

GMS Flash Alert



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European Union – Social Security in a New Brexit Deal

On 24 December 2020, the European Union (EU) and the United Kingdom (U.K.) reached an agreement in principle on the EU-U.K. Trade and Cooperation Agreement¹ (“the Agreement”). The Agreement entered into force on 1 January 2021, but the Agreement is currently undergoing a ratification procedure in the U.K. and in each EU member state. If and when the Agreement has been ratified in each EU member state, it must be approved in the EU parliament.

The EU Council must adopt the decision on the conclusion of the Agreement as the last step of the ratification process. The Agreement applies only to the 27 EU member states and the U.K. at this point.

WHY THIS MATTERS

All cross-border situations that are initiated on 1 January 2021 and thereafter are covered by this Agreement with respect to social security.

All cross-border situations initiated before 1 January 2021 are covered by the prior Withdrawal Agreement between the EU and the United Kingdom.²

Employers and employees should focus on the terms and conditions of social security coverage under the Agreement, because there are significant differences in that coverage and rights concerning social security, depending on whether a cross-border situation is covered by the Withdrawal Agreement or by the new Agreement.

Highlights on Social Security in the Agreement

General

On 1 January 2021, the U.K. left the EU Single Market and Customs Union, and EU policies are no longer applicable to the former EU member state. The departure of the U.K. from the EU will bring about important changes for businesses, citizens, public administrations, and stakeholders in the EU and the United Kingdom.

In order to limit the negative and extensive effects of the U.K.'s exit from the EU, the EU and the U.K. agreed on a Trade and Cooperation Agreement in principle that entered into force on 1 January 2021.

Below we highlight the important changes happening on 1 January 2021:

- **The free movement of persons ends:** U.K. citizens no longer have the freedom to work, study, start a business, or live in the EU. Henceforward they will need visas for long-term stays in the EU. Border checks apply, passports need to be stamped, and EU pet passports will no longer be valid for U.K. residents.
- **The free movement of services ends:** U.K. service providers can no longer benefit from the country-of-origin principle. They must comply with the varying rules of each EU member state or relocate to the EU if they want to continue operating as they did prior to 1 January. There is no more mutual recognition of professional qualifications. U.K. financial services firms lose their financial services passports.
- **The free movement of goods ends:** Customs checks and controls apply to all U.K. exports entering the EU. U.K. agri-food consignments must have health certificates and undergo sanitary and phyto-sanitary controls at the EU member states' border inspection posts. This is a time- and money-consuming exercise for U.K. businesses.

Similarly, the changes will affect the movement of persons, services, and goods from the EU to the United Kingdom.

Social Security

The Agreement provides several measures for coordination of social security for mobile employees aimed at protecting the entitlements of EU citizens temporarily staying in, working in, or moving to the U.K., and of U.K. citizens temporarily staying in, working in, or moving to the EU after 1 January 2021.

Highlights from the Protocol on social security coordination:

- **Persons covered:** persons who are or have been subject to the legislation of one or more states, including their family members and survivors.
- **Matters covered:** sickness benefits, maternity/paternity benefits, invalidity (disability) benefits, old-age benefits, survivors' benefits, benefits for accidents at work and occupational diseases, death grants, unemployment benefits, and pre-retirement benefits.
- **Matters not covered:** family benefits, social and medical assistance, special non-contributory cash benefits, compensation benefits (e.g., victims of crime, assassination, or terrorist acts), long-term care benefits, assisted conception services, certain other cash benefits (e.g., paid expenses for heating in cold weather).
- **Aggregation of periods:** the periods of insurance, employment, self-employment, or residence completed under the legislation of any other state shall be taken into account by a competent state as though they were completed under the legislation of that state, unless something else is stipulated in the Protocol for social security in the Agreement.

- **Exportability of benefits:** rights to cash benefits covered under matters covered (above) shall not be subject to any reduction, amendment, suspension, withdrawal, or confiscation on account of the fact that the person or his or her family reside in a state other than the one in which the institution responsible for providing benefits is situated. This means that, for instance, old age state pension can be exported and paid out between the EU and U.K. without being reduced, suspended, etc. This does not apply to disability and unemployment benefits. Family benefits are not a matter covered by the Agreement and therefore not covered by aggregation or exportability options in the Agreement.
 - **Overlapping benefits:** the right to several benefits of the same kind for one and the same period of compulsory insurance shall not be conferred or maintained. This means that there is a ban on receiving double benefits that refers to the same insurance period. For example, a person cannot receive an old age state pension benefit from an EU member state and the U.K. that both refer to the same insurance period. A person can only be eligible for one such benefit for each insurance period.
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KPMG NOTE

It is important to note that the Agreement does not apply the same scope of social security as the EU Regulations for coordination of social security systems in the EU.

Family benefits are no longer coordinated, which means that eligibility for family benefits and a right to export such benefits, for example during a posting, rest on national legislation in the relevant EU member state and the United Kingdom. There is therefore a significant risk that some employees will not be able to claim family benefits or that family benefits will be reduced or even awarded for a shorter duration.

On the other hand, it is reasonable to expect that claims for family benefits that are only subject to the Agreement will be processed faster than the case is today because the involved authorities will not have to communicate or coordinate family benefits in cross-border situations. The authorities will only have to take their local rules into account.

Furthermore, it should be noted that the exporting of unemployment benefits and disability benefits is also subject to national rules which can reasonably be expected to reduce the eligibility for and the amount of these benefits for some employees in a cross-border situation between the EU and the United Kingdom.

Coordination Rules for Social Security

The Protocol for social security in the Agreement maintains the principle that only one state's legislation for social security applies at a time for matters covered (above).

- **Article 10, main rules:**
 1. An employed or self-employed person is covered by social security for matters covered (above) by the legislation in the state where the working activity is pursued.
 2. A civil servant is subject to the legislation for social security for matters covered in the state where the administration employing him or her is subject.
 3. Any other person who does not fall in the two categories above is covered by the legislation for social security in his or her state of residence;

4. Employed and self-employed persons working on board a vessel flying a flag of the U.K. or an EU member state shall be deemed as a working activity pursued in that state. However, if a vessel is flying a flag of one state and a person's residence and the place of business for the undertaking/person paying the remuneration is in another state, then the legislation for social security where the person resides and the undertaking/person paying the remuneration has their place of business will apply.
 5. Flight and cabin crew performing freight or passenger services shall be deemed to be pursuing an activity in the state where the home base is located.
- **Article 11, detached workers:** a person sent by his or her employer to work in another state on behalf of that employer shall be covered by social security in the sending state. The work in the host state must not exceed 24 months and the person may not replace another detached worker. The employer must be established in the sending state and the employer must perform substantial activities in the sending state.

KPMG NOTE

Although the provision on detached workers resembles the posting provision in Article 12(1) in Regulation (EC) 883/2004 for coordination of social security systems, there are significant uncertainties linked to this provision at this point.³

Firstly, the EU member states must opt in to apply the provision for detached workers by the end of January 2021. Only a few EU member states have opted in for this provision at this time. It is reasonable to expect that, if not all, then the majority of EU member states will opt in for this provision, but the specific procedure surrounding this provision indicates that this is not "business as we know it" from the EU legislation.

Secondly, the Agreement does not provide for an extension of the detachment/posting beyond 24 months. Another question that arises here is if when a detachment for 24 months is used once, does that mean that it cannot be used again in another detachment? If it can, on the other hand, what conditions must be met then?

Lastly, it is unclear what requirement will be presented for the duration of the affiliation to the social security in the sending country prior to the detachment. This could also lead to various approaches in different countries and ultimately lead to rejection of the application of social security in the sending country.

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- **Article 12, work in more than one country:** a person who pursues substantial activity (25 percent or more) in the state of residence is covered by the social security legislation in that state. When a person does not perform a substantial part of his or her working activity in the state of residence, the legislation for social security in the state where the employer is located shall apply.

When assessing whether a person performs substantial activity in the country of residence, one must take into account the working situation as one can project it for the following 12 calendar months. This means that when a person performs work in more than one country on a permanent basis (over 12 months), one must only assess substantial work for 12 months at a time (annual applications for certificates of coverage).

In situations where a person pursues both employed and self-employed activity, the employed activity has priority and determines the applicable legislation for all working activity.

KPMG NOTE

The provision on work in more than one country (so-called “multi-state work”), resembles Article 13 in Regulation (EC) 883/2004 to a large extent.

However, the European Court of Justice has recently ruled in cases that have changed the interpretation of this provision, and there are pending cases that could add to the changes in how this cross-border situation is coordinated in the context of social security in the EU. For example, the concept of employer⁴ has to be clarified. As these rulings no longer apply to the U.K., it is reasonable to expect differences in how countries apply this provision.

This means that an identical situation might have different outcomes depending on the country that assesses the case. This adds to the uncertainty of the social security position for persons in a cross-border situation. As more time passes, it is reasonable to expect that such differences in the interpretation and the application of this and other provisions will increase between the countries.

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- **Distinction between detached workers and workers pursuing working activity in more than one country:** for the purposes of distinguishing the activities, the duration of the activity in one or more states (whether it is permanent or of an ad hoc or temporary nature) shall be decisive. An overall assessment shall be made of all the relevant facts including – particularly in the case of an employed person – the place of work as defined in the employment contract.
 - **Calculation of substantial activity:** substantial activity for employed and self-employed persons is assessed on the basis of indicative criteria:
 - Employed activity: working time or remuneration;
 - Self-employed activity: the turnover, working time, number of services rendered, or income.
 - **Voluntary insurance:** According to Article 10 and Article 12, work in two or more states shall not apply to voluntary insurance for matters covered unless only a voluntary scheme of insurance exists in the state.

For invalidity, old-age, and survivors’ benefits, the person concerned may join the voluntary or optional insurance scheme of the state whose legislation does not apply, provided that the person at some stage in his or her career has been subject to the legislation of that state.

- **Employer’s obligations:** an employer who is not established in a state whose legislation for social security applies must comply with the legislation in that state as if the employer was established there.
- **Health care:** an insured person and his or her family shall receive benefits-in-kind (health care) in the country of residence even if the country of residence is not the competent state, and said person shall receive benefits-in-kind in the competent state even if he or she does not reside there.

The same benefits-in-kind will be provided to the insured person and his or her family during a temporary stay in a state that is not competent for social security, provided that the benefits-in-kind are necessary on medical grounds, the person did not travel with the purpose of receiving the benefits-in-kind, and documentation for valid entitlement is presented.

- **Administration:** it is still not clear how exactly administrative communication will be issued, and requirements around applications and documents are to be applied for enactment of the rights under the Agreement. However, several provisions stipulate how the competent institutions are supposed to resolve issues.

One of the provisions stipulates that a state that requires withdrawal from or correction to the determination of the applicable legislation must receive a reply by the other state within 30 days.

Additionally, a joint committee for social security between the U.K. and the EU will be assisting with resolving the issues that might arise between the EU and the United Kingdom.

KPMG NOTE

The Agreement essentially limits the restrictions and limitations that the U.K.'s exit from the EU presents to the movement of people, companies, goods, capital etc.

It is clear from the Protocol on social security in the Agreement that social security between the EU and U.K. is changing significantly and the full effect of these changes will become more evident in time.

The Withdrawal Agreement has regulated, among other things, social security between the EU and the U.K. from 1 February 2020 until 31 December 2020 (when the U.K. formally left the EU). The Withdrawal Agreement made it possible for persons in a cross-border situation to continue benefiting from the more generous social security coverage under the EU Regulations.

Although the Withdrawal Agreement regulated the relationship between the EU and the U.K. until 31 December 2020, in the context of social security it is stated that persons who are covered by the Withdrawal Agreement can continue benefiting from the Withdrawal Agreement after that date as long as their situation is uninterrupted.

Employers and employees should therefore investigate the possibility of continuing the more generous coverage for social security under the Withdrawal Agreement and avoid the application of the social security rules in the new Agreement as long as possible, depending on the corresponding benefits to the employees.

This can be a complicated technical task and different EU member states seem to be approaching the interpretation of (un)interrupted cross-border situations differently; thus, concerned individuals and employers should consider engaging relevant technical expertise on these important matters.

The restrictions in the new Agreement are expected to trigger a reassessment of the compensation and benefits for employees affected by Brexit. The changes in social security are relevant for any discussion about compensation and benefits for employees affected by the provisions of the Withdrawal Agreement and the new Agreement and should undergo careful analysis and form part of any revision of company policies.

FOOTNOTES:

1 Full text: [Trade and Cooperation Agreement between the European Union and the United Kingdom](#). Note that there might be additional bilateral conditions between the U.K. and Ireland, the U.K., Gibraltar and Spain, and the U.K. and Switzerland, etc.

2 For related coverage of Brexit and the Withdrawal Agreement and immigration matters for U.K. nationals, see our other Brexit reports in GMS *Flash Alert* at: <https://home.kpmg/xx/en/home/insights/2015/09/flash-alert-brexit.html>.

For more on the EU-U.K. Withdrawal Agreement, see: https://ec.europa.eu/info/european-union-and-united-kingdom-forging-new-partnership/eu-uk-withdrawal-agreement_en. Also see: <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1580206007232&uri=CELEX%3A12019W/TXT%2802%29>.

3 Full text: [Regulation \(EC\) for coordination of social security in the EU, no 883/2004](#).

4 See GMS [Flash Alert 2020-325](#), 21 July 2020.

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