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working world

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# Law Brexit brief Financial Services Mobility and Relocation Article

Companies that sell to, buy from, or operate in the United Kingdom or the European Union, or are engaged in their financial or stock markets, are likely to be affected by the United Kingdom's decision to leave the European Union. The specific impact of this, the Brexit decision, will differ by sector, with the financial services sector being one of the most affected.

Financial services firms continued access to the EU Single Market post-Brexit is uncertain, and good risk management requires an analysis of the options, including some form of relocation.

In this article we look at the likely considerations for financial services businesses such as relocation, financial services regulatory, people advisory and employment law aspects.

### People Advisory

The UK is about to begin an unprecedented period of change, creating unique challenges and opportunities. The consequences of Brexit will require planning and communication from companies who wish to prepare for Brexit by relocating their businesses into any EU27 location.

In this context, businesses need to prepare and execute a relocation strategy that considers the preferred location for the move, the anticipated costs, the retention and relocation of talent and minimal business disruption.

### Cost/benefit analysis of relocation

The likely costs and benefits of relocation will vary from location to location. A comprehensive analysis of the differences in terms of tax, social security, immigration and pensions regimes between the 27 EU states is advisable as part of any relocation strategy for financial services businesses.



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## **Social benefits**

EU rules on social benefits are likely to no longer apply to the UK from March 2019 and would be replaced by existing bilateral social security agreements that the UK concluded with some of the remaining EU27 countries in the past. In such cases, the existing agreements would have to be renegotiated in order to adapt them to the current working conditions and to guarantee social protection of the individuals in case of relocation.

Where there are no bilateral social security agreements we would expect the UK to conclude agreements with those EU countries in order to ensure social protection and cover the different work structures as well as for periods of secondment.

## **Managing immigration and mobility liability cost**

For non-EU citizens living and working in the UK, little will change from an immigration and mobility perspective, as they currently need visas and permits to work in the UK or in the rest of the EU.

However, for EU and UK citizens, who do not need a residence visa and work permit today to live and work in the UK and in Europe, the scenario might change. Without any special arrangement between the UK and the EU, Brexit is likely to increase immigration and compliance costs for employers and commuters. In addition to the UK aspect of such costs, an assessment will need to be made of immigration and compliance costs in destination jurisdictions.

## **Change management**

All businesses need to minimize the cost of disruption when making key strategic changes. Change management involves developing a strategy that considers all stakeholders and develops an effective communication strategy before announcing any relocation. Key change management issues are as follows:

### **1. Immigration**

The UK government has made it clear that controlling immigration is an important factor in the negotiations. Companies should therefore prepare for changes in the regulatory framework regarding their employees and in the availability of non-UK employees for their UK operations.

EU27 nationals may need to fulfill additional regulatory obligations to secure the right to work in the UK and vice versa. Personal taxes and national social security requirements may change for national as well as international employees in the UK. As a result, companies may face an increase of costs not only to relocate UK nationals to an EU27 state but also challenges to attract and retain non-EU talent in the UK labor market.

### **2. Refusal to relocate**

Any bespoke relocation strategy and policy will have to deal with the refusal of talent to relocate and the reallocation or redundancy of such talent. As part of persuading talent to relocate, a company will have to develop attractive compensation packages and an effective information communication program setting out the benefits and terms of relocation to employees. A relocation strategy will have to deal with such packages, the required communication strategy and an awareness of the potential redundancy costs and the costs of hiring new talent in the chosen EU27 location.

### **3. Social Security and health care**

Under current EU regulations, where an employee meets the necessary conditions as a posted or multi state worker, it is often possible for the employee to remain in their home country social security system, which will determine its own rules on entitlement to benefits and services such as healthcare. However, the prospect of a "hard Brexit" throws doubt as to whether this system will continue for internationally mobile workers, which could mean changes concerning employers' policies and processes and possible additional social security costs.

### **4. UK Nationals' Retirement Benefits**

UK citizens who live in the European Economic Area (and Switzerland) have their state pensions protected against wage or price inflation. Following the vote to leave the EU, the UK government will have to decide whether this will continue or such pensions will be frozen. At the moment, part of the reason that UK pensioners in the rest of the EU see their pension go up every year is because the principle of the single market is applied. That means pensions and other social security payments rise wherever you live.

Because this agreement is a mutual arrangement between the UK and the rest of the EU, it is now likely to form part of the renegotiation process.

However, the UK has not arranged a similar deal with a non-EU state since 1981 and British citizens who have retired to Europe could see their state pensions curtailed, if a pension deal is not negotiated. This would be a factor to consider in the individual compensation packages for proposed British expats being moved as part of a relocation strategy.

## **Employment law**

The employment law issues to be considered by any financial services company looking to relocate some or all of its business to an EU27 state are considerable.

With respect to staff transfers, the position is complicated as any financial services business is likely to have a mixture of UK and EU27 nationals that it wishes to relocate. How can a company arrange the following issues with as little disruption as possible?

### **UK nationals relocating to EU27 states**

Do existing contracts of employment have relocation clauses allowing such a move to be carried out? Will current contracts of employment governed by English law have to be replaced by an arrangement subject to the law of the destination state? Can secondment arrangements be used? Will the post-Brexit arrangements allow temporary work to be carried out by UK nationals in the company's UK office?

### **EU27 nationals relocating to EU27 states**

In addition to many of the same questions above, the issue of temporary work in the company's UK offices may be more complicated than with respect to a UK national.

### **Remaining employees**

Where the part of a business which is being relocated has employees who are no longer required, what arrangements will need to be made? Can they be transferred to other parts of the business? Will redundancies be required? What are the company's outplacings obligations? Where staff are required to relocate but refuse to do so, what are the company's legal obligations under English employment law?

## **Pensions and Social Security**

What are the rules governing the transfers of pension rights and social security contributions from the UK to an EU27 State for current staff who will be relocated?

## **New locations**

In respect of selecting a destination state, careful thought has to be given to the new location of the business and its employment law regime. Does the new location provide flexibility in its employment law arrangements to accommodate staff arriving from the UK for fixed or indefinite periods? Will trade union and worker's representation structures have to be put in place? Will relocating staff have to switch to local law governed employment contracts? How do you manage the switch from English law governed contracts? How do the compensation rules in place affect the company's current compensation and bonus policies?

## **Immigration issues**

Last but not least, what steps can be taken to safeguard the immigration status of UK nationals relocating to an EU27 state post-Brexit? Are long term, permanent residency or other types of arrangements available and what are the rules that govern those arrangements?

## **Financial Services Regulatory issues in relocation**

Most financial services organizations are preparing contingency plans based upon a hard Brexit scenario, where financial service passporting rights are lost. As such the starting point is to determine which services and products will be prohibited without an EU passport. Given uncertainties around the regulation of cross border services and the general political dynamic, this is a difficult question. We are finding that, depending upon the organization and service provided, the optimum solutions are likely to vary. There also remains a great deal of legal uncertainty over how some of the cross-border concepts considered below will operate in practice in a post-Brexit world.

This section explains some of the different ways in which cross-Channel business may continue and what regulatory considerations financial services businesses face when

determining how many and which staff are to be moved (or how many new positions should be created in the new entity).

Following Brexit, financial services firms in the UK will become "third country firms," which means they will not be firms with an automatic right to access markets in Member States across the EEA under the passporting regimes of the various European Union single market Directives. As such, if firms wish to continue to provide their services across the EEA post-Brexit, they will need to consider the methods which will allow them to do so. In the absence of any explicit prohibition or permission on undertaking an activity, it is left to the national regimes of each Member State as to the extent to which they permit third country business in their jurisdiction.

For some businesses, the amount of activity they carry on in some EEA jurisdictions may be relatively small, and be capable of being serviced by a single individual working part- or full-time. The starting point for most organizations without an existing authorized EU entity will be to establish a new authorized entity in an EU state that can secure the passport and service EU clients. This however is likely to involve considerable disruption and a need to move or hire a significant number of employees.

In some cases however, organizations are considering other ways in which staff can remain in London and continue to be able to conduct activities in the EEA without breaching the regulatory perimeter. A number of potential approaches are being explored:

### **Secondment**

UK-based individuals are seconded to an entity already authorized elsewhere in the EEA to conduct activities on an occasional or regular basis. The rest of the time the individuals would provide services from the UK.

### **Chaperoning**

UK-based individuals fly in to EEA jurisdictions and conduct activities under the supervision of an authorized firm. This may be a convenient option as risks to consumers are minimized and therefore from a policy perspective, no authorization ought to be required.

## **Reverse solicitation**

Clients in EEA jurisdictions solicit the services of the UK-based firm without any marketing by the UK firm to elicit the client's approach. However, different Member States interpret the concept in different ways, and approach what is acceptable to different degrees. This is not especially helpful when directly facing an arm's-length EU client base but may be helpful in facilitating back-to-back booking or service models.

## **Branches**

An entity authorized in the EEA has a branch in the UK, and uses its UK-based employees to provide services back into the EEA under its EEA authorization.

Currently, there is no EEA-wide harmonization regarding how individuals may be able to provide services on behalf of third-country businesses. Accordingly, while the financial services legislative framework attempts to create a level playing field across the EEA, in the area of individuals providing cross-border services, firms will need to take a jurisdiction-by-jurisdiction approach as to whether such individuals can provide services in the EEA on behalf of a third-country firm without that third-country firm triggering national authorization requirements. The ability for UK firms to lawfully provide services to clients in the EEA without authorization will therefore depend upon a number of factors, including:

### **Nature of the services**

The actual nature of the services provided, and the resulting pan-European and national legislation which governs such activities.

### **Physical presence**

The extent to which services are being provided from a physical base or presence within the EEA. Member States are likely to take differing approaches as to what they consider to be a "physical presence" within their jurisdiction.

### **Particular circumstances**

The events and circumstances which led to the UK seeking to provide services in the jurisdiction, i.e., were the services solicited by a client on their own initiative without any marketing?

**Jurisdiction-by-jurisdiction approach**

Each Member State will have its own regulatory perimeter and may provide exemptions and/or exclusions if certain conditions are met, and structuring the provision of services to comply with these exemptions or exclusions may be possible.

**Individual mobility**

If an individual is part of the time acting on behalf of one legal entity, and then part of the time acting for another legal entity, there would have to be very clear processes in place in order to manage the risk that clients are left confused as to which entity they are dealing with. Furthermore, situations would need to be avoided whereby clients receive services from the two entities simultaneously, and therefore have no real way of knowing when services are being provided from one entity as opposed the other.

Ultimately, it may come down to the degree of regularity of services being provided, and the volume of such business being conducted as to whether an individual acting in the EEA on behalf of a firm is permitted without authorization. Given the time it can take to obtain an authorization should one be needed, further enquiries will need to be made. If the outcome is such that authorization cannot be avoided, firms will need to submit their applications for authorization in the Spring of 2018 to allow sufficient time for national regulators to make their authorization decisions prior to March 2019 when the UK leaves the EU.

Therefore, the next step would be to conduct a jurisdictional survey as to the regulatory positions (both, in terms of regulatory provisions and the position taken by the local regulatory authorities) in each location where services may be offered. The extent of the survey would need to cover the activities permitted before authorization may be required, and provide some guidelines as to what firms can do before they risk breaching the regulatory perimeter.

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