



Council of the
European Union

Brussels, 2 February 2018
(OR. en)

5821/18

LIMITE

MIGR 10
SOC 40
CODEC 124
EMPL 28
EDUC 27

**Interinstitutional File:
2016/0176 (COD)**

NOTE

From:	Presidency
To:	Delegations
No. Cion doc.:	10012/16 MIGR 111 SOC 398 CODEC 852 + ADD 1-7
Subject:	Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment (First reading)

At its meeting on 20 December 2017, COREPER discussed a possible way forward in the negotiations with the EP on the proposal for an EU Blue Card Directive. Two compromise packages were presented to Member States who were asked to voice their preference (15699/17). As a result of the discussion, the Chair concluded that Member States were very split on this issue but there seemed to be a slight majority of Member States for option 2. However, COREPER was clear that more work needed to be done at a technical level. Hence, the Presidency pursued bilateral contacts with several Member States and drafted a revised compromise package on the basis of Option 2. At their meeting of 9 February, JHA Counsellors are asked to give their views on each of the elements of the package as set out in the Annex.

I. POSSIBLE ELEMENTS OF AN ALTERNATIVE COMPROMISE PACKAGE

1. National schemes:

- Essentially the EE Presidency compromise suggestion on complementary national schemes. The wording has been adjusted following suggestions from the EP that aim to make it clear that for third-country nationals that comply with the criteria for admission set out in the Directive only EU Blue Cards can be issued.

Article 3(4):

4. Where a third-country national applies to be admitted for the purpose of [highly skilled] employment and he or she fulfils the conditions laid down in national law in application of Article 5, Member States shall issue him or her an EU Blue Card.

Where the third-country national does not fulfil the conditions laid down in national law in application of Article 5(1)(a), Article 5(2) or, where applicable, 5(4) or 5(5), Member States may issue him or her a residence permit other than the EU Blue Card.

Where Member States issue such national permits for the purpose of [highly skilled] employment, they shall grant EU Blue Card holders the same access to national permanent or long-term residence status and the same procedural safeguards if these are more favourable than the safeguards provided for in Article 10. Such residence permits shall not confer the right of mobility in second Member States as provided for in this Directive.

2. Skills vs qualifications:

a) Member States can recognise higher professional skills if they so decide. In order to make it more visible that professional skills can also be recognised, the Presidency suggests to use the term "highly skilled employment" throughout the text. This would not change the substance but might make it easier for the EP to accept the compromise package.

Article 2(b):

"highly [...] ~~qualified~~ **skilled** employment" means employment of a person, who:
in the Member State concerned, is protected as an employee under national employment law or in accordance with national practice, irrespective of the legal relationship, for the purpose of exercising genuine and effective work for, or under the direction of, someone else; is paid; and has the required [...] higher professional qualifications **as attested by evidence of higher education qualifications or, where provided by national law, higher professional skills;**"

b) Higher professional skills are attested by at least three years of professional experience:

Article 2(i):

"(i) "higher professional skills", **where provided for by national law or national procedures,** means **knowledge, skills and competences** attested by at least [...] ~~five~~ three years of professional experience of a level comparable to higher education qualifications and which is relevant in the profession or sector specified in the work contract or binding job offer;"

c) A review clause in Article 25 to meet the concerns of the EP who attaches great importance to the issue of higher professional skills:

Article 25

1. Every three years, and for the first time by [*five years after the date of entry into force of this Directive*], the Commission shall report to the European Parliament and the Council on the application of this Directive in the Member States, in particular the assessment of the impact of Articles **2(i)**, 5, 12, 19 and 20, and the impact of this Directive on the national labour market situations. ~~The Commission shall propose any amendments that are necessary.~~

2. The Commission shall notably assess the relevance of:

(a) the salary threshold set out in Article 5 and of the derogations provided for in that Article, taking into account, among others, the diversity of the economical, sectorial and geographical situations and the labour market impact within the Member States;

(b) the usage of equivalent higher professional skills by Member States and, where relevant and information is available, other concepts under national law that take into account professional experience for the assessment of skills for the purpose of granting highly qualified permits.

The Commission shall propose any amendments that are necessary.

3. Salary threshold

By way of a compromise, the range for setting the salary threshold is lowered to 1.0 to 1.6. At the same time, a number of derogations from the general threshold are possible. The derogation in Article 5(4), combined with Article 2(ja), is inspired by EP Amendment 69 (the last sentence) and the compromise suggestions put forward by the EE Presidency on 7 July 2017 (taken over in the German non-paper of 19 December 2017). The term "where appropriate in consultation with the social partners" can be found in Article 2(2) of the Seasonal Workers Directive.

Article 5(2)

"2. In addition to the conditions laid down in paragraph 1, the gross annual salary resulting from the monthly or annual salary specified in the work contract or binding job offer shall not be inferior to the salary threshold set and published for that purpose by the Member States. The salary threshold set by the Member States shall be at least [...] **1.0** times but not higher than [...] **1.6** times the average gross annual salary in the Member State concerned.

Article 5(2a)

2a. By way of derogation from paragraph 2, Member States may apply a higher threshold of maximum 2.0 times the average gross annual salary in the Member State concerned where:

- **the national average gross annual salary is lower than half of the average at EU level; and**
- **there is a significant difference in the levels of the average gross annual salary between regions in that Member State, which would cause the national salary threshold for [highly skilled] workers to be disproportionately low."**

Article 5(4)

"By way of derogation from paragraph 2, **Member States may, where appropriate in consultation with the social partners, allow for the gross annual salary resulting from the monthly or annual salary specified in the work contract or binding job offer to be inferior to the salary threshold set in accordance with paragraph 2 but not inferior to the prevailing salary.**

In such a case, the applicant shall provide evidence of the prevailing salary via legitimate sources of labour market and salary information, as determined by national law, such as applicable laws, collective agreements or practices, information acquired via statistics or surveys, or, in absence of other sources, evidence of the gross salaries paid by the employer concerned to comparable [highly skilled] workers. Where appropriate, Member States may involve the social partners in assessing this evidence."

Article 2

“(ja) prevailing salary” means the predominant gross salary paid to comparable [highly skilled] workers in terms of:

- occupation,
- sector of employment,
- geographical area where the work is habitually carried out,
- job duties and responsibilities, and
- experience level of the applicant.

Article 5(5)

"5. By way of derogation from paragraph 2, as regards third-country nationals who have obtained a higher education qualification not more than three years before submitting the application for an EU Blue Card, **Member States may apply a lower [...] salary threshold [...] of at least 80 percent of the salary threshold [...] by the Member State concerned in accordance with paragraph 2. [...]**"

Article 23(2):

"2. Member States shall communicate to the Commission [...] upon each modification, but at least once per year:

[...]

b) [...] the **decision whether** ~~list of the professions for which a~~ **employers or third-country nationals may apply for** derogations in accordance with Article 5(4) ~~may be applies~~ and, where applicable, the justification for a derogation in accordance with Article 5(2a);"

Recital 15

(15) In order to ensure a sufficient level of harmonisation in the admission conditions throughout the Union, both a lower and upper factors for the salary threshold should be determined. The lower and upper limit for setting the national salary threshold should be determined by multiplying these factors with the average gross annual salary in the Member State concerned. A salary threshold should be chosen within the range of the lower and upper limit. This salary threshold should set out the minimum salary which a Blue Card holder should earn. Therefore, in order to be admitted under this Directive, applicants should earn a salary which is equal to or greater than the salary threshold chosen by the Member State concerned. **However, Member State should be able to decide, where appropriate in consultation with the social partners, whether to be more flexible and take into account the predominant gross salary paid to comparable [highly skilled] workers instead of the salary threshold. In such a case, the Member State would allow applicants to provide evidence that the applicable salary threshold is not in line with the market-conform salary for the position they are applying for. In that respect, Member States should take into account elements such as the occupation, responsibilities, previous experience, sector of employment or geographical area where the work is to be carried out.**

Recital 16

~~(16) Member States should be able to provide a lower salary threshold for specific professions where it is considered by the Member State concerned that there is a particular lack of available workforce and where such professions belong to major group 1 or 2 of the ISCO ("International Standard Classification of Occupation") classification.~~

4. Scope

a) Applicants for international protection would not be included in the scope; beneficiaries of international protection would, however, be allowed to apply for an EU Blue Card in a Member State other than the one which granted them international protection. In addition, the first Member State should be able to decide to give this possibility to the beneficiaries to whom it has granted international protection. The requirement of a prior residence of 12 months, as it appears in the Council's position, would be waived in the case of the first Member State.

Article 3(2a)

2a. This Directive shall apply to beneficiaries of international protection where, after having resided for at least 12 months in the Member State which granted them the international protection, they apply to be admitted to the territory of another Member State for the purpose of [highly skilled] employment under the terms of this Directive. Member States may decide to apply the provisions of this Directive to beneficiaries of international protection to whom they granted international protection, ~~after having resided for at least 12 months on their territory.~~

b) Third-country nationals who have been admitted to a Member State as seasonal workers pursuant to Directive 2014/36/EU would be able to submit an application for an EU Blue Card. The application would be considered and examined while the person concerned is residing in the territory of the Member State concerned. The third-country national would be granted an EU Blue Card if he or she fulfils all the conditions of admission under the Directive. In that case, he/she would cease to be a seasonal worker.

Article 3(2)(f)

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

~~(f) who have been admitted to the territory of a Member State as seasonal workers pursuant to Directive 2014/36/EU of the European Parliament and of the Council.~~

OR

Member States can decide to allow third-country nationals who have been admitted to a Member State as seasonal workers pursuant to Directive 2014/36/EU to submit an application for an EU Blue Card.

Article 2

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

~~(f) who have been admitted to the territory of a Member State as seasonal workers pursuant to Directive 2014/36/EU of the European Parliament and of the Council;~~

New Article 3(2b):

2b. Member States may decide not to apply the provisions of this Directive to third-country nationals who have been admitted to the territory of a Member State as seasonal workers pursuant to Directive 2014/36/EU of the European Parliament and of the Council.

5. Labour market test

- Member States would have the right to carry out labour market tests for first entry (wording of Article 6(3)(cc) in the fourth column of the table modified to correspond to a rejection ground in paragraph 3):

Article 6(3)(cc)

“(cc) where the Member States concerned has established that ~~may check whether the concerned~~ **vacancy in question could not** be filled by national or Union workforce, by third-country nationals lawfully resident in that Member State and already forming part of its labour market by virtue of Union or national law, or by EU long-term residents wishing to move to that Member State for [highly skilled employment] in accordance with Chapter III of Directive 2003/109/EC.

- The second Member State would have the right to carry out the labour market test in the case of a long-term mobility of a Blue Card holder to a second Member State but only if that Member State also does it upon first entry (Article 20(6) in the fourth column of the table);

Article 20(6)

6. The second Member State may reject an application for an EU Blue Card on the basis of a check **carried out** in accordance with Article 6(3)(cc) [...] only if that Member State **carries out such checks when it is the first Member State**.

- Member States would not be able to conduct labour market tests for family members (Article 16(6), the second subparagraph in the Council text would thus be deleted).

Article 16(6)

6. By way of derogation from Article 14 [...] (2) of Directive 2003/86/EC, Member States shall not apply any time limit in respect of access to the labour market. **By way of derogation from Article 14(1)(b) of that Directive, and** without prejudice to the restrictions referred to in Article 13(3) of this Directive, family members shall have access to any [...] **employment, and to** self-employed activity **in accordance with applicable requirements under national law**, in the Member State concerned.

~~Before a family member is granted access to employment, Member States may check whether the concerned vacancy could not be filled by national or Union workforce, by third-country nationals lawfully resident in that Member State and already forming part of its labour market by virtue of Union or national law, or by EU long-term residents wishing to move to that Member State for employment in accordance with Chapter III of Directive 2003/109/EC.~~

- Member States would be able to require that a change of employer be subject to a labour market test only during the first year and the right of the Blue Card holder to pursue employment would not be suspended until the outcome of the check (Article 13(1a)).

Article 13(1), (1a) and (1b) as they appear in the Council's text have been redrafted to provide more clarity. The reference to the "prior authorisation in writing" in paragraph (1b) has been deleted as deemed unnecessary as Member States would receive the information on the change of the situation and could withdraw the permit if the Blue Card holder no longer fulfils the conditions set out in Article 5.

Article 13(1), (1a) and (1b):

1. EU Blue Card holders shall be entitled to exercise the employment activity in line with the contract presented for the application.

1a. In addition, EU Blue Card holders shall be entitled to change position or employer. Member States may require that a change of employer and changes affecting the fulfilment of the criteria for admission as set out in Article 5 are communicated in accordance with the procedures laid down in national law. The communication procedure shall not suspend the right of the EU Blue Card holder to pursue the employment.

1b. By way of derogation from paragraph 1a, during the first year of legal employment in the Member State concerned as an EU Blue Card holder, where the EU Blue Card holder changes employer, Member States may carry out a check in accordance with Article 6(3)(cc).

6. EU Long-term resident status

- Member States would have the possibility to grant EU long-term resident status after three years of residence (Council text in Article 17(2)). All the other rules and conditions of the LTR Directive, from which no explicit derogation has been made, remain applicable (see below).

Article 17(2)

2. By way of derogation from Article 4(1) of Directive 2003/109/EC, Member States [...] may grant EU long-term resident status to third-country nationals who have legally and continuously resided as EU Blue Card holders within their territory for three years immediately prior to the submission of the relevant application.

- In Recital 37 exceptions from Article 17(2), third subparagraph of the Commission proposal have been added as examples of "disproportionate" in the Council text.

Recital 37:

(37) In order to attract [highly skilled] workers and encourage their continuous stay in the Union, while enabling mobility within the Union as well as circular migration, derogations from Council Directive 2003/109/EC¹⁸ should be provided for in order to give EU Blue Card holders [*EP: and their family members*] easier access to EU long-term resident status. [*Council: Where the EU long-term resident status is obtained after three years and before the regular residence period of five years has been reached, Member States should be allowed to withdraw the status where the person becomes unemployed and does not have sufficient resources to maintain himself or herself and the members of his or her family without having recourse to the social assistance system of the Member State concerned. Member States' authorities retain a margin of manoeuvre with regard to the interpretation of the 'sufficient resources' requirement, provided that this does not undermine the objectives of this Directive and Council Directive 2003/109/EC and the effectiveness thereof. Member States should not withdraw the status where such a measure would be disproportionate.] The withdrawal of the EU long-term resident status would be disproportionate, for example, where the third-country national is temporarily unable to work as the result of an illness or accident; in duly recorded involuntary unemployment and has registered as job-seeker with the relevant employment office; or begins vocational training which, unless the third-country national concerned is involuntarily unemployed, should be related to the previous employment.*

- In the case of mobility, different statuses of residence in different MS would count for the period needed to acquire the long-term resident status Article 17(3)(a). All the other rules and conditions of the LTR Directive, from which no explicit derogation has been made, remain applicable (see below):

Article 17(3):

"3. By way of derogation from Article 4(1) of Directive 2003/109/EC, the EU Blue Card holder having made use of the possibility provided for in Article 20 of this Directive is allowed to cumulate periods of residence in different Member States in order to fulfil the requirement concerning the duration of residence, if that holder has accumulated:

(a) five years of legal and continuous residence ~~as an EU Blue Card holder~~ within the territory of the Member States; and

(b) two years of legal and continuous residence as an EU Blue Card holder immediately prior to the submission of the relevant application within the territory of the Member State where the application for the EU long-term resident status is submitted."

Except when explicit derogations are made, all the other rules and conditions of the LTR Directive remain applicable, in particular concerning how periods of residence under different statuses are taken into account:

Long-term residents' directive

Article 3 - Scope

1. This Directive applies to third-country nationals residing legally in the territory of a Member State.

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

(a) reside in order to pursue studies or vocational training;

[...]

(e) reside solely on temporary grounds such 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 or in cases where their residence permit has been formally limited;

(f) 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.

Article 4 - Duration of residence

1. Member States shall grant long-term resident status to third-country nationals who have resided legally and continuously within its territory for five years immediately prior to the submission of the relevant application.

2. Periods of residence for the reasons referred to in Article 3(2)(e) and (f) shall not be taken into account for the purposes of calculating the period referred to in paragraph 1.

Regarding the cases covered in Article 3(2)(a), where the third-country national concerned has acquired a title of residence which will enable him/her to be granted long-term resident status, only half of the periods of residence for study purposes or vocational training may be taken into account in the calculation of the period referred to in paragraph 1.

[...]

These provisions are to be read in conjunction with the CJEU judgment Singh C-502/10 which clarifies that Article 4(2) in conjunction with Article 3(2)(e) means that it limits the exclusion to those permits which are really limited in time, for example, not renewable.

7. Long-term mobility

- The following options to facilitate long-term mobility are submitted for Member States' consideration (Article 20(2)):
 - a) no obligation to allow the EU Blue Card holder to start working in the second Member State before the permit is issued, but very short processing time (30 days);
 - b) an obligation to allow the EU Blue Card holder to start working in the second MS 30 days after the submission of the application, shorter processing time (60 days);
 - c) obligation to allow the EU Blue Card holder to start working immediately, normal processing time (90 days).

- It would be optional for Member States to request evidence of professional qualifications and sickness insurance.

3a NEW In addition, the Member State concerned may request the EU Blue Card holder to:

~~(a) if requested by the Member State concerned, present the documents attesting higher professional qualifications in relation to the work to be carried out as provided for in national law;~~

~~(b) provide evidence of having, or if provided for by national law, applied for a sickness insurance for all the risks normally covered for nationals of the Member States concerned for periods where no such insurance coverage and corresponding entitlement to benefits are provided in connection with, or resulting from, the work contract.~~

These paragraphs would be deleted in Article 20(3):

3. For the purposes of the application referred to in paragraph 2, the EU Blue Card holder shall [...]:

~~(ca) if requested by the Member State concerned, present the documents attesting higher professional qualifications in relation to the work to be carried out as provided for in national law;~~

~~(f) provide evidence of having, or if provided for by national law, applied for a sickness insurance for all the risks normally covered for nationals of the Member States concerned for periods where no such insurance coverage and corresponding entitlement to benefits are provided in connection with, or resulting from, the work contract.~~

8. Equal treatment

- Member States would have to provide equal treatment as regards family benefits also in situations where the family members reside in a third country. This means that if Member States provide this in the case of their own nationals they would have to do so in the case of EU Blue Card holders.

Article 15(2):

2. With respect to point (c) of paragraph 1 the Member State concerned may restrict equal treatment as regards study and maintenance grants and loans or other grants and loans regarding secondary and higher education and vocational training. Access to university and post-secondary education may be subject to specific prerequisites in accordance with national law.

~~With respect to point (c) of paragraph 1, the Member State concerned may restrict equal treatment as regards family benefits in relation to family members who reside in a third country.~~

With respect to point (f) of paragraph 1 the Member State concerned may restrict equal treatment as regards procedures for obtaining housing. This shall be without prejudice to the freedom of contract in accordance with Union and national law.

9. A ground for rejection in Article 6(3)(d) of the Council text

- Article 6(3)(d) would be deleted and the paragraph would be moved to Article 7(1) instead as a ground for withdrawal or non-renewal. This appears only as a ground for withdrawal and non-renewal in the ICT Directive (Article 8(3)(b)) and the Seasonal Workers' Directive (Article 9(1)(b)) but both a ground for rejection and withdrawal or non-renewal in the Students' and Researchers' Directive (Articles 20(2)(f) and 21(1)(d)).

- A new ground for refusal and withdrawal or non-renewal would be inserted in Articles 6(1) and Article 7(1). Such grounds also exists in the ICT Directive (Articles 7(1)(c) and 8(1)(c)), and in the Students' and Researchers' Directive it appears both as a ground for rejection and withdrawal or non-renewal:

Article 6(3)(d):

~~(d) the Member State has evidence or serious and objective grounds to establish that the third-country national would reside for purposes other than those for which he or she applies to be admitted.~~

Article 6(1)(c) NEW:

1. Member States shall reject an application for an EU Blue Card [...]:

c) where the employer's business was established for the main purpose of facilitating the entry of EU Blue Card holders.

Article (7)(1):

1. Member States shall withdraw or refuse to renew an EU Blue Card where:

(d) the EU Blue Card holder is residing in the Member State concerned for purposes other than those for which he or she was authorised to reside;

(e) the employer's business was established or operates for the main purpose of facilitating the entry of EU Blue Card holders.

II. OTHER ISSUES

The issues listed below, to which the Council attaches great importance, could be added to the package. The EP could be persuaded to accept these in return for the concessions from the Council under point I.

1. Article 5a on volumes of admission would be kept in the text as it appears in the Council's position.
2. Fraudulent documents as a shall-clause for rejection/withdrawal/non-renewal (Articles 6(1)(b) and 7(1)(a)).
3. Obligation to accept applications for the EU Blue Card from the territory of the Member State concerned in the case of holders of long-stay visas and residence permits, but Member States can decide whether to give this possibility to holders of short-stay visas or those who have entered visa free (Articles 9(2) and (3)).
4. It would stay optional for Member States to set up recognition procedures for certain employers (Article 12(1)).
5. The general processing deadline of 90 days would be kept (if shorter processing for long-term mobility – see point 7 above).