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on the legislative own-initiative report on citizenship and residence by investment schemes (2021/2026(INL))

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The specificity of regulating residence by investment under Union law (different legal base compared to citizenship etc.)

I. Residence by investment (RBI)

1. General overview

The Treaty of the Functioning of the European Union (TFEU) provides that the Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows and fair treatment of third-country nationals residing legally in Member States.

The conditions of entry and residence, as well as the standards for issuing residence permits, fall explicitly within the scope of Article 79(2), points (a) and (b) TFEU, thus allowing the Union to have common policy on legal migration.

Over the years, the Union has developed a wide framework of different types of residence for third-country nationals in the Union, as well as the conditions of their stay and the standards for the residence permits that are issued at national level. There are many examples in the Union *acquis* providing for regulation of either short-term or long-term residence, in particular:

- the Blue Card Directive[1];
- the Seasonal Workers Directive[2];
- the Intra-Corporate Transfer Directive[3];
- the Long-Term Residents Directive[4];
- the Single Permit Directive[5];
- 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[6].

All the directives listed above have Article 79(2), points (a) and (b), TFEU (former Article 63, point (3) of the Treaty establishing the European Community) as their sole legal basis. Their main subject matter is to set the conditions that a third-country national should meet in order to benefit from a specific residence status. However, despite the fact that many of them require that a person applying for a residence permit should not pose a threat to public policy, public

[1] Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (OJ L 155, 18.6.2009, p. 17).
[2] Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers (OJ L 94, 28.3.2014, p. 375).
[3] Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer (OJ L 157, 27.5.2014, p. 1).
[4] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ L 16, 23.1.2004, p. 44).
[5] Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (OJ L 343, 23.12.2011, p. 1).
[6] OJ L 132, 21.5.2016, p. 21.

security or public health[7], none of them provides for concrete, standardised security checks of that person. Neither are there any other standards for vetting procedures defined or coordinated at Union level. In addition, none of the existing directive envisages a monitoring or other type of post-control mechanism at Union level.

For the purposes of residence by investment, however, the co-legislators might decide to base a future legal act on several legal bases, thus combining Article 79 TFEU with other relevant provisions of TFEU such as Article 87 on police cooperation, Article 82 on judicial cooperation in criminal matters and/or Article 114 on approximation of laws in the internal market. The inclusion of Article 114 TFEU among the other legal bases will allow not only for concrete requirements in the field of anti-money laundering but also for envisaging more sophisticated notification or monitoring procedures. Having more than one legal basis for a possible legal act in this field could be motivated by the fact that, unlike other residence schemes, the main object of RBI schemes is not to ensure free movement of people to and within the Union but to bring capital to the Union. Third-country nationals are arriving in the Union following their investment and not vice versa. This shifted paradigm compared to the traditional resident schemes where a third-country national benefits from a particular scheme due to a concrete professional or personal characteristic naturally requires a different approach, especially having in mind that the third country national acquires rights under Union law based only on the investment (capital) that has been provided.

2. Advantages of the proposed option:

TFEU provides a clear and undisputable legal basis for regulating the residence of third-country nationals in Article 79(2), points (a) and (b).This legal basis could be easily combined with other legal bases, having in mind that the legal bases mentioned above just like Article 79(2) require use of the ordinary legislative procedure. This creates a possibility to regulate a broader scope of questions covering all the specificities of the investment schemes, including checks on persons and checks on capitals. It also allows the conditions and minimum standards of the investments as well as the requirements for the persons applying for this type of residence to be defined at Union level.

In addition, introducing common standards for RBI schemes would enhance the mutual trust in such schemes and allow the implementation of targeted measures in a coordinated way in all Member States, thus providing for higher convergence in the current national practices, some of which tend to be quite doubtful.

3. Challenges to be considered:

The current practice of regulating specific types of residence is predominantly of a positive nature, providing for specific rules and rights for categories of residents who could have positive impact on the Union economy and social development. One of the main objectives of the above-mentioned directive is to provide for legal certainty and clarity about the rights and obligations of these categories of residents, sometimes even introducing more beneficial regimes for one or more categories. Regulating RBI schemes could be seen as an incentive to apply this type of scheme in practice.

[7] Article 5(1), point (f), of Directive 2009/50/EC, Art. 6(4) of Directive 2014/36/EU, Art. 5(8) of Directive 2014/66/EU, Art. 6 of Directive 2003/109/EC and Art. 7(6) of Directive (EU) 2016/801.

At the same time, if a legal act on RBI schemes introduces very strict and disproportionately severe standards and conditions for acquiring this type of residence permits, it might be seen as breaching one of the main principles of Article 79, 'fair treatment of third-country nationals residing legally in Member States'.

Another challenge lies in the legal limitations of Article 79 towards some of the Member States. In general, legislation based on Article 79 usually differentiates between Member States depending on their status vis-à-vis the Schengen *acquis* for provisions on intra-EU mobility of holders of EU-law based residence permits. In this respect, possible future legislation on RBI schemes with provisions offering intra-EU mobility for holders of the new type of EU residence permit would be applicable in its entirety only to the Member States that apply the Schengen *acquis* in full. Schengen Member States that do not apply Schengen acquis in full (Bulgaria, Croatia, Cyprus and Romania) or that are not part of the Schengen area (Ireland) would be excluded partially from some of the provisions, predominantly those governing free movement of people, free movement of establishment and possibly other rights of the holders of such residence permits. The case for Denmark would depend on the legal basis of the act: they will be excluded from legislation based on Article 79 solely due to their Protocol but will be bound by any legislation that constitutes development of Schengen acquis.

II. Citizenship by investment (CBI)

1. General overview

National citizenship is national competence and is consequently not covered by TFEU. However, all citizens of a Member State are automatically citizens of the Union. Moreover, Article 18 TFEU explicitly forbids any discrimination on the grounds of nationality. Citizenship of the Union is intended to be the fundamental status of nationals of the Member States which cannot be limited or made conditional.

Whether an individual possesses citizenship of a Member State is governed only by the national law of that Member State. That national competence should not, however, be seen as an absolute competence without any limitations. The Court of Justice of the European Union (CJEU) has on many occasions highlighted in its rulings that "Member States must exercise their powers in the sphere of nationality having due regard to the European Union law"[8].

Based on this, it can be concluded that Member States are free to decide to whom and according to what standards and procedures they grant national citizenship but at the same time that is not an absolute power. The CJEU has confirmed that there are certain limitations on how Member States can exercise that power. The general benchmark set by the CJEU in that regard is quite broad, only demanding "due regard to the European Union law". In practical terms, this means that when exercising national power with regard to citizenship, Member States should consider the main principles of Union law and should not exercise their power in a way that affects or harms Union policies, especially with respect to integration and cooperation which depends on the sincere cooperation and mutual trust among the Member States.

[8] C-369/90 *Micheletti and Others*, paragraph 10; C-179/98 *Mesbah*, paragraph 29; C-192/99 *Kaur*, paragraph 19; C-200/02 *Zhu and Chen*, paragraph 37; C-135/08 *Rottmann*, para. 39 and 41; C-221/17 *Tjebbes*, para. 30 and 32.

While it is indisputable that regulating citizenship falls squarely under the power of the Member States, the specific practice of CBI poses political and economic challenges to the Union as a whole. In order to address the challenges faced at Union level there is a clear need to find a solution that could function together with the national competences. Union action should not replace the national competences but should focus only on mitigating a possible negative impact at EU level stemming from purely national decisions.

There are three main risks for the Union posed by the current national CBI schemes:

1. Internal security risk - the focus of the investment schemes is to verify the investment which then serves as a precondition for requiring national citizenship. Even where national authorities perform any checks on the individual and his or her family members, these checks are of secondary nature and are usually performed in a very formalistic way. The citizenship of any Member State automatically grants free movement within the Schengen zone and also freedom of establishment. Thus, by obtaining citizenship under a CBI scheme, all Union rules for entry, stay and residence in the Union applicable for third country nationals are circumvented for the individual in question.
2. Money laundering risk - as mentioned above, the central element of CBI is the existence and the size of the concrete investment that serves as a basis for granting citizenship. Even when Member States are performing checks on the sources of the capital used for the concrete investment, the check is focused only on that particular amount of money. Once becoming a citizen of a Member State, however, the individual becomes subject to all the rights and privileges granted to Unoin citizens with respect to all assets he or she possesses in and outside the Union, not only with respect to the investment made for the purposes of citizenship.
3. Risk of establishing discriminatory practices within the internal market - apart from the risk for the functioning of the internal market that money laundering could cause, CBI schemes also lead to potential loopholes for avoiding specific Union rules regarding trade defence instruments and foreign subsidies distorting the internal market.

In light of this, it will be difficult to legislate CBI schemes at Union level. The final decision on whether to grant national citizenship cannot be regulated at Union level within the current primary legislation (the Treaties). However, certain procedures and requirements could be established, provided that the final decision on citizenshi remain within the Member States.

As mentioned under point I., Art. 114 TFEU could be explored as a potential central or additional legal basis for a possible future legal act regulating RBI and CBI schemes. In order to do so, it would have to be proven that the usage of CBI schemes affects the single market. CBI schemes directly affects three of the four freedoms of the internal market: free movement of capital, free movemnt of persons and free movement of services, including establishment. Unlike RBI, CBI provides to the third-country national full and almost unconditional access to the single market. Taking into consideration the fact that CBI is acquired by an individual simply by having significant capital, it is obvious that the central element is financial resources, not the existence or lack of specific personal characteristics of the third-country national.

Article 114 TFEU represents a wide legal basis for harmonising different measures that can impact the internal market. Article 114(2), however, introduces the implicit limitation that this provision "shall not apply to fiscal provisions, to those relating to the **free movement of**

persons nor to those relating to the rights and interests of employed persons". This limitation constitutes a clear restriction in the the possibility to introduce changes to the rights and principles of free movement of persons through a legal act based on Article 114. However, the proposal outlined below on how to use Article 114 as a possible legal basis for future Union action in the field of CBI does not concern the free movement of persons. That proposal does not deal with the rights and obligations of individuals but with the rights and obligations of Member States and Union institutions. The provisions of such a future legal act shall not affect by any means the principle of free movement.

Against this background, it could be argued that while there is no significant room for Union action in the field for establishing conditions and procedures for acquiring national citizenship at Union level, there is room for settin up a notification system at Union level allowing for mandatory exchange of information among the Member States. This could cover information about third-country nationals applying for and having been granted CBI or having had such an application rejected, including on the checks made by the national authorities of the third-country nationals and on the capital, the scope of the investment and the impact of the investment. The legal act could also envisage the establishment of a dedicated Consultative Forum or other advisory body to analyse and provide advice and guidance in the implementation of CBI schemes at national level. The Consultative Forum or other similar body might be also tasked with developing guidelines, best practices and/or handbooks supporting the proper vetting of applicants and their capital.

2. Advantages of the proposed option

The subject matter of a possible legal act in this regard will be the establishment of a Union network, platform or mechanism for notifications and exchange of information. Thus, there will be no interference in national competences. The specific conditions to be met by the third-country national, as well as the final decision on whether to grant national citizenship, irrespective of any outcome of vetting procedures, will remain within the power of the Member States. At the same time, such a legal act will introduce mandatory notification system.

While such a legal acgt cannot impose the decisions the Member States should take, it can introduce an obligation to communicate standardised information about the checks made on the individuals and the capital involved as part of their general obligation for due diligence in order to avoid negative impact on the internal market and its main pillars.

Ensuring visibility of the decisions taken at national level would, per se, enhance the applicable security standards and limit the possibilities for abuses. The requirement for exchange of information would by default ensure a quasi monitoring mechanism at Union level.

Such a legal act could also include a review clause inviting the Commission to assess the implementation after a certain period and propose a further harmonisation if necessary.

Article 114 TFEU seems a possible choice for legal basis for such a solution, having in mind that in principle Article 114 should be used not to create new Union rights but to harmonise existing national rules. Moreover, the co-legislators enjoy comparatively wide, but not unlimited, discretion, depending on the general context and specific circumstances as regards the harmonisation method.

3. Challenges to be considered

The main disadvantage of this option is that it envisages measures that predominantly have an indirect effect on CBI schemes: A mandatory notification system and exchange of standardised information will ensure a high level of transparency on the decisions taken at national level as well as of the vetting procedures used in every concrete case and will also allow for passive monitoring and reliable information about the phenomena of CBI schemes and the impact it has, but these measures will not allow for intervening directly in the individual decisions taken at national level.

III. Conclusion

Based on the analysis above and depending on the political will of the co-legislators, a comprehensive solution could be to request the Commission to propose a **legislative package comprising of the following legislative proposals**:

1. ***Directive on the conditions of entry and residence of third country nationals participating in investment schemes in one or several Member States*** - proposal based on Article 79 TFEU in combination with additional articles, especially Article 64 TFEU (free movement of capital) and Article 87 TFEU (police cooperation),depending on the concrete scope of the proposal;
2. ***Regulation establishing the European Network for Notification and Exchange of Information on Third Country Nationals Applying for National Citizenship by a Member State through an Investment Scheme*** – proposal based on Article 114 TFEU and, if necessary, a set of additional articles, especially Article. 16(2) (personal data), depending on the concrete scope of the proposal;
3. ***Targeted amendments of the following legal acts allowing for enhanced and systematic checks of third country nationals*** applying for such type of residence/citizenship:
   - SIS Regulation[9];
   - ECRIS TCN Regulation[10];
   - VIS Regulation[11];
   - ETIAS Regulation[12];

[9] Regulation (EU) 2018/1862 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending and repealing Council Decision 2007/533/JHA, and repealing Regulation (EC) No 1986/2006 of the European Parliament and of the Council and Commission Decision 2010/261/EU (OJ L 312, 7.12.2018, p. 56).

[10] Regulation (EU) 2019/816 of the European Parliament and of the Council of 17 April 2019 establishing a centralised system for the identification of Member States holding conviction information on third-country nationals and stateless persons (ECRIS-TCN) to supplement the European Criminal Records Information System and amending Regulation (EU) 2018/1726 (OJ L 135, 22.5.2019, p. 1).

[11] Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation) (OJ L 218, 13.8.2008, p. 60).

[12] Regulation (EU) 2018/1240 of the European Parliament and of the Council of 12 September 2018 establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) No 1077/2011, (EU) No 515/2014, (EU) 2016/399, (EU) 2016/1624 and (EU) 2017/2226 (OJ L 236, 19.9.2018, p. 1).

- Europol Regulation[13];
- Anti-money Laundering Directive[14].

The advantage of such a solution will be an immediate response to the growing concerns about unclear national practices allowing non-vetted individuals and capitals from dubious sources to reach the internal market and the Schengen area.

Moreover, such a solution will increase the mutual trust among the Member States, which is a precondition for any integration policy at Union level. Without entering into fields reserved exclusively for the Member States, it will provide a Union legal framework that can mitigate negative impacts for the Union of possible abuses of RBI and CBI schemes or corrupt practices occurring at national level. Such a legislative package has the potential to establish a reliable set of practices, which in their entirety will regulate in a comprehensive manner RBI and CBI schemes, closing the existing gaps between the national practices and ensuring the necessary harmonisation of some of the schemes.

The main challenge of such a solution lies in the fact that it will entail significant legislative work and involve potentially significant financial resources. The necessary funding for the introduction of residence permits for investments and the establishment of a Union system, platform or mechanism for notification and exchange of information should be calculated and assessed.

[13] Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA (OJ L 135, 24.5.2016, p. 53).
[14] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ L 141, 5.6.2015, p. 73).