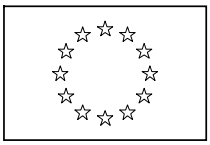

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 11.7.2001
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2001/0154 (CNS)

Proposal for a

COUNCIL DIRECTIVE

on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. CONDITIONS OF ENTRY AND RESIDENCE OF THIRD-COUNTRY NATIONALS FOR THE PURPOSE OF PAID EMPLOYMENT AND SELF-EMPLOYED ECONOMICACTIVITIES

According to the mandate given by the Tampere European Council of October 1999 and in line with the "Scoreboard to review progress on the creation of an area of "freedom, security and justice" in the European Union"[1], the Commission is due to adopt in 2001 a proposal for a Directive dealing with "the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities".

In its recent Communication on a Community Immigration Policy (COM(2000) 757 of 22 November 2000) the Commission has suggested to follow a "two–tier approach": To define a common legal framework on admission of economic migrants and to launch an open coordination mechanism on Community immigration policy. In its Communication the Commission has already set out the main aims and principles upon which the common legal framework should be based:

Transparency and rationality: laying down clearly the conditions under which third-country nationals may enter and stay in the EU as employed or self-employed workers, setting out their rights and obligations and ensuring that they have access to this information and that there are mechanisms in place to see that it is applied fairly.

Differentiating rights according to length of stay: the aim should be to give a secure legal status for temporary workers who intend to return to their countries of origin, while at the same time providing a pathway leading eventually to a more permanent status for those who wish to stay and who meet certain criteria.

Clear and simple procedures: application procedures should be clear and simple.

Respect for the domestic labour market situation: the principle that a post can only be filled with a third-country worker after a thorough assessment of the domestic labour market situation (unless international obligations and commitments of the EU and its Member States already provide otherwise) is currently applied in all Member States and it is not intended to touch this principle.

Availability of information: more extensive use of new communications technology could be used to provide information on job opportunities, conditions of work, etc.

Assist industry: in order to allow European industry, particularly small and medium-sized industries, to recruit – in cases where there is a demonstrated economic need for workers in a specific sector or for a specific job which cannot be filled from within the EU labour market – successfully and quickly from third countries, employers need a practical tool for demonstrating that there is a concrete shortage on the EU labour market.

As indicated in this Communication, the issues addressed in this legal proposal will also need to be the subject of further policy consideration and complementary action within the context of an open coordination mechanism on Community immigration policy. This mechanism is

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[1] COM(2000) 167 final of 24.3.2000 as updated by COM(2001) 278 of 23.5.2001.

going to be made operational in a specific Commission Communication on an open method of coordination for the Community immigration policy, presented in parallel with this proposal.

2. BACKGROUND AND COMPATIBILITY WITH OTHER INITIATIVES

In June 2000, a comparative study on the admission of third-country nationals for paid employment and self-employed economic activities was submitted to the Commission services. It illustrates that currently the rules on admission of third-country nationals to work in the EU differ from Member State to Member State. Both third-country nationals wishing to be admitted to work in the EU and EU employers in need of third-country workers are confronted with sometimes highly complex national administrative rules and procedures and there are only a few common rules and principles applicable in all Member States.

In November 2000, the Commission issued its Communication on a Community Immigration Policy which already outlined the main policy lines this proposal is following.

Compatibility with other initiatives

This proposal has been drafted to be fully compatible with and complementary to the recently proposed draft Directive on long-term resident third-country nationals[2]. Whilst workers and self-employed persons newly arrived in the EU will be covered by the specific legal regime proposed in this proposal, the "horizontal" provisions of the proposed Directive on long-term resident third-country nationals would apply if these third-country workers have fulfilled the conditions and have applied for long-term resident status in accordance with the proposed long-term residents Directive.

The proposal has also been drafted to be fully compatible with the commitments undertaken by the EC and its Member States under the WTO Agreement on Trade in Services (GATS), and to further facilitate the trade in services which has already been committed to in this context.

In accordance with the "Scoreboard to review progress on the creation of an area of "freedom, security and justice" in the European Union", further legislative initiatives concerning the conditions of entry and residence for the purpose of study or vocational training and unpaid activities are to be prepared and to be adopted by the Commission shortly.

3. THE OBJECTIVES OF THE PROPOSAL

With this proposal for a Directive, the Commission is pursuing the following aims:

1. laying down common definitions, criteria and procedures regarding the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities, based on concepts, which have already been successfully applied in Member States;

2. laying down common criteria for admitting third-country nationals to employed activities and self-employed economic activities ("*economic needs test*" and "*beneficial effects test*") and opening different options for demonstrating compliance with these criteria;

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[2] Proposal for a Council Directive concerning the status of third-country nationals who are long-term residents (COM(2001) 127 final of 13.3.2001).

3. providing procedural and transparency safeguards, in order to assure a high level of legal certainty and information for all interested actors on Member State rules and administrative practice in the field of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities;

4. providing a single national application procedure leading to one combined title, encompassing both residence and work permit within one administrative act, in order to simplify and harmonise the diverging rules currently applicable in Member States;

5. providing rights to third-country nationals whilst respecting Member States discretion to limit economic migration: If third-country workers and self-employed persons fulfil all the conditions set out in Chapters II and III they shall be admitted, unless Member States impose limitations in accordance with Chapter IV (e.g. national ceilings or limitations based on reasons of public policy, public security or public health);

6. providing a flexible framework allowing all interested parties, including Member States, to react quickly to changing economic and demographic circumstances and opening the possibility of having an exchange of views on the experiences of Member States in the application of this Directive within an open coordination mechanism on Community immigration policy;

7. adding real meaning to the commitments that the EC and its Member States have undertaken in the context of the WTO GATS Agreement;

8. acknowledging Member States´ right to limit admission of third-country nationals under the terms of this proposal, if a Member State considers that it is necessary to apply horizontal measures (e.g. ceilings or quota) to that effect.

4. THE CHOICE OF THE LEGAL BASIS

The choice of the legal basis is consistent with the changes made to the EC Treaty by the Amsterdam Treaty, which entered into force on 1 May 1999. Article 63(3) of the EC Treaty provides that the Council is to adopt "*measures on immigration policy within the following areas: (a) conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits"*.

Regulation of immigration for the purpose of exercising employed or self-employed economic activities is a cornerstone of immigration policy and the development of a coherent Community immigration policy is impossible without addressing "the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities". Article 63(3)(a) is, accordingly, the proper legal basis for this proposal.

This proposal for a Directive must be adopted by the procedure of Article 67 of the Treaty: the Council acts unanimously on a proposal from the Commission or at the initiative of the Member States after consulting the European Parliament. This proposal is based on Title IV of the EC Treaty, which does not apply to the United Kingdom and Ireland unless those Member States decide otherwise in accordance with the Protocol on the position of the United Kingdom and Ireland annexed to the Treaties. Likewise, Title IV does not apply to Denmark by virtue of the Protocol on the position of Denmark, annexed to the Treaties.

5. SUBSIDIARITY AND PROPORTIONALITY: JUSTIFICATION AND VALUE ADDED

The new Title IV on visas, asylum, immigration and other policies related to free movement of persons, inserted in the Treaty establishing the European Community, confers powers on these matters on the European Community. These powers must be exercised in accordance with Article 5 of the EC Treaty, i.e. if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can, therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. The proposed Directive respects these criteria.

Subsidiarity

The primary objective of this initiative is to determine a harmonised legal frame at EU level concerning the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities and of the procedures for the issue by Member States of pertinent permits. Currently national administrative rules and procedures regulating this field differ widely between Member States. Taking into account the significant divergence of national provisions and regulatory approaches in Member States, the establishment of a harmonised legal frame can only be achieved at Community level.

Proportionality

The form of Community action must be the simplest that will enable the objective of the proposal to be attained and effectively implemented. In this spirit, the legal instrument chosen is a Directive, laying down general principles but leaving the Member States to which it is addressed the choice of the most appropriate form and methods for giving effect to these principles in their national legal system and general context. The proposed Directive determines common definitions, criteria and procedures regarding the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities, whilst leaving a high level of discretion with Member States.

Financial and administrative consequences of the proposal on national governments, local authorities, economic stakeholders and citizens

According to the above mentioned comparative study on the admission of third-country nationals for paid employment and self-employed economic activities, the rules on admission of third-country nationals to work in the EU differ from Member State to Member States. Both third-country nationals wishing to be admitted to work in the EU and EU employers in need of third-country workers are confronted with sometimes highly complex national administrative rules and procedures and there are only a few common rules and principles applicable in all Member States.

The proposed creation of a single national application procedure leading to one combined title, encompassing both residence and work permit within one administrative act, will contribute to simplifying and harmonising the diverging rules currently applicable in Member States. For Member States this creation of a single procedure may be an incentive to streamline their internal administration and to avoid duplication of work. Third-country national wishing to exercise economic activities in the EU and future employer of third-country national will directly benefit from a "one-stop shop procedure".

Both the proposed common criteria for admitting third-country nationals to employed activities and self-employed economic activities ("*economic needs test*" and "*beneficial*

effects test") and the proposed procedural and transparency safeguards will assure a high level of legal certainty, transparency and information for all interested actors. This will be of specific value to economic stakeholders and third-country workers.

National governments (competent authorities) will be allowed to ask for proportionate fees for their activities. These fees may be based on the principle of the service actually provided, thus assuring that the newly established procedures will neither become a financial burden on national administrations, nor an undue burden for those benefiting from the permits issued.

COMMENTS ON ARTICLES

Chapter I: General provisions

Article 1

This Article sets out the aims of this proposal: to determine common conditions and common procedural standards on the entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities.

In the interest of clarity and legal certainty, the proposal follows a horizontal approach and covers the conditions of entry and residence of any third-country national exercising employed or self-employed economic activities in the territory of a Member State. This broad horizontal approach is a general starting point. Within the substantive provisions of the Directive, specific provisions and derogations ensure that the situation of certain groups of persons is properly taken into account. Account is also being taken of more favourable provisions under Community law and under international law .

Article 2

This Article defines the main concepts and terms used in the provisions of the proposal.

(a) The concept of third-country national is defined by default, excluding citizens of the Union as defined by the EC Treaty. It applies to persons having the nationality of a third-country and to stateless persons within the meaning of the New York Convention of 28 September 1954.

(b)-(c) The core element for defining an activity as employed or self-employed person is the exercise of "remunerated economic activities". The term "remunerated economic activity" is to be understood as covering any activity exercised by a person in exchange for economic advantages (money, accommodation, goods), irrespective of the nature of the employer who may be a natural or a moral person, a private or public body, a profit or a non-profit making institution and irrespective of the kind of business conducted. The key element distinguishing employed from self-employed activities is the existence (respectively non-existence) of a subordinate relationship to another person.

(d) In most Member States, the admission of third-country nationals to employed activities is currently regulated by a dual system of residence permits and work permits. The current proposal aims to simplify procedures and it is therefore proposed to replace this dual system by a combined title authorising both residence and work with one administrative act, the "*residence permit – worker*". It has to be stressed that this proposal aims to harmonise the end-result (the combined act) and to simplify the procedural steps to be taken by a third-country national wishing to exercise economic

activities in the EU. This has, however, no direct implications on the way national administrations are internally handling applications before issuing a final decision. A co-responsibility or successive responsibility of different national administrative entities in accordance with internal national distribution of competencies is perfectly possible, as long as the achievement of the end-result (one combined act to be delivered following one single application) is not hampered.

This proposal does not explicitly address the format according to which the different residence permits under this Directive shall be issued. It needs to be stressed, however, that the residence permits according to this proposal are covered by the scope of the Proposal for a Council regulation laying down a uniform format for residence permits for third-country nationals (COM(2001) 157 final of 23.3.2001) and that the rules contained therein – if adopted – would apply to residence permits issued in accordance with this Directive.

(e) Current national rules on admission of third-country nationals to self-employed economic activities are more diverse than those applying for employed activities. Some Member States require work-permits for self-employed economic activities, others don't and regulate access to self-employed economic activities through residence permits. In the interest of more consistent and harmonised European rules, it is again proposed to create a "combined title" authorising both residence and self-employed work with one administrative act, the "*residence permit – self-employed person*".

(f)-(i) See comments on Articles 12 to 15 below.

Article 3

1. This Directive covers the conditions of entry and residence of any third-country national exercising employed or self-employed economic activities in the territory of a Member State. There is, however, a multitude of instruments of international law affecting these fields. It is not the intention of this proposed Directive to overrule these instruments or to modify their content. Whenever such legal instruments contain more favourable provisions, they shall continue to be applicable.

   (a) This point covers international agreements with Community involvement. This category covers both agreements concluded between the Community (acting alone) and one or more third countries as well as "mixed agreements". The main legal instruments worth mentioning in this context are the EEA agreement, the Europe agreements and other Association agreements (e.g.: EC-Turkey). Within the frame of the WTO, the General Agreement on Trade in Services (GATS) contains commitments on movements of natural persons, which are necessary to allow trade in services.

   (b) This point covers multilateral and bilateral agreements, which have been concluded without Community involvement. Legal instruments particularly worth mentioning in this context are the UN Convention and Protocol relating to the Status of Refugees and the Vienna Conventions on Diplomatic and on Consular relations.

2. This proposal aims to harmonise the national provisions on access of third-country nationals to employment in the EU as a "measure of immigration policy" based on Article 63(3) of the Treaty. The Directive is designed to cover those cases where third-country nationals genuinely want to enter the EU labour market. This is not the case if third-country nationals enter the EU for a short time in order to carry out activities, which are ancillary to the supply of goods or services from third countries to the EU. Examples of these short term movements are manifold and cover, e.g. short-term activities in the EU of third-country national crews of airplanes and vessels; lorry drivers delivering goods; third-country artists performing in the EU; third-country business visitors. If the stay of third-country nationals whose activities are directly linked to the supply of goods or services (including workers which are detached from third countries) is more than three months, the Directive applies and the concerned third-country nationals will need to hold a permit in accordance with this Directive, conferring on them all rights and obligations under this Directive. The Directive also applies if the stay of a third-country national is less than three months and not directly linked to the supply of goods or services from third countries to the EU (e.g. seasonal workers staying for two months). Special provisions are, however, foreseen in Articles 12-18, which will allow for differentiated and pragmatic solutions in those specific cases.

3. This paragraph excludes specific groups of persons from the scope of this Directive:

   (i) Third-country nationals established within the Community who are posted worker for the purpose of providing cross-border services or who provide cross border services are already covered by the proposal for a Council Directive extending the freedom to provide cross-border services to third-country nationals established within the Community (Official Journal C 67 of 10.3.1999, p. 17) and the proposal for a directive of the European Parliament and of the Council on the posting of workers who are third-country nationals for the provision of cross-border services (Official Journal C 67 of 10.3.1999, p. 12).

   (ii) These groups of person are (respectively will) be covered by the Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons (adopted by Council on 27.6.2001), the proposal for a Directive laying down minimum standards on the reception of applicants for asylum in Member States (COM(2001) 181 final of 3.4.2001) and a planned proposal on a Directive covering persons who otherwise need international protection.

   (iii) Third-country nationals who are family members of citizens of the Union who have exercised their right to free movement within the EU are already covered by Title III of First Part of Regulation (EEC) No 1612/68, which confers an unrestricted right on residence and access to work in the receiving Member State on this group of persons.

   (iv) This group of persons will be covered by the currently discussed proposed Directive on the right to family reunification (COM(1999) 638 final of 1.12.1999, amended by COM(2000) 624 final of 10.10.2000).

4. Most, if not all, Member States currently have detailed legislation and administrative practice in force, which takes into account the particular situation of the specific groups of persons listed in this paragraph. This proposal aims – as a first step in the

development of a new Community policy – to lay down a common legal framework without embarking on too many details. It is therefore considered to be more appropriate to leave Member States – at this moment – the possibility to maintain or introduce more favourable national provisions on the access to work of third-country nationals falling under the specific groups of persons listed in this paragraph. It needs to be stressed, however, that as soon as Community legal instruments regulating specifically the rights and obligations of these groups of persons are in place, they will take precedence over national rules.

Chapter II: Entry and residence for the purpose of paid employment

Section 1: General rules

Article 4

1. In line with current national rules in most Member States, third-country nationals may only enter and reside for the purpose of exercising activities as employed persons (full-time or part-time) in a Member State if a "residence permit – worker" has been issued in accordance with this Directive (subject to the exceptions mentioned in this Directive).

2. A permit shall be issued if, after verification of the particulars and documents, it proves that the applicant fulfils the requirements for obtaining a "residence permit – worker". If it proves that the applicant does not fulfil the requirements or if a Member State makes use of the possibility to impose limitations in accordance with Articles 26, 27 and 28, the permit shall not be issued. This Article gives a right to applicants who fulfil all the conditions set out in Chapter II, whilst respecting Member States discretion to limit economic migration: in the absence of limitations in accordance with Articles 26, 27 and 28, Member States are obliged to issue a "residence permit – worker".

Article 5

1. Application for a "residence permit – worker" must be submitted by the third-country national concerned. The future employer of a third-country national shall have the possibility to submit an application on behalf of the third-country national applicant.

2. This paragraph foresees that an application should normally be submitted via the representation of a Member State competent for the state of legal residence of the applicant. If the applicant is already legally resident (holding a residence title e.g. as a student) or legally present (e.g. as a holder of a tourist visa or a job-seekers visa or a visa for applying for a work permit) in the Member State concerned, applications can be directly submitted on the territory of the concerned Member State. It needs, however, to be stressed that the submission of an application for a "residence permit – worker" under the terms of this proposed Directive does not confer a right on the applicant to stay in a Member State.

3. This paragraph contains an enumerative list of particulars and documents to be submitted to the competent authority when applying for a "residence permit – worker". In order to obtain some of these particulars and documents (e.g. a copy of the valid work contract or evidence of compliance with the economic needs test) applicants will have to cooperate closely with their future employer.

(b) The applicant must submit a valid work contract or a binding offer of work (an offer of a concrete work contract, which cannot be unilaterally withdrawn by the future employer). If a Member State wishes to do so, it may carry out a systematic advance check within the assessment of the application in order to assure/verify compatibility of the work contract or binding offer of work with national legislation on working conditions, including remuneration.

(d) The applicant will have to provide appropriate evidence that the requirement set out in Article 6 ("economic needs test") is fulfilled. In practice, this will require close cooperation between the applicant and the future employer, who will have to provide the applicant with the necessary papers demonstrating that:

– the post was published and no acceptable application from within the EU labour market was received (Article 6(2)), or

– the requirements under an existing national "green card programme" are fulfilled (Article 6(3)), or

– the income threshold defined under national provisions in accordance with Article 6(4) is exceeded, or

– the amount of money ("employers contribution") required under national provisions in accordance with Article 6(5) has been paid.

(g) This point provides – in accordance with the principle of proportionality – that the applicant needs to demonstrate those skills, which are necessary for the performance of the envisaged activities. This may, but need not necessarily, encompass knowledge of the official language(s) of the Member State.

(h) The assessment of the ability of the applicant to meet the costs of living has to be carried out by competent authorities, taking into account the future income of the applicant, as indicated in the work contract.

4. This paragraph complements the provision of Article 6(1)(f) (see below).

Article 6

1. This Article enshrines at Community level a general principle, which reflects the rules already in force in Member States, which require for the admission of third-country workers a thorough assessment of the domestic labour market situation. In concrete terms this means that third-country nationals may only accede to the EU labour market, if a post cannot be filled by a worker falling under either of the following categories of persons:

(a) Citizens of the Union. Citizens of applicant countries will automatically be covered by this term from the day of accession and will therefore automatically enjoy preferred treatment vis-à-vis third-country nationals. The exact terms of possible restriction of access of citizens of the new EU Member States to the labour market of the EU 15 will have to be determined in the Accession Treaties. The provisions in the accession Treaties will prevail over the provisions of this draft Directive. In the EU Common Position on Chapter 2-Free Movement of Workers it is stated that "current Member States will introduce a preference for new Member State nationals over non-EU labour"; or

(b) Third-country nationals who are family members of citizens of the Union who have exercised their right to free movement within the EU. These persons are already covered by Title III of First Part of Regulation (EEC) No 1612/68, which confers an unrestricted right on residence and access to work in the receiving Member State on this group of persons;

(c) Third-country nationals already enjoying full access to the national labour market concerned under the legal instruments mentioned in Article 3, paragraph 1 (e.g. EEA nationals; persons covered by existing bilateral agreements between certain Member States and certain third countries); or

(d) Third-country nationals already enjoying access to the national labour market concerned under existing national legislation (e.g. persons covered by national provisions on family reunification) or under Community legislation (several of the legislative initiatives mentioned above in the explanations to Article 3(3) will give an access to the labour market to certain groups of third-country nationals); or

(e) Third-country workers who already form a part of the regular labour market of a Member State (persons legally present and working since three years); or

(f) Third-country nationals who had formed a part of the regular labour market of the Member State and who want to return to that Member State after a limited period of absence (persons legally present and working in that Member State for more than three years over the preceding five years). The reasoning behind this point is the idea that third-country workers who have already become a part of the regular labour market of a Member State and who have left this Member State for a relatively short period should enjoy the possibility to return under facilitated conditions.

Paragraphs 2 to 5 of this Article provide several possibilities according to which compliance with the requirement set out in paragraph 1 can be demonstrated in concrete cases. Whilst paragraph 2 must be implemented by Member States, paragraphs 3 to 5 open options which can – but need not – be used by Member States in accordance with national policy decisions. The main argument in favour of this flexible approach is the idea of ”competing for successful models”, which implies having different regimes applied and tested by Member States under the regime of this Directive and subsequently having the outcome discussed within the open coordination mechanism on immigration policy:

2. An *individual assessment* of compliance with the requirement set out in paragraph 1 is designed to provide a practical tool for employers who do not succeed to fill a specific job vacancy within a given period. If employers have published a job vacancy via the employment services of several Member States, e.g. by means of the European Employment Services Network (EURES), for at least four weeks and if they have not received an acceptable application from within the EU labour market (the groups of persons listed above), they will be allowed to recruit from abroad and the chosen third-country national will normally (if all other conditions for a residence permit in accordance with this Directive are met) qualify for a “residence permit – worker”. In order to prevent fraud, the published job vacancies must contain realistic, reasonable and proportionate requirements for the offered post and competent authorities shall check this when handling applications in accordance with this

chapter. The provision on nationals from countries with which accession negotiations have started aims to achieve coherence with the political commitment given during the accession negotiations that people from the candidate countries will in fact be treated more favorably than workers from other third countries in the run up to accession. Thus this paragraph refers to the need to ensure that job vacancies are opened to people from the candidate countries on a preferential basis, before accession, if no suitable person can be found from the categories included in paragraph 1.

3. A possibility for a *horizontal assessment* provides Member States with a flexible tool to react to worker shortage in a specific sector, by establishing, for instance, national "green-card programmes" for the recruitment of certain specialists. This provision is formulated in a very general manner, allowing "green card" or similar programmes in any sector where a labour shortage might arise. This does not imply, however, that Member States are completely free in adopting such measures: First, Member States will always have to establish that there is quantifiable shortage on the labour market for the sector concerned and secondly, the "transparency provisions" of Chapter V of the Directive (obligation to include a statement of reasons based upon objective and verifiable criteria, regular review of the measures, publication before the entering into force) will apply. In order to ensure that people from countries with which accession negotiations have started will enjoy more favorable treatment than other third-country nationals, a provision to this effect is included at the end of this paragraph.

4. A possibility for Member States to fix – at national level – appropriate *income thresholds*. If the annual income offered to a third-country national would exceed this defined threshold, fulfilment of the economic needs test would be deemed to be fulfilled. The reasoning behind this model – which is already current practice in at least two Member States – is the idea that the high-income sector of the European labour market needs less protection and can afford to be more open to global competition.

5. A possibility for Member States to adopt national provisions according to which the fulfilment of the economic needs test would be deemed to be fulfilled for a specific third-country national, if a defined amount of money has been paid by the future employer of that person to the competent authorities. The money received from the employer must be spent for measures promoting the integration of third-country nationals or for vocational training purposes. The reasoning behind this model – which is currently being discussed at political level in several Member States – is the idea that the willingness of an employer to pay an extra premium for recruiting a third-country national can be taken as an implicit proof that there is a shortage at the EU labour market. The level of the contribution would need to be established at national level and could be expressed as a fixed amount of money or a flexible amount of money (multiple of monthly/annual income of the recruited person or other factor). The main argument in favour of opening this option of an "employers contribution" is the idea of "competing for successful models", which implies to have different – and also innovative – regimes applied and tested by Member States under the regime of the Directive and to have the outcome and the experiences of Member States discussed and evaluated within the open coordination mechanism on migration policy.

Article 7

This Article provides that the length of validity of a "residence permit – worker" will be determined by Member States in accordance with the time frame set out in this Article (up to three years for the initial permit and up to three years for a renewed permit). In accordance with the principle that rights of third-country nationals should be incremental with their length of stay, applicants for renewal who have been holding a "residence permit – worker" in the Member State concerned for more than three years will enjoy facilitated access to renewal (no obligation to demonstrate compliance with the requirement set out in Article 6(1)). A "residence permit – worker" can be renewed several times. It should, however, be borne in mind that after five years the "horizontal" provisions of the draft Directive concerning the status of third-country nationals who are long-term residents (COM(2001) 127 final of 13.3.2001) – once adopted – would phase in and workers who have fulfilled the conditions for "*long-term* residence status" could apply for that status instead of asking for a renewal of their "residence permit – worker".

Article 8

The initial admission of third-country workers is based on a test, intended to verify shortages within the EU labour market. It would undermine this principle if third-country workers who have been admitted to fill employment gaps in specific sectors of the labour market could – once admitted – immediately change their job and start working in a sector (a region) where there is no employment gap. On the other hand, changes of the employer within the same field of professional activities (or region) do not hamper this principle. It is, therefore, foreseen that the "residence permit – worker" shall initially be limited to the exercise of specific economic activities, thus allowing for a change of the employer but *not* for a change of the activities carried out. In accordance with the principle that rights of third-country nationals should be incremental with their length of stay, the "residence permit – worker" would become unrestricted after three years. During the initial three years period, holders "residence permit – worker" are, however, entitled to apply for a change in accordance with Article 9. In this case, a re-evaluation of the "economic need" would have to be carried out.

Article 9

This Article obliges holders of a "residence permit – worker" to notify any relevant changes to the competent authorities. Important changes (change of the employer, change of the activities carried out) have to be authorised. Based on the rule of "fair play", competent authorities must not use changes on the labour market (changes regarding fulfilment of the requirement set out in Article 6(1)) as a reason for withdrawing a "residence permit – worker" during its period of validity.

Article 10

1. - 2. Whilst fraudulently acquired permits must be revoked by Member States in any case, Member States have a large discretion (possibility of suspension or revocation of the permit) in case of negligence of its holder (incomplete file, omission to notify pertinent changes) or in cases of application of Article 27 (reasons of public policy and public security).

3. On the one hand, holders of a "residence permit – worker" shall not become a financial burden for the host Member State, on the other hand, these persons contribute to the social security system of the host Member State and should,

therefore, also be entitled to enjoy its benefits (see Article 11) and a fair balance needs to be found. Following the example of national rules applicable in certain Member States, it is proposed that unemployment as such should not constitute a sufficient reason for revoking a "residence permit – worker" unless the period of unemployment exceeds a certain time (three months per year in the first two years of stay; six months per year after two years of stay).

Article 11

1. This paragraph lists the rights conferred by a "residence permit – worker" on its holder, amongst which – most importantly – the right to reside and to work in the Member State. Holders of a "residence permit – worker" shall enjoy the same treatment in substance as citizens of the Union at least with regard to certain basic rights (working conditions, access to vocational training, recognition of diploma, social security including healthcare, access to goods and services which are available to the public, including housing and trade union rights). The latter catalogue of rights is aligned with the catalogue of rights proposed in Article 12 of the Commission proposal for a draft Directive on long-term resident third-country nationals but – in line with the principle that that rights of third-country nationals should be incremental with their length of stay – less exhaustive.

(f)(ii) The right of access to vocational training is ancillary to the permits issued under this Directive to "economic migrants". As already indicated above, a more specific horizontal legislative initiative concerning the conditions of entry and stay of third-country nationals for the purpose of study or vocational training will be prepared and adopted by the Commission shortly.

(f)(iii) Holders of permits under this draft Directive must have the same right to recognition of their qualifications as citizens of the Union. This encompasses also the obligation of the host Member State to take into consideration all the diplomas, certificates and other evidence of formal qualifications – i.e. including those acquired outside the EU – of the person concerned, and his relevant experience, by comparing the specialized knowledge and abilities certified by those diplomas and that experience, with the knowledge and qualifications required by national rules (Case C-238/98 *Hocsman*). However, only a very small group of persons is concerned by this right. Their situation differs from the one of long-term residents, who are third-country nationals, in that the latter are much more likely to either have a diploma obtained in a Member State, or to have had their diploma, obtained in a third country, recognized by a Member State.

2. Taking into account that immediate access of holders of a "residence permit – worker" to certain rights (particularly access to publicly financed housing) may pose problems in specific cases and in line with the abovementioned principle, this paragraph allows Member States to make the exercise of some of the rights dependent on a minimum stay (or a minimum right to stay) of holders of a "residence permit – worker".

3. As highlighted in the recent Commission Communication on a Community Immigration policy, this proposed Directive shall ensure that migrants are not cut off from their country of origin and that they have possibilities of going back as the situation develops in the country of origin. It would discourage this process, if third-country nationals were too "lose" the payments they made into public pension schemes in a Member State upon return to a third country. Under certain conditions they have the right, under national law or under bilateral agreements concluded by the

Member State in question or an international agreement concluded by the Community, to have their pension paid, at the moment of departure or in the future, in the third country where they are resident. Sometimes these instruments even foresee the transfer of pension records into a scheme of a third country. In these cases, the third-country national will not "lose" the payments he/she made into the public scheme of a Member State. This paragraph establishes a *supplementary protection* addressing those cases in which the concerned third-country national has neither acquired a right to an EU pension to be paid now or in the future in a third country, nor a possibility to transfer his/her EU pension rights into a scheme of the third country where he/she resides. In these specific circumstances the concerned third-country national shall have the possibility, under this paragraph, to ask for and receive reimbursement of the payments made into public pension schemes by him/herself and his/her employer.

Section 2: Rules for specific categories

Certain groups of persons are currently being given special treatment by Member States. Whilst, as a matter of general principle, the rules of this proposal apply horizontally, this section contains, based on Member State approaches, more specific provisions for specific groups of persons. These special rules are designed to phase in harmoniously into the general frame of the Directive. In most cases they provide for a waiver from the requirement of an "economic needs test" linked to specific conditions.

Article 12

The definition of "seasonal worker" (Article 2(f)) has already been agreed upon at EC level and is inspired by the annex of Council Resolution of 20 June 1994 on limitations on admission of third-country nationals to the territory of the Member States for employment (the "Employment Resolution") and by Article 9 of the 1997 Commission proposal on a Convention on rules for the admission of third-country nationals to the Member States (the "Convention").

Article 13

The definition of "transfrontier worker" (Article 2(g)) has been inspired both by the annex of the "Employment Resolution" and by Article 10 of the "Convention". In order to provide a flexible frame, which covers all possible scenarios, it also covers third-country national intra-EU commuters. This provision – exceptionally - allows Member States to grant work permits without granting a right of residence. This option is designed to provide an additional element of flexibility in migration policy and it reflects the current legal situation in several Member States.

Article 14

The definition of "intra-corporate transferee" (Article 2 (h)) corresponds with, but at the same time seeks to clarify, the detailed definition contained in the schedule of specific commitments of the EU Member States under the GATS. The EU Member States GATS commitment not to require an "economic needs test" for allowing the temporary presence of "intra-corporate transferees", is not limited to a certain length of stay and may – in specific circumstances – amount to several years. This article proposes to extend this situation to intra-corporate transferees from manufacturing companies as well as service suppliers and to

companies whose principal place of business is in the EU (current GATS commitments only apply to employees of companies whose principle place of business is in a third country.

According to a footnote to the EU-commitments schedule, "*the duration of "temporary stay" is defined by the Member State and, where they exist, Community laws and regulations regarding entry, stay and work*". Paragraph 3 aims at harmonising the initial upper threshold for "temporary stay" at five years. After that, extensions can be granted in accordance with Article 7. According to Article 3(2) of this draft, a "residence permit – worker" in accordance with this Directive is not necessary for intra-corporate transferees staying less than three months.

Article 15

The definition of "trainee" (Article 2(i)) and the rules applicable to this group of persons has already been agreed upon at EC level and is inspired by the "Employment Resolution".

Article 16

Under the terms of the "Employment Resolution", it has already been agreed to give persons pursuing activities as employed person in the course of youth exchange or youth mobility schemes, including "au pairs", special treatment. A detailed definition of "au pair" is given by Article 1 of the Council of Europe European Agreement on "au pair" placement.

Chapter III: Entry and residence for the purpose of exercising self-employed economic activities

Articles 17 and 18

The procedures and conditions on granting a "residence permit – self-employed person" are designed very much in parallel to the rules on granting a "residence permit – worker". The following specifics should, however, be highlighted:

Particular emphasis is given to the need that applicants demonstrate that their financial means include own resources (Article 18(3)(c)).

The key element for assessing the potential beneficial effect of the planned self-employed economic activities in individual cases is the submission of a detailed business plan. In order to assist competent authorities to check a business plan, Member States may of course use external expert advise and request applicants – if considered appropriate – to submit an assessment of their business plan, carried out by a reputable and internationally active accountancy firm. Member States might publish lists containing the names of accountancy firms from which the applicant may choose.

Article 19

As a matter of principle, a permit to exercise self-employed economic activities ("residence permit – self-employed person") shall only be issued if the self-employed activities of the third-country national will have a beneficial effect on employment in the Member State or on the economic development of that Member State. This principle reflects the national provisions applicable in most Member States.

In order to make this principle operational, Member States have the possibility to adopt national provisions by which the fulfilment of this beneficial effect is deemed to be accepted

for specific self-employed economic activities in specific sectors without the need for an individual assessment (*positive generalised assessment* – e.g. setting up certain types of innovative companies). Member States may also decide to adopt national provisions by which the fulfilment of the above condition will be deemed not to be accepted for specific self-employed economic activities in specific sectors without the need for an individual assessment *(negative generalised assessment*). Member States may also decide to adopt national provisions by which the fulfilment of the above condition will be deemed to be accepted for specific self-employed economic activities in specific sectors if a defined minimum amount of money is being invested by the applicant *(financial threshold)***.**

Articles 20 - 24:

The procedures and conditions on granting a "residence permit – self-employed person" are designed very much in parallel to the rules on granting a "residence permit – worker".

Chapter IV: Horizontal provisions

Article 25

This Article clarifies that competence to regulate the level of fees payable by applicants remains with Member States. It is suggested that the level of fees may be linked to the real costs incurred by the national administration. This will allow Member States to create or maintain a flexible fee-policy, including – if Member States consider that this is appropriate – fee-waivers for specific groups of persons and special fees for special services delivered (e.g. a special fee for accelerated handling of applications).

Article 26

This proposal aims to establish a harmonised application procedure according to which third-country nationals will be admitted to exercise economic activities in EU Member States if there is an economic need for them or if a beneficial effect of their economic activities can be expected. The current Directive does, however, not intend to establish an unconditional right of third-country nationals to immigrate, if the above condition and all other requirements laid down in Chapter II or III are fulfilled. Currently, several Member States use quota or ceiling systems to regulate access of third-country nationals to economic activities. These restrictions are applied in addition to the evaluation concerning an economic need or a beneficial effect and are designed to take into account the overall capacity to receive and to integrate third-country nationals on their territory or in specific regions thereof. This Article acknowledges this fact and provides an option for Member States to adopt horizontal measures (e.g. national ceilings; temporary suspension of issuing residence permits) in order to limit the admission of third-country workers if Member States consider this necessary for the reasons mentioned above. Under the terms of Article 30, these national measures will have to be notified to the Commission and the Commission will be entitled under Article 211 of the Treaty to formulate recommendations or deliver opinions on these national rules if it considers this necessary. These rules will also be subject of consideration within the open method of coordination for the Community immigration policy.

Article 27

Member States may restrict the entry and residence of third-country nationals for considerations of public policy, public security and public health. The public policy and public security considerations that can be taken as a basis for refusing entry must be based on

the third-country national´s personal conduct. This implies that decisions restricting the entry and residence of third-country nationals for considerations of public policy and public security must be taken on an individual case-by-case basis, taking into account the specific situation of the individual concerned and the principle of proportionality. Although Member States have discretionary powers in relation to public health, nobody should ever be penalised for suffering from an illness after entry. Reasons of public health can, therefore, not be invoked once a residence permit has been issued.

Article 28

The EC Treaty allows Member States to reserve access to certain posts/activities to their own nationals and to exclude nationals of other Member States: Article 39(4) EC foresees that the principle of free movement of workers shall not apply to "employment in the public service" and Article 45(1) EC foresees that the provisions on the right of establishment shall not apply to "activities which in a Member State are connected, even occasionally, with the exercise of official authority". Both terms have been the subject of case-law of the Court of Justice of the European Communities which, in essence, restricted the possibility of using that derogation to those activities which involve the exercise of public authority and responsibility for safeguarding the general interests of the state or other public bodies. This Article takes up the wording used in Article 39(4) and 45(1) of the Treaty and makes the abovementioned principle applicable for the purposes of this Directive.

Chapter V: Procedure and Transparency

Economic operators and in particular (future) employers of third-country nationals have a legitimate interest to be informed and updated under which circumstances and in accordance with which procedures they may recruit third-country nationals. They also have a legitimate interest that the administrative procedures leading to the issue of a work permit are handled within a reasonable delay. The same applies to third-country nationals wishing to enter the EU labour market. If the EU (its Member States) consider that there is a need or an economic interest to allow third-country nationals to exercise economic activities in the EU, potentially qualified candidates should not be deterred by administrative red-tape. In addition, the European institutions, Member States and the public have a legitimate interest to be informed and updated about what other Member States are doing in this area. For these reasons, and in line with the European tradition of the "rule of law", EC rules on the exercise of activities as employed or self-employed person by third-country nationals should be transparent, provide for legal certainty and also provide for certain procedural guarantees.

Article 29

This Article obliges Member States to make sure that individual decisions on an application for a residence permit under this Directive are adopted and communicated to the applicant at the latest within 180 days, that negative decisions contain a statement of reasons based upon objective and verifiable criteria and that, in addition, the applicants have legal remedies to challenge negative decisions and that they are informed of the time limits allowed for applying for such remedies. Bearing in mind its special nature, this time limit is reduced to 45 days when an application is made to enter a Member State as an intra-corporate transferee. A 45-day period is also provided for trainees and those on a youth exchange scheme.

In addition to the static time-limit of 180 (45) days, Member States shall make public the average turnaround time for handling applications for permits in accordance with this Directive and inform applicants thereof. This provision is intended to allow applicants and

future employers to have a realistic estimate of the time needed until a permit will be issued and to stimulate competition between administrations of Member States.

Article 30

This Article obliges Member States, whenever they adopt horizontal national provisions in accordance with this Directive (e.g. national "green card programs", generalised assessments of self-employed economic activities, national ceilings in accordance with Article 26), to base these provisions on the criteria listed in the relevant provisions of the Directive and to include a statement of reasons based upon objective and verifiable criteria. Moreover, Member States shall be obliged to regularly review these measures to ascertain that the economic/social conditions still justify the national provisions. Moreover the national measures have to be made public in advance of their entering into force. Annual national reports shall be submitted to the European Commission. These regular reports will be an important source of information for the Commission and Member States to be considered within the open method of coordination for the Community immigration policy.

Article 31

This Article enhances transparency by facilitating access to information: Each Member State shall ensure that an exhaustive and regularly updated set of information concerning the conditions of entry and stay of third-country nationals to its territory for the purpose of pursuing activities as employed or self-employed person is made available to the general public (e.g. on a website).

Chapter VI: Final provisions

Article 32

A standard non-discrimination provision is introduced. The wording is based on Article 13 of the EC Treaty and Article 21 of the Charter of Fundamental Rights of the European Union. This provision is without prejudice of obligations descending from international instruments such as the European Convention on Human Rights and Fundamental Freedoms (Article 14).

Article 33

This Article is a standard provision of Community law providing for effective, proportionate and dissuasive penalties. It leaves the Member States with the choice of penalties applicable to infringements of national provisions adopted pursuant to this Directive.

Article 34

The Commission is to report on the application of the Directive by the Member States, in accordance with its role of monitoring the application of provisions enacted by the institutions under the Treaty. Taking into account that this Directive opens various options and models to be tested and applied by Member States and to be further considered within the open coordination mechanism on immigration policy, a monitoring period of four years before producing a report is necessary.

Article 35

Member States are required to transpose the Directive by 1 January 2004. Member States are to inform the Commission of changes made to their legislation, regulations or administrative provisions. They are to make a reference to the Directive when adopting their provisions.

Article 36

This Article sets the date of entry into force.

Article 37

This Directive is addressed to the Member States.

2001/0154 (CNS)

Proposal for a

COUNCIL DIRECTIVE

on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 63(3)(a) thereof,

Having regard to the proposal from the Commission[1],

Having regard to the opinion of the European Parliament[2],

Having regard to the opinion of the Economic and Social Committee[3],

Having regard to the opinion of the Committee of the Regions[4],

Whereas:

(1) With a view to the progressive establishment of an area of freedom, security and justice, Article 63(3) (a) of the Treaty provides that the Council is to adopt measures on immigration policy relating to the conditions of residence, and standards on procedures for the issue by Member States of residence permits.

(2) The European Council, at its special meeting in Tampere on 15 and 16 October 1999, acknowledged the need for approximation of national legislation on the conditions for admission and residence of third-country nationals and it requested to this end rapid decisions by the Council, on the basis of proposals by the Commission.

(3) Regulation of immigration for the purpose of exercising activities as an employed or self-employed person is a cornerstone of immigration policy and the development of a coherent Community immigration policy could not succeed without specifically addressing this issue at Community level.

(4) All Member States have regulated access of third-country nationals to work with detailed national administrative rules. If it is to operate successfully, a Community policy in this field should be put in place progressively. As a first step the aim should

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be to lay down certain common definitions, criteria and procedures, which give a common legal frame to the discretion of Member States.

(5) The newly established Community rules should be based on concepts, which have already been successfully applied in Member States.

(6) In an increasingly global labour market and faced with shortage of skilled labour in certain sectors of the labour market the Community should reinforce its competitiveness to recruit and attract third-country workers, when needed. This should be facilitated by administrative simplification and by facilitating access to relevant information. Transparent and harmonised rules on the conditions under which third-country nationals may enter and stay in the Community to pursue economic activities, and their rights, should be laid down.

(7) Provision for a single national application procedure leading to one combined title, encompassing both residence and work permit within one administrative act, should contribute to simplifying and harmonising the diverging rules currently applicable in Member States.

(8) The chief criterion for admitting third-country nationals to activities as an employed person should be a test demonstrating that a post cannot be filled from within the domestic labour market. The chief criterion for admitting third-country nationals to activities as a self-employed person should be a test demonstrating an added value for employment or the economic development of the host Member State.

(9) Several ways and options for verifying fulfilment of these criteria in the form of individual or horizontal assessments should provide a flexible frame allowing all interested parties including Member States to react flexibly to changing economic and demographic circumstances.

(10) Member States should be allowed to apply horizontal measures, such as ceilings or quotas, limiting the admission of third-country nationals.

(11) Whenever Member States adopt national provisions as provided for by this Directive, they should comply with certain procedural and transparency requirements and in particular an obligation to notify their provisions to the Commission, in order to allow for an exchange of views, further consideration and complementary action within the context of an open coordination mechanism on Community immigration policy.

(12) Member States should lay down rules on penalties applicable to infringements of the provisions of this Directive and ensure that they are implemented. Those penalties must be effective, proportionate and dissuasive.

(13) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.

(14) In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty, the objectives of the proposed action, namely the determination of a harmonised legal framework at Community level concerning the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities and of the procedures for the issue by Member States of the relevant permits cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effect of the action, be

better achieved by the Community. This Directive confines itself to the minimum required to achieve those objectives and does not go beyond what is necessary for that purpose,

HAS ADOPTED THIS DIRECTIVE:

Chapter I
General provisions

Article 1

The purpose of the Directive is:

(a) to determine the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities and

(b) to determine standards on procedures for the issue by a Member State of permits to third-country nationals to enter and reside in its territory and to exercise activities as an employed or self-employed person.

Article 2

For the purposes of this Directive:

(a) "third-country national" means any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty, including stateless persons;

(b) “activity as an employed person” means any remunerated economic activity for and under the direction of another person;

(c) “activity as a self-employed person” means any remunerated economic activity, which is not accomplished for and under the direction of another person;

(d) “residence permit – worker” means a permit or authorisation issued by the authorities of a Member State allowing a third-country national to enter and reside in its territory and to exercise activities as an employed person;

(e) “residence permit – self-employed person” means a permit or authorisation issued by the authorities of a Member State allowing a third-country national to enter and reside in its territory and to exercise activities as a self-employed person;

(f) “seasonal workers” means third-country nationals who retain their legal domicile in a third country but are employed in the territory of a Member State in a sector of activity dependent on the passing of the seasons, under a fixed-term contract for a specific job;

(g) “transfrontier workers” means third-country nationals resident in the frontier zone of a neighbouring country who are employed in the frontier zone of an adjacent Member State and who return to the frontier zone of the neighbouring country each day or at least once a week;

(h) “intra-corporate transferees” means third-country nationals working within a single legal entity and being temporarily transferred into the territory of a Member State, either to the principal place of business or to an establishment of that legal entity,

provided that they have worked for the legal entity concerned for at least the 12-month period immediately preceding the transfer;

(i) "trainees" means third-country nationals whose presence in the territory of a Member State is strictly limited in duration and is closely connected with increasing their skills and qualifications in their chosen profession before returning to their own country to pursue their career.

Article 3

1. The provisions of this Directive shall apply to third-country nationals, except where provisions that are more favourable apply under:

   (a) bilateral or multilateral agreements concluded between the Community, or the Community and its Member States, on the one hand, and third countries on the other hand;

   (b) bilateral or multilateral agreements concluded between one or more Member States and third countries.

2. The provisions of this Directive shall not apply to the exercise of activities which are directly linked to the supply of goods or services from third countries to the Community, as long as third-country nationals carrying out these activities do not stay for more than three months in the Community.

3. The provisions of this Directive shall not apply to:

   (a) third-country nationals established within the Community who are posted to another Member State for the purpose of providing cross-border services or who provide cross border services;

   (b) third-country nationals staying in a Member State as applicants for asylum, under subsidiary forms of protection or under temporary protection schemes;

   (c) third-country nationals whose residence is not legal and whose deportation has been suspended for factual or legal reasons;

   (d) third-country nationals who are family members of citizens of the Union who have exercised their right to free movement within the Community;

   (e) third-country nationals staying in a Member State under family reunification rules.

4. In the absence of specific provisions of Community law, Member States may maintain or introduce more favourable provisions regarding the following categories of person:

   (a) researchers and academic specialists;

   (b) priests and members of religious orders;

   (c) sport professionals;

   (d) artists;

(e) journalists;

(f) representatives of non-profit making organisations.

Chapter II

Entry and residence for the purpose of paid employment

Section 1

General rules

Article 4

1. Member States shall only authorise third-country nationals to enter and reside in their territory for the purpose of exercising activities as an employed person where a "residence permit – worker" has been issued by the competent authorities of the Member State concerned in accordance with this Directive.

2. A "residence permit – worker" shall only be issued if, after verification of the particulars and documents, it appears that the applicant fulfils the requirements for obtaining a "residence permit – worker" in accordance with Articles 5 and 6, subject to any limitations imposed by a Member State in accordance with Articles 26, 27 and 28.

3. When handling an application, the competent authorities shall comply with the procedural safeguards provided for in Article 29.

Article 5

1. In order to obtain a "residence permit – worker", a third-country national intending to exercise activities as an employed person in a Member State shall apply to the competent authority of the Member State concerned. The future employer of a third-country national shall have the right to submit an application on behalf of the third-country national applicant.

2. Applications for a "residence permit – worker" shall be submitted via the representation of a Member State competent for the country of legal residence of the applicant or directly in the territory of the Member State concerned, if the applicant is already resident or legally present there.

3. The application shall be accompanied by the following particulars and documents:

   (a) name and address of the applicant and the employer;

   (b) a valid work contract or a binding offer of work in the Member State concerned, covering the term of the residence permit applied for;

   (c) description of the envisaged activities as an employed person in the Member State concerned;

   (d) appropriate evidence of fulfilment of the requirement laid down in Article 6(1) as provided for in paragraphs 2 to 5 there;

(e) if required by the Member State concerned, a certificate or adequate proof of good character and conduct and a health certificate;

(f) valid passport or equivalent travel documents and, if appropriate, evidence of valid residence title;

(g) documents proving the skills which are necessary for the performance of the envisaged activities and evidence of fulfilment of all the conditions applicable to nationals of the Member State concerned for the exercise of the relevant activity as an employed person;

(h) evidence of having sufficient resources to support the applicant and his/her family members so as to avoid becoming a burden on the social assistance system of the host Member State for the duration of their stay and of having a sickness insurance covering all risks in the host Member State. Those resources shall be deemed sufficient where they are at, or above, the threshold below which the host Member State may grant social assistance to its nationals. Where this criterion is not applicable, the applicant's resources shall be deemed sufficient where they are no less than the amount of the minimum social security pension paid by the host Member State;

(i) proof of payment of the fee for handling the application.

4. Third-country nationals who have been legally resident in a Member State and who have legally exercised activities there as an employed person for more than three years over the preceding five years shall not be required to provide evidence of fulfilment of the requirement laid down in Article 6(1) when submitting an application for a "residence permit – worker" in that Member State.

Article 6

1. When submitting an application in accordance with Article 5, it must be demonstrated that a job vacancy in that Member State cannot be filled in the short term by any of the following categories:

(a) citizens of the Union;

(b) third-country nationals who are family members of citizens of the Union who have exercised their right to free movement within the Community;

(c) third-country nationals already enjoying full access to the national labour market concerned under the agreements referred to in Article 3(1);

(d) third-country nationals already enjoying access to the national labour market concerned under existing national legislation or under Community legislation;

(e) third-country nationals who are legally resident in a Member State and who are and have been legally exercising activities as an employed person in that Member State for more than three years; or

(f) third-country nationals who have been legally resident in that Member State and who have legally exercised activities as an employed person in that Member State for more than three years over the preceding five years.

2. The requirement laid down in paragraph 1 shall be deemed to be fulfilled if a specific job vacancy has been made public via the employment services of several Member States for a period of at least four weeks, and in particular, when appropriate, by means of the European Employment Services (EURES) network established by Commission Decision 93/569/EEC[5], and if no acceptable job application has been received from persons listed in paragraph 1 or from third-country nationals who are citizens of countries with which accession negotiations have been started. The published job vacancy shall contain realistic, reasonable and proportionate requirements for the offered post. This shall be checked and scrutinised by the competent authorities when evaluating an application for a residence permit submitted in accordance with Article 5.

3. Member States may adopt national provisions according to which the requirement laid down in paragraph 1 is deemed to be fulfilled for a specific number of jobs, in a specific sector, for a limited time-period and, if appropriate, in a specific region without the need for an individual assessment. The national provisions shall lay down in detail the criteria according to which applications for work permits shall be ranked when the number of applications received outnumber the published number of jobs. Member States shall consider in the first place applications from citizens of countries with which accession negotiations have been started.

4. Member States may adopt national provisions according to which the requirement laid down in paragraph 1 is deemed to be fulfilled if the annual income offered to a third-country national exceeds a defined threshold.

5. Member States may adopt national provisions according to which the requirement laid down in paragraph 1 is deemed to be fulfilled for a specific third-country national, if a defined amount of money has been paid by the future employer of that person to the competent authorities. The money received from the employer shall be spent for measures promoting the integration of third-country nationals or for vocational training purposes.

Article 7

1. A "residence permit – worker" shall be issued for a predetermined period. The initial "residence permit – worker" granted shall be valid for a period of up to three years to be determined in accordance with national legislation. It shall be renewable for periods of up to three years, to be determined in accordance with national legislation, on application by the holder, to be submitted at least three months before the expiry date and after consideration by the competent authority of a file containing updated information on the items enumerated in Article 5(3) and in particular detailed information on the activities exercised as an employed person.

2. Applicants for renewal who have been holding a "residence permit – worker" in the Member State concerned for more than three years shall not be required to provide evidence of fulfilment of the requirement laid down in Article 6(1).

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[5] OJ L 274, 6.11.1993, p. 32.

Article 8

A “residence permit – worker” shall initially be restricted to the exercise of specific professional activities or fields of activities. It may also be restricted to the exercise of activities as an employed person in a specific region. After three years, it shall not be subject to these restrictions.

Article 9

1. After a “residence permit - worker” has been issued, its holder shall notify to the competent authorities any changes to the information provided in accordance with Article 5(3). If these changes relate to points (b) or (c) of Article 5(3) they shall be subject to the approval of the competent authority of the Member State concerned.

2. During the period of validity of a “residence permit - worker”, competent authorities shall not consider changes that relate to Article 5(3) (d).

Article 10

1. The competent authorities shall revoke a “residence permit – worker” which has been fraudulently acquired.

2. The competent authorities may suspend or revoke a “residence permit – worker” where the particulars supporting the application as provided for in Article 5 are incorrect or have not been amended in accordance with Article 9. The competent authorities may also suspend or revoke a “residence permit – worker” when such measure is considered necessary for reasons of public policy or public security by the Member State concerned in accordance with Article 27.

3. Unemployment in itself shall not constitute a sufficient reason for revoking a “residence permit – worker” unless the period of unemployment exceeds the following duration:

   (a) three months within a 12-month period, for holders of a “residence permit – worker” who have legally exercised activities as employed or self-employed persons in the Member State concerned for less than two years;

   (b) six months within a 12-month period, for holders of a “residence permit – worker” who have legally exercised activities as employed or self-employed persons in the Member State concerned for two years or more.

Article 11

1. During the period of its validity, a “residence permit – worker” shall entitle its holder at a minimum to the following:

   (a) entry to the territory of the Member State issuing the “residence permit – worker”;

   (b) re-entry to the territory of the Member State issuing the “residence permit – worker” after temporary absence;

(c) passage through other Member States in order to exercise the rights under points (a) and (b);

(d) residence in the Member State issuing the "residence permit – worker";

(e) exercise of the activities authorised under the "residence permit – worker";

(f) enjoyment of equal treatment with citizens of the Union at least with regard to:

(i) working conditions, including conditions regarding dismissals and remuneration;

(ii) access to vocational training necessary to complement the activities authorised under the residence permit;

(iii) recognition of diplomas, certificates and other qualifications issued by a competent authority;

(iv) social security including healthcare;

(v) access to goods and services and the supply of goods and services made available to the public, including public housing;

(vi) freedom of association and affiliation and membership of an organisation representing workers or employers or of any organisation whose members are engaged in a specific occupation, including the benefits conferred by such organisations.

2. Member States may restrict the rights conferred under paragraph 1(f)(ii) to third-country nationals who have been staying or who have the right to stay in their territory for at least one year.

They may restrict the rights conferred under paragraph 1(f)(v) with respect to public housing to third-country nationals who have been staying or who have the right to stay in their territory for at least three years.

3. After the expiry of a "residence permit – worker" and following their return to a third country, former holders of a "residence permit – worker" shall have the right to request and obtain the payment of the contributions made by them and by their employers into public pension schemes during the period of validity of the "residence permit – worker," provided that:

(a) the applicant cannot or will not obtain payment of a Member State pension under national law or under the agreements referred to in Article 3(1), when residing in a third country;

(b) the applicant is unable, under national law or the agreements referred to in Article 3(1), to transfer pension rights to a scheme of the third country where the applicant resides;

(c) the applicant formally waives all rights/claims acquired under the national pension scheme concerned;

(d) the application is submitted from a third country.

Section 2

Rules for specific categories

Article 12

1. Seasonal workers may be granted a "residence permit – seasonal worker" for up to six months in any calendar year, after which they shall return to a third country.

   The provisions of Section 1 shall apply *mutatis mutandis* to such permit.

   A "residence permit – seasonal worker" shall not be extended to cover a total period exceeding the six-month period. Member States may issue up to five "residence permits – seasonal worker" covering up to five subsequent years within one administrative act ("multi-annual residence permit – seasonal worker").

2. Member States may ask applicants or their future employers to deposit a security, which shall be repayable on the return of the seasonal worker to a third country.

Article 13

Transfrontier workers may be granted a "permit – transfrontier worker".

The provisions of Section 1, with the exception of Article 11(1)(d), shall apply *mutatis mutandis* to such permit.

Article 14

1. Intra-corporate transferees may be granted a "residence permit – intra-corporate transferee"

   The provisions of Section 1 shall apply *mutatis mutandis* to such permit. However, applicants for a "residence permit - intra-corporate transferee" shall not be required to provide evidence of fulfilment of the requirement laid down in Article 6(1). Instead, applicants shall demonstrate that they fulfil the criteria set out in paragraph 2 of this Article.

2. Intra-corporate transferees shall either be:

   (a) "key personnel", that is to say persons working in a senior management or executive position within a legal entity, receiving general supervision or instructions principally from the board of directors or stockholders of the business or their equivalent. The functions of key personnel can include: directing the establishment or a department or sub-division of the establishment; supervising and controlling the work of other supervisory, professional or managerial employees; and/or having the authority personally to engage and dismiss personnel, or to recommend such engagement or dismissal, or other personnel actions; or

   (b) "specialists", that is to say persons possessing uncommon knowledge essential to the establishment's service, research equipment, techniques or management.

In assessing such knowledge, account will be taken not only of knowledge specific to the establishment, but also of whether the person has a high level of qualification referring to a type of work or trade requiring specific technical knowledge.

3. The initial period of validity of the "residence permit – intra-corporate transferee" shall be equal to the duration applied for, subject to a maximum period of validity of five years.

Article 15

1. Trainees may be granted a "residence permit – trainee".

   The provisions of Section 1 shall apply *mutatis mutandis* to such permit. However, applicants for a "residence permit – trainee" shall not be required to provide the evidence of fulfilment of the requirement laid down in Article 6(1). Instead, applicants shall demonstrate that the envisaged activity is strictly limited in duration and is closely connected with increasing their skills and qualifications.

2. The overall validity of a "residence permit – trainee" shall not exceed one year. This period may be extended exclusively for the time needed to obtain a professional qualification recognised by the Member State concerned in the sphere of activity of the trainee.

Article 16

1. Third-country nationals pursuing activities as an employed person in the context of youth exchange or youth mobility schemes, including "au pairs", may be granted a "residence permit – youth exchange/au pair".

   The provisions of Section 1 shall apply *mutatis mutandis* to such permit. However, applicants for a "residence permit – youth exchange/au pair" shall not be required to provide evidence of fulfilment of the requirement laid down in Article 6(1). Instead, applicants shall demonstrate that the envisaged activity is strictly limited in duration and connected with a youth exchange or youth mobility scheme officially recognised by the Member State concerned.

2. The overall validity of a "residence permit – youth exchange/au pair" shall not exceed one year. This period may be extended exceptionally if a youth exchange or youth mobility scheme officially recognised by a Member State provides for that possibility.

3. Member States may ask applicants or their future employers to deposit a security, which shall be repayable on the return to a third country.

Chapter III

Entry and residence for the purpose of exercising self-employed economic activities

Article 17

1. Member States shall only authorise third-country nationals to enter and reside in their territory for the purpose of exercising activities as self-employed persons where a

"residence permit – self-employed person" has been issued by the competent authorities of the Member State concerned in accordance with this Directive.

2. A "residence permit – self-employed person" shall only be issued if, after verification of the particulars and documents, it appears that the applicant fulfils the requirements for obtaining a "residence permit – self-employed person" in accordance with Articles 18 and 19, subject to any limitations imposed by a Member State in accordance with Articles 26, 27 and 28.

3. When handling an application, the competent authorities shall comply with the procedural safeguards provided for in Article 29.

Article 18

1. In order to obtain a "residence permit – self-employed person", a third-country national intending to exercise activities as a self-employed person in a Member State shall apply to the competent authority of the Member State concerned.

2. Applications for a "residence permit – self-employed person" shall be submitted via the representation of a Member State competent for the country of legal residence of the applicant or directly in the territory of the Member State concerned, if the applicant is already resident or legally present there.

3. The application shall be accompanied by the following particulars and documents:

   (a) name and address of the applicant and of the location of exercise of the envisaged activities as a self-employed person;

   (b) detailed business plan covering the time-period for which a "residence permit – self-employed person" is requested;

   (c) evidence that the applicant has sufficient financial means, including own resources, in accordance with the business plan and, if applicable, evidence of investment of the required minimum investment sum including financial guarantees;

   (d) appropriate evidence of fulfilment of the requirement laid down in Article 19(1);

   (e) if required by the Member State concerned, a certificate or adequate proof of good character and conduct and a health certificate;

   (f) valid passport or equivalent travel documents and, if appropriate, evidence of valid residence title;

   (g) documents proving the skills which are necessary for the performance of the envisaged activities and evidence of fulfilment of all the conditions applicable to nationals of the Member State concerned for the exercise of the relevant activity as a self-employed person;

   (h) evidence of having sufficient resources to support the applicant and his/her family members so as to avoid becoming a burden on the social assistance system of the host Member State for the duration of their stay and of having a sickness insurance covering all risks in the host Member State. Those resources

shall be deemed sufficient where they are at, or above, the threshold below which the host Member State may grant social assistance to its nationals. Where this criterion is not applicable, the applicant's resources shall be deemed sufficient where they are no less than the amount of the minimum social security pension paid by the host Member State;

(i) proof of payment of the fee for handling the application.

4. Third-country nationals who have been legally resident in a Member State and who have legally exercised activities there as a self-employed person for more than three years over the preceding five years shall not be required to provide evidence of fulfilment of the requirement laid down in Article 19(1) when submitting an application for a "residence permit – self-employed person" in that Member State.

Article 19

1. When submitting an application in accordance with Article 18, it must be demonstrated that the envisaged activities as a self-employed person will create an employment opportunity for the applicant and will have a beneficial effect on employment in the Member State concerned or on the economic development of that Member State.

2. Member States may adopt national provisions according to which the requirement laid down in paragraph 1 is deemed to be fulfilled, or not fulfilled, for specific activities as a self-employed person in specific sectors and, if appropriate, in a specific region without the need for an individual assessment.

3. Member States may adopt national provisions according to which the requirement laid down in paragraph 1 is deemed to be fulfilled for specific activities as a self-employed person in specific sectors and, if appropriate, in a specific region if an applicant invests a defined minimum amount of own resources.

Article 20

1. A "residence permit – self-employed person" shall be issued for a predetermined period. The initial "residence permit – self-employed person" granted shall be valid for a period of up to three years to be determined in accordance with national legislation. It shall be renewable for periods of up to three years, to be determined in accordance with national legislation, on application by the holder, to be submitted at least three months before the expiry date and after consideration by the competent authority of a file containing updated information on the items enumerated in Article 18(3), and in particular detailed information on the activities exercised as a self-employed person.

2. Applicants for renewal who have been holding a "residence permit – self-employed person" in the Member State concerned for more than three years shall not be required to provide evidence of fulfilment of the requirement laid down in Article 19(1).

Article 21

A "residence permit – self-employed person" shall initially be restricted to the exercise of specific activities as a self-employed person or to specific fields of activities. It may also be

restricted to the exercise of activities as a self-employed person in a specific region. After three years it shall not be subject to these restrictions.

Article 22

1. After a "residence permit – self-employed person" has been issued, its holder shall notify to the competent authorities any changes to the information provided in accordance with Article 18(3). If these changes relate to points (b) or (c) of Article 18(3) they shall be subject to the approval of the competent authority of the Member State concerned.

2. During the period of validity of a "residence permit – self-employed person", competent authorities shall not consider changes that relate to point (d) of Article 18(3).

Article 23

1. The competent authorities shall revoke a "residence permit – self-employed person" which has been fraudulently acquired.

2. The competent authorities may suspend or revoke a "residence permit – self-employed person" where the particulars supporting the application as provided for in Article 18 are incorrect or have not been amended in accordance with Article 22. The competent authorities may also suspend or revoke a "residence permit – self-employed person" when such measure is considered necessary for reasons of public policy or public security by the Member State concerned in accordance with Article 27.

3. Commercial difficulties shall not constitute a sufficient reason for revoking a "residence permit – self-employed person" unless the period during which the holder is not able to meet the costs of living in accordance with Article 18(3)(h) exceeds the following period:

   (a) three months within a 12-month period, for holders of a "residence permit – self-employed person" who have legally exercised activities as employed or self-employed persons in the Member State concerned for less than two years;

   (b) six months within a 12-month period, for holders of a "residence permit – self-employed person" who have legally exercised activities as employed or self-employed persons in the Member State concerned for two years or more.

Article 24

The rules set out in Article 11 shall also apply to holders of a "residence permit – self-employed person".

Chapter IV

Horizontal provisions

Article 25

Member States may request applicants to pay fees for handling applications in accordance with this Directive. The level of fees shall be proportionate and may be based on the service actually provided.

Article 26

Member States may decide to adopt national provisions limiting the issuing of permits in accordance with this Directive to a set ceiling or suspending or halting the issuing of these permits for a defined period, taking into account the overall capacity to receive and to integrate third-country nationals on their territory or in specific regions thereof. These national provisions shall state in detail which groups of persons are covered by, or exempted from, the measure. If these national provisions impose ceilings, they shall lay down in detail the criteria according to which applications for permits in accordance with this Directive shall be ranked when the number of applications received exceeds the set ceilings.

Article 27

Member States may refuse to grant or to renew, or may revoke, permits in accordance with this Directive on grounds of public policy, public security or public health. The grounds of public policy or public security shall be based exclusively on the personal conduct of the third-country national concerned. Public health shall not be invoked by Member States as a reason for revoking or not renewing a residence permit solely on the ground of illness or disability suffered after the issue of the residence permit.

Article 28

This Directive is without prejudice to the application of national legislation regulating the access of third-country nationals to employment in the public service or to activities which in that Member State are connected, even occasionally, with the exercise of official authority.

Chapter V

Procedure and Transparency

Article 29

1. Member States shall ensure that a decision to grant, modify or renew a permit in accordance with this Directive, is adopted and communicated to the applicant at the latest within 180 days after receipt of the application. Decisions on an application submitted in accordance with Articles 14, 15 and 16 shall be adopted and communicated to the applicant within 45 days after its receipt.

2. Every Member State shall make public the average time necessary for its authorities to issue, modify or renew permits in accordance with this Directive and inform applicants thereof upon receipt of an application.

3. If the information supporting the application is inadequate, the competent authorities shall notify the applicant of the additional detailed information that is required. The period referred to in paragraph 1 shall be suspended until the authorities have received the additional information required.

4. Any decision not to grant, modify or renew a permit in accordance with the application and any decision suspending or withdrawing a permit shall contain a statement of reasons based upon objective and verifiable criteria on which the decision is based. The person concerned shall have the right to apply to the courts of the Member State concerned and shall be informed of the time limits allowed for applying for such remedies.

Article 30

When Member States choose to adopt national measures in accordance with Article 6(3), (4) or (5); Article 19(2) and (3), or Article 26, the following rules shall apply:

(a) the Member State shall base its national provisions on the criteria listed in the relevant provisions of this Directive;

(b) the national provisions shall include a statement of reasons based upon objective and verifiable criteria;

(c) the national provisions shall be subject to regular review at national level to ascertain whether it is justifiable underthis Directive that the national provisions be maintained unchanged;

(d) the national provisions shall be made public in advance of their entry into force;

(e) the Member State shall notify the national provisions to the Commission and they shall submit to the Commission an annual report on the application of those national provisions.

Article 31

Each Member State shall ensure that an exhaustive and regularly updated set of information concerning the conditions of entry and stay of third-country nationals to its territory for the purpose of pursuing activities as an employed or self-employed person is made available to the general public.

Chapter VI

Final provisions

Article 32

The Member States shall give effect to the provisions of this Directive without discrimination on the basis of sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinions, membership of a national minority, fortune, birth, disabilities, age or sexual orientation.

Article 33

Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission by the date specified in Article 35 at the latest and shall notify it without delay of any subsequent amendment affecting them.

Article 34

By 31 December 2007 at the latest, the Commission shall report to the European Parliament and the Council on the application of this Directive in the Member States and propose amendments if appropriate.

Article 35

Member States shall adopt and publish, before 1 January 2004, the provisions necessary to comply with this Directive. They shall forthwith inform the Commission thereof.

They shall apply those provisions from 1 January 2004.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

Article 36

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Communities*.

Article 37

This Directive is addressed to the Member States.

Done at Brussels,

For the Council
The President