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Analysation of the Intra-Corporate Transfer Directive

I. Introduction

As a result of demographic changes in the EU a decline in employment can be perceived since 2010. This decline was foreseeable, since The European Commission indicated it in its Green Paper, issued in 2004 on an EU approach to managing economic migration. In the Green Paper the Commission expressed the need to review the immigration policy of the EU in a longer term.[1] It outlines, that between 2010 and 2030 at the immigration flow of that time, the number of employed people will fall because of the decline in the EU's working age population. The long-term demographic projections that Eurostat issued in 2005 revealed that migration will be able to counterbalance the decline of the population until 2025, but after that it will not be able to outweigh the decrease.[2]

Considering these facts, it is essential to admit third country people in order to ensure the prosperity of the EU by means of compensating the decreasing level of employment. As the Hague Programme, adopted by the European Commission, stated „Legal migration will play an important role in enhancing the knowledge-based economy in Europe, in advancing economic development, and thus contributing to the implementation of the Lisbon strategy."[3] It is quite important to establish a migration policy that secures a legal status and guarantees a set of rights for the labour migrants. Additionally, in case of a lack of a common criteria for the admission of economic migrants, third country citizens are likely to enter the EU illegally.[4]

[1] European Commission: Green paper on an EU approach to managing migration, COM/2004/0811, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52004DC0811 (2018. 11. 22.)
[2] Policy Plan on Legal Migration MEMO/05/494
[3] European Council: The Hauge Programme: Strengthening Freedom, Security, an Justice in the European Union (2005/C 53/01) https://www.easo.europa.eu/sites/default/files/public/The-Hague-Programme.pdf (2018. 11. 22.)
[4] COM/2004/0811

II. The aims of the directive

II.1. The importance of the directive

In order to perceive the significance of the directive, first of all we have to define who intra-corporate transferees are. Intra-Corporate Transferees are those highly skilled third-country nationals who are employed by a multinational corporation and are temporarily sent to another country – within the company structure – to perform their jobs there. The sending company is usually the mother company that is located in a third country and the employees are transferred to a subsidiary which can be found in the EU.[5] The temporary relocation of managers, specialists, trainee employees has become more and more recent due to the globalisation of business and increasing trade. It is an outstanding opportunity of gaining knowledge and new skills both for the host entities and the transferred person. Over the past few years, intra-corporate transfer has become more frequent however the sending companies bumped into many administrative obstacles. The complexity of work permit requirements, the lack of clear schemes but also the flow of intra EU workforce made it difficult to transfer third-county workforce into the EU. Further difficulties were occurring in securing family reunification as well.[6] The directive set up many provisions in order to eliminate these drawbacks of intra-corporate transfer.

II.2. Comprehensive aims

This section aims to summarize the aims of the directive according to its preamble although the aims are going to be explained in detail in the following chapters. In pursuance of the preamble of the ICTD its aims are complex. It includes the reduction of administrative burden on companies and taking measures to facilitate the employees' entry into the area of the EU through a framework of an intra-corporate transfer. Moreover, the directive wishes to facilitate the intra-EU movement of ICTs during their transfer. They are exempt from Schengen visa obligations during their stay and they are

[5] *Paul Minderhoud – Tesseltje de Lange*: The Intra Corporate Transfer Directive: Central themes, problem issues and implementation in selected Member States. Wolf Legal Publishing, Oisterwijk 2018. p. 1. https://www.researchgate.net/profile/Tesseltje_De_Lange/publication/327542574_The_Intra_Corporate_Transferee_Directive_Central_Themes_Problem_Issues_and_Implementation_in_Selected_Member_States/links/5b950522299bf147392fe925/The-Intra-Corporate-Transferee-Directive-Central-Themes-Problem-Issues-and-Implementation-in-Selected-Member-States.pdf (2018. 11. 25.)

[6] *Minderhoud – de Lange* (op. cit.). p. 1.

entitled to to enter stay and work in a Member State that differs from the one that issued the ICT permit without having to apply for another work permit.[7]

The most significant aim of the directive from the transferees' point of view is ensuring them and their family a wide set of rights. Family reunification is also a priority of the directive and generally the legal migration policy of the EU in order to make the Directive more attractive. In accordance with this purpose, favourable rights are set forth regarding family members. These supplemental goals of the directive are part of the main aim which is expressed in the impact assessment accompanying the proposal of the Directive. The main purpose is to boost the economic competitiveness of the EU and to achieve the Goals of EU 2020 strategy.

III. The directive's scope and conditions

III.1. To whom can it be applied?

The directive filled a gap in the legislative instruments of the EU since ICTs were excluded from all the other EU directives on third-country migrant workers. The Directive has a specific scope since it is applicable solely to highly-skilled third-country nationals who are temporarily assigned by a company to subsidiaries located in the EU. The definition of "intra-corporate transfer" outlines that the employee has to be bound by a work contract with the sending company located outside the EU prior to and during the transfer. The scope of the directive is restricted to managers, specialists and trainee employees. These definitions are given in Article 3 but also Recital 13 sets out that they should be built on the specific commitments of the EU under the GATS[8] and bilateral trade agreements. The directive lists six type of third-county nationals that are excluded from the scope of the directive: researchers[9], TCNs who enjoy the right of free movement

[7] *Matthias Lommers – Sanne Oehlers*: ICT Permit Study, Facilitating EU mobility for third-country nationals. https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-ict-permit-study.pdf?fbclid=IwAR1aEaR4ePQn6F3RABHCwCVSA-mIrW9lHc_qQQv0MPcuZREOO8n9l73Xdxw (2018. 11. 25.)

[8] General Agreement on Trade in Services

[9] ICTD Article 2(2)(a)

under an agreement[10], posted workers[11], self-employed workers[12], TCNs who are assigned by agencies[13] and students[14].

[10] ICTD Article 2(2)(b)
[11] ICTD Article 2(2)(c)
[12] ICTD Article 2(2)(d)
[13] ICTD Article 2(2)(e)
[14] ICTD Article 2(2)(f)

III.2. Under which conditions can it be applied?

Article 5 of ICTD governs the conditions of the admission of intra-corporate transferees. The requirements – aside from those explained in the frames of the scope of the Directive – are hereunder briefly set out: proof of an immediate preceding employment with the undertaking outside the EU[15], proof of the sending entity and the host entity belonging to the same undertaking/group of undertakings[16], proof of professional qualifications and experience[17], proof of the details of the assignment in particular some conditions[18], proof of valid travel document and if required a visa and a sickness insurance if required.[19]

However, the duration of the preceding employment depends on the decision in each Member State, it is limited. The limit is from three up to twelve uninterrupted months in case of managers and specialist while a three to six months uninterrupted period is required regarding trainee employees.[20]The purpose of this criteria is to ensure that the skills of the intra-corporate transferee are specific to the host entity.[21]

Belonging to the same undertaking follows from the nature of intra-corporate transfer. Regarding the fact that the conditions of the employment have a great importance in the implementation of the Directive, information such as the duration of the transfer, the remuneration, the location of the host entity and the return to the third country of the transferee has to be ensured in written form in the work contract.[22] Additionally, proof that the transferee has a health insurance in the concerned Member State, but if not so the application has already been serviced, is required.

Article 5 4(a) stipulates that the conditions, laid down in the legislative instruments of the host State, which are applicable to posted workers such as instruments concerning maximum work periods and minimum rest periods, minimum number of paid annual holidays, minimum rates of pay should be met during the transfer.[23] As mentioned above, remuneration is exempt from the provisions applicable to posted workers, since ICTs shall be granted a remuneration that is not less favourable than the one granted to

[15] ICTD Article 5 (1)(a)
[16] ICTD Article 5 (1)(b)
[17] ICTD Article 5 (1)(d)
[18] ICTD Article 5(1)(c)
[19] Lommers- Oehlers (op. cit.)
[20] ICTD Article 5 (1)(b)
[21] ICTD Recital (16)
[22] *Elspeth Guild*: Intra-corporate Transferees: Between the Directive and the EU's international obligations. In: *Minderhoud – de Lange* (op. cit.). p. 38.
[23] Directive 96/71/EC Article 3(1)

nationals occupying comparable position in the Member State where the work is carried out.[24]

The provisions of Article 5(4)(a) and (b) are just obligation towards Member States to examine these conditions while considering a request for admission. However, these rights are not guaranteed as individual rights. On the other hand rights laid down in Article 18 are considered as individual rights.[25]

IV. Transparent and simplified procedure for admission

The following section intends to outline the main features of the application procedure, the permit and the procedural safeguards of the Directive while highlighting the potential issues regarding a few provisions.

IV.1. Questions connected to the application procedure

One of the aims of the Directive is to establish a simplified and transparent admission procedure for ICTs. In the frame of the procedure, Member States can decide whether they require the host entity or the transferee to submit the application for the permit. The Directive prescribes that the application has to be submitted when the applicant resides outside of the territory of the Member State to which the admission is sought. In case of an ICT permit the application has to be submitted at a stage when the transferee is still residing outside the territory of the EU. In case of a long-term mobility the application can be submitted from the territory of the EU but from outside the territory of the Member State to which the long-term admission is sought[26] and it can also be submitted from the territory of the second Member State if the applicant is already staying there.[27] Furthermore, the ICT permit has to be submitted to the authority of the Member State in which the transferee stays in the first place, unless it is not the one where the longest overall stay should occur.[28]

Regarding the purpose of the directive, the Member State issuing the ICT permit qualifies as the first Member State even in the case where the transferee commences its

[24] ICTD Article 5(4)(b)
[25] *Herwig Verschueren*: The Role of Employment and Social Security Rights in the Intra-Corporate TransferDirective. In: *Minderhoud – de Lange* (op. cit.). p. 40.
[26] ICTD Article 22 (2)(c)
[27] ICTD Article 22 (2)(e)
[28] ICTD Article 11 (3)

work in another Member State (the second Member State for the purpose of the Directive) to which the transferees entitled to due to their intra-EU mobility rights.[29] It is also a significant provision of the Directive that the applicant is entitled to lodge an application in a single application procedure.[30]

There is an option for Member States while transposing the Directive to introduce simplified procedures to entities or (group of) undertakings that have been recognized for that purpose by the Member States according to their regulations. The simplification can manifest in an ease of the presentation of some evidence required[31], or in a faster admission procedure and issue of ICT permits or long-term mobility permits as well as in a facilitated visa require procedure.

IV.2. Duration and the renewability of the permit

The upper limit of the duration of the transfer is three years for managers and specialists and one year for trainee employees.[32] Once the duration expired, the transferee is obliged to leave the territory of the EU except for the case if they obtain a residence permit on an other basis under EU or national law. A lower limit has not been set up for the duration of the permit, however it should not be forgotten that the Directive is applicable for stays of more than 90 days.[33] While Member States are empowered to establish a more favourable framework than laid down in the Directive, the minimum length is binding.[34] Member States can decide if they require a maximum of 6 months period to elapse between the end of the maximum duration of a transfer and another application submitted by the same third-country national to the same Member State.[35] These provisions intend to ensure the temporary nature of such assignments of ICTs. The transposition of this provision varies. Some countries decided for the longest period applicable (for example Germany, the Netherlands) while others chose a shorter period of time to be elapsed (Austria, Italy).

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[29] *Fabian Lutz*: Transposition of the ICT Directive 2014/66/EU: Perspective of the Commission. In: *Minderhoud – de Lange* (op. cit.). p. 24.
[30] ICTD Article 11(5)
[31] In Article 5, or in point (a) of Article (22)
[32] ICTD Article 12(1)
[33] ICTD Article 1(a)
[34] *Ferran Camas Roda*: Light and Dark Aspects of the Legal Framework of Intra-Corporate Transfers in Spain. In: *Minderhoud – de Lange* (op. cit.). p. 130.
[35] ICTD Article 12(2)

Another key feature of ICT Directive is that Member States are precluded from introducing other permits, particularly work permit. Indeed, except for the case of the Blue Card Directive, this scheme replaces any existing national schemes, which is essential for the harmonization of the intra-corporate transfers.[36]

IV.3. Procedural safeguards

Article 15(1) stipulates that the competent authorities of the concerned Member State shall decide on the application for an ICT permit or its renewal and notify the applicant in writing as soon as possible. The notifying period cannot exceed 90 days from the date the application was submitted.

The restricted length of the decision on the ICT permit application is a crucial factor regarding the efficiency of the Directive. Multinational companies operate in a highly dynamic environment therefore it is inevitable to react to their needs fast. Most of the national regulations are compliant with this requirement, for instance according to the transposition it takes a maximum of 8 weeks in Austria, 13 weeks in Bulgaria and 30 days in Croatia for the authorities to decide on the ICT permit application. Usually the decision is made in 90 days but obtaining the actual work and residence permit often exceeds this period. Moreover, exceeding the 90 days issuing period can be problematic since ICTs are not entitled to enjoy their intra-EU mobility rights without their permit, they can only rely on their passport or visa which means that they can not travel a longer period than 90 days within the Schengen area.[37] The so-called "accredited sponsorship" scheme can be beneficial to companies since they are eligible to a fast-track admission procedure, the applicant can be exempted from presenting some evidence required and a facilitated visa require procedure.[38] The application of this scheme is not obligatory, it is only optional therefore only few countries are applying it additionally.

[36] *Lucia Brieskova*: Rights, Mobility and Integration of Intra-corporate Transferees in Europe: The Case of Slovakia and England. Oxford 2017. p. 105.
[37] *Antoons – Ghimis – Sullivan*: The Intra-Corporate Transfer Permit and Mobility in the European Union: The Business Perspective Jo Antoons, Andreia Ghimis & Christine Sullivan. In: *Minderhoud – de Lange* (op. cit.). p. 78.
[38] ICTD Article 11(7)

V. Intra-EU mobility

V.1. A unique regime

One of the essential features of the ICT Directive is the possibility it offers to the ICT and in terms of mobility within the EU. The directive aims at facilitating the mobility of ICTs within the Union and at reducing the administrative burden connected to work assignments in several Member States. For this purpose, this directive sets up a specific intra-EU mobility scheme.[39] Under Article 20 third-country nationals who are in possession of a valid intra-corporate transfer permit, issued by the First Member State and a valid travel document, are allowed to enter, stay and work in one or more Member States under the conditions of short-term[40] or long-term[41] mobility.

The intra-EU mobility provisions of the Directive will lead to a significant and unique development in comparison with national systems which do not enable for transferees to work in subsidiaries established in other Member State. By introducing the ICTD this became possible on the basis of the first residence permit and of an additional document listing the entities of the group undertakings in which the transferee is entitled to work.[42] Since free mobility within the EU is a privilege of EU nationals and third-country nationals are required a five year long permanent residence in order to enjoy such rights, this scheme qualifies as a remarkable development.[43] Following from the abovementioned restricted opportunities for intra-EU mobility, it become obvious during negotiations within the Council that a new autonomous regulation has to be adopted in order to fit the needs of ICTs.[44]

V.2. Short-term mobility

Under the rules of short-term mobility, ICTs, holding a valid ICT permit, issued by the first Member State, are entitled to stay in any second Member State and work for their company's subsidiary for a period not succeeding 90 days in any 180-day period per Member State, if the transferee meets the conditions laid down.[45] Under Article 21 of the

[39] *Verschueren* (op. cit.). p. 42.
[40] ICTD Article 21
[41] ICTD Article 22
[42] *Ágnes Töttős*: Negotiations in the Council. In: *Minderhoud – de Lange* (op. cit.). p. 13.
[43] *Brieskova*: Rights, Mobility… p. 105.
[44] *Töttős* (op. cit.) p. 14.
[45] ICTD Article 21(1)

Directive there are two possibilities for implementing mobility provisions: the mobility can happen under a "no procedure" requirement or under a 'notification procedure'. The second Member State can require the host entity of the first MS to notify the authorities of the first and second MS of the mobility. The second may require the notification to include the transmission of certain, which were transmitted to the first MS in accordance with Article 5(1)(c). The second Member State may object to the move of the ICT 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. If the second Member State objects and the mobility has not started yet, the ICT can be prohibited to work in the second Member State. However, if the mobility has started, in certain circumstances the ICT can be requested to seize work and leave the territory. Article 5(4)(b) obliges the Member States to require that the remuneration granted to the third-country nationals during the entire transfer is not less favourable than the remuneration granted to nationals of the Member State where the work is carried out occupying comparable positions.

V.3. Long-term mobility

Member States have two options to choose from while implementing the procedure for long- term mobility: they can apply the same procedures as for the short- term mobility, or a specific procedure for long-term mobility – application for long-term mobility permit submitted to the second Member State.[46] If the second Member State opts for a application procedure of long-term mobility, Article 22(2) allows that second Member State to require the applicant to submit a work contract and, if necessary, an assignment letter, as provided for by Article 5(1)(c) as well as evidence of having, or 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 the criteria of the employment conditions, the remuneration as well as the sufficient income requirements of the ICTs as are not met (Article 22(3)(a)). Decision on the application will be made within 90 days and the ICT can stay and work there, under certain conditions, until the decision is made, without being subject to visa.[47]If the Member Stat takes a positive decision on the application, it issues a permit for long-term mobility.

[46] ICTD Article 22(1)
[47] *Brieskova*: Rights, Mobility… p. 107.

Application for long-term mobility and for short term mobility can not be lodged in line.[48] The aim of this provision of ICTD is to prevent the circumvention of the distinction between short and long-term mobility.[49] In case of a positive decision, a permit for long-term mobility is issued that allows transferees to stay and work in the second Member State.

VI. Set of rights provided by ICTD

VI.1. Right to equal treatment

Under Recital 15 of ICTD ICTs should benefit from at least the same terms and conditions of employment as posted workers –unless the remuneration- such as maximum work periods or safety at work. It means that these conditions will be determined by the laws of the country of origin.[50] Member States should require that ICTs 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 ICTs during their stay on its territory. The aim of these provisions is to protect workers and guarantee fair competition between undertakings established in a Member State and those established in a third country. It ensures that companies established in a third-country will not be able to benefit from lower labour standards. Remuneration, employment conditions and sickness coverage play a significant role in the implementation of the criteria for admission, since once these conditions are not met, it can be ground for refusal, withdrawal or non-renewal of an ICT permit. However, these provisions do not qualify as individual rights, they only oblige the Member States.

Article 18 grants individual rights to ICTs, moreover, under Article 4 of the ICT Directive Member States are not prohibited to introduce in their national legislation more rights than the rights the transferee can draw directly from the equal treatment provisions in Article 18. It has to be mentioned that the remuneration appears in Article 5 (Criteria for Admission), instead of Article 18 (Right to Equal Treatment). That means that ICTs

[48] ICTD Article 22 2(e)

[50] *Lucia Brieskova*: The new Directive on intra-corporate transferees: Will it enhance protection of third-country nationals and ensure EU competitiveness? http://eulawanalysis.blogspot.com/2014/11/the-new-directive-on-intra-corporate.html (2018. 11. 25.)

are given equal treatment with EU nationals regarding salary by putting this as an admission criterion but not an individual right as the other working conditions. [51]

Besides remuneration, another important segment of equal treatment between ICTs and nationals concerns the branches of social security in particular benefits related to sickness, invalidity and old-age.[52] According to Recital (38) adequate social security coverage for ICTs and benefits for family members is important for ensuring proper working and living conditions therefore equal treatment should be granted under national law. Also, Member States can also decide not to grant family benefits to ICTs who stay less than 9 months in the EU.

Article 18 (2)(a) and (b) of the ICTD also establish a list of rights for ICTs regarding freedom of affiliation to a trade union, recognition of diplomas, and access to public goods and services, except housing.

VI.2. Provisions concerning family reunification

Significant provisions are introduced in the ICTD regarding the rights of family members of ICTs. The purpose of it was to remove an important obstacle to accept an assignment in the EU, meaning that the family members of ICTs will be able to accompany the ICTs at the start of their assignment, if they apply at the same time. Moreover, the labour market is accessible also for the family members of ICTs. ICTs' family members unlike EU nationals' family members, need a permit in order to accompany the ICTs. ICTs, similarly to Blue Card holders, enjoy some favourable conditions for family reunification. Its aim is to facilitate intra-corporate transfers to the EU, and thus contribute to the EU's economic competitiveness. Family reunification is an outstanding area of the Directive. ICTs' and their families' right to family reunification is covered by the Family Reunification Directive[53], subject to the derogations from it governed in the ICTD.[54]

There are several favourable conditions regarding family reunification. Firstly, ICTs do not need to have a reasonable prospect of obtaining the right to permanent residence and have a minimum period of residence to be able to bring family with them. Secondly, the integration measures referred to in the Family Reunification Directive, for

[51] *Brieskova*: Rights, Mobility… p. 111.

[53] Council Directive 2003/86/EC of 22 September 2003 on the Rigths to Family Reunification
[54] *Brieskova*: Rights, Mobility… p. 113.

example the language and civic tests (or courses) can be applied by the first Member State only after the family reunification was granted.

Thirdly, the first Member State must grant residence permits to family members within three months, however under the Family Reunification Directive it takes nine months and six months under the Blue Card Directive, from the date of the application. Lastly, spouses enjoy immediate access to labour market in the host Member State.

As it can be seen numerous favourable provisions are set up regarding the rights of family members in order to make the ICT more attractive to the potential transferees.[55]

VII. Assessment, potential issues of the Directive:

By creating this new EU immigration scheme, the ICT Directive brings more certainty for economic actors. A quite positive development is that now all EU countries will have an ICT permit, whereas before the Directive only 14 Member States had such a permit. This makes the EU more transparent and predictable for companies regarding immigration. Moreover, the ICT permit increases efficiency, as it creates a combined work and residence permit. The duration of the application procedure has 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 the 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.[56]

According to some opinion, the Intra-Corporate Transfer Directive is beyond any doubt a unique and valuable piece of legislation in the European migration landscape that contributes to a major change in the EU's and Member States' economic migration policies. This Directive can prove how important is to establish EU-wide schemes and their added value compared to purely national ones. As a consequence, the ICT Directive could result I a huge change to the entire European labour migration policy. According to others, who present a more negative appoint of view for example Lörges in his commention[57] on the Directive: "Due to its restricted scope, the overall impact of this

[55] *Brieskova*: Rights, Mobility… p. 114.
[56] *Antoons – Ghimis – Sullivan* (op. cit.) p. 83.
[57] *H. Lörges*: Intra-Corporate Transfer Directive 2014/66/EU ICT Directive. In: *K. Hail – Bronner – D. Thym*: EU Immigration and Asylum Law – A Commentary. 2nd edition. C.H. Beck, Hart, Nomos, München 2016.

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."

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. It also appears that in many cases Member States did not opt for the less burdensome options available in the Directive. Only a limited number of Member States used the option to set up simplified procedures for entities or groups of undertakings.

Most Member States opted for requiring a cooling off period. 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 period.

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 more.[58]

[58] *Lutz* (op. cit.) p. 33.