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Committee on Employment and Social Affairs

2010/0209(COD)

30.5.2011

DRAFT OPINION

of the Committee on Employment and Social Affairs

for the Committee on Civil Liberties, Justice and Home Affairs

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)0378) – C7-0179/2010 – 2010/0209(COD))

Rapporteur: Liisa Jaakonsaari

(*) Associated committee – Rule 50 of the Rules of Procedure

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SHORT JUSTIFICATION

Globalisation is changing the world at a quick pace. There is a need also for the European Union to adapt to the new reality of a globalised world and interconnected economies and to adapt its laws and rules as well. Temporary mobility of highly skilled workers is an essential feature of today's business model and especially multi-national companies increasingly rely on specialists who are able to work with different projects around the world, often on a short notice. This is why the rapporteur generally agrees with the aim of setting up a uniform set of rules and cutting tape for the rules of Intra-Corporate Transferees entering the European Union.

The entry and mobility of Intra-Corporate Transferees has up to now been under the competences of the individual Member States and this Directive will bring changes to the situation. Hopefully the new situation will create an added value for all stakeholders. The new rules should be uniform and transparent and not allow loopholes or opt-outs for companies and Member States.

The Commission provisions of cutting bureaucracy and red tape for companies are to be welcomed. A one stop shop for companies is essential as it will lead to a less bureaucratic and more efficient application procedure. As a principle, no labour market tests should be required.

The criteria and definitions of the Commission proposal need to be improved and made more precise. The definitions of managers and specialists must be improved as to make them legally watertight and to avoid ambiguities. Your rapporteur finds the definitions codified in the Blue Card Directive useful in this respect. While the Blue Card holders are not Intra-Corporate Transferees but highly educated or specialised individuals who apply for a blue card, they have the same profile as concerns their level of qualification and professional experience.

Your rapporteur fundamentally disagrees with the Commission on what rules should be applied to the Intra Corporate Transferees. The reference to Posting of Workers Directive envisaged by the Commission does not seem to be appropriate in this Directive for several reasons. It has to be noted that it is not clear whether and to what extent the Posting of workers Directive applies to third country nationals. Moreover, in a situation where the Posting Directive is currently reviewed one can ask what sense does it make to refer to a piece of legislation which does currently not serve its original purpose any longer. The Directive is up for review and we don't know what the final text will look like in the end. Finally, the aim of the posting Directive is different than that of the ICT Directive. While the posting of workers directive is meant to ensure the free movement of services, the objective of the ICT-directive is to ensure the free movement of labour.

The Treaties of the European Union as well as the Charter of Fundamental Rights both state that third country national should be treated equally with Union citizens. This Directive should clearly state that equal treatment with local workers is a principle. Following this principle would be the easiest way out, both for Member States and for companies who know exactly what rules must be applied.

The Commission states in its proposal that universally applicable collective agreements should be applied to the Intra-Corporate Transferees. This is a good starting point but not sufficient as these agreements do not cover all sectors in the European Union. In order to fill this gap, all levels of collective agreements including company agreements should be applied to Intra Corporate transferees, not only universally applicable ones. This would generate a common level playing field and ensure the application of the same set of rules to all workers, be they domestic workforce or workers from third countries.

One of the most important pieces of this legislation touches upon the intra-EU-mobility, notably article 16 of this directive. Your rapporteur regrets that this committee can not legislate on this article which concerns the very heart of the directive and can be considered as remit of this committee as it deals with the mobility of workers inside the EU.

AMENDMENTS

The Committee on Employment and Social Affairs calls on the Committee on Civil Liberties, Justice and Home Affairs, as the committee responsible, to incorporate the following amendments in its report:

Amendment 1

Proposal for a directive Citation 1

Text proposed by the Commission

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 79(2)(a) and (b) thereof,

Amendment

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 79(2)(a) and (b) **and Article 153(a), (b) and (g)** thereof,

Or. en

Justification

This directive is not merely an immigration tool but also an instrument to define the rights of those workers in an employment relationship and serve the protection of those workers. The EU Charter for Fundamental Rights (Article 15(3)) requires equal treatment of third country nationals with regard to working conditions.

Amendment 2

Proposal for a directive Citation 1 a (new)

Text proposed by the Commission

Amendment

Having regard to the Charter of Fundamental Rights of the European Union, and in particular Article 15(3) thereof,

Or. en

Justification

This Directive is not merely an immigration tool but also an instrument to define the rights of those workers in an employment relationship and serve the protection of those workers. The EU Charter for Fundamental Rights (Article 15(3)) requires equal treatment of third country nationals with regard to working conditions.

Amendment 3

Proposal for a directive Recital 10

Text proposed by the Commission

Amendment

(10) For the purpose of this Directive, intra-corporate transferees encompass managers, specialists and graduate trainees with a higher education qualification. Their definition builds on specific commitments of the Union under the General Agreement on Trade in Services (GATS) **and** bilateral trade agreements. Those commitments undertaken under the General Agreement on Trade in Services do not cover conditions of entry, stay and work. Therefore, this Directive complements and facilitates the application of those commitments. However, the scope of the intra-corporate transfers covered by this Directive is broader than that implied by trade commitments, as the transfers do not necessarily take place within the services sector and may originate in a third

(10) For the purpose of this Directive, intra-corporate transferees encompass managers, specialists and graduate trainees with **higher professional qualifications**, a **higher** education qualification **and professional experience**. **The requirement of professional experience should not be applied to graduate trainees. Intra-corporate transferees are to be employed in highly qualified employment**. Their definition builds on specific commitments of the Union under the General Agreement on Trade in Services (GATS), bilateral trade agreements **and Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment¹ (the Blue Card Directive)**. Those commitments

country which is not party to a trade agreement.

undertaken under the General Agreement on Trade in Services do not cover conditions of entry, stay and work. Therefore, this Directive complements and facilitates the application of those commitments. *This Directive is intended to fulfil the needs of undertakings established in the Union but not the supply of services within the meaning of the General Agreement on Trade in Services.*

However, the scope of the intra-corporate transfers covered by this Directive is broader than that implied by trade commitments, as the transfers do not necessarily take place within the services sector and may originate in a third country which is not party to a trade agreement.

¹ *OJ L 155, 18.6.2009, p. 17.*

Or. en

Justification

Already codified and functioning definitions from the Blue Card Directive should be applied to this directive as well. In addition to the proposed higher education qualification also the criteria of higher professional qualification, professional experience and highly qualified employment should be added for the sake of clarity, transparency and better regulation. While the Blue Card holders are not Intra-Corporate Transferees but highly educated or specialised individuals who apply for a blue card, they have the same profile as concerns their level of qualification and professional experience.

Amendment 4

Proposal for a directive

Recital 11

Text proposed by the Commission

(11) Intra-corporate transferees should benefit from the same working conditions as *posted* workers *whose employer is established on the territory of the European Union, as defined by Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996*

Amendment

(11) Intra-corporate transferees should benefit from the same working conditions as *local* workers. *Intra-corporate transferees should be given equal treatment with nationals of the host Member State or the permanent staff not only in terms of pay but with regard to all*

concerning the posting of workers in the framework of the provision of services.

That requirement is intended to protect workers and guarantee fair competition between undertakings established in a Member State and those established in a third country, as it ensures that the latter will not be able to benefit from lower labour standards to take any competitive advantage.

terms and conditions of employment. This equality should not be restricted to generally applicable collective agreements, but should apply to any law, regulation or administrative provisions, arbitration awards and collective agreements, including company agreements. That requirement is intended to protect workers and guarantee fair competition between undertakings established in a Member State and those established in a third country, as it ensures that the latter will not be able to benefit from lower labour standards to take any competitive advantage

Or. en

Justification

Intra-Corporate Transferees must be treated equally with the local workforce. The application of the Posting directive is not suitable as it does not guarantee this principle and thus should not be mixed with this directive.

Amendment 5

Proposal for a directive

Recital 13

Text proposed by the Commission

(13) As intra-corporate transfers consist of temporary migration, the applicant should provide evidence that the third-country national will be able to transfer back to an entity belonging to the same group and established in a third country at the end of the assignment. That evidence may consist of the relevant provisions under the work contract. An assignment letter should be produced providing evidence that the third country national manager or specialist possesses the professional qualifications needed in the Member State to which they have been admitted to occupy the post or the regulated profession.

Amendment

(13) As intra-corporate transfers consist of temporary migration, the applicant should provide evidence that the third-country national will be able to transfer back to an entity belonging to the same group and established in a third country at the end of the assignment. That evidence may consist of the relevant provisions under the work contract. An assignment letter should be produced providing evidence that the third country national manager or specialist possesses the **higher education qualification, higher professional qualifications and the professional experience** needed in the Member State to which they have been admitted to occupy

the post or the regulated profession.

Or. en

Amendment 6

Proposal for a directive Recital 22

Text proposed by the Commission

Amendment

(22) This Directive should not affect conditions for the provision of services in the framework of Article 56 of the Treaty. In particular, this Directive should not affect the terms and conditions of employment which, pursuant to Directive 96/71/EC, apply to workers posted by an undertaking established in a Member State to provide a service in the territory of another Member State. This Directive does not apply to third-country nationals posted by undertakings established in a Member State in the framework of a provision of services in accordance with Directive 96/71/EC. As a result, third-country nationals holding an intra-corporate transferee permit cannot avail themselves of the provisions of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services. This Directive should not give undertakings established in a third country any more favourable treatment than undertakings established in a Member State, in line with Article 1(4) of Directive 96/71/EC.

deleted

Or. en

Justification

Intra-Corporate Transferees must be treated equally with the local workforce. The reference to the Posting directive is not suitable as it does not guarantee this principle and should not be mixed with this directive.

Amendment 7

Proposal for a directive

Article 2 - paragraph 2 - point c

Text proposed by the Commission

Amendment

(c) third-country nationals carrying out activities on behalf of undertakings established in another Member State in the framework of a provision of services within the meaning of Article 56 of the Treaty on the Functioning of the European Union, including those posted by undertakings established in a Member State in the framework of a provision of services in accordance with Directive 96/71/EC. ***deleted***

Or. en

Justification

The Posting of Workers directive is not suited to handle Intra Corporate Transferees from third countries. These should not be mixed with the internal mobility of EU.

Amendment 8

Proposal for a directive

Article 2 - paragraph 2 - point c a (new)

Text proposed by the Commission

Amendment

(ca) third-country nationals carrying out activities as temporary agency workers.

Or. en

Amendment 9

Proposal for a directive Article 3 – point b

Text proposed by the Commission

(b) ‘intra-corporate transfer’ means the temporary **secondment** of a third-country national from an undertaking established outside the territory of a Member State and to which the third-country national is bound by a work contract, to an entity belonging to the undertaking or to the same group of undertakings which is established inside this territory;

Amendment

(b) ‘intra-corporate transfer’ means the temporary **transfer** of a third-country national from an undertaking established outside the territory of a Member State and to which the third-country national is bound by a work contract, to an entity belonging to the undertaking or to the same group of undertakings which is established inside this territory;

Or. en

Amendment 10

Proposal for a directive Article 3 – point e

Text proposed by the Commission

(e) ‘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; **this position includes: directing the host entity or a department or sub-division of the host entity, supervising and controlling the work of other supervisory, professional or managerial employees, having the authority personally to hire and dismiss or recommend hiring, dismissing or other personnel actions;**

Amendment

(e) ‘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;

Or. en

Justification

The definition of managers needs to be clarified and limited to those who are highly-qualified and have particular skills and whose personal capacities are indispensable to the proper conduct of the specific activities of the company in the host country. This means that the

criterion for admission must be the qualifications and the place of work within the company, not the salary. An exhaustive list which can be interpreted either in an inclusive or exclusive way does not clarify the situation.

Amendment 11
Proposal for a directive
Article 3 – point f

Text proposed by the Commission

(f) ‘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;***

Amendment

(f) ‘specialist’ means any person ***who is transferred for highly qualified employment, having higher professional qualifications, knowledge at an advanced level and continuous expertise and who possesses specific knowledge essential or relevant to the specific activities of the host entity;***

Or. en

Justification

The definition of specialists needs to be clarified and limited to those who are highly-qualified and have particular skills and whose personal capacities are indispensable to the proper conduct of the specific activities of the company in the host country. This means that the criterion for admission must be the qualifications and the place of work within the company, not the salary.

Amendment 12

Proposition de directive
Article 3 – point g

Texte proposé par la Commission

(g) ‘graduate trainee’ means any person with a higher education qualification who is transferred to broaden his/her knowledge of and experience in a company in preparation for a managerial position within the company;

Amendment

(g) ‘graduate trainee’ means any person with a higher education qualification who is transferred to broaden his/her knowledge of and experience in a company in preparation for a managerial position ***with a view to entering into a permanent contract*** within the company, ***and whose***

tasks in the company are consistent with the higher education which that person has completed;

Or. en

Amendment 13

Proposal for a directive Article 3 – point g a (new)

Text proposed by the Commission

Amendment

(ga) ‘highly qualified employment’ means the employment of a person who:

- in the Member State concerned, is protected as an employee under national employment law and/or in accordance with national practice, irrespective of the legal relationship, for the purpose of exercising genuine and effective work for, or under the direction of, another person,***
- is paid; and***
- has the required adequate and specific competence, as proven by higher professional qualifications,***

Or. en

Justification

A revised set of definitions is needed as to clarify the aims of the directive. For this purpose, an already codified and functioning European definition of highly qualified employment should be inserted in the directive as to ensure that the Intra-Corporate Transferees are employed under conditions envisaged by this directive. This definition is taken from the Council directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (Blue Card directive)

Amendment 14

Proposal for a directive Article 3 – point g b

Text proposed by the Commission

Amendment

(g b) ‘higher professional qualifications’ means qualifications attested by evidence of higher education qualifications or, by way of derogation, when provided for by national law, attested by at least five years of professional experience of a level comparable to higher education qualifications and which is relevant in the profession or sector specified in the work contract or binding job offer;

Or. en

Justification

A revised set of definitions is needed as to clarify the aims of the directive and make it more precise. For this purpose, an already codified and functioning European definition of higher professional qualifications should be inserted in the directive as to ensure that the Intra-Corporate Transferees do also possess the essential professional qualifications. These qualifications, as mentioned as well in Article 5 d) of the Commission proposal need to be made as clear as possible. This definition is taken from the Council directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (Blue Card directive).

Amendment 15

Proposal for a directive Article 3 – point g c

Text proposed by the Commission

Amendment

(g c) ‘professional experience’ means the actual and lawful pursuit of the profession concerned;

Or. en

Justification

A revised set of definitions is needed as to clarify the aims of the directive. For this purpose, an already codified and functioning European definition professional experience should be

inserted in the directive as to ensure that the Intra-Corporate Transferees are employed under conditions envisaged by this directive. This definition is taken from the Council directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (Blue Card directive).

Amendment 16

Proposal for a directive Article 3 – point n

Text proposed by the Commission

(n) ‘universally applicable collective agreement’ means a collective agreement which must be observed by all undertakings in the geographical area and in the profession or industry concerned. In the absence of a system for declaring collective agreements of universal application, Member States may base themselves on collective agreements which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or collective agreements which have been concluded by the most representative employers and labour organisations at national level and which are applied throughout national territory.

Amendment

(n) 'collective agreement' means all kinds of collective agreements, concluded at any level, including at company level, in accordance with national legislation and practices of the host Member State, by the most representative social partners;

Or. en

Justification

All levels of collective agreements should be applied to the Intra-corporate transferees, not only universally applicable ones. Intra-Corporate transferees should be given equal treatment with

Amendment 17

Proposal for a directive

Article 5 – paragraph 1 – point d

Text proposed by the Commission

(d) provide evidence that he or she has the professional qualifications needed in the Member State to which he or she has been admitted for the position of manager or specialist or, for graduate trainees, the higher education qualifications required;

Amendment

(d) provide evidence that he or she has the **higher** professional qualifications **and higher education qualifications** needed in the Member State to which he or she has been admitted for the position of manager or specialist or, for graduate trainees, the higher education qualifications required;

Or. en

Justification

This article needs to be made compatible with the revised set of definitions in article 3.

Amendment 18

Proposal for a directive

Article 5 – paragraph 2 – subparagraph 1

Text proposed by the Commission

Member States shall require that all conditions in the law, regulations or administrative provisions and/or **universally applicable** collective agreements **applicable to posted workers in a similar situation** in the relevant occupational branches are met with regard to the remuneration granted during the transfer.

Amendment

Member States shall require that all conditions in the law, regulations or administrative provisions and/or collective agreements in the relevant occupational branches are met with regard to the remuneration granted during the transfer.

Or. en

Justification

The wording of the posting of workers Directive needs to be deleted, in order to ensure that all levels of collective agreements can be applied to ICTs.

Amendment 19

Proposal for a directive

Article 5 – paragraph 2 – subparagraph 2

Text proposed by the Commission

Amendment

In the absence of a system for declaring collective agreements to be of universal application, Member States may, if they so decide, base themselves on collective agreements which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or collective agreements which have been concluded by the most representative employers' and labour organisations at national level and which are applied throughout national territory.

deleted

Or. en

Amendment 20

Proposal for a directive

Article 14 – introductory part

Text proposed by the Commission

Amendment

Whatever the law applicable to the employment relationship, intra-corporate transferees shall be entitled to:

Whatever the law applicable to the employment relationship, intra-corporate transferees shall be entitled to ***equal treatment with nationals of the host Member State as regards:***

Or. en

Justification

The principle of equal treatment should apply to the whole of Article 14.

Amendment 21

Proposal for a directive Article 14 – point 1

Text proposed by the Commission

1. the terms and conditions of employment ***applicable to posted workers in a similar situation***, as laid down by law, regulation or administrative provision and/or ***universally applicable*** collective agreements in the Member State ***to*** which they ***have been admitted pursuant to this Directive***.

In the absence of a system for declaring collective agreements to be of universal application, Member States may, if they so decide, base themselves on collective agreements which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or collective agreements which have been concluded by the most representative employers' and labour organisations at national level and which are applied throughout national territory.

Amendment

1. the terms and conditions of employment as laid down by law, regulation or administrative provision and/or ***arbitration awards and*** collective agreements in the Member State ***in*** which they ***are currently working***.

Or. en

Justification

The wording of the posting of workers Directive needs to be deleted, in order to ensure that all levels of collective agreements can be applied to ICTs. Furthermore, the host country principle should always apply.

Amendment 22

Proposal for a directive Article 14 – point 2 – introductory part

Text proposed by the Commission

equal treatment with nationals of the host Member State as regards:

Amendment

deleted

Justification

The principle of equal treatment should apply to the whole of Article 14.

Amendment 23

Proposal for a directive

Article 14 – point 2 – point a

Text proposed by the Commission

(a) freedom of association and affiliation and membership of an organisation representing workers or employers or of any organisation whose members are engaged in a specific occupation, including the benefits conferred by such organisations, without prejudice to the national provisions on public policy and public security;

Amendment

(a) freedom of association and affiliation and membership of an organisation representing workers or employers or of any organisation whose members are engaged in a specific occupation, including the benefits ***and rights*** conferred by such organisations, ***including the right to take industrial action***, without prejudice to the national provisions on public policy and public security;

Justification

Intra-Corporate Transferees should also have the right to take industrial action.