European Economic and Social Committee

SOC/393
Conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer

Brussels, 4 May 2011

OPINION

of the
European and Economic and Social Committee
on the
Proposal for a Directive of the European Parliament and of the Council on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer
COM(2010) 378 final – 2010/0209 (COD)

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On 29 September 2010, the Council of the European Union decided to consult the European Economic and Social Committee, under Article 304 of the Treaty on the Functioning of the European Union, on the

> *Proposal for a Directive of the European Parliament and of the Council on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer*
> COM(2010) 378 final - 2010/0209 (COD).

The Section for Employment, Social Affairs and Citizenship, which was responsible for preparing the Committee's work on the subject, adopted its opinion 24 March 2011.

At its 471st plenary session, held on 4 and 5 May 2011 (meeting of 4 May), the European Economic and Social Committee adopted the following opinion by 152 votes to two, with six abstentions.

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1. Conclusions and recommendations

1.1 The European Economic and Social Committee welcomes the European Commission's efforts to set up, in the proposal for a directive on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, transparent and harmonised conditions of admission for this group of temporarily seconded workers.

1.2 However, the EESC has serious concerns about some of the content of the proposal for a directive and about the way the European Commission communicated with the European social partners prior to its publication.

1.3 The Committee finds it regrettable that Article 79 TFEU was chosen as the sole legal basis for the directive, given that it includes important provisions concerning the position of managers, specialists and graduate trainees under employment law and will therefore have a significant impact on Member States' labour markets. The social partners should therefore be formally consulted under Article 154 TFEU on an initiative of this kind before the Commission distributes a specific proposal for a directive. This consultation would not only have fulfilled the Lisbon Treaty's aim of boosting the role of social dialogue in the EU, but would also have provided an opportunity to resolve some of the current sticking points with the social partners prior to publication.

1.4 The proposal for a directive, which lays down conditions of entry for third-country nationals and their families in the framework of an intra-corporate transfer, relates not only to a relatively small group of managers but also to specialists and graduate trainees; in the Committee's view, a directive focusing only on managers would do more justice to the particular position and needs of this group of people. It is even more important, however, for the principle of equality and equal treatment to apply to all employees covered by the directive with regard to salary and working conditions, and for it to be ensured that the directive is not abused.

1.5 The EESC therefore suggests that intra-corporate transferees should be given equal treatment with employees in the host country or the permanent staff not only in terms of salary but with regard to all conditions of employment. This equality must not be restricted to generally applicable collective agreements, but must apply to all provisions in legislation and collective agreements, including company agreements. In the EESC's opinion, the rules on family reunification should be similar to those in the Blue Card Directive (Directive 2009/50/EC).

1.6 The proposal has been published in the middle of the biggest financial and economic crisis in EU history. Some Member States are still a long way from economic recovery, and have such high unemployment rates that higher rates of migration within the EU are likely. In its 2011 Annual Growth Survey[1], the Commission makes specific reference to the risk that even a return to economic growth might not lead to sufficiently dynamic job creation and to the consequent need to increase the relatively low utilisation of labour within the EU. On the other hand and in line with the last Joint Employment Report (2010), the EESC takes into account the fact that certain Member States and employment categories continue to experience a shortage of labour.

1.7 The employees in question are transferred from third countries where wages and levels of social protection are considerably lower than in the EU. It is therefore necessary to monitor compliance with the directive effectively, whilst avoiding imposing unnecessary bureaucratic burdens on businesses. To this end, the Commission is currently developing, in conjunction with the Member States, an electronic exchange system to facilitate cross-border administrative cooperation in connection with the directive on the posting of workers (Directive 96/71/EC). This system should also cover intra-corporate transfers of third-country nationals.

1.8 In the EESC's view, the definitions of "manager", "specialist" and "graduate trainee" should be made clearer, in order to give the companies concerned greater legal certainty and also to ensure that they do not go beyond the obligations set out under GATS and bilateral agreements with third countries. The definitions should be phrased such that they cover exactly the three categories of highly skilled employees whose transfers the directive is intended to regulate.

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1 COM(2011) 11 final, 12.1.2011.

1.9 The EESC believes that, if the directive meets these requirements, it could indeed help to facilitate the intra-corporate transfer of know-how into the EU and to improve the EU's competitiveness.

2. The proposal for a directive

2.1 This directive aims to make it easier for business groups with subsidiaries both within and outside the EU to transfer third-country nationals employed in a company headquartered outside the EU to subsidiaries or branches within EU Member States. It should be possible to transfer managers, specialists and graduate trainees.

2.2 "Manager" means any person working in a senior position, who principally directs the management of the host entity, receiving general supervision or direction principally from the board of directors or stockholders of the business or equivalent.

2.3 "Specialist" means any person possessing uncommon knowledge essential and specific to the host entity, taking account not only of knowledge specific to the host entity, but also of whether the person has a high level of qualification referring to a type of work or trade requiring specific technical knowledge.

2.4 "Graduate trainee" means any person with a qualification following at least three years of university or technical university study who is transferred to broaden his/her knowledge of and experience in a company in preparation for a managerial position within the company.

2.5 The directive is not intended to apply to researchers, as a separate directive is already in place for them (Directive 2005/71/EC).

2.6 The Member States may require the transferee to have had a contract of employment with the group for at least 12 months prior to the transfer, and may also place a limit on the number of people thus admitted. The duration of such transfers is limited to a maximum of three years for managers and specialists, and one year for graduate trainees.

2.7 A fast-track admission procedure and a combined residence and work permit should increase the attractiveness of such transfers.

2.8 Intra-corporate transferees may also work in any other entity established in another Member State and belonging to the same group of undertakings, and at the sites of clients of the host subsidiary in other Member States, provided the transfer to the other Member State does not exceed 12 months. There are, however, exceptions to this rule.

2.9 Minimum wage agreements and/or collective agreements in the host country must be complied with. Rights such as freedom of association, affiliation and membership of a trade

union or employers' association, recognition of diplomas in accordance with national procedures, access to goods and services and access to social security systems must also be respected, but it is not intended that the host country's labour and social law should apply in its entirety.

3. Introduction

3.1 Migration policy has fallen partially within the EU's sphere of competence since the Treaty of Amsterdam, and the European Council and the Council of the European Union have both directly called for an EU migration policy to be developed on a number of occasions (in the 1999 Tampere Council conclusions, the 2004 Hague Programme, the 2009 Stockholm Programme and the Pact on Immigration and Asylum).

3.2 In 2005, following public consultation in the form of a green paper, the European Commission published a "Policy Plan on Legal Migration" that heralded several proposals for directives on labour migration. The Council adopted a directive[2] on immigration of highly qualified workers (the "blue card directive") on 25 May 2009, while the single permit directive is still being negotiated in the Council and European Parliament. The European Commission also published a proposal for a directive on seasonal work at the same time as the proposal to which this opinion relates.

3.2.1 The Commission originally published a proposal for a horizontal directive covering all forms of immigration for work purposes back in 2001. It has now decided to take a sectoral approach, as a horizontal measure turned out not to be feasible.

3.3 On 13 July 2010, the European Commission published a proposal for a directive on intra-corporate transfers, the aim of which is to harmonise at EU level the rules on admitting third-country nationals who are transferred from a business headquartered outside the EU to a business in the same group within the EU.

3.4 The draft directive lays down rules for those workers who are residents and nationals of a non-EU country, have a contract of employment with a company within a business group that is established in that country and are transferred from that company to an associated company in an EU Member State.

3.5 In its explanatory memorandum, the European Commission states that the proposed directive is expected to help achieve the goals of the Europe 2020 strategy: setting up transparent and harmonised conditions of admission for this group of temporarily seconded workers should make it possible to respond promptly to demand from multinational companies for the intra-corporate transfer of managerial and specialist employees from non-Member States. Transfers should make it possible to prepare graduate trainees to take on a management position within

2 COM(2007) 637 and 638, 23.10.2007.

the group. The Commission is convinced that the proposed directive helps to reduce unnecessary administrative obstacles, while at the same time protecting employees' rights and providing adequate safeguards in times of economic difficulty.

3.6 The aim of European migration policy should essentially be, firstly, to be attractive to "top talent", but at the same time to ensure that labour and social standards are not undermined and that appropriate complementary monitoring mechanisms are in place to prevent this. Although this directive does not primarily relate to long-term migration, this requirement should be taken into account.

3.7 Promotion of such transnational movements requires a climate of fair competition and respect for the rights of workers, including creating a secure legal status for intra-corporate transferees. The proposal also sets out certain rights for intra-corporate transferees, such as payment of the remuneration laid down in collective agreements in the host country, though it is not intended that the full spectrum of labour law should apply. Managers are usually paid more than that minimum salary, but this is not generally true of specialists and graduate trainees.

3.8 In its opinion on the proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment[3] the EESC took the position that, as legislation on the admission of immigrant workers is linked to labour market trends, there should be dialogue between the national authorities and social partners. The EESC also stated, in its opinion on the proposal for a Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State[4], that each Member State could decide, in cooperation with the social partners, on what kind of immigration it requires.

3.9 In its opinion on the integration of immigrant workers[5], the EESC stated that workplace integration accompanied by equal opportunities and equal treatment represented a challenge for the social partners too, which they must uphold in collective bargaining and social dialogue, including at European level.

3.10 It should be clear from the above that the EESC is convinced that the social partners should be involved in the legislative process at both Member State and European level.

3.11 In connection with intra-corporate transfers and the issue of "outward mobility", it is worth considering the conditions under which citizens of EU Member States may be seconded to third countries. In particular, it should be ensured that the proposed directive will not

3 OJ C 27, 3.2.2009, p. 108.

4 OJ C 27, 3.2.2009, p. 114.

5 OJ C 354, 28.12.2010, p. 16.

undermine the capacity of the Union to obtain reciprocal commitments under mode 4 of GATS or bilateral agreements. This is of peculiar importance for sectors such as the construction industry which is so far "unbound" under GATS.

4. General considerations

4.1 The initial reaction of the European social partners to the proposed directive was extremely varied. For example, BUSINESSEUROPE welcomed the proposal in principle, and felt that it made a contribution towards greater transparency and a simplification of the admission process for intra-corporate transferees. It also, however, had certain criticisms concerning the proposals, relating particularly to the option of requiring a period of 12 months of prior employment within the transferring company and also to the possibility that the restrictions on Member States applying more favourable rules could lead to a deterioration in the national rules currently in place.

4.2 The European Trade Union Confederation (ETUC), in contrast, expressed serious concerns regarding the proposed directive, and called on the Commission to withdraw it. The ETUC criticised the decision to use Article 79 TFEU as the sole legal basis for the directive, given that both it and the seasonal workers directive would have a significant impact on Member States' labour markets, and stated that the social partners should be consulted on such proposals under Article 154 TFEU. It also felt that the proposal did not guarantee equal treatment for intra-corporate transferees or provide inspection mechanisms and sanctions in the event of breaches of the regulations.

4.3 In terms of migration policy, this approach at least partly follows on from the concept of "circular migration": it is, at any rate, intended to be temporary migration. This concept is frequently regarded as unsuccessful in terms of integration and labour market policies. If Europe does have a shortage of skilled workers and young people in some countries, sectors and professions over the long term, this shortage should be tackled in the first instance through a training offensive and by making use of the free movement of workers within Europe; only after that should consideration be given to controlled labour migration with gradually increasing rights and the prospect of permission to reside longer in the country concerned.

4.4 Others, in contrast, see the concept of temporary or circular migration as the right way of encouraging the migration into Europe of highly skilled workers who can then apply the experience they gain in their country of origin, while at the same time allowing Europe to create a level playing field with its competitors in the global competition for top talent.

4.5 Specific versions of the "temporary migration" approach have already failed in some Member States in the past: because it was assumed that migration was temporary, investment in integration measures was neglected, and these failures have still not been fully made up for.

4.6 In 2007, the European Commission published an important communication on circular migration and partnerships between the EU and third countries[6] which set out the advantages but also the specificities of this concept. The EESC contributed to this debate in an objective manner with its own-initiative opinion[7] recognising that temporary entry arrangements may also be useful and that the current inflexibility of legislation in Europe is a major barrier to circular migration.

4.7 This is, of course, also connected with the issue of family reunification, which is particularly relevant where temporary migration lasts for several years or turns into permanent immigration. The rules on family reunification should therefore be similar to those in the Blue Card Directive (Directive 2009/50/EC).

4.8 Finally the EESC has highlighted the importance of integration in many of its opinions[8].

4.9 The EU and the national authorities must work together to promote integration policy. The EESC recently stated[9] that the common immigration policy should include integration, a two-way social process of mutual adaptation between immigrants and the host society, which should be supported through good governance in the EU, at the national level, and at the regional and local levels. In its opinion on integration and the social agenda[10], the Committee proposes that a process of mainstreaming integration be provided for in the EU's different political, legislative and financial instruments, in order to promote integration, equal treatment and non-discrimination.

4.10 The draft directive under consideration, however, conflicts with these integration efforts, since the assumption that the migration is temporary could discourage integration measures.

4.11 In order to avoid unfair competition, intra-corporate transferees should have at least the same working conditions as the group's local staff, not only as regards the minimum wage, but also in terms of all the labour law standards in the host country, i.e. all elements of the host country's labour law must apply across the board.

4.12 With regard to these rights, the EESC stated the following in its opinion on the Green Paper on an EU approach to managing economic migration[11]: *"The starting point for this debate must be the principle of non-discrimination. Migrant workers, whatever the period for which*

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6 COM(2007) 248 final

7 OJ C 44, 16.2.2008, p. 91.

8 See the following EESC opinions: OJ C 125, 27.5.2002, p. 112; OJ C 80, 30.3.2004, p. 92; OJ C 318, 23.12.2006, p. 128; OJ C 347, 18.12.2010, p. 19; OJ C 345, 28.12.2010, p. 16; EESC opinion on the new challenges of integration (rapporteur: Mr Pariza Castaños).

9 OJ C 48, 15.02.2011, p. 6.

10 OJ C 347, 18.12.2010, p. 19.

11 OJ C 286, 17.11.2005, p. 20.

they are authorised to reside and work, must have the same economic, labour and social rights as other workers."

4.13 In its opinion on the "single permit directive"[12], the EESC highlighted the role of the social partners at the different levels (business, sector, national and European) in promoting equal treatment at work. European Works Councils will also be key players in this connection: after all, this draft is intended to relate primarily to large business groups with a large number of subsidiaries.

4.14 It will be especially important to monitor compliance with the rules. The EESC notes, in its opinion on the proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals[13], that monitoring will not be easy because i) the monitoring bodies do not have enough qualified staff, ii) there are difficulties in dividing up responsibilities between the bodies concerned and iii) there are a large number of companies for which monitoring is envisaged. The Member States must therefore be careful to ensure that the monitoring bodies have the resources to perform their duties effectively.

4.15 The scope of the directive is unclear and too broadly defined: in particular, the definition of "specialists" must be clearly delimited in order to avoid a situation where, *de facto*, all employees in a group can work for up to three years in a subsidiary in a given Member State. The definition of "graduate trainees" should also be re-examined, so that only people being prepared for very specific management duties can actually be transferred as graduate trainees. The wording should reflect the EU's GATS offer from 2005.

4.16 The possibility of excluding certain sectors from the scope of he directive should be examined, at the mutual request of both employers and trade unions in the sector concerned.

4.17 In the case of transfers from one Member State to another, there are practical problems regarding the payment of the salary to which the transferee is entitled. The concerns that are regularly raised concerning wage dumping in connection with transfers from other Member States (within the scope of the directive on the posting of workers) also apply to the scope of this proposal. For example, the European Economic and Social Committee's opinion on the posting of workers[14] stresses that deficiencies in the system of checks and balances could cause problems.

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12 See footnote 4.

13 OJ C 204, 9.8.2008, p. 70.

14 OJ C 224, 30.8.2008, p. 95.

5. **Specific comments**

5.1 The definition of a "specialist" is confusing, and is liable to encompass virtually any kind of employment, since - in the German version in any case - it merely requires "branchenspezifische Fachkenntisse [sector-specific specialist knowledge]". This definition (in the English version this is: "any person possessing uncommon knowledge essential and specific to the host entity, taking account not only of knowledge specific to the host entity, but also of whether the person has a high level of qualification referring to a type of work or trade requiring specific technical knowledge") is much broader than the corresponding definition in the part of the GATS agreement that is binding on the EU, as the German version does not require any "uncommon knowledge"[*]. This means that any specialist worker can be transferred, which significantly increases the risk of wage pressures.

5.2 Even though intra-corporate transfers are currently used mainly by large multinational companies, there should be minimum requirements for the host entity, in order to avoid cases of abuse. For example, it should at any rate be of a certain size – e.g. have a certain number of employees – in order to avoid the kind of abuse where intra-corporate transfers are used to establish single-person enterprises comprising the transferred manager/specialist.

5.3 It should also be ensured that temporary work agencies belonging to a group cannot post workers to other subsidiaries in the group.

5.4 The proposal for a directive specifies that Member States shall reject an application for an intra-corporate transfer if the employer or the host entity has been sanctioned in conformity with national law for undeclared work and/or illegal employment. This should be extended to include cases where wage levels agreed in collective bargaining are not respected. For the sake of proportionality, employers should only be excluded from applying for transfers temporarily, not permanently as provided for in the proposal. It should also be possible to differentiate according to the severity of the offence.

5.5 It is also not enough for there simply to be the possibility of returning to a subsidiary in the sending country: rather, at the very least a contract that is valid until after the end of the secondment should be provided, in order to ensure that workers are not employed solely for the purpose of secondment.

5.6 The draft provides only for compliance with national legislation regarding salaries. In sensitive areas such as intra-corporate transfers, however, the directive should state that all provisions of labour law (both legislation and collective bargaining) in the host country should also apply to intra-corporate transferees and that the transferring organisation or the host entity should undertake to respect these provisions prior to the start of the transfer. It is vital to avoid precarious jobs and differences from the permanent staff.

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[*] Translator's note: this applies only to the German version. The English version does refer to "uncommon knowledge".

5.7 Article 16 effectively gives Member States the power to issue residence and work permits also for the territory of other Member States, but the authorities of the individual Member States do not have the competence to issue such authorisations and permits; nor can the EU transfer this competence, because it does not itself have the power to issue residence or work permits for individual Member States. Moreover, the second Member State is not given any opportunity to verify in any way the work permit that was issued in the first Member State along with the residence permit. It therefore needs to be clarified that a permit can only be valid in the Member State that issued it.

5.8 It is also currently unclear which system applies in the event of a further transfer to a second Member State, as this would then be a secondment from one Member State to another. It will in any event be necessary to provide specific procedures for administrative cooperation between the Member States.

5.9 The proposal provides for the introduction of a simplified procedure, but it is not clear exactly what the simplifications comprise. A fast-track procedure must not work to the detriment of accuracy in inspection: it should in any event be ensured that the authorities can examine every individual case carefully and without any major delay, particularly with regard to the payment of salaries.

5.10 The intention is for secondments totalling up to three years to be possible. Secondments of this length cannot be regarded as internally necessary short-term postings, and the transferee should be integrated normally into operations in the host country. The full spectrum of labour and social law in the host country should therefore apply.

5.11 In many sectors, three-year postings are longer than the usual duration of employment contracts. However, Framework Directive 2009/50/EC (the blue card directive) has already been adopted with regard to labour migration of highly qualified workers.

5.12 Moreover, minimum salaries cannot in all cases prevent wage dumping because, in the event of a further transfer to a second Member State, the draft provides that the conditions applicable in the country issuing the permit should apply. This would lead, in such cases, to the applicable minimum salary being not that in the country of employment (which may be higher) but that in the country issuing the permit. It should therefore in any event be clarified that the transferee must be paid the minimum salary applicable in the state where he/she is actually working. It must be ensured that all the provisions of collective agreements are applied, as well as the principle of equality.

5.13 The draft directive to which this opinion relates does not provide any possibility for transferees to bring actions against their employers before courts within the European Union: the court of jurisdiction for employees transferred from third countries – for example in cases concerning the payment of salaries in line with the collective agreements in the host country –

would generally be the sending state, not the relevant Member State. This would make it unacceptably difficult for intra-corporate transferees to pursue justified complaints. Access to this right is, however, one of the fundamental principles of a democratic society, and must therefore be provided in the host country.

5.14 The EESC calls on the European Parliament and the Council to endeavour to resolve the shortcomings mentioned in relation to this proposed directive in the subsequent legislative process in order to ensure that the directive can really make a positive contribution to facilitating the necessary intra-corporate transfer of know-how into the EU.

Brussels, 4 May 2011.

The President
of the
European Economic and Social Committee

Staffan Nilsson