



AFB Seminar:

Managing Conduct Issues for Visitors to the UK from Head Office and Affiliates

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Association of Foreign Banks (AFB)

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Session overview

- Part 1: The third-party visitor problem
 - Regulatory considerations and practical solutions
 - Employment considerations and practical solutions
- Part 2: Practical scenarios
- Part 3: Open discussion and Q&A

Part 1 – The third-party visitor problem

The SMCR architecture: A brief recap

- Three tiers: Senior Managers; Certification Regime; and Conduct Rules staff.
- Regime applies differently to branches vs subsidiaries of overseas institutions.
- “Overall responsibility” principle critical for group structures.
- Senior Managers: FCA/PRA-approved; named on Statement of Responsibilities.
- Certified persons: firm-assessed annually as Fit and Proper.
- Conduct Rules staff: subject to COCON; broader population.

Defining the visitor population

- Employees of overseas parent or group companies visiting UK entities.
- Seconded and temporarily deployed personnel.
- “Flying in” senior executives exercising authority over UK operations.
- Dual-hatted individuals: group role and de facto UK function.
- Certified and non-Certified individuals – distinction matters.
- Material risk takers: a distinct and important sub-category.

The core regulatory tension

- Group governance: authority typically placed at parent level.
- SMCR: regulatory accountability sits at the UK entity level.
- Visitors may exercise regulated functions without approval or certification.
- Accountability does not transfer offshore.
- The registered UK Senior Manager remains accountable.

Conduct Rules: Who is in scope?

- COCON 1.1.2R, row (5): COCON applies to employees who would be performing an FCA certification function but for SYSC 27.5.3R (the 30-day temporary UK role exclusion).
- The 30-day threshold (SYSC 27.5.3R) is an exclusion from certification only.
- COCON continues to apply by virtue of COCON 1.1.2R, row (5).
- The certification obligation and annual FIT assessment fall away.
- The obligation to comply with COCON's conduct rules does not.
- Critical message: “not certified” does not mean “not regulated”.

Territorial scope of COCON

- Material risk takers for a UK SMCR firm: COCON applies without territorial limitation (COCON 1.1.9R) – and the 30-day exclusion is unavailable to them.
- Senior conduct rules staff: COCON applies wherever conduct is performed (COCON 1.1.9R).
- Other conduct rules staff: COCON applies where conduct is performed from a UK establishment; or where the individual deals with a UK client from an overseas establishment (COCON 1.1.10R).
- “Dealing with” includes any contact with customers.
- Individual UK client = person physically in the UK at the time of the contact.

Fit and Proper: Certified vs non-certified visitors

- Certified employee: subject to both COCON and FIT as an assessment framework.
- FIT's honesty, integrity and reputation criteria (FIT 2.1.1G): broader than COCON; matters from inside and outside the UK are relevant.
- FIT may take into account personal conduct with no employment nexus – but it is an assessment framework for the certification decision, not a freestanding conduct prohibition.
- Non-certified employee: COCON applies (with a work nexus requirement); FIT does not.
- Non-financial misconduct: scope differs significantly between the two categories.

The 30-day exclusion: Conditions and limits

- Exclusion from certification only – not from COCON.
- Three conditions must all be satisfied: (i) individual is based outside the UK for the firm; (ii) no more than 30 days in any 12-month period performing what would otherwise be an FCA certification function; (iii) individual is appropriately supervised by an SMF manager or certified person whose certificate covers the relevant function.
- The exclusion does NOT apply to: material risk takers for a UK SMCR firm; pension transfer/conversion/opt-out advice for retail clients; Lloyd's syndicate advice.
- 30-day allowance is a single aggregate allowance across all relevant functions – not 30 days per function.
- Days are counted per calendar day (not hours) – one day of UK client contact uses one day of the allowance.

The 30-day exclusion: Accompanying visitors

- FCA guidance: The FCA expects an individual relying on the 30-day exclusion to be accompanied on any visit to a UK customer.
- Identify the accompanying person in advance – they should be appropriately competent or certified.
- Define clearly who leads the customer interaction and gives any regulated advice.
- Maintain a day-counting record on a rolling 12-month basis.
- Record: UK presence dates; UK client contacts; relevant activities performed; supervisor details.

Practical solutions: Governance and policy frameworks

- Develop or update a third-party visitor policy – ownership and content.
- Pre-visit assessment protocols: function-testing visitors before arrival.
- Distinguish observational from decision-making participation.
- Committee attendance frameworks and chairing restrictions.
- Visitor log: who visits; how often; what function they exercise.
- Trigger points for updating governance documentation.

Practical solutions: Notification and approval obligations

- SMF approval timelines, documentation, and Fit and Proper assessment for short-term or recurring visitors.
- Managing emergency or unplanned visits – the firm's fallback position.
- When a pattern of visits becomes a de facto SMF appointment requiring formal action.
- Document the basis on which the visit is being managed.
- Identify whether the individual falls within an exclusion or exemption – and verify all conditions are met.

Practical solutions: Intra-group arrangements and monitoring

- Ensure intra-group services agreements reflect regulatory constraints.
- Manage dual-employment and “loaned executive” arrangements carefully.
- Connect patterns of visiting activity to the Management Responsibilities Map and Statement of Responsibilities.
- What a compliant visitor log should capture and who reviews it.
- Virtual presence: the FCA’s evolving position – when a video call may be “in the UK”.
- An Employment Tribunal could order a third-party visitor to attend a hearing as a witness; refusal carries financial and reputational risk.

Employment law: The jurisdictional question

- UK employment law is not automatically limited to employees working in the UK full-time under a UK law contract.
- The test is sufficiently strong connection to Great Britain.
- Not simply where the employee physically works or where contract is governed.
- A senior trader flying to New York – London every other week to managed a UK desk may have sufficient connection to bring an unfair dismissal claim.
- Key point: The Employment Rights Act 2025, once the relevant provisions are brought into force, will reduce the qualifying period from two years to six months and remove the statutory cap on compensatory awards. This will significantly increase risk exposure.

Employment law: Conduct issues that typically arise

- Misconduct during a UK visit – inappropriate behaviour at client events, harassment of UK-based colleagues, breaches of FCA Conduct Rules whilst on UK soil.
- Misconduct discovered whilst in the UK – employee in London when investigation into overseas activities is triggered.
- Regulatory conduct issues – particularly where individual is an approved person or performing controlled functions during UK visit.
- Whistleblowing – where employee makes a qualifying disclosure during or relating to their time in the UK.

Employment law: The disciplinary process

- Even where a home-country governs, the bank must not fall below UK employment law standards – if the employee has (or may have) UK Employment rights.
- ACAS Code of Practice: failure to follow it can lead to compensation uplifts of up to 25% (section 207A, Trade Union and Labour Relations (Consolidation) Act 1992).
- Employee should receive: written notice of allegations; reasonable opportunity to respond; right to be accompanied; right of appeal.
- Home-country HR may be running the process – they may not be familiar with UK employment law requirements.

Employment law: Immigration – A brief but important intersection

- Misconduct leading to dismissal or suspension may affect the employee's ability to remain in the UK lawfully.
- This in turn affects your investigation timeline.
- Reporting obligations to the Home Office for sponsored employees may be triggered.
- Always loop in your immigration advisers when a conduct issue arises in respect of a sponsored employee.

Employment law: Grievances, claims and witness obligations

- Investigate as you would any grievance: comply with UK law, internal procedures, and the ACAS Code.
- An overseas visitor may be ordered to attend an Employment Tribunal hearing as a witness – in person or online.
- Refusal to attend carries financial and reputational risk for the UK firm and the individual.
- Failing to attend could harm the firm's defence and have regulatory consequences.

Employment law: Termination

- If UK statutory rights apply, the dismissal must also be fair under UK law.
- Settlement Agreements must comply with s.203 Employment Rights Act 1996 to bind UK statutory claims – independent legal advice required or use ACAS COT3 form.
- Garden leave enforceable in England and Wales if properly drafted; enforceability in home jurisdiction varies.
- Post-termination restrictions: UK courts apply their own public policy test regardless of governing law.
- Cross-border tax and social security implications: take tax advice.

Employment law: Practical solutions – key takeaways

- Understand the risk of UK Employment Law including unfair dismissal claims (particularly in light of prospective ERA 2025 reforms).
- Audit your overseas visitor population – know who is in the UK, for how long, and how regularly.
- Review disciplinary and investigation procedures – ensure fit for purpose cross-border and ACAS-compliant.
- Co-ordinate between UK and overseas HR and legal teams from the outset of any investigation.
- Preserve evidence carefully in compliance with UK GDPR and applicable overseas data protection laws.
- Take immigration advice where a sponsored employee is involved.
- Have a cross-border investigation protocol in place before any issue arise.

Part 2 – Practical scenarios

Scenario 1 – The facts

- An overseas employee performs regulated activities from or for the UK branch of Norden Capital Bank AG (a German headquartered bank) – therefore subject to the FCA's Conduct Rules.
- The employee breaches one of those rules – e.g. failing 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.

Scenario 1: Questions to consider

- Was the individual subject to COCON at the time of the breach? On what basis?
- Does it matter whether the individual was Certified? What difference does FIT make?
- What are the obligations on the UK branch's approved Senior Manager(s)?
- How does the branch investigate effectively where the individual is overseas and uncooperative?
- How should the branch ensure oversight where it had limited visibility of the individual's activities?
- What are the employment law dimensions? Who has authority to suspend? What process governs?

Scenario 1 – Key points

- If Certified: subject to both COCON and FIT; FIT (as an assessment framework) may take into account personal conduct with no work nexus, including non-financial misconduct – even occurring personally with no nexus to employment.
- If not Certified: COCON applies only where the work nexus exists; FIT does not apply; non-financial misconduct rules apply to conduct within scope of COCON only.
- The branch's approved Senior Manager retains accountability – cannot transfer offshore; the UK branch structure does not diminish this.
- Investigation: preserve evidence immediately (UK GDPR compliant); seek cooperation via group HR; consider FCA notification.
- Suspension from UK duties; establish authority between UK branch management and home entity; co-ordinate IT access cross-border.
- Evidence must comply with UK GDPR and applicable overseas data protection laws.
- Consider firm's COCON breach reporting obligations to the FCA.

Scenario 2: the facts

- 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.

Scenario 2: Questions to consider

- The UK branch may be unaware of the visit – how should the branch ensure proper oversight of overseas employees visiting the UK independently of the branch?
- Is the Certified individual subject to COCON in these circumstances? What about FIT?
- For the non-Certified employee visiting for fewer than 30 days and not performing regulated activity for/from the UK branch: what obligations (other than moral ones) remain?
- Does it matter whether the SYSC 27.5.3R conditions – including supervision and accompanying requirements – are met in practice?
- What governance mechanisms could the branch implement to improve oversight of fly-in, fly-out visitors?
- What are the employment law issues where misconduct occurs during a visit the UK branch was unaware of?

Scenario 2: Key points

- Certified employee: COCON and FIT both apply – undertaking investment advice without authorisation is a regulatory breach; non-financial misconduct (e.g. harassment at a client dinner) may engage FIT's assessment criteria even in a purely social context.
- The 30-day threshold (SYSC 27.5.3R): exclusion from certification only – COCON continues to apply by virtue of COCON 1.1.2R, row (5); for an overseas SMCR firm, the FCA certification function applies only to the extent performed from a UK establishment.
- SYSC 27.5.3R conditions must all be met: overseas base; 30-day aggregate day-count; appropriate supervision; accompanying requirement (SYSC 27.5.5G) – the branch's lack of awareness means it was in no position to satisfy these conditions.
- Non-Certified, fewer than 30 days, no activity for/from branch: technically outside certification and (absent work nexus) COCON – but visitor policy should require pre-notification regardless.
- Employment: the branch's unawareness of the visit is itself a governance failure; if the employee has a sufficient connection to Great Britain, the disciplinary process must comply with UK standards.

Part 3 – Open discussion and Q&A

Your questions and experience

- We invite attendees to raise questions specific to their firms.
- Please share experiences and challenges across the peer group.
- No question is too specific – this is your session.

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