Decision-makers’ guide to assessing the temporary and occasional nature of doctors’ intended practice (under the European Directive on the Recognition of Professional Qualifications)

Introduction

1. This guidance for decision makers aims to make sure there’s consistency, fairness and proportionality in our approach to making decisions on registration cases. In doing so it balances patient protection with fairness to doctors and compliance with the European Directive on the Recognition of Professional Qualifications (2005/36/EC) (‘the Directive’).

2. This guidance will help you to decide whether a doctor’s intended practice is temporary and occasional in nature, as part of their declaration of intention to provide temporary and occasional services under the Directive. Your decision will determine whether we grant temporary and occasional registration.

3. You will be considering cases where concerns have been uncovered, or where there is uncertainty about the nature of the intended practice. This guidance applies also to declarations to renew temporary and occasional practice.

Reasons for referral

4. We assess temporary and occasional practice against specific parameters, under the criteria of duration, frequency, regularity and continuity. Cases will be referred for your decision where any of these basic temporary and occasional parameters are not met, and where no obvious indicators of establishment have been breached. Our Guidance for doctors practising on a temporary and occasional basis provides more explanation on these parameters.

5. You may also receive a referral where other indicators of potential establishment have been identified and discretion is required to make a decision.

6. Additionally, where the information provided is insufficient (either because the applicant has refused to provide requested information or is unable to provide the details required), the case may be referred to you for a decision.
Basic principles for making a decision on temporary and occasional practice

7 Our overarching statutory objective is to protect the public, which in this context may require consideration particularly of protecting patient safety and maintaining public confidence in the profession.* This must be balanced with our legal obligations under the Directive and accompanying legislation.

8 The Directive requires us to assess the temporary and occasional nature of a doctor’s intended practice against its duration, frequency, regularity and continuity. The checklist below outlines factors to consider as part of a more detailed analysis of these individual criteria.

9 You must make decisions on a case by case basis, with reference to the criteria. Your decision will need to take a wide range of factors into account and look at each case with the totality of the proposed service in mind, weighing and considering each element rather than focusing on any one particular part of the intended practice.

10 After considering all the factors of the doctor’s intended and/or actual practice, you must decide one of the following:

- The doctor’s intended practice is not temporary and occasional in nature.
- The doctor’s intended practice is temporary and occasional in nature.
- You do not have enough information to make a considered decision.

Factors to consider

11 You may wish to consider the following factors on a case by case basis in reaching your view.

* Our sub-objectives, under s1(B) of the Medical Act 1983, are to protect, promote and maintain the health and safety of the public, and to promote and maintain public confidence in the medical profession, and proper professional standards and conduct for doctors.
Checklist

1 **Duration** (time the service activity takes to perform): Cases may be referred to you where intended practice is cumulatively greater than one month but less than two. In such cases you should consider:

- How long is each post/role? In general we would be more likely to consider posts of shorter duration to be temporary.

- How does the length of each post compare to the frequency of practise? Posts of longer duration may still be deemed temporary and occasional (T&O) if the frequency of service is low (and conversely we might consider greater frequency where occurrences of practice are shorter in duration).

- Does the cumulative declared duration consist of full-time practice or is it more sporadic within the timeframe outlined (for example, a doctor declares the duration of their intended practice to be two months but it is evident that this is not two months of full-time practice, but includes gaps that the doctor has not accounted for in their declaration)?

- Similarly, is it evident the doctor’s practice is on a part-time basis but duration has not been able to take this into account? For example, their practice is 20 days’ duration but only an hour or two each day?

- Any cases where intended practice is closer to two full months than to one are unlikely be temporary and occasional.

2 **Frequency** (rate of occurrence, which may be the interval between visits): Cases may be referred to you because intended practice will occur relatively frequently over the year. You should consider:

- The duration of each occurrence. In order to be considered to be practising on a temporary and occasional basis, doctors with higher frequency of practise will need each occurrence to be of relatively short duration. Similarly, as outlined above, the converse is true for posts of higher duration.

- The continuity of practice. The intended practice may be more likely to be temporary and occasional if it isn't
You should also consider the gap between occurrences. Generally, the larger the gap the more likely the intended practice is temporary and occasional in nature.

3 **Regularity** (how regularly the services are provided): You may be asked to make a decision on practice that will occur on a potentially regular basis, for example 4 or 5 times consecutively on the same day of the week or date in the month. You should consider:

- The extent to which there is a discernible pattern to the intended practice (this may not necessarily be measured in terms of particular dates or days yet still has a regular element, for example if a doctor is intending to practice *every month*, you might consider this regular practice).

- Is there any discernible pattern not related to time but to another aspect of practice, for example in the intended location of services or the employer? Is the location (and/or employer) the same or does it vary with each occurrence of service provision (meaning it may be, though is not necessarily, temporary and occasional)?

- Does the particular type of practice undertaken by the doctor require regularity to a greater extent than other types would? These types of practice could include demonstrating a particular type of surgery at regular intervals in the academic year, or even a seasonal type of practice (for example a doctor working within a seasonal sport) that is regular from year to year but which you might still consider amounts to temporary and occasional practice.

- Is the degree of regularity indicative of a contract of employment that might indicate establishment (not all contracts will indicate establishment but many will)?

4 **Continuity** (whether the services are provided in a continuous period or whether sporadically over a period of time): Occurrences of practice taking place over more than three continuous days may still qualify for T&O, within reasonable circumstances. You should consider all other criteria against this, particularly:

- The frequency with which the practice will occur, for example if it is a one-off occurrence you may be more likely
to deem it temporary and occasional.

- The type of practice, for example whether the doctor is coming to perform medicine that necessarily takes longer than a few days to complete. Looking after a sports team during a tournament, or surgery that requires follow up appointments taking place over a number of days, are situations you might consider T&O here.

5 Previous renewals and registrations:

- You may want to consider where a doctor has renewed their temporary and occasional practice multiple times, or has been registered on a T&O basis on multiple occasions, in light of the four criteria. This might illustrate that a doctor’s practice is no longer temporary and occasional (for example, if a doctor is practising with regularity over consecutive years, on the basis of a contractual arrangement).

- Similarly, you should consider where we have had previous concerns about a doctor’s practice (whether under temporary and occasional registration or other registration type). For example, whether they have ever had T&O and we have recommended they become established. You should consider whether their intended practice bears any similarities to this previous practice, and if so what assurance we have that the situation is different on this occasion.

6 Sufficiency of the information provided: A case may be referred to you when the information supplied by the doctor is not sufficient to assess easily the temporary and occasional nature of their intended practice, and the adviser has exhausted all means of uncovering the information (following up with the doctor, contacting employers, etc). In such cases you should consider:

- Has the doctor provided all the details they possibly can in the circumstances (for example in some instances the nature of their practice might legitimately mean they don’t know some details about their intended practice)?

- Have they provided a satisfactory explanation of why they cannot provide the details they have been asked for (ie you should assess the quality of their explanation)?
- Is the information that they have provided verifiable (meaning you may be more likely to decide they are being honest in declaring all they can but leaving gaps)?

- Where it is reasonably clear that they have no intention or at least no plans to practise you should, under the Directive, assess their intended practice as not T&O. This is because the Directive requires a doctor to come to the UK ‘in order to provide services’ and that they must have an intention ‘to provide temporary and occasional services’.

- If a doctor has renewed previously they may be able to provide information about their intended practice on the basis that they may be doing something similar (and have not provided this so far).

- Similarly, where they have been registered on a temporary and occasional basis in another Member State they may be able to provide information with reference to their practice there.

### 7 Contractual arrangements/ conditions of employment:

If possible you should consider who the employer is and what type of contract the doctor has, if any, as potential indicators of establishment:

- If a doctor has permanent employment they are established.

- If the doctor holds a fixed term contract it is likely they will be established (unless their practice under that contract fulfils all T&O criteria above).

- Is the doctor providing services for a UK- or an overseas-based organisation? If they are working for an overseas-based organisation, you should consider the nature of the organisation’s presence in the UK, ie does it have an established base and wide influence in the UK or is it solely based overseas?

### 8 Location/ office:

You may wish to consider where the doctor will physically be providing services as this could provide an indicator of establishment. According to the settled case law of the European

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* European Directive on the Recognition of Professional Qualifications (2005/36/EC), Article 7(1)
Court, 'the definition of establishment within the meaning of those articles of the Treaty involves the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period'. This involves considering the following points.

- If they lease or own a UK office for the purposes of practising (ie. they have an established professional base) this may indicate a wider picture of establishment (if they practise with regularity, frequency, or continuity, or for long periods of time, from that office).

- You should also consider whether the doctor is holding themselves out to UK nationals from such a base (also a provision of European case law).

- Will they be providing services in a ‘fixed location’ or in various different locations (the latter might be less tended towards becoming established although not necessarily so, for example locums who work in a variety of settings could easily become established)?

- To what extent is the infrastructure necessary for the purposes of performing the services in question?

**Type/ nature of their practice:** You may wish to consider the following details about the doctor’s intended practice as you apply the Directive’s temporary and occasional criteria:

- Will the intended practice involve direct patient contact, and if so what is the proportion of patient contact to overall practising time? In cases where a doctor/trainee is merely observing, they generally won’t need a licence and registration. Therefore, if they are only practising (ie with direct patient contact) a few days and observing the rest of the time their practice may be more likely to be T&O.

- How many patients will the doctor be seeing (eg is it one patient, but involving pre- and post-operative care or will they be seeing many patients in one visit)?

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* Case C-438/05 Viking [2007] ECR I-10779
† Case C-55/94 Gebhard [1995] ECR I-4165
‡ Case C-55/94 Gebhard [1995] ECR I-4165
- Is the duration, frequency, regularity and continuity of the intended practice driven by factors outside the doctor’s control (e.g., fixtures of a sports team or event)? This may affect how stringently you apply the criteria.

- Will the doctor be treating UK citizens or citizens of their Home State only (or both)? If the doctor is treating only citizens of their home state is this by choice or because of their role e.g., because they are the doctor for a foreign sports team visiting the UK?

- In a number of instances temporary and occasional registration will be in the best interests of doctors and the public, due to the circumstances surrounding the intended practice. For example, where doctors are providing cross-border services between Northern Ireland and the Republic of Ireland. While the criteria above must be applied regardless, it is useful to remember this perspective as you assess each doctor’s intended practice on a case-by-case basis.