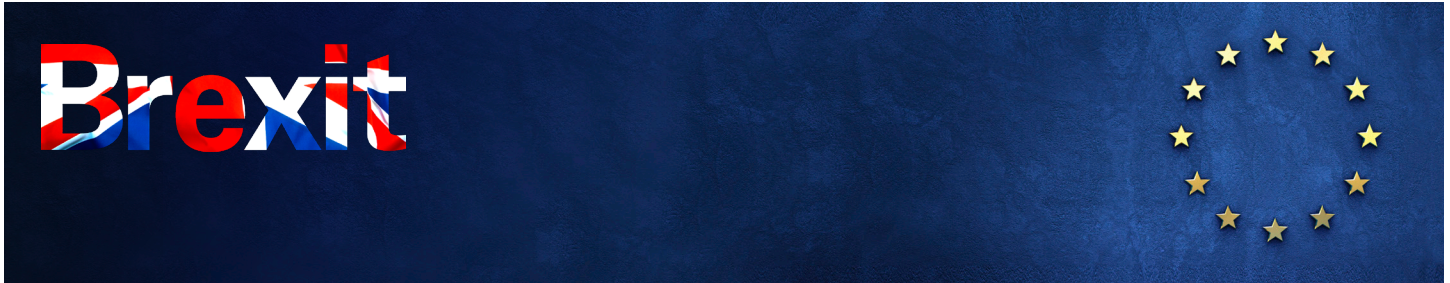


# The Future of Employment Rights and Worker Mobility

Skadden

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As the dust settles on the Trade and Cooperation Agreement (TCA), EU and UK employers and their advisers should carefully consider provisions relating to worker mobility and the potential for future changes to EU-derived employment rights in the UK.

### Takeaways

- Britons can still visit the EU for work as short-term business visitors, but they face restrictions on the provision of services.
- Separate rules and restrictions govern contractual service suppliers, independent professionals and UK professional service providers operating in the EU.
- Immigration requirements can be determined on a country-by-country basis and should be confirmed before travel.
- There will be scope to amend EU-derived employment law in the UK, but only to the extent that this does not create a significant competitive advantage for the UK labour market.

A fundamental tenet of the EU is the freedom of movement of workers and the freedom of establishment (*i.e.*, the right to carry out an economic activity on a stable and continuous basis) within the EU. As of 1 January 2021, these rights no longer apply to UK nationals. The TCA provides new immigration rules between the UK and EU and sets basic standards for UK entities to provide services into the EU and vice versa.

### Worker Mobility

EU nationals who are not already working in the UK now must be sponsored by their UK employer and qualify to work in the UK under its points-based system, typically on a Tier 2 skilled worker or intracompany transfer visa.

Most UK employers have anticipated the need for their employees who are EU nationals to obtain settled status under the EU Settlement Scheme and so be able to continue to work in the UK without sponsorship (and similarly for UK nationals to continue to work in an EU member state), and are now grappling with the ability of their workforce to travel within the EU in the course of their duties.

The TCA provides that visa-free travel is permitted within the EU for certain short-term business visitors (STBVs). This is along the same lines as the existing rules for non-EU nationals travelling within the Schengen Area and allows unrestricted travel for leisure and limited business purposes for up to 90 days in any 180-day period. (The Schengen Area comprises the majority of EU member states — excluding Ireland — along with Iceland, Norway, Switzerland and Liechtenstein.) Permitted business purposes include attending meetings or conferences; consulting with business associates and certain



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management, supervisory or financial services personnel (including insurers, bankers and investment brokers); and engaging in a commercial transaction.

Business travel is limited, however, to prevent the provision of services to the general public and consumers and to prevent the UK traveller from performing services in the EU in return for remuneration from an EU entity. It is not permissible for an employee to transfer to a branch of the employer's company in a different country (even for a short period) as a short-term business visitor or to provide services in an EU country, in each case unless other requirements are met (see Section 2 below).

Business visitors also may be subject, on a country-by-country basis, to additional requirements, such as the need to satisfy an economic needs test or to obtain work permits. Where the economic needs test applies, it will require an assessment of the impact of any trip on local providers, including whether they could offer the same service. It therefore will be important to check local requirements before planning a business trip. (See the [guidance on entry requirements](#).)

STBVs, like other travellers from the UK to the Schengen Area, also will need to have at least six months left on their passport, which must be less than 10 years old at the time of travel. By the end of 2022, there will be a new European Travel Information and Authorisation System (ETIAS), similar to an Electronic System for Travel Authorization (ESTA) for the US, whereby British (and other non-EU nationals) will be required to obtain authorization to travel in the Schengen Area (expected to cost €7 for three years or until the traveller's passport expires, if earlier).

## Cross-Border Services

The ability to travel as an STBV is limited, as set out above, where the STBV intends to perform services. While the TCA includes provisions that enable UK firms to continue to provide services into the EU (whether as service suppliers or investors) with a view to being treated no less favourably than competitors from other EU and non-EU countries, there are new restrictions on travel for service providers from the UK. There are specific provisions governing the delivery of services in different sectors, including legal and other professional services, financial services, digital services, research and development, environmental services and telecommunications. These provisions are intended to provide additional clarity on what is permitted and to set expectations on the treatment and level of access to each party's domestic market.

The level of market access will vary depending on the way in which the services are provided — *e.g.*, whether they go directly from a provider in the UK to a customer in the EU over the

internet or by the service provider's (or its employee's) temporary presence in an EU state. For the purpose of this article, we are focused on the latter example.

Generally, in addition to the ability to travel for short-term business purposes set out above, the TCA anticipates the entry for temporary stay of business visitors in the EU to be utilized by contractual service suppliers (CSSs), independent professionals (IPs), intracorporate transferees (ICTs) and senior representatives of their employers, visiting purely for establishment purposes, such as to set up a branch office (business visitors for establishment purposes, or BVEPs).

CSSs are natural persons employed by an entity based outside the EU that has a contract to supply services to a customer in an EU member state that requires the temporary presence of its employees, such as managed services or third-party secondments. To qualify as a CSS, the individual must have been an employee of the service provider for at least 12 months and have at least three years of relevant professional experience, having gained the applicable degree level and, if required, professional qualification. The maximum period of stay is 12 months, and the CSS cannot be paid by an entity in the EU — they must continue to be paid by the service provider. Reciprocal provisions apply for services into the UK by EU-based providers.

IPs must be self-employed. Their maximum period of stay is 12 months, and they are required to have at least six years of relevant professional experience.

ICTs and BVEPs must have been employed by their employer for at least 12 months and be transferred within their employer's group of companies. ICTs are limited to managers and specialists (who can stay for up to three years) and trainee employees (who can stay for one year). BVEPs are limited to a stay of 90 days in any six-month period.

There are further sector-specific provisions. In legal services, for example, UK-qualified solicitors and barristers will be able to continue to provide advice on UK and public international (but not EU) laws to their clients based in Europe, but local bars and member states may impose additional limits on their activities, specifically if those activities involve a presence in the member states' jurisdictions.

Notwithstanding the provisions in the TCA, there is still a lot to be clarified. The arrangements for the continuation of services differ for each sector and may be interpreted and enforced differently in each member state of the EU. (See the [country-specific guidance](#).)



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## Professional Qualifications

The TCA anticipates that relevant professional bodies will develop arrangements for the mutual recognition of professional qualifications. It sets conditions for the applicable bodies to develop the requirements for recognition and the administrative arrangements to submit joint recommendations to the UK-EU Partnership Council for approval. This follows the model in the EU-Canada Trade Agreement (CETA), although it worth noting that, three years after it was finalised, the CETA still has not resulted in any approved recognition proposals.

## Opportunity To Amend EU-Derived Employment Law?

There has been much recent speculation about the UK government's proposals to amend EU-derived employment law following Brexit.

The TCA includes an agreement that the UK will not (1) reduce existing employment rights, specifically labour and social standards, below those in place on 31 December 2020 (regression) or (2) allow a divergence of employment standards (divergence), in each case to the extent that this would affect trade or investment. This level-playing-field commitment extends to applying and enforcing the EU fundamental rights relating to work, health and safety, fair working conditions, information and consultation, and restructuring undertakings that applied on 31 December 2020. (See "[Level Playing Field Obligations: Insurance Policy or Tinderbox for Future Trade Disputes?](#)")

There are additional commitments regarding working time for road transport workers. Separately, the UK has committed in the TCA to continue to respect the European Convention on Human Rights.

While there is the threat that, following a prescribed arbitration process, tariffs or other rebalancing measures may be imposed if UK employment laws diverge so significantly that they have a material impact on trade or investment, the threshold will be high and require reliable evidence of actual anticompetitive impact, as opposed to conjecture or speculation.

As these provisions will remain subject to changes in the political climate, it is likely that over time certain EU-derived employment provisions, including those that the UK was reluctant to implement in the first place, could be rolled back, so long as doing so would not give the UK a clear competitive advantage. Potential candidates for change include working-time measures, such as the 48-hour week and inclusion of commission and overtime in the calculation of holiday pay; the carryover of holiday pay for long-term absent employees; and the six-year lookback period for equal pay claims.

It also is worth noting that many employment rights in the UK, including the rights not to be unfairly dismissed and to minimum notice and statutory redundancy pay, are derived from domestic legislation; and the majority of the EU's equal treatment laws were based on or are consistent with pre-existing UK laws, including ones concerning race, disability and age. Additional provisions, such as those protecting employees on a change of service provider, are also held out as gold-plating EU employment rights and are unlikely to be the subject of review.