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## ***b-solutions***

### **FINAL REPORT BY THE EXPERT**

**Advice Case:** Dutch-German cross-border employment of students originally from outside the EU

**Advised Entity:** The Economic Board Arnhem-Nijmegen, DE

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## **I. Description of the Obstacle**

The description of the obstacle from the applicant:

“The number of cross-border students in the Rhein-Waal region is growing. At the same time, both on the German side as well as on the Dutch side, we have more international students from outside the EU. If they have studied in the Netherlands, they can look for an internship and job on the Dutch labour market. If they have studied in Germany, they can look for an internship and job on the German market. Legislation in both countries allows for orientation periods, internships and job applications in the country they studied.

However, due to differences in legislation, they cannot apply for internships and jobs just across the border. This is hampering employment, especially in sectors where there is a need for more technical, English-speaking, employees. Hence, a full cross-border employment market is not in place.

This leads to the situation that high potentials from outside the EU are seriously limited in their ability to apply for suitable internships and jobs. On the other side, employers (especially on the Dutch side of the border region) face the inability to hire those high potentials and are not able to fulfil their growing need for those high potentials. “

### **- Assessment**

The situation described generally corresponds to the knowledge gained during the interviews on the ground. As a result of the transposition of European law into national regulations, cross-border cases have only restricted opportunities in practice, as clearly set out in the problem description. Since students in particular, as potential employees on the region's labour market offer the chance of growth and employment, improved use of available potential makes sense and benefits all parties.

## **II. Indication of the Legal/Administrative Dispositions causing the Obstacle**

– as described by the applicant:

“Guidance to be obtained from *Directive (EU) 2016/801 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing*, is limited.



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Dutch regulations do foresee the include that they can do an internship that is part of their curriculum. However, 'voluntary' internships are not possible. Directive 2016/801 also does not provide a solution.

For graduates of non-EU nationality who have successfully completed their university studies in Germany (e.g. with a bachelor's, master's or doctoral degree), the residence permit can be extended for up to 18 months to find a job. During this time, gainful employment is permitted without any restrictions and a job search in the Netherlands is possible. If they find work in the Netherlands, the Dutch employer must apply for a work permit. However,

even this case is complicated: An open position can only be filled with an international if, after three months of public tender, no suitable candidate for the position was found. In this case, the company must apply for a work permit with the responsible UWV.

During these 18 months, an internship abroad can be completed. However, any stay outside of Germany, which lasts longer than six months, automatically leads to the expiry of the residence permit, unless one has agreed explicitly and in writing a longer period with the

foreigners' authority. In any case, it is therefore advisable to have the internship contract with the competent foreigner's department and to make the necessary arrangements. Unfortunately, voluntary internships are not possible in the Netherlands.

In the Netherlands there is a similar visa for a so-called orientation year after completing studies in the Netherlands. Graduates of an international English-language master's degree (or PhDs etc.) are also welcome to apply for this visa. For this purpose, different regulations apply again than in Germany, for example, the visa does not have to be used or applied for directly after graduation, as in Germany. Information can be found quite clearly at the Dutch immigration authority IND.

Therefore, while these students are part of a cross-border education programme, 'normal' legislation still hampers them of joining the related cross-border employment market. First of all, Directive 2016/801 does not address all cross-border employment situations (like voluntary internships). Those situations are addressed by national legislation. However, Dutch and German legislation remain different from that of the other one. The foregoing leads to administrative burdens, because a possible application (if at all) needs to be examined on case-by-case basis at the local Dutch government labour agency ("UWV").



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Essentially, this boils down to the fact that the European Union (Germany in this case) provides a study for high potentials, for who it is in fact made difficult to stay in the European Union – partly because of lack of coherence of legislation applicable on the different sides of the border and partly because of inconsistencies and overlapping of the different administrative procedures.

As we face the challenge to boost the employment in strategic (high tech and energy) sectors, this is not in the interest of the European Union, the member states involved and -most important- the economic and social development of the Region. “

#### - **Assessment**

The description of the legal obstacles is fundamentally correct. However, in the interviews on the ground doubts arose on some statements that – at least in some cases – led to different results. The internships described, which are a necessary precondition for the degree, appear – at least in some cases – to have been carried out across the border. Reference was made, among other things, to the massive support provided by employers to obtain the corresponding Dutch permit. In other cases, commercial agencies are said to have been of assistance for fees ranging from EUR 500 to EUR 1500 per case (depending on time spent and costs). A period of 14 days up to 12 months was cited. After talks on the ground, the national practice on the treatment of graduates is unclear. It was reported in all cases that the information provided by the authorities was very often contradictory or in some cases diametrically different, which illustrates that the situation is generally unclear and that there is a need for clarification.

### **III. Description of a Possible Solution**

After an initial review of simplifications that could possibly be implemented immediately, the conclusion is that the problem of lack of mobility of third-country nationals on the cross-border regional labour market must be tackled intensively. One of the first proposed measures is to simplify the so-called priority test which is carried out by the Dutch employment administration if a non-EU citizen applies for a work permit. According to the statements of the players, the job advertisement in question has to have been published unsuccessfully for 3 months to provide evidence of the need. A potential acceleration would be the desired agreement with the Dutch



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labour authorities that qualifications gained in the studies are compared in advance with the general needs on the labour market in order to generate a positive list, which could then rapidly and effectively form the basis for permits. Furthermore, Dutch firms do not appear to be sufficiently aware of the possibility of acquiring interns from Germany. Targeted information measures could quickly provide assistance in this connection if they also highlight the legal and administrative requirements.

In general, the applicant's focus is on the mobility of non-EU nationals on the labour market of the German-Dutch border region. Exploiting the attractive employment potential and securing jobs in the respective regions based on the availability of a suitable labour force are both stated goals of the applicant region. Both the economic and geographical framework and the legal requirements relate to the entire German-Dutch border region, which is why it would benefit all parties if the issue were dealt with jointly. In particular the application submitted by the Euregio Rhein-Maas-North entitled "Cross Border work for Non EU Citizens" clearly highlights the legal and geographical

breadth of the issues. It is apparent both from the said problems and the ones specifically involved in this case that there are considerable differences concerning the knowledge of the rules and administrative practice in the respective countries. The lack

of transparency hinders the work on these issues. And no adequate independent counselling is currently available.

As the establishment of a uniform EU law must be considered unlikely at the present time, a solution can currently only be achieved under a bilateral agreement between the member states Germany and the Netherlands. On the basis of such an agreement, the existence of a work permit from the country of residence for example could form the basis for the work permit in the neighbouring state.

This should be thoroughly prepared and jointly initiated by the interested parties from the various Euregios. Besides the Euregios, the relevant players are the Border Infopoints, the Eures Partnership and the cross-border employment administrations (SGA).

A campaign or project should deal with the following tasks especially with regard to freedom of movement for workers:

- Establishment of acceptance for the objective of improving freedom of movement for non-EU nationals at local, regional and national level – the target groups are political decision-



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makers and above all employer and employee organisations, economic development institutions and employment authorities.

- Examining whether other universities or other parts of the German-Dutch border region face similar problems and whether cooperation with those players may be possible.
- Examining (and if appropriate drawing up conceptual solutions) whether an improvement in the students' language skills could make it easier to obtain internships.
- Examining (and if appropriate drawing up conceptual solutions) whether a change of residence (possibly only temporarily) can resolve some of the problems. The model project in the Dutch municipality of Kerkrade could act as an inspiration.
- Identification of all potential and relevant cases in which the cross-border work mobility of non-EU citizens is completely or partially restricted.
- With regard to the problems described in this case, students needing internships (both mandatory internships and voluntary study-related internships) must be examined in particular.
- Detailed examination of the legal and administrative rules and requirements on the respective side to obtain a joint pool of knowledge and working basis. The consideration of all the requirements should be harmonised with the government bodies and implementing local administrations.
- Creation of information material and – ideally – the creation of advisory offerings for the target group of employees from non-EU states by means of a bilateral agreement to improve mobility even before free movement of persons is generally facilitated.
- Examination of potentially suitable measures to accelerate procedures and/or circumvent the described restrictions by creating organisational units that can act in connection with posting and/or the placement of interns.
- Active press and communications work should seek not only to establish contacts and present the issues at the border region conference (Forum of Nordrhein-Westfalen and the Netherlands for the Improvement of Collaboration and Coexistence), but also to pave the way for the described agreement between Germany and the Netherlands.



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#### **IV. Pre-Assessment of whether the case could be solved with the European Cross-Border Mechanism**

Proceeding from the assumption that the Commission's proposal (COM (2018) 373) were transposed into applicable law and the current proposal were in force without any changes, I am of the opinion that this mechanism cannot be expected to solve the described problem. The cause of the problem, the description of which is absolutely correct from the perspective of the border region, is based on current European law – Directive (EC) 2016/801 – which was transposed into national law in Germany and the Netherlands.

Even if the proposal is intended to resolve the border obstacles on a legal basis and problems that could be resolved in such a way are clearly imaginable, this instrument does not work in the case described.

The instrument is a mechanism that would lead to the application of the legal rules of the neighbouring state in a certain member state for a joint cross-border region if the application of its own law were to constitute a legal obstacle to the implementation of a joint project (which could be an infrastructure measure or service of general economic interest).

However, as this case in particular involves the practical consequences of the transposition of European law into national law, which has the same content and meets similar standards, on both sides of the border, this mechanism is unable to provide a solution. It could instead be of assistance in situations in which there are no legal arrangements in one of the states or if conflicting rules apply in both of the states.

It remains to be considered whether differences in how strictly cases are handled under national implementation laws with regard to employment opportunities for third-country citizens provide a reason and opportunities to transfer the legislation of one state to the other through the use of this mechanism.

#### **V. Other Relevant Aspects to this Case**

Even during the preparatory work for the examination, the thematically closely linked questions and the geographical proximity of the applicants became apparent. This was pointed out in the interviews on the ground and all consulted parties favoured a joint attempt to find a solution.



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The close linkage, in terms of content, with the Euroregio's Rhein-Maas-Nord's problem description entitled "Cross Border Work for Non-EU Citizens" quite apparently and clearly calls for joint action by the players across the borders of the Euregio.

#### **VI. References and Appendix/Appendices if any**

- Kathleen Neundorf, "Aktuelle Entwicklungen im Beschäftigungserlaubnisrecht für Drittstaatsangehörige", in Zesar, Zeitschrift für Europäisches Sozial- und Arbeitsrecht
- Task force on cross-border workers, regulatory impact assessment, creation of a mechanism to resolve legal and administrative obstacles in a cross-border context
- Directive (EC) 2003/109/ of 25 November 2003
- Directive (EC) 2004/38 of 29 April 2004
- Regulation (EC) 883/2004 of 29 April 2004
- Directive (EU) 2016/801 of 11 May 2016
- Proposal for a regulation COM (2018) 373
- Treaty on the Functioning of the European Union, Articles 21 and 45
- Employment Regulation / Employment Procedure Regulation
- German Residence Act / German Residence Regulations
- tewerkstellingsvergunning – TWV / gecombineerde vergunning voor verblijf en arbeid – GVVA

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