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NOTE

From: Presidency
To: Working Party on Integration, Migration and Expulsion (Admission)
Subject: Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL concerning the status of third-country nationals who are long-term residents (recast)
- Discussion paper

1. INTRODUCTION

The Presidency has presented a compromise proposal (doc. 7517/23) to be discussed at the IMEX (admission) meeting on March 28, 2023. The compromise proposal focuses on Chapter I and II of the Long-Term Residents Directive (LTR Directive). Some of the relevant recitals have been adjusted in accordance with the proposals while others will be amended at a later stage of the discussions. The aim of this discussion paper is to highlight certain key aspects of the Commission's proposal where more information is needed from the Member States to move forward with the negotiations and draft new compromise proposals. In order to facilitate the discussion at the upcoming IMEX-meeting, the Presidency has also asked the Commission to answer some of the questions from the Member States on Articles 1–14, compiled by the Czech Presidency, in writing.

2. SCOPE

2.1. Art. 3(2)(e)

The current LTR Directive excludes several categories of third-country nationals, for example third-country nationals who reside solely on temporary grounds such as au pair or seasonal workers or as workers posted by a service provider for the purposes of cross-border provision of services, or as cross-border providers of services or in cases where their residence permit has been formally limited (Article 3(2), point (e)). In its recast proposal (COM(2022) 650 final), the Commission proposed a deletion of “or in cases where their residence permit has been formally limited” with the motivation that its interpretation led to legal uncertainty in the transposition and implementation by Member States. Several Member States have raised concerns regarding this deletion and the Presidency has asked the Commission to further clarify the reasoning behind the deletion in writing.

Questions for Member States to be discussed in IMEX on March 28:

1. Are Member States still concerned with the deletion in point e? If so, in what way? If possible, please give examples of residence permits that in your view no longer would be included in this provision (i.e., no longer excluded from the scope of the Directive).

2.2. Art. 3(2)(g)

According to Article 4(5) of the Commissions’ recast proposal, *any* period of residence with a long-stay visa or residence permit should be taken into account when calculating the duration of residence necessary to be granted LTR status. Periods of residence currently excluded from the scope of the Directive could therefore eventually lead to LTR status. According to the Presidency, it is not clear if residence in a Member State with a visa or permit during the suspension of a removal decision could lead to LTR status according to the Commission’s proposal. In some Member States, such persons can be granted a temporary residence permit and could therefore be considered as legally residing in that territory. However, such residence is meant to be temporary and should not lead to LTR status. The objective of temporary residence permits due to a suspended removal decision is not for the third country national to be integrated but rather an acceptance of the person’s presence on the territory until the removal decision can be enforced. The Presidency has therefore suggested to explicitly exclude this category from the scope. Similar provisions can be found in Directive 2011/98 and Directive 2021/1883.

Questions for Member States to be discussed in IMEX on March 28:

2. Would Member States agree to explicitly exclude third-country nationals whose removal has been suspended on the basis of fact or law from the scope?

**3. DURATION AND TYPE OF RESIDENCE NEEDED TO ACQUIRE LTR STATUS
(ART. 4)**

In the Commissions' recast proposal, Article 4 includes changes that significantly broaden the scope of the Directive and facilitate the access to LTR status: most importantly, the right to cumulate periods of residence in different Member States in Art. 4(3) and the inclusion of periods of residence currently excluded from the scope of the Directive in Art. 4(5). These are substantial changes that need to be analysed from a policy as well as legal perspective.

Article 4(1) in the PRES proposal (Article 4(5) in the COM proposal)

In the Commission's proposal, any period of residence with a residence permit or long-stay visa in a Member State should, as a rule, be considered when calculating the duration of time necessary to acquire LTR status. Periods of residence currently excluded from the scope of the Directive will therefore be included in the scope of this provision and could lead to LTR status. In addition, when the requirement concerning the duration of residence is fulfilled, third-country nationals can acquire LTR status as soon as they reside in a Member State with a permit or visa included in the scope of the Directive in accordance with Article 3(1), even if it is only for a few days.

In the Presidency compromise proposal, any period of residence with a residence permit or long-stay visa in a Member State should still be considered when calculating the duration of time necessary to acquire LTR status (with a few, explicit exemptions). However, in contrast to the Commission's proposal, the Presidency suggests that this provision would not be applicable when cumulating periods in different Member States (regarding cumulation in different Member States, see below under Article 4(3)). Furthermore, the Presidency suggests that third-country nationals would only be able to make use of such permits for the first two years for the purposes of reaching the required 5-year period. The last three years would have to be residence included in the scope of the Directive in accordance with Article 3(1). The aim is to make sure that third-country nationals who acquire LTR status have resided legally and continuously in the Member State concerned for some time and put down roots in the country (see recital 7).

Example: A third country national spends 2 years with a residence permit solely on temporary grounds (such as an au pair) in Member State X and 3 years with a residence permit for work in the same Member State, where he/she applies for and is granted LTR status.

The Commission proposal for a regulation on Asylum Migration and Management (AMMR) includes a proposed amendment to the LTR Directive. The effect of this proposed amendment would be to add a new subparagraph to Article 4(1) so that, with regard to beneficiaries of international protection, the required period of legal and continuous residence would be three years. The Czech Presidency proposed to move the content of Article 71 of the AMMR proposal to Article 4 of the LTR Directive proposal, to enable its detailed examination in the IMEX Working Party, which was supported by a majority of Member States. In the Presidency proposal the text from Article 71 of the AMMR proposal has been inserted to Article 4(1) of the LTR Directive. The intention is however not to discuss this issue at IMEX on March 28, but at a later stage and in close cooperation with the Asylum Working Party. The inserted text is therefore within brackets.

Article 4(3)

In the Presidency compromise proposal, cumulation of residence in different Member States is still possible. However, in contrast to the Commission's proposal, the Presidency suggests that only periods of residence with a permit issued under specific legal migration directives should be considered. The aim is to only include periods of residence in other Member States based on rules already agreed upon at EU-level, such as an ICT permit or EU Blue Card. Such permits are based on a common set of admission criteria and easily recognised by competent authorities in different Member States. In practice, this will make it easier for competent authorities to determine if residence in other Member States meet the requirements in Article 4. Furthermore, the Presidency suggests that the last three years would have to be residence currently included in the scope of the Directive in accordance with Article 3(1) and within the territory of the Member State where the application for LTR status is submitted immediately prior to the submission of the application.

Example: A third country national spends 2 years in Member State X with an EU Blue Card and 3 years with a residence permit for work (in accordance with national legislation) in Member State Y, where he/she applies for and is granted LTR status.

Questions for Member States to be discussed in IMEX on March 28:

3. Can Member States accept a system where any residence spent as a holder of a long-stay visa or residence permit, even for purposes explicitly excluded from the scope of the directive, are taken into account? If not, which changes to the Commission's proposal would make such a system acceptable (for example the Presidency proposal where only two years of such visas or residence permits, in the Member State concerned, are relevant and some permits are explicitly excluded)?

4. Are Member States in favour of a system with accumulation of residence in different Member States? If not, which changes to the Commission's proposal would make such a system acceptable (for example the Presidency proposal where only permits issued under specific legal migration directives could be cumulated)?

4. CONTROL MEASURES (ART. 4(2))

In Article 4 of the Commissions' recast proposal, a new paragraph 2 has been introduced which obliges Member States to establish appropriate control mechanisms to ensure that the requirement of legal and continuous residence is duly monitored. The provision focuses on investment schemes but is generally applicable. To the Presidency, it is important to counteract abuse of migration systems in general and to make sure that LTR status is based on genuine grounds. At the same time, this is a new addition to the Directive that needs to be analysed properly.

Questions for Member States to be discussed in IMEX on March 28:

5. Which control measures do Member States have in place today to make sure that the requirement of legal and continuous residence is fulfilled? Are such control measures conducted before and/or after LTR status is granted?

5. LEVEL PLAYING FIELD (ART. 5(4), 7(4), 10(3), 12(7) AND 15(5))

The current LTR Directive allows national residence permits of permanent or unlimited validity without restrictions. In its recast proposal, the Commission proposes changes in several articles that limit Member States' ability to maintain and develop national systems that are more beneficial than corresponding provisions in the LTR Directive, including in relation to integration conditions and procedural safeguards. In the compromise proposal, the Presidency has chosen to maintain certain aspects of the level playing field, while at the same time making it possible for Member States to have national policies that in some respects are more favourable than the LTR Directive. The recast proposal aims at making the EU more attractive for skills and talent. The Presidency supports this objective but fears that the Commission's proposal could have the opposite effect if Member States refrain from keeping or introducing particularly attractive permanent residence schemes, for example for high-skilled labour migrants, if they must use the same conditions for LTR status.

Questions for Member States to be discussed in IMEX on March 28:

6. Are Member States in favour of introducing certain aspects of level playing field in the LTR Directive? If so, in which of the relevant articles?

6. ABSENCE FROM THE EU TERRITORY (ART. 9(1))

In the Commission's recast proposal, the period during which an EU long-term resident can be absent from the territory of the Union without losing the status has been extended from 12 to 24 months. Several Member States have in the context of this proposal raised concerns regarding the effects of the ruling of the European Court of Justice in case C-432/20. In the judgment the ECJ held that Article 9(1)(c) must be interpreted as meaning that any physical presence of a long-term resident in the territory of the EU during a period of 12 consecutive months, even if such a presence does not exceed, during that period, a total duration of only a few days, is sufficient to prevent the loss of the right to LTR status. On the one hand, the Presidency agrees with the Commission that it is important to facilitate circular migration. On the other hand, against the background of the ECJ ruling, the Commission's proposal would mean that a person could avoid losing his/her LTR status indefinitely by visiting the territory of the Union briefly every 24 months. As some Member States have pointed out this could lead to improper use of the LTR status. The Presidency has considered different approaches to strike the right balance after the judgment in Case C-432/20. The aim of the compromise proposal is to avoid the unwanted effects of the ruling while at the same time introducing changes that are easy to apply for Member States.

Questions for Member States to be discussed in IMEX on March 28:

7. Can Member States accept an extended period of absence from the territory of the Union if the right balance is struck in the proposal, after the judgment in Case C-432/20?

8. Do Member State agree with the Presidency's approach? If not, which further changes would Member States like to see and why?

7. EQUAL TREATMENT (ART. 12(2))

In the current Directive, Member States may restrict equal treatment to cases where the registered or usual place of residence of the EU long-term resident, *or that of family members from whom he/she claims benefits*, lies within the territory of the Member State concerned (Art. 12(2)). In its recast proposal, the Commission proposed a deletion of “or that of family members from whom he/she claims benefits”. The purpose of the deletion seems to be to adapt the text to the findings of the European Court of Justice in case C-303/19. In the judgment the ECJ held that, subject to the derogation permitted by Article 11(2) of Directive 2003/109, a Member State may not refuse or reduce the entitlement to a social security benefit to long-term residents on the ground that members of his or her family, or some of them, are not resident in its territory but in a third country, when it grants that benefit to its nationals irrespective of the place of residence of their family members. In the Presidency's view however, the deletion in the Commissions' proposal goes beyond the ruling by the ECJ and would further limit Member States' possibilities to restrict equal treatment. Member States that have expressly made use of the derogation regarding family members permitted in Article 12(2) of the current Directive would no longer be able to do so. The Presidency has therefore suggested to reinsert this possibility for Member States.

Questions for Member States to be discussed in IMEX on March 28:

9. Can Member States support the PRES proposal to reinsert the derogation permitted by Article 12(2)?

8. ACQUISITION OF LTR STATUS FOR CHILDREN BORN OR ADOPTED IN A MEMBER STATE (ART. 15(1))

In its recast proposal, the Commission introduces new provisions regarding family members of EU long-term residents. In Article 15(1) the Commission proposes that children of a long-term resident who are born or adopted in the territory of the Member State that issued the long-term resident his/her LTR residence permit shall acquire LTR status without being subject to the conditions set out in Articles 4 and 5. Member States have raised the question whether this provision is more generous than what applies for EU-citizens according to Directive 2004/58/EC. In the Presidency's view this seems to be the case since, according to Article 18 of Directive 2004/58/EC, family members of EU-citizens shall acquire the right of permanent residence after residing legally for a period of five consecutive years in the host Member State.

If Member States still can accept such a system, the Presidency suggests changes in the first sentence to remove ambiguous wording and make the text clearer. A condition that the child needs to reside in the territory of the Member State that issued the long-term resident his/her LTR residence permit has also been added. The aim is to ensure that LTR status only is given to third-country nationals actually residing in the territory of a Member State. The second sentence has been deleted. As far as the Presidency understands, the aim of Article 15(1) is to ensure that a specific group of children can acquire LTR status without fulfilling the conditions set in Articles 4 and 5. The Presidency sees no need to regulate where to lodge an application etc., since this is already regulated in other provisions in the Directive. It is also unclear whether the Member State referred to in the second sentence of the Commissions' proposal could be a different Member State than that mentioned in the first sentence.

Questions for Member States to be discussed in IMEX on March 28:

10. Can Member States accept that children of long-term residents, born or adopted in the Member State, are granted LTR status without being subject to the conditions set out in Articles 4 and 5 (i.e., instantly), even though this provision appears to be more generous than corresponding provisions for family members of EU-citizens?