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Implementation and Application of the International Legal Framework for Intra-Corporate Transfers in the Netherlands

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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).¹ 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-

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).

5 V. Hatzopoulos, *Regulating services in the European Union* (Oxford: Oxford University Press 2012), p. 3-4.

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-

8 Howe & Owens 2016, p. 7.

9 See in particular Cerna, Hollifield & Hynes 2015, p. 17-18.

10 Tans 2017a, p. 332-333.

11 Howe & Owens (2016), p. 6-7.

12 Cerna, Hollifield & Hynes 2015, p. 26-27 and 31; Tans 2017a, par. 7.5.1.4.

13 Article 3.30d Alien's Decree (AD, Vreemdelingenbesluit 2000). Article 1n Decision Effectuating Employment of Foreigners Act (DEEFA, Besluit Uitvoering Wet Arbeid Vreemdelingen).

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).¹⁵ 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.¹⁶ 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.¹⁷

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.¹⁸ 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.

16 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, OJ L 18/1 (16/12/1996), Article 1(3)b.

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.¹⁹ It is useful to take into account the revised offer of the EU, made during the current WTO Doha Round negotiations.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.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).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

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.

20 WTO, Council for Trade in Services, Communication from the European Communities and their Member States, Conditional Revised Offers, 29 June 2005, TN/S/O/EEC/Rev.1.

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.

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:

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 HSM²⁵ 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

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’.²⁶ 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.²⁷ 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,²⁸ this is a complex addition to the international commitments. Its intention is very clear, as this phrase simply makes it

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 1997.²⁹ 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.

²⁹ 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 texts³⁰ 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.

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 *Ken-nismigrantenregeling*), 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 agenda³¹ listed several ICT issues:

31 See: <http://www.permitsfoundation.com/news/netherlands-intra-corporate-transfer-ict-directive/>. All correspondence between the Permits Foundation and the Ministry of Security and Justice can be found here.

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 take 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.

32 https://www.ind.nl/Documents/Openbaar_register_Arbeid_Regulier_Kennismigranten.pdf.

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.