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NOTE

From:	Presidency
To:	Working Party on Integration, Migration and Expulsion (Admission)
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Subject:	Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (recast) - Discussion paper

1. INTRODUCTION

This Presidency discussion paper provides the background and reasoning behind the compromise proposal (doc 6541/23) to be discussed at the IMEX (admission) meeting on March 6, 2023. The aim is to facilitate the analysis of the proposal on a national level and the upcoming discussion in IMEX. For the Presidency, it is important that the recast Single Permit Directive gives an added value at EU level, while at the same time respecting that Member States have different national labour migration systems.

2. SCOPE

2.1. Posted workers - Art. 3(2)(c)

The current Singe Permit Directive excludes all categories of posted workers. In its recast proposal (COM(2022) 655 final), the Commission proposed to introduce a reference to Directive 96/71/EC. The recast proposal therefore only excludes posted third-country workers from other Member States. Page 15 of the Commission's impact assessment report states the following in this regard[1]:

"Furthermore, it is currently unclear if the exclusion of workers posted from third countries in Article 3(2)(c) refers only to TCNs that have been posted from one Member State to another or also those posted from a third country. Directive 96/71/EC on the posting of workers only applies to posting within the EU. Workers posted by an employer established in a third country are not covered by any other Directive. As a result, workers posted from third countries in the framework of the movement of persons under GATS Mode 4 may be also excluded from the scope of the Directive and not benefit from the single permit procedure and related rights. These problems result in administrative inefficiencies and in particular in the lack of clarity for migrants' employers, who do not know exactly what legal regime and attached rights apply to them."

The proposed change from the Commission would mean that posted workers whose employer is established outside the EU/EEA are covered by the Singe Permit Directive, unless they are covered by Directive 2014/66/EU. According to the Presidency, this could be problematic, especially when it comes to the provisions in Chapter III and the right to equal treatment. It could for example be difficult for Member States to ensure equal treatment with regard to conditions for dismissal when the third-country national is employed in a third country. Directive 96/71/EC may also be less favourable compared to the Sigle Permit Directive when it comes to the rights given to third-country nationals. If that is the case, posted workers from a third country would benefit from more rights than posted workers from another Member State. These problems have already been raised by one Member State. The Presidency has therefore chosen to keep the text in the current Directive in its new compromise proposal, excluding all posted workers from the scope.

[1] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022SC0656&from=EN

2.2. Beneficiaries of protection in accordance with national law - Art. 3(2)(h)

The current Single Permit Directive excludes all categories of beneficiaries of protection from the scope, including beneficiaries in accordance with national law, international obligations or the practice of a Member State. In its recast proposal, the Commission proposed to include this category in the scope of the directive by deleting Article 3(2)(h). Page 16 of the Commission's impact assessment report states the following in this regard[1]:

"The above applies also to the beneficiaries of protection according to national law, international obligations or the practice of a Member State. It is currently not clear whether, if allowed to work, they are covered by the procedure of Chapter II and the equal treatment provisions of Chapter III. The European Migration Network study on national protection noted that in a number of areas, such as labour market, education, integration services and social benefits, beneficiaries of protection according to national law are unable to benefit from equal treatment. The Fitness Check concluded that there is currently a gap at EU level as regards the rights of holders of purely national protection statuses."

On a general level, third-country nationals who have applied for or been granted protection in a Member State but not in accordance with Directive 2011/95/EU would be included in the scope of the Commission proposal. The categories of persons included in the scope would therefore differ from one Member State to another depending on national policies on protection.

During the discussions in IMEX, several Member States had objections to the inclusion of this category in the scope of the directive. The comments from Member States included objections to giving equal treatment rights to asylum seekers and practical difficulties in differentiating between different categories of asylum seekers. In practice, the persons included in this category would differ from one Member State to another depending on national policies on protection. Consequently, the Czech Presidency decided to revert to the scope of the current directive which excludes this category. The Presidency shares this assessment and would like to point out that in this regard, the compromise proposal is in line with the current Single Permit Directive. This category is also excluded from the scope of the revised Blue Card Directive (Article 3(2)(b) of Directive 2021/1883).

1 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=SWD%3A2022%3A656%3AFIN&qid=1651222453483

Several Member States have raised questions regarding this provision, but the Presidency has not noted many requests to include this category in the scope of the directive. Member States who wish to broaden the scope of the Single Permit Directive and make it more inclusive are therefore welcome to clarify their position at the IMEX meeting. If there is broad support for such a change, the Presidency could present a proposal aimed at including beneficiaries of protection in accordance with national law, international obligations or the practice of a Member State in the scope, but still excluding applicants for such protection.

3. APPLICATION PROCEDURE - ART. 4(2)

The Presidency proposal on the application procedure in Article 4(2) provides a clear added value for employers and third country nationals in comparison to the current directive, creating more legal certainty.

The proposed text, largely introduced by the Czech Presidency, comes from the revised Blue Card Directive (Art. 10(2) and (3) of Directive 2021/1883). After comments from some Member States, the reference to long-stay visas has been deleted and minor linguistic changes made. In the opinion of the Presidency, it is appropriate that the Single Permit Directive contain different e rules, given that it applies to different skill levels.

In the latest compromise proposal, the Presidency has made further minor changes with the intention of making the text clearer, not changing the substance of the provision. In the second sentence of paragraph 2, it is made clear that Member States can choose to accept applications from all third-country nationals who are legally present in their territory. This gives Member States flexibility and the opportunity to accept applications from third-country nationals with, for example, a long-stay visa. As in the current directive, Member States are not allowed to accept applications from third-country nationals who are illegally present in their territory. The regularisation of illegally staying third-country nationals is however a matter of national competence and therefore the discretion of Member States.

4. TIME LIMITS TO ADOPT A DECISION - ART. 5

The Presidency proposal contains two substantial changes compared to the current directive. First, labour market checks carried out in connection with a specific application for a single permit should be included in the time limit of 4 months. This provides added value compared to the current directive, giving employers and third country nationals greater certainty when it comes to the processing times of single permits. Secondly, the possibility to extend the time limit to more than 4 months in exceptional and duly justified cases clearly includes labour market tests, where relevant. In addition to these substantial changes, the Presidency has made some changes with the intention of making the text clearer and more consistent with the revised Blue Card Directive.

From the discussions in IMEX and the information submitted by Member States, it is clear that a majority of Member States do not support the Commission's proposal to include the possible issuing of a visa in the 4-month time limit. Therefore, the Presidency has not included such a system in its proposal.

Recital 12 contains an invitation to Member States to *endeavour* to issue visas for obtaining a single permit within the 4-month time limit. This text welcomes efforts from Member States to include such visas in the time limit but there is no corresponding legal obligation in Article 5.

The structure of Article 5 has raised some questions from Member States, in particular the connection between paragraphs 2 and 4 and the issue of "complete applications". On a general level, the Presidency has chosen to retain the structure of the current directive with some adjustments to align the text with wording already agreed upon in the revised Blue Card Directive (Article 11(2) of Directive 2021/1883). In the Presidency's view, paragraph 2 gives competent authorities the possibility to *extend* the time limit (i.e., longer than 4 months) if exceptional and duly justified circumstances linked to the complexity of the application apply. Paragraph 4, on the other hand, gives competent authorities the possibility to *suspend* the time limit if they discover that the submitted application is incomplete. This provision would apply regardless of when the competent authorities realise that relevant information is missing.

Example: The competent authority in Member State X receives an application for a single permit on January 1st. The application contains all necessary documents, and the time limit of 4 months starts ticking. This means that a decision should in principle be adopted by May 1st. However, when the authority starts reviewing the application in detail it realises that more information is needed to adopt a decision. At that point, the time limit is suspended in accordance Article 5(4) and the authority notifies the applicant and sets a reasonable deadline to provide the missing information. Once the requested information is submitted the suspension ends and "the clock starts ticking" again. A decision should then be adopted within 4 months + the time required for the administrative process described in paragraph 4.

5. CHANGE OF EMPLOYER - ART. 11(2)

The introduction of a right for single permit holders to change employer is a new element which gives the directive a clear added value. The possibility to change employer facilitates career development and provides protection for migrants who are mistreated by employers. This is an important part of the revision. At the same time, the Presidency proposal aims to give Member States flexibility when it comes to how this right should be implemented.

The right to change employer in Article 11 only applies within the period of validity of the single permit in question, which is clear from the reference to single permit holders. When a change of employer takes place, Member States are free to check admission conditions in accordance with national law, such as working conditions and the reliability of employers. The Single Permit Directive does not regulate admission conditions so that is a matter of national competence and falls outside the scope of the directive (see recital 19). To clarify this further, the text "In addition to verifying the conditions for admission in accordance with national law…" has been added in paragraph 2.

Member States can subject the right to change employer to certain conditions listed in Article 11(2). Member States can therefore choose to apply one or several of the conditions in points (a) to (c). Member States can also choose to allow a change of employer without any procedures or conditions. There are no restrictions to the number of times a single permit holder can change employer during the validity of the permit and paragraph 2 will apply in all cases.

Point (a) gives Member States the option of choosing between a notification or an application procedure for a change of employer. In both cases, the right to start working for a new employer can be suspended for 90 days. This is relevant also in the case of an application procedure since some Member States allow single permit holders to start working for a new employer during the processing of the application. If the right to change employer is not suspended, the single permit holder can start a new employment immediately.

Point (b) gives Member States the possibility to check the labour market situation and/or require that the change of employer does not entail a change of occupation. After consultation with the Council Legal Service, the Presidency has chosen the term "occupation" which covers both "horizontal" (between sectors) and "vertical" (within the same sector") changes. The term occupation is used in other directives and considered praxis in legal texts. The term profession is almost identical to the term occupation but considered somewhat more restrictive. See also recital 33.

Point (c) gives Member States the option to set a minimum period of time during which the single permit holder is required to work for the first employer. If Member States use this option, the minimum period of time cannot exceed twelve months but can of course be shorter. It is also important to point out that single permit holders who are exploited must be able to change employer before the expiration of such minimum periods (see recital 33).

6. PROTECTION AGAINST UNEMPLOYMENT - ART. 11(3)

The first paragraph states that a single permit cannot be withdrawn during a period of at least two months in the event of unemployment. The is also a new addition to the directive and a clear added value for third country national workers who lose their job or willingly leave their employer. This period should be *at least* two months, so Member States can choose to allow longer periods of unemployment. This rule only applies within the validity of the single permit in question.

The second paragraph clarifies that the single permit holder or the employer are obliged to notify competent authorities of periods of unemployment. The Presidency has chosen a mandatory provision, by recommendation from the Council Legal Services, to provide legal certainty for the single permit holder and reduce the administrative burden for Member States. It is also important information for competent authorities when they determine if a single permit can be withdrawn after a certain period of unemployment. The consequences of not notifying competent authorities can be determined by national law. It is therefore not necessary to mention this fact in the provision.

The third paragraph concerns the situation where an unemployed single permit holder finds a new job. At that point, the terms and conditions in Article 11(2) will apply. The third country national should also be allowed to stay on the territory of the Member State during the assessment of the new employment, even if the time period of at least two months has expired, as long as the single permit is valid. Member States are not obliged to allow third country nationals to remain on their territory after a single permit has expired.

Several Member States have raised concerns that allowing unemployment during the validity of a single permit could lead to costs for the Member States, for example for the social security system. The Presidency understands these concerns but would like to point out that, in the proposal, such periods of unemployment are limited to two months. If the possibility to be unemployed would be extended, a maintenance requirement for single permit holders or a limitation of the total time of unemployment could be considered. How single permit holders can support themselves during a period of unemployment will differ between Member States, depending on national policies on social security, unemployment compensation etc. Art. 12 provides certain rights to equal treatment but in the absence of horizontal Union legislation, the rights of third country nationals in different Member States will vary (see recital 21).

7. PREVENTION OF ABUSE AND FACILITATION OF COMPLAINTS - ART. 13-14

Articles 13 and 14 are new additions to the Single Permit Directive, linked to Article 12 on equal treatment. It is the Presidency's understanding that the aim of these provisions is to provide the same level of protection as in the Seasonal Workers Directive (Directive 2014/36) to a larger group of third country national workers. The Single Permit Directive has a much broader scope than the Seasonal Workers Directive when it comes to equal treatment, since Article 12 applies to all third-country national workers who are legally residing in a Member State.

With this in mind, the Presidency has adjusted Articles 13 and 14 to align the text with the corresponding articles in the Seasonal Workers Directive. This means that Member States who already have measures in place for the protection of workers that meet the requirements of the Seasonal Workers Directive, can refer to those measures when implementing the recast Single Permit Directive. No new measures will be required as long as these measures cover the scope of the Single Permit Directive (for example general measures applicable to all workers). A new recital 32 has been introduced to further clarify this.

The Presidency proposal also contains some deviations from the text in the Seasonal Workers Directive. Most importantly, references to national provisions have been introduced in both Article 13 and 14 instead of references to the directive. This was a strong recommendation from the Council Legal Service and the additions are "standard text" for this sort of clauses from the Joint Handbook for the presentation and drafting of acts subject to the ordinary legislative procedure, drafted by the legal and legal-linguistic services of the Council, the Parliament and the Commission in March 2022[1]. The reasoning is that a directive, unlike a regulation, must be transposed into national law before it is applicable in the Member States. In addition, the term penalty is used instead of the term sanction, on advice from the Council Legal Service since it is the correct term in this context.

[1] Within the framework of the Joint Declaration of the European Parliament, the Council and the Commission of 13 June 2007 on Practical Arrangements for the Codecision Procedure (Article 251 of the EC Treaty) (OJ C 145, 30.6.2007, p. 5).

When it comes to Article 14(1), there is an obligation for Member States to provide for a way to lodge complaints either "directly" or "indirectly". The "indirect" option includes two sub options. The third parties mentioned in the same paragraph could for example refer to trade unions or a legal agent.

For the convenience of Member States, reading guidance below:

- Article 13(1) corresponds to Article 24(1) of Directive 2014/36, with the exception that a reference is made to Article 12 in this Directive instead of to the whole Directive.
- Article 13(2) corresponds to Article 17(1) of Directive 2014/36, with the exception that a reference is made to Article 12 in this Directive instead of to the whole Directive.
- Article 13(3) corresponds to Article 24(2) of Directive 2014/36.
- Article 14(1) corresponds to Article 25(1) of Directive 2014/36.
- Article 14(2) corresponds to Article 25(2) of Directive 2014/36.
- Article 14(3) corresponds to Article 25(3) of Directive 2014/36.

8. QUESTIONS FOR MEMBER STATES

- *Do Member States agree with the Presidency's approach and with the content of the compromise proposals?*
- *If not, which further changes would Member States like to see and why?*