Initial appraisal of a European Commission Impact Assessment

European Commission proposal on the conditions of admission of third-country national students, researchers, school pupils, volunteers, remunerated and unremunerated trainees and au pairs


• **Background**

This note seeks to provide an initial analysis of the strengths and weaknesses of the European Commission's Impact Assessment accompanying the above proposal, which is a recast of Directives 2004/114/EC of 31 December 2004 (the 'Students directive') and 2005/71/EC of 12 October 2005 (the 'Researchers' directive'), submitted on 25 March 2013.

The Students’ Directive sets out mandatory provisions for the admission of students who are third-country nationals, leaving also the possibility to Member States of applying the directive to school pupils, volunteers and unremunerated trainees. If they meet the conditions, students are entitled to a residence permit and enjoy certain rights with regard to employment or self-employment to cover part of the cost of their studies and move between different Member States to pursue their studies. The Researchers’ Directive provides for a fast-track procedure for admitting researchers from third countries who have signed a hosting agreement with a research organisation approved by the Member State. The hosting agreement confirms the validity of the research project, the scientific skills of the researcher to complete it, and his or her possession of sufficient resources and health insurance. Researchers can stay in another Member State as part of their research project, and can teach in accordance with national legislation.

The 2011 implementation reports of the above directives concluded that the directives were not adapted to the current circumstances and policy context, and needed to be updated and improved, in order for the EU to reap the full benefits of well-managed migration.

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1 Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service.
capital is considered as one of Europe’s key assets in the context of the Europe 2020 strategy and the need to ensure smart, sustainable and inclusive growth. The need to attract the best minds to the EU for research and innovation is singled out as a priority in the Innovation Union flagship initiative which raises the need for one million new research jobs in Europe in order to meet the target of increasing R&D investment to 3 per cent of GDP and boost Europe’s competitiveness and growth. Furthermore, encouraging people-to-people contacts and actions in education are important aspects of the EU’s external migration policy, providing mutual enrichment through the benefits of cultural, social and linguistic exchange between the host and sending state.

The current proposal aims at improving the provisions on third-country national researchers, students, school pupils, unremunerated trainees and volunteers, and at applying common provisions to two new groups of third-country nationals: remunerated trainees and au-pairs. The Commission indicates that the proposal’s overall objective is to ‘support social, cultural and economic relationships between the EU and third countries, foster the transfer of skills and know-how and promote competitiveness while, at the same time, provide for safeguards ensuring fair treatment of these groups of third-country nationals’4.

- Identification of the issue at stake

The IA explains that the implementation reports on the two afore-mentioned directives identified a number of weaknesses relating to admission procedures, including visas and rights (such as equal treatment with own nationals), and procedural safeguards. In particular, the Commission indicates that less than half the Member States apply the Students’ Directive to the optional groups of school pupils, volunteers and unremunerated trainees, leading to a fragmented approach within the EU and high levels of disparity, with many Member States applying their own national rules, which differ from the EU framework. In addition, current rules were found to be insufficiently clear or binding and not always fully coherent with existing Union programmes, such as mobility measures, thus hampering intra-EU mobility.

Furthermore, as far as remunerated trainees and au-pairs are concerned, the IA indicates that these groups are not covered by any EU legislative framework (these groups generally falling under the general or employment-related immigration rules), a situation which leads to high levels of variability between Member States in terms of admission conditions and requirements of their stay. The Commission argues that ‘remunerated trainees face challenges comparable to those met by unpaid trainees: training might sometimes constitute a disguised employment or fail to provide for a genuine development opportunity in the absence of a proper traineeship agreement or supervision of work’5. According to the Commission, the inclusion of remunerated trainees into the scope of the EU framework would increase the coherence of approaches with unremunerated trainees and the coherence with on-going EU-level initiatives, such as the proposal for intra-corporate transferees, which foresees intra-EU mobility provisions for trainees that move within the framework of such a transfer. As for au pairs, the Commission indicates that their particular vulnerability, which is related to the family context in which they work, and calls for common EU rules which would create clarity and facilitate the monitoring of the fulfilment of the au-pair placement’s objectives and respect for his or her rights and obligations.

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4 Proposal, Explanatory Memorandum, p. 2.
5 IA, p. 11.
The IA explains that the problems identified above can affect the EU’s attractiveness as a destination for highly-skilled migration and hamper its competitiveness in higher education and research. In addition, increasing the EU’s attractiveness for school pupils, volunteers, unremunerated trainees and au-pairs would help foster people-to-people contacts, which are helpful in shaping mutual perceptions and enabling reciprocal enrichment for host and sending societies.

The IA identifies six main problem drivers:

- **Difficulties in admission conditions:** the right of third-country nationals who meet the conditions of the existing directives to be issued a residence permit and to have this permit renewed if they continue to meet the conditions, can be hindered or even invalidated by additional Member State requirements concerning visas. According to the IA, currently only some Member States issue residence permits on their territory, making initial access to the territory dependent on a visa. The Commission argues that, in the absence of common rules regarding the conditions and procedures of issuing long-stay visas at EU level, the guarantees regarding the issuing of visas offered by the directives do not always apply in practice. Other difficulties concern the fragmented situation across the EU for school pupils, volunteers and unremunerated trainees, and the lack of clarity as to the nature, aim and content of the hosting agreement for researchers. Another problem is the lack of clarity of rules and access to information regarding the conditions of admission and rights (for example, types of evidence proving sufficient means of subsistence, lack of good information provision and proper transparency).

- **Lack of synergy and consistency between EU migration rules and EU programmes on mobility such as Erasmus Mundus and Marie Curie:** the IA explains that Erasmus Mundus students are required to study in at least two Member States but often need to fulfil new and separate entry and residence conditions which can hamper the pursuit of their studies. Candidates accepted for Marie Curie fellowships can experience lengthy procedures for obtaining the necessary admission authorisations.

- **Shortcomings in procedural guarantees:** the current directives do not contain any provision on time limits within which applications for admission would need to be assessed and decided upon by Member States. The reasons to be given in case of rejection, non-renewal or withdrawal of an authorisation to enter/stay, and the level of fees for the processing of applications, were also identified as problems.

- **Difficulties to access the labour market:** these difficulties are three-fold:
  - limitations in students’ rights to cover part of their study costs by carrying out economic activities: students carrying out economic activities to cover part of their studies do not enjoy any specific rights under the directive concerning the level of remuneration or social security protection. Also, the 10 hours per week working threshold provided in the directive is deemed insufficient by stakeholders;
  - none of the existing directives contain rules concerning access to the labour market or job-seeking once the research or studies are completed;
- the Researchers’ Directive does not contain provisions granting researchers’ family members immediate access to the labour market, making it, according to the IA, less attractive for highly qualified researchers to move to the EU.

- Difficulties in exercising intra-EU mobility: intra-EU mobility is currently limited to students who have been admitted to a Member State for periods of no less than two years and who would like to follow in another Member State a curriculum already started or a related complementary course. Current provisions for researchers do not allow them to be sufficiently mobile and the other categories of third-country nationals covered by the Students’ Directive do not enjoy any mobility provisions.

- Risk of exploitation and vulnerability of groups currently not covered: While unremunerated trainees are within the optional scope of the Students’ Directive, remunerated trainees are not. However, the purpose and features of the traineeships in the EU are the same for both groups and the exploitation challenges that the two groups face are comparable (notably, the risk of being used as supplementary and underpaid labour force). As for au pairs, the Commission highlights that au-pair schemes which are described as cultural exchange programmes in most Member States can be used as a way of importing cheap domestic or care workers.

In line with the Commission’s Impact Assessment Board (IAB) request, the Commission complements the description of the above problems with precise information on the relevant immigration rules in the Member States and the corresponding flows of foreign students and researchers (Annex II), as well as with an overview of the flows of third-country national au-pairs and remunerated trainees, volunteers, school pupils and unremunerated trainee, as well as of students’ access to job seeking or the labour market following graduation (Annex V).

However, the IA does not contain sufficient evidence and/or practical examples to illustrate the problems identified above, and their magnitude and cross-border effects are quite unclear. The Commission says that ‘there is no quantitative data on the precise number of incoming third-country nationals that encounter the above-mentioned problems, or who have been prevented to move ahead with their initial wish to come to the EU’. There is also no information on the share of third-country national students or researchers wishing to stay in the EU after graduation or completion of the research project or on the share of those who actually do stay for work purposes. In fact, there seems to be a discrepancy between the substantial number of permits issued on an annual basis to non-EU nationals coming to the EU for education and research purposes and the reported difficulties encountered by these groups.

The IA does not explain why many Member States prefer to apply their own national rules to the optional groups of school pupils, volunteers and unremunerated trainees, instead of the rules provided in the Students’ Directive, or why the majority of Member States decided not to grant foreign students and researchers (and their family members) automatic access to their labour markets, despite their ability to do so, or why, notwithstanding their obligation to issue residence permits once all necessary conditions are fulfilled, Member States may decide not to grant the necessary long-term visa. In this context, the need for further harmonisation of

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6 IA, p. 11.
7 According to Annex II of the IA, 7,610 residence permits were granted to researchers in the EU 27 in 2011 and 491,721 to students.
national immigration rules relating to access of third country nationals to the labour market should have been better explained.

Regarding au pairs, the IA does not provide a solid justification as to why Member States cannot prevent exploitation of au pairs themselves and does not detail how the inclusion of au-pairs in the scope of the new recast directive will help improve their protection in practice, since the abuse they may be victim of usually occurs in the family sphere.

The IA includes a very succinct baseline scenario almost exclusively focused on the evolution of the situation for students and researchers in the absence of further EU action. Despite being requested by the IAB to better explain the link between the present proposal and the Single Permit Directive in the framework of the baseline scenario, the Commission only mentions that ‘although the rights of the third-country nationals concerned have evolved with the adoption of the Single Permit Directive, some groups risk not being fully covered by its provisions, due to existing limitations’. Very little information is given in the IA on this aspect and the differences between the two instruments are poorly explained, thus creating confusion.

- **Objectives of the legislative proposal**

The overarching objective is ‘to improve the legal framework applied to third-country nationals who want to come and temporarily stay in the EU for more than three months for research and study purposes’, with the aim of ‘increasing the EU’s innovative capacity and competitiveness, support the economic, social and cultural relationships between the EU and temporary migrants’ country of origin and promote people-to-people contacts’.

On the basis of the problems identified above, the Commission has identified the following specific objectives:

- to improve the conditions of admission;
- to increase coherence of EU migration rules with EU mobility programmes;
- to improve procedural guarantees;
- to improve access to the labour market;
- to improve intra-EU mobility;
- to provide for coherent provisions ensuring protection of au pairs and remunerated trainees.

These are further translated into a number of detailed operational objectives.

- **Range of the options considered**

Four policy options were considered by the Commission. Contrary to the Impact Assessment Board’s request, no information is provided in the IA as to whether other options were discarded at an early stage.

Option 1 (baseline): no changes to the existing situation: according to the Commission, this policy option would leave the identified problems unresolved.

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8 IA summary, p. 3.
9 IA, p. 27.
10 IA, p. 28.
Option 2: increased communication efforts (in particular in case of researchers) and strengthened enforcement of the current rules: since several of the problems identified are related to difficulties with the implementation of the existing legal framework, this option includes better provision of and access to information, in order to make the current provisions clearer so that they can be better applied. The EU immigration portal as well as the EURAXESS portal and network could be used as a tool to make the provisions of the directives better known - for example, by better informing consular staff in third countries of the existing rules and possibilities, as well as interested third-country national researchers. Best practices of Member States in admitting and protecting remunerated trainees and au pairs could also be disseminated. A more systematic exercise of ensuring that Member States understand and respect their obligations under the directives could be carried out.

Option 3: improvement of admission conditions, rights and procedural guarantees: this option mainly includes improvements for students, school pupils, volunteers and unremunerated trainees. Provisions for the currently optional groups of school pupils, volunteers and unremunerated trainees would become mandatory and the provisions on granting visa for students (and the other currently optional categories) would be strengthened to bring them in line with the corresponding provisions of the Researchers’ Directive: Member States would be obliged to grant every facility to obtain the necessary visas to those third-country nationals (students and other categories) who have submitted an application and meet the admission conditions. Students’ rights would be aligned with those granted to researchers under the Researchers’ Directive. Students’ right to work would be extended to cover a minimum of 15 hours per week (instead of currently 10 hours), as of the first year of residence. Procedural safeguards would be introduced since Member States would be obliged to decide on applications within 60 days (extended by an additional 30 days in exceptional circumstances) and would be obliged to justify in writing a decision of rejection, non-renewal or withdrawal of the authorisation to enter/stay. This option would recall that, if fees are charged, they should be proportionate, in line with the recent case-law.

Option 4: further improvement of admission conditions, rights relating to intra-EU mobility and procedural guarantees; offering students and researchers access to job-seeking after finishing their studies or research project; extending scope to au pairs and remunerated trainees: this option, which is built in part on option 3, aims to be more ambitious in improving the conditions and rights of the groups covered. ‘Member States would have the possibility to issue long-stay visas or residence permits. If both types of authorisations are issued, they should require only the fulfilment of admission conditions mentioned in the Directive (so that the conditions remain the same irrespective of the type of authorisation). If third country-nationals stay for more than one year, Member States issuing long-stay visas would have to issue residence permits after the first year’11. Intra-EU mobility for students and researchers (and their families) would be made easier and new mobility provisions are included for remunerated trainees. Specific, more favourable mobility measures would apply to the beneficiaries of Union programmes, such as Erasmus Mundus or Marie Curie. National contact points would need to be established for receiving and transmitting information needed to implement intra-EU mobility. Students would be allowed to work for a minimum of 20 hours per week, to better fund themselves as of the first year of residence, and students and researchers would be allowed to stay on the territory after finalisation of their studies/research to identify work

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11 IA, summary p. 6.
opportunities for a period of 12 months. (This would, however, not be an automatic work permit, the Member States still having the possibility to apply the relevant authorization procedures). This option would also allow more favourable treatment of third-country national researchers regarding branches of social security, including family benefits, beyond the rights given under the provisions of the Single Permit Directive. With regard to procedural safeguards, Member States would have to decide on applications within 60 days for all groups, and within 30 days for Erasmus Mundus and Marie Curie fellows, and would be obliged to justify in writing a decision of rejection, non-renewal or withdrawal of the authorisation to enter/stay. As under option 3, a provision would be included as to the proportionality of processing fees.

Contrary to the Impact Assessment Board’s request, the Commission does not explain the relevance of intra-EU mobility for remunerated trainees and the need to grant third-country students the same rights as researchers (equal treatment related to working conditions, social security, tax benefits, access to public goods and services). The Commission also does not explain why intra-EU mobility measures are presented under the most ambitious policy option only, or why the minimum amount of working hours for students is 15 hours under policy option 3 and 20 hours under policy option 4, and how this number was defined. In addition, the Commission does not indicate how the mandatory time-limits related to the processing of applications and to the job-seeker status are defined. Finally, the Commission only provides a weak analysis of the proportionality of the envisaged measures, given the highly divergent national legislation and different inflows of third-country nationals, depending on the Member State (some Member States having only marginal inflows).

The Commission’s preferred option is option 4.

**Scope of the Impact Assessment**

The Commission indicates that ‘in the absence of reliable quantitative information on all aspects that the proposed initiatives could impact on, the analysis is mainly based on a qualitative assessment of cross-checked criteria’\(^{12}\).

The impacts of the options are assessed against the baseline scenario in terms of their relevance, effectiveness and efficiency in achieving the objectives mentioned above, their feasibility (defined as including transposition and administrative related burden and the financial costs), their economic and social impacts (including impacts on the access of individuals to education and research, on employment and labour market and on cultural and linguistic diversity), their external impacts (including an assessment of the brain drain/brain gain effects) and their impacts on fundamental rights.

The Commission explains that ‘a key assumption in the assessment of impacts is the positive contribution that students and researchers (be they from the EU or elsewhere) make to innovative capacity, competitiveness and growth (in the case of students mainly following graduation). [...] While there is a strong evidence base for the benefits of tertiary education in general, it is not possible to precisely calculate the (economic) benefit that could be expected through the improvement of the EU immigration rules for the respective groups’\(^{13}\).

\(^{12}\) IA, p. 35.

\(^{13}\) IA, p. 69.
Annex IV of the IA provides some elements of quantification of administrative and implementation costs for options 3 and 4 with explanations on the calculation methodology and assumptions used. The Commission indicates that ‘the calculations should be interpreted with a high degree of caution’. Option 4 has the highest implementation costs. The IA indicates that ‘implementation costs would vary among Member States depending on the extent to which they already have provisions that correspond to the ones foreseen by this option’.

Issues such as the lack of flexibility for Member States to take into account national specificities, or the potential abuse of the new migration instrument, are not discussed in the IA. The IA only mentions that ‘any future instrument must take fully into account that migration instruments can be abused, with safeguards in place at both national and EU level to prevent this from happening’.

The Impact Assessment Board had asked the originating Commission service, DG Home, to provide a more differentiated and nuanced assessment of implementation costs across Member States, on the one hand, and the magnitude of the induced positive change, on the other. It also asked the Commission to assess the policy options’ overall effectiveness and efficiency separately and entirely and not per policy objective as is currently still the case in the IA. Finally, despite being requested to do so by the IAB, the Commission does not sufficiently demonstrate that the preferred option is not, despite having the highest implementation costs, the least efficient one.

- **Subsidiarity implications**

The proposal is based on Article 79 (2) TFEU, which provides that ‘the Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States’.

The IA contains a detailed section on the EU’s right to act and subsidiarity, including the tests of necessity and EU added value. The IA explains that the rationale for action at EU level, which was the basis for the adoption of the Students’ and Researchers’ Directives, remains the same. The Commission indicates that ‘although each Member State could have its own national system for admitting the third-country national groups concerned, this would not achieve the general objective of increasing the attractiveness of the EU as a destination for talented migrants and to promote possibilities for cultural exchanges. Having one set of common admission and residence requirements rather than a number of national level rules is more efficient and simpler for potential migrants than having to look into and deal with 27 different systems’.

One reasoned opinion related to his proposal has been submitted by the Greek Vouli ton Ellinon.

- **Budgetary or public finance implications**

No implications are expected for the annual budget of the EU. As mentioned above, implementation costs are examined for options 3 and 4, and some quantification is provided. The administrative costs associated with the assessment of applications, issuing of permits and

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14 IA, p. 43.
15 IA, p. 6.
16 IA, p. 25.
notifications of rejections under the preferred option would amount on an annual basis to around 23 million euro across all Member States\textsuperscript{17}. However, according to the Commission, ‘fees for the authorisations partly offset these costs\textsuperscript{18}’.

- **Stakeholder consultation**

The Commission says that, throughout 2011 and 2012, it ‘consulted Member States and interested groups as well as individuals to help identify problems, develop options for possible future action, and review subsidiarity’\textsuperscript{19}. Member States were consulted in the framework of the Committee on Immigration and Asylum. Discussions were held with national platforms of youth exchange organisations, and several workshops were organised with students and researchers organisations. An online public consultation was launched from 1 June to 23 August 2012. This gathered 1461 replies from individuals as well as Member States’ authorities, educational establishments and research institutions. Around 60 per cent of responses came from within the EU.

The results of the online consultation are provided in Annex I of the IA. The IAB requested several times that the Commission better present stakeholders’ views throughout the document, including negative opinions or reservations. However, this recommendation does not appear to have been followed and stakeholders’ opinions on the various options could not be found in the IA. In addition, regarding negative opinions, the Commission only indicates in the section on the EU’s right to act that ‘most immigration authorities of the EU Member States as consulted in the Committee on Immigration and Asylum see no need to amend the EU legal framework on immigration rules for the groups concerned. They consider that the legislative framework is working well and should be kept as it is. Some Member states argued that the Directives should be kept as separate instruments. Furthermore the argument was made that while the current instruments leave Member States with sufficient flexibility regarding implementation depending on their national specificities, a new instrument may limit such flexibility’\textsuperscript{20}.

- **Quality of data, research and analysis**

The IA largely relies on the implementation reports on the Students’ and Researchers’ Directives, and on the results of extensive consultations with relevant stakeholders. In view of the modification of the EU framework, the Commission launched several data-gathering exercises on remunerated trainees and au-pairs, commissioning relevant external studies respectively by Ernst&Young and GHK. Despite the apparently considerable amount of information available, the IA makes an unconvincing presentation of the identified problems and does not substantiate them with enough concrete evidence and/or case studies. The magnitude of the problems remains unclear and the necessity for EU action in the field of au pairs or access of third-country nationals to the labour markets would need to be further demonstrated. The justification for the proposal appears to give much greater emphasis to economic considerations (competitiveness and growth) related with third country high-skilled migration, in particular students and researchers, than to cultural exchange aspects and people to people contacts.

\textsuperscript{17} Except Denmark.
\textsuperscript{18} IA, p. 43.
\textsuperscript{19} IA, p.7.
\textsuperscript{20} IA, p. 25.
Negative opinions or reservations from stakeholders are hardly presented and certainly not elaborated in detail. Risks of abuse of the new framework are not discussed or assessed, and the proportionality of the envisaged measures is poorly addressed.

The Commission has made efforts to provide quantitative information on the cost implications of the envisaged measures but does not identify precisely which Member States will be the most affected. As far as benefits are concerned, these are only evaluated in a qualitative manner.

Finally, the IA could have provided more information on the content of the provisions of the two existing Directives, and in particular their differences regarding admission conditions, procedures for granting visas and/or residence permits, and students’ and researchers’ rights, in order to make it easier for the reader to understand the extent of the proposed changes to the EU framework.

- Commission’s Impact Assessment Board

The Commission’s Impact Assessment Board (IAB) delivered a first, very critical opinion on the draft IA on 7 September 2012, asking DG Home to submit a revised version of the report. Following the resubmission of the report, the IAB delivered a second opinion on 24 October 2012, identifying several shortcomings in terms of justification of a need for, and the proportionality of, further harmonisation of national immigration rules. Following the recommendations of the IAB, a revised version of the IA was resubmitted on 19 November 2012. On 30 November 2012, the IAB issued a third opinion in which it acknowledged that the report had been improved along the lines of its previous opinions, but still identified a number of weaknesses related to the absence of evidence demonstrating that Member States cannot adequately protect au-pairs themselves or facilitate the access of third-country nationals to their labour markets. It also recommended further demonstration of the size of the identified problems and their cross-border effects, a better assessment of the proportionality of the envisaged measures and stakeholders’ views to be better presented throughout the document. As indicated above, these shortcomings do not appear to have been fully addressed in the present version of the IA. It is very exceptional that the IAB asks twice for resubmission of a draft IA and that it issues three critical opinions on the same IA.

- Coherence between the Commission’s legislative proposal and IA

The IA and the Commission proposal appear to correspond.
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This note, prepared by the Ex-Ante Impact Assessment Unit for the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), analyses whether the principal criteria laid down in the Commission’s own Impact Assessment Guidelines, as well as additional factors identified by the Parliament in its Impact Assessment Handbook, appear to be met by the IA. It does not attempt to deal with the substance of the proposal. It is drafted for informational and background purposes to assist the relevant parliamentary committee(s) and Members more widely in their work.

This document is also available on the internet at:

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