

# The Intra Corporate Transferee Directive

Central Themes, Problem Issues and  
Implementation in Selected  
Member States

*Paul Minderhoud & Tesselde Lange (eds)*

# INTRA CORPORATE TRANSFEREE DIRECTIVE



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# Introduction

*Paul Minderhoud & Tesselje 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 10<sup>th</sup> 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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\* Paul Minderhoud is associate professor at the Centre for Migration Law of the Radboud University Nijmegen; Tesselje de Lange is senior researcher on topics related to international economic migration and assistant professor in comparative administrative and migration law at the University of Amsterdam. T.delange@uva.nl.

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.

*Hermig 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 Camas 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.

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)*

