

LEXCASE AVOCATS BREXIT UPDATE (January 2021)V2

DOING BUSINESS IN FRANCE AFTER THE UK/EU TRADE AND COOPERATION AGREEMENT

INVESTING AND DOING BUSINESS IN FRANCE IN 2021

Summary

The Trade and Cooperation Agreement ('TCA') signed between the United Kingdom and the European Union in December¹, enables **trade in goods without tariffs and quotas** between the UK and the EU, for most categories of **UK produced goods** which **satisfy the rules of origin** set out in the TCA, which require a minimum percentage of UK origin materials and components.

Imports of products for sale in France will be subject to French VAT; and businesses will need to check their obligations concerning declaration, payment and any applicable procedures enabling them to recover or set off the VAT. Fees for customs procedures, analyses etc may be chargeable. This will impact contracts with French purchasers.

Whilst the TCA also establishes a principle of non-discrimination and most favoured nation status for **investments** and **trade in services** by UK businesses in the member States of the EU, freedom to deliver services is limited by relevant European and **national qualifications, or licences, and visa requirements**. The provisions are closely modelled on the WTO General Agreement on Trade in Services which includes 4 recognised modes of service delivery.

For example, **visas or work permits** are required for UK management and personnel engaged in activities going beyond preliminary activities related to investment or trade. Visas will primarily be granted to **senior or highly qualified staff** for provision of services.

Separate rules in the TCA deal with access by members of **independent professions** to the French market for the purpose of providing professional services.

This note is divided into three sections:

(1) Access to Markets

- A) Selling Goods
- B) Selling Services
- C) Investment & Establishment

(2) Access of People

Business visits and preliminary activities
Delivery of Services

(3) Adaptation of Terms & Conditions

(N.B. This note is only intended to provide preliminary information for UK businesses envisaging trade or investment in France. It is a brief summary of the complex provisions of the relevant parts of the TCA. *No action should be taken on the basis of this note without taking advice on the detailed position for your company's products, investment plans or services.*

¹ provisionally in force since 1st January 2021 pending European Parliament ratification

1) Access to markets

A) Selling goods

Tariff and quota free trade with conditions

The TCA agreement establishes a **tariff and quota free** access for UK goods to European markets including France. This does not mean tax free. French **VAT** will usually be applicable. (see below).

The goods entitled to access are those which are produced in the UK and :

-**wholly obtained** in the UK (e.g. minerals extracted or agricultural products grown in the UK); or

-produced exclusively from **materials originating** (*'sufficiently produced'*)² **in the UK** including bilateral cumulation of materials and processes from EU countries included in production of products in the UK; and

-within the **rules of origin** requirements which include general and specific rules set out in the schedules to the TCA for each product category. This means that products must usually contain a given % of UK originating content, either by weight or value.

Continuing access of UK goods to EU markets is also **subject to certain conditions**:

-**level playing field** in the UK (in terms of regulation of competition, state subsidies, tax & social security, employment, climate & environment)

-**avoidance of technical barriers to trade** by the UK. The TCA sets out detailed rules for this aspect.

In the case of non-compliance by the UK (or the EU) of these TCA principles, various dispute resolution measures are envisaged; and it is possible that the advantages of the TCA (tariff & quota free access) may be withdrawn.

Self-certification

In the absence of harmonized standards between the EU and the UK, businesses will be allowed to self-certify compliance with EU standards. This means UK businesses will be responsible for ensuring their products are UK and EU compliant. This will enable businesses to mark and label their products.

However, certain sectors of business activity are subject to special rules in the TCA: *medicinal products, automotive products, chemical & pharmaceutical products, organic products and wine.*

² ORIG7
www.lexcase.com

Sanitary and phytosanitary products will be regulated by the UK and the EU separately, but within the scope of cooperation between them for the protection of consumers.

Customs formalities

Goods transiting from the UK to France will be subject to customs declarations, formalities and checks at the frontier. The TCA sets out detailed rules for this.

UK businesses selling goods into France will need to obtain an EORI number from French customs; or appoint a customs agent.

Where appropriate and possible, UK companies can register as a trusted trader, if they are responsible for arranging transport and export into France.

A transitional period until 30th June 2021 allows for extended deadlines for certain customs paperwork.

VAT

French VAT (20% on most products) is chargeable on import for resale in France. This can be recoverable subject to satisfying certain conditions, with timely filing of applicable declarations and procedures. (Incoterm and T&C's are relevant). ***Lexcase Tax can advise.***

UK companies' Terms & Conditions of trade

A key part of UK companies' export policy will be to agree with French customers on the relevant trade terms and Incoterm, which will determine who is responsible for the customs formalities and related expenses, as well as for payment of VAT. ***Lexcase Sales & Distribution can advise.***

Activities related to delivery of goods in France

UK staff visiting France for the purpose of providing services related to the supply of goods will need a business travel visa in most cases. See under services below.

(N.B. visits for preliminary sales development activities, and after sales, are visa free for limited periods-see below). ***Lexcase Immigration can advise.***

Transport

The TCA also deals with access to transport networks, which may impact arrangements for delivery.

B) Selling Services

i) Services in general

UK businesses will now be required to comply with French national requirements for the services concerned. These may concern the content of the service and/or the method of delivery. Many sectors of business in France are regulated. A licence to operate may be required before a regulated service can be provided.

Where services are provided locally in France by employees of a UK business or by an independent professional (self-employed) based in the UK, or its employees, the services must be provided to the 'final consumer'. See further at 2 b) i) Access of People, below.

These may be specific regulatory requirements, or norms (e.g. AFNOR), at an EU or French level, which must be complied with. This includes existing requirements; and those that may be decided in the future.

Other requirements may emanate from relevant industrial, commercial or professional bodies, which may include such matters as professional qualifications, licences, language requirements... .

In addition, health and safety, working hours and other employment regulations will be applicable to employees of UK companies working in France.

Access to ultimate consumers may be limited under the TCA in certain cases. Consumer regulations applicable to service delivery and conditions of supply under French law will apply.

All of these requirements and regulations need to be checked for your specific business sector, and method of delivery.

Depending on where and when the services are performed, UK or French VAT may be applicable and recoverable.

Lexcase Sales & Distribution & Lexcase Tax can advise. Lexcase has considerable knowledge and experience in many French business sectors.

ii) Independent (self-employed) professions

In most cases, recognition of professional and academic qualifications, as well as accomplishment of various formalities, will be required in France, in order to be able to practice or supply services here.

The TCA contains detailed lists of regulated professions and requirements.

Services provided by independent self-employed professionals will be subject to visa, certain levels of diploma/qualification, and will be limited in time.

Lexcase Sales & Distribution can advise.

C) Investments & the Creation of branches or subsidiaries

Investments

The TCA provides for the absence of discrimination, quotas or quantitative restrictions on investment.

However, this is subject to various restrictive measures (existing or future) which are set out in the TCA and relate either to all business sectors or to 17 specific sectors and 22 future sectors of activity.

It is therefore necessary, in each case, to check whether any of those restrictions may apply.

French foreign investment controls

Certain sectors are subject to prior government authorization : defence sector, encryption...
<https://www.tresor.economie.gouv.fr/services-aux-entreprises/investissements-etranagers-en-france/les-secteurs-d-activites-dans-lesquels-les-investissements-sont-soumis-a-autorisation-prealable>

This will apply in the event of acquisition of the capital or control of companies in the relevant sectors, or where 33% or more of the capital is acquired; or a branch of activity, in the following fields:

- sectors deemed to be vital for national security (including supply of essential goods)
- gambling
- private security firms
- biological prevention/protection in the field of terrorism
- interception of correspondence and conversations
- security of business information systems in vital activities or sectors
- dual use technologies (military & civil)
- encryption
- defence and military equipment or services
- defence contractors
- maintenance of public order and security in the following fields: energy, water, transport networks, space, electronic communications, electronic and computer systems necessary for the police and customs, vital installations, health
- R&D in the fields of cyber security, artificial intelligence, robotic, manufacture of additives and semi-conductors
- storage of sensitive information

Other sectors have specific rules on access. As a starting point, the French National Industrial Property Institute publishes a listing for certain trades and professions :

<https://www.guichet-entreprises.fr/en/regulated-activities/#Negoce>

Lexcase Corporate and **Lexcase Sales & Distribution** can assist with an analysis of sector regulation and requirements of professional bodies.

Registration of a French representative office, branch or subsidiary

Many sectors of business are regulated in France. See eg <https://www.guichet-entreprises.fr/fr/activites-reglementees/>

A licence may be needed before a branch or subsidiary can be registered to do business.

The most usual forms of corporate entity used in France are the **SARL** (Private Limited with individual managing director) or the **SAS** (Private limited with more flexible management structure). The SAS is the most frequently used corporate entity by foreign groups operating in France.

Representative office or branch?

In certain cases, it may be appropriate to register a branch which is the operational sales office of a UK company in France with a permanent representative, subject to French taxation. This requires specific corporate and tax advice.

A representative office is different from a branch, in that it will employ a salesperson only to collect or communicate information and develop the market; but will not have the power to enter into contracts for the sale of goods or services.

A branch or representative office must be registered with the French authorities.

The UK employer of branch or representative office staff must be registered for social security in France in order to obtain social insurance (e.g. for health and accident cover).

Any British employee working for the branch or representative office on a long-term basis will need to hold a work visa.

The tax authorities will be likely to make enquiries from time to time to ensure the office is not actually trading, where it would then be subject to French tax on sales and profits.

Visa for visits related to the creation of branches or subsidiaries

As indicated below (access of people), visits of up to 90 days in any 180 day period, for the purpose of investment or setting up a branch or subsidiary are possible without a visa.

Various documents will be requested for the application via the French government web site <https://france-visas.gouv.fr/web/france-visas/>

Visa for company directors and branch managers

A business visa is now required for UK nationals to be appointed as directors of French companies or official representative of a branch of a UK company in France.

Lexcase Corporate can assist with advice and formalities.

2) Access of people

General

A distinction is made in the TCA between :

- visits for the purpose of preliminary business activities such as prospection or visits for the purpose of investment, setting up an establishment or subsidiary, after sales etc, (a) and
- visits for the purpose of delivery of goods or services (b).

In many cases, access is limited to management, highly qualified or specialized personnel.
N.B.

- The question of whether qualifications need to be recognized in France may arise.
- Depending on the type of activity, visas/work permits will be valid only for limited periods. It is advisable therefore to have your passport stamped showing entry and exit from France. If not, retain proof of travel in and out.

a) Business visits & preliminary activities

i) establishment/investment

Activities:

-e.g. investments, setting up an enterprise in France on behalf of a UK company...

Categories of persons allowed:

“Business visitors for establishment purposes”³= Individuals who are:

- in a senior position within the UK company responsible for setting up an enterprise of the UK company in France
- not offering services or engaging in any economic activity other than for the purpose of establishment of the UK company
- not remunerated by any source in France

³ SERVIN 4.1 -5.
www.lexcase.com

Duration:

Maximum period of 90 days in any period of 180 days.

ii) “short term business” activities

Activities allowed:

The TCA⁴ enables the following activities to be carried out by UK management and personnel without a work visa or work permit :

- a) meetings and consultations: natural persons attending meetings or conferences, or engaged in consultations with business associates;
- b) research and design: technical, scientific and statistical researchers conducting independent research or research for a legal person of the Party of which the Short-term business visitor is a natural person;
- c) marketing research: market researchers and analysts conducting research or analysis for a legal person of the Party of which the Short-term business visitor is a natural person;
- d) training seminars: personnel of an enterprise who enter the territory being visited by the Short-term business visitor to receive training in techniques and work practices which are utilised by companies or organisations in the territory being visited by the Short-term business visitor, provided that the training received is confined to observation, familiarisation and classroom instruction only;
- e) trade fairs and exhibitions: personnel attending a trade fair for the purpose of promoting their company or its products or services;
- f) sales: representatives of a supplier of services or goods taking orders or negotiating the sale of services or goods or entering into agreements to sell services or goods for that supplier, but not delivering goods or supplying services themselves. Short-term business visitors shall not engage in making direct sales to the general public;
- g) purchasing: buyers purchasing goods or services for an enterprise, or management and supervisory personnel, engaging in a commercial transaction carried out in the territory of the Party of which the Short-term business visitor is a natural person;
- h) after-sales or after-lease service: installers, repair and maintenance personnel and supervisors, possessing specialised knowledge essential to a seller’s contractual obligation, supplying services or training workers to supply services pursuant to a warranty or other service contract incidental to the sale or lease of commercial or industrial equipment or machinery, including computer software, purchased or leased from a legal person of the Party of which the Short-term business visitor is a natural person throughout the duration of the warranty or service contract;

⁴ ANNEX SERVIN 3-para 8
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i) commercial transactions: management and supervisory personnel and financial services personnel (including insurers, bankers and investment brokers) engaging in a commercial transaction for a legal person of the Party of which the Short-term business visitor is a natural person;

j) tourism personnel: tour and travel agents, tour guides or tour operators attending or participating in conventions or accompanying a tour that has begun in the territory of the Party of which the Short-term business visitor is a natural person; and

k) translation and interpretation: translators or interpreters supplying services as employees of a legal person of the Party of which the Short-term business visitor is a natural person.

Duration

Maximum period of 90 days in any 6 month period.

Categories of person allowed

“Short term business visitors”⁵ = Persons employed by the UK company who are:

-conference attendees; technical, scientific and statistical researchers ; market researchers and analysts ; trainee personnel; trade fair attendees; sales representatives; purchasing: buyers or management or supervisory personnel for commercial transactions; after sales/leases : installers, repair and maintenance personnel and supervisors, possessing specialised knowledge ; commercial transactions: management and supervisory personnel and financial services personnel (including insurers, bankers and investment brokers) ; tourism: tour and travel agents, tour guides or tour operators ; translators and interpreters (in each case engaged in the corresponding activities in the category concerned, and where necessary with recognized qualifications).

-not engaged in selling goods or services to the general public, and

-remunerated by the UK employer company

b) Delivery of services.

Services may be delivered in several ways: by employees of the UK company visiting the French customer (i); by secondees or expatriates (ii); or by independent professionals in the scope of their professional services (iii).

In general terms, UK companies may only send highly qualified personnel (trainees in some cases) to provide services to EU countries under the terms of the TCA. (See below).

The question of social security cover of employees of a UK company visiting or operating in France on its behalf is briefly mentioned in section (iv) below. ***Lexcase Immigration and Lexcase Employment*** can advise.

⁵ SERVIN 4.3
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i) Delivery of services by the UK company's employees

In principle a work visa or work permit will be required.

Activities allowed:

Activities in France related to the delivery of services by limited categories of employees, (see below), of UK companies not established in France, who have entered into a contract for services not exceeding 12 months.

The services must be supplied to a '**final consumer**'* located in France where the temporary presence of UK company personnel is required.

*(*N.B. The definition of 'Final consumer' (translated in the French version = "consommateur final") has been clarified informally by the European Commission. The final consumer is, in effect, the end user of the service. This is a more restrictive definition than the definition used in article SERVIN 1.2 e) which defines "cross border trade in services". The objective is to avoid the involvement of intermediaries in the service supply chain. The expression 'final consumer' also appears in the EU/Japan Trade Agreement which the EU Commission indicates serves as the reference for the EU/UK Trade Agreement. The EU/Canada Trade Agreement is different as it refers only to 'service consumer'.)*

This means that under the EU/UK Trade Agreement only services provided by the permitted categories (mentioned below) of salaried employees of a UK service supplier, directly to a French final consumer of the service, will qualify for the purposes of this part of the TCA. This requires an analysis of the UK supplier's usual service supply chain.

Duration

Delivery of services: maximum cumulative duration of 12 months.

Categories of person allowed

- Salaried employees who :
- have been employed by the company for at least 12 months for the same type of services,
- have at least 3 years of relevant experience after the age of majority in the same sector
- have a university degree or equivalent qualification, and any specific professional qualifications
- reside in the UK at the time of applying for a visa

All of these persons must be employed and remunerated by the UK company (not by any French entity); and not supplied through a placement or other employment agency.

The number of persons shall not be greater than necessary to fulfil the contract.

ii) Secondees and expatriate staff

Categories of activity:

Temporary transfer to an enterprise of the legal person in the UK which is a member of the same group, including to a representative office, subsidiary or branch of the head company.

Categories of persons allowed:

- managers and specialists employed the UK company for at least 12 months or trainees employed for at least 6 months
- resident outside France at the time of application for a visa
- temporarily transferred to a representative office, branch, subsidiary of head company of the same group as the UK company
- manager, or person with specialist knowledge essential to the business and high level of qualification* and experience; or
- trainee with a university degree temporarily transferred on a paid basis
- have been employed** to work in a French representative office, branch or subsidiary of the UK company.

(*Degrees or qualifications may need to be recognized in France).

**the UK employment contract must be compliant with French employment law).

(They may be employed by the French entity⁶)

Duration: maximum 3 years (one year for trainees) (90 days within 180 days if transfer is for establishment purposes).

iii) Independent professionals

Categories of activity:

Supply of a service through bona fide contract for a period not exceeding 12 months for supply of services to a **final consumer*** in France requiring presence on a temporary basis.

(*see comments under b) i) above)

Categories of persons:

The self-employed person must have:

- at least six years professional experience in the relevant activity, and
- a university degree or equivalent qualification, and
- professional qualifications legally required to exercise that activity in France.

Duration:

12 months

⁶SERVIN 4.2 -1.a) iii)
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iv) Social security cover & insurance

In principle, employers will need to ensure that their employees, who are sent temporarily to work in France, are covered by suitable liability and medical insurance policies.

The situation will depend on whether the visit is temporary or longer term. Although the TCA envisages emergency medical treatment, it is advisable to take out specific medical insurance covering health and medical treatment before the employee arrives in France.

The TCA also deals with various social security benefits some of which may be available in France to employees on secondment or temporary visits; but others are excluded. The subject requires specific advice in each situation.

Lexcase Employment can advise.

3) Adaptation of terms & conditions to the French market

British businesses exporting to France will need to consider adapting their terms and conditions of trade to the new rules, and to the specificities of the French market.

This will include such items as:

- pre-conditions to trade or sale (such as responsibility for obtaining any authorisations, qualifications or licences for the French market)
- regulatory obligations and compliance
- choice of Incoterm covering delivery, transport, customs and transit insurance
- VAT
- service and after sales: visa assistance, health & civil/professional liability insurance, & social security...for employees
- reservation of title and recovery of unpaid goods, insolvency situations (n.b. French rules)
- force majeure provisions (eg transport delays, withdrawal of market access by EU or national authorities; health crises)
- language of contract and language of contract operations
- choice of law and choice of court or international arbitration for dispute resolution. (Various national and regional institutions offer mediation and dispute resolution services which may be a convenient choice, instead of national courts).

It is essential to provide French customers or clients with a complete **French translation** of terms & conditions and ensure that they have been signed, in order to be enforceable.

Lexcase Sales & Distribution and Lexcase Litigation can advise.

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