Intra-EU mobility; an ICT dream come true?

At a time when borders are rather emphasised than opened up and when the mobility of people is rather controlled than liberalized, a revolutionary scheme is under construction in the European Union.

By the end of this year a new dimension will be added to the mobility of third country nationals in the EU, as it will be possible to not only move from one state to another, but also work in these member states under a single permit.

The twenty-six member states of the EU have committed themselves to Directive 2014/66/EC of 15 May 2014 on the conditions of entry and residence of third country nationals in the framework of an intra-corporate transfer (ICT).

They must communicate the text of their measures to the European Commission in Brussels, ultimately by 29 November 2016. Failing timely implementation into national law, the articles of the ICT Directive conferring rights to applicants will then have a direct and binding effect.

Once the ICT Directive is implemented, third country nationals with an ICT permit issued in any member state of first residence will be exempted from the Schengen visa obligations. They can enter, stay and work in their assigned ICT role in one or several second member states, i.e. other than the one to which they were initially admitted with little or no interruption to their assignments.

The grand novelty for Europe is the innovative scheme for intra-EU mobility, as the existing national schemes do not allow intra-corporate transferees to work in subsidiaries established in another member state.

However, as with any measure of such magnitude there are challenges on the way, and the harmonizing effect on intra-company transfer migration in Europe may be relative.

What are the new rules?

The Directive introduces a single permit procedure providing legal stay and work authorization for employment in a first, and in a subsequent member state by a third country national who is transferred for employment within a group of companies which has a corporate establishment both in the European Union and elsewhere in the world.

Subject to the national permit conditions transposed from the Directive, corporate management, technical specialists and employee trainees will be entitled to work in one or several EU-member states for the parent company or one of its establishments. The maximum duration of the ICT permit is three years for managers and technical specialists, and 1 year for employee trainees.

Harmonizing or not?

In the first place it may be worth to mention that the ICT Directive does not cover ICT transfers of up to 90 days. This leaves open the wide range of existing national work permits, and the specific and generic waivers for incidental work in the member states which have signed up to the Directive -the business meetings, the installation and implementation of IT, repair and maintenance of hard ware products, training on the job, bubbling-in assignments to name a few- fall out of the scope of the Directive, if those activities are limited to less than 90 days in any period of 180 days. In other words,

there is no harmonization by EU-law for short term intra–corporate business activities in a single member state.

However, when it comes labour migration in the European Union, the ICT Directive is far more harmonizing in character than the Blue Card Directive, which contains a clause of escape for member states who - within the scope of the Directive - want to continue a more beneficial and flexible national ICT scheme, this is not possible under the new ICT Directive.

Article 2 par. 3 of the ICT Directive explicitly grants that the member states continue to issue residence permits to third-country nationals "other than the intra-corporate transferee permit covered by this Directive, for any purpose of employment for third-country nationals who fall outside the scope of this Directive".

Clearly, this means that the committed member states cannot continue applying an ICT scheme of their own with more favourable conditions and less requirements as instructed in the Directive.

However, what does override (per article 4 of this Directive) are the bilateral and multilateral agreements that are part of the law of the Union, a clause which allows for the most favourable provisions made under these agreements to prevail.

In particular, this regards the stand-still clauses in the association treaties with Turkey and Croatia, which may prevent that a member state exercises a stricter ICT policy under the Directive as regards the companies and the nationals from those countries.

The more favourable provisions in bilateral and multilateral agreements that are part of the law of a singular member state may also override the ICT conditions of the new Directive. Bilaterally, you may think of the many uniformly formatted Friendship Treaties which the United States has concluded with many European states in the context of the Marshall Plan after WO II, but also of establishment treaties with Switzerland and trade agreements with Japan.

Multilaterally, the European Commission had to mind the most favoured nation provisions for intra-concern services in the General Agreement on Trade in Services (GATS) of the WTO and consider that Norway, Iceland and Switzerland are bound to EU law development in their EEA relationship with the European Union.

Taking account of these treaties and agreements, one may conclude that the harmonizing effect of the ICT migration in Europe from the new Directive may be relative.

The intra-EU mobility scheme signifies a major innovation compared to the existing national schemes, which do not allow intra-corporate transferees to work in subsidiaries established in another member state. In this sense, the scheme is truly revolutionary.

However, the success of the intra-EU mobility scheme of will greatly depend on the willingness and effort of the member states to organize an effective intra-mobility information system and robust enforcement to warrant against abuse, just as the ICT Directive has stipulated. As the European migration crises deepens and challenges the open Schengen borders in 2016, the future of this new element of free movement by third-country nationals in Europe could be brighter.

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