

Intra-Corporate Transferees: Comparison with the EU Russia Agreement

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ICTs before the Directive

- National law;
- International Agreements: EU Association Agreements, Stability Agreements, Cooperation Agreements;
- Countries: Successor states of the Soviet Union, Yugoslavia;
- Elsewhere? CETA on services.





Relationship of EU Agreements and ICT

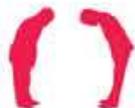
- The Directive:
- Article 4(1)(a): without prejudice to
- Union law, including bilateral and multilateral agreements concluded between the Union and its Member States....and one or more third countries;





Issues between ICT Directive and Agreements

- Definition of companies;
- Definition of relationships to qualify for ICT;
- Definition of ICTs;
- Length of employment;
- Conditions of employment.





How to interpret the provisions?

- Does a third country agreements provisions take precedence over the Directive?
- Should the Directive be read in a manner compliant with the third country agreements?
- Should the agreements be read in a manner compliant with the Directive?
- References to national law and EU direct effect: clear precise and unconditional?





Example: EU Russia Agreement

- Signed 24 June 1994;
- Entry into force: 1 December 1997;
- Protocols for accession states, exchanges of letters on various specific matters eg services 24 July 2012;
- Most recent activity: Protocol on Croatia accession 1 April 2016.





Provisions on labour conditions

- Article 23:
- Subject to the laws, conditions and procedures applicable in each Member State, the Community 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.



Establishment 1

- Article 28(1):
- The Community and its Member States ... shall grant to each other treatment no less favourable than that accorded to any third country, with regard to conditions affecting the establishment of companies in their territories and this in conformity with the legislation and regulations applicable...





A real standstill provision?

- Article 34(1):
- The Parties shall 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.





Establishment 2

- Article 28(2)
- The Community and its Member States shall grant to Community subsidiaries of Russian companies a treatment no less favourable than that granted to other Community companies or to Community companies which are subsidiaries of any third country companies whichever is better, in respect of their operations and this is conformity with their legislation and regulations.





Establishment 3

- Article 28(4)
- The Community and its Member States ... shall grant to branches of Russian companies... a treatment no less favourable than that accorded to branches of companies of any third country in respect of their operation...





Establishment – a standstill provision

- Article 29(3)
- The Community and the Member States ... shall not adopt any new regulations or measures which would introduce or worsen discrimination as compared to the situation existing on the date of the signature of the Agreement as regards conditions affecting the establishment of the other Party's companies in their respective territories in comparison with their own companies.





Establishment – defining ‘worsen’

- Article 29(3):
- The parties agree that the terms ‘worsen discrimination’ include the aggravation of discriminatory conditions or their extension or reintroduction after the current period of application.





Defining the terms: establishment

- Article 30(a)(b):
- Establishment means the right of ... Russian companies ...to take up economic activities by means of the setting up of subsidiaries and branches in ...the Community.
- Subsidiary of a company shall mean a company which is controlled by the first company;





Defining branches

- Article 30(d)
- Branch of a company shall mean a place of business not having legal personality which has the appearance of permanency, such as the extension of a parent body, has a management and is materially equipped to negotiate business with third parties so that the latter, although knowing that there will if necessary be a legal link with the parent body, the head office of which is abroad, do not have to deal directly with such parent body but may transact business at the place of business constituting the extension.





Defining companies

- Article 30(h)
- A ...Russian company shall mean a company set up in accordance with the laws of Russia and having its registered office or central administration or principal place of business in Russia...if only the the registered office is in Russia the company shall be considered a Russian company if its operations possess a real and continuous link with the economy of Russia.





The Establishment right to move personnel

- Article 32:
- A Russian company...shall be entitled to employ or have employed by one of its subsidiaries or branches or joint ventures, in accordance with national legislation, employees with are Russian nationals who are key personnel and are employed exclusively by the companies, subsidiaries, branches or joint ventures...residence and work permits shall only cover the period of such employment.





Defining key personnel

- Article 32(2)
- Key personnel are intra-corporate transferees of legal persons and have been employed by it or been a partner in it (other than majority shareholders) for at least the year immediately preceding the movement and are:
- (a) working in a senior position primarily directing the management of the establishment receiving general supervision from the board or stockholders and including:





Key personnel 2

- The roles included in Article 32(a):
- Directing the establishment or a department or subdivision;
- Supervising and controlling the work of other supervisory, professional or managerial employees;
- Having the authority personally to engage and dismiss or recommend engaging or dismissing or other personnel actions.





Other key personnel

- Article 32(b):
- Included are: persons working within an organisation who possess uncommon knowledge essential to the establishment's service, research equipment, techniques or management.





Defining intra-corporate transferee

- Article 32(c)
- An intra-corporate transferee is defined as a natural person working within a organisation in the territory of the Party and being temporarily transferred in the context of pursuit of economic activities in the territory of the other Party; the organisation concerned must have its principal place of business in the territory of the Party and the transfer must be to an establishment of that organisation effectively pursuing like economic activities in the territory of the other Party.





Conclusions

- How does the Directive interact with the establishment provisions in third country agreements?
- Are the standstill provisions binding?
- To what extent does the jurisprudence of the CJEU on establishment within the Union apply to third country commitments where subsequent directives have been adopted?

