

Posting Workers to the UK from other EU jurisdictions

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Posting workers from other EU/EEA member states

- The Court of Justice case of *Van der Elst* C-43/93 [1994] ECR I-03803 established that, provided certain criteria are met, non-EEA nationals working for an EU employer in the EU should be allowed to provide services in another Member State without the need to obtain a work permit.
- This means that an established non-EEA employee of an EU company in the EU can come to the UK to provide a service on behalf of the company without a work permit. Entry clearance is mandatory for both visa and non-visa nationals.
- www.gov.uk/government/publications/non-eea-and-swiss-nationals-working-in-the-eu-eun04

The basic guidance

EUN4.1 What requirements do non-EEA nationals working for EU employers in the UK need to meet?

The requirements to be met by the employee are that they:

- are lawfully resident in the EU Member State in which the employer is established;
- are lawfully and habitually employed by an employer who is temporarily providing a service in the UK;
- do not intend to take any other employment;
- intend to leave the UK at the end of the period during which his employer is providing the service.

The basic guidance

EUN4.2 What is the visa endorsement for non-EEA nationals working for EU employers?

- D: FOR EMPLOYMENT WITH [add NAME OF COMPANY], Code 4
- Visas should be issued for the length of the contract with the EU employer.
- Applications from family members should be handled in the same way as EEA family permit applications. However, they will not receive EEA Family Permits but dependant visas endorsed:

D: TO JOIN/ACC [NAME OF VAN DER ELST EMPLOYEE], Code 1

The basic guidance

EUN4.3 What requirements do non-EEA/ Swiss nationals working for Swiss employers in the UK need to meet?

- Non-EEA / Swiss national workers (posted workers) of Swiss companies may come to the UK to provide services on behalf of those companies. This is similar to Vander Elst applications but Swiss posted workers are only permitted to work in the UK for a total of 90 days in one calendar year. Visas should be limited to the period of the applicant's intended stay in the UK, up to 90 days.

The basic guidance

EUN4.4 What is the visa endorsement for non-EEA nationals working for Swiss employers?

- Endorsement: FOR EMPLOYMENT WITH [add NAME OF COMPANY], Code 4
- Visas should be issued for the length of the contract with the Swiss employer. Swiss posted workers may NOT be accompanied by their family members.

The basic guidance

EUN4.5 How do I refuse and what are the appeal rights?

- If the applicant does not meet the above criteria they fall to be refused under Paragraph 128 of the Immigration Rules for lack of a work permit. Refusals do not attract a full right of appeal.

A solution to the Tier 2 cap?

Undertakings established in one EU member state may provide services in another EU member state.

1. They may do so by posting workers from the member state of establishment to the member state in which the service is to be provided.
1. In addition to posting workers to provide the services directly, an undertaking may post workers from the member state of establishment to an undertaking owned by the group in another member state by way of intra-group transfer.
1. It may also hire-out its workers to a user undertaking in another member state.

EU Treaty Law

- Generally, restrictions on the freedom to provide services in another member state are prohibited. Article 56 of the Treaty on the Functioning of the European Union (TFEU) (ex Article 49 Treaty on the European Community (TEC)) provides:

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

EU Treaty Law

- Services are considered to be ‘services’ where normally provided for remuneration and insofar as they are not governed by other EU free movement provisions.
- A service provider may *temporarily* pursue an activity in another member state where the service is provided, under the same conditions as are imposed by that state on its own nationals.

EU Treaty Law

Article 57 TFEU (ex Article 50 TEC) provides:

- Services shall be considered to be ‘services’ within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.

‘Services’ shall in particular include:

- (a) activities of an industrial character;
- (b) activities of a commercial character;
- (c) activities of craftsmen;
- (d) activities of the professions.

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

Help from Labour Law

- Where workers are posted from one EU member state to another in order to provide services, they enjoy a measure of protection as regards the terms and conditions of their employment.
- See Directive 96/71/EC of the Council of 16 December 1996 concerning the posting for workers in the framework of the provision of services.

Directive 96/71/EC applies to undertakings established in a member state, which in the framework of the transnational provision of services post workers by one of three transnational measures (art 1(3)). The Directive applies where undertakings:

- (a) *post workers to the territory of a member state on their account and under their direction, under a contract concluded between the undertaking making the posting and the party for whom the services are intended, operating in that member state, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting; (i.e. the service is provided directly by the undertaking making the posting)*
- (b) post workers to an establishment or to an undertaking owned by the group in the territory of a member state, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting; (i.e. there is a transfer from one undertaking in a group to another) or
- (c) being a temporary employment undertaking or placement agency, hire out a worker to a user undertaking established or operating in the territory of a member state, provided there is an employment relationship between the temporary employment undertaking or placement agency and the worker during the period of posting. (i.e. workers are hired out to a user undertaking in another member state)

Directive 96/71/EC

For the purposes of Directive 96/71/EC a posted worker means a worker who, *for a limited period*, carries out his work in the territory of a member state other than the state in which he *normally works* (art 2).

Requirements imposed by states

- The freedom to provide services as protected by the TFEU (and previously by the TEC) precludes a member state from making the movement of its staff subject to restrictions such as a condition as to engagement in situ or an obligation to obtain a work permit, *C-113/89 Rush Portuguesa Ld* [1990] ECR I-01417 at [12].
- Requirements to secure work permits and to meet the attendant costs of such permits may not be imposed.

Requirements imposed by states

- Further, posted workers providing services on behalf of an undertaking may be nationals of a member state or nationals of a non-member state, see *C-43/93 Vander Elst* [1994] ECR I-03803.
- Such checks as are imposed must observe the limits imposed by EU law and the freedom to provide services in particular which cannot be rendered illusory and whose exercise may not be made subject to the discretion of national authorities, *Rush Portuguesa Ld* at [17].

Requirements imposed by states

- An examination of the case law reveals that states have imposed a wide variety of requirements with the aims of protecting:
 - (i) the social welfare of the workers posted, and
 - (ii) the local labour market.
- The Court of Justice has recognised that this is an area that has been coordinated rather than harmonised at EU level
- Further, in respect of the ancillary administrative rules used by Member States to monitor and to ensure compliance with the employment terms and conditions of posted workers, there has been neither coordination nor harmonisation.

In C-445/03 *Commission v Luxembourg* [2004] ECR I-10191...

....Luxembourg sought to impose requirements on a service provider established in another Member State, which sought to deploy in Luxembourg its workforce of nationals of non-Member States who were lawfully resident with permission to work in the Member State of establishment, so that prior work permits were mandatory to work in Luxembourg and their issuance was subject to:

- (i) considerations relating to the employment market,
- (ii) contracts of indefinite duration,
- (iii) previous employment with the same service provider for at least six months, and
- (iv) a minimum bank guarantee.

In C-445/03 *Commission v Luxembourg* [2004] ECR I-10191...

31 A measure which would be just as effective whilst being less restrictive than the measure at issue here would be an obligation imposed on a service-providing undertaking *to report beforehand to the local authorities on the presence of one or more deployed workers, the anticipated duration of their presence and the provision or provisions of services justifying the deployment.* It would enable those authorities to monitor compliance with Luxembourg social welfare legislation during the deployment while at the same time taking account of the obligations by which the undertaking is already bound under the social welfare legislation applicable in the Member State of origin.

In C-445/03 *Commission v Luxembourg* [2004] ECR I-10191...

46 An obligation imposed on a service-providing undertaking *to provide the local authorities with information showing that the situation of the workers concerned is lawful as regards matters such as residence, work permit and social coverage in the Member State in which that undertaking employs them* would give those authorities, in a less restrictive but just as effective a manner as the requirements at issue here, a guarantee that the situation of those workers is lawful and that they are carrying on their main activity in the Member State in which the service-providing undertaking is established. *Combined with the information provided by that undertaking concerning the anticipated period of deployment* (see paragraph 31 of this judgment), that information would enable the Luxembourg authorities to take, as appropriate, the measures necessary at the end of that period.

(emphasis supplied)

By what means may such reporting to national authorities in the member state where the service is to be provided take place? – A simple prior declaration may suffice.

Other illustrative cases

- C-244/04 *Commission v Germany*
- C-219/08 *Commission v Belgium*
- C-515/08 *Vitor Manuel dos Santos Palhota*

Accession State issues

- In C-307/09 *Vicoplus SC PUH* (and two other linked cases) the Court of Justice confirmed that articles 56 and 57 TFEU do not preclude a member state from making, during the transitional period, the hiring-out of workers within the meaning of Article 1(3)(c) of Directive 96/71/EC, on its territory, who are accession state nationals, subject to the obtaining of a work permit.
- The posting of workers under article 1(3)(a) or 1(3)(b) is not so restricted, so the provision of the service directly by the worker posted, or an intra-group transfer achieved by posting a worker is not so restricted.

Abuse of Posted Worker route

- The Court of Justice has been vigilant to ensure that there is no abuse of the freedom to provide services by undertakings established by nationals of a first Member State in another Member State in order to avoid national rules in the first Member State in which they seek to provide a service.
- See for example C-33/74 *Van Binsbergen* [1974] ECR 01299, C-23/93 *TV10* [1994] ECR I-04795, C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I- 01459 and C-255/02 *Halifax plc v Commissioners of Customs and Excise* [2006] ECR I-01609.

Home Office stance, January 2012

The position as it stands is that the arrangements we have put in place to implement the Vander Elst judgment are not intended to make generic provision for posted workers as they are defined in the Posted Workers Directive. The latter is principally concerned with terms and conditions of employment of those workers falling within its scope on the territory of the receiving State.

Broadly speaking, the “Vander Elst” visa category is concerned with non EEA posted workers falling within Article 3(a) of the Directive.

Those falling within Article 3(b) of the Directive will be regarded as an intra-company transfer requiring authorisation under the relevant Tier 2 category of the Points Based System. To do otherwise would require UKBA to distinguish intra-company transfers who are posted solely in the context of supplying a service from those posted to fill a substantive vacancy.

Home Office stance, January 2012

In the case of those falling within Article 3(c), we would not necessarily consider such workers to benefit from the arrangements for “Vander Elst” workers and would consider that a work permit requirement can be applied to such workers. The question of whether a work permit requirement can be required of workers falling within Article 3 (c) of the Posted Workers Directive was recently the subject of an ECJ judgment in the case of Vicoplus (C-307/09).

In that case, the ECJ found that the Treaty does not preclude Member States from applying work permit requirements in respect of workers who are hired out within the meaning of Article 1(3)(c). While that judgment was specifically concerned with the application of a work permit requirement to nationals of accession states under the transitional arrangements for which the Accession Treaties provide, UKBA’s view is that the principles apply equally to cases involving third country nationals posted in similar circumstances.