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NOTE

from: Presidency
to: Strategic Committee on Immigration, Frontiers and Asylum (SCIFA)
on: 30 November 2011

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Subject: 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
- Certain issues

During the discussions at the meetings of the Working Party on Integration, Migration and Expulsion the formulation of the definitions of the categories of third-country nationals who would fall under the scope of the Directive - those of managers, specialists and graduate trainees - has proven to be particularly difficult. The difficulties concern both the content of definitions as well as the exact titles to be used to designate these categories.

The Presidency essentially identifies the problem as a matter of alignment of these definitions with the ones already existing in GATS.

Recital 10 of the draft Directive states that *“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 country which is not party to a trade agreement.”*

Therefore, a question arises as to whether the “broadening the scope of intra-corporate transfers” should also encompass the broadening of the definitions of the relevant categories of intra-corporate transferees. As shown below, the proposal of the Commission broadens certain definitions but also limits them in certain aspects.

Account should be taken of the fact that the broadening of the definitions could in practice replace the GATS commitments and affect the future EU GATS offer in this regard, taking into account the reciprocal nature of GATS and its baseline approach. On the other hand, it should also be noted that limiting the definitions in the Directive could cause problems with the correct implementation of the GATS commitments.

In the annex to this note the Presidency has compared the definitions of managers, specialists and graduate trainees existing in the latest GATS commitments and in the proposals offered in the last round of GATS negotiations with the definitions contained in the Commission's original proposal of the ICT Directive as well as in the latest draft of compromise suggestions tabled by the Presidency. This comparison shows that the definitions of managers in the Commission's proposal and in the GATS commitments do not differ at all in substance while the definitions of specialists and graduate trainees differ in certain aspects.

The Commission's proposal suggests the definitions of specialists and graduate trainees that are broader than the respective GATS definitions. For example, the definition of a specialist does not contain a reference to a “membership of and accredited profession” which is used in the EU GATS offer. Also, the definition of a graduate trainee contains a reference to a “higher education qualification” instead of a reference to a “university degree” in the EU GATS offer.

Some of the elements of definitions are actually more limiting compared to their equivalents in the GATS offer. For example, the definition of a graduate trainee in the Commission's proposal does not refer to the purpose of “career development” but states as the purpose of traineeship a "preparation for a managerial or a specialist position".

In the course of negotiations at the meetings of the Migration Working Party several elements were introduced in the definitions that effectively render them broader, for example the definition of a specialist in the current version of the draft proposal does not contain a reference to the notion of “uncommon knowledge” which is used in the GATS offer. It also emerges from the comparison that the GATS commitments contain a general requirement of previous employment for managers, specialists and graduate trainees although it can be modified by national commitments, whereas the Commission and some Member States would like to see this requirement as optional despite the EU mobility rights provided for by the Directive.

Considering the issues outlined above and in order to advance discussions on the proposal, the Presidency would like to ask SCIFA to give guidance on the following questions:

Should the definitions of managers, specialists and graduate trainees be aligned as far as possible with the definitions of the current EU GATS offer, or should they be modified in order to make the Directive more flexible?

Should the requirement of previous employment be mandatory or optional for these three categories of persons?

Definitions – comparison table

Initial Commission Proposal (COM(2010) 378 final)	Current PRES compromise suggestions (doc. 16677/11 of 16 Nov. 2011)	Economic Partnership Agreement (EPA) with the CARIFORUM 2008 (OJ L 289/I/3, 30.10.2008)	The EU-South Korea Free Trade Agreement (FTA) 2010 (OJ L 127/6, 14.5.2011)	COMMUNICATION FROM THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES Conditional revised Offer http://trade.ec.europa.eu/doclib/docs/2005/june/tradoc_123488.reduced%20cells%20v2.pdf
Art. 3 (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;	Art. 3 (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 during the transfer, to an entity belonging to the undertaking or to the same group of undertakings which is established inside this territory;	Art. 17.2 (a) ‘Key personnel’ means natural persons employed within a juridical person of one Party other than a non-profit organisation and who are responsible for the setting-up or the proper control, administration and operation of an establishment. ‘Key personnel’ comprise ‘business visitors’ responsible for setting up an establishment and ‘intra-corporate transfers’.	Art. 7.17 (2) (a) key personnel means natural persons employed within a juridical person of a Party other than a non-profit organization and who are responsible for the setting up or the proper control, administration and operation of an establishment. Key personnel comprise business visitors responsible for setting up an establishment and intra-corporate transferees;	Categories of natural persons covered under Mode 4 4) All Member States : Unbound except for measures concerning the entry into and temporary stay within a Member State of the following categories of natural persons providing services or except where otherwise indicated in the sector specific part:

<p>(c) 'intra-corporate transferee' means any third-country national subject to an intra-corporate transfer;</p> <p>(d) 'host entity' means the entity, regardless of its legal form, established in the territory of a Member State to which the third-country national is transferred;</p>	<p>(c) 'intra-corporate transferee' means any third-country national subject to an intra-corporate transfer;</p> <p>(d) 'host entity' means the entity, regardless of its legal form, established, in accordance with national law, in the territory of a Member State to which the third-country national is transferred;</p>	<p>(i) 'Business visitors' (...)</p> <p>(ii) 'Intra-corporate transfers' means natural persons who have been employed by a juridical person or have been partners in it for at least one year and who are temporarily transferred to an establishment in the territory of the other Party. The natural person concerned must belong to one of the following categories:</p>	<p>(i) business visitors (...)</p> <p>(ii) intra-corporate transferees means natural persons who have been employed by a juridical person of a Party or have been partners in it (other than as majority shareholders) for at least one year and who are temporarily transferred to an establishment (including subsidiaries, affiliates or branches) in the territory of the other Party. The natural person concerned shall belong to one of the following categories.</p>	<p>(i) Intra-corporate transfers (ICT): For all Member States except (some MSs) : Access is subject to the following conditions:</p> <ul style="list-style-type: none"> - the natural person concerned must work within a juridical person other than a nonprofit making organisation, established in the territory of a WTO Member and have been employed by it (for several MSs: or have been a partner in it (other than as a majority shareholder)) for at least the year immediately preceding the date of admission (the date of application in the case of several MSs) - the natural person is temporarily transferred in the context of the provision of a service through commercial presence in the territory of the Community Member State concerned. <p><i>(All Member States except some MSs : the transfer must be to a commercial presence of the aforementioned juridical person, constituted in and effectively providing services in the territory of the Community Member State</i></p>
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				<i>concerned.</i>) - the natural person concerned must belong to one of the following categories:
Article 3 (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;	Article 3 (e) ‘manager’ means an intra-corporate transferee 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;	1. Managers: Persons working in a senior position within a juridical person, who primarily direct the management of the establishment, receiving general supervision or direction principally from the board of directors of stockholders of the business or their equivalent, including: – directing the establishment or a department or sub-division thereof; – supervising and controlling the work of other supervisory, professional or managerial employees; – having the authority personally to recruit and dismiss or recommend recruiting, dismissing or other personnel actions.	Managers Natural persons working in a senior position within a juridical person, who primarily direct the management of the establishment, receiving general supervision or direction principally from the board of directors or shareholders of the business or their equivalents, including: (A) directing the establishment or a department or subdivision thereof; (B) supervising and controlling the work of other supervisory, professional or managerial employees; and (C) having the authority personally to recruit and dismiss or recommend recruiting, dismissing or other personnel actions.	a) Managers: Persons working in a senior position within a juridical person, who primarily direct the management of the establishment, receiving general supervision or direction principally from the board of directors or stockholders of the business or their equivalent, including: - directing the establishment or a department or sub-division of the establishment; - supervising and controlling the work of other supervisory, professional or managerial employees; - having the authority personally to hire and fire or recommend hiring, firing or other personnel actions.
Art. 3 (f) ‘specialist’	Art. 3 (f) ‘specialist’	Art. 17.2 (a) (ii)	Art. 7.17 (2) (a) (ii)	b) Specialists:

<p>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;</p>	<p>means an intra-corporate transferee possessing specific knowledge essential to the host entity, taking also account of whether the person has a high level of formal qualification and/or professional experience referring to a type of work or trade requiring specific technical knowledge;</p>	<p>2. Specialists: Persons working within a juridical person who possess uncommon knowledge essential to the establishment's production, research equipment, techniques or management. In assessing such knowledge, account will be taken not only of knowledge specific to the establishment, but also of whether the person has a high level of qualification referring to a type of work or trade requiring specific technical knowledge, including membership of an accredited profession.</p>	<p>Specialists Natural persons working within a juridical person who possess uncommon knowledge essential to the establishment's production, research equipment, techniques or management. In assessing such knowledge, account will be taken not only of knowledge specific to the establishment, but also of whether the person has a high level of qualification referring to a type of work or trade requiring specific technical knowledge, including membership of an accredited profession.</p>	<p>Persons working within a juridical person who possess uncommon knowledge essential to the establishment's service, research equipment, techniques or management. In assessing such knowledge, account will be taken not only of knowledge specific to the establishment, but also of whether the person has a high level of qualification referring to a type of work or trade requiring specific technical knowledge, including membership of an accredited profession.</p>
<p>Art. 3 (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;</p>	<p>Art. 3 (g) 'employee in training' means an intra-corporate transferee with a higher education qualification who is transferred to broaden his/her knowledge of and experience in a company in preparation for a managerial or a specialist position within the company;</p>	<p>Art. 17.2 (b) 'Graduate trainees' means natural persons who have been employed by a juridical person of one Party for at least one year, possess a university degree and are temporarily transferred to an establishment or to the parent company of the juridical person in the territory of the other Party,</p>	<p>Art. 7.17 (2) (b) graduate trainees means natural persons who have been employed by a juridical person of a Party for at least one year, who possess a university degree and who are temporarily transferred to an establishment in the territory of the other Party for career development purposes or to obtain</p>	<p>c) Graduate trainees: Persons with a university degree who are transferring for career development purposes or to obtain training in business techniques or methods. The recipient company in the EC may be required to submit a training programme covering the duration of the stay for prior approval, demonstrating that the purpose of the stay is for training.</p>

<p>(h) ‘higher education qualification’ means any diploma, certificate or other evidence of formal qualifications issued by a competent authority attesting the successful completion of a post-secondary higher education programme of at least three years, namely a set of courses provided by an educational establishment recognised as a higher education institution by the State in which it is situated;</p>	<p>(h) ‘higher education qualification’ means any diploma, certificate or other evidence of formal qualifications issued by a competent authority attesting the successful completion of a post-secondary higher education programme of at least three years, namely a set of courses provided by an educational establishment recognised as a higher education institution by the State in which it is situated;</p> <p>Recital 10a) For the purpose of this Directive, in order to evaluate if the third-country national concerned possesses higher education qualifications, reference may be made to ISCED (International Standard Classification of Education) 1997 levels 5a and 6.</p>	<p>for career development purposes or to obtain training in business techniques or methods.</p>	<p>training in business techniques or methods;</p>	
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<p>Art. 5.1 (b) Without prejudice to Article 10, a third-country national who applies to be admitted under the terms of this Directive shall: provide evidence of employment within the same group of undertakings, for at least 12 months immediately preceding the date of the intra-corporate transfer, if required by national legislation, and that he or she will be able to transfer back to an entity belonging to that group of undertakings and established in a third country at the end of the assignment;</p>	<p>Art. 5 (6) Member States shall require the third-country national to provide evidence of employment within the same group of undertakings, [...] from at least 6 months up to 12 months immediately preceding the date of the intra-corporate transfer in the case of managers and specialists, and for 3 months in the case of employees in training.</p>	<p>'Intra-corporate transfers' means natural persons who have been employed by a juridical person or have been partners in it for at least one year (managers and specialists)</p> <p><u>'Graduate trainees'</u> means natural persons who have been employed by a juridical person of one Party for at least one year</p>	<p>intra-corporate transferees means natural persons who have been employed by a juridical person of a Party or have been partners in it (other than as majority shareholders) for at least one year (managers and specialists)</p> <p><u>graduate trainees</u> means natural persons who have been employed by a juridical person of a Party for at least one year</p>	<p>(i) Intra-corporate transfers (ICT): For all Member States except (several MSs) : Access is subject to the following conditions: - the natural person concerned must work within a juridical person other than a nonprofit making organisation, established in the territory of a WTO Member and have been employed by it (for several MSs: or have been a partner in it (other than as a majority shareholder)) for at least the year immediately preceding the date of admission (the date of application in the case of several MSs) (<u>managers, specialists and graduate trainees</u>)</p>
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