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The interaction between EU trade commitments and immigration rules in EU Member States

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1 Introduction

The EU has agreed to, and is negotiating numerous bilateral or plurilateral Free Trade Agreements. These Free Trade Agreements (FTA) encompass the mobility of natural persons and, therefore, interact with immigration law in the EU Member States. This interaction is understudied, hence the European Commission has asked us to investigate this interaction, and to identify potential inconsistencies and regulatory gaps.

Our study comes at a crucial time for EU trade relations, for one because of the recent agreements with major trade partners, China and the UK. While the ratification of the EU-China Comprehensive Agreement on Investment is suspended, the EU-UK Trade and Cooperation Agreement is in force and includes mobility commitments. Thus, FTA have an impact on the mobility of natural persons, regulated in the immigration laws of the EU Member States, and this impact can become considerable. Also, due to the COVID-19 pandemic, there might be a tendency towards more short term mobility instead of full relocations. Time will tell. This study will show that, for the existing and future EU commitments under the FTA to ‘come alive’ and be implemented in the EU Member States in a harmonized and transparent manner, the EU legislator might have to consider developing new EU immigration law.

This study advances from the original World Trade Organization (WTO) framework laid down in the General Agreement on Trade in Services (GATS): GATS Mode 4, which deals with service provision that requires movement of natural persons.¹ Indeed, two types of natural persons are covered by Mode 4: self-employed natural persons supplying services, and natural persons employed by a service supplier in respect of the supply of a service.² Mobility of employees of service providers as covered by GATS reflects the central aim of the GATS: to open up services markets to trade and to establish a global level playing field. To ensure effective competition, a service provider needs to have the opportunity to bring its personnel to another state, as domestic service providers would otherwise be at a significant competitive advantage.

Since the creation of the GATS, the adopted approach to liberalize mobility and trade is included in various other trade agreements. As said, several of these free trade agreements (FTAs) are currently in force, whereas others are still under negotiations or (provisionally applied) pending ratification. While FTAs have adopted the GATS model as the legal framework, certain details vary to a greater or lesser extent.³

¹ Article I:2 GATS, Mode 4 is defined under sub d.

² GATS Annex on Movement of Natural Persons Supplying Services Under the Agreement, par 1.

³ S Tans and M Veenbrink “Upgrading Trade in Services: The Struggle to Move Forward” in: S Tans and M Veenbrink (eds) *Upgrading Trade and Services in EU and International Economic Law* (Wolf Legal Publishers 2019), p 16-17.

These agreements taken together present us currently with five categories of natural persons who are entitled to mobility in trade agreements:

- Contractual Service Suppliers (CSS)
- Independent Professionals (IP)
- Intra-Corporate Transferees (ICT), including Graduate trainees (GT)
- Business Visitors (BV); for Establishment purposes (BVEP) and for Selling purposes (STBV)
- Investors

The main thrust of the GATS, as is the case in the other trade agreements, consists of provisions to ensure access to the market by restricting the imposition by the host state of a specific list of barriers to trade (Market Access, MA), non-discrimination in relation to different foreign service providers active in a host state (Most-Favoured Nation Treatment (MFN)), and non-discrimination in relation to domestic service providers (National Treatment (NT)). Additionally, several of the obligations in relation to Domestic Regulation (DR) are relevant to immigration rules, as these obligations require that legislation is administered in a reasonable, objective and impartial manner. Where needed, independent review and remedies in relation to immigration measures must also be ensured. Of additional significant importance are obligations relating to transparency.⁴ All these topics will be elaborated on in this report.

Host states, in our case the EU Member States, have the opportunity to deviate from FTA obligations on certain grounds relating to public policy, public security and public health concerns. Additionally, all trade agreements ensure, in relation to mobility, that host states may continue to apply measures to regulate entry of natural persons into, or their temporary stay in, their territory. They may do so if this is necessary to protect the integrity of their borders, and to ensure the orderly movement of natural persons across borders. As such, the trade agreements require the EU Member States to ensure access for the categories of persons enjoying mobility rights under the conditions specified in the FTA, yet this can be done by integrating mobility into the existing immigration rules, as long as these rules fit the definitions provided in the FTAs. This report will provide a detailed overview of the immigration rules of all EU Member States, as well as a review of consistency with selected FTAs.

1.1 Implementation at the national level

FTA include commitments that may lead to entry and residence of third-country nationals (TCN) to an EU Member State if the conditions described at the international level are fulfilled, and if none of the GATS/FTA exemptions from the trade obligations apply. In this report, the conditions at the international level are understood as follows. Trade liberalisation provides the scope and the ob-

⁴ S Tans, *Service Provision and Migration. EU and WTO Service Trade Liberalization and Their Impact on Dutch and UK Immigration Rules* (Brill, Leiden 2017), p. 101.

ligations related to that scope. The treaties define the categories of natural persons that can rely on the agreements.⁵ This leads to an initial category of TCN that can have access to an EU Member State. However, an EU Member State may have reserved the right to impose certain conditions impacting this access. Finally, the trade agreements do not prevent the imposition of measures relating to public policy objectives, nor certain measures relating to immigration. Consequently, applicable national rules of the host Member State should allow natural persons the right to entry (access to the territory) of that state, as well as the right to temporary residence, for business purposes under the conditions specified at the international level, unless this would impact a legitimate public policy objective.

1.2 Rights

Besides entry and residence rights, rights to family reunification, working conditions and access to social security benefits strongly affect a choice to (temporarily) move to another state for economic purposes. These are in part regulated by EU law (Family Reunification Directive; Single Permit Directive; ICT Directive). Likely, these rights are also regulated in national laws, including migration law, laws on the access to the national labour market for TCN and laws on rights of migrant service providers.⁶

To summarize, typically, trade agreements therefore impact on, or relate to, national rules which take the following form:

Entry requirements

- The entry conditions
- The work permit requirements
- The type of visas/permits issued

Staying conditions and rights after entry

- The rights granted to the person enjoying mobility rights

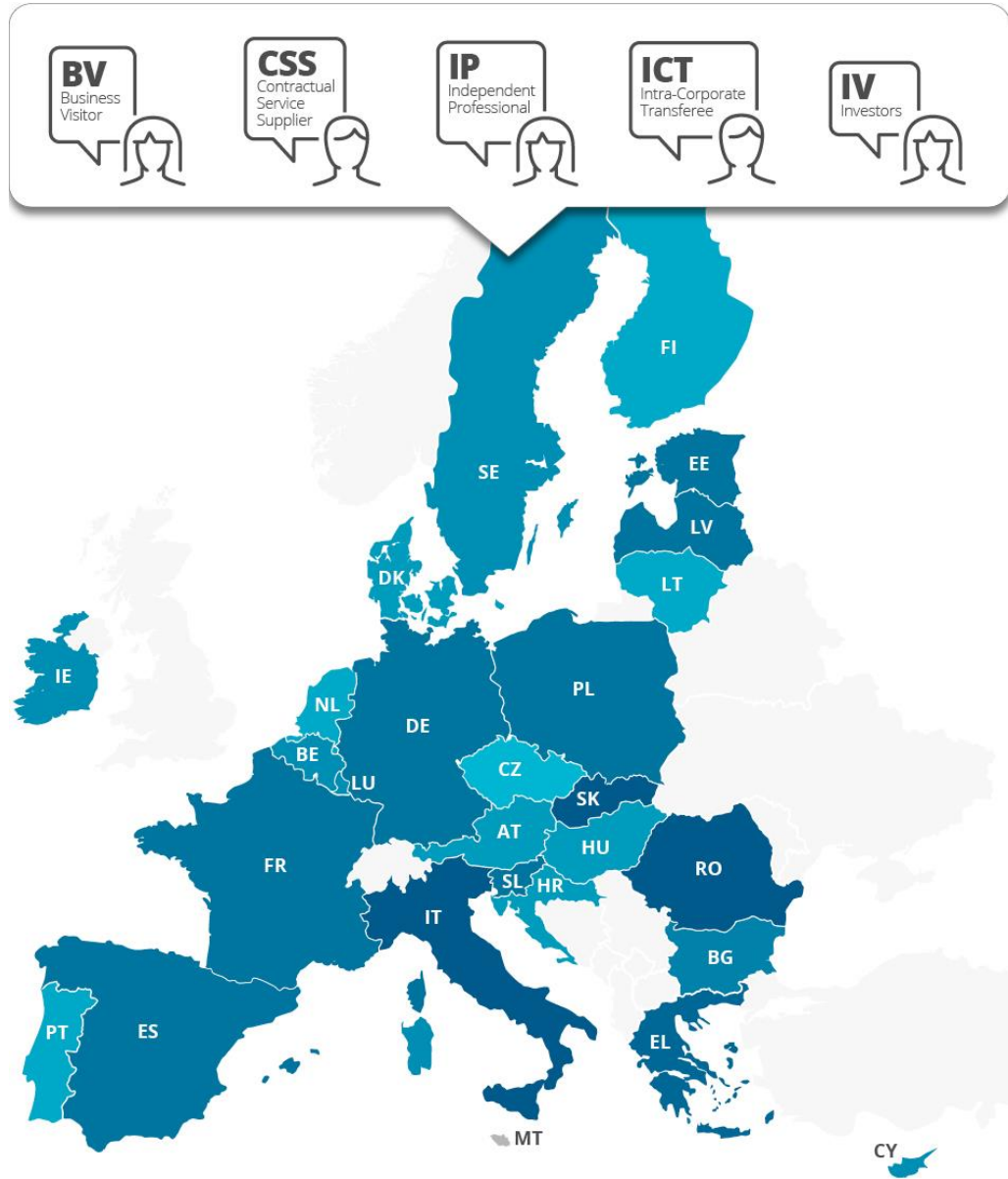
Migration law distinguishes entry routes for specific persons (certain level of education, certain income) or specific purposes (certain job, certain economic sector, as self-employed persons, temporary or more permanent). Entry schemes and the manner in which subsequent staying conditions are regulated vary considerably across the EU. A short-term visa, a long-term visa, a single

⁵ The GATS specifically indicates these categories in the form of commitments (positive listing approach), whereas the EU – CARIFORUM FTA and the EU – Japan agreement adopt a mixed approach, as it provides mobility in general to Investors, BV and ICT, unless specifically restricted in the reservations (negative listing approach), EU – CARIFORUM, Article 80 and 81; EU – Japan, Articles 8.20 and 8.21. For CSS and IP, the EU – CARIFORUM agreement itself limits these categories to several sectors, EU-CARIFORUM, Article 83. The EU – Japan agreement initially seems to include all sectors, yet here it is the list of reservations that lists the sectors which are liberalized for these two categories, EU – Japan. Annex 8-B-IV, par. 10 and 13 provide a specific list of service sectors where CSS and IP may be relied upon, which therefore follows the positive listing approach.

⁶ On which: H Gött, *Labour Standards in International Economic Law: An Introduction* 2018.

permit et cetera may be required, or separate work and residence permits may be obligatory. At the national level, relatively light conditions may apply, or access may be quite strictly limited.

Figure 1.1: Overview of the trade categories and migration obligations and rights.



FOR 27 EU MEMBER STATES			
Entry & stay conditions	<input checked="" type="checkbox"/>	Social security	<input type="checkbox"/>
Work permit requirements	<input type="checkbox"/>	Labour rights	<input type="checkbox"/>
Visa requirements	<input checked="" type="checkbox"/>	UP TO 90 DAYS	<input type="checkbox"/>
Family reunification	<input type="checkbox"/>	+ 90 DAYS	<input type="checkbox"/>

Further obfuscating the picture is the fact that EU Member States may have created a separate set of rules which relate specifically to GATS service provision (for example the Netherlands), or they may have inserted the substance of the GATS liberalisation into non-specific already existing entry schemes relating to regular migration (for example Sweden and Germany).

Finally, certain rules may work differently in practice due to national policy, practice or case law. This study sets out to identify such national rules implementing the obligations laid down in the GATS and other EU Free Trade Agreements.

1.3 Objective

The **objective** of the project is threefold. First, it aims to provide the European Commission a detailed, accessible overview of the state of the EU trade commitments (GATS and bilateral) implementation in immigration rules in EU Member States. Secondly, the objective is to provide this overview to inform the wider public of legal and policy experts working in this complex field of law. Thirdly, it aims to identify potential inconsistencies and regulatory gaps in order to facilitate the European Commission in the enforcement in the member states of the EU trade commitments.

The **purpose** of the project is to identifying the national rules implementing the trade commitments into specific Member States' migration laws, laws on access to the labour market and subsequent provided rights. Several divergencies between the international trade regime and EU and national migration law exist. For example, the EU trade commitments regard exclusively temporary migration, and most commitments indicate a specific duration, varying from several months to three years. EU migration law distinguishes a right to entry either for 90 days in 180 days, for which a Schengen visa can be obtained (but not for non-Schengen countries, currently Bulgaria, Croatia, Cyprus, Ireland and Romania) and a right to stay for over 90 days. The purpose of the study is also to clarify these divergencies.

This has resulted in the following research question to be answered in this report:

What are the legal obligations of the EU Member States under the selected trade agreements with respect to migration of third country nationals, how have these obligations been implemented by the EU Member States in their national law and which best practices as well as less favourable approaches can be discerned?

1.4 Methodology

Experts on national migration law in all the EU Member States filled in an extensive legal questionnaire and some conducted one or two interviews with experts.⁷

To facilitate the national experts to provide an overview interlinked with the international framework, the national experts were guided through the process of collecting national data. The scientific team asked national experts to fill out a detailed **questionnaire** including reference to legislation, case-law, literature and national statistics when available; the questionnaire was accompanied by a guideline to guide the experts and secure common understanding of the task at hand. In order to facilitate national experts to verify regulatory gaps, policy and practice of the functioning of its immigration rules in respect of the EU trade commitments a **semi-structured interview template** was provided by the scientific team which allowed national expert to perform at least one interview with relevant stakeholders (legal practitioners, business associations, regulators).⁸

In addition, we conducted a literature review of the literature from 2017 (with some exceptions 2016) until May 2020 using databases of Hein online, Kluwer, and Oxford Academic Database, Web of Science and Google Scholar.

1.5 Structure of the report

This report is structured as follows. In chapter 2 we present an overview of the commitments under the FTA in general. In chapters 3 – 7 we present the national implementation of the commitments in combination with the national immigration rules for each of the five categories of mobility (BV, CSS, IP, ICT, and Investors). In chapter 8 we give an overview of the national rules providing additional rights (family reunification and social security rights after entry). Chapter 9 deals with the obligations contained in the FTA relating to procedural aspects. Chapter 10 gives an overview in relation to the international obligations relating to transparency and evaluates the EU Member States transparency in respect of the topic at hand. Chapter 11 demonstrates the conditions under which a service provider is granted entry rights, and the grounds for refusal of entry available under national law. These grounds include refusal relating to public policy, security and health and other possible refusal grounds (volumes of admission, waiting periods, labour market tests et cetera). In chapter 12 we present our findings from the literature review and chapter 13 presents our conclusions.

⁷ 11 interviews were conducted. Due to the COVID-19 pandemic interviewing became difficult for most experts.

⁸ A Bryman, *Social Research Methods*, Oxford 2015.

2 EU Trade commitments on Movement of Natural Persons

2.1 Introduction

The three trade agreements investigated in this report, GATS, EU-CARIFORUM and EU-Japan, represent three stages of trade liberalisation. The GATS, which entered into force in 1995, essentially forms the model for the EU – CARIFORUM and the EU – Japan agreement. EU - CARIFORUM was signed in 2008 and at the time it was one of the most far-going when it comes to liberalization of service trade in general, and Mode 4 in specific.⁹ EU – Japan is currently one of the farthest going from a liberalization perspective. These three agreements therefore provide an overview of the progression over time of the liberalisation of trade involving movement rights for natural persons.

This chapter will first give a brief overview of the regulatory framework adopted in these agreements. Second, a general description of the categories of natural persons that enjoy mobility based on these agreements will be provided.

2.1.1 *Movement of Natural Persons, Mode 4*

Mobility of natural persons under the scope of the trade agreements under scrutiny consists of so called “Mode 4”, which is the supply of a service by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member. Thus, the natural person travels to a host state, from the perspective of this report, an EU Member State, in order to provide an activity related to business there. From its inception to date (2021) EU Mode 4 commitments are almost all related to highly skilled service providers, so far covering hardly any other skill levels. This holds true for all FTAs to which the EU is a party. However, all service sectors, with a few specific exceptions, are potentially covered, as such, the limitation to the highly skilled is the result of current liberalisation, and not inherent to the trade agreement itself.¹⁰

For the GATS, more detail concerning Mode 4 is set out in the Annex on Movement of Natural Persons (Annex MNP), which refers to two categories: natural persons supplying services and natural persons of a Member who are employed by a service supplier of a Member, in respect of the supply of a service. This preliminary division is not specifically used in the EU – CARIFORUM or the EU –

⁹ P Sauv  and N Ward, ‘The EC-CARIFORUM Economic Partnership Agreement: Assessing the Progress on Services and Investment’ ECIPE Paper (2009), Available online <<http://www.ecipe.org>>, p 2. EU – CARIFORUM Agreement, available online <http://trade.ec.europa.eu/doclib/docs/2008/february/tradoc_137971.pdf>.

¹⁰ WTO (CTS) 2009 (Presence Natural Persons), par 26.

Japan FTAs, as these include the specific definitions of the categories of Mode 4 service suppliers in the main text of the agreement.¹¹

As the GATS concerns service provision only, GATS mobility is always temporary.¹² The Annex MNP therefore clarifies that the GATS does not apply to situations of permanent residence, nor does it influence measures related to obtaining the status of citizenship of another WTO Member. While mobility is no longer limited to service provision only, the EU – CARIFORUM and the EU – Japan Agreements adopt the same limitation.¹³

2.1.2 Scope of the agreements

As the agreements address the movement of natural persons of the other party,¹⁴ a domestic service supplier is not covered, nor is a non-Member service supplier. Merely domestic companies cannot rely on these agreements to enable entry of TCNs to provide services in their own state.¹⁵ Note must be taken that it may not always be straightforward to determine if a TCN is working in the Member state as an individual service supplier (self-employed, which does fall within the scope of the agreements), or is employed by a service supplier. However, in the case of mode 4, this distinction is critical for determining the relevant legal framework when a national service provider is involving TCNs.

Natural person of another Member is defined in Article XXVIII GATS, which connects the term to nationals of that other WTO Member state. The national falls within the term natural person of another Member state, if that person is residing in another WTO Member state.¹⁶ From the perspective of mobility to an EU Member State, the EU – CARIFORUM and the EU – Japan agreement define ‘natural person of a Party’ as ‘a national of Japan/signatory CARIFORUM states’.¹⁷

The GATS, which only deals with trade in services, does not provide a definition of the concept of services. The scope is defined as: ‘measures by Members affecting’ the entry into and temporary stay in their territories of natural persons for business purposes.¹⁸ FTA, which deal with the topics included in the General

¹¹ See for instance the definition of CSS in both agreements: Article 80(2)(d) EU – CARIFORUM; Article 8.21(b) EU – Japan. Legally, this makes no difference, as the Annexes and the schedules of commitments are all inherently part of the agreement.

¹² See GATS Annex MNP par 2.

¹³ Article 60(5) EU – CARIFORUM Agreement; Article 8.1(3) EU – Japan.

¹⁴ Article II, XVI and XVII GATS.

¹⁵ Non-nationals with a permanent right of residence in a WTO Member State are considered to be natural persons of that Member State as well, if the state in question has notified this. This does not apply to the EU.

¹⁶ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ 2004 L16/44), Article 4.

¹⁷ Article 61(c) EU – CARIFORUM; Article 1.2(q) EU – Japan.

¹⁸ The exact language of the type of measures affected varies as the GATS only concerns trade in services, whereas the FTAs address movement of persons for business purposes, see Article 1:1 GATS, 80(1) EU – CARIFORUM; Article 8.20(2) EU – Japan.

Agreement on Tariffs and Trade (GATT), GATS *and* other topics, such as investment, do not define the concept of services either. These agreements therefore do not regulate trade in services, the intention is to regulate national *measures* impacting trade in services. The central effort is therefore to reduce unnecessary (via the domestic regulation obligation) or discriminatory (market access and national treatment) barriers to trade in services derived from governmental regulation, not regulation itself.¹⁹

2.1.3 Schedules of commitments and lists of reservations

The order in which the categories of natural persons enjoying mobility rights are presented here, and in the following chapters dealing specifically with each category, is as follows. First, the BV category is described, as this category relates to, *inter alia*, the preparation of the economic activity to be performed later (either in the form of a contract preparation or the setting up of commercial presence). Second, the self-employed category follows (IP). Third, service provision through employees will be presented, the CSS category. Finally, ICT and the specific form of GT will be discussed. This category provides the possibility for managers to oversee a commercial presence, or for personnel which has uncommon skills to be used in the commercial presence.

The EU – CARIFORUM FTA and the EU – Japan FTA no longer work from the idea of specific commitments addressing categories of natural persons. Instead, these definitions and the general conditions under which they gain access to, and residence on, the territory of a host state are now part of the specific provisions in the trade agreement itself. Both FTAs contain a chapter dealing with mobility rights. Despite the adoption of Mode 4 categories in the main text, the approach adopted is still similar to that of the GATS, that is, unless a specific category is expressly listed, no liberalisation is provided (positive listing approach). The EU – Japan agreement is different as this agreement provides that all categories are liberalised unless specifically indicated in the lists of reservations (negative listing approach).

2.2 Four main obligations in international trade law

There are four main “obligations” in international trade law that aim for liberalisation: Market Access, National Treatment, Domestic Regulation and Transparency. Though the Most-Favoured Nation (MFN) principle is important in international trade law as well, it is not relevant in relation to national implementation central to our study.²⁰

We will give a brief description of each obligation.

¹⁹ Krajewski 2003, p 62. World Trade Organization, Council for Trade in Services, Communication from the European Communities and its Member States Consolidated GATS Schedule, 9 October 2006, S/C/W/273, horizontal commitment Mode 4, available online: <www.wto.org>.

²⁰ As the coverage of the WTO Agreement is nearly global, the relevance of the MFN obligation in relation to GATS Mode 4 is limited as well. It requires an FTA with a non-WTO Member State to have consequences.

Market access

The market access obligation seeks to provide access for economic activities to foreign markets by targeting a specific list of measures which have as their objective the restriction of this access. These measures are the main forms of regulation applied to limit access to the market for services, investors, for commercial presence and for natural persons providing economic activities. If market access is committed to this means that quota, monopolies, exclusive service suppliers or an economic needs test, and several specific similar types of measures are no longer allowed.

National Treatment

Specifically, under WTO law non-discrimination covers both *de jure* (direct, or overt) discrimination and *de facto* (indirect, or covert) discrimination.²¹ Obligations that only apply to third-country nationals are therefore problematic, including obligations that practically have a stronger impact on economic activities performed by third-country nationals than by domestic providers. The criterion used is whether the measure in question upsets the conditions of competition between domestic and foreign suppliers. Note that this is only possible between actual competitors, in WTO parlance, between 'like' domestic and foreign providers.

The concept of indirect discrimination has led to an extensive debate in the literature and various positions were adopted.²² These positions try to find a balance between the aim to create a level playing field (or addressing protectionism) and the right to regulate. The problem with indirect discrimination is that measures are origin neutral, yet can have a strong distortive effect on competition. The adopted positions thus range from a limitation on the scope of indirect discrimination to an appraisal of regulatory concerns in the form of a necessity test.

In *Argentina - Financial Services* the Appellate Body indicates the following:²³

In our view, under Article XVII of the GATS, a measure either modifies the conditions of competition in the marketplace, thus according less favourable treatment, or it does not. (...) However, ensuring equal competitive conditions, which is required by the legal standard of "treatment no less favourable", is not the same as guaranteeing that one group of services or products does not have any competitive advantage over another group. As Panama rightly points out, ensuring equal conditions of competition under the national treatment obligation means "to guarantee equality of opportunities to compete in the marketplace", rather than to

²¹ A Mattoo 'National Treatment in the GATS, Corner Stone or Pandora's Box?' (1997) 31 *Journal of World Trade* 107, p 110; Krajewski 2003, p 108, confirmed by the Appellate Body in *EC – Bananas III* Appellate Body Report, par 233.

²² For an overview of this debate see: Muller 2016, p 836-837.

²³ Muller 2016, p 839; .

guarantee that all like services and service suppliers are "equally competitive".²⁴

Similarly, the Panel and the Appellate Body rejected an analysis of the regulatory purpose of measures within the framework of less favourable treatment.²⁵ The consequence is that the deciding element remains modification of the conditions of competition negatively affecting most foreign service supplier or services to the advantage of most domestic service suppliers or services. This will by no means be the end of the debate as this conclusion still provides a wide scope to Article XVII.

The relevance of this discussion is that the outcome determines to what extent measures that make it more difficult to compete with locals may be problematic. By definition, migration and access to the labour market rules only apply to third-country nationals. The need to comply with a work permit obligation already means costs and efforts to rely on mobility. However, as is clear from *Argentina – Financial Services*, ensuring equal conditions of competition is not the same as guaranteeing equality of opportunities. Phrased differently, non-discrimination will likely not require the abolishment of work permits.

Domestic Regulation

Non-discriminatory measures can severely hinder trade as well. The GATS contains a provision on domestic regulation which essentially consists of two parts. The GATS seeks to ensure that qualification requirements and procedures, technical standards and licensing requirements (QTL) do not form unnecessary barriers to trade.²⁶ This part of the DR provision in GATS only applies in a rudimentary form. Negotiations to create specific rules fleshing out this provision have been ongoing, but no progress in relation to GATS negotiations should be anticipated any time soon. The EU – CARIFORUM FTA addresses QTL measures in the form of provisions on mutual recognition, however, the EU – Japan FTA does contain substantive provisions relating to QTL.²⁷

²⁴ *Argentina – Financial Services* Appellate Body Report, par 6.139 and 6.144.

²⁵ A position forwarded in analogy with reasoning based on the concept less favourable treatment in Article 2.1 TBT Agreement. However, the TBT Agreement does not contain an exemption ground, which has led to the inclusion of regulatory concerns in *United States – Measures Affecting the Production and Sale of Clove Cigarettes (US – Clove Cigarettes)* WT/DS406/AB/R, 4 April 2012, Muller 2016, p 840; *Argentina – Financial Services* Panel Report, par 7.229-7.231; *Argentina – Financial Services* Appellate Body Report, par 6.121.

²⁶ Article VI GATS contains the domestic regulation obligation which forms a mix of general and specific obligations. Paragraphs 1, 5 and 6 apply to specific commitments, whereas paragraphs 2 and 3 contain obligations that also apply to situations not covered by commitments. Paragraph 4 contains a mandate to negotiate the further development of this obligation in the form of disciplines on domestic regulation. See extensively: P Delimatsis 'Due Process and "Good" Regulation Embedded in the GATS – Disciplining Regulatory Behaviour in Services through Article VI of the GATS' (2006) 10 *Journal of International Economic Law*. G Muller 'The Necessity Test and Trade in Services: Unfinished Business?' *Journal of World Trade* (2015) 49, p 955.

²⁷ EU – CARIFORUM, Art. 85; EU – Japan, Art. 8.29-8.30.

For our study, this part of the domestic regulation obligation is not relevant, as QTL measures relate to the right to perform the activity itself, and not to immigration measures.

The second part of the GATS domestic regulation obligation contains procedural rules, which are relevant to our study.²⁸ Procedural obligations are included in the two other FTA as well. Administration of measures should be reasonable, objective and impartial. Independent review must be available for specific administrative decisions and, where appropriate, remedies for decisions that affect trade in services must be provided.

Transparency

Finally, transparency and due process are required in procedures where a service supplier has made a request for authorisation.²⁹ The GATS requires Members to provide adequate procedures to verify the competence of professionals of other Members. The only requirement is the availability of an adequate procedure, no substantial requirement is listed.³⁰ The EU – CARIFORUM FTA elaborates on this GATS-approach, adopting a chapter dealing with the ‘regulatory framework’, addressing these issues and other topics such as mutual recognition.³¹ The EU – Japan FTA regulates this topic more extensively, a full analysis of which will be provided below.³²

The regulatory approach adopted in these agreements recognises the fundamental importance of transparency.³³ Language differences may already prove a formidable obstacle. Moreover, service provision is usually heavily regulated, in manners that differ from state to state.³⁴ An overview of national measures and conditions that need to be fulfilled is central to the decision to provide a service in the first place. This applies to any individual service supplier, and it applies to continuing trade flows, which benefit from predictable rules and procedures. Moreover, transparency may reveal conflicts between the international trade rules and national measures and it allows for democratic control

²⁸ Delimatsis 2006, p 32-33 referring to these rules as ensuring due process in the GATS. Feketekuty describes due process as the opportunity to consult the government on the interpretation and application of regulations, to appeal regulatory decisions and to obtain a timely response to requests for regulatory decisions, G Feketekuty ‘Regulatory Reform and Trade Liberalization in Services’, in P Sauvé and R Stern (eds) GATS 2000: New Directions in Services Trade Liberalization (The Brookings Institution, Washington DC 2000), p 229-230.

²⁹ Article VI:1 seems to apply to measures of general application while paragraphs 2, 3 and 6 apply to measures with a specific scope such as administrative decisions, Wouters and Coppens 2008, p 218. Measures of general application affect ‘an unidentified number of economic operators’ or ‘a range of situations or cases, rather than being limited in their scope of application.’, Delimatsis 2006, p 20.

³⁰ Delimatsis 2006, p 47-48.

³¹ The obligations comparable to those adopted in the GATS domestic regulation provision can be found in Article 87 EU - CARIFORUM.

³² EU – Japan, Chapter 8 section E.

³³ P Kruger ‘Managing the process of services liberalization’ (2011) No S11TB09/2011 Trade Law Centre for Southern Africa Trade Brief, available online: <www.tralac.org>, p 2.

³⁴ P Delimatsis ‘Article III GATS’ in R Wolfrum, PT Stoll and C Feinäugle (eds) Max Planck Commentaries on World Trade Law, WTO – Trade in Services (Martinus Nijhoff Publishers, Leiden 2008), p 93-95; GATS preamble, par 2.

and public debate. Finally, transparency facilitates negotiations, as it can reveal existing barriers to trade not addressed by GATS liberalisation yet.³⁵

2.3 The combined effect of trade obligations

The just described provisions essentially ensure the following, provided that the obligations apply in full (GATS) and no reservations are made (EU – CARIFORUM and EU – Japan). Firstly, the main methods of protecting a domestic market, quota, economic needs test, etc. should be abolished. This ensures that foreign competitors have access to the market. Subsequently, non-discrimination ensures that a level playing field exists with domestic providers on that market. Furthermore, international trade law seeks to discipline non-discriminatory measures, in specific qualification requirements and procedures, technical standards and licensing requirements, as well. Moreover, procedural requirements ensure due process, as for example a very slow and bureaucratic process may severely hinder trading opportunities. Finally, transparency also directly impacts on international trade, as foreign competitors need to be able to know the circumstances applying to access and the conditions that they need to comply with.

2.3.1 Categories of natural persons

As indicated, in theory, any category of natural persons can be included under the trade commitments, as long as the activity performed by that category falls within the scope of the trade agreement. The Investor category, for example, was not included in the EU's GATS schedules of commitments, yet it is included in EU – Japan. For instance, if desired, the EU could decide to add hairdressers or primary school teachers in the commitments. So far, the EU Member States have included five categories of natural persons in the trade commitments: BV, IP, CSS, ICT and Investors. As the same terminology and categorization is used in FTAs, these definitions are likely to stay.

The main purpose of the trade commitment is to define the categories enjoying mobility rights, to grant entry and residence for a certain period and finally, to remove the barrier of an economic needs test. However, it is necessary to assess the trade commitments with care, as various EU Member States specifically reserve the right to impose an economic needs test in relation to one or more of these categories.

What follows is a brief overview of each category grouped as self-employed, employed and investors.

³⁵ Krajewski 2003, p 124-125; Delimatsis 2008, p 93.

Self-employed

Natural persons that directly receive their remuneration for the provided service from the service receiver are considered to be self-employed.³⁶ Such persons enjoy mobility rights under the trade agreements and are referred to as 'independent professionals' (IP).

Employed

Employers (both juridical persons and natural persons) may use their employees to provide services on the territory of the other party. Therefore, employees of such service providers are granted mobility rights as well.

The EU trade commitments distinguish three categories of employees of service providers: 'contractual service suppliers' (CSS), 'intra-corporate transferees' (ICT)³⁷ and 'business visitors' (BV). In relation to the WTO Doha Round negotiations and the GATS commitments, the EU has offered to include the 'graduate trainee' (GT) category, allowing ICT for training purposes. As such, this category is not included in the current commitments. The EU – CARIFORUM agreement does provide for this category, however, GT is not part of the EU – Japan commitments.

The main difference between ICT and CSS is that in the case of ICT the service provider has a commercial presence on the territory of the Member State (which is the receiver of the service), while CSS does not have commercial presence. BV differ from CSS as they do not perform economic activities (services or otherwise). Rather BV prepare future economic activities, either by preparing the setting-up of a commercial presence, or *inter alia* by negotiating a service contract with a potential service receiver.

Contractual service suppliers are employees of a service provider that perform the service contract concluded between the provider (the employer) and the receiver located in another state. This category therefore relates to the EU law concept of 'posted workers', though comparisons should be made with care, given the differences between (the scope of) international trade law and EU law.

The nationality of both the employee and the employer (or place of establishment in case of a juridical person)³⁸ needs to be that of a Member State, but not necessarily of the same Member State.³⁹ When the service is performed in the EU, this means that in the case of the EU – Japan agreement, the national must be a Japanese national. However, for the EU – CARIFORUM agreement, this may be any national of the CARIFORUM states. This means a CARIFORUM, e.g. Surinamese, national working for an employer established in CARIFORUM country, e.g. Guyana, can provide a service as an employee of that company in

³⁶ WTO (CTS) 2009 (Presence Natural Persons).

³⁷ The term intra-company transferee is used as well, no difference is intended with the use of either term.

³⁸ Article XXVIII GATS.

³⁹ WTO (CTS) 2009 (Presence Natural Persons), par 15.

the EU, for example in France. For the GATS the same reasoning applies in relation to all WTO Member States.⁴⁰

Investors

The EU – Japan agreement also provides for mobility for investors. Specifically, natural persons who establish an enterprise, which not only relates to a branch office as it includes the setting up of a new business, and then develop or administer the operation of that enterprise, are granted mobility. This is more than a commercial presence, as that only relates to setting up a branch office. Mobility into a branch office is covered by the BVEP and ICT category.

2.4 Assessing the legality of measures in light of the trade agreements

Determining whether a certain national measure breaches the trade commitments can be complex. As long as a final ruling by the highest courts or appellate bodies has not been given, legal interpretation can be a matter of debate. With this caveat in mind, for the purpose of this study, we adopt the following approach to assess potential breaches.

As a first step, the content of the trade commitments is provided in each of the substantive chapters of this report. This content is determined by describing the scope of the five categories enjoying mobility rights, and the conditions that apply. Additionally, this requires an examination of the reservations made by each of the Member States. Determining the content of the trade commitments therefore requires a careful approach.

This careful approach also requires an analysis of language of the system in which obligations are implemented. The trade commitments use language that not always correlates to the language used in national legislation, in particular, as the implementation takes place in legislation relating to migration and access to the labour market. For example, the term “economic needs test” is trade language, whereas in migration language reference is often made to a “labour market test”, however, these terms do not encompass the same policy goals. A labour market test refers to the need to comply with the obligation that access to the labour market for third-country nationals, the granting of a work permit, is only possible if the ‘job’ or ‘position’ cannot be fulfilled by a domestic worker. In relation to the EU, this includes the need to prove that a vacancy has been offered to EU citizens without success. Only then may a TCN be hired by the employer. The term economic needs test is not defined in the GATS or the investigated FTAs. As the mobility provisions in international trade law do not necessarily relate to activities which entail access to the labour market, the term economic needs test is broader, and for example, also applies when for instance an apothecary wants to create a branch office in a certain area. If there is already sufficient supply of that activity in the area, the request

⁴⁰ Article XXVIII GATS.

to set up a new branch office may be denied as there is no economic need for it.⁴¹

Another important aspect relates to the system adopted in the trade agreements. Essentially, the trade agreements provide mobility under certain conditions. Once those conditions are met, mobility based on the commitments should be allowed.

In addition, the commitments relating to mobility have a certain objective, they intend to open markets to competition. For example, the idea of Independent Professionals is not only to provide access to the market of other signatory states, but also to allow the Independent Professionals to compete on the basis of a level playing field with 'like' domestic service suppliers.⁴²

For Contractual Service Suppliers, for instance, the mobility itself is essentially a requirement for such level playing field. It is hard to envisage a level playing field when service providers cannot rely on their own personnel to provide a service in the host state.⁴³

Phrased differently, all three trade agreements discussed in this report ensure non-discrimination (the national treatment obligation) to create this level playing field. While for the GATS non-discrimination only applies if specifically committed to, this is indeed the case in relation to the categories discussed in this report. To sum up, where the EU GATS commitments indicate that mobility is provided, this includes acceptance of the national treatment obligation.

As such, the scope of the obligations described above (for example market access and national treatment) must be taken into account as well, in order to assess the conformity of measures with the trade commitments. A prime example is formed by the national treatment obligation. Requiring a work permit is by definition discriminatory, as nationals do not need a work permit to provide their activity on the market of their home state. Practically, if obtaining a work permit essentially entails fulfilling the conditions under which mobility is provided in the trade agreements, this is unproblematic. However, additional requirements, not referred to in the trade agreements may start to infringe the national treatment obligation.

Importantly, even if non-discrimination were to be interpreted as preventing additional conditions related to migration and access to the labour markets, the

⁴¹ See for a discussion on the definition of an economic needs test: WTO (CTS) note by the secretariat on Economic Needs Tests, 30 November 2001, S/CSS/W/118 (01-6155).

⁴² Competition requires the foreign and domestic actor involved to compete, as they are providing similar, or 'like' activities. See, on the question whether this means that separate findings with respect to the "likeness" of services, on the one hand, and the "likeness" of service suppliers, on the other hand, are required, this is not the case, *Argentina – Financial Services* Appellate Body Report, par 6.29.

⁴³ M Krajewski *National Regulation and Trade Liberalization in Services. The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* (Kluwer Law International The Hague 2003), p 67-68; Ortino 2008, p 177-186.

trade agreements clearly provide for an immigration carve-out, as well as exemption grounds relating to the public interest.

The so called “Immigration carve-out” a clause in the trade agreement that suggests that national immigration law (measures relating to the orderly movement of people across borders) remains in place, despite the obligations derived from the agreement. Phrased differently, immigration measures are not part of the scope of the agreements, they cannot be considered as measures the agreements address. However, the carve-out in relation to national migration law does not apply if such immigration measures nullify or impair the treaty commitments.

While we will discuss this in detail in the conclusion, a simple example may clarify this. Visa are typically measures that relate to the orderly movement of people across borders, and such measures are therefore part of the immigration carve-out. If a state would require a fee of 5.000 euro for such a visa application, in our opinion, this would nullify or impair the trade commitments. Another way of looking at this is that a 5.000 euro fee for a visa no longer relates to the orderly movement of persons across borders.

The Annex MNP, and the EU – CARIFORUM agreement provide that:⁴⁴

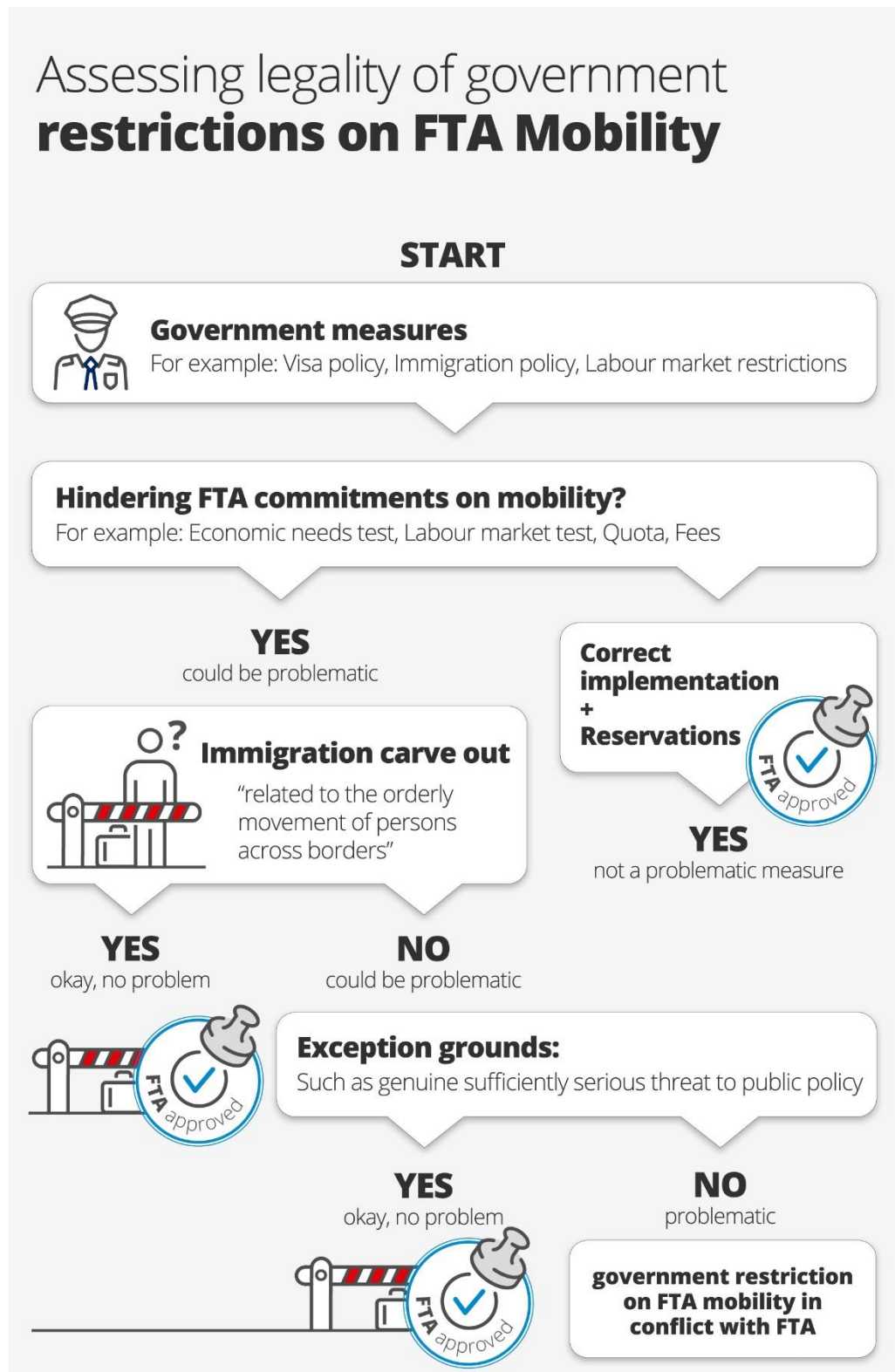
The Agreement shall not prevent a Member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders, provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment.

A footnote in the GATS Annex MNP, as well as the EU – Japan provision on this further provide that ‘the sole fact of requiring a visa for natural persons of certain Members and not for those of others shall not be regarded as nullifying or impairing benefits under a specific commitment’.⁴⁵ This addition is not included in the EU – CARIFORUM agreement. Given that the used language is an exact copy of the GATS, in analogy this explanation suits the other agreement as well.

⁴⁴ GATS Annex MNP; Article 60 (5) (EU – CARIFORUM agreement).

⁴⁵ EU – Japan, Art. 8.1(4).

Figure 2.1 Restrictions on FTA Mobility



3 Business Visitors (BV)

3.1 Introduction

Business visitors (BV) in the three trade agreements investigated have been divided in two sub-categories: business visitors for establishment purposes, and business visitors for service selling or short term. **Short Term Business Visitors (STBV)** refers to natural persons who are engaged in a range of activities which are more preparatory in nature, but not related to the actively selling of goods or services to the general public (some examples are: meetings and consultations, training seminars, fairs and exhibitions and sales negotiations).⁴⁶ If a company wishes to set up a branch office in another state, this will require the presence of representatives/managers of the entity wishing to establish a commercial presence in the host state, a category referred to as **Business Visitors for Establishment Purposes (BVEP)**.⁴⁷

Business visitors do not perform economic activities (in the sense of the FTA because economically they are not adding value yet, hence this is not labour market access), instead they prepare and facilitate economic activities. The employees of a company may be sent to another Member State to prepare the setting up of a commercial presence, or they may negotiate a service contract with a potential service receiver. This category is therefore important to liberalize trade and the mobility for BV forms a vital addition to other forms of trade addressed by trade agreements.

As an example, when services trade can be conducted via GATS Mode 1 (for instance over the internet), it can still be necessary for the service provider to send its personnel to the (potential) receiver, to agree on the terms, or to take a look at the business of the service receiver in order to optimize the provided service. After a contract is concluded, some form of mobility may still be needed, for example to advise the client after installing computer software. In the GATS commitments and the EU – CARIFORUM agreement, the definition of the STBV category is a little different from those in recent FTAs such as the EU-Japan agreement. Earlier STBV was limited to those preparing service provision, so called service sellers. The change in terminology has to do with the fact that the list of activities that such persons may perform is much broader than activities relating to the selling of services only.

3.2 Definition BVEP and STBV

The BVEP category in all three trade agreements essentially allows senior personnel of a company entry for the purpose of setting up a commercial presence

⁴⁶ Manual to the questionnaire.

⁴⁷ Ibid.

in the EU. While the GATS did not specifically include a definition, the EU-CARIFORUM agreement defines business services sellers as:

*natural persons of the EC Party or of the Signatory CARIFORUM States who are representatives of a service supplier of that EC Party or Signatory CARIFORUM State seeking temporary entry into the territory of the other Party for the purpose of negotiating the sale of services or entering into agreements to sell services for that service supplier.*⁴⁸

The BVEP category is defined in the EU-Japan agreement as:

*"business visitors for establishment purposes" means natural persons of a Party working in a senior position who are responsible for setting up an enterprise, do not offer nor provide services, do not engage in any economic activity other than what is required for establishment purposes and do not receive remuneration within the other Party.*⁴⁹

3.3 Conditions STBV and BVEP

Specifically for BVEP, the natural persons concerned must be working in a senior position within a juridical person, who primarily direct the management of the establishment, receiving general supervision or direction principally from the board of directors or stockholders of the business or their equivalent, including:

- directing the establishment or a department or sub-division of the establishment;
- supervising and controlling the work of other supervisory, professional or managerial employees;
- having the authority personally to hire and fire or recommend hiring, firing or other personnel actions.⁵⁰

For STBV this criterion is different, they need to be representatives of the service supplier, which require temporary entry and residence for the purpose of negotiating the sale of services or entering into agreements to sell services for that service provider.⁵¹ Note that the EU-Japan agreement adopts a wider range of activities for STBV. The consequence is that no specific definition is provided

⁴⁸ EU-CARIFORUM, Article 80(2)(c). Specific details for each Member State: GATS EE, SE: the person concerned must have been employed by that service suppliers for at least one year immediately preceding the date of their application for admission.

⁴⁹ EU-Japan, Article 8.21(a), substantially similar EU WTO (CTS) 2006 (EU Consolidated GATS Schedule), horizontal commitment Mode 4 and EU – CARIFORUM, Article 80(2)(a).

⁵⁰ Specific details for each Member State: GATS CZ, EE, SK: such persons would not directly perform tasks related to the actual provisions of the services of the establishment; Specific details for each Member State: EU-Japan AT, CY, UK: Business visitor needs to be employed by an enterprise other than a non-profit organisation, otherwise: unbound; CZ: Business visitor for establishment purposes needs to be employed by an enterprise other than a non-profit organisation, otherwise: Unbound. SK: Business visitor for establishment purposes needs to be employed by an enterprise other than a non-profit organisation, otherwise: Unbound. Work permit required, including economic needs test.

⁵¹ EU-CARIFORUM, Article 80(2)(c).

for STBV in that agreement. Rather, a range of activities that such persons may perform is listed:

(a) meetings and consultations: natural persons attending meetings or conferences, or engaged in consultations with business associates; (b) research and design: technical, scientific and statistical researchers conducting independent research or research for an enterprise located in Japan; (c) marketing research: market researchers and analysts conducting research or analysis for an enterprise located in Japan; (d) training seminars: personnel of an enterprise who enter the European Union to receive training in techniques and work practices which are utilised by companies or organisations in the European Union, provided that the training received is confined to observation, familiarisation and classroom instruction; (e) trade fairs and exhibitions: personnel attending a trade fair for the purpose of promoting their company or its products or services; (f) sales: representatives of a supplier of services or goods taking orders or negotiating the sale of services or goods or entering into agreements to sell services or goods for that supplier, but not delivering goods or supplying services themselves. Short-term business visitors do not engage in making direct sales to the general public; (g) purchasing: buyers purchasing goods or services for an enterprise, or management and supervisory personnel, engaging in a commercial transaction carried out in Japan; (h) after-sales or after-lease service: installers, repair and maintenance personnel and supervisors, possessing specialised knowledge essential to a seller's contractual obligation, performing services or training workers to perform services pursuant to a warranty or other service contract incidental to the sale or lease of commercial or industrial equipment or machinery, including computer software, purchased or leased from an enterprise located outside the European Union into which temporary entry is sought, throughout the duration of the warranty or service contract; (i) commercial transactions: management and supervisory personnel and financial services personnel (including insurers, bankers and investment brokers) engaging in a commercial transaction for an enterprise located in Japan; (j) tourism personnel: tour and travel agents, tour guides or tour operators attending or participating in conventions or accompanying a tour that has begun in Japan; and (k) translation and interpretation: translators or interpreters performing services as employees of an enterprise located in Japan.⁵²

For both categories the following additional conditions apply:

They do not engage in direct transactions with the general public and do not receive remuneration from a source located within the host Member State.⁵³

The maximum duration of stay varies, depending on the trade agreement and moreover varies between the EU Member State. The GATS commitment generally allows entry for 90 days in a six months period,⁵⁴ the EU-CARIFORUM 90

⁵² EU – Japan, Annex 8-III-B.

⁵³ EU-CARIFORUM, Art 80(2)(a); EU – Japan, Article 8.21(a).

⁵⁴ WTO (CTS) 2006 (EU Consolidated GATS Schedule), horizontal Mode 4 commitment. Specific details for each Member State: GATS AT, BE, CY, CZ, DE, DK, ES, FR, EL, IT, IE, LU, MT, NL, PT, SK, UK: The duration of “temporary stay” of business visitors is defined by the Member States and, where they

days in a 12 months period,⁵⁵ and the EU-Japan agreement 90 days in a six months period.⁵⁶

3.4 The EU Legal Framework for business visitors

Because 22 out of the 27 EU Member States are Schengen countries, the Schengen Borders Code⁵⁷ and the Schengen Visa Code⁵⁸ provide the main legislative framework and conditions for entry for short-term stays (90 days within a 180-day period).⁵⁹ For the purpose of our study, conditions of entry are the possession of valid documents necessary to cross the border; the possession of a visa if required by the EU visa list legislation⁶⁰; justification of the purpose and conditions of the stay, and possession of sufficient means of subsistence; not listed as banned from entry within the Schengen Information System (SIS); and not posing a ‘threat to public policy, national security or the international relations’ of any of the Member States.

The Schengen Visa Code provides EU Member States with the authority to grant a business visitors under the FTA a visa to travel to the EU. Drawn up on the basis of Article 51 of the Visa Code is the Visa Code Handbook.⁶¹ A non-exhaustive list of supporting documents which may be requested from the applicant in order to verify the fulfilment of the conditions listed in paragraphs 1 and 2 of Art. 14 Visa Code is set out in Annex II to the Visa Code. Documents to be presented as justification of the stay, including documents which can serve as evidence of travel for business reasons, are:

- (a) an invitation from a firm or an authority to attend meetings, conferences or events connected with trade, industry or work;
- (b) other documents which show the existence of trade relations or relations for work purposes; Examples: Contracts, payment of invoices, list of orders.

exist, Community laws and regulations regarding entry, stay and work; EE: Entry is limited to a maximum duration of 90 days per six month period; FI, PL, SE: Temporary entry and stay is limited to a three month period; HU: Entry and stay shall be for a period of no more than 90 days; LT: The duration of temporary stay is up to three months a year.

⁵⁵ EU – CARIFORUM, Article 82. The fact that the EU-CARIFORUM agreement upholds a cooling-off period of 1 months is interesting, as this is less liberal than the GATS commitments of most EU Member States, forming an example of a so-called GATS minus commitment, or negative preference, see for instance: R Adlung and P Morrison, ‘Less than the Gats: ‘Negative Preferences’ in Regional Services Agreements’ *Journal of International Economic Law*, Volume 13, Issue 4, December 2010, Pages 1103–1143.

⁵⁶ EU-Japan, Annex 8-B-III, par 6. Specific details for each Member State: EU-Japan CY, UK: Permissible length of stay: up to 90 days in any 12 month period.

⁵⁷ Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).

⁵⁸ Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code).

⁵⁹ Bulgaria, Croatia, Cyprus and Romania are to join the Schengen, while Ireland maintains and opt-out.

⁶⁰ Listed in Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.

⁶¹ ANNEX to the Commission Implementing Decision amending Commission Decision C(2010) 1620 final as regards the replacement of the Handbook for the processing of visa applications and the modification of issued visas (Visa Code Handbook I) Brussels, 28.1.2020, C(2020) 395 final.

- (c) entry tickets for fairs and congresses, if appropriate;
- (d) documents proving the business activities of the company; Examples: Annual business register, extract activities of the company; of commerce register, annual report.
- (e) documents proving the applicant's employment status in the company; Examples: Contract, proof of social security contributions.
- (...)
- (h) persons travelling for the purpose of carrying out paid activity: The applicant must provide a work permit or any similar document as provided by the national legislation of the Member State where a paid activity is to be carried out, if applicable.⁶²

Furthermore, documents in relation to accommodation, or proof of sufficient means to cover his accommodation and documents indicating s/he possesses sufficient means of subsistence both for the duration of the intended stay and for the return to his country of origin or residence must be submitted. The subsistence requirement 'shall be assessed in accordance with the duration and the purpose of the stay and by reference to average prices for board and lodging', and Member States' reference amounts for subsistence are to be notified to the Commission.

Neither the relevant regulations nor the annexes explicitly refer to the trade agreements. Reference is made in Visa Waiver Agreements concluded by the EU with certain third countries to persons employed or exercising an independent activity in their country of residence who have to travel for professional purposes.⁶³

The revision of the Blue Card Directive is the first EU migration document to present a list of business activities for which the holder of a Blue Card in one Member State should be permitted to travel to another EU Member State without requiring authorization.⁶⁴ These activities include: "attending internal of external business meetings, attending conferences or seminars,, negotiating business deals, undertaking sales or marketing activities, exploring business opportunities, or attending and receiving training".

The revision of the Blue Card Directive Recast is, thus, not a relevant legal framework in the case of trade related mobility. The list of activities may, however, serve as inspiration for a trade related list of BVs activities as an Annex to the Schengen legislation.

⁶² Visa Code Handbook - Paragraph (h) falls outside the scope of the FTA-BV category because it describes an economic activity; our evaluation is that BV is not mentioned in the Visa Code Handbook as such; para (h) comes close to CSS or IP.

⁶³ Visa Code Handbook p. 12. Also see <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:4384449&from=EN>.

⁶⁴ Directive 2021/1883/EU of 20 October 2021 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, and repealing Council Directive 2009/50/EC (OJ 2021 L381/1), article 2(13).

3.5 Member State implementation and practice

From the outset, it should be made clear that the international framework essentially requires both types of BV to be able to perform the specific activity allowed to them, without restricting access on conditions other than those provided at the international level. As BV do not engage in an economic activity: work permits, economic needs tests and similar restrictions should not be imposed.

Most Member States do provide such relatively unobstructed access in relation to certain business activities, such as attending professional gatherings and seminars or fairs and exhibitions. Member States often also provide such access to certain types of activities, such as supervision and inspection of production or assembly of equipment.⁶⁵ However, what in essence is required is access for all activities relating to:

- the purpose of negotiating the sale of services or entering into agreements to sell services for that service supplier (and also relating to the sales of goods in relation to the EU-Japan FTA), and
- the setting up of a commercial presence.

And in order to correctly implement the EU-Japan agreement, it is not sufficient to allow entry in relation to obtaining a services contract, as it must be possible to engage in all activities listed above at paragraph 3. This means that if a BV cannot base its entry on a visa or permit which does not impose conditions that normally apply to the economically active (such as a work permit), this may be problematic, depending on the actual conditions imposed. Moreover, a visa or permit covering the listed activities should be available for 90 days, in a 6 months, or for the EU-CARIFORUM, in a 12 month period. If a Member State allows entry for 30 days, and then requires a work permit, this too, depending on the conditions that need to be fulfilled for that work permit, is not in line with the trade commitments.

⁶⁵ Both examples are based on Croatia, see Art. 82 and 83 of the Croatian Aliens Act.

Let us take the example of a Japanese company who wants to send two of their employees to several EU countries: Austria, Netherlands, France, Belgium, Spain, Poland to perform an activity which is listed in the EU-Japan trade agreement as falling under the short term business travel scope:

research and design: technical, scientific and statistical researchers conducting independent research or research for an enterprise located in Japan.

When looking at the reservations made by EU Member States for this activity, we can notice that Austria made a reservation, requiring a work permit, including an economic needs test, except for research activities of scientific and statistical researchers. We would therefore expect that in all the other countries listed above, the two Japanese nationals can travel and perform their activities as work permit exempt. The puzzle is slightly more complex in practice as can be noticed below.

France/Poland: there is no legislation on short term business visits as such, but, the Japanese nationals are not required a work permit if they fall under the French short-term work permit exemption

Austria: work permit required (compliant with the EU-Japan trade agreement)

Belgium: work permit is generally required (not falling under the short term business visitor definition and no other short term work permit exemption exists). However, Belgium applies an exemption for short term business visitors for research and design purposes.⁶⁶

Netherlands: there is no legislation on short term business visits as such and this activity is not foreseen amongst those permitted based on the short work permit exemptions

Spain: work permit required (there is no legislation on short term business visits as such and no short-term permit exemption exists)

Combined with Posted Worker notifications (as some EU Member States have extended their Posted Worker legislation to companies located outside the EU) and Social Security rules (no de minimis rule in place for Social Security Certificates of Coverage); these immigration requirements make full compliance harder, if not impossible to achieve.

3.5.1 Specific entry route for BVEP and/or STBV

Germany specifically allows entry for BVEP, which moreover is intended as implementation of the trade commitments.⁶⁷ For STBV, specific implementation exists as well, however, we have added this under a different category as we feel that the listed STBV activities are incomplete. Nevertheless, entry can be based on a general provision relating to all Mode 4 types of movement, which

⁶⁶ Seconded researchers are subject to the Limosa exemption of art. 1, 11° Royal Decree 20/03/2007

⁶⁷ S. 16 German Employment Ordinance (No [FEA] approval shall be required for the issue of a residence permit to persons who:

3. Establish, monitor or control a domestic business unit for an employer domiciled abroad and who, in the course of their employment, while retaining their usual place of residence abroad, do not stay in Germany for more than 90 days in total within a period of 180 days.

Employment Ordinance sec. 30 in connection with Employment Ordinance sec. 16 contains a derogation from the principle that TCNs may only pursue an economic activity if they have a residence title. Sec. 30 no. 1 of the Employment Ordinance addresses the concern that there is no employment within the meaning of the Residence Act (fiction of non-employment) when the activity concerns those related to a business traveller, the duration of which is limited to 90 days in any 180-day period. In Connection with sec. 17 of the Residence Ordinance TCNs according to regulation EU 2018/1806 need no visa in that time frame.

therefore can be used as well.⁶⁸ Bulgaria too has a specific entry route for BE which allows up to three representatives for BVEP purposes entry for a duration of maximum one year.

Cyprus allows entry for applicants that have been invited to Cyprus by a company or are participating in a business event, conference or seminar. While this indeed is a specific entry route for business visitors, it is not entirely apparent whether this would cover every activity allowed by the trade commitments for BVEP and STBV.⁶⁹

A specific entry route can be found in: Cyprus, Denmark (STBV)⁷⁰, Estonia⁷¹, Germany (BVEP), Bulgaria, Lithuania (BVEP) and Romania (BVEP and STBV).⁷²

3.5.2 Access based on the Schengen visa for 90 days

The Czech Republic is an example of a Member State that complies with the requirements to implement both BV categories in the form of a Schengen visa, which is available for a maximum of 90 days in a 180 days period.⁷³

Access based on a visa or a Schengen visa for 90 days without additional requirements related to work or economic activities is provided in the following member States: Czech Republic, Ireland (STBV)⁷⁴, Latvia,⁷⁵ Malta, Romania, Spain⁷⁶, Slovakia and Sweden (BVEP)⁷⁷.

⁶⁸ S. 29 p 5 Employment Ordinance.

3. Establish, monitor or control a domestic business unit for an employer domiciled abroad and who, in the course of their employment, while retaining their usual place of residence abroad, do not stay in Germany for more than 90 days in total within a period of 180 days.

Employment Ordinance sec. 30 in connection with Employment Ordinance sec. 16 contains a derogation from the principle that TCNs may only pursue an economic activity if they have a residence title. Sec. 30 no. 1 of the Employment Ordinance addresses the concern that there is no employment within the meaning of the Residence Act (fiction of non-employment) when the activity concerns those related to a business traveller, the duration of which is limited to 90 days in any 180-day period. In Connection with sec. 17 of the Residence Ordinance TCNs according to regulation EU 2018/1806 need no visa in that time frame.

⁶⁹ The Law on the Aliens and Immigration (Cap.105).

⁷⁰ Aliens (Consolidation) Act (No. 239 of 10 March 2019), specifically entry is possible for, for example, meetings, as long as the migrant does not perform labour.

⁷¹ Entry and residence is possible based on several grounds, including the right to stay in Estonia arising directly from a treaty, Estonian Aliens' Act § 105. As such, this entry route is not specifically directed at BV.

⁷² Art. 23/4/d and 38 GEO 194/2002. Note that for BVE access for foreigners who will become the associate of a Romanian company is possible which likely would cover the right to set up a commercial presence in Romania. However, no reference is made to managers or key personnel, as this is referred to as 'associate or shareholder' in the national legislation.

⁷³ Thus, the visa is based on the Visa Code - Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 and Schengen Borders Code - Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016.

⁷⁴ S. 4 and s17 of the Immigration Act 2004; S.I. NO. 473/2014 – Immigration Act 2004 (Visas) Order 2014, as amended by S.I. No. 17/2018 - Immigration Act 2004 (Visas) (Amendment) Order 2018.

⁷⁵ Art. 9, 10-17, 23 Immigration Law of 31.10.2002.

⁷⁶ Spain allows entry for business activities for 90 days in 180 day period. Whether BV is fully covered depends on the definition used for 'business activities' by the authorities, Ley 4/2000 25; 25 BisRD 557/2011, Section 29.

⁷⁷ 90 days in 180 days entry possible for business purposes which will likely cover BVE, ch 2 sec 1 and 3 Aliens Act (2005:716), ch 3 secs 1 and 4 Aliens Act (2005:716).

3.5.3 Entry route for 90 days without specific details

Portugal allows access for 90 days in 180 days based on a short stay visa, which can be valid up to a year for one or multiple entries, for acceptable purposes to the relevant authorities not covered by other types of visa. Further details are however provided in the form of required documentation for certain purposes. BVEP is not specifically listed, nor are the STBV activities and the EU-Japan list of activities covered. Much depends on the question whether these are acceptable purposes to the authorities.⁷⁸

Finland seems to ensure a system that allows entry for the listed BV purposes, as a residence permit is not required for a stay up to 90 days. However, a residence permit is required if the third-country national intends to work. Much therefore depends on the definition of 'work' and whether the BV activities are considered as such. In addition, Finland should not uphold a stricter cooling-off period than provided in the trade commitments.⁷⁹ In practice, a BV might also apply for a visiting consultant or instructor residence permit, which activities resemble those of business visitors. This requires however, a signed employment contract or binding job offer and the procedure may be rather time consuming.⁸⁰

This form of entry for BV is applicable in: Portugal and Finland.

3.5.4 Entry route with some, but not all BVEP and/or STBV activities

Germany⁸¹ lists activities of BV as defined in its laws which in most cases (but not as a general rule) do not need consent by national labour authorities (no labour market access restriction). Where consent is required, the Federal Employment Agency checks whether the working conditions are comparable to those of domestic employees. These lists of activities in our opinion do not cover all activities BV may perform based on the trade agreements. Nevertheless, entry can be based on a general provision relating to all Mode 4 types of movement, which therefore can be used as well.⁸² Similarly, the Netherlands

⁷⁸ Art. 51 Aliens Act n. 23/2007, of 4th of July; Art. 17, Regulatory Decree 84/2007, of 5th of November. Article 52 of the Aliens Act and Article 12 of the Regulatory Decree refer to the general requirements, and required supporting documents.

⁷⁹ <<https://migri.fi/en/residence-permit>>.

⁸⁰ Finnish Interview.

⁸¹ S. 16 German Employment Ordinance (No [FEA] approval shall be required for the issue of a residence permit to persons who:

1. are employed abroad by an employer based in Germany in the commercial sector,
2. conduct meetings or negotiations in Germany on behalf of an employer domiciled abroad, prepare offers of contracts, conclude contracts or monitor the execution of a contract or
3. Establish, monitor or control a domestic business unit for an employer domiciled abroad and who, in the course of their employment, while retaining their usual place of residence abroad, do not stay in Germany for more than 90 days in total within a period of 180 days. Note that German law provides a general clause for entry and stay based on the GATS and FTAs in S. 29, par 5 Employment Ordinance, however, as the specific provision in the Employment Ordinance on BV intends to implement this category, this general entry channel is not used for BV in practice.

⁸² S. 29 p 5 Employment Ordinance.

3. Establish, monitor or control a domestic business unit for an employer domiciled abroad and who, in the course of their employment, while retaining their usual place of residence abroad, do not stay in Germany for more than 90 days in total within a period of 180 days.

lists activities of BV for which a work permit is not required (no labour market access restriction).⁸³

The Netherlands only lists business visits for the purpose of business visits and contract negotiations. We feel this is an incomplete list of activities to be performed to establish a business. This activity is not qualified as ‘work’ if it lasts no longer than 13 weeks in a period of 52 weeks.⁸⁴

Belgium forms another example of a Member State that allows a BV to remain and work based on a Schengen visa if required and without a work permit if they fall under listed exceptions (see figure 3.1).

For the BV Employee, only activities listed under d and e allow for a stay of 90 days *and* work. The other activities are shorter hence this limitation in time could be seen as a market access restriction. However, for categories d and e described above under the Employee Business Visitor (exploring business opportunities and purchasing goods) a Posted Worker (Limosa) notification is required in order to benefit from the work permit exemption in the Flemish and Walloon Region.⁸⁵

Employment Ordinance sec. 30 in connection with Employment Ordinance sec. 16 contains a derogation from the principle that TCNs may only pursue an economic activity if they have a residence title. Sec. 30 no. 1 of the Employment Ordinance addresses the concern that there is no employment within the meaning of the Residence Act (fiction of non-employment) when the activity concerns those related to a business traveller, the duration of which is limited to 90 days in any 180-day period. In Connection with sec. 17 of the Residence Ordinance TCNs according to regulation EU 2018/1806 need no visa in that time frame.

⁸³ Article 1(1)(a) 1-3 & 10 Dutch Decree on Foreign Labour reads “The prohibition referred to in section 2, subsection 1, of the Aliens Employment Act [to work without a work permit] does not apply with respect to a foreign national a. who has his main residence outside the Netherlands and who performs occasional work consisting solely of: 1°. the assembly or repair of tools, machines or equipment supplied by his employer established outside the Netherlands, or the installation and adaptation of software supplied by his employer established outside the Netherlands, or instruction in its use; 2°. conducting business discussions or concluding agreements with companies and institutions 3°. the preparation, setting up, holding or dismantling of an exhibition or stand for a client based outside the Netherlands, and 10°. the receipt of training or instructions relating to the use of goods manufactured in the Netherlands and services to be provided in the Netherlands.

⁸⁴ Article 1(4) Dutch Decree on Foreign Labour.

⁸⁵ Flanders: Decision of 7 December 2018 of the Flemish Government implementing the Law of 30 April 1999 on the employment of foreign workers, Belgian Official Gazette, 21 December 2018, art. 16; Wallonia: Decision of 16 May 2019 of the Walloon Government relating to the occupation of foreign workers and repealing the Royal Decree of 9 June 1999 implementing the Law of 30 April 1999 relating to the occupation of foreign workers, Belgian Official Gazette, 19 June 2019, art. 15.

Figure 3.1 Belgium (Flemish) work permit exemptions for business visitors⁸⁶

Employed Business Visitors	Self-employed Business Visitors
<p>Business Visitor Employees can be exempted from the work permit requirement for a maximum of 3 consecutive months if they fall under one of the following exemptions:</p> <p>a. If they are specialized technicians:</p> <ul style="list-style-type: none"> (1) installing or assembling self-supplied goods for a maximum of eight days; (2) performing urgent repair or maintenance work for a maximum of five days per calendar month. <p>b. Attending meetings and discussions in closed circle provided they do not exceed 20 consecutive days, up to a maximum of 60 total working days per calendar year. Examples of meetings in closed circle include strategic meetings for multinational organizations, evaluation meetings, or contract negotiations with clients.</p> <p>c. Attending or participating in a conference, seminar or exposition.</p> <p>d. Exploring business opportunities for a maximum of three consecutive months, provided they hold a legitimization card as a sales representative.</p> <p>e. Purchasing goods produced in Belgium on behalf of a company outside of Belgium, for a maximum of three months.</p>	<p>Self-employed Business Visitors are exempted from the professional card obligation, provided:</p> <ul style="list-style-type: none"> a. the duration of stay required for this business does not exceed three consecutive months. b. the business is limited to visit, explore and develop professional contacts, negotiate and conclude contracts, participate in fairs and exhibitions to present products to propose and sell, or to participate in the Boards of Directors or general meetings of companies.

⁸⁶ Business Visitor Employees in Belgium is regulated regionally.
 Flanders: Decision of 7 December 2018 of the Flemish Government implementing the Law of 30 April 1999 on the employment of foreign workers, Belgian Official Gazette, 21 December 2018, art. 16;
 Wallonia: Decision of 16 May 2019 of the Walloon Government relating to the occupation of foreign workers and repealing the Royal Decree of 9 June 1999 implementing the Law of 30 April 1999 relating to the occupation of foreign workers, Belgian Official Gazette, 19 June 2019, art. 15
 Brussels: Royal Decree of 9 June 1999 implementing the Law of 30 April 1999 relating to the occupation of foreign workers, as amended by Decision of 16 May 2019 of the Government of the Brussels-Capital Region, Belgian Official Gazette, 25 July 2018 and Decision of 16 May 2019 of the Government of the Brussels-Capital Region, Belgian Official Gazette, 4 June 2019, art. 2
 Belgium Royal Decree of 3 February 2003 exempting certain categories of foreign nationals from the obligation to hold a professional card for the exercise of a self-employed professional activity, art. 1, 6°.

Member States providing entry for BVEP or STBV based on lists with a too narrow range of activities are: Belgium, Croatia⁸⁷, Italy⁸⁸, Lithuania (STBV)⁸⁹, Luxembourg⁹⁰, the Netherlands and Slovenia (STBV)⁹¹. The list provided by Germany in relation to STBV is too narrow as well, however, it is possible to rely on the general entry route which applies to Mode 4.⁹²

3.5.5 Entry based on work permit or quota

Austria provides specific entry for BVEP. In Austria, business visitors who work for a legal person which does not yet have an establishment in Austria and who are responsible for setting up such an establishment must meet the same conditions as posted workers (ICT). Accordingly, the relevant provision in the Act on Employment of Foreign Nationals, refers to workers who are employed by a foreign employer without an establishment in Austria.⁹³ The building up of an establishment in Austria therefore falls under the term of posting according to Austrian law. This essentially requires the BVEP to obtain a work permit based on posting, which may be subject to an economic needs test.⁹⁴ For STBV, Austria requires a work permit as well, depending on the intended economic activities.⁹⁵

Slovenia has two options available for BVEP, a single permit for residence and work related to agents and short-term work of agents. The first is subject to quota related to the number of third-country nationals in the labour market, the second too refers to 'the duration of the work' and the obligation to report

⁸⁷ Art. 82 and 83 of the Croatian Aliens Act.

⁸⁸ Note that BVE may not have an entry route at all, as entry is possible for economic-commercial purposes and to conduct negotiations and arrange deals. BVS thus is covered, but the list of activities liberalized in the EU-Japan Agreement is not. BVE may be covered if this is considered an economic-commercial purpose, Inter-ministerial decree no. 850 of 11 May 2011.

⁸⁹ Art. 58(8) of the Aliens Law provides an exemption from a work permit obligation for a period up to 3 months to manage affairs related to negotiations for contracts, implementation of such contracts, training of personnel or installment of equipment.

⁹⁰ Article 35 of the Law 29 August 2008 provides for a visa without need of a work permit for 90 in a 180 days. The listed activities do not seem to specifically cover BVE, nor are all the EU-Japan Agreement's BVS activities listed.

⁹¹ Art. 5(1) point 9 Employment, Self-employment and Work of Foreigners Act, service selling is covered, but not all activities listed in the EU-Japan agreement are covered.

⁹² S. 29 p 5 Employment Ordinance.

3. Establish, monitor or control a domestic business unit for an employer domiciled abroad and who, in the course of their employment, while retaining their usual place of residence abroad, do not stay in Germany for more than 90 days in total within a period of 180 days.

Employment Ordinance sec. 30 in connection with Employment Ordinance sec. 16 contains a derogation from the principle that TCNs may only pursue an economic activity if they have a residence title. Sec. 30 no. 1 of the Employment Ordinance addresses the concern that there is no employment within the meaning of the Residence Act (fiction of non-employment) when the activity concerns those related to a business traveller, the duration of which is limited to 90 days in any 180-day period. In Connection with sec. 17 of the Residence Ordinance TCNs according to regulation EU 2018/1806 need no visa in that time frame.

⁹³ § 18 AuslBG.

⁹⁴ § 11 AuslBG.

⁹⁵ § 24 FPG, §18 AuslBG.

the commencement of the work to the employment service of Slovenia. As such, entry based on BVEP is seen as related to entry to the labour market.⁹⁶

Entry for BV based on a work permit or a similar requirement is applicable in: Austria, Slovenia (BVEP) and Sweden (STBV)⁹⁷.

3.5.6 No entry route for BVEP and/or STBV available

The Bulgarian, Greek, Polish and Slovakian national experts indicate that no specific entry scheme for BV is available.

France too has not regulated entry for either BV category. The national expert indicates that where access is allowed for BV, it is not a formal entry route, but an exception made by the authorities in practice. The national expert (a practitioner) also indicates that their law firm recommend that the business visit does not exceed 2 or 3 weeks.

While no specific documentation is required, the practical access is limited to the following activities:

- Attend business meetings;
- Conduct contractual negotiations;
- Attend seminars, conferences or exhibitions,
- Limited training in a classroom environment;
- Making sales calls to potential European clients, provided that the visitor
- Represent a commercial entity outside of France.

While entry based on a start-up scheme is available in Denmark, this scheme in our opinion does not cover BVE. A maximum of 75 third-country nationals can be granted a permit based on the scheme per year. It is a scheme for foreign entrepreneurs providing the opportunity to be granted a Danish residence permit in order to establish and run an innovative growth company.

Member States which do not have a specific entry scheme are: Bulgaria, Denmark (BVEP), France, Greece, Ireland (BVEP) and Poland.

3.6 Conclusion

The above provided division into six different forms of implementation of the BV categories should be seen in perspective, mapped in Table 3.1. The categories we have used are just to provide an overview of the various types of entry schemes available for BV in the Member States. For instance, access based on

⁹⁶ Single permit for residence and work: Art. 37 Foreigners Act Art. 27 Employment, Self-employment and Work of Foreigners Act; short-term for agents: Art. 27 Employment, Self-employment and Work of Foreigners Act.

⁹⁷ Ch 5 sec 2 13, Aliens Ordinance, the BVS activities are likely seen as activities by a worker, however an exemption for the need to obtain a work permit exists for certain activities, the list for which does not cover all aspects of BVS.

Schengen must be seen as an entry route that does not cover all activities, similar to a specific entry route that only lists a too narrow range of activities. And entry based on a work permit, may in practice be quite easy for BVEP, as this does not impact on the labour market. It is also still quite possible that a different entry route, not specifically directed at BV, can be used in practice. The main point we wish to emphasize here is that none of the Member States have clearly implemented the BVEP and STBV category. In particular the detailed list of activities in the EU-Japan agreement for STBV is missing in the national contexts.

We believe this follows from the fact that the Schengen Borders Code, the Schengen Visa Code and the Visa Code Handbook do not clearly add the BVEP and STBV category, which would essentially mean that each Schengen state may simply refer to the Schengen visa to implement the trade agreements.

The definitions of BV provided in the international trade agreements are such that in trade language, these do not constitute economic activities. They are not services, nor delivery of goods, they are activities to prepare future economic activities. This definition does not align with many definitions of 'work' in the Member States, where an activity performed for a company may simply be seen as such. In our view, correct implementation of the BV commitments should not come with conditions that are related to entry to the labour market.

Another point is that some Member States allow BV for 90 days in a 12 month period. This cooling-off period is too long to comply with the EU-Japan commitments, and the GATS commitments inscribed by most Member States.

Thus, we recommend to maintain the list of all BV activities consistent throughout the different EU trade agreements. Furthermore, the European Commission could strive for aligning visa waiver agreements to also reflect these list of activities and thus have harmonization across these different legal instruments.

In addition, the Schengen legislation (Article 6(3) of the Visa Regulation 2018/1806) could be amended to include a comprehensive list (in line with the trade agreement commitments) of activities which must not give rise to the application of the "paid activity" exception to both business visitors' categories. This might also require amending Annex I to the Schengen Borders Code to list all documents which could be used for the purpose of verifying the entry conditions of a business travel.

From an immigration perspective it makes sense to merge both BV categories into one. They are subject to the same limitations: time limitation (maximum 90 days in any six-month period) and activities limitation. Although in practice they do tend to have a different profiles as business visitors for establishment purposes are mainly executive or managerial staff whereas short term business travel can be conducted by non-executive staff, this is not relevant as all activities should be work permit exempt.

Table 3.1 Types of entry routes for business visitors

	Name of the country/Type	Specific entry route for BVEP and/or STBV	Access based on the Schengen visa for 90 days	Entry route for 90 days without specific details	Entry route with some, but not all BVEP and/or STBV activities	Entry based on work permit or quota	No entry route for BVEP and/or STBV available
1	Austria (AT)					■	
2	Belgium (BE)				■		
3	Bulgaria (BG)						■
4	Croatia (HR)				■		
5	Czech Republic (CZ)		■				
6	Cyprus (CY)	■					
7	Denmark (DK)	■(STBV)					■(BVEP)
8	Estonia (EE)			■			
9	Finland (FI)			■			
10	France (FR)						■ ⁹⁸
11	Germany (DE)	■ (BVEP)			■ (STBV)		
12	Greece (EL)						■
13	Hungary (HU)						
14	Ireland (IE)		■ (STBV)				■ (BVEP)
15	Italy (IT)				■		
16	Latvia (LV)		■				
17	Lithuania (LT)	■ (BVEP)			■ (STBV)		
18	Luxembourg (LU)				■		
19	Malta (MT)		■				
20	Netherlands (NL)				■		
21	Poland (PL)						■
22	Portugal (PT)			■			
23	Romania (RO)	■					
24	Slovakia (SK)		■				
25	Slovenia (SI)				■ (STBV)	■ (BVEP)	
26	Spain (ES)		■				
27	Sweden (SE)		■ (BVEP)			■ (STBV)	
?							

⁹⁸ Note that the French authorities do allow BV for several limited activities, including contractual negotiations in practice, however, this is not reflected in the law.

4 Contractual Service Suppliers (CSS)

4.1 Introduction

To liberalize international trade in certain services, it is necessary to allow employees of service providers to be sent to the host state, in order to provide the service for their employer. Without this option, a service provider requiring personnel to provide the service would need to hire that personnel locally. This in itself, and the need to work with new personnel, clearly would lead to extra costs and difficulties in performing the service. This distorts competition, which is the goal of trade liberalization, between domestic service suppliers (who can rely on their own personnel) and third-country service providers. An example can be found in architectural services, the performance of which requires the architect to send its personnel to oversee the project.⁹⁹

4.2 Definitions trade agreements

The investigated trade agreements each include a definition of CSS. In the case of the GATS, this definition is not in the agreement itself, but can be found in the EU schedule of commitments. The EU-CARIFORUM includes this definition in the main text of the agreement. This definition applies simultaneously to the EU Member States and the CARIFORUM states. The EU-Japan agreement includes the definition in the main text as well, be it that a separate definition for CSS from Japan to the EU and from the EU to Japan is adopted.

While no clear definition is provided, the EU GATS definition of CSS, as provided in the EU GATS schedules of commitments can be summarized as follows:

*A natural person engaged in the supply of a service on a temporary basis as an employee of a juridical person, who has no commercial presence in any Member State of the European Community. The juridical person has obtained a service contract from a final consumer in an EU Member State through an open tendering procedure or any other procedure which guarantees the bona fide character of the contract.*¹⁰⁰

The EU-CARIFORUM agreement does provide a specific provision, which reads:

'contractual services suppliers' means natural persons of the EC Party or of the Signatory CARIFORUM States employed by a juridical person of that EC Party or Signatory CARIFORUM State which has no commercial presence in the territory of the other Party and which has concluded a bona fide contract (...) to supply services with a final consumer in the latter Party requiring the

⁹⁹ See extensively: Tans 2017, par. 2.4.2.2.

¹⁰⁰ WTO (CTS) 2006 (EU Consolidated GATS Schedule), horizontal commitment Mode 4, at (iii); the commitment does not provide a clear definition, rather listing the conditions that should be fulfilled. However, from those conditions, the definition here provided can be derived.

*presence on a temporary basis of its employees in that Party in order to fulfil the contract to provide services.*¹⁰¹

The EU-Japan trade agreement contains a similar definition, be it that this definition is included twice, in relation to CSS from the EU to Japan and in relation to CSS from Japan to the EU. Following the original building blocks provided in the GATS, the agreement defines CSS from Japan to the EU as natural persons employed by a juridical person of Japan which has concluded a *bona fide* contract to provide services to final consumers in the European Union.¹⁰² The provision of services is fulfilled by the temporary presence of the employees.¹⁰³ Parties to the EU-Japan have agreed to provide entry and temporary stay to contractual service suppliers.¹⁰⁴

In short, the three trade agreements define CSS as employees of a juridical person providing services, not having a commercial presence within the EU, that perform the service contract concluded between the provider (the juridical person employer) and the receiver located in another state.

4.3 Conditions applying to CSS

All three trade agreements contain a main list of conditions that apply in order to rely on CSS. These general conditions applying to CSS are provided in paragraph 3.1 below. Details in relation to these conditions do vary between the agreements. Where such details vary, this is indicated below. In addition, many details in relation to these conditions vary from Member State to Member State. These details are provided directly after the text of the general condition which the detail deviates from in a footnote.

Finally, an additional level of restrictions may be found. Each Member State may have added specific limitations as vertical commitments in the GATS schedule of commitments. For the EU-CARIFORUM agreement and the EU-Japan agreement, the equivalence to GATS vertical commitments is referred to as a list of reservations.¹⁰⁵

¹⁰¹ EU-CARIFORUM, Art. 80(2)(d); the removed text refers to the explicit removal of 'placement and supply services of personnel' (services sectoral classification list (CPC) 872) from this definition. Note that Art. 80 of the EU-CARIFORUM which provides this definition contains a small omission, indicating that: 'This Chapter applies to measures by the Parties or by the Signatory CARIFORUM States'. This should read 'EC Parties'.

¹⁰² Article 8.21.b(i) EU - Japan.

¹⁰³ Ibid.

¹⁰⁴ As is the case in the EU-CARIFORUM agreement, placement and supply services of personnel are specifically excluded, Art. 8.26, EU - Japan.

¹⁰⁵ EU-CARIFORUM, Annex 4-D; EU-Japan, Annex 8-B-IV, par. 16. Note that both do include some remarks in relation to all service sectors. The EU-CARIFORUM CSS list of reservations includes the following in relation to all services sectors: information on transitional periods, which have all passed and a remark on mutual recognition of diplomas which is not relevant to this study, EU-CARIFORUM, Annex 4-D. The EU-Japan CSS list of reservations contains some deviations from the permissible length of stay. As such, this information is included in a footnote to the general condition below.

Reservations that only apply in relation to a specific service sector, or sub-sector are numerous for all three agreements. As an example, a reservation to an economic needs test in a specific sector is quite common. It is also quite common that a specific Member State wishes to remain unbound (no liberalization is provided) for CSS in a specific service sector. The EU-Japan list of CSS reservations provides for instance in relation to taxation advisory services the following:

CSS: AT, BE, DE, EE, ES, FR, HR, IE, IT, LU, NL, PL, SE, SI, UK: None. BG, CY, CZ, DK, EL, FI, HU, LT, LV, MT, RO, SK: Economic needs test. PT: Unbound.

More details are often included as well. The EU-Japan list of CSS reservations for architectural services and urban planning and landscape architectural services provides:

CSS: AT: Planning services only, where: Economic needs test. BE, CY, EE, EL, ES, FR, HR, IE, IT, LU, MT, NL, PL, PT, SE, SI, UK: None. BG, CZ, DE, HU, LT, LV, RO, SK: Economic needs test. DK: Economic needs test, except for CSS stays of up to three months. FI: None, except: The natural person must demonstrate that he or she possesses special knowledge relevant to the service being supplied.

These lists are long, detailed and too extensive to incorporate here. They should therefore be consulted directly. Naturally, these additional reservations will be taken into account when we describe the specific implementation in relation to each Member State.

In relation to some aspects, the chosen method of reservations is hard to read. To serve as an example, the EU – Japan agreement does not contain a general reservation in relation to economic needs tests in relation to CSS. When looking at the reservations in each specific service sector, several Member States do consistently reserve this option. Taking Romania as an example, every sector which is opened to CSS by Romania is also accompanied by a reservation in relation to economic needs tests. The only sectors where this reservation is not included are sectors for which Romania has not accepted commitments in relation to CSS at all (research and development services, construction and related engineering services, Higher education services, advisory agriculture, hunting and forestry related services).¹⁰⁶ Romanian legislation indeed requires an economic needs test as a condition to enter Romania on the basis of CSS.¹⁰⁷ In light of transparency, a horizontal reservation in such circumstances to apply economic needs tests is preferable.

¹⁰⁶ EU – Japan, Annex 8-B-IV, par 16.

¹⁰⁷ Art. 21 GO 25/2014.

4.3.1 General conditions applying to CSS

The possibility to rely on CSS to perform a service contract is subject to the following conditions:^{108 109}

- The natural persons are engaged in the supply of a service on a temporary basis as employees of a juridical person, who has no commercial presence in any Member State of the European Union;
- The juridical person has obtained a service contract, for a period not exceeding for the GATS: three months¹¹⁰, for the EU – CARIFORUM: 12 months, for the EU Japan: 12 months from a final consumer in the Member State concerned¹¹¹, through an open tendering procedure or any other procedure which guarantees the *bona fide* character of the contract (e.g. advertisement of the availability of the contract) where this requirement exists or is introduced in the Member State pursuant to the laws, regulations and requirements of the European Union or its Member States;
- The service contract shall comply with the laws, regulations and requirements of the European Union and the Member State where the contract is executed;
- The natural person seeking access should be offering such services as an employee of the juridical person supplying the service for at least the year¹¹² immediately preceding such movement;¹¹³
- Temporary entry and stay within the Member State concerned shall be for a period of not more than GATS: three months¹¹⁴ / EU-CARIFORUM six months within a 12-month period. EU-Japan, a cumulative period of not more than 12 months, with possible extensions at the discretion of the European Union and its Member States, in any 24 month period, or for the duration of the contract, whatever is less;¹¹⁵
- The natural person must possess the necessary academic qualifications and professional experience as specified for the sector or activity concerned in

¹⁰⁸ These conditions can be found at: WTO (CTS) 2006 (EU Consolidated GATS Schedule), horizontal Mode 4 commitment; EU-CARIFORUM, Art. 83; EU-Japan, Annex 8-B-IV, par. 10-12.

¹⁰⁹ Specific details for each Member State: GATS CSS commitment applies to all Member States, with the exception of: CY, CZ, HU, MT, LT, PL, SK, SI.

¹¹⁰ Specific details for each Member State: GATS, service contract period not exceeding 12 months (instead of 3 for computer and related services in the case of SE and no specific period at all for EE and LV).

¹¹¹ Specific details for each Member State: GATS, from an enterprise engaged in substantive business activities in the Member State concerned (instead of final consumer) in the case of EE, LV.

¹¹² Specific details for each Member State: GATS, two years (instead of 1) in the case of EE.

¹¹³ Specific details for each Member State: GATS, immediately preceding the date of submission for EE, LV. Note that this variation has become the standard in the EU-Japan agreement which now refers in general to 'immediately preceding the date of submission', EU-Japan, Annex 8-B-IV, par 11(b).

¹¹⁴ Specific details for each Member State: GATS, 3 months in a 24 months period for NL and 90 days in a 6 months period for EE and 6 months in any 12 months period for computer and related services for SE. It is noteworthy to mention that the EU offer in the Doha Round negotiations would extend the three month limitation to 12 months.

¹¹⁵ Specific details for each Member State: EU-Japan, AT, UK, 6 months in 12 months period; BE, CZ, MT, PT: maximum stay for CSS shall be for a period of not more than 12 consecutive months; CY, LT: period of 6 months renewable once for additional period of 6 months. In all these variations the 'or for the duration of the contract, whichever is less' is added. This information can be found in the EU-Japan CSS list of reservations, Annex 8-B-IV, par 16.

the Member State where the service is supplied. This entails a university degree and three years of relevant work experience. For some categories included in the trade commitments, such as fashion models, a university degree is not feasible, a relevant educational degree is then required;

- The commitment relates only to the service activity which is the subject of the contract; it does not confer entitlement to exercise the professional title of the Member State concerned;
- The number of the persons covered by the service contract shall not be larger than necessary to fulfil the contract, as it may be decided by the laws, regulations and requirements of the European Community and the Member State where the service is supplied;
- An economic needs test will not be required except where otherwise indicated for a specific sub-sector.¹¹⁶

Not included in the GATS, as this is in essence clear from the fact that the CSS is employed by the juridical person, the EU-CARIFORUM and EU-Japan agreement nevertheless provides the following additional clarification:

- The natural person shall not receive remuneration for the provision of services other than the remuneration paid by the contractual service supplier during its stay in the other Party.

The commitment relating to the posting of workers is limited to specific service sectors. For the GATS, these sectors are:

*accountancy; taxation advisory services; architectural services; engineering services; integrated engineering services; urban planning and landscape architectural services; computer and related services; construction services.*¹¹⁷

The EU – CARIFORUM agreement limits CSS to the following sub-sectors:

legal advisory services in respect of international public law and foreign law (i.e. non-EU law); Accounting and bookkeeping services; Taxation advisory services; architectural services; urban planning and landscape architecture services; engineering services; integrated engineering services; Medical and dental services; Veterinary services; midwives services; Services provided by nurses, physiotherapists and paramedical personnel; computer and related services; research and development services; Advertising services; market research and opinion polling; management consulting services; services related to management consulting; Technical testing and analysis services; Related

¹¹⁶ The EU – CARIFORUM agreement adopts different language: ‘Other discriminatory limitations, including on the number of natural persons in the form of economic needs tests, which are specified in Annex IV’. This essentially means the same as the phrase adopted in the GATS commitments, as Member States may adopt additional discriminatory conditions, as long as they have specified them.

¹¹⁷ WTO (CTS) 2006 (EU Consolidated GATS Schedule), horizontal Mode 4 commitment. The EU offer in the Doha Round negotiations would add the following sectors to that list: legal services, bookkeeping services, advertising, management consulting services, services related to management consulting, technical testing and analysis services, related scientific and technical consulting services, maintenance and repair of equipment, translation services, site investigation work, environmental services.

scientific and technical consulting services; Maintenance and repair of equipment, including transportation equipment, notably in the context of an after-sales or after-lease services contract; chef de cuisine services; Fashion model services; translation and interpretation services; Site investigation work; Higher education services (only privately funded services); Environmental services; Travel agencies and tour operators' services; Tourist guides services; Entertainment services other than audio-visual services.

The EU-Japan agreement Annex 8-B provides the following list of service sectors to which the CSS provision applies:

legal advisory services in respect of public international law and foreign law; (b) accounting and bookkeeping services; (c) taxation advisory services; (d) architectural services and urban planning and landscape architectural services; (e) engineering services and integrated engineering services; (f) medical (including psychologists) and dental services; (g) veterinary services; (h) midwives services; (i) services provided by nurses, physiotherapists and paramedical personnel; (j) computer and related services; (k) research and development services; (l) advertising services; (m) market research and opinion polling services; (n) management consulting services; (o) services related to management consulting; (p) technical testing and analysis services; (q) related scientific and technical consulting services; (r) mining; (s) maintenance and repair of vessels; (t) maintenance and repair of rail transport equipment; (u) maintenance and repair of motor vehicles, motorcycles, snowmobiles and road transport equipment; (v) maintenance and repair of aircrafts and parts thereof; (w) maintenance and repair of metal products, of (non-office) machinery, of (non-transport and non-office) equipment and of personal and household goods; (x) translation and interpretation services; (y) telecommunication services; (z) postal and courier services; (aa) construction and related engineering services; (bb) site investigation work; (cc) higher education services; (dd) Agriculture, hunting and forestry related services advisory and consulting services; (ee) environmental services; (ff) insurance and insurance related services advisory and consulting services; (gg) other financial services advisory and consulting services; (hh) transport advisory and consulting services; (ii) travel agencies and tour operators' services; (jj) tourist guides services; and (kk) manufacturing advisory and consulting services.

4.4 Overview implementation CSS

Several variations exist concerning the manner in which the EU Member States have implemented their CSS obligations.

A concrete example of the practical implications: a consultancy company located in the US wants to send several employees (US nationals) to its customers in different EU countries: Netherlands, France, Belgium, Austria and Italy where they do not have a legal presence.

In each country, the employees will spend between one and two weeks and they will perform the following tasks: audit, reporting, meetings with the client, training. In this scenario, the challenges this company faces are multiple.

Firstly, when analysing the activities these US nationals will conduct in the EU countries, one can notice that they cannot qualify as simple business visitors as, in addition to the client meetings, they also perform productive, revenue-generating work within the framework of a service agreement entered into by their employer with the customer in the EU. Therefore, if the legislation of the country does not foresee a short-term work permit exemption for this kind of activities, a work permit will have to be obtained, despite the limited duration of the activities spent in the host EU Member State.

Secondly, the company must navigate a very complex set of national immigration rules and entry routes which vary from country to country to understand how they can send their US employees to the different EU countries in a compliant manner. In some countries, such as France, they can benefit from a work permit exemption. However, a Posted Worker Notification will be required. In Belgium, they will have to obtain a short-term work permit, which can easily be obtained if they meet the eligibility conditions of a permit for highly skilled employees, specialized technicians or managerial staff.¹¹⁸ In the Netherlands also, a work permit application will be required, which will need to be sponsored by the Dutch client¹¹⁹ based on the service agreement concluded between both. For all these permits, different eligibility criteria and document requirements apply. Furthermore, the lead times to obtain these permits are quite long (several weeks, sometimes months), incompatible with services that often must be delivered in urgency.

Thirdly, as the US service provider does not have an entity in the EU, the US company cannot sponsor a work permit for their employees in some EU countries, such as Austria. In addition, in most cases, a regular work permit requires the applicant to move their residence to the country issuing the permit, which is obviously not suitable for short-term assignments such as the one discussed here. This is the case in Italy, where, although a service order agreement work and residence permit could be sponsored by the Italian client, such a permit is applied for a length of stay of minimum six months. Therefore, in these circumstances (where only a regular work and residence permit can be obtained for a contractual service supplier) the company will not be able to honour their service agreement. In some countries, opening an entity on the territory of the country could be a solution, however, this will not always be sufficient if the country does not have short-term assignments (shorter than three months) covered in their immigration schemes.

In conclusion, the variety of entry routes for contractual service suppliers in the EU constitutes, on a practical level, an important obstacle to the provision of services by companies established outside the EU. The latter are often faced with a difficult choice between taking a risky approach and opting for partial compliance from an immigration perspective, opening an entity in a European country or abandoning the European service market altogether, or the prospect of entering it.

¹¹⁸ If they do not meet the eligibility criteria, they will have to obtain a work permit, subject to labour market testing.

¹¹⁹ In such cases, the company's clients may be dissuaded from entering a service agreement with the company established in the US, as this imposes on them the administrative burden of work permit applications.

4.4.1 Specific entry route for CSS

Some Member States have a specific visa or work permit for employees of companies based outside the EU which have obtained a service contract in the host state. This entry route clearly uses the definition of CSS provided in the trade agreements as the basis.

Even more transparent are those Member States that have not only copied the above described CSS definition, but also the general conditions (as listed above in par. 3.1.) provided at the international level into national legislation, examples of which are the Netherlands¹²⁰ and Spain¹²¹. An example of a Member State that has not done so, and which seems to have added a restriction not specifically included in the trade agreements is Luxembourg, which requires for CSS an employment contract of indefinite duration between the employer service provider and the posted employee.¹²²

Romania provides a mixed example. While the implementation of CSS, including the conditions that apply, is transparent, various conditions not included in the CSS Trade commitments are added in national law (see figure 4.1), suggesting this is about intra-EU posting.

Figure 4.1 Romanian implementation of CSS¹²³

Romanian notice of employment for seconded workers
<p>General conditions for posting notice:</p> <ul style="list-style-type: none"> - the vacant positions cannot be filled by Romanian citizens of EU Member States / EEA or by permanent residents in Romania - migrant meets the specific training, work experience and authorization conditions - migrant proves s/he is medically capable to engage in the respective activity - migrant has no criminal record incompatible with the work done or are going to be exercised in Romania - migrant falls within the annual quota approved by Government Decision - the beneficiary has no unpaid obligations to the state

¹²⁰ Dutch policy guidance on Labour Migration (Uitvoeringsregels behorende bij de artikelen 2, 6, 7 en 8 van de Regeling uitvoering Wet arbeid vreemdelingen, par 51.)

¹²¹ Ley 14/2013, Section 73.3.B, an alternative entry route that now is in disuse is formed by: L.O 4/2000 Section 43&RD 557/2014; sections 110-116, sections 178-181.

¹²² Art. 46 of Law 29 August 2008 and Law of 8 March 2017, Art. 141 of Luxembourg Labour Law.

¹²³ Art. 21, 24 and 25 GO 25/2014.

Flanders: Decision of 7 December 2018 of the Flemish Government implementing the Law of 30 April 1999 on the employment of foreign workers, Belgian Official Gazette, 21 December 2018, art. 16

Wallonia: Decision of 16 May 2019 of the Walloon Government relating to the occupation of foreign workers and repealing the Royal Decree of 9 June 1999 implementing the Law of 30 April 1999 relating to the occupation of foreign workers, Belgian Official Gazette, 19 June 2019, art. 15

Brussels: Royal Decree of 9 June 1999 implementing the Law of 30 April 1999 relating to the occupation of foreign workers, as amended by Decision of 16 May 2019 of the Government of the Brussels-Capital Region, Belgian Official Gazette, 25 July 2018 and Decision of 16 May 2019 of the Government of the Brussels-Capital Region, Belgian Official Gazette, 4 June 2019, art. 2 Belgium Royal Decree of 3 February 2003 exempting certain categories of foreign nationals from the obligation to hold a professional card for the exercise of a self-employed professional activity, art. 1, 6°.

- the beneficiary carries out activities compatible with the job for which the foreigner is required to work;
- the beneficiary of the service was not punished for undeclared work or illegal employment during the last 6 months prior to the settlement of the application for permanent / seasonal / trainees / cross-border / trained / au pair / detached / ICT workers.

Special conditions for secondment notice:

the beneficiary of services has a contract with the company from which the migrant is posted that requires the posting and the duration of posting which is maximum 1 year within 5 years from the application (exceptions are possible based on treaties concluded by Romania with other countries).

Conditions for the long-stay visa:

General conditions for issuing of visas and special conditions:

- Copy of the secondment notice issued under the conditions of the special legislation regarding employment and posting of foreigners in Romania
- Proof of financial means of support amounting to the minimum gross salary per country guaranteed in payment for the entire period inscribed on the visa
- Criminal record certificate or other document with the same legal value issued by the authorities of the country of domicile or residence
- Medical insurance valid through the duration of the visa coverage of at least 30.000 euro)
- A valid travel document accepted by Romania, on which a visa can be affixed. The validity of the travel document must exceed the validity of the visa you apply for, by at least 3 months, and must have been issued no later than 10 years ago
- Two recent 3 x 4 cm coloured photographs.

Conditions for the residence permit:

- secondment notice
- secondment decision (translated and legalized)
- proof of financial means of support amounting to the minimum gross salary per country guaranteed

Most of these conditions relate to the general entry conditions, and will not be problematic from a trade agreement perspective. The maximum duration of one year within five years, thus the long cooling off period, is however, not in line with the trade agreements. This is specifically indicated through a reference to the trade agreements. Without checking these details, it is hard to be aware of the fact that this cooling off period is shorter when relying on the trade agreements.

For Finland, CSS entry is possible based on the sector they are entering and their individual circumstances.

A specific entry scheme for CSS can be found in Austria, Bulgaria, Croatia, Czech Republic, Finland, France, Ireland, Latvia, Luxembourg, Malta, Romania¹²⁴, the Netherlands and Slovenia.

¹²⁴ Art. 44^1, 21 and 56^1 Government Emergency Ordinance 194/2002.

4.4.2 CSS entry, but limited categories

Several Member States provide for rules based on secondment or posting which are then limited to a specific sector or to a specific type of employee. This would not be problematic, as long as all the sectors listed in each of the trade agreements to which CSS applies are included. This, however, is not the case for any of the Member States relying on this method.

Belgium, for instance, lists three specific types of employees, each with its own conditions relating to education, skills or salary who may stay on Belgium territory for the listed activities for a maximum of 3 consecutive months. Other TCN that do not fall under these categories can obtain a work permit, which is only granted after a labour market test. The example provided above of CSS in the sector of architectural services and urban planning and landscape architectural services as liberalized by the EU-Japan agreement clearly lists Belgium as one of the Member States no longer imposing a labour market test.¹²⁵ However, Belgium does provide an entry scheme for highly skilled workers, where no economic needs test is required. As the current CSS commitments mostly relate to activities for which a bachelor's degree or higher is necessary, this would cover CSS mobility as an alternative, but not for instance for fashion models, chef de cuisine services, travel agencies and tour operators' services or tourist guides services. Additionally, the trade commitments indicate that the Member States may continue to apply their legislation relating to wages, but the highly skilled worker scheme simply set's a minimum wage requirement which is not related to the minimum wage, nor sector specific. In conclusion, this alternative may cover the CSS implementation partly, but not completely.

Denmark provides entry based on posting, however, this scheme does not seem to fit the CSS category as provided in the trade agreements, as it is difficult to comply with this scheme in practice, requires high salary thresholds and a pay limit scheme.¹²⁶

The main problem with this form of implementation is that the definitions and conditions as provided at the national level, no longer correspond with those at the international level. Those relying on CSS as provided in the trade agreements will not always fit this definition.

This type of implementation can be found in Belgium, Greece¹²⁷, Slovakia¹²⁸

¹²⁵ EU-Japan, Annex 8-B-IV, par. 16.

¹²⁶ Aliens (Consolidation) Act (No. 239 of 10 March 2019).

¹²⁷ Greece provides for a visa allowing TCN entry based on employment as specialized technical personnel by an undertaking established in a third country providing services, a definition that is too narrow to cover CSS, Art. 18, par. 1(e) of Law 4251/2014.

¹²⁸ Entry and stay up to 90 days allowed in relation to installation works, warranty and repair works, production facility system set ups, programming works, or vocational training related to previous services, a definition that is too narrow to cover CSS.

Figure 4.2 Work permit for CSS in Belgium

Work permit for CSS in Belgium ¹²⁹	
Conditions	Requirements
<p>Contractual Service Suppliers qualify as standard seconded employees and can legally work in Belgium on the basis of a Work Permit (for stay less than 90 days) or a Single Permit (combined work and residence permit, for stay for more than 90 days) under one of the following categories:</p> <ol style="list-style-type: none"> Highly Skilled Workers Managerial Staff Specialised Technicians <p>If they do not fall under one of the three abovementioned categories, they will only be entitled to the Work Permit/Single Permit after positive labour market testing (with the exception of contractual service suppliers that fulfil the duties of a shortage occupation in the Flemish Region).</p>	<ol style="list-style-type: none"> Highly Skilled Worker <ul style="list-style-type: none"> The employee must possess at a minimum a Bachelor's degree, from a higher education program of at least three years. The employee must earn a yearly gross salary of at least 42.696 EUR (Flanders) or 42.869 EUR (Brussels and Wallonia). Managerial Staff <ul style="list-style-type: none"> The employee must be responsible for the day-to-day management of the company, and is authorized to represent the company and enter into legal agreements on the company's behalf. The employee must earn a yearly gross salary of at least 68.314 EUR (Flanders) or 71.521 EUR (Brussels and Wallonia) Specialised Technicians <ul style="list-style-type: none"> Must install and/or repair machinery or equipment produced, supplied or designed by his foreign employer on client site during a period of maximum six months. Must remain linked to an employment contract with the foreign employer

4.4.3 General work permit/visa

Several Member States do not grant a specific permit for CSS, which means it is necessary to obtain a more general work permit which allows third country nationals to be employed in that Member State. This applies to Hungary, Lithuania, Poland and Sweden.

This manner of implementation is less transparent, as CSS is not specifically mentioned. Moreover, it is prone to miss certain details provided in the trade agreements. However, if the general work permit is flexible enough to cover

¹²⁹ Flanders, Decision of 7 December 2018 of the Flemish Government implementing the Law of 30 April 1999 on the employment of foreign workers, Belgian Official Gazette, 21 December 2018. a) Highly Skilled Workers: art. 17, 1°; b) Managerial Staff: art. 17, 2° c) Specialised Technicians: art. 17, 16°; d) Shortage occupations : art. 18 §1. Wallonia, Decision of 16 May 2019 of the Walloon Government relating to the occupation of foreign workers and repealing the Royal Decree of 9 June 1999 implementing the Law of 30 April 1999 relating to the occupation of foreign workers, Belgian Official Gazette, 19 June 2019. a) Highly Skilled Workers: art. 16, 1°; b) Managerial Staff: art. 16, 2°; c) Specialised Technicians: art. 16, 2°. Brussels, Royal Decree of 9 June 1999 implementing the Law of 30 April 1999 relating to the occupation of foreign workers, as amended by Decision of 16 May 2019 of the Government of the Brussels-Capital Region, Belgian Official Gazette, 25 July 2018 and Decision of 16 May 2019 of the Government of the Brussels-Capital Region, Belgian Official Gazette, 4 June 2019; a) Highly Skilled Workers: art. 9, 6°; b) Managerial Staff: art. 9, 7°; c) Specialised Technicians: art. 9, 9°.

CSS as provided in the trade agreements, this type of implementation is unproblematic.¹³⁰

As an example, Lithuania provides for a general visa up to 90 days which would cover CSS, and which thus complies with the GATS. Specifically, certain nationals, including Japanese nationals, can rely on a visa which would cover CSS and which allows for a longer duration of stay. As such this also complies with the EU-Japan agreement. The problem is that no such exception is provided in relation to CARIFORUM nationals, whereas such nationals may rely on CSS for a period up to 6 months.¹³¹

4.4.4 General reference to entry based on international agreements

Some Member States do not explicitly refer to CSS, rather providing entry on the basis of the WTO Agreement or international trade agreements. This form of implementation is adopted by Germany and Portugal¹³².

Taking Germany as an example, the trade obligations are implemented in general by making a reference to entry based on GATS or FTA commitments.¹³³ Specific paragraphs in the Employment Ordinance also address the activity covered for several CSS regulated by the EU-FTAs. These can be more favourable as the BA's (*bundesagentur für arbeit*) consent is not required. This form of implementation simply allows entry based on the conditions as specified in the trade agreement, without specifying those conditions in the national legislation, be it that several CSS activities are specifically mentioned. By referring to the international agreement, the implementation is by definition in line with that agreement, but in itself this form of implementation itself is not transparent. One needs to consult the trade agreements to know how entry can be achieved. Specifically for Germany, in order to ensure a proper and consistent application of the law by all competent authorities, the Federal Employment

¹³⁰ The Swedish work permit serves as an example, as it is far more liberal than that which is offered via CSS in the trade agreements, ch 2 secs 1,3, 8, 8a, Aliens Act (2005:716) Ch 2 sec 7 Aliens Act (2005:716) ch 5 sec 18 Aliens Act (2005:716) ch 6 sec 4, Aliens Act (2005:716) ch 5 sec 2 p 5. Aliens Ordinance (2006:97) ch 5 sec 2 p 13 Aliens Ordinance (2006:97).

¹³¹ Visa available up to 90 days for general entry purpose which would also cover CSS. For nationals of inter alia Japan, a specific visa is available which allows for a longer duration of stay, par. 16 of Art. 40(1), Art. 495(1) and (2) of the Alien's law, par. 70.10, 77-78 of the Visa Procedure. Poland one visa that might suit CSS to 6 months, which is insufficient for the EU-Japan agreement. Another option which suits CSS can be issued for a longer period if the circumstances justify the foreigner stay for a period longer than 3 months. This can be used in relation to CSS by Japanese companies, but it does not clearly suit the general right of CSS for 12 months provided in that agreement, Regulation of the Minister of Home Affairs and Administration of 19 April 2019 on visas for foreigners, J.L. 2019, it. 782. Act on foreigners (from article 58), 12.12.2013, J.L. 2020, it. 35, Art. 140.

¹³² Reference to the conditions that apply is made in Portuguese legislation, the transfer must be within the same company and the Portuguese branch must provide equivalent services; the worker must be in the company for at least one year and must fit the categories defined by the Aliens Act. Legislation Portugal does allow entry for reports to Temporary Stay Visas in connection with the transfer of workers to provide services according to articles 54, 1, b) and 55 of Aliens Act n. 23/2007.

¹³³ S.29, par. 5. Employment Ordinance.

Agency has published implementing guidelines that outline admission requirements for the different categories of service providers and list commitments on CSS in existing trade agreements.

If properly utilized, which in our opinion entails providing actual information to both the authorities and the public, this form of implementation can implement changes in international commitments directly. This form of implementation is thus highly flexible. If new FTAs are launched, the new commitments do not have to be implemented via a specific legislative procedure, but are directly applicable. This also means that immigration authorities themselves may not be aware of the commitments included in trade agreements.¹³⁴

4.4.5 Duration CSS

As described under 3.1, each of the three trade agreements provides for a different maximum duration of CSS. The GATS commitments are limited to 3 months, the EU-CARIFORUM agreement to 6 months, and the EU-Japan agreement allows 12 months cumulative in a 24 months period.

Most Member States simply provide access for 12 months or more, however, some Member States seem to still rely on the duration which was initially granted in relation to the GATS, or fail to take the 12 months provided in the EU-Japan agreement (and for example CETA) into account. This information is listed in table 4.1.

¹³⁴ Tans 2017, par 6.3.

Table 4.1 Implementation of CSS

	Name of the country/Type	Entry available based on definition CSS	Entry based on trade agreements or employment without specification	Narrow definition of categories / sectors	Representative / sponsor needed in host state	Limited to 90 days or 6 months
1	Austria (AT)	■				
2	Belgium (BE)			■		
3	Bulgaria (BG)	■				
4	Croatia (HR)	■				
5	Czech Republic (CZ)	■				
6	Cyprus (CY)					
7	Denmark (DK)		■			
8	Estonia (EE)		■ ¹³⁵			
9	Finland (FI)	■			■	
10	France (FR)	■				
11	Germany (DE)		■			
12	Greece (EL)			■		6 months
13	Hungary (HU)		■ ¹³⁶			
14	Ireland (IE)	■				
15	Italy (IT)	■			■	
16	Latvia (LV)	■				More than 90, but during 6 month period
17	Lithuania (LT)		■			Mixed ¹³⁷
18	Luxembourg (LU)	■				
19	Malta (MT)	■				
20	Netherlands (NL)	■			■	
21	Poland (PL)		■			6 months
22	Portugal (PT)		■			
23	Romania (RO)	■				
24	Slovakia (SK)		■			90 days
25	Slovenia (SI)	■				
26	Spain (ES)	■			■	
27	Sweden (SE)	■ ¹³⁸				

¹³⁵ Estonian legislation offers CSS to apply for a visa and to work under the short-term employment or apply for a residence permit depending on the need and length of stay and work in Estonia. CSS may also work without registration of short term employment or residence permit if the employment is of temporary nature and does not exceed 5 days within 30-days period.

¹³⁶ The Hungarian legislation does not refer to CSS, rather providing a mix of a reference to the trade agreements and extending a permit for the purpose of employment of TCN in general to CSS, Act No IV. of 1991 on the promotion of employment and support of the unemployed section 7 and Government Decree 445/2013.

¹³⁷ Lithuania provides for a visa for inter alia Japanese citizens which would allow CSS for longer than 90 days. However, such visa are not available for CARIFORUM citizens, which are therefore limited to a stay up to 90 days, whereas they should be allowed to stay for CSS purposes up to 6 months.

¹³⁸ No specific CSS entry available, however, entry route as regular labor migrant is intentionally broad enough to cover CSS. As an example, a job must be offered via Swedish and EU employment websites for 10 days, but this does not apply to CSS.

4.5 Conclusion

The overview of the implementation of the CSS category in the Member States demonstrates that this form of mobility is explicitly implemented by various Member States. Some Member States align the definitions with those that apply to intra-EU posting, others copy the text of the trade agreements. Especially those Member States that copy the language used in the trade agreements, as well as the conditions that apply, create a clear and transparent entry route for CSS.

Some Member States have chosen to include a general entry route which states that entry is possible based on the conditions provided in international trade agreements. This form of implementation is difficult to use in practice, as both authorities and those wishing to rely on CSS frequently are unaware of the details provided in the agreements.

Where nothing specific is indicated, those wishing to rely on CSS need to have an alternative entry scheme available suitable for their purpose, which moreover is not more stringent than the conditions provided in the trade agreements. The main alternative is to apply for a general work permit available for TCN who are temporarily employed in the host state. Such entry schemes are usually grounded on the idea that such TCN enter the labour market of the host state. CSS however, has a different purpose, as it is intended to facilitate the service provider based outside the EU which has obtained a service contract. Unless specifically indicated in the reservations, this means that such work permits must not be based on a labour market test. Work permits occasionally are granted on the condition that a representative or sponsor in the host state is available.

The maximum duration of the CSS entry route should at least be 12 months in a 24 months period based on the EU-Japan agreement, some Member States however, maintain a shorter maximum duration.

For assignments shorter than three months, we recommend the Schengen legislation (Article 6(3) of the Visa Regulation 2018/1806) could be amended to include a comprehensive list (in line with the trade agreement commitments) of activities which must not give rise to the application of the “paid activity” exception to both CSS. This might also require amending Annex I to the Schengen Borders Code to list all documents which could be used for the purpose of verifying the entry conditions of CSS.. For this purpose we also refer to our recommendation on the implementation of the BV category (para 3.6). For assignment longer than three months there is a gap in EU legislation and a new piece of legislation could be envisaged.

5 Independent Professionals (IP)

5.1 Introduction

Natural persons that directly receive their remuneration for the provided service from the service receiver are considered to be self-employed. Such persons enjoy mobility rights under the trade agreements and are referred to as 'independent professionals' (IP). As indicated by the WTO Council for Trade in Services secretariat, the term 'professionals' might be confusing, since these persons do not only supply 'professional services', as any sector may be subject to an IP commitment.¹³⁹ Currently, there is no universal definition of Independent Professionals.¹⁴⁰ In essence, most definitions emphasize the element of working without being an employee, such as owners of small business or those working in other ways on their own-accord.^{141 142 143}

Although this definition is also similar in some European countries laws,¹⁴⁴ there is no coherence within the different legal systems and international labour and trade law regarding this specific aspect of the definition of self-employment.¹⁴⁵ This issue becomes more important as trade in services in recent years has been extended in a way that companies have sent employees abroad to work for shorter periods. Moreover, the self-employed have started to sell their services in other countries.¹⁴⁶ Therefore the European Union Member States have seen a rise of independent professionals and a blurring of the divide between employees and the self-employed.

The investigated trade agreements each include a definition of IP. However, in relation to the GATS, initially, the EU did not inscribe commitments relating to IP at all. Several Member States have joined the EU after the inscription of the Uruguay Round commitments and some of these Member States did include

¹³⁹ WTO (CTS) 2009 (Presence Natural Persons).

¹⁴⁰ Lorence Nye and Kayte Jenkins, 'Understanding Independent Professionals in the EU, 2015' 1.

¹⁴¹ Stephane Rapelli, 'European I-Pros : A Study' (2012) 33.

¹⁴² 'Glossary of Tax Terms - OECD' (OECD Center for Tax Policy and Administration) <<https://www.oecd.org/ctp/glossaryoftaxterms.htm>> accessed 18 September 2020.

¹⁴³ 'Self-Employed Person | Eurofound' <<https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/self-employed-person>> accessed 21 September 2020.

¹⁴⁴ For example the Netherlands states: "A self-employed professional or freelancer (known in Dutch as '*zelfstandige zonder personeel, ZZP'er*') is an entrepreneur without any staff who works for a number of different customers. They work at their own expense and risk." 'Regulations for Self-Employed Professionals | Business.Gov.Nl' <<https://business.gov.nl/starting-your-business/starting-as-a-self-employed-professional/regulations-for-self-employed-professionals/>> accessed 23 September 2020.

¹⁴⁵ Samuel Engblom, 'Self-Employment and the Personal Scope of Labour Law' (2003).

¹⁴⁶ Jan Karlsson and Lisa Pelling, 'Moving Beyond Demographics' (2011).

independent professionals in their schedules.¹⁴⁷ There is therefore currently no IP GATS commitment across the schedule (no horizontal commitment).¹⁴⁸

In the WTO Doha Round negotiations the EU offered to include IP in its schedules of commitments, thus the 15 Member States that originally had no commitments on IP would expand their GATS commitments to this category as well, if the Doha Round would be completed. This offer, and the conditions which need to be fulfilled to rely on IP is therefore described here as an example of what EU commitments on IP may look like in the multilateral agreement if and when it is approved.

The EU-CARIFORUM includes this definition in the main text of the agreement. This definition applies simultaneously to the EU Member States and the CARIFORUM states. The EU-Japan agreement includes the definition in the main text as well, be it that a separate definition for CSS from Japan to the EU and from the EU to Japan is adopted.

The EU – Japan FTA defines Independent Professionals as:

*natural persons who are engaged in the supply of a service and established as self-employed in the territory of Japan, have not established in the territory of the European Union and have concluded a bona fide contract (other than through an agency for placement and supply services of personnel) to supply services to a final consumer in the European Union, requiring their presence on a temporary basis in the European Union in order to fulfil the contract to supply services.*¹⁴⁹

The EU Doha Round offer does not explicitly provide a definition, but all these elements can be found in the listed conditions that comply in order to rely on IP. The definitions provided in the EU-CARIFORUM agreement also, reiterating the elements of self-employment, no commercial presence, obtaining a service contract unrelated to providing labour services, from a final consumer, through a *bona fide* procedure. In addition, the trade agreements both emphasize that fulfilling the contract requires the temporary presence of the self-employed person.¹⁵⁰

All three trade agreements contain a main list of conditions that apply in order to rely on IP. These general conditions applying to IP are provided in paragraph 2 below. Details in relation to these conditions do vary between the agreements. Where such details vary, this is indicated below. In addition, many details in relation to these conditions vary from Member State to Member State.

¹⁴⁷ Thus, the WTO (CTS) 2005 (EU Revised Offer), horizontal Mode 4 commitment indicates that for some of these new Member States the IP commitments shall enter into force with effect from 1 January 2001.

¹⁴⁸ Thus, no general information on IP can be found in the currently applying consolidated schedule of the EU, as is apparent from it, WTO (CTS) 2006 (EU Consolidated GATS Schedule), horizontal commitment Mode 4.

¹⁴⁹ EU Japan Agreement, Article 8.21.c(i)

¹⁵⁰ EU-CARIFORUM, Art. 80(2)(e); EU-Japan, Article 8.21.c(i).

These details are provided directly after the text of the general condition which the detail deviates from in a footnote.

Finally, an additional level of restrictions or liberalization may be found. Each Member State may have added specific limitations or more liberal conditions as vertical commitments in the GATS schedule of commitments. For the EU-CARIFORUM agreement and the EU-Japan agreement, the equivalence to GATS vertical commitments is referred to as a list of reservations.¹⁵¹ These lists are long, detailed and too extensive to incorporate here. They should therefore be consulted directly. Naturally, these additional reservations will be taken into account when we describe the specific implementation in relation to each Member State.

5.2 Conditions IP

The possibility to rely on IP to perform a service contract is subject to the following conditions:¹⁵²

- The natural person must be engaged in the supply of a service and established as self-employed in the territory of one of the parties to the agreement who have no commercial presence in the territory of the EU and who have concluded a bona fide contract (other than providing labour services) to supply services with a final consumer requiring their presence on a temporary basis in order to fulfil the contract to provide services;
- The natural persons must be engaged in the supply of a service on a temporary basis as self-employed persons established in another party and must have obtained a service contract for a period not exceeding 12 months;
- The natural persons entering the other Party must possess, at the date of submission of an application for entry into the other Party, at least six years professional experience in the sector of activity which is the subject of the contract;
- The natural persons entering the other Party must possess (i) a university degree or a qualification demonstrating knowledge of an equivalent level¹⁵³ and (ii) professional qualifications where this is required to exercise an activity pursuant to the law, regulations or requirements of the Member State of the European Union where the service is supplied;

¹⁵¹ EU-CARIFORUM, Annex 4(d); EU-Japan, Annex 8-B-IV, par. 16. Note that both do include some remarks in relation to all service sectors. The EU-CARIFORUM IP list of reservations includes the following in relation to all services sectors: information on transitional periods, which have all passed, and a remark on mutual recognition of diplomas which is not relevant to this study, EU-CARIFORUM, Annex 4-D. The EU-Japan IP list of reservations contains some deviations from the permissible length of stay. As such, this information is included in a footnote to the general condition below.

¹⁵² WTO (CTS) 2005 (EU Revised Offer), horizontal Mode 4 commitment; EU-CARIFORUM, Art. 83, par 3; EU-Japan, Annex 8-B-IV, par 13-15.

¹⁵³ (Original footnote) Where the degree or qualification has not been obtained in the Member State of the European Union where the service is supplied, that Member State of the European Union may evaluate whether this is equivalent to a university degree required in its territory.

- The temporary entry and stay is for a cumulative period of not more than GATS offer and EU-CARIFORUM 6 months¹⁵⁴ in any 12 months period / EU-Japan for a cumulative period of not more than 12 months, with possible extensions at the discretion of the European Union and its Member States, in any 24 month period¹⁵⁵, or for the duration of the contract, whichever is less;
- Access accorded relates only to the service activity which is the subject of the contract and does not confer entitlement to exercise the professional title of the Member State of the European Union where the service is provided.

The EU-CARIFORUM agreement additionally specifies that:

- Other discriminatory limitations, including on the number of natural persons in the form of economic needs tests, which are specified in the list of reservations.

A similar specification is included in the GATS offer:

- Commitments are subject to the application of a numerical ceiling [modalities of application and level to be determined], except where otherwise indicated for a specific sub-sector.¹⁵⁶

For the EU-Japan agreement this is not explicitly mentioned as a general condition, however, many such limitations can be found in the list of reservations. For instance, in relation to 'Architectural services and Urban planning and landscape architectural services' the reservation lists AT: Planning services only, where: Economic needs test.¹⁵⁷

Each trade agreement offers access for IP in a limited number of service sectors. The GATS offer, again, this is only what was offered in the Doha Round negotiations, currently the EU is generally still unbound in relation to IP, indicates the following sectors:

*legal services; architectural services; urban planning and landscape architecture; engineering and integrated engineering services; computer and related services; management consulting services and services related to management consulting and translation services.*¹⁵⁸

The EU-CARIFORUM agreement lists a few additional sectors.

¹⁵⁴ Specific details for each Member State: EU-CARIFORUM, LX 25 weeks, in any 12-month period or for the duration of the contract, whichever is less.

¹⁵⁵ Specific details for each Member State: EU-Japan AT, UK: Maximum stay for CSS and IP shall be for a cumulative period of not more than six months in any 12 month period or for the duration of the contract, whichever is less; BE, CZ, MT, PT: Maximum stay for CSS and IP shall be for a period of not more than 12 consecutive months or for the duration of the contract, whichever is less; CY, LT: Maximum stay for CSS and IP shall be for a period of six months renewable once for an additional period of six months, or for the duration of the contract, whichever is less.

¹⁵⁶ The brackets are provided in the original text and therefore do not constitute added language, WTO (CTS) 2005 (EU Revised Offer), horizontal Mode 4 commitment.

¹⁵⁷ EU-Japan, Annex 8-B-IV, par. 16

¹⁵⁸ WTO (CTS) 2005 (EU Revised Offer), horizontal Mode 4 commitment.

legal advisory services in respect of international public law and foreign law (i.e. non-EU law)¹⁵⁹; architectural services; urban planning and landscape architecture services; engineering services; integrated engineering services;¹⁶⁰ computer and related services; research and development services; market research and opinion polling; management consulting services; services related to management consulting; translation and interpretation services.¹⁶¹

The EU-Japan agreement again increases the number of sectors, listing the following:

(a) legal advisory services in respect of public international law and foreign law; (b) architectural services and urban planning and landscape architectural services;¹⁶² (c) engineering services and integrated engineering services; (d) computer and related services; (e) research and development services; (f) market research and opinion polling services; (g) management consulting services; (h) services related to management consulting; (i) mining; (j) translation and interpretation services; (k) telecommunication services; (l) postal and courier services; (m) higher education services; (n) insurance related services advisory and consulting services; (o) other financial services advisory and consulting services; (p) transport advisory and consulting services; and (q) manufacturing advisory and consulting services.¹⁶³

5.3 Overview Implementation IP

The main issue when looking at the implementation of the IP category is that most Member States have taken no specific action. In such cases, our national experts have provided us with information on entry schemes which come closest to IP. Some experts have not provided an alternative at all, as they conclude that there is no comparable existing visa or permit.

For other categories of trade commitments, such as those for BV or CSS, this situation is different. If the Member States have chosen not to implement BV or CSS explicitly, a similar entry scheme is usually available. For IP, this is not always the case, as the right to provide a temporary service for self-employed persons is not an activity common to migration law schemes. The consequence is that various Member States do have options available that seem to resemble IP, but which are more suitable for entry of self-employed persons which does not relate to temporary presence or to delivering on a single service contract. Such Member States for instance require compliance with a Points-Based System, a requirement that fits better in relation to establishment of the self-employed. Other alternatives to IP are available only when fulfilling some form of

¹⁵⁹ Note that the EU Doha Round offer did not contain the limitation to international public law and foreign law.

¹⁶⁰ Note that the EU Doha Round offer and the EU-Japan agreement do not separate engineering services and integrated engineering services, listing it as one sector.

¹⁶¹ EU-CARIFORUM, Art. 83, par 3.

¹⁶² Note that the GATS offer and the EU-CARIFORUM agreement listed architectural services separately from urban planning and landscape architectural services.

¹⁶³ EU-Japan, Annex 8-B-IV, par. 13.

an economic needs test, which is, unless specifically reserved in the trade agreements, not in line with the trade commitments. Particularly troublesome are national entry schemes provided as alternatives which require commercial presence. This, in essence, requires the opposite of the purpose for which IP was included in the trade agreements. The entire idea is to liberalize service markets for providers who do not wish to leave the home state. Moreover, IP is available for individual service providers, and not for legal persons as those can rely on CSS. Requiring commercial presence from self-employed natural persons is therefore most problematic. It is for this reason that the definition of IP in the trade agreements indeed specifically includes the requirement that the service provider has no commercial presence in the EU.

A good example of an entry scheme which at first glance seems to fit the IP category is formed by Bulgaria. In Bulgaria the Executive Director of the Employment Agency shall issue a permit for providing an IP service by a TCN after the IP submits a detailed plan of providing the service throughout the duration of the permit, on the basis of which a national long-term residence permit or a long-stay visa is issued by the Ministry of the Interior.¹⁶⁴ A national long-term residence permit or a long-stay visa may be obtained by an Independent Professional wishing to perform a service contract and qualify for a permit to provide IP service within the meaning of the Law on Labour Migration and Labour Mobility.¹⁶⁵ Considering the conditions that have to be met and the required documents (see Figure 5.1), it becomes clear that the Bulgarian IP entry scheme does not fit the definition provided by the international trade agreements; the conditions include for example the size of the company receiving the IP and a certificate concerning capability of the Bulgarian language at B1 level.

¹⁶⁴ Art. 44. (1) of the Bulgarian Law on Labour Migration and Labour Mobility.

¹⁶⁵ Pursuant to Art. 24a of the Law on Foreign Nationals in the Republic of Bulgaria.

Figure 5.1 Conditions and requirements for IP in Bulgaria

Conditions and requirements for IP in Bulgaria	
Conditions	Requirements
<ul style="list-style-type: none"> - according to the status, development and public interests of the Bulgarian labour market; - when the third-country national possesses specialized knowledge, skills and professional experience required for the respective post. - the offered working conditions and remuneration are not less favorable than the conditions for Bulgarian citizens for the respective category of labor; - in the previous 12 months the total number of third-country nationals working for the local employer does not exceed 20% of the average number of employed Bulgarian nationals, nationals of other Member States of the EU, of States Parties under the Agreement on the European Economic Area, or the Swiss Confederation, and for small and medium-sized enterprises: 35%. 	<p>The application form shall be enclosed by:</p> <ul style="list-style-type: none"> a) a brief description of the type, nature and purpose of the provided IP service; b) a detailed plan of the activities, for the period of which an issue of a permit is required, in compliance with the requirements of Article 28, para. 2 of the Rules on the Implementation of Law on Labour Migration and Labour Mobility; c) a document(s) attesting the presence of at least two years of professional experience; d) a document establishing the availability of financial resources for the pursuit of the activity of a freelance in accordance with the plan presented; e) a proficiency certificate in Bulgarian at the level of minimum B1 of the Common European Framework Reference of the Council of Europe; f) a document proving that the conditions for exercising a profession included in the List of regulated professions in the Republic of Bulgaria, adopted by a decision of the Council of Ministers on the grounds of Article 3 of the Recognition of Professional Qualifications Act. g) other documents under the Bulgarian legislation regulating the respective type of freelance activity, if required; h) a copy of the page with the photograph and personal data from the travel document of the third-country national; i) two color photographs - 3.5 / 4.5 cm format.

The conditions for renewal, which include prove of multiple contracts and withdrawal, in case of lack of activities over the previous months, depending on the duration of stay confirm that this does not relate to IP as defined at the international level.

The resulting picture is that both practitioners and authorities have little or no knowledge of the fact that entry based on IP should be possible. The Croatian civil servants interviewed had “not encountered this category of persons who would invoke EU trade agreements during the procedure on their legal residence status”.¹⁶⁶ The Lithuanian business representative interviewed also had

¹⁶⁶ Interview Croatian civil servants, 17 April 2020.

no experience with IP.¹⁶⁷ The German practitioners interviewed seemed not to be 100 % sure, with the expert, whether the legislation for self-employed immigrants covers IP properly.¹⁶⁸ And the Maltese legal practitioner said that:

*“the obstacles existing in Malta for independent professionals or self-employed professionals concern third country nationals. In respect of non-EU nationals, an employment license is required and is only granted in exceptional cases.”*¹⁶⁹

Given the unfamiliarity with the FTA-IP in practice, it is not uncommon for legal practitioners to find a ‘work around’ in case a clear FTA-IP category is absent in national law. As an example, figure 5.2, depicted below, illustrates what alternatives could be suggested to an IP wanting to come to the Netherlands.

We will now provide an overview of the manners in which IP has been implemented or which entry schemes come closest to it.

5.3.1 Entry scheme specifically available for Independent Professionals

An example of a Member State that has specifically implemented the trade commitments relating to IP is Portugal. A temporary visa (one year maximum) is available for the purpose of carrying out an independent professional activity. The requirements are to have obtained a contract for provision of services as a self-employed person and the need to demonstrate the necessary qualifications and means of subsistence.¹⁷⁰ Another example is formed by Cyprus, where the national legislation indicates that entry is possible to exercise an independent profession, either through a company or personally. Note, however, that the list of activities, as provided in the trade commitments, is not included. Adding that list specifically would clearly implement the trade commitments.

A specific permit for IP is available in Cyprus¹⁷¹, Portugal, Romania¹⁷² and Slovenia.¹⁷³

¹⁶⁷ Interview Lithuanian business representative, 10 June 2020.

¹⁶⁸ S. 21 German Residence Act; German Expert Interview, 4 May 2020. Although there is no specific regulations for IP section 21 (2) supposedly covers IPs in the meaning of international agreements like the GATS or the CARIFORUM.

¹⁶⁹ Interview Maltese legal practitioner 5 May 2020.

¹⁷⁰ Art. 54(1), c; Art. 89 Aliens Act 23/2007, of the 4th of July; Art. 55, Regulatory Decree 84/2007, of 5th of November. The temporary Visa for the exercise of an independent profession can also be framed by a residence visa to exercise independent professional activity or for entrepreneurial immigrants (articles 58 and 60) valid for 4 months, in order to apply for a residence permit). In the latter case, longer stays exceeding one year are considered, formalized by a residence permit.

¹⁷¹ Regulation 9 para (1)(c) & Regulation 12 of the Alien and Migration Regulations 1972-2013.

¹⁷² Art. 24/1/b, Art.42 GEO194/2002 and for the residence permit art. 54 GEO 194/2002.

¹⁷³ Slovenia explicitly implements the IP commitments in the form of a residence permit. Service providers from Japan and CARIFORUM countries are exempt from visa obligations, this may also simply be an existing national scheme based on foreigners providing services. Slovenia limits the maximum duration of the contract to one year in the fields of science, culture, sports, health and education. For all other sectors, the duration is maximum three months, which is not in line with the EU-CARIFORUM and EU-Japan trade agreements, Art. 26(3), Employment, Self-Employment and Work of Foreigners Act, Art. Art. 37 Foreigners Act.

5.3.2 General reference to entry based on international agreements

Some Member States do not explicitly refer to IP, rather providing entry on the basis of the WTO Agreement or international trade agreements.

Croatia for example has an entry scheme based on international agreements. This entry scheme should indeed then allow entry for a self-employed persons who has obtained a service contract from a receiver in Croatia.¹⁷⁴

Hungarian law provides the following:

*Foreign nationals - other than businesses established in any EEA Member State - may engage in providing cross-border services in the territory of Hungary, where it is expressly permitted by law or international treaty.*¹⁷⁵

This provision is not part of the migration law acts, it can be found in legislation on investment of third-country nationals in Hungary. It is not entirely clear if this provision would indeed lend itself for entry based on IP. Based on two interviews conducted by the Hungarian expert, this should be possible, as ‘a lot of ad hoc decisions are taken in respect of persons – including service suppliers – when the rules are not perfectly fitting them.’¹⁷⁶ It should be kept in mind that even if this provision can be applied like this in practice, this method is very untransparent. As indicated by the Slovakian expert, it is in general possible to enter based on trade agreements, however, no information is provided in the legislation. This essentially means that the applicant must know and demonstrate the possibility to rely on the trade agreements for the purpose of IP.

A general reference to entry based on international trade agreements can be found in: Croatia, Hungary and Slovakia.

5.3.3 Entry based on national self-employment scheme

An example of a Member State that does not specifically implement the IP commitments, but which does allow entry of such persons without problematic restrictions is the Czech Republic. A visa for business purposes is issued for up to 1 year which can be used for the purpose of IP. The conditions listed for this visa are flexible enough to incorporate the conditions identified at the international level.¹⁷⁷

An example of a long term settlement scheme for the self-employed is provided by Austria. However, the permit for self-employment is available to persons

¹⁷⁴ Art. 54, 76(1) point 15, 77 and 81 of Croatian Aliens Act, which provides that ‘an employment contract or a written certificate of the conclusion of an employment contract or other relevant contract’ must be submitted (emphasis added). This may encompass IP. However, other requirements are inter alia an explanation of the justifiability of employment, proof of the registration of a company or representative office in Croatia. Such conditions should not be applied to IP.

¹⁷⁵ Act XXIV of 1988 on the investment of foreigners in Hungary, Section 3/a.

¹⁷⁶ Information from two interviews conducted by the Hungarian expert.

¹⁷⁷ Conditions relate to the requirement of qualifications for regulated professions, having sufficient funds to reside in the Czech Republic and having a place to reside, Sec. 30 and following and Sec. 46 of the Act No. 326/1999 Coll., on Residence of Foreigners in the Territory of the Czech Republic.

who 'have committed contractually to one particular activity which shall exceed a period of six months'. Thus, this scheme is not suitable for IP, as that concerns temporary service provision.¹⁷⁸

Latvia offers TCN who are self-employed the option to apply for a temporary residence permit for a period up to one year or up to five years *if* he or she is registered in Latvia's Commercial Register as an individual entrepreneur. The applicant must prove s/he actively carries out economic activity and provides economic benefits to the Republic of Latvia.¹⁷⁹ This resembles an economic needs test, which does not sit well with the commitments.

This type of implementation is used in: Austria, Czech Republic, Estonia¹⁸⁰, Italy¹⁸¹, Latvia, Lithuania¹⁸² and Spain¹⁸³

5.3.4 Entry schemes aimed at long term, or permanent presence

Belgium provides a clear example of an alternative for IP which relates to establishment by the self-employed. To obtain a professional card, which those wishing to supply a service in Belgium must have, demonstration of added economic value is necessary. This is measured by meeting an economic need of a region, creating employment opportunities, useful investments, the economic impact on companies in the region, promotion of export, the innovative or specialised nature of the activity, etc.¹⁸⁴ It is clear from these examples that the intention is to have the self-employed person add economic value to a region

¹⁷⁸ Art. 60 NAG. Note that Austria has limited the period of stay under the EU-Japan agreement to 6 months for all sectors, instead of one year, see EU – Japan, Annex 8-B-IV, par 16.

¹⁷⁹ Art.47.2; 67; 70 Latvian Government Regulation No.564 of 21.06.2010 On Residence Permits; Latvian Immigration Law Art.9 (1) Art.9(3) 7).

¹⁸⁰ Estonian Aliens Act §192, A temporary residence permit for enterprise may be issued if the settling of an alien in Estonia shall significantly contribute to the achievement of the purpose of the residence permit granted for enterprise and the following conditions are met:
-an alien has a holding in a company or he or she operates as a sole proprietor;
-an alien who is applying for a temporary residence permit for enterprise as a sole proprietor is required to have the capital in the amount of at least 16,000 euros invested in Estonia.

¹⁸¹ Though Italy indeed allows entry based on self-employment for 1 year or longer, several conditions attached to this visa and residence permit demonstrate that IP in the trade agreements has not been taken into account. For instance, quota apply, while Italy does not specifically refer to this limitation in the list of reservations under the EU-CARIFORUM or the EU-Japan agreement. Moreover, various formal declarations and certificates are required which seem to go beyond what is required for IP, such as an attestation of financial parameters to 'start the relevant activity'. This does not fit the situation that a service provider is delivering on a contract obtained in Italy, Art. 26 of Consolidated Immigration act (LEGISLATIVE DECREE n. 286 25 July 1998), Art. 39 of Presidential Decree no. 394/1999, Interministerial decree n. 850, 11 May 2011.

¹⁸² Specific conditions for several nationals, including Japanese apply, these can obtain entry based on self-employment.

¹⁸³ The Spanish work and residence permit for freelancers is flexible enough to fit all the conditions and criteria provided in the trade commitments, L.O. 4/2000 Section 37&RD 557/2011 /sections 103-109. Spain has several additional avenues for IP: Entrepreneurs permits; Permits for highly qualified workers considered as "autonomos dependientes": freelancers depending on a sole client from whom they receive more than 75 % of incomes and National ICT permit (similar to a CSS permit) when the IP is posted to Spain as subcontractor of the sending entity or independant freelancer.

¹⁸⁴ Royal Decree of 2 August 1965, implementing the Law of 19 February 1965 on the exercise of self-employed activities by foreign nationals, Belgian Official Gazette 29 September 1965.

(such as creating employment opportunities) which has little to do with temporary service provision. Moreover, such persons automatically are registered at the entrepreneurs' office (application for a company number and VAT number).

The Points-Based System of the Netherlands, which is intended to provide entry for the self-employed, is another example of this. It relates to establishment, not temporary service provision. Another clear example is provided by Bulgarian law, which requires the service provider to provide a proficiency certificate in the Bulgarian language at B1 level. Note that these types of entry schemes usually require some economic benefit for the host state in the form of investment or an economic needs test.

Figure 5.2 Alternative schemes used in the Netherlands¹⁸⁵

Example: A Japanese architect has been commissioned a project in the Netherlands which will run for one year. How will his legal residence be established?	
Legal Entry Category	Main requirements/restrictions
ICT Directive specialist or manager	<ul style="list-style-type: none"> - Establish legal presence; - Establish employment relation - Service provider must own less than 25% of the stocks: to avoid qualification as entrepreneur instead of ICT-employee; this condition is not laid down in law but in an online Frequently Asked Questions form.¹⁸⁶
CSS (par. 51 Ruwav)	<ul style="list-style-type: none"> - Establish employment relation with legal entity in country of origin - Requirement of employment one year prior to assignment is a restriction
Incidental activity ¹⁸⁷	<ul style="list-style-type: none"> - Work permit exemption for business meetings - Limited duration of max 13 weeks in 52 weeks - Risk of qualifying as illegal employment
“Trajectory” international trade relations ¹⁸⁸	<ul style="list-style-type: none"> - Dutch recipient of service must register the project - Person performing service can be employed by contracting party or a contractor or director - Limited duration of 13 weeks in 52 weeks
National start-up scheme	<ul style="list-style-type: none"> - Establish legal presence - Acquire the support of a Dutch trusted sponsor business incubator operating in the migrant start-up scheme

¹⁸⁵ Interview Dutch legal practitioner 9 September 2020.

¹⁸⁶ https://ind.nl/en/Documents/FAQ_ICT_Richtlijn_ENG.pdf, last visited 13 November 2020.

¹⁸⁷ Article 1 Dutch Decree on Migrant Work.

¹⁸⁸ Article 1k Dutch Decree on Migrant Work (see Dutch Parliamentary Documents 2014-2015, 29 861, nr. 38, p. 18–19. “When registering a trajectory it must be demonstrated what relationship exists between the employer established in the Netherlands and the company abroad to which the employee coming to the Netherlands is affiliated. This can be done, for example, by means of an assignment or cooperation agreement. The employee can perform the activities in the capacity of employee, contractor of an employer established abroad or director/major shareholder. There is no limit to the temporary nature of the work that takes place within a project. The duration of the work, together with the other aspects, will be taken into account in the assessment of whether the work is non-competitive. As a starting point, among other things, the terms from article 1, second paragraph, BuWav can be taken. If the duration of the work remains within the terms stated there, the duration of the work will not be objected to.” Explanatory note in the Official Dutch Gazette 2017, 134.

	- One year permit
National entrepreneurship scheme	- Establish legal presence - Meet requirements under points based system (very small chance of success) - Two year permit <i>The Netherlands has a bilateral Trade Agreement with Japan which will facilitate this residence permit</i>
National high-skilled migrant workers scheme	- Establish an employment relation - Hold no more than 25% of the shares in the employing entity - If the client/employer is not a recognizes sponsor, hire a recognized sponsor pay-rolling company - Comply with the income requirements - Receive monthly salary in a bank account

This type of entry scheme is referred to by the national expert as the most likely alternative in relation to: Belgium, Bulgaria, Germany¹⁸⁹, Luxembourg, Malta¹⁹⁰, the Netherlands and Poland.¹⁹¹

Another example: a self-employed architect (Dominican national) established in the Dominican Republic. He would like to offer his services (including feasibility studies, architectural programming and project management) for a residential construction project in the Netherlands. The Dutch client wants to have the project finalized within one year from contract signature.

Based on the EU-CARIFORUM agreement the Dominican architect should be able to engage in this temporary supply of service, assuming that he meets all the eligibility conditions (six years of professional experience and adequate education credentials). In addition, the Netherlands have not added any reservations to this category, therefore no additional burden, such as economic tests, should apply. However, the Dutch legislation only allows the Dominican architect to provide this service if he establishes a company in the Netherlands and obtains a long stay visa on this basis. In order to do so, three main criteria must be fulfilled:

- o Personal experience (education, work experience)
- o Business plan (USP, price, organization, finance, market information)
- o Added value for the Netherlands (innovation, investments, job creation)

In practice, this third criteria is very subjective and leaves national authorities with a lot of room for interpretation.¹⁹² Therefore, not only is the certitude of obtaining the necessary approvals limited, but the lead times and administrative burden are very likely to dissuade both the Dominican national to compete for this contract and the Dutch client to grant this contact to a provider which has to overcome such major constraints impacting his capacity to deliver the required services in such a short amount of time.

¹⁸⁹ There are alternatives in the form of entry for the liberal professions, however, the German expert indicates that these require commercial presence. These provisions may be broad and discretionary enough to cover IP, which does not seem to happen in practice, S. 21 Residence Act, S. 22 Employment Ordinance.

¹⁹⁰ The entry schemes referred to by the Maltese expert are related to investment, highly skilled innovators who are to set up a business in Malta (leading to employment opportunities in Malta) and project leaders. None of these categories are suitable to facilitate IP entry, Criteria 3.1 of the Employment Licenses Unit guidelines.

¹⁹¹ Poland provides a visa for the purpose of running a business which does not fit the IP definition, Regulation of the Minister of Home Affairs and Administration of 19 April 2019 on visas for foreigners, J.L. 2019, it. 782, Art. 2 point 4. Act on foreigners, 12.12.2013, J.L. 2020, it. 35 (Art. 142-143a).

¹⁹² See also Tesseltje de Lange 'Welcoming Talent? A Comparative Study of Immigrant Entrepreneurs' Entry Policies in France, Germany and the Netherlands' (2018)6, Comparative Migration Studies.

5.3.5 Entry schemes that list conditions relating to longer presence

Some Member States have alternative entry schemes that sit somewhere between suitable and not suitable, because they are intended to cover investors or self-employed persons wishing to provide a business activity in the host state, and not just performing a single service contract. France, as an example, provides a permit for entrepreneurs – *profession libérale*, for stays between 90 days and 12 months, which requires registration with the French commercial register. Moreover, this permit requires the applicant to demonstrate ‘economic viability’, which is not logical if an IP simply wants to deliver on a service contract. Other conditions, which may not be problematic in light of the trade agreements, but nevertheless do not seem to relate to IP are guarantees by a credit institution, forecast supply and foreseeable annual revenue. All such conditions are not really suitable for IP, relating more to temporarily setting up business in France. However, these conditions are not as strict as the requirement to have a commercial presence, adding to the (local) economy through investment or job-creation and other such requirements.¹⁹³ Thus, such Member States indeed may have properly implemented IP, yet various conditions apply that are not related to the type of activity intended by IP.

This in-between form of implementation can be seen in: France and Sweden¹⁹⁴.

5.3.6 No status resembling IP provided

For several Member States, the national experts report that none of the entry schemes resemble IP to a sufficient degree. Other experts have referred to entry schemes, which are, however, not really suitable for entry based on IP. It should be noted that the effect of this is similar to Member States for whom the national expert indicates that commercial presence is required, or where conditions are such that the entry route is in essence related to establishment. In all these cases, no suitable entry scheme for IP is available, unless some form of discretion is available to the authorities, which allow for a creative interpretation of the legislation.¹⁹⁵

For Finland, no specific IP entry route exists. However, several entry categories can be used by IP, depending on the sector they are entering and their individual circumstances.

¹⁹³ Articles L.313-10 3° and R311-3 (14°) of the CESEDA Article R311-2-2 of CESEDA; Annex A of Arrêté du 28 Octobre 2016 relatif aux pièces à produire pour la demande de délivrance de la carte temporaire ou pluriannuelle portant la mention « Entrepreneur/Profession libérale » Articles R. 313-16 to R. 313-16-4 of CESEDA.

¹⁹⁴ The Swedish expert provides that for up to 90 days, a visa for business can be obtained. However, for over 90 days the option available relates more to setting up a business. Reference is made to owning the business, assessment of the business plan from a financial perspective and demonstration of for example ‘customer contacts and/or a network in Sweden’, ch 2 sec 5 para 2 and ch 2 sec 10 Aliens Act (2005:716) ch 5 sec 10, Aliens Act (2005:716) ch 5 sec 5 second para, Aliens Act (2005:716) Migration Agency Website: <<https://www.migrationsverket.se/english/private-individuals/working-in-sweden/selfemployment.html>> Migration Agency Website: <<https://www.migrationsverket.se/English/Private-individuals/Visiting-Sweden/VisitingSweden-for-business-or-a-conference.html>>.

¹⁹⁵ As is suggested as an option by the German expert.

Member States for which the experts did not refer to any entry scheme resembling IP are: Denmark¹⁹⁶, Finland, Greece and Ireland.

5.4 Analysis

Two Member States have an explicit entry scheme available for IP (Portugal and Slovenia) and three Member States (Croatia, Hungary and Slovakia) provide a general reference to entry based on the trade agreements. Explicit entry schemes are to be preferred from the perspective of the trade agreements. While in theory entry should be possible based on this general remark on the trade agreements, in reality this means that the applicant and the authorities must have detailed knowledge of the IP commitments. Clearly, this form of implementation is problematic from the perspective of transparency.

Moreover, of the two states providing an explicit IP entry route, Slovenia has limited the duration of access for IP to 3 months for most service sectors, which is not in line with the EU-CARIFORUM and EU-Japan trade agreements.¹⁹⁷ Thus, only the Portuguese entry conditions for IP are clearly in line with the trade agreements. In fact, the national conditions are much more liberal than the conditions provided in the trade agreements, for example, the 6 years of working experience is not listed as a condition.

As is apparent from the overview provided, most Member States have not implemented IP, either specifically, or because the legislator of that Member State considered that IP is already covered by existing national law. It is likely that most Member States have not considered the IP category at all, which can also be explained by the fact that IP was not originally part of the GATS commitments. As such, when new trade agreements, such as the EU-CARIFORUM agreement, entered into force, there was no provision available for IP based on earlier implementation of GATS commitments. Be that as it may, for most Member States, those wishing to rely on IP must search for an alternative.

Such alternatives come in several forms, and are mostly not suitable to cover the liberalization provided in relation to IP by the trade commitments. Nevertheless, various Member States offer access up to 90 days with relative flexible conditions which those wishing to rely on IP can therefore use.¹⁹⁸ Most of the unsuitable alternatives listed above are required for stay longer than 90 days.

¹⁹⁶ A special individual qualifications scheme exists, however, this does not resemble the IP category as it applies to performers or artists, including singers, musicians and conductors, professional athletes and coaches and specialized chefs who have been offered a job, Special individual qualifications §9a par 2, no 7.

¹⁹⁷ Slovenia limits the maximum duration of the contract to one year in the fields of science, culture, sports, health and education. For all other sectors, the duration is maximum three months, which is not in line with the EU-CARIFORUM and EU-Japan trade agreements, Art. 26(3), Employment, Self-Employment and Work of Foreigners Act, Art. 37 Foreigners Act. However, in accordance with Slovenian legislation international obligations are hierarchically superior, as such, in case of inconsistency, the obligations deriving from international agreements prevail.

¹⁹⁸ The Czech Republic and Sweden form examples of Member States that provide entry schemes useable by IP up to 90 days due to flexible conditions up to this duration.

To be clear, the EU-CARIFORUM agreement allows access for IP up to 6 months, and the EU-Japan agreement allows access for a cumulative period of 12 months.

Table 5.1 IP entry overview

	Name of the country/Type	IP scheme, or entry based on trade agreements	Entry based on self-employment	Self-employment with 'longer term' conditions	Self-employment similar to establishment	No alternative provided
1	Austria (AT)		■			
2	Belgium (BE)				■	
3	Bulgaria (BG)				■	
4	Croatia (HR)	■				
5	Czech Republic (CZ)		■			
6	Cyprus (CY)		■			
7	Denmark (DK)					■
8	Estonia (EE)			■	■	
9	France (FR)			■		
10	Finland (FI)					■
11	Germany (DE)				■	
12	Greece (EL)					■
13	Hungary (HU)	■				
14	Ireland (IE)					■
15	Italy (IT)		■			
16	Latvia (LV)		■			
17	Lithuania (LT)		■			
18	Luxembourg (LU)				■	
19	Malta (MT)				■	
20	Netherlands (NL)				■	
21	Poland (PL)				■	
22	Portugal (PT)	■				
23	Romania (RO)	■				
24	Slovakia (SK)	■				
25	Slovenia (SI)	■				
26	Spain (ES)	■	■	■	■	
27	Sweden (SE)			■		

Besides this general overview, various conditions that are clearly or likely not in line with the IP trade commitments stand out. While we do not think that this is deliberate, as the Member State in question did not intend the listed alternative to cover IP, it is useful to list these problematic conditions here in light of the recommendations for implementation of the IP category.

Italy uses a quota in relation to the alternative provided by the national expert. As Italy made no reservation under the trade agreements, this is not in line with

the market access provision.¹⁹⁹ Various Member States require an investment or economic benefit for the state or region as a condition attached to the listed alternative for entry for IP. Such conditions are economic needs tests, which are contrary to the market access obligation, and should be explicitly exempted under the trade agreements. Economic needs tests can be observed in the alternatives provided by the expert in relation to: Austria, Belgium, Latvia, Luxembourg, Malta and Poland.

France requires the applicant to provide evidence of the activity being 'economically viable' and the expert indicates that this in reality is the most difficult to demonstrate to the authorities. This may be contrary to the trade commitments, which simply refer to service provision by independent professionals. Naturally, a genuine service contract in line with national requirements must be obtained in order to rely on IP, but attesting to economic viability should not lead to a test to verify if the IP applicant has the chance to set-up a business in France, as that is not the intention of IP commitments. In addition, France requires registration of an office at the Chamber of Commerce, which may be an indication of an administrative hurdle to obtaining entry as IP. A similar requirement can be found in Slovakia, which requires in relation to the IP alternative registry at the Trade License Authority.

5.5 Conclusions

We observe that only a few of the Member States have a national scheme that is in accordance with the trade commitments. Our analysis shows that the Member States are primarily providing applicants with more than a one-year residence permit, requiring commercial presence, skills-tests, business experience, etc. Hence, these schemes are typically aiming at the establishment of new businesses and thus not at entry as an Independent Professional as intended by the FTA.

¹⁹⁹ Art. 26 of Consolidated Immigration act (LEGISLATIVE DECREE n. 286 25 July 1998), Art. 39 of Presidential Decree no. 394/1999, Interministerial decree n. 850, 11 May 2011'.

Table 5.2 IP Entry and duration

Name of the country/Type	Independent Professionals (max. 12 months)/requiring commercial presence	FTA Independent Professionals (max. 12 months)/not requiring commercial presence	Possibility of extension beyond 12 months requiring commercial presence	Possibility of extension beyond 12 months not requiring commercial presence	Non-Temporary establishment, primary permit more than a year (not a Treaty-IP in the FTA-sense)
Austria (AT)					■
Belgium (BE)					■
Bulgaria (BG)		■	■		
Croatia (HR)	■		■		
Czech Republic (CZ)	■		■		
Cyprus (CY)		■			
Denmark (DK)					
Estonia (EE)					
France (FR)	■		■		
Finland (FI)	■				
Germany (DE)					■
Greece (EL)					
Hungary (HU)					
Ireland (IE)					
Italy (IT)	■		■		
Latvia (LV)	■			■	
Lithuania (LT)					■
Luxembourg (LU)					■
Malta (MT)	■			■	
Netherlands (NL)					■
Poland (PL)					■
Portugal (PT)		■		■	
Romania (RO)					
Slovakia (SK)	■		■		
Slovenia (SI)		■		■	
Spain (ES)	■	■	■	■	■
Sweden (SE)					■

To conclude, we observe that none of the Member States is carrying a FTA-IP scheme in accordance with FTA commitments. Complying with the definition of Independent Professionals within the trade agreements necessitates the Member States to provide a one year visa without requiring the commercial presence. Although the Member States can have their own regulations regarding the extension or renewal of the visa/permit after one year, their regulations for the first year should be adjusted in a way that does not deviate from the commitment for Independent Professionals under the trade agreements. Our analysis shows that the Member States are primarily providing applicants with more than a one-year residence permit, requiring commercial presence, skills-tests,

business experience, etc. Hence, these schemes are typically aiming at the establishment of new businesses and thus not Independent Professionals as intended by the FTA.

By way of recommendation we suggest EU legislation to harmonize the conditions of entry and stay of Independent Professionals. As for Business Visitors and CSS, this could be tackled by revision of the Visa code as suggested in para 4.5. This would entail amending the Schengen legislation (Article 6(3) of the Visa Regulation 2018/1806) to include a comprehensive list (in line with the trade agreement commitments) of activities which must not give rise to the application of the “paid activity” exception to IP. This might also require amending Annex I to the Schengen Borders Code to list all documents which could be used for the purpose of verifying the entry conditions of an IP.

For service contracts requiring a presence longer than three months, a new piece of legislation could be envisaged for transposition by EU Member States. This category is not meant to integrate the labour market hence such legislation should provide minimal administrative burden and eligibility criteria aligned with the trade agreements. To secure equal treatment with nationals, this category could be included under the scope of the EU Single Permit Directive 2011/98, currently explicitly excluding self-employed migrants.²⁰⁰ Alternatively, we suggest a separate Directive on entry conditions, procedures and rights for self-employed third country nationals.

²⁰⁰ Art. 3(2) k Single Permit Directive.

6 Intra-corporate Transferees (ICT)

6.1 Introduction

Intra-corporate transferees are employees of, or partners in, a juridical person who are temporarily transferred to an establishment of the juridical person in the territory of another party to the trade agreement. As such, multinational companies can send personnel to offices abroad when such is required. In practice, the EU commitments under the FTA are limited to managers and specialists (who possess necessary uncommon skills). In addition, graduate trainees, sent to an office abroad for training purposes, can be included in commitments as well.

Note that an important part of the EU's ICT commitments are included in the scope of the ICT-Directive 2014/66.²⁰¹ The ICT Directive covers conditions of entry to, and residence for more than 90 days, and a maximum duration of three years for managers and specialists, and one year for graduate trainees (referred to in the Directive as trainee employees). The trade commitments only provide a maximum duration, usually of three years. Thus, outside the scope of the ICT Directive, but covered by the commitments under the trade agreements is the transfer of personnel for just 90 days. Unless a short term visa is waived, the trade commitments coincide with Schengen Visa requirements for stays up to 90 days. To prevent possible conflict with the trade agreements, the Directive specifically provides that it applies without prejudice to more favourable provisions of the trade agreements.²⁰² Thus, there is overlap between the ICT category as defined in the trade commitments and the Directive, but there is also a gap in EU legislation, where the EU member states have obligations in respect of intra-corporate transfers under the FTA which are *not* covered by the Directive.

All three trade agreements contain a definition and a main list of conditions that apply in order to facilitate ICT mobility. The definition and the general conditions applying to ICT are provided in paragraph 2 below. Details in relation to these conditions do vary between the agreements. Where such details vary, this is indicated. In addition, many detailed conditions vary from Member State to Member State. These details are provided directly after the text of the general condition which the detail deviates from in a footnote.

Finally, an additional level of restrictions or liberalization may be found. Each Member State may have added specific limitations or more liberal conditions as vertical commitments in the GATS schedule of commitments. For the EU-CARIFORUM agreement and the EU-Japan agreement, the equivalence to GATS

²⁰¹ Directive 2014/66/EU of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intracorporate transfer (OJ 2014 L571/1), Article 4. This Directive is not applied in Denmark and Ireland.

²⁰² Minderhoud P and Lange T de, The Intra Corporate Transferee Directive (2018).

vertical commitments is referred to as a list of reservations.²⁰³ These lists are long, detailed, and too extensive to incorporate here. They should therefore be consulted directly. These additional reservations will be taken into account when we describe the specific implementation in relation to each Member State.

6.2 Conditions for ICT

ICT mobility is subject to a prior employment condition (or having been a partner in the enterprise other than as majority shareholders) of at least a year. The maximum duration of residence for ICT based on the GATS commitments varies between the EU Member States. Most of them have set this at three years. The GATS commitments do not include graduate trainees.²⁰⁴

The GATS Mode 4 commitments on ICT ensure mobility for two categories of natural persons. If a legal person established in a WTO Member State provides services in an EU Member State through a branch office, it can send managers and specialists to the EU location.²⁰⁵

The GATS commitments define intra-corporate transferee as:

*A natural person working within a juridical person, other than a non-profit making organisation, established in the territory of an WTO Member, and being temporarily transferred in the context of the provision of a service through commercial presence in the territory of a Community Member State; the juridical persons concerned must have their principal place of business in the territory of a WTO Member other than the Communities and their Member States and the transfer must be to an establishment (office, branch or subsidiary) of that juridical person, effectively providing like services in the territory of a Member State to which the EEC Treaty applies.*²⁰⁶

Managers are defined as:

a) Persons working in a senior position within a juridical person, who primarily direct the management of the establishment, receiving general supervision or direction principally from the board of directors or stockholders of the business or their equivalent, including: - directing the establishment or a department or sub-division of the establishment; - supervising and controlling

²⁰³ EU-CARIFORUM, Annex 4(d); EU-Japan, Annex 8-B-IV, par. 8. Note that both do include some remarks in relation to all service sectors.

²⁰⁴ The EU revised offer made during the Doha Round negotiations would add Graduate trainees to the EU's mode 4 commitments, EU Revised Offer, horizontal Mode 4 commitment.

²⁰⁵ WTO (CTS) 2006 (EU Consolidated GATS Schedule), horizontal Mode 4 commitment, under i(a) and (b) and footnote 7.

²⁰⁶ Specific details for each Member State: Italy defines intra-corporate transferee as a natural person working within a juridical person constituted as a SPA (joint stock company) or a SRL (capital stock company with limited responsibility), WTO (CTS) 2006 (EU Consolidated GATS Schedule), horizontal Mode 4 commitment, footnote 7.

the work of other supervisory, professional or managerial employees; - having the authority personally to hire and fire or recommend hiring, firing or other personnel actions.

And specialists are defined as:

b) Persons working within a juridical person who possess uncommon knowledge essential to the establishment's service, research equipment, techniques or management. In assessing such knowledge, account will be taken not only of knowledge specific to the establishment, but also of whether the person has a high level of qualification referring to a type of work or trade requiring specific technical knowledge, including membership of an accredited profession.

EU - CARIFORUM

The EU – CARIFORUM agreement adds to the terminology used in the GATS commitments for ICT (and BV), without substantively changing the concepts used. The FTA includes the term key personnel, which refers to those that are somehow involved in the setting-up or managing the activities of a commercial presence. Thus, the ICT category is included in the key personnel category.

'key personnel' means natural persons employed within a juridical person of the EC Party or of the Signatory CARIFORUM States other than a non-profit organization and who are responsible for the setting-up or the proper control, administration and operation of a commercial presence; 'key personnel' comprise 'business visitors' responsible for setting up a commercial presence and 'intra-corporate transfers'.²⁰⁷

Intra-corporate transfers is defined similarly as the GATS definition. It includes managers and specialists. The only difference in comparison to the GATS definition is the change of the word 'services' to 'production' in the specialist category. As such, specialists are: 'Persons working within a juridical person who possess uncommon knowledge essential to the commercial presence's *production*, research equipment, techniques or management.' This change relates to the broader scope of the EU – CARIFORUM FTA which is no longer confined to services trade only.²⁰⁸

²⁰⁷ EU – CARIFORUM, Article 80(2)a.

²⁰⁸ Specific details for each Member State: Scope of intra-corporate transfers BG: The number of intra-corporate transferees is not to exceed 10 % of the average annual number of the EC citizens employed by the respective Bulgarian juridical person: Where less than 100 persons are employed, the number of intra-corporate transferees may, subject to authorisation, exceed 10 %. HU: Unbound for natural persons who have been a partner in a juridical person of the other Party. Managing directors and auditors AT: Managing directors of branches of juridical persons have to be resident in Austria; natural persons responsible within a juridical person or a branch for the observance of the Austrian Trade Act must have a domicile in Austria. FI: A foreigner carrying on trade as private entrepreneur needs a trade permit and has to be permanently resident in the EC. For all sectors, except telecommunications services, nationality condition and residence requirement for the managing director of a limited company. For telecommunications services, permanent residency for the managing director. FR: The managing director of an industrial, commercial or artisanal activity, if not holder of a residence permit, needs a specific authorisation RO: The majority of the commercial companies' auditors and their deputies shall be Romanian citizens SE: The managing director of a juridical persons or a branch shall reside in Sweden.

Note that graduate trainees are defined separately, as these are not considered key personnel.

'graduate trainees' means natural persons of the EC Party or of the Signatory CARIFORUM States who have been employed by a juridical person of that EC Party or Signatory CARIFORUM State for at least one year, possess a university degree and are temporarily transferred to a commercial presence or to the parent company of the juridical person in the territory of the other Party, for career development purposes or to obtain training in business techniques or methods^{209,210}

The actual commitment for key personnel in relation to market access is: the abolishment of limitations on the total number of natural persons in the form of numerical quotas or a requirement of an economic needs test.²¹¹ Moreover, national treatment is committed to as well as discriminatory limitations are no longer allowed.²¹² Furthermore, the temporary entry and stay of key personnel and graduate trainees shall be for a period of up to three years for intra-corporate transfers, and one year for graduate trainees.²¹³

EU – Japan

The EU - Japan agreement defines intra-corporate transferees as:

natural persons who have been employed by a juridical person of a Party or have been partners in it for a minimum of one year prior to the date of their application for entry and stay in the other Party territory, and who are temporarily transferred to an enterprise in the territory of the other Party belonging to the same group of the juridical person.²¹⁴

The following categories are indicated:

²⁰⁹ (Original footnote): The recipient commercial presence may be required to submit a training programme covering the duration of the stay for prior approval, demonstrating that the purpose of the stay is for training. For Spain, France, Germany, Austria and Hungary, training must be linked to the university degree which has been obtained.

²¹⁰ EU – CARIFORUM, Article 80(2)b.

²¹¹ Specific details for each Member State: BU and HU reserve the right to impose an economic needs test for graduate trainees.

²¹² EU – CARIFORUM, Article 81 which has to be read in conjunction with the chapter containing Mode 3 commitments as the liberalization of the key personnel category is limited to the liberalization offered in Mode 3. Essentially that chapter liberalizes all sectors with a few specific exceptions. The exceptions, which are the sectors not subject to Mode 3 liberalization and therefore also not to key personnel movement are: mining, manufacturing and processing of nuclear materials; production of or trade in arms, munitions and war material; audio-visual services; national maritime cabotage; and national and international air transport services, whether scheduled or non-scheduled, and services directly related to the exercise of traffic rights, other than: (i) aircraft repair and maintenance services during which an aircraft is withdrawn from service; (ii) the selling and marketing of air transport services; (iii) computer reservation system (CRS) services; (iv) other ancillary services that facilitate the operation of air carriers, such as ground handling services, rental services of aircraft with crew, and airport management services.

²¹³ EU – CARIFORUM, Article 81.

²¹⁴ EU Japan Agreement, Article 8.21. d.

(A) managers: persons working in a senior position, who primarily direct the management of the enterprise, receiving general supervision or direction principally from the board of directors or from stockholders of the business or their equivalent, including at least: (1) directing the enterprise or a department thereof; (2) supervising and controlling the work of other supervisory, professional or managerial employees; or (3) having the personal authority to recruit and dismiss or to recommend recruitment, dismissal or other personnel-related actions.

(B) specialists: persons who possess specialised knowledge essential to the enterprise's production, research equipment, techniques, processes, procedures or management. In assessing the essential knowledge, account shall be taken not only of knowledge specific to the enterprise, but also of whether the natural person has a high level of qualification referring to a type of work or trade requiring specific technical knowledge, including membership of an accredited profession.

The permissible length of stay in general is three years with possibility for extension to the discretion of the EU Member State.²¹⁵ Detailed provisions on transparency apply, including a separate understanding relating to procedural requirements, return and readmission. The scope and obligations as defined in the investor section applies to mobility of ICT.²¹⁶ Unless otherwise provided in the Annexes containing the reservations, limitations on the number of ICT granted entry are no longer allowed.²¹⁷

The EU – Japan FTA does not provide movement rights for graduate trainees.

Besides the conditions part of the definitions provided above, all three trade agreements require the intra corporate transferee to be employed at least a year by the juridical person before a transfer to a commercial presence in the EU.

6.3 Overview Implementation ICT

Some Member States had entry schemes in place on the basis of the trade agreements, but for many Member States this was not the case. Due to the need to implement the EU-ICT Directive, ICT is probably the category of the

²¹⁵ EU – Japan, Annex 8-B-III, par 6. Specific details for each Member State: AT, CZ, SK, UK: Intra-corporate transferees need to be employed by an enterprise other than a non-profit organisation, otherwise: Unbound. BG: The number of foreign natural persons employed within a Bulgarian enterprise may not exceed ten per cent of the average annual number of citizens of the European Union employed by the respective Bulgarian enterprise. If less than 100 persons are employed, the number may, subject to authorisation, exceed ten per cent. CY: The number of foreign natural persons employed within a Cypriot enterprise may not exceed ten per cent of the average annual number of citizens of the European Union employed by the respective Cypriot enterprise. For small and medium enterprises the number of foreign personnel under this category may be subject to authorisation. FI: Senior personnel needs to be employed by an enterprise other than a non-profit organisation. HU: Natural persons who have been a partner in an enterprise do not qualify to be transferred as intra-corporate transferees. LT: Maximum length of stay is three years, EU – Japan, Annex 8-B-III, par 8.

²¹⁶ Articles 8.20(1), 8.22-8.24, EU – Japan.

²¹⁷ Article 8.25, EU – Japan.

trade agreement that is most recognized as well as most implemented. It is not always clear whether the entry routes available in the Member States for ICT are specific implementation of the trade agreements or of the EU-ICT Directive. Denmark, which is not taking part in the ICT Directive, does not have a specific entry scheme for ICT. Only for trainees a specific entry scheme is available, which allows entry for a person in training at a company. It is a different scheme than the category of trainee in the FTAs as the Danish scheme requires employment at a company in Denmark for shorter period of time with education or training as purpose.²¹⁸

6.3.1 Specific entry scheme for ICT based on trade agreements

While no specific reference to the trade agreements is made, several Member States have entry routes which refer to the definitions and conditions as provided in the trade agreements. Bulgaria has a residence permit, which is granted after decision by the Executive Director of the Employment Agency. The definitions and conditions for managers, specialists and graduate trainees follow the trade commitments. The duration of the residence permit is 3 years for managers and specialists and 1 year for graduate trainees. Note that entry may be refused in line with the Directive if the branch office was set up for the sole purpose of ICT.²¹⁹

The Czech Republic has a specific Intra-Company Employee Transfer Permit which can be obtained by managers, specialists and graduate trainees on conditions similar to the trade agreements. Similar to Bulgarian rules, the duration of the card is 3 years for managers and specialists and 1 year for graduate trainees. Entry may be refused if the branch office was set up for the sole purpose of ICT.²²⁰

Ireland has a specific entry scheme for all three ICT categories, which however does not cover a transfer of only up to three months. Minimum wage requirements are imposed, senior management and key personnel must earn 40.000 euro annually, whereas trainees must earn 30.000 euro annually. The alternative for ICT up to three months would be the Atypical Working Scheme, which deals with atypical short term employment, or other employment situations not governed by the Irish Employment Permits Act.²²¹

Slovakia has explicitly implemented the ICT category as provided in the GATS. Later, an additional route was created to implement the EU ICT Directive as well. As such, the old route now applies to ICT up to 90 days, whereas the new scheme implementing the directive applies to ICT of 90 days and more.

²¹⁸ §9 a par. 2 no. 6.

²¹⁹ Article 33p of the Law on Foreign Nationals in the Republic of Bulgaria.

²²⁰ Sec. 42k of the Act No. 326/1999 Coll., on Residence of Foreigners in the Territory of the Czech Republic.

²²¹ S. 3 A(2)(d) of the Employment Permits Act 2006, as amended by the Act of 2014, Employment Permits Regulations (S.I. No. 95 of 2017).

Slovenia's ICT entry scheme generally follows the trade commitments. However, regarding the host entity, it is necessary that this entity is actively engaged in business. One condition to demonstrate this is that the branch, if registered for less than 6 months, has invested at least 50.000 euro in the business activity in which the ICT will perform work, or in each of the last 6 months prior to the ICT application, had an inflow from the business activity in the amount of at least 10.000 euro.²²²

A specific entry route for ICT is available in Bulgaria, the Czech Republic, Finland, Italy²²³, Latvia²²⁴, Lithuania²²⁵, Luxembourg²²⁶, Malta²²⁷, the Netherlands²²⁸, Portugal²²⁹, Romania²³⁰ and Slovakia.

6.3.2 General reference to entry based on international agreements

Some Member States do not explicitly refer to ICT, rather providing entry on the basis of the WTO Agreement or international trade agreements. Croatia has an entry scheme based on international agreements. As such, managers, specialists and graduate trainees can obtain a residence and work permit based on the conditions specified in the international agreement. Specifically mentioned conditions are a prior employment condition of 9 months for managers and specialists, and 6 months for graduate trainees. Residence and work permits granted on this basis are subject to an annual quota.²³¹

Germany provides a residence title for a posting duration of up to 90 days based on a general reference to entry based on the international commitments.²³² For postings over 90 days, the ICT permit or Mobile-ICT permit (thus entry based on Directive 2014/66) is applicable.

A general reference to entry based on international trade agreements can be found in: Croatia and Germany.

²²² Art. 45.b Foreigners Act, Art. 21,23 Employment, Self-employment and Work of Foreigners Act.

²²³ Art. 27 and Art. 27 quinquies of the Consolidated Immigration Act (Legislative Decree n. 286, 25 July 1998).

²²⁴ Art. 9, 10-17, 23 Immigration Law of 31.10.2002.

²²⁵ Art. 2 (232), par. 42 of Art. 40(1), par. 1 of Art. 442(1), Art. 58(4) of the Alien's Law.

²²⁶ Note that Luxembourg amended the original entry scheme which applied to ICT, to implement the EU ICT-Directive. Articles 47 to 47(6) of the modified law of 29 August 2008 on the free movement of people and immigration, Article 141 and 142 of the Luxembourg Labour Law.

²²⁷ Art 2 ad 17 of the Conditions of entry and residence of Third Country Nationals in the framework of an Intra-Corporate Transfer Regulations, S.L. 217.21.

²²⁸ Dutch policy guidance on Labour Migration (Uitvoeringsregels behorende bij de artikelen 2, 6, 7 en 8 van de Regeling uitvoering Wet arbeid vreemdelingen, par 52 and 53.

²²⁹ According to Portuguese Law, a work visa is not required, only legal entry in order to ask for an ICT legal permit and this applies to all three categories. Several documents can be dismissed if the company is part of a list made by the Economy and Internal Affairs ministries, this certification is valid for five years. The residency permit is valid for one year and renewed for the same period up to three years for managers and specialists and one year for trainees. - Art. 3,1, gg), hh), ii), jj) and kk) and 124-A to 124-I, Aliens Act 23/2007, of 4th of July and Art. 62-B, Regulatory Decree 84/2007, of 5th of November.

²³⁰ Art. 26 GO 25/2014.

²³¹ Art. 54, 80(3) and 79a(3) of the Croatian Aliens Act.

²³² S. 29 p. 5 of the employment ordinance.

6.3.3 Implementation based on Directive 2014/66

Other Member States do not specify between entry based on the trade agreements and the EU ICT Directive. To be clear, The Netherlands, as an example, has a specific entry scheme for ICT based on the trade agreements, as well as an entry scheme for ICT based on the EU Directive. As a specific scheme exists, we do not list The Netherlands in this category, as ICT based on the trade agreements is possible without relying on the provisions that implement Directive 2014/66.

As an example, Austria has an entry scheme based on the EU Directive which thus also covers ICT based on the trade commitments. The definitions used, and the conditions imposed follow those listed in the trade agreements. A prior employment condition of 9 months applies.²³³

Belgium has also transposed the EU Directive. While the legislation is in place, it is (at the time of writing) not yet operational. As such, currently, it is necessary to rely on a specific work permit available for managerial staff and specialized technicians.²³⁴ Graduate trainees are exempted from a work permit obligation, if they do not stay longer than 3 months.

While the managerial staff permit seems to be in line with the conditions in the trade agreement, this is not the case for the work permit available for specialists. Specialists can either rely on a work permit for specialized technicians relates to installing and/or repairing machinery or equipment produced, supplied or designed by the foreign employer on the client site. This definition is far too narrow to cover the trade agreements. Moreover, the maximum duration of this work permit is six months. Alternatively, specialists could fit under the highly skilled worker category, which has as its requirement that the applicant possesses a bachelor's degree (at least 3 years of university).

For all categories the ICT must earn a certain yearly income, which varies depending on the Belgian region. Managers must earn at least 68,314 euro in Flanders, 55,431 euro in Brussels and 71,521 euro in Wallonia. For highly skilled workers, as the alternative for entry as an ICT specialist, this is a grossly salary of 42,696 euro for Flanders, 44,344 euro for Brussels and 42,869 euro for Wallonia. For Graduate trainees the salary requirement is 42,696 euro for Flanders, 42,869 euro for Wallonia and 27,715 euro for Brussels. Entry for all three categories is further conditional on a Legalized Police Clearance Certificate.

²³³ Par 58 NAG and 18a AusIBG.

²³⁴ Flanders: Decision of 7 December 2018 of the Flemish Government implementing the Law of 30 April 1999 on the employment of foreign workers, Belgian Official Gazette, 21 December 2018, art. 16, Wallonia: Decision of 16 May 2019 of the Walloon Government relating to the occupation of foreign workers and repealing the Royal Decree of 9 June 1999 implementing the Law of 30 April 1999 relating to the occupation of foreign workers, Belgian Official Gazette, 19 June 2019, art. 15, Brussels: Royal Decree of 9 June 1999 implementing the Law of 30 April 1999 relating to the occupation of foreign workers, as amended by Decision of 16 May 2019 of the Government of the Brussels-Capital Region, Belgian Official Gazette, 25 July 2018 and Decision of 16 May 2019 of the Government of the Brussels-Capital Region, Belgian Official Gazette, 4 June 2019.

France forms the example of a Member State that has specific entry schemes for the ICT categories for a duration of 90 days or longer, whereas entry up to 90 days is regulated by a different, less specific entry route.

Up to 90 days, managers and specialists can rely on a work permit exemption scheme for certain categories of activities. Note that for activities not covered, this form of implementation is insufficient, as the trade agreements scope relates to the function of the migrant (manager or specialist), and not the activity. For over 90 days, a specific entry scheme is available. The requirement of 3-month seniority of the transferee was changed to a 6 months requirement in 2018.²³⁵ For graduate trainees a specific entry route exists for a maximum duration of 1 year which in essence follows the conditions of the trade agreements.²³⁶

Implementation based on the transposition of Directive 2014/66 can be found in: Austria, Belgium (unfinished), Estonia²³⁷, France, Germany, Greece²³⁸, Hungary²³⁹, Poland²⁴⁰, Spain²⁴¹, Slovenia²⁴² and Sweden.²⁴³

An interesting trend can be noticed after a few years of practical experience with EU ICT permit applications. This merits to be highlighted. While the EU ICT scheme was primarily designed for intra-company transfers, i.e. manager/specialist/trainee temporarily assigned from one company entity outside the EU to a company entity established in an EU country for the purpose of knowledge/skills transfer, on a practical level we can notice that another scenario is more frequent across multinational companies. In fact, the EU ICT scheme is frequently used for putting (additional) staff at the disposal of the EU based group entity to help with the delivery of a service contract established between the EU based entity and the client(s) based in the same country or several other EU country(ies).

²³⁵ Assignment of less than 90 days par 180-day period: Short term work permit exemption scheme: Article L5221-2-1 and D. 5221-2-1 6° of Labour Code. Short term work permit: Article L1262-1 2° of Labour Code. Assignment between 3 and 12 months: Article R311-3 (13°) and L 311-1 of the CESEDA and Article L313-24 of the CESEDA. Assignment between 12 and 36 months: Article L313-24 of the CESEDA.

²³⁶ Article R311-3 (13°) and L 311-1 of the CESEDA and Article L313-24 of the CESEDA.

²³⁷ Aliens Act par 43 p 9, par 106 lg 13 and 14.

²³⁸ Article 127 para A 1 of Law 4251/2014.

²³⁹ TCNA Section 2/A, section 6(3) and 20/E, Government Decree 114/2007m.

²⁴⁰ Note that Poland provides entry for ICT from 90 days to 3 years (one for trainees), and also has a possibility of short-term mobility as ICT, covering the first three months. Regulation of the Minister of Home Affairs and Administration of 19 April on visas for foreigners, J.L. 2019, it. 782, Article 2 point 22; Act on foreigners, 12.12.2013, J.L. 2020, it. 35, Article 139a and further.

²⁴¹ Ley 14/2013 Section 73-74.

²⁴² Art. 45 b-f of the Foreigners Act.

²⁴³ For ICT not covered by the implementation of the EU Directive, the general rules will apply (ICT up to 90 days), which means obtaining a work permit. An exception applies to specialists, those do not require a work permit (ch 5 sec 5. 10 Aliens Ordinance). Ch 6b secs 1 and 2 Aliens Act (2005:716), ch 6b secs 3 Aliens Act.

6.3.4 Multiple entry schemes

In Germany, several entry routes can be used for managers and specialists, which allows firms choice between deploying ICT in the narrow sense of keeping the home contract or opting for a local hire in Germany. Essentially three entry categories are available, entry channels for a short-term stay - stay with a Schengen visa or a visa waiver or visa-free stay based on the ICT Directive, entry for long term ICT and entry for managers and highly qualified persons who are employed locally.²⁴⁴ For graduate trainees several options are available as well. Up to 90 days entry based on a Schengen visa for ICT training purpose, for longer stays entry based on the ICT Directive, and based on a provision which allows entry based on the GATS and trade agreements in general.²⁴⁵ Short term entry for ICT, or any form of entry based on Mode 4 is also possible based on the general reference to entry based on Mode 4. Austria has a similar additional entry scheme, besides the ICT Directive in the form of the Settlement Permit Special Cases of gainful employment (in combination with the exception from the Foreigners Employment Act for special managers)²⁴⁶.

Table 6.1 Types of ICT entry routes used in the Member States

Name of the country/Type	Specific entry route for ICT available	Entry route based on general reference to the trade agreements	ICT entry route available as provided in the EU ICT Directive
Austria (AT)			■
Belgium (BE)			■
Bulgaria (BG)	■		
Croatia (HR)		■	
Czech Republic (CZ)	■		
Cyprus (CY)			
Denmark (DK)			
Estonia (EE)			■
France (FR)	■		
Finland (FI)	■		
Germany (DE)		■	■
Greece (EL)			■
Hungary (HU)			■
Ireland (IE)	■		
Italy (IT)	■		
Latvia (LV)	■		

²⁴⁴ S. 19 par 1 Residence Act, S. 19c Residence Act; S. 3 Employment Ordinance.

²⁴⁵ S 17 Employment Ordinance, S 19(a) and (b) Residence Act.

²⁴⁶ See: <<https://www.migration.gv.at/en/types-of-immigration/permanent-immigration/other-forms-of-settlement/>>.

Name of the country/Type	Specific entry route for ICT available	Entry route based on general reference to the trade agreements	ICT entry route available as provided in the EU ICT Directive
Lithuania (LT)	■		
Luxembourg (LU)	■		
Malta (MT)	■		
Netherlands (NL)		■	
Poland (PL)			■
Portugal (PT)	■		
Romania (RO)	■		
Slovakia (SK)	■		
Slovenia (SI)			■
Spain (ES)			■
Sweden (SE)			■

6.4 Analysis

The main issue in relation to the implementation of the ICT category, as provided in the trade agreements, is that the international commitments clearly cover ICT mobility shorter than 90 days, whereas the EU-Directive has a scope that starts from 90 days. To comply with the trade agreements, it should be possible to find an entry route for ICT for a duration of up to three years (1 year for graduate trainees, which are included in the EU – CARIFORUM agreement). As the EU-ICT Directive offers access under the same conditions as the trade agreements, ICT over 90 days is well covered if the ICT Directive is implemented correctly.

According to our analysis, improvements can be made in respect of the implementation of the FTA regarding at least the following four aspects. Firstly, it should be noted that the EU legal migration directives, including the ICT Directive, allow for the use of numerical quota (volumes of admission, following from Article 79(5) TFEU). Numerical quota may not, however, be imposed under the trade commitments, unless scheduled. As only Bulgaria has scheduled a quota in relation to ICT, it is not possible for the Member States to introduce quota without contradicting their GATS commitments.²⁴⁷ Secondly, not all Member States seem to provide access for ICT shorter than 90 days under the conditions of the trade agreements. Thirdly, we have seen some conditions adopted by some Member States which may be problematic when it comes to the access provided by the trade agreements, as these conditions are not specifically listed in the international agreements, which goes to the obligation of

²⁴⁷ Only Bulgaria has scheduled quota in the FTAs indicating that a maximum of 10% of a companies staff can be foreigner/ICT.

transparency. Fourthly, a specific annual yearly income minimum, which is not specifically mentioned in the trade agreements, other than complying with labour law in general, is imposed by Belgium, Ireland and the Netherlands.²⁴⁸

Unproblematic from the perspective of the trade agreements is, according to our reading of the trade agreements, that some Member States want to ensure the genuine nature of the transfer. For this purpose some Member States require that a commercial presence must not be established *mainly for the purpose of ICT*, which is in line with the ICT Directive (Austria, Bulgaria, Czech Republic, Greece, Hungary, Malta, Sweden). Such conditions are intended to prevent ICT being used for entry of temporary labour. In some other Member States, a condition relating to the office in the home state applies as well, in the form of the condition that the undertaking in the home state must exercise a real economic activity (Austria, Greece). Slovenia imposes this criterion on the commercial presence located in its territory, thus on the host entity.

6.5 Conclusions

All Member States have an option available for ICT. This category is well recognized, not very controversial and simply implementing the EU ICT Directive, which is obligatory under EU law, already suffices to cover implementation of the trade agreements for ICT for longer than 90 days. This includes enforcement of the right to work at a clients' site.

However, as the trade agreements simply allow access for ICT for a period of one day up to three years (one year in the case of graduate trainees) under the conditions of the trade commitments, ICT up to 90 days should be clearly covered as well. As this is not the case in all Member States, this is a gap in EU legislation.

As recommended in para. 3.6 and 4.5 we suggest EU legislation for assignments shorter than 90 days to ensure that the legal entity involved in the ICT performs a genuine economic activity. Such conditions should not, however, lead to additional restrictions which are not specifically listed in the trade commitments. For example, the trade agreements in general specify that national labour law continues to apply, yet imposing higher income requirements than those applicable for domestic workers will not be in line with the trade agreements.

²⁴⁸ The Netherlands, informally (published in online FAQ, not in legislation), applies an income requirement as well. "The remuneration must be in accordance with market conditions, which is considered to be the case if the salary is in accordance with the salary threshold set in the national highly skilled migrants' scheme,

7 Investors

7.1 Introduction

Of the three investigated trade agreements, only the EU – CARIFORUM and the EU – Japan FTA refer to investors. No commitments on this category are inscribed under the GATS. Investors, as will become apparent from the description of the definition of this category provided below, only derive mobility rights from the EU – Japan FTA.

The mobility rights provided in the EU – Japan FTA to the investor category should be read in conjunction with the general investment liberalization provided in that agreement.

This chapter will therefore provide a brief overview of the scope of investment liberalization. However, the focus will lie on the mobility rights provided to natural person investors. In our opinion, the correct manner to assess these rights is as follows:

1. If a specific investment constitutes an establishment of an enterprise (a juridical person, branch or representative office), and if the conditions applying to this form of investment liberalization as provided in the FTA are fulfilled, then
2. the natural person who establishes that enterprise is granted the mobility rights provided by the FTA.

Consequently, correct implementation requires that the Member States indeed allow the establishment of an enterprise under the conditions as provided in the FTA *and* allow the investor entry and residence under the conditions as provided in the FTA. Our analysis shows that the Member States may have investor visa schemes in place, but these differ in many ways from the mobility of investors foreseen in the EU – Japan FTA.

7.2 Definition and conditions

The EU – CARIFORUM agreement connects investors to commercial presence (Mode 3). Investor is defined as:

(b) 'investor' means any natural or juridical person that performs an economic activity through setting up a commercial presence;

(c) 'investor of a Party' means a natural or juridical person of the EC Party or a natural or juridical person of a Signatory CARIFORUM State that performs an economic activity through setting up a commercial presence;

Throughout the agreement, including the Annexes and the reservations, the term investor, when used in relation to a natural person, is therefore consistently connected to setting up a commercial presence. Phrased differently, no mobility is provided to investors in relation to for instance port-folio investment.

This connection which grants rights (such as market access and national treatment) to both a natural person investor and a juridical person investor begs the question whether a natural person investor is also directly granted mobility rights.

Article 81(1), on mobility rights, indicates the following:

(...) the EC Party and the Signatory CARIFORUM States shall allow investors of the other Party to employ in their commercial presences natural persons of that other Party provided that such employees are key personnel or graduate trainees as defined in Article 80. The temporary entry and stay of key personnel and graduate trainees shall be for a period of up to three years for intra-corporate transfers, 90 days in any 12-month period for business visitors, and one year for graduate trainees.

Thus, the natural person investor may send its key personnel to the commercial presence, and when the investor fits the term 'key personnel' him or herself (which means the investor is also an ICT manager, or BVE), mobility rights are granted. As the term investor is defined as 'any natural or juridical person that performs an economic activity through setting up a commercial presence' we do not think that any natural person not being an ICT manager or BVE would fit this definition. As such, the term investor in the EU – CARIFORUM agreement does not add an additional category of natural persons enjoying mobility rights.

The EU – Japan agreement is different, as those enjoying mobility rights are clearly defined in the form of 5 separate categories, each in a hierarchically equal sub paragraph (Article 8.21(a)-to(e)). These categories are: BVE, CSS, IP, ICT and Investors. Thus, contrary to the EU-CARIFORUM agreement, investors appears to be a stand-alone category.

Article 8.20(2), in the section on entry of natural persons provides:

This Section applies to measures by a Party affecting the entry into that Party by natural persons of the other Party, who are business visitors for establishment purposes, intra-corporate transferees, investors, contractual service suppliers, independent professionals and short-term business visitors, and to measures affecting their business activities during their temporary stay in the former Party.

Investors is defined as:

natural persons who establish an enterprise, and develop or administer the operation of that enterprise in the other Party in a capacity that is supervisory

or executive, and to which that person or the juridical person employing that person has committed, or is in the process of committing, a substantial amount of capital.

Note that Article 8.2 defines "enterprise" as a juridical person or branch or representative office. Further, establishment means the setting up or the acquisition of a juridical person, including through capital participation, or the creation of a branch or representative office with a view to establishing or maintaining lasting economic links.²⁴⁹

While thus presented as a separate category, again investor is clearly connected to *establishing* an enterprise and thereafter developing or administering the operation of that enterprise. The difference with the EU – CARIFORUM agreement relates to the fact that investors under the EU – Japan agreement not only relates to commercial presence, where a branch office of the mother company in the home state is set-up, but also to the establishment of a new company in the host state, thus without a parent company existing in the home state.

Note that to rely on this form of mobility an investor needs to comply with several requirements:

- 1) Establish an enterprise (either setting up or acquisition), and
- 2) develop or administer the operation of that enterprise in a capacity that is supervisory or executive, and
- 3) to which that person or the juridical person employing that person has committed, or is in the process of committing, a substantial amount of capital.

As such, in addition to mobility rights granted to BVEP and ICT, which relate to the creation of a branch office, rights are now also granted to those who establish or acquire a company or branch office in the host state and develop or administer the operation of that company.

The investor category closely resembles the BVEP and ICT category, which provide mobility rights in relation to a commercial presence, as the investor category now also covers establishment not related to a branch office. Thus, Article 8.25 logically addresses entry and residence rights to BVEP, ICT *and* investors simultaneously. This provision furthermore provides that limitations on the total number of natural persons granted in the form of numerical quotas or the requirement of an economic needs test are no longer allowed.

7.3 Investment liberalization

To fully understand the scope of the mobility rights granted to investors, it is necessary to discuss the extent of investment liberalization provided in the FTA.

²⁴⁹ EU – Japan, Art. 8.2(i).

We will present a general overview, however, it is beyond the scope of this report to discuss the details of investment liberalization. Our basic assumption is, if the establishment of an enterprise is covered by the FTA, this triggers the mobility provisions and commitments on investors, which will therefore need to be respected by the Member States.

As explained, the investor category is limited to those who establish an enterprise. An enterprise is a juridical person or branch or representative office. The FTA defines establishment as:

the setting up or the acquisition of a juridical person, including through capital participation, or the creation of a branch or representative office, in the European Union or in Japan respectively, with a view to establishing or maintaining lasting economic links²⁵⁰

Investment liberalization essentially follows the familiar pattern of prohibiting restrictions on market access and providing national treatment (non-discrimination) in relation to establishment.

Thus, on the basis of the market access provision numerical restrictions, including economic needs test, are no longer allowed, as are numerical restrictions on the total value of transactions or assets, the number of operations or the total quantity of output. Restrictions on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment are no longer allowed as well, as are restrictions on the total number of natural persons that may be employed in a particular sector or that an enterprise may employ and who are necessary for, and directly related to, the performance of the economic activity in the form of numerical quotas or the requirement of an economic needs test. Finally, restrictions or requirement of specific types of legal entity or joint venture through which an entrepreneur of the other Party may perform an economic activity are also prohibited.

National treatment essentially requires non-discrimination in relation to establishment by nationals.

As foreign investments can be hindered by other types of measures as well, the FTA includes the prohibition of nationality requirements for members of the board, as well as a prohibition on performance obligations.²⁵¹ Importantly, various exemptions and derogations apply as well. This includes the exemption grounds (for instance based on public policy and privacy) and denial of benefits (for instance based on national security and human rights).²⁵² Finally, the right to regulate certain measures (in relation to domestic and foreign establishments) is expressly recognized in Article 8.1:

²⁵⁰ EU – Japan, Art. 8.2(i).

²⁵¹ EU – Japan, Art. 8.10 and 8.11.

²⁵² EU – Japan, Art. 8.3 and 8.13.

For the purposes of this Chapter, the Parties affirm their right to adopt within their territories regulatory measures necessary to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity.

Importantly, the Member States have inscribed various reservations.²⁵³ A random example of such a reservation is the Hungarian reservation in relation to market access. Commercial presence should take a form of limited liability company, joint-stock company or representative office. Furthermore, initial entry as a branch is not permitted except for financial services.

As indicated, discussing the details under which establishment of an enterprise is possible is beyond the scope of this report, and requires a careful analysis of the scope of the provisions relating to investment liberalization, the exemption grounds and similar limitations and the extensive list of reservations in the Annex.

7.4 Implementation in the Member States

In order to implement the trade commitments relating to investors, which are from the FTA studied in this report, only included in the EU – Japan FTA, the EU Member States need to have an entry scheme allowing one year residence for those that develop or administer, in a supervisory or executive capacity, the operation of a company, involving a substantial amount of capital. An economic needs test, quota, specific requirements relating to the investor (for instance the need to have a university degree) or the requirement that the investment will lead to a growth in employment opportunities for locals are not listed in the general provisions.

We will provide an overview of the investor related entry schemes applicable in the Member States and the types of conditions that apply to them. Where such conditions go beyond the general conditions identified above, a Member State should have made a specific reservation for it.²⁵⁴

As is the case with all categories relating to mobility, trade agreements provide temporary entry rights. The EU – Japan FTA provides entry rights to investors up to one year.

²⁵³ EU – Japan, Annex 8-II-B.

²⁵⁴ See for a general overview of investor schemes operational in 20 (including the UK) of the EU Member States, European Commission, ‘Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Investor Citizenship and Residence Schemes in the European Union’, 23 January 2019, COM (2019) 12 final.

7.4.1 *Specific entry scheme for investors*

The Czech Republic has an entry scheme available for investors which seems too restrictive.²⁵⁵ The investment must include job creation and money or other assets must be invested according to a governmental decree. The investment must be targeted on the sector that is in a specific area insufficiently represented or the manufactured products or provided services in a specific area insufficiently represented or new posts for employees will be created (especially for people with disadvantages in the labour market) or the investment shall be innovative or has potential to create further investment opportunities in the future. In our reading, such requirements can be deemed an economic needs test.

Bulgaria has several optional schemes available which may cover the EU – Japan agreement: 1) persons who carry out an activity on implementation and/or maintenance of investment certified under the Investment Promotion Law and verified by the Ministry of Economy; 2) persons who have made an investment in the country by depositing in the capital of a Bulgarian company at least 500 000 BGN (255550 euro), a scheme which is also conditional on at least 10 jobs being created for Bulgarian citizens; 4) persons who invested more than BGN 1,000,000 (511100 euro) or increased their investment by this amount; 5) deposit the amount of at least BGN 1,000,000 (511100 euro) in a licensed credit institution in Bulgaria under a trust management contract with a term of not less than 5 years, and for the same period the deposit is not used to secure other cash loans from a credit institution in Bulgaria.²⁵⁶

Estonia requires an investment to be in the public interest and significantly contributing to the development of the Estonian economy. The investment must be at least 1.000.000 euro into a company, registered in the Estonian Commercial Register, investing primarily into the Estonian economy, or has made an investment into an investment fund, which, pursuant to its investment policy, invests the resources of the fund primarily into the companies entered into the Estonian Commercial register.²⁵⁷ Depending on the investment, the residence permit for enterprise might be relevant as well.²⁵⁸ The requirements relating to the business activity are: a temporary residence permit for enterprise may be issued if the settling of an alien in Estonia shall significantly contribute to the achievement of the purpose of the residence permit granted for enterprise and the following conditions are met: - an alien has a holding in a company or he or she operates as a sole proprietor; - the company or the sole proprietor is entered into the commercial register of Estonia. Moreover, an alien who has a holding in a company and has invested at least 65,000 euros in the share capital of an Estonian company, for which real estate, machinery or equipment has been acquired and registered as fixed assets in Estonia.

²⁵⁵ Sec. 30 and following, Sec. 42n, Sec. 46 of the Act No. 326/1999 Coll., on Residence of Foreigners in the Territory of the Czech Republic.

²⁵⁶ Law on Foreigners in the Republic of Bulgaria, Art 24(1) (19) and (20) and Art. 25(1) (13) and (16).

²⁵⁷ Aliens Act par 197-2 and 197-3.

²⁵⁸ Aliens Act par 192.

Greece has an entry scheme for the purpose of making investments, however, the conditions do not seem to fit the FTA commitments. A capital contribution of 400.000 euro must be made to a company based in Greece or to a Real Estate Investment Company or in a domestic credit institution. As such, setting up a new company or a branch office of an existing company, as has to be possible based on the FTA, is not covered.²⁵⁹

Ireland requires capital to be invested in four categories, which do not cover the commitments of the EU – Japan FTA, as it is for instance not possible to set up a new company.²⁶⁰

Box 7.1: Investment options Irish Investment Programme

The Irish Investment programme offers four investment options for potential investors:

- Enterprise Investment: A minimum of €1 million invested in an Irish enterprise for a period of at least 3 years.
- Investment Fund: A minimum of €1 million invested in an approved investment fund for a period of at least 3 years. Such funds must be approved and regulated by the Central Bank.
- Real Estate Investment Trusts (REIT): A minimum investment of €2 million in any Irish REIT that is listed on the Irish Stock Exchange, for a period of at least 3 years.
- Endowment: A minimum €500,000 philanthropic donation to a project which is of public benefit to the arts, sports, health, culture or education in Ireland. Thus, among the investment options that Ireland offers, one is endowment, which is a minimum € 500,000 philanthropic donation to a project which is of public benefit to the arts, sports, health, culture or education in Ireland.²⁶¹

As the FTA investor category relates to an investment of a continuing nature, it can be argued that the mere act of purchasing is not fully complying with the definition of investment within the Trade Agreements.

In Romania, a visa and subsequent authorization to stay for an investor is conditioned on first obtaining the specialized technical approval on a business plan from the Ministry of Energy, Small and Medium Enterprises and Business Environment (MEIMMMA).²⁶² Entry is possible based on several options depending on the amount invested and the number of jobs created by the investment, for instance 100.000 euro in a limited liability company and the creation of at least 10 new jobs.

²⁵⁹ Art. 16 of Law 4251/2014, Joint Ministerial Decisions 53969/2014 and 46440/2019.

²⁶⁰ Article 8.11 EU-Japan.

²⁶¹ 'Immigrant Investor Programme Guidelines for Applicants' (2019) <<http://www.oecd.org/tax/automatic-exchange/common-reporting-standard/>> accessed 13 November 2020.

²⁶² Art. 55 GEO 194/2002 (Romanian Law).

Specific entry schemes relating to an investment of a certain amount of money are available in Bulgaria, Cyprus²⁶³, Czech Republic, Estonia, France²⁶⁴, Greece, Ireland, Italy, Latvia²⁶⁵, Lithuania²⁶⁶, Luxembourg²⁶⁷, Malta²⁶⁸, Portugal²⁶⁹, Romania, and Spain²⁷⁰.

7.4.2 *Entry based in general on the trade agreements*

Croatia has a general entry scheme based on the conditions contained in an international agreement, which therefore can also cover the investor category.²⁷¹

Germany also has a general entry scheme based on FTA commitments, which however only covers persons employed abroad, thus not covering self-employed investors. An alternative may be residence for self-employed persons, which however does not cover involvement in companies by capital provision only.²⁷²

7.4.3 *Points based system*

For newly established companies that qualify as start-up, Austria provides an example of a Member State that combines a specific investment minimum, of 100.000 euro, with a points based system. As such, the investor needs to reach sufficient points in relation to qualification, education, work experience, language skills and age.²⁷³ This points-based system does not apply to regular investors. For those, a Red-White-Red card for self-employed key workers is available. The requirement is that the self-employed occupation in Austria creates macroeconomic benefit going beyond its own operational benefit. This may be the case if:

- your intended occupation involves a sustained transfer of investment capital to Austria amounting to € 100.000 minimum or
- your intended occupation creates new jobs or secures existing jobs in Austria or

²⁶³ Section 5 and 6(2)(3)(4) Aliens and migration regulations of 1972-2013.

²⁶⁴ Article L.313-20 7, R313-63 to R313-64-1 of the CESEDA. Investment of at least 300.000 euro, safeguard or create jobs.

²⁶⁵ Art. 9, 10-17, 23 Immigration Law of 31.10.2002.

²⁶⁶ Para. 2/1 of Art. 45 (1), 45 (3), 45 (4), 45 (5) of the Lithuanian Aliens' Law. Note that 5 jobs need to be created.

²⁶⁷ Art. 53bis to 53quater of the modified Law of 29 August 2008 on the free movement of people and immigration, Art. 28 of the Law of 2 September 2011 regulating the access to the professions. An investment of 500.000 euro is required and 5 jobs must be created.

²⁶⁸ Article 6, S.L. 217.18 and Article 4, L.N. 47 of 2014 MALTESE CITIZENSHIP ACT (CAP. 188).

²⁶⁹ Aliens Act 23/2007, of 4th of July Art. 3.^o (ii), Article 60.^o (2) and Art. 90 – A; Regulatory Decree 84/2007 of 5th of November.

²⁷⁰ Ley 14/2013 Sections 61-64. Note that the investment must relate to a project proved to be of general interest.

²⁷¹ Art. 54, 77 and 81 Croatian Aliens Act.

²⁷² S. 21(2) Residence Act, S. 29 par 5 Employment Ordinance.

²⁷³ § 41 NAG, § 12b and 24 AuslBG.

- your establishment involves the transfer of know-how respectively the introduction of new technologies or
- your business is of considerable significance for the entire region.²⁷⁴

The Dutch entry scheme for business purposes applies a points based system, including an economic needs test, but does not require a minimum investment.²⁷⁵ Its investor scheme is set apart from the entry for business purposes by not requiring the investor to actively participate in management activities. The Dutch requirements are:

1. the foreign national invests an amount of at least € 1,250,000 in a foreign national established in the Netherlands:
 - a. innovative enterprise;
 - b. contractual partnership that invests in one or more innovative enterprise(s);
 - c. fund that, according to the Ministry of Economic Affairs, fits within the SEED scheme; or
2. the amount to be invested has been deposited into a bank account of a Dutch bank or a bank of an EU Member State with an establishment in the Netherlands under the supervision of Central Bank of the Netherlands. (Article 3.29a, second paragraph, Dutch Aliens Decree).

Thus, a minimum investment is required and an economic needs test applies as the investment has to have innovative added value for the Dutch economy which is tested by a special division of the Ministry of Economic Affairs. Both the investor permit and the business permit are unpopular in the Netherlands because the economic needs tests are time consuming and difficult to pass.²⁷⁶ Neither of these Dutch schemes appear to be a full implementation of the EU-Japan FTA.

A points based system is applied in Austria (for investors relating to start-up companies) and the Netherlands.

Imagine the sole objective of a wealthy Japanese national is to obtain residence in an EU country. It would be easier to do so in a country which only requires an investment of a certain sum in the national budget of the host country, or investment in government bonds than in a country where an economic activity is required, for instance investing in an innovative company²⁷⁷. Whereas in the first instance obtaining a residence right is not necessary to manage the investment made, the supervision of a company in the host country and the evolution of such an investment justifies the need for a residence permit, which should be covered by EU's trade agreements. In this context, a more uniform approach at EU level would help avoiding

²⁷⁴ See the government website: <<https://www.migration.gv.at/en/types-of-immigration/permanent-immigration/self-employedkeyworkers/>>

²⁷⁵ Tesseltje De Lange, 'Welcoming Talent ? A Comparative Study of Immigrant Entrepreneurs ' Entry Policies in France , Germany and the Netherlands' (2018) 6 Comparative Migration Studies.

²⁷⁶ Interview the Netherlands, 9-9-2020. Entrepreneurs may choose to become an employee of their company and opt for entry under the national high-skilled migrant scheme. This is a viable alternative as long as they do not own more than 30% of the shares in the company.

forum shopping for residence rights in the EU, and fill in the gaps, as several EU countries do not have such entry routes for Investors. Investor programs aimed at long term residency rights remain outside the scope of trade agreements.

7.4.4 *No specific scheme available*

Belgium has no specific entry scheme for investors. The expert indicates that a professional card for a self-employed person should be obtained. This card requires the performed activity to add economic value to the region, which may be the case based on useful investments. Note that this card may be granted based on other criteria, such as an economic need and employment opportunities, however, for Japanese nationals the amount of investment involved meeting the requirement of a substantial amount of capital should be sufficient.²⁷⁸ Investors will automatically be registered at the entrepreneurs' office (application for a company number and VAT number).

Hungary also has no entry scheme for investors, and the consulted expert indicates that an investor would have to rely on for example the scheme available for either a gainful activity or for employment purposes.

In relation to Finland²⁷⁹, Slovakia²⁸⁰, and Sweden²⁸¹, investors need to rely on what essentially is entry for business purposes. In Slovenia, investors might be able to rely on an entry scheme available for agents of companies.²⁸²

Member States that do not have a specific entry scheme for investors are Belgium, Denmark, Finland, Hungary, Poland, Slovakia, Slovenia and Sweden.

7.4.5 *Additional conditions*

Various Member States require an investment of a specific sum in relation to the granting of a residence permit for investors, ranging up to 1.000.000 euro. This requirement should be assessed on the basis of the substantive chapter on investment liberalization. While for example the FTA between the EU and Canada, the CETA, specifically mentions a minimum investment in order to rely on the agreement, this is not the case for the FTA with Japan. As such, as long as the definitive sum required for entry relates to a 'substantial amount of capital', such conditions are in line with the EU – Japan FTA.

Bulgaria, France, Lithuania, Luxembourg and Romania all refer to the condition that employment opportunities must be created by the investment. Spain requires either of the following conditions to be fulfilled: the creation of jobs; making an investment with relevant socio-economic impact in the geographic

²⁷⁸ Royal Decree of 2 August 1965, implementing the Law of 19 February 1965 on the exercise of self-employed activities by foreign nationals, Belgian Official Gazette 29 September 1965.

²⁷⁹ <https://migri.fi/en/entrepreneur>.

²⁸⁰ Not specified.

²⁸¹ Ch. 5 sec 5 and 10 Aliens Act.

²⁸² Art. 37 Foreigners Act, Art. 27 Employment, Self-Employment and Work of Foreigners Act.

area where the activity will be carried out; or a relevant contribution to scientific and/or technological innovation. If such a requirement is imposed, a reservation should have been made in the EU – Japan agreement, as no such condition is part of the definition or the general conditions relating to the investor category under that agreement.

Some Member States require the investment to relate to a public good, or in any way contribute to the region. This requirement too is not part of the investor category as liberalized under the FTA. As such, a reservation should have been made if a Member State only allows investment related to a beneficial affect for the region or country, which may be considered as a prohibited economic needs test. The report of Milieu 2018 also shows that as part of the investment requirements, some Member States do impose an economic needs test. The Milieu report²⁸³ shows that for example in some States,²⁸⁴ the criteria for assessing the economic added value of a professional activity is dependent on the economic need of the region along with some other requirements.²⁸⁵

Table 7.1 Duration of stay of TCN for investor/business purpose.

Name of the country/	Investor visa/ residence permit and length first authorisation	Extendable	None	Maximum 12 months, non-extendable
Austria	■ (2 yr)	■ (3 yr)		
Belgium				
Bulgaria				
Croatia				
Czech Republic				
Cyprus	NA			
Denmark	NA		■	
Estonia	■ (5 yrs)			
Finland	■			
France	■ (4 yrs)	■ (4 yrs)		
Germany	■ (3 yrs)	■ (5 yrs)		
Italy				
Latvia				
Lithuania	■ (3 yrs)	?		
Luxembourg				
Malta	■ (indef)			
Netherlands	■ (5 yr)	■ (5 yr)		
Poland			■	

²⁸³ (n.1), p. 30.

²⁸⁴ Belgium, Cyprus, Slovakia, Slovenia.

²⁸⁵ High company capital, economic needs of the region, economic repercussions for companies in the region, creation of employment, promotion of export, and undertaking innovative or specialized activities are taken into account.

Name of the country/	Investor visa/ residence permit and length first authorisation	Extendable	None	Maximum 12 months, non-extendable
Portugal	■ (1 yr)	■ 2yrs		
Romania	■ (1 yr/3yrs)	■ 1yr		
Slovakia				
Slovenia	■ (1 yr)	■ 2yrs		
Spain	■ (1yr / 2 yrs)	■ 5 yrs		
Sweden			■	

7.5 Conclusion

Various Member States provide for an entry scheme which covers, or partly covers the EU – Japan commitments relating to investors. Where such schemes require a minimum sum to be invested, this is in line with the trade agreement, as long as the amount can still be considered as not exceeding a substantial amount of capital. Other frequently encountered conditions are more problematic. Job creation or the requirement that the investment serves a public good are not criteria described in the general conditions that apply to the investor category in the FTA. Such requirements may only be imposed if specifically reserved in the Annex to the EU – Japan FTA.

The possibility to rely on an entry scheme in general on ‘the trade commitments of an FTA’ may indeed lead to entry for Japanese investors, but this form of implementation is not transparent. It requires both the authorities and the person relying on the trade commitments to have knowledge of the FTA and the commitments itself.

Several Member States do not have a scheme specifically covering investors, nor entry based on the trade agreements in general. In such Member States, an alternative scheme is needed. The points based system entry schemes are not entirely suitable for investors, as such schemes require the investor to obtain a certain amount of points in relation to irrelevant conditions (language, skill level) from the perspective of the FTA and investment. However, such conditions may be considered to relate to legitimate migration related concerns (the orderly movement of persons across borders), a matter which will be discussed in the conclusions of this report. Entry based on business activities or acting as an agent may or may not be suitable alternatives for the investor category.

Given the significant differences in implementation at the national level, the manner in which entry schemes for different purposes sometimes have to be matched with CSS and the finding that sometimes no suitable entry scheme is

available, by way of recommendation we suggest EU legislation to harmonize the conditions of entry and stay of investors.

Alternatively, we suggest for assignments shorter than three months, amending the Schengen legislation (Article 6(3) of the Visa Regulation 2018/1806) to include a comprehensive list (in line with the trade agreement commitments) of activities which must not give rise to the application of the “paid activity” exception to both business visitors’ categories. This might also require amending Annex I to the Schengen Borders Code to list all documents which could be used for the purpose of verifying the entry conditions of a business travel. For this purpose we also refer to our recommendation on the implementation of the BV category (para 3.6). For assignment longer than three months, each of the Member States should then ensure proper implementation themselves.

8 Rights

8.1 Family Reunification in relation to Trade in the EU Member States

8.1.1 Introduction

Besides entry and residence rights for trade related purposes, rights to family reunification may affect a TCNs choice to (temporarily) stay and work in the European Union. These rights are in part already regulated by EU law (Family Reunification Directive 2003/86/EC²⁸⁶ (FRD) and derogations there off in the ICT Directive 2014/66/EU). It bares relevance to our topic in respect of those TCNs moving under FTA for the purpose of legal residence, but not for temporary stay on the basis of a visa. If not covered by existing EU law, the right to family reunification is regulated in national migration law and laws on the access to the national labour market for TCNs.

Note must be taken that most FTAs *do not impose any obligation* on contracting states with regard to family reunification. We discuss these entitlements in light of the notion that family reunification and family member access to (self)employment can be helpful in attracting talent to come and work in the EU.

After a brief outline of the existing EU legal framework on family migration, the right to family reunification is analysed based on the duration of stay of the sponsor, with specific attention paid to Investors. Member states have varying national interpretations of which family members may accompany the TCN travelling to the EU for trade related purposes. Beyond the core family such variations are not covered by the Family Reunification Directive and will not be mapped here.²⁸⁷

8.1.2 The existing EU legal framework on family migration

The FRD determines the conditions for the exercise of the right to family reunification by TCNs residing lawfully in the territory of the Member States. According to Article 3(1) FRD a sponsor must have reasonable prospects of obtaining permanent residence; Article 8 of the FRD, Member States may require a sponsor to have stayed lawfully in their territory for a period not exceeding two years, before having his/her family members join him/her. If a Member State applies such a waiting period it means TCNs mobile pursuant to the international trade agreements, with the exception of ICT managers and specialists and investors, are not eligible for family reunification because those are unlikely to stay beyond the two year threshold.

²⁸⁶ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

²⁸⁷ Article 4 Family Reunification Directive 2003/86/EU.

Family reunification under the scope of the ICT Directive derogates from Article 3(1) and Article 8 of the FRD in Article 19: ICTs are eligible for family reunification without the need to wait or without having a prospect of permanent residence. Family members can accompany the manager, specialist and trainee upon entry into the EU. Family members should also gain access to employment and self-employment for the duration of the residence permit of the sponsor without the application of a labour market test. The conformity assessment of the transposition of the ICT Directive performed in 2019 suggests that in general Member States comply with Article 19(6) ICT Directive on access to employment and self-employment.²⁸⁸

There is no common EU-level admission scheme for TCN self-employed or investors, these categories fall within the general framework of the FRD or national derogations thereof which may not go below the minimum level of requirements as set in the FRD.

Article 14 FRD says the sponsor's family members shall be entitled, in the same way as the sponsor, to access to employment and self-employed activity (with a possible time limit for engaging in employment).

8.1.3 Member State specific schemes for family travel & reunification

In our discussion of the Member States' schemes, the right to family migration of TCNs mobile under the FTA is arranged by length of stay of the sponsor, as this defines the relevant migration laws. Under the trade agreements, the duration of stay should not make a difference.

- a) less than 90 days,
- b) more than 90 days up to one year,
- c) more than one year,
- d) more two years, or
- e) no time limits

8.1.3.1 Less than 90 days

For stays up to 90 days accompanying family members can travel to the EU visa free with a valid passport if, based on their nationality, they do not require a visa. Otherwise, they can obtain a Schengen visa. The Visa Code Handbook lists requirements for visa for business travel or for family visits but the Handbook does not specifically mention conditions for visa for accompanying family members of business visitors. Literature nor case law provides further insights into whether this type of travel is at all problematic.

All Member States allow family members who require a visa to enter the EU to apply for a Schengen visa according to "normal" procedures. The following

²⁸⁸ Milieu Law & Policy Consulting, 2019, p. 38. In October 2020, the Permits Foundation also mapped the access to work for accompanying spouses and found most EU Member States offer access. See <https://www.permitsfoundation.com/worldmap/>, last accessed 13 November 2020.

Member States have explicitly reported that no special procedures are in place and hence refer to the ordinary visa procedures: Austria, Belgium, France, Finland, Greece, Ireland, Luxembourg, Netherlands, Malta, Poland, Portugal, Romania, Slovakia, Spain. The visa for family members will not explicitly link to the status of the main applicant.

For the visa conditions of accompanying dependents, Latvia explicitly refers to the conditions as applicable to the TCN employee of a foreign Contractual Service Supplier.²⁸⁹ In Latvia, the family member of a third-country national who has been granted the right to employment with a specified employer or the right to perform commercial activities, also has a right to employment without restrictions.²⁹⁰

The online information on the Dutch “Orange Carpet Visa”, a facilitated procedure for business travellers discussed above, does not mention if this facility applies to accompanying family members.

Member States not yet part of the Schengen area have their own visa policy. Bulgaria allows business visitor to be accompanied by family members, secretary, driver, translator or other “support staff”.²⁹¹

In general, accompanying spouses may not be (self)employed during a visa free stay up to 90 days or, if required, holding a visa for a stay up to 90 days.

8.1.3.2 More than 90 days up to one year

Long-stay visa

The Czech Republic offers accompanying dependents the option of a long-term visa. The long-term visa for the family purpose may be issued for the necessary period, however for the maximum of 1 year. The Ministry of Interior shall decide on application within period of 90 days following the delivery of request, in more complicated cases up to 120 days from the date of lodging the application. France also offers a long-stay visa for stay exceeding 90 days per 180-day period which can be applied for at a French Consulate.²⁹²

Temporary residence permits

CSS and IP ought to gain admission to the Member States for temporary stays of a one year maximum. Some Member States have an exceptional procedure for accompanying family in place for stays up to one year. E.g. Croatia offers a temporary residence permit to immediate family members of TCN workers granted temporary residence pursuant to an international agreement which

²⁸⁹ Art.23 (4) Latvian Immigration Law of 31.10.2002.

²⁹⁰ Art.9 (5) 26) Immigration Law of 31.10.2002.

26) a temporary residence permit as a family member of a foreigner who has been granted the right to employment with a specified employer or the right to perform commercial activities.

²⁹¹ Bulgarian Ordinance on the terms and conditions for issuing visas and determination of the visa regime.

²⁹² Article R311-3 of French CESEDA and Arrêté du 13 février 2019 relatif à la validation du visa de long séjour valant titre de séjour (for post arrival process).

can be applied for abroad or at a local policy department. This is equally so for those who require a visa to enter the Republic of Croatia where temporary residence for the purpose of family reunification may be granted to a TCN who fulfils the requirements, but access to the national labour market is not granted.²⁹³

In Italy the dependent of a foreign citizen in possession of a 1 year permit can apply for a residence permit for family reasons. This Italian permit entitles the holder to work and live in the country for the same duration as the main applicant permit.²⁹⁴ Latvia also offers temporary residence *and* access to the labour market for accompanying spouses.²⁹⁵

8.1.3.3 More than one year

Malta only allows for family reunification with a TCN sponsor holding a residence permit valid for a minimum period of one year *with reasonable prospects of obtaining the right of permanent residence*. Hence, most trade related mobility but for ICT and investment, would not permit family reunification to Malta.²⁹⁶

In Romania the holder of a residence permit for one year can ask for family reunification, there is no requirement of a reasonable prospect of permanent residence.²⁹⁷ Such family members are entitled to perform economic or professional activities as well as be employed.²⁹⁸

France has no favourable process for accompanying family (spouse and minor children) in case of trade related mobility. Thus the general rules apply, which means France only allows for family reunification once the sponsor reaches the 18-months of stay in France.²⁹⁹ In practice, both for CSS and IP family members, entry as a visitor is possible. This is decided in practice by the relevant authorities.

8.1.3.4 Two years or longer

As a general rule in Lithuania, third-country nationals can invite their family members only after having resided for at least 2 years. However, Lithuanian law derogates from this restriction for family members of TCN who are nationals of

²⁹³ Art 54 of the Croatian Aliens Act set general requirements: to prove the purpose of temporary residence, a valid travel document, means of subsistence, health insurance, no ban on entry and stay in the Republic of Croatia and not pose a threat to public order, national security or public health. Art. 48, 54, 55, 56, 57 and 59 of the Croatian Aliens Act and Regulations (Ordinance) on the Status and Work of Third-Country Nationals in the Republic of Croatia.

²⁹⁴ Article 29 and 30 of Consolidated Italian Immigration act (LEGISLATIVE DECREE n. 286 25 July 1998).

²⁹⁵ Art.9 (5) 26) Immigration Law of 31.10.2002. reads: "(5) The right to employment without restrictions shall be granted to a foreigner who has received: [...] 26) a temporary residence permit as a family member of a foreigner who has been granted the right to employment with a specified employer or the right to perform commercial activities."

²⁹⁶ Art 16 of S.L. 217.21 and Art 3 of Maltese Family Reunification regulations S.L. 217.06.

²⁹⁷ Art. 46/1+2 GEO 194/2002 (Romanian Law).

²⁹⁸ Art. 65 GEO 194/2002(Romanian Law).

²⁹⁹ Articles L411-1 to L431-3 of the French CESEDA.

Australia, Japan, United Kingdom, USA, Canada, New Zealand, South Korea who intend to work or engage in other lawful activities in Lithuania. Their family members may immediately apply for a temporary residence.³⁰⁰

8.1.3.5 No time limits

Countries not specifically discussed above do not restrict family reunification to a minimum length of stay of the sponsor beyond 90 days under the condition of the sponsor having a residence permit. These include Belgium, Bulgaria, the Netherlands, Poland and Portugal.³⁰¹ The duration of their stay will be aligned with the duration of stay of the main permit holder.

In Spain all the family dependents of holders of a permit regulated by the law on Entrepreneurs and their Internationalization (the main act regulating several of the here discussed categories) receive a permit aligned with the duration of stay of the main permit holder. Dependents of legal age are authorised to work as employee or freelancers

Whether these family migrants have an immediate access to (self)employment differs. E.g. in Belgium and the Netherlands dependents are authorised to work automatically (limited though to employee positions). Should the family members in Belgium wish to take up self-employed activities, there is still the need to obtain a professional card.³⁰²

8.1.4 Family migrants of investors and self-employed

Although Article 16 of the FRD dictates family members shall have access to employment and self-employment (after a period), this does not appear to be the case in all Member States. Again, this is not necessarily in conflict with the requirements set out under the FTA.

Self-employed TCN or investors can, in most Member States, be accompanied by their spouse from the start (no waiting periods apply). This applies to Austria, where family members of an investor holding a “Rot-Weiß-Rot-Karte” can apply for a so called “Rot-Weiß-Rot Karte plus”, either by way of accompanying the investor or by way of a later reunification.³⁰³ In France, investor’s spouses

³⁰⁰ Art. 2 (26) and 40 (6) of the Lithuanian Aliens’ Law.

³⁰¹ Article 98.^º Aliens Act, A citizen with a valid residence permit has the right to family reunification with the family members that are abroad, with whom he/she have lived in another country, or that are dependent on him/her or lived in cohabitation, whether the family relationship arose before or after the citizen's entry in Portugal. Art. 100.^º of the Aliens Act provides that family reunification may be authorized for partners and minor or dependent children of the partner.

³⁰² Belgium changed its legislation early 2019 has created a clear distinction between self-employed activities and activities as an employee. However, a professional card is provided in an easier manner for applicants already legally residing in Belgium. This means that family members, whose residence rights are based on the main applicants status, can more easily obtain a professional card linked to the duration of their residence permit. Law of 15 December 1980 regarding the entry, residence, settlement and removal of foreign nationals (Belgium Immigration Act), art. 10 Royal Decree of 2 September 2018 implementing the Law of 9 May 2018 Act on the employment of foreign nationals in a specific residence situation, Belgian Official Gazette 17 September 2018, art. 10, 8^º.

³⁰³ § 46 NAG (Austrian Immigration Law).

and children can benefit from favourable provisions. They are eligible to the dependent immigration category “Passeport Talent Famille”. This status also allows the spouse to work. The duration of stay in France is aligned with the duration of stay of the investor.³⁰⁴ For Spain, family dependents of holders of investor, entrepreneur, National-ICt(IP) permits regulated by the law on Entrepreneurs and their Internationalization receive a permit aligned with the duration of stay of the main permit holder. Dependents of legal age are authorised to work as employee or freelancers

TCN investors coming to Greece³⁰⁵, Lithuania³⁰⁶, Luxembourg, the Netherlands, and Malta can also immediately be accompanied by their family members who shall be granted a residence permit for family reunification, expiring simultaneously with the residence permit of the sponsors. For Slovenia, family reunification is possible based on the following general rule: after one year of legal stay in Slovenia plus a prolonged stay for a minimum of one year.³⁰⁷ Certain categories have no waiting time limits for family reunification, such as Blue Card holders, ICT transferee and researchers.

Not all Member States grant the spouse of an investor (or self-employed residence permit holder) access to their labour markets though. E.g. Luxembourg does not grant labour market access. Dependents of investors cannot work in Malta either, they would need to apply for a work permit. In Slovenia accompanying dependents of a person with the temporary residence permit for the purpose of work (which includes investments) may only work after obtaining a work permit from Labour office but after 12 months of residence the work permit is no longer needed. The condition of one year of previous residence shall not apply to a TCN who him- or herself enters in the business register as a person who will perform an independent professional activity (i.e. sole proprietor, so called s.p. status in Slovenian). Thus, free access to self-employed is given in general. However, some self-employed positions could not be carried out with the s.p. status, for example attorneys, detectives, private practitioners of medicine, etc. In e.g. the Netherlands, an American entrepreneur successfully went to court to claim, with reference to the FRD, a right to (self)employment for his spouse.³⁰⁸ This case eventually led to a change of national regulation in this respect, allowing the spouse of an entrepreneur to work as self-employed; however for work in employment a work permit (and labour market test) applies.³⁰⁹

Our Latvian expert explicitly notes that the fee to be paid by the investor (EUR 10,000) is not required from the investor's dependents; this is also the case for the Netherlands.³¹⁰

³⁰⁴ Article L313-21 of the French CESEDA.

³⁰⁵ Article 16A(5) and 16B(4) of Greek Law 4251/2014.

³⁰⁶ Article 40 (6) of the Lithuanian Aliens' Law.

³⁰⁷ Art. 47 of the Foreigners Act.

³⁰⁸ District Court The Hague, 10 August, 2016, <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2016:10629>. The Immigration Authorities appealed the decision without success.

³⁰⁹ WI 2019/5 Dutch Regulation (Werkinstructie) on labour market access for stays longer than 3 months, 28 March 2019.

³¹⁰ <https://ind.nl/Paginas/Kosten.aspx>, last accessed 13 November 2020.

8.1.5 Conclusion

For short term stays no longer than 90 days, accompanying family can either travel into the EU visa free or obtain a visa through the “normal” procedures. Some Member States have additional specific long term visa however, which appears to be more facilitating towards accompanying family members of TCNs seeking temporary market access under the trade agreements, than “normal” visa procedures. A common EU visa policy for movement into the EU related to the trade agreements could benefit from a related long stay visa for family members. The trade agreements do not prescribe access to (self)employment for family members during such a short stay hence, the Member States remain free to apply their own laws in this respect.

In some Member State (France) there is a gap between stays longer than 90 days but not lasting 18 months, as France applied a waiting period for family reunification. French law derogates from this general restriction in case of special categories, such as ICT and Investors, but not for CSS or IP, while TCN performing services under these categories could possibly need to stay longer than 90 days, up to one year. Their family will not be able to remain with them during the whole period of stay and could only visit (multiple times) for in total no more than 90 days in 180 days on a “normal” visa.

Other Member States (Lithuania) derogate from general restrictions on family reunification based on the nationality of the sponsor.

We recommend that the Visa Code Handbook lay out in more detail trade related visa’s and include specific reference to facilitating visa for accompanying family members. Given the current variety amongst Member State of possibilities for family reunification likely hinders transparency and mobility between the Member States.

It is generally accepted that to attract talent to stay in the EU for longer periods (See ICT Directive, Blue Card Directive, researchers under the Students and Researchers Directive, Family Reunification Directive) facilitating family reunification is perceived to positively impact economic migration. If we assume this is also the case for temporary trade related migration, a family reunification scheme and derogations from the Family Reunification Directive as in said Directives could contribute to take away perceived barriers to trade related (temporary) migration which possibly restrict market access unnecessarily.

8.2 Social Security Entitlements

8.2.1 Introduction

The rights that come with temporary stay or residence may have a substantial impact on the choice of e.g. service suppliers or independent professionals to come and work in the EU. There is a blanket reference in the GATS - EU Mode 4 horizontal commitment which provides that all EU and Member States laws

and regulations regarding social security measures shall continue to apply. National social security law thus continues to apply, as long as it does not constitute discriminatory limitations within the meaning of the FTA.³¹¹ It is to the discretion of the EU Member States to what extent they open their social security systems for TCN moving under the scope of the FTA. This chapter thus does not investigate possible conflicts of Member State law and practice with the FTA but rather, it is a preliminary investigation into best practices in the Member States of their social security systems and its inclusion of TCN staying or residing in their country for trade related purposes.

8.2.2 *The existing EU legal framework on social security rights*

Under the existing EU legal framework on social security rights, third-country nationals who work in more than one Member State are covered by Regulation 1231/2010, which extends the provisions of Regulation 883/2004 and Regulation 987/2009 to them. Legal residence should be a prerequisite for the application of these Regulations.³¹² In the *Balandin* case (better known as Holiday on Ice) the CJEU ruled that having a residence permit because of stay for more than 90 days could be considered as having residence, or when family has moved along, thus legal residence for this purpose is different from the concept of ‘domicile’ or ‘permanent residence’.³¹³ In this case TCN were employed in one Member State and stayed in several other Member States for temporary work purposes. The duration of the presence nor the fact that the third-country nationals continue to ‘live’ outside the EU are of fundamental importance to determine whether they are regularly present on the territory of the EU. Given the fact that TCN moving under the FTA coming from outside the EU barely move within the EU, the relevance of Regulation 1231/2010 appears to be limited.

Only investors, at least under the FTA with Japan, are eligible for a legal residence for one year, which means once they obtain legal residence, they will fall within the scope of Regulation (EU) 1231/2010.³¹⁴

Another legal framework is provided by the ICT Directive 2014/66. Intra corporate transferees covered under this Directive have the same right regarding social security benefits as the nationals of the EU Member state ‘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 security legislation in one of those countries’ (article 18(2)(c) ICT Directive). These bilateral social security agreements mostly include provisions according to which seconded workers remain subject to the social security system of the country of origin, sometimes up to

³¹¹ See such as Article 83 (2) and (3) of the EU – CARIFORUM agreement.

³¹² Preamble (11) Regulation (EU) 1231/2010.

³¹³ CJEU 24 January 2019, C-477/17.

³¹⁴ It falls outside the scope of this study to verify if the Member States comply with these EU Regulations.

a period of 60 months.³¹⁵ Also, member States may exclude TCN who have been authorized to reside and work in the territory of a Member State as ICT and fall under the social security system of that Member State for a period not exceeding nine months from family benefits.³¹⁶

According to Article 18(1) ICT Directive, they enjoy at least equal treatment with persons covered by the Posting Directive 96/71/EC with regard to the terms and conditions of employment in accordance with Article 3 of Directive 96/71/EC. As the legal position of *posted workers* under Directive 96/71/EC has improved with the coming into force of Directive 2018/957, this has impact on ICT and their terms and conditions of employment too.³¹⁷ This is without prejudice to Article 4(5) of the ICT Directive, which provides that remuneration granted to TCN during the intra-corporate transfer must not be less favourable than the remuneration granted to nationals occupying a comparable position in the Member State where the work is carried out.³¹⁸

In practice most TCN moving under the FTA may have temporary legal *stay* in the EU (based on a visa for business purposes or a visa-exemption) but do not obtain legal *residence*. In case of a stay for a longer period than 90 days in a 6 month period they may have a residence permit. Thus only those categories staying longer than 90 days with legal residence have access to social security rights, partially under the scope of the ICT Directive.³¹⁹

Whether there is coordination between EU Member States and the home country of the FTA on which social security legislation applies and what social security entitlements exist, depends on whether there is bilateral social security agreement. Bilateral social security agreements contain provisions in terms of applicable legislation and state that, as a rule, only one single national social security system applies. For those that are temporarily seconded to an EU Member State the home social security scheme (with an exemption from host

³¹⁵ Herwig Verschueren, 'The Role of Employment and Social Security Rights in the Intra-Corporate Transfer Directive', in: Paul Minderhoud & Tesseltje de Lange, *The Intra Corporate Transferee Directive: Central Themes, Problem Issues and Implementation in Selected Member States* (2018) Oisterwijk: Wolf Legal Publishers, p. 35-54).

³¹⁶ Article 18(3) ICT Directive 2014/66/EU.

³¹⁷ Council Directive (EU) 2018/957 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (OJ 2018 L 173). Article 3 as amended by Directive 2018/957/EU, requires Member States to ensure equal treatment of posted workers on their territory with respect to the terms and conditions of employment covering the following matters which are laid down in the Member State where the work is carried out in law or collective agreements: (a) maximum work periods and minimum rest periods; (b) minimum paid annual leave; (c) remuneration, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes; (d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings; (e) health, safety and hygiene at work; (f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people; (g) equality of treatment between men and women and other provisions on non-discrimination; (h) the conditions of workers' accommodation where provided by the employer to workers away from their regular place of work; (i) allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons.

³¹⁸ Article 18 ICT Directive; Verschueren 2016; see for a more extensive discussion: Verschueren 2018.

³¹⁹ Article 18(2) c and d and Article 18(3) ICT Directive 2014/66/EU.

social security) is applicable if certain eligibility conditions are fulfilled. This is relevant for BV, CSS, and for ICT. Depending on the scope of such bilateral agreements, this can be equally relevant for the self-employed. In addition, non-contributory social assistance, commonly part of a national general public welfare program, is generally not accessible to TCN who arrive through trade related schemes or for other purposes related to employment or self-employment. Indeed, most TCN they are likely to lose their right to reside in the event of a need for assistance under the general public welfare program.

It must be noted that the existing EU legal framework on equal treatment with respect to social security of third-country national *workers*, as laid down in the Single Permit Directive 2011/98/EU does not apply in this context. Posted workers and self-employed persons fall outside its scope.³²⁰ Besides, third-country nationals moving into the EU under the FTA are likely not to be qualified as 'workers' in the sense of this Directive. Hence Article 12 of that Directive, on the enjoyment of equal treatment in respect of branches of social security, does not apply.³²¹

8.2.3 Member State specific schemes

Due to the great variety of schemes applicable, we present the country details in figure 8.2. Health insurance is mandatory in any case, either in the country of origin/sending state or in the receiving state. In general we see the following options applied:

Figure 8.1 Insurance related to type of stay

Type of stay	Insurance in Sending State or Receiving State
Based on a visa	TCN without a residence permit but staying on a visa remain insured in home Member State depending on application of home social security legislation or bilateral agreement and would thus not be insured in the receiving Member State; In order to obtain Schengen visa, it is important to prove health insurance to cover costs in host country;
Residence permit as employee	TCN with a residence permit as employee remain insured in the country of origin based on bilateral Social Security agreements or national legislation
	TCN with a residence permit as employee where there is no bilateral Social Security agreement in place (or it assigns the receiving state) may be insured in the receiving Member State as Posted Workers (an ICT-Directive like scheme).
	TCN with a residence permit employed in the sending state, where there is no bilateral Social Security agreement in place can be insured in the sending state depending on the national legislation.
Residence permit as self-employed	TCN with a residence permit as self-employed remain insured in the country of origin depending on the applicability and content of bilateral Social Security agreements

³²⁰ Article 3(2)c and 3(2)k Single Permit Directive.

³²¹ As defined in Regulation (EC) No 883/2004.

	TCN with a residence permit as self-employed must or may voluntary take social security insurance in the receiving country, depending on the national legislation.
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Besides the question of legal stay or legal residence, the habitual residence, often depending on duration of residence, can be a defining factor for the obligation to be insured under the social security laws of the receiving state. Once insured, some of the entitlements are *immediately available* upon the moment of insurance while for others a *waiting period* or minimum period of employment may apply before the TCN can claim any rights under the insurance schemes.

With regard to ICT, all Member States report on aspects that relate to the implementation of the ICT-Directive, which falls outside the scope of our study. It appears these rules also apply in case of national ICT schemes, but the data is not fully conclusive on this aspect thus not relayed here (for further details see Annex 3).

8.3 Conclusion

In conclusion, the norms available under current EU migration and social security law most likely do not apply to TCN moving under the scope of the FTA. However, most Member States mention the relevance of bilateral agreements. Our study is not sufficiently detailed to map possible instances of discriminatory limitations (in law or practice) within the meaning of the FTA. Our study thus provides a general overview and supports the general conclusion that the framework of Posting as referred to in the ICT Directive could also be applicable to TCN employees staying for more than 90 days under the FTA. The provisions stated in the EU ICT Directive make sense for all FTA categories.

On the other hand, we see there is no social security liability in the host country for short-term travel of less than 90 days.

Furthermore, self-employed IP and Investor TCN moving under the FTA fall outside the scope of current regulations. A more targeted study into the treatment of self-employed and investor TCN in the Member States in respect of their social security rights would appear useful to draw more substantive conclusions.

9 Review procedures

9.1 Introduction

The trade agreements indicate that a right of appeal and review for any person to whom an administrative decision relating to the commitments has been addressed, should be available. We have emphasized the relevant elements providing the conditions under which such appeal and review should be possible in the provisions of each trade agreement:

The relevant provision of the GATS and substantially similar the EU-CARIFORUM, provides the following:³²²

- (a) Each Member shall maintain or institute as soon as practicable judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services. Where such procedures are not independent of the agency entrusted with the administrative decision concerned, the Member shall ensure that the procedures in fact provide for an objective and impartial review.

On the same matter, EU-Japan states:³²³

Each Party shall establish or maintain judicial, arbitral or administrative tribunals or procedures for the purpose of the prompt review or appeal and, where warranted, correction of administrative actions or, as provided for in its laws and regulations, of failures to act with respect to any matter covered by this Agreement. Those tribunals or procedures shall be impartial and independent of the office or authority entrusted with administrative enforcement of such actions and shall not have any substantial interest in the outcome of the matter.

Therefore, taking these requirements together, the Member States should ensure prompt, appropriate remedies for administrative decisions by an impartial instance, or based on an objective and impartial procedure.

EU-Japan adds the following to this general clause provided in the trade agreements:

Each Party shall ensure that the parties before the tribunals or involved in the procedures referred to in paragraph 1 are provided with the right to:

(a) *a reasonable opportunity to support or defend their respective positions; and*

(b) *a decision based on the evidence and submissions of record.*

³²² GATS, Art. VI(2)a.

³²³ EU-Japan, Art 17.6.

3. Each Party shall ensure, subject to further review or appeal as provided for in its laws and regulations, that the decision referred to in subparagraph 2(b) is implemented by the relevant offices or authorities with respect to the administrative action concerned.³²⁴

Specifically, on administrative decisions relating to mobility rights, EU-Japan states:³²⁵

Each Party shall maintain judicial, arbitral or administrative tribunals or procedures which provide, upon request of an affected entrepreneur or service supplier of the other Party, for a prompt review of, and where justified, appropriate remedies for, administrative decisions that affect:

- (a) *cross-border trade in services as defined in subparagraph (d) of Article 8.2;*
- (b) *establishment as defined in subparagraph (i) of Article 8.2 or operation as defined in subparagraph (p) of Article 8.2; or*
- (c) *the supply of a service through the presence of a natural person of a Party in the territory of the other Party, in accordance with Article 8.24.*

Besides the specific provisions of appeal and review which are specified in the FTAs, this criterion is also listed as one of the conditions in the EU-Japan agreement that need to be fulfilled from a transparency perspective.³²⁶

9.2 EU Law

It is well established EU law that natural persons or business have a right to an effective remedy and to a fair trial based on Article 47 EU Charter of Fundamental Rights. Everyone whose rights and freedoms guaranteed by EU law, obviously including EU migration law and EU trade law, are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in Article 47 of the Charter. This right includes a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

With regard to decisions on visa, Article 32(2) of the Schengen Visa Code prescribes that an applicant be notified on a decision on refusal and the reasons on which it is based. Article 32(3) of the Schengen Visa Code grants applicants who have been refused a visa the right to appeal against the Member State that

³²⁴ EU-Japan, Art 17.6.

³²⁵ EU-Japan, Art. 8.34

³²⁶ Article 8.23(h) (n.3) “1. A Party shall make publicly available information relating to the entry and temporary stay by natural persons of the other Party, referred to in paragraph 2 of Article 8.20. 2. The information referred to in paragraph 1 shall include, where applicable, the following information:... (h)available review or appeal procedures...”

has taken the final decision on the application and in accordance with the national law of that Member State. Information on the relevant procedure must be provided by the Member States.

In a similar vein, a procedure is prescribed in the ICT Directive. Article 15 of this Directive sets procedural safeguards, including timely decisions (as soon as possible but not later than 90 days); stating reasons in writing for a decision declaring inadmissible or rejecting an application or refusing renewal; decisions must be open to legal challenge in the Member State concerned, in accordance with national law. The written notification shall specify the court or administrative authority with which an appeal may be lodged and the time-limit for lodging the appeal.

EU law requires appeal decisions to be taken “timely” or within “reasonable time”. The FTA EU-Japan speaks of “prompt” decisions. We do not immediately see an inconsistency here, although one could argue that “prompt” is sooner than within a “reasonable time”.

9.3 Analysis

In our assessment of the compliance of the Member States with the aforementioned requirements, we have not found any serious gaps relating to trade related procedures.

Table 9.1. gives an overview of the timeframes for review/appeal in the EU Member States, which differ greatly. Furthermore, only some Member States (Bulgaria, Ireland, Luxembourg, Malta and Slovakia, see Annex 4) report specific procedures in place for trade related migration categories, or no procedure at all (Romania).

Table 9.1 Timeframe for appeal in (trade related) immigration cases

Country	Timeframes for appeals in the EU Member States
Austria	- appeal to the Landesverwaltungsgericht within 4 weeks of receiving decision - further appeal to Verfassungs and/or Verwaltungsgerichtshof is possible within 6 weeks of receiving the court decision
Belgium	- firstly within 30 days - if rejected, further appeal possible within 60 days
Bulgaria	14 days to submit a court appeal against a negative decision
Croatia	within 15 days from the date of delivery of the decision
Cyprus	
Czech Republic	within 15 days following delivery of the decision
Denmark	no later than eight weeks after delivery of the decision
Estonia	30 days from the date of notification to refuse to issue a visa and 10 days after the notification to refuse to issue a residence permit
Finland	

Country	Timeframes for appeals in the EU Member States
France	within the 2 months following the notification of the refusal decision
Germany	-one month to appeal in writing - one year to remonstrate and/or to appeal to the court if the rejection letter does not state otherwise
Greece	
Hungary	-within eight calendar days from the decision
Ireland	-within 21 days from the date the decision - <u>On Business Visitors</u> : within 2 months of the date on the letter of refusal - <u>On Managers</u> : within 28 days on the prescribed Submission of a Decision for Review Form
Italy	within 60 days of receipt of notification of denial
Latvia	within 30 days after the day of its notification
Lithuania	within 14 days from receipt of the decision
Luxembourg	no information provided
Malta	-within ten working days from the decision - <u>On Business Visitors</u> : within 15 days
The Netherlands	-within four weeks of the decision
Poland	no information provided
Portugal	-within 15 days following the acknowledgment of refusal - within three months following the notification Lodge a Hierarchical Appeal. In terms of gracious warranties before the administration, complaint is addressed to the author of the act and must be submitted within 15 days (article 191.º n. 3, CPA). The hierarchical appeal is addressed to the highest hierarchical superior of the decision issuer within 30 days (artº 193º (2) CPA) following the notification of the act. Deadline for litigious appeal is 3 months in the case of nullable acts. The right of appeal arises from Art. 20.º and 268.º n.º. 4 of the Constitution
Romania	The refusal to extend the right of stay materializes by issuing a return decision. The return decision can be appealed within 10 days from the date of communication at the court of appeal in whose territorial jurisdiction the General Inspectorate for Immigration is located that issued the return decision. The court solves the appeal within 30 days from the date of its receipt. The court decision is final
Slovakia	Within 15 days from its delivery
Slovenia	An appeal procedure is available within 30 days of the decision
Spain	3 months, depending on the visa/ permit category. As a general rule one month from the notification for administrative appeal and 2 months for the Court appeal. Administrative appeal submission might be mandatory
Sweden	<u>On Investors</u> : no later than three weeks from the day when you received the decision

From our interviews we learn that application procedures may be slow. Furthermore, none of the experts or interviewees actually reported review procedures had been initiated by natural persons or businesses based on the trade

agreements. Such procedures could be initiated against the fact that application procedures appear to be slow or entry categories are missing all together. As the insights into the practical approach offered by Fragomen for this study show, businesses prefer to go by existing legal entry routes instead of challenging the absence of trade related categories in often time consuming and costly legal procedures.

Again from the interviews we learn that not all Member State authorities are fully informed of the trade related mobility categories, and may decide wrongly on such applications or may judge wrongly an actual service being performed encountered during inspections. Hence, decisions could win (in timing and motivation) through a wider knowledge of the FTA commitments.

9.4 Conclusion

The FTA, like EU migration law, require a certain level of procedural safeguards to be applicable on procedures in relation to FTA mobility. The required level of protection does not appear to be higher than common in EU law. However, the standards are by no means fully harmonized (Annex 4 on Procedures applicable in Member States).

10 Transparency

10.1 Introduction

Transparency has an important role to play in trade liberalization. It greatly influences cross border trade, and may be considered an essential element of trade facilitation. Transparency is also essential in relation to consultation between the private sector and public institutions, and in this way too contributes to enhances international trade. Transparency moreover plays an important part in avoiding unnecessary trade restrictions.³²⁷ Moreover, non-transparent laws minimize legitimacy of trade policy and undermine public trust.³²⁸

10.2 Defining transparency in the FTA

Efforts to define transparency have been made at the international, regional and national level. In international law, three main stems of the functions of transparency can be discerned:

“(1) good governance and the rule of law, including foreseeability, accessibility, and legal clarity; (2) accountability, participation, and democracy; (3) effectiveness and efficiency, notably in the financial sector.”³²⁹

The WTO glossary of terms defines ‘transparency’ as:

“the degree to which trade policies and practices, and the process by which they are established, are open and predictable.”³³⁰

At the EU level, the broad notion of transparency implies “openness, communication, and accountability.”³³¹

A clear example of the importance of transparency in relation to the mobility commitments is the following. As is clear from the previous chapters, some commitments have been implemented into national law in the form of a general reference to ‘entry based on international agreements’. As this form of implementation directly refers to the definitions and conditions in the trade

³²⁷ P Kruger ‘Managing the process of services liberalization’ (2011) No S11TB09/2011 Trade Law Centre for Southern Africa Trade Brief, available online: <www.tralac.org>, p 2; P Turnes and R Ernst ‘A framework for transparency in international trade’ *European Research on Management and Business Economics*, (2015) volume 21, issue 1, par 2.

³²⁸ European Commission, Trade for All: Towards a More Responsible Trade and Investment Policy (2015) <http://ec.europa.eu/trade/policy/in-focus/new-trade-strategy/%5Cnhttp://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf>.

³²⁹ Anne Peters, ‘The Transparency Turn of International Law’ (2015) 1 *The Chinese Journal of Global Governance* 3.

³³⁰ ‘WTO - Official Ministerial Website - about the Ministerial - Glossary’ <https://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/23glos_e.htm> accessed 15 October 2020.

³³¹ Addink, H., Anthony, G., Buyse, A., & Flinterman, C. (2010). *Sourcebook on Human Rights and Good Governance. Netherlands Institute of Human Rights (SIM)*.

agreements, from a purely implementation perspective, this suffices. In practice, both beneficiaries of the mobility commitments and public authorities will have difficulties in using and applying the law. A reading of the trade commitments is needed to be aware of the possibilities to rely on the commitments.

A second example, frequently encountered in the analysis of the national reports, is the need to rely on alternative entry schemes, in cases where the legislator has not implemented the trade commitments at all. If the alternative scheme covers the scope of the commitments, in theory, this suffices. In practice, such 'implementation' is difficult to utilize without in-depth knowledge.

More specific examples which may essentially ensure that the trade commitments are never used in practice is the lack of information, information only being available in the home state language, or unexplained or vague terms forming constituent parts of the entry scheme. This is all the more important as service provision is usually heavily regulated, in manners that differ from state to state.³³² Exacerbating this for the topic here under discussion, migration law is usually complex as well. An overview of national measures and conditions that need to be fulfilled is central to the decision to provide a service in the first place. This applies to any individual service supplier, and it applies to continuing trade flows, which benefit from predictable rules and procedures.³³³

In order to facilitate transparency, the EU Commission has taken steps toward publishing all the negotiation cycles and relevant proposals besides inviting the Council to disclose all the FTA negotiating directives, and making the text of the agreements available even prior to finalization of the legal text.³³⁴ Along with these efforts, the EU Member States have tried, and if not should try, to implement the FTA obligations regarding transparency and improve the regulation strategies and policies.

Recognising its importance to international trade, the trade agreements contain obligations relating to transparency.³³⁵ For example, the EU – Japan trade agreement specifies the manifestations of transparency as:

*“providing information on the entry and temporary stay by natural persons of the other party”.*³³⁶

This information should include:

“categories of visa, permits or any similar type of authorisation regarding the entry and temporary stay; documentation required and conditions to be met; method of filing an application and options on where to file, such as consular

³³² P Delimatsis 'Article III GATS' in R Wolfrum, PT Stoll and C Feinäugle (eds) Max Planck Commentaries on World Trade Law, WTO – Trade in Services (Martinus Nijhoff Publishers, Leiden 2008), p 93-95; GATS preamble, par 2.

³³³ Krajewski 2003, p 124-125; Delimatsis 2008, p 93.

³³⁴ Ibid.

³³⁵ P Kruger 'Managing the process of services liberalization' (2011) No S11TB09/2011 Trade Law Centre for Southern Africa Trade Brief, available online: <www.tralac.org>, p 2.

³³⁶ Article 8.23, 'Agreement Between the European Union and Japan for an Economic Partnership'.

offices or online; application fees and an indicative timeframe of the processing of an application; the maximum length of stay under each type of authorisation described in subparagraph; conditions for any available extension or renewal; rules regarding accompanying dependents; available review or appeal procedures; and relevant laws of general application pertaining to the entry and temporary stay of natural persons;”³³⁷

In addition, any proposed measures or changes on these pieces of information should be published in advance.³³⁸ In EU-CARIFORUM, the means of effectively publishing regulations has also been specified which is through official publication or in a written/electronic form.³³⁹

The EU-Japan agreement also provides that information sharing should be provided through publicly accessible website. Article 17.3 states that for fulfilling the objective of transparency:

“When introducing or changing measures of general application, each Party shall:

promptly publish those measures of general application, or otherwise make them publicly available, together with an explanation of their objective and rationale, and where feasible, by electronic means such as a website in English.”³⁴⁰

Nevertheless, the language policy of the EU considers that the legislation and key political documents will be published in the official EU languages.³⁴¹ Therefore, Member States are not obligated to provide their national laws in English.³⁴² As a result, it could be stated that although providing an accessible form, such as a website in English, is not mandatory for the parties to the FTAs, sharing information of national laws in English is much more aligned with the requirements of the FTA.

10.3 Determining Indicators for the EU Member States

Reviewing different FTAs of the EU, we drafted a list of indicators that measure the transparency of each Member State. Trade agreements have specifically referred to these obligations. Thus, it makes it mandatory for Member States

³³⁷ Ibid.

³³⁸ Ibid.

³³⁹ Article 105, European Union, ‘Economic Partnership Agreement between the CARIFORUM States, of the One Part, and the European Community and Its Member States, of the Other Part’ (2008) 289 Official Journal of the European Union 1955 <http://trade.ec.europa.eu/doclib/docs/2008/february/tradoc_137971.pdf>.

³⁴⁰ ‘Agreement Between the European Union and Japan for an Economic Partnership’ (n 16).

³⁴¹ ‘Language Policy | European Union’ <https://europa.eu/european-union/abouteuropa/language-policy_en> accessed 21 October 2020.

³⁴² EU law provides that all the national Member States’ languages are official languages for the European Union, and states that Regulations and other official documents of general application must be written in all the official languages, see Articles 1 & 4 Council Regulation n°1 of 1958.

to follow and implement these obligations.³⁴³ The indicators for transparency according to the most ambitious trade agreements are:

- a) Pre-legislative information concerning any requirement or procedure;
- b) Categories of visa, permits or any similar type of authorisation regarding the entry and temporary stay;
- c) Required documentation and conditions to be met;
- d) Method of filing an application and options on where to file, such as consular offices or online;
- e) Application fees and an indicative timeframe of the processing of an application (see our chapter on procedures);
- f) The maximum length of stay under each type of authorisation described in subparagraph;
- g) Conditions for any available extension or renewal;
- h) Rules regarding accompanying dependents;
- i) Available review or appeal procedures;
- j) Relevant laws of general application pertaining to the entry and temporary stay of natural persons;
- k) Designation of enquiry points (national contact points);
- l) Publicly available information regarding regulatory authorities, the processes and mechanism under which the regulatory authorities evaluate the regulatory measures;
- m) A publicly accessible information source such as an online website³⁴⁴ in English about the measures and their general application.

An evaluation of the Member States' transparency and their ranking is provided in table 10.1 below and figure 10.1. For the purpose of this mapping we have used the expert questionnaires and publicly accessible websites on which most of the indicators could be found.

Besides these national websites, the European Commission has developed the EU Immigration Portal.³⁴⁵ According to the Commission, gradually, the Member States are being requested to add more information both on the EU-level regulated ICT permits as well as the other Mode 4 categories (such as "international services providers"). The Portal provides general explanation about the categories and a synthesis of the measures by category in English, and provides some links to the more detailed national websites (that may be in English, the national language or both). This Portal is on-going work. Indeed, when all Member States have submitted adequate information or links, it can be considered corresponding to the core transparency requirements of FTAs.

³⁴³ Most of these indicators have been specified in the EU-Japan agreement.

³⁴⁴ It is highly recommended that this website contains a top-down menu that provide information on all the indicators. Previously it has been implemented for the EU Blue Card: https://ec.europa.eu/immigration/general-information/what-category-do-i-fit_en.

³⁴⁵ https://ec.europa.eu/immigration/node_en

Table 10.1 Providing information online (in English)(Source: compiled by author)

Country	Categories of visa, permits, or any similar type of authorization regarding entry and temporary stay	Method of filing an application; application fees and timeframe	Maximum length of stay	Conditions for available renewal	Rules on accompanying dependents	Available appeal procedure	Explicit reference to Trade Agreements in English or other languages	Rating and the color
Austria (AT)	■	■	■	■	■	■	■	6,5
Belgium (BE)	■	■	■	■	³⁴⁶	³⁴⁷	NO	5
Bulgaria (BG)	³⁴⁸	■	■	■	■	NO	NO	4,5
Croatia (HR)	■	³⁴⁹	■	■	■	■	NO	5,5
Cyprus (CY)	■	³⁵⁰	■	■	■	³⁵¹	NO	5
Czech Republic (CZ)	■	■	■	■	³⁵²	■	■	6,5
Denmark (DK)	■	■	³⁵³	■	■	■	?	5,5
Estonia (EE)	³⁵⁴	■	³⁵⁵	■	■	NO	NO	4
Finland (FI)	■	■	³⁵⁶	■	■	■	³⁵⁷	6
France (FR)	■	■	³⁵⁸	³⁵⁹	³⁶⁰	³⁶¹	NO	4
Germany (DE) ³⁶²	■	■	NO	NO	■	NO	■	4,5

³⁴⁶ Though available in another website <https://dofi.ibz.be/sites/dvzoe/EN/Application-guides/Pages/Processing%20time%20for%20a%20visa%20application.aspx>.

³⁴⁷ Available in French/Dutch but not English.

³⁴⁸ The link to the long-term category is not available.

³⁴⁹ The site states of filing forms but the form could not be found.

³⁵⁰ Form not available in English.

³⁵¹ Only partially with regard to *Labour Dispute Committee*.

³⁵² Temporary residence permit for a family of EU citizens (information on foreign nationals not found); Long term residence permit information for the purpose of family reunification available.

³⁵³ Only for short term.

³⁵⁴ Information is scattered and not very detailed.

³⁵⁵ Only for short term.

³⁵⁶ This information was hard to obtain.

³⁵⁷ No information provided by the country expert.

³⁵⁸ Little information on each category: short-term visas 90 days; Long term visa maximum length of stay only available to students.

³⁵⁹ No specific information on how to change/extend/renew visa on the website.

³⁶⁰ No information on each category found.

³⁶¹ The website does not provide a search section. Thus, most of the information on differed aspect is hard to be searched.

³⁶² In general the German embassies offer information in the countries language. Concerning the language requirement, the website mentions that it is advisable for anyone in Germany to learn German. In addition, for the family reunification of the temporary migrants, the spouse needs to provide proof of basic German.

³⁶³ There is no search section in the website and the information on this section is hard to obtain.

Country	Categories of visa, permits, or any similar type of authorization regarding entry and temporary stay	Method of filing an application; application fees and timeframe	Maximum length of stay	Conditions for available renewal	Rules on accompanying dependents	Available appeal procedure	Explicit reference to Trade Agreements in English or other languages	Rating and the color
Greece (EL)	³⁶⁴	³⁶⁵	³⁶⁶	³⁶⁷	³⁶⁸	■	NO ³⁶⁹	3,5
Hungary (HU)	■	■	■	■	³⁷⁰	■	NO	5,5
Ireland (IE)	■	■	NO ³⁷¹	■	■	■	NO	5
Italy (IT) ³⁷²	-	-	-	-	-	-	NO	3
Latvia (LV)	³⁷³	■	■	NO	³⁷⁴	■	NO	4
Lithuania (LT)	■	■	■	■	■	■	NO	6
Luxembourg (LU)	■	■	NO	■	■	■	NO	5
Malta (MT)	Website not found	?	?	?	?	?	NO	
The Netherlands (NL)	■	■	NO	■	■	■	■	6
Poland (PL)	³⁷⁵	■	■	■	³⁷⁶	NO	NO	4
Portugal (PT)	■	■	■	■	■	■	■	6,5
Romania (RO)	■	■	NO	NO	■	NO	NO	3
Slovakia (SK)	■	■	■	■	■	■	■	6,5
Slovenia (SI)	■	■	NO	■	■	NO	NO	4
Spain (ES) ³⁷⁷	■	■	■	■	■	■	■	5,5

³⁶⁴ Information available in Greek and not in English.

³⁶⁵ Information available in Greek and not in English (at the time of writing this report, this section was under construction).

³⁶⁶ Information available in Greek and not in English.

³⁶⁷ Information available in Greek and not in English.

³⁶⁸ Information available in Greek and not in English.

³⁶⁹ No information provided.

³⁷⁰ Only for Third-Country National Family Member Of EEA National and Third-Country National Family Member Of Hungarian Citizen.

³⁷¹ No specific information found.

³⁷² Online information is not immediately accessible or available, in the sense that information is available (also in English) in multiple websites (Police, Ministry of Foreign affairs, and other authorities websites, local or nationals) but is not always up to date and does not clearly provide guidance on the procedures to be followed.

³⁷³ There is not a specific list of the different categories of visas.

³⁷⁴ Information only about Application for Residence Document of Europe Union citizen or Union Citizen's Family Member.

³⁷⁵ Not all the categories have been included in the website.

³⁷⁶ Only on EU family members.

³⁷⁷ The "Portal de Inmigración" located in <http://extranjeros.mitramiss.gob.es/> includes the information related to immigration processes. Most of the information available is not in English, however as an exception, the information related to international Mobility legal framework regulated by Ley 14/2013 is available in English. Ley 14/ 2013 applicable to investors, entrepreneurs, highly qualified professionals and third country nationals under ICT. As such, transparency is provided, but not in relation to all categories.

Country	Categories of visa, permits, or any similar type of authorization regarding entry and temporary stay	Method of filing an application; application fees and timeframe	Maximum length of stay	Conditions for available renewal	Rules on accompanying dependents	Available appeal procedure	Explicit reference to Trade Agreements in English or other languages	Rating and the color
Sweden (SE)	■	■	NO	■	■	■	NO	5

10.4 Conclusions

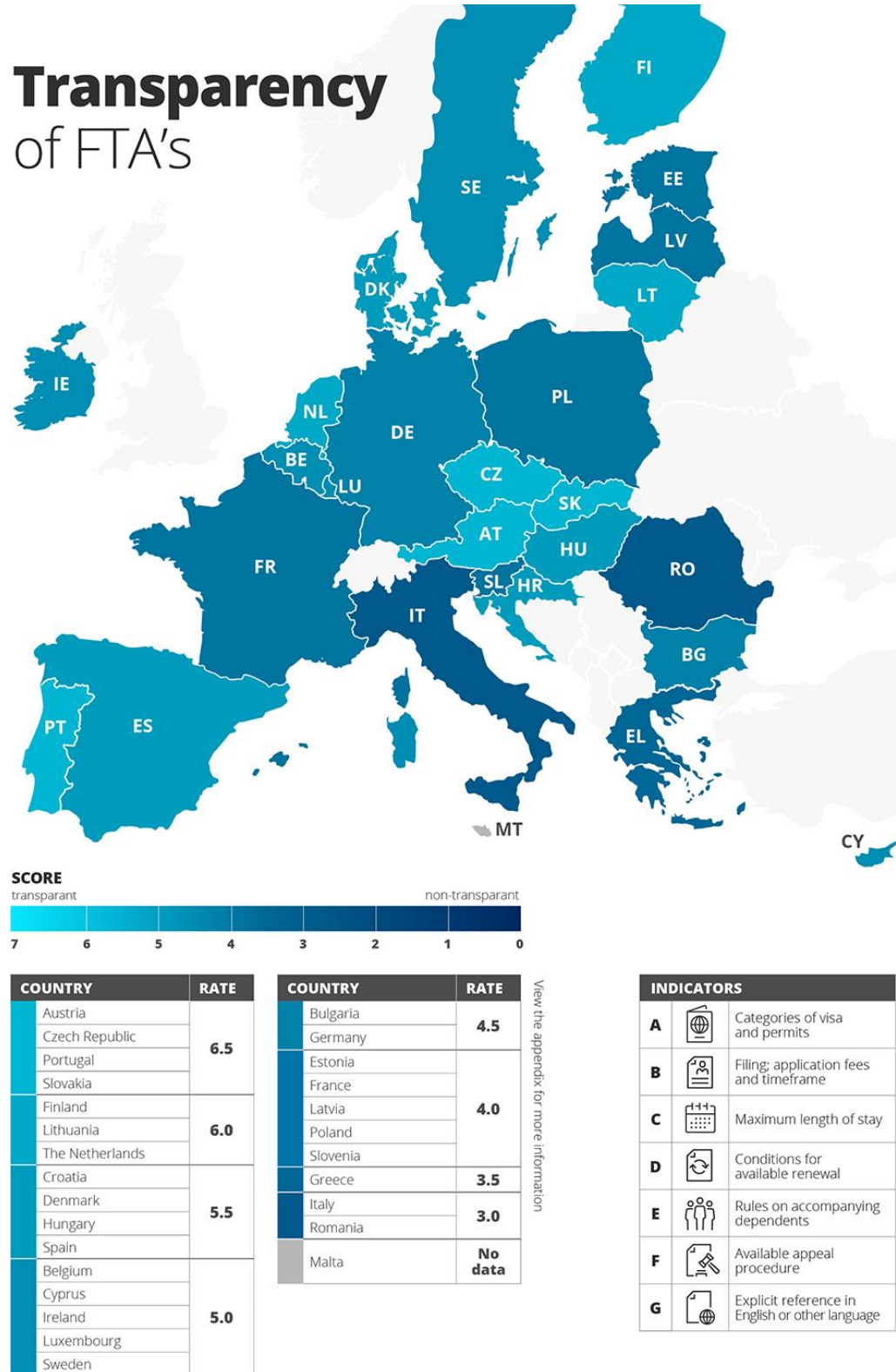
All three FTA examined in this report include transparency obligations. Having a fair and transparent administrative procedure is an obligation for the Member States under the FTA. Transparency also applies to qualification requirements and procedures, technical standards and licensing requirements. Depending on the specific agreement, Member States are obliged to have publicly available references for pre-legislative information. Nevertheless, analyzing the current state of affairs, Member States do not have all this relevant information readily available online for instance. In addition, designation of enquiry points, which is already obligatory under the GATS agreement, and providing information on regulatory authorities are essential elements of transparency for the Member States. In practice, these enquiry points are often formed by a single person within the trade or economy ministry and these are not always updated.

The EU Immigration Portal is a platform aimed at (linking) to the relevant national websites and regulations and can, ones all Member States have submitted adequate information or links, be considered corresponding to the core transparency requirements of FTAs.³⁷⁸ However, at the time of writing, not all relevant links were available in the portal. We recommend the Member States be urged to provide the necessary links to information to be made available through the EU Immigration Portal.

We conclude there is room for improvement of publicly accessible information on the functioning of the FTA in the Member States, in particular as we have also seen examples by Member States of relatively accessible websites available.

³⁷⁸ https://ec.europa.eu/immigration/node_en

Figure 10.1 Mapping of the level of transparency of FTA's



11 General refusal grounds

11.1 Introduction

Trade liberalisation provides the conditions under which international trade may be conducted. However, liberalisation is always balanced with the signatory states right to regulate. The trade agreements provide general remarks on the right to regulate to meet national policy objectives. The GATS and EU-CARIFORUM recognise the right to regulate in general. The EU-Japan agreement adds specific details by referring to policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity.³⁷⁹

Substantively, as is the case in all trade agreements, this means that states can invoke exception grounds to deviate from the obligations of the trade agreement if such is necessary to meet a public policy objective. The exceptions therefore reflect policy objectives which may prevail over the right to rely on the trade agreements. The trade agreements all follow the approach adopted under WTO law, which is the main approach relating to exceptions for international trade law in general.

The trade agreements provide a list of objectives that may be invoked in order to exempt (in EU parlance: justify) any measure which is in conflict with any of the provisions, including the commitments, of that trade agreement. To ensure a balance between the right to rely on trade agreements and the policy space granted to the signatory states, a general condition to successfully invoke an exception ground applies which prevents arbitrary or unjustifiable discrimination between countries where like conditions prevail (restricting access to trade in relation to one trading partner, but not in relation to another, though circumstances are similar), or a disguised restriction on trade (using the exception ground for protectionism instead of a legitimate policy objective).

11.2 Exception grounds in the trade agreements

The trade agreements provide a list of grounds, which can be relied upon in relation to the entire agreement. We limit this list to the two grounds that can be imposed in relation to a natural person, for instance because of the past behaviour of that person or because of a disease. Phrased differently, most of the listed grounds are not related to our topic, the movement of natural persons.³⁸⁰

³⁷⁹ GATS, preamble; EU-CARIFORUM, Art. 60(4); EU-Japan, Art. 8.1, par 2.

³⁸⁰ For example, the GATS provides an exception ground related to protecting human, animal and plant life, the collection of taxes, as well as one related to avoidance of double taxation. Note that the ground 'necessary to secure compliance with laws or regulations' is related to ensuring this in relation to the service activity itself, not the service provider.

The trade agreements, be it with minor variations which we will include in footnotes, provide that:³⁸¹

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

- (a) necessary to protect public security³⁸², public morals or to maintain public order;³⁸³*
- (b) necessary to protect human health;*

The requirement that measures must not be applied discriminatory nor as a disguised restriction on trade is interpreted by the Appellate Body as a necessity test in the *US - Gambling case*.³⁸⁴

The EU-CARIFORUM and the EU-Japan agreement include public security in this list of general refusal grounds. This exception ground is therefore different than the specific security exception, which relates to actions taken in time of war or other emergency in international relations³⁸⁵ (which will not be discussed in this report).³⁸⁶

Specifically in relation to the movement of natural persons, the trade agreements provide a so-called carve out to the scope.³⁸⁷ This is not the same as an exception ground, the carve-out simply means that certain measures simply do not fall within the scope of the trade agreement, and can therefore not be contrary to it.

The GATS Annex on Movement of Natural Persons provides that the agreement does not apply to measures affecting natural persons seeking access to the employment market of a WTO Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis. Additionally, measures regulating the entry of natural persons into, or their temporary stay in, the territory of a WTO Member are exempted from the agreement as well. This includes measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across borders.

³⁸¹ Art. XIV GATS; Art. 224 EU-CARIFORUM; Art. 8.3(2) EU-Japan.

³⁸² Public security is not included in the GATS. Note that the public security ground is not the same as the specific security exceptions of Art. XIVbis.

³⁸³ (Original footnote) The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

³⁸⁴ *US – Gambling* Panel Report, par 6.448-6.449; *US – Gambling* Appellate Body Report, par 292.

³⁸⁵ According to a WTO panel report, the security exceptions relate to actions taken in time of war or other emergency in international relations, WT/DS512/R, 5 April 2019, Panel Report, *Russia – Measures Concerning Traffic in Transit*, par 7.108.

³⁸⁶ Article XIVbis GATS; Art. 225 EU-CARIFORUM; Art. 1.5 EU-Japan.

³⁸⁷ GATS Annex Movement of Natural Persons.

This means that in itself immigration law is not affected by the GATS. An Act of a WTO Member providing the conditions for citizenship of that state will indeed be exempt from the GATS obligations. The carve-out is limited by the condition that such measures must not be applied in a manner nullifying or impairing benefits provided in a specific commitment.

Typically, in EU member states' migration law, these exception grounds are referred to a general refusal grounds. These take the following form, without hierarchy:

- Refusal relating to public policy, security and health, and
- Other possible refusal grounds (volumes of admission, waiting periods, labour market tests et cetera).

The GATS commitments and the EU-Japan agreement specifically indicate that the public morals and public security exception (only EU-Japan) may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society. It is safe to presume that shoplifting will not qualify as such. Note that this phrase is not included in the EU-CARIFORUM agreement.

This report will not explicitly look into the question whether the scope given to the term in the national legal order goes beyond the scope of that term in the international trade agreements. We will however, provide specific conditions which apply to these terms at the national level, if such conditions fall outside what is generally understood under this phrase.

Public security is a term that is used both in the international framework, as well as the national legislation. The terms public morals and public order, as used in the trade agreements, are different than the common terminology in the national law of the Member States, which often adopts public policy as a ground. Note that the public order exception provides a considerable margin for regulatory autonomy to the Member States and includes the more specific term public policy.³⁸⁸ Again, we will list specific details, such as which Member States require a certificate of conduct which relates to the public policy ground.

11.3 General refusal grounds applied in the Member States

Member States invariably include the standard refusal grounds in their legislation. Thus grounds related to the public interest, defined as public order or security (Austria), or public peace, order and national security (Belgium) are, be it sometimes with different wording, always listed. The same holds true for a refusal ground relating to public health.

³⁸⁸ See T Cottier, P Delimatsis and N Diebold 'Article XIV GATS General Exceptions' in R Wolfrum, P Stoll and C Feinäugle (eds) *Max Planck Commentaries on World Trade Law, WTO – Trade in Services* (Martinus Nijhoff Publishers, Leiden 2008), p 291-292.

We will not list these general grounds specifically for each Member State, as they are essentially the grounds listed at the international framework. The grounds we will not specifically list which are common and should fit the definitions of the trade agreements are:

grounds relating to public security, morals and order, unless applied in a manner which does not reflect: 'a genuine and sufficiently serious threat posed to one of the fundamental interests of society'³⁸⁹; grounds relating to fraudulent applications, terrorism, drug or weapon smuggling, human trafficking, registry into the Schengen Information System; grounds related to subsistence requirements and proof of housing in the host state; common refusal grounds relating to public health (epidemic diseases, either as listed by the World Health Organization or the Member State itself).

We will also not specifically list Member States which rely on the Schengen Border Code for their definitions of these grounds.³⁹⁰

As such, the overview below demonstrates the conditions that stand out in light of the trade agreements. It should be emphasized that this does not automatically mean that such conditions are problematic, as such grounds can still fall within the scope of the exception grounds or the immigration carve-out relating to movement of natural persons.

11.3.1 Public security, public order and public policy grounds

As an example of grounds relating to jeopardizing the international relations of the host state, Bulgaria includes as a refusal ground: discrediting the Bulgarian state, undermining the prestige and dignity of the Bulgarian people or entry which would harm the relations of Bulgaria with other states.

Some other examples which are too specific to include in the general tables are the following. A specific refusal ground in Latvia relating to public security is the possibility to refuse third-country nationals serving in foreign armed forces.³⁹¹ Lithuania requires submission of a list of travels and residence in foreign countries, detailed information about himself/herself, relations (former or present) with persons residing in the Republic of Lithuania (including foreign nationals residing in Lithuania), as well as relations with intelligence, security or military institutions of foreign states. If such information is not presented or third-country national refuses to present it, the request for residence permit is not accepted.³⁹² Slovakia may refuse entry if the granting of temporary residence is not in the public interest. In Cyprus refusal of entry may be based on the fact that the migrant is a prostitute or living on the proceeds of prostitution.³⁹³ Entry

³⁸⁹ Note that this explanatory phrase is included in a footnote for the GATS commitments as well as the EU-Japan agreement with the public morals and public security.

³⁹⁰ As is the case in, for example, Croatia, Art. 38(1) of Croatian Aliens Act (Croatian Official Gazette No. 130/11, 74/13, 69/17, 46/18.).

³⁹¹ Immigration Law adopted on October 31, 2002, Art. 34(1) 12).

³⁹² Paras. 5-6 of Art. 26 (1), Art. 26 (4) of the Aliens' Law.

³⁹³ Section 9A (2), Aliens and Migration Law, Cap.105.

to Cyprus may also be refused for mentally and/or psychologically disabled person or feeble-minded person or any person who for any other cause is unable to take proper care for himself.³⁹⁴

Two Member States have adopted violations of laws other than criminal laws as a possible refusal ground. Bulgaria may refuse entry if the TCN has violated labour or tax legislation of the country where the TCN previously resided. Germany lists, in addition to serious crimes, fraud regarding social insurance or social security.³⁹⁵

As an example of the care one should have when comparing these agreements, the footnote included in the GATS, explaining that this ground relates to cases of a genuine and sufficiently serious threat posed to one of the fundamental interests of society, is not adopted in the EU – CARIFORUM agreement.

Table 11.1 Grounds related to public security, public policy and public order (countries without data did not give data in the questionnaire)

	Name of the country/Type	Past criminal convictions	Misdemeanors, administrative or other offences	Previous customs/border-violations	Jeopardizing host state relations	Certificate of Conduct	Non-criminal law violations
1	Austria (AT) ³⁹⁶	■	■	■	■	■	■
2	Belgium (BE)					■	
3	Bulgaria (BG)	■		■	■	■ ³⁹⁷	■ ³⁹⁸
4	Croatia (HR)						
5	Czech Republic (CZ)	■			■		
6	Cyprus (CY)	■		■	■		
7	Denmark (DK)						
8	Estonia (EE)						
9	France (FR)	■					
10	Finland (FI)						
11	Germany (DE)	■	■			■ ³⁹⁹	■
12	Greece (EL)	■	■ ⁴⁰⁰				
13	Hungary (HU)						

³⁹⁴ Section 2(1), Aliens and Migration Law, Cap.105.

³⁹⁵ S. 54 Residence Act.

³⁹⁶ For all these grounds, refusal is only possible if the behaviour was sufficiently serious.

³⁹⁷ Documents not only related to criminal record but also police registration.

³⁹⁸ Labour law and tax law.

³⁹⁹ The national expert indicates that this is not requested by all German embassies, so this requirement does not always apply in practice.

⁴⁰⁰ Minimum of one year sentence, Art. 6 of law 4251/2014.

	Name of the country/Type	Past criminal convictions	Misdemeanors, administrative or other offences	Previous customs/border-violations	Jeopardizing host state relations	Certificate of Conduct	Non-criminal law violations
14	Ireland (IE)	■			■ ⁴⁰¹	■ ⁴⁰²	
15	Italy (IT)	■	■ ⁴⁰³				
16	Latvia (LV)	■		■		■	
17	Lithuania (LT)	■	■			■	
18	Luxembourg (LU)					■	
19	Malta (MT)	■					
20	Netherlands (NL)	■	■	■		■	
21	Poland (PL)						
22	Portugal (PT)	■					
23	Romania (RO)	■		■		■	
24	Slovakia (SK)	■				■	
25	Slovenia (SI)	■	■			■	
26	Spain (ES)	■		■	■	■	■ ⁴⁰⁴
27	Sweden (SE)	■	■ ⁴⁰⁵				

11.3.2 Public health grounds

Three public health related grounds stand out from the common grounds encountered in the national migration law of the Member States.

Two Member States require a medical certificate. Bulgarian law indicates that refusal is possible not only if the TCN may spread a contagious disease posing threat to public health, but also if the third-country national does not hold a vaccination certificate or comes from area with epidemic and epizootic situation. In Germany, the authorities may ask for a medical certificate.

Another specific health related ground adopted by two Member States, Bulgaria and Slovenia, is the possible refusal of entry due to the fact that the TCN arrives from a territory where an outbreak of an epidemic disease has occurred to a certain degree.

⁴⁰¹ Specifically, this concerns a determination by the Minister that it is conducive to the public good that entry is refused, S.4 of the Immigration Act 2004.

⁴⁰² A police clearance certificate is required for a number of pre-clearance applications.

⁴⁰³ Final conviction of a copyright related offence, Law on copyright and Art. 473 and 474 of the Italian Criminal Code.

⁴⁰⁴ Employment law, L.O 4/2000&RD 557/2014 Section 105;106;111.; 113 Ley 14/2013 Section 62.

⁴⁰⁵ Criminality relating to misbehavior is taken into account, however, normally no refusal unless a not too short prison sentence is at stake, Ch. 5 sec 17 and Ch. 5 sec 20, second paragraph Aliens Act (2005:716).

A final specific health related ground that stands out is the possible refusal of entry to Ireland based on drug addiction.⁴⁰⁶

11.4 Conclusion

Most EU Member States adopt variations of the standard refusal grounds, public security, policy and health. Such grounds fit the exception grounds provided in the trade agreement, be it that attention must be given to the clear disclaimer provided, refusal should be based on genuine and sufficiently serious threats.

The tables provided in the previous paragraph reflect conditions that may still fall within the scope of the exceptions provided in the trade agreements. We list them here to demonstrate the variety of grounds that apply. It may be that some of these conditions are not covered by the trade agreement exceptions. The analysis of these specific conditions is part of a general analysis provided in the conclusion to this report.

⁴⁰⁶ S. 4 of the Immigration Act 2004, Schedule 1 of the Immigration Act 2004.

12 Review of literature on the intersection between Trade and Migration

12.1 Introduction

Globalization has shaped many social and economic dynamics. Migration and trade have both been affected by this globalization. Although previously, high-income countries were welcoming the migrant workers for permanent residency to meet the market labour need, some researchers argue that receiving countries are oriented more toward temporary migration.⁴⁰⁷ This body of literature however mainly focusses on migration for low-skilled labour. The focus of our study of trade related migration is mainly on migration for high-skilled work. In order to give some background to the implementation in national laws of the EU member states of the international trade agreements under scrutiny, we reviewed the literature on the intersection between migration and trade. In this review, we discuss key publications that appeared online between 2017 (with some exceptions 2016) and May 2020 on the topic using databases of Hein online, Kluwer, and Oxford Academic Database, Web of Science and Google Scholar. We did not come across literature specific on migration or mobility in the context of EU-CARIFORUM or EU-Japan. We grouped the literature along the following topics: general literature on trade and mobility (para. 2); migration for establishing business purposes (para. 3), business travel (para. 4) and rights of (temporary) high-skilled migrant workers (para. 5).

12.2 General literature on trade and mobility

The general literature on the EU trade agreements seldom addresses the movement of natural persons. The purpose of a 2017 special issue of the *Journal of European Integration* was to analyze the changing politics of trade in the EU, focusing on the EU FTAs with Korea, the US, Canada, and Japan.⁴⁰⁸ The introduction to the special issue does not refer to migration or mobility of natural persons, nor do the contributions. Suzuki (2017) for instance, writing prior to the signing of the EU-Japan Treaty, concluded that there was a lack of societal attention for the agreement, for one because the small scale of EU-Japan trade compared to, for instance, the TTIP.⁴⁰⁹ Pelkmans, in the same issue, examines the meaning of ‘deep and comprehensive’ in four EU FTAs: CETA and EU/Korea, and two FTAs that have not yet been completed (TTIP and EU/Japan). He provides a “tentative explanation of the nature of these four modern EU FTAs by

⁴⁰⁷ Daniel Costa and Philip Martin, 'Temporary Labour Migration Programs: Governance, Migrant Worker Rights, and Recommendations for the U.N. Global Compact for Migration,' (2018) Economic Policy Institute.

⁴⁰⁸ Finn Laursen and Christilla Roederer-Rynning, 'Introduction: The New EU FTAs as Contentious Market Regulation' (2017) 39 *Journal of European Integration* 763 <<https://doi.org/10.1080/07036337.2017.1372430>>.

⁴⁰⁹ Hitoshi Suzuki, 'The New Politics of Trade: EU-Japan' (2017) 39 *Journal of European Integration* 875.

taking a closer look at the business dimension, in particular transnational value chains in some prominent sectors, the growing importance of services and inter-sectoral linkages.”⁴¹⁰ Although one would expect such an analysis to at least mention the relevance of intra-corporate transfers with the moving of value chains, it does not. Pelkmans does address cross-border services where service providers ‘follow’ their multinational clients. Although he is positive on broader regulatory cooperation and sustainable development chapters, he warns for recent political developments, which have shown that such broadening up actually makes market regulation contested.⁴¹¹ In 2019 Young argued how the European Commission’s ‘balanced and progressive’ trade strategy “as a response to anti-globalization sentiments is unlikely to address the identified problem, because it largely reflects continuity with past practices that does not prevent or resolve the politicization of trade policy.”⁴¹²

The seminal study by Tans (2017) is one of the first bigger studies on the intersection of trade and migration law.⁴¹³ This book investigates the interrelation between the liberalization of service provision and movement of natural persons as it has been shaped within EU and WTO law. The overview presented in this book presents a tension between the international obligations related to service mobility of the national implementation in the Netherlands and the UK on the one hand, and their migration law and access to the labour market legislation on the other. It is precisely this tension that is also core to our study at hand.

Furthermore, the literature that does address the intersection between trade and migration often departs from a paradox between liberalization and restrictions. Ekman *et al* (2019), writing on three recently negotiated FTAs: the EU–Canada Comprehensive Economic and Trade Agreement (CETA), the China–Australia Free Trade Agreement (ChAFTA), and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP), conclude that “with a few exceptions, countries do not agree to more far-reaching provisions than those that already exist in domestic law. Commitments tend either to be limited in number and scope, or to be reined in by the catchall provision that preserves the right for signatories to impose measures to regulate the entry or temporary stay of natural persons, including through visa requirements. Rather than opening up new labour mobility channels, commitments are effectively incorporated into existing visa regimes and subject to its limitations.”⁴¹⁴ Although the FTAs incorporate most of the aspects of GATS on mobility, transparency, national treatment, and most-favoured nation principles, there have been instances of

⁴¹⁰ Jacques Pelkmans, ‘Business Dimensions of EU’s New FTAs’ (2017) 39 *Journal of European Integration* 781 <<http://doi.org/10.1080/07036337.2017.1372432>>.

⁴¹¹ *Ibid.*

⁴¹² Alasdair R Young, ‘Two Wrongs Make a Right? The Politicization of Trade Policy and European Trade Strategy’ (2019) 26 *Journal of European Public Policy* 1883.

⁴¹³ Simon Tans, *Service Provision and Migration: EU and WTO Service Trade Liberalization and Their Impact on Dutch and UK Immigration Rules* (Brill Nijhoff 2017).

⁴¹⁴ Åsa Odin Ekman and Samuel Engblom, ‘Expanding the Movement of Natural Persons through Free Trade Agreements? A Review of CETA, TPP and ChAFTA’ (2019) 35 *International Journal of Comparative Labour Law and Industrial Relations* 163.

conflicts between Member States policies on restricting migrations and expanding the need for functioning channels of labour mobility.⁴¹⁵ Thus, attempts to introduce a legally binding labour migration regime through GATS Mode 4 have, in their reading, not been successful.⁴¹⁶ They raised two important questions: "First, do the signatories commit to more expansive possibilities for labour mobility than through the GATS?"; "Second, what has the political reception of such measures been?".

Lavenex *et al* (2019) did a study on recent Preferential Trade Agreements (PTAs) concluded by China and India. Lavenex argues that the limited inclusion of "mode 4" in the GATS has opened a window of opportunity for addressing labour mobility in a trade context.⁴¹⁷ Therefore, multilateral trade negotiation has become a way for advancing labour mobility goals. This study shows that India and China significantly expanded their set of rules on labour mobility or "mode 4" compared to both commitments in GATS and EU/US PTAs. Whereas India approached the conclusion of trade agreements with the West with some resistance, China was successful in concluding far reaching bilateral deals with the West due to its stronger domestic regulatory capacity and capability. Whereas, for various reasons, progress within the WTO/GATS has been stalled, China and India have pursued this agenda in bilateral and plurilateral PTAs.

12.3 Migration for business establishing purposes

Going back to 2015, the European Migration Network compared the existing legal and policy measures of the member States in order to suggest better reforms for entry and stay of third country nationals for business purposes.⁴¹⁸ They concluded that eight member states have referred to their bilateral and other agreements in place with third party countries to regulate mobility of immigrant investors.⁴¹⁹ However, in France, it was not aimed to have arrangements for immigrant investors but "to facilitate the circulations visas and skills and talents residence permit of certain categories."⁴²⁰ In addition, Member States have also considered procedural facilitations for improvement of mobility, namely: shorter residency requirements than for other categories of migrants, fast track examination of applications, possibility to file applications abroad, exemption from "integration contracts", and (in some cases) medical examination.

De Lange (2018) has explored the admission policies for self-employed non-EU immigrants wanting to start or move their business to the European Union (EU),

⁴¹⁵ Ibid.

⁴¹⁶ Ibid.

⁴¹⁷ Sandra Lavenex and Flavia Jurje, 'Opening-up Labor Mobility? Rising Powers' Rulemaking in Trade Agreements' [2019] Regulation and Governance.

⁴¹⁸ European Migration Network, 'Admitting Third-Country Nationals for Business Purposes' (2015).

⁴¹⁹ Ibid.

⁴²⁰ Ibid.

more specifically the French, German and Dutch entry policies for non-EU entrepreneurs.⁴²¹ Although national policies show some similarity, they differ in respect of how and who decides if an entrepreneur serves a national economic interest. In this contribution De Lange presents a model for defining the level of welcoming of such policies, where the level of welcoming depends on both the material criteria, entry conditions giving the entrepreneur a fair chance and on the formal criteria of the applicable procedures and the actors involved in the decision-making process, which goes to transparency of the procedure. The article concludes with a policy recommendation on a future EU policy welcoming immigrant entrepreneurs which should set standards for a large variety of entrepreneurs, allow for the national economic interest to be broadly defined and have, at the least, transparent and practical procedures. This study is strongly focused on permanent establishment and less on business visits prior to establishment or on what is usually perceived as investment migration, although one can argue that the investments required to establish could fall within the scope of the FTA investment paragraphs, if applicable.

In another study, De Lange investigates the intersection between migration for business purposes and the EU agenda for innovation.⁴²² In this contribution, amongst others, De Lange discusses a proposal by the E15 Initiative to establish a plurilateral “innovation zone”. Such a zone would allow skilled researchers and technical personnel to migrate freely for up to ten years, within the GATS framework.⁴²³ Entrepreneurially skilled people are especially needed to move freely in this innovation zone, the plan argues. De Lange stipulates how, “given the rise of flexibilization of labour markets and growing self-employment, such an “innovation zone” would indeed only have added value if (solo self-employed) entrepreneurs are included.” Such a zone would require convergence and coherence between trade, migration, and labour policies and would require compartmentalized administrative bodies to step outside their compartments.

In 2019 the European Migration Network did a study on admission policies for start-ups.⁴²⁴ The EMN found that in about half of the Member States, attracting start-ups and innovative entrepreneurs from third countries is a policy priority. In recent years a variety of specific start-up schemes have been introduced in some Member States. Member States without such schemes use their existing policies to admit start-ups. The EMN highlight, as a common challenge, lengthy

⁴²¹ Tesseltje De Lange, ‘Welcoming Talent ? A Comparative Study of Immigrant Entrepreneurs’ Entry Policies in France , Germany and the Netherlands’ (2018) 6 *Comparative Migration Studies*.

⁴²² Tesseltje De Lange, ‘Intersecting Policies of Innovation and Entrepreneurship Migration in the EU and the Netherlands’ in Sergio Carrera and others (eds), *The External Faces of EU Migration, Borders and Asylum Policies: Intersecting Policy Universes* (Brill Nijhoff 2019).

⁴²³ John M. Curtis, ‘Trade and Innovation: Policy Options for a New Innovation Landscape’ (2016), Policy Options Paper, TheE15initiative. The E15 Initiative aims to stimulate a “fresh and dynamic” look at global trade and investment systems and opportunities to improve the system’s effectiveness and advance sustainable development. Participating countries are Switzerland, Canada, the UK, Sweden, the Netherlands, Denmark and Finland. See <https://e15initiative.org/publications/trade-innovation-policy-options-new-innovation-landscape/>.

⁴²⁴ European Migration Network, ‘EMN Synthesis Report for the EMN Study 2019 Migratory Pathways for Start-Ups and Innovative Entrepreneurs in the European Union’.

application processes as well as difficult access to growth financing and opportunities to scale up the business. Although member States experience difficulty to retain startups, most do not grant preferential access to permanent residence. Another important issue is the lack of data on the survival rates as well as economic results generated of such start-up schemes.

12.4 Business Travel

Business travel, one form of true temporary mobility for trade, is not discussed much in the migration literature. Literature on the use of Schengen visa for business purposes appears to be absent in the databases consulted. In an older study on business travel, Hovhannisyan and Keller (2015), analysed the role of short-term cross-border labour movements for innovation. They estimated the impact of U.S. business travel to foreign countries on their patenting rates. They conclude that the technological knowledge transfer as a result of business travel enhances innovation in the receiving country and may actually be an important channel through which cross-country income differences can be reduced.⁴²⁵ On the intersection with economic development and visa policies, Czaika and Neumayer (2017), conclude that visa restrictions reduce bilateral trade and foreign investment (but less so tourism), thus restrictive visa policies imply “significant economic costs for both visa-issuing and visa-targeted countries, but it creates some positive externalities for countries with a more liberal visa policy. Liberalised visa policies would in particular help poorer countries to partake more in the benefits of economic globalisation”.⁴²⁶

McKay & Tekleselassie (2018) make a valuable econometric contribution to the literature calculating the impact of visa policies on cross-border travel for business, personal and tourism purposes.⁴²⁷ They show that such benefits can be substantially reduced by restrictive visa policies. Determinants of bilateral visa policies are foreign policy, geographic and historical ties and customs unions, while, so they calculate, the role of GDP is modest. Visa policies, as geographical location, historical ties and e.g. a common language play a sizable role in cross-border travel. Next they conclude that travellers from Africa and Asia are most sensitive to visa policies. They note how travel has a substantial share in service exports in the world and how it can generate FDI and associated benefits and potentially promote knowledge transfers. If this is indeed the case is not included in their study and should, they suggest, be part of an agenda for future research.

⁴²⁵ Nune Hovhannisyan and Wolfgang Keller, ‘International Business Travel: An Engine of Innovation?’ (2015) *Journal of Economic Growth*.

⁴²⁶ Mathias Czaika and Eric Neumayer, ‘Visa Restrictions and Economic Globalisation’ (2017) 84 *Applied Geography* 75 <<http://dx.doi.org/10.1016/j.apgeog.2017.04.011>>.

⁴²⁷ Andy McKay and Tsegay G. Tekleselassie, ‘Tall Paper Walls: The Political Economy of Visas and Cross-Border Travel.’ (2018) *World Economy* 41(113).

Mazzeschi & Cartwright Jr. (2018), two legal practitioners, mapped immigration (and tax) rules related to business travel into 17 Schengen countries.⁴²⁸ Theirs is, to our knowledge, the first to juxtapose business activities and work (work permit requiring) activities and problematize the lack of clarity between these activities and the legal regime applicable. They show how the 17 Schengen countries scrutinized each carry a different definition of ‘business activities’ and for this mapping their study is valuable, although obviously detailed national policies are prone to change regularly. To develop a clear definition of business activities, an endeavour indeed called for, they turn to EU law (Posted Workers Directive and the Blue Card Directive) and GATS MODE 4. They do not, however, make reference to, or take inspiration from, the other EU FTA or other regional FTA. Their proposed definition of business activities remains vague, suggesting obvious criteria such as that ‘the service must be an integral part of the business activities of the sending companies’ and that ‘the sending company must maintain and enforce policies to ensure the business visitors activities do not trigger permanent establishment’. From a compliance perspective those are understandable criteria, but they do not push the agenda for implementing the business visitors’ visa under the FTA.

12.5 Intra-Corporate Transfers

In the edited volume by Minderhoud & De Lange (2018) on the implementation of the Intra-Corporate Transfer Directive two chapters focus on the interrelation with trade.⁴²⁹ Tans & Kroes elaborate on the close connection between the ICT Directive, growing international (service) trade and the needs of multinational companies. Under the ICT-Directive multinational companies may request mobility of their highly qualified personnel for various reasons.⁴³⁰ These types of migration are categorized in accordance with the activity or the employee involved: ranging from overseeing or setting up a branch office in another country, negotiating contracts, educating business trainees or requirement of a specifically skilled employee at another office. They conclude, with respect to the implementation in the Netherlands, that the different admission categories bases on GATS or other FTA, EU migration law or national migration law are significant, but not always discernible when consulting national law.

Guild (2018), in the same volume, approaches the ICT Directive from the perspective of the EU’s international obligations. In her contribution she analyses an ‘alternative’ EU framework of companies’ rights to transfer key personnel from outside the EU to a related entity within the EU. This alternative is, in this

⁴²⁸ Marco Mazzeschi and Clayton E. Cartwright Jr., ‘Not Just Business as Usual in the EU: A Comprehensive Analysis of Immigration and Tax Issues Related to Business Trips in 17 Schengen Countries.’ (2018) *International Journal of Business Administration* 9(2).

⁴²⁹ Paul Minderhoud and Tesseltje de Lange, *The Intra Corporate Transferee Directive: Central Themes, Problem Issues and Implementation in Selected Member States* (Wolf Legal Publishers (WLP) 2018).

⁴³⁰ Simon Tans and Jelle Kroes, ‘Implementation and Application of the International Legal Framework for Intra-Corporate Transfers in the Netherlands’ in Paul Minderhoud and Tesseltje de Lange (eds), *The Intra Corporate Transferee Directive : central themes, problem issues and implementation in selected member states* (Wolf Legal Publishers (WLP) 2018).

case, the understudied EU Russia Agreement 1997. Such Trade Agreements as discussed by Guild are also in force with for instance Algeria (2005), Ukraine (1998 replaced in 2016), and Jordan (2002). These agreements seem to offer opportunities for establishment and the transfer of key personnel beyond the ICT-Directive, but they are understudied and underused in practice. Guild finds that indeed, because there are no mandatory transposition requirement in the agreements, which are directly binding on the Member States, these obligations are not observed in practice.⁴³¹

Costello & Freedland (2016) argue that workers in a multinational do not just have a passport of a state, but also of a 'Global Inc'.⁴³² Their labour rights are determined according to corporate policy and for their legal position they are not connected to a particular country (p. 49). They attack the presumption of temporariness (and the subsequent analogy with intra-EU posting) because some of the multinationals falling within the scope of the ICT-Directive are not temporarily delivering a service but are solidly established in the receiving state. In the next section we will discuss more literature on the concept of temporary migration, dominant in trade related migration.

12.6 Rights of high-skilled temporary migrant workers

Migration under the scope of the FTA is, in most cases, temporary migration of high-skilled third-country nationals. Their stay in the destination country is, in the case of employees, tied to the duration of a contract, such as service contract for a temporary period.⁴³³ The literature on migrant rights labels such temporary migration as precarious, although it usually addresses low skilled migrant workers' status.⁴³⁴ Absence or limitations of rights, such as the right to family reunification, is core to this literature as well as the dependence on a third party for the right to enter or remain in a country (e.g. employer).⁴³⁵ The ILO has called attention to bureaucratic practices, lack of transparency in having a unified definition on temporary migrants, political difficulties in implementations, and lack of social dialogue and consultations with – low-skilled – labour

⁴³¹ Elspeth Guild, 'Intra-Corporate Transferees: Between the Directive and the EU's International Obligations' in Paul Minderhoud and Tesseltje de Lange (eds), *The Intra Corporate Transferee Directive : central themes, problem issues and implementation in selected member states* (WLP 2018).

⁴³² Cathryn Costello and Mark Freedland, 'Seasonal Workers and Intra-Corporate Transferees in EU Law' in Joanna Howe and Rosemary J Owens (eds), *Temporary Labour Migration in the Global Era. The Regulatory Challenges* (Bloomsbury 2016).

⁴³³ Ekman, Åsa Odin & Engblom, Samuel. 'Expanding the Movement of Natural Persons Through Free Trade Agreements? A Review of CETA, TPP and ChAFTA', *International Journal of Comparative Labour Law and Industrial Relations* 35, no. 2 (2019): 163–200

⁴³⁴ Leah F Vosko and Robert Latham, 'Liberating Temporariness?' (McGill Queen's University Press 2014).

⁴³⁵ *Ibid.* (no.5).

migrants.⁴³⁶ In a 2016 edited volume on *Temporary Labour Migration in the Global Era*⁴³⁷, Reilly writes:

'Temporariness is itself a diminution of rights and political power, and thus a source of vulnerability in the workplace. The relationship between work and membership has been a dominant theme in discussions of the ethics of labour migrant schemes'.⁴³⁸

We have not found reference to debates over such ethics in literature on trade related migration. Most of this literature is on low-skilled migration and how it emphasizes the need for transparent, accessible and available information about rights (Berntsen, 2015) but the possible vulnerability of high-skilled migrants is, generally speaking, overlooked in the literature.

Van Ostaïjen, Reeger and Zelano⁴³⁹ for instance, claim migrant workers with high salary levels, such as knowledge workers, have more *agency* towards employers and service providers. The work by Ruhs & Martin⁴⁴⁰ also argues that high-skilled migrants, because they are sought-after and presumably in short supply, have more rights than low skilled migrants. In this literature there appears to be an (often unarticulated) assumption that, because of their skill level and income, high-skilled labour migrants know how to empower themselves (for example, to hire a lawyer). Noronha et. al.⁴⁴¹ study high skilled migrant worker resilience (Indian ICT services) in the Netherlands and conclude the regulatory design of the Dutch high-paid migrant worker scheme leaves high-skilled migrant less empowered as sometimes is suggested in literature.⁴⁴²

In sum, there is little literature on the intersection of trade and the type of migration scrutinized in this report, although some seminal studies do address the topic. Developing a research agenda to improve the functioning of mobility of service providers, independent professionals, investors moving under the FTA could provide timely knowledge on a type of mobility that is bound to increase if the number of trade agreements entered into by the EU increases.

⁴³⁶ Piyasiri Wickramasekara, *Bilateral agreements and memoranda of understanding on migration of low skilled workers: a review*, Report prepared for the Labour Migration Branch International Labour Office, 2015, Geneva.

⁴³⁷ Joanna Howe and Rosemary J Owens, *Temporary Labour Migration in the Global Era : The Regulatory Challenges* (Hart Publishing 2016) <<http://search.ebscohost.com/login.aspx?direct=true&db=nlebk&AN=1393497&site=ehost-live>>.

⁴³⁸ Reilly, Alexander in *ibid*.

⁴³⁹ 'The Commodification of Mobile Workers in Europe - a Comparative Perspective on Capital and Labour in Austria, the Netherlands and Sweden' (2017) 5 *Comparative Migration Studies* 6 <<https://browzine.com/articles/78030564>>.

⁴⁴⁰ 'The Rights of Migrant Workers: Economics, Politics and Ethics' [2016] *International Labour Review*.

⁴⁴¹ Ernesto Noronha and others, 'Navigating Embeddedness : Experiences of Indian IT Suppliers and Employees in the Netherlands' (2018), *Journal of Business Ethics*, <<http://dx.doi.org/10.1007/s10551-018-4071-3>>.

⁴⁴² *Ibid*.

13 Conclusions

13.1 Introduction

The interaction between EU Free Trade Agreements and immigration law in the EU Member States is understudied. Free Trade Agreements include commitments that may impact immigration law. The commitments may lead to entry and residence of third-country nationals (TCN) to an EU Member State if the conditions described at the international level are fulfilled, and if none of the exemptions incorporated in the FTA apply.

Trade liberalisation provides the definitions and scope in relation to the categories of natural persons that can rely on the agreements as well as the resulting obligations for states. These agreements present five categories of natural persons who are entitled to mobility into the EU:

- Contractual Service Suppliers (CSS)
- Independent Professionals (IP)
- Intra-Corporate Transferees (ICT), including Graduate trainees (GT)
- Business Visitors (BV; for Establishment Purposes (BVEP) and for Short Term purposes (STBV))
- Investors

While the EU commitments provide the general categories and access conditions, an EU Member State may have specifically reserved the right to impose certain conditions impacting this access. Moreover, the trade agreements do not prevent the imposition of measures relating to public policy objectives, nor certain measures relating to immigration. Consequently, applicable national rules of the host Member State should allow natural persons the right to entry (access to the territory) of that state, as well as the right to temporary residence for business purposes under the conditions specified at the international level. Besides entry and residence rights, non-discrimination in relation to a host states own nationals applies as well. However, for all these obligations, a legitimate public policy objective allows for derogations. Finally, the EU consistently ensures that, despite the liberalisation provided, measures regarding entry, stay, work and social security measures shall continue to apply.

The European Commission has asked us to investigate this interaction, and to identify potential inconsistencies and regulatory gaps. In this concluding chapter we provide an overview of our conclusions and our recommendations. Before doing so we will answer the question how to determine whether an obligation derived from the trade commitments is not met by a Member State.

13.2 Determining compliance in international law

The trade commitments discussed in this report are international agreements, and therefore part of international law. As a consequence, EU and national legislation needs to be in conformity with these trade agreements. If the commitments are implemented into national law correctly, those benefiting from the agreements can rely on them on the basis of national law. If the trade commitments are not implemented, or implemented incorrectly, this may have three consequences. Firstly, a signatory state may seek dispute settlement provided by the trade agreement on behalf of its citizens whose rights were affected by the incorrect implementation.⁴⁴³ Secondly, an EU Member State breaches an EU law obligation if it fails to comply with the obligations derived from an international agreement which applies to the EU. As such, the European Commission may commence an infringement procedure against that Member State.⁴⁴⁴ Thirdly, as the trade agreements also provide for the possibility of review in relation to administrative decisions (incorrect decisions from the perspective of the trade commitments), it should be possible for natural persons or businesses to rely on national procedures to correct such decisions. However, the provisions on the possibility for review included in the trade agreements do not apply to decisions relating to entry.

Determining whether a certain national measure breaches the trade commitments can be difficult. As long as a final ruling by the highest courts or appellate bodies has not been given, legal interpretation can be a matter of debate. For the purpose of this study, we adopt the following approach to assess potential breaches.

As a first step, the content of the trade commitments is provided in each of the substantive chapters of this report. This content can be straightforward, for example: those coming to the EU under the category of “Intra-corporate Transfer” may reside in an EU Member State for three years. Answering the question whether an economic needs test may be applied in relation to Japanese nationals relying on mobility related to Contractual Service Suppliers or Independent Professionals is more difficult. For example, Romania imposes an economic needs test to these categories. Consulting the text of the trade agreement does not reveal if Romania may carry this restriction. Only if we look at the annexes, where specific reservations are included in relation to each service sector, it becomes clear that indeed Romania, and various other Member States, have made this reservation.

Determining the content of the trade commitments therefore requires a careful approach. This careful approach requires an analysis of language, of the system in which obligations are implemented. The trade commitments use language

⁴⁴³ In practice, this has never happened. While hitherto it seemed unlikely that states would commence dispute settlement based on mobility commitments, the EU-UK agreement may change this. As the EU-UK trade agreement replaces free movement, various actors will seek to continue mobility on the basis of the trade agreement.

⁴⁴⁴ C-66/18 Commission v Hungary.

that not always correlates to the language used in national legislation, in particular, as the implementation takes place in legislation relating to migration and access to the labour market. For example, the term “economic needs test” is trade language, whereas in migration language this is often referred to as a “labour market test”, such tests may not necessarily encompass exactly the same policy goals.

Another important issue relates to the system adopted in the trade agreements. Essentially, the trade agreements provide mobility under certain conditions. Once those conditions are met, mobility based on the commitments should be allowed. However, in addition, the commitments relating to mobility intend to open markets to competition, thus ensuring non-discrimination (national treatment). For example, the idea of Independent Professionals is not only to provide access to the market of other signatory states, but also to allow the Independent Professionals to compete on the basis of a level playing field with ‘like’ domestic service suppliers.⁴⁴⁵

The scope of non-discrimination will determine to what extent measures that make it more difficult to compete with locals may be problematic. By definition, migration and access to the labour market rules only apply to third-country nationals. The need to comply with a work permit obligation already means costs and efforts to rely on mobility. However, as it is clear from *Argentina – Financial Services*, ensuring equal conditions of competition is not the same as guaranteeing equality of opportunities.

As such, we consider the application of genuine immigration, and access to the labour market rules, to be inherent to the fact that a foreign trader is not based in the host state. Thus, the additional burdens derived from the need to enter and reside in the host state (obtaining a visa, residence permit and work permit for example), do not upset the conditions of competition. However, highly cumbersome procedures, visa with extremely high costs and other excessive requirements attached to immigration procedures can likely be considered to upset the conditions of competition in relation to domestic competitors.

And there are more key arguments to consider ‘normal’ immigration procedures to be in line with the trade commitments, whereas ‘excessive’ procedures may form a potential breach.

Even if a measure hinders the trade commitments on mobility, this does not by definition lead to a breach of the agreements. Firstly, measures relating to ‘movement of natural persons across borders’, the so-called immigration carve-out, are not prevented by the agreements, provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to any

⁴⁴⁵ Competition requires the foreign and domestic actor involved to compete, as they are providing similar, or ‘like’ activities. See, on the question whether this means that separate findings with respect to the “likeness” of services, on the one hand, and the “likeness” of service suppliers, on the other hand, are required, this is not the case, *Argentina – Financial Services Appellate Body Report*, par 6.29.

Party under the terms of a specific commitment. Secondly, certain policy objectives, such as public order, allow a signatory state to deviate from any of the obligations derived from the trade agreements. Thirdly, the EU has included in all the trade agreements a so called blanket reference, which states that:

All other requirements of [Union] and Member States' laws and regulations regarding entry, stay, work and social security measures shall continue to apply, including regulations concerning period of stay, minimum wages as well as collective wage agreements.

Our key approach, that normal immigration measures are unproblematic, is reaffirmed by these concepts. Firstly, the immigration carve-out indeed explicitly provides that measures relating to crossing borders are not in conflict with the trade agreements. In addition, the blanket reference ensures that such measures continue to apply, despite the trade commitments. Phrased differently, the legality of immigration related measures is clearly confirmed.

However, this also means that our approach in relation to 'excessive' immigration measures is confirmed as well. The immigration carve-out is clearly limited by the phrase provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to any Party under the terms of a specific commitment. As such, measures that are formally part of national immigration law, but which in reality go beyond the orderly movement of people across borders, cannot benefit from the carve-out.

A simple example can clarify this. Visa are explicitly mentioned as the example of a measure relating to the immigration carve-out. Yet, clearly, a visa for which a fee of 10.000 euro is required would likely be considered to nullify or impair the benefits of the commitments.

A more complex example is the following. A system of sponsorship may be seen to regulate immigration. Much depends on the form such a system may take. If sponsorship in essence ensures that movements across borders remain controlled, as the sponsor becomes partly responsible and thus ensures that risks of overstaying are mitigated, this may indeed fit the immigration carve-out. However, if sponsorship would include high fees, extensive administrative obligations, information duties and sanctions in cases of non-compliance, the question becomes whether this still qualify as measures relating to the *orderly* movement of persons across borders or too restrictive to qualify as such. And even if all the obligations relating to sponsorship are considered to regulate the orderly movement of natural persons, a case can be made that excessive measures can nullify or impair the benefits of the specific commitments, which would mean that such measures no longer benefit from the immigration carve-out. Note that the commitment offered in the GATS is *non-discrimination* between domestic and foreign Mode 4 service suppliers. Adopting a strenuous regime in relation to foreign service suppliers may indeed nullify that promise.

It is highly unlikely that contractual service suppliers or independent professionals are able to compete on the basis of a level playing field with domestic service suppliers if a burdensome and costly administrative hurdles apply.

Finally, besides the immigration carve-out, certain policy objectives, such as public order, allow a signatory state to deviate from any of the obligations derived from the trade agreements. Most of the measures listed in our chapter on refusal grounds will fit the exception grounds provided in the trade agreements. The public order exception provides a considerable margin for regulatory autonomy. Note however that these exception grounds only can be applied in relation to a genuine and sufficiently serious threat posed to a fundamental interest of society.

A clear example of a measure that would likely not breach the trade commitments because it can be exempted by public policy is past criminal behaviour. Various Member States may refuse entry based on a third-country national having previous criminal convictions. As such, a notorious drug cartel leader wishing to enter an EU Member State based on the business visitors category can be refused entry. This indeed violates the BV commitment, yet this breach can be exempted based on public policy. The question then is, when is criminal behaviour in the past still relevant to claim that an individual forms a genuine and sufficiently serious threat to a fundamental interest of society. We consider a one day prison sentence, for instance due to a bar fight, too light for this. As such, a refusal ground which can possibly be invoked due to any criminal conviction in our opinion is not covered by public policy.

We will now provide an overview of the review we conducted of implementation in relation to each of the five categories of natural persons enjoying mobility rights.

13.2.1 Business Visitors

None of the Member States have clearly implemented the BVEP and STBV category. In particular the detailed list of activities in the EU-Japan agreement for STBV is missing in the national contexts. For Schengen EU Member States, we believe this follows from the fact that the Schengen Borders Code, the Schengen Visa Code and the Visa Code Handbook do not clearly add the BVEP and STBV category, which would essentially mean that each Schengen state may simply refer to the Schengen visa to implement the trade agreements.

The definitions of BV provided in the international trade agreements are such that in trade language, these do not constitute economic activities. They are not services, nor delivery of goods, they are activities to prepare future economic activities. This definition does not align with many definitions of 'work' in the Member States, where an activity performed for a company may simply be seen as such. In our view, correct implementation of the BV commitments should not come with conditions that are related to entry to the labour market.

Some Member States allow BV for 90 days in a 12 month period. This cooling-off period is too long to comply with the EU-Japan commitments, and the GATS commitments inscribed by most Member States.

Recommendations:

We recommend to maintain the list of all BV activities consistent throughout the different EU trade agreements. In addition, the Schengen legislation (Article 6(3) of the Visa Regulation 2018/1806) could be amended to include a comprehensive list (in line with the trade agreement commitments) of activities which must not give rise to the application of the “paid activity” exception to both business visitors categories. This might also require amending Annex I to the Schengen Borders Code to list all documents which could be used for the purpose of verifying the entry conditions of a business travel.

From an immigration perspective it makes sense to merge both BV categories into one. They are subject to the same limitations: time limitation (maximum 90 days in any six-month period) and activities limitation. Although in practice they do tend to have a different profiles as business visitors for establishment purposes are mainly executive or managerial staff whereas short term business travel can be conducted by non-executive staff, this is not relevant as all activities should be work permit exempt.

13.2.2 Contractual Service Suppliers

The overview of the implementation of the CSS category in the Member States demonstrates that this form of mobility is explicitly implemented by various Member States. Some Member States align the definitions with those that apply to intra-EU posting, others copy the text of the trade agreements. Especially those Member States that copy the language used in the trade agreements, as well as the conditions that apply, create a clear and transparent entry route for CSS.

Some Member States have chosen to include a general entry route which states that entry is possible based on the conditions provided in international trade agreements. This form of implementation is difficult to use in practice, as both authorities and those wishing to rely on CSS frequently are unaware of the details provided in the agreements.

Where nothing specific is indicated, those wishing to rely on CSS need to have an alternative entry scheme available suitable for their purpose, which moreover is not more stringent than the conditions provided in the trade agreements. The main alternative is to apply for a general work permit available for TCN who are temporarily employed in the host state. Such entry schemes are usually grounded on the idea that such TCN enter the labour market of the host state. CSS however, has a different purpose, as it is intended to facilitate the service provider based outside the EU which has obtained a service contract. Unless specifically indicated in the reservations, this mean that such work permits must not be based on a labour market test. Work permits occasionally are

granted on the condition that a representative or sponsor in the host state is available.

The maximum duration of the CSS entry route should at least be 12 months in a 24 months period based on the EU-Japan agreement, some Member States however, maintain a shorter maximum duration.

Recommendations:

Given the significant differences in implementation at the national level, the manner in which entry schemes for different purposes sometimes have to be matched with CSS and the finding that sometimes no suitable entry scheme is available, by way of recommendation we suggest EU legislation to harmonize the conditions of entry and stay of CSS.

Alternatively, for assignments shorter than three months, we suggest amending the Schengen legislation (Article 6(3) of the Visa Regulation 2018/1806) to include a comprehensive list (in line with the trade agreement commitments) of activities which must not give rise to the application of the “paid activity” exception of CSS. This might also require amending Annex I to the Schengen Borders Code to list all documents which could be used for the purpose of verifying the entry conditions of CSS. It is also possible to have the same approach as for BV for stays of less than 90 days. For this purpose we also refer to our recommendation on the implementation of the BV category.

The use in practice of multiple entry visa with long validity, might be sufficient although not for stays of more than three months consecutive. For assignments longer than three months CSS must either be implemented correctly in national legislation, or this type of mobility should become part of legislation at EU level.

13.2.3 Independent Professionals

We observe that none of the Member States is carrying a FTA-IP scheme specifically implementing this category. Complying with the definition of Independent Professionals within the trade agreements necessitates the Member States to provide a one year visa without requiring the commercial presence. Although the Member States can have their own regulations regarding the extension or renewal of the visa/permit after one year, their regulations for the first year should be adjusted in a way that does not deviate from the commitment for Independent Professionals under the trade agreements.

Our analysis shows that the Member States are primarily providing applicants with more than a one-year residence permit, requiring commercial presence, skills-tests, business experience, etc. Hence, these schemes are typically aiming at the establishment of new businesses and thus not Independent Professionals as intended by the FTA.

Given the general finding that the IP category is often missing in national legislation and the manner in which entry schemes for different purposes sometimes have to be matched with CSS and the finding that sometimes no suitable entry scheme is available, by way of recommendation we suggest EU legislation to harmonize the conditions of entry and stay of IP.

Alternatively, we suggest that for service contracts requiring a presence shorter than three months, EU decision makers could envisage a broadening of the scope of allowable work permit exempt (business) activities and inserting them into a new piece of legislation that Member States would transpose and ensure proper enforcement. Alternatively an entry route via a short-term work permit which could be obtained fast with very little administrative requirements and eligibility criteria could be foreseen.

For service contracts requiring a presence longer than three months, a new piece of legislation could be envisaged which should be transposed by EU Member States. This category is not meant to integrate the labour market hence such legislation should provide minimal administrative burden and eligibility criteria aligned with the trade agreements.

To secure equal treatment with nationals, this category could be included under the scope of the EU Single Permit Directive 2011/98, currently explicitly excluding self-employed migrants. Do note, however, that Directive 2011/98 applies to migrants *working* in the EU, meaning accessing the EU labour markets, which is not the case for mobility under the FTA.

13.2.4 Intra Company Transfers

All Member States have an option available for ICT. This category is well recognized, not very controversial and simply implementing the EU ICT Directive (but for Ireland and Denmark), which is obligatory under EU law, already suffices to cover implementation of the trade agreements for ICT for longer than 90 days. This includes enforcement of the right to work at a clients' site.

However, as the trade agreements simply allow access for ICT for a period of one day up to three years (one year in the case of graduate trainees) under the conditions of the trade commitments, ICT up to 90 days should be clearly covered as well. As this is not the case in all Member States, this is a gap in EU legislation.

We recommend EU legislation for assignments shorter than 90 days which moreover ensure that the legal entity involved in the ICT performs a genuine economic activity. Such conditions should not, however, lead to additional restrictions which are not specifically listed in the trade commitments. For example, the trade agreements in general specify that national labour law continues to apply, yet imposing higher income requirements than those applicable for domestic workers has a different purpose than equally imposing national labour laws on domestic and foreign workers, as this criterion is used to restrict

access for ICT earning a wage below the threshold. Income may arguably also be used by immigration authorities as a proxy for skills level (specialist) or seniority (manager). Not however, that this argument only holds valid up to a certain wage level. An unrealistically high wage level would in our eyes be similarly problematic as a visa fee which is so high that its aim is not regulating immigration and its costs but rather nullifying or impairing entry.

13.2.5 Investors

Various Member States provide for an entry scheme which covers, or partly covers the EU – Japan commitments relating to investors. Where such schemes require a minimum sum to be invested, this is in line with the trade agreement, as long as the amount can still be considered as not exceeding a substantial amount of capital.

However, job creation or the requirement that the investment serves a public good are not criteria described in the general conditions that apply to the investor category in the FTA. Such requirements may only be imposed if specifically reserved in the Annex to the EU – Japan FTA.

The possibility to rely on an entry scheme in general on ‘the trade commitments of an FTA’ may indeed lead to entry for Japanese investors, but this form of implementation is not transparent.

Several Member States do not have a scheme specifically covering investors, nor entry based on the trade agreements in general. In such Member States, an alternative scheme is needed. The points based system entry schemes are not entirely suitable for investors, as such schemes require the investor to obtain a certain amount of points in relation to irrelevant conditions (language, skill level) from the perspective of the FTA and investment. However, such conditions may be considered to relate to legitimate migration related concerns (the orderly movement of persons across borders). Entry based on business activities or acting as an agent may or may not be suitable alternatives for the investor category.

As with CSS and IP, given the absence of this category in national entry schemes and the need to use (unsuitable) alternative schemes, we suggest EU legislation to harmonize the conditions of entry and stay of investors.

Alternatively, for assignments shorter than three months, we recommend amending the Schengen legislation (Article 6(3) of the Visa Regulation 2018/1806) to include a comprehensive list (in line with the trade agreement commitments) of activities which must not give rise to the application of the “paid activity” exception investors. This might also require amending Annex I to the Schengen Borders Code to list all documents which could be used for the purpose of verifying the entry conditions of an investor.

As outlined in the 2019 Commission Report, investor residence schemes entail several inherent risks. Although the 2019 Fitness check on legal migration has not identified a strong need for harmonisation in this area⁴⁴⁶ nonetheless our analysis of the FTA leads to the conclusion that such legislation is preferable to implement the FTA. The objective of a potential EU piece of legislation could be to boost trade in services and contribute to sustainable economic growth and employment opportunities in the host country, instead of merely providing opportunities for taking up residence (and possibly accessing the labour market) in an EU country.

13.2.6 Social Security & Family Reunification Rights

The norms available under current EU migration and social security law most likely do not apply to TCN moving under the scope of the FTA. Note however, that FTAs consistently indicate that national and EU regulations relating to work and social security matters shall continue to apply. As an example, ICT can derive social security rights from the ICT Directive, however such rights are not covered in FTA. Most Member States mention the relevance of bilateral agreements. We provide a general overview and support the general conclusion that the framework of Posting as referred to in the ICT Directive could also be applicable to TCN employees staying for more than 90 days under the FTA. The provisions stated in the EU ICT Directive make sense for all FTA categories.

On the other hand, we see there is no social security liability in the host country for short-term travel of less than 90 days. Furthermore, self-employed IP and Investor TCN moving under the FTA fall outside the scope of current regulations. A more targeted study into the treatment of self-employed and investor TCN in the Member States in respect of their social security rights would appear useful to draw more substantive conclusions.

For short term stays no longer than 90 days, accompanying family can either travel into the EU visa free or obtain a visa through the “normal” procedures. Some Member States have additional specific long term visa however, which appears to be more facilitating towards accompanying family members of TCNs seeking temporary market access under the trade agreements, than “normal” visa procedures. A common EU migration policy for movement into the EU related to the trade agreements could benefit from a related long stay visa for family members. Current trade agreements do not prescribe access to (self)employment for family members during such a short stay. Hence, the Member States remain free to apply their own laws in this respect.

The Visa Code Handbook neither creates any legally binding obligations upon Member States nor establishes any new rights and obligations for the persons who might be concerned by it, but aims to ensure a harmonised application of the legal provisions. Therefore we recommend that the Visa Code Handbook

⁴⁴⁶ Fitness Check p. 186 of SWD (2019) 1055 final.

lays-out in more detail trade related visa's and includes a specific reference to facilitating visa for accompanying family members. Given the current variety amongst Member State of possibilities for family reunification likely hinders transparency and mobility between the Member States.

It is generally accepted that to attract talent to stay in the EU for longer periods (See ICT Directive, Blue Card Directive, researchers under the Students and Researchers Directive for researchers, Family Reunification Directive) facilitating family reunification is perceived to positively impact economic migration. As temporary trade related migration also concerns these sought after talents, a family reunification scheme and derogations from the Family Reunification Directive as in said Directives could contribute to take away perceived barriers to trade related (temporary) migration which possibly restrict market access unnecessarily.

13.2.7 Transparency

All three FTA examined in this report include transparency obligations. Having a fair and transparent administrative procedure is an obligation for the Member States under the FTA. Transparency also applies to qualification requirements and procedures, technical standards and licensing requirements. Depending on the specific agreement, Member States are obliged to have publicly available references for pre-legislative information. Nevertheless, analyzing the current state of affairs, Member States do not have all this relevant information readily available online for instance. The EU Immigration Portal can be considered corresponding to the core transparency requirements of FTAs.⁴⁴⁷ However, at the time of writing, not all relevant links were available in the portal yet. We recommend the Member States be urged to provide the necessary links to information to be made available through the EU Immigration Portal.

In addition, designation of enquiry points, which is already obligatory under the GATS agreement, and providing information on regulatory authorities are essential elements of transparency for the Member States. In practice, these enquiry points are often formed by a single person within the trade or economy ministry and these are not always updated.

We conclude there is room for improvement of publicly accessible information on the functioning of the FTA in the Member States, in particular as we have also seen examples by Member States of relatively accessible websites available.

13.2.8 Appeal procedure

The FTA, like EU migration law, require a certain level of procedural safeguards to be applicable on procedures in relation to FTA mobility. The required level of protection does not appear to be higher than common in EU law. However,

⁴⁴⁷ https://ec.europa.eu/immigration/node_en

the standards are by no means fully harmonized (Annex 4 on Procedures applicable in Member States).

Were the European legislator to draft legislation in order to facilitate the proper implementation of the FTA in the EU Member States, we recommend to also harmonize administrative procedures and available remedies for the sake of transparency and procedural fairness.

13.2.9 General refusal grounds

Most EU Member States adopt variations of the standard refusal grounds, public security, policy and health. Such grounds fit the exception grounds provided in the trade agreement, be it that attention must be given to the clear disclaimer provided, refusal should be based on genuine and sufficiently serious threats. In addition, Member States may apply measures relating to the orderly movement of persons across borders.

The consequence of this is that the trade agreements, in our view, allow states to restrict entry if this is proportional. As an example, restricting entry to a person convicted recently of a serious crime, or restricting entry to persons who (repeatedly) commit migration related offences should be in line with the trade agreements. Contrary, misdemeanours or crimes committed for example more than 10 years ago may not warrant refusal of entry if the person concerned wishes to rely on the trade agreements.

13.3 Best Practices

In relation to all categories, the fact that the trade commitments are derived from international agreements based on reciprocity, which moreover include specific obligations relating to transparency, we consider specific reference to the trade agreements a general best practice. Reference to the background of the entry routes included in the legislation or guidelines or on information portals (which are kept up to date) would in essence all suffice, as long as the connection between the specific entry route and the international trade agreement is clearly visible. This is not just important for those wishing to rely on the trade commitments, it is also helpful for national authorities themselves.

The Netherlands provides an example of a Member State that has adopted provisions which grant entry based on a specific mobility category while adding a list of countries (which must of course be kept up to date) who's nationals may rely on these provisions. This ensures that the background of the commitments remains visible, while those able to rely on these entry routes are still limited to the nationals enjoying the benefits of the EU trade agreement.

An additional best practice is to include a general form of entry based on the trade agreements, as is the case in Germany. To be clear, we consider this form

of implementation too general, as it does not provide any of the rather important details that accompany each form of mobility. However, entry based on 'the trade agreements' does ensure that, if no specific form of entry is included in the national legislation, one can always rely on this general provision. As such, this entry route can serve as a safety net.

13.3.1 Business Visitors

This category is best implemented through an entry route which provides relatively unobstructed access in relation to a complete list of the business activities included in the trade agreements. Work permits and similar conditions should not be required. Note that the list included in the EU – Japan FTA is quite extensive. To prevent the effect of an *erga omnes* implementation, which would hinder the EU's position in negotiations, the list can be provided with a clear indication that not every national can benefit from this entry route, as this depends on the condition that the person wishing to rely on this form of entry must be covered by a trade agreement. Member States that provide for entry to set up a commercial presence, separate from the BVST activities often comply fully with the obligations derived from the trade agreements relating to business visitors, as the BVST and BVE categories clearly address two different activities.

13.3.2 Contractual Service Suppliers

An entry route which allows entry for CSS, thus for employees of service providers based outside the EU, either through a specific visa or a work permit, is the most clear example of implementation encountered in the Member States. Even more transparent are those Member States that have not only copied the CSS definition, but also the general conditions provided at the international level into national legislation, an examples of which is Spain. Importantly, Member States should ensure entry in relation to the specific service sectors in which CSS commitments were adopted. Again, including such a list, either in the legislation, policy guidance or via public information would greatly enhance the visibility of this form of mobility.

13.3.3 Independent Professionals

An example of a Member State that has specifically implemented the trade commitments relating to IP is Portugal. A temporary visa (one year maximum) is available for the purpose of carrying out an independent professional activity. The requirements are to have obtained a contract for provision of services as a self-employed person and the need to demonstrate the necessary qualifications and means of subsistence. As with the CSS category, a best practice is to include information on the service sectors which are opened to IP based on the trade agreements.

13.3.4 Intra-Corporate Transferees

Most Member States provide access to ICT based on the ICT-Directive, which suffices to implement the trade agreements from 90 days onward. Those Member States that also provide access for a duration shorter than three months and up to three years fully comply with the trade commitments. Some Member States have adopted separate entry schemes, one covering the ICT-Directive and another covering the broader scope of the FTAs. Note that numerical quota may not be imposed based on the trade commitments. As such, best practice is again to ensure that the specificities of the trade commitments (under 90 days duration and prohibition of quota) remains visible.

13.3.5 Investors

Croatia forms an example of one of the few Member States that has correctly implemented the investor category. Croatia has a general entry scheme based on the conditions contained in an international agreement, which therefore can also cover the investor category. However, we feel that this form of implementation suffices, but should be accompanied with policy guidance or public information providing the definitions and details to this form of mobility. In our view, most Member States miss the mark when it comes to investors, as intended in the trade agreements. As a best practice, the definition provided in the trade agreement, its connection with the investment liberalisation chapter, and the specific conditions that apply based on the trade agreements should be clearly visible.

13.4 To conclude

This report provides an overview of the mobility categories included in Free Trade Agreements and the conditions under which persons can rely on them. An extensive and detailed analysis of the implementation of each of these categories in all EU Member States follows and based on this we provide various recommendations.

The ICT and BV categories can, in general, mostly be relied on to gain entry to EU Member States in line with the trade commitments. As a consequence, most Member States adopt a similar approach to entry for these categories. For CSS, IP and Investors the resulting picture is different, as these categories are less well known and less likely to fit existing entry schemes. As a consequence, the manner in which these categories can be relied on differs more amongst the Member States than is the case with ICT and BV.

In practice these categories are not always recognized, thus those wishing to rely on them, nor by immigration lawyers. We believe that FTAs therefore do not fulfil their potential in this area, this type of mobility is seen as beneficial for both the home and host state.

We believe EU legislation addressing the less well known of these categories (CSS, IP and Investors) would be greatly beneficial as it would lead to clearly recognisable and harmonized entry to the EU for TCN in general for these categories. It would also mean that it is no longer necessary to search for an entry scheme relating to a different category which may in practice also cover the category addressed in trade commitments, again greatly enhancing visibility.

As an alternative recommendation, amending existing EU legislation, such as the Schengen legislation to cover these categories as well, will mostly also work to properly cover each of the categories in so far as they are not consistently covered by national entry schemes at the moment.

Finally, this report, which identifies the current inconsistencies and possible gaps and possibly a detailed implementation guideline including best practices may lead to each of the Member States reviewing their legislation implementing the FTAs, allowing them to ensure complete coverage. Clear language which specifically refers to the FTA itself would already lead to a significant impact on the awareness of the liberalization provided in the trade agreements.

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Annexes

1. List of experts
2. List of interviewees
3. Social security rules per country
4. Procedures applicable in Member States

Annex 1: List of experts

Country	Expert	Organisation
Austria	Johannes Peyrl	Donau Universität Krems
Belgium	Jo Antoons	Fragomen Worldwide
Bulgaria	Valeria Ilareva	FAR, Foundation for Access to Rights
Croatia	Iris Goldner Lang	Faculty of Law, Zagreb
Cyprus	Areti Charidemou	Areti Law
Czech Republic	Radka Sláviková Geržová	FUTEJ & Partners Law Firm
Denmark	Henrik Lindhardt	Gateway to Denmark
Estonia	Leif Kalev	Tallinn University
Finland	Mika Raunio	Siirtolaisuusinstituutti Migration Institute of Finland
France	Tiphaine Moreau	Fragomen's Paris office
Germany	Sandra Lavanex / Paula Hoffmeyer	University of Geneva
Greece	Costas Papadimitriou	University of Athens, Greece
Hungary	Boldizsár Nagy	Central European University
Ireland	David Cantrell and Áine Hartigan	Eugene F Collins Solicitors
Italy	Marco Mazzeschi	Chinese Culture University (Taipei)
Latvia	Edmunds Broks	University of Latvia
Lithuania	Lyra Jakuleviciene	Mykolas Romeris Law School
Luxembourg	Wim Cocquyt	Fragomen Global LLP
Malta	Dr. Jean Philippe Chetcuti/ Dr Priscilla Mifsud Parker	Chetcuti Cauchi Consulting Ltd
Netherlands	Jelle Kroes	Kroes Advocaten
Poland	Izabela Florczak	University of Lodz
Portugal	Francisco Coutinho	Lisbon Nova School of Law - FDUNL
Romania	Sandra Mantu	RU Nijmegen, Faculty of Law
Slovakia	Daniel Futej	Futej & Partners law firm
Slovenia	Sasa Zagorc	University of Ljubljana
Spain	Ana Garicano Sole	Sagardoy Abogados, Madrid
Sweden	Petra Herzfelt Olsson	Stockholms Universitet

Annex 2: List of interviewees

Country	Interviewee	Organisation
Croatia	Ms. Anita Mandić	Head of the Service for Aliens, Croatian Ministry of Interior
	Ms. Irena Kalani	Home Affairs Supervisor, Croatian Ministry of Interior
	Ms. Ivana Perlić Glamočak	EMN NCP Croatia, member of the Directorate for Immigration, Citizenship and Administrative Affairs, Croatian Ministry of Interior
Finland	Mikko Räsänen	Federation of Finnish Industries, Helsinki, Finland (ek.fi)
Germany	Marius Tollenaere and Anna Fontaine	Fragomen Germany, Frankfurt am Main
Greece	Michael Kosmidis	Head of Department of Immigration Ministry of Immigration Policy
Italy	Corrado Scivoletto	Lawyer in Rome, specialized in immigration and employment law
	Government Officer (anonymous)	
Lithuania	Rūta Skyrienė	Executive Director of Association “Investors’ Forum” (business association representing investors)
Malta	Dr Antoine Saliba Haig	Chetcuti Cauchi Advocates
Netherlands	Pieter Krop	Kroes advocaten
Poland	Hanna Gill-Piątek	Vice-chair of Parliamentary Team for Migration and Integration Policy
Portugal	Constança Urbano de Sousa	Member of the Portuguese General Assembly and former Minister of Internal Administration
Slovenia	Grega Malec	Head of the Sector for Migrations for Work Purposes, Ministry of Labour, Family, Social Affairs and Equal Opportunities
Spain	Angeles Vigil (General Secretary) and Maite Rivero (Vice president)	TÉCNICAS REUNIDAS La Asociación Española de Movilidad Internacional (FEEX)

Annex 3: Social security rules per country

Member State	National Social Security Schemes
Austria	A valid sickness insurance is a prerequisite for issuing a visa or a residence permit. Often, posted workers are covered by the social insurance in the country of origin. If there is no bilateral agreement, they will likely be included by Austrian social insurance. ⁴⁴⁸ Self-employed persons are usually not included in the unemployment insurance thus; normally they cannot receive unemployment benefits. There is an Opt-in-clause for self-employed persons. ⁴⁴⁹
Belgium	CSS are as a rule not entitled to any social security benefits in Belgium as they are exempted from payment into the Belgian social security scheme based upon the social security totalisation agreements that Belgium has concluded (Certificate of Coverage) or the Belgian internal law (Belgian social security exemption ruling). ⁴⁵⁰ Posted Worker (Limosa) Notifications and Social Security Certificate of Coverage (CoC)/Belgian social security exemption ruling are requirements attached to the secondment of employees in Belgium, including Contractual Service Suppliers. ⁴⁵¹
Bulgaria	For temporary staying posted workers a confirmation letter from the foreign company employer which guarantees payment of remuneration and covering the costs of social security and health insurance of the employee is required. The employment and insurance relations of third-country nationals who are Independent Professionals, shall be settled under the general terms and conditions of Bulgarian labour and social security legislation. The general terms and conditions of Bulgarian social security legislation are applicable to holders of a continuous residence permit (not temporary visitors). ⁴⁵²
Croatia	Generally, a TCN with a permit to reside and work in Croatia has a right to equal treatment as Croatian nationals with regard to social protection, social and health insurance, right to child benefits, and maternal and parental support. Article 9 (1) point 5 of the Pension Insurance Act, provides for a mandatory pension insurance of third-country nationals that are employed in Croatia. Article 3 of the Pension Insurance Act provides that mandatory insurance covers the following: 1) old-age pension,2) early retirement pension,3) disability pension,4) temporary disability pension,5) survivors' pension,6) minimum pension,7) basic pension,8) occupational rehabilitation,9) compensation for physical damage,10) reimbursement of travel expenses in relation to exercising insured rights provides for a mandatory pension insurance of third-country nationals that are employed in Croatia. ⁴⁵³

⁴⁴⁸ Para. 3 ASVG (Austrian Law).

⁴⁴⁹ Para. 4 ASVG (Austrian Law).

⁴⁵⁰ Belgium Law of 27 June 1969 regarding the social security for employees, art. 3.

⁴⁵¹ Belgium Program Law (I) of 27 December 2006 regarding the prior notification of seconded employees and self-employed, Titel IV Chapter 8, Section 2

⁴⁵² Art. 25(1)(5)(d) of the Bulgarian Rules for the Implementation of the Law on Labour Migration and Labour Mobility.

⁴⁵³ Art. 9(1), point 5 and Art 5 of the Croatian Pension Insurance Act; this is an transposition of Article 12(4) of the Single Permit Directive.

Czech Republic	<p>A TCN with a work permit and employee card in employment relationship with a foreign entity and performing his/her work for the interest of his foreign employer (is paid by the foreign employer), is not obliged to pay any contributions to Czech social security system. However, the TCN employee may voluntarily participate in the social security system.</p> <p>Provided that he/she voluntarily participates, then he/she may be under fulfilment of special conditions entitled to social security contributions. We would like to point out that the Czech Republic has concluded a lot of bilateral treaties that cover the participation in the social security system for each state differently. Self-employed TCN with residence permit who will carry on business activities in the Czech Republic, may participate on a voluntary basis in the social security system (entitlement to sick leave, maternal/parental leave allowance, care-giver's allowance). Provided that they voluntarily participate, then they may be under fulfilment of special conditions entitled to social security contributions. As for the pension insurance the self-employed people must participate in the system. However, bilateral international treaties apply and cover the participation in the social security system for each state differently.</p>
Cyprus (CY)	NA
Denmark (DK)	NA
Estonia (EE)	<p>A valid sickness insurance is a prerequisite for issuing a visa or a residence permit. Employed or self-employed persons will be part of the social security system and therefore entitled to health services and does not need health insurance if he/she is covered by compulsory health insurance. General terms and conditions of Estonian social security legislation and labour market services are applicable to third-country nationals working in Estonia.</p>
Finland (Fi)	<p>The entry categories resemble posted work fall under the scope of Finnish laws on posted working⁴⁵⁴; for the others. E.g. self-employed no reference to any specific national legal regime is provided.</p>
France (FR)	<p>In the absence of a Social Security bilateral agreement between the Home Country and France, both the employee and the employer will have to contribute to the compulsory France Social Security system. This payment entitles the employee in France to receive Social benefits, in cash and/or in kind, he/she is contributing to (including among others sickness, disability, maternity, employment injury, unemployment ...). In case a bilateral Social Security agreement, has been signed between the Home country and France, it has to be checked to which nationalities it applies, which categories of people are concerned (employees, freelance ..), which branches of Social Security are coordinated as well as the duration (initial and potential renewal) and any specific provision. When a branch of Social Security is coordinated, social security contributions will remain paid in the Home country although the assignee will be entitled to receive some benefits, mostly in kind, in France. The last entitlement a social security bilateral agreement can open is the totalization for certain rights which means the person is entitled to add some periods of contributions in one country to claim a right based on a period of contribution in the other country.</p>

⁴⁵⁴ Finnish Act on Posted Workers (447/2016); Employment Contracts Act (55/2001); Working Hours Act (605/1996); Annual Holiday Act (162/2005); Occupational Health Care Act (1383/2001); Occupational Safety and Health Act (738/2002); Occupational Accidents, Injuries and Diseases Act (459/2015); Act on the Contractor's Obligations and Liability when Work is Contracted Out (1233/2006).

Germany (DE)	For stays and activities in Germany that are limited in time from the start in the cases under consideration here, the social security laws of Germany do not apply in principle. The legal situation may depend on the country of origin and whether there is a bilateral social security agreement with Germany or not. For longer-term stays, the same conditions should in principle apply as for German nationals, as eligibility rests on habitual residence in Germany. If that criteria is met TCN employees are subject to statutory health, pension and unemployment insurance. ⁴⁵⁵ Note that this summary does not reflect the complexity of the German social security system; other sources must be consulted for a complete understanding.
Greece (EL)	For temporary stay based on a visa or for self-employed, Greece reports no specific rules applicable. ICTs shall enjoy equal treatment with nationals as regards provisions in Greek law regarding the branches of social security, unless the law of the country of origin applies by virtue of bilateral agreements, ensuring that the intra-corporate transferee is covered by the social security legislation in one of those countries. ⁴⁵⁶
Hungary (HU)	A precondition of the issuance of any visa or residence permit is full coverage for health issues. Employed or self-employed persons must be part of the social security system and therefore entitled to health services. Few exemptions apply, mainly related to short term presence.
Ireland (IE)	As habitual residents of Ireland, successful applicants may access state funds and services as determined by government departments or agencies. Short stay 'C' visa holders are not considered habitual residents and do not have access to social security entitlements. Investors are so called "stamp 4 holders" and successful applicants under the scheme may access state funds and services as determined by government departments or agencies.
Italy (IT)	TCN with legal residence based on a regular permit and their family members are entitled to registration with the National Health Service and to the same treatment as Italian citizens and are guaranteed full assistance under the same conditions. Registration has the same validity of the permit and it can be either mandatory (free) or voluntary (subject to payment). TCN carrying out their activities in Italy are subjected to the Italian social security regulation unless otherwise established by bilateral social security agreements, which regulate that TCN may remain under the social security regulation of their country of origin. ⁴⁵⁷
Latvia (LV)	Social security system in Latvia has two main components: state social insurance services and state social security benefits (allowances). Social insurance services (e.g., state pension insurance, social insurance against unemployment, disability, maternity, sickness insurance) apply to all holders of permanent and temporary residence permits who have made state social insurance contributions, as well as to their dependents. Holders of permanent residence permits are

⁴⁵⁵ Section 5 German Social Security Code (Book 4). (1) Insofar as the provisions on compulsory insurance and eligibility for insurance require employment, they shall not apply to persons who are posted to the area of application of this Code in the context of an employment relationship existing outside the scope of this Code, if the posting is limited in time as a result of the nature of the employment or contractually in advance. (2) Paragraph 1 shall apply mutatis mutandis to persons who are self-employed.

⁴⁵⁶ Article 127 D par. 3c of Greek Law 4251/2014.

⁴⁵⁷ Art. 2; 34 - 35 of Italian Consolidated Immigration act (LEGISLATIVE DECREE n. 286 25 July 1998); Art. 42 of Presidential Decree no. 394/1999.

	<p>eligible also to state social benefits (such as family allowance, child care and child birth allowance, funeral allowance or disability or loss of provider allowance). Disability and old-age social security benefits depend on person's length of residence in Latvia. These benefits are applied to TCN with permanent residence permits who have lived in Latvia in total not less than 60 months out of which the last 12 months must be without interruption. TCN may also receive unemployment benefit if the period of their social insurance is not less than one year, provided the mandatory state social insurance payments for unemployment have been made for not less than 12 months during the time period of the 16 months prior to the day when the status of an unemployed person was obtained.⁴⁵⁸</p>
Lithuania (LT)	<p>TCN who arrive to Lithuania with national visa (visa type D) are not insured with compulsory health insurance thus they have to pay for any health care services, including the issuance of the certificate for illness. TCN who have temporary residence permits can also obtain a social benefit if: a) the TCN is issued a temporary residence permit in Lithuania and allowed to work in Lithuania worked for not less than 6 months; b) the third-country national was issued temporary residence permit in Lithuania on the basis of transfer within the company.⁴⁵⁹</p>
Luxembourg (LU)	<p>If the assignment takes place: between Luxembourg and a country with which a bilateral Social Security Agreement is in place: Certificate of Coverage, where possible; or between Luxembourg and a country with which there is no Social Security Agreement, the employee has to be registered in the Luxembourg social security system.</p> <p>A self-employed person (working under his own name or as a salaried worker) must personally ensure the payment of his social security contributions (both the employee's and the employer's share) in proportion to his gross professional income before tax to CCSS. The social security contributions of self-employed persons are provisionally determined on the basis of: either the last known net taxable income; or, for a newly insured person, the social minimum wage for unskilled workers. If the employee exercises an activity under his name, the Ministry of Foreign Affairs will send a copy of his Business permit to the Social Security Agency and he will register directly. If he works as self-employed for a Company, then he will be insured according to the employees of the private sector.</p>
Malta (MT)	<p>All posted employees covered shall be entitled to receive equality of treatment as the comparable employees and in particular they shall have equal access to employment rights and health and safety rights under Maltese law.⁴⁶⁰ In order to qualify for social security benefits, an individual needs to be contributing to social security either as an employed or as a self-occupied/self-employed person and meet the contribution requirements for each benefit.⁴⁶¹ Depending on the residence permit in possession TCN are entitled to certain benefits. This</p>

⁴⁵⁸ Art.5 Latvian Law on Unemployment Insurance 25.11.1999; Art.2 (2) Law on Support for Unemployed Persons and Persons Seeking Employment 09.05.2002; Art. 20 (5) Law on State Social Insurance 01.10.1997.

⁴⁵⁹ Para. 2 of Art. 6 (1) of the Law on Health Insurance of the Republic of Lithuania; paras. 5 and 9 of Art.5 (6) of the Law of the Republic of Lithuania on Support in Case of Death; Art. 3 (1), 5, 8, 16 of the Law on Social Insurance for Illness and Maternity (No. XII-2501, Register of Legal Acts, 15-07-2016); Art. 3 (1) of the Law on Unemployment Social Benefits (Register of Legal Acts, 05-07-2016, No. 18826

⁴⁶⁰ Posting of workers in Malta is covered by S.L. 452.82, art. 5.

⁴⁶¹ Chapter 318 of the Laws of Malta, Social Security Act.

	does not apply to individuals visiting Malta solely on a business visa. Specific rules apply for ICT. ⁴⁶² TCN Investors have full access to the social security system as any other Maltese citizen. ⁴⁶³
Netherlands (NL)	Acts providing social security based on residence in the Netherlands are mainly applicable to those whose societal life centres on the Netherlands. Whether this is the case depends on the juridical, economic and social circumstances of the person in question. For visa holders and temporary residence this assessment will lead to the conclusion that the migrant will not have residence in the Netherlands in the sense of applicability of the social security laws. For instance, the public authority responsible for social security based on residence considers three years of residence to constitute the tipping point in cases which are not clear based on other circumstances. ⁴⁶⁴ Self-employed TCN (as Dutch nationals) are not obliged to be taken out any social security other than health insurance. ⁴⁶⁵ A condition for legal residence is that the migrant has sufficient means of subsistence. Applications for social assistance for minimum subsistence will be refused and may lead to withdrawal of the residence permit.
Poland (PL)	TCN whose stay in Poland is legal are fully entitled to the whole package of social security entitlements unless something else derives from the bilateral agreements concluded on the coordination of social security. ⁴⁶⁶
Portugal (PO)	In Portugal the law establishes the rights of a <i>residence permit holder</i> , in which there is the guarantee of equal treatment, particularly in what concerns social security, tax benefits, trade union memberships, recognition of diplomas, certificates and other professional credentials or documents granting them access to goods and services made available to the public, as well as the application of provisions that grant them special rights. ⁴⁶⁷ Article 83.º (1) of PT Aliens ACT states that “Without prejudice to the application of special provisions and other rights established in the law, or in international conventions that Portugal is a Party to, the holder of residence permit is entitled, without the need to get a special authorisation on grounds of being a foreign citizen, to: a) Education and teaching; b) Employment; c) Self-employment; d) Professional guidance, training, further training and retraining; e) Health care; f) Access to the law and courts. Article 83.º (2) states that “The application of provisions that guarantee equal treatment to foreign citizens shall be ensured, particularly in what concerns social security, tax benefits, trade union memberships, recognition of diplomas, certificates and other professional

⁴⁶² Laws of Malta S.L 217.21 Art 15,(2),(c).

⁴⁶³ Chapter 318 of the Laws of Malta, Social Security Act.

⁴⁶⁴ Article 3(1) Health Insurance Act; Article 3(1) Unemployment Act; Article 3(1) Act on Disability Insurance; Article 8(1) Act Work and Income According to Labour Capacity. See also: Article 4(c) Decree Extension and Restriction Circle Insured Employee Insurances (Besluit uitbreiding en beperking kring verzekerden werknemersverzekeringen). Sociale Verzekeringsbank policy guidance, SB 1023.

⁴⁶⁵ A legal obligation for self-employed to apply minimum fees and to be insurances is expected.

⁴⁶⁶ Polish Act on the social security system, 13.10.1996, J.L. 2020, it. 266; article 4 point 1.

⁴⁶⁷ Art. 83 (2), Portuguese Aliens Act 23/2007, of 4th July. Act 4/2007, of 16th 2007 defines the general foundations on which the Social Security system is grounded. Act 110/2009, of 16th September - Code of the Social Security Contribution Systems.

	<p>credentials or documents granting them access to goods and services made available to the public, as well as the application of provisions that grant them special rights.”. These rights covered by the Constitution do not depend on resident status, and can be granted to holders of any visa, and also to citizens in an irregular situation.</p> <p>TCN with a residence permit may enrol with the tax authority as Non-habitual resident, in which case the person does not have the whole contributory obligation in Portugal and is exempt to contribute with Social Security.⁴⁶⁸</p>
Romania (RO)	Romania reports CSS have no equal treatment in relation to social assistance but do have equal treatment concerning work conditions, including salary, social security, tax advantages. ⁴⁶⁹
Slovakia (SK)	<p>CSS posted to Slovakia according to the rules described above are on the payroll of the posting entity and are not paying the social insurance and mandatory public health insurance contributions in Slovakia. Therefore they do not have almost any access to the social entitlements.</p> <p>In Slovakia access to the social security entitlements for ICT depends on whether they are paying the social and health insurance contributions in Slovakia, which depends on bilateral agreements with third country states.⁴⁷⁰ In Slovakia some of the social allowances are granted based on the residence permit in Slovakia no matter whether social insurance is paid or not.⁴⁷¹</p>
Slovenia (SI)	Slovenia reports that it has no specific provisions in place for any of the categories. The Single Permit Directive does not apply in these cases; in order to obtain a visa or temporary residence permit, proof of social security insurance in the country of origin must be provided.
Spain (ES)	In Spain it depends on whether a Social Security Agreement applies between the sending country and Spain, as such agreement defines in which country Social Security entitlements are applicable. When there is no Social Security Agreement between the sending country and Spain, the TCN can be registered in the Spanish Social Security System as an employee. In that case Social Security entitlements will be the same as recognized to national workers. ⁴⁷²
Sweden (SE)	Swedish rules on social security are neutral with regard to citizenship. The social security system covers everyone who is resident or working in Sweden. However, the social security legal regime is divided into residence- and work based rights. ⁴⁷³ In order to be guaranteed residence based rights, one has to reside in a particular municipality. One can only be registered as a resident if one is planning to stay there for at least a year. ⁴⁷⁴ The residence-based insurance provide for minimum guaranteed benefits. The work-based benefits cover loss of income. Both workers and independent professionals are covered. However, the qualifying conditions (planning to stay at least a year) have to be fulfilled. This means that the categories discussed here will seldomly be protected by the Swedish social security system.

⁴⁶⁸ Portuguese Regulatory Decree 1-A/2011, of 3rd January: regulates the Code of Contributory Regimes of the Social Security System.

⁴⁶⁹ Romanian Art. 80[^]1/4 GEO 194/2002.

⁴⁷⁰ Slovakia Act No. 461/2003 Coll on Social insurance (“Act on social insurance”).

⁴⁷¹ Slovakia Act No. 580/2004 Coll. on Health insurance (“Act on health insurance”).

⁴⁷² Spanish Law L.O.4/2000 Section 14.

⁴⁷³ Ch 4 sec 2, Swedish Social Insurance Code (2010 :110).

⁴⁷⁴ Ch 5 sec 3, Swedish Social Insurance Code (2010:110).

Annex 4: Procedures applicable in Member States

Country	Text in questionnaires (i)	Special considerations for specific categories
Austria	<p>Against a rejection of a residence permit an appeal can be lodged. Competent court is the Administrative court of the particular province.</p> <p>Against a rejection of an application for obtaining a visa an appeal can also be lodged. Competent court: Federal Administrative Court.</p>	
Belgium	<p>An appeal is possible with the competent regional Minister, within 30 days. Before taking a decision the Minister must consult an advisory body. This advisory body will invite the applicant to a hearing.</p> <p>If rejected, further appeal possible with the Council of State, within 60 days</p>	
Bulgaria	<p>General rules under the Administrative Procedure Code apply. That is, the applicant has 14 days to submit a court appeal against a negative decision. The judgment of the first level court is subject to a final appeal before the Supreme Administrative Court.</p> <p>The appeal procedure challenging the refusal shall be heard by the administrative court in accordance with the general rules under the Administrative Procedure Code.</p> <p>When taking a decision for refusal to issue a visa, the authorized officials are obliged to notify in writing the applicant for visa for the legal basis and for the motives for the decision.</p>	<p><u>On Business Visitors:</u></p> <p>The Bulgarian Chamber of Commerce and Industry may refuse to register, change or delete circumstances on the registration of a Trade Representation Office of a foreign person, if the requirements specified in the Investment Promotion Law and the Regulations for Registration into the Unified Trade Register of BCCI are not met. The refusal shall be communicated to the applicant with reasons. It can be appealed to the Executive Council of BCCI. The decision of the Executive Board is final. Regarding refusal of a residence permit, the general rules under the Administrative Procedure Code apply. That is, the applicant has 14 days to submit a court appeal against a negative decision. The judgment of the first level court is subject to a final appeal before the Supreme Administrative Court.</p>
Croatia	<p>An appeal may be filed against the decision of the Ministry, which has been issued through police administration or police station. A Commission decides about the appeal. The appeal has to be filed within 15 days</p>	

Country	Text in questionnaires (i)	Special considerations for specific categories
	<p>from the date of delivery of the decision. The appeal is submitted to the first-instance body. In case the appeal is submitted to the second-instance body, it will immediately forward it to the first-instance body.</p>	
Cyprus	<p><i>Information on the website is not easily accessible in English</i></p>	
Czech Republic	<p>Provided that the regional Labour Office rejects the application for the work permit, the applicant may file an appeal against such decision within 15 days following delivery of the decision.</p> <p>Provided that the Ministry of Interior decides on rejection of an application for the issuance of the employee card, the applicant may file an appeal against such decision. The appeal must be lodged within 15 days following the delivery of the decision. The Ministry of Interior (Department of Asylum and Migration Policy) may decide on cancellation or change of its own decision in favor of the applicant within 30 days after delivery of the appeal or pass the file to its superior administrative authority for decision. Superior administrative authority is the Commission for Decision-Making in Matters of Residence of Foreign Nationals. The Commission then decides within 60 days following the day of receiving the complete file and opinion of the Ministry of Interior on the appeal and delivers the written decision on the appeal to the applicant.</p> <p>Provided that the Commission confirms the decision of the Ministry of Interior, the already legally effective decision may be further contested by claim submitted to relevant regional court 30 days following delivery of the decision of the administrative body of the last instance. This applies only to the long-term residence permit (rejection of the application for the long-term visa may not be further contested and reviewed by judicial procedure).</p>	
Denmark		

Country	Text in questionnaires (i)	Special considerations for specific categories
Estonia ⁴⁷⁵	No specific information on the website of Minister of Interior was found	
Finland	<p>You can appeal against a decision made by the Finnish Immigration Service to an Administrative Court. Appeal instructions will be attached to the decision you receive. The instructions specify the Administrative Court to which you may appeal, the appeal period, the attachments needed, and the ways you may submit your appeal to the Administrative Court.</p> <p>Not all decisions by the Finnish Immigration Service can be appealed. If the decision you get is not open to appeal, this will be mentioned in the decision.</p>	
France	<p>1. In case of work permit refusal, the refusal decision for the work permit can be appealed to the authority which made this decision in order for them to reconsider their initial decision. This is an administrative appeal which is named "recours gracieux". Alternatively or following the administrative appeal, this is possible to appeal the refusal decision to a higher administrative authority (Ministry). This is what we call the hierarchical appeal ("recours hiérarchique"). This appeal must be filed within the 2 months following the notification of the refusal decision. If the work permit request is still refused after this appeal process, the applicant can launch an action for annulment before the administrative court.</p> <p>2. In case of visa refusal: A specific Commission is in charge of examining the appeal against visa issuance refusals issued by the Consular or Diplo-</p>	

⁴⁷⁵ The EU immigration portal has provided on Estonian appeal procedure concerning refusal of EU Blue Card: "Appeals can be brought to administrative courts against decisions to refuse an EU Blue Card within ten days from the date of notification of the decision." 'Estonia | EU Immigration Portal' <https://ec.europa.eu/immigration/country-specific-information/estonia/highly-qualified-worker_en> accessed 23 November 2020. Estonian government provided the following information in response : Estonia: In case of refusal to issue a visa or residence permit an appeal may be filed with an administrative court or a challenge may be filed against a decision to an administrative authority. in the event of a refusal following a challenge, the right to appeal to an Administrative Court remains. The term and conditions to appeal are explained in the decision of refusal. Aliens Act § 222. Filing of appeal: (1) Within ten days as of the date of notification of the decision an appeal may be filed with an administrative court or a challenge may be filed against a decision on the issue of and refusal to issue, the extension of and refusal to extend and the revocation of a temporary residence permit or the refusal to review an application for a temporary residence permit. A decision on the challenge may be contested in an administrative court within the same term.

Country	Text in questionnaires (i)	Special considerations for specific categories
	<p>matic Authorities: "Commission de recours contre les décisions de refus de visa d'entrée en France" (CRRV). All appeals must be submitted to this Commission. The Commission will either reject the appeal request or make a recommendation in favour to issue the visa to the competent Minister. If the visa request is still refused after this appeal process, the applicant can an action for annulment before the administrative court.</p> <p>Refusal of residence permit: A specific Commission called "commission du titre de séjour" is in charge of reviewing refusal decisions of first issuance or renewal of residence permits.</p>	
Germany	<p>This information is taken from the website of the Federal Foreign Office: "If a visa application is rejected, the applicant has one month to appeal in writing ("remonstrate") to the mission abroad. The mission abroad will then reconsider the application. If the mission still concludes that the applicant does not meet the conditions for obtaining a visa, it will again set out in detail in writing the reasons why it rejected the application in a Remonstrance Notice. The applicant may appeal this decision within one month by filing an action with the Administrative Court in Berlin. The applicant also has the option of appealing to the Court (also within one month) against the initial decision instead of remonstrating to the mission."</p> <p>For national long-term visa, the procedure is the same, but the delays are different: applicants have one year to remonstrate and/or to appeal to the court if the rejection letter does not state otherwise.</p>	
Greece	<p>Applications for cancellation of a decision on the rejection, withdrawal or non-renewal of a residence permit issued shall be filed with the competent administrative court. Special certificates of legal residence shall be granted to third-country nationals for whom the Administrative First Instance Court has delivered a decision on the stay or a temporary order of stay in relation to an administrative</p>	

Country	Text in questionnaires (i)	Special considerations for specific categories
	<p>act, the cancellation of which has been requested, and relates to: a) rejection of an application for renewal of a residence permit,</p> <p>b) withdrawal of an issued residence permit, and</p> <p>c) rejection of an application for initial issue of a residence permit, provided that the application has been lodged along with full supporting documents for one of the reasons referred and a lodging certificate has been procured. The special certificate of legal residence shall form a temporary instrument of residence valid for one year subject to renewal for an equal period each time until delivery of the Administrative Court judgment on the pending cancellation request, and shall grant its holder the same rights as those granted under the withdrawn or non-renewed residence permit. The special certificate of legal residence referred to in this paragraph shall not be granted during the period of extension to voluntary departure.</p>	
Hungary	<p>In matters related to residence permit administrative appeal is available. It must be submitted within eight calendar days from the decision. The second level administrative authority must decide within 21 calendar days. There is recourse to the court proceeding in administrative matters, but that appeal is limited to the review of the legality of the administrative decision and need not entail a hearing. (But hearing may be held if any of the parties so request.) The court must decide within sixty days</p>	
Ireland	<p>A review of a decision regarding these permits may be made within 21 days from the date the decision is notified to the applicant. A review under this section of a decision shall be carried out by an officer of the Minister appointed by the Minister for the purpose; the person so appointed will not be the person who made the decision, and will be of a grade senior to the grade of the person who made the decision. The applicant may review the decision by email to the Department of Enterprise, Trade and Employment</p>	<p><u>On Business Visitors:</u> Where an application for a short stay 'C' visa is refused, the applicant will be sent a 'letter of refusal' that explains why the application was not approved. A negative visa decision can be appealed at no cost. To do so, the candidate must submit an appeal within 2 months of the date on the letter of refusal. The applicant should write a 'letter of appeal' that includes their name, address, email address and Visa Application Transaction Number. The</p>

Country	Text in questionnaires (i)	Special considerations for specific categories
	<p>("DETE"). The applicant may make written submissions and the person appointed to carry out the review will either(a) confirm the decision or(b) cancel the decision and grant to the foreign national concerned the employment permit the subject of the application to which the review relates.</p>	<p>applicant should explain in detail why they believe the decision should be changed. This should be submitted with any supporting documentation. The letter of refusal will indicate if the candidate needs to include their original passport with the appeal.</p> <p><u>On Managers:</u> Where an applicant wishes a refusal decision in relation to an ICT to be reviewed then he/she may do so within 28 days on the prescribed Submission of a Decision for Review Form. The review will be considered by a separate and more senior official. The confirmation of a refusal decision on review does not preclude the applicant from submitting a new application following all of the relevant procedures for the specific employment permit type. There is no review process for the Atypical Working Scheme.</p> <p><u>On Investors:</u> The decision of the Minister for Justice and Equality on an application is final and a rejection of an application for residence under the Immigrant Investor Programme shall not be subject to a review or appeal. This does not prevent the person concerned from making a new application at a later date. Where an application is rejected, the INIS will communicate the reasons for that rejection in writing to the applicant.</p>
Italy	<p>Persons denied visas may lodge a claim with the Tribunale Amministrativo Regionale (T.A.R.) (regional administrative court) of Lazio within 60 days of receipt of notification of denial. Persons denied residence permits may lodge a claim with the Tribunale Amministrativo Regionale (T.A.R.) (regional administrative court) of the region where the authority that has issued the denial is located within 60 days of receipt of notification of denial.</p>	

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Latvia	<p>Appealing the refusal or annulment of a visa.</p> <p>A third-country national has the right to contest a decision regarding the refusal or annulment of a visa within 30 days after the day of its notification. An application must be submitted:</p> <ol style="list-style-type: none"> 1) to the Director of the Consular Department, if the decision has been made by an official of the mission or the Consular Department; 2) to the Minister of Foreign Affairs, if the decision has been made by the Director of the Consular Department; 3) to the Head of the Immigration Office, if the decision has been made by an official of the Immigration Office; 4) to the Head of the State Border Guard, if the decision has been made by an official of the State Border Guard. <p>A third-country national may appeal a decision regarding the contested administrative act in an Administrative District Court.</p> <p>The decision of the court is final and cannot be appealed. The contestation and appeal of the decision does not suspend its operation. Also the submission of an application to a court does not create the right of a third-country national to enter and reside in the Republic of Latvia.</p> <p>Refusal of entry:</p> <p>A third-country national has the right to contest a decision regarding a refusal to enter the Republic of Latvia within 30 days after its adoption. Such a contestation is examined by the Head of the State Border Guard, which in turn may be appealed in an Administrative District Court. The decision of the court is final and cannot be appealed. Contestation and appeal do not suspend the operation of the refusal of entry.</p> <p>Refusal to grant a residence permit:</p> <p>The decision to refuse to issue or register a residence permit or revoke a residence permit may be contested with the Head of the Immigration Office within 30 days after the decision</p>	

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	enters into force. The decision of the Head of the Immigration Office in turn may be contested in a court.	
Lithuania	Third-country nationals who submitted application for a visa and who were refused it, receive a standard notification form about the refusal to issue a visa, the form of visa annulation or termination, which indicates the grounds of such a decision. Such decisions may be appealed by the third-country nationals within 14 days from receipt of the decision to Vilnius District Administrative Court. According to legislation, such appeal shall be submitted in writing in Lithuanian language, while the documents in other languages shall be translated to Lithuanian and approved as per required order. A state fee of 30 euros shall be paid along the submission of the appeal. If the appeal is submitted online 75 percent of the fee shall be paid. The decision to refuse issuance of a visa cannot be appealed under administrative proceedings.	
Luxembourg	1. An official letter to the Ministry of Foreign Affairs, setting the facts. 2. Non - contentious appeal (recours gracieux) to an Administrative Tribunal by a Luxembourgish Lawyer.	<u>On Business Visitors:</u> Appeal to the Embassy of Luxembourg, or to the first country where the Visa application was filed.
Malta	-the appeal has to be filed to the Registry of the Board within ten working days from the decision. -applicants must submit to the Immigration Appeals Board a Copy of the refusal letter and other supporting documents justifying the grounds on which the Decision should be reviewed	<u>On Business Visitors:</u> Whenever a visa application is refused, annulled or revoked by the Maltese authorities, the applicant is issued a refusal letter notifying him or her of the reasons of such refusal. Applicants who have been refused or have had their visa annulled or revoked, have the right to appeal against such decision to the Immigration Appeals Board within fifteen days of the notification of such decision. Any communication should be in English and addressed to the Immigration Appeals Board. <u>On Managers:</u> Where the Executive Chairperson has declared inadmissible or refused an application, or refused renewal or withdrew an ICT permit,

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		<p>the TCN shall have the right to appeal to the Board within the time-limits listed in the Act.</p> <p><u>On Investors:</u> MRVP The decision, determination or verification to be made the Malta Residence and Visa Agency under the regulations shall be made at that agency's absolute discretion and any such decision, determination or verification shall be final and shall not be subject to an appeal MIIP - N/A</p>
The Netherlands	<p>The Netherlands has an administrative appeals procedure available against a negative decision on a Schengen Visa application. The applicant can file administrative appeal with the Dutch Visa Service within four weeks of the decision (or with the proper authority in another EU Member State in case of visa representation, not discussed any further here). A rejection of an administrative appeal can be challenged, again within four weeks, before the District Court whose decision in visa cases is final.</p> <p>If a residence permit is required (e.g. ICT and investors), a negative decision by the authorities can be challenged in three instances, from administrative appeal, to the district court to the Council of State, whose decision may be final, or who may return the case to the District Court for further evaluation. If no visa or residence permit is required but a work permit is required a decision on the application of the work permit must be taken within 5 weeks, administrative appeal against a negative decision must be filed within four weeks, appeal with the District Court and, as instance of last resort the Council of State, must be filed within four weeks after the previous decision/judgement is given.</p>	
Poland	An appeal against a decision of a voivode is entitled (in matters of residence) to the Head of the Office for Foreigners.	
Portugal	Applicants can ask a review or appeal a decision which refuses to grant a visa or a residence permit, in compliance	

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	<p>with the Portuguese domestic law - Article 38(2), Article 39 and Article 82(4), Aliens Act 23/2007, of 4th June.</p> <ul style="list-style-type: none"> • Issue a complaint, within 15 days following the acknowledgment of refusal, against the issuer of the refusal - in compliance with Article 191, CPA; • Lodge a Hierarchical Appeal against the decision of refusal, within three months following the notification - in accordance with Article 59, CPTA, and Article 193 (2), CPA <p>- addressed to the highest hierarchical superior of the decision issuer (Ministry of Foreign Affairs for visas), unless the competence for the decision is delegated or sub delegated.</p> <ul style="list-style-type: none"> • Lodge a Judicial Claim before the competent Administrative Court, within three months of notification of refusal (Article 69 and Article 59, CPTA) requesting the overruling of the refusal, and the granting of the required lawful act. <p>The referred options are not mutually exclusive. As such, the applicant can appeal to the Minister and, depending on the results of such appeal, continue towards litigation – Article 59 (4), CPTA.</p> <p>The applicant can also appeal the decision and Lodge a Judicial Claim simultaneously to the administrative court, without waiting for the results of the appeal - in compliance with Article 59(5), CPTA.</p>	
Romania	<p>- Decision to refuse the issuing of a visa is communicated to the person in question including the grounds for rejection. The decision can be contested based on the Law no 554/2004 (Law on administrative dispute -Decision to refuse a residence permit and reasons are communicated via the return decision. A return decision can be challenged at the Court of Appeal within whose jurisdiction is the local structure of the General Inspectorate for Immigration that issued the decision. The decision of the Court of Appeal is final</p>	<p><u>On Business Visitors for Establishment:</u> No possibility to contest refusal to issue a short stay visa</p>
Slovakia	Temporary residence permit for the purpose of work:	<p><u>On Independent Professionals:</u> Residence permit for the purpose of business :</p>

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	<p>Applicant may appeal against the decision on rejection of the application within 15 days from its delivery. Appeal shall be lodged at the Foreign police department which issued a decision. Decision on appeal may be done the same authority which issued the appealed decision, but only in case appeal is allowed in full. If not, foreign police department will refer the appeal to appellate authority – Directorate of Foreign police which shall make the decision within 30 days as of receiving the case, in complicated cases within 60 days.</p> <p>First instance decision which becomes final (after lapse of time for appeal) may be also reviewed by Directorate of Foreign police in co called out of appellate proceedings. This may be also done from the initiative of Directorate of Foreign police.</p> <p>Final decision of Directorate of foreign police (either in the appellate or out of appellate proceeding) may be the subject of judicial review by Regional Court with possible appeal and extraordinary appeal at Supreme Court as the last instance. Beyond the system of general courts, constitutional complaint may be filled.</p>	<p>Appellate proceedings against the decision on rejection of the application and possibility of subsequent judicial review is same as in the chapter before</p> <p>National visa – national visa is granted by placing the sticker into the passport, no written decision is made; same no decision is made in case of rejection of the application for the national visa. Embassy will usually only inform the applicant on the rejection; there is no possibility of filing any appeal against the rejection, nor the judicial review</p> <p><u>On Managers:</u> Work permit (ICT rules up to 90 days) – it is not possible to appeal against the non-issuance of work permit</p>
Slovenia	<p>Against decisions of administrative units issued at first instance regarding the issue of a single permit for posted persons, no appeal is allowed. Applicant may lodge an administrative dispute (judicial administrative review).</p>	
Spain	<p>A) National ICT Residence Permit+Visa. Available appeal is Recurso de Alzada to be submitted within the following month to the notification of the resolution. Statutory processing time to resolve the appeal is 3 months. The non-resolution on the appeal within the deadline or the resolution denying it, allows to submit a Recurso Contencioso Administrativo</p> <p>B) Residence and Work permit for transnational provision of services+vis. Available appeal is Recurso de reposicion to be submitted within the following month to the</p>	

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	notification of the resolution. Statutory processing time to resolve the appeal is 3 months. The non-resolution on the appeal within the deadline or the resolution denying it, allows to submit a Recurso Contencioso Administrativo in the court	
Sweden	<p>It is the Migration Agency that decides on work and residence permits. Its decisions can be appealed to the Migration Court. The decision of the Migration Court can be appealed to the Appeal Migration Court. The Appeal Migration Court only accept appeals if it is important for guidance of the application of the law, or there are other exceptional reasons to try the appeal. You will be advised on how to make an appeal in the decision documentation that you receive.</p>	<p><u>On Business Visitors:</u> A denied application for a Schengen visa or national visa can be appealed to the Migration Court.</p> <p><u>On Investors:</u> appeal visa decision: if you want to appeal If your application has been rejected you can submit a written appeal no later than three weeks from the day when you received the decision. Instructions on how to submit the appeal can be found in the decision. If the embassy or consulate-general changes the decision: The decision might be changed if new information is submitted. In that case, you will be notified and your visa is glued into your passport. If the embassy or consulate-general does not change the decision it is forwarded If the appeal was submitted on time and the authority that made the decision does not feel that there is any reason to change the decision, they will forward the case as soon as possible. Your application, decision and all other documents that have been submitted in the case will be forwarded to the Migration Court in Gothenburg. The Migration Court will then make the decision. appeal decision on visitor's residence permit: If you do not accept the Swedish Migration Agency's decision, you have the right to lodge an appeal. If you lodge an appeal, it means you want the Swedish Migration Agency's decision to be changed. The appeal will be considered by a court, but you should send your appeal to the Swedish Migration Agency. Your decision tells you</p>

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		how much time you have to appeal, often three weeks from the date you were notified of the decision. If you have a public counsel, he or she can help you with the appeal.