

Bird & Bird & ICT-Card

New residence title for third-country nationals to work in Germany and the EU in the framework of an intra-corporate transfer

In 2014 the European Parliament and the European Council adopted a new European Directive (Directive 2014/66/EU) to develop a common immigration policy within the EU and to facilitate in particular the movement of third-country nationals who transfer to a EU-Member State by way of an intra corporate transfer (ICT-Directive, ICT= Intra Corporate Transfer). The Directive provides a framework with regards to a new national residence title for workers but also implements for the first time harmonised procedures for cross-border movements within the EU.

The Directive is targeted at third-country nationals who reside outside the territory of the European Union at the time of application and who apply to be admitted to the territory of a Member State in the framework of an intra-corporate transfer as managers, specialists or trainee employees. Holders of intra-corporate transferee permits issued by a first Member State then also enjoy the right to stay and work either short-term or long-term in another Member State within another entity of the same group of undertakings under enhanced rules.

This harmonisation facilitates the movement of third-country workers within the EU and reduces the administration effort faced by HR managers dealing with intra-corporate transfers. The ICT-Directive applies to all European Member States except for the United Kingdom, Ireland and Denmark.

What's new?

Effective from 1 August 2017, Germany has transposed this Directive by amending the German Act on Residence Titles (*Aufenthaltsgesetz*) and has created a new residence title, the so-called ICT-Card. The new rules also lay out the prerequisites and procedures for third-country nationals who already hold an ICT-Card granted by another Member State to work in Germany either in the short or long-term.

Application for an ICT-Card in Germany

Generally, the ICT-Card is addressed to third-country nationals who work in an undertaking outside the EU and apply to be admitted to the territory of a Member State for more than 90 days in the framework of an intra-corporate-transfer as managers, specialists or trainee employees to work in an establishment of the same undertaking or group of undertakings in Europe.

For Germany, the prerequisites to apply for an ICT-Card are as follows:

- There must be a transfer of an individual to a host entity in Germany that belongs to the undertaking or group of undertakings established outside the EU to which the applicant is bound by an employment work contract prior to the transfer;
- The transfer to the host entity must be as a manager, specialist or trainee employee and there must be evidence of the individual's adequate qualification(s);
- The prior employment relationship with the transferring undertaking/group of undertakings must exist for at least six months without interruption prior to the transfer;
- The intra corporate transfer to Germany must last for more than 90 days;
- The German Employment Agency (*Bundesagentur für Arbeit*) must approve the transfer; and
- There must be an employment contract for the duration of the transfer as well as an additional assignment letter to govern the transfer to Germany.

A group of undertakings means two or more undertakings recognised as linked under national law in the following ways:

- Either an undertaking, in relation to another undertaking directly or indirectly:
 - holds a majority of that undertaking's subscribed capital; or

- controls a majority of the votes attached to that undertaking's issued share capital; or
- is entitled to appoint more than half of the members of that undertaking's administrative, management or supervisory body;
- Or the undertakings are managed on a unified basis by the parent undertaking.

On an individual level, the new rules apply to three categories of employees: managers, specialists and trainee employees. **Managers** are holders of a senior position, who primarily direct the management of the host entity and receive general supervision or guidance principally from the boards of directors or shareholders of the business or equivalent. The position may also include: 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** means a person working within the group of undertakings with specialised knowledge that is essential to the host entity's areas of activity, techniques or management. In assessing such knowledge, account shall be taken of knowledge specific to the host entity and whether the person has a high level of qualification including adequate professional experience referring to a type of work or activity requiring specific technical knowledge, including possible membership of an accredited profession. The category of **trainee employee** comprises persons with a university degree who are transferred to a host entity for career development purposes or in order to obtain training in business techniques or methods, and who are paid during the transfer.

The duration of the aforementioned transfer is limited to three years for managers and specialists and one year for trainee employees. Where the underlying documents make no reference to the duration of the transfer, the relevant authorities must be notified as to the intended transfer in addition to the application. For any application it is a requirement to provide an underlying employment contract between the applicant and the transferring entity abroad that must have been in place for at least six months prior to the transfer and that will be actively maintained and cannot be dormant for the duration of the transfer. It is not sufficient to establish a new employment contract with the German host entity. The employment contract must contain details on the place of work, position, remuneration and other working

conditions for the duration of the transfer as well as evidence that the individual will be entitled to return to an establishment of the same undertaking or group of undertakings outside the EU after completion of the transfer.

Furthermore, the ICT-Card for Germany will not be granted in cases where the undertaking or presence in Germany has only been established for the sole purpose of facilitating the entry of third-country nationals as intra-corporate transferees. Therefore, German authorities are entitled to check that the German host entity does in fact carry out business activities. Indications of a lack of business activity in Germany could lead to a disproportional number of transferred third-country nationals.

Moreover, a six-month cooling-off period applies so that a transferee may only apply for a new ICT-Card after six months starting from when the transferee leaves Germany on the basis of the previous ICT-Card. As a result, the new rules provide an additional residence title to work in Germany that amends the existing categories for work permits in Germany.

In addition, the ICT-Card enhances "multi-destination" assignments within the EU where individuals intend to spend parts of their transfer to Europe in different member states. Holders of an ICT-Card granted by one Member State are also entitled to stay in any second Member State and work in any other entity established in the second Member State and belonging to the same undertaking or group of undertakings as per the rules on short-term and long-term mobility. The prerequisites for short-term and long-term mobility are then again regulated by each Member State's national laws within the framework of the ICT-Directive.

Short- and long-term mobility under the new German ICT-rules

For Germany, the rules on short-term and long-term mobility in Germany for holders of an ICT-Card granted in another Member State are also regulated within the German Residence Act. According to these rules, holders of a foreign ICT-Card are entitled to work in a German establishment of the same undertaking or group of undertakings for up to 90 days within any 180 day period (**short-term mobility**) in the framework of an intra-corporate-transfer as managers, specialists or trainee employees, without the need for any additional German residence title. The ICT-Card therefore provides for the first time a European residence title that gives its holder a right

to stay and work short-term in any Member State on the basis of a residence title granted by one Member State only. For example, a person who holds a French ICT-Card will be entitled to work short-term in Germany without a German residence title. Short-term mobility to Germany on the basis of an ICT-Card only requires a prior notification by the other Member State's host company to the German authorities (*Bundesamt for Migration und Flüchtlinge*). Generally, German authorities must be notified either at the time of application in the first Member State as to the intended stay in Germany, or at the very latest when the host entity first becomes aware of the intended stay. In the case of notification at the time of application in the first Member State, there is a 20 day period following the notification within which short-term mobility in Germany can be refused for a limited number of specified reasons. In the case of a later notification, a specific right of refusal no longer exists, but foreigners may still be expelled under general national laws.

For longer stays (**long-term mobility**), holders of an ICT-Card granted by another Member State can apply for a so-called **Mobile-ICT-Card** in Germany to enjoy long-term mobility (i.e. more than 90 days within any 180 day period) in Germany. Even though long-term mobility is not directly allowed under a foreign ICT-Card, the new rules provide for an equally simplified procedure: the prerequisites to apply for a Mobile-ICT-Card in Germany are generally the same as for the application for an ICT-Card as described above. However, by applying for a Mobile-ICT-Card in Germany, foreign nationals are deemed to be granted a permit to stay and work in Germany for the duration of the application process, i.e. up to 90 days within any 180-day period. In practice this means that irrespective of the new application process (where the application will still require less effort as a result of the harmonised ICT procedures within the Member States), an individual that is supposed to be further transferred by way of an intra-corporate-transfer to a second Member State can take up their employment within the second

Member State at short notice without the need for a time-consuming application process in the second Member State. For example, on the basis of a French ICT-Card, an applicant for a German-Mobile-ICT-Card will be entitled to work in Germany based on the French ICT-Card only for the duration of the application process in Germany. It is only a prerequisite that the application for the Mobile-ICT-Card will be made at least 20 days before the stay in Germany and provided that the foreign ICT-Card proves to be valid. The application can either be lodged with the local foreigners' office (*Ausländeramt*) at the intended place of stay and work in Germany or with the competent federal authority (*Bundesamt for Migration und Flüchtlinge*). A Mobile-ICT-Card will not be granted if the intended stay with the Mobile-ICT-Card exceeds the length of stay under the ICT-Card in another Member State. Also, it is not possible to apply for a Mobile-ICT-Card for Germany and to simultaneously notify German authorities of a short-term-mobility application. The applicant needs to choose one method or the other, although it remains possible to apply for extensions or to switch between application processes.

Therefore the new rules on ICT-Cards do not only provide for an additional residence title with which to work in Germany but in addition the new ICT-rules and its possibilities for short-term and long-term mobility reflect the needs of multi-national undertakings in moving third-country nationals within the EU.

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