Written evidence submitted by the UK-EU Cross-Border Services Working Group to the UK Trade and Business Commission, 13/04/2021

Please note: This paper was first submitted to the House of Lords in response to the call for evidence for the Future UK-EU Relations: Trade in Services Inquiry. It is presented here largely unchanged.

Version history

01 FEB 2021 Creation

02 APR 2021 Change to Section 2(f) on "Recognition of qualifications":

Sentence "The cessation of the EU obligation on member states to recognize professional qualifications means that the recognition of qualifications now reverts to being defined by national legislation which, in cases like that of Spain, may pre-date that country's EU membership." changed to "Since the EU system of mutual recognition of qualifications will thus no longer apply to UK qualifications, the recognition of qualifications now reverts to being defined by national legislation which, in cases like that of Spain, may pre-date that country's EU membership".

Who we are

The UK-EU Cross-Border Services working group ("CBS WG") was founded by Zoe Adams Green and Debbie Williams in September 2020. In addition to Zoe and Debbie, the core team members are Nick Gammon, Emma Gledhill, Jayne Hamilton and Kim Sanderson. Our aim is to research, examine and raise awareness of the effects of the UK's Withdrawal from the European Union on the provision of cross-border services between the UK, EU and EFTA, including the rendering of services by British citizens resident in one EU/EFTA member state to clients in another EU/EFTA member state. The members of the CBS WG have expertise in the following sectors: aviation, IT, translation and interpreting, culture and media, the marine industry and winter sports. We can be contacted at UKEUCrossBorderServices@gmail.com.

Preface

The CBS WG is extremely concerned about the implications of the new relationship between the UK and EU as per the terms of the EU-UK Trade and Cooperation Agreement ("TCA"). We believe that its terms will prove detrimental to service providers based in the UK and to British service providers based in EU/EFTA member states. Any adverse effects are likely to be felt disproportionately by sole traders and small companies, since these are less able to absorb the extra costs incurred. In our evidence, we aim to identify general problems with the nature and content of the TCA, highlight certain specific issues – illustrated through case studies – and draw attention to the complex circumstances of British nationals resident in the EU/EFTA ("UKinEU/EFTA"), who now face the task of navigating multiple tiers of legislation in order to run their businesses.

1. General problems with the TCA

- Size and complexity
- Lack of individual enforceability of rights
- Inadequate drafting
- Insufficient consideration of UKinEU/EFTA

The TCA is long and complex, containing a host of reservations for specific countries and sectors. Its length makes it unreasonable to expect the average layperson to read and constructively digest it; its complexity means that it cannot be easily summarized to provide guidelines that apply to all or even the majority of service providers. Consequently, confusion abounds as to what it does and does not allow, and confusion is inherently detrimental to business and employment. This confusion is unlikely to be resolved any time soon: the Withdrawal Agreement ("WA") is considerably shorter, and yet British in Europe and its affiliated member groups still receive regular reports of misunderstandings and incorrect implementation. Such problems will likely be amplified in the case of the much longer TCA, and there is the added complication that the rights in the TCA – unlike those in the WA – are not individually enforceable. It is therefore unclear what, if anything, individuals can do if they feel that the provisions in the TCA are not being correctly applied. Many people affected by the TCA do not have a professional body or union to represent them.

Further, in several cases the TCA is imprecise or unclear. For example, the issue of what an "agency" is. Article SERVIN.4.1 5(b) states that:

"contractual service suppliers" means natural persons employed by a legal person of a Party (other than through an agency for placement and supply services of personnel)

Thus, even service providers who are covered by the TCA may be excluded from the rights associated with SERVIN.4.1 if they work via an agency, as is standard practice in more than one sector. Our understanding of these provisions is that they cover business-to-business contracts but not contracts sourced through the intermediary of an agency. However, since "agency for placement and supply services of personnel" is not defined, and there are many different types of agency, it is not clear whether, for example, a British interpreter on the books of a language service provider ("LSP") could be deployed via that LSP to carry out an on-site assignment in an EU member state.

For further information on the potential impact of this oversight/imprecision, please see the separate evidence submitted by CBS WG member Jayne Hamilton, detailing the challenges facing service providers working via agencies and contract brokers in the IT sector, ref. no. PUJ125405.

It should also be noted here that recruitment agencies are themselves service providers and now face many more restrictions upon the candidates they may field, and must grapple with the unenviable task of understanding reservations in the TCA pertaining to multiple sectors and countries.

The final general point we wish to raise is the lack of consideration for UKinEU/EFTA. Brits protected by the various Citizens' Rights Agreements (“CRAs”) were – like EU/EFTA citizens resident in the UK prior to the end of transition – assured that they could continue their lives after Brexit in broadly the same way as before. The WA/CRAs did not make good on this promise, failing to protect major rights such as the full recognition of professional qualifications, and the TCA has not rectified this. In fact, it does not even explicitly clarify whether the provisions of the TCA apply not only to Brits resident in the UK but also Brits resident in the EU/EFTA who wish to provide services in person within an EU member state other than their country of residence. Nor does it explain whether the provisions of EU/EFTA/national legislation that otherwise confer certain rights on third-country nationals resident in the EU/EFTA continue to apply to UKinEU/EFTA, even if they conflict with reservations in the TCA (for more information, see 2 h) below).

2. Specific issues

Below, we provide further detail about issues concerning individual situations.

a) Difference in treatment between company employees and independent professionals

To benefit from TCA provisions allowing the limited on-site rendering of services as per Article SERVIN.4.1, contractual service suppliers (i.e. employees) require at least three years’ professional experience; however, independent professionals require at least six years’ experience.
Moreover, in some sectors, contracted service suppliers may work in certain countries without a permit, but independent professionals may not (see reservations starting from p. 762 of the TCA).

Such restrictions disproportionately impact self-employed service providers, and as a result we have already had reports of independent professionals closing their businesses in order to enter full-time employment, thereby suffering significant financial loss (see Case Studies A and B).

b) Temporal restriction of 12 months for provision of on-site services

Article SERVIN.4.4 4 limits the permissible length of stay to *12 months, or for the duration of the contract, whichever is less.* This puts British service providers at a competitive disadvantage, particularly if it is not possible at the start of a contract to precisely define the amount of time required to complete it. This also excludes British citizens from bidding for rolling contracts and multi-year programmes.

c) Work permit requirements

Where work permits must be procured, they take several weeks or even months to process. This means that British citizens requiring a work permit will be excluded from applying for contracts at short notice. Since, when bidding for contracts, British citizens requiring a permit will not already hold that permit, they will be far less attractive to European clients than EU/EFTA citizens. Further, British service providers may even be excluded from working in a country with no reservation if a contract also includes work in another country which is subject to a reservation.

d) Culture and media

The culture and media sectors have been omitted from the TCA almost entirely. This is a problem not only for UK-based professionals but also for UKinEU/EFTA who are used to working on a pan-EU basis (see Case Studies C and D).

e) Sports and seasonal work

In industries such as sailing and skiing, highly successful businesses have been established with models relying on freedom of movement in the EU, EEA and EFTA. In particular, these industries have tended to provide seasonal work for young people[1]. Their counterparts from 25 years ago are today's managers and business owners, who until now generated employment for many thousands of UK citizens across Europe.

The TCA leaves the sports industries empty-handed. Numerous businesses face closure as their business models suddenly become prohibitively expensive, complex or even illegal. The UK citizens they employ face an end to their entire careers[2] (see Case Study E).

f) Recognition of qualifications

The absence of the recognition of qualifications in the TCA will have a disastrous impact on many professions. Since the EU system of mutual recognition of qualifications will thus no longer apply to UK qualifications, the recognition of qualifications now reverts to being defined by national legislation which, in cases like that of Spain, may pre-date that country's EU membership.

In the case of sailing, the commercial professional "government" qualifications issued by the Royal Yachting Association (“RYA”) in association with the Maritime and Coastguard Agency are among the most highly regarded in the world. However, these have ceased to be valid in Spanish waters with effect from 1 January 2021. In the ski industry too, instructors holding UK qualifications are now reliant on the goodwill of member states to recognize their standing. This sudden loss of EU-wide recognition leaves experienced professionals without a legal basis on which to exercise their profession. This is likely to leave many out of a job and to render many businesses unable to operate (see Case Study F).

g) Imbalance of reservations

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[1] https://www.theguardian.com/politics/2020/nov/22/british-ski-workers-set-to-lose-seasonal-jobs-after-brexit

[2] https://www.dailymail.co.uk/news/article-8974727/Up-2-000-British-ski-instructors-facing-end-careers-Brexit.html

Many of the TCA reservations establish an imbalance between what EU member states allow British citizens to do and what the UK allows citizens of EU member states to do. For example, in translation and interpreting, many EU states impose reservations or are completely unbound by the TCA whereas the UK imposes no such conditions. Thus, EU citizens have greater rights to provide services in the UK than UK citizens do in the EU.

h) British citizens in EFTA

British citizens living in EFTA countries are caught in a web of multiple sets of rules, since each of these countries has its own agreement with the EU.

For example, under the Swiss-EU Free Movement of People Agreement (FMOPA), Swiss firms can deploy employees of any nationality to provide their company's services for 90 days a year on short-term business visits[3]. However, it is not clear whether British employees of Swiss firms are also covered by the TCA. If so, are they prohibited, for example, from delivering a Swiss company's services on a B2C basis due to the prohibition placed on B2C service provision in the TCA?

If that is the case, British citizens – including those covered by the Swiss Citizens' Rights Agreement – will be at a disadvantage not only compared to their Swiss and EU colleagues but also compared to all other third-country nationals employed by Swiss companies.

There is no information on whether the TCA applies on an equal footing with Swiss-EU agreements or whether the latter take precedence in scenarios involving Swiss companies providing services in the EU. This requires urgent clarification.

3. Case Studies

A

Chris Williams has been a self-employed contractor for over 25 years, delivering Configuration Management services to clients throughout the EU/EFTA. He has used a number of frameworks to enable his work and ensure tax compliance, usually his UK limited company or an umbrella company in the country of performance, e.g. Belgium or Switzerland.

Through the combined effects of Brexit and Covid-19, Chris lost his contract in Switzerland and was unemployed for around six months. He was therefore forced to consider permanent employment at a much reduced income.

Chris now works with NATO in Germany, where he is allowed to work due to his privileged status as a NATO International Civilian. He fears that many British contractors will not even have this option, and will be limited to the UK and/or their one country of residence.

B

Julian Hensman is a financial IT specialist based in France. He has found that uncertainty regarding the need for work permits often means potential clients immediately discount him as a contractor. The risks in this competitive market are too high to continue working with British professionals.

Consequently, Julian has closed down his company and entered full-time employment. He now has far less disposable income and has suffered a complete lifestyle change which he believes will be permanent. In his new position, Julian is required to work on-site. The associated costs of maintaining a second home can clearly no longer be written off as company expenses now that he is an employee. As a result, he may be forced to downsize the family home. He has postponed his planned retirement by 10 years.

[3] See Article 17 (b) (ii) 22002A0430(01) - EN

C

Nick Gammon is a British artist and photographer based in the Netherlands. Having lost his freedom of movement through Brexit, he hoped the TCA would allow him to continue working as usual, but the rights of creative professionals have been neglected. Hence despite living in a country that belongs to the Single Market and where creative professionals routinely work across borders, Nick is now unsure about his rights to gather material, cover stories and shoot photographs outside Holland. He does not even know whether he can sell material to clients in other EU member states.

The WA does not help, since Article 25(1) only allows him to provide on-site services in the Netherlands or – if covered by provisions for frontier workers – in one other EU member state. This means Nick is dependent on EU and individual member states' legislation. Mechanisms for working under such legislation are associated with extra costs, and permit requirements are unclear. Despite his best efforts, Nick has been unable to determine what requirements EU member states place upon British journalists/photographers who want to visit their territory for brief periods on a freelance basis. He is concerned about possible sanctions if he inadvertently breaks the rules, and worries about the impact on his residency status in the Netherlands.

D

Felix Pilgrim is a British actor who has previously trained, auditioned and worked in EU countries including Italy, Spain and Greece. He believes it will now be much more difficult for theatre companies to operate as they have done in the past, since each country has its own visa requirements for British actors. He stresses the importance of training as an actor in different European countries, saying it has been essential to the development of his career, and not something he would have been able to achieve easily if there were additional costs and paperwork. At present, he is attempting to clarify what requirements he will have to meet in order to work in EU member states in future.

E

Rob Rees is a ski instructor and director of Inside Out Skiing Ltd, a unique ski school founded more than 10 years ago with over 500 clients. It offers year-round ski instruction based in the UK and a number of EU member states.

Rob has used his EU freedom of movement and recognition of professional qualifications to provide professional services to clients at ski resorts in France, Italy, Spain, Finland and – through bilateral agreements with the EU – Switzerland. His clients enjoy the unique benefit of being able to work with the same instructors over an extended period of time at a range of destinations. As a result, losing the right to provide cross-border services will have a catastrophic effect on his company's ability to stay in business.

There are currently no opportunities for UK citizens to apply for cross-border working rights for the temporary provision of services in the sports industries across the EU. Consequently Rob's company will no longer be able to operate its extremely successful and innovative business model, and his career will be prematurely terminated.

F

Andrew Hutton is chief instructor of an RYA sailing school in Spain. He has lived and worked in Spain for about five years and is covered by the WA. His sailing school also charters yachts and power boats under the Spanish and UK flags.

The Spanish authorities no longer recognize RYA qualifications for use on Spanish-registered boats. This means that the qualifications he offers are less attractive to customers and that his own professional qualifications can no longer be used. Attaining Spanish qualifications to the level of the commercial qualifications he already holds is impractical due to the language barrier, expense (EUR 3000-7000) and time required. He would also have to accumulate experience on board a Spanish vessel, and the whole process would take a couple of years to complete.

In addition, UK-flagged boats can no longer be chartered, or used for training, in Spain and Spanish-flagged boats cannot be chartered to UK-qualified customers. It is now impossible to run RYA cruising courses in Spain. Andrew will be out of work and the business is likely to cease operating.

4. Conclusion

The TCA fails to provide certainty; its content falls short of the provisions required to facilitate smooth business relationships between the UK and the EU. Its complexity and length mean that few people are likely to read it, and even fewer will understand its content and how it relates to their circumstances. Work opportunities and contracts requiring EU citizenship are plentiful, and it is unlikely that qualified British citizens will be able to convincingly argue that they, too, are entitled to apply. Often Brits will be excluded simply because it is too much trouble for both contractor and client to clarify their rights. To protect the interests of British companies, entrepreneurs and service providers, and the wellbeing of British citizens in general, closer alignment with the Single Market must be sought at the earliest opportunity.