

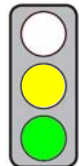
# TRANSFER OF EMPLOYEES FROM THIRD-COUNTRIES TO THE EU

Status: 29 November 2010

## MAIN ISSUES

**Objective of the Directive:** The transfer to EU subsidiaries of managers, specialists and graduate trainees employed by companies in third-countries is to be made easier.

**Parties Affected:** Employees and multinational corporations in third-countries and their EU subsidiaries.



**Pros:** (1) Protectionist restrictions on the free movement of labour force are reduced, thereby boosting overall economic efficiency in the EU.

(2) The transfer of employees from third countries creates positive growth and employment effects, though to a lesser extent than is actually possible.

**Cons:** (1) The Directive makes it more difficult for transferees to access the EU labour market and thus puts them at disadvantage vis-à-vis EU 'Blue Card' holders.

(2) Separate residence permit procedures for employees and their families lead to unnecessary red tape and delays in the deployment of employees.

## CONTENT

### Title

**Proposal COM(2010) 378** of 13 July 2010 for a **Directive** of the European Parliament and the Council on conditions of entry and **residence of third-country nationals within the framework of an intra-corporate transfer**

### Brief Summary

#### ► General context

- The Commission wishes to establish a uniform set of rules which make it easier for undertakings established in a third-country to transfer managers, specialists and graduate trainees for a limited period to EU subsidiaries or branches.
- Moreover, the conditions are to be stipulated under which:
  - a transfer to another Member State is facilitated and
  - family members can accompany the employee concerned.

#### ► Scope and definitions

- The Directive applies to managers, specialists and graduate trainees only.
  - Manager means a person directing at least one sub-division of the host subsidiary and “controlling the work of other supervisory employees” (Art. 3 lit. e).
  - Specialist means a person possessing knowledge specific to the industry concerned and a high level of qualification (Art. 3 lit. f).
  - Graduate trainee means a person with a university degree who is being prepared for a managerial position within the company (Art. 3 lit. g and h).
- The Directive does not apply to third-country nationals who:
  - reside in the EU as researchers;
  - are being transferred on grounds of an agreement between the third country and the EU or a Member State; or
  - are being transferred because of the Directive (96/71/EEC) on the transfer of workers as part of the provision of services. (Art. 2 (2))

#### ► Admission criteria and procedure

- A residence and working permit is to be applied for. Member States determine whether an application is to be lodged by the employee or by the host entity. (Art. 10 (1))
- The application must contain (Art. 5 Abs. 1):
  - evidence that the host entity and the one transferring belong to the same group of undertakings;
  - an assignment letter describing:
    - whether the employee is being transferred as a manager, specialist or graduate trainee;
    - to which location in the EU the employee is being transferred;
    - the duration of the transfer and
    - the remuneration;

- evidence that the employee possesses the qualification required for the position in the Member State concerned;
  - a valid travel document or visa application;
  - evidence that the employee and the accompanying family members have sickness insurance for periods without employment.
  - Graduate trainees must in addition file a training agreement, a description of the training programme and the training conditions (Art. 5 (3)).
  - Member States may require additional evidence that an employee has been employed for at least twelve months in an undertaking before being transferred (Art. 5 (1) lit. b).
  - The employee must not pose a threat to public security, public policy or public health (Art. 5 (1) lit. h).
  - The remuneration must be in line with the statutory requirements and the provisions of collective agreements which apply to “workers in a similar situation” in the hosting Member State (Art. 5 (2)).
  - The Member States may provide for simplified procedures for groups of undertakings which are likely to be reliable or have proven reliable in the past. Their reliability is examined in particular regarding their compliance with taxation and labour law requirements. (Art. 10 Abs. 7)
  - Applications are to be processed within 30 days. This deadline can be extended to up to 60 days if required (Art. 12 (1)).
- **Residence and working permit**
- The permit can be granted where the admission requirements have been fully met (Art. 6 (1)).
  - It remains valid for the duration of the transfer if the transfer is shorter than one year. In the case of a longer transfer, the permit is valid for at least one year. It can be extended by up to three years for managers and specialists, and by one year for graduate trainees. (Art. 11 (2))
  - The permit is valid for all subsidiaries in the Member State and for stays with any customers of the subsidiaries, provided the position requires it (Art. 13 (3) and (4)).
  - The residence and working permit must contain a list of the Member States in which the group of undertakings has subsidiaries (Art. 11 (4)).
  - The same terms and conditions regarding work and employment apply to the posted employees as to the employees of a host subsidiary (Art. 14 (1) and (2) lit. a and b).
  - Posted employees have the right to social protection pursuant to the rules of the host Member State, with the exception, however, of access to social housing and to the counselling services afforded by employment services. (Art. 14 (2) lit. c-e)
- **Family reunification**
- In principle, family reunification is determined in accordance with the Directive 2003/86/EC concerning the right to family reunification (Art. 15 (1)).
  - Residence permits are to be granted to spouses and their (not necessarily joint) minor children (Art. 4 (1) of the Directive 2003/86/EC).
    - A minor is defined by the rules of the third-country.
    - Where children are not joint children, the parent with the resident status must be the custodial parent. In the case of a shared custody, Member States may require the consent of the respective other custodial parent as an entry condition.
  - Member States may, in individual cases, extend their permit to the following family members:
    - the parents of the transferee and the parents of the transferee’s spouse, provided the parents have no other family ties in the third-country and further provided the transferee bears all costs for them; and
    - unmarried children who have reached the age of majority if they are unable to work due to health reasons. (Art. 4 (2) of the Directive 2003/86/EC)
  - In deviation of the Directive 2003/86/EC the following applies:
    - Member States must make the granting of a residence permit for family members dependent neither on integration measures before their entry (Art. 15 (3)) nor on the employee’s prospect of obtaining a permanent residence permit (Art. 15 (2)).
    - Member States must process the application for a residence permit of family members within two months of lodging their application (Art. 15 (4)).
    - A residence permit for family members has the same period of validity as the transferee’s (Art. 15 (5)).
- **Mobility between Member States**
- If transferred employees wish to move to another subsidiary in a Member State listed in their residence and working permit, they must present their application at the competent authority of the respective member State, file the required application forms and prove that the first host Member State has been notified. (Art. 16 (1) lit. b).
  - The duration of the transfer to another Member State must not exceed twelve months (Art. 16 (1) lit. a).

## Changes Compared to the Status Quo

- ▶ To date, for the employment of managers and specialists only the EU-Blue-Card has existed (see [CEP Policy Brief](#)). However, this was conceived for the employment of extra-corporate employees.
- ▶ To date, granting a residence permit to family members has been dependent on them participating in integration measures.

## Statement on Subsidiarity by the Commission

The Commission justifies EU action by claiming the need to avoid the threat of distortion of competition through different national rules and to reduce restrictions in the cross-border deployment of employees. Both are crucial to the attractiveness of Europe as a business location.

## Policy Context

The Directive dates back to the Hague Programme of November 2004, during which the European Council established that legal immigration will play an important role in building a knowledge-based economy in Europe and in promoting economic development. The Commission was asked to develop a concept on legal immigration. It complied with this request in 2005 by producing the "Policy Plan on Legal Migration" [Communication COM(2005) 669], in which it announced four Directives: on the immigration of highly skilled workers [EU-Blue-Card (Directive 2009/50/EC); see [CEP Policy Brief](#)]; on the residence of third-country nationals for seasonal employment (Proposal COM(2010) 379; cp. CEP Policy Brief); on the residence of third-country nationals in the framework of an intra-corporate transfer (present); and on the residence of trainees (not yet published).

## Legislative Procedure

13 July 2010	Adoption by Commission
Open	Adoption by European Parliament and Council, publication in the Official Journal of the European Union, entry into force

## Options for Influencing the Political Process

Leading Directorate General:	DG Internal Affairs
Committees of the European Parliament:	Civil Liberties, Justice and Home Affairs (in charge), rapporteur: Salvatore Iacolino (EPP Group, I); Employment; Women's Rights
Committees in the German Bundestag:	Internal Affairs (in charge); Economics; Labour; EU Affairs
Decision Mode in the Council:	Qualified majority (approval by a majority of Member States and at least 255 out of 345 votes; Germany: 29 votes)

## Formalities

Legal competence:	Art. 79 (2) lit. a and b TFEU (Immigration Policy)
Form of legislative competence:	Shared competence (Art. 4 (2) lit. j TFEU)
Legislative procedure:	Ordinary legislative procedure (Art. 294 TFEU)

# ASSESSMENT

## Economic Impact Assessment

### Ordoliberal Assessment

**The Directive reduces protectionist restrictions on the free movement of employees;** however, the Proposal does not go far enough. Restrictions to managers, specialists and graduate trainees should be removed: the demarcation to other qualifications is inevitably blurred, which leaves room for protectionism. The same holds true for the Member States' option to approve a transfer only if an employee is employed by the groups for at least one year. Moreover, transferees do not have free access to the labour market. Some of the deficits in the regulation of highly qualified immigration ("EU Blue Card") were naturally not repeated. The Commission foregoes government prescribed minimum wages and labour market tests; both contribute to the sealing-off of labour markets.

### Impact on Efficiency and Individual Freedom of Choice

**The Directive** enables non-European corporate groups to deploy their managers and specialists where they are most needed, at the same time as enabling such employees to apply for deployment in an EU subsidiary. This increases the mobility of employees and thus **improves overall economic efficiency, also in the EU.**

### Impact on Growth and Employment

As of 2011 the number of people of working age in the total population will fall. The resulting lack of a qualified workforce and the accompanying threat to growth potential could be alleviated through the immigration of

managers and specialists from third-countries. The Commission backing this policy option, at least with its Proposal for the intra-corporate transfer of managers and specialists in the EU.

However, the Directive falls short of all the possibilities, for the posted managers and specialists only obtain working permits for a limited period. Moreover, they can only enter the free labour market at best through the rather narrow conditions of the EU 'Blue Card' Directive [(2009/50/EC); see [CEP Policy Brief](#)]. Therefore, **the growth effect – and with that the employment effect in other fields of the economy – is therefore lower than would actually be possible.**

#### Impact on Europe as a Business Location

Improved availability of qualified staff is a major criterion for corporations in third-countries when it comes to choosing a business location, and so it therefore strengthens the quality of Europe as a business location. The remuneration requirements – compliance with statutory requirements and collective agreement provisions – are hardly likely to weaken this effect as managers and specialists are generally remunerated beyond collective arrangements anyway.

## Legal Assessment

### Legislative Competence

Unproblematic: The EU is empowered to stipulate conditions of entry and residence for third-country nationals, including the conditions for family reunification and free movement throughout the EU (Art. 79 (2) lit. a and b TFEU).

### Subsidiarity

Member States could also stipulate the conditions for a transfer of workers into their territory themselves. However, then there is the danger that different national conditions could complicate a second cross-border transfer to another Member State if the different criteria are not acknowledged among Member States. Consequently, an EU-wide regulation makes sense.

### Proportionality

**The separate residence application procedures for employees and their family members entail unnecessary red tape and** put family members at a disadvantage, as their procedure takes 60 days, which is twice as long as the procedure for employees. In practice, these differences **result in employees transferring to the EU later than necessary** – not until they are sure that the family members may enter the EU, too. Hence, **the only logical solution would be a uniform procedure** of 30 days for the entire family, which could be extended to up to 60 days where necessary, for instance if there are questions regarding the information given on family members.

On the one hand Member States' possibility to integrate economically dependent parents and children who have reached the age of majority but cannot work, as well as spouses and minor children, improves mobility between third countries and the Member States. On the other hand, the resulting differences between Member States' rules impede family unification should an employee choose to move to another Member State; this, in turn, has a negative impact on EU mobility. If Member States decide to increase the number of family members possessing a residence permit, such a decision should be recognised by all Member States.

### Compatibility with EU Law

There is a significant loophole in **the proposed Directive**: it fails to provide posted employees with direct access to the labour market and thus **discriminates against transferees** from third-countries **vis-à-vis holders of the EU Blue Card**. If posted employees wished to switch to an EU-based company, they would have to apply for an EU Blue Card at the same time as relocating their residence to a third-country, in order to be able to move back after the change of status. Blue Card holders are spared this situation.

### Compatibility with German Law

At least the following German laws need to be amended: the Residence Act; Social Security Code volume VI - statutory public pension scheme; Social Security Code vol. X - social administration procedure and social data protection; and the ordinances governing residence, the implementation of the law through the Central Foreigners Register and the procedure for granting inland-foreigners permission to work.

## Conclusion

The Proposal improves the free movement of employees at international level, boosts overall economic efficiency and creates positive growth and employment effects in the EU, though to a lesser extent than would actually be possible. The Directive should provide transferred managers and specialists with direct access to the labour market, enabling them to switch to other EU-based companies. Moreover, a uniform procedure for granting residence and working permits to employees and family members should be established and the results recognised by all Member States.