

CCBE preliminary comments on Article 17(4) of the proposal for a Long-Term Residents Directive (recast)

27/07/2023

EXECUTIVE SUMMARY

In this document, the CCBE wishes to present its tentative views on some provisions and their potential consequences of the Commission proposal for a directive concerning the status of third-country nationals who are long-term residents (recast). The CCBE is of the view that in principle the proposal introduces several positive changes for long-term residents. However, the new Article 17 (4) raises some practical questions and needs to be clarified as regards its consequences on the rules governing access to the lawyer's profession, especially on the special EU Lawyers regime set in the Lawyers' Establishment Directive. The CCBE recalls that the competence to regulate access to the profession of a lawyer is a national competence of the Member States. Finally, the CCBE thinks that a more thorough analysis of the proposal and its consequences is required and is willing to work with EU institutions on this topic.

On 27 April 2022, the European Commission presented a [proposal for a directive](#) concerning the status of third-country nationals who are long-term residents (recast) (hereafter "LTR Directive (recast)").

The proposal aims at improving the integration and rights of third-country nationals (TCNs) who have resided in the EU lawfully for enough time. The proposal introduces several changes for long-term residents (LTRs). For instance, there are provisions to facilitate the integration and strengthen the rights of TCNs.

While the CCBE recognises the value of favouring intra mobility of TCNs within the EU, the proposal raises some practical questions and needs to be clarified as regards its consequences on the rules governing access to the lawyer's profession.

Member States are competent to set their own rules with regard to the access to the legal profession, and the recognition of qualifications of TCNs (under the GATS rules). These national rules are usually intertwined with the organisation and functioning of the judicial system of a given country. Starting from academic training, lawyers are closely connected to the positive law experiences of the individual Member States and therefore rooted in their respective national legal systems, which are often profoundly different from one another. Hence, Member States remain competent to set the conditions for accessing and exercising the legal profession.

The aim of this paper is not to provide comments on the proposal in general but to focus on the provisions that will have implications regarding TCNs who wish to exercise a regulated profession in the EU, such as the one of a lawyer. The CCBE wishes to present some comments related to a possible interpretation of the proposal and views on these provisions and their potential consequences on the EU lawyers' regime.

Provisions of the proposal which these comments refer to

More specifically, this paper is about the following provisions:

Recital (20): *“Professional qualifications acquired by a third-country national in another Member State should be recognised in the same way as those of Union citizens. Qualifications acquired in a third country should be taken into account in accordance with Directive 2005/36/EC of the European Parliament and of the Council. This Directive should be without prejudice to the conditions set out under national law for the exercise of regulated professions.”*

Recital (36): *“Where EU long-term residents intend to apply for residence in a second Member State in order to exercise a regulated profession, their professional qualifications should be recognised in the same way as those of Union citizens exercising the right to free movement, in accordance with Directive 2005/36/EC and other applicable Union and national law.”*

Article 12: *“1. Long-term residents shall enjoy equal treatment with nationals as regards: (...) (c) recognition of professional diplomas, certificates and other qualifications, in accordance with the relevant national procedures; (...)*

3. Member States may restrict equal treatment with nationals in the following cases:

(a) Member States may retain restrictions to access to employment or self-employed activities in cases where, in accordance with existing national or Community legislation, these activities are reserved to nationals, EU or EEA citizens;”

Article 17 par. 4: *“With regard to the exercise of an economic activity in a regulated profession as defined in Article 3(1), point (a), of Directive 2005/36/EC, for the purpose of applying for a residence permit in a second Member State, EU long-term residents shall enjoy equal treatment with Union citizens as regards recognition of professional qualifications, in accordance with applicable Union and national law.”*

The general provision on equal treatment (Article 12) remains the same as in the LTR Directive from 2013 (Article 11).¹ However, the CCBE notes the new Recital 20 with new wording on qualifications from another Member State and qualifications acquired in a third country.

Moreover, the provisions on equal treatment with regards to recognition of professional qualifications in a second Member State to exercise an economic activity in a regulated profession are new.

EU Lawyers regime

Lawyers in the EU willing to exercise in another Member State are subject to a special regime. They are subject to:

- Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained (**Lawyers’ Establishment Directive**)

¹ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents

- Council Directive of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (77/249/EEC) (Lawyers' Services Directive covering temporary presence in another Member State to provide services)

It is relevant for this paper to focus on and recall the principles of the Lawyers Establishment Directive ("LED"). The Directive confers free movement rights on lawyers. For the purposes of this Directive, 'lawyer' means any person who is a national of a Member State and who is authorised to pursue their professional activities under one of the listed professional titles, i.e. *avocat*, *advogado*, etc.² Therefore, there are two conditions to invoke the directive: nationality of a Member State and a title of lawyer of a Member State.³

The Directive offers amongst others the following rights:

- **Right to practise under the home-country professional title in the host Member State.**
Article 2: Right to practise under the home-country professional title: Any lawyer shall be entitled to pursue on a permanent basis, in any other Member State under his home-country professional title, the activities specified in Article 5.
- **Right to gain admission to the profession of lawyer in the host Member State after three years of effective and regular practice in the law of the host Member State.**
Article 10: Like treatment as a lawyer of the host Member State: A lawyer practising under his home-country professional title who has effectively and regularly pursued for a period of at least three years an activity in the host Member State in the law of that State including Community law shall, with a view to gaining admission to the profession of lawyer in the host Member State, be exempted from the conditions set out in Article 4(1)(b) of Directive 89/48/EEC, 'Effective and regular pursuit' means actual exercise of the activity without any interruption other than that resulting from the events of everyday life.⁴

Possible problematic interpretation and application of the LTR Directive (recast) in conjunction with the LED

The CCBE considers that the provisions of the LTR Directive (recast) may be confusing in relation to market access and the recognition of qualifications, and in particular the profession of lawyer, and, therefore, considers a clarification or amendment thereof to be useful. The CCBE does not accept that the provisions of the LTR Directive (recast) should be interpreted in a way set below but only notes that such an interpretation is possible based on the current text which, hence, has to be amended.

Recital 36 and Article 17(4) of the LTR Directive (recast) as they stand in the proposal seem to provide *de facto* access to the single market for some TCNs by extending the scope of the Professional Qualifications Directive, and "other applicable Union law" meaning also potentially the application of LED to them.

It is the CCBE's understanding that in practice, if interpreted in a certain way, these provisions could have the following consequences on the application of the LED.

Scenario: A third-country national who has an LTR status in one Member State and then acquires a lawyer qualification in this Member State (e.g. French *avocat*) and then moves to another MS (e.g. Germany).

² Article 1 par.2 of the Directive.

³ See also CCBE guide on free movement of lawyers within the European Union, page 7, [available here](#).

⁴ This is in addition to the possibility to have a diploma recognised according to Professional Qualifications Directive with a view to gaining admission to the profession of lawyer in the host Member State and practicing it under the professional title corresponding to the profession in that Member State (Article 10 par.2 LED).

Potentially in this case, the new LTR Directive has an impact on the EU Lawyers regime. If a third-country national acquires an LTR status in France and then qualifies as a French lawyer, becomes a French avocat according to the applicable rules, and then wants to move to Germany, for the recognition of qualifications (Article 17 par.4 of the recast), they should be treated in Germany as an EU citizen with a full qualification obtained in one of the Member States who moves to another Member State.

Normally, French lawyers who are EU citizens and move to Germany to establish there as lawyers do not have to have their qualifications recognised if they have the title of the lawyer mentioned in the LED. They can exercise based on the LED. They will be able to establish as French lawyers in Germany, practise under their home-country title and after 3 years have access to a host-country title.

Under the recast provisions, and according to our understanding, a third-country national who has a LTR status and French lawyer title shall be treated the same way as an EU citizen, meaning as a French lawyer exercising free movement rights, and thus, he/she should be able to invoke the applicability and rights of the LED. So this person could establish in Germany under the title of French lawyer. After three years of exercise as a French lawyer in Germany, the third-country national could gain admission to the German title.

Taking into account the abovementioned considerations, the CCBE would like to express the following views.

- The competence to regulate access to the profession of a lawyer is a national competence.
- Although Article 12 of the proposal seems to still allow Member States to uphold conditions, including nationality condition, in a first Member State of residence, Recital 20 contains new wording whose impact on the rules of Article 12 (former Article 11) and access to the regulated professions in Member States is unclear. It is unclear whether based on these provisions read together, the rules on recognition from the Professional Qualifications Directive would automatically apply to LTRs when they are in the Member State of their first long-term residency, including the rules of taking into account third-country qualifications (Article 3 par.3) and to what extent Recital 20 maintains the possibility for Member States to uphold some restrictions, especially the conditions set out under national law for the exercise of regulated professions.
- Regarding Recital 36 and Article 17 (4), if interpreted in a certain way, the proposal *de facto* means a gain of EU citizens' rights when an LTR moves to a second Member State, in particular with regards to the recognition of professional qualifications to exercise a regulated profession. For the lawyers' regime, it could introduce a big change as it removes in practice the nationality condition present in LED (which is one condition) and therefore, *de facto*, introduces measures on how TCNs (with a full qualification from another Member State – the second condition) could have access to the legal profession of another Member State.
- According to the interpretation of the provisions and consequences set out above, problematic is also the legal basis cited in the proposal – Article 79(2) TFEU⁵ - because it does not allow the EU to adopt

⁵ 2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas:

- (a) the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification;
- (b) the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States;
- (c) illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation;
- (d) combating trafficking in persons, in particular women and children.

measures regarding recognition of qualifications or access to the profession of TCNs. Therefore, the cited provisions in the proposal are legally unjustified.

- The CCBE wishes to stress that it is in principle not against welcoming TCNs who are LTRs into the legal profession but is of the opinion that recognition of qualifications of TCNs is a matter of national law and Member States' competence.
- The CCBE has doubts whether the EU can stipulate in secondary law how TCNs have access to a profession. The decision how this access is regulated is deeply rooted in the competence of the Member States, it is not an EU competence. The EU also does not have competence to abolish nationality conditions vis-à-vis third-country nationals. The question is therefore whether the EU should be allowed to regulate access to the profession in such a way.
- According to the proposed LTR Directive (recast), in the cases foreseen by Article 17(4), Member States would no more be in a position to decide to which nationals to grant access to a profession. Yet, this is a traditional competence of Member States. The reason why it is very important that Member States can assess whether or not to grant access to nationals from a third country to the legal profession is that the profession is part of the justice system.
- In addition to a potential lack of an EU competence, the proposal also seems to underestimate that one Member State with less strict control of the conditions set out in the LTR Directive (recast), e.g. regarding effective residence, can become a port of entrance to single market rights (forum shopping).
- The EU will lose important bargaining chips for any upcoming free trade agreement. It should be kept in mind that EU Member States have committed in EU free trade agreements and through GATS, but also by national laws in which form nationals of third countries can practise in their jurisdiction. It is unclear how the directive would impact on such agreements.
- Finally, it should be noted that the LTR Directive (recast) has a general scope regarding recognition of qualifications, whereas the LED is a *lex specialis* and as such, *generalia specialibus non derogant* (the general does not derogate from the specific).
- The CCBE notes that the LTR Directive (recast) proposal does not provide for any explicit modification of the LED and therefore, the regime concerning the establishment of lawyers and the national competence on the condition to access the profession should not be affected by this proposal. However, to remove any doubt, the Commission should amend the proposal.

CCBE remarks regarding the European Parliament position

The CCBE notes that the European Parliament proposes⁶ amendments to Recital 20 and Article 12 par.1 (c). Article 12 par.1 (c) would stipulate that *“EU long-term residents shall enjoy equal treatment with nationals at least with regard to: (...) recognition of qualifications, including diplomas, certificates and other qualifications, in accordance with the relevant national procedures, and taking into account qualifications acquired in a third country in accordance with Directive 2005/36/EC where the latter qualifications were already recognised in another Member State;”*.

Therefore, these amendments explicitly mention the application of Directive 2005/36/EC to third-country nationals with LTR status where their qualifications were already recognised in another Member State. This is

⁶ LIBE Report, 13.04.2023, available [here](#).

different from the Commission draft which only states that recognition should be in accordance with the relevant national procedures.

Whilst the provision is unclear, any automatism regarding recognition would be unacceptable as the EU does not have the competence to regulate access of TCNs to a profession. The fact that a qualification was already recognised in another Member State does not change this.

The Parliament also proposes to redraft the provision regarding possible restrictions to some activities where the national law reserved them to nationals, EU or EEA citizens (Article 12 par.3 (a)). It proposes to allow these reservations only for the activities that entail occasional involvement in the exercise of public authority, while in the Commission proposal restrictions are allowed more generally. Again, there is no EU competence for such a regulation of access to professions by TCNs. It is the Member States' right to determine nationality requirements for nationals from third countries. The EU has to respect the limits of its competences in this regard.

Regarding Recital 36 and corresponding Article 17 par. 4 sub. 3, the Parliament proposes to list more in detail that professional and "occupational diplomas, certifications and other qualifications" should be recognised in the same way as those of EU citizens. The position of the Parliament is in line with the one of the Commission on the principle of equal treatment as applied in case of movement to a second Member State, and therefore, the CCBE comments above regarding the potential impact on LED remain valid.

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