

# CM2205

## COMMENT ON THE COMMISSION'S PROPOSAL TO RECAST DIRECTIVE 2003/109 ON THE STATUS OF LONG-TERM RESIDENT THIRD-COUNTRY NATIONALS

### June 2022

---

The Commission is to be complimented for its thorough and courageous proposal. Most proposed changes are improvements of the EU long-term resident status for third-country nationals. The proposal facilitates acquisition of the EU long-term residence status by large group of third country nationals. The main barriers to intra-EU mobility and employment in other Member States are removed. Most proposed amendments will contribute to the integration of third-country nationals with the EU status. In this note the Meijers Committee will discuss the main improvements proposed and will make recommendations regarding issues where the proposal reduces the current protection, introduces new risks for persons with the EU-status or fails to bring the directive in line with the EU Charter.

 **Meijers  
Committee**

Standing committee of experts on international  
immigration, refugee and criminal law

## Comment on the Commission's Proposal to recast Directive 2003/109 on the status of long-term resident third-country nationals (COM(2022) 650)

### 1. Introduction

Directive 2003/109 on the status of long-term resident third-country nationals has been in force almost two decades. During those years, the directive became the main EU legislative instrument supporting the integration and legal status of third country immigrants in Member States. More than three million third-country nationals have received, after at least five years of lawful residence in a Member State, the EU long-term resident status; seven million long-term-resident third-country nationals only hold the national permanent residence permit. In April 2022, the European Commission published a proposal amending Directive 2003/109.<sup>1</sup>

The Commission is to be complimented for its thorough and courageous proposal. Most proposed changes are improvements of the EU long-term resident status for third-country nationals. The proposal facilitates acquisition of the EU long-term residence status by large group of third country nationals. The main barriers to intra-EU mobility and employment in other Member States are removed. Most proposed amendments will contribute to the integration of third-country nationals with the EU status. The proposed clauses on the level playing field between the EU and the national status will benefit the integration of those with the national permanent status as well.

In this note the Meijers Committee will discuss the main improvements proposed and will make recommendations regarding issues where the proposal reduces the current protection, introduces new risks for persons with the EU-status or fails to bring the directive in line with the standards of the EU Charter of Fundamental Rights.

### 2. Positive elements of the proposed recast

In the view of the Meijers Committee the most important positive elements of the proposal are the removal of labour market tests and other barriers to employment in another Member State in Articles 16 and 24(2) of the proposed directive. With the introduction of the possibility to start employment or study after 30 days in a second Member State - in the proposed Article 17(5) - these changes are essential for intra-EU mobility. Considering the structural demand for labour in several Member States, these new opportunities for third-country workers already available in the EU for more than five years are to be welcomed. Likely, they will reduce the demand for new labour migration from outside EU.

The proposal facilitates the acquisition of the EU-long-term residents by students, beneficiaries of temporary or national protection and asylum seekers, due to their residence being counted in full for the five years residence requirement, once the person has acquired another residence status, as worker, family member or beneficiary of international protection, which is within the scope of the directive (Article 5(4) of the proposal). This will enhance the integration and access to employment or education of these third-country nationals with long lawful residence in a Member State.

The proposal to allow for acquisition of long-term resident status by the second generation (i.e. children of those with the EU-long term residence status) soon after birth in the Member State in the proposed Article 15 is most welcome. Apparently, this category was forgotten by

---

<sup>1</sup> Proposal for a directive of the European Parliament and the council concerning the status of third-country nationals who are long-term residents (recast), COM/2022/650 final, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2022%3A650%3AFIN&qid=1651218479366>.

the EU legislator in 2003. The early acquisition of the secure residence and equal rights will assist in their integration in the Member State during their youth. It is an important improvement of the current situation on the basis of Directive 2003/109, especially in Member States where children of lawfully resident immigrants do not acquire the nationality of that state at birth or in their early years. This element of the proposal has a precedent in the judgement of the Court of Justice of the European Union (CJEU) from 2004 where the Court held that the provision on the rights of admitted family members of Turkish workers in Article 7 of Association Council Decision No. 1/80 applied a fortiori to the child of a worker who was born and always lived in that Member State.<sup>2</sup> The proposed facilitation of family reunification with persons holding the long term resident status in Article 15 will support the integration of the long-term residents and their family members.<sup>3</sup>

The proposal in Article 9(1)(c) to extend the period of absence from the EU resulting in loss of the EU-long-term resident status from 12 to 24 months will create a positive stimulus for circular or return migration. It will allow third-country nationals holding the EU-status a sufficient opportunity to experience whether they can re-integrate in their country of origin or elsewhere outside the EU without losing the right to return to the host Member State. The facilitation of re-acquisition of status also proposed in Article 9 will support this effect. EU migration policy and law tend to focus on negative stimuli for circular migration (e.g. no rules on extension of single permits in the Single Permit Directive 2011/98). Positive stimuli, like financial incentives or targeted rights, often are more effective than negative ones. Both proposals approximate the long-term residents status on essential points with the free movement rights of Union citizens.

Furthermore, the proposed deletion of the current exclusion from the scope of the directive of third-country nationals whose residence permit “has been formally limited” in Article 3(2)(e) may well increase legal certainty and avoid administrative and judicial procedures.<sup>4</sup>

Finally, the removal of the restriction of equal access for those with the EU-status to social benefits to “core benefits” only in Article 11(4), will support long term residents in marginal positions. It will, hopefully, prevent refusal of housing benefits by national authorities to persons holding the EU-long-term residence status.<sup>5</sup>

### **3. Relationship between EU and national status: more level playing field; no mandatory choice**

This relationship is an important issue since all Member States but four (i.e. Austria, Italy, Luxemburg, and Romania) have maintained parallel national permanent residence permit schemes next to the EU status established by Directive 2003/109. The recast introduces several new provisions aiming to create more of a level playing field between the EU long-term residence permit and the national permanent residence permits.

The explanatory memorandum mentions twice that third-country nationals have a “choice” or a “real choice” between the EU and the national status (on p. 4 and p. 13 of proposal). However, in its first implementation report the Commission stated that “problems arise in the Member States where third-country nationals are not allowed to hold a long term resident permit and another residence permit at the same time and must choose between the two

---

<sup>2</sup> CJEU 11 November 2004, case C-467/02 (Cetinkaya), ECLI:EU:C:2004:708.

<sup>3</sup> See p. 14 and 24/25 of the proposal.

<sup>4</sup> This clause in the current Article 3(2)(e) gave rise to several disputes, see CJEU 18 October 2012, case C-502/10 (Singh), ECLI:EU:C:2012:636 and the pending case C-624/60 (E.K.)

<sup>5</sup> CJEU 24 April 2012, case C-571/10 (Kamberaj), ECLI:EU:CL:2012:233 and CJEU 10 June 2021, case C-94/20 (Land Oberösterreich v KV), ECLI:EU:CL:2021:477.

permits. Such a choice is not in accordance with Articles 4(1) and 7(3) of the current directive and the recast proposal, which both provide that Member States shall grant long term resident status when the applicant fulfils the conditions of the Directive.”<sup>6</sup> Neither the current Directive 2003/109 nor the recast provide that an applicant for the EU-status should give up his or her national permanent residence permit. In the second implementation report the Commission noted that “the CJEU has in the meantime clarified<sup>7</sup> the interpretation of Article 13, which, despite its title, does not provide Member States with the possibility to grant the long term resident status under more favourable conditions, but it rather allows the co-existence of distinct national long-term or permanent residence statuses.”<sup>8</sup> In 2013, the German Bundesverwaltungsgericht held that a third-country national who already had an EU long-term residence status was entitled to a national settlement permit, since this would bring him/her additional rights. The argument that it is technically impossible to issue two documents to the same person was refuted by the court.<sup>9</sup>

Under Union law third country nationals may well have two different residence status, for instance both as family member of mobile EU citizens on the basis of Directive 2004/38 and the EU-long-term residents permit under Directive 2003/103, the first granting rights in the host Member State only, the second granting additional mobility for study or employment in other Member States.

*Recommendation:* add in recital no. 28 the following sentence: “A third-country national may hold both the EU long-term resident status and a national or other EU permanent residence permit.”

The aim of creating a level playing field between the EU long-term residence permit and the national permanent residence permits would be served by a general rule that Member States should provide third-country nationals with the EU long-term resident status the same rights and advantages attached to the national status. The clause in Article 11(6) of the recently adopted recast Blue Card Directive 2021/1883 could serve as a model.

*Recommendation:* add in Article 14 the following sentence: “Where Member States issue national permanent residence permits, they shall grant third-country nationals to whom they issued the EU long-term resident status the same rights and advantages as those provided for under their national schemes where the rights and advantages under such national schemes are more favourable.”

#### 4. Room for improvement

##### 4.1 Legislative history and principle aim of the directive are deleted

The recast proposes to delete recital no. 2 of the current Directive 2003/109, which summarises its legislative history and states the principle aim of the directive, i.e. “that the legal status of third-country nationals should be approximated to that of Member States’ nationals and that a person who has resided legally in a Member State for a period of time to be determined and who holds a long-term residence permit should be granted in that Member State a set of uniform rights which are as near as possible to those enjoyed by citizens of the European Union”. This recital is of great importance for the interpretation of the provisions of the Directive 2003/109. The Court of Justice and its Advocate-Generals frequently quote this recital in judgements or opinions in references concerning Directive 2003/109 as a

---

<sup>6</sup> COM(2011) 585, p. 7.

<sup>7</sup> CJEU of 17 July 2014, case C-469/13 (Tahir) ECLI:EU:C:2014:2094.

<sup>8</sup> COM(2019) 161, p. 7.

<sup>9</sup> BVerwG 19 March 2013, 1 C 12.12, point 13 and 23.

codification of the aim of directive. It should remain to perform this function under the recast. In the explanatory memorandum there is no indication of an intention to change the principle aim of the directive with the recast.

*Recommendation:* re-insert the text of the current recital no. 2 of Directive 2003/109 in the recast.

#### **4.2 Controls against misuse of permits on the basis of investment, no barrier for less rich long-term residents**

The recast proposes to introduce in Article 4(2) a new clause obliging Member States “to establish appropriate control mechanisms to ensure that the requirement of legal and continuous residence is duly monitored, with particular regard to applications submitted by third-country nationals holding and/or having held a residence permit granted on the basis of any kind of investment in a Member States” Both in recital no. 8 and in the explanatory memorandum (p. 10) the need to “prevent the risk of abusive acquisition of EU long-term resident status” is mentioned as a justification for this new clause. However, no information on the occurrence/magnitude of this risk in practice is provided in the explanatory memorandum. Reliable information on this issue appears to be unavailable. This proposal is part of the Commission’s policy to reduce the number of residence permits on the basis of investment only.<sup>10</sup> According to the Commission’s communications on this subject, such permits are issued in a few Member States to a relatively small number of very wealthy third-country nationals (mostly of Russian nationality). The Meijers Committee is concerned that in practice, Member States will primarily apply this generally formulated clause to all third-country nationals irrespective of the purpose for which they were admitted and who are not necessarily wealthy at all. The proposed provision may function as an invitation for immigration authorities to use even a few days interruption between two residence permits as an argument to refuse applications for the status, in cases where the Member State granted a new residence permit after the short interruption, disregarding the Union law principle of proportionality. In any case, an explicit reference to the obligation of national immigration authorities to respect the Union law principle of proportionality should be added. Article 7(3) of the recast Blue Card Directive could serve as a model.

*Recommendation:* delete the whole proposed Article 4(2) or delete the word ‘particular’ from the clause with the result that the clause will only apply to TCN holding a permit on the basis of investment.

*Recommendation:* add a new paragraph 5 in Article 7 reading: 5. “Any decision to reject an application for the long-term residence shall take account of the specific circumstances of the case and shall respect the principle of proportionality.”

#### **4.3 References to Returns Directive inappropriate**

At several places in the text, the recitals, and the explanation memorandum, an explicit reference is made to the Returns Directive 2008/115 with regard to the issuing of the return decision of a third-country national from a second Member State to the first Member State which issued the protection status or the EU long-term resident status.<sup>11</sup> The Returns Directive mainly deals with the return of illegally staying third-country nationals to a country outside the EU. Applying provisions of the Returns Directive to long-term lawfully resident third-country

---

<sup>10</sup> See p. 10-11 of the Explanatory Memorandum and Commission Recommendation C(2022)2028 final of 28 March 2022 on immediate steps in the context of the Russian invasion of Ukraine in relation to investor citizenship and investor residence schemes.

<sup>11</sup> See Article 13(5) and Article 25(2) of the proposal and recital no 21.

nationals holding a protection status or the EU long-term resident status in another Member State creates the impression that their residence in the EU is unlawful. This inappropriate and misleading impression should and could easily be avoided. Contrary to the reference in the proposed Article 13(5), the current Directive 2003/109, also after its revision in 2011, does not contain any reference to the Returns Directive 2008/115.

*Recommendation:* replace the references to Article 6(2) of Directive 2008/115 in the Articles 13 and 25 and in recital no. 21 by the text of the material or procedural rules to be applied in those cases.

*Recommendation:* the prohibition of issuing a permanent entry ban in case of return to the first Member State in the current Article 21(4) of the current Directive should be retained and not be deleted, as proposed in Article 25 of the recast. No explanation for this change is mentioned in the proposal.

#### 4.4 Recognition of professional qualifications

Obtaining recognition of professional qualifications is one of the main barriers to international migration, labour market participation, and integration of migrants. Hence, it is a welcome innovation that Article 17(4) of the recast proposes that with regard to the exercise of an economic activity in a regulated profession as defined in Article 3(1)(a) of Directive 2005/36, for the purpose of applying for a residence permit in a second Member State, EU long-term residents shall enjoy equal treatment with Union citizens as regards recognition of professional qualifications, in accordance with applicable Union and national law. However, this clause is limited to the recognition of qualifications in regulated professions and only to employment in the second Member State. Article 12(1)(c) retains the clause in the current Directive 2003/109 which makes recognition of qualification fully dependent on “the relevant national procedures”.

*Recommendation:* add in Article 12(1)(c): “Member States shall recognise professional qualifications acquired in another Member State in the same way as those of citizens of the Union and should take into account qualifications acquired in a third country in accordance with Directive 2005/36/EC where the latter qualification were already recognised in another Member State.” [Text adapted from recital no 23 of the Single Permit Directive 2011/98.] Moreover, merger of the recitals nos. 20 and 36 both on the subject of recognition of qualifications should be considered.

#### 4.5 Access to employment for students in the second Member State

According to the proposed reading of the last sentence of Article 24(2) a long-term resident third-country national who moves to another Member State as a student under Article 16(2)(b) his or her access to employment in that second Member State will depend entirely on the relevant national rules. The proposal does not present any justification why this third country national with at least five years of lawful residence in the EU should have less access to employment than a student from outside the EU under Article 24 of the Students and Researchers Directive 2016/801.

*Recommendation:* replace the words “points (b) and (c)” in the proposed last sentence of Article 24(2) by “point c” and add the following clause, modelled after Article 24 of the Students and Researchers Directive as new paragraph 3 of Article 24 of the proposed recast:

*“Persons referred to in Article 16(2), point b, outside their study time and subject to the rules and conditions applicable to the relevant activity in the Member State concerned, shall be entitled to be employed and may be entitled to exercise self-employed economic activity.*”



*Each Member State shall determine the maximum number of hours per week or days or months per year allowed for such an activity, which shall not be less than 15 hours per week, or the equivalent in days or months per year.”*

#### **4.6 Explicit mention of EU status on the residence permit issued in a second Member State**

The effectiveness of the current directive is restricted by the absence of a provision requiring the explicit mention in a residence permit is issued to a long-term resident in a second Member State that the permit was issued on the basis of chapter III of the directive. Thus, public authorities, private organisations and other persons often will be unaware that the third-country nationals holds the EU long-term resident status and is entitled the related rights, such as the equal treatment (Article 24 of the proposal) and protection against withdrawal (Article 25). Hence, a clause similar to the one in Article 8(3) of proposal should be added to Article 21(3).

*Recommendation:* add to Article 21(3) the following sentence: “*The residence permit shall be issued in accordance with the rules and standard model as set out in Council Regulation (EC) No 1030/2002. Under the heading ‘remarks’, the Member States shall add ‘the holder is entitled to rights of an EU long-term resident under Chapter III of Directive XXX.’*”

#### **4.7 Effective remedies**

Article 12(2) of the current Directive 2003/109 allows “to mount a legal challenge” against a refusal or withdrawal of the long-term resident status. This clause was drafted in 2003 long before the EU Charter of Fundamental Rights became binding under primary Union law. The current wording does not meet the standards set by Article 47 of the Charter. Hence, the provision should be reformulated in order to comply with those standards. The relevant clauses in the 2014 ICT-Directive, the 2016 Students and Researchers Directive and the recent recast of the Blue Card Directive could serve as a model.

*Recommendation:* replace the first sentence of the current Article 12(2) of Directive 2003/109 with the following text, modelled after Article 15(4) of Directive 2014/66, Article 34(4) of Directive 2016/801 and Article 11(3) of the Directive 2021/1883:

*“Any decision declaring inadmissible, rejecting the application or withdrawing the EU long-term resident status or rejecting the renewal of the permit shall be open to an effective judicial remedy in the Member State concerned, in accordance with national law. The written notification shall specify the court or administrative authority with which an appeal may be lodged and the time-limit for lodging the appeal.”*

#### **4.8 Information on completion of five years of lawful residence**

One of the reasons why the EU long-term resident status is under-used so far, is the lack of awareness and information about the rights and advantages attached to the status. This situation could be changed if the Member State would inform third country nationals once they have lawfully resided in the Member State that they may be entitled to the status and how they could file an application for the status.

*Recommendation:* add in Article 27 a new paragraph 3 reading: “*Once a third-country national has lawfully and continuously resided for five years on the territory of a Member State, that Member State will inform the third-country national about the completion of that term and the possibility to apply for the status provided for by Article 7 in case the conditions of Articles 3, 4 and 5 or Article 26 are fulfilled.*”