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The labyrinth of employment and social rights in the EU Intra-Corporate Transfer Directive

Abstract

Directive 2014/66/EU on Intra-Corporate Transfer regulates temporary secondment of key personnel and trainees from third countries to the Member States of the EU. It is part of the EU external labour migration policy and aims at facilitating this policy by setting up harmonized conditions for admission, residence and work of these migrants, including the right to move and work in another Member State. This article analyses the role and meaning of the provisions in this directive relating to the employment and social security rights of intra-corporate transferees. They are the result of cumbersome negotiations and the compromises that were reached are ambiguously and inconsistently formulated. First, this article will highlight the relevance of the worker's employment position for determining the scope of this directive. Next, it will analyse the role of employment and social security rights in the implementation of the directive by the Member States. These rights are relevant as criteria for admission, as grounds for rejection of an application, as grounds for withdrawal or non-renewal of an ICT permit and as conditions for short-term and long-term mobility within the EU. Subsequently, this article will scrutinize in detail the provisions of Article 18 of the directive which guarantee equal treatment with the nationals of the host State regarding employment and social security rights. Special attention will be paid to the interrelation of this directive with other EU legal instruments such as the Posting of Workers Directive, the Rome I Regulation and social security Regulation 883/2004. It concludes that the complicated and contradictorily worded provisions on employment and social security rights in this directive reflect the ambiguity in the perception of the status of this type of migrant workers coming from a third country: are they to be considered as temporary workers or do they really participate in the labour market of the host Member States?

1. Introduction

The EU Intra-Corporate Transfer (ICT) Directive adopted in 2014¹ aims at facilitating and regulating the temporary secondment of key personnel and trainees from third countries to the Member States of the EU. It is part of the common EU labour migration policy and contains measures to make it easier for third-country managers, specialists and trainee employees to enter and work in the Union within the framework of an intra-corporate transfer from an undertaking established outside the EU to an entity of that undertaking or group established in a Member State. It complements two other directives, one on highly skilled workers (Blue Card Directive)² and one on seasonal workers³, reflecting the EU's piecemeal approach to labour migration.⁴ It is the EU's response to an increased demand for labour, as well as to the

¹ 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-corporate transfer (OJ 2014 L 157/1) (hereinafter referred to as ICT Directive).

² Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment (OJ 2009 L 155/17).

³ 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 (OJ 2014 L 94/375).

⁴ For a more detailed account of the EU labour migration policy see, *inter alia*: S. Carrera, E. Guild and K. Eisele (eds.), *Rethinking the Attractiveness of EU Labour Immigration Policies* (Brussels: CEPS, 2014); S. Guir, 'EU Labour immigration policy: discourses and mobility', *Refugee Survey Quarterly* 2013 (32), 90-111; P. Herzfeld

globalization of business. This directive aims at facilitating such transfers by setting up harmonized conditions for admission, residence and work, including the right to move and work in another Member State (intra-EU mobility).⁵

One of the directive's objectives is to guarantee decent working conditions and fair competition by preventing the sending employer from benefiting from lower labour standards.⁶ Still, the issue of the employment and social security rights of the intra-corporate transferees was fiercely debated during the negotiations on the Commission's proposal in the Council of Ministers and the European Parliament. This resulted in a large number of provisions in the directive, in which the employment and social security position and rights of these workers play a crucial role. However, it does appear that due to these cumbersome negotiations, the compromises that were reached are ambiguously and inconsistently formulated.⁷

This article will examine the role that employment and social security rights play in the ICT Directive and in the implementation of this directive by the EU Member States. First, it will highlight the relevance of the worker's employment position for determining the scope of this directive. Next, it will analyse the role of employment and social security rights in the implementation of the directive by the Member States. These rights are relevant as criteria for admission, as grounds for rejection of an application, as grounds for withdrawal or non-renewal of an ICT permit and as conditions for short-term and long-term mobility within the EU. Subsequently, this chapter will scrutinize in detail the provisions of Article 18 of the directive which guarantee equal treatment with the nationals of the host State regarding employment and social security rights. Finally, some conclusions will be drawn.

The issue of the employment and social security rights of intra-corporate transferees are legally complex due to the interference of and with other EU legal instruments regarding these matters, such as the Posting of Workers Directive 96/71/EC (PWD)⁸, the Private International Law rules of Rome I Regulation 593/2008/EC⁹ and the EU social security coordination Regulation 883/2004/EC.¹⁰ The latter instrument has been extended to third-country nationals moving

Olsson, 'The Legal Basis and a Historical Overview', in P. Herzfeld Olsson (ed.), *National Effects of the Implementation of EU Directives on Labour Migration from Third Countries*, *Bulletin for Comparative Labour Relations*, 91 (Alphen aan den Rijn: Wolters Kluwer, 2016), 1-7 and H. Verschueren, 'Employment and Social Security Rights of Third-Country Labour Migrants under EU Law: An Incomplete Patchwork of Legal Protection', *European Journal of Migration and Law* 2016 (18), 376-380.

⁵ For a detailed analysis of the various provisions of this directive, see: C. Costello and M. Freedland, 'Seasonal Workers and Intra-corporate Transferees in EU Law. Capital's Handmaidens?' in J. Howe and R. Owens (eds.), *Temporary Labour Migrations in the Global Era* (Oxford and Portland: Hart, 2016), 43-63; A. de Bie and A. Ghimis, 'The intra-corporate transferees directive: a revolutionary scheme or a burden for multi-national companies?', *ERA Forum* 2017 (18), 199-211; H. Lörge, 'ICT Directive 2014/66' in K. Hailbronner and D. Thym (eds.), *EU Immigration and Asylum Law, A Commentary* (Baden-Baden – Oxford: Beck-Hart-Nomos, 2016), 974-1022 as well as the chapters in P. Minderhoud and T. De Lange (eds.) *The Intra Corporate Transferee Directive. General Themes, Problem Issues and Implementation in Selected Member States* (Oisterwijk: Wolf Legal Publishers 2018).

⁶ See recitals 15 and 38.

⁷ In the same vein: A. de Bie and A. Ghimis, op cit, 201; A. Lazarowicz, *The Intra-Corporate Transferees Directive: time to break the deadlock*, EPC Policy brief (2013); H. Lörge, op cit, 982.

⁸ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18/1) (hereinafter referred to as 'Directive 96/71' or as 'PWD').

⁹ Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ 2008 L 177/1) (hereinafter referred to as 'Rome I Regulation 593/2008').

¹⁰ Regulation 883/2004/EC on the coordination of the social security systems (OJ 2004 L 200/1) (hereinafter referred to as 'Regulation 883/2004').

within the Member States by means of Regulation 1231/2010/EU.¹¹ It concerns third-country nationals who are legally residing in a Member State and whose situation is not in any way confined to a single Member State. This article will also analyse the impact of these legal instruments on the employment and social security rights of intra-corporate transferees.

2. The relevance of the employment position for determining the scope of the ICT Directive

In defining its personal scope, Directive 2014/66 refers to the employment position of the intra-corporate transferee. The directive has a very specific scope since it concerns temporary assignments by companies of highly skilled third-country nationals, in particular managers, specialists or trainee employees¹², to subsidiaries in the EU.¹³ It follows from the definition of ‘intra-corporate transfer’ in Article 3(b) that the directive only applies if the intra-corporate transferee is bound by a work contract prior to and during the transfer with an undertaking established outside the territory of a Member State. This means that the directive would not apply, or would no longer apply, if the host entity concludes a work contract with the intra-corporate transferee.¹⁴

This is an essential feature of the intra-corporate transfer: the sending company must legally remain the employer of the seconded intra-corporate transferee. However, there is no clarification in the directive (or its recitals) as to how and on the basis of which criteria the host State should determine who is the employer, legally speaking. Indeed, it remains unclear whether the host Member State may apply its own legislation, on the basis of which it could decide that the host entity fulfils the criteria for being the employer of the intra-corporate transferee. This could be the case if the host entity exercises, in actual practice, the main functions of an employer, such as the power to give instructions on how the work should be done, or to make the worker redundant.

The employment position of the intra-corporate transferee is further relevant for the implementation of the provision which excludes some types of work from the scope of the directive. First, third-country nationals who are posted within the framework of the Posting of Workers Directive 96/71 are excluded.¹⁵ However, this exclusion seems to be superfluous since the scope of the PWD is limited to postings by undertakings established in a Member State, whereas the definition of ‘intra-corporate transfer’ in Article 3(b) of the ICT Directive explicitly refers to secondment by an undertaking established outside the territory of a Member State. Consequently, posting from within the EU is already excluded by this definition. Therefore, it is not clear why workers posted in the framework of the PWD had to be explicitly excluded from the scope of the ICT Directive.

¹¹ Regulation (EU) No 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality (OJ 2010, L344/1) (hereinafter referred to as ‘Regulation 1231/2010’). In C-477/17, Balandin the CJEU interpreted the conditions of legal residence widely as also encompassing a temporary stay in a Member State on the basis of a visa.

¹² These categories are defined in Article 3.

¹³ With regard to these subsidiaries recital 24 of the ICT Directive states that ‘with a view to fighting possible abuses of this Directive, Member States should be able to refuse, withdraw or not renew an intra-corporate transferee permit where the host entity was established for the main purpose of facilitating the entry of intra-corporate transferees and/or does not have a genuine activity’.

¹⁴ See also the clarifications given to the EU Contact Group “Legal Migration” at the meeting of 4 July 2019: MIGRAPOL, Contact Group, Mig-Dir-153, 6 (to be consulted at <https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupMeeting&meetingId=17314>).

¹⁵ Article 2(2)(c).

Third-country nationals carrying out activities as self-employed workers are also excluded from the scope of the ICT Directive.¹⁶ No clarification is given in terms of the basis on which criteria the Member States could make the distinction between employed and self-employed workers, contrary to what has been laid down in the PWD. The latter provides in its Article 2(2) that for the purpose of this directive, the definition of a worker is that which applies in the law of the hosting Member State. In the absence of a specific definition in a directive or regulation, as is the case with this ICT directive, it is settled case law of the CJEU that the definition of a worker should be an autonomous EU definition. As regards the concept of ‘worker’ in the context of the free movement for workers of Article 45 TFEU, the CJEU clarified that any person pursuing economic activities which are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a ‘worker’. For the Court, the essential feature of an employment relationship is that, for a certain period, a person performs services for and under the direction of another person (subordination), in return for which he/she receives remuneration.¹⁷

Finally, the ICT-Directive excludes from its scope third-country nationals who *‘are assigned by employment agencies, temporary work agencies or any other undertakings engaged in making available labour to work under the supervision and direction of another undertaking’*.¹⁸ For this category of workers, no further explanation is given either. But recital 36 of the ICT Directive specifies that intra-corporate transferees may exercise specific activities at the sites of clients within the Member State where the host entity is established.

The maximum duration of an intra-corporate transfer is three years for managers and specialists and one year for trainees. Member States may require a cooling off period of up to six months to elapse between ICT permits.¹⁹

3. The role of employment and social security rights in the implementation of the ICT Directive

The employment and social security rights of an intra-corporate transferee play a prominent role in the implementation of the directive. More specifically, they are relevant as criteria for admission, as grounds for rejection of an application, as grounds for withdrawal or non-renewal of an ICT permit, and as conditions for the short-term and long-term mobility within the EU. I will now analyse this role in greater detail.

3.1. Criteria for admission and grounds for rejection of an application or withdrawal of an ICT permit

The criteria for admission are laid down in Article 5 of the ICT Directive. The first requirement is that the third-country national who applies for admission as an intra-corporate transferee, or the host entity, shall *‘present a work contract and, if necessary, an assignment letter from the employer containing details of the duration of the transfer and the location of the host entity or entities; ...; the remuneration as well as other terms and conditions of employment granted*

¹⁶ Article 2(2)(d).

¹⁷ See e.g. Case 66/85, *Lawrie-Blum*, EU:C:1986:284, para 17 and Case C-46/12, *L.N.*, EU:C:2013:97, para 40. In other areas of EU law too, in the absence of any specific definition of a ‘worker’ or any reference to the law of the Member States, the CJEU applied an EU concept of ‘worker’, such as in the field of equal treatment for male and female workers (see Case C 366/99, *Griesmar*, EU:C:2001:648, para 31) or for the implementation of the Working Time Directive 2003/88/EC (see Case C 151/02, *Jaeger*, EU:C:2003:437, paras 58-59) and the Collective Redundancies Directive 98/59 (see Case C-229/14, *Balkaya*, EU:C:2015:455, para 33).

¹⁸ Article 2(2)(e).

¹⁹ Article 12.

during the intra-corporate transfer'.²⁰ Since the remuneration and other terms and conditions of employment will play a crucial role in the implementation of the directive, the information in the work contract will be of the utmost importance.

In addition, the intra-corporate transferee or the host entity shall also '*without prejudice to existing bilateral agreements, provide evidence of having, or, if provided for by national law, having applied for, sickness insurance for all the risks normally covered for nationals of the Member State concerned for periods where no such insurance coverage and corresponding entitlement to benefits are provided in connection with, or as a result of, the work carried out in that Member State*'.²¹ This provision refers to the situation where the intra-corporate transferee is, in connection with or as a result of the work, not covered by the national sickness insurance system of the host Member State. This depends in the first place on the legislation of that Member State, but also on the existing bilateral social security agreements concluded between the home State and the host State. Such an agreement may provide that the intra-corporate transferee remains subject to the sickness insurance system of his/her home State. In that case he/she or the host entity must provide evidence that the intra-corporate transferee has a statutory or a supplementary coverage for sickness insurance that should cover all the risks normally covered for nationals of the host Member State. This may require additional coverage by private insurance schemes.

As a supplementary condition for admission, Article 5(4)(a) obliges the Member States to require that '*all conditions in the law, regulations, or administrative provisions and/or universally applicable collective agreements applicable to posted workers in a similar situation in the relevant occupational branches are met during the intra-corporate transfer with regard to terms and conditions of employment other than remuneration.*'. This provision refers to the terms and conditions as defined by the PWD.²² The PWD does not impose the application of all of the labour law provisions of the receiving State, but only of those provisions that constitute the core of mandatory provisions for minimum protection (the so-called 'hard core'), and more specifically: maximum work periods and minimum rest periods; minimum number of paid annual holidays; remuneration²³; conditions for the posting of employees, in particular by temporary employment agencies; health, safety and hygiene in the workplace; protective measures for special groups of employees (pregnant women, youngsters); provisions regarding equal treatment and non-discrimination; conditions of workers' accommodation and allowances and reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons.²⁴ These conditions apply as far as they are laid down by law, regulations or administrative provisions and/or universally or generally applicable

²⁰ Article 5(1)(c).

²¹ Article 5(1)(g).

²² See Recital 15.

²³ The initial version of the PWD referred to 'minimum rates of pay', but this term was recently replaced by 'remuneration' by Directive (EU) 2018/957 of the European Parliament and the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provisions of services (OJ 2018 L 173/16). This directive had to be implemented by the Member States by 30 July 2020. We may assume that the reference in the ICT Directive to the PWD is a dynamic one which means that it also implies a reference to any amendments to the PWD that are introduced since the adoption of the ICT Directive. Such a dynamic reference would be in line with the objective of the ICT Directive to guarantee decent working conditions and fair competition.

²⁴ The latter two rights were introduced by Directive (EU) 2018/957 (see previous footnote). The last right shall apply exclusively to travel, board and lodging expenditure incurred by posted workers where they are required to travel to and from their regular place of work in the Member State to whose territory they are posted, or where they are temporarily sent by their employer from that regular place of work to another place of work.

collective agreements.²⁵ The reference in this provision to the PWD means that the intra-corporate transferee has to be guaranteed this ‘hard core’ protection in the host Member State, but not all employment protection offered by the law of that Member State.

Strikingly, the remuneration, which is a central element of the employment conditions, is subject to a separate provision in Article 5(4)(b), which states that *‘the remuneration granted to the third-country national during the entire intra-corporate transfer is not less favourable than the remuneration granted to nationals of the Member State where the work is carried out occupying comparable positions in accordance with applicable laws or collective agreements or practices in the Member State where the host entity is established’*. This provision was meant to be an exception to the rules governing the employment rights of workers posted within the EU and was not provided for in the original proposal of the Commission for the ICT Directive.²⁶ Nevertheless, the issue of the remuneration to be guaranteed to the intra-corporate transferee became one of the main issues of debate between the Council of Ministers and the European Parliament. It appears from the discussions in the Council and in the European Parliament that the legislator explicitly wanted to guarantee the same remuneration for a seconded intra-corporate transferee as for a worker of the host State occupying comparable positions.²⁷ This also follows from recital 15 which confirms that this provision *‘is intended to protect workers and guarantee fair competition between undertakings established in a Member State and those established in a third country, as it ensures that the latter will not be able to benefit from lower labour standards to take any competitive advantage’*. Meanwhile, however, the PWD has been amended and it now refers to ‘remuneration’ so that PWD has come in line with the ICT Directive.

Still, Article 5(4)(b) ICT Directive, or any recital, does not clarify what is meant by ‘comparable positions’, the remuneration of which should be guaranteed.²⁸ Neither does it specify which elements of the employer’s obligations are part of the term ‘remuneration’, such as for instance sickness or redundancy payments, supplementary occupational pension schemes or all kind of benefits supplementing the basic wage. The revised PWD excludes *‘supplementary occupational retirement pensions schemes’ from the definition of remuneration*. In addition Article 3(1) third paragraph of the revised PWD specifies that for the purposes of this Directive, the concept of remuneration *‘shall be determined by the national law and/or practice of the*

²⁵ See Article 3 (1) and (8) PWD.

²⁶ COM(2010)378 of 13 July 2010.

²⁷ B. Friðriksdóttir, *What happened to Equality? The Construction of the Right to Equal Treatment of Third-Country Nationals in European Union Law on Labour Migration*, PhD University of Nijmegen, 2016, pp. 232-233. See also the Note from the Council Presidency to the Councillors of 27 January 2014, Council Doc. No 5635/14, 12.

²⁸ The clarifications given by the Commission to the EU Contact Group “Legal Migration” at the meeting of 4 July 2019, state that this reference is meant to guarantee fair competition between undertakings established in the EU and in third countries, but that a binding across the board threshold is no appropriate tool for transposing this article. Member always have to carry out an individual assessment taking into account the salaries paid in that Member State for comparable posts: MIGRAPOL, Contact Group, Mig-Dir-153, 12 (see above footnote 14). In her study on the implementation of equal treatment for highly qualified labour migrants in Sweden, Herzfeld Olsson mentions that the Swedish Migration Agency requires a minimum level based on the 25th percentile in the wages statistics from Statistics Sweden. This means that intra-corporate transferees risk not obtaining an ICT permit or risk losing it if this wage level is not upheld. But she adds that in the present Swedish legal context the intra-corporate transferees do not have any legal means of suing the employer for not providing that wage level. She also casts some doubt on whether this situation fulfils the requirements of the ICT Directive since it may lead to a situation in which intra-corporate transferees are in practice paid along the lower wage segments to a higher degree than local workers: P. Herzfeld Olsson, *Equal treatment for highly qualified labour migrants*, (Uppsala: Uppsala Institute for Evaluation of Labour Market and Education Policy, 2019), 72 and 78.

Member State to whose territory the worker is posted and means all the constituent elements of remuneration rendered mandatory by national law, regulation or administrative provision, or by collective agreements or arbitration awards which, in that Member State, have been declared universally applicable or otherwise apply in accordance with paragraph 8’. Conversely, Article 5(4)(b) ICT Directive does not contain any specification of what should be considered remuneration for the purpose of the implementation of this or other provisions of that directive. Neither does it contain a reference to the law and/or practices of the Member States or a limitation to the constituent elements of remuneration rendered mandatory. And since the reference in Article 5(4)(a) to the PWD excludes the provisions on remuneration therein, the definitions used in the PWD cannot be applied for the implementation of the ICT Directive. Therefore, we may assume that in the absence of any definition of remuneration in the ICT Directive, this concept must be given a wide and common EU meaning.

Article 5(4)(a) and (b) only obliges the host Member States to require, when examining a request for admission, that these employment conditions are met and that this remuneration is granted. However, it does not guarantee these rights as individual rights as such for the intra-corporate transferee. For those rights the intra-corporate transferee can only rely on Article 18 which guarantees the right to equal treatment with workers in the host State, which we will discuss further in point 4.1.

In addition, Article 5(5) allows (and does not oblige) the Member States to require as a ground for admission, *‘that the intra-corporate transferee will have sufficient resources during his or her stay to maintain himself or herself and his or her family members without having recourse to the Member States’ social assistance systems’*. However, this provision itself does not exclude the intra-corporate transferee from entitlement to social assistance under the system of the host Member State. It only seems to mean that the host Member State can refuse the admission of the intra-corporate transferee if there is a risk that this person will need to have recourse to the social assistance system of the host State. Article 18 guarantees, under certain conditions, the right to equal treatment with regard to all branches of social security covered by Regulation 883/2004, which includes some forms of social assistance. The latter provision does not explicitly exclude the intra-corporate transferee from the right to equal treatment for social assistance. We will discuss this further under point 4.2.

Article 5 ICT Directive not only contains criteria for admission, but via Article 7(1) it indirectly also contains grounds for rejection of an application. Indeed, Article 7(1) obliges the Member States to reject applications for an ICT permit when Article 5 has not been complied with. This means that if the intra-corporate transferee or the host entity does not fulfil the grounds for admission with regard to the work contract, the sickness insurance, the terms and conditions of employment and the remuneration as defined in Article 5, the application for the ICT permit must be rejected by the host Member State.

The employment and social security rights of the intra-corporate transferee can also be a ground for withdrawal or non-renewal of the ICT permit. Article 8(5)(a) allows the Member States to withdraw or refuse to renew an ICT permit when Article 5 is not or no longer complied with. Contrary to the provisions of Article 5 and Article 7, where compliance with the employment and social security conditions are mandatory criteria for admission as well as for the acceptance of the application for an ICT permit, in Article 8 these are only optional grounds for withdrawal or non-renewal of the permit. The reason for this seems to be that the consequences of withdrawal or non-renewal may be more cumbersome for the intra-corporate transferee and the host entity, since the work has already started and the intra-corporate transferee is already

residing in the host State. It allows, according to the proportionality principle, to take account of all the relevant circumstances in a particular case.²⁹

3.2. Conditions for intra-EU mobility

One of the essential features and added value of the ICT Directive is the ground-breaking possibility it offers to the intra-corporate transferee and his/her employer in terms of mobility within the EU.³⁰ As stated by recital 25, this directive does aim at facilitating the mobility of intra-corporate transferees within the Union ('intra-EU mobility') and at reducing the administrative burden associated with work assignments in several Member States. For this purpose, this directive sets up a specific intra-EU mobility scheme whereby the holder of a valid ICT permit issued by a Member State is allowed to enter one or more Member States and to stay and work there. The provisions in chapter V (Articles 20 to 23) of the directive entitle the intra-corporate transferee who holds a valid ICT permit issued by a Member State (which is called the 'first Member State') to enter one or several other Member States (which are called 'second Member States') and to stay and work there. In fact, this system indirectly turns the ICT permit issued by a Member State into a permit which allows access to the territory and labour market of all other Member States. Still, this intra-EU mobility is limited to work for another entity of the same undertaking or group of undertakings.

The directive makes a distinction between 'short-term mobility' for a period of up to 90 days and 'long-term mobility' for more than 90 days. Article 21(2) on the short-term mobility states that the second Member State may require the host entity in the first Member State to notify the first Member State and the second Member State of the intention of the intra-corporate transferee to work in an entity established in the second Member State. This provision only requires a notification and not an application for admission. Article 21(3) allows the second Member State to require the notification to include the transmission of, *inter alia*, the work contract and, if necessary, the assignment letter, which were transmitted to the first Member State in accordance with Article 5(1)(c). According to Article 21(6) the second Member State may, based on the notification, object to the move of the intra-corporate transferee to its territory within 20 days from the date it received the notification, when the conditions set out in Article 5(4)(b) are not complied with. The latter provision obliges the Member States to require that the remuneration granted to the third-country nationals during the entire intra-corporate transfer is not less favourable than the remuneration granted to nationals of the Member State where the work is carried out occupying comparable positions. Nevertheless, Article 21(6) is worded as an option for the second Member State to object to the mobility, and not as an obligation. Therefore, it is not clear whether or not the reference to Article 5(4)(b) indirectly imposes an obligation on the second Member State to object to the short-term mobility if the requirement regarding the remuneration in the latter provision is not met. Moreover, there is no reference in Article 21(6) to other employment conditions to which Article 5(4)(a) refers, to sickness coverage to which Article 5(1)(g) refers or to the sufficient resources condition in Article 5(5). Apparently, the directive aims at facilitating as much as possible the short-term mobility by imposing fewer obligations regarding employment conditions and sickness insurance compared to those of the first Member State and compared to the possibilities offered in cases of long-term mobility.

As regards the long-term mobility, Article 22 provides for two systems that the second Member State may adopt. It may apply Article 21 and allow under the system of notification of this article the intra-corporate transferee to stay and work on its territory on the basis of and during

²⁹ P. Herzfeld Olsson, op cit (2019), 71-72.

³⁰ See more on the intra-EU mobility: A. de Bie and A. Ghimis, op cit, 199-211

the period of validity of the ICT permit issued by the first Member State. Alternatively, the second Member State may apply the application procedure provided for in paragraphs 2 to 7 of Article 22. If the second Member State opts for a system of application of long-term mobility, Article 22(2) allows that second Member State to require the applicant to submit, *inter alia*, a work contract and, if necessary, an assignment letter, as provided for by Article 5(1)(c) as well as evidence of having, or, if provided for by national law, having applied for, sickness insurance, as provided for in Article 5(1)(g). The second Member State may reject an application for long-term mobility when, *inter alia*, the criteria of the employment conditions, the remuneration as well as the sufficient income requirements of the intra-corporate transferee as set out in Article 5(4) or Article 5(5) are not met (Article 22(3)(a)). If it takes a positive decision on the application for long-term mobility, it shall issue a permit for long-term mobility. Consequently, in the case of long-term mobility in the EU the second Member States have more possibilities to control the employment conditions as compared to the short-term mobility.

All these provisions on intra EU-mobility are worded as options for the second Member State. Therefore, they offer great flexibility to the second host Member States in terms of control and sanctions with regard to their employment and social security legislation and rules.

4. Equal treatment

It follows from the above analysis that remuneration, employment conditions and sickness coverage play a prominent role in the implementation of the criteria for admission, of the grounds for refusal, withdrawal or non-renewal of an ICT permit as well as in allowing intra-EU mobility. However, the analysed provisions do not, as such, grant the intra-corporate transferee rights in these fields. Only, if these rights are not guaranteed, the intra-corporate transfer or intra-EU mobility may not be allowed to take place.

So, it remains to be determined to which employment and social rights the intra-corporate transferee would be entitled on the basis of the ICT Directive. To answer this question, the directive gives a partial, yet very ambiguously worded, reply in its Article 18 on the right to equal treatment. The objective of this article is to ensure decent working and living conditions for the intra-corporate transferee while staying in the Union³¹ and to protect workers and guarantee fair competition between undertakings established in a Member State and those established in a third country, as it ensures that the latter will not be able to benefit from lower labour standards to gain competitive advantage.³² However, it remains to be seen if the provisions of Article 18 are sufficient to reach this goal, more specifically when one takes into account the interference between this article and other legal instruments relating to the applicable employment and social security law in cross-border situations, more specifically the Posting of Workers Directive 96/71 (PWD), the Private International Law rules of Rome I Regulation 593/2008, the EU social security coordination of Regulation 883/2004 (which has been extended to third-country nationals moving within the Member States by Regulation 1231/2010/EC) and the bilateral social security agreements concluded between the Member States and third countries. Therefore, I will examine in this part the wording and possible meaning of the provisions of Article 18 of the directive in the context of these other legal instruments.

From the outset, we can state that Article 18 grants individual rights to the intra-corporate transferee, and includes corresponding obligations for the Member States as well as the

³¹ See recital 38.

³² See recital 15.

employers.³³ Moreover, pursuant to Article 4 of the ICT Directive, this directive shall not affect the right of Member States to adopt or retain more favourable provisions for third-country nationals in respect of, *inter alia*, Article 18. This means that Member States are not prohibited from introducing in their national legislation more rights than the rights the intra-corporate transferee can draw directly from the equal treatment provisions in Article 18. Article 4 also states that the directive shall apply without prejudice to more favourable provisions in bilateral and multilateral agreements concluded between one or more Member States and one or more third countries.

4.1. Terms and conditions of employment

The issue of the terms and conditions of employment to which the intra-corporate transferee should be entitled on the basis of the ICT Directive was heavily debated during the negotiation process between the Council and the European Parliament. The majority of the Member States regarded the position of the intra-corporate transferees as comparable to posted workers as dealt with in the Posting of Workers Directive. A minority of the Member States as well as the European Parliament pleaded for equal treatment for all terms and conditions of employment with the nationals of the host Member State. The view of the majority in the Council prevailed in the compromises that were eventually reached, even if they are, once again, ambiguously worded.³⁴

Article 18(1) states that *‘whatever the law applicable to the employment relationship, and without prejudice to point (b) of Article 5(4), intra-corporate transferees admitted under this Directive shall enjoy at least equal treatment with persons covered by Directive 96/71/EC with regard to the terms and conditions of employment in accordance with Article 3 of Directive 96/71/EC in the Member State where the work is carried out’*.

This provision is worded as an exception to the law that is applicable to the employment relationship. The rules determining the law that is applicable to the employment relationship are laid down in the Rome I Regulation 593/2008, which is an instrument of Private International Law. It determines the law applicable to contractual obligations, including labour contracts. It has universal application, meaning that according to its Article 2 *‘any law specified in this regulation shall be applicable whether or not it is the law of a Member State’*.

For employment contracts, Articles 8 and 9 Rome I Regulation contain specific rules with regard to the determination of the law applicable to individual employment contracts, both in situations in which the parties have made a choice of law and in situations where no choice of law has been made. In the absence of a choice of law, the principle is that the employment contract is subject to the law of the country where the employee habitually carries out his/her job (or from where he/she usually carries out his/her job)³⁵, even when he/she is temporarily employed in another country (Article 8(2)).³⁶ The latter is normally the case with posted workers, such as intra-corporate transferees. It means that these workers are considered to habitually carry out their work in the country from which they are posted, so that the law of that country remains applicable to the employment relationship. When, as a rule, this employee does

³³ H. Lörge, op cit, 1008.

³⁴ B. Fridriksdottir, op cit, 246-248 and Lörge, op cit, 1008. See also the Note from the Council Presidency to the JHA Councilors of 22 February 2013, Council doc. No 667/13, and the Note from the Council Presidency to the Permanent Representatives Committee of 8 November 2013, Council doc. No 1343/6.

³⁵ Case C-29/10, *Koelzsch*, EU:C:2011:151.

³⁶ Recital 36 of the Rome I Regulation states in this regard: *‘As regards individual employment contracts, work carried out in another country should be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out his tasks abroad’*.

not carry out his/her job in the same country, the law of the country where the employer's establishment is situated is applicable (Article 8(3)). However, these arrangements are put aside if the circumstances as a whole show that the employment contract is linked more closely with another country, in which case the law of that other country applies (Article 8(4)).³⁷ The law determined in the absence of a choice of law is sometimes referred to as 'objective applicable law'.

But the basis of the Rome I Regulation is the freedom of choice of the parties (Article 3). So, in principle, the parties of an employment contract have the freedom to choose the law that is applicable to the contract and may depart from the territorial application of the labour law of the country where the activities are carried out. Still, this freedom of choice is limited. Indeed, even if a choice of law has been made the employee may not lose the protection he/she enjoys on the basis of the mandatory provisions of the 'objective applicable law' (Article 8(1) Rome I Regulation). Moreover, pursuant to Article 9 Rome I Regulation it is also possible to apply the 'overriding mandatory provisions' of the law of another country. These could, for instance, be invoked if the employee is temporarily employed in that other country, as in the case of posting. For the purpose of specifying what these provisions are in the case of posting, the EU legislator has adopted the PWD.

So, the application of these PIL rules, as harmonized at EU level, can have the result that work carried out on the territory of a certain Member State is not, or is only to a limited extent, subject to the employment law of that country. Indeed, according to these rules a posted employee for instance continues to be subject to the employment legislation of the habitual place of work because he/she does not 'habitually' work on the territory of the country in which he/she is temporarily posted. Regarding intra-corporate transferees, this may be the case when the intra-corporate transferee maintains the habitual place of work in the third country of origin. It is also possible, and in some cases even likely, that the employer and the intra-corporate transferee have explicitly opted for the employment law of the home country to continue to apply during the secondment. It is very likely that the employment law of the country of origin will, in principle, remain applicable to the employment contract. Of course, if there is no intention of the intra-corporate transferee to resume work in the country of origin after the transfer to the host Member State, the latter will become the habitual place of work so that the employment law of that state will be the 'objective applicable law'.

Article 18(1) of the ICT Directive means that notwithstanding the fact that the law of a third country remains applicable to the employment contract, the intra-corporate transferee is entitled to at least equal treatment with persons covered by the PWD, with regard to the terms and conditions of employment in accordance with Article 3 PWD, in the Member State where the work is carried out. This article establishes an individual right for the intra-corporate transferees and corresponding obligations for the employers.³⁸ In the first place, it means that if the rights guaranteed by the PWD are more favourable to the rights guaranteed by the law applicable to the employment contract, the first will take precedence.³⁹ But it also means that if the terms and conditions of employment of that third country or as laid down in the employment contract

³⁷ See in this respect also: Case C-384/10, *Voogsgeerd*, EU:C:2011:842 and Case C-64/12, *Schlecker*, EU:C:2013:551.

³⁸ P. Herzfeld Olsson, op cit (2019), 69 and H. Lörge, op cit, 1008.

³⁹ This corresponds to and indirectly implements what is provided in Article 1(4) PWD, that undertakings established in a third country must not be given more favourable treatment than undertakings established in a Member State and to which the PWD applies. The employment protection offered by the PWD to posted workers is the minimum protection that must be offered to intra-corporate transferees who are transferred by their employer established in a third country. See C. Costello and M. Freedland, op cit, 62-63 and P. Herzfeld Olsson, op cit (2019), 75.

are more favourable compared to the terms and conditions guaranteed under Article 3 of the PWD, these more favourable terms and conditions continue to apply. Indeed, the intra-corporate transferee cannot lose rights he/she can draw from other legal sources than the PWD or the ICT Directive.

As already mentioned under point 3.1., the PWD does not impose the application of all the labour law provisions of the host State, but only of those provisions which constitute the core of the mandatory provisions for minimum protection, including, since the recent amendments to the PWD⁴⁰, the remuneration. As a consequence of this amendment the reference to ‘*terms and conditions of employment in accordance with Article 3 of the PWD*’ in Article 18(1) of the ICT Directive also includes a reference to remuneration. However, as regards remuneration, Article 18(1) of the ICT Directive applies ‘*without prejudice to point (b) of Article 5(4)*’. The latter provision states that the Member States shall require, as a criterion for admission of the intra-corporate transferee, that ‘*the remuneration granted to the third-country national during the entire intra-corporate transfer is not less favourable than the remuneration granted to nationals of the Member State where the work is carried out occupying comparable positions in accordance with applicable laws or collective agreements or practices in the Member State where the host entity is established.*’ Still, this provision itself does not entitle the intra-corporate transferee to such a remuneration. The legislator probably meant to guarantee intra-corporate transferees a remuneration corresponding to the criterion for admission as worded in Article 5(4)(b),⁴¹ but again this does not, as such, follow from the wording of the latter provision or of Article 18(1). Still, the reference to the PWD in Article 18(1), which I consider as a dynamic reference including all later amendments to the PWD, now also includes the remuneration. However, the amended version of Article 3 PWD specifies that for the purpose of the PWD the concept of remuneration does not apply to supplementary occupational retirement pension schemes and that this shall be determined by the national law and/or practice of the Member State to whose territory the worker is posted. This kind of reference to the national law of the host Member State is absent in Article 5(4)(b) of the ICT Directive. So, it seems that the term ‘remuneration’ which is used in the latter article may be interpreted more broadly than the term in the amended version of Article 3 PWD. However, as mentioned before, it remains unclear which elements of the employer’s obligations are part of the term ‘remuneration’ in Article 5(4)(b) of the ICT Directive’.⁴²

Moreover, the amendments to the PWD also introduce a new paragraph 1a to Article 3 PWD on the basis of which, when the effective duration of the posting exceeds 12 months⁴³, Member States must ensure that the employer guarantees all terms and conditions of employment which are laid down in the Member State where the work is carried out.⁴⁴ Since Article 18(1) ICT Directive refers to Article 3 PWD, and since we consider this as a dynamic reference, these amendments to the latter article automatically apply to intra-corporate transferees. This means that after this period of 12 (of 18) months, the intra-corporate transferees should be guaranteed

⁴⁰ See footnote 23.

⁴¹ See in the same vein: B. Fridriksdottir, op cit, 248; Herzfeld Olsson, op cit (2019), 72 and H. Lörge, op cit, 1008. Peers is not sure about this and does not exclude that it is a ‘*cynical attempt to prevent ICTs from enforcing a condition of their admission*’: S. Peers, *EU Justice and Home Affairs Law. Volume I: EU Immigration and Asylum Law*, (Oxford: OUP, 2016), 392.

⁴² See on the concept of ‘remuneration’ in Article 5(4)(b) of the ICT Directive point 3.1.

⁴³ This period can be extended to 18 months upon a motivated notification of the employer.

⁴⁴ With the exception of procedures, formalities and conditions of the conclusion and termination of the employment contract, including non-competition clauses and supplementary occupational pension schemes. These conditions should be laid down by law, regulation or administrative practice and/or by collective agreements or arbitration awards which have been declared universally applicable.

all terms and conditions of employment which are laid down in the Member State where the work is carried out.

The PWD aims at being an instrument to prevent social dumping and unfair competition⁴⁵, a goal which is also referred to in recital 15 of the ICT Directive. Still, the receiving States' room to manoeuvre with a view to applying additional elements of their employment law to posted workers is very limited under the PWD. According to the case law of the CJEU, the level of protection the receiving Member State has to guarantee for workers posted on its territory is, in principle, limited to the 'hard core' provisions, unless, pursuant to the law or collective labour agreements valid in the Member State of origin, the working conditions and circumstances are already more favourable for these workers.⁴⁶ On the other hand, Article 3(10) PWD does allow the Member States to extend that hard core '*on matters other than those [...] in the case of public policy provisions*'. This refers to terms and conditions of employment which are not part of the list included in Article 3(1). However, in its judgment *Commission v. Luxembourg* the Court of Justice gave a strict interpretation of these provisions. For the Court, public policy can only be invoked when there is a real and sufficiently serious threat to a fundamental interest of society.⁴⁷ This interpretation of the concept of 'public policy' in the PWD actually means a serious restriction of the Member States' ability to impose the application of other elements of their labour law on their posted employees on the basis of this provision.

However, the ICT Directive seems to depart from this case law, more specifically when it allows the Member States in Article 4(2) to adopt or retain more favourable provisions for third-country nationals in respect of Article 18. The words 'at least' in Article 18(1) specifically seem to indicate this. Consequently, the ICT Directive allows Member States to grant a third-country national intra-corporate transferee a better protection of terms and conditions of employment than the protection offered by the PWD to workers posted within the EU.

Finally, regarding the conditions of employment, we would like to mention Article 18(2)(a) of the ICT Directive which entitles the intra-corporate transferees '*to equal treatment with nationals of the Member State where the work is carried out as regards freedom of association and affiliation and membership of an organisation representing workers or employers or of any organisation whose members are engaged in a specific occupation, including the rights and benefits conferred by such organisations, without prejudice to the national provisions on public policy and public security*'.

4.2. Equal treatment for social security

4.2.1. The right to equal treatment for entitlement to social security benefits

Article 18 of the ICT Directive on equal treatment provides, in principle, for equal treatment with regard to all branches of social security. Article 18(2)(c) states that intra-corporate transferees shall enjoy equal treatment with nationals of the Member State where the work is carried out as regards '*provisions in national law regarding the branches of social security defined in Article 3 of Regulation (EC) No 883/2004, unless the law of the country of origin applies by virtue of bilateral agreements or the national law of the Member State where the work is carried out, ensuring that the intra-corporate transferee is covered by the social*

⁴⁵ See recital 5 of the PWD.

⁴⁶ Case C-341/05, *Laval*, EU:C:2007:809, paras 80-81 and Case C-346/06, *Rüffert*, EU:C:2008:189, paras 33-34. The CJEU also accepts the possibility that undertakings established in other Member States voluntarily join in a more favourable collective agreement in the receiving Member States, *inter alia* in the context of a commitment to their own posted workers.

⁴⁷ Case C-319/06, *Commission v. Luxembourg*, EU:C:2008:350, paras. 29, 30, 49 and 50.

security legislation in one of those countries. In the event of intra-EU mobility, and without prejudice to bilateral agreements ensuring that the intra-corporate transferee is covered by the national law of the country of origin, Regulation (EU) No 1231/2010 shall apply accordingly’.

This provision was the result of difficult negotiations in the Council and with the European Parliament, which explains its formulation.⁴⁸ Its starting point is the right to equal treatment with the nationals of the Member State where the work is carried out. This right applies to ‘*the branches of social security defined in Article 3 of Regulation (EC) No 883/2004*’. Article 3 of Regulation 883/2004 refers to all legislation concerning benefits in case of sickness, maternity and paternity, invalidity, old age and survivors’ pensions, accidents at work and occupational diseases, unemployment and pre-retirement as well as benefits concerning death grants and family benefits. This is an exclusive list, but it applies to both general and special schemes, whether contributory or not. However, social and medical assistance schemes are excluded. Still, benefits which have characteristics of both social security and social assistance are covered. Such benefits are called ‘special non-contributory cash benefits’, because they provide coverage against the risks listed in Article 3 while at the same time guaranteeing the persons concerned a minimum subsistence income in accordance with the economic and social situation in a Member State. They are subject to a special coordination regime laid down in Article 70 Regulation 883/2004, based on the person’s residence. So, the reference in Article 18(2)(c) of the ICT Directive to the branches of social security defined in Article 3 of Regulation 883/2004 includes a wide scope of social security rights.

However, with regard to family benefits Article 18(3) allows the Member States to derogate from equal treatment for intra-corporate transferees who have been authorized to reside and work in the territory of a Member State for a period not exceeding nine months. This exception was the result of a compromise which was heavily discussed during the negotiation process. Several Member States considered that family benefits should only be granted to third-country nationals who are permanently settled in a Member State, which would not be the case for temporary seconded intra-corporate transferees. As a compromise the exception to equal treatment for family benefits was limited to intra-corporate transferees who reside and work in a Member State for less than nine months.⁴⁹ Still, this exception for family benefits applies without prejudice to Regulation 1231/2010, which extends Regulation 883/2004 to third-country nationals legally residing in a Member State and who are in a cross-border situation between Member States. Such a situation would occur if the intra-corporate transferee made use of the possibilities of intra-EU mobility as provided for by the ICT Directive. It could also be the case if a member of the family of an intra-corporate transferee resided in another Member State than the Member State in which this transferee resides and works. In these cases Regulation 883/2004 would apply (via Regulation 1231/2010), including its equal treatment provision, which also concerns family benefits. So, the words ‘*without prejudice to Regulation (EU) No 1231/2010*’ in Article 18(3) would mean that in those very specific circumstances the Member States have to guarantee equal treatment for family benefits as well, even if the period of secondment is less than nine months.

⁴⁸ B. Fridriksdottir, op cit, 249-251 and H. Lörge, op cit, 1009.

⁴⁹ Recital 38 of the ICT Directive states in this respect that ‘*in many Member States, the right to family benefits is conditional upon a certain connection with that Member State since the benefits are designed to support a positive demographic development in order to secure the future work force in that Member State. Therefore, this Directive should not affect the right of a Member State to restrict, under certain conditions, equal treatment in respect of family benefits, since the intra-corporate transferee and the accompanying family members are staying temporarily in that Member State*’.

The right to equal treatment for the branches of social security defined in Article 3 of Regulation 883/2004 does not apply if ‘*the law of the country of origin applies by virtue of bilateral agreements or the national law of the Member State where the work is carried out, ensuring that the intra-corporate transferee is covered by the social security legislation in one of those countries*’. This sentence refers to the issue that has to be solved before the equal treatment clause can be applied. Indeed, it has to be decided first if the intra-corporate transferee is covered by the social security system of a Member State. If a bilateral agreement on social security has been concluded between the host Member State and a third country, the intra-corporate transferee could remain, pursuant to such an agreement, subject to the social security system of the third country of origin. These agreements with third countries normally contain rules on the determination of the social security legislation that is applicable to the persons who are covered.⁵⁰

So, for the implementation of Article 18(2)(c) of the ICT Directive, it first has to be determined whether there is a bilateral social security agreement between the Member State where the intra-corporate transferee is working and the third country in question. Second, it has to be determined to which country’s social security system the intra-corporate transferee is subject under the provisions of such an agreement. These agreements usually include provisions according to which seconded workers remain subject to the social security system of the country of origin, sometimes up to a period of 60 months. Such clauses normally also apply to intra-corporate transferees, who can demonstrate coverage in the country of origin by means of a so-called ‘certificate of coverage’ (COC). In that case, the law of the country of origin applies. Consequently, the right to equal treatment with nationals of the Member State where the work is carried out does not apply. This follows from the word ‘*unless*’ in Article 18(2)(c).⁵¹

In addition, according to the wording of this article, this also seems to be the case if the law of the country of origin applies by virtue of the national law of the Member State where the work is carried out. However, this reference to the national law of the Member State is strange, because the national law of a Member State can prescribe that its own legislation will not be applicable in a specific situation, but it cannot decide unilaterally that the legislation of another country is applicable in that situation.

Anyway, the exception to the equal treatment for the branches of social security defined in Article 3 of Regulation 883/2004 appears to be applied only if the intra-corporate transferee is subject to the social security law of a third country pursuant to a bilateral social security agreement. In the absence of such an agreement, the equal treatment provision applies. This means that intra-corporate transferees and their employers will only be obliged to pay social security contributions in the Member State where the work is carried out, if there is no bilateral social security agreement that subjects the worker to the social security system of a third country. When there is an agreement under which these workers remain subject to the system of a third country, they have to pay contributions under the legislation of that country. This may of course lead to a competitive advantage compared to the situation of workers who are subject to the social security system of the host Member State involved. Additionally, the intra-corporate

⁵⁰ See for further analysis of the content and role of bilateral social security agreements, *inter alia*, Grega Strban, ‘Member States’ approaches to bilateral social security agreements’ *European Journal of Social Security* (2018) 20 (2), 129-147; ILO, *Social Security Coordination for non-EU States in South and Eastern Europe: a legal analysis*, Budapest, 2012; S. Klosse, *External aspects of social security coordination*, (Brussels: MISSOC, 2013).

⁵¹ This is also the position of the Commission’s services as expressed in a note (no A.C. 041/19) added to MIGRAPOL, Contact Group, Mig-Dir-153, 26 (see above footnote 14).

transferee will not be able to claim benefits from the host Member State's social security system even if the benefits of the country of origin are less favourable.⁵²

4.2.2. The applicable social security legislation in the event of intra-EU mobility

The final part of Article 18(2)(c) states that '*in the event of intra-EU mobility, and without prejudice to bilateral agreements ensuring that the intra-corporate transferee is covered by the national law of the country of origin, Regulation (EU) No 1231/2010 shall apply accordingly*'. This means that the rules on the determination of the applicable legislation in Regulation 883/2004 (Articles 11 tot 16), applicable by virtue of Regulation 1231/2010, will apply in the case of intra-EU mobility.⁵³ It depends on the outcome of these rules whether the intra-corporate transferee moving between Member States is subject to the legislation of the first or the second Member State, as defined by the provisions in the ICT Directive on intra-EU mobility.

Different scenarios could be envisaged. The starting point of the conflict rules of Regulation 883/2004 is their exclusive effect or the single State principle. It means that the persons to whom that regulation applies are to be subject to the legislation of a single Member State only, which therefore excludes any possibility of an overlapping of the national legislations of several Member States with regard to one and the same period. This principle is intended to avoid double insurance and double contributions. The basis of these rules of conflict is the territorial application of the social security law of the Member State where the work is carried out (the State-of-employment principle – *lex loci laboris*). It means that a person employed in the territory of one Member State shall be subject to the social security legislation of that State, even if that person resides in the territory of another Member State or if the employer is registered in another Member State (Article 11 Regulation 883/2004).

However, there are a number of exceptions to this rule. When workers are temporarily posted by their employers to pursue activities in another Member State on behalf of their employers they remain, pursuant to Article 12 Regulation 883/2004, subject to the social security legislation of the Member State in which they normally pursue their activities. Still, the application of this provision is subject to a number of conditions, one of which is that there must be an 'organic link' between the undertaking established in a Member State and the workers posted to the territory of another Member State. The CJEU specified that in order to ascertain the existence of such an organic link, the circumstances of employment must show that during the posting period the employee worked under the authority of that enterprise.⁵⁴ Therefore, it seems that this provision on posting between Member States cannot be applied to intra-corporate transferees since they remain bound by an employment contract during the transfer to the EU with an undertaking established outside the EU. If they make use of the intra-

⁵² Still, recital 38 of the ICT Directive, contains a strange limitation to the provisions in Article 18(2)(c) regarding bilateral agreements. It says that '*..., bilateral agreements or national law on social security rights of intra-corporate transferees which are adopted after the entry into force of this Directive should not provide for less favourable treatment than the treatment granted to nationals of the Member State where the work is carried out*'. The ICT Directive entered into force on the day following its publication in the *Official Journal*, which was 28 May 2014 (see Article 28). Since these sentences are not part of the binding provisions of the directive itself, they do not seem to impose an obligation on the Member States not to apply bilateral agreements concluded after 28 May 2014 to intra-corporate transferees.

⁵³ Regulation 883/2004 as such does not apply in a situation which only concerns a Member State and a third country. See Case C-95/99, *Kahlil*, EU:C:2001:532.

⁵⁴ Case C-202/97, *Fitzwilliam*, EU:C:2000:75, para 24.

EU mobility, they will not be posted to a second Member State by the entity of this undertaking in the first Member State, but by the main undertaking in a third country.

Another exception to the State-of-employment principle are the provisions in Article 13 of Regulation 883/2004 on the pursuit of activities in two or more Member States. This situation refers to a person who simultaneously or in alternation exercises one or more activities in two or more Member States. This can indeed be the case with an intra-corporate transferee who makes use of the intra-EU mobility, particularly in case of a short-term mobility and when the intra-corporate transferee regularly works alternatively for entities established in two or more Member States. If Article 13 of Regulation 883/2004 applies, then it determines as the applicable legislation, the legislation of the Member State where the worker resides, provided that he/she pursues a substantial part of his/her activities in the Member State of residence.⁵⁵ In most cases, this will be the first Member State. If the intra-corporate transferee does not pursue a substantial part of his/her activities in this Member State, then Article 13 refers to the Member State where the employer is established. However, the application of these provisions to intra-corporate transferees is problematic since the employer of an intra-corporate transferee is established in a third country and Regulation 883/2004 cannot make the social security legislation of a third country applicable. In order to solve this problem Article 14(11) of Regulation 987/2009 on the implementation of Regulation 883/2004 states that if the employer is established outside the EU, the persons concerned shall be subject to the social security legislation of the Member State of residence, even without pursuing substantial activity there.

However, if an intra-EU mobility situation is such that the intra-corporate transferee does not work simultaneously or in alternation for entities in two or more Member States, but if he/she only works for the entity in the second Member State for a longer period of time, then the basic rule of the state of employment in Regulation 883/2004 will apply, which means that this person will be subject to the social security legislation of the second Member State.

Still, these conflict rules apply '*without prejudice to bilateral agreements*'. However, the implementation of this sentence in Article 18(2)(c) is not self-evident, for instance in a situation in which there is a bilateral agreement between the third country of origin and the first Member State, but not between the third country of origin and the second Member State (or *vice versa*). For instance, if the first Member State has concluded such a bilateral treaty with the country of origin under which the intra-corporate transferee would remain covered by that country of origin's social security system, would it still be possible to apply the rules on the determination of the applicable legislation of Regulation 883/2004 when the intra-corporate transferee would move to a second Member State? Regulation 883/2004 only applies to persons who are subject to or have been subject to the social security system of a Member State, which would not be the case with the intra-corporate transferee who, pursuant to that bilateral agreement, remains subject to the social security system of the country of origin. But what if the second Member State did not conclude a bilateral agreement with the country of origin and considers the intra-corporate transferee as being covered by its own legislation? Then Regulation 883/2004 would apply again. In the document mentioned in footnote 51 the Commission's services consider that Article 18(2)(c) does not derogate from the application of Regulation 1231/2010 (and Regulation 883/2004), as concerns the determination of the Member State competent for social security of an intra-corporate transferee mobile within the EU. This would mean that in cases of intra-EU mobility, it should always be first determined which Member State is competent for social security on the basis of the rules of Regulation 883/2004. According to the

⁵⁵ Residence for the purpose of the application of Regulation 883/2004 means 'habitual residence' which is different from temporary stay: see Article 1(j) and (k).

Commission's services, once the competent Member State has been determined, Article 18(2)(c) contains a clear rule on the prevailing nature of bilateral agreements. That would mean that if the first Member State is competent according to the rules of Regulation 883/2004 and it has concluded a bilateral agreement with the third country of origin, this agreement has to be applied, including the provisions ensuring that the intra-corporate transferee is covered by the national law of the country of origin. If the first Member State did not conclude a bilateral agreement with the country of origin, the rules of Regulation 883/2004 apply. If the second Member State is competent according to these rules, the bilateral agreement concluded by the first Member State cannot be applied by the second Member State since it cannot be imposed on that Member State to apply an agreement concluded by the first Member State. So the second Member State should apply its own legislation. In case the second Member State has also concluded an agreement with the third country of origin, it would follow from the words '*without prejudice to bilateral agreements*' in Article 18(2)(c) that this agreement should be applied by the second Member State. However, strangely enough, the Commission's services opine that this would only be the case if this bilateral agreement would turn out to be more favourable for the person concerned, and this on the basis of Article 4 of the ICT Directive which allows for more favourable provisions. But such conditions do not seem to be part of the reference in Article 18(2)(c) to '*without prejudice to bilateral agreements*'.

It is clear from this analysis of the provision in Article 18(2)(c) that it is very ambiguously worded and that it undoubtedly will give rise to problems of implementation by the Member States and problems of interpretation in cases of conflicts. Such conflicts may arise with regard to the question to which country the intra-corporate transferee and his/her employer will have to pay social security contributions and the amount thereof. Conflicts may also arise with regard to the entitlement of the intra-corporate transferee and his/her family members to social security benefits.⁵⁶

4.2.3. The right to equal treatment for the export of some social security benefits

Article 18(2)(d) guarantees equal treatment with nationals of the Member State where the work is carried out '*without prejudice to Regulation (EU) No 1231/2010 and to bilateral agreements, payment of old-age, invalidity and death statutory pensions based on the intra-corporate*

⁵⁶ This was reflected in two statements made by Hungary and Austria when the ICT Directive was adopted. Hungary stated that '*Hungary expresses its serious disappointment regarding the adopted text in Article 18(2) and Recital (38) since it precludes the practical applicability of bilateral social security agreements and limits Member States in their competence when concluding such agreements. Based on the Treaties social security policy belongs to the competence of Member States. We believe that the purpose of all secondary legislation should respect this. The aim of equal treatment harmonisation is to be interpreted in light of the competence rules of the Treaties. This Directive cannot restrict, nor impair the sovereignty of Member States in this area. In addition in our view the reference to more favourable provisions in bilateral social security agreements is ambiguous, and thus does not ensure legal certainty. Finally, Hungary regrets that the compromise text adopted could create a situation with significant negative impact on the investment readiness in certain economic relations. This may harm economic recovery, could hinder the stimulation of growth and the enhancement of competitiveness, which is a common priority for the EU.*' Austria stated that '*Austria has repeatedly raised severe objections to the way equal treatment in the field of social security is dealt with under the "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". We did not succeed in formulating a text which is consistent with the other EU instruments and the wording contained in the text might give rise to many problems for national transposition, misunderstandings and misinterpretation at national and EU level. Especially in the field of family benefits the text does not sufficiently reflect the necessity for third-country nationals of having acquired the necessary integration into the society of the host Member State before entitlement to benefits have to be opened. Therefore, we request a detailed examination of all existing and any future texts concerning equal treatment in the field of social security before we can agree on such provisions. Austria therefore abstains from voting on the directive*'. See Council Document No 9346/14 ADD 1 of 5 May 2014.

transferees' previous employment and acquired by intra-corporate transferees moving to a third country, or the survivors of such intra-corporate transferees residing in a third country deriving rights from the intra-corporate transferee, in accordance with the legislation set out in Article 3 of Regulation (EC) No 883/2004, under the same conditions and at the same rates as the nationals of the Member State concerned when they move to a third country'.

This provision entitles the intra-corporate transferee to equal treatment with nationals of the Member States where the work is carried out for the export of this list of statutory pensions to a third country. This means that if, pursuant to the national legislation of a Member State, such pensions are also paid when the nationals of that Member State move to a third country, this Member State also has to do this for intra-corporate transferees at the same rate. However, this provision does not guarantee the intra-corporate transferee entitlement to such benefits. The entitlement depends in the first place on that worker being subject to the social security system of the host Member State during the secondment, which depends on the possibly existing bilateral agreement with his/her home country. An intra-corporate transferee who remains subject to the system of the home country can, of course, not acquire pension rights in the host Member State, so that the issue of exporting such rights will not arise. And second, the ICT Directive does not contain any provisions regarding aggregation of periods of insurance, employment or residence. As a result, third-country intra-corporate transferees who, previous to their employment in a Member State, worked in a third country where they fulfilled such periods, cannot bring these into account in order to obtain the right to pensions for which the national social security legislation of the host Member State requires the fulfilment of such waiting periods. The national legislation of many Member States indeed requires the fulfilment of a certain period of employment and payment of contributions for entitlement to an old-age, invalidity or survivor's pension. It is likely that intra-corporate transferees will not be able to fulfil the necessary periods during their limited period of work in the host Member State. Consequently, they would not even be entitled to such benefits, let alone that they could export them when moving back to a third country.

5. Conclusion

The provisions in the ICT Directive in relation to employment and social security rights of intra-corporate transferees are worded in a complicated and contradictory way. They reflect the ambiguity in the directive itself and in the perception of the status of this type of migrant workers coming from a third country. Are they to be considered as temporary workers, seconded by their employers based in a third country to a host entity in a Member State, or are they really participating in the labour market of the host Member States? It seems that the main approach in the directive is that of a temporary stay and work, and not of a full participation in the labour market and in the employment and social protection of the host State. Indeed, it follows from the definition in Article 2(b) that the intra-corporate transferee will continue to be linked with the employer in the third country by a work contract. Moreover, the maximum period of secondment is limited to three years (Article 12).

This approach is also reflected in the provisions on the employment and social security rights of the intra-corporate transferee, albeit not always in a coherent manner. As far as employment rights are concerned, the intra-corporate transferees are in principle considered as posted workers and can only claim rights comparable to these of posted workers within the EU and as laid down in the Posting of Workers Directive. On the other hand, however, the ICT Directive derogates from this status of posted workers with regard to remuneration as well as from the possibility offered to the Member States in Article 4 of the ICT Directive to adopt or retain more favourable provisions (which is excluded under the PWD and the case law of the CJEU)

for them. However, the recently agreed amendments to the PWD confirm the equal treatment with nationals of the host Member State regarding remuneration, so that the status of intra-corporate transferees and workers posted under the PWD are now converged.

The same ambiguity is present in the provisions on social security entitlements. The preference given to the bilateral agreements concluded between the Member States and third countries reflects the way in which temporary labour migration is approached. But in the absence of such agreements the national law of the host Member State will apply.

In addition, the wording of the relevant provisions is sometimes enigmatic and does not always give clear answers to questions of entitlement to rights or questions concerning the relationship of the ICT Directive with other instruments of EU law and bilateral or international agreements. All this will undoubtedly lead to problems and issues regarding the implementation and interpretation of the provisions of the ICT Directive, in particular with regard to the employment and social security rights of the intra-corporate transferees.