

Remote working: planning for beyond the COVID-19 pandemic



Challenges and opportunities posed by remote working, navigating the EU (and global) regulatory considerations for financial services firms

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Executive summary

COVID-19 has had a transformative impact on traditional office workspace arrangements. Despite some initial (very welcome) improvements to the COVID-19 outlook in Europe, future variants and mutations of this present virus or indeed new (prolonged) pandemics could mean a more frequent return to increased restrictions on working from offices or even a return to recurrent and rolling lockdowns.

As has become evident during the pandemic, a number of these restrictions have differing arrangements, including within the same jurisdiction and often segmented vaccination status and/or job role notably for those categorised as “key workers”. In large parts of the EU, these restrictions coupled with a prolonged shift to remote working across sectors, notably in financial services, are reshaping the role of the office as well as, in some part, working behaviours. Over the longer-term, financial services firms, market participants and indeed regulatory and supervisory policymakers may need to consider how to adapt regulatory principles and supervisory expectations originally designed for an office-centric environment to meet what might be a longer-term need or even a preference for what is fast becoming a new working dynamic.

The emergence of the Delta and the Omicron variants of COVID-19 are already a proof in point that remote “working from home” (WFH) as well as more longer-term “location independent working arrangements” (LIWAs) whether in the form of short(er)-term “workcations” or on-going “Digital

Nomad” (DN) arrangements may be here to stay and for longer than originally expected. For the most part, such arrangements have largely worked well both in terms of business continuity and performance of financial services firms and the counterparties, clients and communities they serve. The same can also largely be said for financial services policymakers and supervisors equally adapting to this new working dynamic. For employees, such new working arrangements have also been welcome, even if, for some households, new challenges have emerged. Yet this new working dynamic may also carry (new) risks including those that are specific to such arrangements.

For financial services firms, getting the balance of WFH, LIWA and DN is more than adopting a defensive strategy. Accordingly, if more agile, digitally empowered location-independent working is here to stay, then successfully attracting, retaining and managing staff (and doing so regardless of borders and bricks and mortar locations) will be key to any talent strategy as well as for growth opportunities.

This Background Briefing assesses the lessons learned from 2019 through to 2021 and considers the outlook for financial services for the remainder of 2022 and further ahead. This Background Briefing should be read in context with other Client Alerts and coverage from PwC Legal’s EU Regulatory Compliance Operations, Risk and Engagement (EU RegCORE) centre.



Background and lessons learned

For the most part of modern financial history, firms and their staff conducting financial services activity have largely done so in an office-centric and certainly location-bound working environment. Financial services and markets activity have however become infinitely more electrified and digitised and not just through email as well as handheld devices allowing for more business to be done away from an office and on the go, including outside “traditional” working hours.

While technology has steadily advanced, and become a staple tool that empowers how business is transacted, the laws and regulations (beyond just financial services) that apply to a person’s work are generally based on the jurisdiction where that work is performed. This is the case even if the employer is located elsewhere. Furthermore, financial regulatory compliance obligations along with

regulators’ supervisory expectations apply both to the firm as well as the persons carrying out regulated activities on behalf of the firm (regardless of the working relationship i.e., employee v. contractor v. leased employee).

Importantly, in the EU-27 and in most G-20 jurisdictions, financial services regulation and supervisory expectations have largely been conceived with a focus that regulated activity is conducted in an office-centric work environment as opposed to on WFH basis and certainly not for a prolonged period nor on a LIWA or DN basis. This also applies to employment and tax laws as well as for the scope of insurance coverage for financial services firms and employees. The move to a new remote working environment has demonstrated that a lot of the office-centric rules and regulations might be in need of a more permanent rethink.

Such a change may need to build upon the lessons learned from quick fixes and adaptations that legislative and regulatory policymakers as well as employers have implemented during the COVID-19 pandemic and prolonged lockdowns.

Consequently, if such WFH, LIWA and DN arrangements are not managed in a balanced manner then this can expose both the employer and the employee to new risks. These include, but are not limited to, extending the firm's exposure to, certainly where an employee works from another jurisdiction to that of their office, to that new jurisdiction's tax, regulatory compliance rules and laws. Such risks also arise where an employer attempts to limit, without justifiable means, jurisdictions from which an employee may not perform their duties. While these considerations have long-existed pre-COVID, say where an employee performs their duties while on holiday or while living in an

EU-jurisdiction outside of where their office is located, the impact of the pandemic and for many the appeal to work on a location-independent and agile basis have begun to reshape the discussion and the urgency for more detailed and sustainable certainty from legislators and firms.

Given the above and the discussion on the lessons learned below, financial services firms will want to ensure they have appropriate policies and procedures in place. These should serve to harness and foster opportunities offered by digitally empowered agile working while minimising risks and ultimately to ensure their workforce are not off the grid both literally and figuratively both in a domestic and international concept. Moreover, these policies should also look to reach an agreement between employer and worker as to when staff are required to return to an onsite environment.¹

Lockdowns led to widespread remote working as well as location-independent working

Shortly following the onset of the first set of lockdowns, for those that could, working from home (WFH – is also known as “teleworking” or “remote working”) arrangements became a sudden and then widespread normality. Firms, their counterparts and clients but equally regulatory policymakers and supervisors swapped the office for their spare rooms, sofas and kitchen tables.

Across many countries, notably in the EU-27 (rolling) lockdowns entered into force, EU financial services firms were quickly put under pressure to meet complex public health and workplace safety restrictions. Often these restrictions differed between jurisdictions (including across the EU-27) but also within regions in individual jurisdictions. Firms were required to track and comply with these requirements as they applied within, but equally across jurisdictions, often having to take a strategic regional and global view against a rapidly changing set of restrictions.

In response, many EU financial services firms rapidly focused on increasing their digitalised working arrangements at an enterprise-wide level. Making meetings via video-conferencing work (and to do so smoothly) became day one priorities. Shortly thereafter, ensuring

investments in information and communication technology (ICT), VPN² and cloud-based computing capacity continued to flow followed suit. So too efforts on improving operational and cyber-resilience resources to meet WFH realities. In many ways the ability for firms and their employees to thrive in this new “new normal” rested largely on making collaboration a success while widespread social distancing was in place.

Those firms that rapidly embedded widespread and longer-term location-independent agile working³ arrangements were able to demonstrate that initial doubts that WFH meant reduced productivity and higher cybersecurity as well as data protection risks were largely and quickly dismissed. In most cases those working remotely were more productive than they may have been in the office as commute times reduced to nil.

¹ Such policies also serve to replace any informal arrangements that might be put in place with immediate bosses under informal arrangements and ensure that location-independent working and/or travel are within an employer's knowledge and risk management framework. If travel is conducted without a firm's knowledge, employers may wind up breaking employment laws as well as regulations and laws without any awareness that they are doing so.

² Virtual private networks extend a private network (such as an office's) across a public network (such as that in an employee's home) and allows permissioned users to share data as if their devices were connected directly to the private network.

³ Crucially, agile working seeks to treat work as an activity as opposed to a place where people processes, connectivity and technology as well as time and place come together to find the most appropriate and effective way of working to carry out a particular task.

Yet WFH also highlighted new risks and operational challenges. Some of these included on how to replicate workplace health and safety arrangements into private homes, especially when households were dealing with practical challenges of often rapidly assembled and cramped workspaces. These operational concerns also led to new legal issues ranging from appropriate desk heights of furniture that was never designed to cater to office work, length of screen versus break time and how to generally deal with “Conf Call Fatigue”⁴, priorities for managers and human resources teams across financial services firms quickly moved from rolling-out WFH arrangements, which at first were temporary and soon became an established fixture, to also ensuring employees’ wellbeing was being maintained in this new unfamiliar setting.

With the roll-out of WFH on a widespread basis and the rise of location-independent working gaining pace, new strategic risks and priorities for Human Resources as well as Compliance teams across financial services firms arose. These ranged from how to adapt three lines of defence (3LoD) and compliance target operating models (TOMs) from an office-centric set-up to a decentralised model and in employees’ homes. Equally, considerations and compromises had to be found to ensure how households with employees from competing financial services providers could co-habit, co-work and co-exist with their respective compliance and privacy obligations often in cramped makeshift WFH set-ups.

Other issues arose about how to balance corporate culture and workforce equality during WFH arrangements. This ranged from having to balance how an employer interacts with an employee as to when they can work from where and when they are to be available as well as to how to treat holiday allowances along with how to reduce “quarantine envy”.⁵ Against this backdrop of change more fundamental questions on the future of the traditional office-centric

working relationship arose across certain firms. For some firms and indeed their global workforce⁶ this included discussions within teams or indeed across the organisation whether WFH (fully and/or on a hybrid basis) could introduce a permanent shift in the relationship between workers and employer. Over time this discussion across some firms also expanded to consider whether workers could be based further afield and perhaps on a longer-term basis.

Preferences for longer-term hybrid or full WFH arrangements also became apparent during COVID-19 lockdowns in changing real estate markets where demand, in certain markets and financial centers, for more spacious surroundings in suburbs or in the countryside saw increases. Equally, many households also began to debate the issue: If WFH and home schooling was set to go for longer why not take a “workcation” or move to a more permanent “digital nomad” arrangement either domestically or internationally? Location-independent working would allow a break and a change of scenery from domestic surroundings to often sunnier surroundings with less COVID-19 restrictions and often a more efficient cost and/or higher standard of living.⁷

For some firms, notably those operating in jurisdictions where amendments to employment law meant that these firms would have to enter into amendments to employment contracts to reflect documented WFH arrangements, challenges also arose in defining the place(s) of work. Defining one or more places of work is relevant for those engaging in WFH domestically as well as considering how and whether to do so internationally. This consideration also became relevant relevant for employers and employees and their insurance coverage, in particular for work-related accident and occupational health insurance (both offered by statutory and/or private providers).⁸ A number of insurance firms have more recently begun to consider and/or launch WFH and even digital nomad tailored insurance products but also occupational health insurance policies.

⁴ Conf call fatigue (see also Quarantine envy below) is an undefined firm that emerged during 2020 as the boom in videoconferencing meant that for many, their working day started earlier and ended later due to a higher frequency of meetings taking place via conference calls than would have been the case in an office-centric environment. Some researchers have attempted to show that excessive amounts of close-up eye contact and the increased cognitive load (i.e., nonverbal communication is more difficult) via video calls can be demanding on workers. This coupled with the increased amount of calls may mean a reduction in usual mobility and an ability to stretch or recharge during breaks.

⁵ Quarantine envy is an undefined term that however over the course of 2020 began to gain traction to refer to the envy felt amongst co-workers or colleagues at competitors as to who could work from home or further afield versus who could not and what that meant for surroundings i.e., more spacious and affluent WFH based settings versus those that were not fit for prolonged pandemic situations, cramped and uncomfortable when compared to the office. Quarantine envy, if not controlled by firms and promoting equality amongst employees in what may be offered to them (regardless of what they may make of it) can spur discontent and even “Quarantine Schadenfreude” which, generally does not bode well for collegiality and thus collaboration.

⁶ Notably for those staff working from cramped kitchen or coffee tables or spare rooms.

⁷ Some EU-27 Member States have also considered Digital Nomad visas as a strategic option given the infringement actions the EU Commission has taken against notably Cyprus and Malta investor citizenship schemes, details of which are available here and here. It should be noted that a Digital Nomad visa/work permit scheme is very different to the investor citizenship schemes. Equally a Digital Nomad visa is also different from an entrepreneur or freelancer visa or work permit such as that offered by say Germany.

⁸ This itself is in its own right a question that is highly driven by the nature of the existing insurance, the insurance policy and ultimately the provider and their relationship with the employer. As an example, under most EU jurisdictions, statutory accident insurance cover is usually limited to the territory of where that person is employed. If the employment contract sets out that the place of work is Frankfurt (and the employer can direct the employee from other locations – usually limited to Germany) then it may not cover accidents that occur in a WFH basis if the employee is working from their second residence in say Mallorca, Spain.

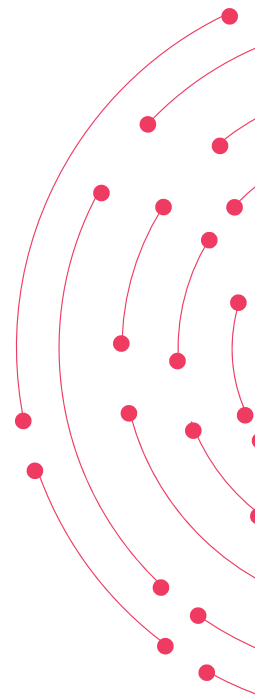
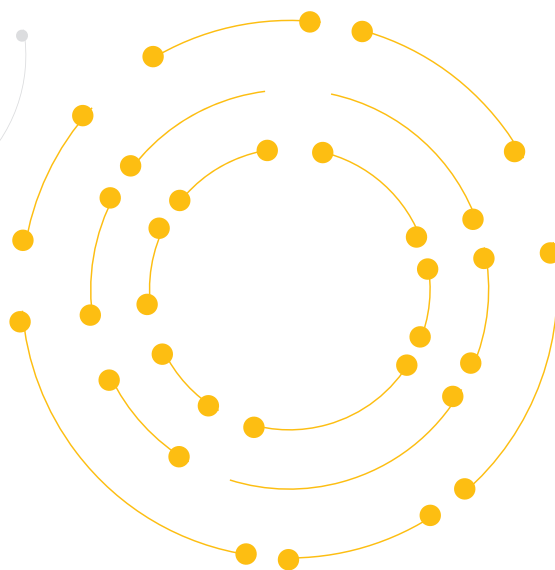
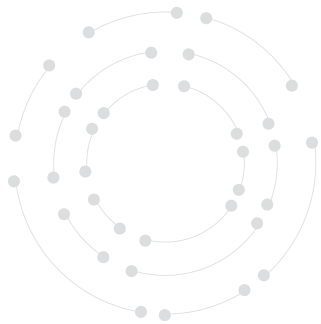
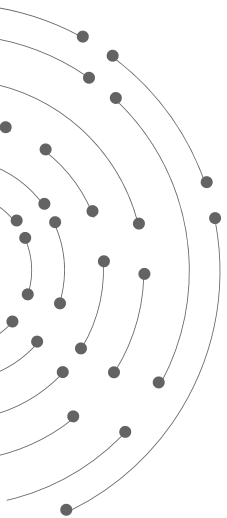
The allure of workcations and digital nomad arrangements

In this challenging environment, stakeholders in the tourism and hospitality sectors across the globe actively began to court those who might look to work from a “foreign” jurisdiction whether for a short term workcation or on a longer-term LIWA or digital nomad basis. Looking to capitalise on this emerging trend a number of policymakers in certain jurisdictions were quick to follow and aimed to attract interest for “their” jurisdictions. Competition rapidly began to heat up amongst existing and new jurisdictions branding themselves as “Digital Nomad Destinations” with each bidding to attract the pent-up demand from those looking to spend some time away from their primary residence, including abroad.

Proposals and solutions from policymakers may have differed in detail across Digital Nomad Destinations but they do share some common concepts. These may include relaxing rules on: (i) employment, work permit and visa and/or residency requirements; (ii) regulatory restrictions or requirement for permissions from a local national competent authority (NCA) or (iii) domestic income or value added tax rates, all of which aim to provide an incentive to persons moving to “their” jurisdictions for a defined period of time.

The influx of such “workcationeers” and/or digital nomads was seen as attractive by such policymakers as it could also provide a benefit in increased occupancy rates in what has been a beleaguered tourism sector across many jurisdictions looking to become Digital Nomad Destinations. More broadly such influx has been estimated as possibly contributing to longer-term positive effects such as and driving economic stimulus across local economies, infrastructure and communities.⁹ Some Digital Nomad Destinations have also, often as a bid to differentiating themselves from competitors, begun to assess how to weave in sustainability both in terms environmental protection, preservation of local culture as well as how to not displace local communities in terms of increased consumer goods and services costs or rapidly rising real estate purchase or rental prices.

While the economic impacts have yet to be measured by Digital Nomad Destinations, increased competition and innovation amongst policymakers bidding to attract skilled professionals is likely to be here to stay regardless of whether COVID-19 or other pandemics come to an end. For some financial services firms, encouraging workcations or DN arrangements that are pragmatic, transparent and equitable may also serve to reduce COVID-fatigue, quarantine envy and thus increase workplace equality.



⁹ Examples of such investment range from improvements to ICT and fiberoptic cabling as well as rolling out wireless technology to also more general improvements to infrastructure servicing the community as well as incoming digital nomads i.e., from schooling, rental accommodation through to entertainment, cultural and leisure offerings.

Different types of location-independent workers

Aside from traditional expatriate and/or secondment arrangements whereby employees resident in one country being sent from that jurisdiction to work from an office or other brick and mortar establishment of a financial services firm in a “foreign” jurisdiction, the following other types of

location-independent workers exist (all of which could either, whether as a result of pandemic restrictions or otherwise, WFH and/or engage in domestic/international workcations and digital nomad arrangements):

1 Overseas local onsite and WFH staff:

a global financial services firm employs staff in a number of jurisdictions. Staff are employed locally and on the payroll run by their operations in each jurisdiction but with a mix of staff that work onsite and/or on a WFH basis retained on the local in-country payroll;

2 Foreign hired WFH staff:

a global financial services provider hires high-quality talent habitually resident in a jurisdiction where the firm has no office. The firm therefore hires the candidate to WFH locally within that jurisdiction.

Defining workcations and digital nomad arrangements

In summary, both workcations and DN arrangements can be equated conceptually to a WFH arrangement - save that the notion of “home” is not bound by a jurisdiction or territory. Workcations and DN arrangements enable the employee to work remotely thus travel – whether self-directed and with the agreement of the employer or those that do so unbeknownst to the employer. Ensuring that both the employer and employee have an agreement of when they can work, from where and for how long and when they are to be available requires an appropriate balance so that risks related to legal, compliance, employment and HR considerations, employment structure as well as progress for the firm and its employee are safeguarded both in the home country but also the host country jurisdiction.

While in some EU jurisdictions, what constitutes a WFH arrangement and who has the right to make use of it and for how long has now been (or is beginning to be) defined in domestic employment and tax laws of certain EU Member States, the same definition of a workcation and a digital nomad arrangement is currently less commonplace. Workcations i.e., the conflation of sustained working (as opposed to sporadically checking emails on holidays) from a vacation-type setting suggests a shorter period of remote working from outside the habitual residence when compared to longer-term digital nomad arrangements. Moreover, in most cases digital nomads tend to be on the

road for longer and across multiple destinations when compared to a single centric destination or region-bound workcation.

Regardless of the differences in definitions, WFH, workcations and digital nomad arrangements along with other forms of location-independent working certainly present opportunities and greater agility, they also present a host of new risks. Such risks can range from financial regulatory as well as audit risks through to a range of employment and tax law considerations for financial services firms as well as for their employees whether embarking or returning from workcations or as a digital nomad notably as to whether an employee outside of that employee’s jurisdiction of habitual residence triggers another jurisdiction’s regulatory perimeter or tax regime.

As discussed below, financial services supervisors are slowly beginning to publish guidelines on their supervisory expectations on WFH (and to a lesser extent digital nomad arrangements). It is conceivable that over time more national competent authorities across the EU-27 may publish their own expectations (which may differ between jurisdictions) and EU authorities may look to step in and set their own EU-27 wide overarching expectations.

The changing role of the office

The opportunities offered by location-independent working have now also raised questions on the longer-term role of the brick and mortar office. Indeed, this is not just related to what to do with empty office space during location-independent working but rather how to make the office more sustainable, “pandemic-proofed”.

For some firms this question also extends as to how (and indeed whether at all) firms, such as anchor tenants might support the breadth of businesses and the wider commercial ecosystem that is very much dependent on professionals’ expenditure connected to the office and those working therein. From cafes to power-lunching restaurants or bars through to dry cleaners and newsagents if the office is shut or at reduced capacity this affects businesses and in turn their employees. It also may reflect revenues for related professional services (accountants, lawyers, consultants, IT services) that have not been able to connect virtually in the same way as prior to the present pandemic inasmuch as it does office printing and cleaning services that may not have been able to go virtually to begin with and which are very much reliant on an office-worker footprint and in person contact driven commercial exchange to generate their livelihood.¹⁰

While there generally seems to be widespread relief due to the relaxation of COVID-19 restrictions (even in light of, at the time of writing, new dominant variants such as Delta and Omicron), not all financial services professionals and their clients are rushing to return to office-centric work.

Many are equally not looking to return to arrangements as they were in place prior to the pandemic. These changing preferences can be distinguished both by job roles and responsibilities inasmuch as demographics and seniority as well as private commitments. Many financial service firms may have found that for younger professionals, who have had less office-centric experience, may be more prone to head back to the office so to be able to benefit from social interactions that are difficult to replicate in an online setting. Those with longer-term tenures in the office workspace may be more reluctant to return.

While for many firms the office will continue to play a central role, there is a realisation that it could well be very different. In this new post-pandemic “new normal”, office-based, WFH, digital nomad and other hybrid arrangements will likely co-exist with one another. Firms as well as employees may be faced with much more choice, either as the employer empowers employees to choose, but equally as perhaps new restrictions, whether as a result of COVID or otherwise require greater agility in shifting the workspace at short notice from the office to elsewhere. Consequently, employers and employees will likely have to strike a balance as to who can work on what and from where for which period of time and in which jurisdiction notably if outside the jurisdiction of the “home” or that of the employee’s office. Certainly, in the EU-27, freedom of movement and freedom of establishment across the EU’s Single Market offers a number of opportunities but also risks for firms and employees alike.



¹⁰ It should be noted that some recent thought leadership contributions from November 2020 (notably as set out by the accomplished research team from a major systemic financial institution, available from page 32 onwards) have even gone so far as to suggest that those that can avail of WFH should be subject to a tax levied on employers to compensate for loss of tax revenue linked to workers’ expenditure for consumer goods and services as well as less employment and revenue for those serving the traditional office worker. The rationale for this is that those workers that benefit from direct financial savings on absence of travel costs, external lunches, expenditure on work clothes may equally be accompanied by indirect (often unseen) costs that benefit the local economy around the office location had the worker been in the office. The proposal, whilst daring and bold, and prefaced on the line of argumentation that governments “have always back-solved taxes to suit the social environment” suggests that any tax should “only apply outside the time when the government advises people to work from home (of course, the self-employed and those on low incomes can be excluded). The current proposal (which is not in any means binding or endorsed by any competent rulemaking authority) suggests a 5% tax rate for “higher-than average incomes” i.e., in the US, over USD 55,000, in the UK, over GBP 35,000 and in Germany, over EUR 40,000. While this may be simplistic, the economics, as proposed, work out to “just” EUR 7.50 per day, which for some is comparable to the cost of their lunch – we would note that this may be comparable, in some jurisdictions with local municipal and/or tourist taxes, where these are levied, often on hotel and rental accommodation invoices. However, it should be noted that the WFH Tax proposal largely runs counter to almost every fundamental principle of tax legislation and is certainly unlikely to garner political support. As an example, the German government instead had at the time of the proposal suggested an introduction of a legal right to at least 24 days of WFH per year for full-time employees.

What has worked well and what could work better in WFH? Charting the path for location-independent and office-centric co-existing working arrangements



Those that can engage in WFH arrangements have, in most instances according to numerous surveys, suggested that they would like to have an option continue to do so once the present pandemic passes or at least work in a hybrid model as well as the flexibility to choose when, where and how to work. This is the case even if some employees have stated that while they miss office amenities and social aspects these are offset by increased job satisfaction and flexibility they enjoy through WFH arrangements.

Some of the benefits were immediately measurable and many may have provided a “win-win” situation for employers and employees, notably the following non-exhaustive examples:

1. Firms sending staff into WFH arrangements can save operational costs and office rent and employees save money (although also at a potential loss to businesses and services connected to office-centric work) and time because they do not need to commute to work (as frequently) or employee households can possibly optimise childcare responsibilities and other family related commitments thus promoting job-market equality;
2. Employees maintained or even increased productivity, quality of work output as well as job satisfaction with some studies suggesting that some employees working remotely, work longer than colleagues in the office although a number of firms have begun to address this in reminding employees about their need to balance their commitments appropriately and take time to recharge;
3. WFH arrangements reduced employers and employee’s carbon footprint both through lower commuting times but equally lesser office-centric related utility consumption;
4. People from diverse backgrounds and experience, including those who live outside the immediate area, are primary caregivers or have disabilities, have now more opportunities to join the workforce, which benefits companies by providing different expertise and helping organisations embrace inclusion and diversity; and
5. WFH allows employees to continue working while waiting for childcare/repair/delivery appointments instead of having to take hours or half-days off work.

Other benefits represent a more fundamental shift and are thus more subjective and difficult to measure even if they were on the whole welcome. For those that settled into WFH arrangements, many found that even if it was difficult to replicate work-based and client-facing engagements while social distancing, in a time where people wanted to do more together with one another while being restricted on physical interactions, greater creativity and collaboration within and across firms were seen as positive outcomes as many professionals realised “we’re all in it together” and common problems need collaboration to prepare common solutions.

While in the financial services, WFH allowed breathing room for professionals in firms to cooperate with their peers both with and without industry associations to focus on fire-fighting the economic consequences of the COVID-19 pandemic but also to advance the operationalisation of a number of regulatory and/or industry led improvements and do so in a way that probably would have taken longer prior to the pandemic. Continuation of such positive momentum could drive forward further ideation, efficiency and value creation to common goals.

WFH and digital nomad arrangements also present questions for firms on how to ensure they can preserve corporate culture and treat employees equally and fairly. This includes how they can make use of WFH arrangements while complying with the rules applicable during the pandemic as well as how to improve team spirit.

Firms have also had to assess how best to replicate office-based exchanges, such as engaging with colleagues around the coffee machine to corporate and social events especially where these spurred creativity or strengthened working relationships. Yet for the foreseeable future location independent working, even if time-bound for a certain agreed period of days per week per employee, seems to be here to stay and will likely coexist with the traditional (pandemic proofed) office environment being available for those employees eager to return or as a place to conduct meetings and social events or simply, for some that are best placed to do that from the office as opposed to WFH, to engage in “deep working”¹¹.

¹¹ Deep working i.e., tasks that might require a lot of focus might be better served at home and collective tasks might be better carried out in the office.

Different environments favour different kinds of work and some employees will be more and more inclined to find solutions to work from the right place at the right moment so that the dual workplace arrangement of office plus home and/or further afield may become the preferable hybrid model. Many firms as well as employees may want to balance the best of both worlds and following the pandemic.

As such, firms meaning to get ahead should already be starting, if they have not already, a conversation on the balance to be struck between flexibility and the needs of the office. Naturally, depending on the role, remote working may be difficult to put into practice or conversely have no impact or rather a positive one on performance. For the financial sector, commercial bankers and financial advisors where working with clients and establishing relationships is key, can continue focusing on these via videoconferencing tools. Traders on the other hand may find it more difficult to substitute their office systems for a WFH equipment.

In any event, now that most firms and their employees have adjusted to the new and more wide-spread WFH scenario, using the knowledge accumulated so far and applying it to the novel business environment and structures,

has established into standard practice. While this may have worked in an ad hoc, temporary setup, with WFH transforming to (semi-)permanent configuration, crucial issues must be addressed and handled with due diligence. The areas that PwC believes firms may want to direct the most attention to are coaching, communication and collaboration.

In order to move to such a new operating model and working relationship with employees and do so in a pragmatic yet prudent manner, financial services firms will want to ensure that their WFH as well as any digital nomad corporate policies are drafted to account for regional and jurisdictional specifics. They must also be drafted so as to balance agility as well as interoperability with revised and redefined three lines of defence (3LoD) models notably as these have had to rapidly expand to cover home-office arrangements. Moreover, drafting should also look to future proof arrangements to account for prolonged pandemic preparedness in light of potential future COVID-19 mutations or other public health emergencies. Firms will also likely want to consider through risk reviews how to create sustainable and compliant working arrangements as tailored to specific job roles and needs.



For some, WFH arrangements began in 2021 to go further afield

With the gradual loosening and repeal of various COVID-19 travel restrictions across the EU-27, some EU financial service firms' senior management, key function holders and control function staff or generally "those that can" were in 2020 exploring taking WFH further afield to possibly safer and, in some instances, sunnier locations. Remote working from second homes domestically and further afield along with "workcations", in what would ordinarily be a holiday destination, gathering pace amongst financial markets professionals (as well as certain supervisory authorities with multinational staff) in 2021.

Travel operators were quick to capitalise on interest from and the pent-up demand amongst those looking for a change of scenery from their domestic lockdown restrictions or cramped WFH set-up. These operators advertised "work from a hotel" or "workcations"¹² as an alternative to WFH. Moreover, many short-term hospitality operators, such as hotels and vacation rental platforms also began changing their strategy to focus on longer-term stays given that these operators needed to fill occupancy, especially if the path of the COVID-19 economic recovery efforts and demand for "traditional" tourism might take longer to recover and possibly in a different form.

¹² This term loosely refers to a hybrid between work and vacation, namely working (on a WFH basis), in an exotic location, during daylight or agreed regular hours and enjoying what the location has to offer in the off-hours for a time-bound period. Swapping, London for Lisbon, Frankfurt for Florence etc., are examples of this. While, like workcations, not a legally defined concept, the notion of Digital Nomad arrangements, aim to extend the workcation approach to something more permanent.

While the uptake of workcations may certainly not be as widespread and as embedded as WFH, it has contributed to cause employers and employees alike to question as to what truly and where counts as an employee's "home" and notably for what time. As a result, "home" becomes a more fluid notion as workcations take root and the option of digital nomad arrangements for financial services employers and employees become an option that both may wish to explore as to the longer term feasibility and compatibility both with strategic aims of businesses' TOMs and corresponding 3LoD considerations. This is likely to continue to be the case even if improved vaccination levels across the EU-27 provide reassurance that that widespread lockdowns are unlikely to return if COVID-19 incidence levels rise whether as a result of mutations or otherwise.

Consequently, EU financial services firms will, in addition to WFH related policies and procedures, also want to consider on how to reflect the rise of workcations and how these two trends impact a firm's TOM and 3LoD framework as well as corporate human capital strategy overall. Careful forward planning by firms in terms of policies and procedures is possibly also required with respect to digital nomad arrangements (which is not free of specific risks for employers and employees alike as discussed below) both this being an extension of the workcation but in many ways an evolution of what was once the traditional overseas/expatriate posting model for many of a firm.



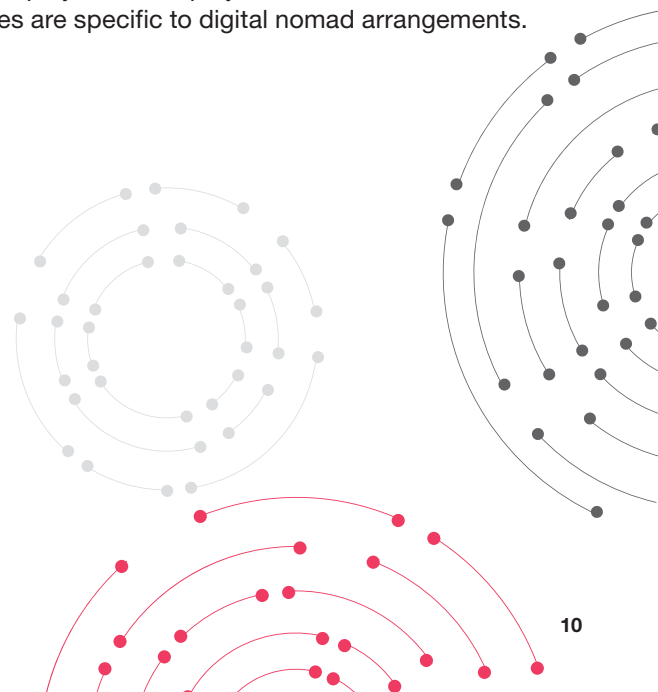
Empowering WFH, agile working and global mobility through digital nomad arrangements

Global mobility for workers, working across borders or expatriate ("expat") postings are certainly not new. Many successful financial services firms have benefitted from their talent's and leadership's mobility as well as a result of similar measures adopted by their own service providers.

Financial services firms large and small rely on expats for various reasons. This can range from securing specific skill sets, transferring knowledge and experience globally but more importantly in order to extend the strategic steering of the company by having people who represent head office as their eyes and ears on the ground in faraway financial centres. Typically, however expat arrangements were largely office centric with expats living and working in the same jurisdiction of where they were sent to by their employer. While the traditional overseas postings and expatriate packages that were commonplace during the late 1980's through to the mid-2000's have largely been displaced by increased digitalisation, they too have also evolved.

Historically, certainly prior to the present pandemic, the term digital nomad was largely reserved for younger millennials, typically working as freelancers for start-ups notably in the ICT or the creative field, often co-working and co-living with likeminded individuals. The growth of interest in workcations, and in turn a number of firms, notably certain U.S. technology firms allowing their workers to relocate, including internationally, provided they could work remotely and that this would not conflict with their role and responsibilities, employees in financial services took note.

Historically, digital nomads tended to originate from more economically developed countries (including in the EU-27) and then based remotely in locations and/or jurisdictions (often different to that of their habitual residence or citizenship) with more economical costs of living, a higher quality of life and lifestyle and often better climate. While there is an absence as to the precise number of EU-27 citizens that would consider themselves being digital nomads nor their job roles, figures in the United States showed a growth from 7.3 million persons identifying as digital nomads in 2019 growing to 10.9 million in 2020 — an increase of 49%. More and more countries are also offering the so-called Digital Nomad visas, with the current number of European countries according to the European Travel Information and Authorisation System amounting to nine and including traditional summer season destinations such as Portugal, Italy, Croatia and Greece but also Iceland and Norway. This continuing trend however also carries risks for both employer and employee and some of those risks themselves are specific to digital nomad arrangements.



Certainly, from a regulatory policymaker and supervisory approach, the bulk of the EU's financial services regulatory and supervisory framework will consider where an activity takes place and who is conducting it from there – usually by reference to an office as opposed to an employee's private home or hotel booking. That being said, EU Member State's tax regimes will likely look to assess where an activity is taking place independent of an office. Both regulatory and tax regimes do not (currently) really reflect WFH, workcations nor digital nomad arrangements and further reforms to tax codes to reflect these concepts would be welcome.

Where regulatory and tax reforms have been implemented, these have largely occurred in those jurisdictions seeking to attract digital nomads (including those from outside of the EU-27) as opposed to in those jurisdictions where those digital nomads would ordinarily be based. Legislative policymakers in select EU Member States have since 2020 began to announce or even implement changes to their domestic immigration, employment and even tax laws so as to attract EU and non-EU persons to consider a more permanent WFH arrangement based out of their country for a period of time and thus become a digital nomad in that host state jurisdiction. While on the one hand these efforts aim to bolster revenues for communities and regions and thus reinvigorate the domestic economy dampened by the economic consequences of the pandemic.



Digital Nomad Destinations: Summary of key developments

The free movement of persons in the EU-27 as well as the freedom to establish and provide services are two of the four fundamental freedoms of the EU's Single Market complementing the freedom of movement of capital and free movement of goods. By contrast the right to residency is linked to an actual job or prospect of a job in that EU Member State and largely governed by the laws of that Member State including the application of EU law in that jurisdiction. These are considerations that are crucial for taking WFH further afield whether through workcations or digital nomad arrangements. Significantly, EU law nor financial regulatory requirements do not contain restrictions in defining from where staff must perform an activity as long as the firm they are employed by is permitted to do so in that jurisdiction.

Despite the shutting of some borders during the March 2020 lockdowns, the COVID-19 crisis and the catalyst to digitalisation in many ways has rekindled the interest of staff but also for some firms to explore digital nomad arrangements. Mobility in times of COVID-19, despite wide-scale social distancing and decoupling from a traditional office based working environment, may even prove to be a boost for some financial services firms, notably in fostering greater creativity and job satisfaction for those that can engage in digital nomad arrangements.

While a number of non-EU jurisdictions¹³ have a depth of experience and a breadth of incentives in attracting non-resident entrepreneurs or highly-qualified staff to set-up in a given jurisdiction for a temporary or more permanent period in their jurisdictions, EU-27 Member States, excluding some exceptions have so far lagged behind. At the start of 2021 this began to change. Estonia, building on its existing "E-Residency" program launched its own Digital Nomad Visa, which could prove an inspiration for some other jurisdictions to follow.

Estonia's Digital Nomad Visa program is unique in that it targets non-EU-27 remote working employees or freelancers whose job role allows them to work from anywhere. In order to be granted a new visa, applicants must evidence they are earning at least EUR 3,504 per month and provide evidence, including client lists, proving their professional role. Once an applicant is granted a visa, they may reside in Estonia for up to 12 months, including up to 90 days of travel across the EU's Schengen Area. The Estonian visa also aims to plug the legal loophole that many Digital Nomads face in not being permitted to work legally in the EU countries they visit.

¹³ Notably Barbados, Bermuda, Anguilla, Dubai (United Arab Emirates), Georgia and the Cayman Islands, Mauritius as well as, to a certain extent Aruba, have Digital Nomad Visa programs or friendly terms to attract, predominantly U.S. and other foreign nationals. A number of the Caribbean jurisdictions and Bermuda have very high costs of living in addition to other local issues or restrictions on trips in and out of the new digital nomad's jurisdiction for the period it has the visa for that jurisdiction.

Certain countries with a large tourism sector, such as Croatia and Cyprus have responded to calls, mostly from local tourism operators and efforts from major vacation rental firms to boost occupancy, by putting forward more concrete proposals for their own digital nomad visas as well as to push for a fast(er)-track for applications by EU-27 and non-EU citizens (including for freelance workers and the self-employed) for temporary or permanent residency in a specific EU jurisdiction. Iceland, while not in the EU but in the European Economic Area and the European Free Trade Association, in 2020 announced it was moving forward with its own family friendly initiatives and long-term visas for non-EU/EEA teleworkers.¹⁴

Then there are other EU Member States, such as Greece, who are going a step further, also as part of its new economic policy and efforts reverse the brain drain, one of the most acute in the EU-27 during the 2008 to 2012 financial crises. Greece¹⁵ has aimed to attract foreigners (notably UK nationals) by offering tax breaks and incentives to assist in turning around the country's performance following a decade-long debt crisis that cost a loss of 25% of economic output already and with a further decline in GDP expected due to COVID-19.

Key practical considerations for workcations and digital nomad arrangements



The following sections provide an overview of some common considerations that apply to both firms and individuals when it comes to engaging in workcations and/or digital nomad arrangements and how to identify and mitigate some of the risks.

Financial services regulatory issues and risks – Lessons learned from Luxembourg?

Across the EU-27, the majority of national competent authorities (NCAs) have yet to publish regulatory rules and supervisory expectations on location-independent working, the majority of which have published guidelines (often non-binding but which still forms part of the supervisory dialogue, and thus can read like rules) that apply to WFH and in certain instances workcations but not digital nomad arrangements. It is conceivable that more NCAs, including those in Digital Nomad Destinations, and subsequently the European Supervisory Authorities (EBA, ESMA and EIOPA as well as possibly the ECB-SSM) (ESAs) could issue their own regulatory guidelines and supervisory expectations.

Luxembourg's regulator the CSSF, published its Circular 21/769¹⁶ on "Governance and security requirements for Supervised Entities to perform tasks or activities through Telework" (the **CSSF Telework Circular**) which, while necessary, given the large amount of financial services professionals working in Luxembourg may actually reside in adjoining EU Member States and who during the pandemic ceased to commute to Luxembourg.¹⁷

¹⁴ Which permits applicants and their families to stay in Iceland for more than six-months. This aims to attract those that can also assist Iceland spearhead its economic recovery.

¹⁵ Greece already maintains a program to attract wealthy investors (minimum investment EUR 500,000) through a flat tax rate program (EUR 100,000) applied to those investors who qualify and who shift their tax residency (minimum of six months must be spent in Greece). This is in addition to an existing program that applies reduced rates for foreign pensioners (flat income tax rate of 7% for foreign pensioners who transfer their tax residence to Greece). The new incentive, which is open to non-Greeks, regardless of nationality as well as Greeks returning from abroad, is to promise that salaried staff or the self-employed will, for a period of 7 years for any new positions created in Greece in 2021, benefit from half of their income that would be subject to Greek income tax, will be treated as be tax-free. Greece's current tax rate of 44% on earnings over EUR 40,000. Persons who have been a tax resident in Greece for seven out of the past eight years will be excluded. This new incentive is expected to be voted on before the end of 2020 and would come into force on January 1, 2020.

¹⁶ Available here.

¹⁷ See background from PwC Luxembourg is available here.

The Telework Circular may provide a source of inspiration for other jurisdictions and authorities to follow. Crucially the Telework Circular is clear that it is post-pandemic orientated (even if building on lessons learned due to COVID-19) that it does not apply to pandemic or other emergency situations even if it builds upon lessons learned during COVID¹⁸.

Telework is defined as "...a form of organising and/or carrying out work, using information and communication technologies within the framework of an employment contract authorising work, which would ordinarily be carried out in the employer's premises, to be performed outside the premises of the employer." Additional criteria apply and workcations (but this does not apply to digital nomad arrangements) do not constitute telework in the eyes of the CSSF.¹⁹ Similarly, working from back-up locations do not also in the eyes of the CSSF constitute telework. All employees including contractors at the disposal of the supervised entity are caught by the Telework Circular.

Consequently, the CSSF Telework Circular, in focusing on governance and security requirements with respect to the implementation and utilisation of work processes based on telework solutions, requires (but does not introduced an approval process to implement, maintain and extend telework solutions) that CSSF supervised entities as well as their branches in Luxembourg and abroad are required "... to the extent that Telework is authorised in the countries where the branches are established and they comply with national regulations. In this context, specific requirements stated in this circular apply as minimum standards to be adopted by branches of Supervised Entities". The Telework Circular also applies to those Luxembourg based "incoming" branches of non-EEA headquartered financial services providers.

Consequently, supervised entities (and their executive function i.e., Board of Directors are expected to have ownership of oversight of arrangements) are thus expected to comply with home and host state regulations and therefore:

1. Firms are expected to define:
 - a. Staff (employees and contractors) that are "Privileged Users" i.e., those with "... access rights enabling them to carry out sensitive operations, both for ICT operations (e.g. system administrators) and for business operations. These sensitive operations are typically related to the provision of critical activities";
 - b. "Critical Activities" which include – and thus may be broader than those required due to other financial services regulations such as for recovery and resolution purposes – the following "...activities in respect of which the occurrence of a problem may have a significant impact on the Supervised Entity's ability to meet the regulatory requirements or even to continue its activities (e.g. transaction processing, order input/upload, 4-eye validations, remote administrative access to ICT systems by the ICT team, etc.)";
 - c. "Authorised Management" which means persons authorised by the CSSF for day-to-day management or persons authorised by the CSSF to effectively conduct the business of a supervised entity;

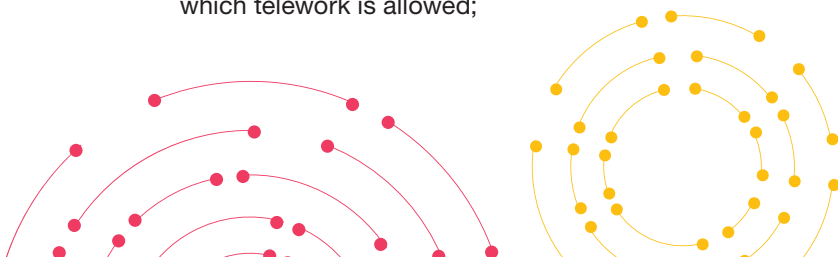
Firms are equally supposed to set out when and on what basis staff are required to return to office-based locations, including on a short-term basis.

2. Notwithstanding teleworking arrangements in place, supervised entities are required to maintain, at all times, a robust "central administration" in Luxembourg and to maintain sufficient substance in its premises, also in order to allow them to deal with emergencies and other time-critical issues in due time. Nevertheless, supervised entities may allow staff to perform tasks and activities through telework. As a result, in principle, all staff, regardless of its function, may be allowed to telework within the limits set in the CSSF's rules in order to guarantee adequate governance of the supervised entities and subject to the legal and regulatory framework on telework in place. Supervised entities are expected to ensure that their internal control framework (and thus 3LoD and TOM) as well as their information and cyber-resilience arrangements are sufficiently robust and continue to be effective and secure in their operations without exception and on an ongoing basis regardless of teleworking;

¹⁸ The Telework Circular states that it: "...does not apply under pandemic situations (for example COVID-19) or in case of other exceptional circumstances having a comparable impact on the general working conditions. This circular is limited to financial sector regulatory requirements. All contractual relations between Supervised Entities and their employees are out of scope of the present circular. It does not create any precedence for rights or obligations on whether Telework may be implemented by entities under the supervision of the CSSF. Furthermore, this circular does not interfere in any legal provisions that are part of the mandatory public policy provisions (règles d'ordre public) or part of the Luxembourg Labour Code. It is intended solely to provide additional guidance on the governance and security requirements to be followed when implementing Telework solutions for employees of entities supervised by the CSSF."

¹⁹ The Telework Circular sets the following cumulative criteria that must be met so that a work relationship may be qualified as Telework: "a. Work must be delivered by means of information and communication technologies based on a previous approval by the employer; b. Work must be performed on a regular or occasional and voluntary basis and within the defined working hours at a predetermined place that is different from the employer's premises. Supervised Entities shall have rules in place to define from where Telework is allowed. These rules need to be documented and respected." Specifically, workcations and other temporary arrangements are excluded and the Telework Circular states that "It should be noted that other forms of remote access by staff members of the Supervised Entities (i.e. while on business trip, e.g. client relationship managers, when attending conferences or professional training), as well as connections from the employer's premises to systems not hosted in the employer's premises are not covered" in the scope of the Telework Circular.

3. Each supervised entity in light of the aforementioned objectives "...should assess to what extent it allows its staff members to work remotely. This assessment should consider the risks of telework and define limits within which it might be allowed to perform tasks remotely. In particular, smaller Supervised Entities with a limited number of staff may need to adapt their internal organisation, taking into consideration requirements, relative to their size.";
4. Firms are also required to assess, including following a completion of an initial risk analysis, which is reviewed on a periodic basis, of telework-specific (notably ICT, labour and tax law-related) risks; that teleworking is balanced and that a relevant corporate policy ensures that:
 - a. The number of staff of a supervised entity which may telework at the same time must comply with central administration requirements in bullet 2 above and thus be the "decision-making centre";
 - b. The amount of normal working time, individual staff members are allowed to telework, should be limited – although it is not clear what constitutes "limited";
 - c. In principle, at least 1 Authorised Manager shall be on site at the head office at all times. Furthermore, key functions shall be sufficiently represented every day in the premises and permanently guarantee the adequate functioning of the activities and controls as well as proper decision-taking. For this purpose, supervised entities shall take into account the size and organisation of the firm and its operations and the nature, scale and complexity of its activities;
 - d. Firms shall ensure that teleworking and any interruptions thereof (such as connection disruptions" do not "...have a substantial impact on the entities' capacity to carry out their activities in an adequate, timely and secure manner." This applies in particular to Critical Activities and thus firms must ensure that these "...can be covered by a sufficiently skilled and responsible staff member present on site at the entity's premises to guarantee the adequate functioning of the activities and controls during business hours."
 - e. The following operational considerations and permitted parameters pertaining to the following items are appropriately documented in the appropriate corporate policy:
 - i. The types of business units or departments that may use telework and activities and/or functions that may be performed via telework;
 - ii. The nature of functions and/or activities of business units or departments that must always be performed on site in the premises of the Supervised Entity;
 - iii. The minimum number of staff required to work at the same time at the premises in Luxembourg at entity level and, where relevant, at business unit or department levels;
 - iv. The amount and times of working hours within which telework is allowed;
- v. The control procedures that have to be implemented in order to be able to monitor the proper execution of work performed by the staff through telework;
- vi. The minimum number of physical meetings that should be held at the head office in Luxembourg;
- vii. Details on the measures to be taken in order to ensure that risks remain contained, including compliance with confidentiality and data protection regulations;
- viii. The operational framework that is implemented enabling the Authorised Management to monitor the number of staff members who are effectively teleworking. The CSSF states however that the existing management information systems and control environment of a supervised entity cannot be altered while allowing tasks to be performed via telework. Existing controls (including four-eyes principles and controls), dashboards and reporting need to be executed in the same way and with the same frequency as defined in the existing internal procedures of the supervised entity in non-teleworking conditions;
- ix. Details on how the firm will maintain evidence enabling the compliance monitoring with the firm's telework policy and any deviations in ICT permissions (and security risks) (this includes but is not limited to e.g., recording the name, function and department/unit of each staff member teleworking). The CSSF suggests that such approach should also allow the firm to demonstrate its compliance with the Telework Circular to independent auditors and to the CSSF. Furthermore firms are required to provide evidence on controls by internal control functions (such as (when applicable) compliance, risk management, including information security (RSSI/CISO) and internal audit, shall include the review of the telework policy, process flows and compliance with the legal and regulatory requirements in their respective multi-year work programme and the report of any issues or findings in that regard to the CSSF in their respective annual summary reports, were applicable) over telework arrangements and any reports of any significant operational incidents in relation to telework that might have occurred during the year as well as a "...short statistic on the use of Telework during the year." Lastly firms are required to present their details on periodic training of staff and evidence of their awareness of compliance with the telework policy and ICT security policies during telework arrangements including which tasks may or may not be carried on private as opposed to company owned ICT devices. Firms are required to evidence that they have carefully assessed and carried out a specific risk analysis on the potential use of privately owned devices by staff as well as the (permitted) use of virtual desktop infrastructures (VDI – often referred to as "remote access") from privately owned devices and permitted monitoring of activity conducted by staff using VDI;



Financial services regulatory issues and risks – recommendations

Irrespective of the CSSF Telex Circular and any other efforts by NCAs and ESAs, financial services firms operating in the EU-27 may wish to consider conducting a full and detailed 360 degree risk assessment. Such review will likely want to consider a firm's exposure to as well as the resilience of risk mitigating measures as well as in the face of regulatory sanctions and breaches, including those that are inadvertent or unintentional.

The outcome of such an assessment may also assist firms when drafting a policy on prolonged WFH (a **Homeworking Policy**) generally as well as in respect of a policy on digital nomads (a **DN Policy**) and balance what is permitted in a given country where an employee is conducting (financial services regulated) activity from and whether the firm employing that person is permitted itself to conduct such business in the given jurisdiction. Equally, in addition to addressing digital and operational resilience priorities in both the Homeworking and DN Policies, consideration may need to be given to whether the impact of any management decisions taken in a jurisdiction other than that of where the employee is ordinarily resident could cause an issue for the firm (as well as the employee) from a regulatory as well as a tax perspective.

Even with increased digitalization, geographic considerations still (rightly or wrongly) matter. They serve as important benchmarks on determining of whether a regulated activity is being delivered in a specific jurisdiction and thus whether a local regulatory perimeter is triggered in that jurisdiction. Differences however exist equally, on whether trigger of the regulatory perimeter solely arises by virtue of an individual²⁰, i.e., workcationeer or digital

nomad being that jurisdiction or carrying out their job from that jurisdiction, even under a temporary arrangement or whether there are any exceptions for "one-off" transactions or in relation to where a certain activity is deemed to take place. The approaches of (including exceptions available from) multiple regulatory may need to be taken into account by the firm and individual.²¹ Ultimately these issues discussed above are independent of any tax considerations for the firm and the individual.²²

Consequently, financial services firms may want to clearly delineate which jurisdictions are adverse to the firm's strategic steering of the firm generally inasmuch as those where, depending on the job function and the employees' respective regulated activity and/or status, workcations and digital nomad arrangements are disadvantageous to the firm's interests.

Lastly, there are issues around financial services regulation that go hand in hand with data protection rules. With an emphasis placed on privacy and secure transfer of information, with a variety of regimes applicable outside of the EU, financial services firms may also expose themselves to potential liability and reputational damage if digital nomads extend where data is being processed and possibly where arrangements are exposed to different risks than if data were processed in a traditional working environment, including domestic WFH arrangements. When workcationeers and digital nomads are based in a new country the way they use and process information may remain the same or change based on their location and permitted data use and processing arrangements may need to be included in the Homeworking and DN Policies.

²⁰ In a number of EU jurisdictions as well as the UK, various job functions and the individuals carrying out that function are subject to rules and/or supervisory expectations that are binding upon the individual in addition to the regulated firm. Often, as is the case with the UK's rules, these rules travel with the individual. This approach of greater rules applicable to individual key function holders, which was spearheaded by the UK, while it was still a member of the EU has been emulated by a number of other jurisdictions, notably Ireland. It may be indeed an area that will become further harmonized at the EU-level with a similar regime applicable across the EU-27.

Financial services firms, as well as individuals, when assessing a DN Policy and digital nomad arrangements in general, will need to be cognisant of the fact that where a person travels, those rules and supervisory expectations may go with them. In short, a person exercising a Senior Management Function under the UK's Senior Managers and Certification Regime or say under the Central Bank of Ireland's Control Functions and Pre-approval Control Functions regime and looking to undertake such activity will have those rules travel with them as they move. This may pose a problem in certain circumstances as these rules were not designed with prolonged WFH let alone digital nomad arrangements in mind.

²¹ In the example above, considerations may also need to be taken on how to account for arrangements where a digital nomad prepares the trade order in a financial instrument, but the actual execution takes place in the firm's habitual jurisdiction or another in which it is permissioned under the relevant financial services regulatory regime to conduct activity. All of these issues are independent of any considerations of where the transaction is actually executed on a trading venue (including OTC) or ultimately where it is booked by the firm and/or the financial instruments are custodied. While in most instances existing rules and arrangements may already be able to accommodate such issues, they vary by jurisdiction and the situation could become a bit more complicated where time zone differences mean orders are routed differently.

²² As an example, firms that permit a digital nomad, via remote access software, to trade financial instruments, whether executing these on behalf of the firm or a client, may need to consider clearly documenting where the regulated activity is deemed to take place. While a firm and its digital nomads may be able to make use of certain exceptions, these vary from jurisdiction, inasmuch as they do for transaction type and market sector.

Employment and pension law considerations

Financial services firms may also, in addition to the regulatory and compliance considerations discussed above, wish to develop a Homeworking and DN Policies to deal with employment and pension law considerations that may arise.

Key points for inclusion in such policies will typically look to address the following themes:

1. how employees may notify/request permission to work abroad and for how long;
2. the ability of the firm and corresponding conditions to require an individual to return to the country where the physical office is located;
3. agreed hours of work (if the individual will be based in a different time zone);
4. any rules on changes to salary (if any) and contractual and/or statutory benefits (especially if the individual is moving to a country where the cost of living is significantly higher or lower); and
5. how to alert (in some jurisdictions employers have a statutory duty to do so) and/or support staff to potential cross-border tax considerations both for the employee and the employer.

A rationale for establishing such policies also is likely to arise from a social security benefit law perspective. This is the case as certainly for intra-EU workcations and digital nomad arrangements for employees to carry (or have digital access to) an “A1 Certificate”, which was introduced by EU Regulation 883/2004. Since 1 July 2019 the A1 Certificate has to be provided by employers to employees (irrespective of nationality) travelling for work across the EU-27 and EEA in order to evidence that that person has social security protections/benefits in their respective home state.²³ Failure to be able to supply an A1 Certificate can carry heavy sanctions, which vary from jurisdiction to jurisdiction. While the A1 Certificate regime was not necessarily geared

towards financial services professionals, checks by authorities are increasing. For non-EU/EEA workcations and digital nomad additional specific arrangements may apply.

From a general contractual employment law perspective, the following is worth noting (although very much specific to the nature of the employment relationship, the jurisdiction(s) in which the person may work and the governing as well as mandatory law(s) applicable to of the relationship):

- It is typical for both an employee’s contract of employment and their statutory employment rights to be governed by the jurisdiction in which the physical office is located. Matters can become more complicated however, where an individual works for an extended period of time in another jurisdiction, especially if that jurisdiction offers more favourable employment protections.
- Although not an absolute solution, it is usually sensible to inform the employee that it is not intended that their working abroad should change the laws that govern the working relationship irrespective of the workcation and/or digital nomad arrangement as these are not intended by employer and employee to constitute a relocation and/or corresponding change in law. However, it may not be possible to contract out of certain local law protections and specific advice should be sought to ensure that the employer is not falling foul of core local employment rights such as those relating to working time, holiday and pay.

As with employment law considerations, retirement and pension planning for both firm and individual employees may require specific attention in Homeworking and DN Policies. While certain EU efforts have sought to promote the portability of pension arrangements, through the voluntary Pan-European Personal Pension Product (PEPP) (operating alongside existing cross-border occupational pension schemes), pension arrangements and access to occupational pension schemes typically do not travel well. This is an issue that many expats and their employers have long required to take dedicated legal and financial advice on in order to understand the implications on existing arrangements and the available options. For digital nomads and their own retirement planning (in a tax efficient manner) the same considerations are likely to apply.

²³ Further information available here.

Tax planning is omnipresent and liabilities tend to travel for firms as well as their employees if conducting certain type of activity (including non-regulated financial services activity). A tax analysis will often involve consideration of liabilities and requirements across multiple tax frameworks, rates and regimes. When financial services firms engage in WFH arrangements with their employees, tax implications for the firm but also the individual will need to be taken into account. While the depth of the economic impact of COVID-19 drove many EU and non-EU jurisdictions' policymakers to enact new legislation granting several tax benefits (such as tax deferrals, deductions and special arrangements with local tax authorities) these were for individuals and companies alike drawn along national lines. In most instances such arrangements focused on balancing flexibility on existing corporate tax residence and permanent establishment (PE) rules so that these are not necessarily triggered through the prolonged stay of some individuals abroad due to travel restrictions.

In April 2020, the Organisation of Economic Cooperation and Development (the **OECD**) issued a report analysing the impact of the COVID-19 crisis in light of double tax treaties. This legally non-binding but influential report contains general guidance about how local tax authorities should approach the need for balancing existing regimes and their principles with those temporary situations where company's workers or directors stay for a longer period for a workcation or digital nomad situation in jurisdictions other than the one that the firm's physical office is located. A summary of the OECD's main conclusions set out in the 2020 Report can be distinguished as follows – and some of this supports location-independent working, whether as WFH, workcations or possibly digital nomad arrangements if the below (and of course the actual legally binding tax rules and approaches of domestic tax authorities) are complied with:

Regular PE concerns

The OECD concluded that the fact that someone is working from home in a different jurisdiction should **not** imply any PE concerns. Such individuals are typically doing so as a result of government directives: it is considered a force majeure event, not an enterprise's requirement. In addition, WFH generally would not meet the permanence requirement for PEs. Moreover, a firm generally has no access or control over the home office.

Agency PE concerns

The OECD Double Tax Convention Model requires that the dependent agent's PE activities must be "habitual" in concluding contracts on behalf of the firm. As a result, if an employee or agent works in a different jurisdiction for a short period only because of a force majeure event and/or government travel restrictions and this extraordinarily impacts his or her normal routine activity, this is unlikely to be regarded as habitual.

Concerns relating to corporate's tax residence – "place of effective management"

Given that many European countries rely on the place of effective management as a criterion (amongst other considerations) to determine a company's tax residence, some board meetings or high management decisions ought to be taken in a different jurisdiction due to travel restrictions. In this case, the OECD's main opinion is that during the COVID-19 pandemic if a firm's director (or management/executive function) works and takes decisions from "home" in a different country because of a force majeure event and/or government directives, this should not relocate the place of effective management of the enterprise to that jurisdiction. The OECD concluded that this is justified due to the extraordinary measures taken by governments, so if holding board meetings or other high management meetings abroad is only explained due to travel restrictions, it is unlikely that such situation will create any changes to an entity's residence status under a tax treaty or relocate the place of effective management to that other jurisdiction.

Nevertheless, the OECD also suggested that affected firms carry out a thorough analysis of these matters, as they are heavy reliant on several facts and circumstances. Following the OECD's recommendations, some local tax authorities have issued further guidance in order to match national rules with regional developments. As a result, most countries (like the UK and Ireland) have followed the OECD's approach, as it is quite understandable to grant some flexibility to rules in this particular and exceptional situation. A focus on facts and circumstances is still preferred when assessing the possible relocation of tax residence, as well. Nevertheless, there are some jurisdictions whose tax authorities have not yet issued guidance regarding these matters. Ordinary rules still apply, and such should be followed by a thorough and careful analysis. As a specific example, although the German tax authority has issued some guidance regarding cross-border workers, at the time of writing, regulations have yet to be issued regarding directors holding board meetings in Germany because of travel restrictions.

In summary, even though harmonised guidance across the EU would be welcome, the process is not yet complete as there are still many countries where relevant tax guidance has not been issued to date.

The 2020 Report was later updated in January 2021 noting that some of the measures intended to be temporary continued on more than nine months later which begged further re-evaluation. The updated report addresses new areas of concern and also examines whether the April 2020 conclusions continue to apply. Given the current situation, another update to the report is probably pending.

General considerations for digital nomads

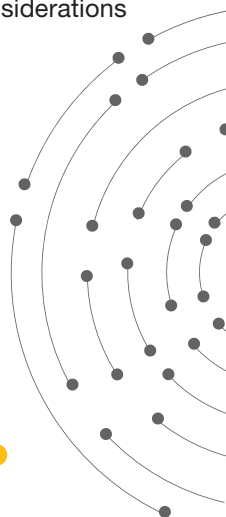
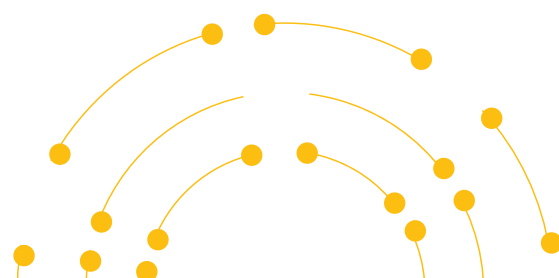
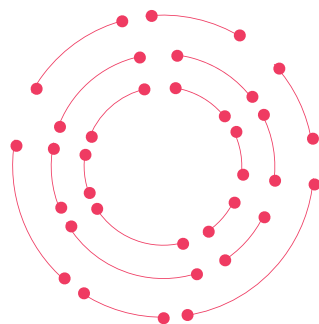
2020 and the start of 2021 has demonstrated that not all location-independent solutions are alike. This includes both in what is permitted by financial services firms and what employees would like in terms of their working arrangements for how long and from where. Financial services firms and their employees thus will have to, going forward, find balance on what work is performed where, for whom, when and in what format inasmuch as how such employees are employed, on what contractual and monetary basis and whether they have dependents.

While some of these considerations are firm and employee specific, the following presents some common items that they may wish to consider:

1. how and what issues may arise in a digital nomad's interaction with colleagues working on-site or WFH back in the home jurisdiction and whether any additional protocols, whether documented or not need to be followed as well as how to deal with work-life balance, any stigmas/resentment amongst colleagues and how best to evidence compliance with a company's cultural values;
2. the need to proactively monitor the red tape in the respective jurisdictions, including changes to how long a workcationer and/or digital nomad can stay and/or work in a respective jurisdiction including any conditions linked to a visa (if any) as well as the implications on dependents. One area that has been complicated by COVID-19 is the ability for digital nomads to undertake visa renewals, including through visa runs, where a digital nomad leaves a country briefly in order to renew their visa. For some, the issue has been about how and when they may be able to get back in to the jurisdiction in which they are based as a digital nomad;
3. whether there are any impacts from competition amongst jurisdictions looking to attract digital nomads as well as those that are looking to prevent "healthcare tourism"²⁴ as well as COVID-specific arrangements for non-residents. Some measures undertaken by EU-27 Member States and those further afield require non-residents

- to evidence they have sufficient insurance coverage as well as proof of available funds (or payment of a fee) to cover healthcare costs whether related to COVID-19 or otherwise. In some jurisdictions, certain policymakers and/or the local populace may view a highly-mobile global population as one of the reasons that COVID-19, variants and mutations have spread as they have;
4. benefits of having specific individual emergency planning and being ready to leave earlier than expected if circumstances warrant action, prolonged pandemic preparedness, responses to emergencies and natural disasters during 2020 and 2021 have proven that digital nomads should work out their own individual financial as well as emergency planning (including consideration of dependents), possibly coordinating this with their respective employer, to ensure that they can return to their habitual residence or another amenable jurisdiction as well as cut ties in a clear, clean and prompt fashion in that jurisdiction in the event circumstances warrant it. COVID-19 has already put pressures on certain expats and some jurisdictions have seen an expat exodus. The "Go or Stay" assessment is one that will likely need coordination between employer and employee; and
5. maintaining a current and periodically updated plan to return back to more traditional WFH or office-centric arrangements. Due to a number of factors those who have embarked on a digital nomad arrangement will also at some point return to their habitual residence and non-digital nomad working arrangements. This will require some careful planning both at the foreign as well as home jurisdiction and a detailed timeline for those to work through as part of their returning. This may also place pressures on finding housing, schooling and sorting out a host of other arrangements for those returning.

Financial services firms' policies and procedures, including in any DN Policy and/or Homeworking Policy may want to be drafted to accommodate some of these considerations above.



²⁴ , regardless of what insurance and travel return arrangements to the habitual place of residence that have been put in place, certain countries have been protecting own citizens' and permanent residents' access to healthcare over those that are merely temporarily in the jurisdiction whether as digital nomads or not.



Looking further ahead

The appeal of location-independent arrangements for financial services firms and their employees are certainly clear and they are likely to be here to stay. So too are the risks. For firms that want to get it right and do so for a sustainable and longer-term period regardless of any future pandemics, a careful balancing of factors is necessary. Some of these considerations and resulting arrangements are specific to firms and individuals. Firms will want to in their Homeworking and DN Policies take a continued and targeted approach in creating arrangements that work generally as well as those that are individual to the needs and circumstances of staff. Furthermore, firms' and employees' evaluation of tax principles will likely require a more proactive and on-going approach so as to facilitate solutions that work for all.

Even if it is conceivable (inasmuch as it would be very desirable) that the EU should roll-out a comprehensive approach to location-independent working across the EU's Single Market²⁵, some of the powers, notably as to tax, (currently) remain a national competence as opposed to

one exclusively conferred to the EU. The likelihood in the immediate term is rather that individual EU Member States and non-EU jurisdictions will press ahead on their own. Member States will establish arrangements that entice those that are permitted to work in a location independent manner for the benefit of that jurisdiction.

Certain countries have, as of 2021, taken steps to ensure a more efficient cross-border cooperation on tax and notably for those that would commute across borders. Germany for example is one such jurisdiction that has, as a result of COVID-19 travel bans and social distancing, agreed that certain days worked in Germany on a WFH basis (or in other adjacent EU Member States with whom bilateral agreements have been reached) would be treated as being worked in that state to which that person would have prior to COVID-restrictions have commuted. Consequently, financial services firms will want to consider their next steps as well as the longer-term strategic options and how best to adjust to this new dynamic.



Our work in helping clients plan ahead

PwC Legal's EU RegCORE along with PwC firms across the global PwC Network are assisting a number of financial services firms in navigating the risks and seizing the opportunities as part of their transition to "pandemic proofing" and digitising their business as well as working arrangements. This also extends to assisting clients with their general digital transformation projects and efforts on relevant:

1. Risk and gap analysis to assess WFH, LIWA and digital nomad specific risks and opportunities for new arrangements;
2. Reviewing and assessing critical dependencies between business units and legal entities and changes introduced by the pandemic and providing strategic advice in light of evolving regulatory requirements and supervisory expectations as set by the European Supervisory Authorities (EBA, ESMA, EIOPA and ECB(-SSM)) as well as national competent authorities (NCAs) in the EU as well as authorities further afield; and
3. Advising on policies and procedures governing WFH, LIWA and digital nomad arrangements as well as

redefining the interoperability of target operating models (TOMs) and three lines of defence arrangements (3LoD) in this new environment;

Moreover, PwC's lawyers and regulatory compliance professionals are also assisting clients with how to structure, implement and manage longer-term location-independent working arrangements from WFH to digital nomad arrangements, both domestically and internationally, in a sustainable manner that complies with financial regulatory, employment and tax law considerations across the relevant jurisdictions.

If you would like to discuss any of the considerations mentioned above, in particular how to forward-plan and benefit from changes as well as how these developments fit into the 2022 priorities of EU financial services supervisors and regulatory policymakers, or how they may affect your business more generally, please contact any of our key contacts or PwC Legal's EU RegCORE Team via: de_eufinreg@pwc.com.

²⁵ notably as the free movement of persons as well as the freedom to establish and provide services are two of the so-called Four Freedoms that underpin the foundations of the EU's Single Market,

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About us

In today's rapidly evolving marketplace, our clients are increasingly concerned with business collaborations, restructuring, mergers and acquisitions, financing and questions of social responsibility. They need legal security when dealing with such complex issues. That is why we work closely with PwC's tax, human resources and finance experts and draw on the resources of our legal network in more than 100 countries to deliver comprehensive advice. Whether a global player, a public body or a wealthy individual, each client can rely on a personal account manager to address his or her specific legal needs. This dedication helps us ensure our clients' long-term business success.

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