh and Liselott Augustsson Salomon, officials of the Swedish Migration Board (13 June 2012).
5. According to a Council Resolution of 20 June 1994 on limitations on the admission of third country nationals to the territory of the member states for employment (OJ C 274).
6. The total number of such applications in 2014 was, however, only 1066, out of which half came from people categorised by the Migration Board as 'specialists' and the other half from those with unskilled jobs.
7. In practice, minimum 13,000 SEK, (implying they will not be eligible to seek social assistance in Sweden).
8. The Posted Workers' Act (1999:678) is an implementation of the Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.
9. Interviews with employers in the domestic work and care work sector showed that they were looking, for example, for people who were hard working and did not report sick, who spoke the same language as the employer and the rest of the staff or who were of the same origin as the person with need for personal assistance.
10. Politicians and trade unions have also made suggestions for reform. The most elaborate are proposals made by the TCO (The Swedish Confederation for Professional Employees) (Memorandum TCO 2012). These proposals include: Control beforehand of the presumptive employer's repute, control of the employer's payment of taxes and debts, a control in retrospect

via the tax authorities of taxes and employer's fees relating to the immigrant in question, strengthening of the legal status of the offer of employment.

11. http://www.migrationsverket.se/Andra-aktorer/Arbetsgivare/Sarskilda-regler-for-vissa-yrken-och-lander/Barplockare.html (07.09.2014).
12. www.migrationsverket.se/info/5124.html (03.08.2012).
13. Now (02.10.2014): http://www.migrationsverket.se/Andra-aktorer/Arbetsgivare/Anstalla-fran-lander-utanfor-EU/Hogre-krav-for-vissa-branscher.html
14. This chapter builds on an empirical investigation of a number of applications and interviews with Migration Board officials responsible for the processing of applications.
15. The Single Permit Directive 2011/98/EU is not dealt with in this article as it implied very minor changes in the Swedish legislation.
16. In the summer of 2014, the Migration Board had granted only two blue cards and these were for doctors.
17. The right to redress was also introduced in the seasonal workers' directive (Article 13.3) and the single permit directive (Article 8.2).

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