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The Intra-Corporate Transferees Directive: time to break the deadlock

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BACKGROUND

The proposal for a directive on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer (ICTs Directive) was published by the European Commission in July 2010. Perceived, at least initially, as an uncontroversial directive, it has nevertheless been treated with reluctance and caution, as we head into the final phase of the negotiating process. Can a decent Commission proposal be turned into a piece of legislation that is of added value for the EU in tough economic times?

Intra-corporate transferees (referred to in this paper as 'transferees') are persons who provide services from one entity of a multinational company (MNC) to another entity of the same MNC in a different country. Due to international commitments under Mode 4 of the General Agreement on Trade of Services (GATS), transferees are – and have been – moving to the EU since GATS came into force in 1995. Mode 4 covers the supply of services through natural persons, including transferees. For the purposes of this directive, the term refers to the transfer of third-country national employees who are trainees, managers and specialists: all of which are highly-skilled profiles.

According to the International Migration Outlook 2011 published by the OECD (Organisation for Economic Cooperation and Development), intra-corporate transfers do not comprise a large proportion of general immigration statistics. Consider the numbers of ICT permits issued in 2009: Luxembourg and the UK are the biggest recipients relative to their population size, receiving 420 and 29,070 respectively. Conversely, the EU's largest country and economic powerhouse, Germany, only received 4,430 in 2009. In 2012, Germany welcomed 6,634, out of a total of 501,000 immigrants arriving in the first half of 2012. These transfers came through MNCs such as Robert Bosch, BASF and IBM. For the purposes of this directive, the numbers in question are even smaller, given that the UK will not be opting in to the ICTs directive.

The EU's need for highly-skilled workers was acknowledged in its 2005 Policy Plan on Legal Migration. Its sectoral approach to legal migration policy resulted in the adoption of the Blue Card (Highly Skilled Workers Directive) in June 2009 and the adoption of the EU Single Permit in December 2011. The remaining legislative proposals currently on the table are the Seasonal Workers Directive and the ICTs Directive. The latter is also geared towards helping the EU reach the goals of its Europe 2020 strategy: the EU's 10-year growth strategy that aims to make growth more smart, sustainable and inclusive.

Companies' need for highly-skilled workers as outlined by the Commission is driven by their desire to hire the best talent from around the world to perform specialist roles in order to provide the highest quality services to customers. No matter how much simpler the process of transferring their third-country national employees becomes, if companies can find this expertise within the EU, they will not look further afield.

When operating in an interconnected global economy, and with a strong multinational presence in Europe, businesses would benefit from a quick and clear process in order to transfer their employees to the EU. They currently face complex and divergent laws and regulations at national level. This complexity of procedures also makes Europe a less attractive

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destination to a would-be transferee, due to the time delays and administrative burden involved.

To meet goals and demands in this regard, the Commission proposal called for "transparent and harmonised conditions of admission of this category of workers, by creating more attractive conditions of temporary stay for transferees and their family, and by promoting efficient allocation and reallocation of transferees between EU entities".

STATE OF PLAY

Delays to the start of the final stage of inter-institutional 'trialogue' negotiations can be put down to the European Parliament (EP) rapporteur being engaged in elections in Italy, and the Cyprus EU Presidency having prioritised asylum policy, bearing in mind the end-2012 deadline for the Common European Asylum System (CEAS).

In addition to such obstacles, a reluctance to move forward has been present on both institutional sides. The EP – and in particular the Socialists and Democrats (S&D) Group – wants to link these negotiations with those on the Seasonal Workers Directive. By doing this, they hope to attain leverage for their position on equal treatment in both. On the Council side, the Irish EU Presidency was dealt a tough negotiating hand given the prevailing mistrust amongst member states, which has coloured the Council position on the issues highlighted below.

Scope

Much inter-institutional agreement can be found in the scope of the ICTs Directive, but serious questions have been raised by the EP with regard to the Council's amendment in Article 2.3. This provision states that member states have the right to "issue residence permits other than the intra-corporate transferee permit […] for any purpose of employment for third country nationals who fall outside the scope of this Directive or do not apply for admission under this Directive or do not meet the criteria set out in this Directive".

The concern raised here is that the ICTs Directive will simply create a parallel system to those already in place at member state level. However, the Council intends to use this to keep the door open to people who are not managers, specialists or graduate trainees of MNCs (after all, not all international businesses deal solely with highly-skilled employees).

A compromise solution from the Presidency, leaving member states only the right to issue residence permits for people who do not meet the criteria, was seen as a step forward by the EP. Given that this legislation is taking the form of a directive and not a regulation, the Council appears to be intent on maintaining flexibility on this matter. Its position is legally sound, but could be problematic for implementation and catastrophic for harmonisation.

This is important, because a scope even broader than this can be found in the Blue Card Directive, where preliminary results show that while Germany modelled its legislation to fit the Blue Card Directive and issued over 4,000 such permits in the second semester of 2012, the Netherlands for instance has continued to issue national residence permits.

Conditions

Further flexibility is granted to member states regarding the conditions for admission. 'May' clauses are liberally spread throughout the articles proposed by the Council. These include conditions where member states may require the transferee to be self-sufficient and capable of supporting his/her family and providing an address in the member state concerned, and that the costs of returning the ICT in the event of an illegal stay are covered by the host entity.

Harmonised conditions of admission cannot be said to have been achieved yet. Hopefully the EP can effectively negotiate with the Council on this count, where appropriate. As things stand, the added value may be undermined if conditions are not harmonised further by changing some of the 'may' clauses to 'shall' clauses.

Family benefits

Regarding family benefits, the Council is ruling out those that are covered under Article 3 of Regulation (EC) 883/04 (coordination of social security systems), unless bilateral agreements between EU member states state otherwise.

The Council justifies this by citing the temporary nature of transferees as opposed to the long-term nature of benefits that are related to supporting demographic trends. The legality of this is questionable, given that it could create double standards on mobility rights, bearing in mind Regulation (EU) 1231/2010, where legally residing third-country nationals and their family members should have the full rights of Regulation 883/04 accorded to them if not already covered.

This may prove to be a tough battle with the EP's Employment and Social Affairs (EMPL) committee, responsible for considering this. Although the Commission foresaw the potential to go beyond the Family Reunification Directive, nothing of the sort is on offer.

Beyond posted workers on rights

The greatest concerns regarding equal treatment in the eyes of the EP, particularly in the eyes of the EMPL committee, are related to the terms and conditions of employment and the potential for wage dumping. With this in mind, the EP has also deleted all references to the Posted Workers Directive (96/71/EC), in order to avoid a repeat.

Many companies have circumvented labour laws by posting people from lower-wage EU countries to higher-wage countries, whilst keeping the posted workers' wage at the level of the country of origin. Such cases include *Laval Un Partneri Ltd v Svenska Byggnadsarbetareforbundet and International Transport Workers Federation v Viking Line ABP*. In both cases, the lower wages granted to employees from Latvia and Estonia respectively were upheld by the European Court of Justice (ECJ), despite Swedish collective agreements in one case and the payment of Estonian and not Finnish wages in the latter case.

Since then, the Commission has put forward an enforcement directive (COM(2012) 131 final) acknowledging that "minimum employment and working conditions are often not respected for the one million or so posted workers in the EU". It sets out conditions that the service provider in the host country must abide with in order to protect workers' rights. A 'general approach' on the matter is scheduled to be issued by the Council in June.

Conversely, the Council has insisted that transferees must have parity with workers referenced in the Posted Workers Directive, in order to ensure that equal treatment is not extended to pensions and health insurance. The EP is looking for parity with EU citizens instead.

In the context of a transfer, it is more likely that transferees will prefer to maintain the same pension plans and health insurance in the country of origin, especially if – as is likely – they will be working on a project basis and moving from one country to another. With this in mind, the Council position can be deemed to be logical. The specialist and highly-qualified nature of transferees means that it is distinctly probable that they will have parity with national workers performing the same tasks anyway. The risk of the ICTs Directive becoming 'another Posted Workers Directive' in terms of wage dumping is highly unlikely.

All in all, the rights accorded to transferees in the Council amendments are actually greater than those for posted workers, given the reference to rights from Regulation (EC) No 883/2004. Taking this into account, and the fact that the issues in the Posted Workers Directive are being dealt with by the Commission, the EP should be able to compromise on this.

Mobility

The issue of intra-EU mobility for transferees is of crucial importance for the added value of this directive. Although the trialogue negotiations have yet to deal with the issue of mobility head on, the key aspects are how the mobility is organised and what powers member states are accorded.

For mobility of a short duration, the Council has proposed in Article 16.1 that "for a period of up to 90 days in any 180 day period, the transfer may take place on the basis of the permit issued by the first Member State". The original Commission proposal allowed for 12 months of a transfer to another member state. The EP's approach allows for intra-EU mobility for half the whole period of the assignment. The differences here are not monumental, but if the Council amendment is to be accepted, a transferee who wishes to exercise his/her mobility for one four-month stay should be able to do so. As it stands, mobility lasting longer than three months requires a new ICT permit application to be made.

However, the most contentious aspect of the Council's amendments on short-term mobility are the greater powers accorded to the second member state in terms of its ability to reexamine the transferee's original application. The Council proposal in Article 16.2b states that the second member state must be notified and will have 20 days to examine the documentation, and may reject the application in accordance with national law. The inclusion of this new article suggests that caution and mistrust amongst member states is prevalent. Notification between member states' authorities regarding mobility is normal, and the ability of the second member state to reject the application does provide a safeguard against fraud, abuse, etc.

What truly lies behind this lack of faith in the checks that other member states carry out is the worry that transferees may be able to enter their country via less stringent and more lenient countries as a result of intra-EU mobility. Therefore countries like Germany, which receives relatively few transferees in general, are more worried about the influx from other member states, rather than applications made directly to their authorities.

Re-examination would be a step too far, slowing down the process and potentially not guaranteeing mobility. There remains a big gap to be breached between the EP's approach of automatism for mobility and the Council's as outlined above.

Reinforcing temporariness

Another contentious issue is the reinforcement by the Council of the temporary nature of the ICT. The Council

has proposed in Article 10.A.2 that transferees will have to return to a third country after a maximum period of three years for managers and specialists, and one year for graduate trainees, and that afterwards member states "may require a certain period of time up to three years to pass between the end of a transfer and another application concerning the same third-country national".

The business community is unsurprisingly not enamoured with the possibility of such a length of time being used, and a period of 90 days is deemed to be much more reasonable. Some member states are worried about triggering long-term residence or even citizenship eligibility with shorter times between applications. This is because it can be triggered at the 4-5 year mark. With the EP not having a formal stance on the matter, this has so far been left untouched in trialogue negotiations.

The Council amendment does not send the right signal to the most highly-skilled people out there. It will harm the EU's attractiveness to highly-skilled workers and could have a negative impact on EU competitiveness. What's more, as transferees work on a project basis, not allowing them to work in the EU for three years after their ICT permit has expired goes against how the real world of business works and restricts opportunities for the transferee. If a transferee wants to stay on a more permanent basis, or the host entity wants to hire the transferee as an employee, this cannot be done by continually renewing ICT permits. Nevertheless, a much shorter period of months and not years is necessary.

PROSPECTS

It is worth recalling that the Commission's proposal wanted to respond to the demand for transferees through "transparent and harmonised conditions of admission," "more attractive conditions for transferees and their family," and "promoting efficient allocation and reallocation of transferees between EU entities". As it stands, the directive falls short on all these counts, with 'may' clauses on conditions, unattractive conditions for family members, complicated procedures for mobility, and lengthy time periods for reapplying.

The current trialogue negotiations started at the end of 2012 despite a variety of difficulties, most of which have been characterised by a lack of inter-institutional communication and impetus. The forecast potential departure from the EP by the rapporteur after the Italian elections could have resulted in a new driveimpetus to complete negotiations beforehand. Now that is not the case, political will needs to be found on both sides, irrespective of false deadlines. A clear trade-off can be made in favour of the Council's approach to transferee rights and a compromise solution on the scope, in exchange for a softer approach from the Council on the three-year waiting period between applications and additional powers for member states in the intra-EU mobility process.

Looking more broadly at legal migration policy at EU level, the Council's strict approach to fraud and abuse is understandable to a certain extent, given the relative youth of this policy field in the EU. Nevertheless, in order to have a more holistic approach, the Council could learn from the EP by involving colleagues dealing with employment policy in the negotiation process. It would be a mistake to allow the negative climate on migration in general, the waning trust amongst member states, and the impact of the economic crisis to lose sight of the fact that highly-skilled expertise in specific fields is needed and hard to come by.

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