



21/2/2011

**EFBWW-FIEC position on the proposal for a Directive on
“Conditions of entry and residence of third-country nationals
in the framework of an intra-corporate transfer” (“ICT”)
COM(2010)378**

1. General remark

According to the EC, the aim of the proposed Directive is to facilitate intra-corporate transfers of skills both to the EU and within the EU, in order to boost the competitiveness of the EU economy, and to complement the set of other measures the EU is putting in place to achieve the goals of the EU 2020 Strategy. However, the EFBWW and FIEC wonder how the proposed Directive relates to the already existing “Blue card” Directive (2009/50/EC), which already defines the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment within the EU, including the eligibility criteria related to a salary threshold.

2. EFBWW and FIEC concerns

a) The scope of the Directive should be aligned to the commitments of the Union in application of international or bilateral trade agreements

The international agreements signed within the framework of WTO (World Trade Organisations) or the bilateral ones spell out common principles of liberalisation and the permitted exceptions. They include individual countries’ commitments to lower customs tariffs and other trade barriers and to open and keep open services markets, thereby setting a basis for transparency and reciprocity. They also set procedures for settling disputes.

The scope of the proposed Directive however is broader than that implied by international or bilateral trade commitments, in particular with regards to the EU commitments under the GATS (General Agreement on Trade and Services).

In particular, EFBWW and FIEC draw the attention of the legislator on the fact that at the moment the construction sector is not covered by the GATS Mode 4 (“presence of natural persons”).

This situation is due, amongst others, to the main specificity of the construction industry, which is characterised by a production process in which the final good is « produced » at the place where it will be used, contrary to goods which are produced in a factory and then moved to the selling points. This specificity implies a systematic transfer of workforce to the various worksites.

The EFBWW and FIEC therefore raise a warning about the unilateral opening of the EU construction markets which, as currently foreseen by the proposed Directive, could affect the competitiveness of EU companies, social protection/standards of workers and weaken the bargaining position of the EU in ongoing and future negotiations.

b) Any interference with and circumvention of the "Posting" Directive (96/71/EC) must be avoided

Because of the main characteristic of the construction industry mentioned here above, the European sectoral social partners, EFBWW and FIEC, asked years ago for an adequate piece of legislation covering the working conditions in case of temporary transfer of workers from a member State to another.

This request was at the basis of the adoption of the "Posting" Directive in 1996.

The scope of the "Posting" Directive concerns any kind of worker without any reference to a specific category (skilled or unskilled, managers, specialists, graduate trainees, etc). It is also fully applicable to third countries companies transferring temporarily workers on the EU market, independently of whether or not they have a subsidiary within the EU.

The "Posting" Directive therefore clearly defines which provisions, including working conditions, must be respected in the host country, both by EU as well as by third country companies.

The proposed "ICT" Directive states that intra-corporate transferees should benefit from the same working conditions as posted workers whose employer is established on the territory of the EU, as defined by the "Posting" Directive. This requirement is intended to protect workers and guarantee fair competition between undertakings established in a Member State and those established in a third country, by ensuring that the latter will not be able to benefit from lower labour standards to take any competitive advantage.

However, Art. 16 of the proposed "ICT" Directive on "Mobility within Member States" creates an unclear framework, which undermines the application of the provisions of the "Posting" Directive and facilitates its circumvention.

As already mentioned, one of the specificities of construction activity is the temporary and mobile nature of its workforce and of its workplace, which makes controls in practice very difficult, in particular when an enterprise is not known by the competent authority and/or is based outside its territory of competence.

For this particular reason construction activities (defined in Annex 3 of the "Posting" Directive) had been explicitly excluded from the derogation foreseen by Art. 3 §2 of the "Posting" Directive, concerning the initial assembly and/or first installation of goods of a maximal duration of 8 days. In the legislative procedure that led to the adoption of the "Posting" Directive, it was decided that such derogation would not be applied to construction activities, in order to avoid that *mala fide* contractors could use it for circumventing the provisions of the "Posting" Directive.

A handwritten signature in black ink, consisting of a stylized initial 'J' followed by a series of loops and a final flourish.

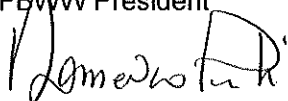
For these same reasons EFBWW and FIEC ask for an exclusion of construction activities from the scope of the proposed "ICT" Directive. Some of the provisions, in particular the ones regarding the definitions of an intra-corporate transfer, of "manager", "specialist" and "graduate trainee" and concerning the mobility within Member States (Art.16) could be misused and abused for obtaining work and residence permits without any possible efficient control by the administration of the information provided.

For these reasons the European sectoral social partners for the construction industry, EFBWW and FIEC, consider that as far as construction activities are concerned request that construction activities be excluded from the scope of the proposed "ICT" Directive.

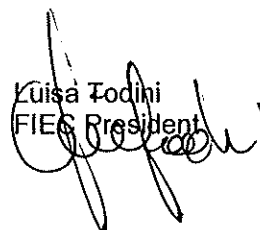
EFBWW and FIEC will follow with attention the development of the debates on the proposed Directive and will undertake further specific actions on issues that are of concern for the construction industry in case the request for a sectoral exclusion is not accepted.

Brussels, 21st February 2011

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3. EFBWW and FIEC requests for amendments

- a) The scope of the Directive should be limited to the EU's specific commitments under international or bilateral trade agreements (Recital 10)

Proposal of the EC	Amendment proposed by EFBWW and FIEC
<p>(10) 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.</p>	<p>(10) 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. and its scope is limited to the Union's specific commitments under international or bilateral trade agreements.</p>

Justification :

The international agreements signed within the framework of WTO (World Trade Organisations) or the bilateral ones spell out common principles of liberalisation and the permitted exceptions. They include individual countries' commitments to lower customs tariffs and other trade barriers and to open and keep open services markets, thereby setting a basis for transparency and reciprocity. They also set procedures for settling disputes.

In order to ensure the application of reciprocal obligations and rights the scope of the Directive should be limited to those areas in which the EU has taken specific commitments under international or bilateral agreements.



b) Construction activities must be excluded from the scope of the proposed Directive (Art. 2 (d) New)

Proposal of the EC	Amendment proposed by EFBWW and FIEC
<p>Article 2 Scope</p> <p>2. This Directive shall not apply to:</p> <p>[...]</p>	<p>Article 2 Scope</p> <p>2. This Directive shall not apply to:</p> <p>[...]</p> <p>(d) activities in the field of building work listed in the Annex 3 of Directive 96/71/EC.</p>

Justification :

In order to avoid a unilateral opening of the EU construction markets, as well as interferences with and circumventions of the "Posting" Directive (96/71/EC), the latter should remain the only EU legislative framework in respect of the temporary transfer of workers within the EU as far as construction activities are concerned.

