

# EU Migration Law Updates 2022

Immigration law is often viewed as an area where nation-states are free to legislate independently and at their own discretion based purely on national interests. However, as the European Community evolved and became the European Union (EU), and in line with the bloc's deepening integration, member states gradually agreed on minimum standards and harmonisation on immigration. For example, at the start of the Covid-19 pandemic, member states decided to close their internal borders based on national interests, while subsequent agreement at EU level led to a gradual reopening of internal borders and common entry requirements at least for the Schengen area<sup>(1)</sup>. Another more recent example is the unanimous decision made by EU member states to use the Temporary Protection Directive as a means to create a common legal residence status for Ukrainian refugees fleeing the war in Ukraine.

While the existence and impact of EU asylum legislation on national immigration policy is well known and often subject to public debate, EU legislation on labour migration is generally subject to less scrutiny. However, this does not mean that the impact of EU laws on labour migration is less significant. In particular, over the past two decades, the EU has steadily increased legislative measures in an effort to make the bloc an attractive place of employment for global talent and in turn drive the economies of its constituent member states.

The EU's executive body, the European Commission, generally proposes legislation that fosters harmonisation in specific areas of labour migration and these are then discussed and negotiated in detail by EU member states. As a result some laws end up being watered down as member states fail to agree on certain contentious issues, such as labour market testing and salary thresholds. However, the European Commission's efforts will always continue, following a trend of further harmonisation that can be expected to continue in future.

In 2020, the European Commission published its plans in the field of immigration in its New Pact on Asylum and Migration. A key pillar of the plans is the Skills and Talent Package, which is specifically intended to address key labour market issues across the EU. Among other measures, this package contained a commitment by the European Commission to revamp existing legislation on labour migration to tackle the skills shortage in the EU.

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## EU Blue Card

In late 2021, a first key step was taken as the amendment of the EU Blue Card Directive was rubber stamped by EU member states. The EU Blue Card was originally introduced in 2009 in order to address talent shortages across the EU as the European equivalent to the US Green Card. The purpose was to make it easier for non-EU/EEA/Swiss nationals to work freely in multiple EU member states within the European Union. However, studies over several years showed that use of the EU Blue Card category was generally low across member states, and therefore a revision was proposed by the European Commission in 2016. However, the negotiations between member states on some key aspects of the revision ended in a deadlock. It is under the Skills and Talent Package that the negotiations were revived

under the leadership of the European Commission and, following agreement by member states, the review Directive entered into force on 17 November 2021. Member states have until 17 November 2023 to implement the amended Directive into national legislation.

The aim of the new Directive is to simplify the procedures and qualifying criteria, widen the scope and to strengthen the rights of EU Blue Card holders.

The most important changes are:

- Facilitated possibility for EU Blue Card holders to undertake business activities in other member states
- Minimum duration of an employment contract reduced from 12 months to 6 months
- Currently Blue Card holders are allowed to move to another member state after a continuous stay of 18 months. This will be reduced to 12 months
- Recognition of professional experience in addition to or instead of educational qualifications
- Standard validity of the Blue Card to be increased from 12 months to 24 months, or the length of the contract plus three months
- Reduction of processing time from 90 days to 60 days (or 30 days for employers included in a national trusted employer scheme)
- Greater flexibility in respect of the salary threshold, which can be between 1 and 1.6 times the average gross salary of the member state, instead of 1.5.

Employers and non-EU/EEA/Swiss employees will likely welcome this increased flexibility and simplified qualifying criteria. Yet it remains to be seen how EU member states will implement the revised Directive for EU Blue Card holders and their family members. This is despite the fact that the final text was watered down in order to break the deadlock. For example, the scope of activities that EU Blue Card holders can perform in other member states without a work permit for up to 90 days are generally already permitted for all business visitors based on national law regardless of nationality.

On 27 April 2022, another important milestone was reached in the EU's efforts to attract key talent to its labour market when the European Commission published its proposals to amend two further pieces of EU legislation on labour migration: the Single Permit Directive and the Long-term Residence Directive.

## Single Permit Directive

The Single Permit Directive entered into force in 2011, and ensured that individuals and employers applying for residence and work authorisation in a member state would be able to benefit from more simplified and efficient processes. For example, applicants would only need to submit a single application for combined entry, residence and work authorisation and, after approval, a single approval should be issued.

The European Commission has now submitted proposals aimed at making those rules and processes more efficient.

The main proposed changes are:

- The possibility for individuals to apply from their home country outside the EU as well as in-country
- A maximum of 4 months processing time, including labour market testing and issuance of an entry visa (if applicable)
- The possibility for the employee to change employer during the permit's validity
- The possibility for the employee to keep the permit for at least another 3 months in the event of unemployment
- New provisions on penalties against employers in case of violations of working conditions, freedom of association and access to social security benefits and to introduce complaints mechanisms.

These would be welcome changes, as shorter processing times, simplified requirements and increased employee flexibility ensure that non-EU nationals can be hired more easily for positions in the EU. Nevertheless, it remains to be seen whether EU member states will agree with these proposals or whether the negotiations will be as complex as for the revised EU Blue Card.

## Long-Term Residence Directive

The EU's Long-term Residence (LTR) Directive entered into force in 2003, and in essence ensured harmonisation of requirements and processes for issuance of long-term residence status for non-EU/EEA/Swiss nationals. For example, the Directive specifies that LTR status must be granted after continuous and legal residence of at least 5 years in the territory of the member state, a maximum processing time of 4 months from date of submission, and common standards for loss of the status as a result of residence outside the member state of issuance or the territory of the EU. In addition, the Directive sets out general conditions for holders of LTR status in one member state to apply for residence in another member state.

However, the Directive is somewhat limited in its effect given that most member states require individuals to pass civic integration and language tests in order to obtain LTR status. In addition, the Directive allows member states to apply labour market tests to those seeking to work and

reside in another member state. As a result, the Directive is not widely used in member states, who are still permitted to issue LTR permits on national grounds, and does not promote intra-EU mobility effectively.

The EU Commission has therefore submitted proposals for an amended LTR Directive.

The main proposed changes are as follows:

- Periods of residence in other member states will be able to be counted towards the cumulative 5 years required to obtain LTR status
- No labour market testing required for persons with an LTR status in one member state who wish to reside and work in another member state
- No labour market testing required for family members of LTR status holders in the member state where the main applicant holds that status
- Facilitated family reunification requirements, and family members of an LTR permit holder that were born in the member state of issuance automatically acquire LTR status
- Reduction of processing time from 4 months to 90 days
- Possibility to apply for LTR status in a member state other than where the status was issued after 3 years residence (instead of 5 years)
- Permitted absence from the EU without losing LTR status increased from 1 year to 2 years.

If these changes are adopted by EU member states, it will provide additional grounds for intra-EU mobility for holders of LTR status. It will also ensure potential applicants will not be limited in their movement within the EU due to a fear of losing accumulated periods of residence in different member states. However, civic integration and language requirements will still generally apply for applicants, which means that it is likely potential applicants will seek to stay within a particular language region, if not a particular member state, for a significant period of time before applying for LTR status.

Interestingly, a new provision has been added, which specifies that periods of residence in a member state on the grounds of investment will not count towards the cumulative period required to obtain LTR status. This is clearly aimed at certain member states' investor and 'golden' visa schemes that have been subject to criticism amid reports of abuse. It is likely that many member states will welcome this change.

As with the proposals on the Single Permit Directive, it also remains to be seen whether member states will adopt the proposals. In this respect there may be some additional challenges as individual member states may seek to protect their existing national immigration policies on long-term residence.

## ETIAS And EES

While not specifically related to labour migration, the EU's plans to implement new systems to regulate entry and exit from the Schengen area by non-EU nationals are well documented. Specifically, in late 2022 and early 2023 the EU will implement the European Travel Information and Authorisation System (ETIAS) and the new Entry and Exit System (EES). These measures are the outcome of initial proposals from 2016 by the European Commission under the Agendas on Security and on Migration.

Travellers who are visa-exempt for short stays (up to 90 days in a rolling 180 day period) may currently simply enter the Schengen area on the basis of their passports and will be stamped upon entry and exit. However, once ETIAS goes live, those nationals will generally be required to complete an online registration form prior to travel. The authorisation will be valid for 3 years and will allow them to enter and exit the Schengen area freely as long as the 90 days' stay in 180 days is not exceeded. Travellers will be required to include personal details on the form, including education, occupation, travel history and criminal antecedents (if applicable), and pay a fee of EUR 7 per person.

While there are some exceptions, such as for holders of an EU entry visa or residence permit and for British citizens with a valid residence permit issued under the EU-UK Withdrawal Agreement, ETIAS will generally apply to all visa exempted non-EU nationals travelling to the Schengen area.

In addition to ETIAS, the EU will also implement the new Entry and Exit System (EES), which is an IT system that will digitally register the entry and exit of most EU nationals travelling to the Schengen area, replacing the current manual process of passport stamping. While holders of an EU entry visa or residence permit and some other specific groups will not be subject to the EES, it will otherwise apply to all non-EU nationals travelling to the Schengen area.

The main aim of ETIAS and EES is to more efficiently and diligently manage cross-border movement to and from the EU and prevent cross-border crime and terrorism. While it will practically impact many travellers who are currently permitted to enter the Schengen area simply on the basis of their passports without prior registrations being required, it is not expected that it will restrict travel for any particular group.

## Closing Remarks

The EU's Skills and Talent Package aims to make the EU more attractive for high-, medium- and low-skilled talent across a variety of sectors. In general, the measures that amend the Directives discussed in detail above include increasing harmonisation across

EU member states, simplifying procedures and promoting intra-EU mobility. Given that recent reports have shown that the EU is facing significant challenges in attracting key skills that are needed across different regions and industries, it is likely that such changes will be welcomed by businesses and employers operating across the EU.

Conversely the implementation of ETIAS and EES will likely be viewed as increasing the administrative burden for persons travelling to the EU. However, the argument can be made that this burden is necessary and acceptable in order to control the EU's borders and tackle crime and terrorism. Whether this will

indeed be successful remains to be seen. In the meantime, employers should ensure their short-term and business travellers are aware of the new requirements so that they can continue to travel without disruption.

**Reference:**

(1) *The Schengen area comprises Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, Switzerland.*



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