

Practical guide

# The legislation that applies to workers

in the European Union (EU),  
the European Economic Area (EEA)  
and in Switzerland

Social Europe







## Table of Content

|  |    |
|--|----|
| INTRODUCTION   | 4  |
| 1. Why do we need this guide?  | 4  |
| 2. The rules at a glance   | 4  |
| PART I: POSTING OF WORKERS   | 6  |
| 1. Which social security system is applicable for employees temporarily posted to another Member State?  | 6  |
| 2. How is the posting of workers defined in the specific community legislation?  | 6  |
| 3. What criteria apply to determine if an employer normally carries out its activities in the 'posting' state?   | 7  |
| 4. When is it possible to speak of a direct relationship between the posting undertaking and the posted worker?  | 8  |
| 5. What about workers recruited in one Member State for posting in another?  | 10 |
| 6. What if a worker is posted to work in several undertakings?   | 11 |
| 7. Are there situations in which it is absolutely impossible to apply the provisions on posting?   | 11 |
| 8. What about self-employed people temporarily working in another Member State?  | 13 |
| 9. What criteria apply to determine if a person is normally self-employed in the posting state?  | 13 |
| 10. What does 'similar' activity mean?   | 14 |
| 11. What procedures must be followed in the case of a posting?   | 15 |
| 12. Agreements on exceptions to the legislation governing posting  | 15 |
| 13. Once a posting has been completed when can a person apply for another posting?   | 16 |
| 14. What is the position in relation to postings already authorised and started under regulation 1408/71? Do these periods count towards the 24 months period allowed under regulation 883/2004? | 17 |
| 15. Suspension or interruption of the posting period   | 18 |
| 16. Notification of changes occurring during the posting period  | 18 |
| 17. Provision of information and monitoring of compliance  | 18 |



|  |    |
|--|----|
| PART II: PURSUIT OF ACTIVITY IN TWO OR MORE MEMBER STATES  | 20 |
| 1. Which social security system is applicable to persons normally working in two or more member states?                        | 20 |
| 2. When can a person be regarded as normally pursuing an activity in two or more member states?                                | 23 |
| 3. How is substantial activity defined?  | 27 |
| 4. Substantial activity and international transport workers  | 28 |
| 4.a.How to determine the applicable legislation for members of flight and cabin crew after 28 June 2012?                       | 30 |
| 5. Over what period should substantial activity be assessed?   | 33 |
| 6. What should happen when duty rosters or work patterns are subject to change?  | 33 |
| 7. How to determine the registered office or place of business?  | 34 |
| 8. What procedures must be followed by a person in the event that s/he is working in two or more Member States?                | 36 |
| 9. What about self-employed persons who are normally self-employed in two or more Member States?                               | 37 |
| 10. When can a person be regarded as normally pursuing an activity as a self-employed person in two or more Member States?     | 37 |
| 11. How is a substantial part of self-employed activity defined?   | 38 |
| 12. What procedures must be followed by a self-employed person in the event that s/he is working in two or more member states? | 38 |
| 13. What criteria apply when determining where the centre of interest of activities is located?                                | 38 |
| 14. What is the situation in relation to a person who is both employed and self-employed in different member states?           | 39 |
| PART III: DETERMINATION OF RESIDENCE   | 40 |
| 1. In which cases does the "residence" of a person play a role under Regulation 883/2004?                                      | 40 |
| 2. How is the term "residence" defined?  | 40 |
| 3. Criteria for determining the place of residence   | 42 |
| 4. Some examples in which the determination of the place of residence might be difficult                                       | 43 |



|  |    |
|--|----|
| PART IV: TRANSITIONAL PROVISIONS   | 49 |
| 1. Are there any special arrangements in place where the legislation applicable has already been decided under Regulation 1408/71, or under Regulation 883/2004 before 28 June 2012?     | 49 |
| 2. From what date will the applicable legislation apply where a person, who is subject to the transitional arrangements, requests to be assessed under new rules of Regulation 883/2004? | 51 |





## Introduction

### 1. Why do we need this guide?

Article 76 of Regulation 883/2004<sup>1</sup> requires Member States<sup>2</sup> to communicate with each other and promote the exchange of experience and best administrative practice to facilitate the uniform application of Community law. This principle is underpinned by the principle of exchanging information in an efficient manner between institutions and the obligation of citizens and employers to provide accurate and timely information.

This Guide is intended to provide, at the various practical and administrative levels involved in implementing specific Community provisions, a valid working instrument to assist institutions, employers and citizens in the area of determining which Member State's legislation should apply in given circumstances.

### 2. The rules at a glance

The guiding principle is that persons to whom the Regulations apply are subject to the legislation of a single Member State only<sup>3</sup>. In the case of employed and self-employed persons the legislation of the Member State where the activity is carried out usually applies. This principle is referred to as *lex loci laboris*. Persons receiving certain short-term cash benefits based on their employment or self-employment are also subject to the legislation of the Member State of activity. Any other person is subject to the legislation of the Member State of residence (*lex domicilii*).

However, in some very specific situations, criteria other than the actual place of employment are justified. Such situations include the posting of workers to another Member State for a temporary period and where a person is working in two or more Member States and certain categories of workers such as civil servants.

The determination of “residence” is of importance in particular as regards non-active persons and in case of work pursued in two or more Member States.

The rules for determining which Member State's legislation is to apply are set out in Articles 11 – 16 of Regulation 883/2004 and the related implementing provisions are set out in Articles 14 - 21 of Regulation 987/2009<sup>4</sup> (hereinafter referred to as the Regulations). These rules are also interpreted by the Administrative Commission for the Coordination of Social Security Systems (hereinafter called the Administrative Commission) in Decision No A2<sup>5</sup>.

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<sup>1</sup> Regulation (EC) No 883/2004 of the EP and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166, 30.4.2004, p.1, corrigendum OJ L 200, 7.6.2004, p. 1, as last amended by Regulation (EU) No 465/2012, OJ L 149, 8.6.2012, p.4 (hereafter: Regulation 883/2004 and Regulation 465/2012).

<sup>2</sup> In the following text, the term “Member State” also refers to the EEA EFTA States and Switzerland.

<sup>3</sup> Article 11 (1) of Regulation 883/2004.

<sup>4</sup> Regulation (EC) No 987/2009 of the EP and of the Council of 16 September 2009 laying down the procedure for implementing Regulation 883/2004, OJ L 284, 30.10.2009, p. 1, as last amended by Regulation (EU) No 465/2012, OJ L 149, 8.6.2012, p. 4 (hereafter: Regulation 987/2009).

<sup>5</sup> Decision No A2 of 12 June 2009 concerning the interpretation of Article 12 of Regulation (EC) No 883/2004 of the European Parliament and of the Council on the legislation applicable to posted workers and self-employed workers



This Guide is divided into four parts:

- Part I dealing with Posting of workers
- Part II dealing with the pursuit of an activity in two or more Member States
- Part III dealing with the determination of residence
- Part IV dealing with transitional provisions

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temporarily working outside the competent State, OJ C 106, 24.4.2010, p. 5 (hereafter: Administrative Commission Decision A2).



## Part I: Posting of workers

### 1. Which social security system is applicable for employees temporarily posted to another Member State?

Sometimes an employer in one Member State (“the posting State”) will want to send an employee to work in another Member State (“the State of employment”)<sup>6</sup>. Such employees are known as *posted workers*.

Under Community rules, workers moving within the European Union must be subject to a single social security legislation<sup>7</sup>. Under the Regulations the social security scheme applicable to those who for reasons of work move from one Member State to another is, generally speaking, that established by the legislation of the Member State of new employment.

In order to give as much encouragement as possible to the freedom of movement of workers and services, to avoid unnecessary and costly administrative and other complications which would not be in the interests of workers, companies and administrations, the Community provisions in force allow for certain exceptions to the general principle referred to above.

The main exception is the requirement to maintain the attachment of a worker to the social security scheme of the Member State in which the undertaking which employs him/her normally operates (the posting State), whenever the worker concerned is sent by that undertaking to another Member State (the State of employment) for a period of time which from the outset is limited (a maximum of 24 months), and provided that certain conditions, discussed below in more detail, continue to apply.

These situations – which give exemption from the payment of insurance contributions in the State of employment – better known as **posting of workers**, are governed by Article 12 of Regulation 883/2004.

The rules, which cover both employed people and self-employed people, are described below.

### 2. How is the posting of workers defined in the specific community legislation?

In line with the above mentioned provisions of the Regulation, a person who works as an employed person in the territory of a Member State on behalf of an employer **which normally carries out its activities in that State** who is sent by that employer to another Member State to perform work there **for that employer** continues to be subject to the legislation of the posting State provided that

- the anticipated duration of that work does not exceed 24 months; *and*
- s/he is not sent to replace another posted person.

<sup>6</sup> “The State of employment” is the State in which the person goes to pursue an activity as an employed (or self-employed) person as defined in Article 1(a) and 1(b) Regulation 883/2004.

<sup>7</sup> Article 11 (1) of Regulation 883/2004.





The posting arrangements are intended to facilitate employers (and workers) who have a requirement for people to work on a temporary basis in another country. Accordingly, they may not be used to staff enterprises or contracts on an on-going basis through repeated postings of different workers to the same positions and for the same purposes.

Accordingly, in addition to the temporary nature of the posting and the fact that it is not designed to replace another worker, there are several important points to note about this special rule.

In the first instance, the employer must **normally carry out its activities** in the posting State. Additionally, the rule that the worker ‘pursues an activity on behalf of an employer’ means that there must exist throughout the period of posting a **direct relationship** between the posting employer and the posted worker.

### 3. What criteria apply to determine if an employer normally carries out its activities in the ‘posting’ state?

The expression “which normally carries out its activities there” means an undertaking which ordinarily carries out **substantial activities** in the territory of the Member State in which it is established. If the undertaking’s activities are confined to internal management, the undertaking will not be regarded as normally carrying out its activities in that Member State. In determining whether an undertaking carries out substantial activities, account must be taken of all criteria characterising the activities carried out by the undertaking in question. The criteria must be suited to the specific characteristics of each undertaking and the real nature of the activities carried out.

The existence of substantial activities in the posting State can be checked via a series of objective factors and the following are of particular importance. **It should be noted that this is not an exhaustive list, as the criteria should be adapted to each specific case and take account of the nature of the activities carried out by the undertaking in the State in which it is established. It may also be necessary to take into account other criteria suited to the specific characteristics of the undertaking and the real nature of the activities of the undertaking in the State in which it is established:**

- the place where the posting undertaking has its registered office and its administration;
- the number of administrative staff of the posting undertaking present in the posting State and in the State of employment – the presence of only administrative staff in the posting State rules out *per se* the applicability to the undertaking of the provisions governing posting;
- the place of recruitment of the posted worker;
- the place where the majority of contracts with clients are concluded
- the law applicable to the contracts signed by the posting undertaking with its clients and with its workers;
- the number of contracts executed in the posting State and the State of employment;



- the turnover achieved by the posting undertaking in the posting State and in the State of employment during an appropriate typical period (e.g. turnover of approximately 25% of total turnover in the posting State could be a sufficient indicator, but cases where turnover is under 25% would warrant greater scrutiny)<sup>8</sup>;
- the length of time an undertaking is established in the posting Member State.

When assessing substantial activity in the Posting State it is also necessary for institutions to check that the employer requesting a posting is the actual employer of the workers involved. This would be particularly important in situations where an employer is using a mix of permanent staff and agency staff.

### Example:

Company A from Member State X has an order to do painting work in Member State Y. The work is expected to take two months. Along with seven members of its permanent staff company A needs in addition three temporary workers from temporary work agency B to be sent to Member State Y; these temporary workers have already been working in company A. Company A requests work agency B to post these three temporary workers to Member State Y along with its seven workers.

Provided that all the other conditions of posting are met, the legislation of Member State X will continue to apply to the temporary agency workers – as to the permanent staff members. Temporary work agency B is, of course, the employer of the temporary workers.

#### 4. When is it possible to speak of a direct relationship between the posting undertaking and the posted worker?

A number of principles emerge from the interpretation of the provisions and from Community case law and daily practice governing when a **direct relationship** exists between the posting undertaking and the posted worker. These include the following:

- responsibility for recruitment;
- it must be evident that the contract was and still is applicable throughout the posting period to the parties involved in drawing it up and stems from the negotiations that led to recruitment;
- the power to terminate the contract of employment (dismissal) must remain exclusively with the ‘posting’ undertaking;
- the ‘posting’ undertaking must retain the power to determine the “nature” of the work performed by the posted worker, not in terms of defining the details of the type of work to be performed and the way it is to be performed, but in the more general terms of determining the end product of that work or the basic service to be provided;
- the obligation with regard to the remuneration of the worker rests with the undertaking which concluded the employment contract. This is without

<sup>8</sup> In principle, the turnover can be assessed on the basis of the published accounts of the undertaking for the previous 12 months. However, in the case of a newly established undertaking turnover from the time they commenced business (or a shorter period, if that would be more representative of their business) would be more appropriate.



prejudice to any possible agreements between the employer in the posting State and the undertaking in the State of employment on the manner by which the actual payments are made to the employee;

- the power to impose disciplinary action on the employee remains with the posting undertaking.

### Some examples:

- a) Company A based in Member State A sends a worker temporarily abroad to perform work in company B situated in Member State B. The worker continues to hold a contract with company A only from which s/he is entitled to claim remuneration.

**Solution:** Company A is the employer of the posted worker since the worker's claim for remuneration is directed at company A only. This is true even if company B refunds the remuneration in part or in full to company A deducting it as operating expenses from tax in Member State B.

- b) Company A based in Member State A sends a worker temporarily abroad to perform work in company B situated in Member State B. The worker continues to have a contract with company A. His corresponding claims to remuneration are also directed at undertaking A. However, the worker concludes an additional work contract with company B and receives also remuneration from company B.

**Solution a):** For the duration of his employment in Member State B the worker has two employers. When he works exclusively in Member State B, the legislation of Member State B applies to him pursuant to Article 11 (3) (a) of Regulation 883/2004. This implies that the remuneration paid by company A is taken into account for determining the social insurance contributions payable in Member State B.

**Solution b):** If from time to time the worker works also in Member State A, the provisions of Article 13 (1) of Regulation 883/2004 must be used to assess whether the legislation of Member State A or that of Member State B is applicable.

- c) Company A based in Member State A sends a worker temporarily abroad to perform work in company B situated in Member State B. The employment contract with company A is suspended for the period of the worker's activity in Member State B. The worker concludes an employment contract with company B for the period of her activity in Member State B and claims her remuneration from that company. Solution: This is not a case of posting since a suspended employment relationship does not contain sufficient labour law ties to warrant the continued application of the legislation of the posting State. Pursuant to Article 11 (3) (a) of Regulation 883/2004 the worker is subject to the legislation of Member State B.

If the social security legislation of Member State B applies in principle, an exception may be agreed in both cases (examples 2 and 3) in accordance with Article 16 of



Regulation 883/2004 taking account of the fact that the employment in Member State B is of a temporary nature, provided that such an exception is in the interest of the worker and an application to this effect is made. Such an agreement requires the approval of both of the Member States involved.

### 5. What about workers recruited in one Member State for posting in another?

The rules on posting of workers can include a person who is recruited with a view to be posted to another Member State. However, the Regulations do require that a person being posted to another Member State is attached to the social insurance system of the Member State in which his/her employer is established immediately before the start of his/her employment<sup>9</sup>. A period of at least **one month** can be considered as meeting this requirement, with shorter periods requiring a case by case evaluation taking account of all the factors involved<sup>10</sup>. Employment with any employer in the posting State meets this requirement. It is not necessary that during this period the person worked for the employer requesting his/her posting. The condition is also fulfilled by students or pensioners or someone who is insured due to residence and attached to the social security scheme of the posting State.

All the normal conditions that apply to the posting of workers in general, also apply to such workers.

Some examples to clarify what the term attachment to the social security scheme "immediately before" the start of the employment means in particular cases:

- a) On 1 June, employer A based in Member State A posts among others workers X, Y and Z to Member State B for a period of ten months to perform work on behalf of employer A.
- b) Worker X started his employment with employer A on 1 June. Immediately before the start of his employment he had been living in Member State A being subject to the legislation of Member State A since he attended a course at university.
- c) Worker Y started her employment with employer A also on 1 June. She had lived in Member State A immediately before the start of her employment; she was a frontier worker and as such had been subject to the legislation of Member State C.
- d) Worker Z who also started his employment with employer A on 1 June had worked in Member State A since 1 May. As a result of this employment he was subject to the legislation of Member State A. However, immediately before 1 May worker Z had been subject to the legislation of Member State B for ten years as a result of an employment relationship.

**Solution:** One of the requirements for the continued application of the legislation of the posting State is that the social security legislation of the posting State must have

<sup>9</sup> Article 14 (1) of Regulation 987/2009.

<sup>10</sup> Administrative Commission Decision A2.



applied to the worker immediately before his/her posting. But it is not required that the worker was employed in the posting undertaking immediately before his/her posting. Workers X and Z were subject to the legislation of Member State A immediately before 1 June and hence meet the requirement for the continued application of the legislation of the posting State in this respect. Worker Y, however, was subject to the legislation of Member State C immediately before 1 June. Since she was not subject to the legislation of the posting State immediately before her posting, she will in principle be subject to the legislation of Member State B, in which she actually works.

#### **6. What if a worker is posted to work in several undertakings?**

The fact that a posted person works at various times or during the same period in several undertakings in the same Member State of employment does not rule out the application of the provisions governing posting. The essential and decisive element in this case is that the work must continue to be carried out on behalf of the posting undertaking. Consequently, it is necessary always to check the existence and continuation throughout the posting period of the direct relationship between the posted worker and the posting undertaking

Posting to different Member States which immediately follow each other shall in each case give rise to a new posting within the meaning of Article 12 (1). The posting provisions do not apply in cases where a person is normally simultaneously employed in different Member States. Such arrangements would fall to be considered under the provisions of Article 13 of the basic Regulation.

#### **7. Are there situations in which it is absolutely impossible to apply the provisions on posting?**

There are a number of situations in which the Community rules *a priori* rule out the application of the provisions on posting.

In particular, when:

- the undertaking to which the worker has been posted places him/her at the disposal of another undertaking in the Member State in which it is situated;
- the undertaking to which the worker is posted places him/her at the disposal of an undertaking situated in another Member State;
- the worker is recruited in a Member State in order to be sent by an undertaking situated in a second Member State to an undertaking in a third Member State without the requirements of prior attachment to the social security system of the posting State being satisfied;
- the worker is recruited in one Member State by an undertaking situated in a second Member State in order to work in the first Member State;
- the worker is being posted to replace another posted person;
- the worker has concluded a labour contract with the undertaking to which s/he is posted.



In such cases the reasons which prompted stringent exclusion of the applicability of posting are clear: the complexity of the relations stemming from some of these situations, as well as offering no guarantee as to the existence of a **direct relationship** between the worker and the posting undertaking, contrasts starkly with the objective of avoiding administrative complications and fragmentation of the existing insurance history which is the *raison d'être* of the provisions governing posting. It is also necessary to prevent wrongful use of the posting provisions.

In exceptional circumstances it would be possible to replace a person who has already been posted, provided the period allowed for the posting has not been completed. An example where this might arise would be a situation where a worker was posted for 20 months, became seriously ill after 10 months and needed to be replaced. In that situation it would be reasonable to allow another person to be posted for the remaining 10 months of the agreed period.

The ban on replacing a posted person by another posted person must be considered not only from the perspective of the posting State but also from the perspective of the receiving State. The posted worker cannot be immediately replaced in receiving Member State A by a posted worker from the same undertaking of posting Member State B, nor by a posted worker from a different undertaking based in Member State B or a posted worker from an undertaking based in Member State C.

From the point of view of the competent institution of posting Member State, the posting conditions may appear to be fulfilled when assessing the posting conditions. However, if an activity in the receiving undertaking of Member State A was previously pursued by a posted worker from posting Member State B, this worker cannot be replaced immediately by a newly posted worker from any Member State. It does not matter from which posting undertaking or Member State the newly posted worker comes from – one posted worker cannot be immediately replaced by another posted worker.

#### **Example (unlimited framework contract):**

*X is an employment agency specialising in providing butchers for meat cutting business in Member State A. Agency X concludes a contract with slaughterhouse Y in Member State B: X sends employees to do meat cutting there. The remuneration (from slaughterhouse Y to employer X) for that service is paid depending on the tons of meat cut. The work carried out by the different posted employees is not always exactly the same but in principle each posted employee could be placed at any position in the meat cutting process. The normal duration of posting is 10 months per employee. The contract between employer X and slaughterhouse Y is a framework contract which allows Y to request posted butchers for subsequent periods (e.g. for every year); but this framework contract is not limited in time itself. Furthermore, there is also employer Z, established in Member State C, which sends his employees to slaughterhouse Y. After some time, an examination shows that the meat cutting activity in slaughterhouse Y has been carried out for years, exclusively and without interruption, by posted workers from employers X and Z.*

This is an example of unauthorised replacement of a posted worker by another posted worker. The Portable document A1 should be withdrawn by the issuing institution and the worker made subject to the legislation of the State of employment as from the date





the competent institution of the posting State was notified and provided with evidence of the situation in the State of employment. In case of fraudulent situations, the withdrawal can also take place retroactively.

When a posted worker is immediately replaced by another posted worker the newly posted worker shall be attached to the social security legislation of the State of work from the beginning of his/her activity because the exception of Article 12 of Regulation 883/2004 does not apply any more to him/her.

## 8. What about self-employed people temporarily working in another Member State?

Sometimes a person who is normally self-employed in one Member State (“the posting State”) will want to go to work temporarily in another Member State (“the State of employment”).

Like posted employees, it would cause administrative difficulties and confusion if a self-employed person temporarily working in another Member State became subject to the legislation of the State of employment. Also, the self-employed person might lose out on benefit.

The Regulations therefore provide a special rule for self-employed persons working temporarily in another Member State which resembles - but is not identical to - the rule for posted employees.

This rule provides that a person **normally self-employed in the posting Member State** who pursues a **similar** activity in the Member State of employment continues to be subject to the legislation of the posting State provided that the anticipated duration of that work does not exceed 24 months<sup>11</sup>.

## 9. What criteria apply to determine if a person is normally self-employed in the posting state?

The Regulations provide that a person “who normally pursues an activity as a self-employed person” means a person who habitually carries out substantial activities in the territory of the Member State in which he/she is established. In particular this applies to a person who

- has pursued his/her self-employed activity for some time before the date when he/she moves to another Member State, and
- fulfils any necessary requirements for his/her business in the Member State in which he/she is established and continues to maintain there the means to enable him/her to exercise his/her activity on his/her return.

When determining whether a person is normally self-employed in the posting Member State it is important to examine the above criteria. Such examination could involve assessing if the person;

<sup>11</sup> Article 12 (2) of Regulation 883/2004.



- keeps an office in the posting State;
- pays taxes in the posting State;
- maintains a VAT number in the posting State;
- is registered with chambers of commerce or professional bodies in the posting State;
- has a professional card in the posting State.

The Regulations require that a self-employed person wishing to avail of the posting arrangements “must have already pursued his/her activity for some time” before the date of posting. In this regard a period of two months can be considered as satisfying this requirement, with shorter periods requiring a case by case evaluation<sup>12</sup>.

### 10. What does ‘similar’ activity mean?

When determining whether a person is going to another Member State to pursue a “similar” activity to that pursued in the posting State, account must be taken of the actual nature of the activity. It does not matter how this type of activity is categorised in the State of employment i.e. whether it is designated as employment or self-employment.

In order to determine if the work is “similar”, the work which the person sets out to perform must be determined in advance, before departure from the posting State. The self-employed person should be able to prove this, for example by producing contracts regarding the work.

In general, self-employed activity in the same sector would be regarded as pursuing a similar activity. However, it must be recognised that even within sectors, work can be very diverse and it may not always be possible to apply this general rule.

#### Examples:

- a) A is a person who normally works as a self employed carpenter in State X and moves to State Y where s/he works as a self-employed butcher. S/he would not be regarded as pursuing a “similar activity” as the employment in State Y bears no similarity to his/her work in State X.

B runs a construction company in State X and accepts commissions relating to the installation of piping and wiring systems. B signed a contract in the State Y for the works consisting in installing the wiring system and repairing the foundation.

- b) B may take advantage of the provisions of Article 12(2) because he is intending to move to the State Y to take up a similar activity, that is, an activity within the same sector (construction).

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<sup>12</sup> Administrative Commission Decision A2.



- c) C pursues activities as a self-employed person in the State X which consists in providing transport services. C temporarily moves to the State Y to perform a contract installing the wiring system and repairing the foundation. Due to the fact that the activity performed in the State Y differs from the activity pursued in the State X (different sectors: X – transport, Y – construction), C cannot take advantage of the provisions of Article 12(2) of the basic Regulation.
- d) D is a self-employed solicitor specialising in criminal law in State X. He secures an assignment in State Y advising a large undertaking on corporate governance. While the area he is working in is different, nevertheless, he is still active in the legal area and so can avail himself of the posting provisions.

### 11. What procedures must be followed in the case of a posting?

An undertaking which posts a worker to another Member State, or in the case of a self-employed person the person himself/herself, must contact the competent institution in the posting State and wherever possible this should be done in advance of the posting.

The competent institution in the posting State shall without delay make information available to the institution in the State of employment on the legislation that is to apply. The competent institution in the posting State must also inform the person concerned, and his/her employer in the case of an employed person, of the conditions under which they may continue to be subject to its legislation and the possibility of checks being made throughout the posting period to ensure these conditions are met.

Where an employee or self-employed person is to be posted to another Member State she/he or his/her employer shall be provided with an attestation A1 (formerly E 101 certificate) from the competent institution. This attestation certifies that the worker comes within the special rule for posted workers up to a specific date. It should also indicate, where appropriate, under what conditions the worker comes within the special rules for posted workers.

### 12. Agreements on exceptions to the legislation governing posting

The Regulations provide that a posting period may not last any longer than 24 months.

However, Article 16 of Regulation 883/2004 permits the competent authorities of two or more Member States to reach agreements providing for exceptions to the rules governing applicable legislation, and that includes the *special rules* governing posting already outlined above. Article 16 agreements require the consent of the institutions of both the Member States involved and can only be used in the interests of a person or category of persons. Accordingly, while administrative convenience may well result from agreements between Member States, the achievement of this cannot be the sole motivating factor in such agreements, the interests of the person or persons concerned must be the primary focus in any considerations.

For example, if it is known that the anticipated duration of a posting for a worker will extend beyond 24 months, an Article 16 agreement must be reached between the



posting State and State/s of employment if a worker is to remain subject to the legislation applicable of the posting State. Article 16 agreements might also be used to permit a posting retrospectively where this is in the interest of the worker concerned, e.g. where the wrong Member State's legislation was applied. However, retrospection should only be used in very exceptional cases.

When it can be foreseen (or becomes clear after the posting period has already commenced) that the activity will take more than 24 months, the employer or the person concerned shall submit, without delay, a request to the competent authority in the Member State whose legislation the person concerned wishes to apply to him/her. This request should be sent wherever possible in advance. If a request for an extension of the posting period beyond 24 months is not submitted or if, having submitted a request, the States concerned do not make an agreement under Article 16 of the Regulations to extend the application of the legislation of the posting State, the legislation of the Member State where the person is actually working will become applicable as soon as the posting period ended.

### **13. Once a posting has been completed when can a person apply for another posting?**

Once a worker has ended a period of posting, no fresh period of posting for the same worker, the same undertakings and the same Member State can be authorized until at least two months have elapsed from the date of expiry of the previous posting period. Derogation from this principle is, however, permissible in specific circumstances<sup>13</sup>.

On the other hand, if the posted worker could not complete the work due to unforeseen circumstances, s/he, or her/his employer, may request an extension of the initial posting period until the completion of such work (up to 24 months in total) without taking into account the necessary break of at least two months. Such request must be submitted and substantiated before the end of the initial posting period.

#### **Examples:**

- a) Worker A is posted from Member State A to Member State B for 12 months. During that period he falls seriously ill for three months and cannot pursue and complete the anticipated work in Member State B. Because A could not complete the work due to unforeseen circumstances, he, or his employer, can request a three month extension of the initial posting period continuing immediately after the original 12 months have elapsed.
  
- b) Worker B is posted from Member State A to Member State B for 24 months in order to perform construction work there. During that period it becomes evident that, because of difficulties with the project, the work cannot be completed by the end of the 24 months. Even though worker B is unable to complete the work due to unforeseen circumstances, an extension of the initial posting period continuing immediately after the 24 months have elapsed cannot be granted by the posting State. The only way in which this can be

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<sup>13</sup> See also Administrative Commission Decision A2.



dealt with is if the institutions concerned conclude an Article 16 agreement (see point 12). In the absence of such an agreement the posting will finish after 24 months.

**14. What is the position in relation to postings already authorised and started under regulation 1408/71<sup>14</sup>? Do these periods count towards the 24 months period allowed under regulation 883/2004?**

Regulation 883/2004 does not contain any explicit provision on aggregation of posting periods completed under the old and new Regulations. However, the clear intention of the legislator was to extend the maximum possible period of posting to 24 months.

Therefore, under the new Regulations, once the worker has ended a posting period of 24 months in total, no fresh period of posting for the same worker, the same undertakings and the same Member State can be granted (except in the context of an Article 16 agreement)<sup>15</sup>.

The following examples illustrate how periods completed under both Regulations should be treated.

- a) Posting E 101 form issued from 1.5.2009 until 30.4.2010 → continued posting under Regulation 883/2004 until 30.4.2011 possible.
- b) Posting E 101 form issued from 1.3.2010 until 28.2.2011 → continued posting under Reg. 883/2004 until 28.2.2012 possible.
- c) Posting E 101 form issued from 1.5.2008 until 30.4.2009 + E 102 form from 1.5.2009 until 30.4.2010 → no continued posting possible under Reg. 883/2004 as the maximum posting period of 24 months is already completed.
- d) Posting E 101 form issued from 1.3.2009 until 28.2.2010 + E 102 from 1.3.2010 until 28.2.2011 → no further extension possible under Reg. 883/2004 as the maximum posting period of 24 months has already been completed.
- e) Request for a posting on 1.4.2010 until 31.3.2012. This period cannot fall under the posting provisions of Reg. 1408/71 because it is longer than 12 months. An Article 17 agreement is therefore necessary.

**15. Suspension or interruption of the posting period**

Suspension of work during the posting period, whatever the reason (holidays, illness, training at the posting undertaking etc.) does not constitute a reason which would justify an extension of the posting period for an equivalent period. Therefore the

<sup>14</sup> Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, OJ L 149, 5.7.1971, p. 2 (hereafter: Regulation 1408/71).

<sup>15</sup> See also Decision No A3 of 17 December 2009 concerning the aggregation of uninterrupted posting periods completed under the Council Regulation (EEC) No 1408/71 and Regulation (EC) No 883/2004 of the European Parliament and of the Council, OJ C 149, 8.6.2010, p. 3.



posting will end precisely upon expiry of the programmed period, irrespective of the number and duration of events which prompted the suspension of activity.

Derogation from this principle is, however, permissible according to Decision No A2 in specific circumstances if the posting period does not exceed 24 months in total (see point 13).

In case of sickness of 1 month a posting period which was initially programmed to take 24 months cannot be extended to 25 months from the beginning of the posting.

In case of longer suspension of work it is up to the persons concerned either to stick to the previously programmed period of posting or to end the posting with a view to arranging a new posting by the same person, taking into account the necessary break of at least two months as mentioned under point 13, or another person if the relevant criteria are met.

## **16. Notification of changes occurring during the posting period**

The posted worker and his/her employer must inform the authorities in the posting State of any change occurring during the posting period, in particular:

- if the posting applied for has, in the end, not taken place or was terminated ahead of schedule.
- if the activity is interrupted other than in the case of brief interruptions arising from illness, holidays, training etc. (see under point 13 and 15)
- if the posted worker has been assigned by his/her employer to another undertaking in the posting State, in particular in the event of a merger or a transfer of undertaking.

The competent institution in the posting State should, where appropriate and upon request, inform the authorities in the State of employment in the event of any of the above occurring.

## **17. Provision of information and monitoring of compliance**

In order to ensure proper use of the posting rules, the competent institutions in the Member State to whose legislation the workers remain subject, must ensure that appropriate information is made available to both employers and posted workers of the conditions which apply to the posting (e.g. via information leaflets, websites), alerting them to the possibility that they may be subject to direct controls designed to check that the conditions which permitted the posting continue to exist.

While providing undertakings and workers with every guarantee to avoid obstacles to the freedom of movement of workers and the free provision of services, the competent institutions of the posting and the employment States, individually or in cooperation, shall take responsibility for all initiatives designed to check the existence and the continuation of the conditions which characterize the specific nature of posting (direct relationship, substantial activities, similar activity, maintenance in the State of residence of the means to pursue self-employed activity etc.).





The procedures to be followed where competent authorities disagree on the validity of posting arrangements, or the appropriate legislation which should be applied in particular cases, are set out in Decision A1<sup>16</sup> of the Administrative Commission.

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<sup>16</sup> Decision No A1 of 12 June 2009 concerning the establishment of a dialogue and conciliation procedure concerning the validity of documents, the determination of the applicable legislation and the provision of benefits under Regulation (EC) No 883/2004 of the European Parliament and of the Council, OJ C 106, 24.4.2010, p. 1.

## Part II: Pursuit of activity in two or more Member States<sup>17</sup>

### 1. Which social security system is applicable to persons normally working in two or more member states?<sup>18</sup>

There are special rules for persons who normally work in two or more Member States. These rules are laid down in Article 13 of Regulation 883/2004. As all the rules for determining the applicable legislation, the rules are designed to ensure that the social security legislation of only one Member State is applicable at a time.

In the situation where a person normally pursues an activity as an employed person, the first step is to determine if **a substantial part of a person's activity is pursued in the Member State of residence<sup>19</sup>**:

- a) If the answer is **yes**, Article 13(1) provides that the legislation of the **Member State of residence<sup>20</sup>** applies.

#### **Example:**

Mr X lives in Spain. His employer is established in Portugal. X works two days a week in Spain and three days in Portugal. As X works two out of five days in Spain (40% of his working time), he performs a 'substantial part' of his activity there. The Spanish legislation is applicable.

- b) If the answer is **no**, then Article 13(1) provides that a person normally working in two or more Member States is subject to:

(i) the legislation of the **Member State in which the registered office or place of business of the undertaking employing her/him** is situated if s/he is employed by one undertaking or employer.

#### **Example:**

Ms Z is employed by an undertaking with its registered office in Greece. She works one day at home in Bulgaria and the rest of the time, she works in Greece. As one day a week amounts to 20% of the activity, Z is not performing a 'substantial part' of her activity in Bulgaria. The Greek legislation will apply.

(ii) the legislation of the **Member State in which the registered office or place of business of the undertakings employing her/him** is situated if she/he is employed by two undertakings which each have their registered office or place of business in the same Member State.

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<sup>17</sup> Article 13 of Regulation 883/2004.

<sup>18</sup> Specific provisions are in place for seafarers and flight and cabin crew, for whom a legal fiction is created in Articles 11(4) and 11(5) of Regulation 883/2004.

<sup>19</sup> See Paragraph 3 for the definition of "substantial part of the activity".

<sup>20</sup> Article 1(j) of Regulation 883/2004 defines residence as the place where a person habitually resides. The elements for determining residence are contained in Article 11 of Regulation 987/2009.



### Example:

Mr Y is a researcher at a university in the Netherlands for four days a week. He lives just across the border with Belgium and commutes three days a week to the Netherlands; the fourth day he works from home in Belgium. In addition to his work at the university, he works one day a week for a law firm in the Netherlands. Mr Y works for two employers, both of which have their registered office in the same Member State (the Netherlands). As Y doesn't pursue a substantial part of his activity in the Member State of residence, the legislation of the Member State in which the employers are located applies. Therefore, the Dutch legislation applies.

(iii) the legislation of the Member State in which **the registered office or place of business of the undertaking employing her/him** is situated, other than the Member State of residence, if s/he is employed by two undertakings, one of which has its registered office in the Member State of residence and the other in another Member State<sup>21</sup>.

### Example:

Mrs X is a business manager for two companies: one in Poland and one in the Czech Republic. She resides in Poland near the German border. Each week, she spends three working days in Germany for the Polish company. For the Czech company, she works one day in Slovakia and one in the Czech Republic. Mrs X does not pursue a substantial part of her activity in her Member State of residence (Poland). She is working for 2 undertakings, one of which is situated in her Member State of residence and the other is situated outside the Member State of residence. In that situation, the legislation of that other Member State (i.e. Czech Republic) should apply.

This rule has been introduced by Regulation 465/2012 in order to avoid a situation where taking up a minor, but more than marginal, activity for an employer who has its registered office or place of business in the Member State of residence could lead to the legislation of the State of residence becoming applicable again 'through the backdoor'.

(iv) the legislation of the **Member State of residence** if she/he is **employed by various undertakings or various employers** whose **registered offices or places of business are in different Member States outside the country of residence**;

### Example:

Mr Y lives in Hungary. Y has two employers, one in Austria and one in Slovenia. He works one day a week in Slovenia. The other four days, he works in Austria.

Even if Y is working for various employers established in different Member States outside his country of residence (Hungary), the legislation of that country applies as it is not possible to identify one Member State in which the "registered office or

<sup>21</sup> This rule is an important change to Article 13(1) after the entry into force of Regulation (EU) No 465/2012. For more information on how to deal with transitions in applicable legislation, see Paragraph 15.



place of business" of his employers is situated outside the Member State of residence.

(v) If a person pursues his/her activity as an employed person in two or more Member States **on behalf of an employer established outside the territory of the European Union**, and if the person resides in a Member State without pursuing substantial activity there, s/he shall be subject to the legislation of the **Member State of residence**.

#### **Example:**

Ms P is living in Belgium. Her employer's undertaking is established in the United States. P usually works half a day per week in Italy and three days a week in France. P also works one day a month in the United States. For the occupational activities in Italy and France, the Belgian legislation is applicable according to Article 14(11) of Regulation 987/2009.

The rules for persons normally working in two or more Member States are similar in nature to those contained in Article 14 of Regulation 1408/71 but are captured in one central provision. The revised rules remove the special provisions of Regulation 1408/71 relating to persons working in the international rail, road and inland waterway sector, as well as the special rules for civil servants. They also introduce the concept of a 'substantial part of the activity' to establish which Member State a person has the closest link with in terms of social security coverage.

These rules apply to a large number of workers, including self-employed persons (see Paragraph 9), international truck drivers, train drivers, international couriers, IT experts, consultants and other professionals who work in two or more Member States.

With the entry into force of Regulation 465/2012, the condition of pursuing a 'substantial part of the activity' applies as a first step in all situations where a person is working in two or more Member States. There is **one exception**, which follows from the practical application of the rules. If the place of residence of a person working for one or more employer(s) or undertaking(s) and the registered office or place of business of that person's employer(s) or undertaking(s) is (are) situated in one and the same Member State, then the legislation of the resident Member State will always be applicable. In this case, it is not necessary to determine whether or not a substantial part of the activity is performed in the Member State of residence.

Under Article 11(2) of Regulation 883/2004, persons receiving cash benefits because of or as a consequence of their activity as an employed or self-employed person<sup>22</sup> shall be considered to be pursuing the said activity. A person who simultaneously receives a short-term benefit from one Member State and pursues an activity in another Member State shall therefore, be considered to be pursuing two activities in two different Member States, and the rules of Article 13 will apply. If the benefit paid in the Member State of residence derives from 'a substantial part' of the person's activities, then the person will be subject to the legislation in the Member State of residence.

<sup>22</sup> For example sickness benefits in cash.



However, the Member States agreed that persons receiving unemployment benefits in their Member State of residence and simultaneously pursuing part-time professional or trade activity in another Member State should be subject exclusively to the legislation of the former State as regards both the payment of contributions and the granting of benefits,<sup>23</sup> and recommended that agreements providing for this solution should be concluded under Article 16(1) of Regulation 883/2004.

Where a person simultaneously receives a long-term benefit<sup>24</sup> from one Member State and pursues an activity in another Member State, they shall not be regarded as pursuing activities in two or more Member States and the applicable legislation shall be determined according to the rules of Article 11(3) of Regulation 883/2004.

## 2. When can a person be regarded as normally pursuing an activity in two or more member states?

Article 14(5) of Regulation 987/2009 provides that a person who ‘normally pursues an activity as an employed person in two or more Member States’ is a person who simultaneously or in alternation exercises one or more separate activities in two or more Member States for the same undertaking or employer or for various undertakings or employers.

The provision was adopted in order to reflect the various cases already dealt with by the Court of Justice of the EU<sup>25</sup>. The intention is to cover all possible cases of multiple activities with a cross-border element and to distinguish activities which, as a rule, habitually extend over the territory of several Member States from those that are exercised exceptionally or temporarily.

**Activities that are performed simultaneously** covers cases where additional activities in different Member States are carried out simultaneously under the same or different employment contracts. The second or additional activity could be exercised during paid leave, during the weekend, or in the case of part-time work, two different activities for two different employers may be undertaken on the same day. For example, a shop assistant in one Member State would still be covered by this provision if s/he works as an employed taxi driver during the weekends in another Member State. International road transport workers driving through different Member States to deliver goods are also an example of persons working 'simultaneously' in two or more Member States. In general, it can be said that coinciding activities are a normal aspect of the working pattern and there is no gap between the activities in one Member State or the other.

**Activities that are performed in alternation** covers situations where the activities are not carried out simultaneously over the territory of several Member States, but consists in successive work assignments carried out in different Member States, one after another. To determine if the activities are carried out during successive periods, not only must the anticipated duration of periods of activity be considered, but also

<sup>23</sup> For further details please see the Administrative Commission Recommendation No U1 of 12.6.2009, OJ C 106 of 24.4.2010.

<sup>24</sup> Invalidity, old-age or survivors' pensions, pensions received in respect of accidents at work or occupational diseases, or sickness benefits in cash covering treatment for an unlimited period.

<sup>25</sup> See, among others, Case 13/73 *Willy Hakenberg*, [1973] ECR 935, Case 8/75 *Football Club d' Andlau* [175] ECR 739, Case C-425/93 *Calle Grenzshop* [ECR] 1995, I-269.



the nature of the employment in question. It is not relevant how often this alternation takes place but some regularity in the activity is required. For example, a business representative who year after year travels in a Member State, canvassing business for nine months, and for the remaining three months a year returns to his Member State of residence to work would be carrying out activities in alternation.

When asked to determine the applicable legislation, the Member State of residence will have to carry out a proper assessment of the relevant facts and guarantee that the information on the basis of which the A1 certificate is provided is correct<sup>26</sup>.

For this assessment, it is, first of all, important to establish whether, at the moment of the determination of the applicable legislation, periods of work in several Member States will follow each other with a certain regularity in the course of the following 12 calendar months. For the purpose of that assessment, the description of the nature of the work as evidenced by the employment contract(s) is of particular importance.

Secondly, the activities as described in the contract(s) should be consistent with the activities likely to be undertaken by the worker. When assessing the facts with a view to determining the applicable legislation, the institution may where appropriate also take account of:

- the way in which employment contracts between the employer and the worker concerned had previously been implemented in practice;
- how the employment contracts are concluded (e.g. is it a 'framework contract' that is not very specific as to the actual Member State where the worker will be working), and
- the characteristics and conditions of the activity performed by the employer.

If the assessment of the factual situation differs from the one based on the employment contract, the competent institution should base itself on the findings of the person's *actual situation*, as assessed, and not on the employment contract<sup>27</sup>. Moreover, if the competent institution discovers that the real working situation differs from the situation as described in the contract after having issued the A1 certificate and has doubts as to the correctness of the facts on which the A1 certificate is based, it will have to reconsider the grounds for its issue and, if necessary withdraw the certificate.

### Example 1:

Mr X resides in Estonia and works for an Estonian subcontracting construction company. He works on an on-call basis under so-called 'framework' contracts. The terms of the contract could mean that he can be asked to work in Finland, Estonia, Latvia and Lithuania. When he will be sent and for how long depends on the availability of the work and the requirements of the assignment. Mr X first works for two months in Latvia. When the assignment comes to an end, the framework contract is terminated. After having waited for a new assignment for two months, he takes up a new activity in Lithuania for ten months under a new framework contract.

<sup>26</sup> See by analogy case C-202/97 *Fitzwilliam* [2000] ECR I-883, paragraph 51 and C-178/97 *Banks* [2000] ECR I-2005, paragraph 38 and Judgment of the Court of Justice of 4 October 2012 in Case C-115/11 *Format Rec.* [2012] not yet published.

<sup>27</sup> Judgment of the Court of Justice of 4 October 2012 in Case C-115/11 *Format Rec.* [2012] not yet published.





In this situation, Mr X works in one Member State at a time under each contract. The contracts do not immediately follow one another and on the basis of the terms of each individual contract it could not be predicted whether Mr X would actually be working in two or more member States over a period of 12 calendar months. Whilst the terms of the framework contract suggested that Mr X could work simultaneously or alternately in different Member States, this was **not reflected in his actual working situation**. The factual working situation does not demonstrate a pattern of regular work in two or more Member States, so for the purposes of determining the applicable legislation this person is not 'normally' pursuing activities in two or more Member States.

### Example 2:

Mr Z resides in Hungary and has two occupations throughout the year. From November of one year to April of the next year he works in Austria for an Austrian undertaking as a skiing instructor. He then returns to Hungary where he is hired by a farm to harvest vegetables in the period between May and October. He has two employment contracts, one with each employer.

To determine if this person is normally pursuing activities in two or more Member States, or is only working in one Member State at a time, the foreseeable activities should amount to employed activities covering, on more than a merely one-off basis, the territory of several Member States. This person will only be treated as working in two or more Member States if there are indications that the work pattern will remain stable for the next 12 calendar months. In the case of seasonal employment, the predictability of the activities that are to take place in the next Member State of work is relevant. Is there already an employment contract in place with another employer in another Member State? If not, does it follow from the working situation in the past twelve months that the person has a **repetitive working pattern** between the Member States involved? Are there any intermittent periods between the activities in another Member State and would they interrupt the 'normal' working rhythm of working in two Member States? If no clear indication of a repetitive work pattern can be found, the applicable legislation will have to be determined under each contract and for each Member State individually and not under Article 13 of Regulation 883/2004.

If a person is held to perform work irregularly in different Member States, this situation would be covered by Article 13 insofar as working in different Member States is an intrinsic part of the work pattern and the interval between periods of work is not of such a length or nature to modify the work pattern in a way that a person would no longer be "normally" working in two or more Member States. It could be that indeed for the first assessment of the applicable legislation for the coming twelve calendar months, the uncertainty or irregularity in the work pattern could lead to the conclusion that a person is not normally pursuing an activity in two or more Member States. However, if during the following twelve calendar months a similar repetitive working pattern can be identified, then the person could be regarded as working in two or more Member States.



### Example 3:

Ms Z works for a circus company established in Italy. She has a contract with the company for an undefined period of time. She normally tours Member States between January and May, staying around one month in each Member State, although it is difficult to predict in advance when and where she will work.

At the time when the resident Member State needs to take a decision on the applicable legislation it is **foreseeable** that Ms Z will normally exercise activities abroad under her employment contract. Her case can therefore be regarded as a case in which activities are normally pursued in more than one Member State. The applicable legislation shall be determined following the rules of Article 13 of Regulation 883/2004 in conjunction with Article 14 (10) of Regulation 987/2009.

For the distinction between multiple activities and posting, the duration and nature of the activity in one or more Member States shall be decisive (whether it is permanent or of a one-off, ad hoc or temporary nature).

To avoid possible manipulation of the rules governing the applicable legislation, **marginal activities** shall not be taken into account for the determination of the applicable legislation on the basis of Article 13 of Regulation 883/2004.

**Marginal activities** are activities that are permanent but insignificant in terms of time and economic return. It is suggested that, as an indicator, activities accounting for less than 5% of the worker's regular working time<sup>28</sup> and/or less than 5% of his/her overall remuneration should be regarded as marginal activities. Also the nature of the activities, such as activities that are of a supporting nature, that lack independence, that are performed from home or in the service of the main activity, can be an indicator that they concern marginal activities. A person who pursues "activities of a marginal extent" in one Member State and also works in another Member State, cannot be regarded as normally pursuing an activity in two or more Member States and is therefore not covered by Article 13 of Regulation 883/2004. In this situation, the person is treated, **for the purpose of determining the applicable legislation**, as having an activity in one Member State only. If the marginal activity generates social security affiliation, then the contributions shall be paid in the competent Member State for the overall income from all activities. This helps to avoid misuse if, for instance, a person is obliged to work for a very short period in another Member States to circumvent the legislation of the 'first' Member State becoming applicable. In such cases, the marginal activities shall not be taken into account when determining the applicable legislation. Marginal activities have to be assessed for each Member State separately and cannot be aggregated.

The procedure of Article 16 of Regulation 987/2009 remains applicable to all cases in which a person pursues an activity in one State and a marginal activity in another.

<sup>28</sup> According to Directive 2003/88/EC concerning certain aspects of the organisation of working time "Working time shall mean any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice. In that context, on-call time where the worker is required to be physically present at a place specified by his employer, shall be regarded as wholly working time, irrespective of the fact that, during periods of on-call time, the person concerned is not continuously carrying on any professional activity."



This follows from the text of Article 16, which applies to **all cases** where a person pursues *an activity* in two or more Member States, irrespective of the working pattern.

### 3. How is substantial activity defined?<sup>29</sup>

A ‘**substantial part of the activity**’ pursued in a Member State means that a quantitatively substantial part of all the activities of the worker is pursued there, without this necessarily being the major part of those activities.

For the purposes of determining whether a substantial part of the activity of an employed person is pursued in a Member State, the following indicative criteria shall be taken into consideration:

- the working time; and/or
- the remuneration.

If in the context of carrying out an overall assessment it emerges that at least 25% of the person’s working time is carried out in the Member State of residence and/or at least 25% of the person’s remuneration is earned in the Member State of residence this shall be an **indicator** that a **substantial part of all the activities of the worker is pursued** in that Member State.

While it is obligatory to take account of working time and/or remuneration, this is not an exhaustive list and other criteria may also be taken into account. It is for the designated institutions to take into account all relevant criteria and to undertake an overall assessment of the person's situation before deciding on the applicable legislation.

In addition to the above criteria, when determining which Member State’s legislation is to apply, the assumed future situation in the following 12 calendar months **must** also be taken into account<sup>30</sup>. However, past performance is also a reliable measure of future behaviour and thus when it is not possible to base a decision on planned work patterns or duty rosters, it would be reasonable to look at the situation over the previous 12 months and to use this for assessing substantial activity. Where a company has only been recently established, then the assessment can be based on a suitable shorter period of time.

#### **Example:**

Mr X is a computer consultant. He works in Austria and Belgium for a company based in Belgium. He lives in Austria where he carries out least 25% of his work. Since he resides in Austria and satisfies the requirement that a substantial part of his activity is carried out in Austria, that State’s legislation is applicable. See Paragraph 1 (a) above. If, on the other hand less than 25% of his work (or remuneration earned) was in Austria, the legislation of the Member State where the company has its registered office or place of business would be applicable (Paragraph 1(b)(i)).

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<sup>29</sup> Article 14 (8) of Regulation 987/2009.

<sup>30</sup> Article 14 (10) of Regulation 987/2009.



Mr P is a carpenter. He works for a company whose registered office is in France and from where he receives his remuneration. He resides in Spain, but over the 12 past calendar months has only pursued 15% of his activities there. His working pattern is likely to be the same for the coming 12 calendar months. The French legislation applies. See Paragraph 1(b)(i) above.

Mr T is employed by two transport companies whose registered offices are in the Netherlands. Mr T has never worked in the Netherlands. The companies provide truck drivers to various international transport companies. Mr T does not work in the Netherlands, or in Poland where he resides. As he does not pursue a substantial part of his activity in the Member State of residence, and receives all his income from the companies in the Netherlands, the legislation of the Member State where his employer have their registered office (outside the Member State of residence, i.e. the Netherlands), applies. See Paragraph 1(b)(ii) above.

Ms Z is a lawyer. She works for two different law firms, one in Italy and one in Slovenia, which is also the State in which she lives. Most of her activity is in Italy (40%) and she does not pursue a substantial activity part of her activity in her State of residence (20%). The total amount of remuneration from Slovenia does not amount to 25% either. As the registered office of one of her employers is located outside the Member State of residence, the Italian legislation applies. See Paragraph 1(b)(iii) above.

Ms Y is a lawyer. She works in Austria for a law firm whose place of business is in Austria, and she works in Slovakia for another law firm whose place of business is in Slovakia. She lives in Hungary. The Hungarian legislation is applicable. See Paragraph 1(b)(iv) above.

#### 4. Substantial activity and international transport workers

As already indicated, the specific rules applicable to international transport workers contained in Regulation 1408/71 have not been carried forward to the new regulations. Accordingly, the same general provisions which apply to persons working in two or more Member States also apply to international transport workers. An exception exists for seafarers, flight and cabin crew members. **More on the applicable legislation to flight and cabin crew members after the entry into force of Regulation 465/2012 on 28 June 2012 can be found in Paragraph 4a.**

This paragraph of the guide is intended to provide assistance in dealing with the particular working arrangements which apply in the international transport sector. However, where it is clear from an initial assessment that a worker is substantially employed in their State of residence, there should be no need for institutions to apply the special criteria suggested in the following paragraphs.

In assessing the "substantial part of the activity" for this group of workers it is considered that working time is the most appropriate criterion on which to base a decision. However, it is also recognised that dividing the activity between two or more Member States may not always be as straightforward for a transport worker as for those in "standard" cross-border employment. Accordingly, a closer examination



of the working arrangements may be needed in order to determine the applicable legislation in such cases when the working hours in the Member State of residence are difficult to estimate.

Some transport workers have set work patterns, routes to be travelled and estimated journey times. A person seeking a decision on applicable legislation should make a reasonable case (e.g. by providing duty rosters or travel calendars or other information) to apportion the activity between time spent working in the State of residence and time spent working in other Member States.

Where the working hours spent in the Member State of residence are not available, or when it is not clear from the circumstances as a whole that a substantial part of the activity is spent in the Member State of residence, then another method other than working hours can be used for determining whether or not a substantial part of the activity is pursued in the Member State of residence. In this regard it is suggested that the activity is broken down into different elements or incidents and a judgement concerning the extent of activity in the state of residence is made on the basis of the number of elements occurring there as a percentage of the total number of incidents in a given period (as outlined in Paragraph 3, the assessment should be based as far as possible on work patterns over a 12 month period).

In the case of road transport, the focus could be on loading and unloading of cargo and the different countries in which this takes place, as illustrated in the following example.

### **Example:**

A truck driver lives in Germany and is employed by a Dutch transport company. The worker's activities are mainly in the Netherlands, Belgium, Germany and Austria. In a given period, e.g. a week<sup>31</sup>, he loads the truck 5 times and offloads the truck 5 times. In total there are 10 elements (5 loadings, 5 off loadings). During this week he loads and offloads once in Germany, his state of residence. This amounts to 2 elements which equals 20% of the total and is thus an indication that there is not a substantial part of activity pursued in the State of residence. Therefore Dutch legislation will apply as the Netherlands is the Member State of the employer's registered office.

Given the broad range of working arrangements that can apply in this sector, it would be impossible to suggest a system of assessment which would suit all circumstances. When assessing the substantial part of the activity, the Regulations specifically provide for an assessment of working time and remuneration. However, the Regulations provide for these to be used as indicators in the framework of an overall assessment of a person's situation. Accordingly, it is possible for the designated institutions who are responsible for determining applicable legislation to use measures other than those outlined in the Regulations and this Guide which they consider to be more suited to the particular situations with which they are dealing.

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<sup>31</sup> This timeframe purely serves as an example and is chosen to keep it simple. It does not prejudice the determination of the 12 month period for this purpose. This is discussed under Paragraph 3.



#### 4.a. How to determine the applicable legislation for members of flight and cabin crew after 28 June 2012?

Regulation 465/2012<sup>32</sup>, which applies as of 28 June 2012, refers to “home base” as the only decisive criterion for determining the social security legislation applicable to flight and cabin crew members<sup>33</sup>. By introducing the concept of "home base", the legislator created in Article 11(5) of Regulation 883/2004 a legal fiction with the purpose of simplifying the determination of applicable legislation for flying personnel. The applicable legislation is directly connected to the "home base" as this is the location where the person is physically located and with which s/he has a close connection in terms of her or his employment.

All new contracts with flight and cabin crew members concluded after 28 June 2012 should therefore be assessed on the basis of the new Article 11(5). In accordance with Article 19(1) of Regulation 987/2009, the applicable legislation shall be determined and the Portable document A1 issued by the Member State where the "home base" is located, if the person concerned has only one stable home base. Flight and cabin crew members who were engaged before 28 June 2012 are not affected by the new rules if their situation remains unchanged and they do not ask to be subject to the new rule (see Paragraphs 15 and 16 of this Guide).

##### Example 1:

A member of the cabin crew is hired on 1 September 2012. She is resident in Belgium and works from a home-base in Eindhoven, Netherlands, for an airline with its registered office in Hungary. Under the new rule of Article 11(5) she is subject to the Dutch social security legislation. The Netherlands' competent institution must inform her and her employer of the obligations laid down in its legislation and must provide them with the necessary assistance to complete the required formalities. The Netherlands' competent institution must provide, at the request of the person concerned or of the employer, an attestation<sup>34</sup> that its legislation is applicable and must indicate, where appropriate, until what date it is applicable and under what conditions.

Where flight or cabin crew members have two or more home bases in different Member States, the designated institution of the Member State of residence shall determine the competent State on the basis of the conflict of law rules contained in Article 13 of Regulation 883/2004<sup>35</sup>. The same goes for flight and cabin crew members who are engaged for short successive assignments of only a few months in

<sup>32</sup> Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012 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 883/2004, OJ L 149, 8.6.2012, p. 4.

<sup>33</sup> The home base being the location nominated by the operator/airline in accordance with Regulation (EEC) No 3922/91 for the crew member as the place from where the crew member normally starts and ends a duty period, or a series of duty periods, and where, under normal conditions, the operator is not responsible for the accommodation of the crew member concerned.

<sup>34</sup> Portable document A1.

<sup>35</sup> Procedure for the determination of legislation applicable is described in Article 16 of Regulation 987/2009.





different Member States (for example, who are engaged through employment agencies). If they have changed home bases regularly within a period of 12 calendar months preceding the last determination of the applicable legislation, or it is likely that they will regularly change home bases within the next 12 calendar months, their situation must be assessed in accordance with Article 13(1) of Regulation 883/2004. The procedure of Article 16 of Regulation 987/2009 applies to these situations, which means that the designated institution in the Member State of residence shall determine the applicable legislation for the person concerned.

### **Example 2:**

A pilot resides in Trier, Germany, and works for two different airlines with registered offices in Luxembourg and Germany. The home base nominated by airline A is Luxembourg Airport and by airline B it is Frankfurt am Main Airport. He is deemed under the legal fiction introduced by Article 11(5) of Regulation 883/2004 to be pursuing professional activity in the two Member States where he has home bases - Germany and Luxembourg. In this exceptional case of two home bases, the applicable legislation must be determined according to the conflict-of-law rules in Article 13 of Regulation 883/2004 by the Member State of residence (Article 16 of Regulation 987/2009). It means that the designated institution of the Member State of residence shall assess if a substantial part of the pilot's overall activities is pursued in Germany. In order to do so, for flying personnel, the institution can use the number of take offs and landings and their locations. Depending on the outcome of this assessment, German legislation will be applicable if a substantial part of the overall activities is pursued there, and if not, Luxembourg legislation becomes applicable.

A temporary change of a home base, for example due to seasonal demands at specific airports, or the opening of a new "home base" in another country by the operator, does not lead to an automatic change of the applicable legislation for the person concerned. Short assignments can be dealt with by the posting provisions, which allow a secondment of up to 24 months without having to change the applicable legislation, provided that the posting conditions are fulfilled<sup>36</sup>.

If a situation cannot be dealt with under the posting provisions and there is a frequent or regular change of home bases, this shouldn't automatically lead to frequent changes in the applicable legislation for flight and cabin crew members either. It follows from Article 14(10) of Regulation 987/2009 that the applicable legislation is assessed on the basis of a projection of work for the following 12 calendar months and in principle should remain stable during that period. As expressed in Recital 18b of Regulation 465/2012 and laid down in Paragraph 6 of this Guide, the so called "yo-yo" effect must be avoided. This means that the determination of applicable legislation for flying personnel should not be subject to review for a period of at least 12 months following the last decision on applicable legislation, on the condition that there is no substantial

<sup>36</sup> See Article 12 of Regulation 883/2004, AC Decision A2 and Part I of this Guide.



change in the situation of the person concerned, but only a change in the usual work patterns.

### **Example 3:**

A Cyprus-registered temporary employment agency operating in the aviation sector recruits a pilot in August who is immediately sent to work for an airline operating within the EU. The airline's flights are scheduled according to the travel industry's needs. The airline operates flights from Spain and in September and October the pilot will be based in Madrid. After that period the pilot will be sent to Italy, where he will work for another airline operating from the home base in Rome, again for another two months. In essence the home base of the pilot changes every few months between different Member States.

This is an example of a situation where Article 13 of Regulation 883/2004 and Article 16 of Regulation 987/2009 apply (alternating activities from home bases in different Member States within 12 calendar months following or preceding the determination of applicable legislation). The applicable legislation is to be determined by the Member State of the pilot's residence in accordance with Article 13 of Regulation 883/2004 and shall remain stable for at least 12 calendar months following the last determination of applicable legislation (see Article 14(10) of Regulation 987/2009 and Paragraph 6 of this Guide).

The outcome of Example No 2 would be that the applicable legislation is determined by the designated institution of the pilot's Member State of residence and depending on the assessment of the elements mentioned in Paragraph 4, either the legislation of State of residence or the State of employer's registered office or place of business becomes applicable. Assuming that there is no substantial part of activity in the Member State of residence and the Cypriot employer is a genuine company as explained in Paragraph 7, Cypriot legislation would be applicable. In case of highly mobile flying personnel employed in the aviation sector for example through employment agencies, it is suggested that the applicable legislation is determined for a period of no longer than 12 calendar months in order to ensure that a regular re-assessment of the person's work patterns and his/her applicable legislation takes place.

The concept of a 'home base' for flight and cabin crew members is a concept under EU law. Its use in Regulation 883/2004 as a reference point for the determination of the applicable legislation is, as is the regulation itself, restricted to the territory of the EU. The concept cannot be applied if a person concerned – even if s/he is an EU national – has his/her home base outside the EU, from which s/he undertakes flights to different EU Member States. In this situation, the general conflict rule for working in two or more Member States continues to apply.

In the situation where an EU national resides in a third country but works as a flight or cabin crew member from a home base in a Member State, that Member State shall be competent for his/her overall activities within the EU. A third country national



who is legally resident in an EU Member State and who is working as a flight or cabin crew member from a home base located in another Member State falls under the material scope of Article 1 of Regulation (EU) No 1231/2010<sup>37</sup>. Consequently, the Member State where the home base is located becomes competent on the basis of Article 11(5) of Regulation 883/2004.

### **5. Over what period should substantial activity be assessed?**

See Point 3. how is "substantial activity" defined.

### **6. What should happen when duty rosters or work patterns are subject to change?**

It is recognised that working arrangements, e.g. for international transport workers, can be subject to frequent change. It would not be practical, nor in the interests of the person to review the applicable legislation every time their duty roster changed. Accordingly, once a decision is made on the applicable legislation this should, in principle and provided that the information given by the employer or person concerned was truthful to the best of their knowledge, not be subject to review for a period of at least the following 12 months. This is without prejudice to the right of an institution to review a decision it has made where it considers that such a review is warranted.

The objective is to ensure legal stability and avoid the so-called "yo-yo" effect, especially for highly mobile workers, such as those in the international transport sector.

#### **Therefore:**

- The applicable legislation under Article 13(1) of Regulation 883/2004 shall be determined and in principle remain stable for the following 12 calendar months;
- The assumed future situation for the following 12 calendar months shall be taken into account. The assumed future situation is based on the outcome of an assessment of the employment contract in combination with any activities which it can be foreseen the person will undertake at the time of the request of the A1 certificate (see Paragraph 2 above);
- If there are no indications that the work patterns will change substantially in the following 12 months, the designated institution shall base the overall assessment on the contracts and working performance of the past 12 months and use this to project the situation for the following 12 months;
- However if the person concerned is of the opinion that the situation in relation to their work pattern has changed or will change substantially, this person or his/her employer can request a reassessment of the applicable legislation, before the 12 month period expires;
- If there is no past working performance or the employment relationship lasts for less than 12 months, the only possible option is to use the data already

<sup>37</sup> Regulation (EU) No 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality, OJ L 344, 29.12.2010, p. 1 (hereafter: Regulation 1231/2010).



available and to ask the persons concerned to provide any relevant information. In practice, this will lead to the use of the work patterns established since the start of the working relationship, or the assumed working activity for the following 12 months.

It should be noted that the arrangements outlined in this paragraph relate only to the work pattern of a person. If any other significant change occurs in a person's situation over the 12 month period after a decision on applicable legislation has been made, e.g. change of employment or residence, the person and/or his/her employer, or the competent institution of a Member State where the person pursues his/her activities, is required to notify the designated institution of the State of residence so that the question of applicable legislation can be reviewed. The designated institution must reconsider the determination of the applicable legislation.

As has been already indicated, it is of course always open to the designated institution to review a decision on applicable legislation where it considers such a review is warranted. If the information given during the initial process to determine the applicable legislation has not been intentionally wrong then any changes arising from such a review should only take effect from a current date.

## **7. How to determine the registered office or place of business?**

Where a person working in more than one Member State does not pursue a substantial part of his/her activity in the Member State of residence, then the legislation of the Member State where the registered office or place of business of the employer or undertaking employing him or her is situated is applicable.

The meaning of the term "**registered office or place of business**" for the purpose of Title II Regulation 883/2004 has been defined in Article 14 (5a) of Regulation 987/2009 as being the registered office or place of business where the essential decisions of the undertaking are adopted and where the functions of its central administration are carried out.

This definition is derived from extensive guidance in the case law of the Court of Justice of the European Union and from other EU regulations. As a general principle "brass plate" operations, where the social insurance of the employees is linked to a purely administrative company without having transferred actual decision-making powers, should not be accepted as satisfying the requirements in this area. The following guidelines are designed to assist institutions in assessing applications where they feel they may be dealing with a "brass plate" operation.

In a case related to the area of taxation (Case C-73/06 *Planzer Luxembourg*), the Court of Justice ruled that the term "business establishment" means the place where the essential decisions concerning the general management of a company are adopted and where the functions of its central administration are carried out. The Court of Justice elaborated on this in the following terms:

"Determination of a company's place of business requires a series of factors to be taken into consideration, foremost amongst which are its registered office, the place of



its central administration, the place where its directors meet and the place, usually identical, where the general policy of that company is determined. Other factors, such as the place of residence of the main directors, the place where general meetings are held, the place where administrative and accounting documents are kept, and the place where the company's financial, and particularly banking, transactions mainly take place, may also need to be taken into account<sup>38</sup>.

As a specification of the definition in Article 14 (5a) of Regulation 987/2009, the following criteria could be taken into account by the institution of the place of residence, on the basis of the available information or, in close cooperation with the institution in the Member State where the employer has its registered office or place of business:

- the place where the undertaking has its registered office and its administration;
- the length of time that the undertaking has been established in the Member State;
- the number of administrative staff working in the office in question;
- the place where the majority of contracts with clients are concluded;
- the office which dictates company policy and operational matters;
- the place where the principal financial functions, including banking, are located;
- the place designated under EU regulations as the place responsible for managing and maintaining records in relation to regulatory requirements of the particular industry in which the undertaking is engaged;
- the place where the workers are recruited.

If, having considered the criteria outlined above, institutions are still not in a position to eliminate the possibility that the registered office is a “brass plate” operation, then the person concerned should be made subject to the legislation of the Member State in which the establishment is situated with which he or she has the closest connection in terms of the performance of employed activity<sup>39</sup>. That establishment shall be considered to be the registered office or place of business employing the person concerned for the purposes of the Regulations.

In this determination, it should not be forgotten that this establishment actually *employs* the person concerned, and that a direct relationship exists with the person in the sense of Part I, Paragraph 4 of this Guide.

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<sup>38</sup> Case C-73/06 *Planzer Luxembourg*, [2007] Rec.p. I-5655, paragraph 61.

<sup>39</sup> See also Case C-29/10 *Koelzsch* [2011], not yet published, paragraphs 42-45. In the case of road transport, Regulation (EC) No 1071/2009 establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport operator and repealing Council Directive 96/26/EC (effective from 4<sup>th</sup> December 2011) requires amongst other things that undertakings “engaged in the occupation of road transport operator shall have an effective and stable establishment in a Member State”. This requires a premise in which documents are located relating to core business, accounting, personnel management, driving time and rest, and any other document to which the competent authority must have access in order to verify compliance with the conditions laid down in Regulation (EC) No 1071/2009.



## 8. What procedures must be followed by a person in the event that s/he is working in two or more Member States?

A person normally employed in two or more Member States must notify this situation to the designated institution of the Member State in which s/he resides<sup>40</sup>. An institution in another Member State which receives a notification in error should, without delay, forward such a notification to the designated institution in the person's Member State of residence. Where there is a difference of views between the institutions of two or more Member States on where the person concerned is resident, this should first be resolved between the institutions by using the relevant procedure and SEDs<sup>41</sup> for determining the Member State of residence.

The designated institution in the **Member State of residence** must determine which Member State's legislation is applicable while taking account of the procedures outlined in this Guide. This determination must be made without delay and shall initially be on a provisional basis. The institution in the place of residence must then inform the designated institutions in each of the Member States in which an activity is pursued and where the employer's registered office or place of business is located of its determination using appropriate SEDs. The applicable legislation shall become definitive if it is not contested within two months of the designated institutions being informed of the determination by the designated institution of the Member State of residence.

Where the legislation to be applied has already been agreed between the Member States concerned on the basis of Article 16(4) of Regulation 987/2009 a definitive decision can be made from the outset. In such circumstances the requirement to issue a provisional decision will not apply.

The competent institution of the Member State whose legislation is determined to be applicable shall without delay inform the person concerned of this fact. The institution can either use a letter or the Portable Document A1 (certificate attesting the applicable legislation<sup>42</sup>). If the competent institution issues a PD A1 for informing the person on the applicable legislation, it can do this either on a provisional or definitive basis. If the institution issues a PD A1 to indicate that the determination is provisional, it must issue a new PD A1 to the person concerned once the determination has become definitive.

An institution can also opt to immediately issue a definitive PD A1 to inform the person concerned. However, if the competence of this Member State is contested and the final competence differs from the initial one as determined by the designated institution of the Member State of residence, then the PD A1 must be immediately withdrawn and replaced by a PD A1 issued by the Member State which has ultimately been determined as competent. More information about the PD A1 can be found in the Guidelines on the use of the Portable Documents<sup>43</sup>.

<sup>40</sup> A list of social security institutions in the Member States can be found at [http://ec.europa.eu/employment\\_social/social-security-directory/](http://ec.europa.eu/employment_social/social-security-directory/)

<sup>41</sup> SED = structured electronic document. See Article 4 of Regulation 987/2009.

<sup>42</sup> See Article 19 (2) of Regulation 987/2009.

<sup>43</sup> See <http://ec.europa.eu/social/>





A person normally employed in two or more Member States who fails to notify the designated institution of the Member State in which s/he resides of this situation will also be made subject to the procedures of Article 16 of Regulation 987/2009 as soon as the institution in the Member State of residence is made aware of the person's situation.

### **9. What about self-employed persons who are normally self-employed in two or more Member States?**

There is a special rule for persons normally self-employed in two or more Member States which provides that a person who is normally self-employed in two or more Member States is subject to:

- the legislation of the Member State of residence if s/he pursues a substantial part of her/his or her activity in that Member State;
- the legislation of the Member State in which the centre of interest of her/his activity is situated if s/he does not reside in one of the Member States in which s/he pursues a substantial part of her/his activity.

The criteria for assessing substantial activity and a person's centre of interest are outlined in Paragraphs 11 and 13.

### **10. When can a person be regarded as normally pursuing an activity as a self-employed person in two or more Member States?**

A person who “normally pursues an activity as a self-employed person in two or more Member States” refers in particular to a person who simultaneously or in alternation exercises one or more separate self-employed activities in the territories of two or more Member States. The nature of the activities does not matter when making this determination. However, marginal and ancillary activities that are insignificant in terms of time and economic return, shall not be taken into account for the determination of the applicable legislation on the basis of Title II of Regulation 883/2004<sup>44</sup>. The activities remain relevant for the application of national social security legislation; if the marginal activity generates social security affiliation, then the contributions shall be paid in the competent Member State for the overall income from all activities.

Care needs to be taken not to confuse temporary postings as provided for under Article 12(2) of Regulation 883/2004 and the provisions relating to someone who pursues a similar activity in two or more Member States. In the former, the person is performing an activity in another Member State for once-off and finite period. In the latter case, activities in different Member States are a normal part of how the self-employed person conducts his/her business.

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<sup>44</sup> Article 14(5b) of Regulation 987/2009 provides that marginal activities shall be disregarded for all situations covered in Article 13 of Regulation (EC) No 883/2004.



## 11. How is a substantial part of self-employed activity defined?

A ‘substantial part of self-employed activity’ pursued in a Member State of residence means that a quantitatively substantial part of all of the activities of the self-employed person is pursued there, without this necessarily being the major part of these activities.

For the purposes of determining whether a substantial part of the activity of a self-employed person is pursued in a Member State, account **must** be taken of:

- the turnover;
- the working time;
- the number of services rendered; and/or
- the income.

If in the context of carrying out an overall assessment it emerges that a share of at least 25% of the above criteria are met, this is an indicator that a substantial part of all the activities of the person is pursued in the Member State of residence.

While it is obligatory to take account of these criteria, this is not an exhaustive list and other criteria may also be taken into account.

### Example:

Bricklayer X performs activities as a self-employed person in Hungary, where he is also residing. Sometimes during the weekend he also renders his services as a self-employed person to an agricultural company in Austria. Bricklayer X is working 5 days a week in Hungary and maximum 2 days a week in Austria. X therefore performs a substantial part of his activities in Hungary and the Hungarian legislation is applicable.

## 12. What procedures must be followed by a self-employed person in the event that s/he is working in two or more member states?

The procedures to be followed in order to determine the applicable legislation for a self-employed person working in two or more Member States are the same as those which apply to an employed person as outlined in Paragraph 8 above. The self-employed person should contact the institution in the Member State of residence on his or her own behalf.

## 13. What criteria apply when determining where the centre of interest of activities is located?

If a person does not reside in one of the Member States in which s/he pursues a substantial part of her/his activity, s/he shall be subject to the legislation of the Member State in which the centre of interest of her/his activities is located.

The centre of interest of activities should be determined by taking account of all the aspects of that person’s occupational activities, notably the **following criteria**:



- the locality in which the fixed and permanent premises from which the person concerned pursues his/her activities are situated;
- the habitual nature or the duration of the activities pursued;
- the number of services rendered; and
- the intention of the person concerned as revealed by all the circumstances.

In addition to the above criteria, when determining which Member State's legislation is to apply, the assumed future situation in the following 12 calendar months must also be taken into account. Past performance can be also taken into account as far as it gives a sufficient reliable picture of the self-employed person's activity.

### **Example:**

Ms XY is self-employed. She pursues 60% of her activities in Austria and also works as a self-employed person in Slovakia for 40% of her working time. She resides in Austria. The Austrian legislation is applicable since she pursues the substantial part of her activities in her Member State of residence.

Mr Z is self-employed. He pursues part of his activity in Belgium and part in the Netherlands. He lives in Germany. He has no permanent fixed premise. However, he works mostly in the Netherlands and earns most of his income there. It is his intention to build his business in the Netherlands and he is in the process of acquiring a permanent premises. Although Mr Z does not pursue a substantial part of his activity in the Netherlands, it is his intention as supported by the circumstances, including his future plans, to make the Netherlands the centre of interest of his activity. Mr Z is subject to the legislation of the Netherlands.

## **14. What is the situation in relation to a person who is both employed and self-employed in different member states?**

A person who normally pursues an activity as an employed person and an activity as a self-employed person in different Member States shall be subject to the legislation of the Member State in which s/he pursues an activity as an employed person. Where, in addition to being self-employed, s/he pursues an activity as an employed person in more than one Member State the criteria of Article 13(1) of Regulation 883/2004, outlined in Paragraph 1 above, will apply to determine which Member State is competent for the activity pursued as an employed person.



## Part III: Determination of residence

### 1. In which cases does the “residence” of a person play a role under Regulation 883/2004?

The conflict rules on applicable legislation contained in Regulation (EC) No 883/2004 are mainly based on the *lex loci laboris* principle. This means that, as a general rule, any person pursuing an activity as an employed or self-employed person in a Member State shall be subject, in the first place, to the legislation of the State where the economic activity is effectively pursued (Article 11(3)(a) of Regulation 883/2004).

The *Lex domicilii*, i.e. the legislation of the country of residence shall apply, however,

- where a person does not pursue an economic activity (e.g. pensioners, children, students) according to Article 11(3)(e) of Regulation 883/2004; or
- where a person carries out economic activities in two or more Member States or where a worker has several employers (Article 13 of Regulation (EC) No 883/2004)<sup>45</sup>.

“Residence” also plays a major role as a conflict rule in case of possible overlapping of benefits:

- Article 17: right to sickness benefits in kind in case of residence in a Member State other than the competent Member State;
- Article 23: right to sickness benefits in kind for pensioners;
- Article 58: award of a supplement;
- Article 65: right to unemployment benefits in case of an unemployed person who resided in a Member State other than the competent State;
- Article 67: right to family benefits for members of the family residing in another Member State;
- Article 68: priority rules in the event of overlapping entitlement to family benefits;
- Article 70: special non-contributory cash benefits.

### 2. How is the term “residence” defined?

Article 1(j) and (k) of Regulation 883/2004 make a distinction between “residence” and “stay”: Residence is defined as the place where a person *habitually* resides, whereas stay means *temporary* residence.

The Court of Justice held that the Member State of “residence” within that meaning is “the State in which the persons concerned habitually reside and where the habitual centre of their interests is to be found.” It added that, “[i]n that context, account should be taken in particular of the employed person's family situation; the reasons which have led him to move; the length and continuity of his residence; the fact

<sup>45</sup> Unless other elements are decisive under that Article.



(where this is the case) that he is in stable employment; and his intention as it appears from all the circumstances”.<sup>46</sup>

The habitual centre of interests must be determined on the basis of the facts, having regard to all circumstances which point to a person’s real choice of a country as his or her State of residence.<sup>47</sup>

This understanding of the term “residence” has a Union-wide meaning<sup>48</sup>, i.e. it applies *per definitionem* in an identical way across all benefits for the purposes of applying Regulation 883/2004 and Regulation 987/2009<sup>49</sup>. This means that whenever these two Regulations refer to the term “residence”, this European definition applies in particular for all provisions in the Regulations which are meant to solve possible conflicts of law.

However, as these two Regulations do not harmonise, but only coordinate the social security systems of the Member States, the Member States may in principle provide (in their national legislation) for additional conditions for entitlement to a specific benefit or cover in a particular social security system, for as long as these criteria are compatible with the law of the European Union and, in particular, with the basic principle of equal treatment and non-discrimination of migrant persons. Where such additional conditions relate to minimum periods of residence, Article 6 of Regulation 883/2004 requires that periods completed in another Member States are, to the extent necessary, taken into account.

Additional conditions might also stem from the fact that national legislation requires “residence” in the Member State in line with a national definition of “residence”. Such a national definition might require fewer, different or further criteria e.g. for entitlement to a benefit which also have to be in accordance with EU law.<sup>50</sup>

The term “stay”<sup>51</sup> is characterized by its temporary character and by the intention of the person to return to his or her place of residence as soon as the underlying purpose for the stay in another country has been reached. “Stay” thus requires a physical presence of the person concerned outside of his or her habitual place of residence.

As the rules on the applicable legislation are based on the principle that any person falling under the scope of the Regulations shall be subject to the legislation of a single Member State only<sup>52</sup>, it can be deduced from this principle that any such person can have only one place of residence within the meaning of the Regulations<sup>53</sup>.

It can also be deduced that any such person must have a place of residence, because otherwise a negative conflict regarding the applicable legislation may arise which the Regulations want to avoid.

<sup>46</sup> Case C-90/97 *Swaddling* [1999] ECR I-1075, paragraph 29.

<sup>47</sup> Case C-76/76 *Di Paolo* [1977] ECR 315, paragraphs 17 to 20, and Case C-102/91 *Knoch* [1992] ECR I-4341, paragraphs 21 and 23.

<sup>48</sup> Case C-90/97 *Swaddling* [1999] ECR I-1075, paragraph 28.

<sup>49</sup> The concept of the term “residence” is the same for the purposes of applying Regulations 1408/71 and 574/72.

<sup>50</sup> As regards the introduction of a right-to-reside test, reference is made to the case C-140/12 *Brey*, not yet reported, and to further jurisprudence of the Court of Justice on this issue.

<sup>51</sup> Or any form of a presence in a Member State which is not habitual residence.

<sup>52</sup> Article 11(1) of Regulation 883/2004.

<sup>53</sup> Case C-589/10 *Wencel*, not yet reported, paragraphs 43 to 51.



This place of residence does not necessarily have to be within the territorial scope of application of the Regulations, i.e. it may also be in a third country (e.g. in the case of a business representative or another itinerant worker with a permanent address in a third country who travels for business purposes in different Member States but returns in the intervals between his or her tours to his or her home country<sup>54</sup>).

### 3. Criteria for determining the place of residence

Taking up the criteria for determining the place of residence within the meaning of Article 1(j) of Regulation 883/2004 identified by the Court of Justice, the legislator, in Article 11 of Regulation 987/2009 provided for a rule which is meant to allow the determination of the place of residence of a person “[w]here there is a difference of views between the institutions of one or more Member States”. The aim of this new Article is to provide a tool ensuring that, in the exceptional case that two institutions cannot agree on the place of residence, there will be nevertheless always one Member State identifiable as state of residence.

In order to determine the **centre of interests** of the person concerned, these institutions have, according to Article 11(1) of Regulation (EC) No 987/2009, to jointly carry out “an overall assessment” of all available information relating to relevant facts, which may include, as appropriate several criteria.

The **criteria for determining residence** are explicitly non-exhaustive ( “in particular” in the words of the Court of Justice in *Swaddling*, and “may include”, as indicated by Article 11 of Regulation 987/2009), and apply whenever the place of residence of a person has to be determined:

- family situation (family status and family ties);
- duration and continuity of presence in the Member State concerned;<sup>55</sup>
- employment situation (nature and specific characteristics of any activity pursued, in particular the place where such activity is habitually pursued, the stability of the activity, and the duration of the work contract);
- exercise of a non-remunerated activity;
- in the case of students, the source of their income;
- housing situation, in particular how permanent it is;
- the Member State in which the person is deemed to reside for taxation purposes;
- reasons for the move;
- the intention as it appears from all the circumstances.

These criteria distinguish between elements related to the objective features of habitual residence such as the duration and continuity of presence on the territory of a Member State and elements applying to the person’s situation. All these elements are purely factual criteria, i.e. they must be assessed irrespective of their lawfulness (e.g. the nature and specific characteristics of a remunerated activity also plays a role in case of illegal employment).

<sup>54</sup> Case C-13/73 *Hakenberg* [1973] ECR 935, paragraphs 29 to 32.

<sup>55</sup> It is, however, not possible to require a certain minimum period of residence, Case C-90/97 *Swaddling* [1999] ECR I-1075, paragraph 30.





The intention of the person concerned must be assessed “as it appears from all the circumstances”. That means that it, must be supported by factual evidence, i.e. it can only be taken into account where it is supported by the objective facts and circumstances. The mere declaration that a person considers or wants to have his or her residence in a specific place is not sufficient.

Where Article 11 of Regulation 987/2009 applies, that is in cases of difference of views between the institutions of two or more Member States about the determination of the residence of a person, Article 11(2) of Regulation 987/2009 provides that the intention of the person concerned acts as a tie breaker, i.e. where the consideration of the various criteria based on relevant facts does not lead to a clear solution.

A person who moves to another country without maintaining any substantive links to his or her country of origin can no longer be regarded as “residing” there even when he or she intends to return to that country. This applies, for instance, when the migrating person does not leave any member of his or her family, any house or rented apartment or any address under which he or she can still be reached in the country of origin.

The elements or criteria for determining residence identified above are not exhaustive. They only apply “where appropriate”, i.e. not all criteria can be used in all situations. They are derived from the relevant case-law of the Court of Justice and Article 11(1) of Regulation 987/2009, but other criteria may also play a role.

Frequently, institutions simply assume that the place of residence is identical with the place where a person has declared to have his or her home address. However, while registration can be taken as an indication of the person’s intention, it is in no way decisive and it cannot be used either as a precondition for accepting that a person resides in a specific place.

While the different criteria identified by the Court of Justice and contained in Article 11(1) of Regulation 987/2009 do not always have the same weight or importance, there is, on the other side, no hierarchy between them. There is no quick-and-dirty easy criterion, which can be taken as decisive, but each individual case must be assessed according to its individual features based on an overall assessment of all relevant facts and circumstances.

#### **4. Some examples in which the determination of the place of residence might be difficult**

The place of residence of a person may be particularly difficult to determine in two kinds of situations:

- a) In the case of highly mobile persons who frequently move from one Member State to another or who simultaneously live in two or more different Member States (= positive conflict between more than one possible places of residence); and



- b) in the case of persons living in rather unstable conditions such as in a makeshift accommodation, a hospital, a student's home or a prison, which he or she might regard as only a temporary situation, but who do not have an habitual residence or permanent address elsewhere (negative conflict in case of no obvious habitual residence).

The following **examples** are only meant to provide some guidance and further clarification in some simplified situations. They do not exempt the institution concerned to assess each individual case according to its own specific features and circumstances.

The examples aim to draw attention to specific characteristics that might be common to many cases, even though most real-life cases encompass more than just one specific characteristic, and to indicate how these specific characteristics should be weighed in terms of residence. The examples do not, however, assess or conclude which country's legislation is applicable in a specific situation or which country would be responsible for benefits.

They illustrate the reasoning which may lead to a specific solution based on the information available, but they do not preclude that an overall assessment of all relevant facts and circumstances might lead to a different result where this is induced by additional or different aspects of a case. It is also important to note that the examples describe a situation at a specific moment and the assessment of residence might be different if the situation continues for a longer period of time or if the circumstances otherwise change over time.

#### 4.1. Frontier workers

Mr A is a Belgian citizen living with his wife and two children in Belgium. He works in France where he has rented an apartment. He usually returns every weekend to his family.

##### Assessment

Mr A spends most of his time in France. This is also the place where he has a stable employment and habitually pursues an economic activity. On the other side, the housing and family situations clearly indicate that his centre of interest continues to be in Belgium. He maintains close ties to his family and to his family's home to which he regularly returns during the weekends. This shows that he intends to stay in France only temporarily and only as long as this is necessary because of his job.

##### Conclusion

As Mr A intends to stay in France only temporarily and as he maintains strong links during this time to his family in Belgium, his major centre of interest and therefore his habitual place of residence is still in Belgium. Mr A is a typical frontier worker within the meaning of Article 1(f) of Regulation 883/2004.<sup>56</sup>

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<sup>56</sup> Case 76/76 *Di Paolo* [1977] ECR 315, paragraphs 17 to 20.



## 4.2. Seasonal workers

Mr B is a Polish student who works as a waiter in a hotel in an Austrian ski station from Christmas to April. During this time, he sleeps in a small room in the hotel where he is employed. After that period, he wants to return to Poland to his parents' home.

### Assessment

Unlike in the previous example, Mr B does not regularly return to his home country during his seasonal employment. However, his housing situation in Austria clearly indicates that he has no intention to live there permanently. He stays in Austria only because of his job. He has no stable permanent employment, but just a work contract for a limited period. Also his intention to return to his home country after termination of employment which is supported by the factual circumstances of his housing and working conditions indicates that he has always maintained his habitual residence in Poland.

### Conclusion

Like most seasonal workers, Mr B only stays temporarily in his country of employment and therefore maintains his residence in his country of origin during his seasonal employment.

## 4.3. Posted workers (A)

Mr C lives with his family in France. He is posted by his employer for two years to Belgium. During the holidays, he returns to France to see his family there. In accordance with the tax agreement between France and Belgium, he pays the French income tax only for the initial six-month period in France and after that period in Belgium. After termination of his employment in Belgium, he intends to return to his family's home in France.

### Assessment

Posting is limited in time and therefore temporary by its very nature. Also the fact that Mr C's family continues to reside in France during the period of posting provides an indication that he maintains his habitual residence in his country of origin during the period of posting.

This is not altered by the fact that tax agreements usually provide that taxes are paid in the country of origin only for the initial six-month period of posting and to the country of employment after that period.

### Conclusion

Mr C continues to reside in his country of origin (France) also during the posting period.



#### **4.4. Posted workers (B)**

Mr D lives with his family in France. He is posted by his employer for two years to Belgium. He rents his French house to another family and moves with his own family to his new place of work in Belgium.

##### Assessment

Unlike in the previous example, Mr D moves with his family to his new country of employment during the period of posting. As he has rented his French house to another family, he will not return there on a regular basis.

##### Conclusion

Both Mr D's family situation and employment situation indicate that he has effectively moved his centre of interest to Belgium and hence resides there during the posting period.

#### **4.5. Students (A)**

Mr E is a student. His parents live in Belgium, but he pursues his studies in Paris where he has rented a small apartment. His studies are financed by his parents. He returns to his parents every week-end.

##### Assessment

The studies of Mr E constitute a non-remunerated activity which is one of the elements listed in Article 11(1) of Regulation 987/2009. On the other hand, his studies are financed by his parents upon whom he is still dependent. In the case of students, the source of their income has been included by Article 11(1) of Regulation (EC) No 987/2009 as a specific criterion to be taken into account.

##### Conclusion

The fact that Mr D regularly returns to his parent's home every weekend and that he is still maintained by his parents who also finance his studies provides a strong indication that his habitual place of residence is still in Belgium where his parents live.

#### **4.6. Students (B)**

Mr F is a student. His parents live in Belgium, but he pursues his entire studies in France where he has rented a small apartment. He is entitled to a French scholarship which covers all of his expenses. He spends most of the weekends in France with his friends.



### Assessment

In this situation, most elements listed in Article 11(1) of Regulation 987/2009 (non-remunerated activities, source of income, housing situation) speak in favour of the assumption that Mr F has moved his centre of interest to France.

### Conclusion

As Mr F's earns his living in France and lives there independently, he may be regarded as residing there.

## **4.7. Pensioners (A)**

Mr G is a German pensioner. In Germany, he owns a house with a garden. He has spent with his wife most of his holidays in Spain. After retirement, they buy a small apartment in the summer resort in Spain, where they had spent most of their holidays. They now live half of the year in the apartment in Spain and half of the year in their house in Germany.

### Assessment

In such a situation, neither duration and continuity of presence in Germany or Spain nor family situation provide a clear answer. It could be considered to assume that he moves his place of residence every six months, but such an assumption of two alternating places of residence within a year should be avoided.

The fact that Mr G and his wife own their house in Germany and have only a small apartment in Spain, that they are German nationals, that they have spent their active life mostly in Germany, that they draw (only) a German pension speak in favour of the assumption that they maintain their closest ties, i.e. the major centre of their personal, social and economic interests in Germany even during the periods they spend in Spain.

### Conclusion

Mr G and his wife continue to reside in Germany even during the periods they live in Spain.

## **4.8. Pensioners (B)**

Mr H, a UK national, decides to move to Portugal together with his wife while in retirement. He buys a house in Portugal, but keeps his house in the United Kingdom which is now inhabited by their daughter's family. But they do not consider their new house in Portugal as their "residence" and assume that their residence is still in the United Kingdom.

### Assessment

Unlike in the previous case, Mr H and his wife spend most of their time in Portugal. They still own a house in the United Kingdom, but this is inhabited by their children's families. They still maintain some cultural and economic tie to the United Kingdom



where they have grown up, where they had spent most of their active life and where they get their pension from, but the fact that they have effectively and entirely moved their home to Portugal prevails.

### Conclusion

In spite of their declaration of intent to the contrary, Mr H and his wife will have to be regarded as residing in Portugal.

### **4.9. Inactive, highly mobile persons (A)**

Mr I is single and unemployed. In search of employment, he leaves the house of his family and moves to another Member State where he has no registered address and no stable employment, but just spends the nights in a friend's apartment. He tries to earn a living by playing music and collecting money in the streets.

### Assessment

Mr I has no close social and economic ties to the Member State where he now lives. He also lacks a stable home or address in this country. It can therefore be assumed that he still maintains his residence in the place where his family lives which is the most stable element in his situation.

### Conclusion

Mr I maintains his residence in his country of origin during his stay in another Member State.

### **4.10. Inactive, highly mobile persons (B)**

Mr J is single and unemployed. In search of employment, he terminates the rental contract for his apartment in his country of origin and goes to another Member State taking all his personal belongings with him. He does not maintain an address in his country of origin and declares that he has no intention to return.

### Assessment

Mr J has no close social and economic ties to the Member State where he now lives. He also lacks a stable home or address in this country. However, he has also entirely cut his links to his country of origin and has no habitual residence there any more, either. The declaration of his intention is therefore supported by factual circumstances.

### Conclusion

Even though Mr J may regard his current stay in the apartment house of a friend as an only “temporary” solution, this must be considered as being his habitual place of residence within the meaning of Article 1 (j) of Regulation (EC) No 883/2004, because he has not maintained any link or close tie to any other place and therefore cannot be regarded as residing elsewhere.





## Part IV: Transitional provisions

### 1. Are there any special arrangements in place where the legislation applicable has already been decided under Regulation 1408/71, or under Regulation 883/2004 before 28 June 2012?

Articles 87(8) and 87a of Regulation 883/2004 provide that if, as a result of the introduction of the new Regulation, a person would be subject to the legislation of a Member State other than the one already determined in accordance with Regulation 1408/71 or in accordance with Regulation 883/2004 as it applied before 28 June 2012, then the previous decision will continue to apply provided the relevant situation remains unchanged.

The first requirement for applying Articles 87 (8) and 87a is that, as a result of Regulation 883/2004 or Regulation 465/2012 coming into force, a person would be subject to the legislation of a Member State other than that already determined in accordance with Title II of Regulation 1408/71<sup>57</sup> or in accordance with Title II of Regulation 883/2004 before 28 June 2012.

The second requirement of Articles 87 (8) and 87a is that the relevant situation remains unchanged.

The purpose of this provision is to prevent many changes of applicable legislation on the changeover to the new Regulation and to allow a "soft landing" for the person concerned with regards to the legislation applicable if there is a discrepancy between the legislation applicable (competent Member State) under Regulation 1408/71 or the previous wording of Regulation 883/2004 and the legislation applicable under the amended rules of Regulation 883/2004.

The discussion in the Administrative Commission showed that simple rules need to be established and applied coherently by all designated institutions so that the criteria used are perceived as fair, workable and transparent.

Under Regulation 1408/71, the designated institution of the competent Member State is to issue a certificate to the person concerned stating that s/he is subject to its legislation (Article 12a of Regulation 574/72<sup>58</sup>). Under Regulation 883/2004, the designated institution of the competent Member State shall also inform the person concerned and provide, on request, an attestation on the applicable legislation (Articles 16 (5) and 19 (2) of Regulation 987/2009). As the competent Member State last determined under Regulation 1408/71 or Regulation 883/2004 and which issued the certificate on applicable legislation is best equipped to check if the situation remains unchanged after the entry into force of Regulation 883/2004 or its subsequent amendments, **it has been agreed that:**

<sup>57</sup> The Administrative Commission agreed that Article 87(8) of Regulation 883/2004 shall be applicable also for Rhine boatmen whose applicable legislation was previously determined according to Article 7(2) of Regulation 1408/71.

<sup>58</sup> Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community, OJ L 74, 27.3.1972, p. 1.



- If necessary, the competent Member State as last determined under Regulation 1408/71 or Regulation 883/2004 and which issued the certificate on applicable legislation (form E101, PD A1) shall assess if the relevant situation remains unchanged and provide a new attestation on applicable legislation if the situation remained unchanged (Portable Document A1).

A change in the relevant situation refers to the factual situation of the person concerned or his/her employer which would have been decisive for the latest determination of the applicable legislation under Regulation 1408/71 or previous wording of Title II of Regulation 883/2004. **Therefore:**

- A change of the “relevant situation” as referred to in Articles 87 (8) and 87a of Regulation 883/2004 means that after the entry into force of Regulation 883/2004 or its subsequent amendments, the factual situation relevant for the determination of applicable legislation under the previous rules of Title II of Regulation 1408/71 or Regulation 883/2004 changed, and this change would have led to the person concerned being subject to the legislation of a Member State other than that lastly determined under Title II of Regulation 1408/71 or Regulation 883/2004.
- As a rule, a new employment, in the meaning of a change of the employer, the termination of one of the employments or the cross-border change of residence is always a change of the relevant situation. In cases where there is a difference of views, the institutions involved shall seek a common solution.
- The expiry of an attestation on applicable legislation (form E101, Portable Document A1) is not regarded as a change in the ‘relevant situation’.
- A person who wishes to be subject to the legislation of the Member State which would be applicable under Regulation 883/2004 in the amended version should make an application in accordance with Article 87 (8) or 87a of this Regulation to the designated institution in that Member State or to the designated institution of the Member State of residence if s/he is pursuing an activity in two or more Member States.

### **Example 1:**

Starting on 1.1.2010 a person resident in France exercises an employed activity for only one employer in France and in Spain where the employer is established. In France, only 15% of the activity is exercised. France is the competent Member State according to Art. 14 (2)(b)(i) of Regulation 1408/71, but not according to Art. 13 (1)(a) of Regulation 883/2004. This means that Article 87 (8) does apply and the person continues to be covered by the French legislation after the entry into force of Regulation 883/2004, unless he opts for the Spanish legislation by virtue of Article 87 (8) of Regulation 883/2004.

### **Example 2:**

A pilot is resident in Germany and has been employed since 2009 by an airline with a registered office in Ireland. His home base is Luxembourg. According to Regulation 1408/71, he was not principally employed in Germany and therefore Ireland was the competent Member State. However, he pursued a substantial part of his professional



activity in Germany within the meaning of Regulation 883/2004 after 1 May 2010. As a result of the application of Article 87 (8) of Regulation 883/2004, the pilot could remain covered by the legislation as lastly determined under Title II of Regulation 1408/71 (Ireland). As a result of Article 87a of Regulation 883/2004, he can remain covered by Irish social security legislation until 27 June 2022<sup>59</sup>, if his relevant situation remains unchanged, although his home base is located in Luxembourg.

Regulations 883/2004 and 987/2009 have applied in relation to Switzerland since 1 April 2012 and in relation to Iceland, Liechtenstein and Norway since 1 June 2012. As the transitional period is a protection clause and prevents changes of applicable legislation at the changeover date to the new rules on applicable legislation, Article 87 shall be applied by analogy for the full 10-year period. It means that the 10-year transitional period will expire in relation to Switzerland on 31 March 2022 and in relation to Iceland, Liechtenstein and Norway on 31 May 2022.

The amendments introduced by Regulation 465/2012, for example the introduction of the concept of "home base" as the decisive element for the determination of applicable legislation for flight and cabin crew, are not applicable to these countries until the appropriate Decisions have been taken by the respective Joint Committees.

For third country nationals, Regulation 1231/2010 entered into force on 1 January 2011, as a consequence of which the transitional period in Article 87(8) of Regulation 883/2004 shall expire on 31 December 2020 and the period in Article 87a on 27 June 2022.

## **2. From what date will the applicable legislation apply where a person, who is subject to the transitional arrangements, requests to be assessed under new rules of Regulation 883/2004?**

As already indicated, a person whose applicable legislation was determined in accordance with Regulation 1408/71, or in accordance with Regulation 883/2004 before 28 June 2012, can request to be made subject to the legislation which is applicable under the amended wording of Regulation 883/2004. Concerning the transition between Regulations 1408/71 and 883/2004, if the person made their request by the 31<sup>st</sup> July 2010 then the change in applicable legislation should take effect from the 1<sup>st</sup> May 2010, i.e. the date from which the new Regulations became applicable. Where a request was received after the 31<sup>st</sup> July 2010, i.e. later than three months after the new Regulations became applicable, any decision made takes effect from the 1<sup>st</sup> day of the month following that in which the application was made.

Concerning the transition between Regulation 883/2004 and amending Regulation 465/2012, requests submitted by 29 September 2012 shall be deemed to take effect on 28 June 2012. Requests submitted after 29 September 2012 shall take effect on the first day of the month following that of their submission.

<sup>59</sup> 10 years from the date of entry into force of Regulation 465/2012.

