



Guide for Mobile Workers in Europe

European Trade Union Confederation (ETUC) 2022



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About the “Guide for Mobile Workers in Europe”

The “Guide for Mobile Workers in Europe” is issued by the European Trade-Union Confederation (ETUC). The ETUC was founded in 1973. The ETUC is the voice of 45 million workers who are members from one of 92 trade union organisations in 39 European countries. In addition, 10 European sectoral federations are affiliated to the ETUC. The ETUC also coordinates 46 Interregional Trade-Union Councils (IRTUC). The IRTUCs are associations of the regional trade union organisations in the many border areas to support local, often cross-border mobile workers in defending and pursuing their social and economic interests.

The “Guide for Mobile Workers in Europe” was first published in 2004 on the initiative of Ger Essers. He had worked for the Dutch Union FNV and was EURES adviser in Euregio Rhine-Meuse-Waal and advised Dutch, Belgian and German cross-border workers. He is co-author of the first three editions of the “Guide for Mobile Workers in Europe” and continues to be involved in cross-border working issues after his retirement. Co-author of the first two editions (2004 and 2007) was Bart Vanpoucke of the Belgian trade union federation ABVV/FTGB, who was active there until 2009 as EURES adviser for Belgian, French and British cross-border workers.

Together with Ger Essers, Katrin Distler elaborated in 2011 the third edition of the guide which represented a fundamental revision of the first two editions, in particular due to Regulation (EC) No. 883/2004 on the coordination of social security systems, which entered into force on 1 May 2010. Katrin Distler has been active in the German Trade Union Confederation (Deutscher Gewerkschaftsbund, DGB) for interregional European politics since 2000 and in this framework since 2004 EURES adviser at the Franco-German-Swiss EURES Cross Border Partnership for the Upper Rhine. She updated the guide for the fourth edition, published at the end of 2017, and for this fifth edition. This latest edition incorporates the changes to the legal basis as of July 2022.

The information that follows has been compiled with the utmost care in order to keep you abreast of recent developments. However, errors may occur, especially as the legal provisions are constantly changing. The authors and publisher cannot be held liable for any misprints, errors or omissions.

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EXECUTIVE SUMMARY

This “Guide for Mobile Workers in Europe”, published by ETUC, is dedicated particularly to those who inform and advise this group of Europe-wide mobile workers, including especially the EURES advisers who are trained by the European Commission in issues of the mobility of workers at transnational and cross-border level and are active in employment services, trade unions or employers’ organisations.

Those who (want to) work in another country, have many questions, e.g.:

Do I need a work permit?

Will my professional qualification be recognised?

Which labour law applies to me?

In which country can/ must I have health insurance?

What do I have to do if I become unemployed?

In which country can/ must I claim for family benefits?

Which country will pay my pension later?

In which country do I have to pay taxes?

The principle of the free movement of persons applies in the European Union (EU) and the European Free Trade Association (EFTA). For the mobile European workers, this means that they have the right to move to another Member State to work and/or to look for a job. Because of the European law principle that persons must not be discriminated against because of their nationality, mobile European workers must be treated in the same way as native workers regarding access to employment, working and employment conditions, social and tax advantages. To achieve free movement, various European regulations and directives have therefore been enacted, establishing certain common rules and principles to ensure that persons exercising their right to free movement are not disadvantaged by the application of different Member State systems.

European law therefore does not provide for the unification of the laws of the Member States, but only for the coordination of national systems. For mobile workers, this means in concrete terms that their rights and obligations are guaranteed in principle thanks to European Community law. But the configuration of these rights and obligations continues to be determined by the respective national/domestic legal systems of their country of work and/or residence.

In one area which is important for mobile workers, the European dimension has little impact: tax legislation. Coordination at European level is currently still lacking on this front. Instead, there are hundreds of bilateral tax treaties agreed between different member states to prevent double taxation. After all, many of these bilateral tax treaties are guided by the basic principles of the OECD Model Convention on the Prevention of Double Taxation.

Part I of the “Guide for Mobile Workers in Europe” presents some important European legal bases for worker’s mobility in Europe. These include not only the free movement of workers as such, but also the coordination of social security systems, including family benefits, European labour law and the bilateral taxation agreements.

In Part II of this guide, the concrete design of all these European rules is explained by way of examples, using different forms of worker’s mobility; among others: frontier workers, posted workers, workers pursuing activities in two or more Member States (e.g., in international transport sector), and seasonal workers. Finally, the situation of pensioners abroad is also mentioned.

PART I: **Legal Bases of the Right of Freedom of Movement for Workers in Europe**



Chapter 1: Cross-border Mobility of Workers in Europe

The principle of the free movement of persons applies within the European Union¹ and the European Free Trade Association. For the European worker, this means that he/she has the right to move to another Member State to work or to look for a job.

The legal basis of freedom of movement for workers is Article 45 of the Treaty on the Functioning of the European Union (TFEU)². Freedom of movement is also a fundamental right guaranteed by Article 15, paragraph 2 of the Charter of Fundamental Rights of the European Union. It is based on the Community principle of non-discrimination on the grounds of nationality, which means that a migrant worker must be treated in the same way as nationals with regard to access to work, conditions of work and employment, and social and tax benefits. To achieve freedom of movement, the Council of the European Union has issued regulations and directives³ setting out certain common rules and principles that ensure that application of the different national systems of Member States does not harm persons who exercise their right to free movement.

EU law therefore does not aim to standardise the different national systems but only to coordinate the systems of individual States. The practical effect for the mobile worker is that his/her rights and obligations are in principle guaranteed under EU law but the form that these rights and obligations take continues to be determined by the national legislation of his country or countries of employment and/or residence.

The European Commission issues an annual report on worker mobility within the European Union (EU) and the European Free Trade Association (EFTA). The “Annual Report on Intra-EU Labour Mobility 2021”, published in May 2022,⁴ provides updated information on labour mobility trends in EU and EFTA countries based on 2019/2020 data.⁵

The analysis considers the mobility of all working age EU citizens (20-64 years) as well as the mobility of the EU citizens in this age group who are active (employed and unemployed).

As a share of the EU working-age population, EU movers have increased steadily since 2017. At the reference date 1 January 2020, they made up 3.8 % of the working-age population in the EU, increasing by a similar rate every year since 2017, when the proportion was 3.5 %. Due to the large numbers of EU movers in Switzerland, they made up a significantly larger proportion of the working-age population in EFTA countries at 15.1 %.

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- 1 The European Union currently (July 2022) consists of 27 member states. The European Free Trade Association (EFTA) comprises the four countries of Iceland, Liechtenstein, Norway and Switzerland. The European Economic Area (EEA) is made up of the EU member states and Iceland, Liechtenstein and Norway. The expression “the EEA and Switzerland” covers the same countries as “EU/EFTA”.
 - 2 The TFEU has its origins in the Treaty establishing the European Economic Community (EEC Treaty) concluded in Rome in 1957, which, together with the EURATOM Treaty, is known as the Treaties of Rome. The EEC Treaty has been amended and renamed several times since then. The TFEU received its current name with the entry into force of the Treaty of Lisbon on 01.12.2009.
 - 3 E.g. Regulation (EEC) No. 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community; repealed by Regulation (EU) no. 492/2011 of 5 April 2011 on freedom of movement for workers within the Union. 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; superseded by Regulation (EC) No 883/2004 of 29 April 2004 on the coordination of social security systems and the implementing Regulation (EC) 987/2009. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.
 - 4 See: <https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8458&furtherPubs=yes>; the Report is only available in English
 - 5 The two main data sources used are Eurostat population (including international migration) statistics and the European Labour Force Survey (EU-LFS), collected until September 2021. Where necessary, the coherence between these two sources as well as their comparability over time to measure trends in intra-EU mobility are discussed in the report.

Countries of destination: Germany hosts around one-third of EU movers, while Spain, Italy and France together host another one-third. In 2020, there were 3.3 million movers resident in Germany, making it the largest destination country by a significant margin. Spain, Italy and France each host approximately 1 million each. Other than these countries, only Belgium and Austria host more than half a million movers. Outside of the EU, Switzerland is a significant destination country, hosting just over 1 million movers, and hence overtakes France as a destination country for EU movers.

Countries of origin: The composition of EU movers by citizenship has remained broadly the same since 2015, with Romanians remaining the largest individual group. In 2020, one-fifth of EU movers were Romanian, followed by Italian and Polish (11 % each), Portuguese (7 %), Croatian and Bulgarian (5 % each).

Work across borders decreased during the Covid pandemic. The mobility of EU/EFTA workers living in one country and employed in another was reduced during the pandemic by a combination of travel restrictions, lower demand for workforce and orders to work from “home-offices”.

The European Commission uses the term “migrant worker” in the sense of the United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.⁶ But the “Annual Report on Intra-EU Labour Mobility 2021” of the European Commission uses the term “mobile European workers” instead of “migrant workers” as an umbrella term for active EU-/EFTA-citizens who reside and/or work in an EU-/EFTA-country other than their country of citizenship. Therefore, the “ETUC Guide for mobile workers in Europe” adopts the definitions of workers’ mobility fixed by this Annual Report.

According to Article 2(1) of this Convention, a migrant worker is “a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.”⁷

According to Article 2(2) of this Convention, these include:

- ▶ Frontier workers: migrant/mobile worker who retains his or her habitual residence in a neighbouring State to which he or she normally returns every day or at least once a week. – The EU uses the same definition for frontier workers in Article 1f EC-Regulation 883/2004 on the coordination of social security systems. For more information, see Chapter 5 and 8 of this Guide.
- ▶ Posted workers are sent by their employer to another country for a limited and fixed period of time to perform a specific assignment or task. – The EU has adopted this definition in Article 12 of EC-Regulation 883/2004 on the coordination of social security systems. For more information, see Chapter 5 and 9 of this Guide.
- ▶ The term “itinerant worker” refers to a migrant/mobile worker who, having his or her habitual residence in one State, has to travel to another State or States for short periods, owing to the nature of his or her occupation, e.g. persons working in international transport. This group also includes persons who carry out two or more part-time activities in different States. -- The EU refers to this group of “itinerant workers” as “normally pursuing an activity in two or more Member States” in Article 13 EC-Regulation 883/2004. For more information, see Chapter 5 and 10 of this Guide.
- ▶ Seasonal worker: migrant/mobile worker whose work by its character is dependent on seasonal conditions and is performed only during part of the year. – The former EEC-Regulation 1408/71 on the application of social security schemes to employed persons and their families moving within the European Community limited the duration of seasonal work to 8 months (Article 1(c) EEC-R. 1408/71), while they are no longer defined under the currently applicable rules in EC-Regulation No 883/2004 on the coordination of social security systems. For more information, see Chapter 5 and 11 of this Guide.

6 See: https://home-affairs.ec.europa.eu/pages/glossary/migrant-worker_en

7 See: <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-protection-rights-all-migrant-workers>

Regarding the above-mentioned different forms of cross-border mobility, the “Annual Report on Intra-EU Labour Mobility 2021” recorded 3.1 million postings or 1.4 million posted persons in 2020 and identified approx. 1 million persons who are normally pursuing an activity in two or more Member States.

Because of the Covid protection measures ordered, many mobile workers also had to work in their “home office” in the state of residence and therefore also belong to this group of “pluri-active workers”. Since the home office orders were due to “force majeure”, the competent authorities agreed to continue to consider them as mobile workers pursuing an activity in only one Member State for the time being. They are therefore not included in the above number of multiple workers.

To number the persons who are frontier workers you need to know the frequency of their commuting. Unfortunately, this cannot be identified in the EU-LFS, which is the data source for the estimation of numbers of mobile workers. Therefore, the Annual Report defines another term of mobile workers. “Cross-border workers” are EU or EFTA citizens who live in one EU or EFTA country and work in another move across borders more or less regularly. On average in 2020, there were 1.5 million persons who live in one country and work in another. We suppose that these “cross-border workers” mainly include the legally defined group of frontier workers but may also include seasonal workers and other mobile workers who move across borders less than once a week.

Chapter 2:

The European Treaties

The Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) together form the primary legal basis of the EU's political system. According to Article 1 TFEU, both treaties are of equal legal rank and complement each other. The TEU contains in particular fundamental institutional provisions. The TFEU, on the other hand, lays down the functioning of the EU institutions and the normative framework in which areas the EU can act and with which competences. The TFEU has been in force since 01.12.2009 and sets out some basic fundamental rights for European citizens.

The most important articles of the TFEU for cross-border mobile workers are:

Article 18 TFEU

Within the scope of this Treaty, and without prejudice to the special provisions it contains, any discrimination on the grounds of nationality is prohibited. [...]

Article 20 TFEU

- 1) *Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.*
- 2) *Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:*
 - a) *the right to move and reside freely within the territory of the Member States; [...]*

Article 21 TFEU

- 1) *Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.*
- 2) *If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1.*
- 3) *For the same purposes as those referred to in paragraph 1 and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt measures concerning social security or social protection. The Council shall act unanimously after consulting the European Parliament.*

Article 45 TFEU

- 1) *Freedom of movement for workers shall be secured within the Union.*
- 2) *Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.*

- 3) It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
- a) to accept offers of employment actually made,
 - b) to move freely within the territory of Member States for this purpose,
 - c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
 - d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.
- 4) The provisions of this Article shall not apply to employment in the public service.

Article 46 TFEU

The European Parliament and Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, issue directives or make regulations setting out the measures required to bring about freedom of movement for workers, as defined in Article 45, in particular:

- a) by ensuring close cooperation between national employment services;
- b) by abolishing those administrative procedures and practices and those qualifying periods in respect of eligibility for available employment, whether resulting from national legislation or from agreements previously concluded between Member States, the maintenance of which would form an obstacle to liberalisation of the movement of workers;
- c) by abolishing all such qualifying periods and other restrictions provided for either under national legislation or under agreements previously concluded between Member States as imposed on workers of other Member States conditions regarding the free choice of employment other than those imposed on workers of the State concerned;
- d) by setting up appropriate machinery to bring offers of employment into touch with applications for employment and to facilitate the achievement of a balance between supply and demand in the employment market in such a way as to avoid serious threats to the standard of living and level of employment in the various regions and industries.

Article 48 TFEU

The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, they shall make arrangements to secure for employed and self-employed migrant workers and their dependents:

- a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;
- b) payment of benefits to persons resident in the territories of Member States.

Where a member of the Council declares that a draft legislative act referred to in the first subparagraph would affect important aspects of its social security system, including its scope, cost or financial structure, or would affect the financial balance of that system, it may request that the matter be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, the European Council shall, within four months of this suspension, either:

- a) refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure; or

- b) take no action or request the Commission to submit a new proposal; in that case, the act originally proposed shall be deemed not to have been adopted.

The rights defined in the TEU are regulated in particular in Regulation (EC) 492/2011 on freedom of movement for workers within the Community, in the Regulations (EC) 883/2004 and 987/2009 on the coordination of social security, and in the directives on the right of residence, etc.

Article 49 TFEU regulates the right of free establishment in another Member State:

Article 49 TFEU

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

Articles 56-62 TFEU regulate the freedom to provide services within the EU and thus set a framework for, among other things, the posting of workers to another member state in order to provide services there:

Article 56

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union.

Article 57

Services shall be considered to be 'services' within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.

'Services' shall in particular include:

- a) activities of an industrial character;
- b) activities of a commercial character;
- c) activities of craftsmen;
- d) activities of the professions

Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals.

Article 293 of the Treaty establishing the European Community (EC Treaty, TEC), which was in force until 30.11.2009, stipulates that Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing, for the benefit of their nationals, the abolition of double taxation within the Community. This article has not been included in the TEU or TFEU. However, Article 4(3) of the TEU contains a general provision to the effect that the Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise attainment of the Union's objectives.

Chapter 3: Right of Residence

3.1 LEGAL BASES OF THE RIGHT OF RESIDENCE

Since 29 April 2004, the right of residence for all citizens of the European Union has been governed by the Residence Directive 2004/38/EC. This Directive also applies to citizens who are not from the European Union but from so-called third countries (third-country nationals) if they are family members of Union citizens. Their right of residence is derived from the corresponding right of the EU citizen. For those who are not EU citizens or family members of EU citizens and who have resided legally and continuously in the same EU state (except Denmark and Ireland) for more than five years, the so-called Permanent Residence Directive 2003/109/EC applies.

Directive 2004/38/EC on the right of EU citizens and their family members to move and reside freely within the EU distinguishes between a right of residence for a maximum of three months, a right of residence for more than three months and a permanent right of residence. Article 23 of Directive 2004/38/EC provides that family members of Union citizens who enjoy a right of residence or a permanent right of residence in a Member State shall also have the right, irrespective of their nationality, to take up an activity as an employed or self-employed person in that Member State.

3.2 RIGHT OF RESIDENCE FOR UP TO THREE MONTHS

Union citizens and their family members can stay in another EU Member State for a period of up to three months with only a valid identity card or passport and without any other conditions or formalities (art.6 Directive 2004/38/EG). An employment contract is therefore not required. The right of residence for up to three months also applies to family members in possession of a valid passport who are not EU nationals and who accompany or join the Union citizen.

According to Article 2(2b) of Directive 2004/38/EC, family members include among others:

„...the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State; ...“

3.3 RIGHT OF RESIDENCE FOR MORE THAN THREE MONTHS

Article 7(1) of Directive 2004/38/EC stipulates that all Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

- ▶ are workers or self-employed persons in the host Member State; or
- ▶ have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State.

If an EU citizen wishes to reside in a Member State for longer than three months, he/she must register with the local authorities (population administration). Proof of registration in the population register is then issued to the Community citizen. No residence permit is required. A residence card is issued to family members who are third-country nationals (Article 9 of Directive 2004/38/EC). The proof of registration must be provided free of charge or at a price that does not exceed the price charged to the country's own citizens for the issue of similar documents.

3.4 RIGHT OF PERMANENT RESIDENCE

Article 16(1) of Directive 2004/38/EC provides that Union citizens who have resided permanently and without interruption on the territory of the host country for five years acquire the permanent right of residence. Article 16 shall also apply to third-country family members who have resided permanently and continuously with the Union citizen on the territory of the host State for five years.

At the request of the Union citizen and after checking the duration of residence (5 years), he/she will receive a document/certificate stating the right of permanent residence (Art.19 Directive 2004/38/EG). The family members from third countries receive a residence card for permanent residence, which must be automatically renewed every ten years (Art.20 Directive 2004/38/EG).

Upon application and after having verified duration of residence (at least five years), Member States will issue Union citizens with a document certifying their right to permanent residence (Article 19 of Directive 2004/38/EC). Member States shall issue family members who are not nationals of a Member State with a permanent residence card which is renewable automatically every ten years (Article 20 of Directive 2004/38/EC).

These documents must be provided free of charge or at a price that does not exceed the price charged to the country's own citizens for the issue of similar documents.

3.5 RIGHT OF RESIDENCE AFTER EMPLOYMENT

The EU citizen maintains his/her right of residence in the event of sickness, an accident at work or involuntary unemployment (after at least one year's work). If an EU citizen with a temporary contract of employment becomes unemployed within less than a year or he/she becomes involuntarily unemployed within the first twelve months of residence, he/she maintains his/her right of residence for six months. In this case the employee must, though, register as a jobseeker at an employment office. Claims to unemployment benefits are regulated by Article 65 of Regulation (EC) 883/2004 (see section 5.5.5 of this guide).

3.6 SOCIAL ADVANTAGES AND SOCIAL ASSISTANCE

Under Article 24 of Directive 2004/38/EC, EU citizens have the right to equal treatment to the citizens of the host Member State. This right also applies to family members who do not hold the nationality of a Member State but do have the right of residence or the right of permanent residence in a Member State.

There is an exception here for social assistance. The Residence Directive states that the State of residence is not obliged to pay a social assistance allowance for the first three months of residence. This applies even if a jobseeker from another Member State is involved.

The right to study grants and maintenance grants for training programmes etc. is only granted once the person concerned has the right of permanent residence (after five years). If, though, the EU citizen is working in the State of residence, he/she can claim all fiscal and social advantages from the outset (Article 7 of Regulation (EU) no. 492/2011; see section 4 of this guide).

Chapter 4

Freedom of Movement for Workers

4.1 THE RIGHT OF EU-CITIZENS TO TAKE UP EMPLOYMENT

EU Regulation 492/2011⁸, which governs the rights of cross-border workers and migrants and their families, is based on the prohibition of discrimination on the grounds of nationality under Articles 18 and 45(2) of the TFEU. Citizens of the Member States of the European Economic Area (EEA, i.e. the Member States of the European Union plus Liechtenstein, Norway and Iceland) have free access to the labour market in the other EEA countries and therefore do not need a work permit; as workers they enjoy freedom of movement. Under another agreement on freedom of movement (Bilateral Agreements I between Switzerland and the European Union), Swiss citizens have the same rights with regard to access to the labour market as EU-citizens.

Article 45 of the TFEU guarantees the free movement of workers, which means that every EEA citizen may work in more or less every sector. An exception is made for employment in the public service, but its scope is limited. It applies only to posts in government services, such as the police or the judiciary, that “involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or other public authorities.”

European Regulation 492/2011 guarantees the equal treatment of EU workers in the Member States in relation to:

- ▶ taking up an activity as an employed person (Article 1);
- ▶ negotiating and concluding contracts of employment (Article 2);
- ▶ labour market access (Article 3), including any quantitative restrictions (Article 4);
- ▶ access to the services of employment offices (Article 5);
- ▶ conditions for engagement and recruitment (Article 6).

Article 7 of EU Regulation 492/2011 is of particular importance. This article governs equal treatment relating to:

- ▶ labour conditions and conditions of engagement;
- ▶ social and tax benefits
- ▶ the right to training, rehabilitation and retraining;
- ▶ the provisions of collective and individual labour agreements.

⁸ Regulation (EU) No. 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union entered into force on 16 June 2011, replacing the previously applicable Regulation (EEC) No. 1612/68 of 15 October 1968 on freedom of movement for workers within the Community. Regulation (EU) No. 492/2011 was amended by Regulation (EU) 2016/589 and by Regulation EU 2019/1149.

Article 7 of EU Regulation 492/2011:

- 1) *A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment;*
- 2) *He shall enjoy the same social and tax advantages as national workers;*
- 3) *He shall also, by virtue of the same right and under the same conditions as national workers, have access to training in vocational schools and retraining centres.*
- 4) *Any clause of a collective or individual agreement or of any other collective regulation concerning eligibility for employment, employment, remuneration and other conditions of work or dismissal shall be null and void in so far as it lays down or authorises discriminatory conditions in respect of workers who are nationals of the other Member States.*

This important Article 7 thus ensures that the migrant and frontier worker is entitled to the same social and tax advantages as national workers. Social and tax advantages include in particular: study grants for children, redundancy or dismissal payments, non-contributory continuation of company pensions in the event of unemployment, tax credits, maternity allowances (birth grant), access to collective private health insurance, tax allowances, income-related expenses, etc.

However, social advantages must not be confused with statutory social security payments. The coordination of statutory social security is governed by the applicable regulations (see Chapter 5 of this Guide).

Examples

- ▶ A Czech family moves to Brussels (Belgium). Both parents take up paid employment in Belgium. On the birth of a child, they claim Belgian maternity allowance (birth grant). This may not be refused on the ground of non-Belgian nationality. Maternity allowances are a “social advantage” (Article 7(2) of EU Regulation 492/2011).
- ▶ A Polish family lives in Maastricht (Netherlands). The father is in paid employment in Belgium. On the birth of a child the family is entitled to Belgian maternity allowances. Belgium may not require the family to live in Belgium. If the father were to be self-employed in Belgium, there would be no entitlement to maternity allowances, because Article 7(2) of EU Regulation 492/2011 applies only to employees and not to the self-employed (ECJ ruling in case C-43/99 (Leclere); at the time of the ECJ ruling EEC Regulation 1612/68, Article 7(2) was still in force).
- ▶ A French student lives in the Netherlands to attend higher education. She works two days a week in paid employment. The student is entitled, because she is an employee within the meaning of Regulation (EC) 883/2004, to claim a supplementary Dutch student grant (ECJ ruling in case C-57/87 (Roulin); at the time of the ECJ ruling, EEC Regulation 1612/68 was still in force).

- ▶ A Greek doctor goes to work in Germany, having first worked in a comparable post in Greece. Under the German collective wage agreement for all federal employees (Bundesangestelltentarifvertrag, BAT), all such employees – including doctors – are entitled to promotion to a higher salary scale after a number of years' service in German hospitals. The European Court of Justice found that the (comparable) years of service in Greece must be counted and treated as on a par with years of service in Germany (ECJ ruling in case C-15/96 Schöning-Kougebetopoulou; at the time of the ECJ ruling EEC Regulation 1612/68 was still in force).
- ▶ Case C-514/12 between the Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken Betriebs GmbH and the Austrian province of Salzburg (Land Salzburg) concerned differing methods of allowing for previous periods of service. The law of the Province of Salzburg governing the assignment of civil servants (Salzburger Landesbediensteten-Zuweisungsgesetz) stipulated that “a contractual agent [employee] shall advance every two years to the next pay step in his grade”. From the date of commencement of employment with the present employer, periods of service were counted in full; only 60% of periods of employment with previous employers was counted. The ECJ decided in this case that differentiation between periods of service with one particular employer and service with other employers was an infringement of European rules on freedom of movement (Article 45 TFEU and Article 7 of Regulation (EC) 492/2011).

Access to trade union organisations and the exercise of trade union rights are governed by Article 8.

Article 8 of Regulation (EC) 492/2011)

- 1) *A worker who is a national of a Member State and who is employed in the territory of another Member State shall enjoy equality of treatment as regards membership of trade unions and the exercise of rights attaching thereto, including the right to vote and to be eligible for the administration or management posts of a trade union. He may be excluded from taking part in the management of bodies governed by public law and from holding an office governed by public law. Furthermore, he shall have the right of eligibility for workers' representative bodies in the undertaking.*

The first paragraph of this Article shall not affect laws or regulations in certain Member States which grant more extensive rights to workers coming from the other Member States.

Freedom of movement is one of the most important advantages of the internal market. But freedom of movement must be regulated fairly. The EU Commission has therefore proposed measures to prevent social dumping by providing national authorities with instruments for tackling abuse and fraud. At the same time, new legal provisions are intended to ensure that existing rights –which previously existed only on paper – can actually be exercised.

Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers removes existing obstacles to the free movement of workers. Such obstacles include public and private employers' inadequate knowledge of EU law, and the difficulties that mobile citizens may have in searching for information and support in the host Member States. To overcome these obstacles and prevent discrimination, the Directive obliges Member States to ensure provision of the following:

- ▶ support and legal advice to migrant EU workers on enforcing their rights, such support to be provided by one or more bodies at national level
- ▶ effective legal protection (e.g. by protecting EU migrant workers who wish to enforce their rights from victimisation), and
- ▶ easily accessible information in more than one EU language on the rights of migrant workers and employment seekers from the EU.

Under this EU Directive Member States must also initiate active dialogue between social partners, NGOs and public authorities in order to promote the principle of equal treatment.

EU Member States were required to bring the laws, regulations and administrative provisions necessary to comply with this Directive into force by 21 May 2016.

4.2 THE EUROPEAN LABOUR AUTHORITY (ELA) AND EURES

The European Labour Authority (ELA)⁹ is an initiative under the European Pillar of Social Rights (EPSR)¹⁰, solemnly proclaimed by the European Parliament, the European Council (i.e. the Heads of State or Government of the EU Member States), the European Commission, representatives of employers' organisations and the ETUC at the Social Summit on 17 November 2017 in Gothenburg (Sweden).

The ELA was established on 31 July 2019 as a European supervisory and implementation authority, has had its permanent registered office in Bratislava (Slovakia) since September 2021 and is expected to be fully operational by 2024. The objective of the ELA is the fair, simple and effective enforcement of EU regulations on all issues of cross-border labour mobility, both in the area of the rules on the free movement of workers and the posting of workers and the coordination of social security systems. Furthermore, the ELA is intended to improve cooperation between Member States in the fight against undeclared work. The tasks of the ELA are:

- ▶ provide individuals and employers with access to information about their rights and obligations as well as relevant service providers;
- ▶ promote cross-border cooperation in the cross-border enforcement of relevant EU regulations, including joint on-site controls;
- ▶ mediate and facilitate solutions in the event of disputes between national authorities or labour market disruptions.

The ELA should support national authorities. At the same time, it should aim to secure synergies between existing EU authorities on needs planning, health, and safety at work, restructuring and the management of undeclared work.

The European Employment Services (EURES) cooperation network was established in 1994 to promote the free movement of workers. This network of more than 1'000 EURES advisers at present supports European citizens in enjoying the same benefits despite language barriers, cultural differences, bureaucratic hurdles, different labour laws and the lack of Europe-wide recognition of educational qualifications. The EURES advisers are trained professionals who provide information and advice to job seekers, employees and employers on cross-border issues relating to job-seeking/recruitment; the labour market; living and working conditions; social insurance and family benefits; labour, social and tax law in Europe. The current list of EURES advisers can be found on the EURES portal <https://ec.europa.eu/eures>.

The European Labour Authority (ELA) and EURES therefore have a joint mandate to ensure that workers' rights are recognised when they move to another EU state, Iceland, Norway, Liechtenstein, or Switzerland to work there, and that employers can recruit applicants from these countries without obstacles.

⁹ <https://www.ela.europa.eu/en>

¹⁰ https://ec.europa.eu/info/strategy/priorities-2019-2024/economy-works-people/jobs-growth-and-investment/european-pillar-social-rights/european-pillar-social-rights-20-principles_en

As of 1 July 2021, the ELA took over the tasks of the European EURES Coordination Office (ECO) previously located at the EU Commission. In the medium to long term, the ELA aims to maximise synergies between EURES and all other ELA activities, in particular the provision of information, and to improve EURES services from a digital and technological standpoint. EURES is to be further strengthened under the ELA. For example, by strengthening cross-border cooperation, which the ELA promotes by streamlining the activities of existing networks, such as the European Platform tackling undeclared work. The European Commission remains an important partner of the EURES network. Political control, including legislation, reporting, evaluation, and the administration of grants, will continue to take place within the framework of the EU Commission.

Members of the ELA Management Board are one representative per EU Member State, two representatives of the European Commission, one independent expert appointed by the European Parliament, two representatives of the European employers' associations and two representatives of the ETUC.

The stakeholder group providing advice to the ELA is composed of two representatives of the European Commission, five representatives of the European employers' associations and five representatives of the ETUC.

In addition, the ETUC is represented by two experts each in the ELA working groups "Information", "Inspections", "Mediation" and "European Platform tackling undeclared work".

4.3 RECOGNITION OF PROFESSIONAL QUALIFICATIONS OBTAINED ABROAD

Recognition of professional qualifications and educational qualifications, or the possibility of exercising the profession learned abroad, is an important aspect in promoting the free movement of workers.

European Directive 2005/36/EC on the recognition of professional qualifications (also known as the European Professional Qualifications Directive) was last amended by Directive 2013/55/EU, which introduced automatic recognition of professional qualifications for certain professions and recognition by the European Professional Card (EPC) for some other professions. The EPC is an electronic method of recognising professional qualifications in another EU state. The EPC makes it possible to exercise the profession temporarily and occasionally in another EU country or to exercise it permanently there (professional establishment).

The Bologna Process also sought to harmonise professional and academic qualifications across Europe. The European Qualifications Framework (EQF) is intended to make professional qualifications and competences in Europe more comparable. The EQF is a non-binding recommendation for the Member States.

The recognition of professional qualifications is imperative for all regulated professions to be allowed to work in another Member State. Regulated professions are legally protected professions in which the exercise is bound by legal regulations on certain qualifications. Regulated professions include teachers, educators, architects, and all medical professions (doctor, nurse, physiotherapist, pharmacist). The EU Commission "Regulated professions database" contains information on regulated professions, statistics on migrant professionals, contact points and competent authorities as provided by EU Member States and EFTA States.

Recognition can be helpful for all non-regulated professional qualifications but is not a mandatory requirement for starting work.

4.4 RESTRICTIONS ON THE FREE MOVEMENT OF WORKERS

The right of all EU citizens to move and choose their place of residence freely within the European Union is one of the most valuable achievements of the European Union, as is the abandonment of internal border controls.

Under Article 45(4) TFEU, the free movement of workers does not apply to **employment in public administration**. According to the ECJ, this exemption must be interpreted very narrowly: Only those positions which entail the exercise of sovereign powers and the perception of general interests of the state (for example, matters of internal or external security of the state) may be restricted to their own nationals.

For a **transitional period**, which applies **after the accession of new Member States to the EU**, certain conditions may apply which restrict the free movement of workers from, to and between these Member States. There are currently no transitional periods as the last restrictions on the free movement of Croatian nationals were lifted on 1 July 2020.

Article 27 of Residence Directive 2004/38/EC allows Member States to restrict the free movement and residence rights of EU citizens and/or their family members, regardless of their nationality, for reasons of public order, safety, or health. Such measures must respect the principle of proportionality. Furthermore, Directive 2004/38/EC provides for a number of procedural guarantees.

In early 2020, at the start of the **COVID pandemic**, each state took its own action to contain the spread of the virus. Border crossings were closed, and border controls reintroduced on Europe's internal borders. Workers - especially frontier workers, seasonal workers and posted workers - have been faced with the lack of European coordination, the lack of coordination between neighbouring countries, with some existential problems in both professional and private life. Since spring 2020, the European Commission, the European Parliament and also the European Council have taken various initiatives to ensure that people, goods and services can once again travel freely in Europe, taking into account health and safety measures.

With the support of the European Trade Union Institute (ETUI) and ETUC member organisations, the ETUC has produced a series of "COVID-19 Watch" briefing notes. They focus on developments that provide critical information about the impact of COVID-19 on labour markets, workers, and citizens across Europe: <https://www.etuc.org/en/publication/covid-19-watch-etuc-briefing-notes>

4.5 THE RIGHT OF THIRD-COUNTRY NATIONALS (NON-EU CITIZENS) TO TAKE UP EMPLOYMENT

Employed persons who are nationals of one of the Member States of the EU/EFTA have an automatic right to work in another Member State. Employed persons who are so called "third-country nationals" do not have an automatic right to work in another Member State. They need a work permit, for which the employer must apply to the responsible authority. If an EU/EFTA worker is married to a third-country national and lives and works in another Member State, the spouse also has the right to take up paid employment in the host country (country of residence). His/her right to take up employment in the country of residence was previously guaranteed under Article 11 of Regulation (EEC) 1612/68; now this right is enshrined in Article 23 of the Residence Directive 2004/38/EC.

Article 23 Directive 2004/38/EG

Irrespective of nationality, the family members of a Union citizen who have the right of residence or the right of permanent residence in a Member State shall be entitled to take up employment or be self-employed there.

Examples

- ▶ A Finnish employer recruits an Italian worker who is married to a Japanese woman. Both spouses are automatically entitled to reside and take up employment in Finland – under Article 1 of Regulation (EC) 492/2011 for the EU citizen, and under Article 23 of Directive 2004/38/EC for his spouse. Therefore, no work permit is necessary for the third country nationals.
- ▶ A French woman living in Portugal is allowed to work in Spain without a work permit. However, this right does not apply to her Argentinian spouse. If the family moves to Spain, the Argentinian spouse has the right to work in the new country of residence, Spain, according to Article 23 of the Residence Directive 2004/38/EC.
- ▶ An Israeli ballerina lives in the Netherlands and works in Belgium. Because she is not an EU citizen, she may only work if she has a work permit.

With **Brexit**, the free movement of workers between the UK and the EU-27 ended on 31 December 2020. The rights of EU-27 citizens who were already living and working in the UK at that time and of British citizens living and working in the EU-27 are covered by the Withdrawal Agreement, which further grants them the right to remain or work, ensures non-discrimination and protects their social security rights. All cross-border issues arising on 1 January 2021 and beyond fall under the EU-UK Trade and Cooperation Agreement on social security.¹²

In recent years, the EU has issued several directives to promote the **immigration of workers from third countries**. These EU measures include the entry and residence conditions for certain categories of immigrants from third countries, e.g.:

- ▶ the creation of a single work and residence permit (Directive 2011/98/EU on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State);
- ▶ seasonal workers (Directive 2014/36/EU on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers);
- ▶ intra-corporate posted workers (Directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer); and
- ▶ highly qualified workers (Directive 2021/1883/EU on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment).

Chapter 5:

Regulation (EG) 883/2004 for the Coordination of Social Security Systems

5.1 LEGAL BASES OF THE COORDINATION OF SOCIAL SECURITY SYSTEMS

The coordination of social security systems is based on Regulation (EEC) 1408/71 of 1971 on the application of social security schemes to employed and self-employed persons and members of their families moving within the Community and Regulation (EEC) 574/72 laying down the procedure for implementing Regulation (EEC) 1408/71. These two regulations have ensured equal treatment and access to social security benefits for all workers who are nationals of a Member State, irrespective of their place of employment or residence. They have both been amended on several occasions since 1971 to bring them into line with changing national legislation systems and to include advancements resulting from decisions of the European Court of Justice. These amendments have contributed to the complexity of the coordinating Community rules and have led to Regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

The modernised coordination system consisting of Regulation (EC) 883/2004 (the Basic Regulation)¹³ and the accompanying implementing Regulation (EC) 987/2009¹⁴ has been in force in the **EU Member States** since **1 May 2010**.

Regulation (EU) 1231/2010 extends Regulation (EC) 883/2004 to nationals of third countries who are not already covered by its provisions solely on the ground of their nationality, while at the same time repealing Regulation (EC) no. 859/2003 (the “old” third-country regulation). It should be noted that Regulation (EU) 1231/2010 does not apply to Denmark.

The modernised coordination system also applies from **1 April 2012** to Switzerland and from **1 June 2012** to the **EEA countries** of Norway, Iceland and Liechtenstein. Since **1 January 2016** EC Regulations 883/2004 and 987/2009 also apply **between the four EFTA countries** of Switzerland, Iceland, Norway, and Liechtenstein.

Therefore Regulation (EEC) 1408/71 and Regulation (EEC) 574/72 continue to apply only for the purpose of Regulation (EEC) 1661/85 laying down the “technical adaptations to the Community rules on social security for migrant workers with regard to Greenland” as long as the relevant principles are not adapted to Regulation (EC) 883/2004 and Regulation (EC) 987/2009.

13 Regulation (EC) No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems; amended by Regulation (EC) No. 988/2009 and Regulations (EU) 1244/2010, 465/2012, 1224/2012, 517/2013, 1372/2013, 1368/2014 and 2017/492

14 Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems; amended by Regulations (EU) 1244/2010, 465/2012, 1224/2012, 1372/2013, 1368/2014 and 2017/492

In December 2016 the **European Commission** proposed a revision of the EU regulations on the coordination of social security systems¹⁵. The **proposed revision seeks to amend four areas of coordination**:

- ▶ access to social benefits claimed by economically inactive EU mobile citizens
- ▶ long-term care benefits
- ▶ unemployment benefits
- ▶ family benefits

The revision also seeks to redefine the relationship between the two regulations on the coordination of social security systems and Directive 96/71/EC on the posting of workers.

The European Parliament decided in its plenary session on 12.11.2018 to initiate negotiations between the European Parliament, the EU Council of Ministers, and the EU Commission on this proposal. Despite numerous dialogues, no agreement has been reached so far. Still contentious issues such as unemployment benefits for frontier workers and seasonal workers or proof of social security for business trips are still being negotiated. Therefore, we will refrain from elaborating on these proposals in more detail here. Further information on the EU Commission's proposed amendments to EC Regulation 883/2004 and the current state of play of the legislative process can be found at the following link: http://eur-lex.europa.eu/procedure/EN/2016_397

Regulations (EC) 883/2004 and 987/2009 do not replace national legislation but merely coordinate the different national social protection systems so that persons who wish to avail themselves of their right to free movement are not penalised by comparison with persons who have always resided and worked in the same country. The provisions of the coordination regulations aim to close any gaps in the various branches of social security for persons mobile in Europe (workers, pensioners, students, self-employed individuals, etc.) or to prevent cross-border mobile persons from not being subject to any legal system of social security or from two legal systems applying at the same time.

The EU coordination provisions thus merely specify which national system a mobile citizen is governed by. The practical effect for mobile European workers is that their rights and obligations in the area of social security systems are guaranteed in principle under EU law but the form that these rights and obligations take continues to be determined by the national legislation of their states of employment and/or residence. National legislation remains in place as far as the amount of social security contributions is concerned and which benefits are granted under which conditions. The European legislation therefore does not lead to a unification (harmonisation) of the different national social systems, but merely coordinates them.

The most important **coordinating principles** of Regulation 883/2004 are:

- ▶ Principle of equal treatment [Art. 4 EC Regulation 883/2004]: Mobile workers have the same rights and obligations as nationals of the state in which they are insured, even if they reside in another state.
- ▶ Principle of equivalence [Art. 5 EC Regulation 883/2004]: Social security benefits and facts or events relevant to the receipt of social security benefits shall be treated in the same way, irrespective of the Member State in which they occurred.
- ▶ Aggregation of insurance periods in the various Member States [Art. 6 EC Regulation 883/2004]: When mobile workers claim a benefit, their previous periods of insurance, employment or residence in other states are considered.
- ▶ Abolition of the residence clauses [Art. 7 EC Regulation 883/2004]: Cash benefits may not be reduced or withdrawn if mobile workers reside in another state. This is known as the principle of exportability.

Regulation (EC) 883/2004 pertains only to statutory social security systems, not supplementary social insurance schemes (company pensions, private health insurance, additional private health and disablement insurance, etc.). The EU coordination provisions do not apply either to social and medical assistance: these benefits are usually granted on the basis of the financial circumstances of the individual involved.

Certain cash benefits that are not based on contributions (non-contributory benefits) are granted only by and at the expense of the relevant authority in the country of residence. In the majority of cases these benefits are paid to individuals whose pension or income falls below a certain threshold. They are not paid if the individual in question is living in another state. These benefits are listed by country in Annex X of Regulation (EC) 883/2004.

5.2 RULES FOR DETERMINING THE APPLICABLE SOCIAL SECURITY LEGISLATION

Article 11(1) of Regulation (EC) 883/2004 stipulates that a person can be covered by social security in only one Member State at a time. This is known as the principle of exclusivity.

The question then arises as to which social security law applies in a given case, i.e. which Member State is “the competent Member State”. Usually, the principle of the State of employment (lex loci laboris) applies. The State of employment is the state in which the individual actually works on an employed or self-employed basis; it does not depend on where the individual lives or on where his employer’s registered office is located.

This general rule is departed from in a limited number of cases, e.g. if an employee is posted by his employer to another Member State for a brief period of time (Regulation (EC) 883/2004, Article 12) or if the worker is active in several Member States concurrently (Regulation (EC) 883/2004, Art.13).

Nature of occupational activity	Competent Member State
<p>Frontier workers pursuing an activity as an employed or self-employed person Article 1(f) of Regulation (EC) 883/2004: “frontier worker” means any person pursuing an activity as an employed or self-employed person in a Member State and who resides in another Member State to which he returns as a rule daily or at least once a week.</p>	<p>Article 11(3)(a) of Regulation (EC) 883/2004: the Member State in which the activity as an employed or self-employed person is pursued</p>
<p>Civil servants and persons treated as such (Art.1d EC-R. 883/2004)</p>	<p>Article 11(3)(b), Regulation (EC) 883/2004: the Member State of the administration that employs them</p>
<p>Former frontier workers receiving unemployment benefits from the State of residence (Art.65 Regulation (EC) 883/2004)</p>	<p>Art. 11(3)c Regulation (EC) 883/2004: State of Residence</p>
<p>Persons not covered by points (a) to (d) who are entitled to benefits from one or more other Member States, e.g. pensioners</p>	<p>Art. 11(3)e Regulation (EC) 883/2004: State of Residence</p>
<p>People working on ships</p>	<p>Art. 11(4) Regulation (EC) 883/2004: the Member State of the flag flown by the vessel or Member State of the employer if he/she resides in that State</p>

Nature of occupational activity	Competent Member State
<p>Flight crew or cabin crew member performing air passenger or freight services</p>	<p>Article 11(5), Regulation (EC) 883/2004: Member State in which the “home base” as defined in Annex III to Regulation (EEC) no. 3922/91 is located</p>
<p>Posted persons</p>	<p>Article 12, Regulation (EC) 883/2004: the Member State of the origin of the posting, provided that the anticipated duration of such work does not exceed 24 months and that the employee is not sent to replace another person</p>
<p>Persons gainfully employed in two or more EU States, e.g.</p> <ul style="list-style-type: none"> ▶ two or more activities on a part-time basis ▶ personnel in international transport ▶ alternating telework <p>Article 16(1), Regulation (EC) 987/2009: A person who pursues activities in two or more Member States shall inform the institution designated by the competent authority of the Member State of residence thereof.</p> <p>Article 21(2), Regulation (EC) 987/2009: An employer who does not have a place of business in the Member State whose legislation is applicable and the employee may agree that the latter may fulfil the employer’s obligations on its behalf as regards the payment of contributions without prejudice to the employer’s underlying obligations. The employer shall send notice of such an arrangement to the competent institution of that Member State.</p>	<p>Article 13(1), Regulation (EC) 883/2004:</p> <ol style="list-style-type: none"> a) the Member State of residence if he/she pursues a substantial part of his/her activity in that Member State b) if he/she does not pursue a substantial part of his/her activity in the Member State of residence: <ol style="list-style-type: none"> i) if he/she is employed by an undertaking or employer ii) or if he/she is employed by two or more undertakings or employers which have their registered office or place of business in only one Member State iii) the Member State in which the registered office or place of business of the undertaking or employer is situated other than the Member State of residence if he/she is employed by two or more undertakings or employers, which have their registered office or place of business in two Member States, one of which is the Member State of residence; or iv) the Member State of residence if he/she is employed by two or more undertakings or employers, at least two of which have their registered office or place of business in different Member States other than the Member State of residence. <p>A share of less than 25% of the working time and/or the remuneration is an indicator that it is not a substantial activity [Article 14(8), Regulation (EC) 987/2009]</p>
<p>Persons who pursue self-employment in two or more States</p>	<p>Article 13(2), Regulation (EC) 883/2004: The State of residence if he pursues a substantial part of his activity in that Member State or the State in which the centre of interest of his activity is situated</p>
<p>Persons who pursue employed and self-employed activity in several Member States concurrently</p>	<p>Article 13(3), Regulation (EC) 883/2004: The Member State in which he pursues an activity as an employed person</p>
<p>Persons employed as a civil servant in a Member State and pursuing an activity as an employed and/or self-employed person in one or more other Member States</p>	<p>Art. 13(4) Regulation (EC) 883/2004: the Member State of the administration that employs them</p>

In some exceptional cases there may be exemption from the rules of the applicable legislation set out in Regulation (EC) 883/2004, Articles 11-15. This possibility is governed by Article 16 (1), which states:

Regulation (EC) 883/2004, Article 16 (1)

Two or more Member States, the competent authorities of these Member States or the bodies designated by these authorities may by common agreement provide for exceptions to Articles 11 to 15 in the interest of certain persons or categories of persons.

Specific case examples of which social security scheme a particular person is subject to in a particular situation can be found in Part II of this Guide.

5.3 AGGREGATION OF PERIODS OF INSURANCE

5.3.1 The switch to another social security system

A person who works in a Member State is also subject to that country's social security system (*lex loci laboris*, Regulation (EC) 883/2004, Article 11(3)(a)). The legal system of the relevant Member State may not impose on EU citizens any conditions as to nationality or place of residence for access to the social security system. However, problems may arise when switching from one social security system to another. In many Member States, a person is entitled to social security services only after he has paid social security contributions for a certain time ("waiting period"). Conditions are often attached to the duration and/or the scope of social security services.

Many mobile European workers were already insured in their Member State of origin. They are therefore entitled to benefits acquired via the social security system. If the social security system of the new country of employment sets conditions on waiting periods or with regard to services, gaps in social security could ensue when they change system. The European regulations, in particular Article 45 TFEU, consider this as a hindrance to the free movement of workers. Article 6 of Regulation (EC) 883/2004 consequently contains provisions which require the periods of insurance acquired in other Member States to be taken into account when calculating the right to social security benefits (i.e. in the aggregation rules):

Regulation (EC) 883/2004, Article 6: Aggregation of periods

Unless otherwise provided for by this regulation, the competent institution of a Member State whose legislation makes:

— *the acquisition, retention, duration or recovery of the right to benefits,*

— *the coverage by legislation, or*

— *the access to or the exemption from compulsory, optional continued or voluntary insurance,*

conditional upon the completion of periods of insurance, employment, self-employment or residence shall, to the extent necessary, take into account periods of insurance, employment, self-employment or residence completed under the legislation of any other Member State as though they were periods completed under the legislation which it applies.

5.3.2 Proof of periods of insurance

Previously, European forms (E-forms) contained all the information required to define and justify a citizen's rights and were used to transfer information between the social insurance institutions of the different Member States. Information is now exchanged between social insurance institutions using electronic forms known as Structured Electronic Documents (SEDs). In some cases, the information that a citizen is required to provide is presented in the form of a document that the citizen can submit to the other social insurance institution, e.g. in order to receive medical treatment in his country of residence. There are ten portable documents (PDs) in all, including the European Health Insurance Card (EHIC). Apart from the card, they are paper forms.

Overview of SEDS and PDs:

- ▶ series A (= applicable legislation)
- ▶ series P (= pensions)
- ▶ series S (= sickness)
- ▶ series F (= family benefits)
- ▶ series DA (= accidents at work and occupational diseases)
- ▶ series U (= unemployment)
- ▶ series H (= horizontal issues)

5.3.3 Coordination of the calculation methods for social benefits

In its Articles 11 to 16, the coordinating Regulation 883/2004 stipulates where cross-border mobile workers are to be insured, thereby preventing such workers being covered by two social security systems or by none at all. The possible problem of waiting periods is solved through the above-mentioned provisions on the aggregation of periods of insurance.

Nevertheless, further problems may arise because national social security systems are organised differently. For example, there are different provisions for disability, retirement and survivorship pensions in the individual Member States with regard to

- ▶ when the eligibility requirements (degree of disablement or age) are met;
- ▶ how the disability or retirement pensions are calculated if individuals have spent periods of insurance in several Member States, acquiring entitlements in each.

5.4 THE RIGHT TO EXPORT BENEFITS

In many Member States, the right to benefits or their payment expires when the worker is no longer resident in that Member State. Upon return to the country of origin or moving to another Member State, acquired benefit rights risk being lost. This forms a hindrance to the free movement of workers.

Accordingly, Regulation (EC) 883/2004 provides that family, sickness, disablement, retirement and death benefits must continue to be paid to their beneficiaries who reside in another Member State or who have returned to their country of origin.

Regulation (EC) 883/2004, Article 7: Waiving of residence rules

Unless otherwise provided for by this Regulation, cash benefits payable under the legislation of one or more Member States or under this Regulation shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary or the members of his family reside in a Member State other than that in which the institution responsible for providing benefits is situated.

Special provisions apply to unemployment benefits, which are presented in section 5.5.5 of this Guide.

This crediting obligation does not have absolute effect. Special non-contributory cash benefits cannot be exported, as already mentioned in section 5.1 of this Guide. These benefits are listed in Annex X of EC Regulation 883/2004.

5.5 SPECIAL PROVISIONS ON THE DIFFERENT TYPES OF SOCIAL SECURITY BENEFITS

5.5.1 Sickness and maternity benefits and equivalent paternity benefits

A person (and his family) who is insured in one Member State and resides in another is entitled to **benefits in kind** from the competent body in the place of residence for the account of the responsible competent body of the first Member State. If this person stays in the competent State for any reason, he/she is entitled, without further ado, to benefits in kind in that State. However, special regulations apply to the family members of frontier workers (this is described in more detail in section 8.2 of this Guide).

Insured persons staying in a Member State other than the competent Member State are entitled to the benefits in kind which become medically necessary during their stay, considering the nature of the benefits and the expected duration of the stay. These benefits are provided by the Member State of stay (Art.19 EC Regulation 883/2004).

As regards **cash benefits**, a person and his/her family members who live or are staying in a Member State other than the competent Member State are entitled to cash benefits provided by the competent institution, i.e. the institution with which the person was insured at the time he/she applied for the benefit. Sickness benefit can be received by the insured person not only in the event of his or her own sickness, but also, under certain conditions, to care for a sick child.

Certain Member States have **waiting periods** for health insurance (entitlement to the continued payment of wages in the event of sickness, to sick pay and/or to remuneration for medical costs). To prevent gaps in health insurance for mobile workers throughout Europe, Article 6 of Regulation (EC) 883/2004 has provided for the aggregation of periods of insurance in the different Member States. Under this provision, the mobile European worker is protected from gaps in his/her right to continued payment of wages in the event of illness, sick pay and/or allowances for treatment costs, but only if he/she was previously covered by statutory health insurance in another Member State. Workers must be able to provide proof thereof to the health insurance body of their new place of residence and/or employment by means of Form S1 (Statement on the aggregation of periods of insurance, employment and residence).

Examples

- ▶ In Belgium, workers are only entitled to sickness benefits if they have been covered by health insurance for at least 12 months and can prove at least 180 working days (or equivalent days). Furthermore, there must be no interruption of more than 30 days between the starting date of incapacity for work and the last day worked (or last day of unemployment). – An Irish worker who works in Belgium and becomes ill after three months is still entitled to Belgian sickness benefit if he/she receives proof (S1, formerly form E-104) from the Irish sickness insurance scheme that he/she has previously been insured in Ireland for at least nine months and can prove at least 150 days of work or equivalent days (Art. 6 EC-R. 883/2004).
- ▶ For Danish sickness benefit, employees are entitled to sickness benefit paid by the employer from the first to the 30th day of sickness if they have worked at least 74 hours in Denmark during the eight weeks preceding the first day of sickness. If the illness lasts longer than 30 days or if there is no right to sickness benefit payable by the employer when the incapacity for work occurs, the municipality shall pay the sickness benefit on condition that the employee has been employed for at least 240 hours within the last six completed calendar months and has worked at least 40 hours in each of at least 5 of those months. – A nurse lived and worked in Ireland. She then goes to Denmark to work and live there. After 3 weeks she falls sick. If the Irish nurse can produce a Form S1 that proves that she was covered by health insurance for more than eight weeks or 13 weeks in Ireland before taking up her duties, the Irish and the Danish periods of insurance are equated and aggregated. In this way, the Irish nurse who emigrates to Denmark is nonetheless entitled to Danish health insurance benefits.

Regulation (EC) 883/2004, Article 34(1): Overlapping of long-term care benefits

- 1) *If a recipient of long-term care benefits in cash, which have to be treated as sickness benefits and are therefore provided by the Member State competent for cash benefits under Article 21 or 29, is, at the same time and under this Chapter, entitled to claim benefits in kind intended for the same purpose from the institution of the place of residence or stay in another Member State, and an institution in the first Member State is also required to reimburse the cost of these benefits in kind under Article 35, the general provision or prevention of overlapping of benefits laid down in Article 10 shall be applicable, with the following restriction only: if the person concerned claims and receives the benefit in kind, the amount of the benefit in cash shall be reduced by the amount of the benefit in kind which is or could be claimed from the institution of the first Member State required to reimburse the cost.*

5.5.2 Benefits for accidents at work and occupational diseases

Accident insurance covers accidents at work, commuting accidents and occupational diseases.

- ▶ Accidents at work are accidents relating to the occupational activity. Commuting accidents are those that occur on the way to and from work. Note: the employer is required to declare any occupational or commuting accident to the competent insurance fund immediately.
- ▶ Occupational disease refers to a disease caused exclusively or primarily by toxic substances or assigned tasks encountered in the exercise of an occupational activity. Each country has a list of recognised occupational diseases. Furthermore, a disease not on this list may in certain cases be considered as an occupational disease if proof can be provided that it was caused by the occupational activity. The European Commission issued a Recommendation on the European Schedule of Occupational Diseases in September 2003.¹⁶

Accident insurance benefits

- ▶ Functional rehabilitation (prostheses and aids);
- ▶ Retraining and return to work;
- ▶ Medical treatment (costs of the physician and medicines);
- ▶ Daily subsistence allowance to offset the loss of wages as a result of an occupational accident;
- ▶ Benefits in kind in the event of permanent disablement or survivor's benefit in the event of death.

Workers do not pay contributions to accident insurance; contributions are paid exclusively by the employer.

Article 36 of Regulation (EC) 883/2004 stipulates the following concerning the right to benefits in kind and in cash in respect of accidents at work and occupational diseases: **Benefits in cash** are essentially provided by the competent institution of the country of employment in accordance with the legal regulations in force in that country. A person who has sustained an accident at work or has contracted an occupational disease and who resides or stays in a Member State other than the competent Member State is entitled to special **benefits in kind** in the event of accidents at work and occupational diseases. These benefits are provided by the institution of the place of residence or stay in accordance with the legislation that applies to it, as though the individual in question were insured under its legislation. The service provider in the country of residence or stay (doctor, hospital, etc.) settles with the domestic liaison body, which then has the treatment costs reimbursed by the accident insurance in the country of employment (so-called benefits-in-kind assistance). In order to receive medical treatment in the country of residence after an occupational accident, proof of existing health insurance is usually accepted (e.g. European Health Insurance Card – “EHIC”). The accident insurance certificate DA 1 (previously E 123), which is intended for assistance in kind, is usually only issued after the accident has been examined and then sent to the liaison office in the state of residence and/or to the insured person.

NOTE: Invoices for the treatment of the consequences of an accident should be forwarded directly to the accident insurance fund in the state of employment or the interstate liaison office in the state of residence. They will check whether the costs can be covered by the accident insurance and whether the invoice amount corresponds to the applicable benefit tariffs. It is strongly discouraged to pay the bill yourself, as in case of overbilling, overpaid amounts cannot be claimed back from the service providers (doctor, physiotherapist, etc.).

The competent institution of the Member State whose legislation provides for meeting the **costs of transporting** (Regulation (EC) no. 883/2004, Article 37) a person who has sustained an accident at work or is suffering from an occupational disease, either to his place of residence or to a hospital, must meet such costs for transport to the appropriate place in another Member State where the person resides. If the person involved is not a frontier worker, the institution must give prior authorisation for such transport.

In the case of occupational diseases where the person who contracted the disease was previously exposed to the same risk in two or more EU Member States, only the accident insurance of the country in which the person most recently exercised the activity which caused the disease is responsible (Regulation (EC) 883/2004, Article 38).

If a person who has sustained an accident at work or has contracted an occupational disease wishes to switch his country of residence, he/she must without fail obtain the prior authorisation of the competent accident insurance institutions, since the benefits in kind are to be received in the new country of residence. Benefits in cash are in principle provided directly by the accident insurance fund with which the person is registered.

Article 39 of Regulation (EC) 883/2004 defines the rules in the event of aggravation of an occupational disease.

Regulation (EC) 883/2004, Article 40(1): Rules for taking into account the special features of certain legislation

If there is no insurance against accidents at work or occupational diseases in the Member State in which the person concerned resides or stays, or if such insurance exists but there is no institution responsible for providing benefits in kind, those benefits shall be provided by the institution of the place of residence or stay responsible for providing benefits in kind in the event of sickness.

5.5.3 Invalidity

In principle, mobile European workers are entitled to an invalidity pension (reduced earning capacity pension) from the Member State (State of employment) where they are socially insured. Under Articles 6 and 7 of Regulation (EC) 883/2004, disability pensions are creditable in and can be exported to another Member State. This means that the mobile European worker can without any problem stay in the territory of his/her State of residence or elsewhere while receiving a disability pension from his/her former State of employment.

Under Article 70 of Regulation (EC) 883/2004, special non-contributory cash benefits cannot be exported. These include benefits pertaining to specific protection for the disabled that is closely linked to the person's social environment in the Member State concerned. The benefits concerned are listed in Annex X of Regulation (EC) 883/2004.

Many Member States require waiting periods prior to entitlement to disability pensions. In the event of a switch from one social security system to another, which is often the case for mobile European workers, gaps in social security may arise. Article 45 of Regulation (EC) 883/2004 protects mobile European workers against gaps in their right to a disability pension by recognising and aggregating periods of insurance.

Regulation (EC) 883/2004, Article 45: Special provisions on aggregation of periods

The competent institution of a Member State whose legislation makes the acquisition, retention or recovery of the right to benefits conditional upon the completion of periods of insurance or residence shall, where necessary, apply Article 51(1) mutatis mutandis.

There are very big differences between disability insurance systems in the European Union with regard to assessment of whether someone is fit for work. Furthermore, there are two fundamentally different systems regarding benefits, namely cumulative systems and risk-based systems.

Each state determines the degree of disability according to its legislation. As a result, the same health damage may lead to a different assessment of disability in different states. The degree of disability assessed, in turn, has an influence on the amount of disability pension in most cases. The lack of alignment or harmonisation of the social systems can lead to a situation in which the same person is declared 0% unfit for work in one Member State and 100% unfit for work in another.

The different national provisions complicate the **calculation and coordination of disability pensions**:

There are two types of legislation concerning disability benefits in the Member States. Member States with Type A legislation are those in which the level of disability benefits depends on the duration of the period of insurance or residence; these states are listed in Annex VI of Regulation (EC) 883/2004: the Czech Republic, Estonia, Ireland, Greece, Croatia, Latvia, Hungary, Slovakia, Finland, Sweden. These systems are subject to special coordination (*pension unique*). The other Member States are classified as Type B in Regulation (EC) 883/2004.

In some countries, the amount of the disability pension is calculated in the same way as the retirement pension, i.e. the amount of the pension depends on the length of the contribution period (hence “cumulative system”); the longer an affiliated person has contributed before becoming disabled, the larger his/her pension will be. These systems do not require the person concerned to be insured at the time that the disability occurs. In other words, a person who stopped working a few years before he/she became disabled is nonetheless entitled to a disability pension based on his/her previous contribution periods.

In other countries, the amount of the pension does not depend on the period of contribution (“risk-based systems”). Accordingly, the amount of the pension is always the same, regardless of how long the person concerned was insured before he/she became disabled. In these countries, however, you have a right to a disability pension only if you are actually insured at the time, you become disabled. Even if you stopped working only shortly before that point, you will not normally be entitled to a disability pension.

For persons who have been insured in only one country, the level of their pension is calculated using the same procedures as for the nationals of that country, in accordance with the relevant provisions in force in that State.

Persons who have been insured in several countries:

- ▶ People who have been insured exclusively in Member States in which the amount of the pension depends on the length of the periods of insurance receive a separate pension from each of those countries. The amount of each pension will correspond to the period of insurance completed in the country concerned.
- ▶ People who have been insured exclusively in Member States in which the amount of the pension does not depend on the length of the periods of insurance receive a pension from the country in which they were insured when their disability commenced. They are always entitled to the full amount of this pension, even if they were insured in that country for only a brief period (e.g. one year). On the other hand, they are not entitled to any pension from the other countries in which they were insured previously.
- ▶ People who were first insured in a Member State in which the amount of the disability pension depends on the length of the periods of insurance and then in a country in which the pension does not depend on the length of these periods receive two pensions: one from the first country which corresponds to the periods of insurance completed under its legislation, and a second from the country in which they were insured when their disability commenced.
- ▶ People who were first insured in a country in which the amount of the pension does not depend on the length of the period of insurance and then in a country in which the pension does depend on these periods receive two separate pensions, each of which corresponds to the length of the periods of insurance in those different countries.

Calculation of pension: pro-rata or partial pension coordination

Article 52 of Regulation (EC) 883/2004 (Award of benefits) specifies how the amount of the benefit is calculated. Each Member State must carry out three calculations:

- 1) National pension: independent benefit
- 2) Theoretical amount
- 3) Proportional or pro-rata pension

1) National pension calculation: independent benefit/pension

The national pension is the disability pension to which a mobile European worker is entitled for the insured years in the Member State in question. This pension is determined in accordance with that Member State's national legal system. The periods of insurance in other Member States are not taken into account. The national disability pension is called an "independent benefit."

2) Calculation of the theoretical pension: theoretical benefit/pension

The theoretical pension is the amount to which a mobile European worker would be entitled if he/she had spent all the periods of insurance that were accumulated in other Member States in that one Member State (fictitious determination). The worker is not entitled to this theoretical amount. The calculation is only an intermediate step in the calculation of the proportional pension. If under these legal provisions the amount of the benefit depends on the length of completed periods, then this amount is the theoretical amount.

3) Calculation of the proportional (pro-rata) pension: proportional benefit/pension

The proportional or pro-rata disability pension is obtained by multiplying the theoretical pension with a fraction. The numerator of the fraction is the length of the periods completed in the Member State; the denominator is the overall length of all periods completed in all the Member States which are taken into account in the calculation of the theoretical amount. The proportional pension is known also as the pro-rata disability pension or the international disability pension.

The amount of the pro-rata disability pension is determined as follows:

$$\frac{\text{Period of insurance in the Member State}}{\text{Total period of insurance in all the Member States}} = \text{Theoretical disability pension in one Member State}$$

Finally, the national disability pension (independent benefit under 1) is compared with the pro-rata benefit (under 3). Each Member State then pays whichever is the higher disability pension.

Five distinct cases may occur for a mobile European worker declared unfit for work, each of which has a special regulatory system:

- a) The worker has worked only in Member States with a risk-based system (Type A) which are listed in Annex VI of Regulation (EC) no. 883/2004: Special coordination
- b) The worker has worked only in Member States with a risk-based system which are not listed in Annex VI of Regulation (EC) no. 883/2004: pro-rata coordination
- c) The worker has worked only in Member States with a cumulative system
- d) The worker worked initially in a Member State with a cumulative system and lastly in a Member State with a risk-based system
- e) The worker worked initially in a Member State with a risk-based system and lastly in a Member State with a cumulative system.

Coordination cases and examples

Case a) The worker has worked only in Member States with a risk-based system (Type A) which are listed in Annex VI of Regulation (EC) no. 883/2004: Special coordination.

- ▶ A worker works for one year in Sweden (risk-based system listed in Annex VI). He/she had previously worked for 15 years in Latvia (risk-based system, likewise listed in Annex VI). In the event of disablement, this worker is – irrespective of his previous insurance – entitled only to the total Swedish disability pension (“single pension”). The special coordination system under Regulation (EC) 883/2004 Article 44(1) ensures that he/she is entitled to a Swedish disability pension (“single pension”) as if he/she had always been registered with social security in Sweden.

Case b) The worker has worked only in Member States with a risk-based system which are not listed in Annex VI of Regulation (EC) 883/2004: pro-rata coordination.

- ▶ A worker works for one year in Belgium (risk-based system not listed in Annex VI). He/she had previously worked for 15 years in the Netherlands (risk-based system, likewise not listed in Annex VI). In the event of disablement, he/she is entitled under Article 52 of Regulation (EC) 883/2004 to a pro-rata (15/16) Dutch disability pension and a pro-rata (1/16) Belgian pension or, if it is more favourable, a full Belgian pension minus the Dutch pro-rata (15/16) partial pension (Regulation (EC) 883/2004, Article 52(3)). If the worker is not entitled to a pro-rata Belgian disability pension, then he/she is entitled to the pro-rata (15/16) Dutch disability pension, if he/she is 100% disabled in accordance with Dutch law.
- ▶ In this second example it is assumed that the disablement was established in both countries. However, assessment criteria often vary widely in the individual States. The decision as to the degree of disablement is taken by the institutions of the State in which the workers were insured and in accordance with the legislation in force in those states. Only Belgium, France and Italy accept the degree of disablement established by each other (Regulation (EC) 883/2004, Annex VII).
- ▶ If the disablement in this second example is established only in the Netherlands but not in Belgium, then this worker is entitled to the full Dutch disability pension. If the reverse is the case and the disablement is recognised only in Belgium and not in the Netherlands, he/she is entitled only to a Belgian partial pension. To cover the income gap that has arisen, he/she must turn to the social authorities of his state of residence.

Case c) The worker has worked only in Member States with a cumulative system.

- ▶ A worker lives and works for 15 years in Austria (cumulative system) and then for 10 years in Germany (cumulative system). In the event of disablement, this worker is entitled under Article 46 or 52 of Regulation (EC) 883/2004 to a pro-rata (10/25) German disability pension (partial pension) and a pro-rata (15/25) Austrian disability pension (partial pension). If the disablement is recognised under German law but not under Austrian law, then the worker is entitled only to a pro-rata (15/25) Austrian disability pension. To cover the income gap that has arisen, he/she must turn to the social authorities of his state of residence.

Case d) The worker worked initially in a Member State with a cumulative system and lastly in a Member State with a risk-based system.

- ▶ A worker worked for 15 years in Germany (cumulative system) and then for 10 years in the Netherlands (risk-based system). In the event of disablement, he is entitled to the full Dutch disability pension. If the disablement is recognised under German law, he is entitled to a pro-rata (15/25) German disability pension. Under Article 52 of Regulation (EC) 883/2004, the Netherlands must then carry out two calculations: it must calculate the Dutch full pension minus the pro-rata (15/25) German disability pension and then the pro-rata (10/25) Dutch disability pension. Under Regulation (EC) 883/2004, Article 52(3), the worker concerned is entitled to the higher amount.

Case e) The worker worked initially in a Member State with a risk-based system and then in a Member State with a cumulative system.

- ▶ A worker works for 20 years in the Czech Republic (risk-based system) and then for ten years in Luxembourg (cumulative system). In the event of disablement, this worker is entitled under Article 46 or 52 of Regulation (EC) 883/2004 to the pro-rata (10/30) Luxembourg and the pro-rata (20/30) Czech pension. If he/she is declared 100% disabled under Luxembourg law but 0% disabled under Czech law, he/she is entitled only to a pro-rata (10/30) Luxembourg disability pension. To cover the income gap that has arisen, he/she must turn to the social authorities of his/her State of residence.

For more information, please contact the competent insurance institutions.

5.5.4 Retirement pension

National pension systems vary widely in Europe. The so-called “Bismarck pension system” is financed by contributions according to the insurance principle. It is a pay-as-you-go system, since the current contributions from workers are used for the ongoing payments to pensioners. In the case of the so-called “Beveridge Model” or “People’s Pension System”, pensions are financed through taxes. In this form of pension scheme, drawing a pension does not depend on employment or insurance periods, but on the country of residence. Since people’s pension systems offer only basic security, these are usually supplemented by compulsory occupational pensions. In the States with a “Bismarck pension system”, there is also often a company pension. The (voluntary) private pension provision is boosted by the State in both systems. Pension provision in both systems is therefore based on three pillars (legal, company, private), but the proportion of the respective total pension varies from state to state.

In recent years, the retirement age has been raised in many European countries because of increasing life expectancy. However, the legal age limit still varies widely between individual States. In addition, there are different possibilities for early age limits in the individual States, e.g. according to gender (special women’s age limits), the duration of employment or the number of insurance years, depending on physical and psychological stress in professional activity or for certain occupational groups (e.g. miners).

Despite all of these differences in the national pension systems in Europe, mobile European workers are entitled to an old-age pension from all Member States in which they have worked or paid contributions to pension schemes. They will receive a partial pension from each of these States, the calculation of which is based on the contributions and insurance periods in the respective State.

There are also specific coordinating provisions for retirement and survivor's pensions. Each Member State in which a person was insured pays a retirement pension to that person when he/she reaches retirement age. The competent institution must take into account all periods completed in accordance with the legislation of every other Member State irrespective of whether they were completed in a general or a special system. If, however, the legislation of a Member State makes the provision of certain benefits contingent upon the requirement that the periods of insurance were completed only in a certain occupation, or self-employment, or a profession, the competent institution of that Member State is required to take into account those periods completed in accordance with the legislation of other Member States only if they were completed in a corresponding system.

There are also rules as to how the competent institutions calculate benefits and define provisions on the overlapping of benefits (Regulation (EC) 883/2004, Articles 52-59).

The following coordinating principles apply to statutory retirement pensions:

- ▶ The pension entitlements acquired in one Member State are guaranteed. The repurchase of statutory retirement pensions, reimbursement of contributions or transfer to another Member State are not possible.
- ▶ The pension entitlements acquired in one Member State are paid upon attaining the pensionable age in force for that Member State. Retirement pensions are paid directly in other Member States (Regulation (EC) 883/2004, Article 7: "Waiving of residence rules"). This does not apply to supplementary social benefits which do not depend on the payment of contributions (known as special non-contributory cash benefits; listed in Chapter 9 and in Annex X of Regulation (EC) 883/2004).
- ▶ For each partial pension, the eligibility conditions (retirement age, minimum insurance periods, etc.) of the state whose insurance institution grants the pension apply. It is therefore possible that there is already entitlement to an old-age pension in one state, but the statutory retirement age has not yet been reached in another state.
- ▶ If, because of waiting periods, a mobile European worker was not affiliated with social security long enough in a Member State to be entitled to an (early) retirement pension, the periods of insurance completed in other Member States must be taken into consideration, in order to qualify for such a pension (Regulation (EC) 883/2004, Article 52).
- ▶ If a mobile European worker was registered with social security in a Member State for less than a year, this retirement pension is generally paid not by that Member State but by the Member State where the worker was most recently registered with social security (Regulation (EC) 883/2004, Article 57).

Examples

- ▶ A French worker has at some point worked as a frontier worker in Germany for ten months. As he/she was registered with social security in Germany for less than one year, he/she is not entitled to a German retirement pension (Regulation (EC) 883/2004, Article 57). Instead, France, where he/she last worked, treats the 10 months of contributions in Germany as if they had been completed in France, and also grants a retirement pension for these periods under French legislation.

- ▶ In the opposite case, i.e. if the French worker worked in France for 10 months at some point and then worked as a frontier worker in Germany until the end of her working life, he/she can also receive a French retirement pension because he/she is entitled to this after just one quarter (three months). As the statutory pension age in Germany is 67, which is higher than in France (62), and the French pension will be very low, it is strongly recommended that you seek advice from the relevant pension institutions BEFORE applying for a pension. Further information at the end of this section 5.5.4 and in Chapter 12 of this Guide.
- ▶ A Latvian worker has worked as an employee in Germany for 4 years. Under German law, he/she is not entitled to a German retirement pension because he/she was not registered with social security for at least five years (waiting period). However, if the worker was also registered with social security in another Member State for at least a year, he/she is nonetheless entitled to a German retirement pension through the recognition and aggregation of all these periods.

Regulation (EC) 883/2004, Article 52 (Award of benefits) sets out the calculation of pensions. Each Member State must carry out three calculations:

- 1) National pension: independent benefit
- 2) Theoretical amount
- 3) Proportional or pro-rata pension

1) Calculation of the national pension: independent benefit/pension

The national pension is the retirement pension to which a mobile European worker is entitled for the insured years in the Member State in question. It is determined in accordance with the national legislation of that Member State. Periods of insurance completed in other Member States are not taken into account. The national pension is called an “independent benefit.”

2) Calculation of the theoretical pension: theoretical benefit/pension

The theoretical pension is the amount to which a mobile European worker would have been entitled if he/she had completed in a single Member State all the periods of insurance completed in other Member States. The worker is not entitled to this theoretical amount. This calculation constitutes only an intermediate step in the calculation of the proportional (pro-rata) pension. If, in accordance with these legal provisions, the amount of the benefit depends on the length of completed periods, then this amount is the theoretical amount.

3) Calculation of the proportional pension: pro-rate benefit/pension

The proportional (pro-rata) pension is obtained by multiplying the amount of the theoretical pension by a fraction. The numerator of the fraction is the length of the period completed in the Member State; the denominator is the overall length of all periods completed in all the Member States which are taken into account in the calculation of the theoretical amount. The proportional pension is known also as the pro-rata pension or the international pension. The proportional retirement pension amounts to:

$$\frac{\text{Period of insurance in the Member State}}{\text{Total period of insurance in all the Member States}} = \text{Theoretical Pension in a Member State}$$

Finally, the amount of the national pension (1) is compared with the proportional pension (3). Each Member State then pays the highest pension amount.

Example:

- ▶ An Austrian laboratory assistant worked for 23 years in Austria, then two years in Germany, and then another 15 years in Italy. He/she was registered with social security for a total of 40 years. The Italian pension service carries out the following pension calculations. The Italian retirement pension is calculated on the basis of the Italian legislation. Then the theoretical pension which he would have obtained if he had been registered with social security in Italy for 40 years is calculated. Finally, the proportional or pro-rata pension is calculated. This corresponds to 15/40 of the theoretical retirement pension. The Italian national pension is compared with the proportional (pro-rata) retirement pension, and the higher amount is paid. Such a calculation must also be carried out in Austria and in Germany. Germany has a waiting period of five years. The German national (independent) pension is therefore not calculated. The laboratory assistant is entitled only to a German pro-rata pension.

The old-age pension is only granted on request. Its application is governed by Article 45 of implementing Regulation (EC) No 987/2009: According to this, mobile European workers can apply for an old-age pension at their country of residence or at the institution of the Member State whose legislation last applied to them. If, at no time, the person concerned is subject to the legislation applied by the institution of his or her country of residence, that institution shall forward the application to the institution of the Member State whose legislation last applied to him or her.

Article 46 up to and including Article 48 of implementing Regulation (EC) No 987/2009 regulates the application procedure: the information and documents on requests for services, the processing of requests by the institutions involved and the notification of decisions to the applicant.

Since collecting pension rights from multiple States can take time, it is recommended that the pension application be submitted at least six months before the planned retirement.

The date of application is binding for all concerned pension schemes. This means that the application submitted to a pension provider is also considered to be an application with the same date for pensions from other States. However, the application procedure can only be initiated in the countries concerned if the application is accompanied by all evidence of the insurance periods covered in other EU and EFTA Member States.

IMPORTANT: The legal retirement age varies between EU and EFTA countries. It is possible that a person is already entitled to an old-age pension in one State, but the legal retirement age has not yet been reached in another State. The drawing of an old-age pension with simultaneous employment has an impact on social security contributions and entitlements to sickness and unemployment benefits. If necessary, it makes sense to postpone the drawing of an old-age pension (Art. 50 para. 1 Regulation (EC) No 883/2004). Therefore, it is strongly recommended to consult the responsible pension providers BEFORE applying for a pension.

IMPORTANT: Regulation (EC) No 883/2004 only regulates the statutory social security systems. For this reason, the **EU has adopted special regulations to protect the supplementary pension rights of mobile European workers.** These regulations apply to supplementary pension systems linked to an employment relationship (“company pension scheme”). Mobile workers must therefore apply for their supplementary pensions, company pension schemes, etc. themselves. It is therefore important to keep this data safe and keep in contact with the respective pension funding services and/or pension funds. This should prevent later mobility-related pension gaps. See Chapter 12 of this Guide for more information.

5.5.5 Unemployment benefits

With regard to unemployment benefits, the competent institution of a Member State takes into account the **periods of insurance or employment** or self-employment as if they were completed in accordance with the legislation in force for it. Under Regulation (EC) 883/2004, the rules for taking into account periods of insurance completed abroad now apply also to the self-employed.

Regulation (EC) 883/2004, Article 61: Special rules on aggregation of periods of insurance, employment or self-employment

The competent institution of a Member State whose legislation makes the acquisition, retention, recovery or duration of the right to benefits conditional upon the completion of either periods of insurance, employment or self-employment shall, to the extent necessary, take into account periods of insurance, employment or self-employment completed under the legislation of any other Member State as though they were completed under the legislation it applies.

The **calculation of unemployment benefits** is governed by Article 62 of Regulation (EC) 883/2004:

Regulation (EC) 883/2004, Article 62: Calculation of benefits

- 1) *The competent institution of a Member State whose legislation provides for the calculation of benefits on the basis of the amount of the previous salary or professional income shall take into account exclusively the salary or professional income received by the person concerned in respect of his last activity as an employed or self-employed person under the said legislation.*
- 2) *Paragraph 1 shall apply where the legislation administered by the competent institution provides for a specific reference period for the determination of the salary which serves as a basis for the calculation of benefits and where, for all or part of that period, the person concerned was subject to the legislation of another Member State.*

Example

- ▶ *A Lithuanian worked in his/her home country for 5 years. He/she then moved to Germany. After working for three months in Germany, he/she lost his/her job. In Germany, a person is entitled to unemployment benefit only after he/she has been employed and subject to compulsory insurance there for at least 360 days. By aggregation and equalisation of the periods, the Lithuanian migrant worker is entitled to German unemployment benefit because he/she can prove a total of 5 years and 3 months of employment (Regulation (EC) 883/2004, Article 61). Under Article 62 of Regulation (EC) no. 883/2004, the benefit is calculated exclusively on the remuneration earned in Germany.*

Article 64 of EC Regulation 883/2004 allows unemployed persons to **continue receiving unemployment benefits and to move to another Member State** for a limited period of time **to look for work**, provided certain conditions are met:

- 1) *A wholly unemployed person who satisfies the conditions of the legislation of the competent Member State for entitlement to benefits, and who goes to another Member State in order to seek work there, shall retain his/her entitlement to unemployment benefits in cash under the following conditions and within the following limits:*
 - a) *before his/her departure, the unemployed person must have been registered as a person seeking work and have remained available to the employment services of the competent Member State for at least four weeks after becoming unemployed. However, the competent services or institutions may authorise his/her departure before such time has expired;*

- b) *the unemployed person must register as a person seeking work with the employment services of the Member State to which he/she has gone, be subject to the control procedure organised there and adhere to the conditions laid down under the legislation of that Member State. This condition shall be considered satisfied for the period before registration if the person concerned registers within seven days of the date on which he/she ceased to be available to the employment services of the Member State which he/she left. In exceptional cases, the competent services or institutions may extend this period;*
 - c) *entitlement to benefits shall be retained for a period of three months from the date when the unemployed person ceased to be available to the employment services of the Member State which he/she left, provided that the total duration for which the benefits are provided does not exceed the total duration of the period of his/her entitlement to benefits under the legislation of that Member State; the competent services or institutions may extend the period of three months up to a maximum of six months;*
 - d) *the benefits shall be provided by the competent institution in accordance with the legislation it applies and at its own expense.*
- 2) *If the person concerned returns to the competent Member State on or before the expiry of the period during which he/she is entitled to benefits under paragraph 1(c), he/she shall continue to be entitled to benefits under the legislation of that Member State. He/she shall lose all entitlement to benefits under the legislation of the competent Member State if he/she does not return there on or before the expiry of the said period, unless the provisions of that legislation are more favourable. In exceptional cases the competent services or institutions may allow the person concerned to return at a later date without loss of his/her entitlement.*
- 3) *Unless the legislation of the competent Member State is more favourable, between two periods of employment the maximum total period for which entitlement to benefits shall be retained under paragraph 1 shall be three months; the competent services or institutions may extend that period up to a maximum of six months.*

Unemployed persons therefore have the unique opportunity to look for work abroad while continuing to receive unemployment benefits. To do so, they must first be registered as unemployed for at least four weeks with the employment service of the state in which they receive unemployment benefits. This is based on the idea that they should first try to exhaust all possibilities of finding work in this state before expanding their search to other countries. However, unemployed persons may receive permission from the employment service to leave this state before the end of this period. From the institution where they are registered as unemployed, they will receive document U2 (portable document unemployment 2, previously E 303) to declare their continued right to unemployment benefit, which allows them to export/ to take their unemployment benefits with them.

Within seven days of departure, the unemployed must register as unemployed with the Public Employment Service of the State in which they are seeking work. They must also submit to the obligations and control regulations there. They then continue to receive their unemployment benefit for three months from the date on which they are no longer available to the labour market of the State they left. The competent employment services or the competent institution of that State may extend this period to a maximum of six months.

If they do not find a job, they must return before the end of this period. If they return after the expiry of this period without the express permission of the employment services of the state from which they receive unemployment benefits, they lose all entitlement to this benefit.

IMPORTANT: Many unemployed people lose their entitlement to benefits due to ignorance of the conditions just explained. They leave the state where they were last employed without registering with the employment services there, they register too late with the employment services of the state where they are looking for work, or they do not return until after the period of benefit transfer has expired. They should therefore definitely contact the employment service of the state from which they receive unemployment benefits to find out more about their rights and obligations.

Further details on the exchange of information, cooperation and mutual assistance between the institutions and employment services of the competent Member State and the Member State to which the person concerned goes to seek employment are set out in Article 55 of the Implementing Regulation (EC) 987/2009.

Article 65 of EC Regulation 883/2004 determines **which state is responsible for benefits to mobile workers who reside in a member state other than the competent state (i.e. the state of employment) and become unemployed:**

- 1) *A person who is partially or intermittently unemployed and who, during his/her last activity as an employed or self-employed person, resided in a Member State other than the competent Member State shall make himself/herself available to his/her employer or to the employment services in the competent Member State. He/she shall receive benefits in accordance with the legislation of the competent Member State as if he/she were residing in that Member State. These benefits shall be provided by the institution of the competent Member State.*
- 2) *A wholly unemployed person who, during his/her last activity as an employed or self-employed person, resided in a Member State other than the competent Member State and who continues to reside in that Member State or returns to that Member State shall make himself/herself available to the employment services in the Member State of residence. Without prejudice to Article 64, a wholly unemployed person may, as a supplementary step, make himself/herself available to the employment services of the Member State in which he/she pursued his/her last activity as an employed or self-employed person.*

An unemployed person, other than a frontier worker, who does not return to his/her Member State of residence, shall make himself/herself available to the employment services in the Member State to whose legislation he/she was last subject.

- 3) *The unemployed person referred to in the first sentence of paragraph 2 shall register as a person seeking work with the competent employment services of the Member State in which he/she resides, shall be subject to the control procedure organised there and shall adhere to the conditions laid down under the legislation of that Member State. If he/she chooses also to register as a person seeking work in the Member State in which he/she pursued his/her last activity as an employed or self-employed person, he/she shall comply with the obligations applicable in that State.*
- 4) *The implementation of the second sentence of paragraph 2 and of the second sentence of paragraph 3, as well as the arrangements for exchanges of information, cooperation and mutual assistance between the institutions and services of the Member State of residence and the Member State in which he/she pursued his/her last occupation, shall be laid down in the Implementing Regulation.*
- (5)
 - a) *The unemployed person referred to in the first and second sentences of paragraph 2 shall receive benefits in accordance with the legislation of the Member State of residence as if he/she had been subject to that legislation during his/her last activity as an employed or self-employed person. Those benefits shall be provided by the institution of the place of residence.*

- b) However, a worker other than a frontier worker who has been provided benefits at the expense of the competent institution of the Member State to whose legislation he/she was last subject shall firstly receive, on his/her return to the Member State of residence, benefits in accordance with Article 64, receipt of the benefits in accordance with (a) being suspended for the period during which he/she receives benefits under the legislation to which he/she was last subject.
- 6) The benefits provided by the institution of the place of residence under paragraph 5 shall continue to be at its own expense. However, subject to paragraph 7, the competent institution of the Member State to whose legislation he/she was last subject shall reimburse to the institution of the place of residence the full amount of the benefits provided by the latter institution during the first three months. The amount of the reimbursement during this period may not be higher than the amount payable, in the case of unemployment, under the legislation of the competent Member State. In the case referred to in paragraph 5(b), the period during which benefits are provided under Article 64 shall be deducted from the period referred to in the second sentence of this paragraph. The arrangements for reimbursement shall be laid down in the Implementing Regulation.
- 7) However, the period of reimbursement referred to in paragraph 6 shall be extended to five months when the person concerned has, during the preceding 24 months, completed periods of employment or self-employment of at least 12 months in the Member State to whose legislation he/she was last subject, where such periods would qualify for the purposes of establishing entitlement to unemployment benefits.
- 8) For the purposes of paragraphs 6 and 7, two or more Member States, or their competent authorities, may provide for other methods of reimbursement or waive all reimbursement between the institutions falling under their jurisdiction.

The entitlements of mobile workers thus differ depending on the type of unemployment and how strongly the link to the country of origin is maintained. The prerequisite for “frontier worker status” in the field of social security is that the “frontier worker” returns to his/her country of residence as a rule daily or at least once a week (Art.1f EC Regulation 883/2004).

In the case of “**partial unemployment**”, i.e. short-time work or other temporary loss of work, the mobile workers concerned receive benefits under the legislation of the State of employment as if they resided there (Art.65(1) EC Regulation 883/2004).

Examples

- ▶ A Bulgarian woman works in Germany and returns to her home country Bulgaria once a month. Due to water damage at her workplace, she is temporarily unable to work. She is entitled to the benefits of the German Employment Service, i.e. short-time allowance.
- ▶ A Polish woman works in Germany and returns to her home country Poland once a week, so she is a frontier worker. Due to water damage at her workplace, she is temporarily unable to work. She is entitled to the benefits of the German Employment Service, i.e. short-time allowance.

In the event of “**full unemployment**”, i.e. termination of employment (end of fixed-term contract or dismissal), different rules apply to frontier workers than to those mobile workers who return to their country of residence less frequently than once a week. The competent employment services may require proof of how often the mobile worker has returned to his/her country of residence respectively whether he/she fulfils the frontier worker status or not.

In the event of **full unemployment, frontier workers** must register as jobseekers with the employment services or unemployment insurance fund of their State of residence, submit to the control procedure there and meet the requirements of the legislation of that Member State (Art. 65 Para. 2 Sentence 1 and Art. 65 Para. 3 Sentence 1 EC Regulation 883/2004).

When applying for unemployment benefits, they need proof of insurance and contribution periods in the country of employment, the European form PD U1 (portable document unemployment 1; formerly: form E 301). They obtain this form by submitting a confirmation from their employer to the authority responsible for unemployment insurance in the country of employment. If the insurance period in the state of last employment is not sufficient for entitlement to unemployment benefits, the insurance periods acquired in another state are also taken into account (Art. 61 EC Regulation 883/2004).

Frontier workers are treated as if they had paid into the unemployment funds of the State of residence and receive their unemployment benefits in the State of residence in accordance with the provisions in force there as regards the application procedure, conditions of entitlement, amount, and duration (Art. 65(5)(a) EC Regulation 883/2004). Although frontier workers are entitled to unemployment benefits only in their country of residence, they can also register as jobseekers in the country in which they were last employed and look for work there (Art. 65 Para. 3 Sentence 2 EC Regulation 883/2004).

“Non-frontier workers” are workers who stay mainly in the country of employment and who return to their country of origin less frequently than once a week. **Non-frontier workers** have, **in case of full unemployment**, a genuine right to choose whether unemployment benefit is obtained from the Member State of residence or from the Member State of employment.

- ▶ A non-frontier worker who returns immediately to his Member State of residence must register as a jobseeker with the local employment office (unemployment benefit fund). The non-frontier worker is entitled to unemployment benefits in accordance with the applicable regulations in the Member State of residence. This unemployment benefit is calculated in accordance with the rules applicable in the Member State of residence (Regulation (EC) 883/2004, Article 65(5)(a)).
- ▶ A non-frontier worker who does not return to his Member State of residence must make him-/herself available to the employment office of the Member State whose legislation last applied to him/her. The non-frontier worker is entitled to unemployment benefit in accordance with the rules applicable in the Member State of employment and the unemployment benefit is likewise calculated in accordance with the rules applicable in the Member State of employment.

Examples

- ▶ A non-frontier worker who resides in Romania and works in Germany is in the event of permanent and definitive unemployment entitled to Romanian unemployment benefits if he/she returns to Romania immediately. The duration and amount of the benefits are based on the legislation in force in Romania.
- ▶ If the non-frontier worker does not return to Romania (State of residence) and registers with the German unemployment office, he/she is then entitled to German unemployment benefit, the duration and amount of which are based on the legislation in force in Germany.
- ▶ If the non-frontier worker, after drawing unemployment benefit for six months in Germany, registers as a jobseeker with the Romanian employment office. Initially he/she is entitled to another three months of German unemployment benefit. After three months he/she is entitled to Romanian unemployment benefit based on the legislation in force in Romania.

The entitlement to special non-contributory unemployment benefits is dealt with in Annex X of Regulation (EC) 883/2004.

5.5.6 Family benefits

Family benefits are, on the one hand, subsidies (family allowances) that families receive until their children can provide for themselves. They are paid independently of the parents' income until the child reaches a certain age or finishes education/training. If the son or daughter has an income of its own, then limits are applied.

On the other hand, family benefits also include benefits that are granted in the first years of the child's life if one of the parents is not engaged in gainful employment or works only part-time and stays at home to raise the child (child-minding allowances).

In certain Member States, such as Belgium or Switzerland, family allowances are provided on the basis of paid employment. Other Member States, e.g. Germany and the Netherlands, provide family benefits only if the children reside on their territory. Under Article 67 of Regulation (EC) 883/2004, a worker is entitled to family benefits in accordance with the legislation of the competent Member State (the State of employment) for family members as though the family members resided in that Member State.

Mobile European workers are in principle entitled to family benefits in the State where they are employed. They may also be entitled in their country of residence, depending on the conditions of entitlement there, the family situation, and the activity of the other parent. Chapter 8 of Regulation (EC) 883/2004 sets out which Member State has primary responsibility for paying family benefits and how an accumulation of family benefits is prevented.

Chapter 8 of Regulation 883/2004 sets out which entitlements arise where and which State has priority in the payment of family benefits. If you are entitled to family benefits under the legislation of more than one State, you will in principle receive the maximum amount of family benefits provided for under the legislation of one of these States.

Family benefits cannot be received twice for the same family member for the same period. There are so-called "priority rules" which stipulate that the payment of benefits by one State is suspended up to the amount of benefits paid by the State which has primary responsibility for family benefits.

Due to the priority rules, the State paying benefits on the basis of self-employment or employment has priority over the State paying benefits on the basis of pension or residence.

Regulation (EC) 883/2004, Article 68: Priority rules in the event of overlapping

- 1) *Where, during the same period and for the same family members, benefits are provided for under the legislation of more than one Member State, the following priority rules shall apply:*
 - a) *in the case of benefits payable by more than one Member State on different bases, the order of priority shall be as follows: firstly, rights available on the basis of an activity as an employed or self-employed person, secondly, rights available on the basis of receipt of a pension and finally, rights obtained on the basis of residence;*
 - b) *in the case of benefits payable by more than one Member State on the same basis, the order of priority shall be established by referring to the following subsidiary criteria:*
 - i) *in the case of rights available on the basis of an activity as an employed or self-employed person: the place of residence of the children, provided that there is such activity, and additionally, where appropriate, the highest amount of the benefits provided for by the conflicting legislations. In the latter case, the cost of benefits shall be shared in accordance with criteria laid down in the Implementing Regulation;*

- ii) *in the case of rights available on the basis of receipt of pensions: the place of residence of the children, provided that a pension is payable under its legislation, and additionally, where appropriate, the longest period of insurance or residence under the conflicting legislations;*
 - iii) *in the case of rights available on the basis of residence: the place of residence of the children.*
- 2) *In the case of overlapping entitlements, family benefits shall be provided in accordance with the legislation designated as having priority in accordance with paragraph 1. Entitlements to family benefits by virtue of other conflicting legislation or legislations shall be suspended up to the amount provided for by the first legislation and a differential supplement shall be provided, if necessary, for the sum which exceeds this amount. However, such a differential supplement does not need to be provided for children residing in another Member State when entitlement to the benefit in question is based on residence only.*

Example

One parent is not working in the children's country of residence, but in another EU/EFTA state.

As a result of the priority rules, the State that pays benefits on the basis of activity as an employed or self-employed person takes priority over the State that pays benefits on the basis of a pension or of place of residence.

- ▶ If the other parent works in the country of residence or draws unemployment benefits there, the family's primary entitlement is to benefits from the country of residence. If appropriate, the country of employment pays a differential supplement. Persons who take parental leave while remaining in a contractually regulated employment relationship are treated in the same way as employed persons.
- ▶ If the other parent draws a pension or does not pursue any occupational activity, the family's primary entitlement is to benefits from the country of employment. If benefits in their country of residence are higher, the non-employed person will upon application to that country receive the differential supplement.
- ▶ If the other parent also works as a mobile worker in the same country, the family's primary entitlement is to family benefits from the country of employment and – if appropriate – a differential supplement from the country of residence.
- ▶ If the other parent also works as a mobile worker but in a different EU/EFTA country, the family's primary entitlement is to family benefits from the country of employment that pays the higher family benefits. The family benefits department of the other country of employment reimburses the family benefits department of the priority state half of the costs; if appropriate, they receive a differential supplement from the country of residence.

Notes

- ▶ These rules apply without restriction only if you are a citizen of an EU or EFTA country.
- ▶ In the case of separated couples, the place of employment of the other parent is still used to determine priority. It is immaterial whether the parents are married, not married, separated or divorced, or whether maintenance claims exist.
- ▶ Important: If children from different relationships live together in one household, the family benefits department should be asked to clarify what entitlement to family benefits attaches to which parent.

- ▶ Under the EU regulations, single persons with a child (where the other parent is dead or unknown and the single parent has sole custody) who work abroad are treated in the same way as couples in which both parents work abroad.

If both parents work as mobile workers in the same Member State, family benefits can be claimed only on the basis of the legislation of the State of employment. The same applies to single parents. If however there is no (longer any) claim to family benefits in the State of employment, the State of residence can pay family benefits. However, under Regulation (EC) 883/2004, it is not required to do so.

Example

- ▶ A family lives in Germany. Both parents work as frontier workers in the Netherlands. There is entitlement only to Dutch family benefits (child benefit, child care benefit, child budget, etc.). There is no entitlement to additional German family benefits, since, under Regulation (EC) 883/2004, Article 11(3)(a), Dutch law is applicable.
- ▶ A single mother lives in Germany and works in the Netherlands. Under Regulation (EC) 883/2004, she is entitled to Dutch family benefits, but to no supplement from Germany. The Dutch child benefit is paid up to the 18th year at most, the German child benefit up to the 25th year at most. Under ECJ case C-325/0 (Bosmann versus the Federal Employment Agency), under German law the German child benefit can be provided when the Dutch child benefit expires.

Chapter 6: European Labour Law

6.1 DEFINITION OF EUROPEAN LABOUR LAW

Labour law is a legislative corpus that defines the rights and obligations of employers and employees in the workplace. Large parts of national labour law are influenced by the law of the European Union. European labour law is designated under Title Ten of the Treaty on the Functioning of the European Union (TFEU) as “social policy” and is composed of a large number of acts that define the minimum requirements in the European Union in terms of:

- ▶ working conditions, which include provisions on equal treatment in the workplace, occupational safety, working time, part-time work, fixed-term employment and the posting of workers;
- ▶ information for and consultation of workers, in particular in the event of collective redundancies and company takeovers.

The legislation includes EEC, EC and EU regulations and directives. Unlike regulations, which apply directly, directives must first be transposed into national law. The Member States have some room for manoeuvre during such transposition into national law and can therefore set more favourable rules for workers than provided in the directive. The most important pieces of labour law legislation are:

- ▶ Regulation (EU) 1215/2012 (“Brussels Ia”) on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters
- ▶ Regulation (EC) 593/2008 (“Rome I”) on the law applicable to contractual obligations
- ▶ Directive 91/533/EEC on an employer’s obligation to inform employees of the conditions applicable to the contract or employment relationship. This Directive shall be repealed with effect from 1 August 2022 and replaced by the Directive (EU) 2019/1152 on transparent and predictable working conditions in the European Union.
- ▶ Directive 96/71/EC, amended by Directive 2018/957, concerning the posting of workers and Directive 2014/67/EU on the enforcement of Directive 96/71/EC
- ▶ Directive 2020/1057/EU laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector and amending Directive 2006/22/EC as regards enforcement requirements and Regulation (EU) No 1024/2012

The national authorities, in particular the courts, are responsible for the transposition of Community law into national law. The European Court of Justice (ECJ) plays an important role in settling disputes and provides legal opinions on questions put by the national courts as to the interpretation of the law. The workers’ rights and obligations are therefore protected throughout the European Union.

6.2 COMPETENT LABOUR COURT: REGULATION (EU) 1215/2012

Regulation (EU) no. 1215/2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (“Brussels Ia”) is a revised version of Regulation (EC) 44/2001 (“Brussels I”). Regulation (EU) 1215/2012 regulates the international competence of the courts in relation to defendants whose place of residence is in an EU Member State and the recognition and enforcement of judgements passed by other EU Member States. This regulation also applies to mobile European workers.¹⁷

As regards individual contracts of employment, Article 21(1) of Regulation (EU) 1215/2012 in Section 5 “Jurisdiction over individual contracts of employment” stipulates:

An employer domiciled in a Member State may be sued:

- a) *in the courts of the Member State where he is domiciled; or*
- b) *in another Member State;*
 - i) *in the courts for the place where the employee habitually carries out his work or in the courts for the last place where he did so; or*
 - ii) *if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.*

Examples

- ▶ A citizen from France works as a frontier worker in Germany. One day he/she notices that his/her pay is too low. The competent court is in Germany because this frontier worker has worked exclusively in Germany.
- ▶ A sales representative residing in Italy is taken on by a Slovenian employer to deal with customers in Italy. There is a dispute about the employee’s salary payment. The employee can refer the case to an Italian court, because he/she exercises his activity in Italy.

Regulation (EU) 1215/2012, Article 22

- 1) *An employer may bring proceedings only in the courts of the Member State in which the employee is domiciled.*
- 2) *The provisions of this Section shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.*

Example

- ▶ A citizen from Belgium works as a frontier worker in the Netherlands. In that country, an employee may be made redundant only if a Dutch court gives authorisation for dismissal. Under Regulation (EU) 1215/2012, Article 22(1), however, the employer can only bring proceedings for such authorisation in a Belgian court, and said Belgian court must apply Dutch law.

Regulation (EU) 1215/2012, Article 23

The provisions of this Section may be departed from only by an agreement on jurisdiction:

- 1) *which is entered into after the dispute has arisen; or*

¹⁷ International jurisdiction in complaints lodged against defendants established in Iceland, Norway or Switzerland is defined in the Lugano Convention on jurisdiction and the enforcement of judgements in civil and commercial matters. Revised in 2007, the Lugano Convention has since 1 May 2011 been in force in all its contracting states, i.e. the Member States of the European Union (and Denmark), Norway, Iceland and Switzerland. Liechtenstein has not joined the Lugano Convention.

- 2) which allows the employee to bring proceedings in courts other than those indicated in this Section.

Example

- ▶ A citizen from Belgium works as a frontier worker in the Netherlands. In that country an employee may be made redundant only if a Dutch court gives authorisation for dismissal. Under Article 22(1) of Regulation (EU) 1215/2012, however, the employer can only bring proceedings for such authorisation in a Belgian court. Under Article 23 of Regulation (EU) 1215/2012, the Dutch court can be declared competent **after the dispute has arisen**. – Important: A clause in the contract of employment to the effect that the Dutch court shall be competent is null and void.

6.3 APPLICABLE LABOUR LAW: REGULATION (EC) 593/2008

6.3.1 Legal considerations

The question of the applicable labour law arises in particular if a worker is posted temporarily or moved permanently to another country by his employer. If on the other hand the worker seeks an activity in another country “voluntarily,” then the labour law of that country usually applies. However, many – particularly multinational – companies avail themselves of the free choice of applicable law in accordance with Regulation (EC) 593/2008, Article 3(1).

Regulation (EC) 593/2008 on the law applicable to contractual obligations (“Rome I”) applies to contractual obligations in civil and commercial matters which have a connection with the law of different States. This regulation turns the Rome Convention of 1980 into a legal instrument of the EU while updating and at the same time replacing it. Together with Regulation (EU) no. 1215/2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (“Brussels Ia”) and Regulation (EC) 864/2007 on the law applicable to non-contractual obligations (“Rome II”), the regulation thereby establishes a set of binding rules for private international law with respect to contractual and non-contractual obligations in civil and commercial matters.

As regards labour law, Regulation (EC) 593/2008 contains the following provisions:

- 34) *The rule on individual employment contracts should not prejudice the application of the overriding mandatory provisions of the country to which the worker is posted in accordance with Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.*
- 35) *Employees should not be deprived of the protection afforded to them by provisions which cannot be derogated from by agreement or which can only be derogated from to their benefit.*
- 36) *As regards individual employment contracts, work carried out in another country should be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out his tasks abroad. The conclusion of a new contract of employment with the original employer or an employer belonging to the same group of companies as the original employer should not preclude the employee from being regarded as carrying out his work in another country temporarily.*

6.3.2 Free choice of law

The parties' freedom to choose the applicable law is set out in Article 3(1) of Regulation (EC) 593/2008:

A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.

Example

- ▶ A sales representative residing in Austria is taken on by a Czech employer to deal with customers in Italy. There is a choice between Austrian, Czech and Italian labour law. However, another system such as Lithuanian labour law can also be agreed.

6.3.3 Mandatory provisions

Regulation (EC) 593/2008, Article 8: Individual employment contracts

- 1) *An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article.*
- 2) *To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.*
- 3) *Where the law applicable cannot be determined pursuant to paragraph 2, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated.*
- 4) *Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply.*

In addition, overriding mandatory provisions must always be taken into account (Regulation (EC) 593/2008, Article 9). These are rules broader in scope than the protection of individual workers. These rules are applied in the general interest ("police and public order laws"); they cover issues such as statutory minimum wages, labour protection laws, etc. Each Member State has its own overriding mandatory provisions (priority rules).

Regulation (EC) 593/2008, Article 9: Overriding mandatory provisions

- 1) *Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.*

Regulation (EC) 593/2008, Article 12: Scope of the law applicable

- 1) *The law applicable to a contract by virtue of this Regulation shall govern in particular:*
 - a) *interpretation;*
 - b) *performance;*
 - c) *within the limits of the powers conferred on the court by its procedural law, the consequences of a total or partial breach of obligations, including the assessment of damages in so far as it is governed by rules of law;*
 - d) *the various ways of extinguishing obligations, and prescription and limitation of actions;*
 - e) *the consequences of nullity of the contract.*
- 2) *In relation to the manner of performance and the steps to be taken in the event of defective performance, regard shall be had to the law of the country in which performance takes place.*

Example

- ▶ For an employee residing in Estonia who is posted by her Estonian employer to Germany, Estonian labour regulations continue to apply. The employment relationship may nevertheless be "co-determined" by special, mandatory provisions (German labour law intervention standards) of German labour law.

Chapter 7:

Tax Coordination: Double Taxation Treaties

7.1 PRINCIPLES OF TAX COORDINATION

In contrast to the situation with regard to social security, there is no supranational regulation of tax law at EU or EFTA level. The coordination of taxation is dealt with in several hundred bilateral taxation agreements between the Member States.

Article 293 of the EC Treaty stipulates that the Member States shall enter into negotiations with each other with a view to the abolition of double taxation within the Community. However, this article was not included in the TEU or TFEU. Nevertheless, the general provisions of Article 4 (3) TEU stipulate that the Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

Irrespective of whether there is any secondary European law such as directives or regulations, the tax systems and tax conventions of the Member States must always comply with the fundamental principles of the Treaty concerning the free movement of people, services and capital, the freedom of establishment (Articles 45, 49, 56 and 63 TFEU) and the principle of non-discrimination. More generally, moreover, Article 21 TFEU stipulates that every citizen of the European Union shall have the right to move and reside freely within the territory of the Member States. The Agreement on the European Economic Area and the bilateral agreements between Switzerland and the European Union extend these principles of the free movement of people, goods and services, as well as the equality of conditions of competition and absence of discrimination, to the citizens and companies of EFTA countries (Iceland, Liechtenstein, Norway, and Switzerland). The secondary law of the EU does not, however, apply to EFTA countries.

International conventions intended to prevent double taxation in an effective manner must include the four fundamental principles of taxation, i.e. the principles of the country of residence, the source country, territoriality, and worldwide income.

- ▶ If the principle of the country of residence is applied in a country for tax purposes, then all persons, natural or legal, are liable for tax in the State in which they have their domicile or in which they have taken up permanent residence.
- ▶ The source principle operates in the opposite direction: under this principle, natural and legal persons are liable for tax in the country from which their income stems. If their income stems from more than one country, taxpayers are accordingly liable for tax in each country.
- ▶ Another, albeit not so widespread taxation principle is the principle of territoriality, under which each taxpayer is liable exclusively for the income which is earned on the territory of the relevant State.
- ▶ Considerably more widespread – in over 100 countries worldwide – is the taxation principle of worldwide income according to which the taxpayers in a particular country (who are defined as tax payers e.g. on account of their place of residence) must pay tax on all their taxable income in that country. In other words, tax is imposed not only on income earned in that country but on all the income of the natural or legal person worldwide – hence the term “worldwide income”.

The European double taxation treaties are based largely on the Model Tax Convention of the Organisation for Economic Cooperation and Development (OECD). This convention provides in general for taxation of income in the source State, although exceptions from the source State principle are possible.

Which State is the State of residence or in which State a person is established is defined in the relevant double taxation treaties.

OECD Model Tax Convention, Article 4: Resident

- 1) *For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein.*
- 2) *Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then his status shall be determined as follows:*
 - a) *he shall be deemed to be a resident only of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident only of the State with which his personal and economic relations are closer (centre of vital interests);*
 - b) *if the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be a resident only of the State in which he has an habitual abode;*
 - c) *if he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident only of the State of which he is a national;*
 - d) *if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.*
- 3) *Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident only of the State in which its place of effective management is situated.*

Two standard methods are used to prevent double taxation: the exemption method and the credit method (see Section 7.3 of this Guide).

The rules of the double taxation treaties that are in force follow neither of the two methods consistently but represent a compromise. Many rules follow the source country principle; however, the country of residence principle is commonly applied as the standard rule for all income that is not covered by any other rule.

Often the wages of mobile European workers are taxed in the State where they work. The question arises as to which Member State – the State of residence or the State of employment – is to grant personal and family-related tax benefits. This problem arises especially in families where one parent works in the State of residence and the other in another State.

In the case of mobile European workers, the question is therefore: when must the State of activity treat this worker - who is liable to tax under foreign law (non-resident) - as a domestic taxpayer with the associated tax benefits (deductible expenses, etc.)?

In the Schumacker case (C-279/93), the European Court of Justice ruled that a mobile European worker (non-resident of the country of employment), whose (family) income is earned largely in the country of employment has a right in that country to all tax benefits/reductions relating to his personal and family situation. Under “largely” the Court of Justice understands more than ca. 90%.

A striking aspect of the case law in the field of taxation is that the European Court of Justice leaves the member states a lot of leeway to conclude agreements to prevent double taxation. Even provisions in such agreements that draw direct distinctions on the grounds of citizenship can be justified under certain circumstances (ECJ ruling in case C-336/96 (Gilly)).

7.2 THE TAXATION OF LABOUR INCOME

IMPORTANT: *The special regulations listed below are those of the OECD Model Tax Convention. The bilateral tax treaty to be applied in the specific individual case may contain regulations that differ from these.*

7.2.1 Principle of the State in which the work is carried out

As regards income tax, the OECD Model Convention applies the principle of the place in which the work is carried out. For a worker who resides in one Member State and works in another, the State of residence must normally relinquish competence for taxation to the State of activity.

OECD Model Tax Convention, Article 15(1): Income from employment

Subject to the provisions of Articles 16, 18 and 19, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.

Example

- ▶ An employee resident in Romania who works for a Spanish employer in Spain is taxed in Spain (principle of the State of activity).

7.2.2 Conditional maintenance of the principle of the state of residence

If employees work in a Member State other than the State of residence and have only a “slight” connection with the State of activity, the State of residence retains its competence to levy tax. This is the case if the employee only performs activities there on a temporary basis and his/her employer has no links with the temporary State of activity.

According to the OECD Model Convention, the following conditions must be met at the same time:

OECD Model Tax Convention, Article 15(2):

Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if:

- a) *the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in any twelve month period commencing or ending in the fiscal year concerned, and*
- b) *the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State, and*
- c) *the remuneration is not borne by a permanent establishment which the employer has in the other State.*

If any of these conditions is not met, a sufficient connection with the temporary work State is deemed to have been established and the worker will be taxed from his/her first physical presence day (for a more in-depth examination of such concepts as “183 days of presence,” “permanent establishment,” etc., see Chapter 9 “Posted workers” of this Guide).

Examples

- ▶ A worker resides and works in Cyprus. From 1 February to 31 May, his/her employer sends him/her to Greece on a temporary assignment with a customer. There is no question of permanent establishment. The worker continues to be taxed in his/her country of residence, i.e. Cyprus.
- ▶ A worker resides and works in Malta. From 1 February to 31 May, his/her employer sends him/her to a construction site in Italy. According to the tax convention, the site must be considered as a permanent establishment. The worker is taxed for his/her salary earned in February, March, April and May in the country of temporary activity, i.e. Italy.

Under tax treaties, temporary workers engaged on a cross-border basis are predominantly taxed in the temporary work State, as the substantive requirements of Article 15(2)(b) are not met. If a temporary employment agency makes a temporary cross-border worker – with whom it has a contract – available to a company in another country, it is considered for the purposes of the tax conventions to be a “formal employer”. When the temporary worker is made available to a company in another country, that company is considered to be the “material employer”; this company is in a position of authority vis-à-vis the employee and pays the temporary worker’s salary.

- ▶ A French temporary worker is sent by a French temporary employment agency to a German company. The wages of this French temporary worker are taxed in Germany from the first day, because the German company concerned is considered as the material employer and reimburses the labour costs to the French temporary employment agency (Art.13(6) Tax Treaty Germany – France).

7.2.3 Workers who usually work in two or more states

A special regulation applies to workers in international shipping and air transport. Their wages are not taxed in the State(s) of activity, but in the State of residence.

OECD Model Tax Convention Article 15 (3)

Notwithstanding the preceding provisions of this Article, remuneration derived by a resident of a Contracting State in respect of an employment, as a member of the regular complement of a ship or aircraft, that is exercised aboard a ship or aircraft, operated in international traffic, other than aboard a ship or aircraft, operated solely within the other Contracting State, shall be taxable only in the first-mentioned State.

For persons working in two or more States but not engaged in international shipping and air transport, not Article 15(3) of the OECD Model Tax Convention just quoted applies, but Article 15(2) of the OECD Model Convention (see section 7.2.2 of this Guide). In a specific individual case, there may therefore be a split tax imposition responsibility. The country or countries of employment and the country of residence may have the right to tax part of the salary. Each country of employment may tax that part of the worker's income earned from activities on its territory. The country of residence taxes the worker's total (worldwide) income progressively but must grant a tax exemption for the pay already taxed in the other Member States.

Example

- ▶ A Belgian worker is hired by an employer established in France. He works two days a week in his/her country of residence (Belgium) and three days in France. The worker is taxed in France for the activities carried out in France. His/her earnings for the activities carried out in Belgium will be taxed in Belgium.

7.2.4 Taxation of employees in the public sector incl. civil servants

The OECD Model Tax Convention provides for civil servants and employees in the public sector to be taxed in principle in the so-called cash state.

Article 19 OECD Model Tax Convention: Government Service

1)

- a) *Salaries, wages and other similar remuneration paid by a Contracting State or a political subdivision or a local authority thereof to an individual in respect of services rendered to that State or subdivision or authority shall be taxable only in that State.*
- b) *However, such salaries, wages and other similar remuneration shall be taxable only in the other Contracting State if the services are rendered in that State and the individual is a resident of that State who:*
 - i) *is a national of that State; or*
 - ii) *did not become a resident of that State solely for the purpose of rendering the services.*

2)

- a) *Notwithstanding the provisions of paragraph 1, pensions and other similar remuneration paid by, or out of funds created by, a Contracting State or a political subdivision or a local authority thereof to an individual in respect of services rendered to that State or subdivision or authority shall be taxable only in that State.*

- b) *However, such pensions and other similar remuneration shall be taxable only in the other Contracting State if the individual is a resident of, and a national of, that State.*
- 3) *The provisions of Articles 15, 16, 17, and 18 shall apply to salaries, wages, pensions, and other similar remuneration in respect of services rendered in connection with a business carried on by a Contracting State or a political subdivision or a local authority thereof.*

7.2.5 Taxation of Pensions and social benefits

Under Article 18 of the OECD Model Tax Convention, non-statutory occupational pensions, private pensions, social benefits, etc. are taxed in the pensioner's State of residence.

OECD Model Tax Convention, Article 18: Pensions

Subject to the provisions of paragraph 2 of Article 19, pensions and other similar remuneration paid to a resident of a Contracting State in consideration of past employment shall be taxable only in that State

Pensions of individuals in government service, on the other hand, are taxed in the source State (the former country of activity or State of the Public Authority) according to Article 19 of the OECD Model Tax Convention.

Statutory social benefits such as sickness and disablement benefits, retirement pensions and death benefits are taxed as "other income" (Article 21 of the OECD Model Tax Convention) in the State of residence of the beneficiary of the social benefits. However, double taxation conventions sometimes contain different articles and/or derogations on social security.

OECD Model Tax Convention, Article 21: Other income

Items of income of a resident of a Contracting State, wherever arising, not dealt with in the foregoing Articles of this Convention shall be taxable only in that State.

Example

- ▶ A resident of Germany receives the statutory Dutch retirement pension, which is taxed in accordance with the Dutch-German double taxation treaty (State of the fund).
- ▶ A Dutch occupational pension, on the other hand, is taxed in Germany (country of residence).
- ▶ Dutch civil servants' pensions paid to retired civil servants living in Germany are taxed in the Netherlands (country of the authorities).

7.2.6 Specific rules for frontier workers

The OECD Model Tax Convention provides specific rules on the taxation of artists and sportsmen/sportswomen (Art.17) and on the taxation of students, business apprentices and trainees (Art.20) but no Article on the taxation of frontier workers.

In taxation treaties between neighbouring Member States, the rules applicable to frontier workers sometimes depart from the principle of the State in which the work is carried out. Even if there is a strong connection with the country in which the work is carried out, the country of residence retains responsibility for taxation. The term "frontier worker" is defined in different ways in different double taxation agreements. In principle, frontier workers are people who live near the border in one Contracting State and work near the border in another Contracting State, usually commuting daily from their home to their place of work and back (see section 8.3 of this Guide).

7.3 AVOIDANCE OF DOUBLE TAXATION

Two standard methods are used to avoid double taxation:

7.3.1 Exemption method

To avoid taxing twice a person who is liable for taxation in two countries, an agreement is reached in the relevant treaties not to tax the income concerned in one of the states. However, in order to tax the economic performance of that person, such income is taken into consideration in the tax exemptions applied for purposes of progressive taxation. The remaining income is therefore taxed at a higher rate in the other country.

If the taxable person has additional income in his/her country of residence or if his/her spouse is gainfully employed there and they are jointly liable for income tax, the income earned abroad is also taken into consideration when determining the tax rate to be applied to this domestic income. The tax rate that is applied is higher than would be the case without the foreign income. Income from employment abroad must therefore be declared in the State of residence even if it is exempt from tax.

7.3.2 Credit method

Under the credit method, the tax levied and paid on income earned in one country (source tax) is credited to the tax to be paid in the other country.

7.3.3 Examples

Example 1

A worker resides in Country A, where he/she worked for five months and earned €12'000. He/she then worked in Country B for seven months and earned €18'000 in that country. The worker's worldwide income therefore amounts to €30'000. As the worker worked for more than 183 days in Country B, he/she is liable for tax in that country. If in Country B the tax rate on an income of €18'000 is 25%, he pays taxes amounting to €4'500 (=18'000 € x 25%) in Country B.

Country of residence A carries out a "shadow calculation," i.e. it calculates how much tax the worker would theoretically have to pay if he/she had earned that €30'000 in his country of residence (Country A). For example, if the tax rate in Country A on an income of €30'000 is 35%, the **theoretical income tax payable is €10'500**.

If the **credit method** is specified in the double taxation treaty between Countries A and B, the tax liability in Country A is calculated as follows:

Theoretical income tax payable	10'500 €
Less tax paid in Country B	4'500 €
Tax payable in Country A	6'000 €
Total tax liability:	10'500 €

If the **exemption method** is specified in the double taxation treaty between Countries A and B, the tax liability in Country A is calculated as follows:

As the tax rate in Country A on an income of €30'000 in this example is 35%, the tax payable on the income of €12'000 earned in Country A is €4'200 (€12'000 x 35%).

Tax payable in Country A	4'200 €
Tax paid in Country B	4'500 €
Total tax payable:	8'700 €

In the exemption method, the tax paid in Country B is not taken into account but the income earned in Country B is. Nevertheless, in this example of the exemption method the worker has a tax advantage of €1'800 by comparison with the credit method, since he/she pays a total of only €8'700. If he/she had earned his/her entire income in Country A, he/she would have had to pay €10'500 in taxes.

Example 2

In the second example, the worker lives in Country B, where he/she works for five months and earns €12'000. He/she then works for seven months in Country C. His/her income from Country C amounts to €18'000. The worker's worldwide income is thus €30'000. Since the worker worked in Country C for more than 183 days, he/she is liable for tax there. If the tax rate on €18'000 is 35%, he/she pays €6'300 in taxes in Country C.

Country of residence B carries out a "shadow calculation," i.e. it calculates how much tax the worker would theoretically have to pay if he/she had earned that €30'000 in his country of residence (Country B). If the tax rate on an income of €30'000 is 30%, the **theoretical income tax payable is €9'000**.

If the **credit method** is specified in the double taxation treaty between Countries B and C, the tax liability in Country B is calculated as follows:

Theoretical income tax payable	9'000 €
Tax paid in Country C	6'300 €
Tax payable in Country B	2'700 €
Total tax payable	9'000 €

If the **exemption method** is specified in the double taxation treaty between Countries B and C, the tax liability in Country B is calculated as follows:

Since in the second example the tax rate in Country B on an income of €30'000 is 30%, the tax payable in Country B on an income of €12'000 is €3'600 (=€12'000 x 30%).

Tax payable in Country B	3'600 €
Tax paid in Country C	6'300 €
Total tax payable	9'900 €

In this second example, under the exemption method the worker must therefore pay € 900 more in tax than if his/her tax liability in Country of Residence B had been determined in accordance with the credit method or if he/she had earned his income exclusively in Country of residence B.

In the Gilly case (C-336/96), the European Court of Justice ruled that application of the method and the higher tax burden by comparison with the exemption method does not violate the principle of equal treatment set out in Article 39 TEU (now Article 45 TFEU).

7.4 DIFFERENT COMPETENCIES FOR SOCIAL SECURITY AND TAX

To assess the net income items of mobile European workers, the amount of the social contributions in both Member States must be taken into account in addition to the income tax payable. It should moreover be borne in mind that social security contributions are (partially) taxed.

In the budgetary system of a Member State there is often a coherent connection between taxation and social security contributions. Certain Member States are consequently characterised by a social security system in which low contributions are offset by higher taxation (for example, the taxation of social security benefits). The opposite exists as well.

For social security, the principle of the State of activity applies, as well as the principle of exclusivity, according to which only one Member State is responsible for charging of social security contributions. However, there may be shared competence when it comes to taxation, i.e. in individual cases the mobile workers concerned may be liable to tax in the State of residence and/or in the State(s) of activity on a pro rata basis.

And since the national tax regulations are even less harmonised than the national regulations regarding the level of social security contribution rates, the net incomes of the mobile workers concerned are sometimes higher, sometimes lower, depending on the Member States involved or responsible, than if only one State alone were responsible for both the collection of social security contributions and taxation.

It also happens that a budgetary measure that entails an increase in social security contributions is, for internal political reasons, offset on the taxation front. If the mobile European worker pays his/her taxes in another Member State, however, he/she does not benefit from this compensation.

PART II: **Different Forms** **of Mobility of Workers** **in Europe**



Chapter 8: Frontier Workers

8.1 WHO IS CONSIDERED AS FRONTIER WORKER?

Frontier workers are employees who work in one Member State (State of employment) and reside in another Member State (State of residence). It is essential that they maintain their normal place of residence outside the State of employment during their employment and return there regularly.

A citizen who moves to a neighbouring State but continues to work in his/her original State of employment (residential migrant) is also a frontier worker.

The term “normal” place of residence does not exclude the possibility that the frontier worker, for practical reasons, also has temporary accommodation in the State of employment.

Different definitions of frontier worker status apply in the area of social security and in the area of tax law.

Non-EU nationals residing in a Member State other than the one in which they wish to work as a frontier worker, or residing in a third country, must normally apply for a visa, work permit (“frontier worker card”) or residence permit in order to be allowed to stay and work in that Member State.

Since frontier workers live in one State and work in another, the question arises whether the regulations of the State of residence or the State of employment apply with regard to labour law, social security and taxes. In cross-border employment relationships, the law of the State in which the employee usually works generally applies. In principle, the law of the State of employment is also applied to social security and taxation, although there may be some special features for frontier workers.

8.2 PARTICULAR PROVISIONS FOR FRONTIER WORKERS IN THE SOCIAL SECURITY SYSTEM

8.2.1 Applicable social security law

Article 1(f) of EC Regulation 883/2004 formulates who is to be considered a frontier worker:

“Frontier worker” means any person pursuing an activity as an employed or self-employed person in a Member State and who resides in another Member State to which he returns as a rule daily or at least once a week;”

A frontier worker is socially insured in his/her country of employment according to Art. 11, para. 3, litt a of the Regulation 883/2004. If he/she was previously socially insured in another Member State, for example in the Member State where he/she lives, because he/she also worked there before, he/she thus “migrates” from one social security system to the other, even though he/she keeps his/her normal place of residence (domicile) in the original Member State (State of residence).

As frontier workers regularly stay in their country of residence, it can be assumed that they have close personal ties with their country of residence and wish to spend "difficult times", e.g. in case of sickness, invalidity and/or unemployment in the country of residence. The Coordination Regulation 883/2004 provides for some special rules for frontier workers, in particular where frontier workers can get treatment in case of sickness, or for entitlement to full-time unemployment benefits.

8.2.2 Sickness

8.2.2.1 Medical benefits

In principle, frontier workers have a right to the medical services of the Member State in which they pay their contributions, i.e. the State of employment – this is the “competent Member State”.

The worker and his/her family nonetheless maintain close personal ties with their State of residence. They must have the opportunity to receive medical treatment in their State of residence. The frontier worker and the family members insured with him/her are therefore registered with the social security institution of the country of employment (competent Member State). In the case of sickness benefits, the country of residence – and not the competent Member State – decides who is recognised as a family member.

Article 17 of Regulation (EC) 883/2004: Residence in a Member State other than the competent Member State

An insured person or members of his family who reside in a Member State other than the competent Member State shall receive in the Member State of residence benefits in kind provided, on behalf of the competent institution, by the institution of the place of residence, in accordance with the provisions of the legislation it applies, as though they were insured under the said legislation.

Under Article 18(2) of Regulation (EC) 883/2004, family members of frontier workers insured with them are entitled, without prior authorisation, to benefits in kind during their stay in the competent Member State. However, if this Member State is listed in Annex III of Regulation (EC) 883/2004, the family members of frontier workers who reside in the same Member State as the worker are entitled in the competent Member State only to benefits in kind that are proven to be medically necessary during their stay.

Examples

- ▶ A frontier worker lives in Germany and works in Denmark (competent Member State). The family members of the frontier worker are registered with the Danish social security system. They are entitled to benefits in kind only in the country of residence, Germany, and not to any Danish benefits in kind, because Denmark is listed in Annex III of Regulation (EC) 883/2004.
- ▶ A frontier worker lives in Denmark and works in Germany (competent Member State). The family members of the frontier worker are registered with the German social security system. They are entitled to both Danish and German benefits in kind, because Germany is not listed in Annex III of Regulation (EC) 883/2004.

The health insurance fund of the country of employment (competent Member State) will send the worker a Form S1 (“Declaration concerning the entitlement to sickness and maternity benefits by an affiliate who lives in a country other than the competent Member State”), which he/she must submit to the insurance institution (health insurance fund) of his/her country of residence.

When frontier workers become unemployed, this right of choice ends abruptly. They must then join the health insurance system in the country of residence.

Frontier workers who retire are entitled to sickness benefits in kind in the Member State in which they last worked, insofar as it concerns the continuation of treatment started in that Member State. For more information, see chapter 12 of this guide.

8.2.2.2 Sickness benefits

The frontier worker is in principle entitled to sickness benefits from the Member State in which he/she was required to contribute, namely the Member State of employment. Some Member States apply waiting periods before a worker is entitled to continued salary payments and/or sickness benefits in the event of sickness. Article 6 of Regulation (EC) 883/2004 protects the frontier worker from gaps in his entitlement to the continued payment of wages in the event of sickness and/or to sickness benefits. The well-timed submission of the S1 document is therefore important.

The coordinating Regulation (EC) 883/2004 provides no right to choose between the Member State of residence and the Member State of employment with regard to entitlement to sickness benefits. Under Article 21 of that Regulation, the cash benefits and continuing wages of an insured person residing in a Member State other than the competent Member State will usually continue to be paid in another Member State (the Member State of residence). This means that the frontier worker may without difficulty stay in the territory of his Member State of residence whilst receiving sickness benefits from the Member State of employment. Depending on the agreements concluded between the Member State of residence and the Member State of employment, the sickness benefits are paid out either directly by the health insurance fund of the Member State of employment or indirectly by the health insurance fund of the Member State of residence.

Article 21 of Regulation (EC) 883/2004: Cash benefits

- 1) *An insured person and members of his family residing or staying in a Member State other than the competent Member State shall be entitled to cash benefits provided by the competent institution in accordance with the legislation it applies. By agreement between the competent institution and the institution of the place of residence or stay, such benefits may, however, be provided by the institution of the place of residence or stay at the expense of the competent institution in accordance with the legislation of the competent Member State. [...]*

The procedures for application of this Article, in particular with regard to the medical examination, are set out in Articles 27 and 87 of the implementing Regulation (EC) 987/2009. Article 27 – “Cost benefits relating to incapacity for work in the event of stay or residence in a Member State other than the competent Member State” (the State of employment) – defines procedures for the affiliates (insured persons), for the institution of the Member State of residence and for the competent institution. Article 87 of Regulation (EC) 987/2009 on medical examination and administrative checks is also important.

8.2.3 Occupational diseases: where can frontier workers be treated?

In the event of an occupational accident or disease, frontier workers are treated in the Member State in which they are insured. The benefits are paid by the accident insurance system in the Member State of employment in accordance with the rules in force in that country.

However, frontier workers may also obtain treatment for an occupational accident or disease in their country of residence. The benefit provider in the Member State of residence (doctor, hospital, etc.) invoices the national liaison office, which then has the treatment costs reimbursed by the accident insurance fund of the country of employment (“non-cash benefit assistance”).

To receive medical treatment at the place of residence after an accident at work, proof of existing health insurance is usually accepted (e.g. the European Health Insurance Card – EHIC).

The accident insurance certificate DA1 (previously E 123), which is intended for assistance in kind, is usually issued only after the accident has been examined; it is then sent to the liaison office in the country of residence and/or to the affiliate.

Medical and other bills for the treatment of the after-effects of the accident should be forwarded to the accident insurance institution in the State of employment or to the inter-State liaison body in the State of residence.

NOTE: Medical and other bills for the treatment of the after-effects of the accident should be forwarded to the accident insurance institution in the State of employment or to the inter-State liaison body in the State of residence. They will check whether the costs can be covered by the accident insurance and whether the invoice amount corresponds to the applicable service tariffs. It is strongly discouraged to pay the bill yourself, as then, if the bill is overcharged, overpaid amounts cannot be claimed back from the service providers (doctor, physiotherapist, etc.).

8.2.4 Frontier workers who become unemployed

Frontier workers pay contributions to the unemployment insurance scheme of the State of employment.

In the event of a temporary suspension of work, such as short-time work or work interruptions due to weather conditions, as well as in the event of the employer's insolvency, benefits are paid by the unemployment insurance in the State of employment (Art. 65 para. 1 EC-R. 883/2004).

However, in the event of unemployment due to the termination or expiry of the employment contract, frontier workers must register as jobseekers with the competent employment services of the State of residence, submit to the control procedure there and meet the requirements of the legislation of that Member State (Art.65 para.2 Sentence 1 and Art.65 para.3 Sentence 1 EC-R 883/2004).

When applying for unemployment benefits, you need proof of insurance and contribution periods in the country of employment, the European form PD U1 (portable document unemployment 1; formerly: form E 301). This form can be obtained by submitting a confirmation from the employer to the authority responsible for unemployment insurance in the country of employment. If the insurance period in the state of last employment is not sufficient for entitlement to unemployment benefits, the insurance periods acquired in another state are also taken into account (Art. 61 EC Regulation 883/2004).

Frontier workers are treated as if they had paid into the unemployment funds of the State of residence and receive their unemployment benefits in the State of residence in accordance with the provisions in force there as regards the application procedure, conditions of entitlement, amount and duration (Art. 65(5)(a) EC Regulation 883/2004).

Although frontier workers are entitled to unemployment benefits only in their country of residence, they can also register as jobseekers in the country in which they were last employed and look for work there (Art. 65 para. 3, Sentence 2, EC Regulation 883/2004).

8.3 THE TAXATION OF FRONTIER WORKERS

8.3.1 Rules on the taxation of frontier workers

Although the OECD Model Convention makes no provision for this, adjacent States may decide to include special rules for “frontier workers” in their double taxation treaties. Frontier workers’ income is then taxed not in the State of employment but in the State of residence.

For example, Germany has concluded bilateral tax treaties with its neighbouring countries France, Austria, and Switzerland, which contain special provisions for frontier workers. The tax treaties between Germany and the other neighbouring states of Belgium, the Netherlands, Luxembourg, Denmark, Poland, and the Czech Republic do not contain any special regulations for frontier workers, who are therefore generally liable for tax in the state in which they work.

If a double taxation treaty provides special rules for frontier workers, a stricter definition than that used in social security usually applies (Article 1(f) of EC-Regulation 883/2004). In addition to the criterion of regular daily return to the country of residence, these definitions usually also contain geographical conditions that frontier workers must commute between the place of residence and the place of work within a defined border zone.

Irrespective of whether a tax treaty contains a cross-border commuter regulation, the taxation of public service activities, pensions as well as payments from statutory social insurance (e.g. sickness benefit, insolvency benefit, short-time working allowance, etc.) are regulated separately from the taxation of earned income in the various bilateral tax treaties. These rules may then take priority over any frontier worker rules. The provisions of a tax treaty may, for example, stipulate that payments from statutory social insurance may only be taxed in the so-called cash state (state of the social insurance fund).

8.3.2 Examples of rules on the taxation of frontier workers

Double taxation treaty between France and Germany

Border zone for frontier workers residing in France

- ▶ On the French side: all the cities and municipalities situated in the departments of Bas-Rhin (67), Haut-Rhin (68) and Moselle (57).
- ▶ On the German side: All the cities and municipalities situated in an area within approx. 30 kilometres of the border.

Border zone for frontier workers residing in Germany

- ▶ For these frontier workers, the border zone extends for approx. 20 km on either side of the border.

Frontier workers in the civil service usually pay their taxes in the State of employment. There are special rules for temporary frontier workers (see section 7.2.1 of this Guide).

Double taxation treaty between Germany and Switzerland

No border zones are defined in the double taxation treaty between Germany and Switzerland. However, the relevant case law assumes that a daily return cannot be expected in the following cases and that for tax purposes a person is therefore not a frontier worker crossing from Germany into Switzerland if

- ▶ there is a legal obligation for the worker to reside in Switzerland;
- ▶ the distance between the place of residence and the workplace is more than 110 kilometres;
- ▶ the commute takes more than an hour and a half each way;
- ▶ the employer bears the living and accommodation costs in Switzerland.

Frontier workers crossing from Germany into Switzerland who on more than 60 days in a calendar year (“adverse days”) and for work-related reasons do not return to their place of residence (the number of days is reduced for part-time employment) are taxed in Switzerland.

Double taxation treaty between France and Switzerland

The earnings of frontier workers who live in France and work in Switzerland are taxed in France if the worker concerned is engaged in gainful employment in the cantons of Basel-Stadt, Basel-Land, Bern, Jura, Solothurn, Valais, Vaud or Neuchâtel and returns to France every day. The worker has the right not to return to his place of residence for a maximum of 45 working days per year without losing his frontier worker status.

8.4 COMPARISON OF FRONTIER WORKER STATUS IN SOCIAL INSURANCE AND TAXATION

For frontier workers, the principle of the State of employment applies to social security (Art.11 Par.3 litt a EC-R. 883/2004) and they must therefore pay social security contributions in the State of employment. If a double taxation agreement with a frontier worker clause is in force at the same time, the frontier worker is liable to tax in the country of residence if the relevant conditions are met. These different responsibilities can have both advantages and disadvantages for the frontier workers concerned (see section 7.4 of this Guide).

The following overview is intended to clarify the different definitions of frontier worker status:

Definition of “frontier worker”	Definition of “frontier worker” in the field of social security	Definition of “frontier worker” in the field of taxation
Legal basis and scope of application	EC Regulation 883/2004 applies in all EU/EFTA States	Agreements in each case between two States that have a common border
General rule of the competent State	Art. 11 EC-R. 883/2004: Competence of only one member state (exclusivity principle); State of employment as decisive criterion	Wages, salaries and similar remuneration are taxed in the State in which the activity is carried out

Definition of “frontier worker”	Definition of “frontier worker” in the field of social security	Definition of “frontier worker” in the field of taxation
Definition of “frontier worker”	Frontier workers in the field of social security (Art. 1f EC-R. 883/2004) means any person pursuing an activity as an employed or self-employed person in a Member State and who resides in another Member State to which he/she returns as a rule daily or at least once a week	Frontier workers in the field of taxation means any person who works in the one State within a defined border zone, lives in the other State within a defined border zone, where they usually return daily.
Frequency of border crossing	Daily or at least once a week [Art.1f]	Daily, possibly a limited number of non-return days per year
Geographical conditions	State of residence and State of employment must be an EU or EFTA member state	Direct neighbouring States with a common border; defined border zone depending on tax agreement
Competent State for frontier workers	State of employment [Art.11 para.3 litt a EC-R. 883/2004]; in the country of residence as a frontier worker, additional entitlements, e.g. visits to the doctor; Right to unemployment benefits only in the State of residence (Art.65 para.2 Sentence 1 and Art.65 para.3 Sentence 1 EC-R 883/2004)	State of residence; but Taxation possible in the State of employment, e.g. limited deduction of source tax or in case of receipt of benefits from the statutory social security system If the number of possible non-return days is exceeded, loss of frontier worker status and taxation in the State of employment
Derogations and special features	Civil servants and persons treated as such: State of the employing administrative unit [Art.11 para.3 litt b EC-R. 883/2004] Social security in the country of residence as soon as a substantial part, i.e. 25% (or more) of the total activity is carried out in the country of residence, e.g. due to home office. For more information, see Chapter 10 of this Guide	Public service employees Pensions Possibly contributions from the statutory social security system
Formalities	Employer is responsible for registration with social security. Exception: observe 25% rule in case of usual activity in two or more States	Frontier workers must apply for a residence certificate at the competent tax authority of the place of residence and submit it to the employer or the tax authority of the place of work.

Chapter 9: Posted Workers

9.1 WHO IS CONSIDERED AS POSTED WORKER?

“Posted workers” are workers who normally carry out activities in the territory of a Member State (country of origin or country of posting) and are posted by their employer to another Member State (country of employment) in the context of “freedom to provide services”. The posting of workers in the context of the provision of services is therefore not covered by the free movement of workers, but by the freedom to provide services (Art.56 TFEU). During the provision of the service, the posted worker will work exclusively in the other Member State. – For example, a Polish employer may receive an order from Germany. In order to fulfil this order, he/she posts an employee to Germany for 5 months. Since this employee has worked in Poland up to now, i.e. usually performs his/her work in Poland, the Polish provisions regarding social security, taxation and labour law apply to him/her. If this employee now works temporarily in Germany, the question arises as to which – the Polish or the German – legal regulations regarding social security, taxes and working conditions apply to him/her.

9.2 SOCIAL SECURITY IN CASE OF POSTING¹⁸

9.2.1 General

In principle a worker must be registered with social security in the country in which he/she actually carries out his activities (EC-Regulation 883/2004, Article 11(3)(a)). If a worker is posted, he/she can nonetheless avail him-/herself of the coordinating Regulation (EC) 883/2004, which allows for a temporary exception from the principle of the country of employment. In concrete terms, this pertains to the articles on posting: Regulation (EC) 883/2004, Article 12(1) and Article 16(1). The corresponding implementing provisions are contained in Regulation (EC) 987/2009, Articles 14 to 21. Decisions A2 and A3 of the Administrative Committee for the Coordination of Social Security Systems are of particular importance.

Article 12(1) EC-Regulation 883/2004: Special rules

A person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted by that employer to another Member State to perform work on that employer’s behalf shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such work does not exceed 24 months and that he/she is not sent to replace another posted person.

Regulation (EC) 883/2004, Article 12(1) specifies the conditions under which a worker who is posted to another Member State (State of transitory activity) may work in that Member State without the legal system of the sending State – in which he/she is normally registered with social security – losing its applicability. Article 16 EC Regulation 883/2004 allows the application of the social security scheme of the sending State to be extended if the 24 months provided for in Article 12(1) of the EC Regulation have been exceeded.

Article 16 (1) EC-Regulation 883/2004: Exceptions to Articles 11 to 15

Two or more Member States, the competent authorities of these Member States or the bodies designated by these authorities may by common agreement provide for exceptions to Articles 11 to 15 in the interest of certain persons or categories of persons.

Regarding the application of this article in the case of posting, the Member States have concluded a mutual agreement in principle that the principle of the country of employment may be departed from for a posting of no more than five years.

9.2.2 Duration of the posting

Article 12(1) of Regulation (EC) 883/2004 specifies that initial permission for a departure from the principle of the country of employment with regard to the obligation to register with social security cannot be granted for a period of more than 24 months. This permission is granted by the competent social security institution in the Member State (sending State) in which the worker was originally registered with social security. A company which posts a worker to another Member State – or in the case of a self-employed person, that person him-/herself – must apply to the competent institution in the sending State. This institution issues Document A1 (statement of applicable legislation, formerly E 101). If owing to unforeseen circumstances, the posting of workers in the context of the provision of services lasts longer than originally foreseen, the permission may under Article 16(1) of Regulation (EC) 883/2004 be granted for a longer period not to exceed 60 months. Under Article 16 of Regulation (EC) 883/2004, however, this requires an agreement between the competent bodies of the sending Member State (sending State) and the receiving Member State (State of transitory activity).

9.2.3 Preconditions for posting

Questions may arise regarding a posting which may not be answerable directly by the provisions of Regulation (EC) 883/2004 on the posting of workers to provide services. The additional rules are set out in Decision no. A2 of the Administrative Committee for the Coordination of Social Security Systems (Administrative Committee). The posting rules may not be used to make various workers available to companies or for assignments by repeated postings to the same position and for the same purposes.

Consequently, in addition to the temporal limitation of the posting and the fact that it is not intended to replace another posted worker, various important points must be taken into consideration:

Firstly, the employee must be normally active in the sending State. Secondly, the rule that the worker “carries out an occupation for the account of the employer” means that there must be contractual ties between the sending company and the posted worker for the duration of the posting. Thirdly, the regulations stipulate that the posted worker must already be registered with the social security system of the Member State immediately before the commencement of his/her employment.

9.2.3.1 Criteria for determining whether an employer normally carries out his activities in the sending State

The term “normally carrying out its activities” refers to an employer who generally carries out substantial activities other than purely internal administrative activities on the territory of a Member State in which it is established. If the company’s activities are limited to internal administrative activities (letterbox companies), the company will not be considered as normally carrying out its activities in that Member State. This point is determined by taking into account all the factors that characterise the activities of the company in question.

To assess the substantial activity in the sending State, the competent institutions must also verify that the employer who requests a posting is really the employer of the employees concerned. This will be all the more necessary if the employer employs permanent and temporary staff concurrently.

Example

- ▶ Das polnische Unternehmen KOLOR hat einen Auftrag für Malerarbeiten in Deutschland. Die Arbeiten sollen zwei Monate dauern. Zusätzlich zu sieben fest angestellten polnischen Mitarbeiter*innen braucht das Unternehmen KOLOR noch drei polnische Zeitarbeitskräfte vom polnischen Zeitarbeitsunternehmen FLEXIA für die Entsendung nach Deutschland; diese Zeitarbeitnehmer*innen arbeiten bereits im Unternehmen KOLOR. Das Unternehmen KOLOR fordert das Zeitarbeitsunternehmen FLEXIA auf, diese drei Zeitarbeitskräfte zusammen mit den eigenen sieben Mitarbeiter*innen Deutschland zu entsenden. Sofern alle anderen Voraussetzungen für eine Entsendung erfüllt sind, gilt weiterhin das polnische Sozialversicherungsrecht für die Zeitarbeitskräfte – genauso wie für die fest angestellten Mitarbeiter*innen.

9.2.3.2 Arbeitsrechtliche Bindung zwischen dem entsendenden Unternehmen und dem/der entsandten Arbeitnehmer*in

Interpretation of the legal provisions and the case law of the European Union as well as daily practice provide various criteria that can be used to assess the existence of a direct relationship between the sending company and the posted worker. These include in particular:

- ▶ The responsibility for the hiring;
- ▶ The contract must clearly be and have been applicable to the parties concerned during the entire posting period, and must ensue from negotiations that led to the hiring;
- ▶ The power to terminate the contract of employment (i.e. the power to dismiss) must remain exclusively with the sending company;
- ▶ The sending company must retain the power to determine the “nature” of the work carried out by the posted worker; it is not a matter of deciding the details of the work to be performed nor the way it is to be done, but more generally of determining the final product of the work or the service that is to be provided;
- ▶ The obligations relating to the remuneration of the posted worker continue to be incumbent upon the company which concluded the contract of employment, without prejudice to any agreement between the employer in the sending State and the company in the country of employment concerning the procedures for the payment of wages to the worker;
- ▶ The sending company retains the authority to impose disciplinary sanctions on the employee.

9.2.3.3 Rules for a worker recruited in one Member State for posting to another Member State

The rules that govern the posting of workers provide for the possibility of recruiting a person to have him/her posted to another Member State. However, the rules require posted workers to be already subject to the social security system of the Member State in which the Employer is established immediately before the commencement of his/her activity as an employed person. A reference period of one month is considered to meet this requirement; shorter periods must be evaluated on a case-by-case basis, taking all pertinent factors into account. Employment with any employer established in the sending State meets this condition. The worker need not therefore have worked during this period for the employer who is requesting his posting. The condition is also met in the case of students or any person insured by the fact of being subject to the social security system of the sending State.

9.2.4 Health insurance during the posting

The posted worker (and if applicable his/her accompanying family members) can avail him-/herself of benefits in kind such as medical treatment, etc. in the Member State where he/she stays and where he/she has been posted. Where the principle of the State in which the work is carried out does not apply, he/she must apply for the European Health Insurance Card (EHIC) or – in the case of prolonged residence in the country of employment – a Form S1 (declaration of entitlement to healthcare and maternity benefits of an affiliate who lives in a country other than the competent country) from the health insurance fund of the sending State.

The European Health Insurance Card (EHIC) must be kept for as long as medical care is necessary. By contrast, Form S1, which is issued in the event of prolonged stay (i.e. residence), must be submitted to the health insurance fund of the host state as promptly as possible. The costs are reimbursed in accordance with the legal system of the country in which the medical care was provided. Both forms (EHIC and Form S1) are issued only to workers who are members of a statutory health insurance. Privately insured workers must inquire with their private insurance institution in advance.

9.3 TAXATION OF POSTED WORKERS

The payment of taxes during a posting is governed by the applicable bilateral double taxation treaties concluded between the posted worker's State of residence and the State of temporary activity to which he is posted. This treaty prevents the posted employee from being taxed twice, or in the wrong treaty State.

The concept of the "183 days rule" and the issue of the "permanent establishment" issue are crucial to the posting of workers in connection with the provision of services.

Most double taxation treaties follow the OECD Model Tax Convention, which is updated at irregular intervals. Posting is governed by Article 15(2)(a) of this convention on "Income from employment" (see Chapter 7 of this Guide). The State of residence nevertheless retains its right to levy taxes on this income if the following conditions are met:

- ▶ the posted worker is not present in the State of employment for more than 183 days per calendar year (previous OECD Model Convention) or a period of 12 consecutive months (new OECD Model Convention), and
- ▶ wages are paid by or on behalf of an employer who does not live in the State of employment, and
- ▶ the wages are not paid on behalf of a permanent establishment or representation which the employer has in the State of employment.

If any one of these three conditions is not satisfied, the posted employee will be taxed in the State of employment in accordance with the legislation of this Member State. This takes retrospective effect and thus applies from the first day of his presence in the State of employment.

In practice it is necessary to make a careful study of the bilateral taxation treaty and additional agreements – and in some cases even the related case law. This will reveal:

- ▶ Whether the 183 physical presence days must be calculated over a twelve-month period or over a calendar year.
- ▶ What exactly should be understood by the term “presence” in the State of employment. Under the new OECD Model Convention “presence in the State of activity” must be understood as every day, including part of a day, that the employee spends in the territory of the State of employment. It thus includes days when work is interrupted on account of sickness, holidays, weekends and/or public holidays.
- ▶ How the “wage payment criterion” is to be interpreted. Who is responsible for the wage costs and what accounting system applies? This is judged on the actual situation. In the case of an agency which operates as the material employer, this leads to taxation in the State of employment.
- ▶ If a temporary worker is employed on a cross-border basis, the “borrowing” company is considered to be the material employer, which means that the worker is taxed in the State of employment from the outset.
- ▶ What exactly should be understood by a “permanent establishment”, e.g. when does a construction site become a “permanent establishment”? – According to Article 5(3) OECD Model Tax Convention, a building site or construction or installation project constitutes a permanent establishment only if it lasts more than twelve months.

9.4 LABOUR LAW IN CASE OF POSTING

9.4.1 Regulation (EC) 593/2008: applicable labour law

Usually, a worker is already employed by the employer before he/she is posted. Accordingly, the labour rules of the Member State in which the worker “normally” performs his/her work apply. In the event of a posting, the employer and the employee are in principle able to depart from this. This is opted for when the labour rules of the Member State to which the worker is posted are to apply (temporarily) for the duration of the posting. If this does not happen, the labour rules of the Member State (sending State) where the worker normally carries out his activities apply.

Under Article 3 Regulation (EC) 593/2008, the employer and the employee are free to choose the applicable law. This choice of law does not, however, result in the worker losing the protection he/she enjoys under the mandatory legal provisions that apply if no choice is made. If no law is chosen, the applicable law is determined in accordance with Article 8 of Regulation (EC) 593/2008 (see Chapter 6 of this Guide).

In addition, the overriding mandatory provisions must be taken into consideration (Article 9 of Regulation (EC) 593/2008). These are rules of broader scope than the protection of individual workers. They are used to protect the public interest. Every Member State has its own overriding mandatory rules.

9.4.2 Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, as amended by the Directive 2018/957/EU

Directive 96/71/EC on the “posting of workers in the framework of the provision of services” contains a set of working and employment conditions which must be compellingly observed by the posting companies in order to ensure a minimum level of protection for posted workers. At the same time, these rules are intended to ensure fair competition between companies in different Member States.

The EU Member States had to adopt corresponding legal and administrative provisions by 16 December 1999 in order to comply with this Posted Workers Directive. As some countries have since joined the EU and the differences in labour and social law provisions and in the structure of wages between the individual Member States have increased, an amendment of the Posted Workers Directive has been negotiated.

Directive 2014/67/EU on the “enforcement of Directive 96/71/EC concerning the posting of workers”, adopted in 2014, is intended to improve the practical application of the posting provisions by addressing issues related to fraud and circumvention of the provisions and promoting the exchange of relevant information between Member States. The Member States had to transpose this Enforcement Directive into national law by 18 June 2016.

In March 2016, the EU Commission submitted a proposal to revise the Posted Workers Directive, which resulted in the Amendment Directive 2018/957/EU and had to be transposed into national law by 30 July 2020.

Article 3 “Terms and conditions of employment”, paragraph 1 of the revised Directive 96/71/EC states:

- 1) *Member States shall ensure, irrespective of which law applies to the employment relationship, that undertakings as referred to in Article 1(1) guarantee, on the basis of equality of treatment, workers who are posted to their territory the terms and conditions of employment covering the following matters which are laid down in the Member State where the work is carried out:*
 - *by law, regulation or administrative provision, and/or*
 - *by collective agreements or arbitration awards which have been declared universally applicable or otherwise apply in accordance with paragraph 8:*
 - a) *maximum work periods and minimum rest periods;*
 - b) *minimum paid annual leave;*
 - c) *remuneration, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;*
 - d) *the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;*
 - e) *health, safety and hygiene at work;*
 - f) *protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;*
 - g) *equality of treatment between men and women and other provisions on non-discrimination;*
 - h) *the conditions of workers’ accommodation where provided by the employer to workers away from their regular place of work;*
 - i) *allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons.*

Point (i) shall apply exclusively to travel, board and lodging expenditure incurred by posted workers where they are required to travel to and from their regular place of work in the Member State to whose territory they are posted, or where they are temporarily sent by their employer from that regular place of work to another place of work.

For the purposes of this Directive, the concept of remuneration shall be determined by the national law and/or practice of the Member State to whose territory the worker is posted and means all the constituent elements of remuneration rendered mandatory by national law, regulation or administrative provision, or by collective agreements or arbitration awards which, in that Member State, have been declared universally applicable or otherwise apply in accordance with paragraph 8.

Without prejudice to Article 5 of Directive 2014/67/EU, Member States shall publish the information on the terms and conditions of employment, in accordance with national law and/or practice, without undue delay and in a transparent manner, on the single official national website referred to in that Article, including the constituent elements of remuneration as referred to in the third subparagraph of this paragraph and all the terms and conditions of employment in accordance with paragraph 1a of this Article.

Member States shall ensure that the information provided on the single official national website is accurate and up to date. The Commission shall publish on its website the addresses of the single official national websites.

Where, contrary to Article 5 of Directive 2014/67/EU, the information on the single official national website does not indicate which terms and conditions of employment are to be applied, that circumstance shall be taken into account, in accordance with national law and/or practice, in determining penalties in the event of infringements of the national provisions adopted pursuant to this Directive, to the extent necessary to ensure the proportionality thereof.

The legal provisions given overriding priority in accordance with Article 3(1) of the Posting Directive must be complied with by the host Member State (country of employment) for the duration of the posting by the foreign employer. This applies irrespective of the law applicable to the relevant contract of employment. The aim is to prevent wage dumping and unfair competition in the receiving state.

The principle of the most favourable formula is clearly set out in Article 3(7) of the Posting Directive:

Paragraphs 1 to 6 shall not prevent application of terms and conditions of employment which are more favourable to workers.

The mandatory application of the legislation of the host Member State must not lead to any loss during the posting period of more favourable working, pay and employment conditions that the posted worker would have enjoyed in the sending country.

9.4.3 ECJ rulings on the posting of workers

In a series of rulings (Viking, Laval, Rüffert, Commission vs. Luxembourg), the European Court of Justice (ECJ) has ruled on the links between the fundamental freedoms in the internal market and the protection of workers and fundamental social rights.¹⁹ In doing so, the ECJ has reinterpreted the minimum standards set in the Posted Workers Directive into maximum limits for working and employment conditions and, as a result, has significantly restricted the possibilities for the receiving Member States to shape wage protection.²⁰

19 See Friedrich-Ebert-Stiftung (ed): Der EuGH und das soziale Europa. Für eine Aufwertung sozialer Grundrechte im EU-Rechtssystem. May 2009, in particular, Alexander Schulz: Der Europäische Gerichtshof und das soziale Europa, pp. 3 ff. and Franz C. Mayer, Der EuGH und das soziale Europa, pp. 16-19.

20 See this and the following: Daniel Seikel: Die Revision der Entsenderichtlinie. Wie der lange Kampf um die Wiedereinbettung exterritorialisierten Arbeitsrechtes gewonnen wurde. WSI Working Paper No. 212, published by the WSI of the Hans Böckler Foundation. August 2020, p. 6 et seq.; furthermore: Jörn Kuhn and Alexandra Groth: Änderungen in der EU-Entsenderichtlinie: Aufwändige Regeln für wenig mehr Gerechtigkeit. In: Legal Tribune Online, 19/07/2019 (accessed on: 28/07/2022)

When the Posted Workers Directive was amended, the term “minimum wage rates” used in the 1996 version was replaced by “remuneration”. As a result, posted workers are now entitled not only to the basic remuneration, but also to all other remuneration components such as Christmas and holiday allowances, surcharges for overtime as well as for night, Sunday and holiday work, daily allowances, etc., provided these are stipulated by law or collective agreements. Furthermore, posting allowances may only be applied to the remuneration if they are not paid to reimburse actual costs incurred. The conditions for the accommodation of posted workers should meet the standards of the host country.

Postings should generally be limited to 12 months. In justified cases, the posting can be extended by another six months, i.e. to a total of 18 months. Under paragraph 1a, newly inserted into Article 3 of Directive 96/71/EC, host countries must ensure that for those who have been posted for more than 12 months, all working and employment conditions laid down in the laws, regulations and/or collective agreements are applicable. This excludes provisions for the conclusion and termination of the employment contract and additional occupational pension schemes.

It should be noted that different periods apply for the social security of posted workers than in the working and employment conditions applicable to them: The provisions of the amended Posted Workers Directive relate to from when which working and employment conditions of the host country apply or the principle of equal pay for equal work in the same place is implemented. However, as explained in Section 9.2 of this Guide, a person posted by his or her employer to another State remains in the social security system of the State of origin, provided that the expected duration of the posting is no more than 24 months. In other words, wage dumping has been made more difficult by the amendments to the Posted Workers Directive, but social dumping is still possible due to the different national social security contributions.

It is also sometimes disputed whether, in a particular case, it is a posting within the meaning of the European directives. An example of this is Case C-16/18 Michael Döbersberger: Austrian Federal Railways (ÖBB) had to award a service contract for onboard service on ÖBB trains. The fulfilment of this contract was awarded by way of a series of subcontracts to “Henry am Zug Kft.”, a company under Hungarian law with its registered office in Hungary. The ÖBB trains, on which the onboard service was provided, travelled from Budapest (Hungary) to Salzburg (Austria) or via Austria to Munich (Germany). The workers used to provide these services were therefore also working in a Member State other than Hungary on each trip. They had to start and finish their service in Budapest. The loading of trains, the checking of stock and the settlement of accounts always took place in Budapest. According to the ECJ, the transport of passengers on trains can be carried out independently of additional services for passengers, such as an onboard service, cleaning or catering. The ECJ ruled that the Posted Workers Directive could not be applied in this case or that the workers employed on international trains cannot be considered to be posted because they perform a substantial part of the work related to the services in question in Hungary and there is no adequate linking of the work performance to the receiving state of Austria.

9.4.4 Special provisions for the posting of drivers

The EU Directive 2020/1057, as a “lex specialis”, sets out specific rules for the posting of drivers.²¹ It distinguishes between types of transport operations to which rules on posting of Directive 96/71/EC and of Directive 2014/67/EU should apply and those to which posting rules should not apply. The general criterion for such distinction is the degree of connection with the territory of the host Member State.

21 See: Guide of the European Commission “Questions and Answers on posting of drivers under Directive (EU) 2020/1057 in the context of transport of goods”

https://transport.ec.europa.eu/system/files/2022-03/guidance-on-posting-of-drivers-transport-of-goods_de.pdf;

<https://www.ela.europa.eu/sites/default/files/2022-06/ela-posted-drivers-leaflet.pdf>;

Detailed information on driving and rest times for professional drivers:

<https://www.ela.europa.eu/sites/default/files/2022-06/ela-driving-rules-leaflet.pdf>

Since 02.02.2022, member states are obliged to provide transparent information on the remuneration of posted drivers when they are working on their territory. In addition, companies must submit posting declarations via the posting declaration portal - a public interface of the Internal Market Information System (IMI).

Those drivers, who are considered as posted, are entitled to the minimum standards prescribed in the host Member State regarding pay and working conditions. The favourability principle also applies here, i.e. if the minimum standards in the host Member State are lower, the rules of the usual State of employment continue to apply.

Chapter 10: Workers pursuing activities in two or more Member States

10.1 DEFINITION OF PLURI-ACTIVITY

Multi-employment mobile workers are people who are usually employed in two or more different states due to the nature of the activity, e.g.:

- ▶ The sailor, who lives in Sweden, who travels the world's oceans
- ▶ The pilot, who lives in Ireland, who flies from Germany to Greece, Italy, Spain, Portugal, Malta and Cyprus
- ▶ The HGV driver, who lives in Lithuania, who travels to Germany, the Czech Republic, Slovakia, Austria, Hungary, Romania and Bulgaria for a transport company based in Poland
- ▶ The sales representative, who lives in the Netherlands, who is sent to clients in Belgium, the Netherlands and Luxembourg by her employer based in France
- ▶ The nurse, who lives in Hungary, who has a part-time job in Hungary and another part-time job in Austria
- ▶ The waitress, who lives in France, who works in a restaurant in Luxembourg and a café in Germany
- ▶ The quality manager, who lives in Denmark, who reviews hotels in Finland, Estonia, Latvia and Lithuania for a Swedish hotel chain
- ▶ The economics professor, who lives in Slovenia, who teaches at a public university in Austria and also works at a consulting firm in Croatia
- ▶ The retail salesman, living in Germany, who does part of his work for his Austrian-based employer in the “home office” in his state of residence.

In the case of pluri-active mobile workers, there is also the question of which social security, tax and labour law rules apply. Moreover, for those who work for the same employer in two or more states, the question is what is the difference between posting and multiple employment?

10.2 THE TAXATION OF PLURI-ACTIVE MOBILE PERSONS

As already explained in Chapter 7 of this Guide, the taxation of earned income is governed by the respective bilateral tax treaties that the employee's State of residence or domicile has concluded with the respective States of activity. Most double taxation treaties follow the OECD Model Tax Convention.

Accordingly, employees in international shipping and air transport are subject to the special rule that their wages are not taxed in the state or states where they work, but in the state of residence.

For all other multi-employed mobile workers not engaged in international maritime and air transport - i.e. also for those engaged in international road transport, Article 15 (2) of the OECD Model Tax Convention applies (see section 7.2 of this Guide).

If workers have only a “slight” connection with the State of activity, the State of residence retains its competence to levy tax. This is the case if the employee only performs activities there on a temporary basis and his/her employer has no links with the temporary State of activity. According to the OECD Model Tax Convention, Article 15(2), the following conditions must be met at the same time:

- ▶ the pluri-active worker is not present in the State of employment for more than 183 days per calendar year (previous OECD Model Convention) or a period of 12 consecutive months (new OECD Model Convention), and
- ▶ wages are paid by or on behalf of an employer who does not live in the State of employment, and
- ▶ the wages are not paid on behalf of a permanent establishment or representation which the employer has in the State of employment.

If any of these conditions is not met, a sufficient connection with the temporary work state is deemed to have been established and the pluri-active worker will be taxed from his/her first physical presence day (for a more in-depth examination of such concepts as “183 days of presence,” “permanent establishment,” etc., see Chapter 9 “Posted workers” of this Guide).

In a specific individual case, there may therefore be a split tax imposition responsibility. The country or countries of employment and the country of residence may have the right to tax part of the salary. Each country of employment may tax that part of the worker’s income earned from activities on its territory. The country of residence taxes the worker’s total (worldwide) income progressively but must grant a tax exemption for the pay already taxed in the other Member States.

In practice it is necessary to make a careful study of the bilateral taxation treaty and additional agreements – and in some cases even the related case law, in order to be able to answer whether and in which countries of activity taxes are to be paid on the income earned there.

10.3 THE WORKING CONDITIONS APPLICABLE TO PLURI-ACTIVE MOBILE PERSONS

Free choice applies in principle with reference to the applicable labour legislation. The choice must, however, be made explicitly. If that is not the case, the choice of law must be sufficiently clear from the provisions of the contract of employment or from the circumstances of the case (Regulation (EC) no. 593/2008, Article 3). The contract of employment should preferably include an express clause regarding the choice of law. This choice of law is nonetheless limited by Regulation (EC) no. 593/2008 Article 8 (see Chapter 6 of this Guide). More specifically, it may not lead to the loss of the protection provided to the worker by the “objectively applicable law,” i.e. the law which would apply if no law was chosen. This means that workers can de facto claim the protection of the objectively applicable law at any time.

Furthermore, the provisions of the mandatory law of the Member State in which the activities are exercised can override the applicable law. Such provisions are known as overriding mandatory provisions.

In practice, it is not so often that no express choice of law is made in a multinational working contract. The choice is determined by several factors. The search for a connection to the applicable social security law can be an argument.

10.4 THE SOCIAL SECURITY OF PLURI-ACTIVE MOBILE PERSONS

Article 11(1) of Regulation (EC) 883/2004 requires exclusivity with regard to the applicable social security law. Consequently, only one system of social security law may apply to a pluri-active mobile worker, even if he/she has concluded several working contracts with different employers from different Member States. The Regulation adopts the principle of the Member State of activity (Regulation (EC) 883/2004, Article 11(3)(a)) as the main rule, but this system cannot handle a situation in which there are two or more countries of activity. There are therefore special rules for pluri-active mobile workers.

In accordance with Article 11(4) of EC Regulation 883/2004, a person working on board a seagoing ship is subject either to the social security system of the flag State or to the social security system of the State in which his/her employer is established, provided that he/she resides in that State:

For the purposes of this Title, an activity as an employed or self-employed person normally pursued on board a vessel at sea flying the flag of a Member State shall be deemed to be an activity pursued in the said Member State. However, a person employed on board a vessel flying the flag of a Member State and remunerated for such activity by an undertaking or a person whose registered office or place of business is in another Member State shall be subject to the legislation of the latter Member State if he/she resides in that State. The undertaking or person paying the remuneration shall be considered as the employer for the purposes of the said legislation.

For flight and cabin crew members, the social security system of the State in which the “home base” is located applies in accordance with Article 11(5) of EC Regulation 883/2004:

An activity as a flight crew or cabin crew member performing air passenger or freight services shall be deemed to be an activity pursued in the Member State where the home base, as defined in Annex III to Regulation (EEC) No 3922/91, is located.

For other persons who habitually carry out activities in two or more States – i.e. also for mobile workers in international road transport, the provisions of Article 13 of EC Regulation 883/2004 as amended by EU Regulation 465/2012 shall apply²²:

- 1) A person who normally pursues an activity as an employed person in two or more Member States shall be subject:
 - a) to the legislation of the Member State of residence if he/she pursues a substantial part of his/her activity in that Member State; or
 - b) if he/she does not pursue a substantial part of his/her activity in the Member State of residence:
 - i) to the legislation of the Member State in which the registered office or place of business of the undertaking or employer is situated if he/she is employed by one undertaking or employer; or
 - ii) to the legislation of the Member State in which the registered office or place of business of the undertakings or employers is situated if he/she is employed by two or more undertakings or employers which have their registered office or place of business in only one Member State; or
 - iii) to the legislation of the Member State in which the registered office or place of business of the undertaking or employer is situated other than the Member State of residence if he/she is employed by two or more undertakings or employers, which have their registered office or place of business in two Member States, one of which is the Member State of residence; or

²² 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

- iv) *to the legislation of the Member State of residence if he/she is employed by two or more undertakings or employers, at least two of which have their registered office or place of business in different Member States other than the Member State of residence*
- 2) *A person who normally pursues an activity as a self-employed person in two or more Member States shall be subject to:*
 - a) *the legislation of the Member State of residence if he/she pursues a substantial part of his/her activity in that Member State;*
 - b) *the legislation of the Member State in which the centre of interest of his/her activities is situated, if he/she does not reside in one of the Member States in which he/she pursues a substantial part of his/her activity.*
- 3) *A person who normally pursues an activity as an employed person and an activity as a selfemployed person in different Member States shall be subject to the legislation of the Member State in which he/she pursues an activity as an employed person or, if he/she pursues such an activity in two or more Member States, to the legislation determined in accordance with paragraph 1.*
- 4) *A person who is employed as a civil servant by one Member State and who pursues an activity as an employed person and/or as a self- employed person in one or more other Member States shall be subject to the legislation of the Member State to which the administration employing him/her is subject.*
- 5) *Persons referred to in paragraphs 1 to 4 shall be treated, for the purposes of the legislation determined in accordance with these provisions, as though they were pursuing all their activities as employed or self-employed persons and were receiving all their income in the Member State concerned.*

As can be concluded from Article 13(5) EC Regulation 883/2004, the principle of exclusivity in social security also applies to mobile workers in pluri-activity. I.e. social security contributions must be paid into the social security system of the competent State from the remuneration earned in other States, in accordance with the provisions of the competent State.

If a person is active in different Member States both as a self-employed and as an employed person, the legislation of the State in which his/her employed activity is established takes priority.

Employees in the civil service are always subject to the legislation of their administrative authority, even if they also pursue activities as employed and/or self-employed persons.

In the case of other pluri-active mobile persons, the social security provisions of the country of residence shall be applied if they perform a substantial part of their work there.

Article 14 of the implementing Regulation (EC) 987/2009 defines “substantial” as a share of the working time and/or wages of at least 25%. Where the substantial part of the activity is carried out is determined on the basis of a forecast for the next 12 months.

Article 14 para 8 of the Implementing Regulation (EC) 987/2009:

For the purposes of the application of Article 13(1) and (2) of the basic Regulation, a ‘substantial part of employed or self-employed activity’ pursued in a Member State shall mean a quantitatively substantial part of all the activities of the employed or self-employed person pursued there, without this necessarily being the major part of those activities. To determine whether a substantial part of the activities is pursued in a Member State, the following indicative criteria shall be taken into account:

- a) *in the case of an employed activity, the working time and/or the remuneration; and*
- b) *in the case of a self-employed activity, the turnover, working time, number of services rendered and/or income.*

In the framework of an overall assessment, a share of less than 25 % in respect of the criteria mentioned above shall be an indicator that a substantial part of the activities is not being pursued in the relevant Member State.

Unfortunately, neither Regulation (EC) No 883/2004 nor implementing Regulation (EC) No 987/2009 define what is meant by “usually active in two or more Member States” or how this activity differs from posting. However, this is important because of the different procedures and responsibilities in determining applicable social security law. In the case of posting, the posting employer must apply for the A1 certificate from the responsible social insurance institution of the ordinary state of activity for each foreign assignment. On the other hand, in the case of multiple employment, the mobile worker concerned must inform the competent authority in his/her state of residence and apply for the A1 certificate, which is valid in the longer term.

Article 16 EC-Regulation 987/2009: Procedure for the application of Article 13 of the basic Regulation

A person who pursues activities in two or more Member States shall inform the institution designated by the competent authority of the Member State of residence thereof.

As soon as a certain regularity of foreign assignments emerges due to the nature of the activity, such as one day per month or five days per quarter,²³ multi-employment mobile workers should take precautionary action themselves and contact the competent authority in their state of residence.²⁴

10.5 EXAMPLES: WHICH SOCIAL SECURITY SYSTEM APPLIES TO PEOPLE WHO USUALLY WORK IN TWO OR MORE MEMBER STATES?²⁵

If a person is usually employed in two or more Member States, the first thing to consider is whether he or she exercises a substantial part of his or her activities in the Member State of residence. According to Article 14(8) of implementing Regulation (EC) No 987/2009, an activity is essential if its share of total working time is at least 25%.

If this is not the case, a distinction must be made as to:

- ▶ whether he or she has one or two or multiple employers;
- ▶ whether the registered offices are all in the same state in the case of two or more employers; and
- ▶ whether or not one of the employers is based in the state of residence of the person with multiple employments.

10.5.1 Example of an HGV driver in international road transport

An HGV driver living in Germany travels within all EU Member States for his employer based in Denmark. As long as the HGV driver spends less than 25% of his working time in his State of residence, Germany, he is subject to the Danish social security system because his employer is based in Denmark (Art. 13 para. 1(b)(i) Regulation (EC) No 883/2004). However, as soon as the HGV driver spends 25% or more of his working time in Germany, he must switch to the German social security system (Art. 13 para. 1(a) Regulation (EC) No 883/2004). His employer must then pay the social security contributions to the German social security system in accordance with German regulations.

²³ Definition of the German Liaison Office „Deutsche Verbindungsstelle Krankenkasse Ausland“ (DVKA), which is responsible in Germany for issuing the A1 form due to pluriactivity, see: https://www.dvka.de/de/arbeitgeber_arbeitnehmer/antraege_finden/gewoehnliche_erwerbstaetigkeit_mitgliedstaaten/beschaeftigung_ag_deutschland/beschaeftigung_ag_deutschland.html

²⁴ Addresses of institutions responsible in the different EU-/EFTA-States for issuing the portable document A1: https://europa.eu/youreurope/citizens/work/social-security-forms/contact_points_pd_a1.pdf

²⁵ For the examples see: “Practical Guide: The Legislation that applies to Workers in the European Union (EU), the European Economic Area (EEA) and Switzerland.” Published by the European Commission. December 2013

Since the HGV driver is travelling in all EU Member States, he needs proof of the social security system responsible for him in any case. He receives this A1 form from the responsible social insurance institution of his State of residence, Germany.

10.5.2 Example of a multi-employment worker with only one employer: Frontier worker who regularly works in her “home office” or “telecommuting”

A web designer, who lives in France, and has worked for five years at an advertising agency in Germany. Her employer now offers the chance to work one or two days a week at home in the “home office”. For a 5- day week, one working day equals 20% of her working time.

- ▶ If the web designer decides to work one day a week at home, i.e. in her state of residence, France, then she would not be doing any essential activity in her State of residence. She would continue to be subject to the German social security system, since her employer is based in Germany (Art. 13 para. 1(b)(i) Regulation (EC) No 883/2004).
- ▶ However, if she chooses to work in her home office in France two days a week in the future, she would be spending 40% of her working time or doing a substantial part of her job in her state of residence, France. She would then have to switch to the French social security system (Art. 13 para. 1(a) Regulation (EC) No 883/2004). Her employer would then have to pay the contributions to French social security under the conditions applicable in France (level of contribution rates, etc.).
- ▶ In this case, however, she also has the option of applying for an exemption under Article 16(1) of Regulation (EC) No 883/2004. If the responsible French and German social insurance institutions approve the web designer's application, she will remain insured in Germany, even though she works more than 25% in her state of residence.

Article 16 (1) EC-Regulation 883/2004: Exceptions to Articles 11 to 15

Two or more Member States, the competent authorities of these Member States or the bodies designated by these authorities may by common agreement provide for exceptions to Articles 11 to 15 in the interest of certain persons or categories of persons.

IMPORTANT: Irrespective of whether the web designer chooses a home office for one day or two days a week, she must apply for the A1 form from the responsible social insurance provider of her country of residence in both cases. There are further information on competent social security system in case of telework in the “Guidance Note on telework” of the Administrative Commission for the Coordination of Social Security Systems (Download: <https://ec.europa.eu/social/main.jsp?catId=868&langId=en>; > Official documents > Other official documents).

The tax agreement between Germany and France governs whether the web designer must pay taxes in France and/or Germany. The Franco-German tax agreement also applies to the question of whether her “home office” is regarded as a “permanent establishment” of her German employer and whether she will then be subject to tax in France.

It is also advisable to determine which labour law should apply when agreeing on work in the home office. In any case, the mandatory work regulations of the respective country of activity must be observed.

10.5.3 Example of a multi-employment mobile person with two employers in the same Member State

An engineer lives near the border in Poland and commutes to Germany three days a week to work at a recycling company. One day a week she works for this recycling company from home (in the “home office”) in Poland. One day a week she works at a consulting firm in Germany.

State of residence	Poland	20% of the working time for employer 1, not based in the state of residence
Seat of the employer 1	Germany	60% of the working time
Seat of the employer 2	Germany	20% of the working time
State competent for social security	Germany	80% of the working time

Since the engineer works only one day a week or spends 20% of her working time in her state of residence, Poland, and her two employers are based in Germany, she is subject to the German social security system (Art. 13 para. 1(b)(ii) Regulation (EC) No 883/2004).

10.5.4 Example of a multi-employment mobile person with two employers, one of whom is based in the state of residence

An engineer lives near the border in Poland and commutes to Germany four days a week to work at a recycling company. One day a week she works at a consulting firm in Poland. In her state of residence, Poland, the engineer only performs 20% or no substantial part of her activity. She works for two companies, one of which is based in her Member State of residence and the other is not.

State of residence	Poland	20% of the working time for employer 2, based in the state of residence
Seat of the employer 1	Germany	80% of the working time
Seat of the employer 2	Poland	20% of the working time
State competent for social security	Germany	80% of the working time

In this case, she is subject to the social security system of that other Member State, i.e. the German social security system (Art. 13 para. 1(b)(iii) Regulation (EC) No 883/2004). This provision was inserted by Regulation (EU) No 465/2012 in order to prevent the resumption of an insignificant but more than marginal activity for an employer that has its registered office or place of residence in the Member State of residence from making the legislation of the Member State of residence applicable again, as it were, via the back door.

10.5.5 Example of a multi-employment mobile person with two employers, none of which are based in the state of residence

An engineer lives near the border in Poland and commutes to Germany four days a week to work at a recycling company. One day a week she works at a consulting firm in the Czech Republic.

State of residence	Poland	0% of the working time
Seat of the employer 1	Germany	80% of the working time
Seat of the employer 2	Czech Republic	20% of the working time
State competent for social security	Poland	0% of the working time

Although the engineer works for several employers based in different Member States but not in her state of residence, Poland, she is subject to the Polish social security system (Art. 13 para. 1(b)(iv) Regulation (EC) No 883/2004), since it is not possible to identify a Member State in which her employers have their “registered office or residence” outside the state of residence.

Chapter 11: Seasonal Workers

The characteristic of seasonal work is that this activity is only carried out during certain periods of the year, in particular in the agri-food and tourism sectors. Very often, seasonal workers must move temporarily to another State to carry out such an activity. Seasonal work is thus characterised by fixed-term short-term employment contracts and precarious working and living conditions. This became more widely known with the outbreak of the Covid19 pandemic.²⁶

In July 2020, the EU Commission issued Guidelines in relation to the Covid pandemic outbreak²⁷ on the rights of seasonal workers from the EU and third countries. In these guidelines, the EU Commission also pointed out that national authorities are responsible for ensuring that EU rules are properly transposed into national legislation and must also monitor their proper application.

11.1 THE RIGHT OF SEASONAL WORKERS TO WORK IN A OR ANOTHER EU MEMBER STATE

In accordance with the freedom of movement of workers enshrined in Article 45 TFEU, EU citizens have the right to take up employment, including seasonal employment, in another Member State. They have the right to receive the same assistance from the national employment offices as nationals of the host Member State. Furthermore, seasonal workers affiliated in a Member State have access to the same level of social protection as other insured persons in that Member State. If they are employed in one Member State and sent by their employer, who can also be a temporary work agency, to work in another Member State, they are considered to be posted workers and they benefit from protection under the Directives on posting of workers (Directive 96/71/EC, Directive 2014/67/EU and Directive 2018/957/EU).

Non-EU seasonal workers who reside in a Member State other than the one in which they will be employed or who reside in a non-EU country usually need to apply for a visa, work permit or a residence permit to stay and work in a Member State. Non-EU nationals residing in a third country and coming to the EU as seasonal workers are covered by the Directive 2014/36/EU on the conditions of entry and stay of thirdcountry nationals for the purpose of employment as seasonal workers.

Besides these differences, EU and non-EU seasonal workers have overall the same rights and are covered by the same rules notably in terms of safety and health at work, working conditions or in case they are posted workers.

11.2 SOCIAL SECURITY OF SEASONAL WORKERS

The rules of EC Regulation 883/2004 on social security also apply to seasonal workers, i.e.

- ▶ Principle of exclusivity (Art.11, para 1 EC-R. 883/2004) and
- ▶ Principle of the State of activity (Art.11, para 3 litt a) EC-R. 883/2004).

²⁶ See: ETUC Briefing Note „Seasonal Workers”: https://www.etuc.org/sites/default/files/publication/file/2020-06/Covid-19%20Briefing%20Seasonal%20Workers%20Final_updated%2012%20June%202020.pdf

²⁷ See: Communication from the Commission: “Guidelines on seasonal workers in the EU in the context of the COVID-19 outbreak (2020/C2351/01)”. Download: [https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:52020XC0717\(04\);](https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:52020XC0717(04);) ETUC Comments on the Commission Guidelines on Seasonal Workers (08.09.2020): <https://www.etuc.org/en/document/etuc-comments-commission-guidelines-seasonal-workers>

Exceptions to the principle of the State of activity are

- ▶ Cases where workers are posted by the employer to perform seasonal work on its behalf (Art.12 EC-R. 883/2004), or
- ▶ Seasonal workers pursuing activities in two or more Member States (Art.13 EC-R. 883/2004).

As a result of the affiliation to the social security system of the competent Member State, seasonal workers should have access to social protection at the same level as for other insured persons in that Member State. This affiliation normally consists of both obligations, such as the payment of social security contributions, and the receipt of immediate rights and benefits, such as health care, family benefits and unemployment benefits. Moreover, the social security system where the person is insured for at least one year shall also provide future pensions when the national entitlement conditions are met (see section 5.5.4 of this Guide).

As for all workers exercising their right to free movement, seasonal workers who are insured in a Member State which is different from the one where the activity is carried out must be in possession of a Portable Document (PD) A1.²⁸ This certificate concerns the social security legislation which applies to the worker and confirms that he/she has no obligations to pay contributions in another Member State.

Third-country nationals who reside outside the Union and are admitted to the territory of a Member State for the purpose of employment as seasonal workers are also entitled to equal treatment with nationals of the host Member State with regard to the branches of social security, as defined in Article 3 of Regulation (EC) 883/2004; however some restrictions may apply.²⁹

11.3 EXAMPLES OF WHICH RULES APPLY TO SEASONAL WORKERS³⁰

11.3.1 Seasonal workers employed in only one Member State

An unemployed Slovak woman finds a job as a seasonal worker for fruit harvesting in Vienna (Austria). She makes use of her right to freedom of movement, but returns once a week, during her periods off work, to Bratislava (Slovakia) to stay with her family. She thus fulfils the requirement of a genuine frontier worker.

State of residence	Slovakia
State of seasonal employment	Austria
State where the employer is situated	Austria
State whose labour law applies	Austria
State whose labour law and occupational safety and health laws apply	Austria
State in which the social security contributions are to be paid	Austria
State which provides social benefits	Austria; with the exception of unemployment benefits. According to Art.65 EC-Regulation 883/2004, the State of residence of the frontier worker is responsible

28 Addresses of institutions responsible in the different EU-/EFTA-States for issuing the portable document A1: https://europa.eu/youreurope/citizens/work/social-security-forms/contact_points_pd_a1.pdf

29 Due to the temporary nature of the stay of seasonal workers, Member States should be able to exclude family benefits and unemployment benefits from equal treatment between such non EU seasonal workers and their own nationals, as well as tax benefits. In relation to third country nationals, it is recalled that according to Regulation (EU) 1231/2010 they enjoy the same rights as EU seasonal workers. See Article 23 of Directive 2014/36/EU on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers

30 For the examples, see also: Guidelines of the Commission on seasonal workers in the EU, September 2020. Download: <https://ec.europa.eu/social/BlobServlet?docId=23003&langId=en>

In this example, the seasonal worker has no employment other than the seasonal work. She is not employed in the Member State of residence (Slovakia), and thus is insured in the Member State of employment (Austria) in accordance with the general principle of social security coordination.

As regards healthcare benefits, the frontier worker is entitled to medical treatment in Austria as well as in Slovakia. The right to sickness benefits in kind in Slovakia is certified by the Portable document S1 (PD S1), which is issued upon request by the Austrian health insurance institution and has to be submitted to the health insurance institution in Slovakia. Sickness benefits in kind are granted in line with the Slovak legislation. The cost of healthcare provided in Slovakia is then reimbursed by the Austrian healthcare institution in accordance with the rates applied in Slovakia. She is also entitled to medical treatment in Austria as though she resides there. In this case, the medical treatment is provided in line with the Austrian legislation and at the expense of the Austrian healthcare institution.

If the seasonal frontier worker becomes unemployed again after the seasonal work in Austria, she must register as a jobseeker in her country of residence, Slovakia (see section 5.5.5 and 8.2.4 of this Guide).

She has the right to take up employment under the same conditions and with the same priority as nationals in Austria. Once in employment, she is subject to the laws and collective agreements of Austria and must be treated like nationals as regards working conditions including remuneration and dismissal. She has also the right to access the same social and tax advantages as nationals.

Furthermore, she has the right to be assisted by the national bodies for free movement of workers; to go to court in case of discrimination by reason of nationality, to be supported by trade unions and other entities in any judicial and/or administrative procedure as well as to be protected against victimisation.

Moreover, the employer of the seasonal worker has the obligation to ensure her health and safety in all the aspects related to work. This includes the prevention of all occupational risks and the provision of information and training adapted to the work, as well as the provision of the necessary equipment. A prior assessment of all possible occupational risks should be made by the employer. In addition to the physical risks linked to fruit picking (working at height, use of ladders, use of scissors, high temperatures, etc.), this must include any relevant information for instance on the risk of infections (e.g. COVID-19). If the seasonal worker does not speak German, the employer should ensure that she receives the safety instructions relevant for her jobs in a language known to her. The employer should also be alert to the need to adjust these measures to take account of changing circumstances and should aim to improve the existing situation.

11.3.2 Seasonal worker temporarily posted by his/her employer in another Member State

A company based in Spain offers diving lessons and further has a school in Portugal. This company sends one of its workers to Portugal in the summer to work as a diving instructor. The Spanish employer maintains a direct relationship to the posted worker, continues paying his salary, and at the end of the summer, the posted worker returns and continues his activity in Spain. The posted worker receives a PD A1 from the Spanish institution.

State of residence	Spain
State of normal employment	Spain
State of seasonal employment	Portugal
State where the employer is situated	Spain
State whose labour law applies	Spain
State whose core labour rights applies	Portugal
State whose labour law and occupational safety and health laws apply	Portugal
State in which the social security contributions are to be paid	Spain
State which provides social benefits	Spain; including unemployment benefits

In this example, the seasonal worker is considered as a posted person, and continues to be insured in Spain, which is the Member State where he is insured before and after the period of seasonal employment in Portugal.

As regards healthcare benefits, the seasonal worker staying in Portugal only temporarily is entitled to use his/her valid European Health Insurance Card (EHIC), issued by the Spanish healthcare institution, in case of necessary treatment. To determine whether a treatment is necessary, the nature of the benefit in kind and the length of the planned stay must be taken into account. The necessary treatment is provided in line with the Portuguese legislation. At the same time, the principle of non-discrimination covered by Regulation (EC) No 883/2004 must be respected. This means that if nationals pay, persons seeking treatment with the EHIC will have to pay too; if nationals receive a reimbursement, persons using the EHIC can be reimbursed according to the same tariffs. The reimbursement can be claimed either in Portugal or in Spain upon his/her return.

As a posted worker, he is still employed by the Spanish sending company and subject to the law of Spain, he is entitled to a set of core labour rights according to laws or applicable collective agreements in Portugal. Particularly, he has the right to receive the same remuneration (including all mandatory constituent elements) he would receive if he had been directly employed by the user undertaking in Portugal. He also has the right to the same minimum rest times, maximum working time rules and minimum paid annual holidays and all the Portuguese health, safety and hygiene at work provisions apply to him.

Moreover, his employer has the obligation to ensure his/her health and safety in all the aspects related to work. This includes the prevention of all occupational risks and the provision of information and training adapted to the work, as well as the provision of the necessary equipment. A prior assessment of all possible occupational risks should be made by the employer. In addition to the physical risks linked to diving (e.g. decompression sickness), this must include any relevant information such as the risk of infections (e.g. COVID-19) or risks linked to equipment failure.

Such information must be provided in a language known to the posted seasonal worker. The employer should also be alert to the need to adjust these measures to take account of changing circumstances and should aim to improve the existing situation.

11.3.3 Seasonal worker employed in two States

For several years, the executive assistant of a French-based company has been taking a 2-month sabbatical in July and August to then work on a Dutch organic farm, harvesting vegetables. Her activity in the Netherlands is independent of the activity in France, and the activities are carried out in alternation i.e. 10 months per year in France and 2 months per year in the Netherlands.

State of residence	France
State of employment	France (>80%) + Netherlands (<20%)
State where the employer is situated	France (>80%) + Netherlands (<20%)
State whose labour law applies	France + Netherlands; depending on the place of work
State whose labour law and occupational safety and health laws apply	France + Netherlands; depending on the place of work
State in which the social security contributions are to be paid	France
State which provides social benefits	France; including unemployment benefits

This seasonal worker is considered as a worker who pursues an activity in two or more Member States. Her activity in France is considered a substantial activity as it exceeds the limit of at least 25% of the total working time with more than 80%. Therefore, her seasonal summer activity in the Netherlands must also be insured in France.

As regards healthcare benefits, the French seasonal worker is entitled to receive healthcare treatment that becomes necessary during her stay in the Netherlands based on the EHIC issued by the French health insurance institution. To determine whether a treatment is necessary, the nature of the benefit in kind and the length of the planned stay must be taken into account. The necessary treatment is provided in line with the Dutch legislation and the principle of equal treatment of persons covered by the Regulation must be respected. This means that if nationals pay, she will have to pay too; if they receive a reimbursement, she can be reimbursed too. The French seasonal worker can claim for reimbursement either in the Netherlands or in France on her return. As regards any other (non-urgent) healthcare treatment, she must wait until her return to France.

She has the right to take up employment under the same conditions and with the same priority as nationals in the Netherlands. Once in employment, she is subject to the laws and collective agreements of Netherlands and must be treated like nationals as regards working conditions including remuneration and dismissal.

The organic farm employer must carefully assess all possible risks associated with the work. For example, in addition to the physical risks associated with vegetable harvesting (e.g. high temperatures or accidents), there may be other possible risks. Following the risk assessment, specific preventive and protective measures must be taken and the employer must provide her with the relevant information in a language she understands.

11.3.4 Another example of a seasonal worker who works in two states

EA waitress works 6 days per month in Poland, which is about 20% of the working time during the whole year. During the holiday seasons, she has seasonal employment in a hotel in Germany. At the end of the holiday session, she returns to her part-time job in Poland.

State of residence	Poland
State of employment	Poland (20%) + Germany (80%)
State where the employer is situated	Poland (20%) + Germany (80%)
State whose labour law applies	Poland + Germany; depending on the place of work
State whose labour law and occupational safety and health laws apply	Poland + Germany; depending on the place of work
State in which the social security contributions are to be paid	Germany
State which provides social benefits	Germany; in case of full unemployment Germany and/or Poland according to Art.65 and Art.64 EC-R. 883/2004 – see section 5.5.5 of this Guide

As in the previous example, she works in two Member States. However, since the activity in her country of residence, Poland, is below the 25% limit with approx. 20% of the working time, she is insured in Germany. She is therefore also entitled to health services there. Upon her return to Poland, she can register the PD S1 issued by the German healthcare institution in Poland, and thus benefit from healthcare treatment as though she was insured in Poland. In this case, sickness benefits in kind are granted in line with the Polish legislation. The cost of healthcare provided in Poland is reimbursed by the German healthcare institution in accordance with the rates applied in Poland.

The Polish seasonal worker has the right to take up employment under the same conditions and with the same priority as nationals in Germany. Once in employment, she is subject to the laws and collective agreements of Germany and must be treated like nationals as regards working conditions including remuneration and dismissal.

The seasonal employer must carefully assess all possible risks linked to her work. Thus, she is exposed to a variety of risks of different kinds in her work as a waitress, e.g. slips and trips, burns or exposure hazardous substances. Psychosocial risks, such as stress or other risks related to the interaction with some clients may also arise in the hospitality sector. Employers can perform the compulsory risk assessment themselves, using online tools such as OiRA³¹, or can ask an external prevention service to take care of it. Further to the risks assessment, specific preventive and protective measures must be implemented, and the employer must provide the Polish seasonal worker with the relevant understandable information in this respect.

11.3.5 Non-EU seasonal worker residing in a third country employed in one Member State

A Moroccan national (Non-EU/third-country national) finds a seasonal job in France in the agricultural industry (fruit picking) for 6 months. She applies for and is granted a seasonal worker permit under the Seasonal Workers Directive by France. To work there as a seasonal worker, she temporarily moves to France.

State of residence	Morocco
State of employment	France
State where the employer is situated	France
State whose labour law applies	France
State whose labour law and occupational safety and health laws apply	France
State in which the social security contributions are to be paid	France
State which provides social benefits	France

In line with the equal treatment provisions of the Directive 2014/36/EU (Article 23), the Moroccan seasonal worker is subject to the laws and collective agreements of France and must be treated like nationals as regards working conditions including remuneration and dismissal. She has also the right to access benefits offered by French legislation on sickness benefits, invalidity benefits and accidents at work as well as tax benefits offered to nationals; however, Member States may apply limited restrictions to equal treatment, e.g. by excluding family benefits and unemployment benefits. – However, France did not transpose the possible restrictions to equal treatment provided for in Article 23(2) of Directive 2014/36/EU.

As in previous examples, the French employer has the obligation to ensure the seasonal worker's health and safety in all the aspects related to work. This includes the prevention of all occupational risks and the provision of information and training adapted to the work, as well as provision of the necessary equipment.

Furthermore, she has notably the following rights:

- ▶ access to mechanisms to lodge complaints against her employer directly or through a third party, protection against dismissal as a reaction to her complaint in the same way as national workers (Art.25 Directive 2014/36/EU),
- ▶ receiving information in writing about her rights and obligations (Art.11 Directive 2014/36/EU),
- ▶ equal treatment with national workers in terms of access to advice services on seasonal work afforded by employment offices (Art.23 Directive 2014/36/EU).

Chapter 12

Pensioners abroad

12.1 WHO COUNTS AS A “PENSIONER ABROAD“?

The chapter entitled “The pensioner abroad” deals with pensioners who, for example, draw a German pension and move to Spain (mobile pensioners). The pension may be a retirement pension, survivor’s pension or disability pension.

It also deals, however, with a seasonal worker who has worked in Poland, Ireland and France and receives an Irish, Polish and French pension.

Or a former Belgian frontier worker who gets a Belgian and a Dutch pension.

12.2 SPECIAL PROVISIONS FOR PENSIONERS IN SOCIAL SECURITY

The social security obligation is subject to the principle of exclusivity. This means that the worker, pensioner, etc. can be subject to the legislation of only one Member State. Under Article 13(3)(e) of Regulation (EC) 883/2004, a pensioner is in principle registered with social security in the country of residence (*lex loci domicilii*).

12.2.1 The right to benefits in kind in the State of residence

Article 23 of Regulation (EC) 883/2004: Right to benefits in kind under the legislation of the Member State of residence

A person who receives a pension or pensions under the legislation of two or more Member States, of which one is the Member State of residence, and who is entitled to benefits in kind under the legislation of that Member State, shall, with the members of his family, receive such benefits in kind from and at the expense of the institution of the place of residence, as though he were a pensioner whose pension was payable solely under the legislation of that Member State.

Example

- ▶ A pensioner with a German and French pension lives in Germany. Under Article 23 of Regulation (EC) 883/2004, this “double pensioner” is covered by healthcare and nursing insurance in Germany. The “double pensioner” is entitled to German benefits in cash and in kind. Under Article 30 of Regulation (EC) 987/2009, he/she pays the contribution on his/her total income (German and French pensions) to the German healthcare and nursing insurance scheme.

Article 30 of Regulation (EC) no. 987/2009: Contributions by pensioners

If a person receives a pension from more than one Member State, the amount of contributions deducted from all the pensions paid shall under no circumstances be greater than the amount deducted in respect of a person who receives the same amount of pension from the competent Member State.

12.2.2 No right to benefits in kind in the State of residence**Article 24 of Regulation (EC) 883/2004: No right to benefits in kind under the legislation of the Member State of residence**

1) *A person who receives a pension or pensions under the legislation of one or more Member States and who is not entitled to benefits in kind under the legislation of the Member State of residence shall nevertheless receive such benefits for himself and the members of his family, insofar as he would be entitled thereto under the legislation of the Member State or of at least one of the Member States competent in respect of his pensions, if he resided in that Member State.*

Example

- ▶ A pensioner with a German pension lives in Spain. He/she has no Spanish pension. Under Article 24 of Regulation (EC) 883/2004, this pensioner is entitled to Spanish benefits in kind and to German benefits in cash. Article 34 of Regulation (EC) no. 883/2004 is applied in case of overlapping benefits in the event of need for care.

This “single pensioner” pays health insurance contributions through his pension in Germany (Article 30 of Regulation (EC) 883/2004 is applied).

Article 30 Regulation (EC) 883/2004: Contributions by pensioners

1) *The institution of a Member State which is responsible under the legislation it applies for making deductions in respect of contributions for sickness, maternity and equivalent paternity benefits, may request and recover such deductions, calculated in accordance with the legislation it applies, only to the extent that the cost of the benefits under Articles 23 to 26 is to be borne by an institution of the said Member State.*

A pensioner is also entitled to benefits in kind during his stay in the competent Member State without prior authorisation (Regulation (EC) 883/2004, Article 27: *Stay of the pensioner or the members of his family in a Member State other than the Member State in which they reside – stay in the competent Member State*), provided that this Member State has opted for this and is listed in Annex IV of Regulation (EC) 883/2004 (*More rights for pensioners returning to the competent Member State*).

Examples

- ▶ A “single pensioner” – with a German pension – residing in Spain may claim German benefits in kind without authorisation. Germany is listed in Annex IV.
- ▶ A “single pensioner” – with a Finnish pension – residing in Spain may not claim Finnish benefits in kind in Finland without authorisation. Finland is not listed in Annex IV of Regulation (EC) 883/2004.

Article 28 of Regulation (EC) no. 883/2004 (*Special rules for retired frontier workers*; see section 12.2.4 of this Guide) applies to former frontier workers.

12.2.3 Stay of pensioners in the competent Member State

Under Article 27 of Regulation (EC) 883/2004, a retired frontier worker who receives a retirement pension only from the competent Member State (the former Member State of employment) is entitled without prior authorisation to benefits in kind in the competent Member State if the Member State has opted for this and is listed in Annex IV.

Examples

- ▶ A pensioner with a German pension lives in France. He/she pays contributions to the German health and long-term care insurance system in Germany. This pensioner is entitled to French benefits in kind and German cash benefits (care allowance). When staying in the competent Member State (Germany), he/she is entitled to all German benefits in kind because Germany is listed in Annex IV.
- ▶ A pensioner with a Danish pension lives in Germany. He/she pays no contributions for health insurance in Denmark, because the Danish social security system is financed through taxes. This pensioner is entitled to German benefits in kind. He/she pays no contributions to the statutory health insurance scheme in Germany but may take out supplementary health insurance on a voluntary basis. Denmark refunds the costs of the benefits in kind received in Germany. When staying in the competent State (Denmark) he/she is not entitled to Danish benefits in kind without the prior authorisation of the Danish health insurance fund, because Denmark is not listed in Annex IV (Regulation (EC) no. 883/2004, Article 19).

12.2.4 Special rules for retired frontier workers

Article 28 of Regulation (EC) no. 883/2004: Special rules for retired frontier workers

- 1) *A frontier worker who retires is entitled in case of sickness to continue to receive benefits in kind in the Member State where he last pursued his activity as an employed or self-employed person, insofar as this is a continuation of treatment which began in that Member State. The term "continuation of treatment" means the continued investigation, diagnosis and treatment of an illness.*
- 2) *A pensioner who, in the five years preceding the effective date of an old-age or invalidity pension has been pursuing an activity as an employed or self-employed person for at least two years as a frontier worker shall be entitled to benefits in kind in the Member State in which he pursued such an activity as a frontier worker, if this Member State and the Member State in which the competent institution responsible for the costs of the benefits in kind provided to the pensioner in his Member State of residence is situated have opted for this and are both listed in Annex V.*

Examples

- ▶ A frontier worker lives in France and works in Germany for ten years. Prior to this he had spent five years working in France. He becomes incapacitated for work and (following a review by the French and German social security institutions) is deemed to be entitled to a German and a French disability pension (pro rata). He is also entitled to both French and German sickness benefits in kind, because both France and Germany are listed in Annex V.
- ▶ A frontier worker lives in the Netherlands and works in Germany for ten years. Prior to this she had spent five years working in the Netherlands. She becomes incapacitated for work and (following a review by the Dutch and German social security institutions) is deemed to be entitled to a German and a Dutch pension on the grounds of reduced earning capacity (pro rata). She is not entitled to German healthcare benefits in kind because Germany is listed in Annex V but the Netherlands is not.

12.2.5 Overlapping of long-term care benefits

If a pensioner receives a foreign cash benefit in case of need of long-term care and at the same time a benefit in kind provided for the same purpose by the institution of the State of residence, the foreign cash benefit is reduced by the amount of the benefit in kind of the State of residence (*according to Art 34 EC Regulation 883/2004 overlapping of cash and non-cash benefits in case of need of long-term care*).

12.2.6 Special notes on German long-term care insurance

Long-term care insurance was introduced in Germany in 1995 as an independent branch of social security and is therefore its “fifth pillar”. German long-term care insurance serves to protect the risk of becoming in need of care and is mandatory for all legally and privately insured persons. All those who have statutory health insurance are automatically covered by the statutory long-term care insurance. Those with private health insurance must take out private long-term care insurance.

People who are expected to be so impaired in their independent lifestyle or skills for at least six months are deemed to need nursing support. The care fund only grants care services on request. The specific amount of benefits depends on the severity of the need for care. To determine this level of care, an expert from the Health Insurance Medical Service (MDK) visits the patient at home and assesses the need for help. This assessment may be carried out abroad by a contracting partner of the MDK. Based on the expert report, the long-term care insurance determines the level of care.

Long-term care insurance provides both services in kind and cash benefits. The domestic care assistance is to be understood as service in kind, which is provided by a contracting partner of the care fund (e.g. outpatient care service). Those in need of care who want to ensure their need for help themselves in a suitable manner and suitable environment (e.g. through relatives, neighbours or other volunteers) can receive a monthly care allowance instead of domestic care assistance. The amount of this cash benefit depends on the level of the need for care.

The European Court of Justice (ECJ) ruled in the Molenaar case³² that German statutory long-term care insurance falls within the scope of the European Regulation on the coordination of social security systems and that the care allowance constitutes a cash benefit. The responsible insurance provider must provide cash benefits in accordance with the coordination rules even if the insured person lives abroad. Mobile workers are therefore basically entitled to the German care allowance. On the other hand, the institution of the country of residence must grant benefits in kind according to its provisions.

IMPORTANT: A prerequisite for entitlement to a care allowance is that the person concerned continues to be legally insured for health and long-term nursing care in Germany. However, if they also draw a pension from a foreign state of residence, they must switch to the health insurance there (Art. 11 para. 3e Regulation (EC) No 883/2004). Mobile employees should therefore seek advice in good time in order to safeguard their rights!

³² see judgement of the European Court of Justice (ECJ) in Case C-160/96 “Manfred Molenaar & Barbara Fath-Molenaar v AOK Baden-Württemberg” of 5 March 1998

12.3 SUPPLEMENTARY PENSION RIGHTS

Directive 98/49/EC “on safeguarding the supplementary pension rights of employed and self-employed persons moving within the European Community” was a first step towards removing obstacles to free movement with regard to supplementary pension benefits. The most important provisions can be summarised as follows:

- ▶ The acquired pension rights of a person who leaves a scheme because he or she moves to another EU Member State must be preserved to the same extent as the rights of a person who remains in the same EU Member State.
- ▶ The beneficiaries of a supplementary pension scheme are entitled to have their pensions paid in another EU Member State.

Directive 2014/50/EU on “minimum requirements for enhancing worker mobility between Member States by improving the acquisition and preservation of supplementary pension rights” had to be transposed by Member States into national law by 21.05.2018. It establishes the following minimum rules to safeguard the pension rights of mobile workers:

1. Acquisition

- ▶ The time spent in an employment relationship before pension rights are treated as irrevocably acquired (“vested”) shall not exceed three years.
- ▶ An employee’s own contributions cannot be lost. The contributions made by a worker who leaves a pension insurance scheme before he/she has accrued vested rights must therefore be reimbursed.
- ▶ If a minimum age for the acquisition of vested pension rights is specified, it must not exceed 21 years.

2. Preservation

- ▶ When a worker leaves a pension insurance scheme, he/she has a right to leave his/her vested pension rights in the scheme, provided that he/she does not agree to a capital payment.
- ▶ Preservation of the rights of outgoing workers must be appropriate by comparison with preservation of the rights of workers who are still active. The method of preserving rights may vary from system to system. For example, the value of the accrued pension rights may be adjusted in accordance with the inflation rate or salary levels (especially in defined benefit schemes) or in line with return on investments derived by the supplementary pension scheme (especially in defined contribution schemes).

3. Information

- ▶ Workers are entitled to know what effect any mobility would have on their pension and annuity rights.
- ▶ Where survivor's benefits are attached to schemes, surviving beneficiaries should also have the same right to information as deferred beneficiaries.

The directive applies to workers who move between EU countries. However, the Member States can extend the rules to workers who change employment within a single Member State.

The directive does not apply to the transferability of supplementary pension rights – that is, opportunities for transferring acquired pension rights to a new system in the context of worker mobility.

12.4 TAXATION OF PENSIONERS ABROAD

Pensioners who receive a foreign disability or old-age pension must pay tax on these pensions in their country of residence according to Article 18 of the OECD Model Tax Convention. However, some bilateral tax treaties provide for taxation by the source or cashing state.

Civil servants' pensions are taxed by the source or fund state according to Article 19 of the OECD Model Convention.

Occupational pensions (supplementary pensions) etc. are mostly taxed in the state of residence.

In any case, it is advisable to check the respective double taxation agreements with regard to the taxation of the various pensions. There it is also specified which method is used to avoid double taxation (exemption method or credit method; see section 7.3 of this Guide).

PART III: **Sources of Information**



Part III: Sources of Information

Website of the European Union: https://european-union.europa.eu/index_en

Treaties of the European Union: <https://eur-lex.europa.eu/collection/eu-law/treaties/treaties-force.html>

Legal Sources:

EU law and EU jurisprudence: <https://eur-lex.europa.eu/homepage.html>

Court of Justice of the European Union: <https://curia.europa.eu/>

Summaries of EU legislation on employment and social policy:

<https://eur-lex.europa.eu/content/summaries/summary-17-expanded-content.html>

Labour Law Research Network: <http://www.labourlawresearch.net/>

European Labour Authority (ELA):

<https://www.ela.europa.eu/en>

EURES-Portal: https://ec.europa.eu/eures/public/index_en

Launched in 1994, EURES is a European cooperation network of employment services, designed to facilitate the free movement of workers. The network has always worked hard to ensure that European citizens can benefit from the same opportunities, despite language barriers, cultural differences, bureaucratic challenges, diverse employment laws and a lack of recognition of educational certificates across Europe.

Residence Law:

https://europa.eu/youreurope/citizens/residence/residence-rights/index_en.htm

Professional qualifications, education and training:

https://europa.eu/youreurope/citizens/work/professional-qualifications//index_en.htm

<https://europa.eu/europass/en>

Live, work, study in the European Union:

https://european-union.europa.eu/live-work-study_en

https://european-union.europa.eu/live-work-study/working-eu_en

https://ec.europa.eu/eures/public/living-and-working_en

<https://ec.europa.eu/social/main.jsp?langId=en&catId=1172>

https://europa.eu/youreurope/citizens/work/index_en.htm

https://europa.eu/youreurope/citizens/work/work-abroad/index_en.htm

Information on the Social Security Systems in the European Union:

Regulation (EC) 883/2004 on the coordination of social security systems:

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02004R0883-20190731>

Regulation (EC) 987/2009 laying down the procedure for implementing Regulation (EC) 883/2004:

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02009R0987-20180101>

<https://www.missoc.org/>

MISSOC, the 'Mutual Information System on Social Protection', was established in 1990 to promote a continuous exchange of information on social protection among the EU Member States. The database includes information on social protection systems and their organisation in the 27 Member states of the European Union, the three countries of the European Economic Area – Iceland, Liechtenstein, and Norway – as well as the UK (up to 1st July 2019) and Switzerland. It also contains a section dedicated to the social protection of the self-employed.

<https://ec.europa.eu/social/main.jsp?catId=1098>

MoveS is a network of independent experts in the field of intra-EU mobility. MoveS stands for Free Movement of Workers and Social Security Coordination. The network is funded by the European Commission. It covers the 27 EU countries, as well as Iceland, Liechtenstein, Norway, and Switzerland.

<https://ec.europa.eu/solvit/> or https://ec.europa.eu/solvit/index_en.htm

SOLVIT is a service provided by the national administration in each EU country and in Iceland, Liechtenstein, and Norway. SOLVIT is free of charge and can help you when:

- ▶ your EU rights as a citizen or as a business are breached by public authorities in another EU country and
- ▶ you have not (yet) taken your case to court (although we can help if you've just made an administrative appeal).

Taxes in Europe

https://taxation-customs.ec.europa.eu/treaties-avoidance-double-taxation-concluded-member-states_en

OECD-Model Tax Convention on Income and on Capital: Condensed Version 2017

<https://www.oecd.org/ctp/treaties/model-tax-convention-on-income-and-on-capital-condensed-version-20745419.htm>

