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NOTE

From: Presidency
To: JHA Counsellors (Migration, Integration, Expulsion)

Subject: Proposal for a Directive of the European Parliament and the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment

- Blue Card Reform: State of play and possible way forward

Background

In 2016, the Commission tabled a proposal for the revision of the 2009 Blue Card Directive. After intense negotiations, the Council reached a general approach in July 2017, while the EP endorsed the Committee on Civil Liberties, Justice and Home Affairs (LIBE) report on the file in June 2017. The trilogue negotiations started in September 2017 and four political trilogues had taken place by December 2017. It became clear that the EP and the Council followed very different approaches not only to the ‘big issues’ such as the question as to whether Member States should be allowed to keep their national systems in parallel to the Blue Card scheme and the recognition of professional experience (the so-called „skills“), but also to a number of other highly political questions such as labour market access, long-term residence or long-term mobility. Since that last political trilogue there have not been any developments in the negotiations with the EP. At the beginning of 2019, the EP refused to resume negotiations on the basis of a new compromise proposal put forward by the Council.

After the elections to the European Parliament in 2019, a new EP rapporteur reached out to the Council to resume negotiations. In addition, the European Commission set out its ideas on the way forward for the Blue Card in its Pact on Migration and Asylum in September 2020.

After bilateral consultations with all Member States and a JHA counsellors meeting on 5 October 2020, the German Presidency has held five technical trilogues so far on the basis of the general approach of July 2017. A political trilogue was scheduled for 28 October 2020 but had to be postponed due to COVID-19 related reasons and did not take place until 25 November 2020. In this political trilogue the following political aspects were discussed: scope, skills / qualifications, salary thresholds, reporting, mobility, long-term residence, family members, labour market tests, unemployment, harmonisation. During the trilogues, the Presidency explained the Council's position as defined in the general approach of July 2017. It appeared that for the EP the issue of skills/qualifications and mobility are of great importance, while on the question of harmonisation the EP signalled some room for flexibility.

Possible way forward

The Council has always supported the objective of having a more attractive Blue Card to better equip the European Union in the global competition for highly qualified third-country nationals. The Presidency therefore considers that the recent momentum in negotiations with the EP as well as the Commission's input should be used to try and find common ground with the EP and reach a compromise that will give the Blue Card the attractiveness it needs while at the same time maintaining the necessary level of flexibility with regard to national labour markets.

In order to make as much progress as possible, the Presidency suggests to first focus on the issues at hand separately, nevertheless keeping in mind that eventually an overall compromise will have to be reached and that nothing is agreed until everything is agreed. Accordingly, the following proposals and questions should not be construed as representing a single comprehensive compromise package but rather as possible parts of a future compromise package. Of course, any movement by the Council on these issues would have to be met by similar openness from the EP.

In order to reach a compromise on the Blue Card reform, both sides will however inevitably have to show a certain degree of flexibility, including on some difficult issues. After the political trilogue of 25 November 2020, the Presidency understands that an overall compromise with the EP will only be possible if the Council shows flexibility, notably with regard to the issue of higher professional skills and mobility, whereas the EP has signalled that it now understands the Council's interest in keeping national systems. This is also the expectation of the Commission, which made the following statement in its New Pact on Migration and Asylum of 23 September 2020 regarding the reform of the Blue Card Directive: ‘The Commission acknowledges the diversity of labour market situations across Member States and their wish for flexibility through retaining national schemes tailored to specific labour market needs. At the same time, the reform must bring real EU added value in attracting skills through an effective and flexible EU-wide instrument. This requires more inclusive admission conditions, improved rights, swift and flexible procedures, improved possibilities to move and work in different Member States, and a level playing field between national and EU systems. The new EU-wide scheme should be open to recognising high-level professional skills and relevant experience.’¹

In light of the above and with a view to testing possible compromise solutions regarding the following political issues, the Presidency would like to ask Member States where and to what extent they see room for manoeuvre concerning these points²:

¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM(2020) 609 final, p. 25.

² References to Articles are made to those of the Council's general approach unless indicated otherwise.

I. Harmonisation

1. Parallel national systems (Article 3 paragraph 4)

Given the stated flexibility of the Commission regarding national schemes - and, of course, depending on the overall compromise in the end - the Presidency believes that it is likely that the EP will (eventually) accept to keep parallel national schemes in the Directive. However, the Commission and the EP have made it clear that it is important that there is no discrimination of the Blue Card holder or applicant³.

- a) **Do Member States support keeping the possibility of parallel national schemes for highly [qualified] third-country nationals while ensuring that similar procedural rights apply to EU Blue Card holders as to highly [qualified] workers benefiting from a national scheme (this would apply particularly to Articles 10, 11, 12, and 16, ensuring that the equal treatment is thus limited to procedural rights and Member States would retain the possibility to provide for different material rights such as access to long-term residence)?**
- b) **Can Member States agree that the equal treatment provisions in Article 15 cover equal treatment of the EU Blue Card holder with highly [qualified] third-country nationals holding a national permit?**

³ In the following 'Blue Card holder'. Where the provisions are also applicable to applicants, they are included accordingly.

The co-legislators agree that the aim of this reform is to have a more attractive Blue Card. Assuming that the EP agrees to keep the possibility of parallel national schemes on condition that the reformed Directive provides for sufficient incentives for applying for a Blue Card instead of a national permit,

c) **could Member States also (still) accept the following additions based on what was discussed in the JHA Counsellors meeting on 11 January 2019⁴ (provided, of course, that the requirements for the EU Blue Card have been and still are fulfilled)?:**

- **facilitation for a quick and easy change from a national permit to the EU Blue Card at any point in the same Member State without a new check of qualifications if already done for the national permit;**
- **take time spent with a national permit in the same Member State before receiving the Blue Card into account for the (shortened) period of residence required for long-term resident status;**
- **make sure full information on the EU Blue Card is made available; equal promotion and information activities as for national schemes.**

⁴ Council document 15787/18, 21 December 2018, p. 2.

2. **bilateral/multilateral agreements (point (b) of Article 4(1))**

The Presidency suggests keeping the possibility of bilateral or multilateral agreements with third countries, which are more favourable than the regime offered by the Blue Card Directive.

- a) **Do Member States agree? Can you give examples why this provision is necessary?**
- b) **Depending on the course of the negotiations, could Member States show some flexibility on this issue, if necessary to reach an overall compromise?**

II. Skills

The Presidency understands from previous discussions in the Council and bilateral consultations with Member States that the vast majority of Member States oppose a *general* opening of the scope of the Directive to third-country nationals (TCNs) with higher professional skills.

However, the Presidency considers that in the framework of an overall compromise, a *limited* opening of the scope of the Directive to TCNs with higher professional skills could be envisaged: the scope of admissible TCNs could potentially be enlarged to include **highly skilled professionals in the area of information and communications technology**. It is the Presidency's understanding that, due to a lack of highly qualified workers in these specific professions, it is common for businesses throughout Europe today to hire workers with higher professional skills even though they might lack formal qualifications.

In this context, the Presidency asks Member States if they could support a compromise proposal along the following lines:

1. The admission of TCNs with higher professional skills should become **mandatory with the following limitations**:
 - It would **only** be **mandatory** to allow TCNs with higher professional skills to apply for an EU Blue Card with regard to **information and communications technology professions**;
 - Moreover, not all information and communications technology professions would be accessible, **but only the following ‘higher’ positions**: Information and Communications Technology Services Managers (ISCO-08 classification 133) and Information and Communications Technology Professionals (ISCO-08 classification 25);
 - The required professional experience would have to be of a **level comparable to academic qualifications**; and
 - All other requirements for obtaining an EU Blue Card would have to be fulfilled.

2. Concerning the minimum necessary length for attaining ‘higher professional skills’: The EP supports the Commission’s proposal according to which higher professional skills are attained after at least 3 years of professional experience. In the Council’s position, at least 5 years of professional experience are required.

The Presidency suggests lowering the required minimum length of professional experience to 3 years if the following additional requirement is put in place: the 3 years of professional experience must have been acquired during the last 7 years.

Could Member States support this compromise proposal?

3. Concerning the assessment of higher professional skills:
- a) Do Member States agree that the admission procedure should include an assessment of whether the acquired skills are sufficient to exercise the specific professional activity listed in ISCO-08 classifications 133 or 25 that the TCN wishes to take up?
 - b) Do Member States agree that the Directive should not contain any specifications as to how higher professional skills are to be assessed?
 - c) Do Member States agree that they should be permitted to assess skills by means of a plausibility check based on the documents presented in the admission procedure?
 - d) Do Member States agree that they should be free to decide, for their respective territory, whether or not the results of the skills assessment should have a binding effect outside the EU Blue Card admission procedure?
4. From the Presidency's point of view, there is no need for an additional transposition period (Article 28(3)) regarding the admission of TCNs with higher professional skills for information and communications technology professions.

Do Member States agree?

5. The Presidency suggests that any future extension of the list of professions accessible with 'higher professional skills' should be adopted through the ordinary legislative procedure.

Do Member States agree or are Member States in favour of more flexibility (e.g. allowing the extension of the list of professions by the adoption of an Implementing Act or a Delegated Act)?

III. Long-term mobility (Article 20)

In the understanding of the Presidency, the EP considers long-term mobility as a key element for making the Blue Card more attractive. In that sense, it is the declared objective of the EP to simplify the procedures in the second Member State for the Blue Card holder by waiving the obligation to apply for a new Blue Card and instead introducing a notification procedure as well as asking for fewer documents to be presented.

1. Notification procedure vs. application procedure

In recent discussions, many Member States supported the need for a stronger coherence between the existing EU directives in the field of legal migration wherever possible. With that in mind, the Presidency suggests adapting the provisions on long-term mobility in the Blue Card Directive to reflect similar provisions in the two most recently adopted Directives: the Students & Researchers Directive⁵ (SRD) and the Intra-Corporate Transferees Directive⁶ (ICTD).

- a) Following the corresponding provisions in the Students and Researchers Directive and in the Intra-Corporate Transferees Directive, could Member States support amending Article 20 in such a way that it is for Member States to decide whether they apply an application procedure or a notification procedure?**

In the affirmative, it will be necessary to establish, in addition to the application procedure, the details of the notification procedure.

- b) Should the requirements requested in the notification procedure match the ones for the application procedure? Where do you see a need for specific provisions only for the notification procedure?**

⁵ Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purpose of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing.

⁶ Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer.

2. **Start working immediately**

EP and Commission are strongly in favour of allowing the Blue Card holder to start working immediately whereas the Council wants to leave it up to Member States to decide whether to allow it. Since it is mostly the employer (and the Blue Card holder) that bears the risk of the TCN starting to work before the verification process has been concluded, the Presidency believes that the Council should consider accepting the ‘shall’ in Article 20 (2) if this proves necessary to reach a compromise. However, care should be taken to ensure that this will be without prejudice to requirements under national law for the exercise of regulated professions, as already mentioned in the Council’s proposal for recital 34.

- a) **Could Member States agree that the Blue Card holder shall be allowed to start working immediately after submitting the application/notification if care is taken to ensure that this will be without prejudice to requirements under national law for the exercise of regulated professions?**

- b) **If not, do you think it would be possible to agree to such a provision if additional requirements are set out in the provision? Could these requirements be similar to those set out e.g. in Article 29(2)(d) of the SRD? In the alternative, what other requirements would you deem necessary?**

3. Documents to be presented

EP and COM are aiming to simplify the procedure, notably by reducing the number of documents that must be presented. A number of Member States on the other hand consider that they should be entitled to assess themselves if the Blue Card holder fulfills all necessary requirements if the TCN wants to stay and work on their territory.

- a) Since the request for documents attesting higher professional qualifications in relation to the work to be carried out as provided for in national law (point (ca) of paragraph 3(- 'unregulated professions') is an optional clause for Member States, the Presidency suggests reverting to the compromise suggestion tabled on 2 February 2018 and converting the provision on sickness insurance (point (f) of paragraph 3) into an optional one and moving both provisions into a new paragraph 3a⁷. This new paragraph 3a would then give those Member States who see a need for it the possibility to request those documents while others could choose not to impose such a requirement.

Could Member States support the Presidency's approach?

- b) As indicated above, the objective of the EP is to simplify the procedures for moving to a second Member State. With a view to showing more flexibility towards the EP, a further simplification of the process could be considered.

⁷ Council Document WK 1284/2018 INIT, 2.2.2018, compromise suggestion for Article 20(3a) in 4CT.

Under the current regime, an EU Blue Card holder who has either

- an EU professional qualification or
- a non-EU professional qualification which is recognised in a first Member State,

might decide to move to a second Member State and may need to have his or her professional qualification recognised again. Directive 2005/36/EC establishes rules with regard to access to regulated professions in a Member State and recognition of professional qualifications that were obtained in one or more other Member States. However, that Directive only applies to EU nationals. For TCNs, the right to equal treatment in the second Member State and thus the possibility of invoking the application of Directive 2005/36/EC, as stated in the Commission's Legal Migration Fitness Check in 2019⁸, do not exist during the preparatory phase of the Intra EU Mobility but only once the TCN has obtained a legal status in the second Member State: According to point (d) of Article 15(1)) EU Blue Card holders shall enjoy equal treatment with nationals of the Member State issuing the EU Blue Card, as regards recognition of diplomas, certificates and other professional qualifications in accordance with the relevant national procedures.

Now the approach suggested by the Presidency would be to grant Blue Card holders equal treatment rights regarding the recognition of professional qualifications with nationals of the second Member State already during the application for a Blue Card in that Member State.

⁸ Fitness Check on EU Legislation on legal migration, 29 March 2019, SWD(2019) 1055 final – part 2/2, Annex 5, no. 2.7.2.

Another alternative could be to grant Blue Card holders equal treatment rights explicitly with union citizens in corresponding application of Directive 2005/36/EC. However, whereas long-term-mobility in the Blue Card will already be possible after twelve months, for qualifications acquired in a third country Directive 2005/36/EC only applies once the activity has been carried out for three years (Article 3 (3) Directive 2005/36/EC). That needs to be taken into account.

Could Member States agree to providing equal treatment with the nationals of the second Member State already in the application phase?

If you cannot agree, could you support equal treatment with union citizens, under corresponding application of Directive 2005/36/EC, keeping in mind that there might be a time gap?

IV. Unemployment

Article 14 deals with the rights and obligations of EU Blue Card holders who are temporarily unemployed. The EP wishes to raise the **maximum period of temporary unemployment (Article 14(1)) from three to six months**. Concerning this point, the Presidency suggests the following compromise proposal:

The maximum period of temporary unemployment shall remain three consecutive months in cases where the TCN has held the EU Blue Card for less than two years. However, in cases where the TCN has been an EU Blue Card holder for two years or more, the maximum period of temporary unemployment shall be six consecutive months.

Do Member States support this Presidency proposal?

V. Labour market tests

According to the EP, conducting a labour market test should be conditional on a high level of unemployment in a given occupation or sector which may be limited to a certain part of the territory of a Member State. Moreover, a Member State would be obliged to notify the Commission, at the latest one month in advance, of its intention to apply a labour market test to a given occupation, sector, and possibly region. The notification would only be valid for the following six months and would need to be justified. In addition, similarly to the Commission, the EP would not allow a labour market test in cases where the TCN changes employers during the first two years of legal employment in the Member State concerned. Finally, according to the EP position, Member States would not be allowed to conduct a labour market test before granting a family member of an EU Blue Card holder access to the labour market.

1. The Presidency considers that, with regard to highly qualified workers, the protection of domestic labour markets through labour market tests is only necessary where the labour market for ‘highly qualified professionals’ is facing disturbances such as a high level of unemployment. The Presidency therefore suggests reconsidering parts of the Commission's initial proposal and makes the following suggestions:
 - a) Labour market tests shall only be conducted if there are disturbances (but not “**serious**” disturbances as in the Commission proposal) on the domestic labour market of a Member State such as a high level of unemployment. However, a Member State would be obliged neither to notify the Commission of its intention to introduce a labour market test nor to give any reasons for the introduction of the labour market test. Moreover, there would not be any time limits for applying labour market tests.

Could Member States support this proposal?

- b) As disturbances on domestic labour markets can vary substantially depending on occupations, sectors and regions within the territory of a Member State, a recital should clarify that Member States should consider limiting labour market tests to the concerned occupations, sectors and regions.

Could Member States support this proposal?

2. Upon arrival, an EU Blue Card holder needs to be progressively integrated into the labour market. Especially during the initial period, it is important for Member States to have safeguards to ensure that persons admitted as highly qualified workers end up in corresponding occupations and the EU Blue Card scheme is not used for abusive purposes by either the employers or the TCNs. In the view of the Presidency, it is therefore crucial that Member States retain the right to conduct a labour market test if the EU Blue Card holder decides to change employer during the initial period of legal employment. However, the Commission and the EP clearly expressed their wish to abolish this right, which exists under the Blue Card Directive currently in force.

- a) Against this backdrop, the Presidency makes the following compromise suggestion:

In general, Member States would retain the right to conduct a labour market test during the initial period of legal employment of an EU Blue Card holder in cases where he or she wishes to change employer. However, this right would be subject to the following condition: The labour market test may only be conducted if the Member State - when the competent authority adopts its decision - has also introduced such checks for TCNs who do not (yet) hold an EU Blue Card.

Could Member States support this proposal?

- b) According to Article 13(1a) of the Council's general approach, Member States would be allowed to conduct a labour market test in cases where an EU Blue Card holder wishes to change the employer **during the first two years of legal employment**. The Presidency suggests reducing this period to **12 months** in the framework of an overall compromise.

Could Member States support this proposal?

3. According to the second subparagraph of Article 16(6), (Commission proposal and Council general approach), Member States may conduct a labour market test before a family member of an EU Blue Card holder is granted access to employment. The EP does not want to grant Member States this right (EP Amendment 131). The Presidency does not consider this labour market test for family members to be crucial as these family members have a right to reside in the Member States. Moreover, facilitating access to the labour market for family members will facilitate their integration in the host Member State. The Presidency therefore suggests abstaining from conducting labour market tests for family members provided that such a test may still be conducted in regard to the Blue Card holder himself.

Could Member States support this proposal?

4. Finally, the Presidency wishes to get a clearer picture on the question as to what extent labour market tests for TCNs are actually applied by Member States. Therefore the Presidency asks the following questions:

Do Member States currently apply labour market tests for TCNs? Have there been any changes recently?
