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DIRECTORATE-GENERAL EMPLOYMENT, SOCIAL AFFAIRS AND INCLUSION
DIRECTORATE-GENERAL MIGRATION AND HOME AFFAIRS
DIRECTORATE-GENERAL JUSTICE AND CONSUMERS
DIRECTORATE-GENERAL TRADE

Brussels, 6 October 2020

REV2 – replaces the notice (REV1) dated
5 October 2020¹

NOTICE TO STAKEHOLDERS

WITHDRAWAL OF THE UNITED KINGDOM AND EU RULES ON POSTING OF WORKERS

Since 1 February 2020, the United Kingdom has withdrawn from the European Union and has become a “third country”.² The Withdrawal Agreement³ provides for a transition period ending on 31 December 2020. Until that date, EU law in its entirety applies to and in the United Kingdom.⁴

During the transition period, the EU and the United Kingdom will negotiate an agreement on a new partnership, providing notably for a free trade area. However, it is not certain whether such an agreement will be concluded and will enter into force at the end of the transition period. In any event, such an agreement would create a relationship which, in terms of market access conditions, will be very different from the United Kingdom’s participation in the internal market,⁵ in the EU Customs Union, and in the VAT and excise duty area.

Therefore, all interested parties, and especially economic operators, are reminded of the legal situation applicable after the end of the transition period. In this context, this notice also explains certain relevant separation provisions of the Withdrawal Agreement.

Please note: This notice does not address:

¹ Version REV2 corrects an error in section 1 of the version REV1 dated 5 October.

² A third country is a country not member of the EU.

³ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJ L 29, 31.1.2020, p. 7 (“Withdrawal Agreement”).

⁴ Subject to certain exceptions provided for in Article 127 of the Withdrawal Agreement, none of which is relevant in the context of this notice.

⁵ In particular, a free trade agreement does not provide for internal market concepts (in the area of goods and services) such as mutual recognition, the “country of origin principle”, and harmonisation. Nor does a free trade agreement remove customs formalities and controls, including those concerning the origin of goods and their input, as well as prohibitions and restrictions for imports and exports.

- sectorial EU legislation on the provision of services, such as EU legislation on financial services, transport services, digital services, telecommunication services and business services;
- EU company law;
- the right to reside, as well as general immigration law in the EU;
- entry conditions for short-term stays in the EU;
- the recognition of professional qualifications when providing services in the EU;
- indirect taxation (value added tax – VAT) of services supplied in the EU.

For these aspects, other notices are in preparation or have been published.⁶

After the end of the transition period, Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services⁷ no longer applies to the United Kingdom. This has in particular the following consequences:

1. POSTING OF WORKERS AFTER THE END OF THE TRANSITION PERIOD (AS OF 1 JANUARY 2021)

Directive 96/71/EC provides for a legal framework that applies to undertakings established in an EU Member State, which post workers to another EU Member State.

After the end of the transition period, Directive 96/71/EC no longer applies to:

- Undertakings established in an EU Member State (“EU undertakings”) sending (“posting”) workers to the United Kingdom; and
- Undertakings established in the United Kingdom (“UK undertakings”) sending (“posting”) workers to the EU.

Rather, in these cases, after the end of the transition period the following applies as regards posting of workers to the EU:

- **national law of the EU Member States will apply**, taking into account also commitments in the future EU-UK partnership agreement, and the commitments and qualifications made by the EU (and its Member States) in the framework of the WTO General Agreement on Trade in Services (GATS) in relation to the temporary presence of certain categories of natural persons in the EU to supply services.⁸

⁶ https://ec.europa.eu/info/european-union-and-united-kingdom-forging-new-partnership/future-partnership/preparing-end-transition-period_en

⁷ OJ L 18, 21.1.1997, p. 1.

⁸ The commitments and qualifications are accessible here: https://www.wto.org/english/tratop_e/serv_e/serv_commitments_e.htm

- According to Article 1(4) of Directive 96/71/EC, in applying national law in case of posting of workers, Member States cannot **give more favourable treatment to undertakings** established in a third country than to undertakings established in the EU. Thus, as from the withdrawal date, Member States must ensure that workers sent (“posted”) to their territory by undertakings established in the United Kingdom are granted at least the terms and conditions of employment applicable to workers posted to that Member State by an undertaking established in the EU.
- The exception to these general principles is the case of **intra-corporate transferees**, namely managers, specialists and trainee employees, transferred to the EU by companies established in the United Kingdom, to which EU law applies.⁹ The Directive harmonises the conditions for entry, stay and intra-EU mobility of third-country national workers transferred by a group of undertakings based outside the EU to an entity of the same group based on the EU territory. The Directive covers stays of up to 3 years for managers and specialists and up to 1 year for trainees, and ensures equal treatment as regards remuneration and the social security branches covered by Regulation (EC) No 883/2004 on the coordination of social security systems.¹⁰

Moreover, after the end of the transition period Directive 96/71/EC continues to apply where an EU undertaking posts a UK national who is legally residing and working in an EU Member State to another EU Member State, without prejudice to national laws relating to the entry, residence and access to employment of third-country workers to the extent that these laws comply with EU law.¹¹ According to the *Vander Elst* case-law of the CJEU,¹² it constitutes a restriction of the freedom to provide services by a Member State (host country) to make third-country workers who are regularly and habitually employed by a service provider established in another Member State and who are posted to the first Member State subject to administrative formalities, such as the obligation to obtain a work permit. Such a restriction complies with the freedom to provide services only if it is justified on the basis of a legitimate public interest and proportionate.

2. WORKERS BEING POSTED AT THE END OF THE TRANSITION PERIOD BY EU UNDERTAKINGS IN THE UNITED KINGDOM AND BY UK UNDERTAKINGS IN THE EU

This section addresses a situation where a worker is posted by an EU undertaking in the United Kingdom and by an UK undertaking in the EU before the end of the transition period, and the worker is still being posted at the end of that period in the United Kingdom or the EU respectively.

⁹ Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer: OJ L 157, 27.5.2014, p. 1. This Directive does not apply to Ireland and Denmark.

¹⁰ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166, 30.4.2004, p. 1.

¹¹ Cf. Recital 20 of Directive 96/71/EC.

¹² Judgment of the Court of Justice of 9 August 1994, *Vander Elst*, C-43/93, ECLI:EU:C:1994:310, and judgment of the Court of Justice of 21 October 2004, *Commission v Luxembourg*, C-445/03, ECLI:EU:C:2004:655. See also judgment of the Court of Justice of 19 January 2006, *Commission v Germany*, C-244/04, ECLI:EU:C:2006:49.

After the end of the transition period, these workers no longer fall within the scope of Directive 96/71/EC. Moreover, unless these workers meet the conditions of EU law on free movement of EU citizens they do not fall within the scope of the Withdrawal Agreement (see below).

This has the following consequences for the right to stay (see below, 2.1), to provide services (see below, 2.2), and social security rights (see below, 2.3).

2.1. Right to stay

2.1.1. Directive 96/71/EC

Directive 96/71/EC ceases to apply and hence does not give a right to such workers to stay in the host county after the end of the transition period.

2.1.2. The Withdrawal Agreement

The Withdrawal Agreement does not give a right to such workers to stay in the host country, where they rely solely in their capacity as posted workers.¹³

However, where UK or EU nationals posted in the EU or the United Kingdom respectively also undertook other activities in the host State before the end of the transition period, under Articles 21, 45 or 49 TFEU or under Directive 2004/38/EC¹⁴, they may qualify as Withdrawal Agreement beneficiaries in accordance with Article 13 of the Withdrawal Agreement.¹⁵

2.1.3. EU law

UK national posted workers may also be covered by the EU's legal migration acquis, such as the long-term residents Directive 2003/109/EC¹⁶ and the EU Blue Card Directive 2009/50/EC¹⁷ or by other provisions in EU law.¹⁸

¹³ This has also been clarified in the Guidance Notice on Part Two of the Withdrawal Agreement: C(2020) 2939 final, section 1.2.2.1. The guidance note is available at https://ec.europa.eu/info/publications/guidance-note-citizens-rights_en.

¹⁴ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158, 30.4.2004, p. 77.

¹⁵ An example could be the case of a UK national posted to an EU Member State at the end of the transition period who commenced to study at a university there before the end of the transition period and meets the conditions of Article 7(1)(c) of Directive 2004/38/EC.

¹⁶ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16, 23.1.2004, p. 44.

¹⁷ Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L 155, 18.6.2009, p. 17.

¹⁸ For example, this could be the case of a UK national who is at the end of the transition period posted to an EU Member State in which his/her EU spouse resides and works in accordance with Article 7(1)(a) of Directive 2004/38/EC.

2.1.4. National law (UK law or national law of an EU Member State)

Furthermore, after the end of the transition period, Member States may grant UK national posted workers, and the United Kingdom may grant EU national posted workers a right of residence on the basis of

- (for workers posted to the United Kingdom) on domestic UK legislation; and
- (for workers posted to the EU) on EU legislation (see above) and national law of the EU Member States.

2.2. Right to provide services

After the end of the transition period, the possibilities for posted workers to provide services (where they rely solely on their capacity as posted workers) will depend:

- (for workers posted to the United Kingdom) on domestic UK legislation; and
- (for workers posted to the EU) on EU legislation and national law of the EU Member States (see above).

2.3. Social security rights

Neither Directive 96/71/EC, nor the Withdrawal Agreement include such workers in the scope of Regulation (EC) No 883/2004.¹⁹ Thus, there will be no coordination of social security under EU law after the end of the transition period for a posting started before the end of the transition period that is linked to the provision of services.

However, workers posted within the meaning of Article 12 of Regulation (EC) No 883/2004, whose posting is not linked to the provision of services (e.g. posting for training purposes or attending a conference) do fall within the scope of the Withdrawal Agreement and the Regulation (EC) No 883/2004 continues to apply after the end of the transition period under the conditions set out in the Withdrawal Agreement.

The websites of the Commission on the posting of workers (<https://ec.europa.eu/social/main.jsp?catId=471>) and intra-corporate transfer (https://ec.europa.eu/home-affairs/what-we-do/policies/legal-migration/work_en) provide more general information. These pages will be updated with further information, where necessary.

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¹⁹ This has also been clarified in the Guidance Notice on Part Two of the Withdrawal Agreement: C(2020) 2939 final, section 1.2.2.21. The guidance note is available at https://ec.europa.eu/info/publications/guidance-note-citizens-rights_en.