

GMS Flash Alert



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Germany - Deadline to Implement Intra-Company Transfers Directive May Be Missed

There is a looming deadline for Germany by which it must implement new European Union (EU) rules on intra-company transfers. Under the so-called "ICT Directive," for the first time, intra-company transferees within a company group to one member state may work at a company group in a different member state under eased conditions.¹

Pursuant to Art. 27 of the ICT Directive, EU member states are required to implement the Directive's provisions by 29 November 2016; however, Germany appears poised to miss the ICT Directive implementation deadline, raising questions as to the status of intra-company transfers into and out of Germany.²

WHY THIS MATTERS

The ICT Directive brings several advantages to business immigration within company groups. Under the rules of the ICT Directive, intra-company transferees might be able to work, for example, in Germany at a German company group entity with a combined residence and work permit that emanates from working at a company group entity in France.

This would facilitate the movement of cross-border workers across the EU and into/out of Germany and lighten the administrative burden that employees and their HR managers and/or immigration counsel typically experience. This could impact costs as well with fewer application fees and related charges to incur.

However, the failure to enact implementing rules in time would mean that intra-company transfers within the EU to/from Germany would operate under existing rules.

Background on ICT Directive

The ICT Directive is the first EU law aimed at a harmonized legal framework for intra-company transfers in all member states except Denmark, Ireland, and the United Kingdom.³ This pertains to intra-company transfers from abroad to the EU or simultaneously within more than one member state of the EU of non-EU/EEA/Swiss nationals.

In May 2014, the EU finalized the law-making procedures for the ICT Directive. Because it is a directive, the provisions are not automatically applicable in each EU member state and they need to be implemented into the domestic law of each member state.

In general, the provisions of the ICT Directive will become the primary framework for all transfers of executive employees, specialists, and trainees⁴ to a company group entity within the EU or from one company group within the EU to another. Please note that transfers not exceeding 90 days or direct transfers of a transferee from a company group entity abroad to a client in Germany are not regulated by the ICT Directive and will remain subject to German law only.

Member states may require from executive employees and specialists a tenure of between three and 12 months with the sending company group entity and between three to six months for trainees.

A transfer of executive employees and specialists must not exceed three years and the transfer of trainees is limited up to one year each at a time. Afterwards, a cooling-off period of at least six months must apply.

Non-EU/EEA/Swiss nationals, who are executive employees, specialists, or trainees under the framework of the ICT Directive, will receive a special national visa and/or combined residence and work permit referring to this Directive with the abbreviation "ICT."

The ICT Directive will help foster transfers not only to one EU member state, but also transfers to multiple destinations in other member states, where entities of the company group exist. The framework differentiates between:

- short-term transfers from one member state to another of up to 90 days during a transfers to the first member state; and
- long-term transfers from one member state to another of more than 90 days during a transfer to the first member state.

With regard to short-term transfers, each member state has to two options. The transferee, who has obtained a combined residence and work permit for "ICT" in another member state may work in that second member state without any further requirements. Alternatively, the second member state may require to be notified of this work in the second member state. The ICT Directive requires the member states to permit an individual to work upon entry – so a pending notification does not jeopardize the possibility to work in the second member state.⁵

With regard to long-term transfers, each member state may apply the notification process or, alternatively, may require an additional combined residence and work permit. That combined residence and work permit must be named "mobile ICT" in order to illustrate the specific framework of the ICT Directive applying to the transferees' situation. However, the transferee will be allowed to start working in the second member state after the application for a "mobile ICT" permit has been filed, even if a positive decision is still pending.

Recognition Process for Company Groups

Art. 11 (6) of the ICT Directive contains an option for member states to apply a registration process for company group entities acting as the host entity with that member state. Based on the registration, a German company group entity will be under a "trusted hosting company" program. The main advantage deriving from registration will be fewer requirements in terms of documentation for transferees to these entities. Additionally, for the transferees, special "fast track"

procedures for obtaining the required visas and “ICT” permits or “mobile ICT” permits must apply. These procedures must be finalized within a special deadline of less than 90 days.⁶ Details on, for example, the competent authority and the requirements during the registration process must be set out by each member state, in cases where the member state decides on implementing such a registration process.

Legislative Status of ICT Directive in Germany

Considering normal German law-making procedures and typical processing times, a lead-time of at least four to six months from bringing the draft of a law to the attention of the German Bundesrat and Bundestag is required until finalization of the process (which means publishing the law in the law gazette). At this stage, a draft of a law implementing the ICT Directive and other directives of the EU does not even exist.⁷ Therefore, Germany is expected to fail to implement the ICT Directive in time.

Precedent for EU Rules Taking Effect Even if Not Domestically Legislated

Under some circumstances, a directive of the EU may directly apply, even if in general the provisions have yet to be implemented by/in a member state. The European Court of Justice decided in 1982 in *Van Duyn (Rs. C-41/74)*⁸ that a directive may exceptionally apply even where a member state has not complied with the deadline for implementation, such as if provisions are unconditional, and sufficiently clear, and precise.

As far as the ICT Directive is concerned, its provisions leave a broad discretion to each member state by granting them different options. In light of this, the formal conditions laid down in the *Van Duyn* case are not met.

KPMG NOTE

Company groups should be prepared for Germany not to implement the ICT Directive in Germany, so “ICT” permits obtained in other EU member states will most likely not bring any benefits for transfers to Germany in the next few months.

KPMG Law in Germany will endeavor to keep readers apprised as developments occur – e.g., once the draft of the German *Bundesregierung* is available and the legislative procedures in the Bundestag and Bundesrat have been initiated.

FOOTNOTES:

1 The ICT Directive’s official name is: Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-company transfer. To access the Directive (in English), click [here](#).

2 Germany also did not implement the EU Blue Card Directive in time. That happened more than one year after the deadline.

3 See recitals No. 47 and 48 of the ICT Directive.

4 For legal definitions, see Art. 3 lit. e to g of the ICT Directive.

5 See Art. 21 (7) of the ICT Directive.

6 90 days is the regular deadline for the competent authority when deciding on these applications, see Art. 15 (1) and 22 (1) of the ICT Directive.

7 It shall be abbreviated "Drittes Richtlinienumsetzungsgesetz".

8 To access Case 41/74, click [here](#).

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