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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 on the Long-Term Residents Directive (LTR Directive) (doc. 11994/23) to be discussed at the IMEX (admission) meeting on July 26th, 2023.

The aim of this paper is to explain the changes introduced by the Presidency in order to speed up the debate by focusing the discussion on a few specific points. Time permitting, delegations will also have the opportunity to comment on other aspects of the proposal. Delegations are of course also welcome to send written comments after the meeting.

2. SCOPE AND DURATION OF RESIDENCE (ARTICLES 3 AND 4, RECITALS 9, 9A, 10 AND 10A)

The Presidency has been working on the excellent basis provided by the SE PRES on two key articles.

Article 3 (Scope)

In Article 3, regarding the scope, without prejudice to the non-exhaustive nature of the list in subparagraph (e), the job search period of Article 25(1) of Directive 2016/801/EU has been expressly excluded from the scope, as some delegations had suggested, on the understanding that it is a temporary permit.

Article 4 (duration of residence)

The Presidency's proposal includes several changes to Article 4, both on content and on format, with the aim of making the text clearer and easier to read.

Based on the SE PRES compromise proposal, there are two situations in which a third country national can request an EU LTR status, that is:

a) They have resided legally and continuously for five years in the MS where the EU long-term residence application is lodged.

In this case, certain periods of residence excluded from the scope shall be taken into account, as long as the applicant has acquired a residence permit that will enable them to be granted EU long- term residence status.

In response to the concerns of some Member States, the proposal of the Presidency aims at clarifying which permits of those excluded in article 3(2) do count to add to the total period of five years.

To this extent, in section 1 of article 4, a second paragraph has been incorporated clarifying which categories excluded from the scope are to be computed, namely **students and intra-corporate transferee workers** under Directive 2014/66. It is considered that the period spent by students in the EU should be counted entirely, facilitating the retention of talent in the EU.

Moreover, a new subparagraph has been introduced to clarify that the periods of residence under **temporary protection, and under a form of national protection other than international protection**, would only count as long as two conditions are met: a) that they are granted this status; and b) that, at a later stage, they acquire a residence permit that will enable them to be granted EU long- term residence status.

This mention has been included in order to clarify which periods are eligible in the categories excluded from the scope in subparagraphs b) and c) of Article 3(2). In the case of temporary protection beneficiaries, the waiting period for obtaining temporary protection is minimal, so it does not seem to make sense to count them; it would represent an additional bureaucratic burden for the Member States and would have little impact.

In the case of forms of national protection other than international protection, these are not permits regulated at the European level, so processing times are unknown and can be highly variable.

Thirdly, the Presidency has reintroduced the Commission proposal on the precautions related to residence permits obtained under **investor residence schemes.** In coherence with this change, they are incorporated in the paragraph 2.

This paragraph pursues two objectives:

– The first is to find a wording that avoids generating possible new burdens on the Member States - a concern expressed by several delegations at the last meeting of the IMEX group - and to encompass them in the tasks that they are already currently carrying out to verify the continuity and legality of the residence, in addition to the rest of the requirements set in the directive.

– The second, to recover the spirit of the Commission proposal, which asked Member States to adopt adequate control mechanisms to guarantee that the requirement of legal and continuous residence in cases where applicants have been holders of a residence permit granted on the basis of any type of investment in a Member State. With this proposal, the Presidency aims at guaranteeing that the Member States control these schemes, basically because they are national schemes and because some of them may not necessarily require continuous physical presence in the territory of the Member State, or simply provide for a limited presence. The concerns expressed by several delegations, and not only by the Commission, have led the Presidency to consider it appropriate to reintroduce the said wording.

b) They have resided two years under certain residence permits in other Member States and three years in the Member State where the EU long-term residence application is lodged

In relation to this, and in order to address the concerns of many Member States, the SE PRES proposed to limit, with respect to the Commission's proposal, the residence permits in another Member State that can be taken into account to accumulate periods of residence.

Thus, in paragraph 2 of Article 4, based on the support given by the majority of the delegations that are in favour of cumulating periods in different Member States (without prejudice to the reservations expressed regarding its applicability) to the combination of 2+3 years, the Presidency is proposing the following amendments:

– During the first two years, in order to increase the number of permits that will be taken into account when accumulating periods of residence in other Member States, the Presidency proposes to include in article 4(2) (a) the following permits issued under legislation of the EU:

  ✓ National residence permits other than an EU Blue Card for the purpose of highly qualified employment, clarifying that these are those expressly permitted by article 3(3) of the Directive 2021/1883/EU.

- ✓ Authorizations as students under Directive 2016/801/EU (the use of the word authorization would imply both long-term visas and residence permits)
- ✓ Authorizations as researchers under Directive 2016/801/EU
- ✓ Residence permits for family members of any of the above categories, as well as those of an EU long-term resident.
- ✓ Residence permits issued to UK nationals who are beneficiaries of the Withdrawal Agreement (the reasons are explained separately below) and non- EU family members under the Withdrawal Agreement as well as to third-country national family members of an EU citizen under Directive 2004/38/ EU (thus collecting in the articles what was already provided for in recitals 6 and 9a)
- ✓ Residence permits as beneficiaries of temporary protection under Directive 2011/55/EC if the Council so decides, and under the conditions set by it, by virtue of the provisions of article 5 of said directive, since the mobility of the this collective does not derive directly from Directive 2011/55, but from a decision subsequently adopted by the Council thus giving it the necessary room for manoeuvre for such a decision also in the face of eventual similar situations.

– During the three years in the Member State where the application is lodged: Member States are given the option of incorporating the permits included in the scope of the **Single Permit Directive** provided they have a minimum validity of one year (disregarding shorter temporary permits). This offers the possibility of expanding the scope through a directive that is part of the EU acquis, meets certain common requirements and have a common format.

As it was made clear in the last IMEX, the scope of the accumulation limited only to the permits harmonized in certain directives can be too limited, and focused only on highly qualified profiles, whereas there are labour needs also in other degrees of qualification that may require promoting their mobility to fill labour shortages in other Member States.

The procedural challenges linked to the accumulations of periods of residence in different Member States, together with the more substantive objections that consider that three years are insufficient to achieve a migratory status just a step below that of EU citizens, make it necessary to ensure, in the text itself, **the commitment of the European Commission to make available to Member States an adequate tool to carry out this verification without excessive administrative burden,** and with the necessary guarantees, also from the point of view of security. In the absence of an appropriate tool at European level to achieve this -and until the VIS recast is not in force-the EU mobile tool, is incorporated into the text, provided it is adapted to these new needs.

In this sense, the Presidency proposes to include an explicit reference in article 4(2) (a) **and a new recital 10a,** expressing the commitment of the Commission to make available to the Member States the appropriate instruments for the effective implementation of this article.

Specific reference to the beneficiaries of the Withdrawal Agreement

With the aim of clarifying that UK nationals under the application of the Withdrawal Agreement and their family members can request an EU long-term residence permit, taking into account also the periods of residence in the EU under Directive 2004/38/EC prior to the end of the transition period (12/31/2020), the Presidency has proposed the following changes:

– The inclusion of a **new recital 9a** that clarifies that **all** periods of legal and continuous residence of UK nationals and their family members under the Withdrawal Agreement as well as previously under Directive 2004/38/EC will be considered periods of legal residence in a Member State to accumulate the five-years period required for the acquisition of the EU long term residence permit, both in one Member State (article 4.1) or in different Member States (article 4.2).

– The specific inclusion in **article 4.2.(a)** that the periods as a beneficiary of the Withdrawal agreement in another Member State shall count for the purposes of accumulating the periods of residence to acquire the EU long term residence permit in another Member State. The Presidency considers that the express inclusion of this category in article 4.2 a) is necessary since the list is exhaustive and "numerus clausus", so that anything that is not included in it, is excluded.

In this sense, and in order to prevent discrimination against family members of EU citizens, those among them that have been subject to Directive 2004/38/EC, are also expressly included in article 4.2 a). So far, they were only mentioned in recital 6.

With regard to **beneficiaries of international protection** (BIPs) and the number of years of legal and continuous residence required to qualify as EU long-term residents, at the last meeting of the IMEX group, which took place on 28 June, the Swedish Presidency opened for debate the reduction to three years for BIPs.

Among the delegations that took the floor, two divergent positions were noted: those in favor of a reduction, and those who are opposed to it.

The Presidency notes that at this stage there is not a sufficient majority in the Council to move forward with the proposal to reduce the number of years for this collective to three years. So, other options must be explored.

In view of this situation, having examined the reasons put forward by delegations, the Spanish Presidency considers that there are two possible ways forward on this issue:

– The first is to maintain the general rule of five years within the directive, including BIPs, since there is already an improvement in their access to this status, namely, the accumulation of the entire period being an applicant, that will be counted for this five-year requirement.

– The second is to postpone the decision for a later debate, by incorporating into Article 4.1 the following sentence: "With regard to beneficiaries of international protection, the required period of legal and continuous residence shall be XXX years", putting this paragraph for debate in the Council at a later stage.

In view of this situation, the Spanish Presidency in the Compromise text is proposing to maintain the 5-year requirement as a general rule of the directive, trying to find an intermediate solution in order to reconcile positions by considering the following counterbalancing elements: taking into account that the average application time for BIPs is 15 months, in practice, their transition from BIPs to long-term residents would take place, in most of the cases, before it currently takes place, and, in any case, after five years residing in the EU, as this example shows:

Example:

BIP lodging an application on 01/01/2021 and getting the BIP status on 01/04/2022, would qualify for EU LTR status (provided he mets all the requierements) on:

- Under the current directive: 15 months being applicant* 50% = 7,5 months. He still needs 52,5 months from 01/04/2022, so on the 15/08/2026.
- Under the 3-years proposal: On the 01/04/2025.
- Under the Spanish Presidency proposal: On the 01/01/2026.

(Under the current directive, periods as applicants exceeding 18 months shall be counted in full, so, in those Member States where the processing times are longer than that, the benefit for the BIP will be none with this new system, whereas in those Member States where processing times are shorter, BIPs will become long-term residents before).

Bearing in mind that the Presidency's aim is to reach a general approach as soon as possible, by October, the Presidency would like to ask delegations to express their views on this issue by answering the following question:

Would Member States agree with the proposal incorporated by the Presidency in article 4- that now takes also into account the entire period spent as applicants- or would they prefer to specify within the Council the number of years of residence for BIPs at a later stage?

3. APPROPRIATE ACCOMODATION (ARTICLE 7)

The rationale of the deletion in Article 7(1), second subparagraph of the reference to appropriate accommodation is the following: including it under Article 5 may lead to interpret it as a condition. Yet, for the Presidency, such reference is superfluous, because if a third-country national can rely on stable and regular resources, he/she should be also able to rely on an appropriate accommodation. Hence, we have moved it to Article 7 as in the current Directive.

4. ABSENCES WHICH MAY CONDUCT TO A WITHDRAWAL OF THE LTR STATUS (ARTICLE 9)

One of the Commission proposals to increase the added value of this directive is to increase the maximum period of absence from the EU for EU long-term residents.

However, the wording of article 9 of the proposal not only should improve the current one but it should also be easy to control in order to avoid a misuse.

The judgment of the CJEU C-432/20 marks a milestone in the interpretation of article 9.1 (c) of Directive 2003/109/EC, by admitting that, in order to prevent the loss of the right to long-term resident status, it is sufficient for the long-term national to be present even only for a few days in the territory of the European Union, during the period of 12 consecutive months following the start of his or her absence.

This interpretation, in the opinion of the Presidency, is disproportionate since a person who is not present but a few days per year should not be considered as a resident.

a) Someone who is present can be considered a long-term resident, without even having to reside for 10 days in the EU Member State that granted them that status. That is, that mere "presence" of a few days is considered sufficient to "break" the period of 12 consecutive months, causing the timer to reset to zero.

b) This is inconsistent with the main criterion for acquiring long-term residence status, which is, as established in recital 7, maintaining a "legal" and "continuous" residence for a certain period so that the person can take root in the EU.

c) It could hinder and even conflict with the duty of the national authorities to ensure compliance with the general requirements of legal and continuous residence for a total of five years, and with the special focus that, in terms of control, the proposal makes with respect to national investor regimes that, precisely, do not require continued presence.

To avoid this, the Presidency considers necessary to modify article 9.1 (c) in order to provide for longer periods of absence and, at the same time, to avoid potential abuses and, as far as possible, facilitate tits implementation by national authorities.

At the last IMEX meeting under the Swedish Presidency (28/6), Member States were divided around the preference for maintaining the criterion of controlling "absences" versus "main residence".

Neither of the two options is free of difficulties.

Taking into account the pros and cons of both alternatives, the Presidency is proposing to:

a) Set a maximum period of 18 months in which the EU long-term resident has not had his main residence in the territory of the EU. Vacation periods or short absences that do not entail moving the residence outside the EU should be disregarded in this sense.

b) The 18 months are not necessarily consecutive, but rather accumulative, in order to prevent abuses from persons that come to the EU for a short period with the main purpose of interrupting this period and keeping their EU long-term resident status, even though they are not actually residing in the EU.

c) Maintain a time frame within which such absences would be computed (5 years).

d) Establish a *dies a quo* regarding the computation of said 5-year time frame for the sake of legal certainty. Both national authorities and EU long-term residents will know exactly when the five-year periods start, and when it finishes.

e) Incorporate a 5-year calculation rule taking into account the provisions of article 8(2) regarding the minimum validity of EU long-term residence permits. According to this article, Member States may issue permits exceeding five-years (i.e, ten years).

Examples of permitted absences:

Example with current directive:

- Third-country national who has been issued the EU LTR permit on 01/01/2020

- On the next day, 02/01/2020 he travels outside the EU for 11 months and returns on 02/12/2020. Then, he spends several days in the Member State that issued the permit.

- He leaves again on 15/12/2020 and is gone again for 11 months.

- Finally, he returns to the EU on 15/11/21, stays for some days and leaves again on 01/12/2021, and so on and so forth, until December 2024, when he requests the renewal of his EU LTR permit.

-As the EU LTR permit holder meets the requirement of not having been absent for more than 12 continuous months, his card is renewed for another 5 years. Result: he has EU long term status despite only being in the EU for less than three months in 5 years.

Example under the Presidency proposal:

Following the same case above, as his main residence is clearly not in EU, on the one hand, and has been residing outside for more than 18 months, he would have his EU long term resident status withdrawn.

As almost of the delegations have stated the current difficulty in controlling absences, for various reasons (their passports are no longer stamped, legal residence in the EU), the Presidency is proposing to maintain the concept of main residence, adding in recital 17 elements that, both positively and negatively, allow the authorities to define what is meant by such a concept, and which already appears in some European standards.[1] .

In addition, in order to make it easier for national authorities to carry out adequate monitoring or to indicate when and how they can do so, a new section 9(1)a has been incorporated which may reflect, in the articles, the idea pursued with the elements of the recital. The wording is inspired by articles 14(3) and 21 of Directive 2004/38/EU, which we consider balanced and "realistic" since it avoids the systematic carrying out of controls, but it does allow the authorities to act in the event of reasonable doubt.

The Presidency is aware that this option is contested by some delegations, which were inclined to maintain the criterion of "absence" -as up to now- on the basis of (a) the lack of definition of the concept of main residence at a European level; b) the practical difficulties derived from its adoption and c) the preference for a scheme in which the Entry Exit System (EES), when it came into force, could facilitate the task.

An attempt has been made to clarify it in the correlative recital. As for the EES, the truth is that it will not solve the current problems of control of absences because it does not register residents (holders of residence permits and long-term visas).

Despite outlining the reasons for the proposal finally introduced in its text, the Presidency has considered other alternatives for the first paragraph of article 9(1) letter c), which are the following:

a) Absence from the territory of the Union for more than 18 months within a period of five years from the date of issue of the last EU-long-term residence permit

b) Absence from the territory of the Union for more than 18 consecutive months within a period of five years from the date of issue of the last EU long-term residence permit, provided that the rest of the period the main residence is in the territory of the Union.

Option a) is increasing the period of absence from 12 to 18 non-consecutive months, maintaining a time horizon of 5 years. There is no reference to the main residence criterion. In addition, a person could be absent a maximum of 3.6 months per year, less time than under the current directive, At the same time, this option would allow ensuring that the person has its main residence in the EU.

Option b) increases the time of absence allowed under the current directive from 12 to 18 consecutive months, including a five- year reference period. This allows to increase absences and attempts to counteract the detrimental effects of the EUCJ ruling.

Do Member States agree with a system based on the control of the main residence, that combines longer periods of absence and prevents abuse?

5. RESOURCES FROM THIRD PARTIES (ARTICLES 5, 17 AND 18).

According to the CJEU Judgment issued in case C-302/18, and regarding article 5.1.a) "resources" can also include the resources made available to them by a third party, as long as such resources are considered stable, regular and sufficient, taking into account the individual situation of the applicant in question.

In other words, the resources do not necessarily have to be their own and those made available to the applicant by a third party may be taken into account. However, it clarifies that there is no obligation to always accept them, but that national authorities must assess the individual situation of the applicant and whether the resources can be considered stable, regular and sufficient.

Some delegations have conveyed their concern regarding the obligation to consider the resources made available to third parties.

Bearing in mind that the financial requirements set forth in Article 5 are still in the recast directive proposal, and that, in effect, the authorities have to assess whether these resources are regular, stable and sufficient, as well as the individual situation of the applicant, the Presidency suggests incorporating a reference in these articles, in order to clarify that Member States may - or may not - take these resources from third parties into account, considering the individual situation of the applicant, and as part of the overall assessment of the stability, regularity and sufficiency of economic resources. Said reference has also been maintained in Article 17 and Article 18, to maintain consistency throughout the text.

To facilitate the evaluation task of the national authorities, the wording given by the Swedish Presidency of Recital 11 has been partially maintained, specifically, eliminating the reference to the judgment to and, therefore, eliminating the obligation of having to always accept resources from third parties. It could eventually avoid a number of claims, judicial appeals and the raising of new questions for a preliminary ruling.

Do Member States agree to include a may clause in this article?

6. FAMILY MEMBERS OF EU LONG- TERM RESIDENTS (ARTICLE 15).

Under Directive 2003/109/CE, there was no regulation concerning the rights of family members of an EU- long term resident in the first Member State, but only in case of mobility. In the previous IMEX meetings, Member States expressed their concern because this situation might lead to different set of rights, depending on whether they exercised their right to mobility or not. Moreover, Member States also expressed their concern about Article 15 providing different statuses for family members of EU-long term residents, namely children born/adopted in the territory of the EU versus the rest of family members. Whereas the first issue has been addressed by the Swedish Presidency, the second one remains unsolved.

In this regard, the European Commission proposal foresaw that children of an EU- long term resident born or adopted in the territory of the Member State that issued him/her the EU long-term residence permit shall acquire EU long-term resident status automatically, without being subject to the conditions set out in Articles 4 and 5. The rest of family members would fall under Directive 2003/86/EC, with some derogations.

However, this solution did neither include, nor mention, other children of the EU- long Term resident that were born/ adopted outside the territory of the European Union. Thus, according to the proposal, those children remained under the Family Reunification directive (with derogations). All in all, with this legal framework, there was a possibility that in the same family there could be children with different migratory statuses and different residence permits leading to different set of rights.

To prevent this, the Swedish Presidency asked Member States whether they would rather keep this issue out of the directive (unregulated), meaning there is no harmonised solution at a European level, or whether to address it in this directive, in Article 15.

The Presidency, having reviewed the written comments sent by Member States and carefully listened to their contributions at the IMEX meetings, now proposes that, at least, all the dependent children in the same family have the same status and the same treatment, and the same set of rights.

The concept of what is understood by dependent children is that used in Article 4(1) and (2) of Directive 2003/86/EU, as indicated in recital 17. This personal scope has been chosen to include all dependent children of the holder, so as to include both those born or adopted who are dependent and also those who, being of legal age, are objectively unable to provide for their own needs on account of their state of health.

As children born outside the European Union full under the Family reunification directive, according to the proposal, the question was whether to apply the family reunification conditions also to children born/adopted by the EU- long – term resident in the territory of the European Union, or to consider them all as if they were born in the European Union. Legally speaking, as children born in the EU are not entering the EU from abroad, they would not fall under the scope of the Family reunification directive, so it would not be fair to grant them a Family reunification status/permit when they are entitled to a national (better) permit.

Thus, in the compromise text, the Presidency is proposing to consider all of them as if they were born in the territory of the European Union, regardless of their place of birth. In this case Member States may decide which national permit they should issue to these children. Members States then may opt to issue these children a national permit with similar characteristics to the family reunification permit, the national permit that they usually issue to children born in their territory from third country nationals or issue the same permit as their parents'. This may entail that some children will see how their migratory status improves once one of their parents become a EU long-term resident.

Example

A third-country national comes to the EU on 01/01/2020. Two years later, on 01/01/2022, her 12-year-old daughter comes under the Family reunification directive. On 01/06/2023 she has a second child, born in the EU, who is issued a national permit. She has two children with different migratiory statuses, and different sets of rights.

On 01/01/2025 she would become an EU long-term resident status, and her 12-year-old daughter, that is now 15, would also see her migratiry status change to the same one as her sibling, which in most of the cases will be an improvement.

(Note: the migratory status of all children of EU long term residents under Family reunification would change, regardless of them having siblings born/adopted in the EU or not).

Do Member States agree with the Presidency on the convenience of providing all the children of the EU Long term resident the same status and treatment?

Would it be enough to refer their status to national law, or would Member States prefer to go beyond this proposal and provide the same status to these children in all Member States?