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NOTE

From:	General Secretariat of the Council
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Subject:	Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL concerning the status of third-country nationals who are long-term residents (recast) – Written replies by the Commission services on Articles 1-14

Delegations will find attached the written replies by the Commission services to Member States' questions on Articles 1-14 of the above-mentioned proposal.

ANNEX

Compiled list of questions based on Member States' written contributions on Art. 1-14

- Article 1 - Subject matter: Request for clarifications on the addition of the term "*continuously*", since the term already exists in subsequent Articles (Articles 4 and 26) of the Directive.

ANSWER: The insertion of the word "continuously" in Article 1(a) aims at bringing more clarity by establishing that the applicant has to be continuously present in the territory of the Member States to fulfil the condition of residence required to acquire EU long-term resident status.

- Article 3 - paragraph 2, point e:
  - Requests for clarifications on the deletion of: "or in cases where their residence permit has been formally limited" in Article 3(2)(e).

ANSWER: The Court of Justice found that "the literal wording of Article 3(2)(e) of Directive 2003/109 is ambiguous in meaning and it is not therefore possible to determine clearly and at first sight its exact scope" (C-502/10 Singh, par. 33). In *Singh*, the CJEU found that in contrast with the situation of third-country nationals, whose residence is based solely on temporary grounds, in which it is clear that the temporary nature does not permit the long-term residence of the third-country national concerned, the fact that a residence permit contains a formal restriction does not in itself give any indication as to whether that third-country national might settle on a long-term basis in the Member State, notwithstanding the existence of such a restriction. "Thus, a formally limited residence permit within the meaning of national law, but whose formal limitation does not prevent the long-term residence of the third-country national concerned, cannot be classified as a formally limited residence permit within the meaning of Article 3(2)(e) of Directive 2003/109, as otherwise the achievement of the objectives pursued by the directive would be jeopardised and, therefore, it would be deprived of its effectiveness" (par. 51).

It derives from the judgment that a formal limitation attached to a permit does not in itself necessarily prevent the long-term residence of the third-country national in the Member State concerned.

Given the legal uncertainty in the transposition and implementation by Member States, the Commission considered that it was appropriate to delete the reference to formally limited residence permits and that, in accordance with the case-law, Member States shall have regard to the purpose of the residence and not of the formal limitation of the permit.

- What is the meaning of the term "solely on temporary grounds" in relation to the term "formally limited" which has now been deleted? Does the term "solely on temporary grounds" cover only those who have strict restrictions according to the Directives in the area of legal migration, or is the area broader and can include those limited by national legislation? What is the criteria to understand certain residence permit as being "solely on temporary grounds"? If seasonal workers are excluded according to Directive 2014/36 (because they are limited to 6 months a year), what about the stays of volunteers, ICT and interns who are on temporary ground due to the nature of their work (they also have residence restrictions; for example, ICT can be sent for a maximum of 3 years). Does this also apply to this category of persons?

ANSWER: The term "solely on temporary grounds" is already present in the Long-Term Residents Directive in force. Therefore, Member States are already obliged to implement this Article and the Court of Justice already interpreted its meaning.

The Court underlined that the principal objective of the Directive is the integration of third-country nationals, who have settled on a long-term basis in the Member States. The Court also found that the duration of the legal and continuous residence of 5 years shows that the person concerned has put down roots in the country and therefore the long-term residence of that person (C-502/10 Singh).

The Court has interpreted "solely on temporary grounds" as meaning grounds that imply a residence of a third-country national in the Member State concerned is not long-term. To that effect, the directive gives several examples of residence linked to the exercise of an activity which is per se of temporary nature, such as au pair work, seasonal work, or cross-border services.

In light of the aforementioned objective, the Directive however excludes from its scope residence of third-country nationals which, whilst lawful and of a possible continuous nature, does not *prima facie* reflect any intention on the part of such nationals to settle on a long-term basis in the territory of the Member States.

ICTs reside in the territory of the MSs solely on temporary grounds (notably, the ICT permits are for precise periods of times, with limits to their renewability[1]), thus, Article 3(2)(e) is also applicable to them. For volunteers and interns, Member States need to consider the criteria established by the Court of Justice to assess, on a case by case, whether the stay of the third-country nationals is solely on temporary grounds.

- At the IMEX meeting on 14 September 2022, the Commission said that this deletion merely implements rulings of the European Court of Justice, in particular its judgment in case C-502/10 (Singh). Request for the Commission to re-examine whether completely deleting the condition goes beyond the Court's interpretation in the aforementioned ruling. Otherwise, the Directive would include limited residence permits for specific individuals who cannot expect to receive long-term residence permits but would nevertheless not be prevented from staying in the Member State concerned in the long term.

[1] Article 12 of the ICT Directive establishes that: "1. The maximum duration of the intra-corporate transfer shall be three years for managers and specialists and one year for trainee employees after which they shall leave the territory of the Member States unless they obtain a residence permit on another basis in accordance with Union or national law.
2. Without prejudice to their obligations under international agreements, Member States may require a period of up
to six months to elapse between the end of the maximum duration of a transfer referred to in paragraph 1 and another
application concerning the same third-country national for the purposes of this Directive in the same Member State. (see Directive 2014/66/EU).

ANSWER: see previous answers

- Article 4 - paragraph 2: Concerns about the verification of the legal and continuous residence, especially as an important monitoring tool, namely the stamping of the passport, would be removed by the EES. At the IMEX meeting on 14 September 2022, several Member States highlighted practical challenges and questions about the effective implementation of a possible control mechanism (different national residence permits; information-sharing among Member States; burden on the public administration). Request for clarifications in detail about how such a control mechanism would work.
  - Does this mean the establishment of control mechanisms for all third-country nationals seeking long-term residence status (during this procedure), or already during the procedure of temporary residence? In what sense should these controls be established?
  - Are MS obliged to have formal bodies, instructions, when should they be implemented and during what procedure? Does this paragraph refer only to the verification of physical presence on the territory of the MS?

- In that sense, is the five-year period subject to additional check? Absences are already covered in paragraph 6, so does this provision oblige MS to check whether TCN was physically absent during the five-year period?

- What is the meaning of the word "monitored"? Does this mean the introduction of a legal obligation to check person during their temporary stay (and on what grounds, and is only physical presence checked)?

- Is a national provision according to which the status of all persons with temporary residence status ceases if the person is absent for more than 90 days continuously, considered as a control mechanism? Can all residences be checked, since the legislative text is quite general, with particular emphasis on investment schemes?

ANSWER: As indicated in the Explanatory Memorandum, residence must have been legal and continuous in order to count for obtaining the EU LTR status. To prevent the risk of abusive acquisition of EU long-term resident status, Member States should ensure that the requirement of legal and continuous residence is duly monitored for all categories of third-country nationals. This risk is particularly relevant for those third-country nationals who hold a residence permit granted on the basis of any kind of investment in a Member State, as the granting of these residence permits is not always subject to the requirement of continuous physical presence in the Member State, or it is merely subject to the requirement of the investors' presence in the Member State for a limited time.

To prevent this risk, Member States should strengthen checks on the residence requirement, with particular regard to applications for EU long-term resident status submitted by third-country nationals holding and/or having held a residence permit granted on the basis of an investment, in cases where the issuing of such permits has not been subject to the requirement of continuous physical presence in the Member State concerned or has been subject to the requirement of the investor's presence in the Member State concerned for a limited time. The proposal includes also a provision not allowing Member States to take into account periods of residence as a holder of a residence permit granted on the basis of any kind of investment in another Member State for the purpose of cumulating periods of residence in different Member States. This provision is introduced with the aim to limit the attractiveness

of such schemes and addresses the fact that not all Member States have regulated this category of residence permits.

The recast (and the Directive) only establishes obligations to achieve a result on Member States. It is then up to them to establish appropriate control mechanism, as long as they ensure that they are effective. Member States might already have effective monitoring mechanisms in place. To this extent, and to better understand the challenges faced by the Member States, the Commission foresees to discuss this matter in the upcoming Contact Group Legal Migration, scheduled for 28 April.

- Article 4 - paragraph 3: Request for further clarification as to how residency information will be exchanged among Member States and how the latter will assess it including whether such residence has actually taken place. What kind of residence in other Member States should be taken into consideration? Is there a database or some other form of technical assistance available for Member States when they need to contact the previous Member State? And how can there be assurance that Member State 1 is willing to do a careful assessment of the residence permits granted in that state for the cumulation of periods of residence in Member State 2 (only a burden for Member State 1)? At the IMEX meeting on 14 September 2022, the Commission said that only periods based on long-term visas should count, not periods based on Schengen visas. Request for explanations on whether periods based on Schengen visas would count if followed by residence based on another residence permit.

ANSWER: Only period spent in the territory of the MSs as holder of a long-stay visa or residence permit shall be counted to this extent; thus, the period spent in MSs as holders of Schengen visa shall not be counted for the purposes of acquiring LTR status.

The Commission has provided Member States with an instrument aimed at facilitating the exchange of information: EU MOBIL. To this extent, the Commission is foreseeing a discussion on this point in the next Contact Group Legal Migration to better understand how Member States exchange information, if they are using EU MOBIL, to what extent, the challenges they are encountering to this end, and how the Commission can support them to this end.

To be noted that EU MOBIL is increasingly used: so far in 2023, 382 communications were sent, with 13 active Member States. Many communications contain multiple requests. In 2022, 1.510 communications were sent, with 17 active Member States. In 2021, 1343 communications were sent with 15 active Member States. In 2020, 566 communications were sent, with 17 active Member States. In 2019, 20 communications were sent with 7 active Member States. The total number of registered users for EU-MOBIL is about 120 for all Member States – some recently active, some not active for a while now.

- Article 4 - Paragraph 5:
  - Since Article 4 (5) refers to Article 4 (1), can the Commission confirm that periods of residence under Article 3 (2) cannot be taken into account for calculating continuous residence of two years in accordance with Article 4 (3)? Could periods under Article 3 (2) be counted into cumulated periods of residence of five years under Article 4 (3)?

ANSWER: The recast proposal aims at facilitating the acquisition of the EU LTR status and to make the status more attractive. Hence, periods of residence under Article 3(2), notably temporary protection and vocational training and studies, can be taken into account to calculate the required period of residence pursuant to Article 4(3). Every period spent as a holder of a long-stay visa or residence permit shall be taken into account for the purpose of acquisition of the EU LTR status. Hence, if, after the completion of his/her studies, a student remains in the territory of the Member States as a holder of a residence permit and the period spent in the EU amounts to five years, he or she can apply for the EU LTR status and the period spent in the EU as a student will count to this end.

As the proposed provision now includes any residence that is long-stay visa or based on residence permit to be taken into account, even those periods that are excluded from the scope: Why are diplomats still excluded from counting towards the time required for long-term residence? Are only residences that result in residence permits (in line with Regulation 1030/2002) taken into account? If under national rules seasonal workers up to 90 days do not have to obtain a residence permit in card form (there is a decision on residence and work permit), is this considered a residence permit in the sense of this Directive?

ANSWER: Diplomats are excluded from the scope of the Directive due to their particular status and the nature of their stay, which is not aimed at integrating into the host society, but to serve their home country.

As far as TCNs admitted in the territory of the MSs for the purpose of seasonal work, the document they are issued for stays not exceeding 90 days is a short-term visa or a work permit – thus, their stay under these conditions shall not be taken into account for the purpose of the acquisition of the LTR status.

- Article 5 - Conditions for acquiring EU long-term residence status - paragraph 1:
  - "*Also made available by a third party*" - definition of "*third party*" should be clarified, as it can raise concerns of legal and technical/implementing nature, whilst the "relativization" of the income criterion, could create issues of legal uncertainty. In this respect, third party should be examined in relation to the family members of the applicant and not third parties in general. In addition, it is unclear how it relates to the passage "without recourse to the social assistance system" in the same article.

ANSWER: This provision is aligning the Directive with the relevant case law of the CJEU (*C-302/18 X v Belgische Staat)*. The wording is compliant with comparable provisions enshrined in Directives 2004/38 (EU Citizenship Directive) and 2003/86 (Family Reunification Directive), which establish that the origin of the resources referred to in that provision is not a decisive criterion for the Member State concerned for the purpose of ascertaining whether they are stable, regular and sufficient.

Accordingly, it is for the competent authorities of the Member States to specifically analyse the individual circumstances of the applicant for long-term resident status taken as a whole and state the reasons why those resources are sufficient or insufficient and do or do not have a certain degree of permanence and continuity, so that that applicant does not become a burden for the host Member State.

Resources from a third party or a member of the applicant's family are therefore not excluded by Article 5(1)(a) of Directive 2003/109, provided that they are stable, regular and sufficient. In that regard, the legally binding nature of a commitment of cost bearing by a third party or a member of the applicant's family may be an important factor to be taken into account. It is also permissible for the competent authorities of the Member States to take into

account, *inter alia*, the family relationship between the applicant for long-term residence and the member or members of the family prepared to bear his costs. Similarly, the nature and permanence of the resources of the member or members of the applicant's family may be relevant factors to that effect.

Therefore, the new wording of the Article does not bring any change in the meaning of the Article, as it has been interpreted by the Court of Justice.

Without recourse to social assistance:

This sentence has been interpreted by the Court of Justice with regards to the Family Reunification Directive, which presents the same wording, in case C-578/08 Chakroun.

According to the judgment, 'social assistance' refers to assistance granted by the public authorities, whether at national, regional or local level, which can be claimed by an individual, in this case the sponsor, who does not have stable and regular resources sufficient to maintain him/herself and the members of his/her family and who, by reason of that fact, is likely to become a burden on the social assistance system of the host Member State during his/her period of residence. This is a concept which has its own independent meaning in EU law and cannot be defined by reference to concepts of national law. The CJEU has held that this concept must be interpreted as referring to general assistance which compensates for a lack of stable, regular and sufficient resources, and not as referring to special assistance which enables exceptional or unforeseen needs to be addressed. Therefore, the expression 'recourse to the social assistance system' does not allow a Member State to refuse long term resident status to an applicant who proves that he/she has stable and regular resources which are sufficient to maintain him/herself, but who, given the level of his/her resources, will nevertheless be entitled to claim special assistance to meet exceptional, individually determined, essential living costs, tax refunds granted by local authorities on the basis of his/her income, or income support measures .

- Request for explanation on what the impact of this would be. In the IMEX meeting on 14 September 2022, the Commission mentioned pertinent ECJ case law. Which rulings did the Commission refer to?

ANSWER: Case C-578/08, *Chakroun;* Case C-140/12, *Brey; C-302/18 X v Belgische Staat.*

- Article 5 - paragraph 4: Does the provision mean that Member States may derogate from Article 14 and issue national residence permits under more favourable conditions in terms of income and integration, but that these more favourable conditions must then also apply to granting EU long-term resident status?

ANSWER: Member States are still entitled to grant national residence permits under more favourable conditions. However, they are required to ensure a level-playing field between national permanent residence permits and EU LTR permits. In other words, if more favourable conditions apply to national permanent permits with regard to, notably, integration conditions and resources requirements, they shall also apply to EU LTR. Hence, no stricter requirements can be imposed to applicants for EU LTR status.

- Article 7 – Acquisition of EU long-term resident status : request for clarification in relation to Article 7, paragraph 4, subparagraph 1 and national statuses of permanent residence. Does this mean that dual status of national permanent residences and long-term residence are possible at the same time? These cases could occur if national permanent residence permits require shorter period of continuous residence, and TCN applies, after acquiring such national residence, for long-term residence status. Request for explanation on the reason behind the abolition of the prerequisite for 'adequate housing' as a condition for acquiring EU long-term resident status.

ANSWER: With regard to adequate housing, it is worth noting that it has never constituted a requirement to fulfil in order to assess positively an EU LTR resident permit application, but only a means of evidence to substantiate that the applicants meet the requirements set forth in Articles 4 and 5 of the Directive. Hence, pursuant to the current Directive, no application for EU LTR status shall be rejected solely because the applicant cannot submit evidence of adequate housing as this does not constitute a requirement. The deletion from Article 7, titled acquisition of EU long-term resident status, of the reference to adequate housing aims at bringing more clarity and legal certainty as to which conditions need to be satisfied for an application for EU LTR residence permit to be approved. This does not prevent Member States to take into consideration the situation of third country nationals as regards accommodation when checking their stable and regular resources.

- Article 9 – Withdrawal or loss of status: Request for explanation on the deletion of "expulsion".

ANSWER: This is an update in terminology, not a deletion. The replacement of the word 'expulsion' by the terms "ending of the legal stay" in Article 9 aligns the LTRD with the wording of the Return Directive, which has been adopted after the current LTRD. The Return Directive provides for rules on return for persons who are illegally staying in the territory of a Member State.

With regard to the maximum period of absence of 24 months foreseen in the proposal (Article 9, par 1 (c)), this aims at promoting circular migration, to allow third-country nationals to use their skills in their countries of origin, maintaining their personal ties, contribute to their development and then return to the Member State where they are integrated while not losing the EU LTR status.

Article 12 - Equal treatment - paragraph 1(f): Request for clarification on

- the concept of public housing, as long-term EU residents will also be eligible for government subsidies and funding. The wording differs from that in Article 12 of the Single Permit Directive (where it says "access to public and private housing").

ANSWER: The amendment to article 12(1)(f) aims at clarifying that equal treatment needs to granted to LTR holders with regard to both access to private housing and access to public housing. This is already the case under the current Directive, but the changes aim at clarifying the meaning of the provision.

The wording of the Article in the proposed recast SPD is different as the LTR goes beyond the SPD as the former is an integration Directive. Under the current SPD, equal treatment may be limited with regard to public housing but not with regard to private housing.

- whether the concept of "access to private housing stock" under the term "access" also includes the matter of acquisition of real estate by foreigners which may be a subject of regulation in the Member States.

ANSWER: The concept of access to private housing also includes acquisition of real estate. This is already the case under the current Directive, the amendment is only a semantical clarification. The acquisition of private housing is particularly important to achieve the main aim of the Directive, namely the integration in the host society.

- whether the proposed amendment means that EU long-term residents could exercise their rights to be treated equally to MS nationals with regard to access to private housing;

ANSWER: Yes, as explained earlier.

- whether the proposed amendment means that EU long-term residents could exercise their rights to be treated equally with the nationals of second MS in case of using mobility rights;

ANSWER: According to Article 24, equal treatment is granted in the same areas and conditions as per Article 12 of the LTRD.

- Article 12 - paragraph 2: Request for explanation on the impact of this deletion on the meaning of this paragraph.
  - May a Member State not be allowed to introduce the presence of family members as a prerequisite for equal treatment?
  - During the discussion at the IMEX Working Party (14/09/2022), the Commission justified the deletion of the text on the basis of a recent judgment on family benefits and the alignment with case law in relation to the Single Permit Directive. Request for clarification as to which concrete judgments the Commission had in mind, so that it may be examined whether these judgments also have an impact on tax arrangements under national law.

ANSWER: As mentioned in the Impact Assessment for the proposal, Article 11(2) of the current EU Long Term Residents Directive allows Member States to derogate from the principle of equal treatment with regard to family benefits where the family members of the long-term resident reside outside the Member State: this is inconsistent with the regime of the other legal migration Directives, including the Single Permit Directive, which allows for a more limited derogation to the equal treatment provisions. It is not coherent to allow for broader derogations in the EU Long Term Residents Directive, which provides for the rights of third country nationals who are integrated in the host Member States[2].

[2] While Member States may, under the LTRD currently in force, apply derogations to those who reside outside the territory of Member States, the CJEU clarified that "those derogations can be relied on only if the authorities in the Member State concerned, who are responsible for the implementation of that Directive, have stated clearly that they intended to rely on them". CJEU, Judgement of 25 November 2020, case C-303/19, Istituto nazionale della previdenza sociale.

Article 12 – paragraph 3 (a) – in relation to the new recital 20: Recital 20 remains unclear, as to which procedure or criteria should qualifications acquired in a third country be recognised, since the personal scope of application of the Directive 2005/36/EC is limited to MS nationals. Or would an analogue application of Art. 3 (3) respective Art. 55a be intended?

ANSWER: The question is not fully clear.

The current EU LTR Directive, as other legal migration Directives, prescribes that EU LTR holders shall enjoy equal treatment with nationals as regards the recognition of professional diplomas, certificates and other qualifications, in accordance with the relevant national procedures[3]. This does not facilitate the recognition of non-EU qualifications, but rather ensures that third country nationals have the same treatment in recognising their non-EU qualifications as EU nationals with the same non-EU qualifications.

Examples:

1. A Member State recognises a diploma obtained by its nationals in an American university at the presentation of the original diploma with a certified translation. On the basis of the equal treatment provision in the LTR Directive, the Member State shall also recognise the same diploma in case of an EU LTR holder, at the presentation of the original diploma with a certified translation.

2. A Member State recognises a professional qualification from a third country for accessing a regulated profession obtained by its nationals based on the presentation of a recognised diploma and after the passing of additional exams. On the basis of the equal treatment provision in the LTR Directive, the Member State shall also recognise the same professional qualification obtained by EU LTR holders on the presentation of a recognised diploma and after the passing of additional exams.

[3] Article 11, 1, c) of the current Directive, Article 12, 1, c) of the proposed recast.

The additional provision proposed in the recast LTRD (Article 17, 4 last sub-paragraph)

Currently, EU LTR holders requesting a permit to reside in a second Member State do not enjoy equal treatment with nationals as regards the recognition of professional qualifications in the second Member State. EU LTR holders enjoy such equal treatment only once they have obtained a legal status in the second MS, and not during the preparation of their mobility. This gap represents a serious obstacle to the exercise of intra-EU mobility, since the recognition of a qualification can be a condition to obtain a work contract/job offer, which in turn can be a condition to obtain the residence permit in the second Member State. The impact assessment of the proposed recast LTRD confirmed that mobile long-term residents face significant difficulties in the recognition of their professional qualifications[4].

Therefore the Commission proposed in the recast Directive (Article 17, 4 last sub-paragraph) that for the purpose of applying for a residence permit in a second Member State, EU LTR holders shall enjoy equal treatment with Union citizens as regards recognition of professional qualifications, in accordance with applicable Union and national law. A similar provision is included in the 2021 Blue Card Directive (Article 21, 2 second sub-paragraph).

[4] Members of the European Network of Public Employment Services highlighted this as one of the key barriers preventing third-country nationals from accessing the labour market of other Member States, confirming the responses to the Legal Migration Fitness Check Public Consultation.

Example:

Member State "B" requires an EU citizen having obtained a professional qualification in Member State "A" to follow additional courses and to pass additional exams in order to have his/her professional qualification recognised according to Directive 2005/36/EC. In the current situation, when a third country national is an EU LTR holder in Member State "A" and applies for a residence permit in "Member State" B to exercise a regulated profession, Member State "B" could request him/her to fulfil additional criteria than the ones applicable to an EU citizen in order to have his/her professional qualification recognised (e.g. for instance, to study for an additional year). This could mean that the third country national would not receive the job offer necessary to have the residence permit in Member State "B". If the proposed recast LTRD was adopted, Member State "B" would need to apply the same procedure to this third country national, therefore requesting him/her to fulfil the same criteria as an EU citizen to have his/her professional qualification recognised.

- Article 12 - paragraph 7: Request for clarifications on the scope. What kind of equal treatment rights does this paragraph refer to? Against the backdrop of Article 14, Article 12 (7) is understood as not referring to the conditions for issuing a long-term residence permit under residence law, but only to equal treatment rights granted as a consequence of issuing such a permit. Is this understanding correct? Could the Commission also explain how Article 12 (1) (d) relates to Article 12 (7)? Does Article 12 (7) restrict the rights granted under Article 12 (1) (d)?

ANSWER: Article 12(7) aims at ensuring a level playing field between national permanent residence permits and EU LTR residence permits with regard to equal treatment. Hence, in case where the former grant more favourable conditions, the same conditions need to be applied to the latter. This provision does not concern the conditions underlying to the issue of national residence permits. Article 12(7) does not restrict the rights granted under Article 12(1) (d).

Article 14 - National residence permits of permanent or unlimited validity: Request for clarification on whether it is still possible to issue national permanent residence titles also on terms that are more favourable; after all, national permanent residence permits do not confer any EU free movement rights. Article 14 is understood to mean that it will still be possible to issue national permanent residence permits, but as a rule they may no longer be granted on more favourable terms. As a consequence, this would mean that those provisions governing national permanent residence permits that are more favourable for the applicant than the provisions contained in this Directive for the EU long-term residence status can no longer be upheld, which would be problematic. Request for the Commission once again to explain the meaning of this deletion.

ANSWER: This provision does not prevent MSs to issue national permanent residence permits that are more favourable. Article 14 requires MSs to apply those more favourable conditions, - when they concern resources, integration conditions, equal treatment rights, procedural safeguards, family members' rights, and access to information – also to the EU LTR status.