AK EUROPA

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AK Position Paper

Directive of the European Parliament and the Council on the conditions on entry and residence of third-country nationals within the scope of an intra corporate transfer

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About us

The Federal Chamber of Labour is by law representing the interests of about 3.2 million employees and consumers in Austria. It acts for the interests of its members in fields of social-, educational-, economical-, and consumer issues both on the national and on the EU-level in Brussels. Furthermore the Austrian Federal Chamber of Labour is a part of the Austrian social partnership.

The AK EUROPA office in Brussels was established in 1991 to bring forward the interests of all its members directly vis-à-vis the European Institutions.

Organisation and Tasks of the Austrian Federal Chamber of Labour

The Austrian Federal Chamber of Labour is the umbrella organisation of the nine regional Chambers of Labour in Austria, which have together the statutory mandate to represent the interests of their members.

The Chambers of Labour provide their members a broad range of services, including for instance advice on matters of labour law, consumer rights, social insurance and educational matters.

More than three quarters of the 2 million member-consultations carried out each year concern labour-, social insurance- and insolvency law. Furthermore the Austrian Federal Chamber of Labour makes use of its vested right to state its opinion in the legislation process of the European Union and in Austria in order to shape the interests of the employees and consumers towards the legislator.

All Austrian employees are subject to compulsory membership. The member fee is determined by law and is amounting to 0.5% of the members' gross wages or salaries (up to the social security payroll tax cap maximum). 560.000 - amongst others unemployed, persons on maternity (paternity) leave, community- and military service - of the 3.2 million members are exempt from subscription payment, but are entitled to all services provided by the Austrian Federal Chambers of Labour.

Herbert Tumpel
President

Werner Muhm
Director

Executive Summary

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On 13.07.2010, the EU Commission has submitted a proposal for a Directive on intra corporate transfer. The purpose of this proposal is to harmonise the regulations on the admission of employees, who are transferred by a company with seat outside the EU to a company of the same corporate group within the Union, throughout the EU.

The AK rejects the adoption of such a Directive. We have more than once in the past referred to the dangers, which might arise in respect of wage and social dumping in case of transfers from one Member State of the EU to Austria. With regard to the transfer of third-country nationals, the ECJ has pushed the controlling powers of the Member States very much into the background.

The concerns, which have been regularly voiced by the AK with regard to wage dumping in connection with transfers from other Member States (within the scope of the Posting of Workers Directive), do also apply to the scope of this proposal.

Although the employees transferred have to be paid at least in accordance with the Austrian minimum wage regulations (normally collective agreements), it is, however, completely unclear how this should be monitored. These problems are even more acute in case of transfers from non-EU states, as most third countries have a significantly lower wage level than Austria.

The possible transfer period of up to three years (a year in case of trainees) makes it clear that the issue hardly concerns short-term transfers. It is more likely that the intention is to create a migration model for "skilled personnel", apart from the Blue Card Directive for highly qualified employees, without calling it by its name.

The integration of "trainees" and the hardly defined group of "skilled personnel" give grounds for concern that graduates who were educated in Austria and already available employees (Austrians and already settled EU citizens as well as third-country nationals) will be squeezed out. The possible requirement of twelve months of previous employment is not sufficient to allay these concerns.

In the opinion of the AK, a Directive concerning intra corporate transfer would infringe against the subsidiarity principle. This means in simple terms that the EU is only supposed to assume those tasks, which the Member States are not able to deal with either alone or in a satisfactory manner. The vague statements of the EU Commission in respect of obligations from GATS and WTO Agreements re-

spectively do not represent a suitable reason.

Even after the coming into force of the Treaty of Lisbon, the contractual basis has not been clarified for adopting this Directive. If one takes the judicature of the ECJ concerning the transfer from one Member State as a basis, then, in case of transfers no access to the labour market of the respective Member State will be required. Whether Art 79 VAEU represents a suitable legal basis for the adoption of such a Directive, is extremely doubtful.

This proposal is obviously only dealt with by the Justice and Home Affairs Council. However, intra corporate transfer is to a large extent a labour market issue. As a result, the Employment Council and its committees must at least be involved in the proposal in an equal manner if not in a leading capacity.

Based on the reasons already mentioned, the AK is strictly opposed to the Proposal of the EU Commission and urges the Secretary of State for the Home Department and MEPs to disagree with this Proposal for a Directive on intra corporate transfer both in Council and Parliament.

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The AK position in detail

As outlined above, the AK rejects the present Proposal. Any remarks on individual provisions of the Proposal should therefore be seen in this light.

On Art 3 - Definition of terms

The definition "intra corporate transfer" refers to a "temporary secondment". It is therefore not clear whether the Directive assumes a secondment or a transfer/posting. However, the different terms are associated with different legal consequences. The definitions/ translation should therefore be thoroughly checked.

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As far as the provisions concern "executive personnel", the provision is not dissimilar to the Austrian rotation principle. The definition of a skilled employee/worker, however, is extremely vague and suitable to cover almost all employment situations, as only "industry-specific skills" are required. Based on the reasons stated above, the AK is of the opinion that skilled personnel and trainees should not be included at all.

In order to prevent cases of abuse, certain minimum requirements should also be introduced, which the receiving branch would have to comply with. A branch should have a certain size, in particular a certain number of employees to prevent one-person enterprises to be created by intra corporate transfers that consist only of the transferred/ posted skilled/executive employee. This danger could become even more significant as in such a case the transferred employee would represent an executive employee within the meaning of the draft proposal (based on the fact that he manages the receiving branch), which means that he or she could avoid the requirement of a high education standard or a higher education degree.

On Art 4 - More favourable provisions

According to the draft proposal, bilateral and multilateral agreements of the Union with third countries should not be affected. Mainly addressed will be the GATS and Mode 4 Agreement. The Commission, however, uses exactly these obligations to explain why the present draft proposal does not contradict the subsidiarity principle. It is therefore not conclusive why this Directive should among others be adopted to meet the obligations from

GATS and Mode 4, but on the other hand leave more favourable provisions untouched. In this respect the argument with regard to the subsidiarity principle does not hold.

On Art 5 - Admission criteria

The previous employment period of twelve months with the sending company should not be left to the Member States but should be generally determined. Individual states, which have included this twelve-month period in their legislation, could come under pressure if other Member States have not done the same. The sheer opportunity of returning to the branch in the sending state is also not sufficient: it would be much better to provide at least for unlimited employment or a right to return for a certain period (for example two years) that every posted employee could take.

It is unclear whether the employment offered by the employer in accordance with Art 5 Paragraph 1 lit c refers to an offer of the sending facility or the receiving branch. In this case it should be made clear that an existing contract of employment remains in force with the sending facility, which would make the return to a third country easier.

Right from the start, periods without health insurance should not be possible when an intra corporate transfer is taking place during existing employment.

With regard to the requirement of a higher education degree or a professional qualification, it must be made clear that this must always be fulfilled in case of a transfer/posting and not only if it is required in accordance with national labour law.

Art 5 Paragraph 1 lit g must probably be understood in such a way that periods without health insurance might occur during the course of an intra corporate transfer, which should be covered by an application for a (obviously voluntary) health insurance. Right from the start, such periods without health insurance should not be possible when an intra corporate transfer is taking place during existing employment or if it directly follows an employment period with the sending facility and the transferred/posted employee immediately takes up employment with the receiving branch in the country of destination. A requirement in lit g leg cit should be comprehensive insurance cover provided by the sending facility or the receiving branch, which must already be proven when an application is made.

Pursuant to Art 5 Paragraph 2, the draft proposal only provides for complying with national legal provisions with regard to salary or wage. This must be extended in such a way that all labour law provisions (both of a legal nature and with regard to collective agreements) of the country of destination do also apply to employees who were transferred within a corporation and that both the sending facility and the receiving branch respectively have to commit themselves prior to the transfer to comply with these provisions.

The statement in Art 14 Paragraph 1 that the labour and employment conditions apply to transferred employees in comparable situations, does not go far enough. This does not merely concern a right of employees but also an obligation for employers to comply with these provisions.

Apart from that, Art 14 Paragraph 1 does not make clear whether only the rights of other transferred employees apply in accordance with the Core Labour Standards of the Posting of Workers Directive in the country of destination or whether the labour law of the country of destination in its entirety will apply. Under recital 11, the Directive refers to those working conditions of transferred employees, which have been provided for in Directive 96/71/EG: these, however, only concern Core Labour Standards, which are applied in respect of transfers between Member States. These, however, require each EU Member State to have a certain number of labour standards to provide minimum protection, which cannot be taken for granted in case of intra corporate transfers from third countries.

It must therefore be clearly specified that the labour law of the country of destination in its entirety must apply to third-country nationals who were transferred within a corporation.

The authorities of the individual Member States, however, have not the competence to issue respective permits and approvals.

On Art 6 - Reasons for objection

The AK regards the provision of Art 6 Paragraph 4 in connection with Art 16 as highly problematic: this regulation would result in the fact that a Member State would have the competence to grant residence and work permits also for the territory of other Member States. The authorities of the individual Member States, however, have not the competence to issue respective permits and approvals. The EU is not able to transfer this competence as the EU itself does not have the competence to grant residence or work permits for individual Member States. This position is not weakened by the fact that the applicant must submit the documents in accordance with Art 5 to the relevant authority of the other Member State as the first Member State has already checked the content of the application. Apart from that, there is no opportunity for the second Member State to check in any way the work permit, which was issued by the first Member State in conjunction with the residence permit.

It must therefore be clarified that a permit is only valid in the Member State that issued it.

On Art 10 - Applications for approval

We reject the introduction of simplified procedures. It is also not clear how precisely the procedure should be sim-

plified. It must, however, be guaranteed that authorities are able to check every individual case thoroughly. In case of a simplified procedure (which has not been defined in detail) this would probably not be the case.

On Art 11 - Residence and work permits for employees who were transferred within a corporation

A transfer of three years, however, can no longer be justified by the statement that it would concern a necessary short-term intra corporate transfer.

As already mentioned in the general part, the proposed extremely long maximum duration of the transfer is a clear indication of the fact that these migration situations, based on this draft proposal, concern in reality "normal" labour migration and not only typical transfer cases: because the permit is supposed to be issued for one year and may be extended "by maximum three years" (trainees by one year). Obviously this shall mean (contrary to the phrasing) that the maximum duration of the transfer should be three years (compare the original English version: „ […] extended to a maximum of three years"). A transfer of three years, however, can no longer be justified by the statement that it would concern a necessary short-term intra corporate transfer. The intention seems to be that the transferred/posted employee will be integrated into the operation in the country of destination. There cannot be another interpretation of such a long duration of the transfer.

Due to the fact that the Directive 2009/50/EG (so-called Blue Card Directive) was adopted for the labour migration of highly qualified employees, it is the obvious assumption that the intention is to create a migration model for skilled personnel in the guise of intra corporate transfer. Therefore the proposed duration of the transfer is definitely too long.

On Art 12 - Procedural safeguards

Thirty days are not sufficient to evaluate a complex issue in a one-stop-shop procedure. Although currently an application for being granted a work permit (also for persons working under the rotation principle) must be decided within six weeks (42 days); in the present case, however, several national authorities are involved. It is therefore necessary to provide for a longer decision-making period; a procedure lasting at least six weeks should be possible.

Apart from that it must be made clear that appeals to an administrative authority with reviewing, cassatory examination through Constitutional and Administrative Court corresponds with the procedural safeguards of Art 12.

On Art 14 - Rights

The right to recognition of diploma certificates and other certificates of qualification stated in Art 14 Paragraph 2 lit b is not clearly structured as it remains open whether this recognition must

take place analogue to the regulations of Directive 2005/36/EU on the recognition of professional qualifications or purely in accordance with national provisions on the recognition of third country diplomas. It is essential to provide relevant clarification.

Pursuant to Art 14 Paragraph 2 lit d employees shall be entitled to the payment of pension benefits, which they have accumulated at the time of the transfer to a third country. As it is the case with most pensions systems within the EU, a period of three years does hardly qualify for a claim to a purely national pension without the recognition of relevant insurance periods accumulated in a foreign country. Therefore, in case of transfers from third countries, with whom no social insurance agreements with regard to pension benefits exist, guaranteeing this right to pension benefits is extremely problematic.

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On Art 16 - Mobility between the Member States

Art 13 Paragraph 6 which is referred to does not exist in the draft proposal. It is therefore not clear what this reference means.

Should you have any further questions please do not hesitate to contact

Mr. Johannes Peyrl
T +43-(0)1-501 65 2687
e-mail: johannes.peyrl@akwien.at

as well as

Mr Christof Cesnovar
T +32 (0)2 230 62 54
e-mail: christof.cesnovar@akeuropa.at
at our AK office in Brussels.

Austrian Federal Chamber of Labour
Prinz-Eugen-Straße 8-10
A-1040 Vienna, Austria
T +43 (0) 1 501 65-0
F +43 (0) 1 501 65-0

AK EUROPA
Permanent Representation of Austria
to the EU
Avenue de Cortenbergh, 30
B-1040 Brussels, Belgium
T +32 (0) 2 230 62 54
F +32 (0) 2 230 29 73