

AFB WORKSHOP: MANAGING CONDUCT ISSUES FOR VISITORS TO THE UK FROM HEAD OFFICE AND AFFILIATES

SCENARIOS – MODEL ANSWERS

SCENARIO 1

- An overseas employee performs regulated activities from or for the UK branch of Norden Capital Bank AG (a German headquartered bank).
- The employee commits an act whereby he fails to act with integrity or with due skill, care and diligence.
- The employee then returns to their home country and becomes unresponsive or uncooperative with any subsequent investigation.
- The branch had limited visibility of the individual's activities whilst in the UK; no visitor log; no pre-visit notification.

Question 1: Was the individual subject to COCON at the time of the breach? On what basis?

Yes. COCON 1.1.10R provides that COCON applies to conduct rules staff where their conduct is performed from an establishment maintained in the United Kingdom by the SMCR firm. He was performing regulated activities from or for the UK branch - that is, from a UK establishment - and COCON applied on that basis.

COCON 1.1.2R, row (5) expressly provides that COCON applies to an employee of an SMCR firm who would be performing an FCA certification function but for SYSC 27.5.3R (the temporary UK role exclusion). The 30-day exclusion disapplies the certification obligation only. The obligation to comply with COCON's conduct rules survives it entirely.

Failing to act with integrity or with due skill, care and diligence constitutes a clear breach of COCON 2.1.1R – the requirement to act with integrity – and COCON 2.1.3R – the requirement to act with due skill, care and diligence.

Question 2: Does it matter whether the individual was Certified? What difference does FIT make?

Yes - it matters significantly.

If Certified: the individual is subject to both COCON and FIT. FIT is broader than COCON: it can take into account matters arising in or outside the UK and matters with no direct work nexus. A failure to act with integrity or with due skill, care and diligence is a serious matter and would be

highly relevant to a FIT assessment. The branch must consider whether to revoke or decline to renew the individual's certificate and must assess its regulatory reference obligations.

If not Certified: COCON can still apply to the individual as other conduct rules staff, where the territorial conditions under COCON 1.1.10R are met - and they are here. However, FIT does not apply to non-certified employees. Non-financial misconduct would only be relevant to the extent it falls within COCON's scope, i.e. where there is a work nexus.

Question 3: What are the obligations on the UK branch's approved Senior Manager(s)?

The branch's approved Senior Manager(s) retain full regulatory accountability. That accountability does not transfer offshore because the individual has returned to Frankfurt.

In practical terms, the responsible Senior Manager must:

- Commission an adequate investigation promptly and retain personal oversight - COCON 2.2.1R (SC1) requires Senior Managers to take reasonable steps to ensure that the business of the firm for which they are responsible is controlled effectively.
- Assess whether FCA notification is required - COCON 2.1.3R (Rule 3) requires all conduct rules staff to be open and cooperative with the FCA and other regulators. More specifically, COCON 2.2.4R (SC4) imposes a duty on Senior Managers to disclose appropriately any information of which the FCA or PRA would reasonably expect notice - including making a disclosure in the absence of any request or enquiry from the regulator.
- Restrict or remove the individual's responsibilities pending the outcome.
- Ensure evidence is preserved and secured immediately.

Question 4: How does the branch investigate effectively where the individual is overseas and uncooperative?

The individual's uncooperativeness is not a reason to stop - it is a reason to document, escalate and proceed on the available evidence:

- **Preserve evidence immediately** - emails, records of activity, system access logs and communications data - in compliance with UK GDPR and applicable German data protection law.
- **Restrict system access** - coordinate with group IT cross-border.
- **Seek cooperation through group channels** - engage the overseas parent's HR, legal and compliance teams; document all requests and responses received (or not received).
- **Give the individual a genuine opportunity to respond** - in writing or by video; document any refusal.
- **Proceed on available evidence** - if the individual refuses to engage, provided the opportunity to respond has been properly offered and recorded.
- **Assess FCA notification obligations promptly** - do not assume the group is handling this. SC4 imposes a duty on the Senior Manager to disclose appropriately any

information of which the FCA would reasonably expect notice, including in the absence of a request or enquiry.

Question 5: How should the branch ensure oversight where it had limited visibility of the individual's activities?

Limited visibility is itself a governance failure. The key practical steps are:

- **Implement a Third-Party Visitor Policy** requiring pre-visit notification for all visiting personnel regardless of certification status, with function-testing before arrival.
- **Maintain a compliant visitor log** recording who visited, when, what functions were performed, who supervised them, and whether the SYSC 27.5.3R conditions - overseas base, 30-day aggregate day-count, and appropriate supervision - were checked and satisfied.
- **Apply monitoring controls** - restricted system access, activity monitoring, management information, and escalation triggers for unusual activity.
- **Reflect recurring visiting arrangements** in the Management Responsibilities Map and the relevant Senior Manager's Statement of Responsibilities.
- **Escalate control deficiencies** - if the branch cannot obtain sufficient information to supervise an activity, restrict access and escalate to the responsible Senior Manager and, where appropriate, to the FCA.

Question 6: What are the employment law dimensions? Who has authority to suspend? What process governs?

The employment law process must run in parallel with - and be coordinated with - the regulatory investigation from day one.

Does UK employment law apply? Possibly yes. The employment relationship must have a "strong connection with Great Britain". Where the employee is based and where they habitually work can be decisive - but the following may be considered:

- The degree to which their work is connected to UK operations;
- Who manages and supervises them in practice;
- Where they are paid and in what currency;
- Where their career decisions are made; and
- The regularity and purpose of UK visits.

An overseas employee regularly performing regulated activities from or for the UK branch may well satisfy that test regardless of his Frankfurt contract.

Who has authority to suspend? This must be established - it does not flow automatically. The branch must identify the employing entity, the person with contractual authority to suspend, and whether German mandatory procedural requirements (including any works council obligations)

apply. UK law provides that suspension is not a neutral act. Suspension must be justified (preferably in writing) to avoid issues.

What process governs? If UK employment law rights apply, the disciplinary process must comply with the relevant ACAS Code of Practice (which is in the process of being revised). Failure to comply with the Code can result in a compensation uplift of up to 25% under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 where the failure was unreasonable. The individual is entitled to: written notice of allegations; a reasonable opportunity to respond; the right to be accompanied; and a right of appeal. Engage UK employment counsel early - home-country HR are unlikely to be familiar with UK requirements.

Comply with UK GDPR and inform those overseas of the risk of DSARs / how to avoid damaging the defence of a claim.

Key additional points:

- Section 43B(2) of the Employment Rights Act 1996 provides that it is immaterial whether the relevant failure occurred in the UK or elsewhere - whistleblowing protection may apply to disclosures made during the UK visit relating to conduct occurring overseas.
- If the individual is a sponsored employee, suspension or dismissal may trigger Home Office reporting obligations - take immigration advice promptly.
- Evidence gathering must comply with UK GDPR and applicable German data protection law.

SCENARIO 2

- A Certified employee of Norden Capital Bank AG visits the UK solely to see their own UK-based clients (fly-in, fly-out) – not performing any activity for or from the UK branch.
- They undertake a regulated activity in the UK – e.g. advising on or managing investments – and/or engage in non-financial misconduct (e.g. harassing a customer or colleague).
- The UK branch may not be aware the individual has even travelled to the UK – no pre-visit notification; no visitor log.
- Secondary element: a non-Certified employee visiting UK-based clients on a fly-in, fly-out basis for fewer than 30 days in a 12-month period – not performing any regulated activity for or from the UK branch.

Question 1: The UK branch may be unaware of the visit - how should the branch ensure proper oversight?

Unawareness is a governance failure, not a defence. The branch should implement:

- **Mandatory pre-travel notification** - overseas employees must notify UK compliance before any UK business travel, identifying proposed activities, duration, clients and certification status.
- **Detection controls** - HR and travel data, access-card records, IT log-ins and expense claims should be used to identify unnotified visits.
- **Clear allocation of responsibility** - SYSC 26 requires the branch to allocate management responsibility for its activities. Oversight of incoming visitors must be allocated to a named, sufficiently senior individual and documented.
- **Group-wide awareness** - head office and affiliate HR and compliance teams must understand that any UK business travel falls within the branch's regulatory oversight framework, whether arranged by the branch or not.

Question 2: Is the Certified individual subject to COCON in these circumstances? What about FIT?

COCON - Yes. The 30-day exclusion in SYSC 27.5.3R disapplies the certification obligation only. COCON 1.1.2R, row (5) expressly provides that COCON continues to apply to an employee who would be performing an FCA certification function but for SYSC 27.5.3R.

On territorial scope: for an overseas SMCR firm such as Norden Capital Bank AG, COCON applies to other conduct rules staff where conduct is performed from the UK establishment (COCON 1.1.10R(2)(a)). The limb extending COCON to dealing with a UK client from an overseas establishment (COCON 1.1.10R(2)(b)) applies only to UK SMCR firms - not to overseas SMCR firms (COCON 1.1.10R(3)). If the individual is a material risk taker for the UK

SMCR firm, COCON 1.1.9R applies without any territorial limitation - and the 30-day exclusion is unavailable entirely.

Investment advice given to a UK client during the visit is a potential breach of COCON 2.1.1R (integrity) and COCON 2.1.4R (due regard to clients' interests). Serious harassment during the client dinner may also engage COCON 2.1.1R, provided there is a sufficient work nexus - which is likely here given that the individual was present in her professional capacity as a senior relationship manager.

FIT - Yes. FIT is an assessment framework applied at the point of certification - not a freestanding conduct prohibition. It can take into account matters with no direct work nexus and matters arising in or outside the UK. Both the unauthorised investment advice and the harassment are relevant to the individual's honesty, integrity and reputation. The branch must consider whether to revoke or decline to renew the individual's certificate and must assess its regulatory reference obligations.

Question 3: For the non-Certified employee visiting for fewer than 30 days and not performing regulated activity for or from the branch - what obligations remain?

"Not Certified" does not mean "unregulated." The following obligations remain:

- **COCON - does not apply on the basis of COCON 1.1.10R.** For an overseas SMCR firm, COCON 1.1.10R(2)(a) requires conduct to be performed from the UK establishment - which it is not. COCON 1.1.10R(2)(b), which extends COCON to dealing with a UK client from an overseas establishment, applies only to UK SMCR firms and is therefore unavailable to an overseas SMCR firm such as Norden Capital Bank AG. COCON does not apply on either limb on these facts.
- **Internal policies** - conduct, confidentiality, information security, conflicts, anti-bribery, market abuse and expenses policies apply regardless of certification status.
- **Employment obligations** - the individual remains subject to their contract of employment and disciplinary framework.
- **Other applicable law** - UK criminal law, market abuse, bribery, harassment and UK GDPR apply regardless of certification status.

The firm retains full ability to investigate and discipline - and must do so where conduct raises regulatory concerns.

Question 4: Does it matter whether the SYSC 27.5.3R conditions - including supervision and accompanying requirements - are met in practice?

Yes - substance rather than paperwork is what counts.

SYSC 27.5.3R has three conditions that must all be satisfied: (i) the individual is based outside the UK; (ii) no more than 30 days in aggregate over any rolling 12-month period performing what would otherwise be an FCA certification function; and (iii) the individual is appropriately supervised by an SMF manager or certified person whose certificate covers the relevant function. SYSC 27.5.5G adds that the FCA expects the individual to be accompanied on any visit to a UK customer.

In this scenario, the branch was unaware of the visit. It had made no supervision arrangements and taken no steps to arrange accompaniment. The exclusion would not be available on these facts even if the day-count was otherwise within the 30-day allowance - the conditions were not satisfied in substance. The branch cannot rely on the exclusion retrospectively where the required arrangements were never put in place.

The exclusion is also unavailable entirely - regardless of the day-count - for an individual performing the material risk taker FCA certification function for a UK SMCR firm.

Question 5: What governance mechanisms could the branch implement to improve oversight of fly-in, fly-out visitors?

A proportionate framework should include:

- **Pre-travel notification and approval** - mandatory, with a defined UK approval owner;
- **Central visitor register** - recording identity, role, dates, activities, clients, certification status, supervisor and rolling 12-month day-count;
- **Named supervision and accompanying arrangements** - documented for SYSC 27.5.3R and SYSC 27.5.5G purposes;
- **Pre-arrival briefing and written attestations** - covering COCON, market conduct, conflicts and escalation obligations;
- **Access controls** - restricted premises, systems and client records unless approved;
- **Post-visit confirmation** - activities undertaken and days spent in the UK, used to update the rolling day-count;
- **Detection controls** - periodic reconciliation of travel, HR, access-card, IT log-in and expense data to identify unnotified visits; and
- **Exception reporting** - to the responsible SMF manager, with periodic internal audit testing.

Question 6: What are the employment law issues where misconduct occurs during a visit the UK branch was unaware of?

The branch's unawareness does not prevent disciplinary action - but it has direct employment law consequences and may itself constitute a systems and controls failure in the eyes of the FCA.

- **Jurisdiction** - the test is whether there is a sufficiently strong connection with Great Britain. A senior relationship manager who regularly visits UK clients as a central part of their role may satisfy that test regardless of her Frankfurt contract.
- **Authority to act** - identify the employing entity and the person with contractual authority to take disciplinary action. German procedural requirements, including any works council obligations, may apply alongside UK employment law standards.
- **Grievance** – a colleague who says they were harassed may raise a grievance and a claim. Comply with the relevant ACAS Code. The alleged perpetrator can be required to give evidence in person or remotely at a public hearing in the UK. Written reasons for the

Tribunal's decision on the claim are available to the public online at no cost and accordingly carry risk, financial and reputational, for parties and witnesses.

- **Process** - if UK employment law rights apply, the ACAS Code of Practice must be followed. Failure to do so can result in a compensation uplift of up to 25% under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992. The individual is entitled to written notice of allegations, a reasonable opportunity to respond, the right to be accompanied, and a right of appeal. Engage UK employment counsel early.
- **Whistleblowing** - section 43B(2) of the Employment Rights Act 1996 provides that it is immaterial whether the relevant failure occurred in the UK or overseas. Any retaliatory action must be carefully avoided. No cap on compensation. Increased risk of Interim Relief applications.
- **Immigration** - if the individual is a sponsored employee, suspension or dismissal may trigger Home Office reporting obligations. Take immigration advice promptly.
- **Data protection** - evidence gathering must comply with UK GDPR and applicable German data protection law. Protect the bank from DSARs by informing those overseas of the risk and how to proceed.