

**Analysis of the status and of the rights of third-country researchers
Residing and working in an EU Member State**

The note sent on 13 January 2010 by Mr Klapisch to Vice-President Reding outlines the situation and problems encountered by third-country researchers who reside in an EU Member State to carry out a research project. This note covers a number of concerns which touch upon different policy areas, notably research policy, visas, immigration and intellectual property rights. This analysis seeks to address these different concerns and has been drafted by DG JLS with the input of DG Research in non-immigration issues.

I. Immigration Policy

The note stresses the need to attract to the EU third-country researchers in order to meet the targets of the Lisbon Declaration and recalls that the number of researchers in the EU is known to be insufficient to reach these goals and boost EU's position as an international centre for research. The note also highlights the importance of reducing existing obstacles to inward mobility and to improve intra-EU mobility for third-country researchers, as well as of granting them equal conditions in terms of working conditions, social security, tax benefits and other socio-economic rights.

The Commission clearly recognised the above concerns already in 2004, by putting forward proposals for directives and recommendations on the admission of third-country researchers¹. These proposals were negotiated at unanimity in the Council with consultation of the European Parliament and a Council Directive "on a specific procedure for admitting third-country nationals for the purposes of scientific research²" and a Recommendation of the European Parliament and of the Council "to facilitate the issue by the Member States of uniform short-stay visas for researchers from third countries travelling within the Community for the purpose of carrying out scientific research³" were adopted in 2005. Other provisions in the *acquis* on visas concern third-country researchers. The aim of these instruments is to reduce obstacles to the entry and residence of third-country researchers and to grant them intra-EU mobility rights.

A. The Researchers' Directive

The objective of the Directive is "*the introduction of a special admission procedure and the adoption of conditions of entry and residence applicable to third country nationals for stays of more than three months in the Member States for the purposes of conducting a research project under a hosting agreement with a research organisation*⁴".

Member States may retain or adopt more favourable provisions for persons to whom it applies.

¹ COM(2004) 178 final of 16.03.2004.

² Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research, OJ L 289/15 of 3.11.2005.

³ Recommendation of the European Parliament and of the Council of 28 September 2005 to facilitate the issue by the Member States of uniform short-stay visas for researchers from third countries travelling within the Community for the purpose of carrying out scientific research (2005/761/EC), OJ L 289/15 of 3.11.2005.

⁴ Recital 23

It shall be recalled that the researchers' directive has been negotiated at unanimity in the Council and consultation of the European Parliament.

1. Who is covered by this instrument:

Article 2(d) clearly defines who is a researcher for the purposes of this directive: "*researcher* means a third-country national holding an appropriate higher education qualification, which gives access to doctoral programmes, who is selected by a research organisation for carrying out a research project for which the above qualification is normally required". The link with a research organisation in a Member State is therefore fundamental: a third-country researcher coming to the EU to carry out independent research would not be covered by this instrument.

Furthermore, clearly spelled exceptions concern:

1. Doctoral students: doctoral students are excluded as they are considered as falling under the scope of Directive 2004/114/EC on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service⁵. This Directive – that had to be transposed by Member States by January 2007 – sets down common conditions and procedures for the entry and residence of the above categories of third-country nationals, including the possibility for students to move to a second Member State "*to follow in another Member State part of the studies already commenced, or to complement them with a related course of study in another Member State*";
2. Researchers seconded by a research organisation to another research organisation in another Member State.

2. How this admission scheme is designed:

The directive has created a common entry scheme for researchers who will work for a research organisation of one Member State. Its finalities are twofold: on the one hand to simplify entry procedures for third-country researchers, on the other to give responsibility to research organisations in Member States and give them a leading role in the procedure⁶. This is done using the instrument of "hosting agreements":

1. Private and public research organisations shall first be included in a list of "approved research organisations" for each Member State⁷. The approval procedure aims at verifying that applying organisations are actually doing research and are not constituted for the sole reason to abuse of the system and short-circuit immigration legislation. Precise procedures are set out in national legislation and the approval shall be granted for a period of a minimum of five years. In cases where a researcher remains illegally in the territory of the Member State concerned, the research organisation may be held financially responsible for the costs related to his/her stay and return incurred by public funds⁸;

⁵ OJ 2004/114/EC

⁶ Recital 13: "*The specific procedure for researchers is based on collaboration between the research organisations and the immigration authorities in the Member States: it gives the former a key role in the admission procedure with a view to facilitating and speeding up the entry and residence of third-country researchers in the Community while preserving Member States' prerogatives with respect to immigration policing*".

⁷ Article 5.

⁸ Article 7(2) outlines that the Member States may check the terms upon which the hosting agreement has been based and concluded. The research organisation therefore has a responsibility in ensuring the legitimacy of their undertakings.

2. The hosting agreement is signed by the third-country researcher and the research organisation and constitutes the basis of this admission scheme⁹. The directive clearly lists what must be included in a hosting agreement such as the purpose and duration of the research undertaken, the researcher's qualifications in light of these objectives and the legal relationship and working conditions of the researchers. The researcher must further demonstrate sufficient resources during the period of the agreement and sickness insurance cover.
3. A third country national must fulfil all conditions outlined in the directive¹⁰ in order to be admitted as a researcher in the territory of a Member State. Member States are obliged to control all immigration conditions (i.e. travel documents and the fact that the person shall not pose a threat to public policy, security and health), but – contrary to all other legal immigration directives – should in principle rely on research organisations as concerns the terms upon which the hosting agreement has been based and concluded¹¹.
4. A residence permit will be issued to third country researchers for a period of at least one year, with opportunity for renewal if all the aforementioned conditions continue to be met, and the Member State shall grant every facility to obtain the requisite visas. The directive outlines that Member States are responsible for determining whether applications for residence permits are made by the researcher or by the research organisation concerned. Though applications are normally considered and examined when the third-country national is residing outside the territory of the Member State, applications may be made in the territory of the Member State, at the discretion of the Member State in question¹². However, Member States may withdraw or refuse to renew a resident permit when it has been fraudulently acquired, when the conditions of entry are no longer met or for reasons of public policy, public security or public health.
5. A work permit is no longer required in addition to the residence permit. Furthermore, Member States shall not run labour market tests or require the research organisation to prove that no researcher who is an EU national could carry out the research project object of the hosting agreement: in the specific case of researchers, the principle of freedom of research prevails over the principle of EU preference.

In view of the above, it is therefore very important that research organisations based in the EU apply for the approval of the Member State in which they are situated so that they can make use of the special admission procedure and so that researchers coming to carry out a research project in the EU are covered by the Directive's provisions, in particular the equal treatment and the intra-EU mobility provisions.

3. *Rights assigned to Researchers*

The Directive outlines that in order to make the EU more attractive to third-country researchers¹³, they should be entitled to a number of rights:

⁹ Article 6: "*A research organisation wishing to host a researcher shall sign a hosting agreement with the latter whereby the researcher undertakes to complete the research project and the organisation undertakes to host the researcher for that purpose*".

¹⁰ Article 7 – Conditions for Admission

¹¹ In the course of the negotiations in the Council it was made clear that Member States should not check each and every agreement, but this had to be done either randomly or possibly on the basis of risk analysis.

¹² Recital 20: " *Holders of residence permits should be in principle allowed to submit an application for admission while remaining on the territory of the Member State concerned*".

¹³ Recital 15: "*In order to make the Community more attractive to third-country researchers, they should be granted, during their stay, equal social and economic rights with nationals of the host Member State in a number of areas and the possibility to teach in higher education establishments*".

1. Regarding family members¹⁴, conditions for exercising the right to family reunification are to be found in the family reunification directive¹⁵. The researchers' directive does not completely change the system in place, but it establishes two derogations. The most important one is that Member States shall 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 (a possibility in the family reunification directive¹⁶), therefore allowing immediate family reunification. This is very important as it allows third-country researchers to accept also relatively short-term projects and/or to be mobile.
2. Researchers admitted under this directive are entitled to teach in accordance with national legislation, although a maximum amount of hours or day for this activity may be set by the Member States.
3. Researchers admitted under the terms of this directive are entitled to equal treatment with nationals in a number of areas: diploma and professional qualifications recognition, working conditions, social security benefits¹⁷, tax benefits and access to goods and services.¹⁸ This article is very important, above all if read in conjunction with the one on the hosting agreement, where the research organisations shall indicate the legal relationship and the working conditions of the third-country researchers. It means that working conditions, including health and safety at the work place, as well as social security shall be the same for EU nationals and third-country researchers when they are in comparable situations.

Besides the binding provisions of the directive on equal treatment, the European Charter for Researchers states as a general principle that: *"Employers and/or funders of researchers should ensure that researchers enjoy fair and attractive conditions of funding and/or salaries with adequate and equitable social security provisions (including sickness and parental benefits, pension rights and unemployment benefits) in accordance with existing national legislation and with national or sectoral collective bargaining agreements"*.

4. Intra-EU mobility

A researcher, as defined under this directive, is allowed to carry out part of their research in another Member State under the conditions set out in the directive.¹⁹ Different regimes apply according to the length of stay in the second Member State:

1. If the researcher stays in another Member State for a period of maximum three months, the research may be carried out on the basis of the hosting agreement concluded in the first Member State. 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.

¹⁴ Article 9

¹⁵ Council Directive 2006/86/EC of 22 September 2003 on the right to family reunification, OJ L 251 of 3.10.2003, p. 12.

¹⁶ In the family reunification directive Member States may impose a waiting period up to two years.

¹⁷ These benefits concern: sickness, maternity and paternity, invalidity, old-age, survivors', unemployment, pre-retirement and family benefits, benefits in respect of accidents at work and occupational diseases, death grants (article 3 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, applicable as of 1 May 2010 and repealing Council Regulation (EEC) No 1408/71).

¹⁸ Article 12 – Equal Treatment

¹⁹ Article 13 – Mobility between Member States

2. 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 territory. Member States will ensure the facilitation of visa applications in these circumstances.

These provisions intend to contribute to removing obstacles to the mobility of researchers, and to provide them with incentives to continue their research activities in Member States.

5. State of play of transposition and implementation of the directive

The deadline for the implementation of the Researchers Directive was 12 October 2007. All Member States have notified its transposition into national legislation. DG Research, in agreement with DG JLS, will launch a call for tender to carry out a study to examine and report on the legal and practical transposition of the directive by the Member States²⁰. This study will also cover Recommendation 2005/761/EC (cfr. section on visa policy) and should be completed during the second semester of 2011. The Commission will make use of the findings and factual elements of this study to assess whether the Member States have correctly applied the provisions of the Researchers' directive and might propose amendments. Infringements procedures could also be launched where necessary to ensure the compliance with the provisions of the directive.

B. Visa Policy

Several instruments in the field of visa policy are relevant for third-country researchers.

1. Recommendation 2005/761/EC

Recommendation 2005/761/EC of the European Parliament and of the Council to facilitate the issue by the Member States of uniform short-stay visas for researchers from third countries travelling within the Community for the purpose of carrying out scientific research²¹ recommends that the Member States (a) expedite the examination of visa applications from researchers from third countries subject to a visa requirement under Regulation (EC) No 539/2001, (b) promote the mobility of researchers from third countries within the European Union by issuing them with multiple entry visas, (c) facilitate the adoption of a harmonized approach to the supporting evidence, and (d) encourage the issue of visas without administrative fees for researchers, in accordance with the *acquis*.

2. The Common Consular Instructions (CCI)

The Common Consular Instructions (CCI) on visas for the diplomatic missions and consular posts²² set out the current common rules applied by the consular posts of the Schengen States for the examination of visa applications. The CCI take into account Recommendation 2005/761/EC of the European institutions by waiving the visa fee (currently € 60) for researchers from third countries travelling within the Community for the purpose of carrying out scientific research (Annex 12, Rule II.2.).

In accordance with the CCI, Member States may issue a visa valid for one or more entries, provided that the length of a continuous stay or the total length of successive stays does not exceed three months per six-month period. Furthermore, they may issue a multiple entry visa

²⁰ "Invitation to tender N° RTD N°2009/S 246-351921 – Monitoring human resources policies and practices in research and assessing the impact of the "Scientific Visa" package". A first call for tender had been launched in January 2010, but was annulled on 3 March. The call for tender will be revised to take into account Council Conclusions of 2 March 2010 on European researchers' mobility and careers.

²¹ OJ L 289, 3.11.2005.

²² OJ C 326, 22.12.2005.

with a validity period of one year, entitling a three month stay during any half-year, to persons providing the necessary guarantees and persons in whom the Schengen states have shown a particular interest. In exceptional cases, the consulates may issue a visa with a validity period of more than one year but not more than 5 years to certain categories of persons (CCI, Part V). It is for the consular posts of the Schengen States to appreciate the situation of the visa applicant and to decide on issuing multiple entry visa with a long term of validity.

3. *The Visa Code*

The Common Consular Instructions will be replaced by Regulation (EC) No 810/2009 of the European Parliament and of the Council establishing a Community Code on Visas (Visa Code)²³, which will apply from 5 April 2010.

In accordance with Article 16 of this new **Visa Code**, the visa fee shall be waived for researchers from third countries travelling for the purpose of scientific research as defined in the Recommendation 2005/761/EC (cf. above).

This new Visa Code provides for issuing of multiple entry visa with a period of validity between six months and five years to persons who prove the need to travel frequently and/or regularly due to their occupational or family status, such as representatives of civil society organisations travelling for the purpose of educational training, seminars and conferences, and who prove their integrity and reliability, in particular, the lawful use of previous uniform visas, their economic situation in the country of origin and their genuine intention to return (Article 24).

4. *Agreements on visa facilitation*

The agreements on the facilitation of the issuance of visas between the EU and Serbia, former Yugoslav Republic of Macedonia (FYROM), Albania, Bosnia and Herzegovina, Moldova, Ukraine provide for the following facilitations for the citizens of these countries belonging to the category of *persons participating in scientific, cultural and artistic activities, including university and other exchange programmes*:

(a) concerning documentary evidence regarding the purpose of the journey, *the following documents are sufficient for justifying the purpose of the journey to the other Party: (..) a written request from the host organization to participate in those activities* (Article 4 of the Visa Facilitation Agreements (VFAs));

(b) concerning the issuance of multiple entry visas, diplomatic missions and consular posts of the Member States shall issue multiple-entry visas with the term of validity of up to one year to this category of persons, provided that during the previous year they have obtained at least one visa, have made use of it in accordance with the laws on entry and stay of the visited State and that there are reasons for requesting a multiple-entry visa (Article 5 of VFAs);

(c) concerning fees for processing visa application, fees for processing the visa application are waived for this category of persons (currently € 35 for the citizens of these countries) (Article 6 of VFAs).

C. Non-Immigration issues

The note by Mr Klapisch addresses a series of issues that do not fall under the scope of the immigration and visa policy, and that are under the direct competence of DG Research who's monitoring and promoting the implementation of the European Charter for Researchers.

²³ OJ L 243, 15.0.2009.

In general terms, the Commission is promoting the use of the European Charter for Researchers and the Code for the Recruitment of Researchers through the network of EURAXESS Services centres, through the Marie Curie Actions (promotion of Charter and Code and obligation to award employment status in case of longer stays) and by helping volunteering institutions to organise a European peer scrutiny of their Institutional Human Resources Strategy against the principles of the Charter and Code. One thousand institutions have so far signed up to the Charter and Code. The implementation is being monitored with the help of the ERA Steering Group Human Resources and Mobility and annual reports are envisaged.

As concerns specific issues:

1. The note stresses the difficulties of third-country researchers in obtaining reliable information and dedicated support in order to solve legal and administrative problems in the country of residence, as well as in respect of careers counselling. An important role in this respect is and can be increasingly played by the network of EURAXESS Services centres (more than 200 centres in 37 countries): researchers from third countries are a natural target group for those centres.
2. Difficulties are also reported to arise in respect of intellectual property rights. The intellectual property rights of researchers, including those of researchers going to or coming from third countries, is dealt with in their employment contracts and may differ per country and institution. The European Charter for the Researchers states that: *Employers and/or funders should ensure that researchers at all career stages reap the benefits of the exploitation (if any) of their R&D results through legal protection and, in particular, through appropriate protection of Intellectual Property Rights, including copyrights. Policies and practices should specify what rights belong to researchers and/or, where applicable, to their employers or other parties, including external commercial or industrial organisations, as possibly provided for under specific collaboration agreements or other types of agreement.*

The Commission Recommendation on the management of intellectual property in knowledge transfer activities and the Code of Practice for universities and other public research organisations provide more details and recommend that member States should: *"Ensure equitable and fair treatment of participants from Member States and third countries in international research projects regarding the ownership of and access to intellectual property rights, to the mutual benefit of all partners involved."*

3. Finally, the note refers to issues of participation in the governance of research organisations, as it is reported to happen frequently that third-country researchers are not consulted on issues of importance for them and their job. In this respect, it shall be recalled that the governance of research organisations falls within national, regional or institutional competences. The European Charter for the Researchers, however, recognises such legitimate requests of third-country researchers and states that: *"Employers and/or funders of researchers should recognise it as wholly legitimate, and indeed desirable, that researchers be represented in the relevant information, consultation and decision-making bodies of the institutions for which they work, so as to protect and promote their individual and collective interests as professionals and to actively contribute to the workings of the institution"*.

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Residence permits granted to third-country researchers in 2008 for a period of minimum 3 months.

time [†]	2008
geo [▼]	
Belgium	95
Bulgaria	:
Czech Republic	45
Denmark	:
Germany (includin...	40
Estonia	5
Ireland	170
Greece	15
Spain	500
France	1925
Italy	15
Cyprus	0
Latvia	5
Lithuania	0
Hungary	35
Malta	0
Netherlands	380
Austria	150
Poland	10
Portugal	:
Romania	:
Slovenia	5
Slovakia	10
Finland	:
Sweden	480
Total (of data available)	3885

Special values:

- not applicable or real zero or zero by default

0 less than half of the unit used

: not available