

Schengenⁱ short term assignments

How to assess where activities can be carried out on “business” or it can be considered work and be subject to obtaining a work visa

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The Schengen Visa Codeⁱⁱ and Schengen Acquisⁱⁱⁱ do not contain a definition of what must be considered “business” activity and that can therefore be carried out without obtaining a work permit. The Schengen Handbook for the processing of visa applications and the modification of issued visas^{iv}, contains a non-exhaustive list of supporting documents for business trips and outline that for persons travelling for the purpose of carrying out paid activity:

“The applicant must provide a work permit or any similar document as provided by the national legislation of the Member State where a paid activity is to be carried out, if applicable”.

Most, if not all, legislations of Schengen Member countries do not contain a clear and specific definition of what can be considered “business”. This is a grey area and many companies do not have clear directions when they are sending their employees for short business assignments (i.e. for maximum 90 days every 180 period) in the Schengen area.

Italy, for example, defines business visitors^v as: **“foreigners who intend to enter the country for commercial/economic purposes, to make contacts or conduct negotiations/arrange deals, for learning or verifying the use and functioning of capital goods^{vi} purchased or sold under commercial and industrial cooperation agreements.”**

In our opinion, a useful guidance – which has valid foundations at international level (at least amongst OECD countries) - for assessing whether an activity can be considered “business” or be subject to obtaining a work permit, can be found in the OECD^{vii} Commentary^{viii} to the new OECD Tax Model Convention^{ix}. Section 8.14 of the commentary to Art. 15^x of the Convention (which set forth the rules for the international taxation of income from employment) states that:

“Where a comparison of the nature of the services rendered by the individual with the business activities carried on by his formal employer and by the enterprise to which the services are provided points to an employment relationship that is different from the formal contractual relationship, the following additional factors may be relevant to determine whether this is really the case:

- **who has the authority to instruct the individual regarding the manner in which the work has to be performed;**
- **who controls and has responsibility for the place at which the work is performed;**
- **the remuneration of the individual is directly charged by the formal employer to the enterprise to which the services are provided (see paragraph 8.15 below);**
- **who puts the tools and materials necessary for the work at the individual’s disposal;**
- **who determines the number and qualifications of the individuals performing the work;**
- **who has the right to select the individual who will perform the work and to terminate the contractual arrangements entered into with that individual for that purpose;**
- **who has the right to impose disciplinary sanctions related to the work of that individual;**
- **who determines the holidays and work schedule of that individual”**

ⁱ Schengen member countries are: Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, Switzerland

ⁱⁱ Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code).

ⁱⁱⁱ Council Decision 1999/436/EC of 20 May 1999

^{iv} COMMISSION IMPLEMENTING DECISION C (2011) 5501 final of 4.8.2011

^v Decreto Interministeriale n. 850/201: “per finalità economico-commerciali, per contatti o trattative, per l'apprendimento o la verifica dell'uso e del funzionamento di beni strumentali acquistati o venduti nell'ambito di contratti commerciali e di cooperazione industriale”

^{vi} i.e. machines and tools used in the production of other goods (contrasted with consumer goods) (this is for clarification purposes only, it is not in the text of the Decree)

^{vii} OECD has current 35 member States, for a full list see www.oecd.org

^{viii} <http://www.oecd.org/berlin/publikationen/43324465.pdf>

^{ix} OECD Model tax convention on income and capital (2014)

^x **INCOME FROM EMPLOYMENT: 1.** Subject to the provisions of Articles 16, 18 and 19, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State. **2.** Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if: **a)** the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in any twelve month period commencing or ending in the fiscal year concerned, and **b)** the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State, and **c)** the remuneration is not borne by a permanent establishment which the employer has in the other State.