

# Position Paper

## **UEAPME position on the proposal for a Directive on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer**

### **I. Introduction**

On 13 July 2010 the European Commission published a proposal for a directive on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer.

The aim is to facilitate the intra-corporate transfer of skills within multinational companies to the EU and within the EU. It is expected to help match supply and demand of highly qualified workers on the labour market and thereby contribute to creating a knowledge-based society and increased competitiveness in Europe in line with the Europe 2020 Strategy.

The proposal is part of a legal migration policy package<sup>1</sup>. Article 79 (2)(a) and (b) of the Lisbon Treaty sets out a new political and legal foundation for comparable rights of immigrants in the EU.

### **II. General comments**

UEAPME takes note of the new proposal. UEAPME agrees with the scope of the directive applying to third country nationals residing outside of the EU in the framework in an intra-corporate transfer. Further, UEAPME welcomes the aim to create more harmonised procedures of entry and residence to the EU to meet skill needs for intra-corporate transfers, as well as the need to simplify administrative procedures for companies.

However, we have reservations regarding certain aspects of the draft directive which require further examination to avoid a potentially problematic impact for SMEs and crafts, in particular in certain sectors, such as construction. Possible abuse linked to this particular proposed directive could lead to a distortion of competition and therefore undermine the competitiveness of SMEs and crafts. Therefore we consider it highly necessary to adapt specific provisions in order to prevent circumventions as far as possible.

Moreover, since this directive also deals with highly qualified third-national workers employed as specialists, it should be aligned more consistently with the definition used for specialists in the General Agreement on Trade and Services (GATS).

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<sup>1</sup> Legal Policy Migration Package of 2005 consisting of four separate directives

Finally, subsidiarity must be respected and notably the right of each Member State to determine the volumes of admission of third country nationals coming to their territory since Member states have strong diverse economic situations, which require respecting specificities at national and sectoral level.

## III. Specific comments on the proposal

### Chapter I – General provisions

#### Article 3 - Definitions

The Article outlines the persons to whom the directive applies. UEAPME agrees with the definitions used for “managers”, i.e. those working in a senior position and who directly manage the host entity, as well as for “graduate trainees”, i.e. those providing evidence of higher education qualifications.

However, UEAPME is concerned about the current definition proposed for “specialists”, which is less clear. It states that a specialist can be “any person possessing uncommon knowledge essential and specific to the host entity”. For consistency reasons we therefore request to have the definition of specialists more aligned with the definition of specialists used in the GATS as follows:

*“Specialists: 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.”*

In addition, in order to ensure that only the persons considered as specialists and having the appropriate level of expertise for employment purposes are admitted, the definition should be completed with a new point after 3 (f) as follows:

“High level of qualifications means either providing evidence of higher education qualifications, i.e. according to current Article 3 (h) *“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 recognized as a higher education institution by the State in which it is situated; or at least 5 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”*.

Furthermore UEAPME considers that in view of tackling the unemployment problems in Europe the professional profile of the specialist should be explicitly needed by the host enterprise and should be unavailable in the host country.

### Chapter II – Conditions of admission

#### Article 5 - Criteria for admission

The Article and respective Recitals outline the conditions for admission of a transferee, which need to be fulfilled notably by the transferee and Member State concerned and indirectly by the host entity.

UEAPME considers these criteria need to be made more effective for all three parties to limit possible abuse with a negative impact for SMEs and crafts.

- Provisions for Member State

Firstly, under the Commission proposal in order to ensure that the skills of the ICT are specific to the host entity, the Member State concerned “may” require a transferee to have been employed within the same group of undertakings for at least 12 months prior to transfer.

UEAPME considers the criteria should be strengthened and oblige Member States to “shall” require a specialist to fulfill the provisions (Recital 12).

- Provisions for specialists

Secondly, UEAPME highlights the importance to maintain the current requirement in the draft directive for the “transferee” concerned to provide proof of having been employed at least 12 months within the entity of origin immediately preceding the transfer. However, in the case of “specialists” this provision should be made more concrete by specifying that the transferee shall have worked in the function as a “specialist” at least 12 months within the entity of origin immediately preceding the transfer. Regarding managers and trainees Member states should be free to set a threshold which may be below the 12 months.

- Provisions for host undertaking

Third, UEAPME considers that when it comes to admission conditions for intra-corporate specialists, a new provision is required to ensure that the company concerned has been established and operating in the host Member State at least 6 months prior to request of a transfer of an intra-corporate “specialist”. The objective is to reduce among others the risk of creating a subsidiary for the sole purpose of transferring non-EU workers presented as specialists to the EU labour market and to limit the use of “letter box companies”.

### **Article 5 – Grounds for refusal**

The Article allows Member States to refuse an application if the employer has been sanctioned for undeclared work and/or illegal employment.

UEAPME deems this measure should not be applied so restrictively and not immediately at the first infraction, but only in repeated cases. In addition, it should apply within a certain timeframe and should be proportional according to the type of infraction.

### **Article 8 – Penalties**

According to this Article Member States “may” hold the host entity responsible and provide penalties for failure to comply with the conditions of admission.

UEAPME believes that Member States should apply a stronger approach and must consequently provide penalties according and in proportion to the type of infraction. The provision should therefore be strengthened requiring Member States “shall” hold the host entity responsible, as well as requesting Member States to include an a-posteriori level of control notably regarding the remuneration granted during the transfer declared in Article 5.

## **CHAPTER III – Procedure and permit**

### **Article 13 – Rights on the basis of the intra-corporate transferee permit**

The Article sets out the rights of an intra-corporate transferee to visit other Member States for work purposes. In view of exploiting new opportunities for business growth, UEAPME believes it should not be limited to the sites of clients of the entities belonging to the group of undertakings, but also include potential business partners, provided that the employment relationship is maintained with the undertaking set-up in a third country.

### **Article 16 - Mobility between Member States**

The proposal enables geographical mobility of third-country nationals, allowing them to work in another Member State provided certain conditions are met.

Accordingly, for a transfer up to 12 months a third-country national who has been admitted as an intra-corporate transferee may be allowed to work in an entity of the same group in another Member State on the basis of the first residence permit and of a document identifying the entities of the group of undertakings in which the ICT is permitted to work. The second Member State must only be informed of the main conditions of mobility. Moreover, for a transfer over 12 months the other Member State only “may” require a new application for a residence permit as an intra-corporate transferee in that Member State.

UEAPME considers these mobility provisions need adapting to ensure compliance with the right of each Member State to determine the volumes of admission stemming from third-country nationals. Therefore stricter conditions should be applied according to the duration of the transfer. For a transfer under 12 months Member States should be able to ask for a new application, whereas for a transfer exceeding 12 months the worker shall be requested to submit a new application to the second Member State.

Moreover, there is a need to establish clear mechanisms for administrative cooperation between Member States to provide information for instance on the level of the salary in the respective sector.

### **Conclusions:**

- UEAPME agrees with the scope and aim of directive, however has a number of concerns regarding the potential negative impact on SMEs and crafts in particular in the construction sector. Hence specific provisions of the directive should be strengthened to avoid circumventions as far as possible.
- Definition of specialists needs to be aligned more consistently with the one used for specialists in the GATS. In addition, specialists must either possess a higher education qualification or 5 years of professional experience.
- Criteria for admission need to be made more effective for Member States, the worker and companies to limit possible abuse and notably “letterbox companies”.
- Provision for Member States to apply penalties should be enhanced according and in proportion to the type of infraction, as well as requiring Member States to control notably the level of remuneration granted during the transfer declared in Article 5.
- Rights on the basis of an ICT permit should be extended to include potential business partners in another Member State, provided the employment relationship is maintained with the undertaking set-up in a third country.
- Conditions for geographical mobility between Member States should be enhanced according to the duration of the transfer (under or above 12 months) in order to ensure compliance with the right of each Member State to determine the volumes of admission from third-country nationals.

07/02/2011