

# Migration Rights, EU Law and International Trade Agreements

## Revealing Gates for Business in Fortress Europe

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Under the supervision of Elspeth Guild I have written my dissertation in one of the many fields which she specialises in, migration rights derived from EU law and WTO law. In specific, she has created my main research path, moving beyond the realm of international trade law and to investigate in detail the consequences of international trade agreement provisions for the autonomy of states concerning migration and access to the labour market. Both in relation to the chapters I had to write and to various conferences I attended where she acted as discussant, I was always awed by the ease in which she managed to move discussions to a broader view. It invariably left me with new ideas to develop regarding my own research. In this contribution, I will do just that, use one of Elspeth's conclusions and practically apply it. I will focus on one specific example of Elspeth's research interests, access for the economically active to an EU Member State's market.

Essentially, access to the EU Member State's market can be divided into two main systems. First, EU law itself grants access to EU nationals on the basis of the internal market provisions. The second system consists of access rights granted to third-country nationals.<sup>1</sup> Additionally, a third group of beneficiaries may be identified on the basis of agreements with specific third countries which in essence provide similar rights to the nationals of these states as is granted to EU nationals.<sup>2</sup> This group clearly belongs to the first system, as they have comparable access as EU nationals have.

Access for third-country national workers is based on secondary legislation, for instance the Blue Card Directive and the Seasonal Workers Directive.<sup>3</sup> Access for third-country national service providers can be based on specific directives, such as the Intra-Corporate Transferee Directive, and it can be derived from various international

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1 E Guild, 'Questioning Temporary Migration Schemes in the EU', in: S Carrera, A Geddes, E Guild and M Stefan (eds), *Pathways Towards Legal Migration into the EU*, Brussels: CEPS 2017, p. 42; E Guild, 'Intra-Corporate Transferees: Between the Directive and the EU's International Obligations', in: P. Minderhoud & T. de Lange (eds), *The Intra Corporate Transferee Directive. Central Themes, Problem Issues and Implementation in Selected Member States*, Oisterwijk: Wolf Legal Publishers 2018, p. 65.

2 E. Guild, 'Equivocal Claims? Ambivalent Controls?' ,in: E. Guild & S. Mantu (eds), *Constructing and Imagining Labour Migration*, Aldershot: Ashgate Publishing 2011, p. 214.

3 Directive 2009/50/EC on the conditions of entry and residence of non-EU nationals for the purposes of highly-qualified employment; Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers.

agreements signed by the EU.<sup>4</sup> The EU's secondary legislation initiatives are based on the model provided by the General Agreement on Trade in Services (GATS), which in itself also provides access rights for third-country national service providers. The GATS provided the EU with a model system to regulate trade in services, for instance with former Soviet States.<sup>5</sup> More recently, various Free Trade Agreements (FTA) signed by the EU continue to provide access to the EU market for service providers from specific third countries such as Canada and Japan.<sup>6</sup> Interestingly, while much attention is granted to this new generation of FTA, earlier EU agreements already contain rules on movement rights for service providers.

For instance, rights for Intra-Corporate Transferees (ICT) are provided in agreements with Algeria, Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyz Republic, Moldova, Russia, Ukraine, Uzbekistan and Jordan.<sup>7</sup> Elspeth emphasizes that these international agreements, 'though largely ignored by states and to a great extent unknown to lawyers' do have legal consequences. One of the reasons why such agreements are not taken as seriously as for instance the implementation of a specific EU directive, is the fact that these agreements often do not have direct effect, as is clear from case law and as is now added in the agreements themselves as well.<sup>8</sup> Yet, Elspeth explains that in relation to rights for ICT, it is the ICT Directive, which is intended to provide a basic level of access and protection to third-country national ICT, that essentially provides a specific legal argument for those wishing to utilize the just mentioned international agreements. As is the case with other types of secondary legislation addressing (temporary) movement rights for third country nationals in relation to labour or service provision, the ICT Directive specifically provides that it applies 'without prejudice to more favourable provisions of bilateral and multilateral agreements'.<sup>9</sup> As such, it is the secondary legislation that actually ensures the necessity for a Member State to correctly apply the international agreement. If the ICT Directive contains a more onerous provision than an international agreement, this onerous provision should be set aside. This should simply be a matter of *pacta sunt servanda*, yet ignoring the international agreement is no longer a matter for international law only. Due to the ICT Directive EU legislation turns this into a legal obligation based on EU law. The same applies to other directives containing a similar clause.

When we practically apply Elspeth's reasoning to for example the EU – Algeria Agreement, the result is interesting. The ICT Directive provides various conditions in relation to ICT. For instance, the ICT Directive states that evidence must be provided in relation to the prior-employment of the ICT (at least three, up to twelve uninter-

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4 The international trade agreements under discussion here expressly avoid any form of labour mobility; Directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer.

5 Guild 2018, p. 57.

6 The Comprehensive Economic and Trade Agreement between the EU and Canada (CETA) and the EU-Japan Economic Partnership Agreement.

7 Guild 2018, p. 59.

8 S. Tans, *Service Provision and Migration*, Leiden: Brill 2017, p. 260-263; see for instance CETA, Article 30.6.

9 Article 4(1) under b ICT Directive; Guild 2018, p. 66.

ted months immediately preceding the date of the ICT) in the home state by the company relying on the ICT provisions.<sup>10</sup> This simply was not specifically included in the EU – Algeria Agreement, yet, that agreement does provide the condition that ICT is conditional on 12 months prior employment.<sup>11</sup> Demanding proof (ICT Directive) and simply imposing a condition of 12 months prior employment (EU - Algeria) should in my opinion not be seen as more onerous, specifically as the EU – Algeria Agreement also indicates that the ICT should be ‘in accordance with the legislation in force in the host country of establishment’. This last condition nevertheless is included to ensure that measures of the host state applying in a specific service sector, can be imposed on the ICT from Algeria. I am not convinced that such language also applies to the example of demanding proof as required by the ICT Directive.

I find the ICT Directives requirement of 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’ a bit more tricky. It is evident that the EU-Algeria Agreement addresses temporary movement only, as such, the Algerian ICT will no longer have any legal ground based on the international agreement to stay within the host Member State. Yet demanding proof in advance is something quite different.<sup>12</sup> Similarly, the ICT Directive requires ‘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 (...)’.<sup>13</sup> This again may be read in the EU-Algeria Agreement provision dealing with ICT, yet required experienced is not listed there. True, being a manager or a specialist probably means that the required experience will be there in the first place, yet the EU-Algeria Agreement simply speaks, in relation to specialists, of ‘uncommon knowledge essential to the establishment's service, research equipment, techniques or 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’.<sup>14</sup> I am not convinced that an Algerian ICT can be required to provide evidence of experience necessary for the specific activity required in the branch office in the host state. Essentially, uncommon knowledge should in my opinion be sufficient.

What is evident is that since the signing of the first agreements including service mobility related rights (the GATS itself and the aforementioned EU Agreements with former Soviet Union states), the legal language used in secondary EU legislation and modern FTAs is far more detailed, in particular in relation to conditions and evidence.<sup>15</sup> Providing a practical example of the argument made by Elspeth demonstrates that such

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10 ICT Directive Article 5(1)b.

11 EU-Algeria Agreement, Article 33(2).

12 ICT Directive Article 5(1)(c) IV.

13 ICT Directive Article 5(1)(d) IV, emphasis added.

14 EU-Algeria Agreement, Article 33(2)b.

15 On variations in language used in GATS commitment and more modern FTAs, the EU-CARIFORUM Agreement and CETA in specific, see: 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 & M. Stefan (eds), *Pathways Towards Legal Migration into the EU*, Brussels: CEPS 2017, par 16.7; Note that the Ukraine should be exempted from the list above as the EU-Ukraine Agreement as the original agreement was replaced with a modernized version in 2016.

details may become problematic if formulated too stringently. It leads me to one of the main points of this line of Elspeth's research. During a conference held by the author she referred to the oddity of FTAs consistently providing rights for private parties while at the same time such agreements prohibit any possibility to rely on such rights. During another conference she remarked that the implementation of trade agreements should be left to trade, not the home office. It is exactly that which in my opinion is what has happened to more stringently formulated modern counterparts, they are increasingly addressing concerns over immigration and access to the labour market. Yet, that is the sole purpose of trade agreements, business and trade require movement. It is trade agreements that provides gates for such movements and it is up to practitioners to use them and Member States to allow them to be used.