



Legal Alert

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Hiring a UK Service Provider in the Czech Republic? There's a catch...

How will the cross-border trade in services continue?

After the announcement and publication of the EU-UK Trade and Cooperation Agreement ('TCA') between the United Kingdom and the European Union, there was much discussion about the absence of provisions on the ability of UK and EU financial services firms to provide financial services into each other's territories and how this issue would be dealt with in the future relationship between the UK and the EU. (For completeness, this area of trade proved to be too difficult for the parties to agree on in time for the 31 December, 2020 deadline, so this particular can has been kicked down the road in the form of a Joint Declaration on Financial Services Regulatory Cooperation committing the parties to better define how financial services can be provided).

Travelling to provide services?

Much less has been discussed about how the cross-border trade in other services would work between the two territories, yet the TCA has much to say on the issue.

While the establishment of enterprises in each other's territories in order to provide services is not particularly restricted, the provision of cross-border services via the travel to the EU by employees engaged by a UK entity is more so.

The Trade and Cooperation Agreement

Chapter 4 of the Title II: Services and Investment of the TCA ('Chapter 4 of the TCA') deals with the ability of individuals to

travel into and stay temporarily in the UK/EU for business reasons. The area we will concentrate on is how contractual service suppliers can move between the EU and the UK. The TCA regulates the provision of services in 37 different industry sectors and in each sector individual EU Member States retain the right to further control the provision of services into their country by UK entities by applying an economic needs test (more of which below).

Controlling UK Service Providers

In each case, a UK entity that wishes, and which may be contractually obliged to currently, to send individuals into an EU Member State to deliver services in any of the 37 specified industry sectors, must comply with the restrictions in Chapter 4 of the TCA. In comparison, it should be noted that the UK imposes no restrictions on the delivery of services by EU service providers into the UK.

The TCA uses a specific definition of a contractual service supplier ('CSS'), being a person employed by a legal entity which has a contract not exceeding 12 months to supply services to a final consumer in an EU Member State which requires the presence of its employees in that EU Member State and the individual concerned having to satisfy further conditions about his or her length of service and qualifications in the area of the type of service involved.

It appears unclear in the text whether or not a UK company can try and circumvent the rules by engaging an EU national to provide the services but we would venture to say that on the wording of Chapter 4 of the TCA this would not be permitted; however, on a practical basis it is hard to see how this would be prevented.

Some of the industry sectors regulated by Chapter 4 of the TCA include engineering services, research and development services, telecoms services, advertising services and



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insurance services. Where an industry sector is not specifically regulated by Chapter 4 of the TCA, individual EU Member States are free to set their own rules.

Will an Economic Needs Test be applied?

With regards to industry sectors that are specified in the TCA, this means that a Czech company wishing to receive services from a UK company that requires the presence in the Czech Republic of employees of the UK service provider must check whether or not the employees physically providing the services in the Czech Republic satisfy the conditions laid out in the TCA, and not just the definition of CSS but also whether the relevant industry sector is further regulated by the requirement of an economic needs test ('ENT'). Of the 37 specifically mentioned industry sectors, the Czech Republic reserves the right to apply an ENT in 34 of them.

An ENT typically involves an assessment by a country as to whether or not individuals in its own state could provide the service concerned. It is an economically protective measure that the Czech Republic wishes to fully embrace with respect to services coming from the UK.

Who knows?

We contacted certain Czech ministries to ask them how the Czech Republic would apply the ENTs to a specific number of industries, being engineering services and integrated engineering services, advertising services and manufacturing advisory and consulting services. While we have not received a response directly from the Ministries, associated government bodies confessed to not being aware of the regulations imposed by the TCA, still less about how an ENT would be carried out. Our research of the application of ENTs in other trade arrangements that the EU has suggests that

„In those sectors where economic needs tests are applied, their main criteria will be the assessment of the relevant market situation in the European Union Member States or the region where the service is to be provided, including with respect to the number of, and the impact on, existing services suppliers.“

(TCA concluded between EU, Colombia and Peru).

Further research suggests that the ENT would not be carried out by a Member State government body but that the parties to the arrangement themselves seeking to obtain permission for a UK entity to send staff to provide the services would have to provide their own analysis to justify allowing such staff to enter the Czech Republic and perform the service. This is a somewhat burdensome requirement, which may cause some difficulties where a binding contract for services from the UK to the Czech Republic has already been entered into and which may also represent a significant disincentive for Czech companies to engage a UK service provider in the future.

Have band, will travel? Not necessarily...

While travel restrictions are in place this issue has not had much light cast upon it, although the issue has become news to a limited extent in the UK in the context of touring musicians and arts sector workers, where it has been recognised that this particular sector is not included in the TCA and so there is no automatic right to be able to travel to the EU to provide those services. Once travel restrictions are eased, it will become clearer to UK business that the services it wishes to provide and also to Czech business receiving the services from UK companies that it wants has become subject to significant restrictions.

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There clearly will be an impact on current service contracts between a UK deliverer of services and a Czech recipient, where there is a contractual obligation on a UK company to provide services via an individual's presence in the Czech Republic given that a new barrier to the execution of the legally contracted services has been erected.

We will explore this issue in further detail in our next alert.

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