

GMS Flash Alert

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Germany - Draft Law on Implementing EU's ICT Directive

On 12 January 2017, the German government submitted to Parliament a draft law¹ implementing:

- the European Union's Intra-Company Transfer ("ICT") Directive,²
- the so-called REST Directive (Researcher's and Student's Directive³), and
- the Seasonal Worker's Directive.⁴

The measures in this draft law will significantly transform Germany's legal landscape in respect of the rules governing non-EU/EEA/Swiss nationals posted to Germany. It is supplemented by a draft of an administrative regulation⁵, which will amend the existing German Employment Regulation ("BeschV") and the Residence Regulation ("AufenthV").

In consideration of the usual legislative process for such matters, it may be May or June 2017 before the new rules are enacted.

WHY THIS MATTERS

The draft law and regulations represent the broadest change to cross-border workers' rules in Germany since the implementation of the EU Blue Card Directive in 2012. The implementation of the ICT Directive will lead to new German "residence titles"⁶ and new obligations on the part of workers moving into and out of Germany, their employers, and their immigration advisers. While the new rules, when enacted, will significantly amend Germany's legal landscape, current German legal provisions on intra-company transfers will not be abolished, but, rather, will co-exist with the new rules.

Companies will have the chance to facilitate and support "multi-destination" assignments within the EU and incorporate procedures, measures, and policies around such in their mobility programs and assignment policies in cases where their cross-border employees are performing services pertaining to multinational projects.

In Summary

The ICT Directive is the primary EU law creating a harmonized legal framework for intra-company transfers in all EU member states (except Denmark, Ireland, and the United Kingdom).⁷ For the first time, intra-company transferees within a company group from one member state may work at a company group in a different member state under more liberal conditions; in some scenarios, they might be able to work, for example, in Germany at a German company group entity with a residence title issued under the ICT Directive's framework for when they were working at a company group entity in France.

The REST Directive as well as the Seasonal Worker's Directive have created a comparable framework for intra-EU mobility. These will also be transposed into German national law and implemented throughout the country in respect of non-EU/EEA/Swiss nationals (Denmark, Ireland, and the United Kingdom have also opted out for these two directives).

Highlights of the Changes in Store for Germany under the ICT Directive

The ICT Directive regulates transfers of staff within a company group from one legal entity to another or to a branch office of one legal entity that last more than 90 days. Not covered are shorter assignments of less than 90 days and so-called "direct assignments" from a company group's legal entity to a customer, which is possible in Germany, for example, under the Vander Elst Visa or residence titles issued for the purpose of performing services on the occasion of a contract for work and materials pursuant to Sec. 19 (2) BeschV for up to 36 months.

As defined by the ICT Directive, German law will provide for three categories of staff members that can be transferred to Germany:

- Executive employees,
- Specialists, and
- Trainees.

Assignments of executive employees and specialists will be limited to three years, assignments of trainees to one year.⁸ A cooling-off period of six months (counted from the last actual day of the previous assignment to Germany) will apply for all three groups of staff members, before the individual can be assigned again despite a role change, for example, from specialist to lead executive.⁹

The draft law applies the definitions of executive employees, specialists, and trainees as per the ICT Directive as follows:

Staff member category	Definition	Supposed to be regulated in
Executive employee	Person holding a senior position, who primarily directs the management of the host entity, receiving general supervision or guidance principally from the board of directors or shareholders of the business or equivalent.	Sec. 19b (2) AufenthG
Specialist	Person working within the group of undertakings possessing specialised knowledge essential to the host entity's areas of activity, techniques, or management. In assessing such knowledge, account shall be taken not only of knowledge specific to the host entity, but also of whether the person has a high level of qualification	Sec. 19b (2) AufenthG

	including adequate professional experience referring to a type of work or activity requiring specific technical knowledge, including possible membership of an accredited profession.	
Trainee	Person with a university degree who is transferred to a host entity for career development purposes or in order to obtain training in business techniques or methods, and is paid during the transfer.	Sec. 19b (3) AufenthG

New ICT Directive Scheme and Co-Existence with Existing German Framework for Intra-company Transfers

The German government does not intend to abolish existing rules for intra-company transfers, but will implement a parallel framework. A very clear indication of this is the continuity of all other regulations of the AufenthG and the BeschV, which are currently applicable for intra-company transfers.

Implementation of Intra-EU Mobility Scheme Stipulated by Art. 20 – 22 of the ICT Directive

As expected, Germany's government will make use of the alternatives available to it regarding intra-EU mobility, which allow Germany the maximum control possible over assignments under the ICT Directive scheme. Intra-EU mobility means that a staff member can be assigned to a legal entity or branch office in one member state with specific regulations in place to help ease assignments to other legal entities or branch offices within another, second EU member state.

In general, the ICT Directive has defined two different forms of intra-EU mobility and allows the EU member states to opt for one of these:

Type of intra-EU mobility	Duration of stay (per country)	Immigration option #1	Immigration option #2
Short-term	Up to 90 days within a period of 180 days	Working in the second member state without any immigration formality	Notification process
Long-term	More than 90 days	Notification process	Requirement of a permission to work in the second member state

With regard to short-term assignments, the German government intends to opt for the immigration option #2 (notification process), which will involve the Federal Office for Migration and Refugees (*Bundesamt für Migration und Flüchtlinge* – BAMF).

New Residence Permits

Under the draft law, a Mobile-ICT-Card will be made available in cases where a residence title is applied for, should a second assignment from another EU member state lasting more than 90 days at a time take place. It is not to be confused with the (simple) ICT-Card, which is issued to transferees for initial transfers to Germany as the "first destination" country. Both the (simple) ICT-Card and Mobile-ICT-Card will be additional German residence titles to the Schengen visa, the

national visa, the (combined) residence (and work) permit, the EU Blue Card, the settlement permit, and the EU long-term residence permit.

Their issuance will be subject to an internal approval by the German Federal Employment Agency (*Bundesagentur für Arbeit*). The Federal Employment Agency will assess whether the transferee is an executive employee, specialist, or trainee as well as whether (1) their salary is comparable to that of the local workforce and (2) other working conditions (e.g., working hours, entitlement for annual leave) are comparable to other assigned staff to the company group's legal entity or branch office of the legal entity in Germany.

Compliance and Penalties

There are rules regarding notification, applications, and conditions of intra-corporate transfers.

There will be fees for applications and notifications.

Failure to be in compliance with the rules may attract penalties.

In Brief: REST Directive and Seasonal Worker's Directive

Comparable – but in its details different to the ICT Directive – the REST Directive stipulates a framework for intra-EU mobility (largely for students, researchers, and trainees with academic backgrounds) and the draft law aims at implementing privileges for holders of a student's or researcher's residence title in another EU member state.

The Seasonal Worker's Directive and its proposed implementation in Germany provide for a very limited scope: only covering activities in the areas of farming, forestry, gardening, fruit and vegetable processing, the catering and hotel industry, and at timber mills.

(Details on the transposition of these Directives into German law under the new draft law BR-Drs. 9/17 and 10/17 are beyond the scope of this *Flash Alert*; however, in due course, we will be publishing an article on such details in KPMG's online "insight and analysis" publication *The Expatriate Administrator*.)

FOOTNOTES:

1 See: BR-Drs. 9/17, which is available on the website of the [German Bundesrat](#). For related coverage, see GMS [Flash Alert 2016-123](#) (1 November 2016).

2 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.

3. The official name is: [Directive 2016/801/EU](#) of the European Parliament and of the council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing.

4 The official name is: [Directive 2014/36/EU](#) of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers.

5 See: BR-Drs. 10/17, which is available on the website of the German Bundesrat: www.bundesrat.de.

6 A specific German "umbrella" term including visas, combined residence and work permit – as an example, please see [Sec. 4 \(1\) AufenthG \(in English\)](#).

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

8 See Sec. 19b (4) AufenthG as drafted.

9 See Sec. 19b (6) No. 3 AufenthG as drafted.

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