Intra-Corporate Transferees: Between the Directive and the EU’s International Obligations

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1. Introduction

Directive 2014/66 on the conditions of entry and residence of third country nationals in the framework of an intra-corporate transfer was adopted on 15 May 2014 after a fairly short gestation period which commenced with the proposal for the legislation in 2011. Other contributions in this book examine the negotiations of the directive and its transposition into the law of the Member States. The World Trade Organisation (WTO) framework into which the directive arrived is also the subject of another chapter. Here, I will examine the ‘alternative’ EU framework of companies’ rights to transfer key personnel from outside the EU to a related entity within the EU which predates the directive and came into being through agreements between the EU and third countries. This framework was much influenced by developments in the WTO, in particular the successful conclusion of the Uruguay Round of negotiations in 1994 which introduced trade in services as part of the menu of negotiated trade arrangements designed to facilitate international economic transactions.

Trade in services, unlike trade in goods, includes the movement of people across international borders as part of service provision. Taking as my case study the EU Russia Agreement 1997, I will compare the provisions of that agreement regarding companies’ rights to transfer key personnel from outside the EU to a related entity within the EU with those of the directive. For the sake of simplicity I will refer to the provisions of the agreement and those of the directive as intra-corporate transfers for the purposes of the comparison. Of particular interest are those provisions where the EU Russia Agreement is more liberal regarding the conditions of these transfers than the directive. In the early 1990s, the ambitions of EU-Russia relations were quite extensive. Subsequent events and frictions (including though not starting with the Russian invasion of Georgia in 2008) have cooled these expectations. Nonetheless, and notwithstanding EU sanctions against Russia following the annexation of Crimea, the EU Russia Agreement has continued in force regulating the majority of trade between the parties.

The earlier Partnership and Cooperation Agreements (the Europe Agreements) with Central and Eastern European countries (which became Member States of the

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EU in 2004 and 2007) were the templates on the basis of which a wide range of agreements were settled, in particular, with successor states of the Soviet Union and the former Yugoslavia.3 The agreements contain sections on labour conditions (generally limited to equal treatment rights and social security, for example Articles 23 et seq of the Russia Agreement), on establishment of companies (which includes the movement of key personnel for example Article 28 et seq of the Russia Agreement) and services (for example Articles 36 et seq Russia Agreement). A general feature of the agreements is the safeguarding of visa, border and migration issues as matters of national law to be complied with (for example Articles 48 and 50 of the Russia Agreement). However, the application of national law is subject to a limitation: national laws and regulations regarding entry and stay, work, labour conditions and the establishment of natural persons must be applied in such as manner as to nullify or impair the benefits accruing to the parties under the agreement. This language has a WTO origin.

2. WTO and the EU

The WTO and EU constitute two distinct legal orders which share little in common.4 However, the successful conclusion of the Uruguay Round in 1994 brought trade in services into the WTO realm and in doing so raised awareness generally about the importance of services.5 This was a new field of international trade which was being opened up through the WTO and the subject was rather fashionable. At the same time, the EU was grappling with the fall of the Berlin Wall and the emergence of a substantial number of new countries out of the dissolution of the Soviet Union. By 1994, the dice had already been cast as to which states formerly behind the Iron Curtain6 would be invited to join the EU in the short and longer term7 and which has culminated so far in the big enlargement of 2004,8 the arrival of Bulgaria and Romania in 2007 and Croatia in 2013. Those former Eastern Block states which were

unlikely to be invited or which would not wish to join the EU were still close or not so close neighbours of the EU. A smooth transition from trade with the Soviet Union and its allies to trade with the emerging states was of great importance to the EU. Many EU countries had strong trading links with their eastern neighbours and were suffering serious economic disruption as a result of the changed framework. The way forward chosen by the EU was to follow the WTO approach and to negotiate trade agreements with these successor and emerging states covering all important aspects of trade. The inclusion of services in the WTO in the new General Agreement on Trade in Services (GATS) provided an impetus for a parallel move in the EU agreements with its neighbours but using an EU type model.

In the scramble to regulate trade relations in particular with the new Russian Federation, the EU entered into an interim agreement in 1995 (which entered into force the following year) which covered only trade in goods (and related provisions). This was followed two years later in 1997 by a Partnership and Cooperation Agreement which includes extensive provisions on trade in services. As in respect of GATS, the inclusion of trade in services would include the so called mode 4 – the movement of people across international borders to provide services.

The GATS’ definition of service provision covers two forms of free movement in EU law. The first is free movement of services, one of the four fundamental freedoms of the EU. The second is the right of establishment which is a subcategory of another fundamental freedom, that of persons (it covers the free movement of legal persons as well as natural ones). While the EU treaties deal with the two categories somewhat differently and in different but related chapters, GATS rolls the two together – companies and people moving to provide services in another state come under the same heading without reference to the length of time they plan to stay. In the negotiation of the post 1990 agreements, the EU chose to follow the GATS model as far as including services but in the form of its own model dividing the GATS’ definition of services into the EU definition of services and establishment.

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11 Interim Agreement on trade and trade-related matters between the European Community, the European Coal and Steel Community and the European Atomic Energy Community, of the one part, and the Russian Federation, of the other part OJ L 247 (13/10/1995)
12 Agreement on Partnership and Cooperation establishing a partnership between the European Community, the European Coal and Steel Community and the European Atomic Energy Community, of the one part, and the Russian Federation, of the other part OJ L 327 (28/11/1997).
3. Between Services and Establishment

For EU purposes, the key dividing line between services and establishment was established in 1995 by the Court of Justice of the European Union (CJEU). The Court found that the key difference is not a question of time – how long the services would be provided in the host Member State – but a question of infrastructure. So long as a business does not acquire infrastructure in the State where the services is being provided then the activity will come within the scope of service provision. If the business does acquire infrastructure then the freedom being exercised becomes that of establishment. The right of services provision and establishment of legal persons in EU law includes the right of companies and businesses to send their personnel to a host Member State to provide a service for the business there or to establish or work for an economic presence of the business in the host State. Thus the establishment part of the right of free movement of persons can include intra-corporate transferees. While the relevant provisions of the Treaty on the Functioning of the European Union are not particularly elaborate regarding the extent of the right of establishment, this right has been the subject of some jurisprudence from the Court of Justice in the form it takes in EU agreements with third countries. The Court confirmed that the right of establishment in the Europe Agreements while not having the same meaning as that in the EU Treaty may be sufficiently clear, precise and unconditional to have direct effect. In the same judgment, however, the Court defined the essential elements of self-employment as distinct from employment both for the purposes of the TFEU and the Europe Agreements.

The cases which have come before the Court on the right of establishment of third country nationals have been essentially about individuals seeking to be self-employed in a Member State. All these cases have arisen in circumstances where EU law does not provide a right of free movement of workers but does permit third country nationals to enter into self-employment – the situation of the Europe Agreements. Under the agreements between the EU and these states (which applied before their accession to the EU) there was a right of establishment for natural persons but no right of free movement of workers. As nationals of these countries arrived in EU destinations and started exercising their right of self-employment they ran into difficulties with immigration authorities. A number of references went to the

18 E. Guild & S. Peers. ‘Out of the Ghetto? The personal scope of EU law’, in: K. Hailbronner & D. Thym, EU Immigration and asylum law, Leiden: Brill 2006, p. 81-114. C-43/93 Van der Elst ECR [1994] I-03803. The principle has been expressly acknowledged by the CJEU regarding service provision. It has yet to confirm that by extension this also applies to establishment where the employee sent to the host Member State is a third country national.
CJEU on the meaning and scope of the right to self-employment under the agreements.22 The consequence was an EU definition of self-employment as separate from employment and a development of the principle of direct effect of provisions in third country agreements where sufficiently clear, precise and unconditional.23 However, the provisions of these agreement granting an entitlement to businesses based in the third country to send their key personnel to work in a host Member State never came before the CJEU although it was included in the agreements.

In the meantime, the provisions on establishment (including ICTs) included in the Europe Agreements were reproduced with occasional changes in many other agreements including (but not limited to) Algeria (2005), Armenia (1999), Azerbaijan (1999), Georgia (1999), Kazakhstan (1999), Kyrgyz Republic (1999), Moldova (1999), Russia (1997), Ukraine (1998 replaced in 2016), Uzbekistan (1999) and Jordan (2002).24 Extensive EU agreements with all of the Western Balkan states include not only provisions on establishment of companies but also a right of self-employment for individuals.25 Other agreements, such as the one with Egypt, refer to establishment through a commitment to uphold the GATS rules (once again revealing the overlap between the two concepts in the GATS regime).26

4. The Intersection of Establishment and National Law on Entry and Stay

In the context of the Europe Agreements, the Court of Justice was required to address the relationship of a right of establishment (self-employment in particular) with the safeguarding of national laws and regulations on entry and stay, work etc. which appear in those agreements in forms similar to that found in the subsequent third country agreements including that with Russia. The Court found that the power of the host Member State to apply its domestic rules regarding entry, stay and establishment of natural persons to applications submitted by nationals of a party to a Europe Agreement is expressly subject to the condition that this does not nullify or impair the benefits accruing to the party under that Agreement.27 A visa requirement was found not to nullify and impair the right so long as neither the purpose nor the effect make it impossible or excessively difficult for the relevant third country nationals to exercise their rights under the agreement, ‘provided that the competent authorities of

25 Albania, Macedonia, Montenegro and Serbia.
27 Case C-257/99, Barkoci & Malik ECLI:EU:C:2001:491.
the host Member State exercise their discretion in regard to applications for leave to enter for purposes of establishment, submitted pursuant to that Agreement at the point of entry into that State, in such a way that leave to enter can be granted to a […] national lacking entry clearance on a basis other than that of the Immigration Rules if that person’s application clearly and manifestly satisfies the same substantive requirements as those which would have been applied had be sought entry clearance in the [country of origin].”28

5. Intra-Corporate Transferees in the EU Russia Agreement

The principle of the EU Russia Agreement is to regulate trade between the two parties. It is based on the principle of reciprocity limited to the two entities, their businesses and their nationals. The ICT Directive is designed to develop the area of freedom, security and justice within the EU. Its objective is to develop the EU’s common immigration policy, to ensure efficient management of migration flows and fair treatment of third country nationals residing legally in the Member States.29 Thus the objectives of the directive, which have external impacts on the movement of ICTs into the EU, are for the EU purely internal. While the EU Russia agreement applies to all 28 Member States, the ICT directive does not apply to the opted out Member States: Denmark, Ireland and the UK.

The relationship of the agreement and the directive is clarified by the ICT directive at article 4(1) which states that it shall apply without prejudice to more favourable provisions of Union law, including bilateral and multilateral agreements concluded between the Union and its Member States on the one hand and one or more third countries on the other. Thus the EU principle that treaties, including those with third countries take priority over EU secondary legislation is clearly respected by the directive.30

In both cases the agreement and the directive regulate the conditions according to which companies are entitled to move their personnel from a third country to any EU Member State to work for an entity within the EU which belongs to the company abroad. While the directive is carefully worded to include the conditions of entry and residence as well as rights, the agreement is more broad brush in its approach though it includes a proviso that the residence and work permits of ICT employees under the agreement shall only cover the period of ICT employment.31 The directive only permits an ICT worker to work in one Member State with cumbersome provisions on intra-EU mobility (dealt with elsewhere in this volume). The agreement applies to all Member States but it does not specify whether once an ICT worker has been moved to one EU Member State to work for an entity related to the employer in an agree-

28 Case C-257/99, Barkoci & Malik ECLI:EU:C:2001:491
31 Article 32(1) Agreement on Partnership and Cooperation establishing a partnership between the European Communities and their Member States, of the one part, and the Russian Federation, of the other part OJ L 327 (28/11/1997).
ment country, that employee should be able to move to another entity in another Member State so long as it is related to the principal enterprise in the third country. Intra-EU mobility of third country national personnel has only been judicially considered by the CJEU as regards service provision. In that series of cases, the Court held that the EU based employer could not be required to fulfill national work permit requirements for its third country national personnel moving between Member States to provide services as part of the employee’s employment where the employee was already lawfully employed by the employer in one Member State.

The chapter in the Russia agreement which deals with the issue is entitled ‘conditions affecting the establishment and operation of companies’ (Title IV, Chapter II). The operative provision is couched in the language of non-discrimination – Article 28(2) which states that the Union and its Member States shall grant to Union subsidiaries of Russian companies treatment no less favourable than that granted to other Union companies or to Union companies which are subsidiaries of any third country companies whichever is better, in respect of their operation (and in conformity with their legislation and regulations). There is also a duty not to impede the establishment of subsidiaries and branches. Article 30 defines ‘establishment’ for the purposes of the agreement which means the right of Union or Russian companies to take up economic activities by means of the setting up of subsidiaries and branches in Russia or in the EU respectively. A detailed examination of the key personnel provisions of the agreement in comparison with the ICT directive can be found below.

Article 34 of the Russia agreement requires the parties to use their best endeavours to avoid taking any measures or actions which render the conditions for the establishment and operation of each other’s companies more restrictive than the situation existing on the day preceding the date of signature of the agreement. As will be identified below, the EU may be in breach of this undertaking as their best endeavours to ensure that the ICT directive does not render the conditions for an intra-corporate transfer after the date of the agreement. As will be shown below, the directive does exactly that – it makes transfers more onerous which means that Russian companies are required to rely on the agreement to establish and defend their rights.

A number of sectors are excluded from the agreement including air transport, inland waterways transport and maritime transport. Special provisions apply also to the banking services sector (Article 29).

6. Comparing the EU Russian Agreement and the ICT Directive

The treatment of ICTs in the EU Russia Agreement and the ICT Directive vary on a number of important issues. These are:

33 C-43/93 Van Der Elst 9 August 1994.
34 Article 35 Agreement on Partnership and Cooperation establishing a partnership between the European Communities and their Member States, of the one part, and the Russian Federation, of the other part OJ L 327 (28/11/1997).
The definition of companies, the agreement defines a company (either Russian or EU) as a company set up in accordance with the relevant laws (EU or Russian) which has its registered office or central administration or principal place of business in the territory of one of the parties. If the company has only its registered office in the territory of one of the parties, it will be considered a company of that party if its operations possess a real and continuous link with the economy of that party. In the directive, the undertaking (employer) as such is not defined. There is a definition of a group of undertakings which sets out the relationship necessary for the ICT to take place. This states that a ‘group of undertakings’ means two or more undertakings recognised as linked under national law in the following ways: an undertaking, in relation to another undertaking directly or indirectly, holds a majority of that undertaking's subscribed capital; controls a majority of the votes attached to that undertaking's issued share capital; is entitled to appoint more than half of the members of that undertaking's administrative, management or supervisory body; or the undertakings are managed on a unified basis by the parent undertaking; (Article 3(l)).

This definition is much more onerous than that contained in the Russian agreement which only requires a real and continuous link to Russia. There is no limitation regarding sharing holdings as such nor qualification regarding control of votes attached to share capital. Thus under the Russia agreement enterprises which would not be able to fulfil the conditions of the ICT directive would nonetheless qualify to send key personnel to an EU Member State.

The definition of key personnel in the Russia agreement includes:

(a) persons working in a senior position with an organization, who primarily direct the management of the establishment (branch, subsidiary or joint venture), 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 subdivision of the establishment,
   - supervising and controlling the work of other supervisory, professional or managerial employees,
   - having the authority personally to engage and dismiss or recommend engaging, dismissing or other personnel actions; and

(b) persons working within an organization who possess uncommon knowledge essential to the establishment's service, research equipment, techniques or man-

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35 Article 30(h) Agreement on Partnership and Cooperation establishing a partnership between the European Communities and their Member States, of the one part, and the Russian Federation, of the other part OJ L 327 (28/11/1997).
agement. The assessment of such knowledge may reflect, apart from knowledge specific to the establishment, a high level of qualification referring to a type of work or trade requiring specific technical knowledge, including membership of an accredited profession; (Article 32(1)).

In the ICT directive the scope of an ICT is limited to managers, specialists or trainee employees (Article 5(1)(c)). These are defined in Article 3 of the directive as follows: (a) “‘manager’ means a person holding a senior position, who primarily directs the management of the host entity, receiving general supervision or guidance principally from the board of directors or shareholders of the business or equivalent; that position shall include: directing the host entity or a department or subdivision of the host entity; supervising and controlling work of the other supervisory, professional or managerial employees; having the authority to recommend hiring, dismissing or other personnel action;” (b) “‘specialist’ means a person working within the group of undertakings possessing specialised knowledge essential to the host entity’s areas of activity, techniques or management. In assessing such knowledge, account shall be taken not only of knowledge specific to the host entity, but also of whether the person has a high level of qualification including adequate professional experience referring to a type of work or activity requiring specific technical knowledge, including possible membership of an accredited profession;” and (c) “‘trainee employee’ means a person with a university degree who is transferred to a host entity for career development purposes or in order to obtain training in business techniques or methods, and is paid during the transfer’. This definition is much more detailed and specific than that in the Russia agreement which means that key personnel who could qualify under the agreement may be excluded by the directive. However, the directive permits trainee employees to be transferred, a category on which the agreement is silent.

As regards the working relationship, the definition in Article 5 of the ICT directive states that the enterprise must ‘provide evidence of employment within the same undertaking or group of undertakings, from at least three up to twelve uninterrupted months immediately preceding the date of the intra-corporate transfer in the case of managers and specialists, and from at least three up to six uninterrupted months in the case of trainee employees;’. Further, Article 5((1)(c)(iv) requires ‘evidence that the third-country national will be able to transfer back to an entity belonging to that undertaking or group of undertakings and established in a third country at the end of the intra-corporate transfer’.

The obligation to show that the person will be transferred back is not present in the agreement. Further, the Russia agreement in Article 32(2)(c) only requires that ‘an 'intra-corporate transferee' is defined as a natural person working within an organization in the territory of a Party, and being temporarily transferred in the context of pursuit of economic activities in the territory of the other Party; the organization concerned must have its principal place of business in the territory of a Party and the transfer must be to an establishment of that organization, effectively pursuing like economic activities in the territory of the other Party.’ This is more flexible than the definition in the ICT directive. Article 32(2) of the agreement states ‘Key personnel of the abovementioned companies herein referred to as 'organizations' are 'intra-corporate transferees' as defined in paragraph (c) in the following categories, pro-
vided that the organization is a legal person and that the persons concerned have been employed by it or have been partners in it (other than as majority shareholders), for at least the year immediately preceding such movement...’ This opens also the possibility for partners of an enterprise to be ICTs under the agreement and situation not contemplated under the directive.

While the agreement requires 12 months previous employment before a transfer can take place under its provisions, the ICT directive is more generous permitting ‘evidence of employment within the same undertaking or group of undertakings, from at least three up to twelve uninterrupted months immediately preceding the date of the intra-corporate transfer in the case of managers and specialists, and from at least three up to six uninterrupted months in the case of trainee employees.’ (Article 5(1)(b).

Regarding conditions of employment, the Russia agreement requires ‘Subject to the laws, conditions and procedures applicable in each Member State, the [Union] and its Member States shall ensure that the treatment accorded to Russian nationals, legally employed in the territory of a Member State shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals.’ (Article 23, Labour Conditions). This provision applies to all Russian nationals working in EU Member States (not only ICTs) so will also apply to Russian workers under the other labour mobility directives such as the seasonal workers directive. As Friðriksdóttir has examined in detail, the right to equal treatment is not available to all third country national workers under the EU labour mobility directives and noticeable by its complete absence from the seasonal workers directive. Articles 5(4) and 18 ICT directive only provide for equal treatment equivalent to similar jobs or equal to that of the posted workers directive which is limited to minimum pay, maximum work periods, minimum annual leave, conditions of hiring out through temporary labour agencies, health and safety at work and equal treatment between men and women. Alternatively, the directive also includes the following areas for equal treatment: freedom of association, recognition of diplomas etc, some coordination of social security within the EU, old-age, invalidity

38 Article 5(4) ‘Member States shall require that: (a)all conditions in the law, regulations, or administrative provisions and/or universally applicable collective agreements applicable to posted workers in a similar situation in the relevant occupational branches are met during the intra-corporate transfer with regard to terms and conditions of employment other than remuneration. In the absence of a system for declaring collective agreements of universal application, Member States may base themselves on collective agreements which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or collective agreements which have been concluded by the most representative employers and employee organisations at national level and which are applied throughout their national territory; (b) the remuneration granted to the third-country national during the entire intra-corporate transfer is not less favourable than the remuneration granted to nationals of the Member State where the work is carried out occupying comparable positions in accordance with applicable laws or collective agreements or practices in the Member State where the host entity is established.’
39 Directive 96/71.
and statutory death pensions and access to goods and services. Member States are permitted under the directive to exclude family benefits (Article 18(3)). This is far from equal treatment in wages and working conditions including dismissal which applies under the agreement.

The ICT directive limits the duration of a transfer in Article 12 as follows: ‘The maximum duration of the intra-corporate transfer shall be three years for managers and specialists and one year for trainee employees after which they shall leave the territory of the Member States unless they obtain a residence permit on another basis in accordance with Union or national law.’ No limitation on the duration of a transfer is included in the Russia agreement though transfers are temporary. Thus Russian companies can claim that the duration of their key personnel’s stay in the Member States limited to one and three years cannot be applied to them so long as the key personnel meet the conditions of the agreement.

The ICT directive permits the Member States to ‘determine the volumes of admission of third-country nationals in accordance with Article 79(5) TFEU. On that basis, an application for an intra-corporate transferee permit may either be considered inadmissible or be rejected.’ (Article 6). No similar provision exists in the Russia agreement. As an international agreement of the EU with a third state, the Russia agreement has the same legal status as the EU treaties themselves.40 Thus the limitation on volumes of admission of third country nationals contained in Article 79(5) TFEU which post-dates the Russia agreement and is inconsistent with it cannot be applied to Russian ICT workers coming to the EU in accordance with the agreement’s provisions. The priority of the Russia agreement is expressly protected by Article 4(1) ICT directive.

7. Conclusions

There are two quite separate legal regimes which apply to the transfer of third country nationals from enterprises outside the EU to related ones inside the EU. The best known is the ICT directive which was adopted in 2014 and has received a substantial amount of publicity. The inclusion of mandatory transposition requirements in the directive means that the Member States have brought their national legislation into conformity with it (as set out in this book). The other regime is older, dating from early agreements of the EU with third countries, where a reciprocal system of establishment of enterprises between the parties was included in the agreement. While such provisions have appeared in many agreements, the most detailed as those which were concluded with countries in the 1990s and thereafter first with a view to accession to the EU (the Europe Agreements) and thereafter with many other states, successors of the Soviet Union, the Western Balkans but also more widely. There is no mandatory transposition requirement in third country agreements which are directly binding on the Member States. The result has been that the provisions on ICTs in the

agreements have been largely ignored by states and are to a great extent unknown to lawyers.

As set out above, in the EU legal order, international agreements with third countries take priority over EU secondary law such as directives. This is expressly stated in relevant directives (and regulations) which are without prejudice to more favorable provisions of bi- and multilateral agreements (for instance Article 4(1)(b) ICT directive). Thus where a third country national ICT worker comes within the scope of such an agreement, the worker and his or her employer are entitled to rely on the more favorable provisions of the agreement to regulate the transfer. The provisions of an agreement may be directly effective if they are sufficient clear, precise and unconditional which means that they take effect directly in the EU legal order (including that of the Member States). But even where a provision of a third country agreement may not be directly effective, the priority of international agreements recognized in the ICT directive means that the application of the directive must be consistent with the key personnel provisions of the agreement even if those provisions are not directly effective. This means that the provisions of the directive, where inconsistent with those of an international agreement to which the EU is a party must be interpreted in a manner consistent with the agreement even where this may mean disregarding a more onerous provision expressly stated in the directive.