

Bird & Bird

The impact of EU-UK Trade and Cooperation Agreement on UK nationals

Introduction

Free movement of persons between the UK and EU ended on 31 December 2020. In this article, we aim to raise awareness of the potential obstacles employers now face when sending their UK national employees to the EU for business purposes.

The EU-UK Trade and Cooperation Agreement ('TCA') was recently implemented in the UK as a domestic legislation. It is an agreement covering trade and services between the UK and EU from 1 January 2021. The EU Parliament has yet to vote on the TCA, however, it is deemed provisionally applicable in the EU from 1 January 2021.

- The TCA contains various caveats and limitations which restrict the activities of UK nationals when entering the EU for business purposes without a valid work permit/residence permit. We will focus on the impact of the TCA as it applies to UK nationals as there are more impediments compared to EU nationals who plan to enter the UK as a business visitor.
- We anticipate that business travel to the EU by UK nationals will raise significant compliance issues for the unwary as some rules in the TCA are specific to local EU Member States. The TCA also limits the type of permissible activities depending on the purpose of entry to the EU.
- The current lack of mutual recognition of qualification also raises significant issues when a UK national employee plans to engage in an activity that is regulated in a particular EU host country, but where that employee lacks the requisite qualification in the local jurisdiction. That being said, it will be possible for the UK and EU to agree on arrangements for mutual recognition for certain professional qualifications going forward.

The TCA does not affect the new Immigration Rules which apply to EU nationals seeking to work and reside in the UK permanently (see [here](#) for more detail). Likewise, for UK nationals seeking to stay in the EU permanently they will need to comply with conditions applicable under the domestic law of the relevant EU Member State.

Further complicating the picture is a separate agreement between the UK and Switzerland regulating the entry of temporary visitors who are UK nationals. The UK-Switzerland Mobility Agreement is outside the scope of this article and will be dealt with separately.

Purpose of entry to the EU

Depending on the purpose of entry and temporary stay, the TCA lists five routes for UK nationals to choose from:

- 1) Business Visitor for Establishment Purposes
- 2) Contractual Service Supplier
- 3) Independent Professionals
- 4) Intra-company Transferees
- 5) Short-term Business Visitors

Each category contains specific qualifications and limitations. It remains to be seen how each EU Member State will implement the TCA in their domestic legislation as some categories may require an application be made before a UK national can enter under a particular category.

We will look at each category for temporary business activities in detail below.

Business Visitor for Establishment Purposes

These individuals are often employed by a legal entity as a senior executive and are responsible for setting up a legal enterprise in the host country on behalf of the overseas company. They are prohibited from offering services other than to establish the legal entity and must not receive remuneration from the host country.

Contractual Service Supplier

Contractual Service Suppliers ('CSS') are employed by a UK entity which does not have a presence in the EU host country. There must be a bona fide agreement in a defined sector to supply services between the UK entity and the final consumer in the EU host country not exceeding 12 months. The individual in question must have worked for the UK company in the same type of services for at least 12 months and have the necessary qualification (e.g. at least three years of professional experience, a university degree or a qualification demonstrating knowledge to an equivalent level).

The CSS route is likely to pose an issue for UK nationals who lack the local permission or licence to engage in a regulated activity.

An economic needs test (commonly known as the labour market test) may be required for some EU countries depending on the sector. For example, Hungary requires an economic needs test for activities falling under management consulting services.

Individuals are prohibited from receiving remuneration from an EU source.

Independent Professionals

These individuals are self-employed in the UK and have not established a presence in the EU. They also must have a bona fide contract to supply services in a defined sector to a final consumer in the EU. The length of agreement must be under 12 months. The engagement cannot be supplied through a recruitment agency. This raises issues for UK staffing and recruitment companies who will now need to consider other methods by which to deploy their UK contractors and consultants in EU member states.

Independent Professionals must also possess at least six years of professional experience, a university degree or a qualification demonstrating knowledge to an equivalent level.

An economic needs test may be required for some EU countries depending on the sector. For example, the Czech Republic requires an economic needs test for activities falling within computer and related services. Similar to CSSs, Independent Professionals may need local professional qualifications if legally required in the EU host country.

Intra-company Transferees

In most instances, UK national employees in this category have been employed for at least 12 months immediately prior to the date of application. They are temporarily transferred to a group entity in the EU and are managers, specialists or trainee employees.

Short-term Business Visitors

The TCA provides for visa-free travel for short-term visits in accordance with the host country's domestic law. The TCA does not define short-term business visitors. However, there is a list of permissible activities for short-term visits (e.g. meetings, research, training etc), followed by limitations depending on the particular EU Member State and/or specific activity. For example, Austria will generally require a work permit for after-sales service, including an economic needs test, according to the TCA. Note that Short-term Business Visitors must not sell goods/supply services to the general public nor receive remuneration in the EU host country.

Summary

The TCA creates many potential roadblocks for employers contemplating sending their UK nationals to the EU for business purposes other than for work which requires a valid work permit and/or residence permit in the host EU country.

- UK national business travellers to the EU will need to examine their purpose of entry and ascertain the limitations on any planned activities carefully. The TCA contains numerous exceptions and limitations which apply to the various modes of mobility (e.g. Business Visitor for Establishment Purposes, Short-term Business Visitor).
- Contractual Service Suppliers and Independent Professionals are the most restrictive routes of entry as they contain additional restrictions in the form of an economic needs test depending on the sector and host country.
- The Short-term Business Visitor route will be used by many employers planning to send their UK nationals to the EU if they do not possess a valid work permit and/or residence permit in the host country, as for this category the employer can have an existing presence in the EU and there is no prior application process in most instances if the intended activity is permissible. Employers are reminded of the applicable restrictions on the scope of permissible activities, which differ according to each EU country, including requirements for a work permit and economic needs test.

Guidance on the full requirements and application process are yet to be published. Whilst trade agreements are not set in stone and further amendments are likely, employers are advised to proceed very carefully as refusal of entry can have a lasting negative impact on a UK national employee's ability to travel in the EU.

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