

Note of the Standing Committee of experts on international immigration, refugees and criminal law on the proposal for a Council Directive amending Directive 2003/109/EC to extend the scope to beneficiaries of international protection

Although the Standing Committee welcomes a proposal to extend the scope of Directive 2003/109/EC (LTR Directive) it has some serious objections against the proposal, presently under consideration. The Committee agrees with the choice, not to include a mechanism for transfer of responsibility for protection under community law in the Directive. However, there are two points of concern. The scope of the amended Directive threatens to differentiate between excluded and included categories without good justification. In the opinion of the Standing Committee, the main criteria for obtaining LTR status should be the length of the legal stay, regardless of the grounds on which the right of residence was granted. Further, the present negotiations risk to neglect the principle of non-refoulement, as will be set out below.

Scope of the amendment

The proposal presented by the Commission extends the scope of the LTR Directive to third country nationals who have been granted refugee or subsidiary protection within the meaning of the Qualification Directive, but still excludes third country nationals who have been granted other forms of compassionate or humanitarian protection.

The Standing Committee is aware of the different viewpoints concerning the extension of the scope of the LTR Directive. Some delegations have reservations to the proposal as such; others want to limit it to third country nationals who have been granted refugee status only, while some other delegations expressed their support to the extension of the Directive to other forms of compassionate or humanitarian protection as well. The proposal as presented by the Commission urges Member States which introduced already a single uniform asylum status to make a distinction between beneficiaries of refugee or subsidiary protection and beneficiaries of compassionate or humanitarian protection who currently have the same rights.

The delegations which expressed their concern about extending the provisions of the long term resident status to beneficiaries of subsidiary protection argued that this might be a pull factor. This argument can not be convincingly put forward. Considering the time lapse of 5 year legal residence before acquiring the long term resident status the Standing Committee is unable to see how a stronger status 5 years after admission may attract applicants for subsidiary protection in retrospect.

The Standing Committee recalls that the European Council at its 1999 Tampere meeting stated that long term resident third country nationals should be granted a set of uniform rights which are as near as possible to those enjoyed by citizens of the European Union without making a distinction for what reasons a third country national resides in a Member State. According to recital 6 of the Preamble of the LTR Directive "The main criterion for acquiring the status of long-term resident should be the duration of residence in the territory of the Member State. Residence should be both legal and continuous in order to show that the person has put down roots in the country." The Standing Committee cannot see why this should be different for beneficiaries of subsidiary protection or for third country nationals who are granted residence on humanitarian or any other ground. Therefore, the Standing Committee is of the opinion that the main criteria for obtaining LTR status should be the length of the legal stay, regardless of the grounds on which the right of residence was granted, unless the third country national resided in a Member State solely on temporary grounds (conform Article 3(2), sub a, b, e and f, LTR Directive).

For this reason the Standing Committee is in favour of extending the scope of the LTR Directive to all long term resident third country nationals, irrespective of the grounds on which the right of residence was granted (temporary grounds excluded). In line with the Tampere Conclusions and the Hague Programme concerning the fair and equal treatment of all long term resident third country nationals and the call to establish a uniform status the Directive should include all third country nationals; not only refugees and beneficiaries of subsidiary protection but also third country nationals who are granted residence on humanitarian or any other (not strict temporary) ground. The aim of the LTR Directive of full integration (see recital 4 of the Preamble) can only be achieved if all long term residents in the Member States are covered by the Directive. Moreover, the exclusion of long term resident beneficiaries of subsidiary protection or long term residents on humanitarian or other grounds from the benefits of the Directive may be considered as a violation of Article 14 of the European Convention on Human Rights while it makes a distinction between different categories of third country nationals for which an objective justification is lacking.

The Standing Committee is not convinced by the counter argument that humanitarian or other status granted according to the national legislation could not be covered by the Directive because the different status under national legislation are not recognised by all Member States. The same applies with regard to the present beneficiaries of the Directive, as well as regarding refugees and subsidiary protection beneficiaries. The residence status of third country nationals falling under the current Directive is also (mainly) according to the national law of the Member States and still differs from Member State to Member State, while for example the labour migration is not (yet) harmonised within the European Union. And with regard to refugees and subsidiary protection beneficiaries, the Qualification Directive allows for Member States to apply more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection.

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In case no agreement is reached on the scope of the Directive the Standing Committee strongly supports the inclusion of a provision providing for the possibility for Member States who chose to do so, to grant LTR status to all third country nationals legally resident in that Member State for 5 years.

Transfer of responsibility

A study by the Danish Refugee Council on transfer of protection status in the EU illustrates that requests for transfer of protection are rarely made. In practice the differences in interpretation by Member States of the existing legal provisions do not cause insurmountable problems. Against this background the proposal to amend the LTR Directive does not include a mechanism for transfer of responsibility for protection under community law. The Standing Committee agrees with this approach. Therefore, requests for transfer of responsibility remain governed by the Geneva Refugee Convention and by the European Agreement on the transfer of responsibility adopted within the framework of the Council of Europe. In addition the Standing Committee mentions in this respect the relevance of UNHCR-Conclusion 12 (XXIX) on Extraterritorial Effect of the Determination of Refugee Status.

Respect of the principle of non-refoulement

Since the proposal does not deal with the transfer of responsibility for international protection, it is important to safeguard the respect of the principle of non-refoulement in the second Member State. Safeguarding this principle resulted in rather complicated provisions. The proposed amendments to Article 12 and 22 aim to ensure as far as possible that the principle of non-refoulement is safeguarded in all situations. According to the new paragraph 3a of Article 12 a Member State which decides to expel a long-term resident whose long-term resident's permit contains the remark "international protection" shall *consult* the Member State which granted the international protection as mentioned in the remark and the long-term resident *shall be expelled* to this Member State, unless in the meantime international protection has been withdrawn.

Although the Standing Committee is aware of the complexity of the issue, it noted nevertheless with utmost concern that in the latest document concerning the issue, 16086/07 ASIM 103 of 30 November 2007, a delegation proposed to replace "consult" with "inform" and to replace in the wording "shall be expelled" "shall" with "may also". In doing so, the principle of non-refoulement will be seriously undermined. If the obligatory consultation of the Member State which granted international protection is replaced by a notification only and if another Member State is not under the obligation to expel the protected person to the first Member State, the Member State which granted international protection will not be able to live up to its international obligations anymore. If, following a obligatory consultation, it is established that the third country national still benefits from international protection in the consulted Member State expulsion should only be possible to this Member State. Otherwise, the prohibition of refoulement would be seriously at risk. In particular, since the proposal does not include a mechanism for transfer of responsibility for international protection, full respect of the principle of non-refoulement requires under all circumstances the obligatory consultation of and expulsion to the Member State which granted the international protection.

Conclusion

- *In case no agreement is reached on the scope of the Directive as proposed by the Standing Committee, it is strongly recommended to include a provision providing for the possibility for Member States who chose to do so, to grant LTR status to all third country nationals legally resident in that Member State for 5 years.*
- *The Standing Committee is in agreement with the fact that the proposal to amend the LTR Directive does not include a mechanism for transfer of responsibility for protection under community law.*
- *Full respect of the principle of non-refoulement requires under all circumstances the obligatory consultation of and expulsion to the Member State which granted the international protection.*