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From: Presidency
On: 4 October 2019
To: Strategic Committee on Immigration, Frontiers and Asylum (SCIFA)
Subject: Legal Migration - what can we do better?

1. INTRODUCTION

Legal migration is an integral part of the 2015 European Agenda on Migration and it will more than likely play an important role in the future work of the Commission and the EU as a whole. Even if topics such as preventing irregular arrivals, revising the Common European Asylum System and making returns more efficient have dominated the EU discussion in recent years, providing adequate legal pathways to the EU and promoting their attainability is an essential element of the EU's overall migration strategy. While simultaneously dealing with the migration crisis, the EU recently managed to agree on a major reform of its immigration rules in order to attract talent from abroad, in particular students and researchers. With this in mind, now is the time to reflect on how to further increase the added value of EU-level policies and instruments in this field. At the same time, it remains clear that Member States have legitimate national needs and interests when it comes to legal migration, especially for economic purposes, and they retain the ultimate competence to decide the numbers of third-country nationals to be admitted for work purposes.

Based on the findings of the Fitness Check evaluation¹ published this spring, the Commission is likely to continue assessing whether the current legal migration acquis, comprising a broad package of directives, properly meets its objectives. The only pending legislative proposal, the revision of the Blue Card Directive, is in deadlock as no compromise has been reached yet between the co-legislators, despite the efforts of multiple Council presidencies.

The beginning of the new legislative cycle is an appropriate moment to take stock of the elements of the EU's legal migration policy that Member States consider the most essential, especially in the context of the global migratory situation and the challenges linked thereto. As a starting point, it can be argued that a properly functioning policy should serve national interests, especially when it comes to attracting the necessary skills and talents. At the same time, it should contribute to the overall goal of better-managed migration at EU level, providing clear added value compared to action taken solely at national level, in particular in the context of relations with third countries of origin. In the spirit of a comprehensive approach to migration, the policy priorities for developing legal avenues should be determined in full coherence with related areas such as asylum and return/readmission policy, as well as with external relations more generally.

The purpose of this paper is to facilitate the discussion on legal migration, with a view to helping us reflect on our priorities during the new institutional cycle. Two separate aspects have been chosen for discussion to illustrate the role and relevance of legal migration: (1) intra-EU mobility as an element to make the EU more attractive; and (2) legal migration as part of the comprehensive approach to migration management, especially as a tool to foster cooperation with key third countries of origin and transit.

¹ https://ec.europa.eu/home-affairs/what-we-do/policies/legal-migration/fitness-check_en

2. THE LEGAL MIGRATION ACQUIS AND THE PROVISIONS ON INTRA-EU MOBILITY

The Commission published a comprehensive Fitness Check on the EU Legislation on Legal Migration on 29 March 2019. It aimed to assess whether the EU legal migration acquis is fit for purpose. The legislative scope covers seven legal migration directives adopted between 2003 and 2018: the Family Reunification Directive (FRD), the Long-Term Residents Directive (LTRD), the EU Blue Card Directive (BCD), the Single Permit Directive (SPD), the Seasonal Workers Directive (SWD), the Intra-Corporate Transferees Directive (ICTD) and the Students and Researchers Directive (SRD). Consultations with all stakeholders on the results of the Fitness Check, including with Member States in the context of the Contact Committee on legal migration, have taken place between April and July 2019, providing the Commission with relevant feedback on the possible way forward in this area.

The aforementioned directives contain various provisions on admission conditions and procedures and the rights of third-country nationals (TCNs) when residing in Member States. Some also include provisions on the right to intra-EU mobility, which is an uncontested benefit that only EU-level instruments can provide, in contrast to purely national law. The mobility provisions, together with the rules linked to freedom to travel within the Schengen area, offer TCNs a chance to move, stay, work and study in Member States other than the one having granted the initial residence permit.

According to the OECD, effective and well-functioning intra-EU mobility rules are significant, since the EU-wide labour market may be more attractive for TCNs than individual national markets. The EU-wide labour market offers more career opportunities and prospects for TCNs to earn higher wages². Studies have found that TCNs' mobility could be of assistance in meeting specific labour market needs, since in principle TCNs are more willing to move for work purposes than natives are. However, due to existing barriers to mobility, TCNs are about half as likely as EU nationals to be mobile within the EU. Among the different categories of TCNs, highly educated individuals are more likely to be mobile than other categories of migrants. A similar pattern is found in EU national populations, where individuals with a tertiary education generally tend to be more mobile than other segments of the workforce³.

The data on the mobility of TCNs is currently very limited, since Member States do not keep statistics regarding which Member States TCNs arrive from. It is possible, however, to get an overall picture of the importance of EU legislation as regards legal migration by looking at statistics on residence permits granted based on the existing EU acquis. In 2017, the number of TCNs legally residing in the EU-25 area (all Member States except UK, IE and DK, since the EU legal migration acquis does not apply to them) was 18.7 million, which equates to 4.1 % of the total population of EU-25.

The attractiveness of intra-EU mobility links directly to the effectiveness of the mobility provisions and how they are implemented in the Member States. The Fitness Check concluded that with regard to mobility, the current legal migration directives are not making the most of their potential. The directives have different optional and mandatory requirements for applying for or notifying intra-EU mobility. This means that intra-EU mobility, in its current form, is a complex set of provisions, which may make it difficult for TCNs to understand their rights and for various national authorities to implement the rules in practice.

² Recruiting immigrant workers, OECD and EU (2016).

³ OECD, 2016.

The results of the Fitness Check suggest that so far the directives' facilitation of mobility has not always been translated into practice. Second Member States often require the same procedures and documents from mobile third-country nationals as they require from first-time applicants. An important finding from the Fitness Check is that the so-called first generation of legal migration directives (LTRD & BCD) facilitates intra-EU mobility to a limited extent only. In order to move to a second Member State, TCNs often have to go through similar and equally burdensome procedures as when applying for their first residence permit. More far-reaching provisions were included in the directives negotiated later (ICTD and SRD). The effectiveness of these mobility provisions will be tested during the coming years.

The EU Blue Card (permit for highly qualified workers) is a central element in the EU framework for attracting skills and talents. However, it is clear that the mobility provisions in the current BCD are limited. This may be hampering the attractiveness of the Blue Card compared to the schemes for researchers or intra-corporate transferees (ICTs). Based on the need to revamp and update the Blue Card, including better mobility provisions, the Commission adopted a proposal on 7 June 2016 on a revised BCD. In terms of the backdrop to this reform, it is noteworthy that the EU had already successfully agreed on new legislation (namely the ICTD in 2014 and the SRD in 2016) with ambitious mobility provisions. However, in the context of the migration crisis that emerged in 2015 and the complex overall political situation, the Blue Card negotiations proved to be difficult – not so much in relation to mobility provisions, but rather in relation, primarily, to whether or not Member States would be able to keep their parallel national schemes for highly skilled workers.

When it comes to agreeing on mobility provisions, it is always a balancing act between the EU-level benefits of added mobility and attractiveness on the one hand, and issues related to national interests – such as protection of the labour market – on the other. Any arrangement approaching mutual recognition of residence permits issued by other Member States seems to be difficult to accept, despite the fact that the provisions already agreed upon for ICTs and researchers go quite far in that respect. The core issue remains trust among Member States. It is important to identify our common objectives and jointly agree on the best balance between the different legitimate interests. Another conclusion we might draw is that it is difficult to reform mobility rules if it is unclear how the current rules work and what the major shortcomings are. This is why we need more information on where we stand today, particularly in terms of the practical application of the common rules.

3. LEGAL AVENUES AS PART OF THE COMPREHENSIVE APPROACH TO MIGRATION

Following the sharp increase in irregular arrivals to the EU in 2015-16, the question of whether there are enough legal avenues to the EU available to provide a viable alternative to irregular means, often linked to the action of human smugglers, is more pertinent than ever. Resettlement of refugees from third countries is a way of providing international protection in a safe and orderly manner, but resettlement figures are currently relatively modest in the EU. In light of the significant global needs, the EU should continue to increase its resettlement efforts. Moreover, it seems necessary to further develop complementary pathways as part of the overall improvement of migration management, including the fight against irregular migration. These complementary pathways allowing admission to the EU could be based on grounds such as work, study or family reunification.

The UNHCR Three-Year (2019–2021) Strategy on Resettlement and Complementary Pathways⁴ aims to improve the availability and predictability of complementary pathways for refugees. According to UNHCR, complementary pathways can provide an additional way for refugees to access international protection, and can therefore also serve as a way of sharing responsibility with third countries hosting large numbers of refugees. The pathways listed in the UNHCR strategy are diverse. Humanitarian admission, private or community sponsorship programmes and humanitarian visas are listed as options that could provide flexibility and complement resettlement by offering additional opportunities for refugees who have resettlement needs. Other complementary pathways for admission, such as family reunification, education and labour opportunities, are migration avenues that could increasingly be made available to persons in need of international protection.

With regard to the admission of migrants other than on protection grounds, especially regarding admission for economic purposes, it is worth asking whether the EU's current policy and practice sufficiently promote the use of the existing legal channels and make them attainable globally. Developing legal avenues as alternatives to irregular migration is relevant not only for the individuals concerned, but also for their regions of origin. Opportunities to study, train or work in an EU Member State may significantly benefit local communities. More generally, external aspects have become central to the EU's migration policy. Providing adequate legal channels to the EU may enhance cooperation with the relevant third countries by creating concrete positive leverage (that can be used, for instance, to encourage better cooperation on readmission), but it also sends an important message to those third countries that the EU is committed to engaging in mutually beneficial, sustained partnerships.

⁴ <https://www.unhcr.org/protection/resettlement/5d15db254/three-year-strategy-resettlement-complementary-pathways.html>

Many Member States enjoy fruitful and long-standing bilateral cooperation with partner countries on migration management, including facilitated legal entry channels. It is important that Member States are able to continue developing these partnerships and that they are provided with the necessary EU support, in full respect of the applicable legal framework. At the same time, this is a timely moment to consider whether there are areas where the EU could support Member States further, or where the EU would be better equipped to act than individual Member States. For instance, EU-level information campaigns, awareness-raising activities or other capacity-building efforts in third countries could be considered useful.

The pilot projects on legal migration represent a concrete EU-level initiative. They are meant to facilitate cooperation with the third countries involved on a comprehensive management of migratory flows. Their other purpose is to reduce incentives to use irregular routes by offering safe and lawful alternatives to persons wishing to migrate in order to work or study. A number of key third countries were selected to be considered for the projects, bearing in mind the EU's overall strategic interests in improving migration management. Five projects have been launched and are being implemented by Member States with EU financial support (Mobility Partnership Facility and Emergency Trust Fund for Africa), mainly with North African countries (while one project concerns Nigeria)⁵. A willingness has been shown to extend the scope of the projects to make them relevant for a larger group of Member States.

⁵ In addition, the IOM has been awarded EUR 1.8 million (call under Union actions) for a project involving Senegal and Nigeria, to address labour market shortages in a number of Member States.

Against this background, Member States are invited to reflect on the following questions:

- *How does the patchwork of mobility provisions included in the current acquis look from the Member States' perspective? Have Member States gained any early experience or learned any lessons from the two recently adopted directives (ICTD and SRD) and the intra-EU mobility that they are intended to facilitate?*
- *What would an 'ideal' intra-EU mobility scheme look like? More specifically, what is the right balance between the protection of national interests on the one hand and enhancing the attractiveness of the entire EU through the facilitation of labour mobility on the other?*
- *How could the current legal pathways be further developed or promoted so that they would offer a more viable alternative to irregular migration, and would help the EU and its Member States manage migration in a safe and orderly manner? Do Member States have good national practices to share? How could the EU best provide support for this task?*
