

# Frequently asked questions

## Directive Intra Corporate Transferees

1 October 2021

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### CONCERN

#### What is meant by a group of undertakings?

A group of undertakings for the purpose of the ICT Directive means: "Two or more undertakings recognised as linked under national law in one of the following ways:

- when an undertaking, in relation to another undertaking, directly or indirectly, holds a majority of that undertaking's subscribed capital;
- controls a majority of the votes attached to that undertaking's issued share capital;
- can appoint more than half of the members of that undertaking's administrative, management or supervisory body, or
- when the undertakings operate under the central supervision of the parent company."

It is a group of undertakings, in the case of at least one of these structures. It is furthermore worth mentioning the difference in the definition of a group of undertakings in the Foreign Nationals Employment Act.

#### How will the assessment take place to determine whether it is a group of undertakings? Can I submit this question in advance?

When a **recognised sponsor** submits the application, the UWV or the IND will not test beforehand whether your organisation falls under the definition of concern. You can check this yourself on the basis of the definition. In the application form you indicate what the relationship is between the Dutch entity and the foreign subsidiary employing the transferee.

When a **non-recognised sponsor** submits the application, the IND will ask advice from the UWV. For this advice the IND and UWV at the minimum need:

- A proof of registration with the Chamber of Commerce (*Kamer van Koophandel – KvK*). With this proof IND and UWV assess whether this is a transfer as mentioned in the Directive. You send proof of registration with the KvK with your application and/or you write the registration number from KvK on the application form. A proof of registration at the Chamber of Commerce may not be older than 3 months.

Is the proof of registration at the KvK missing? Then the IND will not ask advice from the UWV. The IND will also reject the application.

The ICT-Directive does not have criteria for amount of turnover. However, it has to be an existing company that is carrying out economic activities. To assess this you will have to send the following documents:

- Proof of own address where the economic activities are taking place;

- Declaration of payment behaviour. This declaration proves that the tax agency (*Belastingdienst*) knows the company and the company is paying payroll taxes and turnover taxes;
- Proof that at least 1 fulltime employee is already employed by the Dutch company before the intra corporate transferee is coming to the Netherlands.

Has the IND asked advice from the UWV? Then the UWV can, if required, ask for additional documents or information.

### How long does the company has to be established in the Netherlands?

There are no regulations as to the length of the establishment of the group member in the Netherlands. If a newly established group member wishes to be recognised, the policy for start-up companies applies. The IND may then consult the Netherlands Enterprise Agency (RVO.nl) with respect to the assessment of the continuity and solvability.

### Where must the parent company be established?

The group member, with which the intra-corporate transferee has an employment contract, must be established outside the EU. The ICT Directive does not dictate the location of the parent company.

### Are sister companies also a group of undertakings?

Sister companies are a group of undertakings provided these are linked in one of the ways described in the definition.

### How long must economic activities take place?

The ICT Directive does not prescribe the length of the economic activities. When a newly established group member in the Netherlands applies for recognition as sponsor, the IND will assess the company according to the current policy for start-up companies.

### Will it become more difficult to become a recognised sponsor?

The recognition procedure will not change by the implementation of the ICT Directive.

### Does a network organisation fall within the scope of the ICT Directive?

**In a network organisation, local partners own each division and there is a wide set of agreements that each division needs to uphold. This connects the divisions in the network. Externally, it seems as if there is one company. Examples of these kind of organisations are accountant offices or law firms.**

No, neither of the parties in a cooperation possesses a majority of the organisation. Therefore, they are not one company.

### Do charity organisations or non-profit organisations fall within the scope of the ICT Directive? After all, economic activities do not occur in these organisations.

It is possible that economic activities take place at a charity- or non-profit organisation. In that case, the organisation falls within the scope of the ICT Directive. The EU Court considers any activity that is to offer goods or services on a market as an economic activity.

## CONDITIONS RESIDENCE PERMIT

### Which employees fall within the scope of the ICT Directive?

Employees who do not have the nationality of one of the EU Member States or Norway, Iceland, Liechtenstein or Switzerland, who have an employment contract with an undertaking established outside the EU and who will temporarily be transferred to one or more branches of this undertaking within one or more Member States in the EU. These employees specifically involve managers, specialists (so-called key personnel) at higher professional educational level (or higher) and trainees with a university degree of international groups of undertakings.

### What are the definitions of manager, specialist and trainee?

**Manager:** a person holding a senior position, who primarily directs the management of the concern (host entity). The manager is receiving general supervision or guidance principally from the board of directors or shareholders of the business or equivalent. The position includes:

- Directing the host entity or a department or subdivision of the host entity;
- Supervising and controlling work of the other supervisory, professional or managerial employees;
- Having the authority to recommend hiring, dismissing or other personnel action.

**Specialist:** person working within the group of undertaking possessing specialised knowledge essential to the host entity's areas of activity, techniques or management. This knowledge is assessed on:

- The specific knowledge the host entity is looking for; and
- Whether the employee has a high level of qualification and adequate professional experience for the type of work or activity. This included possible membership of an accredited profession.

**Trainee:** a person with a university degree who is transferred to a host entity for career development purposes or in order to obtain training in business techniques or methods and is paid during the transfer.

### Where should the employee have his main residence during the application?

When a first application is submitted for a residence permit on the grounds of the ICT Directive and the Netherlands is the country where the employee will stay the longest, then the employee will have to have his main residence outside the EU Member States during the application. Will you do an application for an employee on the grounds of intra EU-mobility, the employee should only have main residence outside the Netherlands.

### Which countries have implemented the Directive?

The website EUR-Lex reports the actual status of implementation.

### Is there a salary criterion for a stay based on the ICT Directive?

The employment standards, employment relationships or working conditions must at least meet the level required by law and the level usually applied in the sector. The remuneration must therefore be in accordance with market conditions. The underlying principle is that a salary that meets the highly skilled migrants' standard is generally

considered a salary in accordance with market conditions.

### What does a salary in accordance with market conditions precisely mean within the framework of the ICT Directive?

Upon assessing market conformity, a salary that meets the highly skilled migrants' standard (with the age standard of older or younger than 30 years of age) is, in principle, considered in accordance with market conditions.

### During the presentation about the ICT Directive, the IND confirmed that it would seek alignment with the conditions regarding salary components as applies to the Highly Skilled Migrants' Scheme. Where can I find this in the laws and regulations? Can an application be rejected on this?

It is set out in the Aliens Act Implementation Guidelines (*Vreemdelingen*) that the IND, in principle, considers a salary that meets the highly skilled migrants' standard, as a remuneration in line with market conditions. Determination of the salary is done in the same way as with the Highly Skilled Migrants' Scheme. If the salary does not meet this condition, the IND will first consult UWV before reaching a decision. Incidentally, a foreign national must always have sufficient means of support. If this is not the case, the IND will reject the application.

### Is the employer allowed to pay a new employee within the framework of the ICT procedure less than he would at present pay a highly skilled migrant younger than 30 years of age?

The 3 positions as stated in the ICT Directive are positions at university / higher professional educational level. The standard used for highly skilled migrants is in accordance with market conditions for the 3 mentioned positions at university / higher professional educational level. These are the applicable highly skilled migrants' standards. If an intra-corporate transferee earns less than these amounts, it is then up to the employer to show that such a lower salary is common for this or similar position, taking account of the qualifications of the foreign national, within its organisation. The IND will seek advice from UWV about this.

### Is it possible to gross-up the net salary, as is allowed within the Highly Skilled Migrants' Scheme, within the ICT Directive?

The gross monthly salary (excluding holiday allowance) is what is requested.

### Does the salary have to be paid in or outside the EU?

Either is possible. There is however the obligation to make non-cash salary payments, and, in addition, the sponsor is required to keep the payslips in its records (Article 4.35a Aliens Regulations - *Voorschrift Vreemdelingen*).

### Are intra-corporate transferees liable to pay social insurance contributions? Do they need to submit an A1/E101 declaration?

The IND has no information about this. The SVB can provide you with further information.

### What is the difference between an apprentice and a trainee within the meaning of the Directive? An apprentice is also often transferred within a group of undertakings.

A trainee is already at least 3 months employed with the group of undertakings. There is no minimum term for apprentices. Furthermore, an apprentice does not need to have a

position on a higher professional educational level or Master's degree.

Article 3.30d paragraph 1 under d under 4 of the Aliens Decree sets out that the assignment letter has to state that the foreign national is able to transfer back to another entity. Does this mean that the host entity merely needs to mention that the employee will return to the original entity or a different undertaking within the group? In other words, that the employee leaves the Netherlands following the end of his transfer? Does it specifically need to state that the employee will not stay for more than 3 years since this is the maximum period?

The idea behind the ICT Directive is that after the stay in the Netherlands the employee returns to the foreign employer or goes to another EU based undertaking of the organisation. However, the employee can apply for a national residence permit after the maximum period of residence.

May the holder of an ICT residence permit get a highly skilled migrant permit after three years of residence, even if he keeps his labour contract with the employer outside the EU?

Yes, when the maximum period of residence on the grounds of the ICT Directive (this is 3 years for a manager or specialist and 1 year for a trainee-employee) has passed, the employee no longer falls within the scope of the Directive now that he has residence in the Netherlands. If he meets the conditions of the Highly Skilled Migrants' Scheme and the Dutch company is a recognised sponsor, he can apply for a highly skilled migrant residence permit. In that case, the IND will consider as evidence a statement from the employer abroad stating the duration of the transfer, the nature of the employment and the wages.

If a person is transferred to the Netherlands while he is not yet at least 3 months in employment, does this person fall within the scope? Will he still be eligible for the residence permit as highly skilled migrant?

He does fall within the scope, however, he does not meet the condition and therefore does not get an ICT residence permit. Nor will he be eligible for another residence permit.

Is the trainee employee obligated to return after one year?

Intra-corporate transfers constitute a temporary migration. The maximum period of a transfer to the EU, including mobility between Member States, may not exceed one year for trainee employees. After which a trainee employee must leave for (or return to) a third country unless he gets a residence permit on another basis in accordance with Union or national law.

Currently a highly skilled migrant may stay outside the Netherlands for a maximum period of 8 months without losing his status, provided he continues to receive his salary and does not change his main residence. Does this also apply to residence under the ICT Directive?

If the intra-corporate transferee has a residence permit based on the Directive and then stays in another EU country based on this permit for short or long-term mobility, the IND assumes that there is no change in main residence.

How about an intra-corporate transferee who has the Netherlands for the long-term mobility and has a mobile intra-corporate transfer permit in another EU country? That person may be outside the Netherlands for a longer period than 6 months, will be deregistered with the municipality, yet keeps his Dutch permit. He, however, does not meet the condition of registration in the Municipal Personal Records Database (BRP).

Please see previous question

If an employee has obtained an intra-corporate transferee status in France and moves to the Netherlands, must he have the same type of work, the same position in the Netherlands as he had in France? May the employee have a different position?

The assumption is that he will have the same position. However, the IND will not assess this, as France immigration has already done this. He will get a residence permit and it will state 'mobile ICT'.

Is it possible to have 2 residence permits in 2 EU Member States during the 3- year stay?

Yes, this is possible

What is the policy with respect to legalisation and certification of diplomas?

This is in line with the current policy concerning the legalisation of documents. The Ministry of Foreign Affairs decides when a document is sufficiently legalised or provided with an Apostille stamp for use in the Netherlands. Please check [www.rijksoverheid.nl](http://www.rijksoverheid.nl) to see for each country how documents may be legalised.

Does the ICT Directive cover a secondment structure?

Third-country nationals who fall within the scope of the Secondment Directive and who are posted and work under the management and supervision of another undertaking, are not covered by this Directive (see Article 2 of the Directive) since they are seconded to the Netherlands from an EU country. Third-country nationals who are transferred from an undertaking outside the EU to a branch of that undertaking in the Netherlands and who are consequently seconded to a third party while under the management and supervision of that Dutch branch, however, do fall within the scope of the Directive.

Can a person build up a right of residence (to count towards permanent residence or naturalisation among other things) during their stay in the Netherlands based on the permit "intra-company transfer"?

Stay as part of an "intra-company transfer" does not count towards obtaining a residence permit as "long-term resident EC". It is a temporary right of residence. With respect to a national permanent residence permit, the current policy remains in full effect; this means that upon submitting the application for a permanent residence permit, the foreign national must have a valid residence permit with a non-temporary purpose of stay (therefore not a permit for an "intra-company transfer"). In this case, the preceding years of legal residence (thus also residence on the grounds of the ICT permit) do count towards determining the required five-year period of stay. The main rule then being that the built-up residence must immediately precede the application.

Within the framework of the highly skilled migrant scheme, a managing director may not possess more than 25% of the shares. Does this also apply to managers within the scope of the ICT Directive?

No, this condition does not apply to managing directors within the scope of the ICT Directive. The definition of manager includes that the person must do his work 'receiving general supervision or guidance principally from the board of directors or shareholders of the business or equivalent'. This must be checked factually. If a person, however, has more than 50% of the shares, it can reasonably be concluded that this person should be considered a self-employed and, therefore, the ICT Directive does not apply to this person. Is there any doubt about the number of shares owned by the managing director (more or less than 50%)? Then the IND will request additional documents from the applicant.

## FAMILY MEMBERS

May children under the age of 21 accompany the intra-corporate transferee to the Netherlands under the ICT Directive (instead of under the age of 18)?

The Directive does not change the age limit for family members of intra-corporate transferees. It, therefore, involves children younger than 18 years of age. However, other EU Member States could have a different age limit, as national legislation may apply here.

## TREATIES

Do other conditions in terms of the assessment apply to persons who have a nationality of a country with which the Netherlands has concluded a social security agreement?

No, there are no other conditions applicable.

Do other conditions in terms of assessment apply to persons who have the American nationality, given the Friendship treaty?

No, when applying for an ICT permit, no other conditions in terms of assessment apply to persons who have American nationality. If you meet the conditions of the Friendship Convention, you can still apply for a residence permit as a self-employed person based on this Convention. At this point, nothing has changed for the Americans due to the ICT regulation.

Do other conditions in terms of assessment apply to persons who have the Turkish nationality, given the Association Treaty?

Persons holding Turkish nationality are not obligated to apply for an ICT residence permit even if the transfer falls within the scope of the Directive. One could also apply for a residence permit as highly skilled migrant or a work permit based on paragraph 24 of the Foreign Nationals Employment Act Implementation Decree. No other conditions apply when submitting an ICT permit application.

Do other conditions apply in terms of assessment to persons who have the Japanese nationality, given the Netherlands-Japanese Trade Agreement?

It is not obligatory to apply for an ICT permit when a trade agreement can be invoked. In other words, one may choose. Persons with the Japanese nationality could also apply for a residence permit as highly skilled migrant or a work permit based on paragraph 24 of the Foreign Nationals Employment Act Implementation Decree if they meet the conditions for one of these permits. No other conditions apply when submitting an ICT permit application.

## PROCEDURE

Do (short or long-term) mobile intra-corporate transferees get a sticker upon notification or after having submitted an application?

Not upon notification. Reporting to UWV means that you do not have to submit an application for a permit to be allowed to work. With respect to the stay, the short-stay regulations (maximum of 90 days) apply. Further reference is made to the information of UWV about this notification procedure. When an application has been submitted to the IND, the general procedure applies.

Do the arrangements made relating to terms, such as currently apply to Single Permit applications, also apply to ICT applications for non-recognised sponsors?

As is the case with the Single Permit procedure, the IND aims to process the ICT applications of non-recognised sponsors within 7 weeks.

A foreign national with an ICT permit issued by another EU Member State is coming to the Netherlands for short-term mobility. The employer has to report this foreign national to UWV. The Reporting Regulations do not set out that any information about the remuneration has to be provided. It does state in the explanatory notes that during the employment at least the statutory minimum remuneration in the Netherlands must be paid. Which remuneration then has to be paid? Is this the remuneration that, for instance Germany, considers to be in accordance with market conditions as this is where the ICT permit was issued and which decision was based upon that remuneration?

The Directive assumes that the remuneration will continue to be paid based on which the ICT permit was granted in the other Member State. In the Netherlands this may never be less than the statutory minimum salary.

Are there any additional obligations (the duty to keep records and obligation to retain and provide information) for recognised sponsors within the framework of 'intra-corporate transfer'? For example any regulations pertaining to deregistration?

Please see the new Articles 4.23a and 4.35a of the Aliens Regulations:

#### Article 4.23a

1. The sponsor of a foreign national, who is staying in the Netherlands or who wants to stay within the framework of an intra-corporate transfer, provides information if:
  - a. the foreign national no longer is employed with the sponsor or with the undertaking established outside the European Union;
  - b. the foreign national no longer holds a position that complies with the definition of manager, specialist or trainee employee within the meaning of Article 3 under e, f or g of the Directive 2014/66/EU;
  - c. the foreign national no longer stays in the Netherlands as an intra-corporate transferee;
  - d. the foreign national no longer fulfils a job of which the employment standards, the employment relationships or the working conditions at least meet the level required by law and the level usually applied in the sector;
  - e. the foreign national who wants to or who exercises a profession in individual healthcare for which registration is required is not registered in the register of the Act on professions in individual healthcare (BIG-register);
  - f. the foreign national who exercises a regulated profession within the meaning of Article 1 of the Recognition of EU professional qualifications Act and no longer holds a recognition of the professional qualifications within the meaning of Article 5 of that act.
2. The sponsor, referred to in the first paragraph, provides information about its position as sponsor if the sponsor no longer belongs to the same undertaking or group of undertakings as the undertaking established outside the territory of the European Union, as referred to in Article 3, under I, of Directive 2014/66/EU.

#### Article 4.35a

1. The sponsor of a foreign national who is staying in the Netherlands or who wants to stay within the framework of an intra-corporate transfer, includes in its records the following information pertaining to the foreign national of whom he is the sponsor:
  - a. the employment contract with the undertaking established outside the European Union and the assignment letter of the employer, or, if the foreign national is a trainee employee, the trainee agreement;
  - b. payslips that show that the foreign national, after having been granted entry, fulfils a job of which the employment standards, the employment relationships or the working conditions at least meet the level required by law and the level usually applied in the sector;
  - c. proof of registration in the training institute of the Medical Specialists Registration Committee (MSRC), Social Medicine Physicians Registration Committee (SGRC) or General practitioner and Nursing home Physicians Registration Committee (HVRC) if the foreign national is a doctor in training to become a specialist;
  - d. the certificates of higher education required in the relevant sector within the meaning of Article 2, under h, of the Recognition of EU professional qualifications Act, insofar as the foreign national exercises a regulated profession within the meaning of Article 5 of that act.
2. The sponsor, referred to in the first paragraph, in meeting his obligations as sponsor, includes documents with regard to the way in which he gives effect to the duty or care.