

**ADMINISTRATIVE COMMISSION
FOR THE COORDINATION OF SOCIAL SECURITY SYSTEMS**

Subject: Guidance Note on telework applicable from 1 July 2023

Note of 21 June 2023 (AC 137/23)

During the COVID-19 Pandemic, the Administrative Commission adopted Guidance on the legislation applicable to telework, recommending that telework in a Member State other than the competent (“usual”) Member State of employment, due to COVID-19, should not lead to a change of applicable legislation.

That Guidance, which was successively extended until 30 June 2022, was adopted for reasons of *force majeure*, in response to the specific and exceptional consequences of the health crisis, namely the containment measures and the temporary closure of Member States' borders.

After 1 July 2022, the *force majeure* could not any longer be a valid legal base.

During the Pandemic, telework increased considerably enabling categories of professions and businesses to pursue their activity and will remain, to a certain extent, a way of working. Moreover, many citizens have found advantages with telework, during that period (e.g. with the saving of transport time).

Therefore, it was necessary to assess how the current legal framework should be interpreted and if it is fit for the purpose of an increased amount of telework or hybrid work (which means a combination between work at the premises of the employer and telework), in normal working circumstances (not linked to the Pandemic).

The original Guidance note on telework (AC 125/22REV2) was adopted in June 2022 and was due to be used from 1 July 2022 to cover any organisation of telework from that date. However, given that the interpretation of the legal framework could have led to results others than those under the COVID-19 Guidance previously agreed and because that previous guidance had been applied since 2020, an abrupt change of applicable legislation on 1 July 2022 was considered detrimental to a large number of teleworkers. Therefore, a transition period was advisable, during which there would still be no change in the applicable legislation. This transition period was necessary to avoid hardship for the persons and enterprises concerned, in particular, in the context of the freedom of movement of workers. The transition period was foreseen at first until 31 December 2022 and extended later on (AC 125/22REV3) until 30 June 2023, because in addition to the protection of the workers, there were also some technical and administrative difficulties and the need to give additional time to employers, employees, any other person concerned as well as the relevant institutions to determine the legislation applicable. During that period of 12 months there was no change to the way Title II had been previously applied between February 2020 and the end of June 2022. This approach covered cases, which started

already before 1 July 2022 as well as those, which started after this date, for the period until 30 June 2023.

As of 1 July 2023, in normal working circumstances, Title II of Regulation (EC) No 883/2004 will apply as before the Pandemic. It is necessary to understand better the impact of the existing legal framework of Regulations (EC) No 883/2004 and 987/2009 on telework and to safeguard a common interpretation in all Member States, as this has not been done before the Pandemic in that regard. Therefore, this current Guidance note shows ways how to interpret the existing legal framework for the special situation of telework, in light of a rather flexible approach to the extent possible in order to meet the general aims of Title II of Regulation (EC) No 883/2004.

This current Guidance note reflects the discussions on the topic of cross-border telework that took place in the Ad-hoc group on telework of the Administrative Commission between September 2022 and March 2023.

Although cross-border telework could, in principle, concern employed and self-employed persons, the focus of this note is put on employed persons.

I. Definition of cross-border telework

‘Cross-border telework’ is an activity which can be pursued from any location and could be performed at the employer’s premises or place of business and;

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

It is also important to stress that, in the situation of employment, for the purposes of this note cross-border telework takes place in agreement between the employer and the employee, in accordance with national law.

Examples

A non-exhaustive list of some examples that are considered to fall within the scope of the above definition of cross-border telework:

- A Belgian resident is employed by a Dutch employer. He visits clients in the Netherlands during three days a week and performs his administrative tasks and the paperwork from home during two days a week.

- A German resident is employed by a French employer. He delivers parcels to French customers (he drives his van around in France) for three days a week and pursues the role of HR manager of the company exclusively from his home during two days a week.

II. Legislation applicable to teleworkers

The principle of *lex loci laboris* enshrined in Article 11 of Regulation (EC) No 883/2004 has to remain the main principle for determining the legislation applicable to a person carrying out a professional activity. The fact that telework has become part of the organisation of work does not affect the full application of that principle since the location of an activity must be understood as referring to the place where, in practical terms, the person concerned carries out the actions connected with that activity (see, in particular, judgment of the ECJ C-137/11, *Partena*).

Nevertheless, some exceptions to *lex loci laboris* are possible especially in the context of Articles 12 and 13 of Regulation (EC) No 883/2004; it has been analysed if and under what circumstances they apply to telework.

Moreover, it seems relevant to foresee the conditions for telework to be included in agreements, which could be concluded pursuant to Article 16 of Regulation (EC) No 883/2004.

1) Interpretation of Article 12 in relation to telework

Article 12 of Regulation (EC) No 883/2004 provides for an exception to the general principle under Article 11 (3) (a) – the *lex loci laboris* rule. Any exception to a general rule – in principle – has to be interpreted in a rather restrictive way.

Although Article 12 of Regulation (EC) No 883/2004 is a means for facilitating the cross-border provision of services, ensuring the stability of the social security legislation applicable to the worker and avoiding administrative complications for undertakings, it also covers other situations of an activity in another Member State during which the worker can remain subject to the legislation of the Member State where s/he is insured (e.g. s/he attends conferences, goes to meetings etc.). Anyhow, one condition for the application of that rule is that the person is ‘... posted by that employer to another Member State to perform work on that employer's behalf’.

Therefore, provided that the other conditions are met, telework in another Member State on behalf of the employer, can be considered as covered by Article 12 of Regulation (EC) No 883/2004.

Of course, Article 12 of Regulation (EC) No 883/2004 concerns only cases where the telework in another Member State is random, limited in time and not part of the habitual working pattern (in the latter case the application of Article 13 of Regulation (EC) No 883/2004 has to be assessed).

Following this interpretation, Article 12 of Regulation (EC) No 883/2004 applies to any telework, which has been agreed upon explicitly (formally or informally) between the employer

and the employee. It can be argued that, in these cases, the application of Article 12 is in the interest of the employer, which is an important element for any case under this Article. As the past years during the Pandemic have shown, telework is usually in the interest of the employer as well as the employee, leading to more flexibility, higher efficiency, and lower rent operating costs for the employer. These interests normally are not affected differently by the telework being carried out across the border. Subsequently, there is no need to differentiate in whose interest or on whose initiative the telework is being performed, which would also alleviate the administrative burden for the competent institutions who have to assess individual cases. If telework were contrary to the effectiveness of the work of the employee, the employer would not agree to such a request for telework.

Therefore, the specific interests of the employer and/or employee are not relevant, but rather that all other requirements are met, for example, the employee still has to continue to be subject to the employer's direction.

Examples of cases that could be covered by Article 12 of Regulation (EC) No 883/2004 under this interpretation are the following (if these show cross-border elements):

- An employer has to shut down some rooms of the offices building to renovate them. All the employees working in these rooms are sent home to perform teleworking.
- The employee can only continue to work from home, because e.g. s/he has to care for sick children, aged relatives, small children or is the partner of such a person (otherwise this employee would have e.g. to take paid or unpaid leave and would not any longer be in a position to exercise the work, which is important for the employer).
- An employee agrees with the employer that s/he will telework during the following 4 weeks to better concentrate on a specific project.
- An employee stays at the holiday place and starts to telework there for another month before returning home and resuming work in the office.
- Any other comparable cases, where there is an agreement between the employer and the employee concerned. In case of doubt as to whether a concrete case could be subsumed under this category, an agreement under Article 16 of Regulation (EC) No 883/2004 is advisable to avoid disputes between Member States.

A posting concerning telework activities in another Member State must fulfill all the classical posting conditions in line with AC Decision No A2 and the Practical Guide on applicable legislation.

Especially, the performed cross-border telework during the posting period should be full-time, i.e. 100% of the working time.

Continuous full-time telework in a Member State without any timely limit would be excluded from Article 12 as/if it is not of an ad hoc or temporary nature and supposed to be longer than the 24 months. Instead, Article 11 (3) of Regulation (EC) No 883/2004 applies.

Part-time posting, i.e. alternating activities at the employer's premises and the remote location on a temporary basis is, in principle, a situation that should be subject to pursuing activities in two or more Member States (Article 13 of Regulation (EC) No 883/2004). Nonetheless, in practice, it can occur that a temporary and ad hoc situation for working abroad leads to only a brief interruption of the work pattern. As to avoid administrative burden, this may be considered as one posting situation (filling one PD A1 for the entire period instead of several for each part of posting activity). Justification for this approach can be found in AC Decision No. A2 (point 3b).

2) Interpretation of Article 13 in relation to telework

If telework is normally and usually exercised in more than one Member State, that is, whenever it is part of the normal working pattern, based on an agreement between the employer and the employee (formal or informal), Article 13 of Regulation (EC) No 883/2004 becomes applicable.

Pursuant to that provision, the legislation of the Member State of residence applies if a substantial part of the activity is carried out there. If this is not the case, the legislation of the Member State where the registered office or place of business of the undertaking or employer is located, applies. In accordance with Article 14 (8) of Regulation (EC) No 987/2009, in the framework of an overall assessment, a share of less than 25% of all the relevant criteria is an indicator that a substantial part of the activity is not being pursued in the relevant Member State. The situation has to be examined for the following 12 months under Article 14 (10) of Regulation (EC) No 987/2009.

Article 13 of Regulation (EC) No 883/2004 and Article 14 of Regulation (EC) No 987/2009 have to apply as a rule to telework. In the framework of an overall assessment, the specific elements of telework have to be taken into account.

Nevertheless, the existing legal framework does not allow to deviate especially for telework from Article 13 and the 25% rule. If a substantial part (25% and above) takes place in the Member State of residence of the person concerned, an agreement under Article 16 of Regulation (EC) No 883/2004 can be concluded to safeguard that not the legislation of this Member State of residence but the one of the Member State in which the employer has his registered office or place of business is applicable.

The following situations could be covered by Article 13 of Regulation (EC) No 883/2004:

- a switch between work at the premises of the employer and telework on a weekly basis (e.g. one day per week every week);
- longer intervals are foreseen (e.g. one week every six weeks);

- a more flexible arrangement: e.g. the employee is allowed to telework when the nature of the work to be carried out allows or e.g. during a maximum number of days of telework per year.

3) Conditions for the application of Article 16 to agreements on telework

Although the interpretation proposed of Articles 12 and 13 of Regulation (EC) No 883/2004 already allows to consider some aspects of the special situation of telework, agreements under Article 16 of Regulation (EC) No 883/2004 on exceptions to the general rules on applicable legislation, in the interest of certain persons or categories of persons, remain the tool to address the new/atypical work situations in all other cases, if the result of the application of the legal framework is not deemed to be desirable.

The following possibilities exist:

- **Individual Article 16 agreements** that can be concluded for each individual case by the Member States involved
- **Group of persons Article 16 agreements** that can be concluded for groups of persons by the Member States involved (which could cover specific categories of persons as e.g. the employees of specified employers or also e.g. a certain group of teleworkers)

Individual Article 16 agreements have to be administered via the EESSI-system. It is up to the Member States involved to agree on the procedure of how to administer certain groups of persons. Anyhow, these procedures must be transparent and it must be safeguarded that all Member States involved are aware about the persons to which these agreements apply.

As Article 16 agreements can only be concluded in the interest and with the consent of the persons concerned, it must be safeguarded that a person who would fall under a certain group of persons can at least opt out from these agreements.

In order to facilitate the conclusion of such agreements for those cases where the interpretation proposed under Part II Chapters 1 and 2 of this note would lead to the competence of the Member State of residence of the person concerned, the Administrative Commission agrees that the following criteria could favour an Article 16 agreement:

- telework due to family reasons such as hospitalisation of a relative or need for constant or increased care of a relative;
- telework with the aim of facilitating the exercise of the activity by people with disabilities.
- **Multilateral Article 16 agreements** that more than two Member States could agree to conclude for specific groups of persons

Several Member States have decided to conclude a multilateral Framework Agreement on telework designated to enter into force on 1 July 2023. The Framework Agreement provides for the possibility of derogating upon request from the threshold of 25 percent of the work performed in the Member State of residence applicable under the Regulations on the coordination of social security systems, provided that the work is performed both for one or more employers established in one Member State and from home in the Member State of residence by means of cross-border telework. In these cases, the Agreement provides that the social security legislation of the Member State in which the employer(s) is/are based applies despite telework of less than 50 percent of the working time in the Member State of residence.

Further information on the details of the Agreement as well as on its signatories, are published at: <https://socialsecurity.belgium.be/en/internationally-active/eu-cross-border-telework-eu>.

III. Entry into force of this Guidance note

The interpretation proposed in this note is due to be used from 1 July 2023 and cover any organisation of telework from that date.