BUSINESSEUROPE

POSITION PAPER

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PROPOSAL FOR A DIRECTIVE ON CONDITIONS OF ENTRY AND RESIDENCE OF THIRD COUNTRY NATIONALS IN THE FRAMEWORK OF AN INTRA-CORPORATE TRANSFER

Executive Summary

For sustainable economic growth in Europe, it is vital that it remains attractive for human resources from all over the world. As business becomes increasingly global, companies need to be able to transfer key personnel from one entity to another, including across the borders of the EU.

A key component in ensuring Europe's attractiveness for multinational companies is therefore to facilitate such transfers. This is crucial not only for the EU to be an attractive option in location decisions but also for European companies to stay competitive.

The current situation for intra-corporate transfers is far from ideal. Companies face lengthy and costly admission procedures that are difficult to manage due to their complexity. It is time to come to terms with these difficulties. Overall, BUSINESSEUROPE welcomes the proposal for a directive on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer.[1] It would help bring transparency and simplification to admission procedures of intra-corporate transferees (ICTs).

Nevertheless, certain elements are of concern to business. In particular, the period of employment required within the entity of origin immediately preceding the transfer should be set to no more than six months for managers and specialists and three months for trainees. The current possibility to require up to 12 months of prior employment would seriously hamper the use of the directive, not least for entities based in emerging economies where staff turnover is high. In addition, the definition of a specialist should be broadened to respond to the need of companies to send employees with different profiles and for different purposes as ICTs. A broad definition is crucial to avoid that the directive becomes too narrow and obsolete in an increasingly dynamic business climate. Moreover, the limited possibilities for Member States to apply more favourable provisions would force some Member States to make significant restrictions of current national legislation and practice that would run counter to the overall objective of the draft directive.

At the same time, BUSINESSEUROPE wishes to underline the importance of putting in place of a common legislative framework concerning intra-corporate transfers. The important role such a directive would play for the competitiveness of the EU needs to be recognised.

[1] According to BDA, there is a potential for serious adverse effects on the labour market through abusive practices of the proposed Directive which is particularly high in the construction and related sectors. In these sectors it is furthermore particularly difficult to control effectively abusive practices. Therefore they should be excluded from the scope of the directive altogether, or at least from article 16 of the directive.

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I. Introduction

1. On 13 July 2010, the Commission adopted a proposal for a directive on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer. This includes third-country nationals who apply to be admitted as graduate trainees.

2. The aim of the draft directive is to facilitate intra-corporate transfers of skills both into and within the EU to boost the competitiveness of the EU economy and to complement the set of other measures the EU has committed to in its policy plan for legal migration. This initiative should contribute to achieving the goals of the Europe 2020 strategy.

II. General Comments

3. In spite of the economic crisis, resulting in high unemployment rates, European labour markets are increasingly dependent on immigration. This is due to demographic ageing but also to shortages of highly skilled people. Although immigration cannot be the only solution to such labour shortages, it is necessary to ensure that Europe is attractive to highly skilled immigrants.

4. Intra-corporate transfers of staff are one form of legal migration. However, for the purpose of policy making it is important to distinguish ICTs from other forms of legal migration. ICTs represent a temporary infusion of talent. As such they do not form part of the local labour market and are transferred under the sponsorship of their employer.

5. Moving to another country for a limited period of time would not be an attractive option for the individual if the conditions surrounding the transfer are too disadvantageous. For instance, it is not reasonable that the spouse accompanying the ICT would have to spend a significant share of his or her stay in the foreign country without being able to take up a job.

6. The volume of people entering the EU as intra-corporate transferees (ICTs) is not large, but they bring an important added value to European business. Companies increasingly need to be able to move an employee from one entity to another, between Member States as well as across the border of the EU. Multinational companies need to be able to transfer key competencies for a certain time in order to complete important development projects, to meet customer demand and to be able to make efficient use of corporate resources.

7. Such transfers should be welcomed as they will contribute to the competitiveness of European business and to the EU as a whole. Despite this, intra-corporate transfers are currently hindered by different rules and regulations, long and complex admission procedures imposing large costs for the company.

8. In order for Europe to stay competitive, there is a need to facilitate and clarify admission procedures for ICTs. The importance of this should not be underrated. When multinational companies make location decisions, mobility restrictions on key personnel between a European entities and non-EU entities

could well be the disadvantage that leads to a location in another part of the world being chosen.

9. In this context, it should be underlined that ambitions to boost the competitiveness of the EU through facilitated transfer of skills also depends on flexible labour markets and a good business climate overall.

10. The route towards a draft directive has not been without difficulties. Back in November 2004, the Hague Programme recognised that 'legal migration will play an important role in enhancing the knowledge-based economy in Europe". In its subsequent communication "A policy plan on legal migration" from 2005, the Commission suggested that a proposal for a directive on ICT along with three other proposals on labour migration should be adopted between 2007 and 2009. However, only one of the planned proposals for a directive was adopted during this time, in spite of the commitment expressed by Member States in "The European Pact on Immigration and Asylum" of 2008. This was the one on the Blue Card, concerning immigration of highly skilled immigrants. The Stockholm programme, adopted in 2009, invited the Commission and Council to continue to implement the policy plan from 2005.

11. Against this background, a high-quality directive that truly succeeds in facilitating and clarifying the procedure for admission of ICTs must not be delayed.

12. As to content, BUSINESSEUROPE welcomes the draft directive overall since it:

    - Recognises the value of the mobility of skills between entities of a company as well as the difficulties that companies are currently facing with admission procedures.

    - Put forward suggestions that would help bring transparency and simplification to admission procedures.

    - Helps meet the EU's international trade commitments.

13. Looking ahead, the adoption of a high-quality directive by the European Council and the European Parliament is important, without compromising the ambition to truly facilitate intra-corporate transfers of skills and boosting the competitiveness of the EU economy.

14. In this context, BUSINESSEUROPE also wish to highlight the need of European companies to send key personnel to third countries. This is important for their possibilities to pursue development projects and win public procurement tenders etc. Currently, European companies face important obstacles in doing so. These obstacles are a serious concern for BUSINESSEUROPE and must also be addressed.

III. Specific Comments

Definitions

15. Article 3 in the draft directive defines the concept of 'intra-corporate transfer' as "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". When it comes to the period of employment prior to transfer, Member States could "introduce provisions that are more favourable to third-country nationals".

16. Nevertheless, BUSINESSEUROPE strongly advises the European Commission, Parliament and Council not to make the definition of an intra-corporate transferee too restrictive. The practical use of the directive for solving the current untenable situation that companies face would then be severely curtailed.

17. Article 3e in the proposal for a directive deals with the definition of a manager. In this context, BUSINESSEUROPE would like to highlight that a manager who principally directs the host entity, receiving general supervision or direction only from the board of directors or stockholders, is at an extremely high level of seniority within the multinational company. It is vital not to restrict intra-corporate transfers to the top level of management, as such transfers are crucial also for other types of key personnel, for instance to carry out specific development projects, etc.

18. Therefore it is useful that the definition of a manager as set out in the draft directive also includes managers directing sub-divisions or departments of the host entity. However, the definition should be broadened to also include managers directing teams.

19. In addition, the definition of a specialist, as stated in article 3f, is problematic since it is unclear what is meant by "uncommon knowledge". The definition risks causing uncertainty, which in turn could lead to an unnecessary strict interpretation among the competent authorities to decide on admission. The word "uncommon" should therefore be deleted.

20. It is crucial that the definition of a specialist is broad enough to respond to the need for different types of ICTs in a rapidly changing business environment, in Europe as well as in third countries. The directive otherwise risks to become obsolete in terms of its real effect. It should also reflect the fact that transfers are undertaken not only to provide knowledge to the host- or client site but also for the individual sent to *acquire* knowledge.

21. It is important that international personnel transfers are not hampered without good reason by an unduly narrow definition of "group of undertakings". The concept of "group of undertakings" should not stop at a majority shareholding or a voting majority but also encompass, for instance, legally distinct businesses brought under the same management umbrella on a contractual basis.

More favourable provisions

22. BUSINESSEUROPE is seriously concerned about the limited possibility for Member States to apply more favourable provisions for persons to whom the draft directive applies. According to article 4, such provisions only concern Articles 3 (i), 12, 14 and 15. This would signify a serious restriction of national legislation and practice in several Member States.

Conditions for admission

23. In article 5, the draft directive lays down the conditions which applicants must fulfil for admission, for instance that "evidence must be provided that the transfer is actually taking place between entities of a same group of undertakings" and that "a document describing the tasks assigned and specifying the remuneration" must be produced. The subsequent three articles state the grounds for refusal, for withdrawal or non-renewal of the permit and the penalties in cases of failure to comply with the conditions of admission.

24. BUSINESSEUROPE is concerned with the requirement set out in article 5.1b of employment of 12 months within the entity of origin immediately preceding the transfer. Although recognising that this only applies when national legislation so requires, BUSINESSEUROPE advocates that the future directive should change the criterion concerning to a maximum of six months for managers and specialists and to three months for trainees.

25. It is obviously important to avoid abuse of the possibility to undertake intra-corporate transfers. We believe that the requirements set out in article 5.1a and 5.1d-h combined with article 5.2 are enough to ensure this. These articles require the third-country national to present evidence on the fulfilment of a range of conditions, concerning remuneration, professional qualification and position in the host entity. Together, they are key to ensure that the ICT scheme will not be abused and should be enforced effectively.

26. For a company, it is a fairly large and costly operation to transfer an employee to an entity in another country. Enabling such transfers to be carried out for employees who have worked for 6-12 months within the company will not cause the ICT scheme to be used for large-scale immigration of highly skilled in general. While that scheme regards a permanent job offer to highly skilled immigrants from a company within the EU, the draft ICT directive deals with temporary immigration.

27. Furthermore, in many of the home countries of the third-country nationals to be transferred, it is common to change jobs more frequently than in Europe. The staff turnover in companies that wish to undertake the transfer is very high. This could be illustrated by the IT sector in India. The turnover rate in the typically young and well-educated workforce sometimes exceeds 100 percent a year, and rates of 30-40 percent are not unusual. Setting the minimum length of previous employment in accordance with European labour markets, that are

also becoming increasingly dynamic, will therefore exclude key personnel in emerging economies from the scheme.

28. A requirement of employment of no more than six months within the entity of origin immediately preceding the transfer should therefore be enough for managers and specialists and three months for trainees.

29. BUSINESSEUROPE stresses the importance of clearly specifying which supporting documents are required as evidence so as to ensure identical interpretation by Member States and to avoid unnecessary bureaucracy. Therefore, the evidence required to ensure that the ICT is taking a position as a manager, specialist or graduate trainee (5.1(c)(2)) should take the form of a job role description within the assignment letter. In parallel, ensuring that the ICT has the professional qualifications needed (5.1(d) should take the form of a resume. To guarantee that common standards are applied across Member States these specifications should form part of article 5.

Procedure and permit

30. Articles 9-12 deal with procedure and permit, including access to information, applications for admission, the intra-corporate transferee permit and procedural safeguards.

31. BUSINESSEUROPE welcomes that the application for admission of ICT should be submitted to a single application procedure and that simplified procedures are possible for groups of undertakings. In addition, we welcome that the competent authorities of the Member State concerned shall adopt a decision and notify the applicant within 30 days of the complete application being lodged.

32. However, the procedure for exceptional cases should be allowed no more than an additional 30 days. Moreover, those exceptional cases should only include applications concerning host entities in several Member States. As the draft directive does not clearly state what is meant by exceptional cases, it might open up for frequent deviations from the 30-day limit. Consequently, the untenable situation that companies are facing currently with lengthy and thus costly procedures might very well continue in some Member States.

Rights

33. The proposal for a directive lays down, in article 13-15, the rights of intra-corporate transferees and those of family members.

34. When it comes to the rights of the latter group, the draft directive refers to the Council Directive 2003/86/EC on Family Reunification. The derogation from the first subparagraph of Article 5(4) of this directive, which is stated in Article 15.4 in this draft directive, is of fundamental importance for the attractiveness of the ICT scheme to third-country nationals. The derogation means that family members should be granted residence permits at the latest within two months from the date on which the application was lodged and not nine months, provided that the conditions for family reunification are fulfilled.

35. However, no such derogation has been introduced in the draft directive concerning article 14(2) in the Council Directive 2003/86/EC, setting a time limit of 12 months for member states to examine the situation on their labour market before granting family members access to it. This will seriously impact on the attractiveness of the ICT scheme to third-country nationals and to companies, and will ultimately counteract the draft directive's ambition on boosting the competitiveness of the EU economy.

36. BUSINESSEUROPE supports the idea of granting basic socio-economic rights on an equal footing with those of posted workers.

Mobility between Member States

37. Article 16 allows an intra-corporate transferee to work in another Member State, provided that the admission criteria set out in article five as well as the conditions set out in article 13(4) are fulfilled. If the duration exceeds 12 months, the other Member State may require a new application for a residence permit.

38. BUSINESSEUROPE welcomes that the draft directive facilitates geographical mobility of third-country nationals already legally residing and working in a Member States as an ICT. However, in the case of a transfer of more than 12 months to another Member State, requiring a re-launch of the application procedure would hamper cross-mobility. At the very least, a specification of what maximum length this second application should be allowed is required. Leaving competent authorities to decide on what is a "timely manner" to grant applications, as the draft directive currently stands, is too vague.

IV. Conclusion

39. Intra-corporate transfers of staff Immigration will be crucial to cope with the challenges on our labour market, including skills shortages. ICTs entering the EU constitute a small group in terms of volume, but they bring a high added value to European business. Being able to transfer personnel between entities in different countries is increasingly important for multinational companies. The EU needs to be an attractive location alternative to ensure future employment opportunities.

40. BUSINESSEUROPE welcomes the draft directive overall and wishes to underline the necessity to facilitate the complex and lengthy admission procedures that companies currently are facing. We ask the European Parliament and the European Council to avoid delay of a high-quality directive and to take into account the following points in particular:

    - For the directive to have actual real effect, it is imperative that the scope of the directive does not become too restrictive. When it comes to the definition of specialists, it is crucial to broaden this definition to respond to the need for different types of ICTs that emerges in a dynamic business environment, starting with excluding the requirement of uncommon knowledge. The definition of managers should include

managers directing sub-divisions, departments or teams of the host entity.

- Regarding the conditions for admission, BUSINESSEUROPE advocates that the maximum length of employment prior to transfer which Member States could be allowed to require should be no longer than 6 months for specialist and managers and three months for trainees. We believe that the harmful consequences for business and the competitiveness of the EU of the proposed 12 month period have been underrated in the draft directive.

- BUSINESSEUROPE is seriously concerned about the restricted possibilities for Member States to apply more favourable provisions than set out in the draft directive, as this would be counter-productive to the overall aim of the directive. The text should be redrafted to allow for more favourable provisions to apply not just for the articles mentioned.

- Finally, a precondition for the scheme to be attractive for key personnel in third countries is that their family members can access the European labour market swiftly. A derogation is therefore necessary from the Council Directive on Family Reunification, article 14(2).

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