

**Bar Council Seminar: Preparing for the End of Transition (EU membership),
Tuesday 07 January 2021:**

Immigration issues for barristers

Information Note

Topics covered in the Seminar:

- Short-term business visits to EU states
- Court hearings, arbitrations, and advisory work
- Collecting fees from clients based overseas
- Visa requirements
- Frontier working under the Withdrawal Agreement
- Longer visits as independent professionals
- Establishment and residency
- Practice in relation to the Republic of Ireland
- Health insurance

Introduction

1. This seminar concerned the mobility provisions in the UK-EU Trade and Cooperation Agreement. The provisions may be found in Article Servin 4.3 and 4.4 and Annex Servin 3 and Annex Servin 4.
2. There are two mobility routes in the Treaty that are of interest to the independent Bar: (i) the provision made for *Short-term Business Visitors*, and (ii) the provision made for *Independent Professionals*.
3. Where provision for mobility is not made in the Treaty so that those provisions apply when seeking entry to an EU state under its immigration rules, a barrister seeking entry to an EU state in order to provide a service or to work must seek entry, permission to stay or reside, and authorisation to work, under the particular provision made in the local immigration rules of that EU state. *Individual states may make provision that is more generous than that provided in the Treaty, or less generous if they have taken reservations, so the Treaty is a starting point in that regard.*

Short-term Business Visitors under the Treaty

4. As things stand, UK nationals are visa-free as regards short-term visits and so are visa free in this category and can seek entry on arrival. They do not need to secure a visa prior to travel. However, it is possible that a particular EU state may impose a visa requirement for a particular short-term activity and so the local rules in the EU state concerned should always be consulted. Bear in mind that there is a degree of overlap between the activities allowed under the Treaty's short-term business visitor route and the Schengen area's rules for business visitors (UK nationals are visa-free when seeking entry under Schengen visitor rules). Note too that the Schengen area excludes some EU states and includes some non-EU states.
5. Short-term business visitors cannot take a fee from a client in the host state. (NB an individual EU state may permit a fee to be taken but where it does so, it would be doing so under its own rules. Local arrangements should always be checked. Where a particular EU state does allow a fee to be taken, a visa may be required. Note too that a visa to travel is not the same thing as a work permit authorising work on arrival, though a particular visa may authorise work.)
6. Short-term business visitors are to be admitted to an EU state subject to the following conditions:
 - (a) Not to engage in selling their goods or supplying services to the general public;
 - (b) Not, on their own behalf, to receive remuneration from within the Party where they are staying temporarily; and
 - (c) Not to engage in the supply of a service in the framework of a contract concluded between a legal person that has not established in the territory of the Party where they are staying temporarily, and a consumer there, except as provided for in Annex Servin-3.
7. Unless otherwise specified, an EU state must allow entry of UK nationals who are short-term business visitors *without the requirement of a work permit, economic needs test* or other prior approval procedures of similar intent (unless a reservation has been entered by the EU state concerned, see below).
8. The permissible length of stay is for a period of up to *90 days in any six-month period*.

9. The activities short-term business visitors are permitted to engage in are (NB remember, individual states may allow fewer activities where they have entered a reservation or, indeed, may allow additional activities at discretion):

- (a) *meetings and consultations*: natural persons attending meetings or conferences, or engaged in consultations with business associates;
- (b) *research and design*...
- (c) *marketing research*...
- (d) *training seminars*: personnel of an enterprise who enter the territory being visited by the Short-term business visitor to receive training in techniques and work practices which are utilised by companies or organisations in the territory being visited by the Short-term business visitor, provided that the training received is confined to observation, familiarisation and classroom instruction only;
- (e) *trade fairs and exhibitions*: personnel attending a trade fair for the purpose of promoting their company or its products or services;
- (f) *sales*: representatives of a supplier of services or goods taking orders or negotiating the sale of services or goods or entering into agreements to sell services or goods for that supplier, *but not delivering goods or supplying services themselves*. Short-term business visitors shall not engage in making direct sales to the general public;
- (g) *purchasing*: buyers purchasing goods or services for an enterprise, or management and supervisory personnel, engaging in a commercial transaction carried out in the territory of the Party of which the Short-term business visitor is a natural person;
- (h) *after-sales or after-lease service*...
- (i) *commercial transactions*: management and supervisory personnel and financial services personnel (including insurers, bankers and investment brokers) engaging in a commercial transaction for a legal person of the Party of which the Short-term business visitor is a natural person;
- (j) *tourism personnel*...
- (k) *translation and interpretation*..

10. EU non-conforming measures derogating from this general provision, include:

- (a) **CY, DK, HR**: Work permit, including economic needs test, required in case the short-term business visitor supplies a service.
- (b) **LV**: Work permit required for operations/activities to be performed on the basis of a contract.
- (c) **MT**: Work permit required. No economic needs tests performed.
- (d) **SI**: A single residency and work permit is required for the supply of services exceeding 14 days at a time and for certain activities (research and

design; training seminars; purchasing; commercial transactions; translation and interpretation). An economic needs test is not required.

- (e) **SK:** In case of supplying a service in the territory of Slovakia, a work permit, including economic needs test, is required beyond seven days in a month or 30 days in calendar year.
11. The Short-term Business Visitor provisions (Article Servin 4.3, Annex Servin 3) do not make any significant difference. The UK has not secured any ability for short-term business visitors to take a fee from a client in the host state (sometimes known as permitted paid engagement (PPE), see Article Servin 4.3. In other words, they cannot be paid by a host state client when they travel to provide services (though individual EU states may permit a fee to be taken at their discretion and on their terms, see above).
 12. This matters to the UK. It is the only route in the Treaty that is work-permit free and, at present, largely visa-free, so you can just board a plane and go, without first being required to obtain a visa. If you want to compete with EU citizens supplying services in each other's countries, you need to be able to take a fee from a customer, as EU citizens can do (e.g. a French service supplier in Germany). Moreover, the UK is a less attractive place to supply services for a fee if there is no visa-free route to do so quickly.
 13. In addition, only certain activities are permitted as short-term business visitors, although as already noted individual EU states may allow additional activities. UK nationals and EU Citizens can only travel to do a limited range of things (meetings, marketing, etc.), see Annex Servin 3, para 8. So, for example, under the Treaty, as a short-term business visitor, a lawyer cannot travel to provide legal advice. It is not within scope.
 14. In the Schengen Area (note, not all EU states participate) the Schengen business visitor rules do not contemplate a fee being taken from a customer in a host state by a business visitor. Thus, the matter falls to each EU state to administer its own visa and work permit arrangements for third country nationals (as UK nationals now are) who seek to provide services for a fee to EU customers. Note: the same applies to EU citizens who seek to do the same in the UK. UK rules will apply. Local rules may be more generous. But often they are not. Under current local rules, the Home Office only allows business visitor entry for *1 month* where a business visitor seeks to take a fee from a UK client. And even then, it only does so only in a highly restricted range of activities. That period is too short and the list of permitted activities too narrow. The Bar Council is advocating with the Home Office in this matter.
 15. Finally, the Treaty limits short-term business visitor migration to 90 days in any 6-month period. Home Office rules currently allow 6 months at a time), so there is no gain for those coming to the UK. Further, 90 days in any 6-

month period (actually 180 days) is the default limit under Schengen visitor rules, so UK nationals gain little there when seeking to travel to EU states.

16. In the result, as regards business visitors, while there is some particularity as to what activities are permitted, the list is still narrowly focused, no fees can be taken from a customer, and the permitted period for a business visitor appears to add little.

Independent Professionals

17. This is a route under which self-employed barristers may supply services on a time-limited basis and for a fee.
18. "independent professionals" means natural persons engaged in the supply of a service and established as self-employed in the territory of a Party who:
 - (i) have not established in the territory of the other Party;
 - (ii) have concluded a bona fide contract (other than through an agency for placement and supply services of personnel) for a period not exceeding 12 months to supply services to *a final consumer* in the other Party, requiring their presence on a temporary basis; and
 - (iii) possess, on the date of their application for entry and temporary stay, *at least six years professional experience in the relevant activity, a university degree or a qualification demonstrating knowledge of an equivalent level and the professional qualifications legally required to exercise that activity in the other Party.*
19. In the sectors, subsectors and activities specified in Annex Servin-4 and subject to the relevant conditions and qualifications specified therein:
 - (a) a Party must allow the entry and temporary stay of independent professionals in its territory;
 - (b) a Party shall not adopt or maintain limitations on the total number of independent professionals of the other Party allowed entry and temporary stay, in the form of numerical quotas or an economic needs test; and
 - (c) each Party shall accord to independent professionals of the other Party, with regard to the supply of their services in its territory, treatment no less favourable than that it accords, in like situations, to its own service suppliers.

20. Access accorded under this provision relates only to the service which is the subject of the contract and *does not confer entitlement to use the professional title of the EU state where the service is provided.*
21. The number of persons covered by the service contract must not be greater than necessary to fulfil the contract, as it may be required by the law of the EU state where the service is supplied.
22. The permissible length of stay shall be for *a cumulative period of 12 months, or for the duration of the contract, whichever is less.* It is possible that an individual EU state may allow a longer period. Local rules should always be checked.
23. Subject to reservations, the UK and EU states have taken commitments in accordance with Article Servin.4.4 with respect to Independent Professionals in the following sectors or sub- sectors:
- (a) *Legal advisory services in respect of public international law and home jurisdiction law;*
- (b)...
24. The EU's reservations, qualifying this general provision, are:
- (a) All Sectors:
- (i) In **AT**: Maximum stay shall be for a cumulative period of not more than six months in any 12 months period or for the duration of the contract, whichever is less.
- (ii) In **CZ**: Maximum stay shall be for a period of not more than 12 consecutive months or for the duration of the contract, whichever is less.
- (b) Legal advisory services in respect of public international law and home jurisdiction law:
- (i) In **AT, CY, DE, EE, FR, HR, IE, LU, LV, NL, PL, PT, SE**: None.
- (ii) In **BE, BG, CZ, DK, EL, ES, FI, HU, IT, LT, MT, RO, SI, SK**:
Economic needs tests.
25. In the sectors where economic needs tests are applied, for the EU, their main criteria will be the assessment of the relevant market situation in the EU state

or the region where the service is to be provided, including with respect to the number of, and the impact on, services suppliers who are already supplying a service when the assessment is made.

26. Note that in addition to the list of reservations, an EU state may adopt or maintain a measure relating to qualification requirements, qualification procedures, technical standards, licensing requirements or licensing procedures that does not constitute a limitation within the meaning of Article Servin.4.4. Such measures, which include requirements to obtain a licence, obtain recognition of qualifications in regulated sectors or to pass specific examinations, such as language examinations, even if not listed, apply in any case to contractual service suppliers or independent professionals.
27. The Treaty does not prevent an EU state imposing a visa-requirement. The rules for the relevant state will need to be checked when seeking to make use of this route.
28. Only certain activities are allowed under this route. For example, as regards lawyers, only legal *advisory* services and *not* advocacy or representation is permitted, see Annex Servin 4, paras 10 and 11. And even then, *only* in the areas of public international law and home jurisdiction law (note, not EU law). If you want to appear as an advocate, whether in a public court or tribunal or in an arbitration, this is not a mobility route for you. Whether or not your qualification is recognised or you are permitted to practice under local regulation, there is not a mobility route for advocacy in courts or public tribunals of the EU and Member States (Mode 4 (Fly-in-fly-out) supply). Thus, you will need to check two other sources of mobility rights: (i) the provision made for entry for work under the particular immigration rules of the EU state concerned, and (ii) if appearing before a court that is itself constituted under an international treaty (e.g. CJEU, ICJ, ICC, etc.), whether that agreement or the governing statute provides for entry to the territorial jurisdiction where the court is situated for the purposes of representation.
29. Each EU state will be able to set its own visa/work permit rules for activities that fall outside the permitted scope of these provisions. UK nationals who seek to supply such services will need to comply with local rules.
30. Further, under the Treaty each entry will be for a maximum of 12 months or for the contract's duration, whichever is less (though an individual EU state may permit a longer period). Thus, this is not a route for professional people who make a success of their businesses, get repeat work, and seek to become established in the host state.

Longer visits as independent professionals

31. When a UK national who is an independent professional seeks to enter and stay in an EU state for more than 12 months or seeks to stay beyond 12 months, they must seek to do so under the particular provision made by an EU state at its discretion under its immigration rules. In such cases, the Treaty, as applied by the EU state concerned, adds nothing.

Establishment and residency

32. When a UK national who is an independent professional seeks to establish themselves in an EU state and to reside there, they must seek to do so under particular provision made by an EU state at its discretion under its immigration rules. In such cases, the Treaty, as applied by the EU state concerned, adds nothing.

Frontier Workers under the Withdrawal Agreement

33. Frontier Workers live in one EU member state and work in at least one other. EU citizens who are frontier workers exercise rights of free movement under the EU Treaties and need no special immigration rules (though special provision is made for them and their family members in the Co-ordination of Social Security Regulation (883/2004)).
34. When the Brexit transition period ended at 11 pm on 31 December 2020 free movement between the UK and EU member states ended. What happened to those frontier workers who, for example, live in France or Belgium and work in the UK (or vice versa)?
35. The provision made in the UK's EU Withdrawal Agreement is straightforward. However, you will also need to check provision in each EU state as to how this provision has been transposed and implemented.
36. Under the Agreement, 'frontier workers' are EU citizens or United Kingdom nationals who pursue an economic activity in accordance with Article 45 (free movement of workers) or 49 (right of establishment, e.g. as self-employed) of the Treaty on the Functioning of the European Union (TFEU) in one or more states *in which they do not reside* (article 9, Withdrawal Agreement).
37. Thereafter, 'state of work' means, in respect of United Kingdom nationals, an EU member state in which they pursued an economic activity as frontier workers before the end of the Brexit transition period (31 December 2020) and in which they continue to do so thereafter (note for UK nationals they are only

frontier workers in the EU member states in which they have worked and not in all EU member states).

38. There are several important points to note about this short formulation:

- (i) What matters is the pursuit of economic activity but no minimum period of time for its exercise is specified.
- (ii) The exercise of economic activity must be in accordance with EU law, so any abuse of rights (something narrowly construed by the CJEU) will not count.
- (iii) The exercise of economic activity must be before the end of the Brexit transition period (11pm on 31 December 2020).
- (iv) A UK national must continue to be economically active in one or more EU member states thereafter.

39. The rights of family members of frontier workers extend to rights of residence in the frontier worker's state of work.

40. In common with other self-employed persons, self-employed frontier workers have a series of work-related rights protected by the Withdrawal Agreement. These include all rights protected by Article 49 TFEU (right of establishment, e.g. as self-employed) and embrace matters such as the right to social advantages in the state of work (article 25, Withdrawal Agreement).

41. In particular, self-employed frontier workers enjoy the right to enter and exit the state of work (in accordance with Article 14 of the Withdrawal Agreement), and they retain the rights they enjoyed as self-employed persons there provided they are in one of the circumstances where self-employed status may be retained under the Free Movement Directive (2004/38/EC, article 7(3)(a) (b), (c), and (d)) (temporary illness, unemployment, vocational training), even where they do not move their residence to the state of work.

42. The right to enter and exit the state of work is an immigration right in the sense that it provides for a right of admission and a right to leave. It creates rights at the national border and removes the discretion of the state of work to grant or refuse permission to enter or leave.

43. The state of work may require United Kingdom nationals who have rights as frontier workers to apply for a document certifying that they have such rights. Where it does so, United Kingdom nationals have the right to be issued with such a document (article 26, Withdrawal Agreement).

44. No exit visa, entry visa or equivalent formality may be imposed on the holder of a valid document certifying frontier worker rights.
45. Discrimination on grounds of nationality (as defined in article 18 of the TFEU) is prohibited in the state of work. There are also specific rights to equal treatment for employed frontier workers (article 24, Withdrawal Agreement) and self-employed frontier workers (article 25, Withdrawal Agreement).

Practice in the Republic of Ireland

46. Under Common Travel Area arrangements made between the UK and Ireland, as regards mobility and migration, UK nationals are permitted to enter and reside in Ireland and to work there. These arrangements are bilateral and not provided for by any agreement with the EU.

Co-ordination of Social Security, Healthcare, and Pensions

47. There is a Protocol on Social Security Co-ordination as part of the Trade and Cooperation Treaty. Generally speaking, UK Nationals working temporarily as independent professional in an EU state will continue to pay national insurance contributions in the UK but be able to receive specified cash benefits and public healthcare (benefit in kind) in the state in which they are staying temporarily, subject to local qualifying conditions of general application.

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