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Cross-border telework and social security: A new multilateral Framework Agreement

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Introduction

Knowing the applicable legislation for social security matters is crucial for workers engaging in cross-border activities within the European Union. For individuals who reside and work within the same country, determining the correct solution is relatively simple – the person will fall under the legislation of the State of residence. However, for individuals engaged in cross-border telework, where their residence and work are in different countries, the situation becomes more complex. With the diverse working pattern that emerged during the COVID-19 pandemic, there is an urgent need for legislators, authorities, and administration to adapt to this new reality.

From July 1, 2023, a new multilateral framework agreement on the application of Article 16 of Coordination Regulation EC 883/2004 in cases of habitual cross-border telework entered into

force. This framework is the solution provided by the Administrative Commission[1] for the Coordination of Social Security Systems to deal with the high number of employees working from home for some days a week but having an employer and office situated in another Member State. This agreement has been signed by 18 States so far (here you can find the countries that officially signed the Framework Agreement). It allows, upon request, that the legislation of the State of the employer is applicable.

What is the normal rule?

At European level, there is no harmonization of the 27 national social security systems. The European Union decided to opt for a coordination instrument, namely the Coordination Regulation EC 883/2004 in combination with the Implementation Regulation EC 987/2009. According to Frans Pennings, these two legal tools intend "to adjust social security schemes in relation to each other in order to regulate transnational questions, with the objective of protecting the social rights of persons in case the facts of their circumstances are not limited to one State"[2]. In addition, a worker can only be subject to one social security legislation. In order to ensure the free movement of workers, the Coordination Regulation provides rules which help to identify which national legislation will be the applicable one.

The general rule, the State of employment principle (*lex loci laboris*), regarding the applicable social security legislation, can be found in Article 11 (3) (a) coordination rules of Regulation EC 883/2004. According to this Article, a person pursuing an activity as an employed person in a Member State shall be subject to the legislation of that Member State. However, for cross-border teleworkers, who perform work in different Member States, determining the applicable legislation is more difficult. In such cases, Article 13 of the same Regulation comes into play. According to Article 13 (1) (a), a person who normally pursues an activity as an employed person in two or more Member States shall be subject to the legislation of the Member State of residence if he/she pursues a substantial part (meaning more than 25 %, pursuant to Article 14 (8) of the Implementation Regulation EC 987/2009) of his/her activity in that Member State (*lex loci domicilii*). Marginal activity will not be considered when applying Article 13 of the Coordination Regulation according to Article 14 (5) (b) of the Implementation Regulation EC 987/2009. The recommended indicator for marginal activity is activities that make up less than 5% of the regular working time or remuneration.[3] However, a case-by-case evaluation must be conducted to determine its applicability. This means that even before the COVID-19 pandemic occasional work from home was not taken into account and did not influence the legislation applicable.[4]

The Impact of COVID-19 and temporary rules

During the COVID-19 pandemic, the Administrative Commission adopted guidance on the legislation applicable to telework.[5]This guidance recommended that telework in a Member State other than the competent ("usual") Member State of employment, due to COVID-19, should not lead to a change of applicable legislation. This was due to the fact that more people started working from home and therefore could easily fulfil the 25 % rule of Article 13 (1) (a). This would have meant that the legislation of the state of residency would have become the applicable legislation. That Guidance, which was successively extended until June 30, 2022, was adopted for reasons of force majeure, in response to the specific and exceptional consequences of the health crisis and the subsequent step of the temporary closure of Member States' borders.

New Framework Agreement

"Telework still persists as a permanent new way of work." This is the acknowledgement in the Explanatory Memorandum to the Framework Agreement on the application of Article 16 (1) of Coordination Regulation EC 883/2004 in cases of habitual cross-border telework. Considering this new post-Covid reality and the fact that a consensus about reform of the Coordination Regulation will not be reached in the near future, a significant achievement in the field of social security has been made with the attainment of this Framework Agreement. It is important to recall that this agreement does not introduce new "automated" rules. At the end of the day, it is still up to the employer or employee to make an individual request in line with Article 16 of the Coordination Regulation EC 883/2004. Article 16 permits two or more Member States to conclude a common agreement for exceptions to the rules about determining the applicable legislation (e.g. Article 13) in the interest of certain persons or categories of persons. The advantages of this Framework Agreement are that the procedure is simplified, and legal certainty is offered in advance.

The personal scope of this agreement is limited to habitual cross-border teleworkers who are in an employment relationship and fall under the application of Article 13 (1) (a) of the Coordination Regulation EC 883/2004, Article 2 (2) of the Framework Agreement. Additionally, only cross-border telework is covered. This means according to Article 1 (c) of the Framework Agreement an activity that can be pursued from any location and could be performed at the employer's premises or place of business and:

1. is carried out in a Member State or Member States other than the one in which the employer's premises or the place of business are situated and
2. is based on information technology to remain connected to the employer's or business's working environment as well as stakeholders/clients in order to fulfil the employee's tasks assigned by the employer or clients, in case of self-employed persons.

This means that the activity is not dependent on a certain location or surroundings. The work could theoretically be performed from everywhere. A digital connection (IT link) with the company's infrastructure is an integral part of the definition of working remotely as a teleworker. This entails that, as a rule, manual activities outside the employer's premises or business place do not fall within the scope of the definition.[6] Finally, only employees who are employed by one single employer (or several employers all situated in the same Member State) are covered. A three-country situation is not covered by the Framework, see Article 2 (2) of the Framework Agreement.

According to Article 3 of the Framework Agreement, upon request, a person who carries out habitual cross-border telework within the meaning of the Framework Agreement and is covered by Article 2, will be subject on the basis of Article 16 (1) of theCoordination Regulation EC 883/2004 to the legislation of the State in which the employer has his registered office or place of business, provided that the cross-border telework in the State of residence is less than 50% of the total working time.

Procedure

When a request is submitted for a person, the signatory Member States conclude an Article 16 agreement derogating from Article 13 (1) (a) designating the Member State where the employer(s) is situated as competent, provided that the amount of telework in the Member State of residence is less than 50% of the total working time of that employee. If a person works for several employers,

who are located in the same Member State, the total working time of every employer combined will be used as a reference. This implies that the majority of the working time is spent in the Member State where the employer(s) is situated. The cross-border telework must be agreed upon between employer and employee formally or informally. The request for the application of the Framework Agreement must be made in consent between them.[7]

After the two parties agree to pursue this procedure, according to Article 18 of the Implementation Regulation EC 987/2009, a request by the employer or the person shall be submitted in the Member State, whose legislation the employee or person concerned requests to be applied. This means that the request must be filed with the competent institution of the Member State where the employer has its statutory seat.

Moreover, this Framework Agreement introduces a simplified procedure where both Member States give their consent in advance. This means that the competent institution of the Member State of the employer assesses, upon receipt of the request, if the conditions of the Framework Agreement are fulfilled. In the event of a positive assessment, an A1 certificate will be issued and the (former) competent State of residence will be informed via EESSI (Electronic Exchange of Social Security Information), Article 4 (5) of the Framework Agreement. If the conditions of the Framework Agreement are not met, the case is dealt with as a regular Article 16 request.

The Framework Agreement produces no effects prior to the date of entry into force. Until July 1, 2024 an A1 certificate can be applied for with retroactive effect until July 1, 2023 provided that social security contributions have been paid in the Member State of the employer. After July 1, 2024 the retroactive effect is limited to three months.

According to Article 4 (4), an agreement under Article 3 of the Framework Agreement may be applied for a maximum of 3 years at a time, with extensions possible upon a new request. According to Article 6 (2), this Framework Agreement shall enter into force on July 1, 2023 as long as at least two States have signed it (a threshold which, as noted, has been met). The Framework Agreement is concluded for a period of 5 years, and shall be automatically extended each time for another 5 years without a review process taking place.

A solution to the problem?

In conclusion, the Framework Agreement, while considered a reasonable compromise, has notable limitations that need to be addressed. The limitations include its restricted personal scope, which only applies to employees performing telework through a digital connection. This raises the challenge of distinguishing between tasks conducted on the employer’s premises and those suitable for telework, requiring employees to be aware of which activities can be performed from home. In the Explanatory Memorandum, it is stated that some offline tasks can be considered telework, such as reading materials or offline grading of tests.[8] It is important to note that neither the Framework Agreement nor the Explanatory Memorandum states who is responsible for supervising the evaluation of the actual performed working time. Additionally, the framework’s applicability is restricted to combinations involving two Member States, even if all additional countries have signed the Framework Agreement. This limitation arises from the use of Article 16 of the Coordination Regulation EC 883/2004. The parties concerned need to be aware of those rules and make a request to the authorities, which still need to evaluate the case and provide a decision.

However, it is important to acknowledge that the Framework Agreement represents a positive step towards addressing the needs of employees residing in a different Member State from their working state. By allowing employers to agree to home office arrangements (if it is less than 50% of the total working time) without triggering legislative changes, this agreement goes in the right direction. It remains questionable whether it is sufficient to provide the necessary flexibility in light of the new work reality.

Nevertheless, there is an urgent demand for a new Coordination Regulation as the existing coordination rules are outdated in light of modern and fast-changing working practices. In 2016, the European Commission proposed to amend Regulation EC 883/2004 and Implementation Regulation EC 987/2009.[9] Since 2019, ongoing trialogues between the Council, Commission and Parliament have not yielded an agreement thus far. The complexity of the negotiations lies primarily within addressing issues concerning the rules about posting and the aggregation and calculations of unemployment benefits.[10] Social security remains a complex field where finding common ground is difficult. The significance of this problem was further highlighted by the Framework Agreement, as not all Member States have yet signed it.

References

[1] The Administrative Commission for the Coordination of Social Security Systems is attached to the European Commission and shall be made up of a government representative from each of the Member States, assisted,

where necessary, by expert advisers. See Article 71 (1) of the Coordination Regulation EC 883/2004.

[2] Frans Pennings, *European Social Security Law* (7th edition, Intersentia 2022). Chapter 1 Introduction to the Concept of Coordination, page 6.

[3] Administrative Commission. *Practical guide on the applicable legislation in the EU, EEA and Switzerland (2013)*. 27/53.

[4] Case C-570/15 X v Staatssecretaris van Financiën, ECLI:EU:C:2017:674, paras 28 and 29. In this case, the European Court of Justice ruled that a person, who out of the total hours worked in one year for his employer established in one Member State carried out only 6.5% of those hours in another Member State (that being the State of his residence), is not to be considered to be normally employed in the territory of two Member States.

[5] Administration Commission for the Coordination of Social Security Systems. *Guidance Note on COVID-19 pandemic*. Revised version as of 25/11/2021 – AC 074/20REV3.

[6] Article 1 of the Explanatory Memorandum to the Framework Agreement on the application of Article 16 (1) of Regulation (EC) No. 883/2004 in cases of habitual cross-border telework.

[7] Article 3 of the Explanatory Memorandum to the Framework Agreement on the application of Article 16 (1) of Regulation (EC) No. 883/2004 in cases of habitual cross-border telework.

[8] Article 1 of the Explanatory Memorandum to the Framework Agreement on the application of

Article 16 (1) of Regulation (EC) No. 883/2004 in cases of habitual cross-border telework.

[9] European Commission. Proposal for Regulation of the European Parliament and of the Council amending Regulation (EC) No 883/2004 on the coordination of social security systems and regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/200.

[10] European Commission, Commission staff working document. *Impact assessment. Initiative to partially revise Regulation (EC) No 883/2004 of the European Parliament and of the Council on the coordination of social security systems and its implementing Regulation (EC) No 987/2009, SWD(2016) 460, Brussels, 2016*.

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