On 29 November 2016 the deadline for the transposition of Directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer expired. This so called ICT Directive regulates the temporary secondment of managers, specialists or trainee employees who are transferred from a company outside the EU to an entity of the same undertaking or group of undertakings inside the EU, while staying on their home country employment contract, and who reside outside the EU at the time of application.

This book highlights the central themes, problem issues and implementation in selected Member States of this ICT Directive.

The contributions to this book are based on lectures presented at a seminar on this Directive, organised in November 2017 by the Centre for Migration Law, Radboud University Nijmegen, together with Tesseltje de Lange of the University of Amsterdam, under the Jean Monnet Centre of Excellence program. These contributions deal with the negotiations and transposition of the Directive, the role employment and social security rights play in the ICT Directive, a comparison with the EU Russia Agreement of 1997 as well as a business perspective and a migrants’ rights perspective. And it discusses the implementation in The Netherlands, Germany, Spain and Sweden.

Paul Minderhoud & Tesseltje de Lange (eds)
INTRA CORPORATE TRANSFEREE  DIRECTIVE
The Intra Corporate Transferee Directive: Central Themes, Problem Issues and Implementation in Selected Member States

Paul Minderhoud & Tesseltje de Lange(eds)
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Annex
Introduction

Paul Minderhoud & Tesseltje de Lange*

On 29 November 2016 the deadline for the transposition of Directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer expired. This so-called ICT Directive regulates the temporary secondment of managers, specialists or trainee employees who are transferred from a company outside the EU to an entity of the same undertaking or group of undertakings inside the EU, while staying on their home country employment contract, and who reside outside the EU at the time of application.

As a result of the globalisation of business, increasing trade and the growth and spread of multinational groups, in recent years movements of managers, specialists and trainee employees of multinationals, temporarily relocated to other units of the company, have gained momentum. Such intra-corporate transfers of key personnel result in new skills and knowledge, innovation and enhanced economic opportunities for the host entities, thus advancing the knowledge-based economy in the Union. Intra-corporate transferees (ICTs) from third countries also have the potential to facilitate transfers from the Union to third-country companies and to put the Union in a stronger position in its relationship with international partners. Facilitation of admission of ICTs enables multinational groups to tap their human resources best. However, a number of factors pose an administrative burden on ICTs: a lack of clear specific schemes, the complexity and diversity of visa or work permit requirements, costs and delays in transferring foreign ICTs from one Member State to another and difficulties in securing family reunification. To address this situation, a Directive on intra-corporate transfers was adopted in 2014. This Directive establishes a transparent and simplified procedure for admission of ICTs, based on common definitions and harmonised criteria.

This book is a result of a seminar organized at 10th November 2017 at the Radboud University Nijmegen as part of the Jean Monnet Centre of Excellence program. It highlights the central themes, problem issues and implementation in selected Member States of this ICT Directive.

The book starts with a contribution of Ágnes Tóttós in which she describes the negotiations on this Directive in the Council in the context of the EU harmonisation policy of legal migration. Her contribution focusses on three of the most crucial issues during these negotiations. Firstly, Member States had to become familiar with the new target group of this Directive chosen by the Commission and the reasons why EU harmonisation for this group was considered necessary. This also implied identifying this group in relation to other groups, such as highly-skilled migrants and

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posted workers. Secondly, social security issues were also extensively debated with a special focus on family benefits and the application of social security agreements. Thirdly, the new autonomous regime of intra-EU mobility is described in details, as this is clearly one of the most important added value of the Directive.

Fabian Lutz subsequently, discusses the transposition of the Directive from the perspective of the Commission. He gives an overview of the key legal issues as discussed at the Contact Group Legal Migration. This Contact Group is a Commission expert group, which had been set up in order to exchange views with Member States experts on the application of EU Directives on legal migration, including the ICT Directive. He further discusses the mobility choices the Member States have made so far, the relation of the specific ICT mobility scheme with the Schengen Acquis as well as the cooperation between the national contact points.

Herwig Verschueren examines the role employment and social security rights play in the ICT Directive and the implementation of this Directive by the EU Member States. These rights are relevant as criteria for admission, as grounds for rejection of an application, as grounds for withdrawal or non-renewal of the ICT permit and as conditions for short-term and long-term mobility within the EU. The issue of the employment and social security rights of intra-corporate transferees appears to be legally complex due to the interference of and with other EU legal instruments regarding these matters, such as the Posting of Workers Directive. The chapter also scrutinizes in detail the provisions of Article 18 of the directive which guarantee equal treatment with the nationals of the host State regarding employment and social security rights.

Then, Elspeth Guild approaches the Directive from the perspective of EU’s international obligations. She examines the ‘alternative’ EU framework of companies’ rights to transfer key personnel from outside the EU to a related entity within the EU which predates the directive and came into being through agreements between the EU and third countries. Taking as a case study the EU Russia Agreement 1997 she compares the provisions of that agreement regarding companies’ rights to transfer key personnel from outside the EU to a related entity within the EU with those of the directive.

Jo Antoons, Andreia Ghimis & Christine Sullivan analyse the Intra-Corporate Transfer permit and mobility in the European Union from a business perspective. Their contribution discusses the ambitions of the Directive for companies assigning talent to the European Union via an intra-corporate transfer, the impact the Directive has had on harmonizing admission criteria for ICT’s and whether national implementation of the Directive addresses business needs. Their analysis shows that, in practice, significant divergences exist in the implementation of the EU ICT scheme at domestic level. These variables originate from the many ‘may’ and ‘multiple-choice’ clauses the Directive contains, but also from the varied legal migration traditions and political climates of countries in the European Union (the ‘EU’). Within this patchwork landscape the business community tends in their view to overlook the added value and the interesting prospects the Directive creates and rather focuses on the persisting barriers to intra-EU mobility and the additional burden at national level brought by the EU ICT scheme when compared to pre-existing national ICT schemes.
**Simon Tans & Jelle Kroes** focus on the international framework dealing with intra-corporate transfers and how this is in use in the Dutch legal order. Since the implementation of the ICT Directive 2014/66 in the Netherlands, the Dutch context has five different entry schemes for this category of temporary migrant workers. They conclude with listing some practical concerns on the implementation and application of the Directive in the Netherlands. They argue that in order to understand the manner in which the Directive was implemented in the Netherlands, one must reflect on the recent tightening of immigration control. In essence, the international framework for intra-corporate transfers in the Netherlands and the recent changes in the national framework are the result of opposing, and inherently linked trends.

**Gunther Mävers** discusses the situation in Germany, where the implementation of the Directive entered into force on 1 August 2017. He describes the three possible options available: An ICT card for stays of more than 90 days, a notification for short term stays of no more than 90 days and a mobile ICT card for stays of more than 90 days for applicants holding a ICT card issued by another Member State. He shows that whereas most of the provisions leave no discretion how to implement the directive in some cases the German legislator has made use of the leeway provided by the directive. The German administration has introduced a streamlined and modern (cloud-based) procedure meeting the needs of the companies concerned to have a flexible and fast system in for application.

**Ferran Camaś Roda** describes the light and dark aspects of the legal framework of Intra-Corporate Transfers in Spain, which was the first Member State to transpose this ICT Directive. He shows that the Spanish legislation concerning intra-corporate transfer regulations was a way of attracting talent and resources to Spain following the economic recession that began in 2008. There are however still regulatory gaps in the law transposing Directive 2014/66, which can be resolved by referring to the interpretation of similar situations in other laws.

And **Petra Herzfeld Olsson** describes the transposition of the ICT Directive in Swedish law as a company-friendly exercise. Before the transposition of the ICT Directive no distinction had been made between labour migrants employed by a Swedish employer and those who were part of an intra-corporate transfer. The Swedish starting point is that all labour migrants, independent of sector and employment arrangements, shall be treated in the same manner. However, this existing unified system has recently been questioned and there are signals to prioritise skilled labour migrants in the future. The argument is that low skilled jobs should be kept for newly arrived refugees. Opting for a company-friendly transposition of the ICT directive can be seen as an indirect but important first step in that direction. The focus of his contribution is on how these new rules differ from the general system, but also on how the government navigated within the margin of appreciation provided for by the directive.

The book ends with Concluding remarks by the hand of **Tesseltje de Lange**. Building on the chapters in this volume she ‘measures’ how welcoming the ICT Directive is to the expats or business elites that are transferred into the EU.

Citing from the contribution of **Lutz** we can perhaps conclude that the positive reception of the Directive by economic operators and the fact that – so far – no
complaints were received by the Commission may be taken as a signal for justifying a positive assessment. But it cannot be excluded either that a number of problems have not surfaced yet. The first application report, due in November 2019, will tell us more.
The Intra-Corporate Transferee Directive: Negotiations in the Council

Ágnes Tőttős

1. The EU Harmonisation of Legal Migration

The European Commission primarily aimed to approach the EU legislation of legal migration of third country nationals from an economic point of view. Accordingly, the Commission proposed the first Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities on 11 July 2001.1 No matter how noble the intention of the Commission was to create an EU-wide harmonised system for a very wide range of third-country national migrants, i.e. to follow a horizontal approach in order to cover both the groups of employees and self-employed persons, the negotiation of the Directive revealed many problems.

“The proposal, which closely followed the 1999 Tampere Programme’s milestones, was finally withdrawn because representatives of certain EU Member States expressed deep concern about the possibility of having ‘more Europe’ in these nationally sensitive fields.”2

Turning to other categories of migrants instead of workers and entrepreneurs, the proposals of the Commission launched according to the instructions set out by the Tampere European Council on sets of harmonized rules on third-country nationals coming for purposes such as family reunification, studies and research had been more successful as for the negotiations in the Council and resulted in a number of directives adopted between 2003 and 2005. Directive 2003/86/EC3 on family reunification adopted as the first legal migration directive harmonizes criteria for family reunification between third-country nationals and therefore embraces family reunification as a right of migrants. Directive 2003/109/EC4 creates a European regime for acquiring EU long-term residence status after five years of legal residence in a Member State. Directive 2004/114/EC5 focusing mainly on migrants coming for pursuing

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2 S. Carrera et al., Labour Immigration Policy in the EU: A Renewed Agenda for Europe 2020, CEPS Policy Brief No. 240, 5 April, Brussels: CEPS 2011, p. 3.
studies and Directive 2005/71/EC\(^6\) setting up a unique procedure for the admission of researchers reflect the EU’s preference for knowledge-based migration.

The Hague Programme of November 2004, continuing the implementation of the initiatives of the 1999 Tampere Programme, stressed that legal migration plays an important role in strengthening the knowledge-based European economy, economic development and also contributes to the implementation of the Lisbon Strategy. In order to facilitate the adoption of a new draft Directive on economic migration, the European Commission initiated an extensive consultation with its ‘Green Paper on an EU approach to managing economic migration’\(^7\). The primary objective of the consultation launched by the Green Paper was to find the most appropriate form of regulation in the Community on the reception of migrants for economic purposes from third countries, and to discover what would be the added value of the establishment of such a Community framework.\(^8\)

The result of this consultation was the continuation of the sectorial, or more precisely selective approach of laying down migration rules for certain chosen groups of migrants instead of covering a wider scope of third-country nationals by a harmonised set of criteria.

‘The main justification was that, by doing this, the common European policy would be in line with the political priorities and legal regimes applying in most EU Member States.’\(^9\)

The Policy Plan on Legal Migration\(^10\) was the way in which the Commission envisaged a framework directive – together with four further directives covering four specific groups of economic migrants. Carrera’s view on the new Policy Plan clearly highlights the differences between the new perspective and the initial proposal of 2001:

‘The main result of the approach advocated by the “Policy Plan on Legal Migration” has been the emergence of a hierarchical, differentiated and obscure European legal regime on labour immigration which accords different rights, standards and conditions for entry and stay to different groups and countries of origin of TCN.’\(^11\)

The plan of five directives resulted in actually four proposals from the Commission among which the first to reach a maturity for adoption was Directive 2009/50/EC\(^12\) creating the so-called EU Blue Card. The framework directive, also known as Single

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\(^7\) COM (2004) 0811final: Green paper on an EU approach to managing economic migration.

\(^8\) The Hague Programme also referred to the Green Paper and the consultation, which would form the basis of a policy plan on legal migration including admission procedures capable of responding promptly to the changing labour market demand.

\(^9\) Carrera 2011, p. 4.


\(^11\) Carrera 2011, p. 3.

The ICT Directive: Negotiations in the Council

Permit Directive (Directive 2011/98/EU\textsuperscript{13}) not touching upon admission criteria, but definitely bringing major change in procedural rules as well as rights of third-country national workers was only adopted two years later. Two more draft directives – the proposal for a Directive on intra-corporate transfers\textsuperscript{14} and the proposal for a Directive on seasonal workers\textsuperscript{15} – were proposed by the Commission in 2010. Their adoption had long been awaited as a result of the negotiations between the co-legislators Council and European Parliament under the ordinary legislative procedure that was extended to the field of legal migration by the Lisbon Treaty. Finally the Directive on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers (Directive 2014/36/EU)\textsuperscript{16} and the Directive on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer (Directive 2014/66/EU)\textsuperscript{17} were both adopted\textsuperscript{18} in the first half of 2014 and their transposition was due in the second half of 2016.\textsuperscript{19}

The negotiations of the two legal migration Directives adopted in 2014 lasted more than three and a half years. This was partly because as a result of the Lisbon Treaty these legal acts had to be negotiated and adopted both by the European Parliament and the Council as co-legislators. Furthermore, both Directives had challenging issues that had to be resolved during the negotiations in order to adopt provisions that could easily be interpreted and therefore effectively implemented.

This chapter intends to highlight three of the most crucial issues that provided extensive tasks for immigration experts of the Member States throughout the negotiations of the ICT Directive, including during the period of the Hungarian Presidency of the Council in early 2011. Firstly, Member States had to become familiar with the new target group chosen by the Commission and the reasons why EU harmonisation was considered necessary. This also implied identifying this group in relation to other groups, such as highly-skilled migrants and posted workers. Secondly, social security issues were also extensively debated with special focus on family benefits and the application of social security agreements. Thirdly, the new autono-


\footnotesize{\textsuperscript{14} Proposal for a directive of the European Parliament and of the Council on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, COM/2010/0378 final.}

\footnotesize{\textsuperscript{15} Proposal for a directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment, COM/2010/0379 final.}


\footnotesize{\textsuperscript{18} Austria, Spain and Hungary abstained during the adoption, while Denmark, Ireland and the UK did not take part in the adoption; the rest of the Member States voted in favour of the Directive.}

\footnotesize{\textsuperscript{19} The deadline of the transposition of the ICT Directive was 29 November 2016.}
mous regime of intra-EU mobility will be introduced in details, as this is clearly one of the most important added value of the Directive.

2. Defining and Distinguishing the Target Group

One of the driving forces of extending the EU legal migration acquis to this target group was the fact that

‘the EU-25 commitments under the General Agreement on Trade in Services (GATS)\(^{20}\) open up the possibility to have recourse to intra-corporate transferees in the services sector and in the context of provision of services, typically without an economic needs test, for a maximum of three years (for managers and specialists) or one year (for graduate trainees), provided they meet the requirements specified in the relevant schedule, such as prior employment for one year. (…) The trade commitments given under the GATS, as well as bilateral agreements, are not intended to cover exhaustively the conditions of entry, stay and work.’\(^{21}\)

Consequently, the ICT Directive serves as a complementary set of provisions for the implementation of the GATS.

Nevertheless, the existing rules of the GATS not only provided incentives, but also challenges during the negotiations. As regards both the definitions and the admission criteria, the main question was whether the Directive should differ to any extent from the GATS provisions and if yes, what consequences this divergence could have. Member States were especially cautious to set out provisions more preferential compared to those of GATS as it would mean the unilateral provision of more preferential treatment without being able to ask concessions from GATS partners, and consequently it could discredit the results of international negotiations.

To this end, the co-legislators decided to keep the definitions of the GATS as much as possible, yet certain expressions were still altered. In its statement the Commission considered

‘that the definition of “specialist” in Article 3 (f) of this Directive is in line with the equivalent definition (“person possessing uncommon knowledge”) used in the EU’s schedule of specific commitments of the WTO’s General Agreement on Trade in Services (GATS). The use of the word “specialised” instead of “uncommon” does not entail any change or extension of the GATS definition and is only adapted to the language now in use.’\(^{22}\)


Measures to attract highly qualified third-country nationals, such as key staff of transnational corporations, are part of the broader framework identified by the EU 2020 Strategy, which set the objective of the Union becoming an economy based on knowledge and innovation, reducing the administrative burden on companies and better matching labour supply with demand. Nevertheless, the negotiations of the Directive also posed questions on how the target group of the ICT Directive relates to other groups already covered by EU law, such as highly-skilled migrants and posted workers. It was easier to point at the difference between intra-corporate transferees and highly-skilled migrants, as intra-corporate transferees are seconded on the basis of a work contract with a third-country undertaking, and are therefore excluded from the scope of the Blue Card Directive, which requires a work contract or binding job offer with an entity in the EU.

As regards posted workers, the Recital of the ICT Directive set out that

‘this Directive does not affect the conditions of the provision of services in the framework of Article 56 TFEU. In particular, this Directive does not affect the terms and conditions of employment which, pursuant to Directive 96/71/EC, apply to workers posted by an undertaking established in a Member State to provide a service in the territory of another Member State. This Directive should not apply to third-country nationals posted by undertakings established in a Member State in the framework of a provision of services in accordance with Directive 96/71/EC. Third-country nationals holding an intra-corporate transferee permit cannot avail themselves of Directive 96/71/EC. This Directive should not give undertakings established in a third country any more favourable treatment than undertakings established in a Member State, in line with Article 1(4) of Directive 96/71/EC.’

3. Social Security Issues

Adequate social security coverage for intra-corporate transferees, including, where relevant, benefits for their family members, is important for ensuring decent working and living conditions while staying in the Union. Therefore, equal treatment should be granted under national law in respect of those branches of social security listed in Article 3 of Regulation (EC) No 883/2004 of the European Parliament and of the Council. Although legal migration Directives do not harmonise the social security legislation of Member States, they set out equal treatment clauses regarding social security, which many times lead to excessive and even heated discussions within the Council and also during the interinstitutional negotiations. Therefore, it is worth to see the specific issues regarding the target group of the ICT Directive, especially with regard to the basic social security principles and social security agreements (SSAs).

ILO Conventions and Recommendations establish five basic social security principles, which are the following.

23 Recital (37) of the ICT Directive.
24 Recital (38) of the ICT Directive.
‘First, under the principle of equality of treatment between nationals and non-nationals, migrant workers must benefit from the same conditions as nationals with regard to coverage and entitlement to benefits in the host country. Second, determination of the applicable legislation ensures, by establishing the rules for determining the applicable legislation, that the social security rights of a migrant worker is governed at any given point by the legislation of one country only. (…) Third, the maintenance of acquired rights principle and provision of benefits abroad means that any acquired right should be guaranteed to the migrant worker in any one territory, even if it has been acquired in another, and that there should be no restriction on the payment of benefits, for which the migrant has qualified, in any of the countries concerned. (…) Fourth, maintenance of rights in the course of acquisition provides for the totalization of periods of insurance, employment or residence and of assimilated periods for the purpose of the acquisition, maintenance or recovery of rights and for determining the eligibility to benefits, the calculation of benefits, as well as for determining the cost sharing of benefits paid. Fifth, the provision of administrative assistance, which is twofold. On one hand, authorities and institutions of the signatory countries shall afford one another assistance with a view to facilitating the application of the respective agreements. On the other hand administrative assistance should be provided to the person covered by the agreement.’

As regards the ICT Directive, Member States’ concerns mainly touched upon the first and second principle quoted above. The principle of equality of treatment between nationals and non-nationals requires that benefits are provided under the same conditions in case the situation of nationals and third-country nationals are similar. Nevertheless, it also means that justified restrictions may be allowed if the situations of the two groups at the two ends of the comparison differ. The most debated benefits in this regard are usually unemployment benefits, family benefits, and study grants. In case of the ICT Directive it was the issue of family benefits the provision of which raised most of the concerns. While the Commission and the European Parliament usually support the most extensive rules on equal treatment, in this case they also had an additional argument: intra-corporate transferees are likely to exercise their intra-EU mobility right, which leads to the applicability of the social security coordination rules extending complete equal treatment to those moving within the EU.

Nevertheless, the outcome of the negotiations lead to the possibility to introduce restrictions in this regard as set out in Article 18(3) of the ICT Directive, yet it was also declared that it is without prejudice to Regulation (EU) No 1231/2010 of the European Parliament and of the Council. Therefore in the event of mobility between Member States this Regulation should apply regardless whether the particular Member State applies this restriction in the one Member State situations or not.

28 Recital (39) of the ICT Directive.
The Recital of the Directive also puts much emphasis on providing justification for this restriction:

‘In many Member States, the right to family benefits is conditional upon a certain connection with that Member State since the benefits are designed to support a positive demographic development in order to secure the future work force in that Member State. Therefore, this Directive should not affect the right of a Member State to restrict, under certain conditions, equal treatment in respect of family benefits, since the intra-corporate transferee and the accompanying family members are staying temporarily in that Member State.’

Nevertheless, Austria still had major concerns regarding the final compromise text of the Directive, and therefore attached a statement to it:

‘Austria has repeatedly raised severe objections to the way equal treatment in the field of social security is dealt with under the “Directive of the European Parliament and of the Council on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer”. We did not succeed in formulating a text which is consistent with the other EU instruments and the wording contained in the text might give rise to many problems for national transposition, misunderstandings and misinterpretation at national and EU level. Especially in the field of family benefits the text does not sufficiently reflect the necessity for third country nationals of having acquired the necessary integration into the society of the host member state before entitlement to benefits have to be opened. Therefore, we request a detailed examination of all existing and any future texts concerning equal treatment in the field of social security before we can agree on such provisions. Austria therefore abstains from voting on the directive.’

The second principle regarding which extensive discussions were carried out even at the last moment of the negotiations, was the one that declares that social security agreements determine the applicable legislation in order to guarantee that the social security rights of a migrant worker is governed at any given point by the legislation of one country only. As several Member States have a wide range and variety of bilateral and multilateral social security agreements, it was a crucial issue for them to be able to apply these regardless of the adoption of the ICT Directive. Article 18(2)c) therefore sets out that intra-corporate transferees shall enjoy equal treatment with nationals of the Member State where the work is carried out as regards provisions in national law regarding the branches of social security defined in Article 3 of Regulation (EC) No 883/2004, unless the law of the country of origin applies by virtue of bilateral agreements or the national law of the Member State where the work is carried out.

29 Recital (38) of the ICT Directive.
ensuring that the intra-corporate transferee is covered by the social security legislation in one of those countries.'31

Nevertheless, the last sentence of Article 18(2) also states that ‘the bilateral agreements or national law referred to in this paragraph shall constitute international agreements or Member States’ provisions within the meaning of Article 4.’ Consequently, a restriction of Article 4 is still applicable regardless of the provisions of Article 18(2)c), namely that such bilateral agreements or provisions of national law could only be applied if they provide preferential treatment compared to the provisions set out in the Directive. This interpretation is even more visible in the Recital:

‘Social security rights should be granted without prejudice to provisions of national law and/or bilateral agreements providing for the application of the social security legislation of the country of origin. However, bilateral agreements or national law on social security rights of intra-corporate transferees which are adopted after the entry into force of this Directive should not provide for less favourable treatment than the treatment granted to nationals of the Member State where the work is carried out. As a result of national law or such agreements, it may be, for example, in the interests of the intra-corporate transferees to remain affiliated to the social security system of their country of origin if an interruption of their affiliation would adversely affect their rights or if their affiliation would result in their bearing the costs of double coverage.'32

Nevertheless, the picture was still not clear enough for certain Member States. Hungary also declared its concerns in a statement regarding the contradictions of the provisions of the Directive and the principle of SSAs determining the applicable legislation instead of what is more preferential:

‘Hungary expresses its serious disappointment regarding the adopted text in Article 18(2) and Recital (38) since it precludes the practical applicability of bilateral social security agreements and limits Member States in their competence when concluding such agreements. Based on the Treaties social security policy belongs to the competence of Member States. We believe that the purpose of all secondary legislation should respect this. The aim of equal treatment harmonisation is to be interpreted in light of the competence rules of the Treaties. This Directive cannot restrict, nor impair the sovereignty of Member States in this area. In addition, in our view the reference to more favourable provisions in bilateral social security agreements is ambiguous, and thus does not ensure legal certainty. Finally, Hungary regrets that the compromise text adopted could create a situation with significant negative impact on the investment readiness in certain economic relations. This may harm economic recovery, could hinder the stimulation of growth and the enhancement of competitiveness, which is a common priority for the EU.’33

31 First sentence of Article 18(2)c) of the ICT Directive.
32 Recital (38) of the ICT Directive.
The Commission also considered this issue a key one as regards the implementation of the Directive, thus issued a statement putting more emphasis on the monitoring of implementation:

‘The Commission will monitor the implementation of Article 18(2), points (c) and (d), of this Directive in order to assess the possible impact of the bilateral agreements referred to in that Article on the treatment of intra-corporate transferees and on the application of Regulation (EC) No 1231/2010 and take, where necessary, any appropriate measure.’

4. The New Autonomous Regime of Intra-EU Mobility

One of the unique characteristic features of the newly chosen target group of intra-corporate transferees was that they require the possible maximum flexibility in being able to travel within the EU for the purpose of carrying out work in various entities belonging to the same group of undertakings. This added value of the new set of provisions was claimed by all the stakeholders from the very beginning of negotiations. In line with this need, Article 16 of the Commission’s proposal set out plans to authorise a third-country national who has been admitted as an intra-corporate transferee to carry out part of the assignment in an entity of the same group located in another Member State, on the basis of the first residence permit and of an additional document listing the entities of the group of undertakings in which he or she is authorised to work. According to the Commission’s proposal it may require a residence permit if the duration of work exceeds twelve months but may not require the intra-corporate transferee to leave its territory in order to submit such applications. Nevertheless, the Commission’s proposal meant a huge step from the existing rules of mobility. Before the ICT Directive was adopted, the EU acquis on short and long-term stay contained two kinds of mobility regimes. One is set out in the Schengen acquis and the other one in the so-called Blue Card Directive.

According to Article 6(1)b) of the Schengen Borders Code, third-country nationals holding a valid residence permit or a valid long-stay visa may also enter the Schengen area for intended stays on the territory of the Member States of a duration of no more than 90 days in any 180-day period. Therefore, a residence permit issued by the Member States according to the uniform format laid down by Council Regulation (EC) No 1030/2002 could allow even intra-corporate transferees to enter and stay for a short period of time in another Member State, yet there are limi-
tations to this short-stay in particular in the following three aspects. Firstly, the permission to stay does not include the permission to work as the Schengen area does not mean the unification of national labour markets, therefore additional authorisation would still be needed to enter a second Member State’s labour market. Secondly, this short-stay is quite limited in time, as the Schengen mobility only allows to spend 90 days within a 180-day period in the whole Schengen area and not in the Member States separately. Thirdly, the variable geometry of the justice and home affairs results in the fact that Member States not fully applying the Schengen acquis are also bound by the ICT Directive, yet their residence permit is not able to provide the mobility right set out in the Schengen Borders Code.

The so-called variable geometry had a major effect on how the intra-EU mobility provisions of the ICT Directive were formulated. ‘Variable geometry’ is the term used to describe the idea of a method of differentiated integration in the European Union.

‘The debate on variable geometries has long entertained political and intellectual elites in Europe. It has emerged and thrived in response to the tension between continuing widening of the EU on the one hand, and the EU’s internal functioning on the other.’

In case of migration affairs, there is a double variety that needs to be taken into consideration: on the one hand Schengen acquis does not bind all the Member States equally, on the other hand the United Kingdom, Ireland and Denmark opt-out from the harmonisation of legal migration, with the UK and Ireland keeping the right to opt-in pre- or post-adoption of the relevant legal act. The question therefore arose on how to provide preferential stay in a second Member State, if the residence permit was not issued by a non-Schengen Member State, but the second Member State is within the Schengen area, and thus the entry and stay in the Schengen area would, according to the main rule, require the acquisition of a Schengen visa or a residence permit issued by a Schengen state.

Based on the above discussed framework set out by the Schengen acquis, it became obvious during the negotiations within the Council that the Schengen acquis does not provide the required solution and a new, autonomous set of rules need to be adopted in order to fit the needs of intra-corporate transferees and create a true added value of the ICT Directive. The legal discussions also led to the conclusion that such unique rules on intra-EU mobility are not only needed, but that it is also legally possible to deter from the Schengen acquis as regards intra-EU mobility rights attached to a particular residence permit. While the Schengen rules regulating short-term stays are based on Article 77 TFEU, the harmonisation of legal migration takes place based on Articles 79(2)a) and b) TFEU, also referring explicitly to ‘the definition of the rights of third-country nationals residing legally in a Member State, includ-

ing the conditions governing freedom of movement and of residence in other Mem-
ber States’.

Apart from the Schengen rules on short-stays within the Schengen area, another
model for creating intra-EU mobility rules are set out in the Blue Card Directive.
Nevertheless, it is outspokenly admitted that the current EU Blue Card Directive has
demonstrated intrinsic weaknesses such as very limited facilitation for intra-EU mo-
bility. Therefore, the need for a set of provisions much more effective than those of
the Blue Card Directive was self-evident. Yet, the Commission’s proposal suggesting
basically the mutual recognition of an ICT permit for an initial 12-month period was
considered an excessive step compared to the fact that the EU acquis before the
adoption of the ICT Directive did not necessarily contain such a mutual recogni-
tion.

It was therefore the Member States’ task during the negotiations of the ICT Di-
rective to formulate a creative solution that was more innovative than any of the legal
migration directives before, but that did not go too far as the new structure relied
heavily on mutual trust between Member States. The outcome of the brainstorming
within the Council was actually a mix of the Schengen mobility rules and the Blue
Card model as the ICT Directive distinguishes between short-term and long-term
mobility. According to article 21 on the rules of short-term mobility,

‘third-country nationals who hold a valid intra-corporate transferee permit issued by the first
Member State shall be entitled to stay in any second Member State and work in any other
entity, established in the latter and belonging to the same undertaking or group of
undertakings, for a period of up to 90 days in any 180-day period per Member State subject to
the conditions laid down in this Article. The second Member State may require the host entity
in the first Member State to notify the first Member State and the second Member State of the
intention of the intra-corporate transferee to work in an entity established in the second
Member State.’

For more than 90 days per Member State, the second Member State may decide to
apply the rules of short-term mobility and allow the intra-corporate transferee to stay
and work on its territory on the basis of and during the period of validity of the intra-
corporate transferee permit issued by the first Member State; or apply the procedure
of issuing a so-called ‘mobile ICT’ permit.

The new autonomous regime of intra-EU mobility also refers to the unique situation
when the intra-corporate transferee permit is issued by a Member State not ap-
plying the Schengen acquis in full and the intra-corporate transferee crosses an exter-

41 Article 79(2)b) of TFEU.
and residence of third-country nationals for the purposes of highly skilled employment, COM/
2016/0378 final, Explanatory memorandum.
43 The Students Directive and the Researchers Directive do not create mutual recognition, either, only
certain set out certain kinds of facilitation of intra-EU mobility without the actual legal effect of mu-
tual recognition.
44 Article 21(1)-(2) of the ICT Directive.
45 Article 22 of the ICT Directive.
nal border, in which case the second Member State shall be entitled to require certain pieces of evidence regarding the fact that the intra-corporate transferee is moving to the second Member State for the purpose of an intra-corporate transfer. As these new rules on intra-EU mobility bring a huge reform regarding the rights attached to residence permits and provide an exception to the provisions of the Schengen Borders Code, the Council, the Parliament and the Commission felt the necessity to attach a statement to the Directive at its adoption:

“This Directive establishes an autonomous mobility scheme providing for specific rules, adopted on the basis of Article 79(2), points (a) and (b) TFEU, regarding the conditions of entry, stay and freedom of movement of a third-country national for the purpose of work as an intra-corporate transferee in Member States other than the one that issued the intra-corporate transferee permit, which are to be considered as a lex specialis with respect to the Schengen acquis. The European Parliament and the Council take note of the Commission’s intention to examine whether any action needs to be taken in order to enhance legal certainty as regards the interaction between the two legal regimes, and in particular to examine the need for updating the Schengen Handbook.”

In fact, the answer of whether an update of the Schengen Handbook is required in this regard has been answered affirmative, and therefore additional parts of the Handbook are being drafted in order to provide an effective application of the new rules on intra-EU mobility. It is even more so needed after the adoption of the new Students and Researchers Directive that, being inspired by the ICT Directive, also sets out similar rules regarding researchers distinguishing short-term and long-term mobility, while creating another variation of intra-EU mobility provisions as regards third-country national students pursuing studies in the framework of a Union or multilateral programme.

5. Challenges of Implementation

Although some Member States already set out specific rules on intra-corporate transferees in their national law, most of the Member States had to create such set of rules as a new purpose of stay when transposing the Directive. Furthermore, the right of intra-EU mobility, which was also one of the major arguments behind this new step

46 Article 23(1) of the ICT Directive.
49 Article 28-29 of the Students and Researchers Directive.
50 Article 27 of the Students and Researchers Directive.
of harmonisation, definitely required policy choices to be made in every single Mem-
ber State applying the Directive, both as regards short- and long-term mobility.

Consequently, the transposition of the Directive was by far not an easy task and
as a result, many of the Member States were late in completing it. Nevertheless, dur-
ing the discussions between the Commission and the Member States on the imple-
mentation of the Directive it became clear that the provisions regarding short-term
mobility are formulated in a way that even without the transposition of the Directive
in certain Member States, ICT permits issued in other Member States would contain
such a right in terms of the non-transposing Member States as well, as the provisions
on short-term mobility are considered to have direct effect in this case.

It is also inevitable that such a huge reform on the intra-EU mobility regime will
result in challenges as regards implementation, especially in terms of understanding
their lex specialis nature compared to the Schengen acquis. Therefore, I also consider it
crucial that the Schengen Handbook is modified in order to provide ample explana-
tion on the practical application of the new autonomous mobility regime.

Finally, it should also be emphasised that regarding certain issues of legal migra-
tion Member States retain their powers even if harmonisation takes place concerning
a new group of third-country nationals. Consequently, Article 79(5) TFEU also ap-
plies in the case of intra-corporate transferees, according to which EU harmonization
in shared competence shall not affect the right of Member States to determine vol-
umes of admission of third-country nationals coming from third countries to their
territory in order to seek work, whether employed or self-employed.
Transposition of the ICT Directive 2014/66/EU: Perspective of the Commission

Fabian Lutz*

1. Introduction

The deadline for the transposition of the ICT Directive ended on 29 November 2016. 25 Member States bound by the Directive (all Member States except IE, DK and UK) should have notified their national implementing measures to the Commission by that moment. This was, however, not the case: at the expiry of the deadline, only four Member States (ES, BG, RO and NL) had notified full transposition to the Commission. In the course of the subsequent six months, nine further Member States (HU, IT, EE, FR, MT, CY, LV, LU and SK) notified full transposition. One year after the expiry of the deadline, the number of Member States having notified full transposition had reached nineteen (including CZ, AT, PT, DE, HR and LT). Four Member States (SI, PL, FI and SE) notified full transposition in the months after and currently – when drafting this chapter in June 2018 – only one Member State (BE) still has not complied with the obligation to notify complete transposition. The average transposition delay for the ICT Directive was 7.5 months. According to the July 2017 EU Single Market Scoreboard,1 Member States are currently late on average by 6.7 months when transposing single market directives. Compared with this benchmark, the transposition performance by Member States in relation to the ICT Directive can therefore be assessed as ‘average’.

It is important to bear in mind that the above information relates solely to the communications made by Member States when notifying their transposition measures to the European Commission. A verification of completeness and correctness of the communicated measures is still pending for most Member States and the fact that a Member State has notified the Directive as fully transposed does not mean that it is fully and correctly transposed in reality.

Since it is not possible yet to give a full substantive picture on the way in which Member States have transposed the Directive, this chapter will have to focus on those elements which are already available, notably those which have emerged as output of the work of the Contact Group Legal Migration.

* The author is working in the European Commission’s Directorate-General Home Affairs. All views expressed in this article are purely personal and do not necessarily reflect the views of the European Commission. The author would like to thank Alexandra Sa Carvalho for her valuable comments and contributions.

2. Key Legal Issues – Discussed at the Contact Group Legal Migration

The Contact Group Legal Migration (E02904) is a Commission expert group, which had been set up in order to exchange views with Member States experts on the application of EU Directives on legal migration, including the ICT Directive. The aim of this Contact Group is to facilitate the identification of possible problems and open questions relating to the discussed Directive and to offer an opportunity for an open and informal discussion between Member States experts working on the transposition and application of the Directives and the Commission services. Contact Groups do not have any authority to take formal decisions, but rather constitute a forum for on-going exchange of views on interpretation and application of Union legislation, aiming at developing joint views on how the requirements set out in the discussed Directives might be met. The documents of this expert group are publicly available at the Commission Register of Expert Groups.

The most recent and relevant document concerning the ICT-Directive is document Mig-Dir 111. This document summarises the preliminary outcome of informal discussions on the ICT Directive in the period 2015-2017. It contains a large number of questions and answers to interpretative questions raised either by Member States experts or by the Commission. The document does not formally commit Member States or the Commission, since legally binding interpretations of Union law can only be given by the European Court of Justice, but it gives a very good overview on issues which were considered as problematic or unclear. Many of the issues raised in the document are likely to also emerge when assessing the correctness of implementing legislation in Member States. It therefore pays to have a closer look at the substance of this paper, focusing on a selected number of key issues. The below compilation contains direct quotes of questions and answers taken from document Mig-Dir 111, sometimes complemented by further considerations and comments.

2.1 Scope and Parallel National Schemes (Article 2)

Question: Can a national permit or an EU Blue Card be granted if the applicant meets the criteria of the ICT Directive?

Answer: The applicant is allowed to choose which permit to apply for and the Member State should not change the application on his or her behalf. However, Member States are not allowed to create or maintain national admission schemes for those third-country nationals falling within the scope of the ICT Directive. Doing so would be counter to the provisions of the Directive. Therefore, the issue should not arise, a conclusion echoed by some Member States. The definitions included in the ICT Directive specify which categories of third-country nationals fall within the scope.

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2  http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=2904.
**Question:** Does an ICT who will be seconded from outside the EU to an EU Member State for more than three years fall within the scope of the directive?

**Answer:** The definitions included in the ICT Directive specify which categories of third-country nationals fall within its scope. For example, managers who are temporarily seconded from a third country to a Member State clearly fall within the scope of the ICT Directive and Member States are not allowed to create or maintain national admission schemes for those third-country nationals. Doing so would be counter to the provisions of the Directive. Article 12(1) limits the duration of the transfer of managers to a maximum of 3 years. Article 4(2) does not allow Member States to adopt or retain more favourable provisions in that respect. This means that intra corporate transfers of more than three years are in principle not allowed any more. The only way – in practice – for a further transfer exceeding 3 years would be an application for a new transfer (which must be submitted in accordance with Article 3(b) from outside the territory of the Member States). Such renewed application is only possible after the end of the ‘cooling-off period’ which Member States are free to require (or not to require) under Article 12(2). Another option would be to change status and to apply for another type of permit (such as a Blue Card).

### 2.2 Profit-making Nature of ‘Undertaking’ (Article 3(l))

**Question:** Could you specify the exact meaning of the term ‘undertaking’ for the purpose of Directive 2014/66/EU? Does the term include commercial companies as well as cooperatives such as a European cooperative society?

**Answer:** Directive 2009/38/EC (which served as inspiration for this provision) does not give a clear answer. Competition law sees undertakings as profit-making companies. This does not prevent a differing interpretation of the term ‘undertaking’ in the context of a migration Directive based on Article 79 TFEU. The wording of the Directive does not impose an interpretation according to which ICT mobility should be limited to managers, specialists and trainee employees of profit-making entities. In view of the aims and objective of the Directive, a broad sui generis interpretation of ‘undertaking’ in the ICT Directive context should be applied, covering also internationally active NGOs, cooperatives or other non-profit making undertakings, provided all the conditions set by the Directive are met.

### 2.3 Length of Prior Employment Requirement (Article 5(l)(b))

**Question:** What is the duration of employment to be verified? Do the time periods referred to in this paragraph have the meaning that Member States are able to set specific time requisites, e.g. 8 months for managers and specialists and 4 months for trainees?

**Answer:** Yes, Member States may decide on the minimum required prior work experience, within the limits set by Article 5(l)(b) of this Directive. The minimum required work experience should be at least 3 months. The minimum required work experience should not exceed 12 months for specialists and managers, and 6 months for trainee employees. This provision may result in different minimum periods set by individual Member States. For that reason, it is not a condition which is to be verified as part of intra-EU mobility of already admitted transferees.
**Question**: Should the previous work experience required by the Directive be in the same position as the ICT is in now, i.e. if the ICT is being transferred as a manager, the required previous experience must be that of the manager, and not, for example, as a specialist?

**Answer**: The Directive does not specifically require that the previous work experience of the transferee be in the same position. However, Article 5(1)(d) provides the basis for evaluating the prior work experience of the third-country national; the previous work experience would therefore be relevant, but the position in which the experience was acquired is not specified by the Directive. Member States will have the possibility to assess such relevance when examining the application.

### 2.4 Working Conditions and Remuneration (Article 5(4))

**Question**: Article 18 (right to equal treatment) specifies that ICTs should be treated equally to posted workers, with more favourable provisions being allowed. Can ICTs be admitted under the same conditions as other posted workers not coming from the EU?

**Answer**: ICTs should under no condition be treated less favourably than posted workers, third-country nationals or others. This is specified in Article 18 (equal treatment). Moreover, in the case of ICTs, Member States shall check upon admission that the ICTs’ remuneration is at least on par with nationals in comparable positions. As regards other working conditions, the ICT Directive takes over the language of the Posted Workers Directive in this respect (including its references to collective agreements). Further additional rights can be given to ICTs on the basis of Article 4 (more favourable provisions), which also refers to Article 18.

**Question**: Can a general salary threshold be imposed, based on the average gross annual salary in a Member State, such as for instance: ICT managers = 1.4 x average gross annual income; ICT specialists = 1 x average gross annual income and ICT trainees = 0.8 x this gross annual income?

**Answer**: Article 5(4)(b) expressly requires a comparison with ‘comparable positions in the Member State where the host entity is established’. This is meant to guarantee fair competition between undertakings established in the EU and in third countries (see recital 15). Depending on the sectors of industry and job profile, a manager with 1.4 x average gross annual income may be underpaid or overpaid. A binding across the board threshold is therefore no appropriate tool for transposing Article 5(4)(b) since it lacks the necessary individual comparison. This assessment might be different if the threshold was constructed as an indicative threshold only (or a set of indicative thresholds for different sectors) – combined with an obligation for the authorities to always also carry out an individualised assessment taking into account the salaries paid in that Member State for comparable posts.
2.5 Rejection of Application if Host Entity was Established for the Main Purpose to Facilitate Entry of ICTs (Article 7(1))

**Question:** Would a business practice under which a third-country company is setting up a new branch in an EU Member State which would be run exclusively (or to a large majority) by a team of ICTs coming from this third country be considered as contrary to the ICT Directive?

**Answer:**
1. According to Article 3(b) of the ICT Directive, the transfer must take place to 'an entity belonging to the undertaking or to the same group of undertakings which is established in that Member State'. This implies that the entity in the receiving State must have already been legally set up before the ICT application is submitted.
2. According to Article 7(1)(c) of the ICT Directive, an application for an ICT permit shall be refused if 'the host entity was established for the main purpose of facilitating the entry of ICTs'. This provision targets entities which do not have much genuine activity but instead act as de-facto intermediaries or as vehicles for transferring staff from abroad, cf. also Recital 24, even if this is done for the benefit of other entities in the same group. Criteria to assess this condition would be: the time that the host entity exists and whether it has already been operational for a certain period, the scope of its business activities and the number of its personnel as compared to the number of applications for ICTs to this entity.

The concrete situation described in the question would most probably be considered as falling under Article 7(1)(c) and therefore not considered as an ICT. This assessment could be different if the newly established host entity was operated by a majority of local staff and only a limited number of ICTs.

2.6 Place of Application (Article 11(2))

**Question:** Are applications, by a third-country national or by an already admitted ICT-permit holder, allowed from within the EU (but outside the territory of the Member State to which one seeks admission)?

**Answer:** The meaning of Article 11(2) needs to be determined in accordance with the different scenarios which may arise in practice, as set out in relevant provisions of the Directive:

1. **Application for an ICT permit:** With a view to Articles 2(1) and 3(b), Article 11(2) does not put into question the basic principle that applications must be submitted when the third-country national is residing outside the territory of the Member States.
2. **Application for permit for long-term mobility of an ICT:**
   2.1. **Not yet staying in the second Member State under short-term mobility:** The application may be submitted from the territory of a Member State (Art 22(2)(c)) – but from outside the territory of the specific Member State to which admission under long-term mobility is sought (Art 11 para 2).
   2.2. **Already staying in the second Member State under short term mobility:** The applicant may already stay in territory of the Member State to which admission under long-term mobility is sought (Art 22(2)(c)).
2.7 Definition of First Member State (Article 11(3))

Answer (to a question on possible problems caused by the definition of first Member State): Article 11(3) aims to prevent that applicants choose the Member State on the basis of easier admission conditions, rather than actual needs, and subsequently use the intra-EU mobility rights to circumvent admission rules of a second Member State. This Article also recognises that there might be situations in which the transferee does not plan to commence work in the Member State in which s/he will spend the bulk of the transfer.

The first Member State for the purposes of the Directive is the Member State which will issue the ICT permit, even in cases where the transferee intends to work first in another Member State (the second Member State for the purposes of the Directive) on the basis of the intra-EU mobility rights conferred by that permit. The application for an ICT permit for long-term mobility can only be lodged if the transferee has a valid ICT permit in the first Member State. The stay in the second Member State can only commence if the transferee possesses a valid ICT permit in the first Member State (and has fulfilled the second Member State's requirements under Articles 20-23).

Some Member States do not issue permits at the consular post, but only on the territory (e.g. by a local administration). The procedure for issuing the ICT permit in the first Member State should be kept as short as possible, particularly in cases where mobility would be needed from the start, so as not to nullify or impair the effect of the Directive and to allow the transferee to commence working in the second Member State as soon as possible.

The visa, if required, to enter the first Member State's territory and collect the ICT permit would be a D-type visa (long-stay). While this type of visa grants Schengen mobility rights, it cannot be used to reside and work in another Member State. Issuing the appropriate ICT permit swiftly is therefore essential.

2.8 Cooling-off Period and Status Change (Article 12(2))

Question: The last words of paragraph 2 ‘in the same Member State’ (not plural) suggests that the period of 6 months can only be applied by the Member State(s) where the last transfer had taken place. Is that correct?

Answer: Yes, the required period of absence can only be applied to subsequent transfers to the same Member State.

Question: Can ICT permit holders benefit from a change in status, allowing them to stay on the territory? How is the temporary nature of this type of migration ensured?

Answer: If national or EU legislation governing other categories of third-country nationals (i.e. other than ICTs) allow applications for admission from within territory, an ICT could make use of them. The ICT Directive does not diminish such rights. He/she would then no longer be an ICT in that Member State and would have to fulfil all conditions specific to his/her new permit. An example could be a third-country national, residing on an ICT permit, applying for an EU Blue Card. If the applicant fulfils the criteria set out in the Blue Card Directive, as implemented in that Member State, he/she could be given a Blue Card. However, by definition, a new
ICT transfer can only take place after the third-country national has returned to a third country.

### 2.9 Work on Client’s Site Permitted (Article 17(c))

A relevant issue which has not been discussed so far in the Contact Group is the question to what extent ICTs may be allowed to carry out work on the sites of clients of their host entity. Recital 36 of the Directive sets out: *This Directive should not prevent intra-corporate transferees from exercising specific activities at the sites of clients within the Member State where the host entity is established in accordance with the provisions applying in that Member State with regard to such activities.* There are, however, no provisions in the Articles of the Directive which directly regulate the issue. A possible interpretation may be to interpret Article 17(c), which gives ICT permit holders the right to exercise the specific employment activity authorised under the permit in accordance with national law in any host entity belonging to the undertaking or the group of undertakings in the first Member State as covering also work at clients sites under the supervision and direction of the host company.

### 2.10 Existence of Bilateral Agreements on Social Security (Article 18(2)(c))

Another issue which has not been discussed so far in the Contact Group, even though it was one of the most political and controversial points in the negotiations leading to the adoption of the ICT Directive, is the question to what extent bilateral agreements on social security making the law of the country of origin applicable may supersede, as ‘more favourable provisions’, the application of Regulation (EU) No 1231/2010. It will be necessary to first collect practical experiences based on a sufficient number of individual cases of ICTs relying on this provision before being able to evaluate whether this provision raises implementation problems.

### 2.11 Admission and Work of Family Members (Article 19)

**Question:** Do family members need a permit for family reunification from the first Member State, before being able to stay in a second Member State, with the benefits of Article 19 of the Directive? Also in the case where the first Member State is not the Member State where the intra corporate transferee starts working?

**Answer:** Family reunification in the second Member State is allowed on the basis of Article 19. If the conditions of this Article are fulfilled, family reunification should be granted. Therefore, if the transferee is allowed to stay and work in a Member State which granted mobility under Article 22, the transferee's spouse can be allowed to join on the basis of Article 19 regardless of that spouse's status in the first Member State.

**Question:** We would like to know how to determine/regulate entry and residence of a family member of an ICT, who is on a long-term mobility in another Member State or in several Member States. We would also like to know if it is possible to use the provisions as determined for a family member in the Blue Card Directive.
Answer:
1. Normal Schengen rules allow family members holding a valid residence permit to stay (but not to work) up to 90 days/180 days in other Member States.
2. If a family member accompanying a mobile ICT to another Member State wants to stay there for more than 90 days, a new application under Article 19 for stay in the other Member State is necessary.
3. The rules in the Blue Card Directive are similar but not identical to the rules in the ICT Directive – Member States may apply national law transposing Article 19 of the Blue Card Directive to family members of mobile ICTs only insofar as these national rules are similar or more favourable than Article 19 ICT Directive.

3. Mobility Choices and Guidance on the Practical Application of the Mobility Scheme Established by the ICT Directive

One of the major objectives of the ICT Directive is to facilitate mobility of ICTs within the Union (‘intra-EU mobility’) and to reduce the administrative burden associated with work assignments in several Member States. For this purpose, this Directive sets up a specific intra-EU mobility scheme whereby the holder of a valid ICT permit issued by a Member State is allowed to enter, to stay and to work in one or more Member States in accordance with the provisions governing short-term and long-term mobility under the Directive. Short-term mobility for the purposes of this Directive is covering stays in Member States other than the one that issued the ICT permit, for a period of up to 90 days per Member State. Long-term mobility for the purposes of this Directive is covering stays in Member States other than the one that issued the ICT permit for more than 90 days per Member State.4 The provisions on intra-EU mobility set out in the ICT Directive are complex, but innovative and are considered as significantly contributing to the added value of the Directive.

3.1 Mobility Choices

Article 21 and 22 of the Directive left Member States the choice between different options for implementing the mobility provisions. For short-term mobility, Member States could allow mobility to happen under a ‘no procedure’ requirement or they could require a ‘notification procedure’. For long-term mobility, Member States could choose between ‘no procedure’, ‘notification procedure’ or ‘application procedure’, the latter involving the issuance of a ‘mobile ICT permit’ by the second Member State.

The below overview5 shows that nine Member States opted to allow short-term mobility under the ‘no procedure’ requirement, whilst sixteen Member States require notification. As regards long-term mobility, all but four Member States seem to prefer the heaviest option, namely an application procedure.

4 Recital 25 of the ICT Directive.
5 Based on information received from Member States as on 1 March 2018. This information still needs to be cross-checked and corrections may be necessary. Info related to the MS which did not notify full transposition yet is put in brackets.
3.2 Relation with Schengen Acquis

The specific mobility scheme established by the ICT Directive lays down autonomous rules regarding entry and stay for the purpose of work as an ICT in Member States other than the one that issued the ICT permit. These autonomous rules of a legal migration act based on Article 79(2) TFEU, constitute ‘lex specialis’ in relation to the normal Schengen rules.

From the outset there was a clear understanding that the adoption of such complex legal construction would have to go hand in hand with clear practical guidance in order to assure smooth application. Therefore, when the ICT Directive was adopted in 2014, the European Parliament, the Council and the Commission co-signed a statement in which the Commission expressed its intention to examine the need for

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6 Recital 26 of the ICT Directive.
7 Text of statement: ‘This Directive establishes an autonomous mobility scheme providing for specific rules, adopted on the basis of Article 79(2), points (a) and (b) TFEU, regarding the conditions of en-
updated the Practical Handbook for Border Guards (Schengen Handbook) as regards intra-EU mobility of ICTs. As a follow-up to this promise, Commission services prepared, in consultation with the Contact Group Legal Migration, a new section on intra-corporate transferees to be included in chapter 5 (‘special rules for checks on certain categories of persons’) of the ‘Practical Handbook for Border Guards (Schengen Handbook)’. The draft text (likely to be adopted by the European Commission in autumn 2018) highlights and explains the rules applicable in case of border control of holders of ICT permits:

**Intra-corporate transferees holding a permit of a Schengen State not yet fully applying the Schengen acquis**

The intra-EU mobility scheme established by Directive 2014/66/EU lays down autonomous rules which allow holders of an intra-corporate transferee (ICT) permit issued by a Schengen State not yet fully applying the Schengen acquis, to exercise mobility and to enter, stay and work in one or several second EU Schengen States bound by the provisions of that Directive (i.e. all EU Member States except United Kingdom, Ireland and Denmark).

**Short-term mobility** (up to 90 days in any 180-day period per EU Member State bound by the Directive): Holders of an ICT permit are not required to be in possession of a valid visa, if they provide evidence that they are moving to a second EU Member State bound by the Directive in the context of intra-EU mobility authorised under that Directive. Such evidence shall be provided by means of:

(a) a copy of the notification sent by the host entity in the first EU Member State bound by the Directive in accordance with Article 21(2) of the Directive; or
(b) a letter from the host entity in the second EU Member State bound by the Directive that specifies at least the details of the duration of the intra-EU mobility and the location of the host entity or entities in the second EU Member State bound by the Directive.

The allowed maximum period of cumulated short-term stays in second EU Member States bound by the Directive under ICT mobility rules may exceed 90 days in any 180-day period: Subsequent short-term stays of up to 90 days in any 180-day period per EU Member State bound by the Directive in different EU Member States bound by the Directive are authorised and may add up to a significant part of the overall maximum duration of residence of intra-corporate transferees (three years for managers and specialists; one year for trainee employees) depending on the circumstances of each individual case. The rules on short-term mobility are directly applicable as of 29 November 2016.
* Example:
An Indian manager holding a Croatian ICT permit may stay 170 days (90 days of short-term mobility in Italy followed by 80 days of short-term mobility in Germany) during a 180-day period without infringing Schengen rules.

Long-term mobility (more than 90 days per EU Member State bound by the Directive): The rules on long-term mobility depend on the choice made by the relevant second EU Member State bound by the Directive when transposing the ICT Directive. The second EU Member States bound by the Directive may either require a residence permit ‘mobile ICT’ (application procedure) to be issued by that second EU Member State bound by the Directive or opt for applying the rules on short-term mobility. In the first case, the residence permit ‘mobile ICT’ shall be required, in the latter case, the rules described above apply.

3.3 **Cooperation between National Contact Points**

Article 26 of the ICT Directive provides that Member States shall appoint contact points which shall cooperate effectively and be responsible for receiving and transmitting the information needed to implement the provisions of the Directive dealing with intra-EU mobility (Articles 21, 22 and 23). The provisions requiring a direct exchange of information between Member States authorities on individual files are in particular:

Article 21(6) 
‘(…) The competent authorities of the second Member State shall inform without delay the competent authorities of the first Member State and the host entity in the first Member State about their objection to the mobility’.

Article 22 (6): 
‘(…) The second Member State shall inform the competent authorities in the first Member State where a permit for long-term mobility is issued’.

Article 23(2): ‘Where the first Member State withdraws the intra-corporate transferee permit, it shall inform the authorities of the second Member State immediately.’

and Article 23(5): 
‘In the cases referred to in paragraph 4, the first Member State shall, upon request of the second Member State, allow re-entry of the intra-corporate transferee, and, where applicable, of his or her family members, without formalities and without delay.’

The ICT Directive spells out that Member States shall give preference to exchanging of information via electronic means and recital 42 emphasises that the collection and transmission of files and data should be carried out in compliance with the relevant data protection and security rules. The concrete way in which information is exchanged between the national contact points is presently not regulated yet at EU level. Currently Member States must therefore cooperate bilaterally and provide relevant information to each other's national contact points, in accordance with national
law and bilateral cooperation arrangements. Frequently, this exchange of information seems to take place in the form of – possibly encrypted – e-mails. In the Contact Group Legal Migration, several Member States raised this issue and suggested that there would be added value in giving a further steer on exchanging data in a safe and appropriate manner. Some Member States suggested providing for communication tools to be used in between national contact points for exchanging personal information related to intra-EU mobility. Responding to this call, the Commission services presented, at the March 2018 meeting of the Contact Group Legal Migration, a discussion document\(^8\) with options for setting up a dedicated communication tool to be used by national contact points for exchanging personal information related to intra-EU mobility. Given that not only the ICT Directive, but also three other Directives (Directive 2003/109/EC – Long-term Residents; Directive 2009/50/EC – EU Blue Card and Directive (EU) 2016/801 on Students and Researchers) contain provisions regarding the establishment of contact points in the Member States responsible for information sharing, in particular on issues linked to intra-EU mobility, it is likely that such future communication tool – if it will be created – will serve as a tool for safe information exchange between the national contact points of all relevant legal migration directives.

4. **Enforcement**

In its role as Guardian of Union law, the Commission also has the task to supervise the correct implementation and application of the Directive, to encourage Member States to correct shortcomings and if necessary to launch formal infringement procedures. As regards formal infringement procedures, it is important to distinguish three main case categories:

- **Non-transposition cases:** These relate to the mere fact that a Member State did not comply in time with the obligation set out in the respective transposition Article of the Directives (Article 27 of the ICT Directive) to communicate the national measures implementing the Directive before the expiry of the transposition deadline to the Commission. These procedures are opened by the Commission \textit{ex officio} and quasi automatically in those cases in which no communication of full transposition was notified by the Member State in time. As regards the ICT Directive the Commission opened on 24 January 2017 seventeen infringement procedures against all those Member States which had – at that moment – not notified yet national measures fully transposing the Directive. Most of these procedures were subsequently closed, once notifications of full transposition were received.

- **Non-conformity cases:** The acceptance by the Commission that a directive was fully transposed by a Member State for the purposes of closing a non-transposition case does not imply necessarily that all provisions of the Directive were correctly transposed. The assessment of the correct transposition of a Directive requires a profound in-depth examination, frequently also involving clarifying fact-finding

\(^8\) Document Mig-Dir 114.
contacts with Member State authorities so as to determine with certainty the applicable national legislation. As regards the ICT Directive, the Commission services are currently entering the phase of verifying in-depth the national legislation and it cannot be excluded that in certain cases, if dialogue with the Member States concerned does not pave the way for the necessary amendments to be adopted at national level, targeted infringement procedures will have to be launched.

- **Complaint cases:** These are cases which are based on complaints received by the Commission. In the field of migration, such complaints are in many cases submitted by NGOs, law firms or migrants themselves. Complaints are a precious supplementary source of information for the Commission about realities in Member States legislation and administrative practice.

Next to this, *legal appeals procedures at national level, leading eventually to preliminary references* to the European Court of Justice are an important tool for fostering compliance with EU law. This is particularly the case in the field of migration law, where the majority of judgments delivered by the ECJ in the last decade were based on preliminary references. National judges are playing a key role as a point of reference for making EU migration law a reality in Member States and preliminary references have proven to be a very quick and efficient way for obtaining an authentic interpretation of the provisions of EU migration law. It still remains to be seen whether the provisions of the ICT Directive are susceptible to lead to national appeals procedures and resulting preliminary references.

5. **Outlook**

The ICT Directive is a relatively young directive and it is not possible yet to give an assessment of its effects, strengths and weaknesses. Many Member States were late in transposing it and there was no time yet to gain sufficient experiences with its application and to study in depth its implementation. A first application report is due in November 2019. At this point in time it will be possible to present a first coherent picture of the way in which Member States transposed it and its practical effects.

Some of the results of the currently ongoing ‘Fitness Check’ of the legal migration acquis⁹ may also be relevant for the ICT Directive. A discussion paper¹⁰ with preliminary findings on coherence and gaps of the EU legal migration acquis was presented to Member States expert in the Contact Group Legal Migration in November 2017. Findings of relevance for the ICT Directive include those related to the *clarity and consistency of terminology.*

‘All legal migration Directives examined in this section cover a number of steps of the migration process. Most of the Directives contain provisions on admission conditions,

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⁹ For further details on the currently ongoing Fitness Check see: https://ec.europa.eu/home-affairs/what-we-do/policies/legal-migration/fitness-check_en.
¹⁰ Document Mig-Dir 104.
admission procedures, rights based on the authorisation (such as the right to work and access to the labour market and the right to equal treatment with nationals in other areas), the format of the authorisation (such as a combined work and residence permit or visa), and the situation of family members. A number of Directives also contain provisions on information about migration possibilities (transparency) and intra-EU mobility. The internal coherence check showed that in the different Directives, similar issues are frequently addressed by different wording. Differing legal techniques (general clauses vs detailed enumerations) were used to address comparable issues and frequently these differences cannot be explained by the different scope of the Directives at stake. The reason for this lack of legal consistency lies mainly in the historic genesis of the different Directives, each of which had its own peculiarities, policy constraints and decision makers involved (...). On top of this, vague formulations seem to have been sometimes deliberately used in the decision-making process as a tool for reaching agreement. On a number of issues, the coherence check gives an indication that the clarity and consistency of terminology of the EU legal migration rules could be improved.\textsuperscript{11}

As regards more specifically those categories of \textit{third-country service providers} which are not yet covered by the scope of the ICT Directive the paper sets out:

‘The external coherence review showed that posting of service providers from outside the EU to EU Member States (in those cases that are not covered by the scope of the ICT Directive), such as contractual services suppliers, independent professionals, business sellers and visitors is currently not covered by the EU legal migration acquis, except for the general principle set out in Article 1(4) of the Posted Workers Directive that undertakings in third countries should not be given more favourable treatment than Member States undertakings. Further harmonisation at EU level may – as it is already the case with the ICT Directive – complement and facilitate the application of international commitments under GATS and bilateral trade agreements. At the same time, it is necessary to assess the proportionality of possible harmonisation efforts and the potential impact on EU’s leverage in the negotiation of future agreements with third countries, notably in what regards reciprocity.’\textsuperscript{12}

Views on the likely impact of the ICT Directive differ:

In their Article ‘\textit{The EU ICT Directive: A Revolutionary Scheme or a Burden?}’, \textsuperscript{13} De Bie and Ghimis argue that

‘the ICT Directive is without any doubt a unique and valuable instrument in the European migration landscape that contributes to a major shift in the EU’s and Member States’ economic migration policies. (…). This Directive can prove the relevance of EU-wide schemes and their added value compared to purely national ones. As a consequence, the ICT Directive could bring a much needed impetus to the entire European labour migration policy.’

\begin{itemize}
\item \textsuperscript{11} Document Mig-Dir 104, p. 2.
\item \textsuperscript{12} Document Mig-Dir 104, p. 16.
\item \textsuperscript{13} A. de Bie & A. Ghimis, ‘ The intra-corporate transferees directive: a revolutionary scheme or a burden for multi-national companies?’, \textit{ERA Forum} (2017) 18:199–211.
\end{itemize}
A more negative assessment is given by Lörges in his comment\textsuperscript{14} on the ICT Directive:

‘Due to its restricted scope, the overall impact of this Directive will be rather limited. In addition, its effects might be further diminished by its considerable complexity which reduces the attractiveness of the rules and raises doubts whether the Directive will indeed be able to enhance the number of intra-corporate transfers significantly. However, the Directive might play an important role in the further development of intra-EU mobility for third country nationals due to its flexible mobility scheme which is independent from the Schengen regime.’

It is not possible yet to verify or falsify these statements.

The fact that nine Member states opted for the non-bureaucratic ‘no procedure’ requirement for short term mobility even though they could have chosen the heavier notification procedure, may be taken as a positive signal. A significant number of Member States also provided for deadlines for taking a decision which are shorter than the maximum of 90 days prescribed by Article 15(1).

On the other hand, the preliminary analysis of some of the notified measures transposing the Directive seem to point to a general trend of Member States to implement all or most of the ‘may’ clauses of the Directive. It also appears that in many cases Member States did not opt for more streamlined and less burdensome options available in the Directive:

- Only a limited number of Member States seem to have used the option of Article 11(6) to set up simplified procedures for entities or groups of undertakings which have been recognised for that purpose.
- The overwhelming majority of Member States opted, under Article 22, to use the more burdensome application procedure and not the notification procedure for long-term mobility.
- Most Member States seem to have opted for requiring a cooling off period under Article 12(2). Sometimes this choice appears to be in contradiction with the wish, expressed by the same Member States, to allow for periods of stay of ICTs exceeding the maximum periods of three years (for managers and specialists) or one year (for trainee employees) fixed by Article 12(1).

These preliminary findings give a somehow mixed picture. Maybe the positive reception of the directive by economic operators and the fact that – so far – no complaints were received by the Commission may be taken as a signal for justifying a positive assessment. But it cannot be excluded either that a number of problems have not surfaced yet. The first application report, due in November 2019, will tell us more.

The Role of Employment and Social Security Rights in the Intra-Corporate Transfer Directive

Herwig Verschueren*

1. Introduction

This chapter will examine the role employment and social security rights play in the ICT Directive and the implementation of this directive by the EU Member States. One of the directive’s objectives is to guarantee decent working conditions and fair competition by preventing the sending employer from benefiting from lower labour standards.1 Still, the issue of the employment and social security rights of the intra-corporate transferees was fiercely debated during the negotiations on the Commission’s proposal in the Council of Ministers and the European Parliament. This resulted in a large number of provisions in the directive in which the employment and social security position and rights of these workers play a crucial role. However, it will appear that due to these cumbersome negotiations, the compromises reached are sometimes ambiguously and inconsistently formulated.2

First, this chapter will highlight the relevance of the employment position of the worker for determining the scope of this directive. Next, it will analyse the role of employment and social security rights in the implementation of the directive by the Member States. These rights are relevant as criteria for admission, as grounds for rejection of an application, as grounds for withdrawal or non-renewal of the ICT permit and as conditions for short-term and long-term mobility within the EU. Subsequently, this chapter will scrutinize in detail the provisions of Article 18 of the directive which guarantee equal treatment with the nationals of the host State regarding employment and social security rights. Finally, some conclusions will be drawn.

The issue of the employment and social security rights of intra-corporate transferees appears to be legally complex due to the interference of and with other EU legal instruments regarding these matters, such as the Posting of Workers Directive 96/71/EC (PWD),3 the Private International Law rules of Rome I Regulation 593/2008/EC4 and the EU social security coordination Regulation 883/2004/EC.5

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1 See recitals 15 and 38.


The latter instrument has been extended to third-country nationals moving within the Member States by means of Regulation 1231/2010/EU. Moreover, international agreements concluded by the European Union as well as by the Member States may influence the implementation of the provisions of the directive. Therefore this chapter will also analyse the impact of these legal instruments on the employment and social security rights of intra-corporate transferees.

2. The Relevance of the Employment Position for Determining the Scope of the ICT Directive

In defining its personal scope Directive 2014/66 refers to the employment position of the intra-corporate transferee. The directive has a very specific scope since it concerns temporary assignments by companies of highly skilled third-country nationals, in particular managers, specialists or trainee employees, to subsidiaries in the EU. It follows from the definition of ‘intra-corporate transfer’ in Article 3(b) that the directive only applies if the intra-corporate transferee is bound by a work contract prior to and during the transfer with an undertaking established outside the territory of a Member State. This means that the directive would not apply, or would no longer apply, if the host entity concludes a work contract with the intra-corporate transferee. This is an essential feature of the intra-corporate transfer: the sending company must legally remain the employer of the seconded intra-corporate transferee. However, there is no clarification in the directive (or its recitals) as to how and on the basis of which criteria the host State should determine who legally speaking is the employer. Indeed, it remains unclear whether the host Member State may apply its own legislation, on the basis of which it could decide that the host entity fulfils the criteria for being the employer of the intra-corporate transferee. This could be the case if the host entity exercises, in actual practice, the main functions of an employer, such as the power to give instructions on how the work should be done, or to make the worker redundant.

The employment position of the intra-corporate transferee is further relevant for the implementation of the provision which excludes some types of work from the scope of the directive. First, third-country nationals who are posted within the framework of the Posting of Workers Directive 96/71 are excluded. However, this exclusion seems to be superfluous since the scope of the PWD is limited to postings by undertakings established in a Member State, whereas the definition of ‘intra-corporate transfer’ in Article 3(b) of the ICT Directive explicitly refers to secondment by an undertaking established outside the territory of a Member State. Consequently, posting from within the EU is already excluded by this definition. Therefore it is not

5 Regulation 883/2004/EC on the coordination of the social security systems (OJ 2004 L 200/1) (hereinafter referred to as ‘Regulation 883/2004’).
7 Article 2(2)(c).
clear why workers posted in the framework of the PWD had to be explicitly excluded from the scope of the ICT Directive. Moreover, the exclusion of workers posted within the framework of the PWD does not clarify as such the relationship between the PWD and the ICT Directive, more specifically with regard to the employment conditions of the intra-corporate transferees. More clarity is given in the equal treatment provision of Article 18(1) of the ICT Directive, which we will discuss in point 4.1.

Third-country nationals carrying out activities as self-employed workers are also excluded from the scope of the ICT Directive. No clarification is given in terms of the basis on which criteria the Member States could make the distinction between employed and self-employed workers, contrary to what has been laid down in the PWD. The latter provides in its Article 2(2) that for the purpose of this directive, the definition of a worker is that which applies in the law of the hosting Member State. In the absence of a specific definition in a directive or regulation, it is settled case law of the ECJ that the definition of a worker should be an autonomous EU definition. As regards the concept of 'worker' in the context of the free movement for workers of Article 45 TFEU the ECJ clarified that any person pursuing economic activities which are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a 'worker'. For the Court, the essential feature of an employment relationship is that, for a certain period, a person performs services for and under the direction of another person (subordination), in return for which he/she receives remuneration.

Finally, the ICT-Directive excludes from its scope third-country nationals who

‘are assigned by employment agencies, temporary work agencies or any other undertakings engaged in making available labour to work under the supervision and direction of another undertaking’.

For this category of workers, no further explanation is given either.

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8 Article 2(2)(d).
9 For early statements of this rule, see Case C-53/81 (Levi), EU:C:1982:105, para 17; and Case C-66/85 (Lawrie-Blum), EU:C:1986:284, para 16. See more recent Joined Cases C-22/08 and C-23/08 (Vatsouras and Koupatantze), EU:C:2009:344, para 26; and Case C-46/12, L.N., EU:C:2013:97, para. 39.
10 See Case C-66/85 (Lawrie-Blum), EU:C:1986:284, para 17; Joined Cases C-22/08 and C-23/08 (Vatsouras and Koupatantze), EU:C:2009:344, para 26; and Case C-46/12, L.N., EU:C:2013:97, para 40. In other areas of EU law too, in the absence of any specific definition of a 'worker' or any reference to the law of the Member States, the ECJ applied an EU concept of 'worker', such as in the field of equal treatment for male and female workers (see Case C 366/99 (Griesmar), EU:C:2001:648, para 31) or for the implementation of Working Time Directive 2003/88/EC (see Case C 151/02 (Jaeger), EU:C:2003:437, paras 58-59) and the Collective Redundancies Directive 98/59 (see Case C-229/14 (Balkaya), EU:C:2015:455, para 33).
11 Article 2(2)(e).

The employment and social security rights of an intra-corporate transferee play a prominent role in the implementation of the directive. More specifically, they are relevant as criteria for admission, as grounds for rejection of an application, as grounds for withdrawal or non-renewal of the ICT permit, and as conditions for the short-term and long-term mobility within the EU. I will now analyse this role in greater detail.

3.1 Criteria for Admission

The criteria for admission are laid down in Article 5 of the ICT Directive. The first requirement is that the third-county national who applies for admission as an intra-corporate transferee, or the host entity, shall

‘present a work contract and, if necessary, an assignment letter from the employer containing details of the duration of the transfer and the location of the host entity or entities; …; the remuneration as well as other terms and conditions of employment granted during the intra-corporate transfer’.12

Since the remuneration and other terms and conditions of employment will play a crucial role in the implementation of the directive, the information in the work contract will be of the utmost importance.

In addition, the intra-corporate transferee or the host entity shall also

‘without prejudice to existing bilateral agreements, provide evidence of having, or, if provided for by national law, having applied for, sickness insurance for all the risks normally covered for nationals of the Member State concerned for periods where no such insurance coverage and corresponding entitlement to benefits are provided in connection with, or as a result of, the work carried out in that Member State’.13

This provision refers to the situation where the intra-corporate transferee is, in connection with or as a result of the work, not covered by the national sickness insurance system of the host Member State. This depends in the first place on the legislation of that Member State, but also on the existing bilateral social security agreements concluded between the home State and the host State. Such an agreement may provide that the intra-corporate transferee remains subject to the sickness insurance system of his/her home State. In that case he/she or the host entity must provide evidence that the intra-corporate transferee has a statutory or a supplementary coverage for sickness insurance that should cover all the risks normally covered for nationals of the host Member State. This may require additional coverage by private insurance schemes.

12 Article 5(1)(c).
13 Article 5(1)(g).
As a supplementary condition for admission, Article 5(4)(a) obliges the Member States to require that

‘all conditions in the law, regulations, or administrative provisions and/or universally applicable collective agreements applicable to posted workers in a similar situation in the relevant occupational branches are met during the intra-corporate transfer with regard to terms and conditions of employment other than remuneration. (…)’.

This provision takes over the wording of the Posting of Workers Directive which is applicable for postings between the Member States. Recital 15 of the ICT Directive confirms that this provision indeed refers to the terms and conditions as defined by the PWD.

The PWD does not impose the application of all of the labour law provisions of the receiving State, but only of those provisions that constitute the core of mandatory provisions for minimum protection (the so-called hard core), and more specifically: maximum work periods and minimum rest periods; minimum number of paid annual holidays; minimum rates of pay; conditions for the posting of employees, in particular by temporary employment agencies; health, safety and hygiene in the workplace; protective measures for special groups of employees (pregnant women, youngsters); provisions regarding equal treatment and non-discrimination. These conditions apply as far as they are laid down by law, regulations or administrative provisions and/or universally or generally applicable collective agreements.\(^\text{14}\)

Strikingly, the remuneration which is a central element of the employment conditions, is subject to a separate provision in Article 5(4)(b), which states that

‘the remuneration granted to the third-country national during the entire intra-corporate transfer is not less favourable than the remuneration granted to nationals of the Member State where the work is carried out occupying comparable positions in accordance with applicable laws or collective agreements or practices in the Member State where the host entity is established’.\(^\text{15}\)

This exception to the rules governing the employment rights of workers posted within the EU was not provided for in the original proposal of the Commission for the ICT Directive.\(^\text{16}\) Nevertheless, the issue of the remuneration to be guaranteed to the intra-corporate transferee became one of the main issues of debate between the Council of Ministers and the European Parliament. It appears from the discussions in the Council and in the European Parliament that the legislator explicitly wanted to guarantee the same remuneration for a seconded intra-corporate transferee as for a

\(^{14}\) See Article 3 (1) and (8) PWD.
\(^{15}\) The PWD itself refers to ‘minimum rate of pay, including overtime wages’, excluding other elements of the pay. Consequently, the PWD does not guarantee to the posted worker the same remuneration as the workers in the host State. Recently the PWD was amended and the term ‘minimum rates of pay’ was replaced by the term ‘remuneration’: see Article 1(2)(a) of Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 (OJ 2018 L 173/16).
worker of the host State occupying comparable positions.\textsuperscript{17} This also follows from recital 15 which confirms that this provision

‘is intended to protect workers and guarantee fair competition between undertakings established in a Member State and those established in a third country, as it ensures that the latter will not be able to benefit from lower labour standards to take any competitive advantage’.

Still, this provision, or any other recital of the ICT Directive, does not clarify what is meant by ‘comparable positions’, the remuneration of which should be guaranteed.\textsuperscript{18} Neither does it specify which elements of the employer’s obligations are part of the term ‘remuneration’, such as for instance sickness or redundancy payments or supplementary occupational pension schemes.

Article 5(4)(a) and (b) only obliges the host Member States to require, when examining a request for admission, that these employment conditions are met and that this remuneration is granted. However, it does not guarantee these rights as individual rights as such for the intra-corporate transferee. For those rights the intra-corporate transferee can only rely on Article 18 which guarantees the right to equal treatment with workers in the host State, which we will discuss in greater detail in point 4.1.

In addition, Article 5(5) allows (and does not oblige) the Member States to require as a ground for admission,

‘that the intra-corporate transferee will have sufficient resources during his or her stay to maintain himself or herself and his or her family members without having recourse to the Member States' social assistance systems’.

However, this provision itself does not exclude the intra-corporate transferee from entitlement to social assistance under the system of the host Member State. It only seems to mean that the host Member State can refuse the admission of the intra-corporate transferee if there is a risk that this person will need to have recourse to the social assistance system of the host State. Article 18 guarantees, under certain conditions, the right to equal treatment with regard to all branches of social security covered by Regulation 883/2004, which includes some forms of social assistance. The latter provision does not explicitly exclude the intra-corporate transferee from the


\textsuperscript{18} In a document entitled ‘Frequently asked questions. Directive Intra Corporate Transferees’ of 23 November 2017 the Dutch Immigration Office specifies that the remuneration must be in accordance with market conditions and that the underlying principle is that a salary that meets the highly skilled migrants’ standard, is generally considered to be a salary in accordance with market conditions. If an intra-corporate transferee earns less than these amounts, it is then up to the employer – taking into account the qualifications of the foreign national – to show that such a lower salary is common for this or a similar position within his organization or undertaking. The salary requested is the gross salary. See: https://ind.nl/en/Documents/FAQ_ICT_Richtlijn_ENG.pdf (last accessed on 20 April 2018).
right to equal treatment for social assistance. We will discuss this further under point 4.2.

3.2 Grounds for Rejection of the Application

Article 5 ICT-Directive not only contains criteria for admission, but via Article 7(1) it indirectly also contains grounds for rejection of an application. Indeed, Article 7(1) obliges the Member States to reject applications for an ICT-permit when Article 5 has not been complied with. This means that if the intra-corporate transferee or the host entity does not fulfill the grounds for admission with regard to the work contract, the sickness insurance, the terms and conditions of employment and the remuneration as defined in Article 5, the application for the ICT-permit must be rejected by the host Member State.

In addition, according to Article 7(2) the host Member State

‘shall, if appropriate, reject an application where the employer or the host entity has been sanctioned in accordance with national law for undeclared work and/or illegal employment’.

This provision is worded very ambiguously as a result of a compromise between the Council and the European Parliament. Some Member States as well as the European Parliament wanted this condition to be obligatory, while other Member States preferred it to be optional. In principle this condition is a mandatory ground for rejection of the application, but the words ‘if appropriate’ would mean that a sanction for undeclared work and/or illegal employment should not be an automatic ground for rejection but rather something that should be considered on a case by case basis.19

Furthermore, Article 7(3)(a) and (c) also offers the host Member States the possibility to reject the application when

‘the employer or the host entity has failed to meet its legal obligations regarding social security, taxation, labour rights or working conditions’;

or when

‘the intent or effect of the temporary presence of the intra-corporate transferee is to interfere with, or otherwise affect the outcome of, any labour management dispute or negotiation’.

The latter option refers to practices of using third-country nationals as ‘strike breakers’. These options obviously enable the Member States to discretionarily use these criteria as grounds for rejection of the application.

3.3 Grounds for Withdrawal or Non-renewal of the ICT Permit

The employment and social security rights of the intra-corporate transferee can also be a ground for withdrawal or non-renewal of the ICT permit. First, Article 8(2) contains the again ambiguously worded provision that the Member States

‘shall, if appropriate, withdraw an intra-corporate transferee permit where the employer or the host entity has been sanctioned in accordance with national law for undeclared work and/or illegal employment’.

Next, Article 8(5)(a) allows the Member States to withdraw or refuse to renew an ICT-permit when Article 5 is not or is no longer complied with. As discussed above, the latter provision contains a number of conditions in relation to the employment and social security rights of the intra-corporate transferee. Contrary to the provisions of Article 5 and Article 7, where compliance with the employment and social security conditions are mandatory criteria for admission as well as for the acceptance of the application for an ICT-permit, in Article 8 these are only optional grounds for withdrawal or non-renewal of the permit. The reason for this seems to be that the consequences of withdrawal or non-renewal may be more cumbersome for the intra-corporate transferee and the host entity, since the work has already started and the intra-corporate transferee is already residing in the host State.

3.4 Conditions for Intra-EU Mobility

One of the essential features and added value of the ICT Directive is the possibility it offers to the intra-corporate transferee and his/her employer in terms of mobility within the EU.20 As stated by recital 25 this directive does aim at facilitating the mobility of intra-corporate transferees within the Union (‘intra-EU mobility’) and at reducing the administrative burden associated with work assignments in several Member States. For this purpose, this directive sets up a specific intra-EU mobility scheme whereby the holder of a valid ICT-permit issued by a Member State is allowed to enter one or more Member States and to stay and to work there. The provisions in chapter V (Articles 20 to 23) of the directive entitle the intra-corporate transferee who holds a valid ICT-permit issued by a Member State (which is called the ‘first Member State’), to enter one or several other Member States (which are called ‘second Member States’) and to stay and work there. In fact this system indirectly turns the ICT permit issued by a Member State into a permit which allows access to the territory and labour market of all other Member States. Still, this intra-EU mobility is limited to work for another entity of the same undertaking or group of undertakings.

The directive makes a distinction between ‘short-term mobility’ for a period up to 90 days and ‘long-term mobility’ for more than 90 days. Article 21(2) on the short-term mobility states that the second Member State may require the host entity in the first Member State to notify the first Member State and the second Member State of

20 See the contributions of Lutz and Antoons, Ghimis & Sullivan in this book.
the intention of the intra-corporate transferee to work in an entity established in the second Member State. This provision only requires a notification and not an application for admission. Article 21(3) allows the second Member State to require the notification to include the transmission of, *inter alia*, the work contract and, if necessary, the assignment letter, which were transmitted to the first Member State in accordance with Article 5(1)(c). According to Article 21(6) the second Member State may, based on the notification, object to the move of the intra-corporate transferee to its territory within 20 days from the date it received the notification, when the conditions set out in Article 5(4)(b) are not complied with. The latter provision obliges the Member States to require that the remuneration granted to the third-country nationals during the entire intra-corporate transfer is not less favourable than the remuneration granted to nationals of the Member State where the work is carried out occupying comparable positions. Nevertheless, Article 21(6) is worded as an option for the second Member State to object to the mobility, and not as an obligation. Therefore it is not clear whether or not the reference to Article 5(4)(b) indirectly imposes an obligation on the second Member State to object to the short-term mobility if the requirement regarding the remuneration in the latter provision is not met. Moreover, there is no reference in Article 21(6) to other employment conditions to which Article 5(4)(a) refers, to sickness coverage to which Article 5(1)(g) refers or to the sufficient resources condition in Article 5(5). Apparently, the directive aims at facilitating as much as possible the short-term mobility by imposing fewer obligations regarding employment conditions and sickness insurance compared to those of the first Member State and compared to the possibilities offered in cases of long-term mobility.

As regards the long-term mobility, Article 22 provides for two systems that the second Member State may adopt. It may apply Article 21 and allow under the system of notification of this article the intra-corporate transferee to stay and work on its territory on the basis of and during the period of validity of the ICT-permit issued by the first Member State. Alternatively, the second Member State may apply the application procedure provided for in paragraphs 2 to 7 of Article 22. If the second Member State opts for a system of application of long-term mobility, Article 22(2) allows that second Member State to require the applicant to submit, *inter alia*, a work contract and, if necessary, an assignment letter, as provided for by Article 5(1)(c) as well as evidence of having, or, if provided for by national law, having applied for, sickness insurance, as provided for in Article 5(1)(g). The second Member State may reject an application for long-term mobility when, *inter alia*, the criteria of the employment conditions, the remuneration as well as the sufficient income requirements of the intra-corporate transferee as set out in Article 5(4) or Article 5(5) are not met (Article 22(3)(a)). If it takes a positive decision on the application for long-term mobility, it shall issue a permit for long-term mobility. Consequently, in the case of long-term mobility in the EU the second Member States have more possibilities to control the employment conditions as compared to the short-term mobility.

All these provisions on intra EU-mobility are worded as options for the second Member State. Therefore they offer great flexibility to the second host Member States in terms of control and sanctions with regard to their employment and social security legislation and rules.
4. Equal Treatment

It follows from the above analysis that remuneration, employment conditions and sickness coverage play a prominent role in the implementation of the criteria for admission, of the grounds for refusal, withdrawal or non-renewal of an ICT permit as well as in allowing intra-EU mobility. However, the analysed provisions do not, as such, grant the intra-corporate transferee rights in these fields. Only, if these rights are not guaranteed, the intra-corporate transfer or intra-EU mobility may not be allowed to take place.

So, it remains to be determined to which employment and social rights the intra-corporate transferee would be entitled on the basis of the ICT Directive. To answer this question, the directive gives a partial, yet very ambiguously worded, reply in its Article 18 on the right to equal treatment. The objective of this article is to ensure decent working and living conditions for the intra-corporate transferee while staying in the Union and to protect workers and guarantee fair competition between undertakings established in a Member State and those established in a third country, as it ensures that the latter will not be able to benefit from lower labour standards to gain competitive advantage. However, it remains to be seen if the provisions of Article 18 are sufficient to reach this goal, more specifically when one takes into account the interference between this article and other legal instruments relating to the applicable employment and social security law in cross-border situations, more specifically the Posting of Workers Directive 96/71 (PWD), the Private International Law (PIL) rules of Rome I Regulation 593/2008, the EU social security coordination of Regulation 883/2004 (which has been extended to third-country nationals moving within the Member States by Regulation 1231/2010/EC) and the bilateral social security agreements concluded between the Member States and third countries. Therefore, I will examine in this part the wording and possible meaning of the provisions of Article 18 of the directive in the context of these other legal instruments.

From the outset we can state that Article 18 grants individual rights to the intra-corporate transferee, and includes corresponding duties for the Member States as well as the employers. Moreover, pursuant to Article 4 of the ICT Directive, this directive shall not affect the right of Member States to adopt or retain more favourable provisions for third-country nationals in respect of, inter alia, Article 18. This means that Member States are not prohibited to introduce in their national legislation more rights than the rights the intra-corporate transferee can draw directly from the equal treatment provisions in Article 18.

4.1 Terms and Conditions of Employment

The issue of the terms and conditions of employment to which the intra-corporate transferee should be entitled on the basis of the ICT Directive was heavily debated during the negotiation process between the Council and the European Parliament. The majority of the Member States regarded the position of the intra-corporate trans-

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21 See recital 38.
22 See recital 15.
23 Lörges 2016, p. 1008.
Intra-corporate transferees as comparable to posted workers as dealt with in the Posting of Workers Directive. A minority of the Member States as well as the European Parliament pleaded for equal treatment for all terms and conditions of employment with the nationals of the host Member State. The view of the majority in the Council prevailed in the compromises eventually reached, even if they are, once again, ambiguously worded.\textsuperscript{24} Article 18(1) states that

\begin{quote}
‘whatever the law applicable to the employment relationship, and without prejudice to point (b) of Article 5(4), intra-corporate transferees admitted under this Directive shall enjoy at least equal treatment with persons covered by Directive 96/71/EC with regard to the terms and conditions of employment in accordance with Article 3 of Directive 96/71/EC in the Member State where the work is carried out’.
\end{quote}

This provision is worded as an exception to the law that is applicable to the employment relationship. The rules determining the law that is applicable to the employment relationship are laid down in the Rome I Regulation 593/2008, which is an instrument of Private International Law. It determines the law applicable to contractual obligations, including labour contracts. It has universal application, meaning that according to its Article 2 ‘any law specified in this regulation shall be applicable whether or not it is the law of a Member State’.

The basis of this regulation is the freedom of choice of the parties (Article 3). So, in principle, the parties of an employment contract have the freedom to choose the law that is applicable to the contract and may depart from the territorial application of the labour law of the country where the activities are carried out. Still, this freedom of choice is limited. For employment contracts Articles 8 and 9 Rome I Regulation contain specific rules with regard to the determination of the law applicable to individual employment contracts, both in situations in which the parties have made a choice of law and in situations where no choice of law has been made. In the absence of a choice of law the principle is that the employment contract is subject to the law of the country where the employee usually carries out his/her job (or from where he/she usually carries out his/her job), even when he/she is temporarily employed in another country.\textsuperscript{25} When, as a rule, this employee does not carry out his/her job in the same country, the law of the country where the employer’s establishment is situated is applicable. However, these arrangements are put aside if the circumstances as a whole show that the employment contract is linked more closely with another country, in which case the law of that other country applies.\textsuperscript{26} The law determined in the absence of a choice of law is sometimes referred to as ‘objective applicable law’.

\textsuperscript{24} Friðriksdóttir 2017, p. 246-248 and Lörges 2016, p. 1008. See also the Note from the Council Presidency to the JHA Councillors of 22 February 2013, Council doc. No 667/13, and the Note from the Council Presidency to the Permanent Representatives Committee of 8 November 2013, Council doc. No 1343/6.

\textsuperscript{25} Recital 36 of the Rome I Regulation states in this regard: ‘As regards individual employment contracts, work carried out in another country should be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out his tasks abroad’. This could be the case with posted workers.

\textsuperscript{26} See in this respect also: Case C-384/10 (Vooggoerd), EU:C:2011:842 and Case C-64/12 (Schlecker), EU:C:2013:551.
However, even if a choice of law has been made the employee may not lose the protection he/she enjoys on the basis of the mandatory provisions of the ‘objective applicable law’ (Article 8(1) Rome I Regulation). Moreover, pursuant to Article 9 Rome I Regulation it is also possible to apply the ‘overriding mandatory provisions’ of the law of another country. These could, for instance, be invoked if the employee is temporarily employed in that other country, as for instance in the case of posting. For that purpose the EU legislator has adopted a specific directive, the PWD.

So, the application of these PIL rules, as harmonized at EU level, can have the result that work carried out on the territory of a certain Member State is not, or is only to a limited extent, subject to the labour law of that country. Indeed, according to these rules a posted employee continues to be subject to the labour legislation of the habitual place of work because he/she does not ‘habitually’ work on the territory of the country in which he/she is temporarily posted. Regarding intra-corporate transferees, this may be the case when the intra-corporate transferee maintains the habitual place of work in the third country of origin. It is also possible, and in some cases even likely, that the employer and the intra-corporate transferee have explicitly opted for the labour law of the home country to continue to apply during the secondment. It is very likely that the employment law of the country of origin will, in principle, remain applicable to the employment contract.

Article 18(1) of the ICT Directive means that notwithstanding the fact that the labour law of a third country remains applicable to the employment contract, the intra-corporate transferee is entitled to at least equal treatment with persons covered by the PWD, with regard to the terms and conditions of employment in accordance with Article 3 PWD, in the Member State where the work is carried out. In the first place, this means that if the terms and conditions of employment of that third country or as laid down in the employment contract are more favourable compared to the terms and conditions guaranteed under Article 3 of the PWD, these more favourable terms and conditions continue to apply. Indeed, the intra-corporate transferee cannot lose rights he/she can draw from other legal sources than the PWD.

The PWD does not impose the application of all of the labour law provisions of the host State, but only of those provisions which constitute the core of the mandatory provisions for minimum protection, including minimum rates of pay.27

The PWD aims at being an instrument to prevent social dumping and unfair competition, a goal which is also referred to in recital 15 of the ICT Directive. Still, the receiving States’ room to manoeuvre with a view to applying additional elements of their labour law to posted workers is very limited under the PWD. The level of protection the receiving Member State has to guarantee for workers posted on its territory is, in principle, limited to the ‘hard core’ provisions, unless, pursuant to the law or collective labour agreements valid in the Member State of origin, the working conditions and circumstances are already more favourable for these workers.28

27 See above point 3.1.
28 Case C-341/05 (Laval), EU:C:2007:809, paras 80-81 and Case C-346/06 (Rüffert), EU:C:2008:189, paras 33-34. The Court also provides for the possibility that undertakings established in other Member States voluntarily join in a more favourable collective agreement in the receiving Member States, inter alia in the context of a commitment to their own posted workers.
On the other hand, Article 3(10) PWD does allow the Member States to extend that hard core ‘on matters other than those [...] in the case of public policy provisions’. This refers to terms and conditions of employment which are not part of the list included in Article 3(1). However, in its judgment *Commission v. Luxembourg* the Court of Justice gave a strict interpretation of these provisions. For the Court public policy can only be invoked when there is a real and sufficiently serious threat to a fundamental interest of society. This interpretation of the concept of ‘public policy’ in the PWD actually means a serious restriction of the Member States’ ability to impose the application of other elements of their labour law on their posted employees on the basis of this provision.

However, the ICT Directive seems to depart from this case law, more specifically when it allows the Member States in Article 4(2) to adopt or retain more favourable provisions for third-country nationals in respect of Article 18. Moreover, the words ‘at least’ in Article 18(1) seem to indicate this. Consequently, the ICT Directive allows Member States to grant a third-country national intra-corporate transferee a better protection of terms and conditions of employment than the protection offered by the PWD to workers posted within the EU.

In addition, as regards remuneration, Article 18(1) of the ICT Directive applies ‘without prejudice to point (b) of Article 5(4)’. The latter provision states that the Member States shall require, as a criterion for admission of the intra-corporate transferee, that

> ‘the remuneration granted to the third-country national during the entire intra-corporate transfer is not less favourable than the remuneration granted to nationals of the Member State where the work is carried out occupying comparable positions in accordance with applicable laws or collective agreements or practices in the Member State where the host entity is established.’

Still, this provision itself does not entitle the intra-corporate transferee to such remuneration and neither does the wording of Article 18(1). Probably the legislature meant to guarantee for the intra-corporate transferee a remuneration corresponding to the criterion for admission as worded in Article 5(4)(b), but again this does not, as such, follow from the wording of the latter provision or of Article 18(1). It also remains unclear what exactly is meant by a remuneration in ‘comparable positions’ or which elements of the employer’s obligations are part of the term ‘remuneration’, such as for instance sickness or redundancy payments or supplementary occupational pension schemes.

This issue may be solved by the recent amendments to the PWD. The European legislator replaced the reference to ‘minimum rates of pay’ in the PWD by a reference

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29 Case C-319/06 (*Commission v Luxembourg*), EU:C:2008:350, paras. 29, 30, 49 and 50.
to ‘remuneration’. As a consequence of this amendment the reference to ‘terms and conditions of employment in accordance with Article 3 of the PWD’ in Article 18(1) of the ICT Directive would also include a reference to remuneration. However, the implicit reference to the PWD in Article 5(4)(a) of the ICT Directive excludes remuneration. For the latter, the provision of Article 5(4)(b) will continue to apply. This could be relevant since the amended version of Article 3 PWD specifies that for the purpose of the PWD the concept of remuneration shall be determined by the national law and/or practice of the Member State to whose territory the worker is posted. This kind of reference to the national law of the host Member State is absent in Article 5(4)(b) of the ICT Directive. So, it seems that the term ‘remuneration’ which is used in the latter provision may be interpreted more broadly than this term in the amended version of Article 3 PWD.

In addition, the amendments introduced in Article 3 of the PWD also include other aspects than remuneration. In the future Article 3 of the PWD will also guarantee equal treatment with regard to the conditions of workers’ accommodation when provided by the employer to workers away from their regular place of work as well as allowances or reimbursement of travel, board and lodging expenses for workers away from home for professional reasons. Moreover, the amendments to the PWD also introduce a new paragraph 1a in Article 3 PWD on the basis of which, when the effective duration of the posting exceeds 12 months, Member States must ensure that the employer guarantees all terms and conditions of employment in the Member State where the work is carried out. Since Article 18(1) ICT Directive refers to Article 3 PWD, these amendments to the latter article will automatically also apply to intra-corporate transferees, once they become applicable.

Regarding the conditions of employment, we finally mention Article 18(2)(a) of the ICT Directive which entitles the intra-corporate transferees ‘to equal treatment with nationals of the Member State where the work is carried out as regards freedom of association and affiliation and membership of an organisation representing workers or employers or of any organisation whose members are engaged in a specific occupation, including the rights and benefits conferred by such organisations, without prejudice to the national provisions on public policy and public security’.

4.2 Equal Treatment for Social Security

Social security rights only play a limited role as criteria for admission, as grounds for rejection of the application, as grounds for withdrawal or non-renewal of the ICT permit and for the implementation of the intra-EU mobility. Indeed, Article 5(1)(g), concerning the criteria for admission, only refers to sickness insurance and Article 7(1)(a) (concerning grounds for rejection) and Article 8(5)(a) (concerning grounds for

31 See above footnote 15. Overtime rates are included, but supplementary occupational retirement schemes are excluded. The deadline for the transposition of the amendments is 30 July 2020.
32 This period can be extended to 18 months upon a motivated notification of the employer.
33 With the exception of procedures, formalities and conditions of the conclusion and termination of the employment contract, including non-competition clauses and supplementary occupational pension schemes.
withdrawal of non-renewal) refer to Article 5, which includes sickness insurance. Article 5(5) refers implicitly to social security, by allowing the Member States to require for the admission of the intra-corporate transferee that he/she has sufficient resources during his or her stay to maintain himself or herself and his or her family members without having recourse to the Member States' social assistance systems. Finally, Article 22(2)(a)(v) requires that when an application for a long-term intra-EU mobility is submitted the second Member State may require evidence of having, or, if provided for by national law, having applied for, sickness insurance, as provided for in Article 5(1)(g). Apart from these references to sickness insurance and social assistance, there is no further reference to social security rights as criteria for admission, as grounds for rejection of the application or for withdrawal or non-renewal of the ICT permit and for the implementation of the intra-EU mobility.

4.2.1 The Right to Equal Treatment for Entitlement to Social Security Benefits

Conversely, Article 18 of the ICT-directive on equal treatment provides, in principle, for equal treatment with regard to all branches of social security. Article 18(2)(c) states that intra-corporate transferees shall enjoy equal treatment with nationals of the Member State where the work is carried out as regards

> ‘provisions in national law regarding the branches of social security defined in Article 3 of Regulation (EC) No 883/2004, unless the law of the country of origin applies by virtue of bilateral agreements or the national law of the Member State where the work is carried out, ensuring that the intra-corporate transferee is covered by the social security legislation in one of those countries. In the event of intra-EU mobility, and without prejudice to bilateral agreements ensuring that the intra-corporate transferee is covered by the national law of the country of origin, Regulation (EU) No 1231/2010 shall apply accordingly’.

This provision was the result of difficult negotiations in the Council and with the European Parliament, which explains its formulation. Its starting point is the right to equal treatment with the nationals of the Member State where the work is carried out. This right applies to ‘the branches of social security defined in Article 3 of Regulation (EC) No 883/2004’. Article 3 of Regulation 883/2004 refers to all legislation concerning benefits in case of sickness, maternity and paternity, invalidity, old age and survivors’ pensions, accidents at work and occupational diseases, unemployment and pre-retirement as well as benefits concerning death grants and family benefits. This is an exclusive list, but it applies to both general and special schemes, whether contributory or not. However, social and medical assistance schemes are excluded. Still, benefits which have characteristics of both social security and social assistance are covered. Such benefits are called ‘special non-contributory cash benefits’, because they provide coverage against the risks listed in Article 3 while at the same time guaranteeing the persons concerned a minimum subsistence income in accordance with the economic and social situation in a Member State. They are subject to a special coordination regime laid down in Article 70 Regulation 883/2004, based on the person’s residence.

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So, the reference in Article 18(2)(c) of the ICT Directive to the branches of social security defined in Article 3 of Regulation 883/2004 includes a wide scope of social security rights.

However, with regard to family benefits Article 18(3) allows the Member States to derogate from equal treatment for intra-corporate transferees who have been authorized to reside and work in the territory of a Member State for a period not exceeding nine months. This exception was the result of a compromise which was heavily discussed during the negotiation process. Several Member States considered that family benefits should only be granted to third-country nationals who are permanently settled in a Member State, which would not be the case for temporary seconded intra-corporate transferees. As a compromise the exception to equal treatment for family benefits was limited to intra-corporate transferees who reside and work in a Member State for less than nine months. Still, this exception for family benefits applies without prejudice to Regulation 1231/2010 which extends Regulation 883/2004 to third-country nationals legally residing in a Member State and who are in a cross-border situation between Member States. Such a situation would occur if the intra-corporate transferee made use of the possibilities of intra-EU mobility as provided for by the ICT Directive. It could also be the case if a member of the family of an intra-corporate transferee resided in another Member State than the Member State in which this transferee resides and works. In these cases Regulation 883/2004 would apply (via Regulation 1231/2010), including its equal treatment provision which also concerns family benefits. So, the words ‘without prejudice to Regulation (EU) No 1231/2010’ in Article 18(3) would mean that in those very specific circumstances the Member States have to guarantee equal treatment for family benefits as well.

The right to equal treatment for the branches of social security defined in Article 3 of Regulation 883/2004 does not apply if

‘the law of the country of origin applies by virtue of bilateral agreements or the national law of the Member State where the work is carried out, ensuring that the intra-corporate transferee is covered by the social security legislation in one of those countries’.

This sentence refers to the issue that has to be solved before the equal treatment clause can be applied. Indeed, it has to be decided first if the intra-corporate transferee is at all covered by the social security system of a Member State. If a bilateral agreement on social security has been concluded between a Member State and a third country, the intra-corporate transferee could remain subject to the social security system of the third country of origin. These agreements with third countries normally

35 Recital 38 of the ICT Directive states in this respect that ‘in many Member States, the right to family benefits is conditional upon a certain connection with that Member State since the benefits are designed to support a positive demographic development in order to secure the future work force in that Member State. Therefore, this Directive should not affect the right of a Member State to restrict, under certain conditions, equal treatment in respect of family benefits, since the intra-corporate transferee and the accompanying family members are staying temporarily in that Member State’. 
contain rules on the determination of the social security legislation which is applicable to the persons covered.36

So, for the implementation of Article 18(2)(c) of the ICT Directive, first of all it has to be determined if there is any bilateral social security agreement between the Member State where the intra-corporate transferee is working and a third country. Second, it has to be determined to which country’s social security system the intra-corporate transferee is subject under the provisions of such an agreement. Mostly these agreements include provisions according to which seconded workers remain subject to the social security system of the country of origin, sometimes up to a period of 60 months. Such clauses would normally also apply to intra-corporate transferees. In that case the law of the country of origin would apply, and consequently the right to equal treatment with nationals of the Member State where the work is carried out will not apply. This follows from the word ‘unless’ in Article 18(2)(c).

In addition, according to the wording of this article this also seems to be the case if the law of the country of origin applies by virtue of the national law of the Member State where the work is carried out. However, this reference to the national law of the Member State is strange, because the national law of a Member State can prescribe that its own legislation will not be applicable in a specific situation, but it cannot decide unilaterally that the legislation of another country is applicable in that situation.

Anyway, the exception to the equal treatment for the branches of social security defined in Article 3 of Regulation 883/2004, appears to be applied only if the intra-corporate transferee is subject to the social security law of a third country pursuant to a bilateral social security agreement. In the absence of such an agreement, the equal treatment provision applies. This means that intra-corporate transferees and their employers will only be obliged to pay social security contributions in the Member State where the work is carried out, if there is no bilateral social security agreement that subjects the worker to the social security system of a third country. When there is an agreement under which these workers remain subject to the system of a third country, they have to pay contributions under the legislation of that country. This may of course lead to a competitive advantage compared to the situation of workers who are subject to the social security system of the host Member State involved. In addition, the intra-corporate transferee will not be able to claim benefits from the host Member State’s social security system even if the benefits of the country of origin are less favourable.37


37 Still, recital 38 of the ICT Directive, contains a strange limitation to the provisions in Article 18(2)(c) regarding bilateral agreements. It says that ‘(…), bilateral agreements or national law on social security rights of intra-corporate transferees which are adopted after the entry into force of this Directive should not provide for less favourable treatment than the treatment granted to nationals of the Member State where the work is carried out’. The ICT Directive entered into force on the day fol-
Article 18(2)(c) adds to this that

‘in the event of intra-EU mobility, and without prejudice to bilateral agreements ensuring that the intra-corporate transferee is covered by the national law of the country of origin, Regulation (EU) No 1231/2010 shall apply accordingly’.

This means that the rules on the determination of the applicable legislation in Regulation 883/2004, as well as the specific provisions of that regulation which entitle to benefits, will apply if there is a cross-border situation between more than one Member State. But these rules will not apply if, pursuant to a bilateral agreement, the intra-corporate transferee remains covered by the national law of the country of origin. However, the implementation of this sentence in Article 18(2)(c) is not self-evident, for instance in a situation in which there is a bilateral agreement with the country of origin concluded by the first Member State (within the meaning of the provisions in the ICT Directive on intra-EU mobility), but not with the second Member State (or vice versa).

It is clear from this analysis of the provision in Article 18(2)(c) that it is very ambiguously worded and that it undoubtedly will give rise to problems of implementation by the Member States and interpretation in cases of conflicts. Such conflicts may arise with regard to the question to which country the intra-corporate transferee and his/her employer will have to pay social security contributions and the amount thereof. Conflicts may also arise with regard to the entitlement of the intra-corporate transferee and his/her family members to social security benefits.38

Following its publication in the Official Journal, which was 28 May 2014 (see Article 28). Since these sentences are not part of the binding provisions of the directive itself, they do not seem to impose an obligation on the Member States not to apply bilateral agreements concluded after 28 May 2014 to intra-corporate transferees.

38 This was reflected in two statements made by Hungary and Austria when the ICT Directive was adopted. Hungary stated that ‘Hungary expresses its serious disappointment regarding the adopted text in Article 18(2) and Recital (38) since it precludes the practical applicability of bilateral social security agreements and limits Member States in their competence when concluding such agreements. Based on the Treaties social security policy belongs to the competence of Member States. We believe that the purpose of all secondary legislation should respect this. The aim of equal treatment harmonisation is to be interpreted in light of the competence rules of the Treaties. This Directive cannot restrict, nor impair the sovereignty of Member States in this area. In addition in our view the reference to more favourable provisions in bilateral social security agreements is ambiguous, and thus does not ensure legal certainty. Finally, Hungary regrets that the compromise text adopted could create a situation with significant negative impact on the investment readiness in certain economic relations. This may harm economic recovery, could hinder the stimulation of growth and the enhancement of competitiveness, which is a common priority for the EU.’ Austria stated that ‘Austria has repeatedly raised severe objections to the way equal treatment in the field of social security is dealt with under the “Directive of the European Parliament and of the Council on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer”. We did not succeed in formulating a text which is consistent with the other EU instruments and the wording contained in the text might give rise to many problems for national transposition, misunderstandings and misinterpretation at national and EU level. Especially in the field of family benefits the text does not sufficiently reflect the necessity for third-country nationals of having acquired the necessary integration into the society of the host Member State before entitlement to benefits have to be opened. Therefore, we request a detailed examination of all existing and any future texts concerning equal treatment in the field of social security before we can agree on such provisions. Austria
4.2.2 The Right to Equal Treatment for the Export of Some Social Security Benefits

Article 18(2)(d) guarantees equal treatment with nationals of the Member State where the work is carried out

‘without prejudice to Regulation (EU) No 1231/2010 and to bilateral agreements, payment of old-age, invalidity and death statutory pensions based on the intra-corporate transferees’ previous employment and acquired by intra-corporate transferees moving to a third country, or the survivors of such intra-corporate transferees residing in a third country deriving rights from the intra-corporate transferee, in accordance with the legislation set out in Article 3 of Regulation (EC) No 883/2004, under the same conditions and at the same rates as the nationals of the Member State concerned when they move to a third country’.

This provision entitles the intra-corporate transferee to equal treatment with nationals of the Member States where the work is carried out for the export of this list of statutory pensions to a third country. This means that if pursuant to the national legislation of a Member State such pensions are also paid when the nationals of that Member State move to a third country, this Member State also has to do this for intra-corporate transferees at the same rate. However, this provision does not guarantee the intra-corporate transferee entitlement to such benefits. The entitlement depends in the first place on that worker being subject to the social security system of the host Member State during the secondment, which depends on the possibly existing bilateral agreement with his/her home country. An intra-corporate transferee who remains subject to the system of the home country can, of course, not acquire pension rights in the host Member State, so that the issue of exporting such rights will not arise. And second, the ICT Directive does not contain any provisions regarding aggregation of periods of insurance, employment or residence. As a result, third-country intra-corporate transferees who previous to their employment in a Member State worked in a third country where they fulfilled such periods, cannot bring these into account in order to obtain the right to pensions for which the national social security legislation of the host Member State requires the fulfilment of such waiting periods. The national legislation of many Member States indeed requires for entitlement to an old-age, invalidity or survivor’s pension the fulfilment of a certain period of employment and payment of contributions. It is likely that intra-corporate transferees will not be able to fulfil the necessary periods during their limited period of work in the host Member State. Consequently, they would not even be entitled to such benefits, let alone that they could export them when moving back to a third country.

5. Conclusion

The provisions in the ICT Directive in relation to employment and social security rights of intra-corporate transferees are worded in a complicated and contradictory...
way. They reflect the ambiguity in the directive itself and in the perception of the
status of this type of migrant workers coming from a third country. Are they to be
considered as temporary workers, seconded by their employers based in a third coun-
try to a host entity in a Member State, or are they really participating in the labour
market of the host Member States? It seems that the main approach in the directive is
that of a temporary stay and work, and not a full participation in the labour market of
the host State. Indeed, it follows from the definition in Article 2(b) that the intra-
corporate transferee will continue to be linked by a work contract with the employer
in the third country. Moreover, the maximum period of secondment is limited to
three years (Article 12). This approach is also reflected in the provisions on the em-
ployment and social security rights of the intra-corporate transferee, albeit not always
in a coherent manner.

As far as employment rights are concerned, the intra-corporate transferees are in
principle considered as posted workers and can only claim rights comparable to these
of posted workers within the EU and laid down in the Posting of Workers Directive
96/71. But on the other hand the ICT Directive derogates from this status of posted
workers with regard to remuneration as well as from the possibility offered to the
Member States in Article 4 of the ICT-Directive to adopt of retain more favourable
provisions (which is excluded under the PWD and the case law of the ECJ) for them.
However, the recently agreed amendments to the PWD confirm the equal treatment
with nationals of the host Member State regarding remuneration, so that in the future
the status of intra-corporate transferees and workers posted under the PWD will
converge.

The same ambiguity is present in the provisions on social security entitlements.
The preference given to the bilateral agreements concluded between the Member
States and third countries reflects the way in which temporary labour migration is
approached. But in the absence of such agreements the national law of the host
Member State will apply.

In addition, the wording of the relevant provisions is sometimes enigmatic and
does not always give clear answers to questions of entitlement to rights or of the
relationship of the ICT Directive with other instruments of EU law and bilateral or
international agreements. All this will undoubtedly lead to problems and issues re-
garding the implementation and interpretation of the provisions of the ICT Directive.
These will not only concern the entitlement of intra-corporate transferees to em-
ployment and social security rights, but also the implementation by the Member
States of the numerous provisions on the role of these rights as criteria for admission,
as grounds for rejection of the application for the ICT permit, as grounds for its
withdrawal or non-renewal and as criteria for intra-EU mobility.
Intra-Corporate Transferees: Between the Directive and the EU’s International Obligations

Elspeth Guild*

1. Introduction

Directive 2014/66 on the conditions of entry and residence of third country nationals in the framework of an intra-corporate transfer was adopted on 15 May 2014 after a fairly short gestation period which commenced with the proposal for the legislation in 2011. Other contributions in this book examine the negotiations of the directive and its transposition into the law of the Member States. The World Trade Organisation (WTO) framework into which the directive arrived is also the subject of another chapter. Here, I will examine the ‘alternative’ EU framework of companies’ rights to transfer key personnel from outside the EU to a related entity within the EU which predates the directive and came into being through agreements between the EU and third countries. This framework was much influenced by developments in the WTO, in particular the successful conclusion of the Uruguay Round of negotiations in 1994 which introduced trade in services as part of the menu of negotiated trade arrangements designed to facilitate international economic transactions.

Trade in services, unlike trade in goods, includes the movement of people across international borders as part of service provision. Taking as my case study the EU Russia Agreement 1997, I will compare the provisions of that agreement regarding companies’ rights to transfer key personnel from outside the EU to a related entity within the EU with those of the directive. For the sake of simplicity I will refer to the provisions of the agreement and those of the directive as intra-corporate transfers for the purposes of the comparison. Of particular interest are those provisions where the EU Russia Agreement is more liberal regarding the conditions of these transfers than the directive. In the early 1990s, the ambitions of EU-Russia relations were quite extensive. Subsequent events and frictions (including though not starting with the Russian invasion of Georgia in 2008) have cooled these expectations. Nonetheless, and notwithstanding EU sanctions against Russia following the annexation of Crimea, the EU Russia Agreement has continued in force regulating the majority of trade between the parties.

The earlier Partnership and Cooperation Agreements (the Europe Agreements) with Central and Eastern European countries (which became Member States of the European Union)...

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EU in 2004 and 2007) were the templates on the basis of which a wide range of agreements were settled, in particular, with successor states of the Soviet Union and the former Yugoslavia. The agreements contain sections on labour conditions (generally limited to equal treatment rights and social security, for example Articles 23 et seq of the Russia Agreement), on establishment of companies (which includes the movement of key personnel for example Article 28 et seq of the Russia Agreement) and services (for example Articles 36 et seq Russia Agreement). A general feature of the agreements is the safeguarding of visa, border and migration issues as matters of national law to be complied with (for example Articles 48 and 50 of the Russia Agreement). However, the application of national law is subject to a limitation: national laws and regulations regarding entry and stay, work, labour conditions and the establishment of natural persons must be applied in such as manner as to nullify or impair the benefits accruing to the parties under the agreement. This language has a WTO origin.

2. WTO and the EU

The WTO and EU constitute two distinct legal orders which share little in common. However, the successful conclusion of the Uruguay Round in 1994 brought trade in services into the WTO realm and in doing so raised awareness generally about the importance of services. This was a new field of international trade which was being opened up through the WTO and the subject was rather fashionable. At the same time, the EU was grappling with the fall of the Berlin Wall and the emergence of a substantial number of new countries out of the dissolution of the Soviet Union. By 1994, the dice had already been cast as to which states formerly behind the Iron Curtain would be invited to join the EU in the short and longer term and which has culminated so far in the big enlargement of 2004, the arrival of Bulgaria and Romania in 2007 and Croatia in 2013. Those former Eastern Block states which were

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unlikely to be invited or which would not wish to join the EU were still close or not so
close neighbours of the EU. A smooth transition from trade with the Soviet Union
and its allies to trade with the emerging states was of great importance to the EU.
Many EU countries had strong trading links with their eastern neighbours and were
suffering serious economic disruption as a result of the changed framework.\(^9\) The
way forward chosen by the EU was to follow the WTO approach and to negotiate
trade agreements with these successor and emerging states covering all important
aspects of trade. The inclusion of services in the WTO in the new General Agree-
ment on Trade in Services (GATS)\(^{10}\) provided an impetus for a parallel move in the
EU agreements with its neighbours but using an EU type model.

In the scramble to regulate trade relations in particular with the new Russian
Federation, the EU entered into an interim agreement in 1995 (which entered into
force the following year)\(^{11}\) which covered only trade in goods (and related provi-
sions). This was followed two years later in 1997 by a Partnership and Cooperation
Agreement which includes extensive provisions on trade in services.\(^{12}\) As in respect
of GATS, the inclusion of trade in services would include the so called mode 4 – the
movement of people across international borders to provide services.\(^{13}\)

The GATS’ definition of service provision covers two forms of free movement
in EU law. The first is free movement of services, one of the four fundamental free-
doms of the EU.\(^{14}\) The second is the right of establishment which is a subcategory of
another fundamental freedom, that of persons (it covers the free movement of legal
persons as well as natural ones).\(^{15}\) While the EU treaties deal with the two categories
somewhat differently and in different but related chapters, GATS rolls the two to-
gether – companies and people moving to provide services in another state come
under the same heading without reference to the length of time they plan to stay. In
the negotiation of the post 1990 agreements, the EU chose to follow the GATS
model as far as including services but in the form of its own model dividing the
GATS’ definition of services into the EU definition of services and establishment.

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\(^{9}\) Y. Gorodnichenko, E.G. Mendoza \\& L.L. Tesar. 'The Finnish great depression: From Russia with

\(^{10}\) J.P. Batista, Juliana ‘General agreement on trade in services’, *The Wiley-Blackwell Encyclopedia of Global-

\(^{11}\) Interim Agreement on trade and trade-related matters between the European Community, the
European Coal and Steel Community and the European Atomic Energy Community, of the one
part, and the Russian Federation, of the other part OJ L 247 (13/10/1995)

\(^{12}\) Agreement on Partnership and Cooperation establishing a partnership between the European
Communities and their Member States, of the one part, and the Russian Federation, of the other

\(^{13}\) A. Carzaniga, ‘The GATS, Mode 4, and Pattern of Commitments.’ *Moving People to Deliver Services* 21


\(^{15}\) J. Wouters, ‘Private international law and companies’ freedom of establishment,’ *European Business
3. Between Services and Establishment

For EU purposes, the key dividing line between services and establishment was established in 1995 by the Court of Justice of the European Union (CJEU). The Court found that the key difference is not a question of time – how long the services would be provided in the host Member State – but a question of infrastructure. So long as a business does not acquire infrastructure in the State where the services is being provided then the activity will come within the scope of service provision. If the business does acquire infrastructure then the freedom being exercised becomes that of establishment. The right of services provision and establishment of legal persons in EU law includes the right of companies and businesses to send their personnel to a host Member State to provide a service for the business there or to establish or work for an economic presence of the business in the host State. Thus the establishment part of the right of free movement of persons can include intra-corporate transferees. While the relevant provisions of the Treaty on the Functioning of the European Union are not particularly elaborate regarding the extent of the right of establishment, this right has been the subject of some jurisprudence from the Court of Justice in the form it takes in EU agreements with third countries. The Court confirmed that the right of establishment in the Europe Agreements while not having the same meaning as that in the EU Treaty may be sufficiently clear, precise and unconditional to have direct effect. In the same judgment, however, the Court defined the essential elements of self-employment as distinct from employment both for the purposes of the TFEU and the Europe Agreements.

The cases which have come before the Court on the right of establishment of third country nationals have been essentially about individuals seeking to be self-employed in a Member State. All these cases have arisen in circumstances where EU law does not provide a right of free movement of workers but does permit third country nationals to enter into self-employment – the situation of the Europe Agreements. Under the agreements between the EU and these states (which applied before their accession to the EU) there was a right of establishment for natural persons but no right of free movement of workers. As nationals of these countries arrived in EU destinations and started exercising their right of self-employment they ran into difficulties with immigration authorities. A number of references went to the

18 E. Guild & S. Peers. ‘Out of the Ghetto? The personal scope of EU law’, in: K. Hailbronner & D. Thym, EU Immigration and asylum law, Leiden: Brill 2006, p. 81-114.C-43/93 Van der Elst ECR [1994] I-03803. The principle has been expressly acknowledged by the CJEU regarding service provision. It has yet to confirm that by extension this also applies to establishment where the employee sent to the host Member State is a third country national.
20 Case C-257/99, Barkoci & Malik ECLI:EU:C:2001:491, EU:C:2001:491, [2001] 3; C-327/03 Pantayotou [2001] ECR I-6557; C-16/05 Tum & Dari 2006] EUECJ; C-438/00 Kolpak (Deutscher Handballbund) [2003] EECJ;
CJEU on the meaning and scope of the right to self-employment under the agreements. The consequence was an EU definition of self-employment as separate from employment and a development of the principle of direct effect of provisions in third country agreements where sufficiently clear, precise and unconditional. However, the provisions of these agreement granting an entitlement to businesses based in the third country to send their key personnel to work in a host Member State never came before the CJEU although it was included in the agreements.

In the meantime, the provisions on establishment (including ICTs) included in the Europe Agreements were reproduced with occasional changes in many other agreements including (but not limited to) Algeria (2005), Armenia (1999), Azerbaijan (1999), Georgia (1999), Kazakhstain (1999), Kyrgyz Republic (1999), Moldova (1999), Russia (1997), Ukraine (1998 replaced in 2016), Uzbekistan (1999) and Jordan (2002). Extensive EU agreements with all of the Western Balkan states include not only provisions on establishment of companies but also a right of self-employment for individuals. Other agreements, such as the one with Egypt, refer to establishment through a commitment to uphold the GATS rules (once again revealing the overlap between the two concepts in the GATS regime).

4. The Intersection of Establishment and National Law on Entry and Stay

In the context of the Europe Agreements, the Court of Justice was required to address the relationship of a right of establishment (self-employment in particular) with the safeguarding of national laws and regulations on entry and stay, work etc. which appear in those agreements in forms similar to that found in the subsequent third country agreements including that with Russia. The Court found that the power of the host Member State to apply its domestic rules regarding entry, stay and establishment of natural persons to applications submitted by nationals of a party to a Europe Agreement is expressly subject to the condition that this does not nullify or impair the benefits accruing to the party under that Agreement. A visa requirement was found not to nullify and impair the right so long as neither the purpose nor the effect make it impossible or excessively difficult for the relevant third country nationals to exercise their rights under the agreement, ‘provided that the competent authorities of

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25 Albania, Macedonia, Montenegro and Serbia.


27 Case C-257/99, Barkoci & Malik ECLI:EU:C:2001:491.
the host Member State exercise their discretion in regard to applications for leave to enter for purposes of establishment, submitted pursuant to that Agreement at the point of entry into that State, in such a way that leave to enter can be granted to a [...] national lacking entry clearance on a basis other than that of the Immigration Rules if that person’s application clearly and manifestly satisfies the same substantive requirements as those which would have been applied had be sought entry clearance in the [country of origin].”

5. Intra-Corporate Transferees in the EU Russia Agreement

The principle of the EU Russia Agreement is to regulate trade between the two parties. It is based on the principle of reciprocity limited to the two entities, their businesses and their nationals. The ICT Directive is designed to develop the area of freedom, security and justice within the EU. Its objective is to develop the EU’s common immigration policy, to ensure efficient management of migration flows and fair treatment of third country nationals residing legally in the Member States. Thus the objectives of the directive, which have external impacts on the movement of ICTs into the EU, are for the EU purely internal. While the EU Russia agreement applies to all 28 Member States, the ICT directive does not apply to the opted out Member States: Denmark, Ireland and the UK.

The relationship of the agreement and the directive is clarified by the ICT directive at article 4(1) which states that it shall apply without prejudice to more favourable provisions of Union law, including bilateral and multilateral agreements concluded between the Union and its Member States on the one hand and one or more third countries on the other. Thus the EU principle that treaties, including those with third countries take priority over EU secondary legislation is clearly respected by the directive.

In both cases the agreement and the directive regulate the conditions according to which companies are entitled to move their personnel from a third country to any EU Member State to work for an entity within the EU which belongs to the company abroad. While the directive is carefully worded to include the conditions of entry and residence as well as rights, the agreement is more broad brush in its approach though it includes a proviso that the residence and work permits of ICT employees under the agreement shall only cover the period of ICT employment. The directive only permits an ICT worker to work in one Member State with cumbersome provisions on intra-EU mobility (dealt with elsewhere in this volume). The agreement applies to all Member States but it does not specify whether once an ICT worker has been moved to one EU Member State to work for an entity related to the employer in an agree-

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28 Case C-257/99, Barkoci & Malik ECLI:EU:C:2001:491
31 Article 32(1) Agreement on Partnership and Cooperation establishing a partnership between the European Communities and their Member States, of the one part, and the Russian Federation, of the other part OJ L 327 (28/11/1997).
ment country, that employee should be able to move to another entity in another Member State so long as it is related to the principal enterprise in the third country. Intra-EU mobility of third country national personnel has only been judicially considered by the CJEU as regards service provision. In that series of cases, the Court held that the EU based employer could not be required to fulfill national work permit requirements for its third country national personnel moving between Member States to provide services as part of the employee’s employment where the employee was already lawfully employed by the employer in one Member State.

The chapter in the Russia agreement which deals with the issue is entitled ‘conditions affecting the establishment and operation of companies’ (Title IV, Chapter II). The operative provision is couched in the language of non-discrimination – Article 28(2) which states that the Union and its Member States shall grant to Union subsidiaries of Russian companies treatment no less favourable than that granted to other Union companies or to Union companies which are subsidiaries of any third country companies whichever is better, in respect of their operation (and in conformity with their legislation and regulations). There is also a duty not to impede the establishment of subsidiaries and branches. Article 30 defines ‘establishment’ for the purposes of the agreement which means the right of Union or Russian companies to take up economic activities by means of the setting up of subsidiaries and branches in Russia or in the EU respectively. A detailed examination of the key personnel provisions of the agreement in comparison with the ICT directive can be found below.

Article 34 of the Russia agreement requires the parties to use their best endeavours to avoid taking any measures or actions which render the conditions for the establishment and operation of each other’s companies more restrictive than the situation existing on the day preceding the date of signature of the agreement. As will be identified below, the EU may be in breach of this undertaking as their best endeavours to ensure that the ICT directive does not render the conditions for an intra-corporate transfer after the date of the agreement. As will be shown below, the directive does exactly that – it makes transfers more onerous which means that Russian companies are required to rely on the agreement to establish and defend their rights.

A number of sectors are excluded from the agreement including air transport, inland waterways transport and maritime transport. Special provisions apply also to the banking services sector (Article 29).

6. Comparing the EU Russian Agreement and the ICT Directive

The treatment of ICTs in the EU Russia Agreement and the ICT Directive vary on a number of important issues. These are:

33 C-43/93 Van Der Elst 9 August 1994.
34 Article 35 Agreement on Partnership and Cooperation establishing a partnership between the European Communities and their Member States, of the one part, and the Russian Federation, of the other part OJ L 327 (28/11/1997).
Elspeth Guild

- The definition of companies;
- Definition of key personnel;
- The definition of the relationships which qualify for intra-corporate transfers;
- The required length of employment before transfer;
- The conditions of employment;
- Duration of the transfer;
- Quotas or limitations.

Starting with the definition of companies, the agreement defines a company (either Russian or EU) as a company set up in accordance with the relevant laws (EU or Russian) which has its registered office or central administration or principal place of business in the territory of one of the parties. If the company has only its registered office in the territory of one of the parties, it will be considered a company of that party if its operations possess a real and continuous link with the economy of that party.\(^ {35} \) In the directive, the undertaking (employer) as such is not defined. There is a definition of a group of undertakings which sets out the relationship necessary for the ICT to take place. This states that a ‘group of undertakings’ means two or more undertakings recognised as linked under national law in the following ways: an undertaking, in relation to another undertaking directly or indirectly, holds a majority of that undertaking's subscribed capital; controls a majority of the votes attached to that undertaking's issued share capital; is entitled to appoint more than half of the members of that undertaking’s administrative, management or supervisory body; or the undertakings are managed on a unified basis by the parent undertaking;’ (Article 3(l)). This definition is much more onerous than that contained in the Russian agreement which only requires a real and continuous link to Russia. There is no limitation regarding sharing holdings as such nor qualification regarding control of votes attached to share capital. Thus under the Russia agreement enterprises which would not be able to fulfil the conditions of the ICT directive would nonetheless qualify to send key personnel to an EU Member State.

The definition of key personnel in the Russia agreement includes:

(a) persons working in a senior position with an organization, who primarily direct the management of the establishment (branch, subsidiary or joint venture), receiving general supervision or direction principally from the board of directors or stockholders of the business or their equivalent, including:
- directing the establishment or a department or subdivision of the establishment,
- supervising and controlling the work of other supervisory, professional or managerial employees,
- having the authority personally to engage and dismiss or recommend engaging, dismissing or other personnel actions; and

(b) persons working within an organization who possess uncommon knowledge essential to the establishment's service, research equipment, techniques or man-

\(^ {35} \) Article 30(h) Agreement on Partnership and Cooperation establishing a partnership between the European Communities and their Member States, of the one part, and the Russian Federation, of the other part OJ L 327 (28/11/1997).
management. The assessment of such knowledge may reflect, apart from knowledge specific to the establishment, a high level of qualification referring to a type of work or trade requiring specific technical knowledge, including membership of an accredited profession; (Article 32(1)).

In the ICT directive the scope of an ICT is limited to managers, specialists or trainee employees (Article 5(1)(c)). These are defined in Article 3 of the directive as follows:

(a) “‘manager’ means a person holding a senior position, who primarily directs the management of the host entity, receiving general supervision or guidance principally from the board of directors or shareholders of the business or equivalent; that position shall include: directing the host entity or a department or subdivision of the host entity; supervising and controlling work of the other supervisory, professional or managerial employees; having the authority to recommend hiring, dismissing or other personnel action;” (b) “‘specialist’ means a person working within the group of undertakings possessing specialised knowledge essential to the host entity’s areas of activity, techniques or management. In assessing such knowledge, account shall be taken not only of knowledge specific to the host entity, but also of whether the person has a high level of qualification including adequate professional experience referring to a type of work or activity requiring specific technical knowledge, including possible membership of an accredited profession;” and (c) “‘trainee employee’ means a person with a university degree who is transferred to a host entity for career development purposes or in order to obtain training in business techniques or methods, and is paid during the transfer’. This definition is much more detailed and specific than that in the Russia agreement which means that key personnel who could qualify under the agreement may be excluded by the directive. However, the directive permits trainee employees to be transferred, a category on which the agreement is silent.

As regards the working relationship, the definition in Article 5 of the ICT directive states that the enterprise must ‘provide evidence of employment within the same undertaking or group of undertakings, from at least three up to twelve uninterrupted months immediately preceding the date of the intra-corporate transfer in the case of managers and specialists, and from at least three up to six uninterrupted months in the case of trainee employees;’. Further, Article 5((1)(c)(iv) requires ‘evidence that the third-country national will be able to transfer back to an entity belonging to that undertaking or group of undertakings and established in a third country at the end of the intra-corporate transfer’.

The obligation to show that the person will be transferred back is not present in the agreement. Further, the Russia agreement in Article 32(2)(c) only requires that ‘an 'intra-corporate transferee' is defined as a natural person working within an organization in the territory of a Party, and being temporarily transferred in the context of pursuit of economic activities in the territory of the other Party; the organization concerned must have its principal place of business in the territory of a Party and the transfer must be to an establishment of that organization, effectively pursuing like economic activities in the territory of the other Party.’ This is more flexible than the definition in the ICT directive. Article 32(2) of the agreement states ‘Key personnel of the abovementioned companies herein referred to as 'organizations' are 'intra-corporate transferees' as defined in paragraph (c) in the following categories, pro-
vided that the organization is a legal person and that the persons concerned have been employed by it or have been partners in it (other than as majority shareholders), for at least the year immediately preceding such movement…” This opens also the possibility for partners of an enterprise to be ICTs under the agreement and situation not contemplated under the directive.

While the agreement requires 12 months previous employment before a transfer can take place under its provisions, the ICT directive is more generous permitting ‘evidence of employment within the same undertaking or group of undertakings, from at least three up to twelve uninterrupted months immediately preceding the date of the intra-corporate transfer in the case of managers and specialists, and from at least three up to six uninterrupted months in the case of trainee employees.’ (Article 5(1)(b).

Regarding conditions of employment, the Russia agreement requires ‘Subject to the laws, conditions and procedures applicable in each Member State, the [Union] and its Member States shall ensure that the treatment accorded to Russian nationals, legally employed in the territory of a Member State shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals.’ (Article 23, Labour Conditions). This provision applies to all Russian nationals working in EU Member States (not only ICTs) so will also apply to Russian workers under the other labour mobility directives such as the seasonal workers directive.36 As Friðriksdóttir has examined in detail, the right to equal treatment is not available to all third country national workers under the EU labour mobility directives and noticeable by its complete absence from the seasonal workers directive.37 Articles 5(4)38 and 18 ICT directive only provide for equal treatment equivalent to similar jobs or equal to that of the posted workers directive39 which is limited to minimum pay, maximum work periods, minimum annual leave, conditions of hiring out through temporary labour agencies, health and safety at work and equal treatment between men and women. Alternatively, the directive also includes the following areas for equal treatment: freedom of association, recognition of diplomas etc, some coordination of social security within the EU, old-age, invalidity

38 Article 5(4) ‘Member States shall require that: (a) all conditions in the law, regulations, or administrative provisions and/or universally applicable collective agreements applicable to posted workers in a similar situation in the relevant occupational branches are met during the intra-corporate transfer with regard to terms and conditions of employment other than remuneration. In the absence of a system for declaring collective agreements of universal application, Member States may base themselves on collective agreements which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or collective agreements which have been concluded by the most representative employers and employee organisations at national level and which are applied throughout their national territory; (b) the remuneration granted to the third-country national during the entire intra-corporate transfer is not less favourable than the remuneration granted to nationals of the Member State where the work is carried out occupying comparable positions in accordance with applicable laws or collective agreements or practices in the Member State where the host entity is established.’
39 Directive 96/71.
and statutory death pensions and access to goods and services. Member States are permitted under the directive to exclude family benefits (Article 18(3)). This is far from equal treatment in wages and working conditions including dismissal which applies under the agreement.

The ICT directive limits the duration of a transfer in Article 12 as follows: ‘The maximum duration of the intra-corporate transfer shall be three years for managers and specialists and one year for trainee employees after which they shall leave the territory of the Member States unless they obtain a residence permit on another basis in accordance with Union or national law.’ No limitation on the duration of a transfer is included in the Russia agreement though transfers are temporary. Thus Russian companies can claim that the duration of their key personnel’s stay in the Member States limited to one and three years cannot be applied to them so long as the key personnel meet the conditions of the agreement.

The ICT directive permits the Member States to ‘determine the volumes of admission of third-country nationals in accordance with Article 79(5) TFEU. On that basis, an application for an intra-corporate transferee permit may either be considered inadmissible or be rejected.’ (Article 6). No similar provision exists in the Russia agreement. As an international agreement of the EU with a third state, the Russia agreement has the same legal status as the EU treaties themselves. Thus the limitation on volumes of admission of third country nationals contained in Article 79(5) TFEU which post-dates the Russia agreement and is inconsistent with it cannot be applied to Russian ICT workers coming to the EU in accordance with the agreement’s provisions. The priority of the Russia agreement is expressly protected by Article 4(1) ICT directive.

7. Conclusions

There are two quite separate legal regimes which apply to the transfer of third country nationals from enterprises outside the EU to related ones inside the EU. The best known is the ICT directive which was adopted in 2014 and has received a substantial amount of publicity. The inclusion of mandatory transposition requirements in the directive means that the Member States have brought their national legislation into conformity with it (as set out in this book). The other regime is older, dating from early agreements of the EU with third countries, where a reciprocal system of establishment of enterprises between the parties was included in the agreement. While such provisions have appeared in many agreements, the most detailed as those which were concluded with countries in the 1990s and thereafter first with a view to accession to the EU (the Europe Agreements) and thereafter with many other states, successors of the Soviet Union, the Western Balkans but also more widely. There is no mandatory transposition requirement in third country agreements which are directly binding on the Member States. The result has been that the provisions on ICTs in the

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agreements have been largely ignored by states and are to a great extent unknown to lawyers.

As set out above, in the EU legal order, international agreements with third countries take priority over EU secondary law such as directives. This is expressly stated in relevant directives (and regulations) which are without prejudice to more favorable provisions of bi- and multilateral agreements (for instance Article 4(1)(b) ICT directive). Thus where a third country national ICT worker comes within the scope of such an agreement, the worker and his or her employer are entitled to rely on the more favorable provisions of the agreement to regulate the transfer. The provisions of an agreement may be directly effective if they are sufficient clear, precise and unconditional which means that they take effect directly in the EU legal order (including that of the Member States). But even where a provision of a third country agreement may not be directly effective, the priority of international agreements recognized in the ICT directive means that the application of the directive must be consistent with the key personnel provisions of the agreement even if those provisions are not directly effective. This means that the provisions of the directive, where inconsistent with those of an international agreement to which the EU is a party must be interpreted in a manner consistent with the agreement even where this may mean disregarding a more onerous provision expressly stated in the directive.
The Intra-Corporate Transfer Permit and Mobility in the European Union: The Business Perspective

Jo Antoons, Andreia Ghimis, Christine Sullivan*

1. Introduction

This article discusses the ambitions of the 2014/66/EU Directive1 (the ‘EU ICT’ or the ‘Directive’) for companies assigning talent to the European Union via an intra-corporate transfer; the impact the Directive has had on harmonizing admission criteria for ICT’s; and whether national implementation of the Directive addresses business needs. Our analysis, which is conducted more than one year after the Directive’s transposition deadline of 29 November 2016, shows that, in practice, significant divergences exist in the implementation of the EU ICT scheme at domestic level. These variables originate from the many ‘may’ and ‘multiple-choice’ clauses the Directive contains, but also from the varied legal migration traditions and political climates of countries in the European Union (the ‘EU’). Within this patchwork landscape the business community tends to overlook the added value and the interesting prospects the Directive creates and rather focuses on the persisting barriers to intra-EU mobility and the additional burden at national level brought by the EU ICT scheme when compared to pre-existing national ICT schemes.

1.1 Background and Objectives of the EU ICT Directive

Before this European scheme for intra-corporate transfers entered into force, several – but not all – EU countries had national ICT schemes in place. The European Commission’s impact assessment of 2010 shows that, in fact, only 14 EU Member States had such a permit.2 In practice, companies were facing complex process and

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eligibility requirements that differed from one country to another. Moreover, the time and financial costs of transferring non-EU ICTs to EU entities (but also from one EU entity to another) were very high. Yet, the need for intra-corporate transfers was (and still is) increasing due to globalisation, growing trade flows and the EU’s skills shortages with respect to the highly skilled.

In this context, the European Commission chose to present a proposal for a European scheme that set forth a transparent legal framework for third country national ICTs entering the European Union. This scheme was meant to increase the EU’s competitiveness and innovation and to facilitate the expansion of companies globally and particularly in the EU. The European legislators were hoping to achieve this by:

- Developing a set of common conditions of admission for third country national ICTs;
- Defining a straightforward process for a combined work and residence permit;
- Creating more attractive conditions of stay for ICTs and their families;
- Facilitating their intra-EU mobility.

As mentioned in the European Commission’s Impact Assessment, the scheme only covers a limited number of highly skilled employees. Furthermore, this type of migration is demand-driven by the needs of the hosting entity. It is limited in time (maximum 3 years) and the employment relationship of the transferees remains with the home entity. So, ICTs do not integrate the European/host country’s labour market as such. Given these specificities of the EU ICT scheme, negotiations around this Directive were expected to be straightforward.

However, discussions lasted for four years and the final text, although ambitious, contains many safeguards: ‘may’ and ‘multiple-choice’ clauses that have had a negative impact on the desired harmonization effect of this piece of legislation. Almost eight years after the Commission’s Proposal, we are now able to make a preliminary assessment of the EU ICT Directive’s impact at national and European level and comment upon its relevance to new market realities.

1.2 Business and Bringing Talent to the EU

In the past, the business community and the European legislator interacted minimally in the design of European migration policy. This is partially due to the EU’s restricted powers in the area of migration and the mistaken perception that labour/economic migration rules are adopted exclusively at the national level. Furthermore, the fragmented approach of the EU legal migration policy adopted following the failure of the 2001 Proposal for a horizontal Directive on the entry and residence conditions for all third-country nationals exercising paid and self-employed activities in the EU, made Europe even less accessible and easy to understand for companies.

In this context, the EU Blue Card Directive, adopted in 2009, marked a turning point. This scheme, aiming to attract the best and the brightest to Europe, had limited success. Although a European instrument, the implementation of this Directive
gave rise to a variety of national schemes. This led to the general understanding that besides harmonization – which, in general, is quite minimal due to lack of mutual trust amongst EU countries and political climates – a European scheme needs an added value to be successful. This added value, that can be generated only at EU level, is to remove obstacles to the migration of highly qualified third country nationals and to facilitate the employees’ and employers’ use of economic migration policies in a Single European Market.

More recently, the EU became an important interlocutor for business on legal migration topics. The EU policy makers also acknowledged that when the EU develops employer-sponsored migration pathways, employers, and the business community in general, must have a seat at the table.

This was highlighted by the European Commission in its 2015 European Agenda on Migration:

“The Commission will also establish a platform of dialogue to include input from business, the trade unions, and other social partners, to maximise the benefits of migration for the European economy and the migrants themselves.”

The same year, representatives of the business community, such as Fragomen, were selected to be part of the Expert Group on Economic Migration whose mission is to support the European Commission with policy development in the field of economic migration.

But even before the actual formalisation of the expert group, business representatives were already invited to advise on the elaboration of a scheme to facilitate the temporary intra-company transfer of third country nationals from a company located outside the EU to branches and subsidiaries in EU countries. The message brought by some companies during the preliminary discussions of what has later become the EU Intra-Corporate Transferees Scheme was twofold.

On the one hand, economic operators explained the growing preference of global companies for short term assignments to avoid overhead and costs associated with long term assignments. They pointed to the increase in short term cross-border travel including the rotation of business travellers, the multiplication of company roles with cross border duties and project assignments linked to service delivery.

On the other hand, business leaders explained that companies are typically organised more along business lines rather than geographic lines and that they were looking more and more to the European Union as a region, rather than to individual Member States for expanding their activity. Therefore, the diversity of rules and procedures they had to comply with in various countries when sending key highly skilled personnel to subsidiaries in the EU, as well as the slowness and complexity of these rules, were harmful to the EU’s attractiveness as a destination region.

Based upon this input, the feedback from other stakeholders, and its own analysis of the EU’s immigration needs, in 2010 the European Commission proposed a common set of rules for a combined residence and work permit for short stays for a

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targeted group of highly qualified professionals (managers, specialists and graduate trainees). The objective was also to establish more attractive residence conditions for these non-EU intra-corporate transferees and to facilitate their mobility within the EU. Summed up, these innovative provisions were supposed to create a legal framework fit for the needs of business and to eventually position Europe as a destination for global business.

Before turning to the EU ICT framework and whether it meets the needs of business, the authors would like to provide some background on our experience with the EU ICT and the context in which we have arrived at the observations presented in this article. Fragomen is the world’s leading immigration law firm with expertise in the migration laws, policies, and practices of most of the world’s countries, including all EU Member States. Fragomen has special experience-based knowledge with migration policies in all EU countries which enables us to build holistic comparative analyses of the different legislations and provide advice on migration issues to national governments and regional intergovernmental organisations.

Since its establishment in 1999, Fragomen’s Brussels office has been developing strong ties with European Union and Member States’ policy makers. Fragomen helps build bridges between businesses and EU stakeholders. It does so by strictly monitoring legislative processes, building strong networks, participating in EU expert groups on economic migration, speaking at public events organised by EU institutions and other stakeholders and pro-actively partnering with European decision makers in overseeing the implementation of European legislation in the EU Member States to contribute to coherent and effective national implementation programs, reduce excessive administrative burdens, and to avoid overlaps, gaps and inconsistencies.

With government affairs specialists operating across the Member States and at EU level, Fragomen can uniquely contribute to the development of a comprehensive European immigration policy to meet Europe’s economic, innovation and development needs. Clients of the firm are predominantly multinational companies that operate across Europe and that perceive Europe as a regional market. These clients are looking for solutions that allow them to quickly bring their talent to the EU and move employees easily across the borders of various Member States. These companies need a European migration policy to be regional rather than national, and they are eager for transparent, flexible and fully compliant means to employ third country nationals within the EU’s Single Market.

I. The Intra-Corporate Transferees Directive in Practice

Undoubtedly, the biggest added value of the European ICT Directive is its unique and innovative intra-EU mobility scheme. In fact, the EU ICT permit is the first permit to facilitate the mobility of third country national employees for work purposes within the EU and to employ them in various EU countries with one single EU ICT permit. Two types of mobility are covered by the ICT scheme: short term mobility (less than 90 days in any 180 day period per Member State) and long term mobility (more than 90 days in any 180 day period per Member State, but less than the period spent in the Member State that issued the main ICT permit).
I.1 The Business Short Term Mobility Needs

There is a global trend of increasing short-term assignments that will continue worldwide and in the EU. In a report by the global consulting firm Mercer, research showed that 56% of multinational companies expected to increase their use of short-term assignments in 2015/2016. The report showed that for the corresponding time, fewer companies (44%) expected to see a growth in long-term assignments.

This corresponds to what we see in practice, with clients increasingly sending employees on global short-term assignments and business travel. We also see more often that there are functions and roles that require multiple short-term assignments across EU Members States. A very conclusive example is that of an EMEA Human Resources Director whose responsibilities involve frequent international travel across Europe. Traditionally, EU migration schemes have left business ill-equipped to send such third country national staff on these short-term assignments in a timely and fully compliant manner.

While most large multinational companies have an increasing portion of their workforce on short-term and business travel, regulatory schemes remain inadequate to address the business reality of non-traditional staff, and of business traveller populations specifically. Specialized employees are often dispatched between corporate entities for days or weeks as a cost saving and convenient component of corporate mobility programs. This is partially due to the economic environment being defined by a high degree of volatility and uncertainty, but also a reflection of the skills shortage in many countries. As a result, companies are reviewing their policies and processes to manage challenges in the best way possible to remain cost efficient. But because they face an increasingly complex landscape of regulation and enforcement across various jurisdictions (not just in immigration law but also social security regulations, personal and corporate tax and labour law), compliance risks are higher than ever.

Companies with business traveller populations are particularly challenged with unclear ownership within the organization due to the nature of business travel, legislative frameworks that are premised on physical presence that goes beyond business visits, and historic legislative instruments that do not anticipate business travel. Incoherence between the rules for business travellers from one country to the next makes it difficult, if not impossible, to ensure compliance for those who are mobile across multiple jurisdictions. Company groups operating across Europe face a labyrinth of requirement assessments to keep their business travel population compliant, with different durations of work permit exempt stay and activities allowed in each EU country. Compounding this are the elaborate and lengthy permit processes to obtain permits if the nature of the activities to be performed is not work permit exempt.

Even for short-term assignments, which fall more in-line with traditional immigration approaches, compliance for mobile populations has been a historic hazard.

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Because immigration is primarily a national Member State competence, companies have confronted a patchwork of short term work permit requirements that do not provide intra-EU mobility options. It is here that the EU brings tremendous added value and where the EU ICT permit has been heralded as a potential game-changer for global mobility policies. In fact, the short-term (less than 90 days in any 180 days) mobility obligations set forth in the EU Directive are so precise, clear and unconditional that they have ‘direct effect’ and can be invoked even without additional measures set forth in national transposing law. What this meant was that even when only a few EU countries had implemented the EU ICT Directive, companies could already send their staff on a short-term work assignment in any second Member State on the basis of an EU ICT permit issued in the first Member State.

And yet, at the date of drafting this article, Fragomen has not yet filed any short term mobility notification on behalf of its clients. From our discussions with stakeholders outside the firm (non-clients and other practitioners), it seems that the use of intra-EU mobility is minimal if not non-existent. However, we did have several conversations with clients who could benefit from the intra-EU mobility scheme, but no client has yet decided that this would be the most suitable option for them and their employees at the moment. It can seem surprising given what we mention here above, i.e. that short-term assignments are increasingly used by companies operating in the EU and that several business operators had advocated for this while the EU ICT scheme was being discussed at EU level.

This can be attributed in part to the changes in internal company policy required to assign staff in a new way across the EU. But the most important reason are the barriers that still exist to effective use of the short-term or long term mobility provisions of the EU ICT Directive. We will discuss some of the barriers to intra-EU mobility, both short-term and long-term, in this section.

I.2 The EU ICT Intra-EU Mobility: Beneficial for Business but Many Obstacles Still Exist

Historically, movement of third country nationals across the EU has fallen under Schengen area provisions (while the Schengen area and the EU are geographically different areas, their partial overlap means that travel of foreign nationals in the EU is largely governed by the Schengen Border Code.) Contrary to national residence permits that can only grant their holders Schengen mobility rights (for purposes other than work: tourism, family, conferences, etc.), the EU ICT permit authorizes transferees to perform work related activities in the second EU Member State. This is a major change and a significant improvement to the EU’s legal migration policy for two main reasons. Firstly, it demonstrates the main advantage of developing business migration policies at EU level: shaping mobility schemes that no Member State can create individually. Secondly, it responds to the needs of multinational companies who increasingly advocate for less red tape and facilitated intra-EU movement for their foreign skilled business professionals.

However, although ambitious, several factors mitigate the success of the EU ICT intra-EU mobility scheme. The first factor is the scattered implementation of the Directive throughout the EU. Whereas some countries transposed the Directive before or close to the transposition date, such as Spain and the Netherlands, others, such as Belgium, have still not adapted their legislation even one year and a half later. This, together with the fact that even those countries that did implement the Directive on time have not defined their intra-EU mobility processes thoroughly and precisely enough, has kept the business community in legal uncertainty. Despite the European Commission’s reassurances confirming direct effect of the short term mobility provisions, companies have not used them because of – among other reasons – the lack of clear and straightforward processes. Economic operators do not want to take any non-compliance risks, as they are aware of how damaging this can be.

The second factor applies mostly to long term mobility provisions, because of the strict mechanism chosen for by EU countries. Whereas for the short term mobility process some countries chose the less restrictive option of not introducing a notification procedure (for example: Austria, Czech Republic, Latvia8), there are only very few countries that have not opted for a full mobile EU ICT permit application, the most restrictive option for long term intra-EU transfers. Employers therefore question the real added value of having a long term mobility scheme if most of the admission criteria and almost all document requirements are checked once again. To be fair, there is added value in the fact that, because there should not be any visa requirements and in-country applications are possible and can be preceded by a short term mobility assignment, transferees may start working immediately in the second EU country. This can be very beneficial for businesses, but this improvement is perceived as minimal.

The third factor that can be damaging to the success of the EU ICT’s intra-EU mobility scheme is the link that has already been created in practice between Posted Workers requirements, EU ICT main permit applications and intra-EU transfers. Some countries apply the requirements of the Posted Worker Enforcement Directive (2014/67/EU9), adopted the same year as the EU ICT Directive (2014/66/EU), to employers not established in the EU for both EU ICT main permit applications and for short term and long term mobility processes, even when an immigration application or a notification has been completed.

One of these requirements is to submit a Posted Workers notification for the ICT to employment authorities prior to the start of the assignment. While the 1996 Posted Workers Directive does mention that economic operations established in a third country cannot be treated more favourably than those established in the EU10, the question is whether these restrictions do not violate the principle of proportionality and go beyond what is reasonable to avoid social dumping.

8 However, these countries ask for a Posted Workers notification, see following paragraph.
It is extremely dissuading for economic operators to make use of intra-EU mobility if they are expected to submit – in some countries – two different notifications (the posted workers notification and the EU ICT short term mobility notification) to two different authorities for a short term assignment, although the transferee has already received an EU ICT permit in a different EU country (and therefore his contract, salary level, experience and other employment conditions have already been verified once in the EU). Furthermore, there are countries that decided not to impose a short term mobility notification, but extended their Posted Workers notification for ICT short term intra-EU assignments. This approach adopted by many countries can jeopardize the success of the intra-EU ICT mobility scheme because it damages the intended flexibility of the process.

Even more problematic is that some countries also impose Posted Workers notifications not only for intra-EU transfers but also alongside main EU ICT permit applications. In our view, this administrative burden is unnecessary and disproportionate because the ICT permit application offers sufficient guarantees against social dumping. Italy is however a positive example on this point, as they specifically excluded Posted Workers notification requirements for EU ICT permit applications.

To complicate things even further, there are issues regarding social security coverage of the transferees who make use of intra-EU mobility rights. In principle, the social security affiliation of the transferee remains in the home country of the third country national, as this is where his employment relationship with his employer is established. When coming to an EU country, the transferee can demonstrate coverage in the home country by means of a certificate of coverage issued by the third country, as per a bilateral agreement between that third country and the EU country (if one exists). However, in cases of intra-EU mobility, the transferee must prove his coverage to two or more European states. This is a problem because, even if bilateral social security agreements exist with these European states, several third countries do not issue certificates of coverage for multiple EU countries covering the same period of time. This leads to confusion as to where there is a social security liability and may even lead to split liability. It is even more problematic when Posted Workers notifications are requested (which very often cannot be completed without a certificate of coverage for social security purposes). The confusion increases when the sending country does not have a bilateral social security agreement with all the EU countries that are part of an EU ICT’s mobile transfer.

The fourth and last factor is the very complicated interaction of EU ICT mobility with the Schengen Borders Code.11 There is a great deal of confusion generated by these rules which appear to be similar, but have totally different objectives. EU ICT mobility establishes a total number of days to be spent in each Member State, which is more favourable than the Schengen mobility allowing a maximum number of 90 days in any 180 day period in the entire Schengen Area. In addition, Schengen mobility enables legal stay but the limited nature of work activities that can be done within the framework of Schengen mobility and for how long depend entirely on national legis-

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lation. Thus, there is considerable legal uncertainty due to the lack of transparency and consistency across the EU.

Another specific problem arises when a family member joins an EU ICT permit holder for a short term mobility assignment. If the transferee must perform duties in more than just one EU country, he will be able to spend more than 90 days outside the main EU receiving country, whereas the family member will fall under Schengen rules and can only accompany him/her for a total of 90 days over a six-month period.

Moreover, the variable geometry created by the legal migration opt-outs and the fact that not all EU countries subject to the EU ICT Directive apply the Schengen acquis in full generates a complicated puzzle, difficult to solve even for immigration professionals. The situation of non-Schengen countries – Bulgaria, Cyprus, Croatia and Romania – is very relevant. These countries issue EU ICT permits and their holders are allowed to make use of the EU intra mobility scheme for work purposes. However, these permits do not allow them to travel within the Schengen Area for tourist purposes, for instance. The situation of UK, Ireland and Denmark is less intriguing but adds to the general confusion because these countries are part of the EU, but not of the Schengen Area and they have also opted out of the EU ICT Directive. Hopefully, the European Commission will shed some light on this aspect in Autumn 2018 when they plan to amend the Schengen Border Guards Handbook. Furthermore, despite the fact that the EU ICT permit is not applicable in these countries, a third country national residing in the UK, Ireland or Denmark will not qualify for an EU ICT permit by virtue of not residing outside the EU at the time of filing an application.

\textbf{I.2 Variables in the EU ICT Practical Implementation}

Next to these intra-EU mobility possibilities, the EU Directive on intra-corporate transfers is innovative in several other aspects. Yet, its implementation by national governments generates a very asymmetrical landscape, leading to a complex immigration environment for business. This environment may force companies to start thinking strategically about their regional human mobility planning. In this chapter we will focus our analysis on the differences generated by the implementation of the ICT Directive at national level: national ICT schemes in the Member States that still have them (their type and overlap with the EU scheme); divergences in terms of admission criteria; processing times; and the cooling off period between two intra-corporate transfers. We will also discuss variations we noticed at the Member State level which, unlike the ones mentioned previously, do not originate from the text of the EU Directive or from transposition legislation, but rather have arisen in practice.

\textbf{I.2.1 Parallel National Schemes}

In an unprecedented manner, the EU ICT Directive obliges EU governments to eliminate all parallel national schemes, meaning that as soon as a transferee falls within the scope of the EU Directive, they cannot be issued any permit other than the EU ICT permit. This provision was meant to ensure the harmonization of the ICT schemes in all EU states, and reflects lessons learned from the non-successful Blue Card scheme which competes with national schemes in many EU countries.
From our experience so far, Member States have dealt very differently with the replacement of their national schemes. Some countries have eliminated their scheme altogether, such as Luxembourg and Austria. This led to practical issues in some cases. For instance, the Vienna immigration authorities refused to renew rotational permits (former national ICT permits) even though renewal applications were introduced before the implementation of the EU ICT Directive in Austria, leaving hundreds of applications at a standstill. The only solution offered was to switch those concerned to a local contract and apply for a different type of permit.

The majority of EU Member States have adapted their schemes so as to avoid overlap with the EU scheme. For instance Germany has maintained its national ICT scheme based on the GATS (General Agreement on Trade in Services) for assignments of less than 3 months. In addition, Germany also decided to keep their International Staff Exchange Program for intra-corporate transferees alongside the EU ICT permit. This program allows a company to bring a third country national employee into Germany for every employee sent out from Germany. In theory, whenever a transferee is considered a specialist he/she falls under the scope of the EU ICT Directive. Yet, in practice, for now, German authorities still use the International Staff Exchange scheme even in these cases.

Another interesting example is France. French authorities maintained their national scheme for transferees who sign local contracts in France. Similarly, in the Netherlands the Knowledge Migrant scheme (national permit) is now used only when the employee is on a local contract, whereas previously both assignees and local hires could make use of the scheme. The Netherlands moreover allows in-country assignees to change their status to Knowledge Migrant when their EU ICT status expires after three years while remaining under home country employment. (As no permit has yet to reach the three-year mark this change of status remains to be seen in practice, and there has been some conversation about whether this interpretation conforms to the Directive.)

At the time of writing this article, some countries still allow companies to choose between national and EU ICT permits when they overlap, for example Italy. In addition, others that have transposed the EU legislation do not use it very often in practice. This is the case of Romania. Slovakia announced they eliminated their national ICT scheme as of May 1, 2018. It is however not clear if the current national ICT permit holders are able to switch to an EU ICT permit after this date or if they are obliged to change status to a permit for locally hired employees.

These are just a few illustrative examples of the differences and inconsistencies in practice among the various Member States. Fragomen is conducting an in depth analysis on the approach of all EU countries. By mapping these variations we can keep companies informed of local requirements, but we can also keep national and EU policy makers aware of how the EU ICT works in practice.

I.2.2 Admission Criteria

For a migration scheme to be useful for sponsor companies employing talent in the EU, uniform practices and consistent admission criteria are crucial. Whereas the EU ICT Directive does harmonize the admission criteria of intra-corporate transferees in broad terms, it also gives flexibility to Member States. Some of this flexibility, but not
all of it, can certainly be justified by the major differences of the labour markets in EU countries.

In this sense, salary thresholds differ broadly from country to country due to economic discrepancies that persist within the EU. Most countries chose to define market conform salary as the salary that a national from that Member State would receive for the same position and with the same level of experience (sometimes the sector of activity and the region are also taken into consideration); other countries, such as the Netherlands, established precise salary indications. This does not go per se against the spirit of the EU rules, especially because when the threshold is not met Dutch authorities conduct a case by case analysis to evaluate market conformity of the offered salary.

The level of experience required within the group for intra corporate transferees also varies from country to country. Some require three months of experience for both managers and specialists and for trainees (for instance Italy and Spain). Others, like Germany, require six months of experience for managers and specialists and none for trainees. Luxembourg has transposed the exact wording of the Directive by requiring managers and specialists to have experience between three to twelve months and ICT trainees between three to six months.

A very important aspect of the EU ICT scheme is that it allows managers and specialists to prove their qualifications not only by means of a diploma, but also with significant professional experience. This is an interesting aspect for businesses because it can happen that critical staff do not hold the requisite degree to qualify under traditional knowledge schemes; think of a young self-taught IT specialist who has not attended college, or a senior executive who went straight into work for a company without attending higher education and has risen through the ranks to become an essential business manager.

This substitution of qualifications is unfortunately not available in Romania at the time of writing this article. Romanian authorities currently require diplomas as proof of an appropriate level of qualification for the position in the host entity. In addition, applicants must submit applications for diploma recognition that takes around one month, so it severely delays the process.

Furthermore, even when available, the modalities by which applicants or sponsors can prove their professional qualification vary from country to country. Some countries have forms that must be completed by applicants and others ask for assignment or experience letters from employers. Legalisation and translation requirements also differ significantly between Member States, to the point that, in some countries, the costs of contract translation are so high that companies are reluctant to apply for EU ICT permits at all.

I.2.3 Processing Times and Accredited Sponsors

Multinational companies operate in highly competitive and very dynamic economic environments. This requires highly flexible global mobility policies that respond to a company’s skills, knowledge and innovation needs as quickly as possible. Therefore, immigration schemes with short processing times for applications – especially for short term assignments – are crucial to efficiently fill the human resources gaps of companies (in highly skilled employment, but not only). The ICT scheme in the EU takes this into consideration. By imposing a maximum of 90 days for processing ICT
permit applications and by obliging Member States to issue a combined work and residence permit, the Directive shows the intention of the EU legislator to meet this business need.

Our analysis shows that most of the national legislations are compliant with this requirement. However, it is too early to assess if in practice this is also the case. We do however have some indications to say that, in some cases, the application involves several steps and, although a decision is made and a temporary work authorization is received, the actual work and residence permit takes longer than 90 days to obtain. This is problematic because before they receive their combined (residence and work) permit, transferees cannot benefit from intra-EU mobility rights (especially since in some countries – for instance Italy – it can take several months before the permit is issued). Until the permit is issued the employees can only rely on their entitlement to travel within the Schengen Area for a maximum of 90 days in any 180-day period based upon their visa or passport (if they are exempted from a visa due to visa waiver agreements). Once those 90 days expire, they need their permit to be able to travel. However, as mentioned earlier, it is still early to make a definitive assessment about processing times, as not all the countries that have transposed the Directive have also started issuing EU ICT permits.

We must also underline that the accredited sponsorship schemes\(^\text{12}\) that provide even shorter processing times and less documentation requirements are very beneficial for business needs. Unfortunately the EU Directive does not oblige, but only allows countries to have these schemes. Therefore, few countries actually have them. In essence, only those countries that already had such arrangements in place for their national permits now use accredited sponsorship schemes for ICTs: Spain, Slovakia, Italy. The Netherlands is also a very good example. Their accredited employer scheme enables a shortening of the processing times by one-third, from six to twelve weeks to two to four weeks. (Companies not enrolled in the accredited sponsorship may still apply for EU ICT permits, albeit via the longer process and with higher documentation requirements.) Currently, France is also considering introducing a similar scheme for accredited sponsors, but it is not yet certain whether ICTs will benefit from it as well.

**1.2.4 Work at Client Site**

The possibility of having the transferee work at a client site is undoubtedly very important and something that multinational companies strongly advocate for. The Directive allows Member States to decide whether the EU ICT permit holder may work at the client site or not, and, in practice, there are countries that do allow this (Austria, Germany, Spain, Latvia, Croatia, Portugal, Luxembourg) – although the permit can only be obtained via a local entity of the foreign employer, not by sending the transferee directly to the client – and countries that do not allow this (France, Slovakia, Romania). Other countries have not yet defined this aspect into their legislation. But this is a crucial element for businesses and one of the main factors to determine how successful the EU ICT permit will be.

\(^{12}\) Schemes that allow employers to enjoy various advantages (such as: accelerated admission procedures, less documentary evidence) if they undergo a certain procedure defined by the authorities aimed to guarantee their trustworthiness.
I.2.5 Cooling-off Period

Intra-corporate transfers are meant to be temporary assignments. The EU ICT Directive allows a maximum duration of the transfer of three years for managers and specialists and one year for graduate trainees. After this maximum duration they must leave, and countries may choose to ask for a maximum six-month waiting period before a second ICT permit application is introduced for the same Member State. The idea behind this limitation is that ICTs should not be able to apply for more permanent types of stay (such as EU long term residence after five years) especially because their employment relationship and social security coverage remain in the home country, so they are therefore not fully integrated economically in the host country.

EU countries have transposed this provision in very different ways: while most of the countries chose to implement a cooling off period of six months (Germany, Latvia, Luxembourg, Netherlands, Romania), some opted for a shorter period of three (Italy) or four months (Austria). Spain decided not to have any cooling off period. This is good news for business operators. Nevertheless, even in these cases transferees must go back to their home country and apply for a second permit (which involves costs and loss of time).

In several countries the legislation is silent as to the application of a cooling off period: France and Slovakia. However, although not clearly stated in the ICT legislation, in practice, France does ask transferees to wait before they can submit a second ICT application. It is very important for legal certainty and transparency to have clear provisions in the law. This is essential for companies to know how to plan and amend their mobility policies. At the moment of writing this article, France is planning to amend its legislation to provide more clarity on the cooling off period.

I.2.6 Other Variables Revealed in Practice

Along with the variables that are permitted by the EU Directive’s flexible wording – especially by the ‘may’ and ‘multiple choice’ clauses – others appear in practice due to the different interpretations that national administrations give to various terms or concepts.

For instance, the notion of ‘group entity’ differs from country to country and there is even more variation in the way in which entities can prove that they are part of the same group. In the Netherlands, accredited sponsors do not have to show any proof because of the trust relationship established between authorities and the accredited sponsors, which are expected to make their own good faith evaluation of the necessary affiliation between entities. Non-accredited sponsors do not have specific means to prove the link between their entities. They can do this by any means (for instance providing a list of subsidiaries) although authorities prefer an organizational chart. Employers only need to prove this upon the authorities’ request. Germany also asks for an organizational chart (but accepts other documents such as Annual reports, etc.). In Luxembourg, a simple attestation signed by the home country entity confirming that the host entity is part of the group suffices. On the other side, Bulgaria demands an official government document proving the link between the entities. The Czech Republic requests an extract from Commercial Register both for the home and the host entity as well as Articles of Incorporation.
Another relevant example of administrative variation was the interpretation given by German authorities of the interaction between payroll and the definition of an assignment. After the first EU ICT permits were filed in Germany, they were rejected by the authorities on the basis that the applicant would appear on the German payroll. It was the interpretation that for the applicant to be deemed an assignee, the payroll should be held in the home country. This interpretation was not set forth anywhere in German legislation nor in implementation indications, but was rather an interpretation of decision makers for specific files. This of course caused alarm and distress for companies who were unprepared to make drastic changes to payroll practices. After discussion and review with the German authorities, more flexibility has been granted although the base salary must be paid through the payroll of the home country, whereas allowances can be paid in Germany. This example illustrates the idiosyncrasies of local interpretation that companies can face, confounding the fragmentation that already exists at legal transposition level.

Another example that concerns Germany is linked to the mechanism for checking if the host entity meets its legal obligations regarding social security, taxation, labour rights or working conditions. When submitting an application, these entities must assure that they meet their lawful obligations with regard to social security law, tax law and labour law and that they do not aim at or cause a company or labour law dispute. Whereas these requests seem reasonable, by imposing only yes or no answers, authorities do not allow any flexibility. It is unclear what time frame they are referring to (the last 3 years, 5 years, 10 years?). German authorities also confirmed an automatic rejection of all applications submitted by host entities that do not give these assurances. Thus, there is no case by case analysis and/or proportionality check.

II. How Does the Business Community Perceive the EU ICT Permit So Far?

Although the Directive dates from 2014, the fact that so many countries have been late in transposing makes the EU ICT Directive fairly new. Furthermore, legislative frameworks at national level are still not definitive or very precisely designed. This makes it quite difficult to assess the scheme’s overall efficiency at present time. Yet, we can already evaluate the initial reaction of the business community towards the EU ICT and in the various EU countries.

From an immigration perspective, businesses employing third country nationals cannot access the EU as a region and – except for VanderElst provisions limited to the free movement of services – they could assign their employees only to individual Member States. Not because there was no need for intra-EU movement and a regional approach but because the immigration schemes at national level have had no interaction with each other (lack of trust between EU states) and because there was no intra-EU mobility element attached to them. Of course, it is not within the competence of the individual Member States to provide intra-EU options and only the EU could act here.

The EU ICT scheme is slowly changing this. In general, economic operators are enthusiastic about the possibility of using intra-EU mobility provisions and being fully compliant with their business traveller population. These provisions are, in
broad terms, adapted to their business needs. However, we see that companies remain largely unaware and/or unenthusiastic of the possibilities that exist at the EU level via the EU ICT scheme. This is partially due to the fact that they must become accustomed to this new approach, but, as explained above, primarily because of the many practical obstacles to using the mobility provisions of EU ICT. It is our experience that companies are, for the time being, struggling to overcome mobility and eligibility obstacles, rather than planning on how to make the most of the EU ICT’s added value.

To ensure that intra-EU mobility does not remain simply a nice concept on paper but with no application on the ground, EU and national policy makers must ensure that unnecessary burdens (such as duplicative Posted Workers notifications) are completely eliminated from the main EU ICT procedure and from EU ICT mobility processes. In addition, the situation of multi-state workers with pan-European roles must be simplified. More explanations are needed on how the notification formalities apply to them. National authorities should envisage the possibility of allowing companies to notify for a certain reference period by mentioning the approximate amount of time the employee would spend in one country.

The social security aspect of the intra-EU mobility must also be clarified. It certainly makes sense that the EU country issuing the main EU ICT permit asks for a certificate of coverage proving that the transferee remains within the ambit of his home country’s social security scheme and absolving both the employee and the employer from contributing to the host EU country’s social security system in full or only partially.

If a bilateral social security treaty exists between the home country and the EU Member State that issued the main EU ICT permit and the employee fulfils the conditions of home social security liability, the home country’s social security system should apply. Other EU destination countries should not question this principle, request additional certificates of coverage covering their jurisdictions or impose social security premium payments in the absence of such a certificate. If such a bilateral social security treaty does not exist, the social security legislation of the EU country that issued the main EU ICT permit should apply (based upon Regulation 1231/201013).

We recommend that in all instances of intra-EU mobility, other EU destination countries accept an A1 form issued by the Member State that issued the main EU ICT permit, whether that A1 form demonstrates payment of premiums in that Member State or an exemption from payment based upon a bilateral social security treaty concluded between that Member States and a third country.

The same precision is desirable for rules concerning work at client sites. This is a critical aspect of many business models (because it enables, amongst others, faster decision making, closer collaboration, more flexibility and contributes to building trust). The EU should understand what exactly are the concerns of Member States that do not allow this and encourage them – with the example of those countries who

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do accept work at client site – to overcome the fears they have, or advise on how to regulate in a way that does not lead to abuse.

For the time being there has been a great deal of focus from companies on the admission criteria for ICTs. As detailed earlier in this article, EU countries have adapted the admission criteria of the EU ICT permit to their local labour market needs and characteristics which has led to many variables in implementation. On the one hand, these variables, together with the document requirements and process differences, make it very difficult for the scheme to be perceived as an EU wide scheme (especially because the process is very straightforward in some countries, but very burdensome in others). Yet, on the other hand, they also create strategic planning opportunities for businesses with operations across Europe. For example, if a company must transfer one of their more recent employees to two different European countries for similar periods of time, they can choose to apply for the main EU ICT permit in a country that requires less experience within the group for the transferee or has shorter processing times and subsequently use intra-EU mobility to send him to the second EU country (while respecting the condition that the country of longest stay should be the country where the main application is submitted).

One of the most striking characteristics of the roll out of the EU ICT permit has been how strongly business has reacted to the three-year maximum duration of an assignment, which, in general, is perceived very negatively. Indeed, prior to the EU ICT Directive, some countries had nationals schemes in place that allowed stays for at least five years (this is in line with social security provisions that allow the transferee to remain under home social security coverage for five years). Therefore, the three years’ duration combined with a six-month cooling off period of the EU permit is an element of dissatisfaction for most companies who see that this can require significant changes in their business model, which also comes with significant administrative costs. Many companies are now searching for methods to circumvent this limitation within the legal context of national immigration options. At first many countries were also worried that this reduced duration would diminish their attractiveness as a destination country. Whereas there is some element of truth in this, the solution of not applying a cooling off period would be very much welcome or, at least waiving the cooling off period if certain guarantees are built in through trusted partnerships or on the basis of salary thresholds.

2. Conclusion

Based on very limited data, in 2010 the European Commission estimated that approximately 15,500 ICTs were arriving in EU countries (excluding the UK and Ireland14) per year. To boost this number and to respond to the companies’ needs for intra-corporate transfers of skills, a scheme for this kind of transfers has been established at EU level, aiming to harmonize admission conditions, processes and to give more rights to ICTs, mainly intra-EU mobility rights.

By creating this new EU immigration scheme, the ICT Directive does bring more certainty, in certain aspects, for economic actors. A very positive development is that now all EU countries will have an ICT permit in place, whereas before the EU Directive only 14 Member States\textsuperscript{15} had such a permit. This makes the EU as a whole more transparent and predictable for companies from an immigration perspective. Furthermore, the ICT permit increases efficiency, as it creates a combined work and residence permit which was not necessarily the case with pre-existing national permits. The processing times have also been significantly reduced in several countries.

However, the harmonizing effect of the EU ICT Directive is still quite limited. Although most EU countries eliminated their parallel national schemes – which was supposed to result in more harmonization between the Member States – our practical experience shows that companies are still dealing with many variables because national administrations have adapted their schemes to the specificities of their job markets. While challenging, these variables can nevertheless create opportunities for strategic immigration planning. What remains to be seen is whether these opportunities will become more apparent to companies, or if business operators will continue to focus on limitations in the individual Member States.

Next to the challenges of this variable geometry is the fact that the primary added value of the EU Directive, the intra-EU mobility scheme for which the business community has advocated for, is still not fit for use. The EU ICT mobility can be seen as the continuation of a trend already started by the European Court of Justice in 1994 with the Vander Elst\textsuperscript{16} ruling enabling the mobility of third country nationals in possession of a work permit issued by one EU country to conduct work in second EU country (without applying for a second work permit) in the context of service provision. The Vander Elst exemption is a very useful tool for business but it lacks harmonization as each country has given this ruling its own interpretation. Moreover, the trend toward facilitating intra-EU mobility will continue with the implementation of the new (2016) students and researchers Directive.\textsuperscript{17} Indications also exist in the new EU Blue Card proposal\textsuperscript{18}, proving that intra-EU mobility for business travel is on EU’s agenda not just for ICTs but also for other types of migrants, including those considered more permanent. These initiatives are all very encouraging, but many difficulties still remain in practice. For the EU ICT permit, before intra-EU processes become as straightforward as intended by the European legislator, the European Commission and Member States will have to find solutions for: administrative burden of Posted Workers notifications, social security aspects and Schengen implications.

At present the success of the EU ICT Directive is very difficult to assess because it is such a new scheme. Whereas there has been some progress towards more har-

\textsuperscript{15} Idem.
\textsuperscript{16} C-43/93 (Vander Elst), ECLI:EU:C:1994:310.
\textsuperscript{17} Directive 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, 2016, OJ L 132, Directive 2016/801/EU.
monization and efficiency, many issues still have to be addressed and implemented at national level. The European Directive does have potential to respond to corporate needs for short term transfers and intra-EU mobility. However, although it may seem that with the completion of the transposition the work is almost over, it is in fact only beginning. Substantial efforts will have to be deployed at EU level to analyse the quality of the transpositions at national level and on-going dialogue with national administrations must be conducted to ensure that all impediments that were very difficult to predict at the time of the legislative negotiations, but which appear quite frequently in practice, are eliminated.
Implementation and Application of the International Legal Framework for Intra-Corporate Transfers in the Netherlands

Simon Tans & Jelle Kroes*

1. Introduction

This chapter will focus on the international framework dealing with intra-corporate transfers (ICT) and how this is in use in the Dutch legal order. The EU ICT Directive 2014/66 builds on the international initiatives to liberalize mobility for this category. The definitions adopted in the Directive are based on the definitions included in the General Agreement on Trade in Services (GATS). Since the creation of the GATS, various Free Trade Agreements (FTA) to which the EU participates were concluded. FTA tend to cover liberalization of mobility for ICT as well. To understand the terminology used in Directive 2014/66 on intra-corporate transfers (ICT Directive), it is therefore helpful to provide an overview of the international framework dealing with trade in services. Next, this chapter will provide an overview of the implementation of the ICT Directive in the Dutch legal order. To understand the manner in which the Directive was implemented by the Netherlands, it is helpful to reflect on the recent tightening of immigration control. In essence, the international framework for Intra-corporate transfers in the Netherlands and the recent changes in the national framework are the result of opposing, and inherently linked trends.

The result is an interesting mix of Dutch rules facilitating entry for ICT, and restrictive conditions which are part of the general immigration rules. Moreover, as a consequence of the various differing initiatives relating to mobility for intra-corporate transferees, the Netherlands now has five different entry schemes for this category of temporary migrant workers.

The purpose of this chapter is therefore threefold. Firstly, a brief discussion of the many aspects related to ICT will be provided. Secondly, an overview of the types of ICT entry schemes for ICT included in Dutch legislation will follow. Thirdly, this chapter includes an overview of the Dutch rules on ICT based on the GATS and FTAs. This overview will provide insight to the background of the rules included in the EU Directive. Finally, the chapter will provide an explanation and overview of the Dutch entry rules for ICT based on the EU Directive. More specific, some prac-

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1 The definitions used in the ICT Directive were first formulated within the EU’s GATS Schedule of Commitments: EU horizontal Mode 4 commitment, World Trade Organization, Council for Trade in Services, Communication from the European Communities and its Member States Consolidated GATS Schedule, 9 October 2006, S/C/W/273, available online: <www.wto.org> (last visited 1 May 2019).
tical issues from the perspective of companies wishing to rely on ICT will be described.

2. Globalization and Migration Control, Opposing Trends

The creation of the ICT Directive is closely connected to the growth in international (service) trade and the needs of multinational companies. These phenomena are part of, and caused by globalization.\(^2\) Essentially, multinational companies may request mobility of their highly qualified personnel for various reasons. As a consequence of international regulation and national entry schemes, these demands are categorized in accordance with the activity or the employee involved.\(^3\) As such, overseeing or setting up a branch office in another country, negotiating contracts, educating business trainees or the requirement of a specifically skilled employee at another office are all recognized objectives requiring mobility of personnel of internationally operating companies.\(^4\) In specific, international trade flows related to services continuously grow as well, as does the importance of the services sector from an employment perspective.\(^5\)

Generally speaking, globalization, an increase of international trade and the parallel ‘discovery’ of international trade in services,\(^6\) lead to various initiatives at the international, the European Union (EU), and at the national level to facilitate this specific type of mobility. At the national level, facilitating access for ICT is the result of both implementation of the international obligations and unilateral liberalization. ICT is a prime example of highly-skilled labour migrants, a group that tends to be favoured in terms of access in what is referred to as competition for the ‘best and brightest’.\(^7\) In the previous years this has led to an incentive to liberalize this type of service amongst various EU Member States. Additionally, ICT serves a direct pur-

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2 J. Howe & R. Owens, ‘Temporary Labour Migration in the Global Era: The Regulatory Challenges’ (introduction), in: J. Howe & R. Owens (eds), Temporary Labour Migration in the Global Era: The Regulatory Challenges (Oxford: Hart Publishing 2016), p. 5 and 9. Howe and Owens provide an overview of the edited volume. That overview demonstrates the broad spectrum of issues connected to temporary labour migration in general. They also provide an insightful overview of the connection between capital and globalisation on the one hand, and ICT on the other. The term ‘globalization’ is used here in general, indicating inter alia the increasing interconnection of economies, the resulting increase in international trade and the increase in temporary labour migration.

3 Ibid., p 7, note that Howe and Owens explain this in relation to temporary labour migration in general, not specifically in relation to ICT.

4 S. Tans, Service Provision and Migration; EU and WTO Service Trade Liberalization and Their Impact on Dutch and UK Immigration Rules (Leiden: Brill Nijhoff 2017), p. 76-78. Note that some of these objectives, i.e. setting up a branch office and negotiating contracts, fall within the category of Business Visitors (hereinafter: Tans, 2017a).


6 Prior to the inclusion of trade in services within the WTO framework, trade in services was thought of only in connection to goods, and mostly ignored, Tans 2017a, p 39-40.

7 See in particular L. Cerna, J. Hollifield & W. Hynes ‘Trade, Migration and the Crisis of Globalization’, in: M. Pannizon, G. Zürcher & E. Fornalé (eds), The Palgrave Handbook of International Labour Migration (Basingstoke: Palgrave Macmillan 2015), p. 20. The battle for the brains, as it is also referred to, is clearly part of European policy as well, as is for example clear from the 2000 Lisbon strategy goal for the EU to become ‘the most competitive and dynamic knowledge-based economy in the world’.
pose for companies established in the state concerned. It is unsurprising that the facilitation of entry for ICT is therefore subject to lobbying by influential actors.\(^8\)

An opposing trend clearly emerged during the first decade of the new millennium. For various reasons, immigration policies in various EU Member States have become more restrictive. The economic crisis emerging in 2008 certainly has a strong role to play.\(^9\) For the EU Member States the enlargement of the EU of 2004 is just as influential. The United Kingdom (UK) forms a prime example of both trends. Up to 2006, the UK economy was one of the most open economies in the world. However, the 2008 recession and concerns over abuse of entry routes and an increase of (in particular Eastern) European nationals led to a significant restriction of UK immigration policy.\(^10\) For the Member State here under discussion, the Netherlands, a similar trend is clearly visible. Since 2006 legislation and policy concerning (labour) migration is consistently becoming stricter.

This is just a part of the complex background for the topic of ICT. Business and Trade Ministries have a clear incentive to facilitate mobility for this category.\(^11\) At the same time, national politics and Ministries responsible for immigration and labour market policies push for restrictive immigration rules in general. At the national level of the EU Member States, ICT is simply part of the general rules on immigration and therefore affected by this tendency to restrict immigration.\(^12\)

3. Dutch ICT Entry Routes

The Dutch implementation legislation transposing the ICT Directive entered into force in November 2016. As such an additional entry route for ICT was included in the legislative system regulating admission of foreigners for work related purposes.\(^13\) As the ICT Directive cannot derogate from international treaties binding to the EU, these forms of ICT are explicitly excluded from the scope of the Directive.\(^14\) As such, Article 4 of the Directive applies ‘without prejudice to more favourable provisions of’ bilateral and multilateral agreements. This provision refers to the GATS and FTA which include ICT rights. Note that, as described in another contribution in this book, specific rights to transfer certain employees to a branch office within the EU are also included in various other EU agreements signed with third countries to which Article 4 applies as well.

As the ICT Directive does not cover all forms of ICT, policy space is left for a national entry scheme for ICT not falling within the scope of the Directive (for in-

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9 See in particular Cerna, Hollifield & Hynes 2015, p. 17-18.
10 Tans 2017a, p. 332-333.
12 Cerna, Hollifield & Hynes 2015, p. 26-27 and 31; Tans 2017a, par. 7.5.1.4.
14 Directive 2014/66, Article 4; The rules concerning ICT based on the GATS and FTA can be found in the Regulation Effectuating Employment of Foreigners Act (REEFA, Regeling Uitvoering Wet Arbeid Vreemdelingen), par 52 and 53.
stance, a transfer shorter than three months). In effect, two national schemes are relevant: the specific national ICT scheme (provided for in par. 24 REEFA) and the (in practice more widely used) Highly Skilled Migrant (HSM) scheme. Finally, ICT was already part of EU law in the form of a category of the intra-EU posting of workers. As such, this form of ICT is included in the Posted Workers Directive. Since intra-EU posting of workers concerns posting by EU based service providers, whereas the ICT under discussion in this book concern transfers from non-EU based companies, intra-EU ICT will not be discussed substantially here. The consequence is that the Netherlands now has five different entry schemes, four of which relate to ICT from an undertaking in a third-country to a branch office in the Netherlands: 1) the ICT Directive scheme, 2) the GATS/FTA scheme, 3) the national ICT scheme and 4) the national HSM scheme.

Note that ICT based on the GATS and FTA are limited to movement as a consequence of service trade liberalization. As such, ICT on the basis of these agreements relates to mobility for undertakings providing services only. Contrary, the EU Directive is not limited to ICT within a group of undertakings providing services. As such, a company trading in goods can rely on the EU ICT Directive. However, the GATS ICT category is implemented by the Netherlands without this limitation. As such, the Dutch implementation is more liberal than the GATS commitment, as it also applies to companies that do not provide services.

The implementation of these obligations by the Netherlands indeed takes the form of three different schemes, in parallel to the two national entry schemes. While these ICT options indeed can be distinguished clearly, that does not mean they do not overlap in practice. Considering the fact that the EU Directive concerns secondary EU law, whereas the international commitments relating to the liberalization of service provision are based on international reciprocal agreements, these entry routes should indeed be kept separate. This means that those falling within the scope of both the EU Directive and bilateral or multilateral agreements including rights for ICT are not affected by the exclusive nature of the personal scope of the Directive. This is not so for the two national schemes that ICT could normally rely on; they are in effect suppressed by the ICT Directive, the practical consequences of which we will discuss below, in paragraph 5.

3.1 ICT Entry Conditions under the GATS and FTA

As indicated, the definition of the ICT categories listed in the EU directive, managers, specialists and trainees, are based on the definitions included in the GATS. These

15 REEFA, par 24.
17 As is apparent from the explanation provided in the REEFA, par. 24.
18 An undertaking providing services may transfer a manager from a third-country to an office in the Netherlands which is possible both on the basis of the GATS and the EU Directive (if the specific conditions are fulfilled). The undertaking in question in practice can choose.
definitions were first included in the EU’s schedule of commitments.\textsuperscript{19} It is useful to take into account the revised offer of the EU, made during the current WTO Doha Round negotiations.\textsuperscript{20} The current EU GATS commitments only relate to managers and specialists, whereas the EU’s revised offer includes commitments relating to graduate trainees. It is to be expected that graduate trainees will indeed be part of the commitments resulting from a successful conclusion of the Doha Round.\textsuperscript{21}

Directive 2014/66 essentially provides the same definitions as those provided in the EU’s revised GATS offer, be it that there are minor differences in language. The definition of managers contains insubstantial differences such as ‘establishment’ (GATS) and ‘host entity’ (directive).\textsuperscript{22} Another example is that the GATS refers to managers as those ‘receiving general supervision or direction principally from the board of directors or stockholders’, whereas the directive refers to ‘receiving general supervision or guidance principally from the board of directors or shareholders’.

For specialists, the language differs as well:

Specialists: Persons working within a juridical person who possess uncommon knowledge (directive ‘specialised knowledge’) essential to the establishment’s service, research equipment, techniques or management (directive ‘essential to the host entity’s area of activity, techniques or management’). In assessing such knowledge, account will be taken not only of knowledge specific to the establishment, but also of whether the person has a high level of qualification (Directive: ‘including adequate professional experience’) referring to a type of work or trade requiring specific technical knowledge, including (directive ‘possible’) membership of an accredited profession.

Again, most of these variations in my opinion do not entail substantive differences. For instance, the omission of ‘research equipment’ in relation to the specialists uncommon/specialised knowledge still seems insignificant. Under the GATS commitment, an employee with specific knowledge on research equipment (operated in the host entity) can indeed rely on that knowledge to justify a transfer to the branch office within the EU. That same person can rely on the directive, for instance a mechanic with specific knowledge on a specialized laser operated by the branch office.

\textsuperscript{19} A WTO Members GATS schedule of commitments provides the type of service provision (the modalities) and the service sectors which were subject to GATS liberalization provided by that specific WTO Member State as the result of the WTO negotiations, see for instance P. Mavroidis, ‘Highway XVI Re-Visited: The road from Non-Discrimination to Market Access in GATS’, 2007 World Trade Review 6: 3. As the only successful round of negotiations since the inclusion of the GATS was the Uruguay Round (1986-1994), the current commitments are those negotiated during that round. The EU GATS commitments include commitments relating to ICT, see: WTO, Council for Trade in Services, Communication from the European Communities and their Member States, Schedule of Commitments, horizontal section, 15 April 1994, SC/31 and SC/31/Suppl. 2.


\textsuperscript{21} While the revised offer made by the EU in 2005 is not binding until the round is indeed successfully completed, the fact that graduate trainees are already included in FTA to which the EU participates provides a strong indication that this category will remain part of the EU’s offer in the Doha Round.

\textsuperscript{22} This difference can be explained by the fact that the term establishment causes confusion within EU law, due to the freedom of establishment.
would still fit the definition of having specialised knowledge ‘essential to the host entity’s area of activity, techniques or management’.

The definitions of graduate trainees (directive ‘trainee employee’) vary as well. The GATS terminology does not refer to payment during the transfer. However, that requirement is covered elsewhere in the EU’s GATS commitments which specifically conditions all forms of service mobility with the following phrase:

All other requirements of Community and Member States’ laws and regulations regarding entry, stay, work and social security measures shall continue to apply, including regulations concerning period of stay, minimum wages as well as collective wage agreements.23

The GATS definition refers to the possibility to require the submission of ‘a training programme covering the duration of the stay for prior approval’, an optional requirement missing in the directive. However, Article 5(c)(ii) of the directive does require evidence that the third-country national (TCN) is taking a position as a trainee employee in the host entity.

In our opinion, insignificant differences are unproblematic. For instance, a shift from plural (GATS: managers, specialists, graduate trainees) to singular (directive: manager, specialist, trainee employee) has no consequence. Nevertheless, more significant variations should be avoided, either when the EU creates new secondary legislation, in the final wording of the EU’s offer if the Doha Round is successfully completed, or in newly negotiated FTA. Ultimately, these definitions are implemented in the national legal order of the EU Member States. Slight variations in all these definitions lead to additional complexity in relation to an already complex topic.24

Another major difference lies in the fact that GATS and FTA commitments do not apply in full. Rather, specific commitments must be undertaken (GATS) or are explicitly listed as not covered by the agreement (FTA). As an example, the commitment concerning graduate trainees in the EU’s GATS revised offer does not apply to nine EU Member States.

3.2 Conditions for ICT based on the Current GATS Commitments

The definition, and conditions for ICT entry as listed in the GATS commitments are as follows:

‘The temporary presence, as intra-corporate transferee, of natural persons in the following categories, provided that the service supplier is a juridical person and that the persons concerned have been employed by it or have been partners in it (other than as majority shareholders), for at least the year immediately preceding such movement.’

An ‘intra-corporate transferee’ is defined as:

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23 EU GATS Schedule of Commitments, horizontal section Mode 4, fn 6.
24 Tans has argued elsewhere that the implementation legislation of GATS commitments in the national legal order of the Netherlands and the UK, due to their complexity, is subject to several mistakes, see: Tans 2017a, par 5.3.6 and 7.5.1.2 (the Netherlands) and par 6.3.8.2 and 7.5.2.3 (the UK).
- a natural person working within a juridical person, other than a non-profit making organisation, established in the territory of an WTO Member
- and being temporarily transferred in the context of the provision of a service through commercial presence in the territory of a Community Member State;
- the juridical persons concerned must have their principal place of business in the territory of a WTO Member other than the Communities and their Member States
- and the transfer must be to an establishment (office, branch or subsidiary) of that juridical person, effectively providing like services in the territory of a Member State to which the EEC Treaty applies

As noted, the EU has offered additional liberalisation within the framework of the Doha Round Negotiations. Currently graduate trainees are not part of the GATS commitments, but they are included in the EU offer made in 2005. Additionally, this category is part of FTA to which the EU participates. The conditions listed in the offer relating to trainees are:

- employed at least a year prior to transfer
- transfer duration of maximum one year
- training programme may be requested by host state
- university graduate.

3.3 The National Dutch ICT Entry Scheme

Article 24 of the annex effectuating rules REEFA contains the conditions that apply to those not falling within the scope of the Directive. As such, this scheme contains the ‘leftover’ national rules which remain in excess of the categories falling within the EU Directive. The conditions are as follows:

- the concern (group company), other than non-profit, needs to fulfil a certain turnover threshold as it needs to be a ‘large concern’. In practice this means a € 50 million worldwide turnover (gross revenue);

- Managers and specialists
  - degree requirement at technical university level
  - salary requirement similar to the HSM\textsuperscript{25} scheme aged over thirty
  - maximum duration of three years

- Trainee
  - no condition of employed at least a year prior to transfer
  - duration of maximum three years
  - training programme demonstrating need required
  - university graduate or HBO
  - salary requirement equal to HSM under the age of thirty, this is not part of the GATS commitments

- Specialists
  - transferred due to specific knowledge and skills

\textsuperscript{25} See below at par 5.4.
Compared to the Dutch GATS commitments, some differences are interesting. Regarding managers and specialist, the salary requirement is not included in the GATS commitments. Instead, reference is made to labour law which ‘continues to apply’. Moreover, the GATS commitments do not define temporary. As such, the national scheme is quite liberal.

4. Difficulties Arising from the Implementation of the GATS and FTA

One of the most important differences between the Directive and the GATS and FTA ICT is the fact that the Directive concerns EU law. Due to this origin, the entire system of judicial protection, including implementation mechanisms such as direct effect, and the obligation for authorities and courts to apply EU harmonious interpretation, therefore applies to the implementation based on the Directive. Infraction procedures and the possibility to raise complaints with the Commission are also prime examples of this EU framework.

This does not apply to the international agreements. Disputes are settled on a state to state basis, and the international agreements do not have direct effect. In June 2018 there is no case law on this specific topic at the international level, and the meaning of various provisions of the GATS (and therefore their counterparts in FTAs) is still unclear. As such, the Indian case against the US triggered due to the dramatic increase of the fee for H1b and L-1 work visas may be of significant interest in this field. Currently that case is still in the negotiations phase and may never reach the WTO adjudicating bodies.

However, as is clear from the implementation, the Dutch authorities struggle with these international entry routes, and the EU Directive will lead to much needed case law guidance. As an example of how complicated these minor variations may get, the ICT Directive and the national ICT scheme of the Netherlands contain salary requirements. However, there is no such condition listed in the paragraphs implementing the GATS and FTAs. This has to do with the fact that the international commitments do not specify a salary requirement other than a general statement (a blanket reference) indicating:

‘All other requirements of [Union] and Member States’ laws and regulations regarding entry, stay, work and social security measures shall continue to apply, including regulations concerning period of stay, minimum wages as well as collective wage agreements.’

Without extensively describing the issue here, this is a complex addition to the international commitments. Its intention is very clear, as this phrase simply makes it

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26 This is clear from the GATS ‘blanket reference’ included in the commitments. This rather troubling aspect of the GATS commitments is described extensively in S Tans ‘Trade commitments in GATS, EU-CARIFORUM and CETA, and the inclusion of blanket references to entry, stay, work and social security measures’ in: S Carrera, A Geddes, E Guild and M Stefan (eds) Pathways towards Legal Migration into the EU. Reappraising concepts, trajectories and policies. (CEPS, Brussels 2017) (Hereinafter:Tans 2017b).
27 The existing GATS cases do not deal with mobility for service providers.
28 See: Tans 2017b.
unnecessary to define all these requirements, as well as that it takes away the need to keep updating the commitments. However, a side-effect is that it creates a backdoor allowing backtracking on the internationally agreed commitments. A very real example is the following:

- Member States increasingly add conditions in their general migration rules such as sponsorship, and the possibility to exclude applications based on previous criminal convictions, even minor ones. The only condition is that this must concern a felony (misdrijf), thus a misdemeanour (overtreding) is not sufficient for refusal. Yet this therefore includes the possibility to reject applications for those who have a criminal conviction with very short sentences. Such conditions did not exist at the time of acceptance of the GATS commitments in 1997. It is unclear whether these additional conditions to the agreed commitments are violating those commitments. A similar problem is raised by Dutch sponsorship. All its conditions did not exist at the time the commitments were signed and thus form additional conditions.

As a final point, we find it decidedly odd to implement GATS and FTA commitments in the annex to the effectuating rules of the REEFA, thus at the policy guidance level. The same goes for the EU Directive which, as will be described below, is implemented by explaining provisions based on Frequently Asked Questions – hypothetical questions, of course, in effect being nothing else than a format for implementing regulations. To us, the choice for such forms of implementation does not reflect the status of their origin, binding international treaties based on reciprocity.

5. Technical Implementation Issues with the ICT Directive in the Netherlands

5.1 Introduction

Whereas the ICT Directive was received with enthusiasm and excitement in the Netherlands on a general level, its arrival immediately raised concerns among immigration stakeholders. The dominant concern was certainly the mandatory character of the ICT permit scheme, particularly in the light of its non-renewability, but there were other concerns as well:

- the definition of education qualifications for trainees;
- the building up of rights towards permanent residency during intra-EU mobility;
- the application of specific salary thresholds versus labour conditions that must be ‘not less favourable than in accordance with the law or collective agreements or practices in the host country’
- the processing time for non-recognised sponsors.

While the WTO agreement entered into force on 1 January 1995, negotiations concerning Mode 4 continued. The current commitments were inscribed in the schedules in 1997.
In this paragraph we reflect on the Dutch implementation of the ICT Directive and the discussions that it has sparked. We will focus primarily on the issue of (non-)renewability of the ICT permit after the maximum duration, and the way the government has managed the associated issues.

### 5.2 Transposition of the ICT Directive in the Netherlands

The legal texts implementing Directive 2014/66 were publicized on 2 resp. 25 and 28 November 2016, shortly before the transposition deadline. By way of service to the industry, the Dutch immigration authority (IND) during the month of November 2016 organized a series of information meetings for stakeholders (companies, immigration practitioners, NGO’s). At these meetings several relevant issues came up to which an answer could not be found in the legal texts or the legislative proceedings. For example, the question was raised whether ICT permit holders would be able to switch to a national permit scheme after reaching the maximum of one, respectively three years without observing the cooling off period of (in the Netherlands) 6 months. The IND could not, at that point, give a conclusive answer to several of the issues that were raised.

### 5.3 Confusion among Stakeholders

With regard to the issue of renewal of stay without observing the cooling off period, the analysis, in fact, seems simple. Article 2 of the Directive clearly stipulates that the Directive applies both to new applicants and to ICT permit holders already admitted. See:

ICT Directive, article 2, **Scope:**

‘1. This Directive shall apply to third-country nationals who reside outside the territory of the Member States at the time of application and apply to be admitted or who have been admitted to the territory of a Member State under the terms of this Directive, in the framework of an intra-corporate transfer as managers, specialists or trainee employees.’ (emphasis added, authors)

Since ICT permit holders therefore fall under the personal scope of the Directive, they should be subject to both the obligation to leave the territory of the Member States after expiration of the maximum period of stay, and the obligation to observe the applicable waiting period before being able to apply for a new ICT permit. The only way to become eligible for a national permit immediately (i.e. without the employee having moved out of the EU), is to make the employee fall out of the material scope of the ICT Directive. One way to do this would be to place the employee on a local employment contract. Several of the industry stakeholders involved however clearly stated that such a solution would be highly undesirable.

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30 The Alien’s Decree (Vreemdelingenbesluit), the Alien’s Provision (Voorschrift vreemdelingen) and the Regulation Effectuating Employment of Foreigners Act (REEFA, Regeling Uitvoering Wet Arbeid Vreemdelingen).
For several weeks, the IND did not take a formal stance, and the situation remained unclear. Would transferees effectively be able to continue their stay after the maximum (one or) three years of ICT permit, or not?

5.4 Corporations’ Favourite Pet: The Highly Skilled Migrant (HSM) Scheme

Why was the issue so important? Not only because companies, as a rule, prefer an inhibited control over the mobility of their employees, but also because the situation used to be perfectly fine until the ICT Directive appeared at the scene. Companies used to have a choice of several permit options for their intra-corporate transferees, options that were now mandatorily being replaced by a permit scheme that was new and unknown, and apparently strictly temporary. The most important of the existing schemes in this regard was the Highly Skilled Migrant scheme (HSM scheme or Kennismigrantenregeling), based on two simple conditions: recognised sponsorship and a salary threshold. Although the HSM scheme wasn’t designed with a view to ICT’s, it allowed for the employee to remain on a foreign employment contract (and payroll), and in practice became the most widely used scheme for ICT situations, as it is more attractive than the national ICT scheme. It is granted for 5 years, renewable without limitation; its application process is fast, and dependents get full labour market access. The national ICT scheme, which applies comparable admission criteria, remained a useful alternative in cases where the Dutch entity of a group company does not have recognised sponsor status and/or the group does not meet the threshold of an annual gross revenue of € 50 MIO.

No wonder then, that the suppression of these national schemes by the ICT Directive caused concerns. With the ICT Directive, the always renewable HSM permit was suppressed by a (one or) three years ICT permit, not renewable, and with a cooling off period of 6 months.

The concerns of large multinational corporations were predominantly related to social security issues. For example, a Japanese multinational may prefer to maintain its staff on a Japanese contract when they are seconded abroad, in order to achieve a beneficial social premiums burden in comparison to the employees being transferred to a local Dutch contract. Such beneficial solutions are based on bilateral treaties and are generally limited in time. As in the case of Japan, postings could last for a maximum of 4 years before losing the social security premium benefit, and most Japanese companies therefore had a policy to post transferees for four years, at the end of which the company would have to make a decision to either recall the transferee, or put him or her on local contract. Under the ICT permit, this decision should be made already at the end of (one or) three years.

5.5 Legislation by Frequently Asked Questions

On 8 December 2016, the IND posted a document on its website: ICT Directive frequently asked questions. Among many other questions, this document contained the question: ‘Must (the transfer letter) explicitly contain the wording that the employee cannot stay longer than 3 years, since that is the maximum period?’ The answer reads:
'After the stay in the Netherlands the employee must return to the foreign employer or another EU based undertaking of the organisation.'

This answer, in our view, seems to be consistent with the Directive. No renewal or change of status after three years of stay.

On 16 February 2017, however, the position was reversed. Without any prior announcement or clarification, the IND posted a revised version of the *ICT Directive frequently asked questions* on its website, which settled the issue even more clearly, however in the opposite way. A new question-and-answer were added, cited here in full for the sake of clarity:

‘Question: May the holder of an ICT residence permit get a highly skilled migrant permit after three years of residence, even if he keeps his labour contract with the employer outside the EU?

Answer: When the maximum period of residence on the grounds of the ICT Directive (this is 3 years for a manager or specialist and 1 year for a trainee-employee) has passed, the employee *no longer falls within the scope of the Directive now that he has residence in the Netherlands at the moment of submitting the application.* If he meets the conditions of the Highly Skilled Migrants’ Scheme and the Dutch undertaking where he works is recognised as a sponsor, *he can apply for a highly skilled migrant residence permit.*’ (emphasis added, authors)

So, the dispute was finally and unequivocally settled: even when the contract remains with an establishment outside the EU, the ICT permit holder can apply for a national permit immediately after expiration of the ICT permit and without leaving the EU territory. As argued above in paragraph 3, we feel that this is not in line with the provisions of the Directive; the fact that the employee resides in the Netherlands at the moment of application clearly does not make him fall out of scope, because this interpretation would render the second leg of Article 2 paragraph 1 of the Directive aimless.

### 5.6 Lobby and Advocacy

This remarkable and unannounced reversal was apparently effectuated by way of lobby and advocacy. Several parties had been speaking with the IND and/or the Ministry of Security and Justice, one of them the Permits Foundation, an international NGO based in the Hague campaigning for expat spouses’ rights. Most importantly, on 14 February 2017, a senior officer from the Ministry attended a meeting of the sponsors of the Permits Foundation. The agenda[^31] listed several ICT issues:

1. The need to be able to change to a Highly Skilled Migrant (HSM) permit after an ICT assignment;
2. The cooling-off period of six months after the expiry of the permit (e.g. in case of continued need for intra EU mobility);
3. Education qualifications for trainees;
4. Building up residence rights after an ICT has changed to an HSM permit.

Two days after that meeting, the amended FAQ as just described, were publicized. The Permits Foundation must have been aware of this – as mentioned, the general public would have known only if one stumbled onto the added question by chance - but nevertheless asked the Ministry by letter of 23 February 2017 explicit confirmation on the issue, as well as on a few other issues. In its letter of 13 March 2017 the Ministry of Security and Justice:
- confirmed its position vis-à-vis the change of status and the cooling off period; there is no cooling off period in case of change of status to HSM, but still between subsequent ICT-assignments
- confirmed that trainees need to have a Master’s Degree; as a result, trainees without a Master’s Degree do not fall within the scope of the ICT-directive (and therefore have the opportunity to apply for a national residence permit).
- confirmed that time spent in other EU-countries as a result of intra EU mobility counts towards the five years period as required for a (national) permanent residence permit, as long as the ICT keeps holding the Dutch ICT-permit during the period(s) of mobility.

5.7 Analysis of the Renewability Aspect

As mentioned, we feel that the Directive provides no legal basis for the Dutch position on the change of status to HSM. ICT permit holders are ‘in scope’ and therefore are, similar to new transferees, subject to the Directive, and must therefore observe the cooling off period. Notwithstanding this legal analysis, one could argue that the Dutch interpretation does little harm to the principles and objectives of the Directive. This will be for the European Commission to consider in its implementation report. What is less easy to understand, is why the Dutch government has chosen to implement the (optional) requirement of a cooling off period – of six months no less. If the policy maker did not aspire to enforce the cooling off period, it would have been more consistent to refrain from implementing it altogether, just as several other Member States

5.8 Other Concerns

Several other concerns were raised: the degree requirements for trainees, the issue of building up mobility rights, the salary thresholds and concerns relating to certain procedural aspects.

The rule that time spent while being ‘intra-EU mobile’ counts towards a national permanent residence permit (only) if the Dutch ICT permit is maintained, does not raise any issues with the principles of the ICT Directive, in our view. The other three aspects will be discussed in the following paragraphs.
5.8.1 Trainees: A University Degree Means: A Master’s Degree (sometimes)

The fact that the requirement to have a ‘university degree’ is interpreted by the Dutch policy makers as Master’s Degree can be understood from the perspective of the Dutch educational system; education institutions grant what is called a Bachelor’s Degree to those with 3 years of University education, or 4 year of higher vocational training. A Master’s Degree can only be obtained through 4 years of University education. In most countries around the world however ‘university’ implies a 4 year higher education course, resulting in a Bachelor’s Degree. Master’s Degree courses are mainly for those with academic ambitions or being more advanced in their work career (for example MBA students). The Dutch system is therefore slightly out of balance with the international standard. Interestingly, in the Dutch implementation of the ICT paragraph of the WTO GATS, the term university degree is interpreted as a Bachelor’s Degree, so there seems to be a lack of consistency. We reiterate that the GATS provisions have served the EU legislators as a template for the ICT Directive, and there does not seem to be a solid argument for the difference in approach. Here again, the Dutch policy maker basically solves the issue by stating in the FAQ that a trainee without a Master’s Degree falls outside the scope of the Directive, and therefore is eligible to apply for a national permit (and in practice will qualify for such permit in most cases). Since having a university degree is not only mentioned under the conditions for the ICT trainee permit (in Article 5, par. 1 sub d) but also in Article 3 where the definition of trainee is given, a literal reading of the ICT Directive does not rule out this approach, however, since the idea behind it is to harmonize rules for those who are considered transferees by their companies, rather than offering a worldwide technical definition of transferee, the Dutch approach could be questioned. But the result is not unsatisfactory; trainees can still be transferred, and the extra benefit of intra-EU mobility options that the ICT permit offers might not be missed that much by trainees. Again: the Directive’s principles may not necessarily be jeopardized, but the legal reasoning is unsatisfactory.

5.8.2 Salary Thresholds

The salary needs to be ‘not less favourable than in accordance with the law or collective agreements or practices in the host country’ (Article 5 par. 4 sub a of the ICT Directive). The Aliens Decree provides that a salary below the thresholds set for the HSM scheme, can be assessed against a market level standard by the Central Labour office (CLO). In practice, it is submitted for advice to the CLO in all cases where the salary threshold is not met. Including a CLO advice as standard procedure can be problematic:
- the procedure will slow down, based on our experience we know this can often to up to (or over) 90 days;
- a certain capriciousness enters the process; market level assessments from the CLO are found unreliable by a Dutch court (see AWB 17/10941, 26th April 2018).

5.8.3 Processing Times

Only recognised sponsors will get a quick decision on their ICT applications: within two weeks’ time. For non-recognised sponsors, the maximum processing time set by the ICT Directive (90 days) is in practice an accurate estimate. One of the factors
causing the delay is that also in this case, the application will be submitted for advice to the CLO, with the associated risks.

The distinction recognised/non-recognised is important for the Dutch policy maker. Most multinationals are recognised sponsors; there are currently around 8,000 companies recognised sponsors.32 Companies that have only recently set up an establishment in the Netherlands will normally not apply for recognised sponsorship until the moment they have the need for it, i.e. when they want to employ foreign staff (whether new hires or transferees). Obtaining the recognised sponsor status takes about 4 weeks’ time. There is a government fee of € 3,861. Newly established entities, no matter how large and reputable the mother companies, must wait 18 months before qualifying. There may be a lot to say about this distinction, which we will not do in the scope of this chapter.33

6. Conclusion

The overview of schemes for intra-corporate transfers to the Netherlands provides a complex picture. From the perspective of those wishing to rely on ICT these entry schemes may be seen as possible entry routes, each with differences in conditions that need to be complied with. This chapter’s first purpose was to provide a background to these differences. Within the national legal order, these differences are no longer clearly visible, yet the difference between entry based on GATS / FTA, EU law or national law are significant. From the perspective of dispute settlement, the EU Directive significantly differs from the GATS / FTA commitments. From the perspective of the possibility to modify entry schemes, the national scheme may be altered unilaterally, whereas the EU and GATS / FTA schemes clearly are part of internationally binding norms.

At first glance, the conditions that apply vary in specific details, for instance a longer or shorter cooling off period, or a longer or shorter period of prior employment with the home entity. However, under the surface the differences may be far more significant. The option to impose certain labour conditions, for example specific minimum salary thresholds, differs as well. The Directive refers to ‘national law or collective agreements or practices in the host country’, which is in parallel with the national entry scheme. Under the GATS a similar guarantee is made. However, the origin of GATS commitments is based on international negotiations. It is far from clear whether more stringent conditions, such as a possible need to have a salary at least equal to the HSM scheme is in line with what was promised during the Uruguay Round negotiations in the 90’s. Is it possible to impose a higher salary threshold for foreigners in the implementation of an international agreement seeking non-discrimination between nationals and foreigners? This chapter does not answer this question, as there simply is no clarity at the WTO level. However, what this chapter does indicate is the importance of the origin of each scheme.

33 On Dutch sponsorship, see extensively Tans 2017a, p. 281-287 and p. 401-407.
In addition to the background for the EU ICT Directive at the international level, this chapter had a second purpose, to provide an overview, from a practical perspective, of the implementation of the ICT Directive in the Dutch legal order. Several issues were pointed out.

The suppression of the national ICT schemes by the ICT Directive has raised some concerns in practice. While due to a successful industry lobby the Netherlands does not require a cooling off period in case of a switch to the HSM permit, the European Commission may differ with this stance when it assesses the Dutch implementation of the Directive.

Another issue relates specifically to the Dutch implementation. The interpretation of the university degree requirement in the Dutch implementation for transferees is transposed in Dutch legislation as a Master’s Degree requirement. While this interpretation may be in line with the wordings of the Directive, it is not consistent with the worldwide definition, nor is it consistent with the Netherlands’ implementation of its own GATS commitments, where a bachelor’s degree counts as a university degree.

In addition, the ‘soft’ salary requirement imposed by the ICT Directive is turned into a strict salary threshold in the case of the Netherlands, as a salary below the set threshold must be assessed by the Dutch CLO against the market level standard. This slows down the application process drastically and makes the outcome to a certain extent unreliable.

The CLO assessment is also standard procedure if the sponsor does not have recognised sponsor status. Newly established entities must in practice wait no less than 18 months before qualifying as recognised sponsors. As such, before they obtain this qualification such companies cannot rely on the fast track procedure available to recognised sponsors.
Intra-corporate Transfer (ICT) Directive – The German Perspective

Gunther Mävers*

On 15 May 2014 the European Parliament and the Council of the European Union adopted ‘Directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer’.¹ This initiative – as reflected by recital no. 5 – is due to the development, that

‘[A]s a result of the globalisation of business, increasing trade and the growth and spread of multinational groups, in recent years movements of managers, specialists and trainee employees of branches and subsidiaries of multinationals, temporarily relocated for short assignments to other units of the company, have gained momentum’.

Therefore, the EU lawmaker takes the position in the following recital that

‘such intra-corporate transfers of key personnel result in new skills and knowledge, innovation and enhanced economic opportunities for the host entities, thus advancing the knowledge-based economy in the Union while fostering investment flows across the Union. Intra-corporate transfers from third countries also have the potential to facilitate intra-corporate transfers from the Union to third-country companies and to put the Union in a stronger position in its relationship with international partners. Facilitation of intra-corporate transfers enables multinational groups to tap their human resources best.’

Based on this mindset the intra-corporate transfer directive shall facilitate the intra-company assignments of managers and executives within the EU and enable ‘multi-national groups to tap their human resources best’ as it is also said in the recitals. The EU Member States had to implement the directive until 29 November 2016.

1. Implementation in Germany

In implementation of the EU Intra-corporate transfer directive, the so-called ICT card (‘ICT-Karte’) has been introduced in Germany effective 1 August 2017 (hence for EU standards with a slight delay) by adding several provisions to the Residence Act (‘Aufenthaltsgesetz’), Section 19b-19d Residence Act.² In addition hereto the Federal

² These provisions have been added by a legislative package implementing not only the intra-corporate transfer directive, but also the seasonal workers directive (‘Directive 2014/36/EU of the
Ministry of the Interior has published guidelines on how to apply these laws and regulations (the ‘bit’ on the intra-company transfer directive being no less than close to 30 pages long).³

In a nutshell there are several options available:

- ICT card for stays of more than 90 days (Section 19b Residence Act)
- notification for short term stays of no more than 90 days (Section 19c Residence Act)
- Mobiler ICT card for stays of more than 90 days for applicants holding a ICT card issued by another EU Member State (Section 19d Residence Act)

Moreover, whereas with regard to most of the provisions there is no room for discretion how to implement the directive in some cases the German legislator has made use of the leeway provided by the directive with regard to its implementation.

Finally, the administration has developed and introduced a streamlined and modern (cloud-based) procedure meeting the needs of the companies concerned to have a flexible and fast system in place.

In detail:

2. ICT Card

The intra-corporate transfer permit or ICT card is a new residence title for third-country nationals who are active as executives, specialists or trainees in a company and are sent to a branch of the same group for stays of more than 90 days, cf. (Section 19b Residence Act).

2.1 Intra-company Transfer

The term intra-company transfer is defined by Section 19b par. 1 Residence Act – in alignment with the definition of the term by the directive – as follows:

‘An intra-company transfer is the temporary secondment of a foreigner
1. to a domestic branch of the company to which the foreigner belongs, if the company is located outside the European Union, or

2. to a domestic branch of another company in the group of undertakings, to which the company located outside the European Union employing the foreigner belongs.’

With regard to the term group of undertakings – like for many other terms in the context of the ICT-directive – one can rely on the definition as provided for by Art. 3 (l) ICT Directive as follows (since the term is not defined by the provisions implementing the ICT directive):

‘group of undertakings’ means two or more undertakings recognised as linked under national law in the following ways: an undertaking, in relation to another undertaking directly or indirectly, holds a majority of that undertaking’s subscribed capital; controls a majority of the votes attached to that undertaking’s issued share capital; is entitled to appoint more than half of the members of that undertaking’s administrative, management or supervisory body; or the undertakings are managed on a unified basis by the parent undertaking;

The decisive factor is therefore whether one company is owns the majority of the share capital of another company (more than 50%), the majority of the voting rights (more than 50%) or can appoint the majority of the members of the administrative, management or supervisory board (more than 50%). In addition, it is also sufficient if both companies are under the direction of the same parent company. To prove the corporate structure, it is possible, for example, to refer to excerpts from the commercial registrar (if existing) or submit articles of association; in addition a letter from the company secretary or corporate counsel describing the group of undertakings and its structure might be helpful since this would likely help the person in charge to better understand the facts of the case insofar.

2.2 Requirements for the Grant

The ICT card can be granted if the following conditions as set forth by Section 19b par. 1-3 Residence Act are met:

- The applicant will be employed as a management, specialist or trainee in the receiving branch office in Germany (Section 19b par. 2 no. 1 Residence Act).

With regard to the definition of the terms ‘manager’, ‘specialist’ and ‘trainee employee’ one can again rely on the directive that defines these terms as follows:

‘Manager’ means a person holding a senior position, who primarily directs the management of the host entity, receiving general supervision or guidance principally from the board of directors or shareholders of the business or equivalent; that position shall include: directing the host entity or a department or subdivision of the host entity; supervising and controlling work

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4 Application guidelines no. 1.2.3.4.
5 This is also mentioned in the reasoning and explanation for the draft Act as presented by the government to the Parliament, cf. BR-Drs 9/17, p. 49, http://dipbt.bundestag.de/dip21/brd/2017/0009-17.pdf.
of the other supervisory, professional or managerial employees; having the authority to recommend hiring, dismissing or other personnel action;

‘Specialist’ means a person working within the group of undertakings possessing specialised knowledge essential to the host entity’s areas of activity, techniques or management. In assessing such knowledge, account shall be taken not only of knowledge specific to the host entity, but also of whether the person has a high level of qualification including adequate professional experience referring to a type of work or activity requiring specific technical knowledge, including possible membership of an accredited profession;

‘Trainee employee’ means a person with a university degree who is transferred to a host entity for career development purposes or in order to obtain training in business techniques or methods, and is paid during the transfer;

Such definition is also the basis for the provision implementing the directive, cf. Section 19b par. 2 sentence 2 (managers) and 3 (specialists) and par. 3 sentence 1 (trainees) Residence Act.

‘A manager within the meaning of this Law is a key person employed primarily as the head of the receiving branch, who is primarily under the general supervision of, or receives general direction from, the management body or the shareholders or equivalent persons. This item includes the management of the host office or a department or sub-division of the host branch, the supervision and control of the work of the other supervisors and professionals, as well as the authority to recommend employment, dismissal or other staffing.’

‘A specialist within the meaning of this Act is one who has the necessary specialist knowledge of the activities, the procedures or the administration of the receiving branch, a high level of qualification and appropriate professional experience.’

‘A trainee within the meaning of this law is someone holding a university degree, is completing a trainee program that serves career development or training related to business techniques and methods, and is remunerated.’

• Manager

In case of a director of the company or manager running or steering the business to prove this requirement should not be problematic. The provision implementing the direction explicitly stipulates that the position of a manager includes the management of the host branch office or one of its departments or sub-divisions, the supervision and control of the work of the other supervisors and professionals, as well as the power of attorney to recommend the hiring or termination of an employee as well as any other, dismissal or other staff-related measures. Otherwise, the leadership function and responsibility must be diligently described in the cover letter to the application or its appendices (by making references to rights such as proxy-holder, power of attorney to hire, dismissal or to execute other personnel measures for instance or any other criteria reflecting the alleged leading position for a manager or describing and proving the professional background and experience for a specialist). In individual cases, the description of the intended position in the company and its interpretation by the authorities will determine whether the foreigner is to qualified a manager or
specialist. It is decisive that the employee has an executive position that includes both leadership as well as control and oversight.\textsuperscript{6} Generally, it can be said that the authorities do have a tendency not to be too strict with regard to these requirements and not to question in detail the alleged facts if the position as described matches with the job title, the job duties, the salary and the other circumstances described by the application in the cover letter or any of its appendices.

- **Specialist**

Specialist is an employee, who has indispensable special knowledge about the areas of activity, the procedures or the administration of the receiving branch, a high level of qualification and appropriate professional experience. When assessing qualifications, it is not just a question of whether or not the employee has knowledge that suits the needs of the receiving branch. The authorities shall also take into account whether the person has a high level of qualification features.\textsuperscript{7} For instance, such a high level of qualification can be proven by the holding a university degree or completed vocational training. However, in lack of such qualification, it is not excluded per se that the employee is to be regarded a specialist even though this will then obviously be more difficult to prove. The qualification level must rather cover certain work or activities, which require company-specific knowledge. To evaluate this qualification level professional experience also plays a role. After all, the assessment of the authorities shall be based on proven formal qualifications (university degree, completed vocational training, Training) by also taking into consideration professional experience to assess whether the employee is a specialist.

- **Trainee**

Trainee is an employee who holds an university degree, has completed a trainee program and is a salaried. The trainee program must aim to improve the professional development or training related to business techniques and methods that are genuine to the company. Hence, different from what one would think a trainee must have been with the company before being assigned; moreover, a trainer does not also not fall under the scope of coverage of the ICT directive (unless being categorized a specialist\textsuperscript{8}).

Finally, it should be noted that these definitions may (slightly) differ from the ones used in national law in other contexts hence it may well be necessary to point out the differences should the person in charge at the authorities not be aware of the distinction to be made in individual cases are apply them wrongly. In case the requirements of both the ICT category and the (national) executive and specialist category (Section

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\begin{itemize}
\item Application guidelines no. 1.0.4.1.2.
\item Application guidelines no. 1.0.4.2.3.
\item Cf. Klaus, BeckOK AuslR/Klaus AufenthG § 19b margin 29a. With regard to trainers the national trainee category can be used alternatively and does not only include trainees, but also employees doing the training.
\end{itemize}
\end{flushleft}
3 and 4 Employment Regulation) are met, the permit shall be granted under the ICT category.⁹

- The applicant has been previously employed by the company or the group of companies for a continuous period of at least six months (Section 19b par. 2 no. 2 Residence Act).

Different from the *Vander Elst* visa category, where the European Court of Justice has ruled that no such pre-employment can be made a requirement prior to the grant of the visa (cf. supra for details in the chapter ‘V. Alternatives’), the ICT-directive and the stipulation implementing it to German law require mandatorily that the applicant must have been previously employed by the company or the group of companies for a continuous period of at least six months. This is one of the points where the Member States have been given implementation leeway since Article 5 par. 1 b) ICT Directive requires that evidence of employment within the same undertaking or group of undertakings, from at least three up to twelve uninterrupted months immediately preceding the date of the intra-corporate transfer in the case of managers and specialists, and from at least three up to six uninterrupted months in the case of trainee employees shall be provided. By this requirement it shall be ensured that the skills of the intra-corporate transferee are specific to the host entity.¹⁰ In comparison to other Member States Germany has opted for an average period of time for managers and specialist that however applies to both managers and specialists as well as to trainees so for the latter group it has been opted for the maximum period of time.

- The intra-company transfer shall take more than 90 days (Section 19b par. 2 no. 3 Residence Act).

Another requirement is that the intended secondment shall last more than 90 days for the following reasons as summarized by the ICT Directive in one of the recitals as follows:

‘Short-term mobility for the purposes of this Directive should cover stays in Member States other than the one that issued the intra-corporate transferee permit, for a period of up to 90 days per Member State. Long-term mobility for the purposes of this Directive should cover stays in Member States other than the one that issued the intra-corporate transferee permit for more than 90 days per Member State. In order to prevent circumvention of the distinction between short-term and long-term mobility, short-term mobility in relation to a given Member State should be limited to a maximum of 90 days in any 180-day period and it should not be possible to submit a notification for short-term mobility and an application for long-term mobility at the same time.’¹¹

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⁹ The provision implementing the ICT category is supposed to be *lex specialis*, cf. Fehrenbacher, HTK-AusR/§ 19b AufenthG – margin 9 re par. 2. Cf. also Application guidelines no. 1.0.4.5 ff. for further details with regard to the distinction between the ICT manager and specialist category and the national executive and company specialist category.

¹⁰ Cf. recital 16 of the directive.

It should be noted that this refers to calendar days, not working days. If it is not yet clear whether the stay shall last for longer, it is questionable whether the requirement is still met. In my view it should be differentiated as follows: if it is quite likely that the stay will last for more than 90 days the requirement is probably not met whereas when it is not (yet) clear at all that the stay might last longer the requirement is met.

- The Federal Agency for Employment pursuant to Section 39 Residence Act consents to the grant of the ICT card or such consent is not required because of the corresponding activity being exempt from the requirement for authorization (Section 19b par. 2 no. 4 Residence Act).

Since there is no such exemption in place any residence permit under the ICT category can only be granted once the labour authorities have consented, cf. Section 10a par. 1 Employment Regulation (‘Beschäftigungsverordnung’). The labour authorities do check (i) whether the employment takes place in the receiving branch as a manager, specialist or trainee, (ii) whether the salary as to be paid to the intra-corporate transferee during the secondment matches the local job market, and (iii) whether the other conditions are comparable to other intra-corporate transferees of the company. Remarkably the latter is therefore checked in comparison not to local employees but to other seconded employees of the company. Finally, as foreseen by Section 10a par. 2 Employment Regulation consent can be given without having run a check if there are any German workers, foreigners who possess the same legal status as German workers with regard to the right to take up employment or other foreigners who are entitled to preferential access to the labour market under the law of the European Union are available for the type of employment concerned.

- The applicant has an employment contract valid for the duration of the envisaged intra-company transfer and, if necessary, a letter of assignment reflecting in particular the conditions of employment (e.g. job location; job title; salary) and the possibility to return after the assignment (Section 19b par. 2 no. 5 Residence Act).

Based on Art. 5 par. 1 c) ICT Directive (dealing with the criteria for admission) the applicant shall present a work contract valid for the duration of the transfer and, if necessary, an assignment letter from the employer containing the following: (i) details of the duration of the transfer and the location of the host entity or entities; (ii) evidence that the third-country national is taking a position as a manager, specialist or trainee employee in the host entity or entities in the Member State concerned; (iii) the remuneration as well as other terms and conditions of employment granted during the intra-corporate transfer; (iv) evidence that the third-country national will be able to transfer back to an entity belonging to that undertaking or group of undertakings

12 Cf. also Klaus, BeckOK AuslR/Klaus AufenthG § 19b margin 33-34.
13 This provision has been inserted effectively on 5 August 2017 by Ordinance on the Implementation of Residence Directives of the European Union on Labour Migration from 1 August 2017, BGBl. I, p. 3066, https://www.bgbl.de/xaver/bgbl/start.xav?start=%2F%2F%5B%40attr_id%5D%27bgbl117s3066.pdf%27%5D#_bgbl__%2F%2F%5B%40attr_id%5D%27bgbl117s3066.pdf%27%5D_1524836344395.
and established in a third country at the end of the intra-corporate transfer. Hence, the employment contract respectively the letter of assignment must in particular reflect the working conditions for the duration of the transfer and a right of the employee to return to a company or located outside the EU. By this provision as implemented to German law it shall be assured that the authorities are in a position to check the conditions of employment including the salary and the temporary nature of the secondment. The contract or assignment letter must be concluded with the foreign entity – not the company or branch in Germany – prior to the transfer and shall not be suspended for the duration of the transfer.

- The professional qualifications of the applicant are to be proven (Section 19b par. 2 no. 6 Residence Act).

Professional qualifications of the applicant are generally to be proven by way of presenting originals (if required) or copies of the documents reflecting the professional qualification, such as degrees, certificates or job references. The link to the planned activity may also be established by providing a job description or functional description. Whereas generally English documents are accepted the authorities may request German translations as certified by a certified translator (Section 23 par. 1 Administrative Procedures Act: ‘The official language is German.’) and in some cases even legalized or apostilled versions of the documents may be required.

### 2.3 Grounds for Refusal

As foreseen by Section 19b par. 5 Residence Act the ICT card shall not be issued if the foreigner:

- under agreements between the EU and its Member States and third countries, enjoys rights of free movement equivalent to those of EU citizens (Section 19b par. 5 no. 1 Residence Act);
- is duly employed by a company being established in any of these third countries (Section 19b par. 5 no. 2 Residence Act); or
- completes an internship as part of his or her studies. (Section 19b par. 5 no. 3 Residence Act).

By these provisions it shall be assured that third country nationals benefitting of freedom of movement (e.g. citizens of the European Economic Area Member States that are not EU members – Iceland, Liechtenstein, Norway – and Swiss citizens) are not be processed under the ICT category (no. 1 and 2) and that trainees engaging into a training with a company besides their studies are not covered by the ICT directive.

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14 Cf. Application guidelines no. 1.1.3.6.
15 Cf. Application guidelines no. 1.1.3.6.
16 Cf. Application guidelines no. 1.1.3.7.
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17 Insofar as the application can be filed under the national trainee category in compliance with Section 15 no. 5 Employment Regulation if the training is a mandatory or integral part of the studies.

18 Cf. Application guidelines no. 1.1.4.

19 Fehrenbacher, HTK-AuslR / § 19b AufenthG / re par par. 4.

20 Based on the reasoning and explanation for the draft Act as presented by the government to the Parliament, this is to be checked by i.a. applying the following criteria: Duration of existence of the host branch and its business as carried out so far, range of operations and comparison of the total number of employees with the number of applications for intra-company transfers, cf. BR-Drs 9/17 page 50, http://dipbt.bundestag.de/dip21/brd/2017/0009-17.pdf, cf. also Application guidelines no. 1.1.4.1.

21 Cf. also the very interesting thoughts of Klaus with regard to the impact if these times are subject to later changes so that the employee has been processed under ICT category in Germany but does not turn out to stay more in another Member State, BeckOK AuslR/Klaus AufenthG § 19b margin 49.1ff.

22 Cf. recital 16 of the directive.

23 Fehrenbacher, HTK-AuslR/§ 19b AufenthG / re par 1 and par. 4, such view being reflected also by recital 17 that reads as follows: ‘As intra-corporate transfers constitute temporary migration, the maximum duration of one transfer to the Union, including mobility between Member States, should not exceed three years for managers and specialists and one year for trainee employees after which they should leave for a third country unless they obtain a residence permit on another basis in accordance with Union or national law. The maximum duration of the transfer should encompass the →

Strictly speaking this provisions do contain rules with regard to the scope of coverage rather than grounds for refusal.\(^{18}\)

Moreover, as foreseen by Section 19b par. 6 Residence Act the ICT card shall not be issued if:

- the host entity was established mainly for the purpose of facilitating the entry of intra-company workers (Section 19b par. 6 no. 1 Residence Act);
- in the context of the transfer, the foreigner will be resident in another EU Member State within the framework of the transfer provided for in Directive 2014/66/EU for longer than in Germany or in another EU Member State (Section 19b par. 6 no. 2 Residence Act); or
- if the application is submitted before expiry of a six months period from the end of the last stay of the foreigner for the purpose of intra-company transfer to Germany, so-called cooling-off period (Section 19b par. 6 no. 3 Residence Act) that runs from leaving the country, not from the initially planned end of the transfer.\(^{19}\)

By these provisions it shall be assured that there will be no abuse (no. 1),\(^{20}\) that applications are to be filed in the EU Member State where the longest stay shall take place (no. 2)\(^{21}\) and that the skills of the intra-corporate transferee are specific to the host entity (no. 3).\(^{22}\)

2.4 Duration

The ICT card may be granted for up to one year to trainees and for up to three years to managers or specialists including periods of extension, cf. Section 19b par. 4 Residence Act. Since the assignment shall be of temporary nature this time limit should also apply in case of a specialist being promoted into a manager position rather than starting to run again.\(^{23}\) Hence, in need of longer stays a switch from the ICT assign-
ment category to one of the localized employment categories, such as the EU Blue Card category (Section 19 a Residence Act in conjunction with Section 2 par. 1 no. 2 or par. 3 Employment Regulation) or the academic person category (Section 2 par. 1 or 3 Employment Regulation) or the executive and company specialist category (Section 4 Employment Regulation) is necessary. Since the ICT card is a residence permit and therefore its holder stays legally in Germany such application can be filed from within Germany, cf. Section 6 Residence Act in conjunction with Section 39 par. 1 Residence Ordinance (‘Aufenthaltswiderrichtung’). 24

2.5 Application

The application must be filed abroad (outside the EU) in the country of residence of the third country national. 25 Hence, even those third nationals benefiting from the so-called EU visa waiver programme, 26 have to file the application at place of their habitual residence. The decisive factor is that the place of residence or place of residence of the foreigner is in the third country; a mere presence in the third country to submit an application is not sufficient. 27 However, to file for extension form within Germany is possible, cf. Section 39 no. 8 Residence Act.

3. Short-term Intra-company Mobility

In addition to the intra-company transfer category for long-term mobility, the implementation of the ICT directive has created privileges to ensure short-term mobility for intra-company transferees.

3.1 Material Requirements

There is no need for short-term intra-company transferees for a residence title at all for stays of up to 90 days within any 180 days period if the host entity has notified the Federal Office for Migration and Refugees (‘Bundesamt für Migration und Flüchtlinge’)

24 The ICT Directive does exclude such change to a national category during or after the end of the intra-company transfer if such transfer comes to an end, for instance because the employee is localized and henceforth employed under a local employment contract with the local entity or the requirements of any other national category are met, cf. Application guidelines no. 1.0.6.

25 Cf. Art. 2 par 1 Directive: ‘This Directive shall apply to third-country nationals who reside outside the territory of the Member States at the time of application and apply to be admitted or who have been admitted to the territory of a Member State under the terms of this Directive, in the framework of an intra-corporate transfer as managers, specialists or trainee employees.’

26 Such privilege is based on ‘Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement’, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R0539&from=EN.

of the intention to employ the individual in Germany and has proven respectively presented the following (cf. Section 19c Residence Act):

- Legal residence title of the individual concerned as granted under Directive 2014/66 EU in another EU Member State (Section 19c par. 1 sentence 1 no. 1 Residence Act)

The short-term intra-company transferee must hold an ICT permit as duly issued under the rules governing the ICT category in another EU Member State. Hence, an entry-permit embodying the right to engage into employment under the ICT category should strictly speaking not be sufficient this being questionable though.\(^\text{28}\)

- Host entity belongs to the same group of companies than the home entity domiciled in a third country (outside the EU) that employs the individual (Section 19c par. 1 sentence 1 no. 2 Residence Act)

Again, the term ‘group of companies’ is to be interpreted in accordance with the following definition as set forth by 3 (l) Directive:

“group of undertakings” means two or more undertakings recognised as linked under national law in the following ways: an undertaking, in relation to another undertaking directly or indirectly, holds a majority of that undertaking’s subscribed capital; controls a majority of the votes attached to that undertaking’s issued share capital; is entitled to appoint more than half of the members of that undertaking’s administrative, management or supervisory body; or the undertakings are managed on a unified basis by the parent undertaking’.

The employer must be domiciled outside the EU. Consequently, the assignment to a branch of a subsidiary in another Member State that does not belong to the same group of companies is not possible under the ICT directive since in these cases the company employing the individual is not domiciled outside the EU.\(^\text{29}\)

- Employment contract and assignment letter reflecting in particular the conditions of employment (e.g. job location; job title; salary) and the possibility to return after the assignment (Section 19c par. 1 sentence 1 no. 3 Residence Act)

Furthermore, the employment contract and, if necessary, the letter of assignment respectively the document by presentation of which the ICT card has been applied for in the other Member State must be presented.

\(^{28}\) Cf. Klaus BeckOK AuslR/Klaus AufenthG § 19c margin 11b and c, rightly pointing out that this should not make any difference as there is no justification for a different treatment. In fact, many German Embassies or Consulates do issue visas entitling their holders to engage into employment for up to 6 or 12 months given that the processing of the final residence permit – that is issued by a centralized agency – takes quite some time in Germany.

\(^{29}\) Cf. Klaus BeckOK AuslR/Klaus AufenthG § 19c margin 7a and 7 b with a.
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- A copy of the passport or a suitable replacement (Section 19c par. 1 sentence 1 no. 4 Residence Act)

Finally, a passport or substitute passport document must be presented.

3.2 Notification Requirement

As foreseen by Art. 21 par. 2 ICT Directive the receiving Member State may require the host entity in the sending Member State to notify the first Member State and the second Member State of the intention of the intra-corporate transferee to work in an entity established in the second Member State. In Germany, such notification is required by law, cf. section 19c par. 1, 2 and 3 Residence Act. The reasoning for the notification requirement – as reflected by the justification provided in the draft implementation act\(^{30}\) – is trifold: on the one hand, the notification requirement shall enable the authorities to take note and record the short-term transfers (for statistic and other purposes); on the other hand the authorities shall be enabled to check the conditions of employment in order to protect the employees from being exploited and finally the authorities shall be given the right to raise security concerns.

In Germany, the following rules do apply:

The receiving entity must make the notification at the time when the foreigner in the sending EU Member State applies for a residence permit under the ICT category. If the receiving establishment is not yet aware of the intention to transfer the employee to a branch in Germany at that time, it must make the notification at the time when it becomes aware of this intention, cf. Section 19c par. 1 sentence 2 and 3 Residence Act. If the residence permit is issued by a non-Schengen state (e.g. EU Member State that is not member to the Schengen agreements) and when entering via a non-Schengen state, the foreigner must keep a copy of the notification that is to be presented to the competent authorities upon request, cf. Section 19c par. 1 sentence 4 Residence Act.

The notification shall be filed online with the Federal Office for Migration and Refugees by using a bilingual (German-English) form as provided for by the Federal Office for Migration and Refugees\(^{31}\) that shall be uploaded together with the required documentation once having duly registered with the ICT National Contact Point (the latter being possible by way of an informal e-mail sent to the following email address: ict@bamf.bund.de), cf. the official instructions as published by the Federal Office for Migration and Refugees\(^{32}\) for details. The following shall be filed:\(^{33}\)

\(^{30}\) BR-Drs 9/17 page 51, http://dipbt.bundestag.de/dip21/brd/2017/0009-17.pdf. Apparently, despite the fact that an ICT card had been issued by another EU Member State, the receiving Member State shall still have the possibility to ‘double check’ this being in contradiction to the principle that deeds as duly issued by another EU Member State shall not be questioned.


\(^{33}\) Cf. Application guidelines no. 1.3.2.2.
- Address/contact details of the internally transferred employee in the other Member State and (as far as is known) in Germany;
- Proof of the residence permit as issued by the other Member State (copy);
- Proof of affiliation of the receiving branch to the company domiciled in a third country that employs the foreigner (for example, confirmation by the company/branch, excerpts from company registrar, articles of association, annual report);
- Employment contract and, if necessary, letter of assignment;
- Copy of passport or passport substitute.

After having uploaded all the necessary documents into a separate folder for each individual, instead of clicking a button ‘application complete’ or the like a separate message has to be sent over email to the abovementioned email address (ict@bamf.bund.de) stating that the mobility notification for the individual employee has been uploaded in full; the name of the folder also has to be indicated in the message. It should be noted that the notification will not be verified for its completeness and that the subsequent procedural stages will not be initiated until receiving this message. If the notification received is complete, the branch of the company will be informed with regard to the immigration authority that is responsible for it, as well as quoting the relevant reference number. Welcome to digitalization in Germany!

If the notification is made in time and if entry and residence have not been refused (cf. below), the foreigner may, within the period of validity of the residence permit of the other EU Member State having granted the ICT card enter Germany at any time if he has been in possession of such residence permit or – if it has been applied for simultaneously at the same time – once the notification has been made and stay there for the purpose of the short-term intra-company transfer, cf. Section 19c par. 4 Residence Act.

Whereas the company is in charge of filing the notification it is the employee being assigned under the ICT category who is obligated to inform the authorities immediately if the ICT card has been extended by another EU Member State. This provision is implementing Art. 21 par. 8 ICT Directive reading as follows:

‘Where the intra-corporate transferee permit is renewed by the first Member State within the maximum duration provided for in Article 12(1), the renewed intra-corporate transferee permit shall continue to authorise its holder to work in the second Member State, subject to the maximum duration provided for in paragraph 1 of this Article.’

### 3.3 Grounds for Refusal

The application may be rejected in accordance with Section 19c par. 4 Residence Act such provision implementing the grounds for refusal with regard to the short-term mobility intra-company transfers as referred to in Article 21 par. 2 ICT Directive as follows:

- Salary lower than those for local employees (Section 19c par. 4 sentence 1 no. 1 Residence Act)

Firstly, entry and residence are to be rejected by the authorities if the salary to be paid to the foreigner for the time of the intra-corporate transfer to Germany is less favor-
able than the remuneration of comparable German employees, cf. Section 19c par. 4 sentence 1 no. 1 Residence Act. This is to be checked by the foreigners office that may however request assistance from the labour authorities as foreseen by Section 72 par. 7 Residence Act.\textsuperscript{34}

- **General requirements not met (Section 19c par. 4 sentence 1 no. 2 Residence Act)**
  Secondly, entry and residence are to be rejected by the authorities if the requirements as set forth by Section 19c par 1 sentence 1 numbers 1 (ICT card), 2 (branch belonging to the group of companies) and 4 (presentation of passport or passport substitute) are not met.

- **Manipulation of documents filed (Section 19c par. 4 sentence 1 no. 3 Residence Act)**
  Thirdly, entry and residence are to be rejected by the authorities if the documents provided pursuant to Section 19c par. 1 have been fraudulently acquired or falsified or manipulated.

- **Surpassing of long-term mobility time limits (Section 19c par. 4 sentence 1 no. 4 Residence Act)**
  Fourthly, entry and residence are to be rejected by the authorities if the foreigner has been in the EU for more than three years (managers / specialist) respectively more than one year (trainees). This is logical since the ICT Directive shall facilitate intra-company transfers for no longer.

- **Interest in expulsion (Section 19c par. 4 sentence 1 no. 5 Residence Act)**
  Fifthly, entry and residence are to be rejected by the authorities if there is an interest in the expulsion of the foreigner. To examine this an involvement of the security authorities as provided for in Section 73 par. 2 and 3 Residence Act may be initiated.

  In the cases of Section 19c par. 4 sentence 1 numbers 1 to 4, a refusal must be made to the Federal Office for Migration and Refugees no later than 20 days after receipt of the complete notification under. In the case of number 5 (Interest in expulsion), a refusal is also possible at any later time during the stay of the foreigner. In addition to the foreigner, the refusal must also be communicated to the competent authority of the other Member State and the receiving branch in Germany. If rejected in due time, the foreigner has to stop employment immediately; the exemption from the requirement of a residence permit existing until then is not given any longer.

### 3.4 Certificate

If, within 20 days of receipt of the notification no decision to refuse entry and stay of the foreigner has been taken, the foreigner shall receive a certificate of eligibility for entry and / or residency by the Federal Office for Migration and Refugees for the

\textsuperscript{34} Cf. Application guidelines no. 1.3.2.7.
purpose of the intra-company transfer within the framework of short-term mobility. Such certificate does not have a constitutive, but a declaratory effect.\textsuperscript{35}

4. Mobile ICT Card

Finally, the implementation of the ICT directive has created privileges to ensure long-term mobility (of more than 90 days) for holders of an intra-company transferee permit as duly issued by another EU Member State. As reflected by recital no. 5 of the ICT Directive, the Directive

‘aims to facilitate mobility of intra-corporate transferees within the Union (‘intra-EU mobility’) and to reduce the administrative burden associated with work assignments in several Member States [and] [f]or this purpose, this Directive sets up a specific intra-EU mobility scheme whereby the holder of a valid intra-corporate transferee permit issued by a Member State is allowed to enter, to stay and to work in one or more Member States in accordance with the provisions governing short-term and long-term mobility under the Directive.’

It is up to the Member States to decide whether the presentation of the ICT permit as duly established by another EU Member States suffices, whether a notification is required or a separate permit has to be applied for, cf. Art. 22 par. 1 Directive.

Germany has opted for the latter option by way of establishing the Mobiler ICT card (‘\textit{Mobiler-ICT-Karte}’) as a new residence title for third-country nationals entitling the holder of an ICT permit as issued by another EU Member State to reside and work in Germany for long-term stays (of more than 90 days) under the terms of the ICT directive. This shall offer the advantage that the existence of the prerequisites also in the federal territory can be tested to assure that the desired stay of more than 90 days is compliant with the other regulations dealing with such stays for the purpose of employment.\textsuperscript{36}

The Mobile ICT card will be granted if the following conditions are met, cf. Section 19d Residence Act:

4.1 Material Requirements

- The applicant holds an ICT permit as duly issued in another EU Member State (Section 19d par. 1 Residence Act).

The first requirement is that the applicant holds an ICT permit as duly issued in another EU Member State. Different from the ICT card as regulated by Section 19b Residence Act the applicant is already in possession of an ICT permit of another Member State from where he shall be sent to Germany (and perhaps also other Member States) within the period of validity of the ICT permit.

• The applicant shall be employed as a manager, specialist or trainee (Section 19d par. 2 no. 1 Residence Act).

Secondly, the applicant shall be employed as a manager, specialist or trainee these terms being defined in accordance with the ICT Directive by the provisions implementing the directive, cf. Section 19b par. 2 sentence 2 (managers) and 3 (specialists) and par. 3 sentence 1 (trainees), cf. above for details.

• The intracompany transfer will take more than 90 days (Section 19d par. 2 no. 2 Residence Act).

Thirdly, the intra-company transfer must take more than 90 days as otherwise the rules for short-term intra-company mobility apply.

• The applicant shall present (a) a contract of employment valid for the duration of the transfer and, if necessary, a letter of assignment reflecting in particular the conditions of employment (e.g. job location; job title; salary) and the possibility to return after the assignment and (b) a proof that the applicant may return to a branch of the same undertaking or group of companies established outside the EU after the end of the transfer (Section 19d par. 2 no. 3 Residence Act).

Fourthly, the applicant shall present a work contract valid for the duration of the transfer and, if necessary, an assignment letter from the employer containing the following: (i) details of the duration of the transfer and the location of the host entity or entities; (ii) evidence that the third-country national is taking a position as a manager, specialist or trainee employee in the host entity or entities in the Member State concerned; (iii) the remuneration as well as other terms and conditions of employment granted during the intra-corporate transfer; (iv) evidence that the third-country national will be able to transfer back to an entity belonging to that undertaking or group of undertakings and established in a third country at the end of the intra-corporate transfer. By this provision as implemented to German law it shall be assured that the authorities are in a position to check the conditions of employment including the salary and the temporary nature of the secondment. Since the foreigner already is in possession of a residence permit, there are less strict requirements than for applications for an ICT card.

• The Federal Agency for Employment pursuant to Section 39 AufenthG consents to the grant of the Mobile ICT card or such consent is not required because of the corresponding activity being exempt from the requirement for authorization (Section 19d par. 2 no. 4 Residence Act).

Finally, since there is no such exemption in place any mobile ICT card can only be granted once the labour authorities have consented, cf. Section 10a par. 1 Employment Regulation (Beschäftigungsverordnung).37 The labour authorities do check (i) whether the employment takes place in the receiving branch as a manager, specialist or

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37 This provision has been inserted effectively on 5 August 2017 by Ordinance on the Implementation of Residence Directives of the European Union on Labour Migration from 1. August 2017, BGBl. I, p. 3066, https://www.bgbl.de/xaver/bgbl/start.xav?start=%2F%2F%2F%5B%40attr_id%3D%27bgbl117s3066.pdf%27%5D#_bgbl__%2F%2F%5B%40attr_id%3D%27bgbl117s3066.pdf%27%5D__1524836344395.
trainee, (ii) whether the salary as to be paid to the intra-corporate transferee during the secondment matches the local job market and (iii) whether the other conditions are comparable to other intra-corporate transferees of the company. Remarkably the latter is therefore checked in comparison not to local employees but to other seconded employees of the company. Finally, as foreseen by Section 10a par. 2 Employment Regulation consent can be given without having run a check if there are any German workers, foreigners who possess the same legal status as German workers with regard to the right to take up employment or other foreigners who are entitled to preferential access to the labour market under the law of the European Union are available for the type of employment concerned.

4.2 ‘Permission Fiction’

If the application for the Mobile ICT card is made at least 20 days before the start of the stay in Germany and if the residence title of the other EU Member State is still valid, the stay and employment of the foreigner of up to 90 days within any 180 days shall be allowed, cf. Section 19d par. 3 Residence Act. By this provision the following provisions as set forth by Art. 22 par. 2 lit. b) – c) ICT Directive are implemented:

‘Where an application for long-term mobility is submitted: (…) the second Member State shall take a decision on the application for long-term mobility and notify the decision to the applicant in writing as soon as possible but not later than 90 days from the date on which the application and the documents provided for in point (a) were submitted to the competent authorities of the second Member State; (c) the intra-corporate transferee shall not be required to leave the territories of the Member States in order to submit the application and shall not be subject to a visa requirement; (d) the intra-corporate transferee shall be allowed to work in the second Member State until a decision on the application for long-term mobility has been taken by the competent authorities, (…).’

There are differing opinions with regard to the question whether to have filed the application at least 20 days before starting to work shall also be sufficient in those cases where the applicant stays in Germany already without engaging into employment or without the need for a permit (for the activity being exempt from the need for a work permit, cf. Section 30 Employment Regulation).38

4.3 Grounds for Refusal

• Mobile ICT Card vs. short-term ICT transfer (Section 19d par. 4 Residence Act)

The application shall be rejected if it has been submitted in parallel with a notification under the short term ICT category, cf. Section 19d par. 4 Residence Act. This allows a separation between short-term and long-term mobility. The application shall also be

38 Whereas according to Klaus, this shall be possible since the directive requires only to have submitted the application at least 20 days before the beginning of the long-term mobility, cf. Klaus, Z-IR 2017, 257, 266; Fehrenbach takes the position that the clear wording of the provision does exclude such view, cf. HTK-AusIR/§ 19d AufenthG – margin 3 re par. 3.
rejected if it has been filed during a short-term intra-company transfer stay (according to § 19c Residence Act), but not at least 20 days before the end of this stay. The provision implements Article 22 par. 2 ICT Directive, which provides for a clear distinction between short-term and long-term mobility. For both types of mobility different regulations apply which have to be applied and observed separately. This enables a clear distinction between short-term and long-term intra-company mobility. The applicant is required to choose between both ways. However, if the need for a longer stay arises during the stay in the context of short-term mobility, this shall in principle also be possible. If the application for the Mobile ICT card is made during a short-term mobility stay, it must however be submitted at least 20 days before the end of said stay.

39  If the application for the Mobile ICT card is made during a short-term mobility stay, it must however be submitted at least 20 days before the end of said stay.

Furthermore the Mobile ICT card shall not be issued if the foreigner within the scope of the intra-company transfer shall stay longer in Germany than in other EU Member States, cf. Section 19d par. 5 Residence Act. In that case the German ICT card shall be granted. The provision implements Article 11 par. 3 sentence 2 ICT Directive. The application must be rejected if the foreigner wishes to stay longer in Germany than in other EU Member States. In these cases the application for an ICT card pursuant to Section 19b Residence Act must be applied for in Germany (whereas with regard to the stays in the other EU Member State(s), applications for short- or long-term intra-company mobility may be initiated in compliance with the laws of said Member State(s). In contrast, a mobile ICT card can be issued if the stay in Germany is to have the same duration as in another EU Member State and the individual may chose the procedure to file the application under. Decisive for the examination are primarily the details of the foreigner. If the alien initially assumes a shorter stay in Germany and therefore applies for the Mobile ICT card, but then wishes to extend his stay in Germany, this can in principle be achieved by extending the Mobile ICT card up to the maximum duration of the internal transfer (see also Article 22 (5) of the ICT Directive 2014/66/EU).

•  Longer stay in another EU Member State (Section 19d par. 5 Residence Act)

Finally, the application may be rejected if the maximum duration of the intra-company transfer (e.g. up to one years to trainee employees and for up to three years to managers or specialists including periods of extension) has been reached, cf. Section 19d par. 6 no 1 Residence Act. The provision implements Article 22 par. 3 of the ICT Directive, based on which a ground for refusal is given if the maximum duration of the internal transfer is exceeded or if the required cooling-off period of six months

39  Cf. Application guidelines no. 1.2.4.1.
40  Cf. Art. 11 par. 3 sentence 2 Directive: ‘Where the first stay is not the longest, the application shall be submitted to the authorities of the Member State where the longest overall stay is to take place during the transfer.’ In case of identical stays in several Member States the applicant may choose where to file.
has not been complied with. The application for the Mobile ICT card can therefore be refused if the maximum duration of the internal transfer, e.g. three years for executives or specialists (Section 19b par. 4 no. 1 Residence Act) respectively one year for trainees (Section 19b para. 4 No. 2 Residence Act) is to be exceeded, Section 19d par. 6 no. 1 Residence Act. Furthermore, the application can be rejected if the waiting period of six months between two transfers (Section 19b par. 6 no. 3 Residence Act), is exceeded, Section 19d par. 6 no. 2 Residence Act. Different from the aforementioned grounds of refusal the authorities may refuse the application and have therefore discretion.

4.4 Notification of Changes

The receiving branch office shall be obliged to notify the competent foreigners office of changes to the aforementioned conditions without delay, as a rule within one week, cf. Section 19d par. 7 Residence Act and Art. 22 par. 3 Directive.

4.5 Application

Whereas the application for an ICT permit must be filed abroad (outside the EU) in the country of residence of the third country national, the application for a Mobile ICT card can be filed from within Germany by those privileged third-country nationals that can enter the Schengen territory for stays of up to 90 days within any 180 days without a visa. However, the application must be filed before expiry of these 90 days. Moreover, to file for extension form within Germany is also possible, cf. Section 39 par. 1 no. 9 Residence Act. The application can be filed with the foreigners office or the Federal Office for Migration and Refugees (Bundesamt für Migration und Flüchtlinge) that would however only forward the application to the competent foreigners office and will inform the applicant, cf. Section 19g par. 2 Residence Act. In case of requiring further information, the foreigners office may reach out to the Federal Office for Migration and Refugees (Section 91g par. 4 Residence Act); moreover, if the mobile ICT card is issued, the foreigners office must notify the Federal Office for Migration and Refugees without delay, cf. Section 91g par. 5 sentence 3 Residence Act. Finally, the Federal Office for Migration and Refugees informs the competent foreigners office of the other EU Member State that has issued the ICT card about the issuing of the Mobile ICT card, cf. Section 91g par. 5 sentence 1 no. 2 Residence Act).

5. Alternatives

It should be noted that in case the intra-corporate transfer category is not an option because its requirements cannot be met for either the company being not part of a group of companies so that there is no intra-company transfer or for the individual not meeting the requirements as set forth by the directive and the law transposing it there may well be other alternatives that can be used and should be considered to make the transfer possible.
• **National intra-company transfer category**

Firstly, the national intra-company transfer category may be an option that besides the EU intra-company transfer category as implemented by the intra-company transfer directive remains in place.

If the conditions for the national intra-company transfer category are met the foreigners office does not require consent from the labour authorities and can grant the residence title for the purpose of employment without the need for a job market test on the basis of Section 10 Employment Regulation. This provision states as follows:

§ 10 International intra-company transfer, projects abroad
For an employment for a period of up to three years the consent for the grant of a residence permit can be given without a priority check as laid down in § 39 para 2 sentence 1 no. 1 and 2 AufenthG [Residence Act]

1. if, within an intra-company transfer inside a worldwide-acting company or group company, skilled labour is concerned who provides university degree or higher education or similar qualifications

2. if an employee of a worldwide-acting company or group company who is working abroad must necessarily be transferred to the inland establishment of the company or group company in order to ensure the preparation of a project abroad, if the employee is responsible for the realization of the project abroad and provides a qualification which is comparable to the qualification of skilled German workers and he/she, moreover, provides a specific and, above all, a company-related knowledge.

In the cases specified in Sentence 1 no. 2, the consent for the grant of a residence permit can also be given for the skilled labour of the initiator of the project abroad if such skilled staff is temporarily entrusted with the preparation works by the contractor, if the project assignment involves a respective obligation for the contractor and such employment is required with view to a future engagement within the finalised project. Sentence 2 is also applicable if the contractor has no branch or establishments abroad.7

According to the implementing provisions of the foreigners office a worldwide-acting company in this connection is a company whose foreign business (holding company or subsidiary) holds a capital share of at least 50%. Different from the ICT category an intra-company transfer as defined by national law is at issue only when foreign employees are transferred to Germany and when there is a transfer of German employees abroad to (roughly) the same extent.41

With a view to the contractual implementation an employment contract of a foreign employee is normally either supplemented by a secondment agreement or suspended for the period of transfer. In any case, the return of the employee must have been previously determined, although no specific date for the return needs to be given.

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41 Cf. also Application guidelines no. 1.0.5.4 ff. for further details with regard to the distinction between the ICT category and the national intra-company category.
The idea of an intra-company transfer is that no examination of the labour market must be carried out in the event of a transfer of personnel from abroad to Germany and from Germany abroad that takes place between the companies of the employer or the group it belongs to. The exchange of personnel needs to be roughly the same in terms of the number of employees involved so there is no impact on the German labour market – ‘10 in/10 out’.

In practice, it is not always easy to prove that the conditions for an intra-company transfer have been met when the application is filed for the first time and therefore such applications should be prepared carefully. In particular, the annual report of the company and the report on the personnel exchange between the companies involved must be filed on an annual basis.

The intra-company transfer application process is likely to take 6 – 10 weeks after all documentation has been compiled and the application has completely been filed. The permit will be granted for a period of up to 3 years.

- **Executive and specialist category**

Furthermore, under certain conditions, specialists can also be given the consent for the grant of a residence permit for the purpose of employment. According to § 4 Employment Regulation, this applies for:

- Executives and other people, who – by engaging in their occupation – above all have special and specific corporate knowledge (specialists) of a company in the country for qualified employment in this company (No. 1) or
- Executives for an employment at a joint venture based on international agreements (No. 2)

In particular, this category may be an option in case the company sponsoring the assignment does not belong to a group of companies and therefore cannot use the intra-company transfer category (neither the ICT one nor the national one) or the individual in question is neither a manager nor an executive. It should however be noted that this category is only available for specialist as defined by Section 4 no. 1 Employment Regulation: ‘Executives and other people, who – by engaging in their occupation – above all have special and specific corporate knowledge of a company’. So far the authorities have referred to the definition of these terms as outlined by the Works Constitution Act (‘Betriebsverfassungsgesetz’) and if fully applied such definition would reduce the scope of availability of the specialist category to a happy few of the company’s staff depending on the size and the structure of the company in question.

Now with a legal definition established by the ICT directive on an EU level it remains to be seen whether the authorities will refer to these definitions instead or take them at least into consideration.

Whereas in theory this seems to be quite difficult to meet the requirements of the executive and company specialist category it is in practice actually not unlikely at all that the authorities do accept such application if the skills and the special knowledge of the individual are as well described as the need of the business to have this special executive or employee being assigned to the job in question. Hence, to put a proper application together documenting the skills and special knowledge of the applicant is absolutely crucial in these cases.
• Service provision category (‘Vander Elst’)

Finally, there might be an alternative for third country nationals to be assigned to Germany even without having to apply for a residence permit for the purpose of employment first if certain conditions as provided for in § 21 Employment Regulation (‘Beschäftigungsverordnung’) are met. This is due to the so-called ‘Vander Elst – Visa’ which is based on the case law of the European Court of Justice rendered with regard to Art. 49 EU Treaty (now: Art. 56 Treaty on the Functioning of the European Union, TFEU) – freedom to provide services.

‘§ 21 Service delivery
For the grant of a residence permit to persons who are orderly employed in the residence country of a company that is based in a Member State of the European union or in a contracting state of the treaty on the European Economic Area and shall be relocated to the Federal Republic in order to perform services no approval is required.’

The regulation implements the case-law of the European Court of Justice which stipulates that a temporary relocation of employees who are third-country nationals being duly employed in the home country (employment contract; work permit) for the purpose of cross-border services is generally protected by the freedom of services pursuant to Article 49 et. seq. EC Treaty (starting with the legal matter C-43/93 – Vander Elst, of the European Court of Justice). The amendment – which became effective on July 11, 2007 – was required as a consequence of the judgement given by the European Court of Justice (Commission v. Germany, legal matter C-244/04, Jan. 19, 2006). For a visa application the agencies abroad check whether the preconditions stipulated in the case-law guidelines of the European Court of Justice are fulfilled in the individual case. Unlike the previous regulation there is no need to have been employed previously for a certain period in the country where the employee worked before the assignment (such regulation being regarded as non-compliant with the EU laws and regulations by the European Court of Justice back in January 2006). However, the visa scheme is only applicable if there is an employment between the third country national and the service provider having its seat in another EU country, if the service provider in that EU country (not the parent abroad) has a contract with the client in Germany and if the assignment will be for a temporary period of time.

Different from both the EU intra-company transfer category and the national intra-company transfer category the company sponsoring the application must not belong to a group of companies. Furthermore there must not be an exchange of personnel so it can be an assignment to Germany only without having employees sent outbound to the same extent. Moreover, the Vander Elst visa category can be used for any employee, not just managers, executives and specialists. Finally, neither a formal registration nor a formal application is required since a simple notification of the Embassy or Consulate in charge is sufficient. After all the Vander Elst visa category seems to be and remains actually quite attractive as an option here.
6. Outlook

Since the intra-company transfer directive has just been implemented in Germany it remains to be seen to what extent companies concerned will make use of the new categories as offered under the directive and the legislation implementing the directive. It will be interesting to see whether the new set of categories as put forward by the EU will be competitive enough to be more attractive for companies than the national intra-company transfer categories that of course remain in place besides or if there will be a certain attitude of some Member States to compete with the new categories by making the national intra-company categories more attractive (what partly happened with the EU Blue Card). For those companies not having the intra-corporate structure as requested by the intra-company transfer categories the Vander Elst visa category that is based under the freedom of a company duly established in one Member State to deliver services in any other Member State with third country nationals without the requirement for a residence permit for the purpose of employment remains an interesting alternative that to some extent is far more flexible.
Light and Dark Aspects of the Legal Framework of Intra-Corporate Transfers in Spain

Ferran Camas Roda*


Introduction

In 2015, Spain was the first EU Member State to transpose 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.1

Following the collapse of the housing bubble and the ensuing economic recession, which started in 2008, the Spanish Government adopted laws guided strictly by economic interests in order to attract affluent foreigners as well as highly-qualified professionals. To this end, Act 14/2013, of 27 September 2013, of support to entrepreneurs and their internationalisation (Ley 14/2013, de 27 de septiembre, de apoyo a los emprendedores y su internacionalización) was initially adopted. Containing specific regulations regarding international mobility, this Law was aimed at facilitating the entry into and residence in Spain of third-country nationals. It was directed specifically at investors, entrepreneurs, highly-qualified professionals, researchers and workers subject to intra-corporate transfers within the same undertaking or group of undertakings.

Against this backdrop, the activity of the Spanish negotiators leading to the adoption of Directive 2014/66/EU was especially intense, since many of the regulations laid down in Act 14/2013 on international mobility were finally adopted in the European Directive.2 However, the adoption of Directive 2014/66/EU was also a good excuse for Spain to extend even more the scope for accepting foreign professionals

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1 According to documentation submitted by Fabian Lutz at the above mentioned Seminar, notification of the complete transposition of the Directive by Spain was given on 16 September 2015.

(and other target groups) in the framework of an intra-corporate transfer. This was done by transposing the Directive with an amendment to Act 14/2013, with special focus on its chapter on international mobility. This amendment was Act 25/2015, of 28 July 2015, on second chance mechanism, reduction of the financial burden and other social order measures (Ley 25/2015, de 28 de julio, de mecanismo de segunda oportunidad, reducción de la carga financiera y otras medidas de orden social).

The first important conclusion that can be drawn from Act 14/2013 (later amended by Act 25/2015), is that, with one specific law, the Spanish Government strengthened its commitment to regulate entry conditions and procedures for the granting of work and residence permits to economic migrants, highly-qualified professionals and intra-corporate transferees. This law, therefore, is an exception to the general legislation applicable to foreigners, laid down in Organic Law 4/2000 of 11 January 2000, on the Rights and Freedoms of Foreigners in Spain, and their Social Integration (Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social).

Before Act 14/2013 was adopted, intra-corporate transfers were regulated under Organic Law 4/2000 and its implementing regulations set out in Royal Decree 557/2011 of 20 April 2011 (Real Decreto 557/2011, de 20 de abril, por el que se aprueba el Reglamento de la Ley Orgánica 4/2000, sobre derechos y libertades de los extranjeros en España y su integración social). Specifically, Royal Decree 557/2011 regulated – and continues to regulate since it has not been officially modified or invalidated – residence and work permits granted in the framework of the transnational provision of services (Royal Decree 557/2011, Articles 110 to 116). Its starting point was the same as for Act 14/2013; that is, it refers to cases in which foreign workers are posted to work in Spain depending, through a specific labour relationship, on a company established in a non-EU country or a country that does not belong to the European Economic Area. Nonetheless, Royal Decree 557/2011 is a restrictive law in the sense that it does not allow for transfers for training purposes. Workers are required to have worked a considerable time for their employer before coming to Spain (at least a year, and nine months in the case of service provision to the company). More importantly, foreign workers are also obliged to pass through the filter of the ‘national employment situation’. This means they can only be employed in Spain if there are no Spanish national workers to cover the vacancy they are applying for.

In order to create a framework for some of these restrictions, Act 14/2013 serves to separate the issue of intra-corporate transfers from Royal Decree 557/2011, and has several objectives. Firstly, more streamlined, rapid procedures have been adopted to facilitate these transfers and other cases of economic migration (for example, highly-qualified professionals) in relation to a limited and select group of foreign nationals. Secondly, Act 14/2013 is aimed at preventing issues such as the previously mentioned national employment situation from hindering work permit application procedures.

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This separation of laws is of interest because Act 14/2013 is aimed at facilitating access to work in Spain by relaxing entry requirements and streamlining rules for granting permits, as is the case for ‘highly-qualified professionals’ or also ‘intra-corporate transferees’, and includes not only employees, but also self-employed persons wishing to provide their services in Spain. On the other hand, stricter conditions of entry or more restrictive entry procedures have been upheld in the general law on immigration, Organic Law 4/2000. Under this law, authorisation to work can only be granted to foreign nationals if there are no national or legally resident candidates for the job they seek (otherwise known as the national employment situation).

I would also like to draw attention to another issue. Several factors, but mainly the economic recession and a labour market model based on precarious employment, have led a small, but visible, number of Spanish citizens (including foreigners with Spanish citizenship), many of whom highly qualified, to emigrate to other countries. However, this has been matched by Spain promoting more favourable entry conditions (compliance with the national employment situation is not required) for highly qualified professionals from non-EU countries, which, in turn, have weaker labour markets than Spain. In my opinion, this detected imbalance should be redressed so that, on the one hand, Spanish labour market conditions are prevented from causing a brain drain and, on the other, a balance is sought between favourable entry requirements for highly-qualified professionals and rigid legal requirements for unskilled migrant workers.

Nonetheless, the bid to attract foreigners to Spain, on the grounds of economic interest, addressed in Act 14/2013, has been more successful than before in promoting international mobility. Data (up to 2016) show that 24,505 visas and permits were granted, of which 11,774 corresponded to primary holders and 12,371 to family members. Most permits were granted to directors or highly-qualified personnel (39% of the total), and, in second place, to intra-corporate transferees within the same undertaking or group of undertakings (29%). Of these, the service sector was the sector that was granted most work permits (61.5% of companies belonged to this sector), while beneficiaries were mainly from the USA, China and India.4

1. Intra-corporate Transfers – Legal Framework

In the first section of Article 73.1 of Act 14/2013, in its amendment, Act 25/2015, lays down that the residence permit for intra-corporate transfers provides that: ‘those foreign nationals [i.e. non-EU third-country nationals] who are posted to Spain within the framework of an employment or professional relationship or for professional training purposes with a company or group of companies established in Spain or in another country must hold the relevant visa in accordance with the duration of

their posting and a residence permit for intra-corporate transfers, which will be valid throughout the national territory.

As we can see, the personal scope of this Law is especially extensive since it not only allows intra-corporate transfers in the framework of a labour relationship, but also for training purposes. It even permits transfers for professional reasons, so self-employed persons or independent professionals may benefit from this authorisation modality. Not only that, but in order to facilitate international mobility, the labour relationship in all the mentioned cases may be with a company, or group of companies, already established in Spain, or ‘in another country’. In other words, the company does not even have to be in Spain.

Under this law, foreign workers are obliged to hold a valid visa for the duration of their posting as well as a residence permit. Thus, regardless of the validity period of the visa (whether it is for more or less than 3 months) the foreign worker is required to obtain an intra-corporate transfer residence permit. This authorisation is valid in ‘all the Spanish territory’, so it is not limited to one Spanish region or province. Nor is it restricted to one specific activity sector (as occurs in the general legal framework for foreigners seeking employment in Spain).

To obtain the corresponding residence permit, intra-corporate transferees must also meet the general requirements laid down in Article 62 of Act 14/2013. Thus, ICT residence permits are only granted to applicants who comply with both the general requirements (Article 62) and the specific requirements laid down in Article 73.

Article 62 of Act 14/2013 sets out the requirements to be met for stays not exceeding three months, as well as for long-stay visas. In addition, all applicants for visas and residence permits under Act 14/2013, including intra-corporate transferees, must meet the following requirements: firstly, not be in Spain in an irregular situation; secondly, be over 18 years of age, and have no criminal record in Spain or in the countries where they have resided for the past five years, for criminal offences defined in the relevant Spanish legislation. It should be made clear that a copy of the foreigner’s criminal record only has to be presented once, at the time of application. Thus, if applicants, for whatever reason, have already presented it (for example, they have already been legally residing in Spain), they are not required to present it again.

The third requirement is not to be subject to an alert issued for the purposes of refusing entry in the territorial space of countries with which Spain has signed an agreement in this regard; fourthly, have a public or private health insurance with an insurance company authorised to operate in Spain, and fifthly, have sufficient financial resources for themselves and for the members of their families during their residence in Spain. Act 14/2013 does not establish what is meant by ‘sufficient financial resources’. General immigration law can be used to this end. It lays down several parameters for establishing what sufficient financial resources actually means, depending on whether the foreigner is applying for an initial work permit or a family permit for family reunification in Spain. Generally, this is based on different percentages published in the Public Indicator of Multiple Effect Income (IPREM), passed in the annual budget laws. In 2018, it was € 537.84 per month. Thus, in the case of work authorisation for employees, the company is required to provide evidence that it has this amount (100% of the IPREM) to comply with the work contract. In the case of the family reunion permit, foreign workers must provide proof that their income
is 150% of the IPREM. These figures do not correspond to the type of foreign worker (or company) covered by Act 14/2013. However, faced with a failure to properly define ‘sufficient financial resources’, the foreigner will probably be required to accredit 150% of the IPREM, since it are the workers themselves (and not the company) that must provide evidence. Finally, under Article 62 of Act 14/2013, the foreigner is obliged to have paid the visa or authorisation processing fee.

Once these general requirements have been met by all applicants, Act 14/2013 lays down specific requirements for investors, entrepreneurs, highly-qualified professionals, researchers and intra-corporate transferees. Firstly, the existence of an actual business activity and, where applicable, that of the business group. Therefore, proof of residence in the sending country is not required, but evidence that the employer is not a ghost company and the business activity is in the formal sector must be provided. Secondly, foreigners are required to have a higher education qualification or equivalent or, where applicable, a minimum of 3 years’ professional experience. A certified translation of any qualifications must be provided together with a certification of professional experience, which can be obtained from the employer or the labour authorities in the sending country. Fourthly, the existence of a previous and continuous employment or professional relationship of 3 months with one or more of the companies of the group is required. This can be accredited by any means, such as remuneration slips. The final requirement is company documentation accrediting the posting. In this case, it is important for the company to present documents related to the worker’s labour and social security obligations in Spain. In this way, it can be confirmed whether the sending country and company for which the intra-corporate transferee is working are responsible for social security contributions, as well as ensuring that the company assumes its obligations in this regard.

1.1 Intra-corporate Transfer Residence Permits – Modalities

Once the previous requirements have been met, Article 73 of Act 14/2013 stipulates two modalities of intra-corporate transfer residence permits: on the one hand, the EU ICT Intra-corporate transfer work permit, and on the other, the National residence permit for intra-corporate transfers (National ICT).

Before taking a closer look, it is important to remember briefly that Directive 2014/66/EU lays down the conditions of entry and stays of more than 90 days in the territory of Member States, and the rights of certain third-country nationals and their family members in the framework of an intra-corporate transfer. It also establishes a specific mobility regime within the EU that enables the permit holder from one Member State to enter, reside and work in another Member State.

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5 This is applicable to foreign entrepreneurs wishing to work in Spain according to S. Serrano Escribano, ‘El empresario extranjero no comunitario dentro de las medidas de internacionalización del emprendedor’, Revista de Derecho Migratorio y Extranjería 45/2017, p. 32.
6 These fees are regulated by Order ESS/1571/2014, of 29 August, which establishes the amount of fees for processing administrative authorisations for international mobility.
a) EU ICT residence permit for intra-corporate transfers

Article 73.1, section a), of Act 14/2013 regulates the so-called EU ICT residence permit for intra-corporate transfers, which is derived from Directive 2014/66/EU. According to this provision, “This permit is issued in the case of temporary posting to work as manager, specialist or for training, from a company established outside the European Union to an undertaking belonging to the same company or group of companies established in Spain.”

Therefore, with this permit, beneficiaries are granted the right to live and work in Spain provided that the posting is temporary and the worker is from a company ‘established outside the European Union’. The posting must be to an undertaking belonging to the same company or group of companies established in Spain.

Under this law, the minimum duration for the residence permit is not specified. In fact, it could be understood from Article 73.1 section a) regulating the EU ICT residence permit that the employer that transfers a non-EU employee to Spain only has to apply for a visa (whatever the duration) and a residence permit for the same period of time. It is also worth noting that residence permits for temporary stays under general immigration laws (including permits for transnational service provision) have a validity period of more than 90 days. However, intra-corporate transfer permits have been separated from the main block of permits contemplated under Act 14/2013. General immigration laws are not, therefore applicable and EU ICT permits may be granted for stays in Spain of less than 90 days.

Nonetheless, it should not be forgotten that Directive 2014/66/EU provides for stays of more than 90 days. Although Member States are actually permitted to establish a more favourable framework of provisions than those laid down in the Directive, the minimum length of stay is not one of them. The benefits and mechanisms granted by the Directive (for example, intra-EU mobility) can only be applied if stays are for more than 90 days. This is an issue that should have been defined under Act 14/2013, since no reference has been made to it.

EU ICT permits should be granted for stays of more than 90 days to adjust accordingly to the Directive. Permit beneficiaries are specified under Act 14/2013. Article 73.3 a) lays down that EU ICT permits shall only be granted to certain kinds of workers: firstly, to Managers, understood as people who have among their duties the management of a company or of a department or sub-division thereof. The maximum duration for this permit is 3 years.

Secondly, the EU ICT permit can also be granted to a Specialist, a person who has specialised knowledge relating to the activities, techniques or management of the company. Like the permit for Managers, the maximum validity period for this permit is 3 years.

Finally, the EU ICT permit can also be granted to a Trainee worker; a University graduate who is posted in order to obtain training in the techniques or methods of the undertaking and who receives remuneration for it. This authorisation is only valid for one year.

Not only can relocated foreigners settle in Spain temporarily, they also have the right to freedom of movement within the EU. Article 73.1, section a) of Act 14/2013 specifies that holders of EU ICT permits issued by Spain are free to enter, reside and
work in one or several Member States subject to prior notification and application for
authorisation to those States in accordance with Directive 2014/66.

Conversely, under Act 14/2013, companies established in other EU Member
States are also allowed to post EU ICT permit holders to Spain for the duration of
the authorisation after first notifying the Unit for Large Companies and Strategic
Economic Sectors (UGE-CE), an entity attached to the Spanish Ministry of Em-
ployment and Social Security. Thus, holders of EU ICT permits issued by another
State may only be posted in Spain after first notifying the competent Spanish authori-
ties. However, Act 14/2013 also stipulates that the Directorate-General for Migra-
tion, another body within the Spanish Ministry of Employment, has 20 days to reject
the posting, specifying the grounds for refusal in the following cases: a) when the
conditions stipulated in Article 73 of Act 14/2013 are not fulfilled; b) when the doc-
uments submitted have been acquired on a fraudulent basis, or have been falsified or
manipulated; and c) when the maximum duration of the transfer has expired.

This law does not stipulate whether notice of arrival in Spain of an intra-
corporate transferee whose EU ICT permit was issued by another Member State is
for less than 90 days, as laid down in Directive 2014/66/EU (short-term), or for
longer (long-term mobility). Nor does it stipulate whether additional requirements
(for example, the need to apply for another permit in Spain) are called for by the
State in such cases, in accordance with possible scenarios provided for by Directive
2014/66/EU. A set of requirements was actually introduced in European legislation
for these cases given the reluctance of some Member States to recognise permits
issued in other States where conditions for obtaining the authorisation to live and
work were more permissive. Some Member States also showed concern for losing
control over entries to their territory if this modality of freedom of movement was
implemented without restrictions. Nonetheless, under Spanish law, regulations on
foreign workers entering the country in the framework of an intra-corporate transfer
are flexible.

b) National residence permit for intra-corporate transfers (National ICT)
According to Article 3 of Directive 2014/66/EU, Member States have the right to
issue residence permits that are different from intra-corporate transfer permits in the
case of posting of third-country nationals that fail to enter the Directive’s scope of
application. Thus, outside the regulations laid down in Directive 2014/66/EU, Mem-
ber States are permitted to establish parallel national legislation for the categories of
staff covered by this EU law, although they might lack the benefits afforded by EU
ICT permits.

This offer has been used by Spain to regulate the National residence permit for
intra-corporate transfers (National ICT) in Article 73.1 section b) of Act 14/2013.
Under this law, this permit ‘shall be applicable in the cases not included in section a)

7 Corinne Balleix, Strengthening Co-operation with Countries of Origin, OECD Social. Employment and
checksum=382A01907A5E593CC77105D5A6154CA9.
[that is, in those cases in which the conditions for obtaining EU ICT permits are not met] or once the maximum duration of the transfer stipulated in the previous section has expired’.

Thus, the National ICT will be implemented in cases other than those provided for in the EU ICT permit. These are:

1. As you will recall, the EU ICT permit covers applications ‘from a company established outside the European Union’. Consequently, it follows that the National ICT may be granted to EU-based companies wishing to transfer their non-EU workers. Yet, this is incompatible with Act 45/1999, of 29 November 1999, derived from Directive 96/71/EC, concerning the posting of workers in the framework of the transnational provision of services. Regulated in this Directive is the posting of a worker to a work centre of the undertaking itself or that of another undertaking of the group of which it forms a part. Basically, Act 14/2013 is aimed at regulating intra-corporate transfers made by multinational companies or groups of companies with an international scope, rather than strictly EU-based companies. The latter are provided for under Act 45/1999.

Concerning the National ICT, Act 14/2013 allows this permit to be granted when the category of the posted worker falls outside the scope of the EU ICT permit; that is, when the worker is not a manager, specialist or trainee. Accordingly, by virtue of bilateral agreements between Spain and other countries, admission is granted to independent professionals or service providers posted in the framework of an agreement between two undertakings that are not part of the same group, but have business relations.

2. In case the maximum validity period (1 or 3 years depending on the category) has elapsed.

There continues to be no mention of a minimum validity period when applying for the National ICT. As this permit comes under Spanish Law, outside the scope of the Directive, it can be granted for stays of less than 90 days.

To sum up, the National ICT provides for a wide scope of applications with regard to the posting of third-country nationals in the framework of intra-corporate transfers. Similarly, the terms that may be established in bilateral agreements between Spain and other countries are broad.

c) Intra-corporate group transfers- Intra-corporate transfers of groups of professionals (Article 74 of Act 14/2013)

Companies that meet the requirements for the EU ICT or National ICT permit, “may apply for the joint processing of permits, based on the planned management of a provisional quota of permits submitted by the company or groups of companies”. This kind of collective permit for groups of professionals is regulated under Article 74 of Act 14/2013, and the application process is based on the planned management
of a provisional quota of permits submitted by a company or group of companies, prior registration with the UGE-CE.  

1. To begin, it should be noted that not all companies are entitled to apply for this permit. Only those meeting certain requirements, (particularly those established in Article 71.1a) of Act 14/2013 regulating the issuance of permits for highly-qualified foreign professionals) can do so.

According to this Article, companies may apply for the joint processing of permits if they meet some of the following requirements: an average workforce during the three months immediately prior to filing the application greater than 250 workers in Spain, registered in the relevant Social Security system; or an annual net business turnover in Spain, of over 50 million Euros or volume of own funds or equity or net worth in Spain exceeding 43 million Euros. Similarly, companies may use this procedure if they have carried out an annual average gross investment, from abroad, of not less than 1 million Euros, in the three years immediately prior to the application filing date, or companies with an investment stock value or position according to the latest data from the Foreign Investments Registry of the Ministry of Economy and Competitiveness of over 3 million Euros. Finally, small and medium-sized businesses established in Spain, which belong to a sector considered strategic, which is certified by a report from the Directorate-General for International Trade and Investments, are also authorized to apply for the joint processing of permits.

2. As mentioned before, companies applying for this type of ICT permit must first register with the UGE-CE. This registration is valid for 3 years.

Given that joint processing of permits is linked to the EU ICT or National ICT, registered companies are exempt from accrediting the following: the existence of an actual business activity and, where applicable, that of the business group; that the foreign worker has a higher education qualification or equivalent or, where applicable, a minimum professional experience of 3 years, and finally, the existence of a previous and continuous employment or professional relationship of 3 months with one or more of the companies of the group.

Thus, at the time of application, companies applying for the joint processing of intra-corporate transfer permits are not required to provide documentation in relation to the aspects mentioned above. However, despite being exempt from accrediting certain general requirements, they are required to meet the specific requirements for intra-corporate transferees (actual business activity, higher education qualification or equivalent, or a minimum professional experience of 3 years). These requirements must be met even though the corresponding documentation is not presented. In fact, companies have to be in possession of the supporting documentation in case the Administration ex officio check compliance, although they do not have to accredit these requirements at the time of application.

Finally, it should be mentioned that, although Article 74 of Act 14/2013 encourages companies to plan a provisional quota of permits for intra-corporate transfers of groups of professionals, the maximum number or quota is not limited. In other

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words, under Spanish law, no limits have been set on the number of permits a company can apply for using the joint processing system.

### 1.2 Common Elements in Intra-corporate Transfer Permits

In order to streamline conditions of entry and stay for foreigners coming to Spain in the framework of an intra-corporate transfer, different (basically procedural) privileges have been provided for under Act 14/2013. These are implemented in the different authorisation modalities outlined above.

1. To begin, the Fourth Additional Provision of Act 14/2013 lays down that authorisation to reside and work in Spain shall be processed pursuant to Directive 2011/98/EU of the European Parliament and 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. Provision for this procedure should be made when neither the posted foreign worker resides in an EU Member State nor the sending Company is based in an EU country. If they were from the EU it is likely that Act 45/1999 on the posting of workers in the framework of the transnational provision of services would be implemented instead of Act 14/2013 on intra-corporate transfers. In relation to the former, the so-called Vander Elst doctrine is also applicable. Derived from the European Court of Justice Judgment of 9 August 1994 (Case C-43/93), it was established that a Member State company employing non-EU workers cannot be required to obtain work permits issued by international migration organisations for its employees in the event that they are posted to another Member State.

Generally speaking, the application for express intra-corporate transfer permits is made by the company itself. Applications for the entrepreneurial visa will be resolved and notification received within 10 working days, while applications for residence permits require 20 working days (public holidays excepted) to process from the moment the application is filed before the competent body (Article 76, Act 14/2013). If no decision is reached within said period, the permit is deemed to be granted due to administrative silence. In other words, the absence of resolution is considered confirmatory. Application must be processed and resolved within the stipulated period.9

Article 76 also lays down that ‘the application for residence permits provided for in this section shall extend the validity of the stay or residence status applicable to the applicant until the procedure is terminated’. This guarantees that the legal status applicable to foreign nationals in Spain who have applied for a residence permit or permit renewal remains unchanged until termination of the application procedure. Thus, they avoid having to return to their countries and recommence the application process. It has been noted that, through a lack of awareness or the necessary documentation, applications for permit renewal are often made a few days before expiry.

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9 This was confirmed by Judgment 545/2016 of 18 July 2016 of the Madrid High Court of Justice (Administrative Chamber) in relation to a permit for entrepreneurs.
On the other hand, under the law, permit holders (in this case, foreign nationals) can apply for permit renewal for two-year periods provided they continue to meet the conditions giving them this right. The filing of the application for renewal will extend the validity of the permit until termination of the procedure. It can also be extended in the event that the application is filed within the ninety days after expiry of the previous permit, without prejudice to the filing, where applicable, of the appropriate sanction procedure.

2. The national employment situation in Spain is not taken into account for these permits. Consequently, the UGE-CE merely ensures that the legal requirements are met by the applicant. Applicants are not, therefore, subject to external conditions, such as the implementation of the national employment situation mechanism, in which case the UGE-CE would have to check no Spanish nationals or legally resident foreigners were available to cover the corresponding post.

3. Applications for permits for family reunification can be made after the primary holder has been granted authorisation to reside in Spain, but joint and simultaneous processing are also possible. Family members entitled to reunification are the spouse, civil partner, children under 18, children over the age of 18 dependent for health reasons, or who are financially supported by the applicant and have not yet formed a family unit, and dependent parents and/or grandparents.

These are the main characteristics of intra-corporate transfer permits to work in Spain. These permits have been successfully adopted by economic migrants compared to third-country nationals seeking employment in Spain, who do not fill any of the categories covered by the EU ICT permits. Statistics show that entry to Spain for the latter has been vetoed, mainly because of the economic recession and a preference for national workers (nationals, EU nationals and legally resident third-country nationals in Spain).

4. To end, it must be pointed out that infringements and sanctions regarding Intra-Corporate Transfer regulations are subject to the general framework provided for under the previously mentioned Organic Law 4/2000 of 11 January 2000, on the Rights and Freedoms of Foreigners in Spain, and their Social Integration. Thus, for failure to comply with Act 14/2013, infringements should be included among general cases of non-compliance (applicable to any migrant worker in Spain) laid down under Organic Law 4/2000. Sanctions are divided into three groups under this law: slight infractions, (basically infringements of formal requirements or documentation), which can entail a fine of up to € 500; serious infractions, applicable to foreigners working illegally in Spain without having obtained a work permit, which may entail a fine of between € 501 and € 10,000, and finally, very serious infractions, such as the hiring of foreign workers without having obtained the corresponding work permit, or committing an act of fraudulent concealment of the employment relationship with the foreigner, entailing a fine of between € 10,001 and € 100,000.

These sanctions naturally correspond to the general conditions of entry of foreigners to Spain. They may also be compatible with other sanctions imposed for non-compliance with labour and social security legislation, some aspects of which we will turn to next.

Article 18 of Directive 2014/66/EU on the right to equal treatment lays down that no matter what law is applicable to the employment relationship, intra-corporate transferees shall enjoy the right to equal treatment, at least in relation to the terms and conditions of employment in the Member State where the work is carried out, in accordance with Directive 96/71/EC of the European Parliament and of the Council, of 16 December 1996, concerning the posting of workers in the framework of the provision of services. Thus, a minimum standard is set in the Directive to ensure that intra-corporate transferees have the same employment conditions as transnational workers (including maximum periods of work, minimum duration of paid vacations, and salary rates).\(^\text{10}\)

As we can see, Directive 2014/66/EU at least ensures equal treatment in working conditions for intra-corporate transferees in accordance with Directive 96/71/EC, which covers the transnational provision of services. However, the two legal frameworks cannot be mixed. Recital 37 of Directive 2014/66/EU states that third-country nationals holding an intra-corporate transfer permit cannot avail themselves of the provisions laid down in Directive 96/71/EC.

Under European Law, the intra-corporate transfer permit (provided for in Spain under Act 14/2013) is not compatible with other modalities, such as the permit for the transnational provision of services (regulated by Act 45/1999, of 29 November 1999).

The Spanish law that specifically deals with intra-corporate transfers did not adopt Act 45/1999 concerning the posting of workers in the framework of the transnational provision of services. To avoid confusion, Act 14/2013 should have provided for equal treatment in working conditions rather than merely requiring the company applying for work permits to provide evidence (at the time of application) that its employment conditions were in compliance with Act 45/1999.

According to Directive 2014/66/EU, intra-corporate transferees shall enjoy equal treatment with nationals of the Member State where the work is carried out in relation to: freedom of association and affiliation; membership of an organisation representing workers or employers, and recognition of diplomas and social security coverage (see Article 18 of the Directive). Implied here is the requirement to ensure posted workers are covered by the same social security legislation (understood as the host country’s legislation), laid down in Article 3 of EC Regulation Nº 883/2004, as national workers. This occurs, according to the Directive, ‘unless the law of the country of origin applies by virtue of bilateral agreements on the national law of the Member State where the work is carried out, ensuring that an intra-corporate transferee is covered by the social security legislation in one of those countries’. This regu-\(^{10}\) Corinne Balleix, *Strengthening Co-operation with Countries of Origin*, OECD Social, Employment and Migration, Working Papers Nº 183, Paris: OECD Publishing 2016, p. 35, at http://www.oecd-ilibrary.org/docserver/download/5jlwxzb00pxv-en.pdf?expires=1522140575&id=id&accname=guest&checksum=382A01907A5E593CC77105D5A6154CA9.

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Regulation may lead to confusion. It would appear that equal treatment in relation to social security coverage is guaranteed ‘unless the law of the country of origin applies’ due to bilateral agreements or to applicable legislation in the sending country, which, by the way, may be subject to EC Regulation N° 883/2004 in relation to Regulation (EU) 1231/2010. As a general rule, this Regulation lays down that the applicable legislation corresponds to the State of origin or sending State. It could also be said that the right to equal treatment gives way to the implementation of the law of the country of origin or the bilateral agreement. Equal treatment may also be guaranteed in certain areas (Article 3 of EC Regulation N° 883/2004), even though the law of the sending country is applied.

Moreover, the salary offered to third-country national workers must not be less favourable than that offered to nationals of the Member State in which the work is carried out occupying comparable positions. Firstly, Article 5 of Directive 2014/66/EU accepts that the remuneration to be paid is not determined by the provisions of applicable laws or collective agreements. However, section 4 of Article 5 lays down that remuneration granted to the third-country national during the entire intra-corporate transfer must not be less favourable than that granted to nationals of the Member State where the work is being carried out occupying comparable positions in accordance with applicable laws or collective agreements or practices in the Member State where the host entity is established.

Intra-corporate transferees are not directly or specifically covered under Spanish Law in this regard, apart from general legislation on immigration that guarantees equal working conditions in Spain for legally resident foreigners and Spanish nationals. In any event, a reference in Act 14/2013 is needed.

Conclusions

To conclude, Spanish legislation concerning intra-corporate transfer regulations for third-country nationals was ground-breaking. It was a way of attracting talent and resources to Spain following the economic recession that began in 2008. Among other initiatives, the Spanish Government opted for a kind of policy based on economic interests rather than a general policy directed at non-EU citizens wishing to settle in Spain. Hence, economic migrants were granted important privileges in both conditions of entry to Spain and in entry procedures.

Yet, regulatory gaps have been detected in the law transposing Directive 2014/66/EU concerning intra-corporate transfers. These gaps can be resolved by referring to other laws for their interpretation such as, for example, validity periods for residence permits. Similarly, certain situations may lead to confusion. In the case

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11 See also the contribution of Verschueren in this book.
of employment conditions, Act 45/1999 on the posting of workers in the framework of the transnational provision of services also regulates labour conditions.

Moreover, it is essential that the issue of equal treatment in working conditions and social security coverage is enshrined in the specific intra-corporate transfer legislation.
Transposing the ICT Directive into Swedish Law – A Company-friendly Exercise

Petra Herzfeld Olsson

1. Introduction

The transposition of the ICT directive into Swedish law led to a clear shift. Previously, no distinction had been made between labour migrants employed by a Swedish employer and those who were part of an intra-corporate transfer. The Swedish starting point is that all labour migrants, independent of sector and employment arrangements, shall be treated in the same manner. However, the choices made by the Swedish legislator in the transposition process indicate that this shift was rather welcome. The existing unified system has recently been questioned. The Swedish Social Democrats (also the biggest party in Sweden) has declared that it has lost trust in the unified system and instead will prioritise skilled labour migrants in the future. The argument is that low skilled jobs should be kept for newly arrived refugees. Opting for a company-friendly transposition of the ICT directive can be seen as an indirect but important first step in that direction.

This chapter is organised as follows. First, to provide a better understanding of the extent of the shift caused by the ICT directive, the general Swedish labour migration scheme is introduced in Section 2. Section 3 is devoted to the transposition of the ICT directive. The focus is on how these new rules differ from the general system, but also on how the government navigated within the margin of appreciation provided for by the directive. What were the overriding principles governing the choices made? The final section provides some concluding remarks.

The text will focus on managers and specialists. In most cases no distinctions are made between trainees and the other two categories. The differences provided by the directive are mandatory and, accordingly, part of the provisions transposing the directive.

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1 This chapter is based on similar ones in other published texts by the author, see for example, ‘Empowering Temporary Migrant Workers in Sweden’, in: J. Howe & R. Owens, Temporary Labour Migration in the Global Era The regulatory Challenges, Oxford: Hart 2016, p. 206-208.
2. Swedish Law on Labour Migration

2.1 The General Provisions

To enter Sweden, a third-country national needs a Schengen visa or a national visa.\(^2\) Stays longer than 90 days require a residence permit.\(^3\) All third-country nationals who work in Sweden must have a work permit.\(^4\) This applies both if the third-country national is employed in Sweden or continues to be employed by a foreign employer and is posted to Sweden.\(^5\) An exception applies for specialists in multinational companies staying less than one year.\(^6\) They can work in Sweden without a work permit.

In 2008 a reform was implemented with the aim of establishing a labour migration system that would apply in the same manner to all labour migrant groups.\(^7\) This labour migration scheme is driven purely by employer demand. No labour market tests are conducted, no skill preferences based in law or quotas apply and the system is open to all sectors of the labour market.\(^8\) It is the individual employer who decides whether they need to recruit workers from third countries, but it is the migrant worker who applies for the work permit. The migrant worker must submit an offer of employment from the employer in the application. When the applicant continues to be employed in a third country and is transferred to Sweden temporarily, the offer of employment can be given by the host company in Sweden.

To ensure that migrant workers do not replace domestic workers, the terms of employment offered must be similar to those enjoyed by domestic workers.\(^9\) The Aliens Act therefore prescribes that the worker must be offered a wage, insurance and other terms of employment that are not worse than those laid down in the relevant collective agreement or provided for by custom in the occupation or industry.\(^10\)

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2 Ch. 2 s. 3 Aliens Act 2005:716. A number of exceptions apply, for example, for citizens in EEA countries, ch. 2 s. 8a Aliens Act 2005:716. Citizens from the countries mentioned in this list need a visa to enter Sweden. Available at: http://www.government.se/government-policy/migration/list-of-foreign-citizens-who-require-visa-for-entry-into-sweden.

3 Ch. 2 s. 5 Aliens Act 2005:716. Exceptions apply, for example, to citizens of Denmark, Norway, Iceland and Finland, citizens of EEA countries and those with a visa for stays longer than three months, ch. 2 s. 8b Aliens Act 2005:716.

4 Ch. 2 s. 7 Aliens Act 2005:716. Exceptions apply for citizens of Denmark, Finland, Iceland and Norway, as well as EEA citizens, ch. 2 s. 8c Aliens Act and for specific categories, ch. 5 s. 1 and 2 Aliens Ordinance 2006:97.

5 See the form ‘Offer of employment’. The applicant must specify whether he or she will be employed by a Swedish employer or posted to Sweden: https://www.migrationsverket.se/download/18.5e83388f141e129ba6312ecab/1519893956227/anst_erbj_232011_sv.pdf, p 2.

6 Ch. 5 s. 2.10 Aliens Ordinance.

7 Legislative Bill 2007/08:147, p. 34.

8 However, employers must respect the principle of European Union preference. In reality, that only means that the vacancy must have been published on the websites of the Swedish Public Employment Service and the European Employment Services for at least ten days. If that is done, the employer is free to offer the job to anyone, Legislative Bill 2007/08:147, p. 36 and Legislative Bill 2013/14:227, p. 8. This requirement does not apply to posted workers, however.

9 Legislative Bill 2007/08:147, p. 27.

10 Ch. 6 s. 2 Aliens Act 2005:716.
The Migration Agency has designed a specific form – the Offer of employment – that must be completed and accompany the application for a work permit. In the Offer of employment form, the parties must declare whether the employer is bound by a collective agreement and, in that case, identify the trade union party. It must also specify the wage, working time, applicable insurances, kind of employment (indefinite or temporary) and the period of employment. The combined effect of wage and working time is also important to meet the last legal requirement for being granted a work permit. Migrant workers must be able to support themselves, meaning that their total income must be higher than the level of social assistance for maintenance (around 1,300 euros per month).

Trade unions are given a specific role in the application procedure. They are given an opportunity to verify whether the terms laid down in the offer of employment are in accordance with the collective agreements or custom. This is based on the trade unions’ knowledge of the content of and specific responsibility for monitoring working conditions, including collective agreements in the Swedish labour market. However, they are not obliged to give their opinion, and the Migration Agency is not bound to follow the opinion given. Some trade unions refrain from using this opportunity if the employer is not bound by a collective agreement. The argument in such cases is that the trade unions do not have the means to control whether the offered conditions are in fact applied if there is no collective agreement. In such cases, the Migration Agency must verify independently whether the terms offered are sufficient.

All work permits are temporary. They are granted for the duration of the employment offered, but for a maximum of two years. Work permits may be extended an unlimited number of times, but the total period may exceed four years only in exceptional cases. For each extension a new offer of employment is required from an employer. After having worked legally in Sweden for a total of four years within a seven-year period, the migrant worker may be granted a permanent residence permit. In 2017, 2,691 foreigners were granted permanent residence on that ground.

The application process for obtaining a decision on a work- and residence permit can, in some cases, be rather time consuming. Some companies, however, have an ongoing need for labour migrants. If they meet certain conditions such companies can be certified and thereby obtain access to a fast-track decision-making process.

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11 Available at: https://www.migrationsverket.se/download/18.5e83388f141c129ba6312eab/1485556063715/anst_erbj_232011_sv.pdf.
12 Ch. 6 s. 2 Aliens Act 2005:716; MIGR 2015:11 (Case law from the Migration Court).
13 Ch. 5 s. 7a Aliens Ordinance 2006:97. Available at: http://www.migrationsverket.se/download/18.5e83388f141c129ba6312b76/1485556063117/233011+Fackligt+yttre+arbetsstillstand.pdf.
14 Legislative Bill 2013/14:227, p. 20.
15 See, for example, statements by the biggest white-collar trade union UNIONEN. Available at: https://www.unionen.se/rad-och-stod/yttre-arbetsstillstand.
16 The blue-collar trade union for hotel and restaurant workers. Available at: https://www.svd.se/hrf-kraver-kollektivavtal-for-att-ge-arbetstillstand.
17 Ch. 6 s. 2a Aliens Act 2005:716.
18 Ch. 5 s. 5. Aliens Act 2005:716.
19 E-mail from the statistical department at the Migration Agency (26 September 2017).
The decision shall in such cases be taken within ten days for a first-time application and within 20 days when applying for an extension or renewal.\textsuperscript{20}

The work permit is tied to a specific employer and to a specific type of work (occupation) for the first two years, but thereafter it is tied only to a specific type of work.\textsuperscript{21} If migrant workers want to change employer or type of work, they must apply for a new work permit. That can be done from within Sweden as long as the previous residence permit is still valid.

The work permit and/or residence permit may be revoked if the employment has ceased, and until December 2017 was supposed to be revoked if the working conditions did not meet the requirements of the law; for example, if the wage is lower than the wage provided for in the relevant collective agreement. This latter rule was criticized as being rigid, leading to unjust results. Hence, in December 2017 the law was amended, making it possible for the employer to correct mistakes a posteriori and avoid a revocation of the work permit.\textsuperscript{22} The Appeal Migration Court, in addition, clarified that an overall assessment must be done in such cases.\textsuperscript{23} If employment has still not begun four months after arrival of the migrant worker, the permit will however, be revoked. To ensure that migrant workers are not too dependent on their employer, they can stay in Sweden for three or four months without losing the residence permit to search for a new job if they lose the job to which the work permit is connected.\textsuperscript{24}

\subsection*{2.2 The Exception for Specialists in Multinational Companies}

The specific exception for specialists in multinational companies, in its wording before the transposition of the ICT-directive, is somewhat mysterious. It is difficult to obtain any information on how the conditions in the provision were applied. The work permit unit at the Migration Agency never got into contact with workers that took advantage of this exception. Either, they only stayed for less than 90 days and therefore did not need any permit at all, or they stayed longer but only applied for a residence permit, which are processed by another unit at the Migration Agency. No statistics are available on the number of workers that took advantage of this provision. The only available information in the internal handbook of the Migration Agency states that the provision should be interpreted generously, as it has been introduced in order to simplify and speed up the exchange of specialists over country borders.\textsuperscript{25} The Migration Agency’s impression is that this exception was seldom used.\textsuperscript{26}

Other studies, however, indicate that in theory the exception could be used in a high number of cases where it was not. Many highly qualified labour migrants coming to Sweden every year working in the IT sector are posted to a Swedish company

\begin{thebibliography}{99}
\bibitem{20} https://www.migrationsverket.se/English/Other-operators-English/Employers/Employing-people-from-non-EU-countries-/Become-a-certified-employer.html (visited 2018-04-30).
\bibitem{21} Ch. 6 s. 2a Aliens Act 2005:716.
\bibitem{22} Ch. 7 s. 3 and 7e Aliens Act 2005:716: Legislative Bill 2016/17:2012.
\bibitem{23} Appeal Migration Court’s judgments in 13 December 2017: MIG 2017:24 and MIG 2017:25.
\bibitem{24} Ch. 7 ss. 3 and 7e Aliens Act 2005:716.
\bibitem{25} Handbook under the rubric \textit{Arbetsstilländ för arbete – Anställning}, p. 5 ff (2015-10-26).
\bibitem{26} E-mail to author from the legal unit at the Migration Agency, 4 March 2016.
\end{thebibliography}
belonging to the same company group as the company in the third country sending the worker to Sweden.27 One explanation could be the certification system. Applications that would qualify for the exception might be related to certified companies and for them a decision is taken so fast that it is no reason to single out those that could be exempted from the work permit requirement.

3. Transposition of the ICT Directive

3.1 Starting Points

When evaluating the Swedish transposition of the ICT directive it is important to keep in mind that labour migrants who are now covered by the ICT Directive would, in most cases, have been treated like any other labour migrants in accordance with the general rules. Specialists transferred within the same company or company group to Sweden and staying for a maximum of one year had an opportunity to work without a work permit. It is unknown to what extent that provision was applied. However, it is known that many workers that probably would have qualified for that exception used the general procedure.

The ICT directive is the second EU-initiated crack in the no longer so solid Swedish unified system for labour migration. The EU Blue Card was the first and the transposition of the Seasonal Workers directive will be the third when it enters into force on 1 June 2018.28

A new chapter in the Aliens Act is devoted to ICT permits.29 Nevertheless, during the transposition process the government claimed that it was striving to keep the new system as close to the old general one as possible.30 For issues not covered by the directive the general rules shall be applicable also to ICT workers. This applies, for example, to rules on expulsion, refoulement and procedures.31

Sweden is loyal to the exclusiveness of the ICT directive in the sense that workers covered by the scope of the directive can only apply for an ICT permit.32 However, it is possible to change to an ordinary work permit if the employment conditions change and the labour migrant is directly employed by a Swedish employer. Such applications can be submitted from within Sweden only if the ICT permit has not expired.33 In line with the Swedish ambition to let the employer decide about the need to recruit a worker from a third country the possibility to apply quotas was not used.34

29 Legislative Bill 2017/18:34, p. 30.
31 Legislative Bill 2017/18:34, p. 30.
32 Legislative Bill 2017/18:34, p. 31.
33 Legislative Bill 2017/18:34, p. 94–95.
34 Legislative Bill 2017/18:34, p. 50.
3.2 Personal Scope

The personal scope of the directive was debated during the transposition process. This was so in particular regarding the provision that excludes workers assigned by employment agencies, temporary work agencies or any other undertakings engaged in making labour available to work under the supervision and direction of another undertaking in the directive.\textsuperscript{35} The Professional Workers Trade Union Federation, SACO, argued for a clear statement excluding consultants from the coverage of the new chapter in the Aliens Act.\textsuperscript{36} The fear was that the new provisions could be used by workers not posted to an entity belonging to the multinational company. The government referred to recital 36, which states that intra-corporate transferees should not be prevented from exercising specific activities at the sites of clients within the Member State where the host entity is established in accordance with the provisions applying in that Member State with regard to such activities. The decisive factor, if the work is performed at the client, must – according to the government – be whether or not the work is conducted under the supervision and direction of another undertaking.\textsuperscript{37} Hence, consultants were not explicitly excluded.

Another discussion on the scope related to the meaning of the categories of workers that could apply for an ICT directive that some stakeholders considered too vague. The Professional Trade Union Federation, SACO, and the White-Collar Workers Trade Union Federation, TCO, suggested that the definitions of the three categories, specialist, managers and trainees, covered by the new ICT-provisions should be made more precise through a reference to the Swedish professional classification system SSYK.\textsuperscript{38} The government chose instead not to include any definitions at all in the legal text and referred to the upcoming case law.\textsuperscript{39}

Another hot topic was how to deal with the exception for a work permit in the Aliens Ordinance for specialists. The biggest Swedish employers’ and business organisation Svenskt Näringsliv and its member organisation for the service sector Almega urged the government to keep it. This indicates that the exception is at least considered valuable for employers. Due to the exclusive nature of the directive it was not considered possible to meet this request in full but the government promised that it would try to take these considerations into account during the transposition.\textsuperscript{40} The exception survived but with the amendment that it shall not be applied in those cases in which an ICT permit is required.\textsuperscript{41} This indicates that the concept of a specialist in the ordinance has a broader coverage than a specialist in the ICT context. Otherwise the choice to keep this provision will be of relevance only for stays shorter than 90 days.

\begin{itemize}
\item \textsuperscript{35} Article 2.2(e) dir. 2014/66/EU.
\item \textsuperscript{36} Legislative Bill 2017/18:34, p. 35.
\item \textsuperscript{37} Legislative Bill 2017/18:34, p. 35.
\item \textsuperscript{38} Legislative Bill 2017/18:34, p. 38.
\item \textsuperscript{39} Legislative Bill 2017/18:34, p. 39.
\item \textsuperscript{40} Legislative Bill 2017/18:34, p. 29, 31.
\item \textsuperscript{41} Ch. 5 s. 2.10 Aliens Ordinance in its new wording from 1 March. 2018 (Ordinance SFS 2018:72.)
\end{itemize}
3.3 **Criteria for Admission, Rejection, Withdrawal and Renewal**

The requirements for obtaining an ICT permit, even those that differed significantly from the requirements for obtaining a general work permit, did not receive much attention. The requirements that the labour migrant must be employed in the company established in the third country and have been employed by that company without interruption for three months are, for example, new.\(^\text{42}\) The government chose the lowest possible time threshold for previous employment as no such requirement applied in the general labour migration system. The period required must be fulfilled on the day when the transfer is supposed to take place.\(^\text{43}\) It would accordingly be possible to employ a person and immediately ask them to apply for an ICT permit in Sweden. A decision on an application for an ICT permit must be taken within 90 days.\(^\text{44}\) Another new requirement is that the ICT applicant must be able to prove that, when the ICT permit expires, he or she can be transferred to an entity in a third country belonging to the company or company group.\(^\text{45}\) Another completely new provision connected to the seriousness of the transfer is the requirement to deny an application if the host entity was established for the main purpose of facilitating the entry of intra-corporate transfers.\(^\text{46}\)

A controversial issue in Swedish labour migration law has been the general requirement that the employer is only obliged to provide an offer of employment to the labour migrant and not an employment contract in the work permit application process.\(^\text{47}\) The criticism is based on the fact that the terms in an offer of employment can change when the employment contract is concluded and that it is less likely that the labour migrant will oppose such changes when already in Sweden. At the time of the transposition of the EU Blue Card, some trade unions used the opportunity to propose a change in this regard. They claimed, in vain, that the directive required a work contract for obtaining an EU Blue Card.\(^\text{48}\) The ICT directive requires that the applicant shall ‘present a work contract and, if necessary, an assignment letter from the employer containing a number of details regarding the employment.’\(^\text{49}\) The Swedish government refrained from including the words *work contract* in the law. The government’s argument was that the information required, such as wages, length of employment and length of transfer, would in practice lead to the labour migrant being obliged to hand in employment contracts, assignment descriptions and other documents proving the required information.\(^\text{50}\) That this actually is implied is confirmed in other parts of the preparatory work.\(^\text{51}\)

\(^{42}\) Ch. 6b s. 1 Aliens Act.  
\(^{43}\) Legislative Bill 2017/18:45, p. 38.  
\(^{44}\) Ch. 5b s. 1 Aliens Ordinance.  
\(^{45}\) Legislative Bill 2017/18:34, p. 39.  
\(^{46}\) Legislative Bill 2017/18:34, p. 49.  
\(^{49}\) Art. 5.1 (c) dir. 2014/66/EU.  
\(^{50}\) Legislative Bill 2017/18:34, p. 43.  
\(^{51}\) Legislative Bill 2017/18:34, p. 92.
Regarding the level of wage and working conditions required for admittance, the ICT conditions deviate from what applies in the general rules. Partly they are more favourable and partly less. First, the requirement is stricter in the sense that it does not refer to an offer of employment, but states that to be granted an ICT permit the remuneration shall not be lower than what is required in Swedish collective agreements or customary in the profession or sector and other terms and conditions of the employment shall not be worse than those applicable to workers posted to Sweden in accordance with the Posting of Workers Act (1998:678) by EEA and Swiss employers (POWA).\textsuperscript{52} The provision refers, in contrast to the general rules, to remuneration and not wages. Remuneration is typically wider than wages, but as wage issues are not dealt with in law in Sweden, guidance should be sought in the relevant collective agreement.\textsuperscript{53} The reference to the 'hard nucleus' in the posting act (transposing the Posting of Workers directive, 96/71) also differs from what applies to other labour migrants. In the general rules, insurance and other terms and conditions of employment shall at least be in accordance with relevant collective agreements or custom in the profession or sector. For those that apply for an ICT permit no insurance is required and only a limited set of terms and conditions of employment are demanded.

Also new to Swedish labour migration law is the requirement that applicants must not pose a threat to public policy, public security or public health.\textsuperscript{54}

Most of the mandatory grounds for rejection were considered to be an indirect effect of the admission conditions and therefore not transposed in a specific order. One exception that was introduced concerned required documents that were fraudulently acquired, falsified or tampered with.\textsuperscript{55} Regarding the facultative grounds the outcome was different. The government reformulated the facultative provisions to bring them closer to other Swedish provisions and, surprisingly – as similar conditions do not apply in the general system – chose to transpose almost all of them. An application can now be rejected if the employer or the host entity has been sanctioned for employing foreigners without the necessary permits; has given the authorities false information concerning employment with regard to decisions on taxes or fees; failed to meet its legal obligations regarding social security, taxation, labour rights or working conditions; or if the employer’s or the host entity’s business is being or has been wound up under national insolvency laws or no economic activity is taking place.\textsuperscript{56} Both sides of industry were still dissatisfied with the outcome. The Swedish business federation, Svenskt Näringsliv, found the provisions unclear and that it was not suitable to include rejection provisions based on sanctions and legal obligations. The white-collar trade union federation TCO on the other side, wanted the last provision in Article 7 to be made part of the law: where the intent or effect of the temporary presence of the intra-corporate transferee is to interfere with or otherwise affect the outcome of any labour management dispute or negotiation.\textsuperscript{57}

\textsuperscript{52} Ch. 6b s. 1 p. 2 Aliens Act.
\textsuperscript{53} Legislative Bill 2017/18:34, p. 467.
\textsuperscript{54} Legislative Bill 2017/18:34, p. 50.
\textsuperscript{55} Legislative Bill 2017/18:34, p. 52.
\textsuperscript{56} Legislative Bill 2017/18:34, p. 53 ff.
\textsuperscript{57} Legislative Bill 2017/18:34, p. 53.
Furthermore, a number of new grounds for withdrawal and non-renewal were introduced in the transposition process. If the permit was fraudulently required; if it can be proved that the permit has been falsified or tampered with; if the permit holder resides in Sweden for purposes other than those for which he or she was admitted; if the host entity was established for the main purpose of facilitating the entry of the ICT permit holder; or if the ICT permit holder poses a threat to public policy, public security or public health. These conditions are all clauses in the ICT directive and if any of these situations pertain the permit shall be withdrawn or a renewal denied. Other situations may lead to the same result. This is the case for example if the ICT permit holder has stayed and worked in another EU Member State in violation of the provisions on short- or long-term mobility. 58

3.4 Duration of ICT Permit, Qualification Periods for Re-entry and Short- and Long-term Mobility

During the transposition process, when there was a conflict between (i) the general ambition to remain as close as possible to the general structure and (ii) the aim behind the directive to facilitate intra-corporate transfers and ensure that such companies are able to obtain the personnel they need, the Swedish government often chose the latter. One example is the choice to impose a three-year ceiling on permits, in contrast to the general limit of two years. 59 In this case the government did not even justify why it thought it was reasonable. The argument was only raised in relation to the question of qualification periods before re-entering Sweden. The government chose not to apply any qualification periods between when an ICT permit expires after the maximum period of three years and the granting of a new ICT permit. 60 This means that the applicant must leave Sweden when the maximum period has expired but can immediately apply for a new ICT permit and be back at work for another three years very soon. 61 This choice was criticised by the professional trade union federation, SACO, but motivated in terms of the aim of the directive. A qualification period was not considered in line with the aim of facilitating intra-corporate transfers and could mean that a company’s need for personnel was not satisfied. 62 SACO’s argument was that the requirements in the directive, which differed from the general rules, were justified by the temporary nature of ICT permits. If someone can come back for repeated periods of three years such deviations from the general rules are perhaps not really justified. 63 One can of course ask whether it is justified at all in the Swedish context, as all work permits are temporary and can apply only for a maximum of two years.

60 Legislative Bill 2017/18:34, p. 81, see articles 7.4 and 12.2 dir. 2014/66/EU.
61 Legislative Bill 2017/18:34, p. 59.
62 Legislative Bill 2017/18:34, p. 81.
63 SACO, Remissvar Genomförande av ICT-directivet (Ds 2017:3) Rnr 14.17, p. 3.
This leads us, from a multinational’s perspective, to the important achievements of the ICT directive on long-term and short-term stays in other EU Member States. The government chose opposite starting points when transposing the provisions on long- and short-term mobility. When transposing the provisions on short-term mobility a clearly company-friendly attitude predominated. There is, for example, no requirement to notify the authorities about a short-term transfer to Sweden. The government justified this choice by a concern that such a notification mechanism could hamper the free movement ambitions of the directive. The government also points to the general obligation in the Posting of Workers Act to notify both intra-EU and third-country national postings to the Work Environment Authority. No response mechanism has been attached to this notification mechanism. However, the register is public and the trade unions can identify where postings take place and contact the company or workers if necessary. The government also rejected the proposal from the professional trade union federation SACO, to require that remuneration should be set on the same basis as for Swedish ICT permits during short-term mobility stays. The government’s choice in this case indicates that it is more eager to facilitate short-term mobility than to ensure that short-term ICT workers are paid according to Swedish standards. This choice also corresponds to the remaining exception in the Aliens Ordinance, in which intra-corporate stays shorter than 90 days will not require a general work permit.

With regard to long-term mobility the government took a different view, as stays in Sweden can be very long and a worker’s connection to Swedish society so strong that it was deemed suitable to require a long-term mobility permit in those situations. Therefore, the intra-corporate transferee has to apply for an ICT permit for long-term mobility in accordance with Article 22.1(b) in the directive. In such cases an application must be made to the Migration Agency and the government chose to go for all the requirements available in the directive, except for that the ICT worker can be transferred to an entity in a third country. No specific notification obligation for the worker applies. The government, however, rejected the proposal from the white-colour trade union federation TCO, to implement the option to require that the notification would be sent 20 days before the long-term mobility stay starts. It was motivated by the fact that no similar time frames applied in other cases. An ICT permit for long-term mobility is supposed to be revoked and a renewal denied along the same lines as ordinary ICT permits.

65 Legislative Bill 2017/18:34, p. 63.
66 Legislative Bill 2017/18:34, p. 65.
68 Legislative Bill 2017/18:34, p. 68.
69 Legislative Bill 2017/18:34, p. 67.
70 Legislative Bill 2017/18:34, p. 88.
71 Legislative Bill 2017/18:34, p. 69.
Regarding the obligation to allow re-entry of an ICT worker in accordance with Article 23.5 of the directive, Sweden introduced an exception to the normal requirement of a visa for entry. This was done because the directive requires that re-entry shall be allowed without formalities and without delays.

3.5 No Simplified Procedures, but Additional Notification Demands

No specific measures were introduced transposing the facultative provisions in the directive on simplified procedures in some cases. The government claims that in those cases where the employer or the host companies are well known to the Migration Agency and where routines are already established the application process is likely to be fairly fast. However, the certification process cannot be applied in these cases.

ICT workers apply for an ICT permit from a third country, except for long-term mobility permits, which can be applied for from within Sweden, in line with the ordinary Swedish procedures. If already known, planned stays in other EU Member States shall be mentioned in the first application. If any of those stays are longer than the stay in Sweden the application should not be made in Sweden.

The obligation to notify the authorities about changes of work conditions is new to the Swedish system. Workers who have applied for an ICT permit or who hold an ICT permit for long-term mobility shall notify changes that can affect the conditions for the permit to the Migration Agency. The host company shall notify the Migration Agency about conditions affecting ICT permits for long-term mobility.

3.6 Sanctions

The option of holding the host company responsible for a failure to fulfil the conditions for entry, stay and mobility is not used. This decision has been criticised by both the white-collar trade union federation TCO and the professional trade union federation SACO. TCO argued that in practice the employer has the power to ensure that the conditions are fulfilled and should therefore be held accountable when that is not the case. None of the optional sanction possibilities in Articles 9.1, 9.2 and 9.3 or 23.7 of the directive were transposed. This is justified by the principles governing the general Swedish system. There it is the labour migrant who is responsible for having the necessary permits for work in Sweden. And as the government was of the...
opinion that it was not wise to deviate from the general solutions if not required when transposing the directive, these options to sanction the employer or host entity provided for in the directive were not transposed. The government also considered that the obligation in Article 9 to prevent abuse was already complied with in Swedish law.

3.7 Rights Connected to an ICT Permit

The Swedish transposition of the so-called equal treatment provisions in Article 18 of the directive is somewhat troubling. According to Article 18.1 the intra-corporate transferees admitted under the Directive shall, whatever the law applicable to the employment relationship, and without prejudice to point b) of Article 5:4, enjoy at least equal treatment with persons covered by Directive 96/71/EC with regard to the terms and conditions of employment in accordance with Article 3 Directive 96/71/EC. The directive refers to the Posting of Workers directive. That directive is transposed into Swedish law through the Posting of Workers Act (POWA). The POWA, in contrast to the Posting of Workers directive, applies to postings from anywhere in the world, meaning that it also applies to postings from third countries. Therefore no further transposing measure was deemed necessary in this case. Two difficulties with this argumentation will be touched upon. The first difficulty is related to the coverage of the POWA. The POWA has the same coverage as the Posting of Workers directive and therefore applies only within the context of provision of services. The ICT directive is not limited to services. This fact was highlighted during the transposition process and the government refused to admit that this could be a problem. Instead, it simply established that in general intra-corporate transfers within the context of the ICT directive will be regarded as the provision of a service and therefore be covered by the POWA. This concept of service in EU law is not very clearly defined. According to Article 57 TFEU a service is normally provided for remuneration insofar as it is not governed by the provisions relating to freedom of goods, capital and persons. The CJEU has explained that ‘services’ covers services that are not covered by other freedoms, in order to ensure that all economic activities fall within the scope of the fundamental freedoms. But as Catherine Barnard has demonstrated, ‘services pose intellectual and practical problems not experienced with other freedoms’. There is, for example, a potential overlap both with freedom of establishment and free movement of goods. It is not likely that the concept of service in the Swedish POWA would make a distinction between intra-EU and other situations. This is not the place to dig deeper into this question but it is enough to

81 Legislative Bill 2017/18:34, p. 91.
82 Legislative Bill 2017/18:34, p. 92.
84 Legislative Bill 2017/18:34, p. 105-106.
87 Ibid., p. 292.
highlight that when an intra-corporate transferee is not covered by the POWA, no minimum level of rights is provided for in Swedish law. In reality this might be an academic problem, explained by the fact that as soon as there is a service related part of the activity the POWA can be applied.

The reference to point (b) of Article 5(4) in the equal treatment article indicates that remuneration should not be the minimum level provided for in the Posting of Workers directive but should be equal to national workers occupying comparable positions in accordance with applicable laws or collective agreements or practices in Sweden. The government, however, did not say anything about this reference during the transposition process. Rather, they seem to assume that the Posting of Workers directive sets the limit here as well. This is a rather odd assumption as the admission requirement is equal remuneration. The likelihood that the host company will not ensure that intra-corporate transferees are paid equally with domestic workers is, however, perhaps not high. If the parties involved do not ensure that the level required to be admitted to Sweden is upheld, they risk the withdrawal of the ICT permit. This is explained by the withdrawal provision that makes it possible to withdraw an ICT permit if the conditions for admission are no longer met.

Not ensuring an individual right to equal treatment that can be enforced is, however, problematic. When Sweden transposed the Single Permit and the EU-Blue Card directives, one question concerned the extent to which Sweden already guaranteed equal treatment with regard to terms and conditions of employment for third-country national workers. The government explained that there is no express distinction based on citizenship in Swedish labour law. The government admitted that none of the discriminatory-grounds part of the Discrimination Act covered citizenship, but in their view indirect discrimination could be used on the basis of ethnicity in a case of discriminatory terms and conditions of employment. The terms of the employment contract not covered by legislation could be an example. Wages are the most typical example as in Sweden they are set either in collective agreements or in the individual employment contract. There is no statutory minimum wage and no public mechanism to extend collective agreements to independent employers. If an intra-corporate transferee is paid less than Swedish colleagues performing the same kind of work, it may be the case that the distinction being made is between persons involved in an intra-corporate transfer and others and in those cases it is hard to think of any applicable discriminatory ground. It may be possible to invoke indirect discrimination if there is a neutral rule being applied that has a specific negative effect on persons with another ethnicity than Swedish. But the question is whether that is at all possible. The two workers in question are not employed by the same employer. It is very doubtful whether a claim could be raised against the host company in such a case. Another unresolved question is how this equal treatment provision relates to the choice of law provisions in Rome I applicable to employment contracts with an international connection.

89 Legislative Bill 2007/08: 95, p. 137.
The other provisions in Article 18 on equal treatment posed no problems. However, one small change in relation to Swedish rules in general was required with regard to Article 18.3, which authorises the Member States to limit the right to equal treatment with regard to family benefits when authorisation is given for the intra-corporate transferee to reside and work in Sweden for a period not exceeding nine months. This possibility was used in relation to financial study support for family members attending high school.91 In all other cases regarding the social security branches where equal treatment is required, Swedish law make no distinctions based on citizenship.92

The general Swedish rules on family reunification for labour migrants are relatively generous. The specific rules on family reunification in the new chapter in the Aliens Act are basically the same as those that apply to family members in the ordinary system.93 The concept of family as such is, however, more limited in the directive and the government saw no reason to equalise it with the general rules.94

4. Effects of the New Scheme in Practice

One question is of course whether these provisions will have any real effect in practice in Sweden. If one looks at the composition of the labour migrants coming to Sweden before these rules entered into force the answer is likely to be ‘yes’. The extent will depend on how the concept of ‘specialist’ will be interpreted. A fairly high number of labour migrants coming to Sweden work, for example, in the IT sector; in 2017 the number was 5,400 out of 15,552.95 Many of them were transferred to Sweden temporarily and continued to be employed in a third country.96 These workers have at least a BA in engineering or science and fill shortages in the sense that their special competence is not available to the extent needed in Sweden. Is this sufficient to qualify as a specialist? Some of the tasks perhaps do not require high level qualifications, but what is ‘specialised knowledge essential to the host entity’s areas of activity, techniques or management’, taking into account ‘whether the person has a high level of qualifications, including adequate professional experience referring to a type of work or activity requiring specific technical knowledge’?97 It is likely that the company transferring the workers considers that they are crucial for the host company’s activities in Sweden. Whether that is all it takes is, for the moment, not clear.

91 Legislative Bill 2017/18:34, p. 110.
92 Legislative Bill 2017/18:34, p. 110.
97 Article 3 (f) Directive 2014/66/EU.
5. Conclusions

It is obvious that the Swedish legislator saw this transposition as an opportunity to promote the presence of multinational companies in Sweden. In many cases in which a choice could be made to ensure fair labour standards, for example, the government opted for the more company-friendly option; one example is the choice not to apply a qualification period for re-entering and using three-year ICT permits. It also seems that the government does not rule out that these workers can become part of the permanent workforce. The possibility to earn time to qualify for Swedish permanent residency is one instance of that, in contrast to the directive’s clear stance that these workers cannot use ICT time to qualify for a long-term residence permit.98 In such cases the Migration Agency is supposed to look into a labour migrant’s contribution to Swedish society and their connection to Sweden. The government has advised the Agency to take facts about a labour migrant’s stays and work in other EU Member States into account when such assessment is carried out.99 The directive in general, however, also contains more cumbersome admission conditions and rejection possibilities. Here the government took the opportunity to include provisions that would counteract bogus employers, in line with intensified Swedish ambitions within this field.

Nevertheless, it is impossible to avoid the fact that until the intra-corporate transferee has been working for more than four years in Sweden their stay in Sweden and in the EU is totally in the hands of the multi-national company. Cathryn Costello and Mark Freedland have indicated that the directive ‘permit workers to be moved like adjuncts to transnational service provision’.100 The crucial point is that individual workers do not have any movement rights but are dependent on the will of the multinational company concerning their transfer to one or more EU Member States. Accordingly, ‘ICT status depends on the employing organisation’s transnational corporate reach, which may include permanent infrastructure, or may be much more ephemeral and rooted in corporate law fictions’.101

From that perspective it is not logical that so much responsibility is put on the worker in the rules transposing the directive in Sweden. The most astonishing example is the reasoning around turning down the option to introduce sanctions for employers when the conditions for the stay are not met. The Swedish government stated frankly that in the Swedish system the worker is responsible for meeting the conditions of the permit.102 Such a stance is questionable in any employer-driven labour migration system. In posting situations the situation is, if possible, even more unsatisfactory as the employer is in total control of the admission conditions and their fulfilment.

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98 Legislative Bill 2017/18:34, p. 95-95.
99 Legislative Bill 2017/18:34, p. 96.
101 Ibid.
102 Legislative Bill 2017/18:34, p. 90 ff.
Concluding Remarks
Is the Intra-Corporate Transfer Directive Welcoming International Talent?

*Tesseltje de Lange*

1. Introduction

At the closing of the seminar on the ICT Directive 2014/66/EU discussed in this volume, I posed the question: Is the Intra Corporate Transfer Directive welcoming international talent? The international audience, including many corporate immigration law experts, answered the question to the affirmative. The Directive is welcoming because of the innovative intra-EU mobility it offers non-EU employees of the multinationals covered by the Directive. On the other hand, the Directive is not so welcoming because of, for instance, the time limit of three years on the posting of ICT transferees (ICTs). As the chapters in this volume illustrate, selected EU Member States have tried to implement the Directive in such a way in order to make the immigration law for intra-corporate transferees as welcoming as possible. In doing so, they may actually have stretched some of the Directive’s intentions and limitations. They have done so with reason. In 2017, France ‘attracted a total of 1,298 new job-creating foreign investments […] that created or maintained 33,489 jobs’.1 US headquarters of multinationals, such as Facebook, take the lead in France. In 2017, the OECD reported that foreign-owned firms in Poland directly sustained 26% of jobs in the private sector in 2013.2 Neighbouring country Germany has attracted many of the world’s largest companies, like Amazon, investing €100 million ($112 million) in building a 64,000 square-meter logistics centre and Chinese telecoms group Phicomm opening its European headquarters in Germany, to employ 1,100 people.3 The Netherlands attracted 357 foreign businesses such as Netflix, in 2017, which in total created 12,686 jobs.4 The Netherlands Foreign Investment Agency (NFIA) welcomed these foreign investments, rolling out a so called ‘orange carpet’.5 ICTs are an important economic asset.

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1 Business France, 2018. These data include EU investments.
4 Netherlands Foreign Investment Agency 2018.
5 See the NFIA website https://investinholland.com. Multinationals – obviously – include other factors than migration law in their decision to locate. In 2017 the number of American foreign investment projects in the Netherlands went down 22%, contributing for 32% less jobs in the Netherlands. This decrease is attributed to Dutch environmental requirements, B. van Dijk & H. Verbrae-
The overall objective of the ICT-Directive is to be welcoming to foreign directive investments and to roll out an ‘orange carpet’ for multinationals coming to the EU. This is articulated in the directives’ preamble 3:

‘The Commission’s Communication of 3 March 2010 entitled ‘Europe 2020: A strategy for smart, sustainable and inclusive growth’ sets the objective of the Union becoming an economy based on knowledge and innovation, reducing the administrative burden on companies and better matching labour supply with demand. Measures to make it easier for third-country managers, specialists and trainee employees to enter the Union in the framework of an intra-corporate transfer have to be seen in that broader context.’

The need to reduce administrative burdens is addressing companies’ needs, while the second sentence addresses the needs of talented migrant workers. The Directive is a migration law tool for attracting multinationals and for attracting talented staff. With respect to the latter, I investigate in this final chapter, how welcoming the ICT-Directive is for the transferred managers, specialists and trainees, often called expats, corporate transferees, mobile business elites, global managers, transients and the like, as well as other third-country national migrant workers in the EU.

In section 2 I will briefly discuss how I ‘measure’ the welcoming nature of an immigration law or policy. In section 3 I will analyse some of the welcoming aspects of the Directive and its implementation, building on the chapters presented in this volume. In the final section I will draw some conclusions and offer suggestions for a research agenda on intra-corporate mobility and migration law and policy welcoming intra-corporate transferees in the EU.

2. Measuring the ‘Welcoming’

Most migration policy today is restrictive or at least selective and not often perceived as welcoming. In the so called battle for brains or war on talent, a ‘welcoming’ policy can be an important asset, although researchers have argued that a welcoming migration policy alone doesn’t attract talent. While the beneficial effects and ethics of welcoming the super-rich have been challenged the experiences with the arrival of foreign (non-EU) multinational corporations is generally perceived as positive for the economy and employment of the national work force. Indeed, the EU 2020 Strategy, cited by Töttös in this volume, expresses the objective of the Union to become an economy based on knowledge and innovation, and to do so, it needs to reduce the

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administrative burden on companies and requires the better matching of labour supply with demand. This language suggests that the objective of the Directive is indeed to create a welcoming immigration policy. In order to measure the welcoming nature of any migration policy, I use a model for ‘welcoming talent’ in migration law that I developed elsewhere.  

The model tests for three elements to define the ‘welcoming’ nature of immigrant policy: a material element, a procedural element and an institutional element. In this chapter I will focus on two aspects of the material element, one procedural and one institutional element. First, materially welcoming, addresses the level of evidentiary requirements with regard to skill levels, income requirements, labour contracts or assignment letters and the like. I remember a case I was working on as an immigration lawyer about 20 years ago: while in the middle of moving to the Netherlands and with all his personal documents stacked away safely in a container, I had to ask a CEO with over 25 years of management experience for proof of his Bachelor’s Degree, because that was what the authorities wanted to see. His extensive CV did not suffice. Such evidentiary requirements, in my reading, do not qualify as welcoming. Secondly, mobility rights are a material element in this model. These include the right to move in and out of the host state, but also the right to move employers and the right to move into a more secure status (permanent residence or nationality) or other status (a Blue Card or entrepreneurship, to become an expat-preneur).  

Qualifying the ‘freedom’ to change or mix location, employer or status as welcoming is inspired by Orly Nobels’ book ‘Talent wants to be Free’. Nobel argues that non-compete clauses in labour contracts only hinder innovation. Similarly, stimulating innovation being one of the goals of the ICT-Directive, we could argue that more freedom of movement granted to the third-country nationals is a more welcoming policy. Welcoming is a migration policy that includes accelerated options into permanent residence or possibly citizenship. In Germany for instance, a migrant holding a Blue Card or a residence permit as a self-employed professional can switch into a national permanent residence permit after three years and as Herzfeld-Olsson discusses in this volume, Sweden has a similar option after four years of employment. A similar entitlement may be part of the – still under negotiation – Blue Card Recast. What does the ICT-Directive have to offer in this respect? An important material element of welcoming, also drawn out by Kostakopoulou  is the level of rights acquired by migrant workers, such as the right to education, the right to family reunification or – along with permanent residence or even sooner - to political participation. In this volume Verschueren addresses employment and social security rights extensively, I refer to his chapter.

The second element in the welcoming model are procedures. These include the time it takes to decide on an application, fees to be paid, transparency of the procedure, and available legal protection. Like the preamble said, the less administrative burdens the better. I will postpone an analysis of these formal aspects because their true nature is to be experienced on the ground and will surely be part of evaluations of the implementation of the Directive yet to come.

A final aspect, further elaborated upon, is the aspect of the fast tracking of procedures for recognised multinationals. This will be addressed as part of the third element of welcoming: the institutional framework of the migration policy at hand. Institutionally, the decision to grant a residence permit is taken by national immigration authorities. But other authorities, investment agencies, city mayors or economic councils, may have invested time in ‘recruiting’ the multinational and may possibly vouch for the third-country national workers to be transferred into the multinational. This institutional design comes to the fore in simplified procedures for recognised entities, undertakings or groups of undertakings (article 11(6) of the Directive). To a large extent, once recognised as a trusted sponsor, the multinational can decide on the entry and residence of their expats. Such expedited procedures may well be qualified as welcoming because they breaks down administrative burdens. But how welcoming is this near ‘privatisation’ of migration decisions for the expat who, in practice, has to rely on ones’ employer for all employment and immigration affairs?

3. Materially Welcoming?

3.1 Scope and Alternatives

Prior to implementing the ICT-Directive, as explained by Camas Roda in this volume, Spain implemented a law with a very welcoming scope, including transfers for professional reasons, so self-employed persons or independent professionals may benefit from this residence permit. The ICT-Directive however, excludes from its scope self-employed persons. An issue raised by Verschueren in this volume is that in EU law, defining if someone is self-employed or not is not so straightforward, hence, it is ambiguous what kind of ‘self-employed’ workers are excluded from the scope of the Directive and to what extent the Spanish law can still be applied to those working as a self-employed person for a multinational. This would, of course, only become an issue if the entry into Spain of such self-employed third country national ‘transferees’ is challenged, for instance by for co-workers, unions or the European Commission, if they would care to challenge this hybridisation of transferees. In my reading, the Spanish law of 2013 appears to be more in line with the international mobile business elites’ working structures than the employment based ICT-Directive. The Directive 2014/66/EU does permit the Member States to establish parallel national legislation for the categories of staff (or self-employed) not covered by this EU law, although they will lack the benefits afforded by EU ICT permits. Spain has explicitly done so together with regulating the entry of self-employed service providers. To include self-employed entrepreneurs, who receive notice on their application within 10 days, Spain acknowledges the reality of a ‘global service provider work force’ constituted of expat-preneurs, migrant workers choosing a more entrepreneurial, less dependent and
Concluding Remarks

possibly more profitable, career within multinationals. Germany has a national scheme in place as well. The national intra-company transfer category requires that the number of incoming workers transferred to Germany by the company should be roughly the same number as the outbound, German transferees. The companies’ annual report and a report on the personnel exchange between the subsidiaries are important documents to prove fulfilment of the conditions for a national German intra-company transfer permit. According to Mävers it can be hard to fulfil these requirements, a more in depth analysis on the ground could lead to the conclusion that in the German context the ICT-Directive provides a more welcoming scheme than the national scheme did.

The alternative to the use of the ICT-Directive discussed by Guild in this volume, are the EU trade agreements with third countries, which allow for a right of establishment and transfer of key personnel. Such agreements are in force with for instance Algeria (2005), Russia (1997), Ukraine (1998 replaced in 2016), and Jordan (2002). These agreements seem to offer opportunities for establishment and the transfer of key personnel beyond the ICT-Directive, but they are to my knowledge underused in practice.

EU law has another alternative available to talented migrants already present in the EU, like TCN students, PhDs’ or researchers. They do not qualify under the ICT-Directive because Member States must require previous and continuous employment with the multinational abroad. The consequence of this ‘company-members only’ requirement is that local talent is excluded from the Directive. Likely, the Multinational Corporation (MNC) actually selects an EU country as their base for a head office because of the available talent. This alternative source of talent (other than nationals of course), TCN already living in the host state, can be employed during a search period under Directive 2016/801 or under the Blue Card Directive 2009/50, or a national alternative. They can perform services under the intra-EU services, the so called ‘VanderElst’ regime in other EU Member States, either at clients’ sites or other offices of the multinational. As Mävers points out in his conclusion, the ‘VanderElst route’ might be more interesting for businesses, because it does not require a residence permit for their mobile TCN in the second Member State as the ICT-Directive allows for. Interestingly, as Lutz explain, the majority of Member States opted for the less welcoming application procedure in case of long term mobility instead of the more welcoming notification procedure, which would have been similar to the VanderElst route notification. Antoons, Ghimis and Sullivan explain in this volume why businesses lobbied for something else, something more restrictive. ‘The VanderElst exemption is a very useful tool for business, but it lacks harmonisation as each country has given this ruling its own interpretation’, so indeed, the harmonisation has been established, but to some extent the harmonisation is a step backward from what VanderElst would allow for.

3.2 **Evidentiary Requirements**

The Directive sets criteria for three categories of migrant workers: managers, specialist and trainees. As discussed, trainees must provide a university degree, managers and specialists must provide evidence of their professional qualifications and experiences needed in the host-entity. Not so welcoming is the optional clause allowing Member States to require the diploma’s to be translated in the official language of that state. Most educational institutions probably provide an English copy of a degree and I would say it is more welcoming to also accept English translations.

In Spain it is the transferees themselves (and not the company, unless it is a recognised company) that must provide evidence of fulfilling the income requirement. In Sweden both have the obligation to inform the authorities but only the employee is sanctioned if this obligation is not complied with, as the Directive prescribes. This can become an issue in my opinion, as it is often a human resource department of the company that is in contact with the immigration authorities and not the migrant. If the human resource department misses a reporting obligation, should the migrant pay the price? Not so welcoming for the migrant. Tans and Kroes are sceptical towards the Dutch government’s way of assessing if the salary threshold for ICT’s is meet, and which salaries conform to national standards. In Germany, according to Mävers, the authorities ‘have a tendency not to be too strict’ with regard to the required proof of the position of the manager, as long as the documents match job title, job duties, salary and other circumstances described in the application. Indeed, the welcoming nature of any government policy stands or falls with the civil servants’ interpretation – if there is room for interpretation – and attitude towards the applicant. This holds a risk of ‘profiling’ and of giving larger well known firms a more welcoming treatment, but if this indeed is the case, requires further research.

3.3 **Freedom to Move**

Article 79(2)(a) and (b) TFEU explicitly refers to ‘the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States’. As Tóttós rightly points out in this volume:

‘One of the unique characteristic features of the newly chosen target group of intra-corporate transferees was that they require the possible maximum flexibility in being able to travel within the EU for the purpose of carrying out work in various entities belonging to the same group of undertakings.’

The intra-EU mobility scheme provided for by the ICT-Directive turns the ICT permit issued by one Member State into a permit which allows access to the territory and labour market of all other Member States. If Nobel’s right to be ‘free’ is to include the right to move from one country to another, the intra-EU mobility scheme indeed offers more flexibility and in that sense is indeed very welcoming. There is one important limitation. The freedom is not to move into the labour markets on the individual’s choice. It is only a freedom to move as a ‘pawn’ of the multinational, it is a moving restricted by the borders of the multinational, other parts of the EU labour
market remain closed. To put it bluntly, the Directive impacts the power relations between employer-multinational and employee-transferee in such a way that the third-country national is a ‘corporate citizen’ without much rights in the host state where the worker is physically staying. In implementing the Directive, Member States seem to have tried to lessen this effect.

The ICT-Directive is in this respect similar to the mobility scheme provided by the EU internal market’s freedom to provide services, which includes the freedom to post third-country national workers as discussed above, but does not allow for accessing the labour market in the second host state and take up residency there.

The provisions that allow for intra EU-mobility are phrased as options for the second Member State. This means a high level of discretion is granted to second host Member States, allowing it to be as welcoming to intra-EU mobility of third country national transferees as it deems fit. Like in Sweden, where such mobility needs to be reported but does not require a new residence permit if it lasts no longer than 90 days. Spain only requires notification for both short-term and long-term intra-EU assignments and does not require a residence permit. As Camas Roda points out in his contribution, this means Spain ‘trusts’ the other Member States’ assessment and has a ‘flexible’ approach to third-country national workers entering Spain. Such trust could be seen as a sign of welcoming intra-corporate transferees but it is not the dominant attitude.

Obviously, the obligation of the multinational to return the third-country national to the ‘home country’ or at least to some place outside the EU after the maximum duration of the posting of three years is unwelcoming in the long run. The fact that Member States have tried to work around this (Sweden, the Netherlands, Spain for sure) can be seen as proof of the Directive being unwelcoming in this respect, and the Member States’ intent to be more welcoming.

So, finally, although switching to a national permit is allowed, in for instance the Netherlands, the duration for which the migrant holds an ICT permit is irrelevant for a right to long term residence. This time doesn’t even count as half time, as is the case for TCN students. This means that those persons entering the EU as ICT’s, business elite, captains of industry and possibly taking important decisions for the countries’ economies through their business, have to wait longer than others (family migrants, blue cards, students as well as refugees) before being eligible for full membership, nationality and voting rights.

4. Procedurally Welcoming?

The issue of procedural welcoming is an aspect only addressed explicitly by Tans and Kroes in this volume. They state that

‘[o]ne of the most important differences between the Directive and the GATS and FTA ICT is the fact that the Directive concerns EU law. Due to this origin, the entire system of judicial protection, including implementation mechanisms such as direct effect, and the obligation for

14 Article 5(1) sub c-iv ICT-Directive.
authorities and courts to apply EU harmonious interpretation, therefore applies to the implementation based on the Directive. Infraction procedures and the possibility to raise complaints with the Commission are also prime examples of this EU framework.’

True. Two thoughts on this: first, from case law we can conclude that either multinationals or their managers and specialists hardly ever go to court over migration issues. It’s probably not so much time or financial constraints, but, and this is speculation, not worth the hassle. My second thought is that this might change, as it will be these multinationals (and their legal advisors operating throughout Europe) who will be confronted with the diverging interpretations of the same Directive. Getting an interpretation from the ECJ takes time, so that’s not so welcoming, but not having an opportunity to challenge a national interpretation of international norms at all, is far less welcoming.

5. The Institutional Design: Accredited Sponsors

The ICT permit is a single permit which means a single administrative body must be assigned to decide applications under this Directive. The Directive does allow for a certain level of ‘privatisation’ of the migration decision on the entry of employees of multinationals who hold a recognised sponsor status, so called ‘accredited sponsors’, outlined in article 11 par. 6-9 of the Directive.15

According to Lutz in this volume, the preliminary analysis of transposition of the Directive shows that many Member States did not chose for streamlined and less burdensome options available in the Directive, the most ‘welcoming’ options so to speak:

‘only a limited number of Member States seem to have used the option of Article 11(6) to set up simplified procedures for entities or groups of undertakings which have been recognised for that purpose.’ (Lutz, Chapter 2)

In this section, I will briefly discuss the coming about of the recognised sponsorship system in the ICT-Directive, not discussed elsewhere in this volume. Fast track procedures are welcoming both migrant worker and host, cutting back on red tape and limiting the time barriers once the transfer has been decided on. The privatisation of the entry scheme may however tip the power balance between transferee and the multinational, and to what extent this may ‘hurt’ the receiving state and society as well as the transferee if he or she is interested in a more permanent migration, is a ques-

tion that goes beyond these concluding remarks. It calls for empirical studies into the relationship between the three main actors: state, employer and migrant.

The original proposal included this instrument (article 10 proposal), and preamble 20 explained in more detail the intent of the instrument:

A fast-track procedure may be set up for groups of undertakings which have been recognised for that purpose. Recognition should be granted on the basis of objective criteria made publicly available by the Member State and ensuring equal treatment between applicants. It should be granted for a maximum of three years, as the criteria need to be reassessed on a regular basis. Such recognition should be restricted to transnational corporations presenting credentials showing their ability to comply with their obligations and supplying information about the expected intra-corporate transfers. Any major change affecting the ability of the corporation to meet those obligations and any complementary information on future transfers should be reported without delay to the relevant authority. Appropriate sanctions such as financial sanctions, the possibility of withdrawing recognition, and rejections of future applications for permit should be provided for.16

So four factors influence the recognition and its consequences, these are 1) which corporations can be recognised 2) what evidentiary requirements are set 3) what are the obligations that come with the recognition and 4) what sanctions should be put in place if these obligations are neglected.

An EP amendment suggested making available the recognition only to undertakings which fall within the scope of Directive 2009/38/EC on the establishment of a European Works Council.17 This would entail that only ‘Community-scale groups of undertakings’ would be eligible for the fast track procedure, which would have been groups of undertakings with the following characteristics: at least 1000 employees within the Member States, at least two group undertakings in different Member States, and at least one group undertaking with at least 150 employees in one Member State and at least one other group undertaking with at least 150 employees in another Member State. Dropping this link to the European Work Councils definitely made the Directive more welcoming because it allows for recognising and thus fast track procedures to be available to all multinationals under the scope of the Directive. If this proposal had been accepted it would have made the Directive far less welcoming due to the limited scope.

The proposal furthermore allowed for recognition to be granted for a maximum of three years on the basis of the following information: (a) information relating to the financial standing of the group of undertakings aiming to ensure that the intra-corporate transferee will be guaranteed the required level of remuneration and rights as provided for in Article 14; (b) evidence that the conditions of admission regarding prior transfers have been complied with; (c) evidence that tax law and regulations

have been complied with in the host country; (d) information related to forthcoming transfers. In the end, the details were deleted from the preamble, the requirements for recognition moved into draft article 10(7) of the proposal.

In the end, the brief text of preamble 31 was agreed upon. It now reads: ‘It should be possible to set up a simplified procedure for entities or groups of undertakings which have been recognised for that purpose. Recognition should be regularly assessed.’ The time limit on the recognition was deleted. And the requirements described in the proposed preamble had been deleted. The final text of Article 11(6) says that recognition by Member States will take place in accordance with their national law or administrative practice. Thus, it is left to the Member States’ discretion to accredit sponsors. This also means that a common recognition of sponsors, giving some multinationals a EU-wide trusted sponsor status, is still a faraway option, possibly not even considered.

The benefit of the recognition is a fast tracking of procedures (article 11(7)). The recognition also imposes certain obligations on the multinationals: The ICT recognised sponsors shall notify to the relevant authority any modification affecting the conditions for recognition (not the conditions for the transferee to remain in the EU) without delay and, in any event, within 30 days (article 11(8)). Obviously, this requires proper administration and awareness of the relevance to report certain issues to the national authorities. The 30 day time-limit was added by another EP amendment. Interestingly, the Member States did not want to be tied down to having to decide in 45 days while they did oblige the multinationals to provide information within 30 days.

If a Member State applies the recognition procedure, they shall provide for appropriate sanctions, including revocation of recognition, in the event of failure to notify the relevant authority (article 11(9) Directive). With quite some experience in administrative sanctions in the field of labour migration law, the Netherlands has a developed administrative sanctioning policy in place, ranging from administrative fines up to € 1,250 in case of neglect to report a (minor) change on time, to the revocation of the recognition. Whether these sanctions pass the proportionality test the future will tell.

Antoons, Ghimis and Sullivan in this volume highlight the benefits of the accredited sponsorship schemes with regard to shorter processing times and less documentation requirements, all very beneficial for business needs. The countries that have the procedure in place are Spain, Slovakia, Italy and The Netherlands. In Spain, companies may request registration in the UGE-CE, which registration is valid for 3 years. Registered companies are exempt from accrediting the stipulated requirements at the time of application, but must be in possession of the supporting documentation should the labour authorities conduct checks to ensure compliance. Like the Dutch system, this recognition creates a high level of private migration control. According to Antoons e.a. France is also considering introducing a similar scheme for accredited sponsors, but it is not yet certain whether ICTs will benefit from it. As discussed by Herzfeld-Olsson in this volume, Sweden has an accredited sponsor program and fast tracking procedure, but decided not to apply it to ICT’s. Germany has implemented a

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18 Council Document 5771/14, Amendment 70.
recognition scheme for universities under Directive 2016/801, but not for multinationals under the scope of the ICT-Directive.\footnote{Par. 2.0.3. of the German ‘Application guidelines of the Federal Ministry of the Interior with regard to the Aew and Ordinance on the Implementation of Residence Directives of European Union on labor migration’ discussed by Mävers in this volume. Also see: https://www.bamf.de/SharedDocs/Anlagen/DE/Downloads/Infothek/Forschung/ListeAnerkennungsverfahren/001-liste-der-anerkennungen_xls.html.} Germany has however, as Mävers explains in this volume, introduced a streamlined and modern (cloud-based) procedure meeting the needs of the companies concerned to have a flexible and fast system in place. Possibly, such a service is more welcoming, if indeed it sufficiently fast tracks the application without the need of prior accreditation of the sponsor, administrative obligations and a control and sanctioning system to be put in place.

6. Future of Welcoming ICTs in the European Union

This chapter addressed the question: How welcoming is the ICT-Directive? Although the Directive clearly adds to the welcoming nature of the EU for receiving multinationals in the EU, the analysis is less positive when it regards the third-country national specialist, manager or trainees’ legal position as a migrant and as an employee. Several suggestions for more empirically informed studies have been done and these must tell us whether this is indeed problematic.

Future research could also investigate the additional rights of third-country nationals transferred into EU Member States by multinational corporations and how third-country national transferees indeed perceive and experience their legal position, as migrants, expats, expat-preneurs, global or corporate citizens. How, when and why do they switch into a national migration status, and when, if ever do they obtain permanent residence or even nationality? Do they ever become part of the EU business elite, and if not, how important is it for the EU or for them never to acquire certain rights, such as, for instance, voting rights? But such research should probably not only consider the multinational and the third-country national worker. The receiving societies’ resilience and preparedness to welcome immigrant business elites, expats and internationals is definitely understudied. The third-country nationals may not be required to ‘integrate’ but to what extent a society, especially cities, can have them live in a parallel universe without clashing with the otherwise restrictive attitudes towards migration is to be investigated further. It is a dilemma touched on by some in this volume which cannot be ignored. With this volume we hope to provide some groundwork for legal practitioners, policy advisors, mobility and expat managers and researchers in welcoming business and talent into the European Union.
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

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) 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 field of immigration which are fair towards third-country nationals.

(2) The TFEU provides that the Union is to 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. To that end, the European Parliament and the Council are to adopt measures on the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, as well as the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States.

(3) The Commission’s Communication of 3 March 2010 entitled ‘Europe 2020: A strategy for smart, sustainable and inclusive growth’ sets the objective of the Union becoming an economy based on knowledge and innovation, reducing the administrative burden on companies and better matching labour supply with demand. Measures to make it easier for third-country managers, specialists and trainee employees to enter the Union in the framework of an intra-corporate transfer have to be seen in that broader context.

(4) The Stockholm Programme, adopted by the European Council on 11 December 2009, recognises that labour immigration can contribute to increased competitiveness and economic vitality and that, in the context of the important demographic challenges that will face the Union in the
future and, consequently, an increased demand for labour, flexible immigration policies will make an important contribution to the Union's economic development and performance in the longer term. The Stockholm Programme thus invites the Commission and the Council to continue implementing the Policy Plan on Legal Migration set out in the Commission's Communication of 21 December 2005.

(5) As a result of the globalisation of business, increasing trade and the growth and spread of multinational groups, in recent years movements of managers, specialists and trainee employees of branches and subsidiaries of multinationals, temporarily relocated for short assignments to other units of the company, have gained momentum.

(6) Such intra-corporate transfers of key personnel result in new skills and knowledge, innovation and enhanced economic opportunities for the host entities, thus advancing the knowledge-based economy in the Union while fostering investment flows across the Union. Intra-corporate transfers from third countries also have the potential to facilitate intra-corporate transfers from the Union to third-country companies and to put the Union in a stronger position in its relationship with international partners. Facilitation of intra-corporate transfers enables multinational groups to tap their human resources best.

(7) The set of rules established by this Directive may also benefit the migrants' countries of origin as this temporary migration may, under its well-established rules, foster transfers of skills, knowledge, technology and know-how.

(8) This Directive should be without prejudice to the principle of preference for Union citizens as regards access to Member States' labour market as expressed in the relevant provisions of the relevant Acts of Accession.

(9) This Directive should be without prejudice to the right of Member States to issue permits other than intra-corporate transferee permits for any purpose of employment if a third-country national does not fall within the scope of this Directive.

(10) This Directive should establish a transparent and simplified procedure for admission of intra-corporate transferees, based on common definitions and harmonised criteria.

(11) Member States should ensure that appropriate checks and effective inspections are carried out in order to guarantee the proper enforcement of this Directive. The fact that an intra-corporate transferee permit has been issued should not affect or prevent the Member States from applying, during the intra-corporate transfer, their labour law provisions having — in accordance with Union law — as their objective checking compliance with the working conditions as set out in Article 18(1).

(12) The possibility for a Member State to impose, on the basis of national law, sanctions against an intra-corporate transferee's employer established in a third country should remain unaffected.
(13) For the purpose of this Directive, intra-corporate transferees should encompass managers, specialists and trainee employees. Their definition should build on specific commitments of the Union under the General Agreement on Trade in Services (GATS) and bilateral trade agreements. Since those commitments undertaken under GATS do not cover conditions of entry, stay and work, this Directive should complement and facilitate the application of those commitments. However, the scope of the intra-corporate transfers covered by this Directive should be broader than that implied by trade commitments, as the transfers do not necessarily take place within the services sector and may originate in a third country which is not party to a trade agreement.

(14) To assess the qualifications of intra-corporate transferees, Member States should make use of the European Qualifications Framework (EQF) for lifelong learning, as appropriate, for the assessment of qualifications in a comparable and transparent manner. EQF National Coordination Points may provide information and guidance on how national qualifications levels relate to the EQF.

(15) Intra-corporate transferees should benefit from at least the same terms and conditions of employment as posted workers whose employer is established on the territory of the Union, as defined by Directive 96/71/EC of the European Parliament and of the Council (4). Member States should require that intra-corporate transferees enjoy equal treatment with nationals occupying comparable positions as regards the remuneration which will be granted during the entire transfer. Each Member State should be responsible for checking the remuneration granted to the intra-corporate transferees during their stay on its territory. That is intended to protect workers and guarantee fair competition between undertakings established in a Member State and those established in a third country, as it ensures that the latter will not be able to benefit from lower labour standards to take any competitive advantage.

(16) In order to ensure that the skills of the intra-corporate transferee are specific to the host entity, the transferee should have been employed within the same group of undertakings from at least three up to twelve uninterrupted months immediately prior to the transfer in the case of managers and specialists, and from at least three up to six uninterrupted months in the case of trainee employees.

(17) As intra-corporate transfers constitute temporary migration, the maximum duration of one transfer to the Union, including mobility between Member States, should not exceed three years for managers and specialists and one year for trainee employees after which they should leave for a third country unless they obtain a residence permit on another basis in accordance with Union or national law. The maximum duration of the transfer should encompass the cumulated durations of consecutively issued intra-corporate transferee permits. A subsequent transfer to the Union might take place after the third-country national has left the territory of the Member States.

(18) In order to ensure the temporary character of an intra-corporate transfer and prevent abuses, Member States should be able to require a certain period of time to elapse between the end of
the maximum duration of one transfer and another application concerning the same third-
country national for the purposes of this Directive in the same Member State.

(19) As intra-corporate transfers consist of temporary secondment, the applicant should provide
evidence, as part of the work contract or the assignment letter, that the third-country national
will be able to transfer back to an entity belonging to the same group and established in a third
country at the end of the assignment. The applicant should also provide evidence that the
third-country national manager or specialist possesses the professional qualifications and
adequate professional experience needed in the host entity to which he or she is to be trans-
ferred.

(20) Third-country nationals who apply to be admitted as trainee employees should provide evi-
dence of a university degree. In addition, they should, if required, present a training agreement,
including a description of the training programme, its duration and the conditions in which
the trainee employees will be supervised, proving that they will benefit from genuine training
and not be used as normal workers.

(21) Unless it conflicts with the principle of preference for Union citizens as expressed in the
relevant provisions of the relevant Acts of Accession, no labour market test should be re-
quired.

(22) A Member State should recognise professional qualifications acquired by a third-country
national in another Member State in the same way as those of Union citizens and should take
into account qualifications acquired in a third country in accordance with Directive
2005/36/EC of the European Parliament and the Council (5). Such recognition should be
without prejudice to any restrictions on access to regulated professions deriving from reserva-
tions to the existing commitments as regards regulated professions made by the Union or by
the Union and its Member States in the framework of trade agreements. In any event, this
Directive should not provide for a more favourable treatment of intra-corporate transferees,
in comparison with Union or European Economic Area nationals, as regards access to regu-
lated professions in a Member State.

(23) This Directive should not affect the right of the Member States to determine the volumes of
admission in accordance with Article 79(5) TFEU.

(24) With a view to fighting possible abuses of this Directive, Member States should be able to
refuse, withdraw or not renew an intra-corporate transferee permit where the host entity was
established for the main purpose of facilitating the entry of intra-corporate transferees and/or
does not have a genuine activity.

(25) This Directive aims to facilitate mobility of intra-corporate transferees within the Union (‘in-
tra-EU mobility’) and to reduce the administrative burden associated with work assignments in
several Member States. For this purpose, this Directive sets up a specific intra-EU mobility
scheme whereby the holder of a valid intra-corporate transferee permit issued by a Member
State is allowed to enter, to stay and to work in one or more Member States in accordance with the provisions governing short-term and long-term mobility under this Directive. Short-term mobility for the purposes of this Directive should cover stays in Member States other than the one that issued the intra-corporate transferee permit, for a period of up to 90 days per Member State. Long-term mobility for the purposes of this Directive should cover stays in Member States other than the one that issued the intra-corporate transferee permit for more than 90 days per Member State. In order to prevent circumvention of the distinction between short-term and long-term mobility, short-term mobility in relation to a given Member State should be limited to a maximum of 90 days in any 180-day period and it should not be possible to submit a notification for short-term mobility and an application for long-term mobility at the same time. Where the need for long-term mobility arises after the short-term mobility of the intra-corporate transferee has started, the second Member State may request that the application be submitted at least 20 days before the end of the short-term mobility period.

(26) While the specific mobility scheme established by this Directive should lay down autonomous rules regarding entry and stay for the purpose of work as an intra-corporate transferee in Member States other than the one that issued the intra-corporate transferee permit, all the other rules governing the movement of persons across borders as laid down in the relevant provisions of the Schengen acquis continue to apply.

(27) In order to facilitate checks, if the transfer involves several locations in different Member States, the competent authorities of second Member States should be provided where applicable with the relevant information.

(28) Where intra-corporate transferees have exercised their right to mobility, the second Member State should, under certain conditions, be in a position to take steps so that the intra-corporate transferees’ activities do not contravene the relevant provisions of this Directive.

(29) Member States should provide for effective, proportionate and dissuasive sanctions, such as financial sanctions, to be imposed in the event of failure to comply with this Directive. Those sanctions could, inter alia, consist of measures as provided for in Article 7 of Directive 2009/52/EC of the European Parliament and of the Council (6). Those sanctions could be imposed on the host entity established in the Member State concerned.

(30) Provision for a single procedure leading to one combined title encompassing both residence and work permit (‘single permit’) should contribute to simplifying the rules currently applicable in Member States.

(31) It should be possible to set up a simplified procedure for entities or groups of undertakings which have been recognised for that purpose. Recognition should be regularly assessed.

(32) Once a Member State has decided to admit a third-country national fulfilling the criteria laid down in this Directive, that third-country national should receive an intra-corporate transferee permit allowing him or her to carry out, under certain conditions, his or her assignment in
diverse entities belonging to the same transnational corporation, including entities located in other Member States.

Where a visa is required and the third-country national fulfils the criteria for being issued with an intra-corporate transferee permit, the Member State should grant the third-country national every facility to obtain the requisite visa and should ensure that the competent authorities effectively cooperate for that purpose.

Where the intra-corporate transferee permit is issued by a Member State not applying the Schengen acquis in full and the intra-corporate transferee, in the framework of intra-EU mobility, crosses an external border within the meaning of Regulation (EC) No 562/2006 of the European Parliament and of the Council (7), a Member State should be entitled to require evidence proving that the intra-corporate transferee is moving to its territory for the purpose of an intra-corporate transfer. Besides, in case of crossing of an external border within the meaning of Regulation (EC) No 562/2006, the Members States applying the Schengen acquis in full should consult the Schengen information system and should refuse entry or object to the mobility for persons for whom an alert for the purposes of refusing entry or stay, as referred to in Regulation (EC) No 1987/2006 of the European Parliament and of the Council (8), has been issued in that system.

Member States should be able to indicate additional information in paper format or store such information in electronic format, as referred to in Article 4 of Council Regulation (EC) No 1030/2002 (9) and point (a)16 of the Annex thereto, in order to provide more precise information on the employment activity during the intra-corporate transfer. The provision of this additional information should be optional for Member States and should not constitute an additional requirement that would compromise the single permit and the single application procedure.

This Directive should not prevent intra-corporate transferees from exercising specific activities at the sites of clients within the Member State where the host entity is established in accordance with the provisions applying in that Member State with regard to such activities.

This Directive does not affect the conditions of the provision of services in the framework of Article 56 TFEU. In particular, this Directive does not affect the terms and conditions of employment which, pursuant to Directive 96/71/EC, apply to workers posted by an undertaking established in a Member State to provide a service in the territory of another Member State. This Directive should not apply to third-country nationals posted by undertakings established in a Member State in the framework of a provision of services in accordance with Directive 96/71/EC. Third-country nationals holding an intra-corporate transferee permit cannot avail themselves of Directive 96/71/EC. This Directive should not give undertakings established in a third country any more favourable treatment than undertakings established in a Member State, in line with Article 1(4) of Directive 96/71/EC.
Adequate social security coverage for intra-corporate transferees, including, where relevant, benefits for their family members, is important for ensuring decent working and living conditions while staying in the Union. Therefore, equal treatment should be granted under national law in respect of those branches of social security listed in Article 3 of Regulation (EC) No 883/2004 of the European Parliament and of the Council. This Directive does not harmonise the social security legislation of Member States. It is limited to applying the principle of equal treatment in the field of social security to the persons falling within its scope. The right to equal treatment in the field of social security applies to third-country nationals who fulfil the objective and non-discriminatory conditions laid down by the law of the Member State where the work is carried out with regard to affiliation and entitlement to social security benefits.

In many Member States, the right to family benefits is conditional upon a certain connection with that Member State since the benefits are designed to support a positive demographic development in order to secure the future workforce in that Member State. Therefore, this Directive should not affect the right of a Member State to restrict, under certain conditions, equal treatment in respect of family benefits, since the intra-corporate transferee and the accompanying family members are staying temporarily in that Member State. Social security rights should be granted without prejudice to provisions of national law and/or bilateral agreements providing for the application of the social security legislation of the country of origin. However, bilateral agreements or national law on social security rights of intra-corporate transferees which are adopted after the entry into force of this Directive should not provide for less favourable treatment than the treatment granted to nationals of the Member State where the work is carried out. As a result of national law or such agreements, it may be, for example, in the interests of the intra-corporate transferees to remain affiliated to the social security system of their country of origin if an interruption of their affiliation would adversely affect their rights or if their affiliation would result in their bearing the costs of double coverage. Member States should always retain the possibility to grant more favourable social security rights to intra-corporate transferees. Nothing in this Directive should affect the right of survivors who derive rights from the intra-corporate transferee to receive survivor's pensions when residing in a third country.

In the event of mobility between Member States, Regulation (EU) No 1231/2010 of the European Parliament and of the Council should apply accordingly. This Directive should not confer more rights than those already provided for in existing Union law in the field of social security for third-country nationals who have cross-border interests between Member States.

In order to make the specific set of rules established by this Directive more attractive and to allow it to produce all the expected benefits for competitiveness of business in the Union, third-country national intra-corporate transferees should be granted favourable conditions for family reunification in the Member State which issued the intra-corporate transferee permit and in those Member States which allow the intra-corporate transferee to stay and work on their territory in accordance with the provisions of this Directive on long-term mobility. This right would indeed remove an important obstacle to potential intra-corporate transferees for accepting an assignment. In order to preserve family unity, family members should be able to
join the intra-corporate transferee in another Member State, and their access to the labour market should be facilitated.

(41) In order to facilitate the fast processing of applications, Member States should give preference to exchanging information and transmitting relevant documents electronically, unless technical difficulties occur or essential interests require otherwise.

(42) The collection and transmission of files and data should be carried out in compliance with the relevant data protection and security rules.

(43) This Directive should not apply to third-country nationals who apply to reside in a Member State as researchers in order to carry out a research project, as they fall within the scope of Council Directive 2005/71/EC (12).

(44) Since the objectives of this Directive, namely a special admission procedure and the adoption of conditions of entry and residence for the purpose of intra-corporate transfers of third-country nationals, cannot be sufficiently achieved by the Member States but can rather, by reason of the scale and effects of the action, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union (TEU). In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(45) This Directive respects the fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union, which itself builds upon the rights deriving from the Social Charters adopted by the Union and by the Council of Europe.

(46) In accordance with the Joint Political Declaration of Member States and the Commission on explanatory documents of 28 September 2011 (13), Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.

(47) In accordance with Articles 1 and 2 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the TEU and to the TFEU, and without prejudice to Article 4 of that Protocol, those Member States are not taking part in the adoption of this Directive, and are not bound by or subject to its application.

(48) In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark annexed to the TEU and the TFEU, Denmark is not taking part in the adoption of this Directive, and is not bound by it or subject to its application.
HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I
GENERAL PROVISIONS

Article 1
Subject-matter

This Directive lays down:

(a) the conditions of entry to, and residence for more than 90 days in, the territory of the Member States, and the rights, of third-country nationals and of their family members in the framework of an intra-corporate transfer;

(b) the conditions of entry and residence, and the rights, of third-country nationals, referred to in point (a), in Member States other than the Member State which first grants the third-country national an intra-corporate transferee permit on the basis of this Directive.

Article 2
Scope

1. This Directive shall apply to third-country nationals who reside outside the territory of the Member States at the time of application and apply to be admitted or who have been admitted to the territory of a Member State under the terms of this Directive, in the framework of an intra-corporate transfer as managers, specialists or trainee employees.

2. This Directive shall not apply to third-country nationals who:

(a) apply to reside in a Member State as researchers, within the meaning of Directive 2005/71/EC, in order to carry out a research project;

(b) under agreements between the Union and its Member States and third countries, enjoy rights of free movement equivalent to those of Union citizens or are employed by an undertaking established in those third countries;

(c) are posted in the framework of Directive 96/71/EC;

(d) carry out activities as self-employed workers;

(e) are assigned by employment agencies, temporary work agencies or any other undertakings engaged in making available labour to work under the supervision and direction of another undertaking;

(f) are admitted as full-time students or who are undergoing a short-term supervised practical training as part of their studies.
3. This Directive shall be without prejudice to the right of Member States to issue residence permits, other than the intra-corporate transferee permit covered by this Directive, for any purpose of employment for third-country nationals who fall outside the scope of this Directive.

**Article 3**

**Definitions**

For the purposes of this Directive, the following definitions apply:

(a) ‘third-country national’ means any person who is not a citizen of the Union, within the meaning of Article 20(1) TFEU;

(b) ‘intra-corporate transfer’ means the temporary secondment for occupational or training purposes of a third-country national who, at the time of application for an intra-corporate transferee permit, resides outside the territory of the Member States, from an undertaking established outside the territory of a Member State, and to which the third-country national is bound by a work contract prior to and during the transfer, to an entity belonging to the undertaking or to the same group of undertakings which is established in that Member State, and, where applicable, the mobility between host entities established in one or several second Member States;

(c) ‘intra-corporate transferee’ means any third-country national who resides outside the territory of the Member States at the time of application for an intra-corporate transferee permit and who is subject to an intra-corporate transfer;

(d) ‘host entity’ means the entity to which the intra-corporate transferee is transferred, regardless of its legal form, established, in accordance with national law, in the territory of a Member State;

(e) ‘manager’ means a person holding a senior position, who primarily directs the management of the host entity, receiving general supervision or guidance principally from the board of directors or shareholders of the business or equivalent; that position shall include: directing the host entity or a department or subdivision of the host entity; supervising and controlling work of the other supervisory, professional or managerial employees; having the authority to recommend hiring, dismissing or other personnel action;

(f) ‘specialist’ means a person working within the group of undertakings possessing specialised knowledge essential to the host entity's areas of activity, techniques or management. In assessing such knowledge, account shall be taken not only of knowledge specific to the host entity, but also of whether the person has a high level of qualification including adequate professional experience referring to a type of work or activity requiring specific technical knowledge, including possible membership of an accredited profession;

(g) ‘trainee employee’ means a person with a university degree who is transferred to a host entity for career development purposes or in order to obtain training in business techniques or methods, and is paid during the transfer;
(h) ‘family members’ means the third-country nationals referred to in Article 4(1) of Council Directive 2003/86/EC (14);

(i) ‘intra-corporate transferee permit’ means an authorisation bearing the acronym ‘ICT’ entitling its holder to reside and work in the territory of the first Member State and, where applicable, of second Member States, under the terms of this Directive;

(j) ‘permit for long-term mobility’ means an authorisation bearing the term ‘mobile ICT’ entitling the holder of an intra-corporate transferee permit to reside and work in the territory of the second Member State under the terms of this Directive;

(k) ‘single application procedure’ means the procedure leading, on the basis of one application for the authorisation for residence and work of a third-country national in the territory of a Member State, to a decision on that application;

(l) ‘group of undertakings’ means two or more undertakings recognised as linked under national law in the following ways: an undertaking, in relation to another undertaking directly or indirectly, holds a majority of that undertaking’s subscribed capital; controls a majority of the votes attached to that undertaking’s issued share capital; is entitled to appoint more than half of the members of that undertaking’s administrative, management or supervisory body; or the undertakings are managed on a unified basis by the parent undertaking;

(m) ‘first Member State’ means the Member State which first issues a third-country national an intra-corporate transferee permit;

(n) ‘second Member State’ means any Member State in which the intra-corporate transferee intends to exercise or exercises the right of mobility within the meaning of this Directive, other than the first Member State;

(o) ‘regulated profession’ means a regulated profession as defined in point (a) of Article 3(1) of Directive 2005/36/EC.

**Article 4**

**More favourable provisions**

1. This Directive shall apply without prejudice to more favourable provisions of:

(a) Union law, including bilateral and multilateral agreements concluded between the Union and its Member States on the one hand and one or more third countries on the other;

(b) bilateral or multilateral agreements concluded between one or more Member States and one or more third countries.
2. This Directive shall not affect the right of Member States to adopt or retain more favourable provisions for third-country nationals to whom it applies in respect of point (h) of Article 3, and Articles 15, 18 and 19.

CHAPTER II
CONDITIONS OF ADMISSION

Article 5
Criteria for admission

1. Without prejudice to Article 11(1), a third-country national who applies to be admitted under the terms of this Directive or the host entity shall:

(a) provide evidence that the host entity and the undertaking established in a third country belong to the same undertaking or group of undertakings;

(b) provide evidence of employment within the same undertaking or group of undertakings, from at least three up to twelve uninterrupted months immediately preceding the date of the intra-corporate transfer in the case of managers and specialists, and from at least three up to six uninterrupted months in the case of trainee employees;

(c) present a work contract and, if necessary, an assignment letter from the employer containing the following:

(i) details of the duration of the transfer and the location of the host entity or entities;

(ii) evidence that the third-country national is taking a position as a manager, specialist or trainee employee in the host entity or entities in the Member State concerned;

(iii) the remuneration as well as other terms and conditions of employment granted during the intra-corporate transfer;

(iv) evidence that the third-country national will be able to transfer back to an entity belonging to that undertaking or group of undertakings and established in a third country at the end of the intra-corporate transfer;

(d) provide evidence that the third-country national has the professional qualifications and experience needed in the host entity to which he or she is to be transferred as manager or specialist or, in the case of a trainee employee, the university degree required;

(e) where applicable, present documentation certifying that the third-country national fulfils the conditions laid down under the national law of the Member State concerned for Union citizens to exercise the regulated profession to which the application relates;

(f) present a valid travel document of the third-country national, as determined by national law, and, if required, an application for a visa or a visa; Member States may require the period of
validity of the travel document to cover at least the period of validity of the intra-corporate transferee permit;

(g) without prejudice to existing bilateral agreements, provide evidence of having, or, if provided for by national law, having applied for, sickness insurance for all the risks normally covered for nationals of the Member State concerned for periods where no such insurance coverage and corresponding entitlement to benefits are provided in connection with, or as a result of, the work carried out in that Member State.

2. Member States may require the applicant to present the documents listed in points (a), (c), (d), (e) and (g) of paragraph 1 in an official language of the Member State concerned.

3. Member States may require the applicant to provide, at the latest at the time of the issue of the intra-corporate transferee permit, the address of the third-country national concerned in the territory of the Member State.

4. Member States shall require that:

(a) all conditions in the law, regulations, or administrative provisions and/or universally applicable collective agreements applicable to posted workers in a similar situation in the relevant occupational branches are met during the intra-corporate transfer with regard to terms and conditions of employment other than remuneration.

In the absence of a system for declaring collective agreements of universal application, Member States may base themselves on collective agreements which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or collective agreements which have been concluded by the most representative employers and employee organisations at national level and which are applied throughout their national territory;

(b) the remuneration granted to the third-country national during the entire intra-corporate transfer is not less favourable than the remuneration granted to nationals of the Member State where the work is carried out occupying comparable positions in accordance with applicable laws or collective agreements or practices in the Member State where the host entity is established.

5. On the basis of the documentation provided pursuant to paragraph 1, Member States may require that the intra-corporate transferee will have sufficient resources during his or her stay to maintain himself or herself and his or her family members without having recourse to the Member States' social assistance systems.

6. In addition to the evidence required under paragraph 1, any third-country national who applies to be admitted as a trainee employee may be required to present a training agreement relating to the preparation for his or her future position within the undertaking or group of undertakings, including a description of the training programme, which demonstrates that the purpose of the stay is to train the trainee employee for career development purposes or in order to obtain training in business techniques or methods, its duration and the conditions under which the trainee employee is supervised during the programme.

7. Any modification during the application procedure that affects the criteria for admission set out in this Article shall be notified by the applicant to the competent authorities of the Member State concerned.

8. Third-country nationals who are considered to pose a threat to public policy, public security or public health shall not be admitted for the purposes of this Directive.
Annex

Article 6

Volumes of admission

This Directive shall not affect the right of a Member State to determine the volumes of admission of third-country nationals in accordance with Article 79(5) TFEU. On that basis, an application for an intra-corporate transferee permit may either be considered inadmissible or be rejected.

Article 7

Grounds for rejection

1. Member States shall reject an application for an intra-corporate transferee permit in any of the following cases:
   (a) where Article 5 is not complied with;
   (b) where the documents presented were fraudulently acquired, or falsified, or tampered with;
   (c) where the host entity was established for the main purpose of facilitating the entry of intra-corporate transferees;
   (d) where the maximum duration of stay as defined in Article 12(1) has been reached.

2. Member States shall, if appropriate, reject an application where the employer or the host entity has been sanctioned in accordance with national law for undeclared work and/or illegal employment.

3. Member States may reject an application for an intra-corporate transferee permit in any of the following cases:
   (a) where the employer or the host entity has failed to meet its legal obligations regarding social security, taxation, labour rights or working conditions;
   (b) where the employer's or the host entity's business is being or has been wound up under national insolvency laws or no economic activity is taking place;
   (c) where the intent or effect of the temporary presence of the intra-corporate transferee is to interfere with, or otherwise affect the outcome of, any labour management dispute or negotiation.

4. Member States may reject an application for an intra-corporate transferee permit on the ground set out in Article 12(2).

5. Without prejudice to paragraph 1, any decision to reject an application shall take account of the specific circumstances of the case and respect the principle of proportionality.

Article 8

Withdrawal or non-renewal of the intra-corporate transferee permit

1. Member States shall withdraw an intra-corporate transferee permit in any of the following cases:
   (a) where it was fraudulently acquired, or falsified, or tampered with;
(b) where the intra-corporate transferee is residing in the Member State concerned for purposes other than those for which he or she was authorised to reside;

(c) where the host entity was established for the main purpose of facilitating the entry of intra-corporate transferees.

2. Member States shall, if appropriate, withdraw an intra-corporate transferee permit where the employer or the host entity has been sanctioned in accordance with national law for undeclared work and/or illegal employment.

3. Member States shall refuse to renew an intra-corporate transferee permit in any of the following cases:

(a) where it was fraudulently acquired, or falsified, or tampered with;

(b) where the intra-corporate transferee is residing in the Member State concerned for purposes other than those for which he or she was authorised to reside;

(c) where the host entity was established for the main purpose of facilitating the entry of intra-corporate transferees;

(d) where the maximum duration of stay as defined in Article 12(1) has been reached.

4. Member States shall, if appropriate, refuse to renew an intra-corporate transferee permit where the employer or the host entity has been sanctioned in accordance with national law for undeclared work and/or illegal employment.

5. Member States may withdraw or refuse to renew an intra-corporate transferee permit in any of the following cases:

(a) where Article 5 is not or is no longer complied with;

(b) where the employer or the host entity has failed to meet its legal obligations regarding social security, taxation, labour rights or working conditions;

(c) where the employer's or the host entity's business is being or has been wound up under national insolvency laws or if no economic activity is taking place;

(d) where the intra-corporate transferee has not complied with the mobility rules set out in Articles 21 and 22.

6. Without prejudice to paragraphs 1 and 3, any decision to withdraw or to refuse to renew an intra-corporate transferee permit shall take account of the specific circumstances of the case and respect the principle of proportionality.

Article 9
Sanctions

1. Member States may hold the host entity responsible for failure to comply with the conditions of admission, stay and mobility laid down in this Directive.
2. The Member State concerned shall provide for sanctions where the host entity is held responsible in accordance with paragraph 1. Those sanctions shall be effective, proportionate and dissuasive.

3. Member States shall provide for measures to prevent possible abuses and to sanction infringements of this Directive. Measures shall include monitoring, assessment and, where appropriate, inspection in accordance with national law or administrative practice.

CHAPTER III
PROCEDURE AND PERMIT

Article 10
Access to information

1. Member States shall make easily accessible to applicants the information on all the documentary evidence needed for an application and information on entry and residence, including the rights, obligations and procedural safeguards, of the intra-corporate transferee and of his or her family members. Member States shall also make easily available information on the procedures applicable to the short-term mobility referred to in Article 21(2) and to the long-term mobility referred to in Article 22(1).

2. The Member States concerned shall make available information to the host entity on the right of Member States to impose sanctions in accordance with Articles 9 and 23.

Article 11
Applications for an intra-corporate transferee permit or a permit for long-term mobility

1. Member States shall determine whether an application is to be submitted by the third-country national or by the host entity. Member States may also decide to allow an application from either of the two.

2. The application for an intra-corporate transferee permit shall be submitted when the third-country national is residing outside the territory of the Member State to which admission is sought.

3. The application for an intra-corporate transferee permit shall be submitted to the authorities of the Member State where the first stay takes place. Where the first stay is not the longest, the application shall be submitted to the authorities of the Member State where the longest overall stay is to take place during the transfer.

4. Member States shall designate the authorities competent to receive the application and to issue the intra-corporate transferee permit or the permit for long-term mobility.

5. The applicant shall be entitled to submit an application in a single application procedure.

6. Simplified procedures relating to the issue of intra-corporate transferee permits, permits for long-term mobility, permits granted to family members of an intra-corporate transferee, and visas may be made available to entities or to undertakings or groups of undertakings that have been recognised for that purpose by Member States in accordance with their national law or administrative practice.

Recognition shall be regularly reassessed.

7. The simplified procedures provided for in paragraph 6 shall at least include:

(a) exempting the applicant from presenting some of the evidence referred to in Article 5 or in point (a) of Article 22(2);
(b) a fast-track admission procedure allowing intra-corporate transferee permits and permits for long-term mobility to be issued within a shorter time than specified in Article 15(1) or in point (b) of Article 22(2); and/or

(c) facilitated and/or accelerated procedures in relation to the issue of the requisite visas.

8. Entities or undertakings or groups of undertakings which have been recognised in accordance with paragraph 6 shall notify to the relevant authority any modification affecting the conditions for recognition without delay and, in any event, within 30 days.

9. Member States shall provide for appropriate sanctions, including revocation of recognition, in the event of failure to notify the relevant authority.

Article 12

Duration of an intra-corporate transfer

1. The maximum duration of the intra-corporate transfer shall be three years for managers and specialists and one year for trainee employees after which they shall leave the territory of the Member States unless they obtain a residence permit on another basis in accordance with Union or national law.

2. Without prejudice to their obligations under international agreements, Member States may require a period of up to six months to elapse between the end of the maximum duration of a transfer referred to in paragraph 1 and another application concerning the same third-country national for the purposes of this Directive in the same Member State.

Article 13

Intra-corporate transferee permit

1. Intra-corporate transferees who fulfil the admission criteria set out in Article 5 and for whom the competent authorities have taken a positive decision shall be issued with an intra-corporate transferee permit.

2. The period of validity of the intra-corporate transferee permit shall be at least one year or the duration of the transfer to the territory of the Member State concerned, whichever is shorter, and may be extended to a maximum of three years for managers and specialists and one year for trainee employees.

3. The intra-corporate transferee permit shall be issued by the competent authorities of the Member State using the uniform format laid down in Regulation (EC) No 1030/2002.

4. Under the heading ‘type of permit’, in accordance with point (a) 6.4 of the Annex to Regulation (EC) No 1030/2002, the Member States shall enter ‘ICT’. Member States may also add an indication in their official language or languages.

5. Member States shall not issue any additional permits, in particular work permits of any kind.

6. Member States may indicate additional information relating to the employment activity during the intra-corporate transfer of the third-country national in paper format, and/or store such data in electronic format as referred to in Article 4 of Regulation (EC) No 1030/2002 and point (a)16 of the Annex thereto.

7. The Member State concerned shall grant third-country nationals whose application for admission has been accepted every facility to obtain the requisite visa.
Annex

Article 14
Modifications affecting the conditions for admission during the stay

Any modification during the stay that affects the conditions for admission set out in Article 5 shall be notified by the applicant to the competent authorities of the Member State concerned.

Article 15
Procedural safeguards

1. The competent authorities of the Member State concerned shall adopt a decision on the application for an intra-corporate transferee permit or a renewal of it and notify the decision to the applicant in writing, in accordance with the notification procedures under national law, as soon as possible but not later than 90 days from the date on which the complete application was submitted.

2. Where the information or documentation supplied in support of the application is incomplete, the competent authorities shall notify the applicant within a reasonable period of the additional information that is required and set a reasonable deadline for providing it. The period referred to in paragraph 1 shall be suspended until the competent authorities have received the additional information required.

3. Reasons for a decision declaring inadmissible or rejecting an application or refusing renewal shall be given to the applicant in writing. Reasons for a decision withdrawing an intra-corporate transferee permit shall be given in writing to the intra-corporate transferee and to the host entity.

4. Any decision declaring inadmissible or rejecting the application, refusing renewal, or withdrawing an intra-corporate transferee permit shall be open to legal challenge in the Member State concerned, in accordance with national law. The written notification shall specify the court or administrative authority with which an appeal may be lodged and the time-limit for lodging the appeal.

5. Within the period referred to in Article 12(1) an applicant shall be allowed to submit an application for renewal before the expiry of the intra-corporate transferee permit. Member States may set a maximum deadline of 90 days prior to the expiry of the intra-corporate transferee permit for submitting an application for renewal.

6. Where the validity of the intra-corporate transferee permit expires during the procedure for renewal, Member States shall allow the intra-corporate transferee to stay on their territory until the competent authorities have taken a decision on the application. In such a case, they may issue, where required under national law, national temporary residence permits or equivalent authorisations.

Article 16
Fees

Member States may require the payment of fees for the handling of applications in accordance with this Directive. The level of such fees shall not be disproportionate or excessive.
CHAPTER IV
RIGHTS

Article 17
Rights on the basis of the intra-corporate transferee permit

During the period of validity of an intra-corporate transferee permit, the holder shall enjoy at least the following rights:

(a) the right to enter and stay in the territory of the first Member State;

(b) free access to the entire territory of the first Member State in accordance with its national law;

(c) the right to exercise the specific employment activity authorised under the permit in accordance with national law in any host entity belonging to the undertaking or the group of undertakings in the first Member State.

The rights referred to in points (a) to (c) of the first paragraph of this Article shall be enjoyed in second Member States in accordance with Article 20.

Article 18
Right to equal treatment

1. Whatever the law applicable to the employment relationship, and without prejudice to point (b) of Article 5(4), intra-corporate transferees admitted under this Directive shall enjoy at least equal treatment with persons covered by Directive 96/71/EC with regard to the terms and conditions of employment in accordance with Article 3 of Directive 96/71/EC in the Member State where the work is carried out.

2. Intra-corporate transferees shall enjoy equal treatment with nationals of the Member State where the work is carried out as regards:

(a) freedom of association and affiliation and membership of an organisation representing workers or employers or of any organisation whose members are engaged in a specific occupation, including the rights and benefits conferred by such organisations, without prejudice to the national provisions on public policy and public security;

(b) recognition of diplomas, certificates and other professional qualifications in accordance with the relevant national procedures;

(c) provisions in national law regarding the branches of social security defined in Article 3 of Regulation (EC) No 883/2004, unless the law of the country of origin applies by virtue of bilateral agreements or the national law of the Member State where the work is carried out, ensuring that the intra-corporate transferee is covered by the social security legislation in one of those countries. In the event of intra-EU mobility, and without prejudice to bilateral agreements ensuring that the intra-corporate transferee is covered by the national law of the country of origin, Regulation (EU) No 1231/2010 shall apply accordingly;
Annex

(d) without prejudice to Regulation (EU) No 1231/2010 and to bilateral agreements, payment of old-age, invalidity and death statutory pensions based on the intra-corporate transferees' previous employment and acquired by intra-corporate transferees moving to a third country, or the survivors of such intra-corporate transferees residing in a third country deriving rights from the intra-corporate transferee, in accordance with the legislation set out in Article 3 of Regulation (EC) No 883/2004, under the same conditions and at the same rates as the nationals of the Member State concerned when they move to a third country;

(e) access to goods and services and the supply of goods and services made available to the public, except procedures for obtaining housing as provided for by national law, without prejudice to freedom of contract in accordance with Union and national law, and services afforded by public employment offices.

The bilateral agreements or national law referred to in this paragraph shall constitute international agreements or Member States' provisions within the meaning of Article 4.

3. Without prejudice to Regulation (EU) No 1231/2010, Member States may decide that point (c) of paragraph 2 with regard to family benefits shall not apply to intra-corporate transferees who have been authorised to reside and work in the territory of a Member State for a period not exceeding nine months.

4. This Article shall be without prejudice to the right of the Member State to withdraw or to refuse to renew the permit in accordance with Article 8.

Article 19

Family members

1. Directive 2003/86/EC shall apply in the first Member State and in second Member States which allow the intra-corporate transferee to stay and work on their territory in accordance with Article 22 of this Directive, subject to the derogations laid down in this Article.

2. By way of derogation from Article 3(1) and Article 8 of Directive 2003/86/EC, family reunification in the Member States shall not be made dependent on the requirement that the holder of the permit issued by those Member States on the basis of this Directive has reasonable prospects of obtaining the right of permanent residence and has a minimum period of residence.

3. By way of derogation from the third subparagraph of Article 4(1) and from Article 7(2) of Directive 2003/86/EC, the integration measures referred to therein may be applied by the Member States only after the persons concerned have been granted family reunification.

4. By way of derogation from the first subparagraph of Article 5(4) of Directive 2003/86/EC, residence permits for family members shall be granted by a Member State, if the conditions for family reunification are fulfilled, within 90 days from the date on which the complete application was submitted. The competent authority of the Member State shall process the residence permit application for the intra-corporate transferee's family members at the same time as the application for the intra-corporate transferee permit or the permit for long-term mobility, in cases where the residence permit application for the intra-corporate transferee's family members is submitted at the same time. The procedural safeguards laid down in Article 15 shall apply accordingly.

5. By way of derogation from Article 13(2) of Directive 2003/86/EC, the duration of validity of the residence permits of family members in a Member State shall, as a general rule, end on the date of expiry of the intra-corporate transferee permit or the permit for long-term mobility issued by that Member State.
6. By way of derogation from Article 14(2) of Directive 2003/86/EC and without prejudice to the principle of preference for Union citizens as expressed in the relevant provisions of the relevant Acts of Accession, the family members of the intra-corporate transferee who have been granted family reunification shall be entitled to have access to employment and self-employed activity in the territory of the Member State which issued the family member residence permit.

CHAPTER V
INTRA-EU MOBILITY

Article 20
Mobility

Third-country nationals who hold a valid intra-corporate transferee permit issued by the first Member State may, on the basis of that permit and a valid travel document and under the conditions laid down in Article 21 and 22 and subject to Article 23, enter, stay and work in one or several second Member States.

Article 21
Short-term mobility

1. Third-country nationals who hold a valid intra-corporate transferee permit issued by the first Member State shall be entitled to stay in any second Member State and work in any other entity, established in the latter and belonging to the same undertaking or group of undertakings, for a period of up to 90 days in any 180-day period per Member State subject to the conditions laid down in this Article.

2. The second Member State may require the host entity in the first Member State to notify the first Member State and the second Member State of the intention of the intra-corporate transferee to work in an entity established in the second Member State.

In such cases, the second Member State shall allow the notification to take place either:

(a) at the time of the application in the first Member State, where the mobility to the second Member State is already envisaged at that stage; or

(b) after the intra-corporate transferee was admitted to the first Member State, as soon as the intended mobility to the second Member State is known.

3. The second Member State may require the notification to include the transmission of the following documents and information:

(a) evidence that the host entity in the second Member State and the undertaking established in a third country belong to the same undertaking or group of undertakings;

(b) the work contract and, if necessary, the assignment letter, which were transmitted to the first Member State in accordance with point (c) of Article 5(1);

(c) where applicable, documentation certifying that the intra-corporate transferee fulfils the conditions laid down under the national law of the Member State concerned for Union citizens to exercise the regulated profession to which the application relates;
(d) a valid travel document, as provided for in point (f) of Article 5(1); and

(e) where not specified in any of the preceding documents, the planned duration and dates of the mobility.

The second Member State may require those documents and that information to be presented in an official language of that Member State.

4. Where the notification has taken place in accordance with point (a) of paragraph 2, and where the second Member State has not raised any objection with the first Member State in accordance with paragraph 6, the mobility of the intra-corporate transferee to the second Member State may take place at any moment within the period of validity of the intra-corporate transferee permit.

5. Where the notification has taken place in accordance with point (b) of paragraph 2, the mobility may be initiated after the notification to the second Member State immediately or at any moment thereafter within the period of validity of the intra-corporate transferee permit.

6. Based on the notification referred to in paragraph 2, the second Member State may object to the mobility of the intra-corporate transferee to its territory within 20 days from having received the notification, where:

(a) the conditions set out in point (b) of Article 5(4) or in point (a), (c) or (d) of paragraph 3 of this Article are not complied with;

(b) the documents presented were fraudulently acquired, or falsified, or tampered with;

(c) the maximum duration of stay as defined in Article 12(1) or in paragraph 1 of this Article has been reached.

The competent authorities of the second Member State shall inform without delay the competent authorities of the first Member State and the host entity in the first Member State about their objection to the mobility.

7. Where the second Member State objects to the mobility in accordance with paragraph 6 of this Article and the mobility has not yet taken place, the intra-corporate transferee shall not be allowed to work in the second Member State as part of the intra-corporate transfer. Where the mobility has already taken place, Article 23(4) and (5) shall apply.

8. Where the intra-corporate transferee permit is renewed by the first Member State within the maximum duration provided for in Article 12(1), the renewed intra-corporate transferee permit shall continue to authorise its holder to work in the second Member State, subject to the maximum duration provided for in paragraph 1 of this Article.

9. Intra-corporate transferees who are considered to pose a threat to public policy, public security or public health shall not be allowed to enter or to stay on the territory of the second Member State.

Article 22

Long-term mobility

1. In relation to third-country nationals who hold a valid intra-corporate transferee permit issued by the first Member State and who intend to stay in any second Member State and work in any other entity, established in the latter and belonging to the same undertaking or group of undertakings, for more than 90 days per Member State, the second Member State may decide to:
(a) apply Article 21 and allow the intra-corporate transferee to stay and work on its territory on the basis of and during the period of validity of the intra-corporate transferee permit issued by the first Member State; or

(b) apply the procedure provided for in paragraphs 2 to 7.

2. Where an application for long-term mobility is submitted:

(a) the second Member State may require the applicant to transmit some or all of the following documents where they are required by the second Member State for an initial application:

(i) evidence that the host entity in the second Member State and the undertaking established in a third country belong to the same undertaking or group of undertakings;

(ii) a work contract and, if necessary, an assignment letter, as provided for in point (c) of Article 5(1);

(iii) where applicable, documentation certifying that the third-country national fulfils the conditions laid down under the national law of the Member State concerned for Union citizens to exercise the regulated profession to which the application relates;

(iv) a valid travel document, as provided for in point (f) of Article 5(1);

(v) evidence of having, or, if provided for by national law, having applied for, sickness insurance, as provided for in point (g) of Article 5(1).

The second Member State may require the applicant to provide, at the latest at the time of issue of the permit for long-term mobility, the address of the intra-corporate transferee concerned in the territory of the second Member State.

The second Member State may require those documents and that information to be presented in an official language of that Member State;

(b) the second Member State shall take a decision on the application for long-term mobility and notify the decision to the applicant in writing as soon as possible but not later than 90 days from the date on which the application and the documents provided for in point (a) were submitted to the competent authorities of the second Member State;

(c) the intra-corporate transferee shall not be required to leave the territories of the Member States in order to submit the application and shall not be subject to a visa requirement;

(d) the intra-corporate transferee shall be allowed to work in the second Member State until a decision on the application for long-term mobility has been taken by the competent authorities, provided that:

(i) the time period referred to in Article 21(1) and the period of validity of the intra-corporate transferee permit issued by the first Member State has not expired; and
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(ii) if the second Member State so requires, the complete application has been submitted to
the second Member State at least 20 days before the long-term mobility of the intra-
corporate transferee starts;

(e) an application for long-term mobility may not be submitted at the same time as a notification
for short-term mobility. Where the need for long-term mobility arises after the short-term
mobility of the intra-corporate transferee has started, the second Member State may request
that the application for long-term mobility be submitted at least 20 days before the short-term
mobility ends.

3. Member States may reject an application for long-term mobility where:
(a) the conditions set out in point (a) of paragraph 2 of this Article are not complied with or the
criteria set out in Article 5(4), Article 5(5) or Article 5(8) are not complied with;

(b) one of the grounds covered by point (b) or (d) of Article 7(1) or by Article 7(2), (3) or (4) ap-
plies; or

(c) the intra-corporate transferee permit expires during the procedure.

4. Where the second Member State takes a positive decision on the application for long-term
mobility as referred to in paragraph 2, the intra-corporate transferee shall be issued with a permit
for long-term mobility allowing the intra-corporate transferee to stay and work in its territory. This
permit shall be issued using the uniform format laid down in Regulation (EC) No 1030/2002.
Under the heading ‘type of permit’, in accordance with point (a)6.4 of the Annex to Regulation
(EC) No 1030/2002, the Member States shall enter: ‘mobile ICT’. Member States may also add an
indication in their official language or languages.
Member States may indicate additional information relating to the employment activity during the
long-term mobility of the intra-corporate transferee in paper format, and/or store such data in
electronic format as referred to in Article 4 of Regulation (EC) No 1030/2002 and point (a)16 of
the Annex thereto.

5. Renewal of a permit for long-term mobility is without prejudice to Article 11(3).
6. The second Member State shall inform the competent authorities in the first Member State
where a permit for long-term mobility is issued.
7. Where a Member State takes a decision on an application for long-term mobility, Article 8,
Article 15(2) to (6) and Article 16 shall apply accordingly.

Article 23

Safeguards and sanctions

1. Where the intra-corporate transferee permit is issued by a Member State not applying the
Schengen acquis in full and the intra-corporate transferee crosses an external border, the second
Member State shall be entitled to require as evidence that the intra-corporate transferee is moving
to the second Member State for the purpose of an intra-corporate transfer:
(a) a copy of the notification sent by the host entity in the first Member State in accordance with
Article 21(2); or
(b) a letter from the host entity in the second Member State that specifies at least the details of the duration of the intra-EU mobility and the location of the host entity or entities in the second Member State.

2. Where the first Member State withdraws the intra-corporate transferee permit, it shall inform the authorities of the second Member State immediately.

3. The host entity of the second Member State shall inform the competent authorities of the second Member State of any modification which affects the conditions on which basis the mobility was allowed to take place.

4. The second Member State may request that the intra-corporate transferee immediately cease all employment activity and leave its territory where:
   (a) it has not been notified in accordance with Article 21(2) and (3) and requires such notification;
   (b) it has objected to the mobility in accordance with Article 21(6);
   (c) it has rejected an application for long-term mobility in accordance with Article 22(3);
   (d) the intra-corporate transferee permit or the permit for long-term mobility is used for purposes other than those for which it was issued;
   (e) the conditions on which the mobility was allowed to take place are no longer fulfilled.

5. In the cases referred to in paragraph 4, the first Member State shall, upon request of the second Member State, allow re-entry of the intra-corporate transferee, and, where applicable, of his or her family members, without formalities and without delay. That shall also apply if the intra-corporate transferee permit issued by the first Member State has expired or has been withdrawn during the period of mobility within the second Member State.

6. Where the holder of an intra-corporate transferee permit crosses the external border of a Member State applying the Schengen acquis in full, that Member State shall consult the Schengen information system. That Member State shall refuse entry or object to the mobility of persons for whom an alert for the purposes of refusing entry and stay has been issued in the Schengen information system.

7. Member States may impose sanctions against the host entity established on its territory in accordance with Article 9, where:
   (a) the host entity has failed to notify the mobility of the intra-corporate transferee in accordance with Article 21(2) and (3);
   (b) the intra-corporate transferee permit or the permit for long-term mobility is used for purposes other than those for which it was issued;
   (c) the application for an intra-corporate transferee permit has been submitted to a Member State other than the one where the longest overall stay takes place;
   (d) the intra-corporate transferee no longer fulfils the criteria and conditions on the basis of which the mobility was allowed to take place and the host entity fails to notify the competent authori-
ties of the second Member State of such a modification;

(e) the intra-corporate transferee started to work in the second Member State, although the conditions for mobility were not fulfilled in case Article 21(5) or point (d) of Article 22(2) applies.

CHAPTER VI
FINAL PROVISIONS

Article 24
Statistics

1. Member States shall communicate to the Commission statistics on the number of intra-corporate transferee permits and permits for long-term mobility issued for the first time, and, where applicable, the notifications received pursuant to Article 21(2) and, as far as possible, on the number of intra-corporate transferees whose permit has been renewed or withdrawn. Those statistics shall be disaggregated by citizenship and by the period of validity of the permit and, as far as possible, by the economic sector and transferee position.

2. The statistics shall relate to reference periods of one calendar year and shall be communicated to the Commission within six months of the end of the reference year. The first reference year shall be 2017.


Article 25
Reporting

Every three years, and for the first time by 29 November 2019, the Commission shall submit a report to the European Parliament and to the Council on the application of this Directive in the Member States and shall propose any amendments necessary. The report shall focus in particular on the assessment of the proper functioning of the intra-EU mobility scheme and on possible misuses of such a scheme as well as its interaction with the Schengen acquis. The Commission shall in particular assess the practical application of Articles 20, 21, 22, 23 and 26.

Article 26
Cooperation between contact points

1. Member States shall appoint contact points which shall cooperate effectively and be responsible for receiving and transmitting the information needed to implement Articles 21, 22 and 23. Member States shall give preference to exchanging of information via electronic means.

2. Each Member State shall inform the other Member States, via the national contact points referred to in paragraph 1, about the designated authorities referred to in Article 11(4) and about the procedure applied to mobility referred to in the Articles 21 and 22.
Article 27
Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 29 November 2016. They shall forthwith communicate the text of those measures to the Commission. When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 28
Entry into force

This Directive shall enter into force on the day following that of its publication in the Official Journal of the European Union.

Article 29
Addressees

This Directive is addressed to the Member States in accordance with the Treaties.

Done at Brussels, 15 May 2014.

For the European Parliament
The President
M. SCHULZ
For the Council
The President
D. KOURKOULAS

(2) OJ C 166, 7.6.2011, p. 59.
Annex


On 29 November 2016 the deadline for the transposition of Directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer expired. This so called ICT Directive regulates the temporary secondment of managers, specialists or trainee employees who are transferred from a company outside the EU to an entity of the same undertaking or group of undertakings inside the EU, while staying on their home country employment contract, and who reside outside the EU at the time of application.

This book highlights the central themes, problem issues and implementation in selected Member States of this ICT Directive.

The contributions to this book are based on lectures presented at a seminar on this Directive, organised in November 2017 by the Centre for Migration Law, Radboud University Nijmegen, together with Tesseltje de Lange of the University of Amsterdam, under the Jean Monnet Centre of Excellence program. These contributions deal with the negotiations and transposition of the Directive, the role employment and social security rights play in the ICT Directive, a comparison with the EU Russia Agreement of 1997 as well as a business perspective and a migrants’ rights perspective. And it discusses the implementation in The Netherlands, Germany, Spain and Sweden.

Paul Minderhoud & Tesseltje de Lange (eds)