

## Preserving Intra-Corporate Mobility Between the UK and the EU After Brexit\*\*

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### I Introduction

In their White Paper published on 12 July 2018,<sup>1</sup> the UK Government outlined their proposal for the conditions under which they envisaged the future relationship between the United Kingdom and the European Union. One of the most controversial areas in the final text of the White Paper is the regulation of the future cooperation with the EU in the field of free provision of services.<sup>2</sup>

Services are the fastest growing sector of the global economy today and account for two thirds of global output, one third of global employment and nearly 20% of global trade. In this

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<sup>1</sup> HM Government: The future relationship between the United Kingdom and the European Union – White Paper (published 12 July 2018; last updated 17 July 2018), <[www.gov.uk/government/publications/the-future-relationship-between-the-united-kingdom-and-the-european-union](http://www.gov.uk/government/publications/the-future-relationship-between-the-united-kingdom-and-the-european-union)> accessed 10 November 2018.

<sup>2</sup> In the event of leaving the European Union, the effect on free movement of services will depend on what agreement is put in place. The Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom, endorsed on 25 November 2018 together with the Withdrawal Agreement, does contain provisions on trade in services and investment in services and non-services sector (Section III), allowing in principle a level of liberalisation in trade in services well beyond the Parties' WTO commitments and building on recent Union Free Trade Agreements (<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/759021/25\\_November\\_Political\\_Declaration\\_setting\\_out\\_the\\_framework\\_for\\_the\\_future\\_relationship\\_between\\_the\\_European\\_Union\\_and\\_the\\_United\\_Kingdom\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759021/25_November_Political_Declaration_setting_out_the_framework_for_the_future_relationship_between_the_European_Union_and_the_United_Kingdom_.pdf)>; accessed 13 December 2018). Should the Withdrawal Agreement and Political Declaration be rejected by the UK Parliament (an option still open at the time of the present article), four options seems to be available to the United Kingdom: 1. becoming a member of the European Free Trade Agreement (EFTA) and then joining the European Economic Area (EEA), gaining a position similar to Iceland, Liechtenstein and Norway; 2. joining the EFTA and then have a series of bilateral agreements with the EU, similarly to Switzerland; 3. entering into a customs union with the EU, with cross-border provision of services regulated under the World Trade Organisation's (WTO) General Agreement on Trade in Services (GATS); 4. in case of 'no-deal' to rely solely on WTO GATS arrangements. See: Catherine Barnard, Amy Ludlow, 'Free movement of services, migration and Brexit' <https://www.repository.cam.ac.uk/bitstream/handle/1810/266327/Brexit%20and%20services%20v5.pdf?sequence=5> accessed 13 December 2018.

growing environment, the EU being currently the UK's largest trading partner, while the UK playing a key role as the 'EU's gatekeeper' for financial and commercial relations coming from the USA, Canada, and other trading partners from past and current British Overseas Territories justify the UK's and the EU's common intention to strike the best deal in this field.

As one of the main motors of the Brexit referendum was the British population's fears related to (internal) free movement, to loss of jobs and shrinking of life standards,<sup>3</sup> it is interesting to read the UK Government's proposal on the regulation of the movement of workers within the framework of the provision of services post-Brexit.

This article aims at reviewing the UK Government's proposal regarding the regulation of provision of services under 'mode 4', but also at highlighting whether and how the current EU law already in place (e.g. 2014/66/EU Directive on European Intra-Corporate Transfer) could continue to facilitate cooperation between the EU and its soon to be former Member State.

## II Regulating Intra-Corporate Mobility in General

One of the ways to provide services in another country is to send independent professionals or employees of the service supplier for a temporary period of time, to perform certain work activities on behalf of the service supplier. These natural persons – in the EU terminology often referred to as 'posted workers' for EU nationals and 'ICTs' or 'intra-corporate transferees' for non-EU nationals – do not integrate into the labour market of the host member state, as they typically remain subject to their home employment contract and social security system.

One of the main agreement of international scope is the General Agreement on Trade and Services (GATS), a treaty of the World Trade Organization (WTO) that entered into force in January 1995 as a result of the Uruguay Round negotiations. The treaty was created to extend the multilateral trading system to the service sector, in order to remove trade barriers between their signatory members.<sup>4</sup>

Under the GATS, services can be traded internationally in four different ways:<sup>5</sup>

- Cross-border supply (Mode 1) – the supply of a service from the territory of one Member into the territory of any other Member;
- Consumption abroad (Mode 2) – the supply of a service in the territory of one Member to the service consumer of any other Member;
- Commercial presence (Mode 3) – the supply of a service by a service supplier of one Member, through commercial presence in the territory of any other Member;

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<sup>3</sup> Éva Gellérné Lukács, 'European Labour Authority – The guardian of posting within the EU?' (2018) 1 Hungarian Labour Law E-Journal 4, <[http://hllj.hu/letolt/2018\\_1\\_a/A\\_01\\_GellerneLukacs\\_hllj\\_2018\\_1.pdf](http://hllj.hu/letolt/2018_1_a/A_01_GellerneLukacs_hllj_2018_1.pdf)> accessed 4 November 2018.

<sup>4</sup> 164 members since 29 July 2016, based on the WTO records. <[www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm)> accessed 8 November 2018.

<sup>5</sup> General Agreement on Trade in Services (GATS) (entered into force 1 January 1995) art 1.

– Presence of natural persons (Mode 4) – the supply of a service by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.

Although GATS Mode 4 is often perceived as a form of labour migration, it may also be conceptualised as an instrument of multilateral trade liberalisation.<sup>6</sup> Under Mode 4, a service is supplied by a service supplier of a WTO Member in the territory of another WTO Member through the presence of natural persons. In order to benefit from Mode 4, the natural persons and their employer must all originate in a WTO Member.

While the WTO GATS agreement itself does not provide a detailed regulation of the provision of services under Mode 4, the movement of natural persons who are service suppliers of a Member, or employed by a service supplier of a Member under the GATS Agreement, is further addressed by the GATS Annex on Movement of Natural Persons Supplying Services (the MNP Annex), which provides some clarification on the scope of Mode 4. According to the MNP Annex:

3. [...] Members may negotiate specific commitments applying to the movement of all categories of natural persons supplying services under the Agreement. Natural persons covered by a specific commitment shall be allowed to supply the service in accordance with the terms of that commitment.

4. The Agreement shall not prevent a Member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders, provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment.<sup>7</sup>

Although the GATS does not set any time limits for the supply of a service under Mode 4 and the WTO Members remain free to regulate the issue as they choose, the MNP Annex clearly highlights that the natural persons entering the territory of another Member shall be allowed to do so only temporarily, to supply the services covered by a specific commitment, and shall not seek access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis.<sup>8</sup>

Recognising that free trade in services and facilitation of foreign direct investment is much more effective when there exists some form of movement of people so that service providers and recipients, as well as investors, are able to travel freely to do business, various international trade agreements exist in parallel to the WTO-GATS, establishing rules for

<sup>6</sup> Johanna Jacobsson, 'GATS Mode 4 and labour mobility: The Significance of Employment Market Access' in E. Fornalé, M. Panizzon, G. Zurcher (eds), *The Palgrave Handbook of International Labour Migration* (Palgrave Macmillan 2015, Basingstoke) 61.

<sup>7</sup> The sole fact of requiring a visa for natural persons of certain Members and not for those of others shall not be regarded as nullifying or impairing benefits under a specific commitment.

<sup>8</sup> WTO GATS MNP Annex para 2.

temporary entry and the presence of natural persons for business purposes. The primary purpose of free trade agreements, however, is to facilitate trade in goods and services and promote investment among trading partners, and not the regulation of mobility rights in general, as these would fall under the sovereign rules of the negotiating parties.

A similar principle of provision of services through the presence of natural persons is enshrined in the Treaty on the Functioning of the European Union, when regulating the freedom of provision of services within the EU:<sup>9</sup>

Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals.

At EU level, the conditions of provision of services through the deployment of personnel are further regulated in detail in various pieces of secondary legislation, most notably:

- Directive 96/71/EC concerning the posting of workers in the framework of the provision of services;<sup>10</sup>
- Directive 67/2014/EU on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation');<sup>11</sup>
- Directive 66/2014/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer.<sup>12</sup>

Similarly to the WTO GATS Mode 4 provisions, both 'primary' directives – 'Posting of Workers' Directive 96/71/EC and 'ICT' Directive 66/2014/EU – define the conditions under which a service provider may engage the temporary migration of personnel to perform their activity; these employees are deployed to the host Member State to fulfil a specific objective, and are obliged to return to their home employer once this objective is attained, without seeking access to the employment market of the host Member State, nor to apply for citizenship, residence or employment on a permanent basis.

Since the commitments undertaken under GATS or bilateral agreements do not cover conditions of entry, stay and work, these directives complement and facilitate the application of those commitments, without affecting either the agreements concluded by the European

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<sup>9</sup> *Treaty on the Functioning of the European Union*, Title IV, Chapter III, art.57 (OJ C 326, 26.10.2012, p. 47–390).

<sup>10</sup> Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 18, 21.1.1997.

<sup>11</sup> Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation'), OJ L 159, 28.5.2014.

<sup>12</sup> Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, OJ L 157, 27.5.2014.

Union with third countries or the laws of Member States concerning the access to their territory of third-country providers of services.

### III The United Kingdom and ICTs – The Importance of Reaching an Agreement

Reaching an agreement in the field of provision of services is paramount for the UK. Even the UK Government admits that the EU is currently the UK's largest trading partner, with an export of goods and services reaching 48% of the UK's total trade with all countries. Currently, the flow of services is secured through the Single Market and the Customs Union; outside the Single Market, the UK and the EU will have to agree on the level of interaction that the UK has with the EU's institutions and structures. The basis of such an agreement will be the GATS – General Agreement on Trade in Services, unless a specific trade agreement is arranged between the UK and the EU.

While the regulation of the provision of services under Modes 1–2–3 is essential, it may be interesting to reflect on the eventual perception post-Brexit of Mode 4, requiring the movement of persons (independent professionals or employees of a service supplier) as part of the provision of services.

Relative to the other three modes of supply, available estimates suggest that the trade through Mode 4 remains a very small component of overall trade in services, accounting for between 1 and 2 per cent of the total.<sup>13</sup> In the EU, these proportions are even lower: in 2015, there were around 1,9 million postings in the EU comprising 0.65% of the labour force in the EU28<sup>14</sup> (or 0,2–0,3% counted on the basis of full-time equivalent)<sup>15</sup>. Nevertheless, the fear of social dumping continues to grow and attitudes remain more negative to low-wage trade in services when it involves posted workers than to low-wage trade in goods.<sup>16</sup>

In the UK, the influx of workers posted from the EU is relatively low, although the UK has not implemented the notification requirements deriving from the Enforcement Directive and so it is difficult to assess the number of employees actually posted from the EU to the UK – according to the European Commission's data, in 2016 the UK received 57.226 employees from the EU, mainly from France (21.1%), Germany (19.5%), Spain (18.3%) and Poland

<sup>13</sup> WTO International Trade Statistics 2005 <[www.wto.org/english/res\\_e/statis\\_e/its2005\\_e/its2005\\_e.pdf](http://www.wto.org/english/res_e/statis_e/its2005_e/its2005_e.pdf)> accessed 10 November 2018.

<sup>14</sup> Uuriintuya Batsaikhan, 'EU posted workers: separating fact and fiction. August 2017' <<http://bruegel.org/2017/08/eu-posted-workers-separatingfact-and-fiction/>> accessed 4 November 2018.

<sup>15</sup> Zsolt Darvas, 'Could revising the posted workers directive improve social conditions?' August 2017. <[http://bruegel.org/wp-content/uploads/2017/08/Darvas\\_2017-01-31\\_EP\\_Posting\\_workers-1.pdf](http://bruegel.org/wp-content/uploads/2017/08/Darvas_2017-01-31_EP_Posting_workers-1.pdf)> accessed 4 November 2018.

<sup>16</sup> Lars Calmfors, Girts Dimdins, Marie Gustaffson Sendén, Henry Montgomery, Ulrika Stavlöt, 'Why do people dislike low-wage trade competition with posted workers in the service sector?' (2013) 47 *The Journal of Socio-Economics* 82–93 <[www.sciencedirect.com/science/article/pii/S105353571300125X](http://www.sciencedirect.com/science/article/pii/S105353571300125X)> accessed 4 November 2018.

(9.5%).<sup>17</sup> The UK is also one of the middle-ranking sender countries, posting approx. 49,210 employees to the EU on a yearly basis – approx. the same number as the Czech Republic and Romania. Although there are no current statistical numbers reviewing the situation of posted workers in the UK, a survey conducted by the UK's Office for National Statistics from 2008 indicated that the biggest number of workers were occupied in the sectors of real estate renting & business activity (38,179), financial intermediation (22,773), manufacturing (22,560) and health & social work (13,012).<sup>18</sup> Post-Brexit, all these posted workers will be considered as employees of a service supplier providing services under Mode 4 of the GATS agreement, unless otherwise agreed by the UK and the EU.

#### **IV The UK Government's Proposal on ICTs**

Although the UK would halt access to the free exchange of services with the EU, and end free movement of people once it leaves the Single Market in 29 March 2019 (or 31 December 2020, if a transitional period is agreed), the UK Government has proposed exceptional treatment of establishments seeking to continue providing cross border services through a legal presence and deployment of personnel (posted workers and ICTs).

The UK Government's proposal to maintain the provision of services through the deployment of personnel – as outlined in the White Paper – is to negotiate a new UK-EU post-Brexit Free Trade Agreement, based mainly on the already existing WTO's General Agreement on Trade in Services (GATS), but also reflecting 'the UK's and the EU's deep history, close ties, and unique starting point'<sup>19</sup>. In the ideal scenario according to the UK, the future relationship between the UK and the EU in the field of intra-corporate transfers would resemble those recently negotiated between the EU and Canada, and forming part of an enhanced Comprehensive Economic and Trade Agreement.

In the White Paper, the UK Government clearly outlines a vision of facilitated mobility of workers between the UK and the EU to support the UK's service-based economy, as well as the cross-border provision of professional services, of which the EU is also a beneficiary.

As presented in the White Paper, the UK Government is resolved to continue facilitating the provision of services on WTO-GATS terms, including an enhanced Mode 4:<sup>20</sup>

- supporting businesses to provide services and to move their talented people;
- allowing citizens to travel freely, without a visa, for tourism and temporary business activity;
- facilitating mobility for students and young people, enabling them to continue to benefit from world leading universities and the cultural experiences the UK and the EU have to offer;

<sup>17</sup> <[www.europarl.europa.eu/infographic/posted-workers/index\\_en.html?country=uk#receivedworkers](http://www.europarl.europa.eu/infographic/posted-workers/index_en.html?country=uk#receivedworkers)> accessed 14 August 2018.

<sup>18</sup> <[www.eurofound.europa.eu/publications/report/2010/uk-posted-workers](http://www.eurofound.europa.eu/publications/report/2010/uk-posted-workers)> accessed 14 August 2018.

<sup>19</sup> HM Government White Paper.

<sup>20</sup> HM Government White Paper, 33.

- as streamlined as possible, to ensure smooth passage for legitimate travel while strengthening the security of the UK's borders; and
- providing for other defined mobility provisions, including arrangements to ensure that UK citizens living in the EU, in future, continue to benefit from their pension entitlements and associated healthcare.

The UK's proposal for the economic partnership would:<sup>21</sup>

1. include new arrangements on services and investment that provide regulatory flexibility, recognising that the UK and the EU will not have current levels of access to each other's markets, with new arrangements on financial services that preserve the mutual benefits of integrated markets and protect financial stability, noting that these could not replicate the EU's passporting regimes;
2. end free movement, giving the UK back control over how many people come to live in the UK.

The UK's proposal builds on the principles of international trade and the precedents of existing EU trade agreements, and reflects its unique starting point. It would include:<sup>22</sup>

- general provisions that minimise the introduction of discriminatory and non-discriminatory barriers to establishment, investment and the cross-border provision of services, with barriers only permitted where agreed upfront;
- a system for the mutual recognition of professional qualifications, enabling professionals to provide services across the UK and EU;
- additional, mutually beneficial arrangements for professional and business services; and
- a new economic and regulatory arrangement for financial services.

In addition to the general services provisions, the UK proposes supplementary provisions for professional and business services, for example, permitting joint practice between UK and EU lawyers, and continued joint UK-EU ownership of accounting firms. The supplementary provisions would not replicate Single Market membership, and professional and business service providers would have rights in the UK and the EU which differ from current arrangements.<sup>23</sup>

The Government's White Paper on the future relationship between the United Kingdom and the European Union, published in July 2018, has been criticised by both sides of the political spectrum: Tories argued that May's plans to strike an association agreement, matching EU rules on goods and collecting some external customs tariffs, was too soft and 'a bad deal for Britain'<sup>24</sup>, while the Labour party is missing a strong emphasis on retaining the benefits of the Single Market and the Customs Union – which are essential for maintaining industries, jobs and businesses in Britain.<sup>25</sup>

<sup>21</sup> HM Government White Paper, 14, para 7.

<sup>22</sup> HM Government White Paper, 25, para 49.

<sup>23</sup> HM Government White Paper, 28, para 57.

<sup>24</sup> <[www.theguardian.com/politics/2018/jul/12/mays-white-paper-a-bad-deal-for-britain-claim-tory-brexiteers](http://www.theguardian.com/politics/2018/jul/12/mays-white-paper-a-bad-deal-for-britain-claim-tory-brexiteers)> accessed 4 April 2019.

<sup>25</sup> <<https://labour.org.uk/manifesto/negotiating-brexiteers/>> accessed 4 April 2019.

In fact, while the UK Government would establish a new free trade area and maintain a common rulebook for goods and agri-foods,<sup>26</sup> they would end the application of the other three key freedoms of the EU – services, capital and people. In these fields, the preference would be to achieve a ‘CETA plus plus plus’ trade agreement – with similar trade objectives to those recently negotiated between Canada and the EU,<sup>27</sup> but enhanced to reflect markets that are already very much more integrated.<sup>28</sup>

## V CETA Plus Plus Plus – The Dream Option?

Compared to the WTO-GATS, the CETA agreement negotiated between the EU and Canada reduces red tape for businesses and self-employed people and facilitates the temporary movement of labour between the EU and Canada in two ways: by smoothing the process for business migration categories and by enhancing mutual recognition of professional qualifications.<sup>29</sup>

The EU-Canada agreement creates a legal framework to facilitate the entry and stay of key personnel (business visitors for investment purposes, investors and intra-corporate transferees), contractual service providers, independent professionals and short term business travellers, as well as the negotiation and adoption of mutual recognition agreements, to allow EU and Canadian professionals to practice outside of their home country without taking any additional tests or professional training – a goal envisaged also by the UK Government in the country’s future relationship with the EU.<sup>30</sup>

Chapter 10 of the CETA removes the requirement for a Labour Market Impact Assessment for three categories of EU foreign nationals entering Canada for business purposes:<sup>31</sup>

1. Key personnel, including intra-corporate (company) transferees, investors and business visitors for investment purposes;
2. Contractual service suppliers and independent professionals; and
3. Short-term business visitors.

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<sup>26</sup> HM Government White Paper, 14.

<sup>27</sup> *Canada–European Union Comprehensive Economic and Trade Agreement (CETA)* (signed on 30 October 2016; entered into force on 21 September 2017).

<sup>28</sup> House of Commons – Exiting the European Union Committee: The future UK–EU relationship, Fourth Report of Session 2017–2019, 2.

<sup>29</sup> Andriia Ghimis, ‘Is CETA a Model for EU-UK Business Migration Post-Brexit?’ September 2017 <[www.fragomen.com/insights/blog/ceta-model-eu-uk-business-migration-post-brexit](http://www.fragomen.com/insights/blog/ceta-model-eu-uk-business-migration-post-brexit)> accessed 4 November 2018.

<sup>30</sup> UK Government White Paper, Ch. 1.3.2, 27.

<sup>31</sup> Christopher McHardy, ‘New International Mobility Program Options under Canada-European Union (EU) Comprehensive Economic and Trade Agreement (CETA), May 2018’ <[www.mccarthy.ca/en/insights/blogs/mccarthy-tetrault-employer-advisor/new-international-mobility-program-options-under-canada-european-union-eu-comprehensive-economic-and-trade-agreement-ceta](http://www.mccarthy.ca/en/insights/blogs/mccarthy-tetrault-employer-advisor/new-international-mobility-program-options-under-canada-european-union-eu-comprehensive-economic-and-trade-agreement-ceta)> accessed 4 November 2018.



As the current literature suggests, despite the facilitation of mobility of key personnel in conjunction with the provision of services, *overall* the CETA in its current form would not satisfy the UK's needs to continue the exchange of services with the EU in a seamless manner<sup>32</sup>:

– *Strict limits to movement of people are drawn by listing categories of persons who can temporarily move to a contracting state.*<sup>33</sup> CETA only tackles temporary migration directly linked to the free provision of services. This would limit the EU-UK movement of people for business purposes to certain categories of people (investors, intra-corporate transferees (ICTs), business travellers, independent professionals).

– *Temporariness of mobility rights.* Time limits for stay in a host state differ depending on the categories of persons described above: a maximum 3 years for ICTs, maximum 90 days for business travellers, while the UK seems to be keen on facilitating the temporary mobility of scientists and researchers and investors, as well as students and young graduates.<sup>34</sup>

– *Limits to mobility to those activities covered by the international trade agreement.*<sup>35</sup> Following the CETA model, mobility of personnel would be granted only to a very closely defined group of personnel, while sectors such as health care, public education, culture and other social services may be excluded from mobility rights if they are not covered by the trade agreement.

– *Subsistence / introduction of administrative requirements in support of mobility rights.* Labour mobility regimes under free trade agreements, unlike in the EU, allow the application of host state immigration law; therefore, if a state has a visa regime *vis-à-vis* its trading partner, it is not obliged to establish visa-free entry for its trading partner's nationals. The CETA follows this established practice, however it seems to be in contrast with the UK Government's wish to agree on reciprocal arrangements with the EU that are as streamlined as possible to ensure smooth passage for legitimate travel;<sup>36</sup>

– *Lack of regulation of long-term mobility.* Unlike free movement provisions under EU law, mobility rights under international trade agreements do not cover rights to residence, social rights or employment on a permanent basis.<sup>37</sup> The CETA does not address long-term work-related migration, although the UK Government's White Paper expressly indicates that it would only support short-term business visits and temporary intra-corporate transfers, while ending the free movement of workers.<sup>38</sup>

Even the recently negotiated Economic Partnership Agreement between the EU and Japan, signed on 17 July 2018, mirrors the CETA in the sense that its applicability is restricted

<sup>32</sup> Ghimis (n 29).

<sup>33</sup> Catherine Barnard, Emilija Leinarte, 'Labour mobility under international trade agreements, October 2018' <<http://ukandeu.ac.uk/explainers/labour-mobility-under-international-trade-agreements/>> accessed 4 November 2018.

<sup>34</sup> HM Government White Paper, 33.

<sup>35</sup> Barnard, Leinarte (n 33).

<sup>36</sup> HM Government White Paper, 33.

<sup>37</sup> Barnard, Leinarte (n 33).

<sup>38</sup> HM Government White Paper, 33.

only to the key personnel required for the provision of services (business visitors for establishment purposes, intra-corporate transferees [managers and specialists, but *not* trainees], investors, contractual service suppliers, independent professionals and short-term business visitors)<sup>39</sup>, and the persons thus posted to the EU or to Japan still need to comply with the immigration laws and regulations applicable to the entry and temporary stay in the destination country, even if the parties will facilitate and expedite the entry of workers within the framework of the provision of services.<sup>40</sup>

It is interesting to note that, even in this most recent example of a trade agreement negotiated by the EU on behalf of the Member States, the provisions on mobility adopted by the EU Commission and the Council are quite generic, and the entry and temporary requirements for each Member State are outlined in separate Annexes (Annex 8-B-III to Annex 8-B-V) and include different scenarios for the various Member States. Consequently, it is unlikely that, post-Brexit, UK nationals will be favoured with uniform treatment across the EU-27, but will probably adapt to the immigration requirements already in place in each Member State for third country nationals.

## **VI EU ICT Directive – A Possible Lifebuoy in the Brexit Tempest?**

The July 2018 White Paper was born in an environment when – eight months ahead of Brexit Day – the UK Government was still optimistic that they would be able to negotiate reciprocal arrangements with the European Union, favouring the mobility of people for the provision of services, while retaining a sovereign choice in a defined number of areas and remaining consistent with the end of free movement.<sup>41</sup> Although the EU welcomed the UK Government's proposal for an 'enhanced Ukraine-style' association agreement, which opens towards a 'soft Brexit' and makes significant concessions on the authority of the CJEU and cooperation on a wide range of issues, including a 'strong security partnership', the UK Government's was warned on numerous occasions by different EU stakeholders, in response to its White Paper, that it will not be allowed to 'cherry-pick' the most beneficial aspects of single market access,<sup>42</sup> such as requiring access to the Single Market for the provision of goods and capital, but not the free movement of services or people, nor the payment of any financial contribution towards the EU.

The Withdrawal Agreement and Political Declaration endorsed by the UK Government and EU leaders at a special meeting of the European Council on 25 November 2018 sets the scene for the Parties to develop an ambitious, wide-ranging and balanced comprehensive economic partnership, encompassing a free trade area as well as wider sectoral cooperation,

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<sup>39</sup> EU-Japan Economic Partnership Agreement (signed on 17 July 2018; not yet in force), art. 8.20, para. 2.

<sup>40</sup> EU-Japan Economic Partnership Agreement, art. 8.22, para. 1–2.

<sup>41</sup> HM Government White Paper, 32.

<sup>42</sup> Former EU negotiator Michel Barnier on 6 December 2016 in Brussels; German Chancellor Angela Merkel on 16 February 2018 in Berlin; EU Council President Donald Tusk on 7 March 2018 in Luxembourg; EU Parliament's Resolution on the framework of the future EU-UK relationship (14 March 2018).

facilitating trade and investment between the Parties while respecting the integrity of the Union's Single Market and the Customs Union as well as the UK's internal market. The unpopularity of the Withdrawal Agreement among the Cabinet and the UK Members of Parliament<sup>43</sup> however still keeps open the option of a 'no-deal scenario' as we approach the end of the negotiation period.

In the event of the rejection of the Withdrawal Agreement by the UK Parliament and, consequently, a potential 'no-deal Brexit' scenario, it may be worth reviewing the pieces of legislation already in place that could complement the provisions of the WTO-GATS on intra-corporate mobility and further facilitate the mobility of personnel.

Exiting the EU, the United Kingdom would no longer be subject to the Posting of Workers Directive, in the sense that it applies to 'undertakings *established in a Member State* which, in the framework of the transnational provision of services, post workers [...] to the territory of a Member State'<sup>44</sup>. Nevertheless, post Brexit the United Kingdom could become a beneficiary of the provisions of the EU ICT directive, as it may be applicable to UK nationals posted to the EU within the framework of the provision of services if considered third-country nationals, even though this piece of legislation has not been adopted by the UK.<sup>45</sup>

Similarly to the WTO-GATS, the EU ICT Directive facilitates the cross-border transfer of key personnel from third countries with the intent of fostering the exchange of new skills and knowledge while promoting innovation and enhanced economic opportunities for the host entities, thus advancing the knowledge-based economy in the Union while fostering investment flows across the Union.<sup>46</sup> The definition of the key personnel – intra-corporate transferees – encompasses managers, specialists and trainee employees, built on specific commitments of the WTO-GATS and bilateral trade agreements.<sup>47</sup>

Since the WTO-GATS does not regulate the conditions of entry, stay and work, the EU ICT Directive creates a new permit type, complementing and facilitating the (long and short-term) cross-border mobility of personnel within the European Union.<sup>48</sup> A further benefit compared to the WTO-GATS and other international trade agreements is that the scope of the intra-corporate transfers covered by the EU ICT Directive is broader than that implied by trade commitments, as the transfers do not necessarily take place within the services sector and may originate in a third country which is not party to a trade agreement.<sup>49</sup>

<sup>43</sup> On 4 December 2018 the House of Commons voted in favour of a motion finding Ministers in contempt for their failure to publish full legal advice concerning the EU Withdrawal Agreement. <<https://www.parliament.uk/business/news/2018/december/contempt-motion-on-publishing-of-legal-advice/>> accessed 13 December 2018.

<sup>44</sup> Art. 1 para 1 of the Posting of Workers Directive; highlights by the author.

<sup>45</sup> Recital 47 in the preamble of the EU ICT Directive: 'In accordance with Articles 1 and 2 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the TEU and to the TFEU, and without prejudice to Article 4 of that Protocol, those Member States are not taking part in the adoption of this Directive, and are not bound by or subject to its application.'

<sup>46</sup> Recital 6 of the EU ICT Directive.

<sup>47</sup> Recital 13 of the EU ICT Directive.

<sup>48</sup> With the exception of the UK, Ireland and Denmark (Recital 47–48 of the EU ICT Directive).

<sup>49</sup> Recital 13 of the EU ICT Directive.

The main benefit of the EU ICT Permit – compared to the national ICT regimes already in place in each Member State – is its scope, regulating both long- and short-term transfers of highly-skilled third-country nationals to the EU, setting up a flexible mobility scheme allowing the conversion of an EU ICT Permit acquired in one Member State into an equivalent work and residence title in another Member State, reducing (ideally) the administrative burdens and processing times.

There are several aspects of the EU ICT Directive, however, that would significantly change the way UK-based undertakings – used to the benefits of the free movement rights enjoyed by EU nationals – could post their employees to the EU for temporary assignments: – *Strict limits to the categories of persons who can benefit from the EU ICT Permit option.* The EU ICT Directive only applies to third-country nationals employed in the position of ‘manager’, ‘specialist’ or ‘trainee employee’ in their home country, possessing the professional qualifications and experience needed in the host country, and the seniority in employment (at least 3–12 months for managers and specialists, 3–6 months for trainee employees) guaranteeing their ties with the home employer undertaking.<sup>50</sup> Lower skilled employees or new hires will not be able to be transferred under the EU ICT scheme.

– *Temporariness of mobility rights.* Time limits for stay in a host state differ depending on the categories of persons described above: the main EU ICT Permit may be obtained for a maximum 3 years for managers and specialists, maximum 1 year for trainee employees, while intra-EU mobility is further limited depending on the duration of the transfer to an additional EU Member State: short-term mobility is limited to up to 90 days in any 180-day period per Member State; long-term mobility to a second Member State cannot exceed the time spent in the Member State issuing the main permit.<sup>51</sup>

– *Limits to mobility to the activities covered by the international trade agreement.* The EU ICT directive does not apply to third-country nationals participating in a research project, or who are self-employed, or admitted as full-time students and undergoing a short-term supervised practical training as part of their studies.<sup>52</sup>

– *Procedural differences between EU Member States.* Intra-corporate mobility being regulated at EU level in the form of a directive, the EU Member States enjoy a broad margin of discretion when achieving the results outlined in the directive, often originating slightly different application processes in each jurisdiction. The same applies to the EU ICT Directive, where it is possible to identify different approaches to intra-EU mobility across the European Union.<sup>53</sup>

Overall, the application of the EU ICT permit to highly skilled employees employed in the UK and critical to operations in the European Union will be an available option that could efficiently complement the WTO-GATS rules in the event of a ‘no-deal scenario’, introducing

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<sup>50</sup> Art 5 of the EU ICT Directive.

<sup>51</sup> Art 12, 13, 21 of the EU ICT Directive.

<sup>52</sup> Art 2 of the EU ICT Directive.

<sup>53</sup> Deloitte ICT Permit Study – Facilitating EU mobility for third-country nationals, June 2018. <[www2.deloitte.com/global/en/pages/tax/articles/2018-eu-intra-corporate-transferees-study.html](http://www2.deloitte.com/global/en/pages/tax/articles/2018-eu-intra-corporate-transferees-study.html)> accessed 4 November 2018.

a labour mobility regime allowing key personnel to perform their activities (not only provision of services) across multiple jurisdictions. Nevertheless, UK undertakings will face a radical change to their accustomed environment, involving increased administrative burdens and costs, which seems to be in conflict with the UK Government's expectations.

## VII Conclusions

The House of Commons previously acknowledged that providing services on WTO-GATS terms alone – including under Mode 4 – would be particularly damaging to the UK economy,<sup>54</sup> contrary to the Prime Minister's previous position that 'no deal for Britain is better than a bad deal for Britain'<sup>55</sup>.

While trading on WTO terms would satisfy some of the stated UK red lines – no free movement, no CJEU, freedom to follow an independent trade policy – it would also introduce tariffs on goods and restriction on movement of key personnel to perform the services. In fact, the WTO-GATS provisions would only allow the provision of services through the presence of natural persons of the EU in the territory of the UK (or vice versa) for a limited category of workers (mostly those with a high level of training and expertise), meeting the pre-employment and seniority conditions, and active in the field of provision of services – consequently, excluding persons working in non-service sectors, e.g., agriculture and manufacturing.

Additionally, it should also be taken into consideration that the WTO-GATS may only facilitate the provision of services from a work authorisation, but not from a residence authorisation perspective, entailing the necessity to apply for visas and other entry and residence permits for the workers posted to the trade partner's territory, which would significantly raise the lead time required to 'land' workers in the destination country, as well as the costs associated with these assignments.

Trading on WTO-GATS terms would also not allow the long-standing relationship between the UK and the EU to be taken into consideration, nor would it allow a special regime at the Northern Ireland-Ireland border due to the Most Favoured Nation rule, whereby a preferential treatment for one trading partner has to be offered to others, unless it is as part of a free trade deal.<sup>56</sup> The UK will therefore be constrained to negotiate a series of bilateral arrangements with the EU to safeguard the preferential treatment of the Irish border, and include all worker categories currently working in the UK and posted from the UK to the EU in sectors other than the pure provision of services.

<sup>54</sup> House of Commons, 5.

<sup>55</sup> Lancaster House speech (17 January 2017).

<sup>56</sup> Julia Nielson, Daria Taglioni, 'A quick guide to the GATS and Mode 4; OECD – WORLD BANK – IOM Seminar on Trade and Migration Geneva, Palais des Nations, 12-14 November 2003' 5. <[www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/microsites/IDM/workshops/Trade\\_2004\\_04051004/related%20docs/quick\\_guide.pdf](http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/microsites/IDM/workshops/Trade_2004_04051004/related%20docs/quick_guide.pdf)> accessed 4 November 2018.

The EU ICT directive, already implemented in the majority of EU nationals, could offer a competitive solution complementing the provisions of the WTO-GATS related to mobility under 'Mode 4', offering a combined residence and work permit to the UK employees (and their families) who qualify. The eligibility conditions outlined by the EU ICT directive, however, remain quite strict, and would definitely limit the mobility of personnel between the United Kingdom and the European Union.