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OUTCOME OF PROCEEDINGS

of :	Working Party on Migration and Expulsion
on :	5 October 2001
No. prev. doc.:	11702/01 MIGR 72
No. Cion prop.:	8237/01 MIGR 33 COM(2001) 127 final
Subject:	Proposal for a Council Directive concerning the status of third-country nationals who are long-term residents

At its meeting on 5 October 2001 the Working Party on Migration and Expulsion began the second reading of the above proposal.

Maintaining all of their reservations, the German and Austrian delegations insisted on the need to provide for a mechanism for the exchange of information between Member States. Referring to a Commission initiative announced following the terrorist attacks in the United States for setting up a central database in which all third-country nationals who had committed acts constituting a threat to public policy or to national security would be registered, the Austrian delegation wondered to what extent such an initiative could be incorporated in the framework of this Directive. The German delegation stressed the importance of the question of very broad cooperation between Member States on the exchange of data, which ought, regardless of any proposals that the Commission might submit in the future, to be discussed insofar as it affected the freedom of movement of third-country nationals within Union territory.

Wondering to what extent the future Commission initiative could affect this Directive, which dealt with a very specific category of third-country nationals, the Presidency pointed out that the idea of setting up a database covering everyone who moved about within Union territory with the Community status of long-term resident had been launched by the Austrian delegation during the first reading, but had not met with the agreement of a majority of delegations. It also felt that, insofar as it concerned questions relating essentially to public policy and national security, the initiative advocated by the Commission ought to be examined by other Council bodies.

Stressing that the initiative in question was in the process of being drawn up, the Commission representative said he was not yet able to give details.

While endorsing the objective of harmonising national legislation in this field, the Italian delegation entered a general reservation on the proposal for a Directive.

The Greek delegation said that the proposal was still the subject of consultations amongst the various authorities concerned in Greece and maintained a general reservation.

Articles 1 to 7 of the draft Directive are set out below. The delegations' comments on those Articles are set out in footnotes.

Draft

COUNCIL DIRECTIVE

concerning the status of third-country nationals who are long-term residents

Chapter I

General provisions

Article 1 [1]

Subject matter

This Directive determines:

(a) the terms for conferring and withdrawing long-term resident status granted by a Member State in relation to third-country nationals legally residing in its territory, and the rights pertaining thereto; and [2]

(b) the terms on which third-country nationals enjoying long-term resident status have the right of residence in Member States other than the one which conferred that status on them. [3]

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1 EL entered a reservation and A a scrutiny reservation on this Article.

2 A, noting that the implementation of point (a) would result in an infringement of its constitutional rules concerning the competence of the Austrian Länder, entered a reservation.

3 E entered a reservation, considering that Article 1(b) and Chapter III of this Directive were not consistent with Article 63(4) of the Treaty, which provides for measures defining the conditions under which third-country nationals may reside in other Member States and does not establish a right to free movement in other Member States. It recalled, furthermore, that the Tampere European Council conclusions did not call for third-country nationals to be granted the **same** rights as EU citizens but for them to be granted rights and obligations **comparable** to those of EU citizens. Cion, observing that the objective of this provision was to implement Article 63(4) of the EC Treaty, stressed that although in certain areas, as established in Article 12 of the Directive, third-country nationals were granted the same rights as EU citizens, they did not enjoy entirely equal treatment.

Article 2

Definitions

For the purposes of this Directive:

(a) "*third-country national*" shall mean any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty;

(b) "*long-term resident*" shall mean any third-country national who has long-term resident status as provided for by Article 8;

(c) "*first Member State*" shall mean the Member State which granted a third-country national long-term resident status;

(d) "*second Member State*" shall mean any Member State other than the one which for the first time granted a third-country national long-term resident status and in which that long-term resident exercises the right of residence;

(e) "*family members*" shall mean the applicant's spouse or unmarried partner, minor children and relatives in the ascending line and adult dependent children admitted to the Member State concerned and residing there in accordance with Council Directive …/…/EC on the right to family reunification. The family members of citizens of the Union are defined by the Community legislation relating to free movement of persons in accordance with Article 4 of that Directive; [1]

(f) "*refugee*" shall mean any third-country national enjoying refugee status within the meaning of the Geneva Convention on the Status of Refugees of 28 July 1951, as amended by the Protocol signed in New York on 31 January 1967 [2];

(g) "*long-term resident's EC residence permit*" shall mean a residence permit issued by the Member State concerned upon the acquisition of long-term resident status.

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1 The Working Party agreed to postpone consideration of this definition pending further work on the draft Directive on family reunification.

2 D/E/A, which entered reservations, and EL, which entered a scrutiny reservation, did not feel that refugees ought to come within the scope of the Directive, because the status of refugee was different from that of long-term resident third-country national. Accordingly, refugees ought to be covered by a separate instrument (A) or at least by a specific chapter of the Directive (EL). Indicating that it had not yet adopted a final position on this matter, FIN stressed the need to deal with the question of refugees' acquisition of the status of long-term resident either in the Working Party on Migration and Expulsion or in the Working Party on Asylum. In that context I felt that the most appropriate forum for the examination of that question would be the Working Party on Asylum and D wondered whether it ought not to be analysed by an ad hoc working party. B/F/NL and S insisted that the matter ought to examined by the Working Party on Migration and Expulsion within the framework of the examination of this proposal for a Directive, and wanted refugees to stay within its scope.
B and F in particular stressed that this Directive took no account of the status of the third-country nationals concerned (refugees or economic immigrants) but only of the length of time for which they had been resident within the territory of a Member State. According to F the substantive question that this Directive really raised was whether the intention was to give refugees the possibility of moving within the territory of the Union after five years' residence within the territory of a Member State.
Endorsing the remarks made by B and F, Cion stated its opposition to an approach that excluded refugees.
Pres noted that very different positions were held on the inclusion of refugees in the scope of the Directive.

Article 3

Scope

1. This Directive shall apply to third-country nationals residing legally within the territory of a Member State.

2. This Directive shall not apply to third-country nationals who:

(a) are authorised to reside in a Member State on the basis of temporary protection or have applied for authorisation to reside on that basis and are awaiting a decision on their status;

(b) are authorised to reside in a Member State on the basis of a subsidiary form of protection in accordance with international obligations, national legislation or the practice of the Member States or have applied for authorisation to reside on that basis and are awaiting a decision on their status [1];

[1] According to FIN and S persons eligible for a subsidiary form of protection ought to be covered by the Directive; on the other hand, A wanted to exclude them from its scope. Cion said that a distinction must be made between temporary and subsidiary protection. It pointed out that, under the Directive on temporary protection, in the event of a mass influx of displaced persons (Directive 2001/55/EC of 20 July 2001) persons eligible for that type of protection could never acquire the status of long-term resident except in the event of a change of status (for example, a person eligible for temporary protection acquiring the status of refugee). On the other hand, in the case of subsidiary protection, it pointed out that the concept varied greatly from one Member State to another. A Commission proposal for a Directive on subsidiary protection, which would shortly be submitted to the Council, provided that persons eligible for that type of protection could invoke the Directive's provisions on the status of third-country national long-term resident, to which it referred. It noted that by means of that proposal for a Directive the scope of this Directive was extended.
In that context D, insisted on the need for more effective coordination of the activities of the Working Party on Migration and Expulsion and the Working Party on Asylum because of the links between the matters they dealt with, and invited the Commission to submit a summary document reflecting its general approach to the question of refugees and related matters.

(c) have applied for recognition as refugees and whose application has not yet given rise to a final decision;

(d) [1] reside in order to pursue studies, with the exception of studies for a doctorate [2], or vocational training, or as *au pair* or seasonal worker, or as workers posted by a service provider for the purposes of cross-border provision of services, or as cross-border providers of services;

(e) enjoy a legal status governed by the Vienna Convention on diplomatic relations of 1961, the Vienna Convention on Consular Relations of 1963, the Convention of 1969 on Special Missions or the Vienna Convention on the Representation of States in their Relations with International Organisations of a Universal Character of 1975.

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[1] According to A, which stressed the difficulties of drawing up a list of the different situations that could be taken into account in this provision, subparagraph (d) ought to be replaced by a more general provision intended to exclude any form of temporary residence. D and I endorsed the suggestion made by A, on which NL expressed reservations. While supporting A's approach, B stressed the necessity of strictly defining the concept of temporary residence in order to prevent the exclusion of certain categories of third-country nationals from access to the status of long-term resident. In that context Pres drew attention to the fact that certain types of temporary residence could involve fairy long periods of residence within the Member States' territories. S preferred to adopt the approach proposed by the Commission. Although it did not oppose the idea advanced by A, which, in its view, ought to be examined in detail, Cion felt that general terms, such as "temporary residence", ought not to be adopted. It also wondered whether and how national legislation could take account of periods of residence that a person had spent within the territory of a Member State as part of a stay that would be considered temporary in the event of a change of status.

[2] Several delegations (B/D/EL/F/A and P) felt that periods spent within the territory of a Member State for the purpose of studying for a doctorate ought not to be counted for the purpose of acquiring the status of long-term resident. FIN and S, on the other hand, wanted such periods to be counted.

3. Third-country nationals who are members of the family of a citizen of the Union who has exercised his right to the free movement of persons may not acquire long-term resident status in the Union citizen's host Member State until they have obtained the right of permanent residence in that Member State within the meaning of the legislation on the free movement of persons [1].

4. This Directive shall apply without prejudice to more favourable provisions of:

(a) bilateral and multilateral agreements between the Community or the Community and its Member States, on the one hand, and third countries, on the other; [2]

(b) the European Convention on Establishment of 13 December 1955, the European Social Charter of 18 October 1961 and the European Convention on the Legal Status of Migrant Workers of 24 November 1977 [3].

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[1] It was suggested that this paragraph be worded more simply, for example:
"Where the members of the family of a citizen of the Union have acquired the right of permanent residence in the host Member State, as defined in Community law on the freedom of movement of persons, they shall be eligible for the status of long-term resident".
In the context of the examination of this paragraph, Cion said that the members of the family were those laid down in the Community legislation in force. It also pointed out that in the draft recast Community legislation on the freedom of movement of persons, it had been proposed that unmarried partners and their direct ascendants and descendants be added to the categories referred to in Regulation No 1612/68 (spouse, direct descendants less than twenty-one years old, direct descendants more than twenty-one years old, dependant direct ascendants) as partly adapted by the various Community instruments that subsequently amended that Regulation, if national legislation provided for their being treated as married couples.
D and A repeated their reservations on the definition of family members, and stated their opposition to the inclusion of unmarried partners with family members taken into account by Community legislation through the recasting of that legislation. Stressing the possibility of conflict between this Directive and other Community texts being examined by other working parties, they insisted on the need to ensure the coordination of the proceedings in those various fora.

[2] A felt that the Member States ought to be able to conclude bilateral and multilateral with third countries in this area and entered a reservation.

[3] D noted that the European Convention on the status of migrant workers had not been ratified by all the countries that were members of the Council of Europe, and hoped that this subparagraph would include no reference to international conventions and agreements.
Pres felt that that question ought to be examined by the Legal Service.

5. This Directive shall apply without prejudice to the obligations imposed by Article 33 of the Geneva Convention of 28 July 1951 on the Status of Refugees, as amended by the New York Protocol of 31 January 1967, and Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 [1].

Article 4

Non-discrimination clause [2]

The Member States shall give effect to the provisions of this Directive without discrimination on the basis of sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinions, membership of a national minority, fortune, birth, disabilities, age or sexual orientation.

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[1] F wondered why a reference to the principle of "non-refoulement" should be included in the body of the Directive. Recalling that in the case of the Directive on temporary protection, it was agreed, after long debates, to insert a similar text as a recital in the preamble, it suggested following the same approach in this Directive. Cion, observing that Article 3(5) was essentially a safeguard clause for refugees, felt that this issue needed to be further examined.

[2] Cion said that this provision was a standard non-discrimination clause, which was inserted in many Community instruments and was based on Article 21 of the Charter on Fundamental Rights. EL took the view that such a clause seemed to be based on Article 13 of the EC Treaty, which allowed the Council, where necessary, to take appropriate measures against discrimination, rather than Article 21 of the Charter on Fundamental Rights. Stressing the need to revise this provision, it recalled that in the context of the Directive on temporary protection the issue concerning the introduction of a non-discrimination clause had been extensively discussed and agreement had been reached on the insertion of the relevant text as a recital in the preamble. F, supporting EL, argued that in the context of this Directive it would be advisable to follow the same approach. Cion, while taking the view that the context of this Directive was different from that of the Directive on temporary protection, felt that this issue should be considered further. It observed that in all circumstances this non-discrimination clause was introduced with a view to ensuring an appropriate implementation of the Directive. It also added that this clause should not be assimilated to non-discrimination clauses contained in Directives based on Article 13 of the EC Treaty.

Chapter II

Long-term resident status in a Member State

Article 5

Duration of residence

1. A Member State shall grant long-term resident status to third-country nationals who have resided legally and continuously for five years [1] within its territory [2].

For the purpose of determining the period of legal residence referred to in the first subparagraph, no account shall be taken of any entry or stay preceding the issue of the first residence permit [3].

2. For the purpose of calculating the period of legal and continuous residence referred to in paragraph 1:

(a) periods of residence within the territory of the Member State as asylum-seeker or as beneficiary of temporary protection shall be taken into account only if the third-country national is a refugee [4];

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1 EL repeated its request for a period of more than five years and maintained a reservation on the period.

2 D suggested specifying in paragraph 1 that the period of residence spent within the territory of the Member State to be taken into account must be real, since only a period of real residence would make the integration of third-country nationals possible, and in its view that was the prior condition for the grant of the rights provided for in the Directive.

3 D and EL entered linguistic and scrutiny reservations.

4 Regarding refugees, see footnote 2 on page 5.

(b) periods of residence for study purposes, [with the exception of study towards a doctorate], shall be taken into account as to half only [1].

3. Periods of absence from the territory of the Member State concerned shall not interrupt the period of legal and continuous residence referred to in paragraph 1 and shall be included for the purposes of calculating that period where they are:

(a) shorter than six consecutive months [2],

(b) related to the discharge of military **or civilian** obligations, detachment for employment purposes, including the provision of cross-border services, studies or research, serious illness, pregnancy or maternity [3] [4], or

(c) related to residence in a second Member State as member of the family of a long-term resident exercising the right of residence under this Directive or of a citizen of the Union exercising the right to free movement of persons. [5]

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1 A and P maintained reservations and NL a scrutiny reservation on this provision.

2 S stressed the dangers of abuse, as the period of residence of the person concerned could be interrupted several times by long absences of less than six months each, which would nevertheless be counted for the purpose of status acquisition.
While admitting that there might be some abuse, Cion stated its opposition to the multiplication of safeguards and the introduction of additional conditions.
Pres felt that this point ought to be examined in greater detail.

3 EL and A felt that no absence ought to exceed a specified length of time, and a specific period ought to be laid down in (c) or (d).
D also wanted a time limit to be taken into account, and stressed the need to aim at a harmonised period for all the Member States.

4 S felt that in subparagraph (c) a distinction must be made between cases in which there was a real emergency, when interruption of the stay would be authorised without any prior assessment, and others, such as serious illness, pregnancy or maternity, when the existence of an emergency and the justification of absence could be assessed.

5 EL entered a reservation on subparagraph (c).

4. Uninterrupted periods of residence of at least two years by a family member of a citizen of the Union, who as family member resides in a third State and within a period of three years returns to the Member State concerned, shall be taken into account in the calculation of the period of residence referred to in paragraph 1 [1].

[1] EL maintained a reservation on this paragraph. S questioned the added value of this provision.
Noting that, contrary to D's assertion, it did not affect the free movement of persons, Cion stressed the complexity of this provision. It pointed out that its purpose was to ensure that periods spent by third-country nationals who lived with citizens of the Union within the territory of a Member State were counted for the purpose of the acquisition of long-term resident status. Under this provision such persons' periods of residence within the territory of a Member State would be taken into account even if those period were interrupted by long absences caused by establishment with a citizen of the Union in a third country.

Article 6

Conditions as to resources and sickness insurance

1. Member States shall ask third-country nationals to provide evidence that they have, for themselves and for dependent family members:

(a) stable resources corresponding to the level of resources below which social assistance may be granted in the Member State concerned. Where this provision cannot be applied, the resources shall be considered to be adequate where they are equal to the level of the minimum social security pension paid by the Member State concerned. The criterion of stability of resources shall be evaluated by reference to the nature and regularity of the resources enjoyed prior to the application for long-term residence status; [1]

[1] D/EL/I and A entered reservations on this paragraph. D in particular felt that other conditions ought to be imposed as well as the condition concerning resources, which it would be better to specify, as the person concerned had to have resources sufficient for his needs without being a burden on the Member State concerned. In particular, the person concerned ought to have appropriate accommodation and adequate linguistic knowledge and to be integrated into the social security system. I and A supported D's suggestion that provision be made requiring appropriate accommodation.
E stressed that, as well as conditions concerning economic factors, this provision ought also to cover the tax obligations to which the persons concerned were subject.
F and S maintained reservations. Stressing that after staying within the territory of a Member State for five years the person concerned was supposed to be integrated, they opposed the idea of imposing additional requirements. In particular, F referred to the criterion of integration, which it felt could take the place of all the other criteria used by the Directive, including that of the length of the period of residence. It felt that application of that criterion would make it possible to grant the status of long-term resident even before the end of the five-year period.
Pres pointed out the difficulties of defining the parameters for the assessment and "measurement" of the concept of integration. Regarding a remark by F, which felt that the criteria for the assessment of the degree of integration ought to be determined by the Member State concerned, it observed that if such an approach were employed it would be more appropriate to use objective and harmonised criteria, since under the Community status third-country nationals would be able to move about in other Member States.
FIN supported the Commission's approach.
Cion noted that a number of delegations wanted to introduce other conditions to be met by the person concerned, which would be in addition to those of the length of time, sufficient resources and health insurance laid down by the Directive. In particular it said that E's suggestion concerning tax obligations ought to examined in greater detail.

(b) sickness insurance covering all risks in the Member State concerned.

2. The conditions imposed in paragraph 1 shall not apply to:

(a) refugees [1];

(b) third-country nationals born within the territory of a Member State. [2]

Article 7 [3]

Public policy and domestic security

1. Member States may refuse to grant long-term resident status where the personal conduct of the person concerned constitutes an actual [4] threat to public order or domestic security.

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1 D and A maintained a reservation and a scrutiny reservation respectively.

2 According to D this provision conferred rights too similar to those linked with nationality and ought to be deleted.
F opposed a suggestion by Pres that this provision be restricted to **children** who were third-country nationals born within the territory of the Member State in question.

3 I and NL entered scrutiny reservations.

4 A, supported by D/F and EL, suggested deleting the word "actual", making it also possible to take into account acts committed in the past whose seriousness might, in the judgment of Member States, be regarded as constituting a continuing threat.
I thought the concept used in this Directive should be harmonised with that adopted in the Directive on the right to family reunification, and that it should be ascertained whether the notion of an actual threat had ever been used in Community law.
Cion pointed out that the reference to an actual threat did not exclude the possibility of taking into account acts which had occurred in the past. In response to a question by EL, it said that even an offence committed in another Member State could constitute an actual threat to the Member State concerned.
Replying to a query from EL on the subject of permit renewal, Cion said this was automatic. It also noted that renewal could be refused if an offence were committed while the permit was being renewed.

2. [1] Criminal convictions shall not in themselves automatically warrant the refusal referred to in paragraph 1 [2]. Such refusal may not be founded on economic considerations.

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[1] S entered a scrutiny reservation.

[2] D felt that it must be specified that persons who had convictions could not in any event obtain residence permits. Referring to the approach based on general preventive considerations which was employed in Germany, under which a person with a conviction lost his right to obtain or keep a residence permit without its being necessary to carry out a detailed examination of his dossier, it pointed out that conviction as such ought to suffice to justify refusal. In that context it stated its opposition to the extension of the principles of the case law of the European Court of Human Rights concerning citizens of the Union to third-country nationals. Noting that in the case of certain crimes it ought to be possible to refuse the person concerned entry, EL supported D.
Cion said that Article 7 did not prevent the Member State concerned from refusing the person concerned entry, if national law so provided, provided that that provision concerned only the grant of long-term resident status. In reply to a question put by P, it stressed that the factor to be taken into account was that of the existence of any automatic mechanism, in national law, requiring the expulsion of a person with a conviction. The expulsion of a person who had committed acts of sufficient gravity would be perfectly acceptable under this provision. In addition, if because of the offence for which the person concerned had been prosecuted – such as theft – the conviction had not led to a decision to expel him, this provision provided that to refuse to grant him the status the Member State concerned must carry out an additional examination of his dossier. It added that Article 7 did not provide for the ranking of offences on the basis of their gravity or importance; it was for the Member States to appreciate the facts, as this provision restricted itself to requiring that the personal behaviour of the person concerned must constitute an actual threat to public policy or domestic security.