Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (recast)

DIRECTIVE (EU) 2016/801 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 11 May 2016

on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing

(recast)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular points (a) and (b) of Article 79(2) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee[(1)],

Having regard to the opinion of the Committee of the Regions[(2)],

Acting in accordance with the ordinary legislative procedure[(3)],

Whereas:

(1) A number of amendments are to be made to Council Directives 2004/114/EC[(4)] and 2005/71/EC[(5)]. In the interests of clarity, those Directives should be recast.

(2) This Directive should respond to the need identified in the implementation reports on Directives 2004/114/EC and 2005/71/EC to remedy the identified weaknesses, to ensure increased transparency and legal certainty and to offer a coherent legal framework for different categories of third-country nationals coming to the Union. It should therefore simplify and streamline the existing provisions for those categories in a single instrument. Despite differences between the categories covered by this Directive, they also share a number of characteristics which makes it possible to address them through a common legal framework at Union level.

(3) This Directive should contribute to the Stockholm Programme's aim of approximating national legislation on the conditions for entry and residence of third-country nationals. Immigration from outside the Union is one source of highly skilled people, and students and researchers are in particular increasingly sought after. They play an important role in forming the Union's key asset, human capital, and in ensuring smart, sustainable and

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inclusive growth, and therefore contribute to the achievement of the objectives of the Europe 2020 Strategy.

(4) The implementation reports on Directives 2004/114/EC and 2005/71/EC pointed out certain insufficiencies, mainly in relation to admission conditions, rights, procedural safeguards, students' access to the labour market during their studies and intra-EU mobility provisions. Specific improvements were also considered necessary regarding the optional categories of third-country nationals. Subsequent wider consultations have also highlighted the need for better job-seeking possibilities for researchers and students and better protection of au pairs who are not covered by Directives 2004/114/EC and 2005/71/EC.

(5) For the gradual establishment of an area of freedom, security and justice, the Treaty on the Functioning of the European Union (TFEU) provides for measures to be adopted in the fields of asylum, immigration and the protection of the rights of third-country nationals.

(6) This Directive should also aim at fostering people-to-people contacts and mobility, as important elements of the Union's external policy, notably vis-à-vis the countries of the European Neighbourhood Policy or the Union's strategic partners. It should allow for a better contribution to the Global Approach to Migration and Mobility and its Mobility Partnerships which offer a concrete framework for dialogue and cooperation between the Member States and third countries, including in facilitating and organising legal migration.

(7) Migration for the purposes set out in this Directive should promote the generation and acquisition of knowledge and skills. It constitutes a form of mutual enrichment for the migrants concerned, their country of origin and the Member State concerned, while strengthening cultural links and enhancing cultural diversity.

(8) This Directive should promote the Union as an attractive location for research and innovation and advance it in the global competition for talent and, in so doing, lead to an increase in the Union's overall competitiveness and growth rates while creating jobs that make a greater contribution to GDP growth. Opening the Union up to third-country nationals who may be admitted for the purpose of research is also part of the Innovation Union flagship initiative. Creating an open labour market for Union researchers and for researchers from third countries was also affirmed as a key aim of the European Research Area, a unified area in which researchers, scientific knowledge and technology circulate freely.

(9) It is appropriate to facilitate the admission of third-country nationals applying for the purpose of carrying out a research activity through an admission procedure which does not depend on their legal relationship with the host research organisation and by no longer requiring a work permit in addition to an authorisation. This procedure should be based on collaboration between research organisations and the immigration authorities in Member States. It should give the former a key role in the admission procedure with a view to facilitating and speeding up the entry of third-country nationals applying for the purpose of carrying out a research activity in the Union while preserving Member States' prerogatives with respect to immigration policy. Research

organisations, which Member States should have the possibility to approve in advance, should be able to sign either a hosting agreement or a contract with a third-country national for the purpose of carrying out a research activity. Member States should issue an authorisation on the basis of the hosting agreement or the contract if the conditions for entry and residence are met.

(10) As the efforts to be made to achieve the target of investing 3 % of GDP in research largely concern the private sector, this sector should be encouraged, where appropriate, to recruit more researchers in the years to come.

(11) In order to make the Union more attractive for third-country nationals wishing to carry out a research activity in the Union, their family members, as defined in Council Directive 2003/86/EC[(6)], should be allowed to accompany them and benefit from intra-EU mobility provisions. Those family members should have access to the labour market in the first Member State and, in the case of long-term mobility, in the second Member States, except in exceptional circumstances such as particularly high levels of unemployment where Member States should retain the possibility to apply a test demonstrating that the post cannot be filled from within the domestic labour market for a period not exceeding 12 months. With the exception of derogations provided for in this Directive, all the provisions of Directive 2003/86/EC should apply, including grounds for rejection or withdrawal or refusal of renewal. Consequently, residence permits of family members could be withdrawn or their renewal refused if the authorisation of the researcher they are accompanying comes to an end and they do not enjoy any autonomous right of residence.

(12) Where appropriate, Member States should be encouraged to treat doctoral candidates as researchers for the purposes of this Directive.

(13) Implementation of this Directive should not encourage a brain drain from emerging or developing countries. Measures to support researchers' reintegration into their countries of origin should be taken in partnership with the countries of origin with a view to establishing a comprehensive migration policy.

(14) In order to promote Europe as a whole as a world centre of excellence for studies and training, the conditions for entry and residence of those who wish to come to the Union for these purposes should be improved and simplified. This is in line with the objectives of the agenda for the modernisation of Europe's higher education systems, in particular within the context of the internationalisation of European higher education. The approximation of the Member States' relevant national legislation is part of this endeavour. In this context and in line with the Council conclusions on the modernisation of higher education[(7)], the term ‘higher education’ encompasses all tertiary institutions which may include, inter alia, universities, universities of applied science, institutes of technology, *grandes écoles*, business schools, engineering schools, IUTs, colleges of higher education, professional schools, polytechnics and academies.

(15) The extension and deepening of the Bologna Process launched through the Bologna Joint Declaration of the European Ministers of Education of 19 June 1999 has led to more comparable, compatible and coherent systems of higher education in participating countries but also beyond them. This is because Member States have supported

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the mobility of students and higher education institutions have integrated it in their curricula. This needs to be reflected through improved intra-EU mobility provisions for students. Making European higher education attractive and competitive is one of the objectives of the Bologna Declaration. The Bologna Process led to the establishment of the European Higher Education Area. Its three-cycle structure with easily readable programmes and degrees as well as the introduction of qualifications frameworks have made it more attractive for third-country nationals to study in Europe.

(16) The duration and other conditions of preparatory courses for students covered by this Directive should be determined by Member States in accordance with their national law.

(17) Evidence of acceptance of a third-country national by a higher education institution could include, among other possibilities, a letter or certificate confirming enrolment.

(18) Third-country nationals who apply to be admitted as trainees should provide evidence of having obtained a higher education degree within the two years preceding the date of their application or of pursuing a course of study in a third country that leads to a higher education degree. They should also present a training agreement which contains a description of the training programme, its educational objective or learning components, its duration and the conditions under which the trainee will be supervised, proving that they will benefit from genuine training and not be used as normal workers. In addition, host entities may be required to substantiate that the traineeship does not replace a job. Where specific conditions already exist in national law, collective agreements or practices for trainees, Member States should be able to require third-country nationals who apply to be admitted as trainees to meet those specific conditions.

(19) Trainee employees who come to work in the Union in the context of an intra-corporate transfer are not covered by this Directive, as they fall under the scope of Directive 2014/66/EU of the European Parliament and of the Council[(8)].

(20) This Directive should support the aims of the European Voluntary Service to develop solidarity, mutual understanding and tolerance among young people and the societies they live in, while contributing to strengthening social cohesion and promoting young people's active citenship. In order to ensure access to the European Voluntary Service in a consistent manner across the Union, Member States should apply the provisions of this Directive to third-country nationals applying for the purpose of European Voluntary Service.

(21) Member States should have the possibility to apply the provisions of this Directive to school pupils, volunteers other than those under the European Voluntary Service and au pairs, in order to facilitate their entry and residence and ensure their rights.

(22) If Member States decide to apply this Directive to school pupils, they are encouraged to ensure that the national admission procedure for teachers exclusively accompanying pupils within the framework of a pupil exchange scheme or an educational project is coherent with the procedure for school pupils provided for in this Directive.

(23) Au pairing contributes to fostering people-to-people contacts by giving third-country nationals an opportunity to improve their linguistic skills and develop their knowledge of and cultural links with the Member States. At the same time, third-country national

au pairs could be exposed to risks of abuse. In order to ensure fair treatment of au pairs and address their specific needs, it should be possible for Member States to apply the provisions of this Directive regarding the entry and residence of au pairs

(24) If third-country nationals can prove that they are in receipt of resources throughout the period of their stay in the Member State concerned that derive from a grant, a fellowship or a scholarship, a valid work contract, a binding job offer or a financial undertaking by a pupil exchange scheme organisation, an entity hosting trainees, a voluntary service scheme organisation, a host family or an organisation mediating au pairs, Member States should take such resources into account in assessing the availability of sufficient resources. Member States should be able to lay down an indicative reference amount which they regard as constituting 'sufficient resources' that might vary for each one of the respective categories of third-country nationals.

(25) Member States are encouraged to allow the applicant to present documents and information in an official language of the Union, other than their own official language or languages, determined by the Member State concerned.

(26) Member States should have the possibility to provide for an approval procedure for public or private research organisations or both wishing to host third-country national researchers or for higher education institutions wishing to host third-country national students. This approval should be in accordance with the procedures set out in the national law or administrative practice of the Member State concerned. Applications to approved research organisations or higher education institutions should be facilitated and should speed up the entry of third-country nationals coming to the Union for the purpose of research or studies.

(27) Member States should have the possibility to provide for an approval procedure for respective host entities wishing to host third-country national pupils, trainees or volunteers. Member States should have the possibility to apply this procedure to some or all of the categories of the host entities. This approval should be in accordance with the procedures set out in the national law or administrative practice of the Member State concerned. Applications to approved host entities should speed up the entry of third-country nationals coming to the Union for the purpose of training, voluntary service or pupil exchange schemes or educational projects.

(28) If Member States establish approval procedures for host entities, they should be able to decide to either allow admission only through approved host entities or to establish an approval procedure while also allowing admission through non-approved host entities.

(29) This Directive should be without prejudice to the right of Member States to issue authorisations for the purpose of studies, research or training other than those regulated by this Directive to third-country nationals who fall outside its scope.

(30) Once all the general and specific conditions for admission are fulfilled, Member States should issue an authorisation, within specified time limits. If a Member State issues residence permits only on its territory and all the conditions of this Directive relating to admission are fulfilled, the Member State should grant the third-country national concerned the requisite visa and should ensure that the competent authorities effectively