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**REPORT FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN
PARLIAMENT**

**on the application of Directive 2005/71/EC on a specific procedure for admitting third-
country nationals for the purposes of scientific research**

1. INTRODUCTION

Council Directive 2005/71/EC on a specific procedure for admitting third-country nationals for more than three months for the purpose of scientific research (hereinafter 'the Directive')¹ was the fourth legislative instrument in the field of legal migration after the Treaty of Amsterdam introduced the competence to legislate in this field. After consultation of the European Parliament, it was adopted on 12 October 2005 by unanimity by the Council. Denmark and the United Kingdom are not bound by the Directive.

The overall aim of the Directive is to reduce obstacles to the entry and residence in the EU of third-country national researchers (hereinafter 'researchers') and to grant them intra-EU mobility rights. The Directive introduced a mechanism which was new to the then existing EU acquis in the area of migration. Specifically-approved research organisations could conclude hosting agreements with researchers on the basis of which a researcher would no longer require a work permit in addition to a residence permit.

This report assesses the application of the Directive². It is based on a study prepared for the Commission³, as well as other sources including ad-hoc queries from the European Migration Network⁴ and discussions with Member States. Member States have had the opportunity to review and update the factual information on their respective countries.

2. MONITORING AND TRANSPOSITION

Member States had to transpose the Directive by 12 October 2007 (Art. 17), and communicate this information to the Commission. Between 2007 and 2011 the Commission held meetings with Member States to discuss questions on the implementation and interpretation of the Directive.

In 2007, the Commission launched infringement proceedings under Article 258 (ex-226) of the Treaty on the Functioning of the European Union against 17 Member States for not having implemented the Directive in time, or for not having properly informed the Commission of the adoption of national legislation implementing the Directive. Since then, all Member States have gradually adopted transposition measures, and infringements proceedings for non-communication have been closed.

3. COMPLIANCE OF THE TRANSPOSITION MEASURES

3.1. Definitions (Art. 2)

Article 2 of the Directive defines 'research', 'research organisation' and 'researcher'. While a majority of Member States have defined 'research' and 'research organisation' in line with the Directive, less than half of Member States have done so for the definition of 'researcher'. To

¹ OJ L 289/15 of 03.11.2005

² As called for under Article 16 of the Directive

³ By the International Centre for Migration Policy Development ICMPD

⁴ Available from <http://www.emn.europa.eu> under 'Ad-hoc queries'

complete the European Research Area and increase the attractiveness of Europe as a research destination, it is important that all Member States interpret and apply the definitions in a uniform way.

3.2. Scope (Art. 3)

The Directive applies to third-country nationals who apply to be admitted to the territory of a Member State for the purpose of carrying out a research project. 12 Member States have defined the scope in the same way as the Directive⁵. BE, EE, IE, FR, IT, AT, PT and RO do not incorporate all elements of the scope, while no explicit transposition measures have been identified in ES, LV, LT, NL and SI. In practice this does not seem to prevent third-country national researchers from availing themselves of the benefits of the Directive.

3.3. More favourable provisions (Art. 4)

Some Member States have signed bilateral and/or multilateral agreements offering more favourable conditions to particular third-country nationals than those foreseen in the Directive. The main purpose of these agreements is to determine the applicable social security legislation and to ensure portability of social security.

3.4. Research organisations (Art. 5 and 6)

Approval of research organisations (Art. 5)

Art. 5 (1) lays down the requirement for research organisations to be specifically approved in order to employ researchers. Member States decide on a specific national approval procedure⁶. The duration of the approval shall not be less than five years and can be shortened only in exceptional cases (Art 5. (2)). These provisions are complied with in most Member States⁷.

LV, LT and PT have only a general procedure, i.e. one not specific to the Directive, to accredit educational/research institutions. Generally, this practice constitutes more favourable provisions because national research organisations do not have to undergo an additional approval procedure in order to admit researchers under the Directive. Other Member States (EL, FR and AT) consider as approved all domestic public universities and require approval only for other categories of organisations. In SI there are no provisions on the duration of the approval granted and the approving authority has the right to examine at any time whether the research organisation still fulfils the initial conditions. This is not compliant with the Directive.

Art. 5(3) and (4) grant Member States discretion to require a 'written undertaking' from research organisations that they would bear the costs for any irregular stay and return of a researcher, as well as a confirmation that the research work has been carried out⁸. DE, CY, LU, MT, AT, PL, RO, SI and SK have made use of these two options. BE, CZ, EL, IT, LT

⁵ BG, CY, CZ, DE, EL, FI, HU, LU, MT, PL, SE and SK.

⁶ In most Member States Ministries of Education or Research or its subordinated institutions grant approval, Ministries of the Interior are only rarely involved.

⁷ BE, BG, CZ, DE, EE, IE (not transposed in the law, but as an administrative procedure), ES, FR, IT, CY, LU, HU, MT, NL, AT, PL, RO, SK, FI and SE.

⁸ within two months of the date of expiry of the hosting agreement

HU and NL have transposed only the provision on illegal stay and return, while IE and FI have transposed only the requirement to confirm that the work has been carried out. ES, FR, PT and SE did not transpose any of these provisions. BG, EE and LV use the general wording of the respective immigration laws, treating research organisations as sponsors that are committed to pay all costs in case of an illegal stay.

The obligation for Member States to publish and regularly update the list of approved research organisations (Art. 5(5)) was transposed in 19 countries⁹. While in EE, IE, IT, LT and PT there are no legal obligations to publish the list, in practice it is available on the website of the national approving authority. Some Member States publish the list only in official documents which can be difficult to access. 'Regular update' is interpreted in different ways, with some updates being done only on an annual basis.

Under Art. 5(6) and (7) Member States may lay down specific conditions for refusing to renew or for withdrawing the approval of research organisations, as well as consequences for hosting agreements and researchers' residence permits¹⁰. 14 Member States have transposed both provisions¹¹, whereas no specific consequences for the refusal to renew or the withdrawal of the approval of research organisations are regulated in BE, BG, IE, HU, IT, MT, AT, SI and SE. The provision has not been transposed by LT and PT.

3.5. Hosting agreement between a research organisation and a researcher (Art. 6)

In the hosting agreement the researcher undertakes to complete the research project and the research organisation undertakes to host the researcher for that purpose (Art. 6(1)). Member States have addressed this provision in different ways, with the majority of countries applying only the hosting agreement¹², others requiring an employment contract instead of or in addition to the hosting agreement (BE, EE, IE, ES, IT, AT, PL¹³), while LT and PT require only an employment contract.

Art. 6(2) obliges research organisation to check, before signing the hosting agreement, the purpose and duration of the researcher's project and the financial resources to carry it out, her/his qualifications, sufficient monthly resources without recourse to the Member State's social assistance system, and sickness insurance. The hosting agreement must also specify the legal relationship and the working conditions of the researcher. This provision was correctly transposed in most Member States¹⁴. AT does not regulate the need to specify the legal relationship and working conditions of researchers in the hosting agreement, given that it applies employment contracts, while LT, PT and SI do not regulate the examination of the purpose and duration of the research by the research organisation, availability of financial resources and the researcher's qualification.

Art. 6(3) gives Member States discretion to regulate the need for research organisations to provide the researcher with an individual statement of financial responsibility for the costs

⁹ BE, BG, CZ, DE, EL, ES, CY, LV, LU, MT, NL, AT, PL, RO, SI, SK, FI and SE.

¹⁰ During the background research carried out for this report no cases of withdrawal have been identified.

¹¹ CZ, DE, EE, EL, ES, FR, CY, LV, LU, NL, PL, RO and SK.

¹² BG, CZ, DE, EL, FR, CY, LV, LU, HU, MT, NL, RO, SI, SK, FI and SE.

¹³ PL requires a mix of hosting agreement and employment contract, in the form of a hosting agreement signed between the research organisation and the researcher as an employment contract, contract of mandate or task-specific contract.

¹⁴ BE, BG, CZ, DE, EE, IE, EL, ES, FR, IT, CY, LV, LU, HU, MT, NL, PL, RO, SK and SE.

that would be incurred by public funds should there be an illegal stay and return. 10 Member States have transposed this optional clause¹⁵.

Art. 6(4) provides for the lapsing of the hosting agreement if a researcher is not admitted to the country or if the legal relationship between the researcher and the research organisation is terminated. This is compliant in most Member States¹⁶. IT directly stipulates the lapse of the hosting agreement as a consequence of the researcher not being granted a residence permit. The transposition is incomplete in EE and FR, where the lapsing of researchers' residence permits is regulated rather than the lapsing of their hosting agreements. DE and PL regulate the lapse of the hosting agreement in cases of non-admission of researchers to the country, without regulating the termination of the legal relationship between researchers and research organisations. No transposition provisions are foreseen in LT, AT and PT.

Art. 6(5) obliges research organisations to promptly inform the relevant domestic authorities of any occurrence likely to prevent the implementation of the hosting agreement. This provision is transposed and compliant in the majority of Member States¹⁷. In EE, LV and NL the general obligation of notification of the sponsor under immigration law applies if the third-country national no longer meets the conditions under which the permit was granted. The provision has not been transposed in FR, IT¹⁸, LT and PT.

3.6. Admission, residence and family reunification (Art. 7, 8, 9 and 10)

Conditions for admission (Art. 7)

Art. 7 lays down the conditions for admission of researchers. Transposition is compliant in almost all Member States. They either created a specific 'third-country national researcher' category, or considered them under general immigration law. Generally Member States consider researchers as bona fide applicants and offer them more favourable conditions than other categories of immigrants.

Paragraph 2 allows Member States to check the terms upon which a hosting agreement has been based and concluded, an option which only BE, BG, EL, CY, LU and NL made use of. Generally it appears that if there are doubts about the application, most immigration authorities check the validity and the terms of the hosting agreement.

Paragraph 3 obliges Member States to admit researchers once the necessary checks have been carried out and all requirements have been positively verified. The majority of Member States¹⁹ has clearly transposed this provision. The lack of conditions specified in other Member States' national legislation in terms of admitting researchers to their territory in order to pursue a research activity under a hosting agreement could potentially hinder the access of researchers, since authorities may decide at their discretion whether or not to admit the researcher, and this therefore appears not to be fully compliant with the Directive.

¹⁵ CZ, DE, EL, CY, LT, LU, HU, MT, NL and PL.

¹⁶ BE, BG (transposed in the official template for the posting agreement), CZ, IE, EL, ES, CY, LV, LU, HU, MT, NL (general labour legislation applies), RO, SI, SK, FI and SE.

¹⁷ BE, BG, CZ, DE, IE, EL, ES, CY, LU, MT, AT, PL, RO, SI, SK, FI and SE.

¹⁸ However, in practice research organisations in IT are under the obligation to notify the relevant immigration authorities if the implementation of the hosting agreement is not possible.

¹⁹ CZ, DE, EE, IE, EL, ES, FR, CY, LT, LU, HU, MT, PL, RO, FI and SE.

Duration of residence permit (Art. 8)

Art. 8 obliges Member States to issue a residence permit for at least one year and to renew it if the conditions are still met. If the research project is scheduled to last less than one year, the permit shall be issued for the duration of the project. BG, DE, CY, LT, LU, MT, PL, FI and SE transposed the Directive literally. In CZ, EE, AT, PT and SK the residence permit is granted for up to two years, in EL and IT for the duration of the research project which is also the case in BE, ES, LV, HU NL and RO, (with a maximum of five years for ES and HU). In FR, renewal is for one year and limited to a maximum of four years and in SI for the duration of the hosting agreement, but for no longer than one year. The duration is not specified in IE.

Family members (Art. 9)

Art. 9 facilitates family reunification by issuing residence permits to researchers' family members for the same duration as for the researchers themselves, with more favourable conditions than under the family reunification Directive²⁰. Member States may not impose the condition of the researcher having resided in that Member State for a minimum period of time before family members can join him/her, therefore allowing immediate family reunification and also enabling researchers to accept short-term projects and/or to be mobile.

Most Member States have no specifications in the law that family reunification is dependent on the requirement of a minimum period of residence by the researcher. ES, CY and SI have used the exact wording of the Directive, while the other countries have transposed this provision by not including the obligation of a minimum residence period in the list of the requirements for family reunification.

Almost all Member States²¹ have established the same duration of validity of the residence permit for family members as for the researcher. Most countries provide a residence permit with the right to work. LU has not regulated the duration of the residence permit granted to researchers' family members, although in practice it appears that the duration of a permit granted to a family member is the same as that of the researcher. In FI, family reunification is possible only when the sponsor (researcher) has been issued a continuous or permanent residence permit²².

Withdrawal or non-renewal of the residence permit (Art. 10)

Art. 10 allows Member States to withdraw or refuse to renew the residence permit issued to researchers and to define the particular conditions under which a permit can be withdrawn or a renewal can be refused, including the fraudulent acquisition of the permit, reasons of public

²⁰ Under Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification Member States may require the sponsor to have stayed lawfully in their territory for a period not exceeding two years, before having his/her family members join him/her.

²¹ BE, BG, CZ, DE, EE, IE, EL, ES, FR, IT, CY, LV, LT, HU, MT, NL, AT, PL, PT, RO, SI, SK and SE.

²² As during the research work for this report no third-country national researchers were pursuing research activities in FI under a hosting agreement, it was not possible to gather information on the functioning of the Finnish procedures on family reunification.

policy, public security or public health. All Member States have regulated these conditions in their national legislation²³.

3.7. Researchers' rights (Art. 11, 12 and 13)

Teaching (Art. 11)

Art. 11 entitles researchers to teach in accordance with national legislation, although a maximum number of hours or days spent on this activity may be set by Member States. The national transposition provisions are compliant in most countries²⁴.

Some Member States (BE, EE, IE, LU FI and SE) have no clear provisions regulating the right to teach; however, since researchers under the Directive are exempt from a work permit, one may assume that teaching is permitted. In IT teaching is allowed only in relation to the research project set out in the hosting agreement. In LV teaching is allowed if this is expressly stipulated in the hosting agreement.

Equal Treatment (Art. 12)

Researchers admitted under the Directive are entitled to equal treatment with nationals in a number of areas: recognition of diplomas and professional qualifications, working conditions, social security benefits, tax benefits and access to goods and services. EL, CY, MT, PT and RO have used the wording provided by the Directive. A number of countries²⁵ made use of general anti-discrimination laws that prohibit discrimination on grounds such as sex and racial or ethnic origin. SI applies a combination of specific equal treatment provisions addressed particularly to third-country national researchers and general anti-discrimination law. It is not entirely clear whether the application of a general prohibition of discrimination fully meets the requirements of equal treatment under the Directive.

In BE not all aspects of equal treatment have been addressed in the transposition²⁶. The equal treatment provisions are not transposed in AT.

In practice, at least as far as the results of the survey of researchers admitted under the Directive are concerned, they do not seem to experience discrimination or disadvantages.

Mobility between Member States (Art. 13)

Researchers admitted under the Directive are allowed to carry out part of their research in another Member State. If the researcher stays in another Member State for up to three months, the research may be carried out on the basis of the hosting agreement concluded in the first Member State²⁷. If the researcher stays in a second Member State for more than three months, this Member State may require a new hosting agreement to carry out the research on its

²³ No case has been identified where a researcher's residence permit had been withdrawn. However, cases of non-renewal were identified. For example 3% of all applications for BE and 22% of all applications for NL.

²⁴ BG, CZ, DE, EL, ES, FR, LT, MT, NL, AT, PL and PT; with time limits in CY, HU, RO, SI and SK.

²⁵ BG, CZ, DE, EE, IE, ES, FR, IT, LV, LT, LU, HU, NL, PL, SK, FI and SE.

²⁶ The requirement for recognition of qualifications has not been transposed.

²⁷ The only conditions foreseen are that he/she has sufficient resources in the other Member State and is not considered as a threat to public policy, public security or public health in the second Member State.

territory. Where legislation stipulates a visa or residence permit prior to mobility, this shall be granted in a timely manner.

Mobility of researchers has been incorporated into national legislation by 17 Member States²⁸. In the other Member States, national legislation does not explicitly stipulate that researchers who have been issued a permit in another Member State can work on their territory without an additional work permit. This may result in legal uncertainty which will hinder the right to intra-EU mobility and may qualify as not compliant.

3.8. Procedure and transparency (Art. 14 and 15)

Applications for admission (Art. 14)

Art. 14 obliges Member States to determine whether applications for residence permits are to be made by the researcher or by the research organisation concerned (1). It further states (2) that while applications shall be considered and examined when the researcher is residing outside the Member State to which he/she wishes to be admitted, Member States may accept an application submitted from their territory (3). Paragraph 4 requires Member States to grant an applicant who meets the conditions every facility to obtain the requisite visas.

Most countries require researchers to make the application themselves²⁹, with the exception of ES where it is the research organisation. Both options are possible in IT, CY, LT and SI.

Initial applications for admission are considered and examined while the applicant is still residing outside the territory of the Member State concerned in BG, EE, ES, CY, LU, SI, FI and SE. They are examined while the researcher is within the territory of the Member State concerned in DE, IE, EL, FR, IT and PT. Both options are possible in BE, CZ, LV, LT, HU³⁰, MT, NL, AT, PL, RO³¹, SK and FI.

Whereas in a number of Member States³² facilities to help obtain the requisite visa are provided, others have not provided them.

Procedural safeguards (Art. 15)

Member States are required to adopt a decision on a researcher's admission as soon as possible and - where appropriate - to provide for accelerated procedures (1). Transposition is fully compliant in most countries³³, with some using the wording of the Directive whereas others set explicit time limits (for example seven working days in BG, or within two weeks in NL). In DE, IE, LT, LU and PL, no particular facilitation or acceleration is foreseen³⁴.

Paragraph 2 states that consideration of an application may be suspended where the information provided is inadequate, and obliges the competent authorities to inform the

²⁸ BG (draft legislation), CZ, DE, EL, ES, FR, IT, CY, LT, LU, HU, MT, PL, RO, SI, SK and FI.

²⁹ BE, BG, CZ, DE, EE, IE, EL, FR, LV, LU, HU, MT, NL, AT, PL, PT, RO, SK, FI and SE.

³⁰ Applications may be submitted within the territory only under special circumstances.

³¹ Applications may be submitted within the territory by certain categories of researchers only.

³² BE, BG, CZ, DE, EE, IE, ES, FR, IT, CY, LT, HU, MT, AT, SI and SE.

³³ BE, BG, CZ, EE, EL, ES, FR, IT, CY, LV, HU, MT, NL, PT, RO, SI, SK, and FI.

³⁴ Some national authorities argue that as long as the general immigration procedures are effective and efficient, there is no need to introduce an accelerated procedure specifically for researchers.

applicant of any further information they need. CZ, DE, EL, CY, LU, HU, MT, AT, SI, SK and SE have specifically regulated the provision.

When an application for a residence permit is rejected, researchers shall be notified about the decision as well as about the procedures for possible redress and the time limit for taking action (3). The procedures are compliant in most Member States³⁵.

Where an application for a residence permit is rejected or a residence permit withdrawn, the researcher concerned has the right to mount a legal challenge before the national authorities concerned (4). So far no substantive case law relevant to the implementation of this article has been identified.

4. CONCLUSIONS AND STEPS TO BE TAKEN

The legal analysis shows that Member States have transposed most of the key elements of the Directive, be it the approval of research organisations, hosting agreements or application procedures. Yet there is a clear need for improvements - through enhanced transposition, possible amendments to the Directive and better guidance and information provision.

The reinforced Global Approach to Migration and Mobility (GAMM)³⁶ provides an appropriate context to strengthen the application of the Directive. The partnership frameworks under the GAMM, in particular mobility partnerships, will offer opportunities to attract researchers from key partner regions such as the Southern and Eastern Neighbourhood³⁷. The need to improve and promote the Directive is underlined also by the low numbers of researchers admitted under the Directive (6,945 in 2010, many coming from India, China, the United States, the Russian Federation and Japan³⁸). This is in stark contrast to the challenges at stake - in order to meet the Europe 2020 target of increasing R&D investment to 3% of GDP, one million additional researchers will be needed³⁹. The Council calls for larger numbers of talented people to be attracted to and encouraged to remain within the European Research Area⁴⁰.

Attention should also be given to the objective set in the Strategy for equality between women and men 2010-2015⁴¹, as there is still a large gender imbalance among researchers.

Improvements can be made in several ways. Member States' effective implementation of the Directive is paramount, in particular by providing clear and unambiguous definitions of researchers' rights, safeguarding them in the event of the withdrawal of a research organisation's approval, and by making clear distinctions between permits for researchers and other types of permits. Basic definitions such as 'researcher' and 'research organisation' need to gain a uniform understanding in all Member States bound by the Directive. The report also points to a number of areas in which the Directive may need to be amended. These include

³⁵ BE, CZ, DE, EE, EL, FR, IT, CY, LV, LT, LU, HU, MT, NL, AT, PL, PT, RO, SI, SK and SE.

³⁶ COM (2011) 743 final

³⁷ COM (2011) 248 final

³⁸ EU aggregate figures from Eurostat for Member States for which data are available.

³⁹ Europe 2020 Flagship Initiative Innovation Union. COM(2010) 546 final

⁴⁰ Council Conclusions on Innovation Union for Europe, 3049th Competitiveness Council meeting Brussels, 26 November 2010

⁴¹ COM(2010) 491, SEC(2010) 1079 and SEC(2010) 1080

clear definitions regarding the legal quality and format of hosting agreements, a more uniform way of updating and publishing the list of research organisations and possibly also the laying down of time limits for deciding on an application.

Provision of information and raising awareness of the possibilities the Directive offers are important and the Commission is playing its part, mainly through the EURAXESS portal and the network of EURAXESS Service Centres as well as the Immigration Portal. Moreover, the mobility partnerships and other cooperation tools and partnership frameworks under the GAMM will be used to further improve the provision of information and awareness raising to priority partner countries.