

# GUIDE FOR MOBILE EUROPEAN WORKERS





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# INTRODUCTION

**T**he principle of the free movement of persons applies in the European Union and the European Economic Area. For the European worker, this means that he has the right to move to another Member State to work or to look for a job. In doing so, he can expect greater freedom of movement and better protection than other workers who are not European citizens.

Nonetheless, mobile workers run into a very complex legal framework. The European legislation and regulations are, despite their size, relatively modest in their intentions. The often very different national laws and regulations in Member States remain to a great extent in place. The sole aim on the European level is to establish a number of basic rights, and to coordinate the different legislative frameworks in a number of areas. There is no intention to harmonise and/or standardise national legislations.

The practical effect for the mobile worker is that his rights and obligations are not solely guaranteed by European legislation and regulation. They continue to be determined also by national legislation in his country or countries of residence and of work. In one area which is important for mobile workers, the European dimension has little impact: taxation. As yet there is a complete lack of European coordination. So the hundreds of bilateral taxation treaties designed to prevent double taxation and mutually agreed between Member States remain in full force.

The European Trade Union Confederation (ETUC) represents the interests of workers at European level with a strong social dimension that puts the interests and the well-being of working people in the foreground, promotes social justice, and fights against exclusion and discrimination. The regional trade union organisations in many border regions of Europe have joined together in Inter-Regional Trade Union Councils (IRTUCs), to support the local, often cross-border mobile workers in defending and pursuing their social and economic interests.

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

Part I of this publication explains a number of European treaties, regulations and directives. We also consider the underlying principles of the OECD model treaty to prevent double taxation, on which almost all bilateral double taxation treaties are based. The application of all this in practical cross-border employment situations is discussed in greater detail in Part II (Chapters 8 to 13).





# PART I

## LEGAL BASES OF THE RIGHT OF FREE MOVEMENT FOR WORKERS IN EUROPE



The principle of the free movement of persons applies within the European Union and the European Economic Area. For the European worker, this means that he has the right to move to another State to work or to look for a job.

The legal basis of the free movement for workers is Article 45 of the Treaty on the Functioning of the European Union (TFEU)<sup>1</sup>. The 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 because of nationality, whereby a migrant worker must be treated in the same way as nationals as regards in particular 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 directives<sup>2</sup> in which Community law defines certain rules and principles to guarantee that the application of the different national systems does not harm persons who exercise their right to free movement.

EU law therefore does not aim to harmonise and/or render uniform the different national systems, but only to coordinate national legislations. The practical effect for the mobile worker is that his rights and obligations are guaranteed chiefly thanks to EU law but continue to be determined by the national legislation of his country or countries of employment and/or residence.

## The EU Treaty

The EU Treaty sets out a number of fundamental rights for European citizens. The Treaty on the Functioning of the European Union (TFEU) has been in force since 1 December 2009.

For cross-border and migrant workers the most important articles in the Treaty are:

### **Article 18, TFEU (ex Article 12, TEC)**

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

<sup>1</sup> The TFEU has been in force since 1 December 2009. This regulation on the freedom of movement of workers was up to 30 November 2009, after the Maastricht Treaty, governed by Article 39 of the Treaty Establishing the European Community (EC Treaty); and up to 30 October 1993, by Article 48 of the EC Treaty.

<sup>2</sup> Regulation (EEC) No. 1612/68 of the Council of 15 October 1968 on the freedom of movement for workers within the Community; 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;

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.

### **Article 20 TFEU (ex Article 17, TEC)**

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 (ex Article 18, TEC)**

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 (ex Article 39 TEC)**

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 (ex Article 40 TEC)**

- 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 (ex Article 42 TEC)**

*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 EU Treaty are developed in particular in Regulation (EEC) n° 1612/68 of the Council of 15 October on freedom of movement for workers within the Community, in Regulation no. 883/2004 on the coordination of social security systems, and Regulation no. 987/2009 laying down the procedure for implementing Regulation (EC) no. 883/2004 on the coordination of social security systems, in the directives on the right of residence, etc.

Article 293 of the EC Treaty 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 taken over in the TEU or TFEU. However, the provision in Article 4, paragraph 3 TEU contains a general provision to the effect that the Member States shall facilitate the achievement of the Union's task and refrain from any measure which could jeopardise the attainment of the Union's objectives.

## **2 Regulation (EEC) 1612/68 on the free movement for workers**

### **2.1 The right of EEA citizens to take up employment**

European Regulation 1612/68, 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 12 and 39, paragraph 2 of the EEC Treaty. As a condition for the application of Regulation 1612/68, the worker

must be a citizen of one of the Member States of the European Economic Area (EEA = the Member States of the European Union plus Liechtenstein, Norway and Iceland). A supplementary agreement has been concluded with Switzerland.

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 the public sector, but its scope is limited. This only concerns government services, such as the police or the judiciary, “whether or not directly participating in the exercise of public authority and those functions extending to the protection of the general interests of the state or other public bodies.”

The European Regulation 1612/68 guarantees the equal treatment of EEA 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 Regulation 1612/68 is of particular importance. This article governs non-discrimination 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.

#### **Article 7 of Regulation 1612/68:**

*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 finance for children, redundancy payments or dismissal, non-contributory continuation of company pensions in the event of unemployment, tax credits, maternity allowances (birth grant), access to collective private health insurance, tax rebates, etc.

Social benefits must not be confused with statutory social security payments. The coordination of statutory social security is governed by Regulation 1408/71 (see Chapter 3).

#### **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” (under Article 7, paragraph 2 of Regulation 1612/68).

- 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 is self-employed in Belgium, there is no entitlement to maternity allowances, because Article 7, paragraph 2 of Regulation 1612/68 only applies to employees and not to the self-employed (Leclere judgement C-43/99).
- 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 in employment, to claim a supplementary Dutch student grant (Roulin judgement C-57/87).

**Another type of example (Article 7, paragraph 4 of Regulation 1612/68):**

- A Greek doctor goes to work in Germany, after working in a comparable post in Greece. Under the German collective labour agreement, employees, including doctors, are entitled to promotion to a higher salary scale after a number of years’ service in German hospitals. The Court of Justice found that the (comparable) years of service in Greece must be counted and treated equally with years of service in Germany (Schöning-Kougebetopoulou judgement C-15/96).

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

**Article 8 of Regulation 1612/68:**

*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; 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 provisions 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.*

## **2.2 The right of non-EEA citizens (third country nationals) to take up employment**

Employed persons who are nationals of one of the Member States of the EEA (and Switzerland) have an automatic right to work in another Member State. Employed persons who are not citizens of a Member State (or Switzerland) – “third country nationals” – do not have the right to go and work in another Member State. They need a work permit. In the event that an EEA worker is married to a non-EEA citizen (third country national) “and” goes to live and work in another member State, the spouse also has the right to take up paid employment in the host country (State of residence).

Until recently, his/her right to take up employment in the State of residence was guaranteed by Article 11 of Regulation 1612/68. Now they are assured by Article 23 of the new Residence Directive 2004/38/EC. Articles 10 and 11 of Regulation 1612/68 were abolished when said new Residence Directive 2004/38/EC was introduced.

**Article 23 of Directive 2004/38/EC**

*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. He is married to an Argentinean woman. Both spouses are automatically entitled to reside and take up employment in Finland – under Article 1 of Regulation 1612/68 for the EU citizen, and under Article 23 of Directive 2004/38/EC for his spouse. Therefore, no work permit is necessary for the non-EEA citizen.
- A Croatian nurse living in Croatia – a country which has not yet joined the European Union – does not automatically have the right to work in Austria. A work permit is necessary for this. Even if the Croatian nurse is married to a German man, who is working as a cross-border worker in Austria but living in Croatia, she is not allowed to work in Austria. If the couple moves to Austria, there is no need for a work permit any more.
- A construction company based in Hungary employs Ukrainian workers on a permanent basis and temporarily posts them in France. The company is not obliged to apply for a work permit from the French authorities, on the grounds of Articles 56 and 57 of the TFEU (ex Articles 49 and 50 TEC, free movement of services); (Vander Elst judgement C-43/93, and judgement in Case C 445/03, Commission vs. Luxembourg). If, however, a temporary employment agency established in Hungary dispatches a Ukrainian temporary worker to France, it must apply for a work permit in France.
- An Israeli ballerina lives in Amsterdam (NL) and works in Antwerp (B). Because she is not an EEA citizen, she may only work if she has a work permit. She is entitled to Belgian child allowances (social security payments) under Regulation 1408/71 on the coordination of social security. She has no entitlement to Belgian maternity allowances (social advantage) under Article 7, paragraph 2 of Regulation 1612/68. She is entitled to child allowances but not maternity allowances because third country nationals are covered by the scope of the social security coordinating Regulation 1408/71, but not that governing the free movement of workers, Regulation 1612/68.

## 2.3 The right of residents of the new Member States to take up employment

There were two important enlargements to the European Union in recent years. The EU grew from a club of 15 into one of 25 with the accession to the Union on 1 May 2004 of ten new Member States (Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia – hereinafter referred to as the 2004 accession countries). Then, on 1 January 2007, another two new Member States (Bulgaria and Romania – hereinafter referred to as the 2007 accession countries) joined the Union bringing the total number of members to 27.

In the case of each enlargement, the “old” and new Member States agreed on transitional arrangements. This allows the right to free movement of workers, a politically sensitive issue, to be introduced gradually. The result of this is essentially that the original system, under which residents of the new Member States needed a work permit to work in an “old” Member State, may still be retained for a time desired.

The transition periods are divided into three phases (2 years + 3 years + 2 years) and limited to seven years maximum:

YEARS AFTER ACCESSION	CONDITIONS FOR MAINTAINING THE PROTECTIVE CLAUSE
Phase 1: 0-2 Years after accession	None
Phase 2: 2-5 Years after accession	Unilateral formal notice by the Member State to the EU Commission
Phase 3: 5-7 Years after accession	Reasoned formal statement in case of a serious disruption of the labour market or fear thereof

In theory, the restrictions are to end with the second phase. Nevertheless, a Member State which still applies national measures at the end of the second phase may, in the event of serious disruptions, after serving relevant notice to the Commission, maintain said measures until the expiry of the seven-year period after the accession date. The transitional regulations shall expire for the eight Central and Eastern European states on 30 April 2011, and end irrevocably for Bulgaria and Romania on 31 December 2013.

As regards the transition period for the countries that acceded in 2007, we are in the second phase which is to expire on 31 December 2011.

Workers from Bulgaria and Romania already have free access to the following EU Member States: Denmark, Greece, Spain, Portugal, Finland, Sweden, the Czech Republic, Cyprus, Estonia, Latvia, Lithuania, Hungary, Poland, Slovenia and Slovakia.

Restrictions on access to the labour market are still in force for workers from Bulgaria and Romania in the following EU member States: Belgium, Germany, Ireland, France, Italy, Luxembourg, the Netherlands, Austria, the United Kingdom and Malta.

EU Member States must always give preference to Bulgarian and Romanian workers over new entrants from third countries.

Bulgaria and Romania grant all EU citizens freedom of movement.

The transitional regulation applies only for the freedom of movement of workers. The freedom of movement of services is possible as of the first day of accession.

Freedom to provide services means that self-employed individuals or companies can provide temporary services in every other EU Member State, without having to have an establishment in that State and without being discriminated against in favour of self-employed individuals or companies in that EU Member State.

The freedom to provide services includes the right to post one's own employees temporarily, to open sales offices and to solicit business actively in another country, without having to have an establishment there.

A special guarantee clause applies only for Austria and Germany, under the terms of which the posting of workers from the new Member States can be subject to conditions. This applies not only with regard to the "2004" accession countries, but also to the "2007" accession countries. This possibility however, applies only to a limited number of services, such as the construction industry and industrial cleaning, and may be used only if the sectors concerned are seriously affected.



# 3

## Regulation (EC) 883/2004 for the coordination of social security

### 3.1 General

The coordination of social security systems is based on Regulation (EEC) n° 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;” and Council Regulation (EEC) 574/72 laying down the procedure for implementing Regulation (EEC) n° 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to their families moving within the community. These two regulations guarantee equal treatment and social security services for all nationals of EU Member States, irrespective of their place of residence or employment. They have both been amended on several occasions since 1971 to be brought in line with the changing national legislations, and to include advancements owing to decisions of the Court of Justice of the European Communities. These amendments have contributed to the complexity of the coordinating Community rules and have led to Regulation (EC) n° 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems. Regulation (EC) n° 883/2004 (the Basic Regulation) and the new implementing Regulation (EC) n° 987/2009 have been in force in the EU Member States since 1 May 2010. The current regulations abrogated Regulations (EEC) n° 1408/71 and n° 574/72 as of the entry into force of the new regulation.

Nevertheless, Regulation (EEC) n° 1408/71 and Regulation (EEC) n° 574/72 shall remain in force and their legal effects shall remain valid (Article 96, Regulation 987/2009) for the purpose of:

- Council Regulation (EEC) no. 1661/85 of 13 June 1985 laying down the technical adaptations to the Community rules on social security for migrant workers with regard to Greenland;
- The Agreement on the European Economic Area concerning the EEA States Iceland, Liechtenstein and Norway;
- The agreement between the European Community and its Member States of the one part, and the Swiss Confederation of the other part, on the free movement of persons and other agreements containing a reference to Regulation (EEC) no. 574/72;

for as long as said agreements have not been amended in accordance with the implementing regulation.

Regulation (EU) 1231/2010 extended Regulation (EC) 883/2004 to nationals of third countries who do not already fall under these provisions solely on the basis of their nationality, and at the same time cancels Regulation (EC) no. 859/2003.

Regulations (EC) n° 883/2004 and n° 987/2009 do not replace national legislation but 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 coordinating regulations are geared to closing any possible gaps in the different branches of social security for mobile persons in Europe (workers, pensioners, students, self-employed individuals, etc.).

The practical effect for mobile workers is that their rights and obligations are guaranteed chiefly thanks to EU law, but continue to be determined by the national legislation of their states of employment and/or residence.

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

- the determination of a single applicable social security legislation;
- the mandatory aggregation of periods of insurance in the various Member States concerning family allowances, sickness, disablement, retirement pensions and death benefits;
- the export of social security services;
- the coordination of calculation methods for social security services.

Regulation (EC) no. 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.).

### 3.2 Rules for determining the applicable social security legislation

Regulation (EC) no. 883/2004 – and at the time, Regulation (EEC) 1408/71 also – lays the foundations for social security law in force concerning the free movement for workers within the European Economic Area (EEA) and Switzerland. These provisions establish in which Member State mobile European workers are covered by social insurance. These rules determine which social security law applies in a given case, thereby preventing that a mobile person in Europe (worker, pensioner, student, self-employed individual) is not subject to any social security system, or that two legal systems are applicable concurrently.

Article 11, paragraph 1, section a) stipulates that a person can be covered by social security in only one Member State. This is known as the principle of exclusiveness.

The question then arises as to which social security law applies in a given case, i.e. which Member State is what is known as the Member State responsible. Usually the principle of the state of employment (*lex loci laboris*) applies.

This general rule is departed from in a limited number of cases, e.g. in the case where an employee is posted by his employer in another Member State for a brief period of time (Regulation (EC) no. 883/2004, Article 12, or Regulation (EEC) no. 1408/71, Article 14) or, if the worker is active in several Member States concurrently (Regulation (EC) no. 883/2004, Article 13, or Regulation (EEC) no. 1408/71, Article 14(a)). Pursuant to Article 11(3) of Regulation (EC) no. 883/2004, pensioners are insured in their country of residence.

NATURE OF THE OCCUPATIONAL ACTIVITY	COMPETENT STATE
Frontier worker with employee or self-employed status	Article 11(3) a, Regulation (EC) n° 883/2004: State where the occupational activity is carried out
Workers in the civil service	Article 11(3) b, Regulation (EC) n° 883/2004: State of administration who employs them
People working on ships	Article 11(4), Regulation (EC) n° 883/2004: State of the flag flown by the vessel or State of employer if he resides in that State
Posted persons	Article 12, Regulation (EC) n° 883/2004: 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>Person gainfully employed in two or more States, e.g.</p> <ul style="list-style-type: none"> <li>- two or more activities on a part-time basis</li> <li>- personnel in international transport</li> <li>- alternating telework</li> </ul>	<p>Article 13(1), Regulation (EC) n° 883/2004:</p> <p><b>State of residence</b> if he pursues a substantial part of his activity in that Member State, or if he is employed by various undertakings or various employers whose registered office or place of business is in different Member States,</p> <p><b>State</b> in which the registered office or place of business of the undertaking or <b>employer</b> employing him is situated, <b>if</b> he does not pursue a substantial part of his activities in the Member State of residence.</p> <p>State in which the registered office or place of business of the undertaking or employer employing him is situated, if he does not pursue a substantial part of his activities in the Member State of residence.</p> <p>A part of less than <b>25%</b> is an indicator that it is not a substantial activity [Article 14(8), Regulation (EC) n° 987/2009]</p>
<p>Persons who carry on self-employment in two or more States</p>	<p>Article 13(2), Regulation (EC) n° 883/2004:</p> <p>State of residence if he pursues a substantial part of his activity in that Member State or in the State in which the centre of interest of his activity is situated</p>
<p>Persons who carry on concurrently employed and self-employed activity in several Member States</p>	<p>Article 13(3), Regulation (EC) n° 883/2004:</p> <p>Activity as an employed person</p>

### Examples

- A resident of Portugal works in Spain, but returns to Portugal at least once a week. This employee is a frontier worker. He is subject to the social security system of the country in which he works, Spain (Regulation (EC) 883/2004, Article 11 (3)a and Regulation (EEC) 14008/71, Article 13(2)a respectively).
- A Swedish company posts its personnel manager to Denmark for twelve months. Since he is on secondment, the employee remains subject to Swedish social security (Regulation (EC) 883/2004, Article 12(1) and Regulation 1408/71, Article 14(1)b respectively).
- A resident of Italy works for a French company in both France (50%) and Italy (50%). He is subject to the social security of a single Member State, in this case Italy, the country where he both lives and works. The French employer must accordingly make social security contributions in Italy (Regulation (EC) 883/2004, Article 13(1)a, and Regulation (EEC) 1408/71, Article 14(2)b(i) respectively).
- A resident of Austria works as a maintenance mechanic for a German company, but also works in Italy and Switzerland. The employee is subject to the social security legislation of a single Member State, in this case Germany, where his employer is based (Regulation (EEC) 1408/71, Article 14(2)b(ii) – If Regulation (EC) no. 883/2004 enters into force for Switzerland as well, Article 13(1) b of Regulation (EC) no. 883/2004 shall apply).
- A resident of France is self-employed in France and has part-time employment in Germany. Pursuant to Article 13(3) of Regulation (EC) no. 883/2004, he is insured in the state of employment, i.e. in Germany, as an employee, but also for his self-employed activity.<sup>3</sup>
- A Dutch woman, who receives a survivor's benefit from the Netherlands, is insured in the Netherlands pursuant to Article 11(3)e of Regulation (EC) no. 883/2004. If she takes what is known as a mini-job in Germany, then the Dutch social security law may no longer apply; instead, pursuant to Article 13(a) of Regulation (EC) no. 883/2004, German social security law will apply. Mini-jobs refer to minor employment with a monthly income of at most €400, for which particular social security legislation applies.

<sup>3</sup> Pursuant to Regulation (EEC) no. 1408/71, Article 14c and Annex VII, persons who are employed or self-employed in two different Member States at the same time are more often than not required to register with social security in both countries.

These are only a few examples, with no claim to being exhaustive. If a person is active in several States, he should consult the insurers without fail.

In a number of very exceptional cases, there may be exemption from the rules of the applicable legislation set out under Regulation (EC) 883/2004, Articles 11 to 15. This possibility is governed under Article 16, which states:

**Regulation (EC) 883/2004, Article 16<sup>4</sup>**

*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.<sup>5</sup>*

## 3.3 Aggregation of periods of insurance

### 3.3.1 Change into 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*, pursuant to Regulation (EC) no. 883/2004, Article 11, paragraph 3, letter (a)). The legal system of the respective 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 changing from one social security system to the other. In many Member States, a person is entitled to social security services only after he has paid social security contributions for a certain time (with reference to a length of time or waiting period). Conditions are often attached to the duration and/or the scope of services from social security.

Many mobile European workers were already insured in the Member State of origin. They are therefore also entitled to benefits saved from social security. If the social security of the new country of employment sets conditions on waiting periods or with regard to the services, gaps in social security could ensue when they change system. The European regulations, in particular Article 45 TFEU, considered this as a hindrance to the free movement for workers. Article 6 of Regulation (EC) no. 883/2004 consequently contains provisions which require that the accumulated periods of insurance in other Member States must count also towards the ascertainment of the right to social security benefits (known as 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.*

4 Regulation [EEC] no. 1408/71, Article 71(1)

5 Regulation [EEC] no. 1408/71, Articles 13 to 16.

### 3.3.2 Proof of periods of insurance

Up to now, European forms have contained all the information required to define and to justify your rights and have been used to transfer information between the insurance systems of the different countries beyond borders.

As of 1 May 2010, new forms will be issued in the EU Member States. After a transition period of two years, the exchange of paper E forms currently used will be replaced by exchanges of electronic forms, known as Structured Electronic Documents (SEDs). The content of the SEDs is similar to the current paper E forms.

During the transition period, the paper E forms will be gradually replaced by the SEDs, used provisionally in paper format with, in principle, the same appearance as the E forms. They will then be gradually replaced by Electronic Exchange of Social Security Information (EESSI). Furthermore, in certain cases, new Portable Documents (PDs) will be introduced with the information required by a citizen. There are ten portable documents in all, including the European health insurance card. Apart from the card, they are paper forms. They will be distributed as of 1 May and even after the transition period.

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)

### 3.3.3 Coordination of the calculation methods for social benefits

In its Articles 11 to 16, the coordinating Regulation no. 883/2004 stipulates where cross-border mobile workers are to be insured, thereby preventing that such workers are covered doubly by social security or not at all. The possible problem of waiting periods is solved through the afore-discussed provisions on the aggregation of periods of insurance.

Nevertheless, further problems may arise because national social security systems are organised differently. By way of example, there are different provisions for disability pensions, as well as for retirement and survivorship pensions in the individual Member States as to,

- when the eligibility requirements (degree of disablement or age) are met;
- How the disability or retirement pensions are calculated, if individuals have periods of insurance in several Member States and have consequently acquired entitlements.

## 3.4 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 severe 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.*

Unemployment benefits however may be exported only for a very limited period of 3 months maximum (Regulation (EC) 883/2004, Article 64).

#### **Examples**

- A Portuguese frontier worker living in Portugal, who has worked his entire career in Spain, receives Portuguese unemployment benefit from Portugal if he is fully unemployed (principle of the country of Residence, Regulation (EC) no. 883/2004, Article 65(5)). If he is on short time, however, then he is entitled to Spanish unemployment benefit (Regulation (EC) no. 883/2004, Article 65 (1)).
- A Dutch couple moves to Italy. She has a disability pension and he draws unemployment benefit. The disability pension is exportable (Regulation (EC) no. 883/2004, Article 7), but the export of the unemployment benefit is limited to three months (Regulation (EC) no. 883/2004, Article 64(1)c).

This obligation is not absolute. Special non-contributory cash benefits may not be exported. Such benefits are listed in Annex X of Regulation (EC) 883/2004.

## **3.5 Special provisions on the different types of social security benefits**

### **3.5.1 Sickness and maternity 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 is entitled, without further ado, to benefits in kind in that state. However, special regulations apply to the family members of frontier workers.

Insured persons, who stay in a state other than the competent Member State, are entitled to benefits in kind, which they prove to be medically required during their stay, whereby the type of benefits and the foreseeable period of stay are to be taken into consideration. These benefits are granted by the host Member State. Cash benefits, on the other hand, are paid by the Member State of affiliation.

Family members of a pensioner, who reside in another Member State than the pensioner, are also entitled to benefits in kind, which are provided by the institution of their place of residence.

As regards **cash benefits**, a person and his 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 applied for the benefit.

Certain Member States have **waiting periods** for health insurance (entitlement to the continued payment of wages in case of sickness, sick pay and/or remuneration for medical costs). This is the case for instance in Belgium, Denmark, Finland, France, Ireland, Norway, and Austria. To prevent gaps in health insurance for mobile workers throughout Europe, Article 6 of Regulation (EC) no. 883/2004 has provided for the aggregation of periods of insurance in the different Member States.

The provision provides mobile workers protection throughout Europe against gaps to their entitlement to the payment of their wages in case of sickness, sick pay and/or remuneration for medical costs, but only if they were previously covered by legal 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 or employment by means of Form S1 (Statement on the aggregation of periods of insurance, employment and residence).

- In Belgium, an individual is granted his sick pay, after he has been covered by social insurance for a period of six months. An Irish worker, who works in Belgium and falls sick after three months, is nonetheless entitled to Belgian sick pay, if he can provide proof that he had been covered by health insurance coverage (former Form E-104 (Irl) or S1) for at least 3 months (Regulation (EC) no. 883/2004, Article 6).
- A nurse lives and works in Ireland. She then goes to Denmark to work and live there. After 3 weeks, she falls sick. In Denmark, a worker is entitled to the sick pay paid by the employer as of the first day of falling sick, if he had worked at least 74 hours in Denmark during the last eight weeks prior to the first day of sickness. If the sickness lasts longer than two weeks, or if there is no entitlement to sick pay upon disablement, the municipality pays the sick pay, on condition that the worker had been gainfully employed for the last thirteen weeks before falling ill, and had worked at least 120 hours during that period. If the Irish nurse can produce an S1, submitted to the Irish Social Welfare Office, which proves that she was covered by health insurance for more than 8 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 emigrated to Denmark is nonetheless entitled to Danish health insurance benefits.

**Regulation (EC) 883/04, Article 34, Overlapping of long-term care benefits, paragraph 1:**

*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.*

### **3.5.2 Benefits for accidents at work and diseases**

The accident insurance comprises 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 immediately any occupational or commuting accident to the competent the insurance fund.
- Occupational disease refers to a disease caused exclusively or primarily in the exercise of an occupational activity by toxic substances or assigned tasks. 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.

#### Accident insurance benefits

- Functional rehabilitation (prostheses and auxiliary means);
- Retraining and return to work;
- Medical treatment (cost for the physician and medicines);
- Daily subsistence allowance to offset the loss of wages in case of an occupational accident;
- Benefits in kind in case of permanent disablement or, survivor's benefit in case of death.

The workers do not pay contributions to accident insurance, which are borne exclusively by the employer.

Article 36 of Regulation (EC) no. 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 shall be entitled to special **benefits in kind** of the scheme covering accidents at work and occupational diseases provided, on behalf of the competent institution, by the institution of the place of residence or stay in accordance with the legislation which it applies, as though he were insured under the said legislation.

If a frontier worker or migrant worker was initially insured in one Member State for 20 years, than in another Member State for 1 year, if he sustains an accident at work or contracts an occupational disease, he shall be entitled only to one benefit in cash (indemnification from the Member State in which he was last covered by social insurance) (single pension method; no proportional calculation of partial pension from several Member States).

#### **Example**

→ With regard to accidents at work and occupational diseases, a German frontier worker who works in Luxembourg and sustains an accident is entitled to (medical) benefits in kind and benefits in cash (compensation). The country of residence (Germany) is responsible for the benefits in kind. Frontier workers can however also obtain medical benefits in the country of employment, i.e. Luxembourg. The frontier worker must submit Document DA1 (previously E 123) to the competent health insurance institution of his domicile. The claim for the reimbursement of costs for benefits in kind in the event of an accident at work amounts to 100%. Such benefits in kind comprise medical care, medicines, orthopaedic devices, nursing, hospitalisation as well as benefits to participate in working life. The benefits in cash are granted to the frontier worker in accordance with Luxembourg law.

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, shall meet such costs for the transport to the corresponding 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.

For 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 exercised the activity which caused the disease shall be responsible (Regulation (EC) no. 883/2004, Article 38).

If a person who has sustained an accident at work or has contracted an occupational disease, wishes to change country of residence, he must obtain without fail 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 essentially provided directly by the accident insurance fund with which the person is registered.



**Article 39 of Regulation (EC) no. 883/2004 defines the rules in case of aggravation of an occupational disease.**

**Regulation (EC) no. 883/2004, Rules for taking into account the special features of certain legislation, Paragraph 1:**

*1. 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.*

### 3.5.3 Incapacity for work

A frontier worker or frontier worker is essentially entitled to a disability pension (reduced earning capacity pension) from the Member State (the state of employment) where he is registered with social security. Pursuant to Articles 6 and 7 of Regulation (EC) no. 8833/2004, disability pensions can be counted on and also exported to another Member State. This means that the cross-border worker can stay without any problem in the territory of his country of residence or elsewhere, while he receives a disability pension from the former country of employment.

Pursuant to Article 70, special non-contributory cash benefits cannot be exported. These are benefits pertaining in particular to the specific protection for the disabled, closely linked to the said person's social environment in the Member State concerned, which are listed in Annex X of Regulation (EC) no. 883/2004.

Many Member States require waiting periods prior to entitlement to disability pensions. In the event of change 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 as regards their right to a disability pension through the recognition and aggregation of 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 in the European Union between disability insurance systems as regards the assessment of whether someone is fit for work. Furthermore, there are two fundamentally different systems regarding benefits, namely cumulative systems and risk-based systems.

The number of disability classes (degree of disablement) differs from country to country: In Belgium, there is only one disability class; in Germany, the Netherlands and Portugal, there are two. In Greece, a person is (partially) disabled, if he is less than 50% fit for work; In Spain as of 33%, in Lithuania as of 45%, in Romania as of 50% and in Slovakia as of 41%. The lack of alignment or harmonisation of the social systems can lead to a situation where a migrant worker or frontier worker is declared 0% unfit for work in one Member State and 100% in another.

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

There are two types of legislation concerning disability benefits in the Member States. Member States with Type A legislation are those where the amount of disability benefits depends on the duration or

the period of insurance or residence, which are expressly identified in Annex VI of Regulation (EC) no. 883/2004: the Czech Republic, Estonia, Ireland, Greece, Latvia, Finland, Sweden and the United Kingdom. There is a special coordination (*single pension*) for these systems. The other Member States are classified under Type B in Regulation (EC) no. 883/2004.

In certain 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 period of contribution: the longer an affiliated person has contributed before becoming disabled, the longer his pension will be. These systems do not require that the person concerned be insured at the time that the disability occurred. In other words, a person who stopped working a few years before he became disabled is nonetheless entitled to a disability pension corresponding to previous periods of contribution.

In other countries, the amount of the pension does not depend on the period of contribution (risk-based systems). Accordingly, the amount of pensions is the same, whether the affiliate was insured 5, 10 or 20 years before he became disabled. What is important here is that the person was really insured at the time that the disablement occurred. Under these systems, the right to a pension nonetheless depends on the actual insurance at the time that the disablement occurred: if you stopped to work shortly before that point, you will not be entitled to a disability pension.

The amount of the pension of the persons insured in a single country 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 insured in several countries:

- You were insured exclusively in Member States where the amount of the pensions depends on the periods of insurance: in such a case, you will receive separate pensions from each of those countries. The amount of each pension will correspond to the periods of insurance completed in the country concerned.
- You were insured exclusively in Member States where the amount of the pension does not depend on the periods of insurance: you will receive a pension from the country where you were insured when your disability occurred. You will always be entitled to the full amount of this pension, even if you were insured in that country for only a brief period (one year, for instance). Conversely, you will not be entitled to any pension from the other countries where you were insured previously.
- You were first insured in a Member State where the amount of the pension depends on the length of the periods of insurance, then in a country where the pension does not depend on the length of these periods: you will 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 where you were insured when your disability occurred.
- You were first insured in a country where the amount of the pension does not depend on the length of the period of insurance, then in a country where the pension does depend on these periods: you will receive two separate pensions, each of which corresponds to the length of your periods of insurance in those different countries.

Calculation of pension: pro-rata or partial pension coordination

Article 52 of Regulation (EC) no. 883/2004 (Award of benefits) stipulates 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 state pension is the disability pension to which a mobile European worker is entitled for the insured years in a Member State. 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 had spent all the periods of insurance, which were spent 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 for the calculation of the proportional pension. If, pursuant to this legislation, 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 for 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:

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

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

Five distinct cases may occur for a frontier 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**

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

→ A worker works for 1 year in Sweden (risk-based system listed in Annex VI). He had previously worked for 15 years in Latvia (risk-based system, likewise listed in Annex VI). In case of disablement, this

worker is, irrespective of his previous insurance, entitled only to the total Swedish disability pension (known as the single pension). Pursuant to Regulation (EC) no. 883/2004 Article 44(1) he is entitled to a Swedish disability pension, as if he had always been registered with social security in Sweden.

This special coordination entails that the worker is entitled to a disability pension (known as the single pension).

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.

- A worker works for 1 year in Belgium (risk-based system not listed in Annex VI). He had previously worked for 15 years in the Netherlands (risk-based system, likewise not listed in Annex VI). In case of disablement he is, pursuant to Regulation (EC) no. 883/2004, Article 52 entitled to a pro-rata (15/16) Dutch disability pension and a pro-rata (1/16) Belgian pension or, if more favourable, a full Belgian pension minus the Dutch pro-rata (15/16) partial pension (Regulation (EC) no. 883/2004, Article 52, 3). If the worker is not entitled to a pro-rata Belgian disability pension, then he is entitled to the pro-rata (15/16) Dutch disability pension, if he is 100% disabled in accordance with Dutch law.

In these two cases, it is supposed 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) no. 883/2004, Annex VII).

If the disablement in these two cases is established only in the Netherlands but not in Belgium, than this worker is entitled to the full Dutch disability pension. Conversely, if the disablement is recognised only in Belgium and not in the Netherlands, he is entitled only to a Belgian partial pension.

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

- A migrant worker lived and worked for 15 years in Austria (cumulative system) and then for 10 years in Germany (cumulative system). In case of disablement, this worker is, pursuant to Regulation (EC) no. 883/2004, Article 46 or 52, entitled 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.

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 case 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. Pursuant to Regulation (EC) no. 883/2004, Article 52, the Netherlands must carry out two calculations: the Dutch full pension minus the pro-rata (15/25) German disability pension and then the pro-rata (10/25) Dutch disability pension. Pursuant to Regulation (EC) no. 883/2004, Article 52(3), the worker concerned is entitled to the higher amount.

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

- A worker worked for 20 years in the Czech Republic (risk-based system) and then for 10 years in Luxembourg (cumulative system). In case of disablement, this worker is, pursuant to Regulation (EC) no. 883/2004, Article 46 or 52, entitled to the pro-rata (10/30) Luxembourgish and the pro-rata (20/30)

Czech pension. If he is declared 100% disabled under Luxembourgish law, but 0% under Czech law, he is entitled only to a pro-rata (10/30) Luxembourgish disability pension. He must turn to the social security authorities of his place of residence to cover the ensuing income gaps.

For more information, please contact the competent institutions.

### 3.5.4 Retirement pension

In essence, mobile European workers can lay claim to a retirement pension from all the Member States where they were registered with social security. The respective retirement pension is proportional to the accumulated periods of insurance, during which the worker was actually covered (partially or pro-rata).

The claim to a retirement pension is governed by Article 45 of implementing Regulation (EC) no. 987/2009, to wit: the claimant can submit the claim to a retirement pension to the institution of his state of residence or to the institution of the Member State, whose legislation was applicable to him most recently. If the legislation that the institution of the worker's place of residence applies did not apply to that worker at any time, then said worker must submit his claim to the institution of the Member States whose legislation applied for him most recently. The point in time of the lodging of the claim is binding for all participating institutions. The application procedure is governed by Article 46 bis to Article 48 of implementing Regulation (EC) 987/2009: certificates and information to be submitted to institutions, the processing of claims by the participating institutions, and the announcement of the decisions to the claimant.

Owing to a lack of Europe-wide approximation, the national pension systems vary widely. Many systems are insurance schemes for workers (e.g. Spain, Ireland, Belgium, Portugal); others are insurance schemes (basic pensions for the respective citizens (e.g. the Netherlands, Sweden, Denmark). The pension-entitlement age also varies from one Member State to the other (the Netherlands: 65; Norway: 67; France: 60, etc.). Certain countries provide the possibility of early retirement with or without reductions (Germany, Belgium, Luxembourg, etc.), but others do not. The accumulation of pensions varies considerably as well. There are pensions that are proportional to earned income (Belgium, Germany, France, etc.), while the legal retirement pensions are independent of earned income in other countries (the Netherlands, Denmark, etc.). Many Member States (e.g. Germany) have waiting periods as well.

There are specific coordinating provisions for retirement and survivor's pensions as well. Each Member State, in which a person was insured, pays a retirement pension to that person when he has reached 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 profession, the competent institution of that Member State must take into account these 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) no. 883/2004, Articles 52- 59).

A person who draws benefits in accordance with the legislation of different Member States, whose total amount is below the minimum benefit pursuant to the legislation of the state of residence, must obtain a supplementary benefit from the institution of the state of residence.

Pursuant to Regulation (EC) no. 883/2004, Article 7, retirement and survivor's pensions are to be paid out in another Member State. This means that the frontier worker may stay on the territory of his state

of residence or elsewhere, while he receives a retirement pension from a former country of employment.

The following coordinating principles apply to the legal retirement pensions:

- The pension entitlements acquired in one Member State are guaranteed. The repurchase of legal retirement pensions, reimbursement of contributions or transfer in 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) no. 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) no. 883/2004).
- If a mobile European worker was not affiliated with social security long enough in a Member State, because there were waiting periods, in order 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) no. 883/2004, Article 52). If a mobile European worker was registered with social security in a Member State for less than a year, the retirement pension is paid not by that Member State, but by the Member State where the worker was registered with social security most recently (Regulation (EC) no. 883/2004, Article 57).

### **Examples**

- A worker works in Germany. He had previously lived in the Netherlands for 5 years (but had not necessarily worked there) and had worked in Belgium for 10 years. Upon turning 63, he applied for his German retirement pension. Whether he is entitled to a Belgian early retirement pension depends on the periods of insurance during which he was registered with social security. At the age of 63, he is entitled to a Belgian retirement pension through the aggregation of the periods of insurance in Belgium, the Netherlands and Germany. However, although he is entitled to a Belgian retirement pension at 63, that does not mean that he will also get a Dutch retirement pension at that age. The legal retirement pension in the Netherlands is paid only upon reaching the age of 65.
- A French worker had at some point worked as a frontier worker in Germany for 10 months. As he was registered with social security in Germany for less than one year, he is not entitled to a German retirement pension (Regulation (EC) no. 883/2004, Article 47). However, the worker is entitled to a retirement pension for that period which is paid by the State where the worker worked last (France).
- A Swedish worker worked as a salaried employee in Germany for 4 years. According to German law, he is not entitled to a German retirement pension because he was not registered with social security for at least 5 years (waiting period). If the worker was registered with social security in another Member State, he is nonetheless entitled to a German retirement pension through the recognition and aggregation of all these periods (known as the statutory pension).

Regulation (EC) no. 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:**

The national pension is the retirement pension to which a mobile European worker is entitled for the years registered with social security in a Member State. 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.

## 2 Calculation of the theoretical pension:

The theoretical pension is the amount to which a mobile European worker would have been entitled if he 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 for the calculation of the proportional (pro-rata) pension.

## 3 Calculation of the proportional (pro-rata) pension (known as the statutory 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 for 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 2 years in Germany, and another 15 years in Italy. He 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 (known as statutory 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 can also be carried out in Austria and in Germany. Germany has a waiting period of 5 years. The German national (independent) pension is not calculated. The laboratory assistant is entitled to only a German pro-rata pension.

The rules of the coordinating Regulation (EC) 883/2004 relating to the claim and calculation of legal pensions do not apply to supplementary pension entitlements (company supplementary pensions, civil-service pensions, etc.), which are governed by Directive 98/49/EC "on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community." The mobile European worker must therefore claim his supplementary pensions, occupational pension, etc. himself. It is particularly important that he keeps the relevant data carefully and has regular contacts with the respective retirement and/or pension funds, in order to prevent subsequent pension gaps caused by mobility.

### 3.5.5 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. The rules for taking into account periods of insurance completed abroad now apply also to the self-employed pursuant to Regulation (EC) no. 883/2004.

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

1. 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.

The new regulation deals mainly with two issues in connection with unemployment benefits:

- The export of these benefits for unemployed persons going to another Member State (Regulation (EC) no. 883/2004, Article 64).
- The entitlement to benefits for unemployed persons who resided in a Member State other than the competent State during their last employment (Regulation (EC) no. 883/2004, no. 65).

#### **Example**

→ A citizen of Greece worked for 5 years in Greece. He then moved to Germany. After working for 3 months in Germany, he lost his job. In Germany, a person is entitled to unemployment benefit only after he has been employed there for at least 360 days subject to compulsory insurance. The Greek worker is entitled to German unemployment benefit because he can prove, through aggregation and equalisation, periods of employment totalling five years and 3 months (Regulation (EC) 883/2004, Article 61). The benefit is calculated pursuant to Regulation (EC) no. 883/2004, Article 62 exclusively on the remuneration earned in Germany.

Chapters 9, 10 and 12 of this guide contain more details on unemployment benefits. The claim to special non-contributory unemployment benefits is dealt with in Annex 10 of Regulation (EC) no. 883/2004.

## **3.5.6 Family benefits**

Family benefits are the family allowances or payments that families receive until the children can fend for themselves. They are paid independently from the parents' income until the child reaches a certain age or graduates. If the child has an income, then limits are applied.

Family benefits also include benefits paid in the first years of the child, when one of the parents is not engaged in gainful employment but stays at home to raise the child (child minding allowances).

Chapter 8 of Regulation (EC) no. 883/2004 sets out which Member State has to pay family benefits and how an accumulation of family benefits is prevented. In certain Member States family allowances are



provided on the basis of an employment activity, e.g. Belgium. Other Member States, e.g. Germany or the Netherlands, provide family benefits only if the children reside on their territory. Pursuant to Regulation (EC) no. 883/2004, Article 67, 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.

### **Example**

→ A worker and his family members live in Belgium. Only one parent works – as a frontier worker in the Netherlands. In the Netherlands claim to family benefits is based on residence. In Belgium, claim to family benefits is based on employment. Pursuant to Regulation (EC) 883/2004, Article 67, the family is entitled to Dutch family cash benefits in the state of employment. The Dutch family benefits must be exported. There is no claim to Belgian family benefits.

A pensioner is entitled to family benefits according to the legislation applicable in the competent Member State for the pension. The distinction contained in Regulation (EEC) no. 1408/71 between pensioners and orphans on the one hand, and other beneficiaries of social security on the other has not been retained in the new Regulation (EC) n.883/2004, thereby doing away with the distinction between family benefits and family allowances; the sample spectrum of family benefits has provided for all, pensioners and persons responsible for orphans, employees and the unemployed alike.

If a worker lives with his family in a Member State other than the one where he is registered with social security, two systems of family benefits may apply at the same time (benefit accumulation). Often, the family is also entitled to family benefits in accordance with the legislation of the state of residence. To prevent that double or no family benefits are paid, priority rules apply in the event of overlapping claims.

### **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; ...*

### **Example**

→ A worker and his family members live in the Netherlands. Only one parent works – as a frontier worker in Belgium. In the Netherlands, the other parent is entitled to the Dutch family benefits on the basis of residence (e.g. €70 per month). In Belgium, the frontier worker is entitled to Belgian family benefits on the basis of employment (€90 per month). The family is entitled to benefits from several Member States (the Netherlands and Belgium) on different grounds. Pursuant to Regulation (EC) no. 883/2004, Article 68, the Belgian family benefits (€80 per month) are paid by priority. The Dutch family benefit fund pays subordinately the difference between the Dutch family benefits (€70 per month) and the Belgian family benefits (€80 per month) (the increase is €10 per month).

If both parents work in different Member States, and thus are entitled to family benefits on the same basis of “employment,” then the family has priority claim to the family benefits in the state of residence, if one of the parents works in the state of residence (Regulation (EC) no. 883/2004, Article 68, (1)b)i). The other Member State pays its family benefit subordinately. If the family benefit provided in the subordinate Member State is higher than the family benefit paid by the priority competent State, then the subordinate Member State provides the balance.

### Example

- A worker and his family members live in the Netherlands. One of the parents works in the Netherlands, where that parent is entitled to the Dutch family benefits on the basis of employment (e.g. €70 per month). The other parent works in Belgium, and is entitled to the Belgian family benefits only on the basis of employment (e.g. €90 per month). The family is entitled two benefits from two Member States (the Netherlands and Belgium) on the same grounds. Pursuant to Regulation (EC) 883/2004, Article 68, the Dutch family benefits (€80 per month) are paid by priority. The Belgian family benefit fund pays subordinately the difference between the Dutch family benefits (€70 per month) and the Belgian family benefits (€80 per month) (the increase is €10 per month).
- A family lives in Poland. The father works as a frontier worker in Germany, the mother works in Poland. The family has two children (aged 6 and 9): If both parents are employed in different EU Member States, the claim has priority in the state of employment which is concurrently the state of residence of the child. It is important that the other State may be required to provide benefits in a subordinate capacity. In such a case, the balance would have to be paid by the subordinate state, if the corresponding benefit is higher there, e.g. the difference between the child benefit in Poland and Germany for a frontier worker from Germany, who works in Poland. In Poland, a child benefit is paid only when the net income is not higher than PLN 504 (€126). In this example, the children aged 6 and 9 get €23<sup>6</sup> each in Poland (if any at all). As the father is employed in Germany, there is a claim to the difference between €184<sup>7</sup> (child benefit in Germany) and €23 (child benefit in Poland).
- If, unlike the previous example, the mother is not employed, then Germany is the competent Member State by priority.

If both parents work as frontier workers in the same Member State, family benefits can be claimed 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. Pursuant to Regulation (EC) no. 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 only entitlement to Dutch family benefits (child benefit, child care benefit, child budget, etc.). There is no entitlement to additional German family benefits, since, pursuant to Regulation (EC) no. 883/2004, Article 11, 3 a, Dutch law is applicable.
- A single mother lives in Germany and works in the Netherlands. Pursuant to Regulation (EC) no. 883/2004, she is entitled to Dutch family benefits, but to no increase thereof in 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. Pursuant to Case C-325/0, Bosmann versus the Federal Employment Agency, according to German law, the German child benefit can be provided when the Dutch child benefit reaches its time limit.

6 Child benefit in Poland: PLN 68.00 (= € 17) per child up to the age of 5; PLN 91.00 (= €23) per child between the age of 5 and 18; PLN 98.00 (=€25) per child between the age of 18 and 24.

7 Child benefit in Germany: €184 for the first and second child, €190 for the third child and €215 for every further child.

# 4

## European labour law

### 4.1 General

Labour law is a legislative corpus that defines the rights and obligations of employers and employees at the work place. A large part of the national labour law is 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 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 comprise the working time, part-time work, fixed term employment and the posting of workers;
- Information for and consultation of workers, in particular in case 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 a certain room for manoeuvre during such transposition into national law and can set more favourable rules for workers than provided in the directive. The most important pieces of labour law legislation are:

- Regulation (EC) no. 44/2001 (“Brussels I”) on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters...
- Regulation (EC) no. 593/2008 (“Rome I”) on the law applicable to contractual obligations
- Directive 96/71/EC concerning the posting of workers in the framework of the provision of services

The national authorities, including the courts, see to the application of national transposition measures. The Court of Justice of the European Communities plays an important role in disputes and provides legal opinions on questions put by the national courts as to the interpretation of the law. Your rights and obligations are consequently guaranteed throughout the European Union. Important decisions of the European Court of Justice on labour law include, e.g. Viking, Laval, Rüffert and Commission vs. Luxemburg (cf. Part II, Chapter 8).

### 4.2 Competent labour Court: Regulation (EC) 44/2001

Regulation (EC) no. 44/2001 “on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters” establishes Community regulations for the jurisdiction and recognition of decisions in civil and commercial matters. This regulation also applies to mobile European workers.<sup>8</sup>

<sup>8</sup> The international jurisdiction in complaints lodged against defendants established in 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, Norway, Iceland and Switzerland. Liechtenstein has not joined the Lugano Convention.

As regards individual contracts of employment, Regulation (EC) 44/2001, Article 19 "Jurisdiction over individual contracts of employment" stipulates:

**Regulation (EC) no. 44/2001, Article 19: Jurisdiction over individual contracts of employment**

*An employer domiciled in a Member State may be sued:*

- 1) *in the courts of the Member State where he is domiciled; or*
- 2) *in another Member State;*
  - a) *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*
  - b) *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 notices that his 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 French employer to represent him with customers in Italy. There is a dispute about the salary payment. The employee can refer the case to an Italian court, because he exercises his activity in Italy.

**Regulation (EC) 44/2001, Article 20**

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. Pursuant to Regulation (EC) no. 44/2001, Article 20(1), however, the employer can only bring proceedings for such authorisation in a Belgian court, whereby said Belgian court must apply Dutch law.

**Regulation (EC) 44/2001, Article 21**

*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*
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. Pursuant to Regulation (EC) no. 44/2001, Article 20(1), however, the employer can only bring proceedings for such authorisation in a Belgian court. Pursuant to Regulation (EC) no. 44/2011, Article 21, the Dutch court can be declared competent **after the dispute has arisen**. – Important: A clause entered in the contract of employment to the effect that the Dutch court shall be competent, is null and void.

## 4.3 Applicable labour law: Regulation (EC) 593/2008

### 4.3.1 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 applies most often. However, many – particularly multinational – companies avail themselves of the free choice of applicable law pursuant to Regulation (EC) 593/2008, Article 3, 1.

Regulation (EC) no. 593/2008 on the law applicable to contractual obligations (Rome I) is applicable 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 (EC) no. 44/2001 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (Brussels I), and Regulation (EC) no. 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. Both the Vienna Action Plan of 1998 and the Hague Programme of 2004 with its action plan stress the significance of harmonised rules concerning the conflict of laws in the implementation of the principle of the mutual recognition of judgements in civil and commercial matters. As regards labour law, Regulation (EC) no. 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.*

### 4.3.2 Freedom of choice

#### **Regulation (EC) 593/2008, Article 3: Freedom of choice, paragraph 1**

*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 French employer to represent him with customers in Italy. There is a choice between Austrian, French and Italian labour law. However, Lithuanian labour law can also be agreed.

### 4.3.3 Imperative provisions

#### **Regulation (EC) 593/2008, Article 4: Applicable law in the absence of choice**

1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows:

...

2. Where the contract is not covered by paragraph 1 or where the elements of the contract would be covered by more than one of points (a) to (h) of paragraph 1, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.

3. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.

4. Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected.

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

1. 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 are to be taken into account (Regulation (EC) no. 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"), labour protection laws, etc. Each Member State has its own intervention standards overriding mandatory 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**

- A worker residing in Spain, who is posted by his employer to Germany, whereby the Spanish labour regulations continue to apply, may nonetheless be subject also to special, overriding provisions (German labour law intervention standards). It is important to know which areas of German labour regulations are considered as overriding provisions. The posted Spanish worker should inquire with the German Trade Union Federation (known by the German initials DGB) and/or the “liaison offices” indicated in the Directive on the posting of workers.

# 5

## **Tax coordination: double taxation treaties**

### **5.1 General**

In contrast to social security, there is no supranational regulation at EU or EEA level concerning tax law. The coordination of taxation is dealt with in several hundred bilateral taxation agreements by and 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 Treaties on EU / FEU. 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.

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. In a more general manner, Article 21 TFEU moreover stipulates that every citizen of the Union shall have the right to move and reside freely within the territory of the Member States. The Agreement on the European Economic Area (EEA) extends 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 undertakings of EEA countries (Iceland, Liechtenstein and Norway). The secondary law of the EU does not, however, apply to EEA countries.

International conventions intended to hinder 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 actually liable for tax in the state where they have their domicile or where they have taken up permanent residence.

- What is known as the source principle goes 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 different countries, the taxpayers are accordingly liable for tax in the corresponding different countries.
- Another, albeit not so widespread taxation principle is the principle of territoriality, whereby each taxpayer is liable exclusively for the income which is earned on the territory of the respective state.
- Considerably more widespread – in over 100 countries worldwide in fact – is the taxation principle of worldwide income according to which taxation is carried out at the place of residence, but not only on income earned in that country, but actually all the income of a natural or legal person worldwide, whence the concept of “worldwide income.”

The European double taxation treaties are inspired in large measure by the Organisation for Economic Cooperation and Development (OECD) Model Tax Convention. This convention provides in general for taxation of income in the source state, although exceptions from the source state principle are possible. It may be agreed, however, that frontier workers are taxed in the country of residence (cf. Chapter 10).

The provision as to which state is the state of residence or in which state a person is established, is stipulated in the respective 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 applied to prevent double taxation: the exemption method and the credit method (cf. Section 5.5).

The rules of double taxation treaties in force follow neither of the two methods consistently, but represent a compromise. Countless rules follow the source country principle; however, the country of residence principle is commonly applied as the standard rule for all income, for which no other rule has been applied.



Often, the pay of a frontier or posted worker is taxed in the country of employment. The question arises as to which Member State – the country of residence or the country of employment – is to grant tax relief (deductions) or tax exemption in connection with the family situation. This problem arises in particular when one parent works in the country of residence and the other in another country.

In the case of cross-border workers, the following question arises: When must the country of employment treat this worker – who is liable to taxation under foreign law (non-resident) – as a domestic taxpayer (fictitious citizen) and grant him the tax deductions relating thereto?

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

One striking aspect of jurisdiction in the field of taxation is that the Court of Justice leaves the Member States a great deal of leeway to conclude agreements to prevent double taxation. Even provisions in such agreements, which draw direct distinctions on the ground of citizenship, can be justified under certain circumstances (ECJ decision in Case C-336/96 Gilly).

## 5.2 Principle of the country of employment

As regards income tax, the OECD Model Convention provides for the application of the principle of the country of employment. For a worker who resides in one member State and works in another Member State, the country of residence must in theory relinquish the competence for taxation to the country of employment.

### **OECD Model Tax Convention, Article 15:**

*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:**

→ A worker who resides in France and works in Spain for a Spanish employer is taxed in Spain (principle of the country of employment).

Nevertheless, double taxation treaties concluded between neighbouring countries may make an exception to this principle of country of employment for cross-border workers; if such is the case, the country of residence retains the right to taxation (cross-border workers, cf. paragraph 5.4.3).

Often, another principle applies for artists (Article 17), athletes (Article 17), (university) instructors (Article 20), and students (Article 20). The salaries and pensions of civil servants (Article 19) are usually taxed in the state of the authorities (country of employment).

## 5.3 Maintenance of the principle of the country of residence subject to certain conditions

If a worker carries out his activities in a Member State other than his country of residence, and if his connection with that country of employment remains “minimal,” the country of residence retains its competence to tax. This is the case when the worker carries out activities in this other Member State only temporarily and his employer has no connection with the country of employment. The OECD Model Convention uses objective criteria to determine such situations. The country of residence must not cede the competence to tax the salary for such activities to the country of employment, if the following conditions are not met simultaneously:

### **OECD Model Tax Convention, Article 15, paragraph 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 country of employment is deemed to have been established with the country of employment and the worker will be taxed as of his first physical presence (for a more in-depth examination of such concepts as “183 days of presence,” “permanent establishment,” etc., cf. Chapter 8: Posted workers). Pursuant to tax conventions, temporary cross-border workers are often taxed in the country of employment, because they do not materially meet condition b). 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 as an official employer in tax conventions. If said temporary worker is made available to a company in another country, said company is considered as a material employer. This company actually exercises real powers of employer and also pays indirectly the temporary worker’s salary.

### **Examples:**

- A worker resides and works in Italy. He is sent to Spain by his employer from 1 February to 31 May on a temporary mission with a customer. There is no question of permanent establishment. The worker continues to be taxed in his country of residence, i.e. Italy.
- A worker resides and works in Italy. He is sent to a site in Spain by his employer from 1 February to 31 May. According to the tax convention, the site must be considered as a permanent establishment. The worker is taxed for his salary earned in February, March, April and May in the country of employment, i.e. Spain.
- A Polish temporary worker is sent by a Polish temporary employment agency to a Dutch company. The wages of this Polish temporary worker are taxed in the Netherlands from the first day, because the Dutch company concerned is considered as the material employer and reimburses the labour costs to the Polish temporary employment agency.

## 5.4 Specific rules

The OECD Model Tax Convention lays down strict conditions in Article 15, paragraph 2, if the country of residence retains its taxation competence, including if the worker carries out his activities in another Member State.

### **Example**

- A worker residing in France, who works in Spain for an employer established in France, can be taxed in Spain (principle of the country of employment) or in France (principle of the country of residence). Which of the two Member States is competent for taxation is determined in accordance with the double taxation treaties between France and Spain.

## **5.4.1 Multinational workers**

A special regulation applies to workers in international transport. Their salary is not taxed in the country of employment, but in the Member State where the actual management of the company is located (principle of the country of residence, cf. Chapter 11).

### **OECD Model Tax Convention, Article 15, paragraph 3**

*Notwithstanding the preceding provisions of this Article, remuneration derived in respect of an employment exercised aboard a ship or aircraft operated in international traffic, or aboard a boat engaged in inland waterways transport, may be taxed in the Contracting State in which the place of effective management of the enterprise is situated.*

If a worker works in two or more Member States, the aforementioned rules (Article 15, paragraph 2 of the OECD Model Tax Convention), may give rise to a right of divided taxation. The country or countries of employment and the country of residence may obtain the right to tax part of the salary. Each country of employment may tax that part of income earned from activities generated on its territory. The country of residence taxes the worker's total (worldwide) income in accordance with progressive taxation, but must grant a tax exemption for the salary already taxed in the other Member States.

### **Example:**

- A British worker is hired by an employer established in France. He works 2 days a week in his country of residence, i.e. the United Kingdom, and 3 days in France. The worker is taxed in France for the activities carried out in France. He will be taxed in the United Kingdom for the salary paid for the activities carried out in the United Kingdom.

For other standard cases of multinational work, cf. Chapter 11: Multinational Workers.

## **5.4.2 Taxation of pensions and social benefits**

The question arises as to whether occupational pensions, private pensions, social benefits, etc. are taxed. Public pensions (of civil servants) are on the other hand taxed in the source country (previously in the country of employment).

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 country of residence of the beneficiary of the social benefits. Nevertheless, double taxation conventions at times comprise different articles and/or derogations on social security.

### **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

### **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 Italy receives a German statutory retirement pension. The German retirement pension is taxed in accordance with the German-Italian double taxation treaty (state of the fund).
- 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 is nonetheless 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).

### **5.4.3 Specific rules for cross-border workers**

In taxation treaties between neighbouring countries, the rules applicable to cross-border workers often depart from the principle of the country of employment. In spite of a strong connection with the country of employment, the country of residence retains the taxation competence. Additional protocols define the delimited border region in which a worker must reside and work to be eligible for cross-border worker status (cf. Chapter 10).

## **5.5 Methods for avoiding double taxation**

Two standard methods are used to avoid double taxation:

### **5.5.1 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. In order to tax the economic performance of that person however, such income is taken into consideration in the limited exemption when applying progressive tax rates. The tax rate for the other income is thus increased in the other country.

If you have additional income in the country of residence or if your spouse is gainfully employed there, and you 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. A higher tax rate is applied as would be the case without the foreign income. Consequently, in spite of the tax exemption, income from employment abroad must be declared in the country of residence.

### **5.5.2 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. In the case of frontier workers, this is the standard deduction or the wage tax, withheld from the worker and paid to the competent tax office.

### 5.5.3 Examples

#### Example 1

A worker resides in Country A, where he worked for 5 months and earned €12,000. He then worked in Country B for 7 months, and earned €18,000 in that country. The worker's worldwide income amounts to €30,000. As the worker worked more than 183 days in Country B, he is liable for tax in that country. If the tax rate on an income of €18,000 is 25%, he pays taxes amounting to €4,500 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 had earned that €30,000 in his country of residence (Member State A). The tax rate on an income of €30,000 is e.g. 35%, and thus the **theoretical income tax payable is €10,500**.

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

Taxes paid in Country B:	€4,500
Taxes payable in Country A:	€6,000
<b>Total tax liability:</b>	<b>€10,500</b>

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

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

Taxes payable in Country A:	€4,200
Taxes paid in Country B:	€4,500
<b>Total taxes payable:</b>	<b>€8,700</b>

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, in accordance with the exemption method, the worker has a tax advantage of €1,800 by comparison with the credit method, since he pays a total of €8,700 only. If he had earned his entire income in Country A, he would have had to pay €10,500 in taxes.

#### Example 2

In the second example, the worker lives in Country B, where he works for 5 months and earns €12,000. He then works for 7 months in Country C. The income from country C amounted to €18,000. The worker's worldwide income thus amounted to €30,000. Since the worker worked in Country C more than 183 days, he is liable for tax there as well. If the tax rate on €18,000 is 35%, he 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 had earned that €30,000 in his country of residence (Member State B). The tax rate on an income of €30,000 is e.g. 30%, and thus the **theoretical income tax payable is €9,000**.

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

Taxes paid in Country C:	€6,300
Taxes payable in Country B:	€2,700
<b>Total taxes payable:</b>	<b>€9,000</b>

If the **exemption method** is stipulated 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 A on an income of €12,000 is €3,600 (=€12,000 x 30%).

Taxes payable in Country B:	€3,600
Taxes paid in Country C:	€6,300
<b>Total taxes payable:</b>	<b>€9,900</b>

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

In the Gilly case (C-336/96), the European Court of Justice ruled that the application of the tax calculation procedure or the higher tax burden by comparison with the exemption method did not violate the principle of equal treatment pursuant to Article 39 TEU (now Article 45 TFEU).

## 5.6 Different competencies for social security and taxes

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

The extensive independence of the Member States on tax matters leads to situations in practice whereby social security legislation (“where workers are registered with social security”) is often confronted with assignment rules in bilateral taxation treaties (“where taxes are paid”). In the case of cross-border work under its different forms (frontier work, posting, etc.), social security contributions and taxes may be paid in accordance with contradictory principles (“lex locis laboris” or the principle of the country of employment on the one hand, and “lex locis domicilii” or the principle of the country of residence on the other). This situation leads to a lack of coordination and may, depending on the case, be favourable or detrimental to the cross-border worker concerned.

The major difference between taxes and social security contributions is that the principle of exclusiveness applies for social security, i.e. only one Member State is competent for the collection of social security contributions. In the case of taxation, it is possible for a worker who is employed in two or more Member States to have his salary taxed in the Member States where he is paid for activities carried out on their territories. Here, it is not a matter of double but rather shared taxation (based on what is known as salary splitting).

Accordingly, workers in the international goods transport sector are registered with social security in the Member State where the employer is headquartered (principle of the country of residence, Regulation (EC) no. 883/2004 Article 11, paragraph 2 or Regulation (EC) no. 1408/71, Article 14, paragraph 2, letter a)) and must often pay taxes for the wages which they earned from activities outside the Member State, where the employer is headquartered. There are different jurisdictions here for the collection of taxes and social security contributions, with all their advantages and disadvantages.

**Example:**

- A cross-border worker lives in France and works in Belgium. He pays relatively low social security contributions in Belgium and relatively low income tax in France. This situation is consequently advantageous for him.
- Conversely, the cross-border worker who lives in Belgium and works in France pays relatively high French social security contributions as well as relatively high Belgian income tax: this situation is consequently detrimental to him.

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 cross-border worker pays his taxes in another Member State, however, he does not benefit from this compensation.

The cross-border worker must therefore be fully informed about his rights and obligations in concrete terms. The tax and social security authorities have a role to play in this regard, but European employers as well. The latter are morally bound to inform and support their employees in optimal fashion. When the latter suffer a financial loss because of the international dimension of their occupational activities, the employers must, in our view, provide compensation. This principle applies also to the Member States, which must grant compensation to their cross-border workers if the latter are exposed to losses because of amendments to the national legislation and regulations and/or an amendment to double taxation treaties.

A certain number of double taxation treaties (the Netherlands and Belgium 2003, Belgium and Germany 2004) have been recently amended to have the taxation competence follow the same principle as the collection of social security contributions (principle of the country of employment or of equality in the field). When the amendment entailed a disadvantage for the Dutch workers, compensation arrangements were negotiated. The Dutch government grants compensation to cross-border workers who will go to Belgium to work after the entry into force of the new double taxation treaty. Equality between neighbours is thus achieved.

**Example**

- The employee's contribution to health insurance in France is 0.75% of the total salary compared with 2.35% in Alsace-Moselle; the employer's contribution is 12.8% of the total salary. People who are subject to the French system, but are not tax residents in France, are not required to pay the general social contribution (known by the French initials GSG) and the contribution for the reimbursement of the social debt (known by the French initials CRDS). Conversely, they are required to pay a health insurance contribution, the employee's share of which is 5.5% of the total salary, compared with 7.1% in Alsace-Moselle.

# 6 Supplementary pensions

Directive 98/49/EC “on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community” was introduced in 1998. This is not the legal pension, which is coordinated by Regulation (EC) no. 883/2004.

The purpose of this directive on pensions is to protect the rights of workers (affiliates) for supplementary pensions when these workers move from one Member State to the other. The protection concerns both the voluntary supplementary pension systems and the mandatory systems. Directive 98/49/EC requires the Member States to take measures which ensure that the workers (affiliates) who avail themselves of the right of free movement of people, and for whom the premiums/contributions are no longer paid, retain the pension rights that they have acquired.

When a worker affiliated with a supplementary pension system is posted by his employer in another Member State, the directive enables him to maintain his affiliation to that system. The term “posting” is understood in the sense of Article 12 of Regulation (EC) no. 883/2004.

## **Directive 98/49/EC, Article 6: Contributions to supplementary pension schemes by and on behalf of posted workers**

- 1. Member States shall adopt such measures as are necessary to enable contributions to continue to be made to a supplementary pension scheme established in a Member State by or on behalf of a posted worker who is a member of such a scheme during the period of his or her posting in another Member State.*
- 2. Where, pursuant to paragraph 1, contributions continue to be made to a supplementary pension scheme in one Member State, the posted worker and, where applicable, his employer shall be exempted from any obligation to make contributions to a supplementary pension scheme in another Member State.*

The directive moreover provides an obligation to inform so as to combat the cross-border information deficit.

## **Directive 98/49/EC, Article 7: Information to scheme members**

*Member States shall take measures to ensure that employers, trustees or others responsible for the management of supplementary pension schemes provide adequate information to scheme members, when they move to another Member State, as to their pension rights and the choices which are available to them under the scheme. Such information shall at least correspond to information given to scheme members in respect of whom contributions cease to be made but who remain within the same Member State.*

In case C-269/07 (European Commission versus the Federal Republic of Germany; decision on “Riester pension”), the ECJ ruled that national regulations on supplementary retirement provisions were not compatible with EU law if they made the granting of the benefits conditional on:

- The beneficiary being subject to unlimited tax liability in the Member State;
- The benefit having to be paid back as soon as the unlimited tax liability was ended, and;
- Excluding the option of using the capital built up under this regulation to acquire private residential housing, unless the property was situated in the home market.



# 7

## Right of residence

### 7.1 General

Since 29 April 2004, the right of residence for all citizens of the European Union has been governed by a single directive: Residence Directive 2004/38/EC. This directive also applies to non-EU citizens (third country nationals) if they are family members of an EU citizen. Their right of residence is derived from the corresponding right of the EU citizen.

As for other cases, a separate Residence Directive (2003/109/EC) applies to third country nationals - i.e. non-EU citizens - who are long-term residents

The right of residence is divided into three categories: the right of residence for up to three months (7.2), the right of residence for more than three months (7.3), and the right of permanent residence (7.4).

The right also of the family members to take up employment - regardless of their nationality - is set out in Directive 2004/38/EC. Article 23 stipulates that the family members of an EU citizen having the right of residence or right of permanent residence in a Member State have the right to be employed or self-employed in that Member State

### 7.2 Right of residence for up to three months

On production of a valid passport or identity card, an EU citizen and his family members have the right of residence in a Member State for a period of up to three months without any conditions or any formalities (Article 6 of Directive 2004/38/EC). This also applies to dependent family members, even if they are not themselves Community citizens (third country nationals). There are no administrative requirements (Article 6 of Directive 2004/38/EC). The residence of the Community citizen is authorised on the basis of a valid passport. No contract of employment is required.

May an unmarried partner stay in another Member State if he or she is dependent on the worker who goes to live and work in another Member State? This is only the case in those Member States that allow their own citizens to live with an unmarried partner from another Member State. Cohabitation is regarded as a "social advantage" under Article 7, paragraph 2 of Regulation 1612/68 (Reed decision C-59/85). Moreover, the term "family member" is defined as follows in Article 2, paragraph 2 b of Directive 2004/38/EC:

*"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."*

### 7.3 Right of residence for more than three months

Article 7, paragraph 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.

In the event that an EU citizen wishes to reside in a Member State for longer than three months, he must report to 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 not Community citizens (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.

The residence card for family members who are not Community citizens is not a conventional residence permit, but a special "Residence card of a family member of a Union citizen". The card has a purely declaratory value - in other words, it provides written confirmation of the right of residence granted under Directive 2004/38/EC. The residence card 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.

## 7.4 Right of permanent residence

The right of permanent residence is acquired after residing for a period of 5 years in a Member State. Article 16, paragraph 1 of Directive 2004/38/EC stipulates that all Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. Article 16 also applies to family members who do not hold the nationality of a Member State and who have resided legally for a continuous period of five years in the host Member State with the Union citizen.

Upon application, Member States will issue Union citizens, after having verified duration of residence (at least 5 years), 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 within six months of the submission of the application; the permanent residence card 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.

## 7.5 Right of residence after the end of employment

The EU citizen maintains his right of residence in the event of sickness, an accident at work or involuntary unemployment (after one year's work). Where he is unemployed following a temporary contract of employment with a duration of shorter than one year or he has become involuntarily unemployed within the first twelve months of residence, he maintains his right of residence for 6 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.

## 7.6 Social advantages and social assistance

Under Article 24 of Directive 2004/38/EC, EU citizens have the right to identical ('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 also applies if a jobseeker from another Member State is involved.

The right to study grants and maintenance grants for training programmes and so on are only provided to the person concerned once he has the right of permanent residence (after 5 years). If, though, the EU citizen is working in the State of residence, he can claim all fiscal and social advantages from the outset (Article 7 of Regulation 1612/68).

In the case of involuntary unemployment, the person concerned may have the right to statutory unemployment benefit, paid by the State of residence. The right to statutory unemployment benefit is based on Article 65 of Regulation (EC) 883/2004.

Social assistance allowances do not fall within the scope of this regulation.



# PART II

## DIFFERENT FORMS OF MOBILITY FOR WORKERS IN EUROPE





## Posted workers

### 8.1 General

A “posted worker” is an employee who normally works in the territory of one Member State (the originating State), and who is sent by his employer - “in the framework of the provision of services” - to work in another Member State. Posting is thus not covered by the regulations on the free movement of persons. During this period the posted employee works exclusively in this Member State. It includes, for example, a resident of Spain, who is sent by his Spanish employer to work in Germany for 20 months to undertake work for a German customer.

In the course of his “normal” working activities the employee in question is subject to the employment laws, social security and income tax of a given Member State. However, posting to another Member State, even if this is only temporary, can interrupt this normal and familiar framework.

The practical impact of posting on an employment situation thus merits attention. Not only in relation to the applicable social security legislation (Regulation (EC) no. 883/2004), but also in terms of income tax (bilateral double taxation treaties) and employment law (Regulation (EC) no. 593/2008 and the posted workers’ Directive 96/71/EC). For each of these areas different rules and/or provisions apply.

### 8.2 Social security<sup>9</sup>

#### 8.2.1 General

In essence, a worker must be registered with social security in the country where he actually carries out his activities (Regulation (EC) no. 883/2004, Article 11 (3) a). If a worker is posted, he can nonetheless avail himself of the coordinating Regulation (EC) no. 883/2004, which allows for a temporary exception from the principle of the country of employment. In concrete terms, this pertains to Articles on posting: Regulation (EC) no. 883/2004, Article 12, 1 to Article 16, 1. The corresponding implementing provisions are stipulated in Regulation (EC) no. 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 Regulation EC 883/2004: Special rules**

1. 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

<sup>9</sup> Partially from: Practical Guide: The Legislation that applies to Workers in the European Union (EU), the European Economic Area (EEA) and Switzerland.

Member State, provided that the anticipated duration of such work does not exceed twenty-four months and that he is not sent to replace another person.

Regulation (EC) no. 883/2004, Article 12,1 stipulates the conditions under which a worker who is posted to another Member State (country of employment), may work in the Member State, without the legal system of the sending State, where he is normally registered with social security, losing its applicability. Additional possibilities are provided under Article 16 of the same regulation.

### **Article 16 Regulation (EC) no. 883/2004: Exceptions to Articles 11 to 15**

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.

With regard to the application of this article in the case of posting, the Member States have concluded an agreement in principle that in the event of posting, the principle of the country of employment may be departed from for up to five years.

## **8.2.2 Duration of the posting**

Regulation (EC) no. 883/2004, Article 12, 1 stipulates that an initial exception for a departure from the principle of the country of employment with regard to the obligation to register with social security, cannot exceed twenty-four months. This exception 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 in another Member State or, in the case of a self-employed person, that person himself, must apply to the competent institution in the sending State. Said institution issues Document A1 (formerly E101). If, owing to unforeseeable circumstances, the posting of workers with a view to provide services lasts longer than originally foreseen, the exception may, pursuant to Regulation (EC) no. 883/2004, Article 16, 1, be granted for a longer period not to exceed 60 months. An agreement by and between the respective competent bodies of the sending Member State (sending State) and the receiving Member State (the country of employment) is nonetheless required to that end pursuant to Regulation (EC) no. 883/2004 Article 16.

## **8.2.3 Preconditions for posting**

Questions may arise regarding a posting, which may not be answerable directly by the provisions of Regulation (EC) no. 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 dispatching 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:

First, the employee must be normally active in the sending State (8.2.3.1). Second, 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 (8.2.3.2). Third, the regulations stipulate that the worker must be registered with the social security system of the Member State from the outset of his employment (8.2.3.3).

### 8.2.3.1 Criteria for stating that an employer normally carries out his activities in the sending state

The terms “normally carrying out its activities” refer to an employer who generally carries out substantial activities other than purely internal administrative activities on the territory of a Member State in which he is established. If the company’s activities are limited to internal management, 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; the pertinent factors have to be adapted to the specific characteristics of each employer and to the real nature of the activities exercised.

The existence of substantial activities by the company in the sending State can be verified by a set of objective factors. The factors listed below are of particular importance. This list is not exhaustive because the criteria must be adapted to each case and take account of the nature of the activities carried out by the company in the state of establishment. It may also prove necessary to take into account other criteria that reflect the specific characteristics of the company and the real nature of the activities it carries out in the state of establishment:

- The place in which the sending company has its registered office and administration;
- The number of administrative employees of the sending state and the country of employment – if the sending company only has administrative staff in the sending state, the provisions relating to the posting of personnel do not apply;
- The place of employment of the posted worker;
- The place where the majority of the commercial contracts are concluded;
- The law applicable to the contracts signed by the sending company with its customers and its employees ;
- The number of contracts performed in the sending state and in the country of employment;
- The turnover generated by the sending company in the sending state and in the country of employment during a sufficient evaluation period (e.g. a turnover equivalent to about 25% of the total turnover generated in the sending state may be a sufficient indicator; additional checks will be needed below this 25% threshold). In principle, the turnover may be evaluated from the accounts published by the company for the previous twelve months. Nevertheless, in the case of a newly created company, it will be more appropriate to calculate the turnover as of the start of its activities (or over a shorter period, if that is more representative).
- The period of the company’s activity in the sending Member State.

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

#### **Example:**

- The Polish company KOLOR is commissioned by a customer to carry out paint works in Germany. The works were to last two months. In addition to seven members of its permanent staff, KOLOR wishes to send to Germany three temporary workers made available by the temporary employment agency FLEXIA. The temporary workers have already worked for KOLOR, which asks FLEXIA to post these three temporary workers to Germany at the same time as its own seven workers. If all the other conditions relating to the posting are met, Polish law will continue to apply to the temporary workers as well as to the permanent staff.



### 8.2.3.2 “Direct relationship” between the sending company and the posted worker

The interpretation of the legal provisions and the case law of the European Union as well as daily practice provide a certain number of 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 (otherwise put, 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 has to be done, but more generally, of determining the final product of said work or the service that has 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 relating to the procedures for the payment of wages to the worker, between the employer in the sending state and the company in the country of employment;
- The sending company retains the authority to impose disciplinary sanctions on the employee.

#### **Examples:**

- Company A established in Member State A posts an employee temporarily to carry out a task in Company B established in Member State B. The posted worker remains under the contract of employment concluded with Company A, and may demand remuneration only from Company A.  
Solution: Company A is the employer of the posted worker, because the latter can be remunerated only by that company. This is true even if Company B reimburses Company A for the entire salary paid to the posted worker and deducts this salary from its taxes as operating charges in Member State B.
- Company A established in Member State A posts an employee temporarily to perform a task in Company B established in Member State B. The posted worker remains under the contract of employment concluded by Company A and is paid by Company A. Nevertheless, the posted worker concludes an additional contract of employment with Company B, which also pays him a salary.  
Solution a): During the period of his posting in Member State B, the worker has two employers. When he works exclusively in Member State B, he is subject to the legislation of the latter, in accordance with Regulation (EC) no. 883/2004, Article 11, (3) a. Accordingly, the remuneration paid by Company A is taken into consideration to determine the social security contributions that have to be paid in Member State B.  
Solution b): If the posted worker also works in Member State A from time to time, the provisions of Regulation (EC) no. 883/2004, Article 13, 1 should be consulted to determine which of the two legislations (of State A or State B), applies.
- Company A established in Member State A posts an employee temporarily to perform a task in Company B established in Member State B. The contract of employment concluded with Company A is suspended for the period during which the worker is posted in Member State B. The posted worker concludes a contract of employment with Company B for the period of his posting in Member State B; he is paid by Company B.  
Solution: This is not a posting situation, because a suspended employment relationship does not warrant the application of the sending State’s legislation regarding labour law. Consequently, in accordance with the provisions of Regulation (EC) no. 883/2004, Article 11, 3, a, the worker is subject to the legislation of Member State B.

Whereas, in theory, the legislation of Member State B applies to social security, a derogation may be considered in two cases (examples 2 and 3), under Regulation (EC) no. 833/2004, Article 16, given the

temporary nature of the work carried out in State B. This derogation must nonetheless be carried out in the interest of the posted worker, who must make the request. Furthermore, such an agreement must be approved by the competent institutions of the two Member States concerned.

### 8.2.3.3 Rules for a worker recruited in one Member State for posting in another Member State

The rules that govern the posting of workers provide for the possibility of recruiting a person to have him posted in another Member State. Nevertheless, the rules require that posted workers be subject to the social security system of the Member State in which the Employer is established "right before the commencement of his activity as an employed person." A reference period of one month is accepted, as shorter periods require an evaluation on a case by case basis, taking all pertinent factors into account. Any employment with an employer established in the sending State meets this condition. The worker need therefore not have worked for the employer who requested his posting during this period. The condition is also met in the case of students or retirees, or any person insured by the fact of residing in a Member State and being subject to the social security system of the sending State. All the conditions usually applicable to the posting of workers shall also apply (to the posted workers).

#### **Examples:**

- On 1 June, Employer A established in Member State A posts in Member State B employees X, Y and Z, for a period of ten months so that they can perform a task for his own account.
- Employee X starts to work for Employer A on 1 June. Right before commencing his activity as an employed person, he lived in Member State A, where he was studying at the university.
- Employee Y also started to work for employer A on 1 June. Right before commencing his activity as an employed person, he lived in Member State A, but was a cross-border worker and was subject to the legislation of State C.
- Employee Z, who also started to work for Employer A on 1 June, had been working in Member State A since 1 May. He was consequently subject to the legislation of Member State A. Nevertheless, right before 1 May, said employee had been subject to the legislation of Member State B for ten years because of an employment relationship.

**Solution:** For the legislation of the sending State to continue to apply, one of the conditions is that the employee concerned had been subject to the social security system of that State right before his posting. The worker need not however have been employed by the sending company right before his posting. As they were subject to the legislation of Member State A right before 1 June, Employees X and Z meet the conditions for maintaining the legislation of the sending State in force, which is not the case with Employee Y, who was subject to the legislation of Member State C right before 1 June. As he was not subject to the legislation of the sending Member State right before the commencement of his posting, he will in principle be subject to the legislation of Member State B in which he actually works.

### 8.2.4 Situations in which it is absolutely impossible to apply the provisions of Regulation (EC) no. 883/2004 governing the posting of workers

In a certain number of situations, the rules of Regulation (EC) 883/2004 exclude the application of the provisions relating to the posting of workers, i.e. that the posted worker must be insured in the country of employment, in particular when:

- The company to which the posted worker is assigned places the worker at the disposal of another company situated in the same Member State;
- The company to which the posted worker is assigned places the posted worker at the disposal of another company situated in another Member State;

- The worker is hired in one Member State so as to be posted in a company situated in a second Member State for the benefit of a company situated in a third Member State, although the requirement of being subject to the social security of the sending State prior thereto was not met;
- The worker is hired in one Member State by a company situated in another Member State to work in the Member State of employment;
- The worker is posted to replace another posted worker;
- The worker has concluded a contract of employment with the company in which he is posted.

In such cases, the reasons for strictly foregoing the application of Article 12 of Regulation (EC) no. 883/2004 governing the posting of workers are very clear: Articles 11 and 13 of Regulation (EC) no. 883/2004 are applied. The complexity of relations arising out of one of these situations, apart from the fact that it offers no guarantee of a direct relationship between the worker and the sending company, runs in direct contradiction with the objective of doing away with administrative complications and segmentation of social security coverage of those concerned, which is the very reason behind the provisions governing the posting of workers. Any erroneous use of these provisions must also be prevented. In certain exceptional circumstances, a person already posted could be replaced, provided that the initially planned period of posting has not yet run its full course. This situation could occur, for instance, if a worker posted for a period of 20 months fell seriously ill after 10 months and had to be replaced. It would be reasonable, in such a case, to authorise the posting of another person to cover the remaining period of 10 months.

It should be borne in mind that in such cases, it is not the posting rules of Regulation (EC) no. 883/2004 relating to social security that apply, but the rules of the posting Directive 96/71/EC as well as the national posting legislation relating to labour law.

### 8.2.5 Health insurance during the posting

The posted worker (as well as his accompanying family members, under certain circumstances), can avail himself of benefits in kind such as medical treatment, etc. in the Member State where he stays or where he has been posted. For as long as the principle of the country of employment does not apply, he must apply for the European Health Insurance Card (EHIC) or – in 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 must be kept for as long as medical care is necessary. Form S1, which is issued in case of prolonged stay (i.e. residence), must however 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 legally required to take out health insurance. Privately insured workers must inquire with their private insurance institution.

## 8.3 Taxation

The payment of taxes during a posting is governed in the applicable bilateral double taxation treaties concluded by the posted worker's State of residence with the State of employment to which he is posted. This treaty prevents the posted employee from being taxed twice, or in the wrong treaty state. A good understanding of "the 183 days rule" and "the permanent establishment" issue is essential.

Most double taxation treaties follow the OECD Model Tax Convention, which is updated at irregular intervals. Posting is governed by Article 15 “income from work” (cf. Chapter 5).

The OECD-model convention states that the taxation of income from work (wages) in first instance is allotted to the State of residence. However the State of employment will tax wages earned for work carried out on its territory (the State of employment principle).

The State of residence nevertheless retains its right to levy taxes on this income if the following conditions are satisfied:

- 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 State of employment.

In practice an attentive reading of the bilateral taxation treaty - and in some cases even that of the related case law - is necessary. This will make it clear:

- if 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 employment ” must be understood as every day, even if only for a part of that day, that the employee is in the territory of the State of employment. It thus includes days of interruption of work for sickness, holidays, weekends and/or public holidays spent in the State of employment);
- how the “wage payment criterion” must be interpreted (who is responsible for the wages, and under what accounting system this takes place). This is judged on the actual existing situation. In the case of an agency which operates as the material employer, this leads to taxation in the State of employment);
- in the event that an employment agency worker is supplied to a company in another country, 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?”).

## 8.4 Labour law in case of posting

### 8.4.1 Regulation (EC) no. 593/2008 on the law of contractual obligations

Usually, a worker is already employed by the employer before he is posted. Accordingly, the labour rules of the Member State in which the worker “normally” performs his work apply. In the event of a posting, the employer and the employee have essentially the choice of departing therefrom. This is opted for when the labour rules of the Member State in 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.

Pursuant to Regulation (EC) no. 593/2008 (freedom of choice of law) the employer and the employee are free to choose the applicable law. This choice of law does not however lead to a situation where the worker loses the protection he enjoys under mandatory legal provisions, which apply for want of said choice of law. If no law is chosen, the applicable law is determined pursuant to Regulation (EC) no. 593/2008 Article 8 (cf. Chapter 4).

In addition there are overriding mandatory provisions to be taken into consideration (Regulation (EC) no. 593/2008 Article 9). These are rules of broader scope than the protection of individual workers. These rules are used for the protection of the public interest. Every Member State has its own overriding mandatory rules.

## **8.4.2 Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (Directive on posting 96/71/EC)**

In addition to Regulation (EC) no. 593/2008, Directive 96/71/EC applies to the “posting of workers in the framework of the provision of services.” This directive has been transposed into national labour rules (worker posting act). It aims to harmonise the overriding mandatory rules inasmuch as it determines the areas of labour law in each Member State that are in the very least part of the overriding rules, even if the legislator or case law of that State has not yet taken any initiative on this matter. However, there can be no question of harmonisation as to content. In other words, the principle of subsidiarity continues to apply to give a concrete national content to these legal provisions. There are therefore legal and administrative provisions that take overriding mandatory priority, but the respective labour rules differ in the individual Member States.

### **Article 3, 1, of Directive 96/71/EC “Terms and conditions of employment”**

*1. Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1 (1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:*

*- by law, regulation or administrative provision, and/or*

*- by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8, insofar as they concern activities referred to in the Annex:*

*a) maximum work periods and minimum rest periods;*

*b) minimum paid annual holidays;*

*c) the minimum rates of pay, 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.*

The legal provisions given overriding priority pursuant to Article 3, 1 of the posting Directive are to be complied with by the host Member State (country of employment) for the duration of the posting by foreign employers. This applies, “irrespective of the law applicable to the respective contract of employment.” Social dumping and unfair competition will thus be prevented in the receiving state.

Pursuant to Article 3, paragraph 7 of the posting Directive, the working conditions and the labour protection provisions of the sending State shall apply, if the working conditions and the labour protection provisions of the receiving State are less favourable than those of the sending State (principle of preferential treatment).

As already mentioned, this regulation applies not only for the legal provisions, but also for the provisions stipulated in the collective bargaining agreement for the construction industry and related sectors. Pursuant to Directive 96/71/EC, Article 3, paragraph 10, every Member State expands the content and scope of the Directive concerning the posting of workers. Many Member States have actually subjected all binding wage agreements from all sectors to the scope of the Directive concerning the posting of workers. These countries are Belgium, France, Finland, Greece, Italy, Luxembourg, the Netherlands, Austria, Portugal, Slovakia, Slovenia and Spain.

Latvia, Lithuania, Malta, Poland and the United Kingdom have not extended the scope of the posting Directive to generally binding wage agreements. In Germany, only a few sectors are included in the worker posting act.

### **Example**

- If a French employer employs a worker in the German construction industry, he must pay the German minimum wage, provided it is higher than the French wage.
- A Spanish employer posts a Spanish worker in the Dutch horticultural sector. There is a legal minimum wage in the Netherlands, which must be paid to the Spanish worker in any event. The Dutch collective bargaining agreement has been declared generally binding. This means that the wage agreed under the terms of the agreement (which is higher than the legal minimum wage) must be paid. In addition, the working conditions agreed with the Spanish employer must also be granted.
- A Polish employer posts a worker to provide services (freedom to provide services) in a German slaughterhouse. There is no legally prescribed minimum wage in Germany. This means that the Polish employer can continue to pay the Polish salary to the posted worker. However, there are legal minimum wages in certain sectors, e.g. in industrial cleaning. If the worker is posted to one of these sectors with legal minimum wages, then the Polish employer must pay the posted worker the minimum wage in force for that sector in Germany.

Furthermore, Directive 96/71/EC, paragraph 1, indent 2, stipulates that if the aforementioned matters are regulated even more extensively for the construction industry and related sectors in the collective agreements, then such specific provisions are to be applied as overriding rules. These related sectors comprise all construction works that pertain to the construction, repair, maintenance and renovation or demolition of buildings (cf. Annex of the Directive).

### **Examples**

- A Hungarian employer posts a worker to a Dutch construction site, to provide services as a construction worker there. There is a generally binding wage agreement for the construction industry in the Netherlands. The Hungarian employer must therefore guarantee his posted worker also at least the Dutch collectively agreed regulations concerning work and rest periods, holidays, wage scales, etc., if matters described in Article 3, paragraph 1 of Directive 96/71/EC are concerned.
- Another Hungarian employer posts a worker to carry out activities in a Dutch slaughterhouse. This employer must pay at least the Dutch legal minimum wage, but is not required to comply with the wage scales of the Dutch collective agreements for slaughterhouses, if the collective agreement in question has not been declared generally binding.

The Directive concerning the posting of workers provides the absolute minimum standard. It also gives the Member States the option to declare customary practices for posting and collective agreements that

go even further on their territory as compulsory law (Directive 96/71/EC, Article 3, paragraph 10). Certain Member States have availed themselves of this possibility. The following Member states have actually done so for all collective agreements from all sectors, namely: Belgium, France, Finland, Greece, Italy, Luxembourg, the Netherlands, Austria, Spain and Portugal.

The principle of the most favourable formula is clearly provided in the posting Directive (Article 3, paragraph 7):

*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 of any more favourable working, pay and employment conditions for the posted worker during the posting period, than he would have enjoyed in the country of origin.

### **Example**

- A worker posted to Germany by his Spanish employer is subject to the compulsory German labour law. Pursuant to the European Directive 96/71/EC concerning the posting of workers, these are in particular the matters listed in Article 3, paragraph 1 thereof, as contained in German Labour law and the German collective agreement for the construction industry. Whether the German authorities have subjected other collective agreements to the scope of the Directive concerning the posting of workers, or has declared other elements of the German labour legislation to take overriding priority, has to be examined. The worker can obtain this type of information from the German Trade Union Federation (GDB) and/or the “liaison offices” indicated in the Directive on the posting of workers.
- For a worker residing in Spain, who is posted by his Spanish employer to Germany, where the Spanish labour rules continue to apply, the employment relationship may nonetheless be “co-determined” by special, overriding provisions (German labour intervention standards). It is important to know which areas of the German rules are considered as overriding mandatory provisions. The posted Spanish worker can obtain information from the German Trade Union Federation (GDB) and/or the “liaison offices” indicated in the Directive on the posting of workers.

## **8.4.3 ECJ decisions on the posting of workers**

Pursuant to the preamble of Directive 96/71/EC, the abolition of obstacles to the free movement of persons and services constitutes one of the objectives of the Community (Recital 1); any restrictions based on nationality or residence requirements are prohibited (Recital 2). Furthermore, the Directive stipulates (Recital 5):

*... Whereas any such promotion of the transnational provision of services requires a climate of fair competition and measures guaranteeing respect for the rights of workers;*

In a series of decisions (Viking, Laval, Rüffert, Commission vs. Luxembourg), the European Court of Justice (ECJ) has ruled on the connection of fundamental freedoms in the internal market with the protection of workers and social fundamental rights:<sup>10</sup>

- Case C-438/05 Viking (ECJ ruling of 11 December 2007): The Finnish shipping company Viking Line planned to re-flag one of its vessels and to register it in Estonia, so as to be able to employ the crew at the lower Estonian wages. The Finnish Seamen’s Union (FSU) and the International Transport Work-

<sup>10</sup> Cf. 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.

ers' Federation tried to prevent this. The ECJ saw a restriction of the freedom of establishment in the threatened industrial action pursuant to Article 43 TEC (now: Article 49 TFEU).

- Case C-341/05 Laval (ECJ ruling of 18 December 2007): The Latvian firm Laval had posted a worker from Latvia to Sweden to carry out construction works. Laval had concluded a wage agreement with a Latvian construction workers' union, but not with the Swedish trade union. The Swedish trade unions took industrial action compatible with Swedish law to demand such an agreement. Laval lodged a complaint with the European Court of Justice. In its ruling, the Court upheld the right of the unions to take industrial action in defence against social dumping. In the concrete case at hand, however, the European Court of Justice came to the conclusion that pursuant to the Directive concerning the posting of workers, a Member State is not allowed to make the provision of a service on its territory contingent upon the maintenance of working or employment conditions which go beyond the compulsory provisions on a minimum level of protection. Such a minimum level could be set by nationally fixed minimum wages. If there are no minimum wage provisions in the country concerned (in Sweden, for instance, wages are negotiated exclusively by the social partners under collective bargaining), then industrial action for the protection of workers is not legitimate.
- Case C-346/06 Rüffert (ECJ ruling of 3 April 2008: A German construction company employed, for the construction of a prison in Lower Saxony (Germany), a Polish subcontracting company, which paid less than the wage agreed in the wage agreement. This practice ran contrary to the Law of the State of Lower Saxony on the awarding of contracts, according to which such awarding depends on whether the wage agreed in the wage agreement is paid at the site of performance. The European Court of Justice decided that the law of awarding of public contracts may not require wages governed by collective agreements, if such agreements have not been declared generally binding. Moreover, the Court criticised the fact that this provision concerned only the public sector.
- Case C-319/06 "Commission versus Luxembourg" (ECJ ruling of 19 June 2008): This case concerned a legal rule in Luxembourg, according to which the wage paid to posted workers must be automatically adjusted to the cost of living. This indexing concerned all wages, including those which did not fall under the minimum wage category. The European Court of Justice reprimanded this aspect in particular, since it goes beyond the wording of the posting Directive, Article 3, paragraph 1 c ("minimum rates of pay"). Luxembourg cited the special clause in Article 3, paragraph 10 of the posting Directive, according to which the Member States may apply terms and conditions of employment on matters other than those referred to in Article 3, paragraph 1. The ECJ did not, however, concur with this view.

When the posting Directive was issued, it was generally seen as an important instrument in the fight against "social dumping," i.e. unfair competition on the basis of wages and working conditions by foreign providers of services in the (labour) market of the host country. Through these four European Court of Justice decisions, the question arises whether it can serve the implementation of the principle of "equal pay and working conditions for equal work at the same place." In the cases of Laval, Rüffert and the Commission versus Luxembourg, the European Court of Justice interpreted the posting Directive in such a way that it can be considered the maximum directive with regard to matters that can be regulated, as well as in regard to the level of protection that can be demanded, and the methods that can be used to ensure that the conditions of employment of all domestic and foreign undertakings in a region or in a sector are equally respected.

ETUC consequently asked for a protocol on social progress as an annex to the treaties, in order to make it unmistakably clear, that all provisions of the treaties concerning the freedom of movement are to be interpreted under the acknowledgement of fundamental rights, and in order to embed this in a far reaching concept of social progress and harmonisation of working conditions and social systems. The new EU treaties stipulate expressly in Article 3, paragraph 3:

*The Union (...) shall work for (...) a highly competitive social market economy, aiming at full employment and social progress.*



# 9

## Migrant workers

### 9.1 Who has migrant worker status?

By a “migrant worker” we mean a worker who has lived and worked in more than one Member State, and lives and works in the last of these Member States.

#### **Example**

- An Irish nurse, using the employment services of the EURES network, is recruited by a hospital in Denmark and consequently moves to that country. European legislation guarantees her free access to the Danish labour market and also ensures that she does not thereby lose the social rights she previously acquired in Ireland.

### 9.2 Working regulations and right to stay

Articles 1 to 6 of Regulation (EEC) no. 1612/68 guarantee the “free movement” of EEA nationals in the single labour market (see Chapter 2). They can therefore automatically work without a work permit in all other Member States.

Non-EEA nationals, “third country nationals”, do not enjoy this freedom of movement. If an EEA national migrates to another Member State with his family, the family members can also work in the other Member State under the same conditions as the worker himself (Article 23 of the Residence Directive 2004/38/EC) - this is regardless of their nationality, so this also applies to third country nationals.

If the migrant worker is employed in a Member State he can automatically claim the same tax and social advantages as national employees (Article 7, paragraph 2 of Regulation (EEC) no. 1612/68). If a national employee from a specific national sector, for example, is promoted to a higher salary scale by reason of long service, the years of service which the migrant worker has completed in a comparable sector in another Member State must be recognised and taken into account (Schöning-Kougebetopoulou Decision, C-15/96).

If an EEA citizen works in a Member State, he also has the right of residence there. This is all governed by Directive 2004/38/EC, which has been transposed into national legislation. Provided that the person concerned maintains employee status (or equivalent status according to Article 7, paragraph 3 of Directive 2004/38/EC), he is assured of the right of residence in the host Member State. Once he has resided for 5 years continuously in this Member State, he will acquire the right of permanent residence there. He can only lose that right of permanent residence if he is away from the host Member State for more than two consecutive years.

#### **Example:**

- The Irish nurse and her family members - even if one of them is not an EEA citizen - thus do not need work permits to work in Denmark. In terms of labour conditions, she must be treated the same as a nurse with Danish nationality. If seniority conditions exist for nurses in the Danish health care

sector, account must be taken of her years of service in Ireland when determining her right to these advantages. If she obtains an employment contract for an indeterminate period, she also has the right to remain in Denmark for an initial period of five years, and, if her employment continues, on a permanent basis.

Chapter 2 (Free movement of employees) and Chapter 6 (Right of residence) of this Guide provide further details on this subject.

## 9.3 Social security

### 9.3.1 Applicable social security law

Whoever works in a Member State is also subject to the social security of that State (*lex loci laboris* pursuant to Regulation (EC) no. 883/2004 Article, 11, 3 (a)). The legal system of the respective Member State may not impose on EU citizens any conditions of citizenship or residence with regard to access to the social security system.

The individual conditions relating to health insurance, occupational accidents and diseases, disablement, retirement pension, unemployment and family benefits have already been explained in Chapter 3 of this Guide.

How and where a migrant worker is registered with social security if he obtains one or more retirement pensions from different Member States is explained in Chapter 13.

### 9.3.2 Unemployment

In principle, once he has worked in his new country of residence and has then become unemployed, a migrant worker is entitled to the unemployment benefits of his new country of residence and employment.

All Member States have their own unemployment rules. Generally the right to unemployment benefit, and the length of time for which it is paid, are dependent on a minimum number of hours, days, months or years that an employee has worked in a given period in this Member State. Upon changing from one social security system to another, there is a danger of insurance gaps for a migrant worker, in particular if he becomes unemployed shortly after arriving in his new country of residence and of employment. Regulation (EC) no. 883/2004 Article 61 consequently has provided for the aggregation of periods of employment and of insurance, in order to protect his entitlement to unemployment benefit in case of such gaps.

A migrant worker needs Form U1 by way of proof that he was registered as a worker with social security in another Member State. Form U1 is a "declaration about the periods which are to be taken into consideration for the provision of unemployment benefits." This form must be submitted with the application for unemployment benefit to the unemployment benefit fund of the new country of employment. The migrant worker should apply for Form U1 before moving from the unemployment office of the Member State where he had hitherto been registered with social security.

In most Member States unemployment benefit provided depends on the previously earned remuneration. The calculation for a migrant worker is carried out pursuant to Regulation (EC) no. 883/2004 Article 62. In calculating the benefits based on previous remuneration, the competent institution (unemployment benefit fund) of a Member State (country of residence) takes into consideration the remuneration that the migrant worker earned during his last employment in accordance with these legal provisions.

### **Example**

- Suppose that the Irish nurse previously worked for 5 years in Ireland. After 4 months work in Denmark she is dismissed due to restructuring. In Denmark an unemployed worker is entitled to income-related unemployment benefit if he has been in paid employment and paying his insurance contributions for at least 52 weeks in the previous 3 years. If the Irish employee can demonstrate, using form U1, that before her Danish job she worked for 5 years in Ireland, the Irish insurance period must be taken into account and aggregated with the Danish insurance period by the unemployment service. Form U1 is issued by the Irish Social Welfare Office. In calculating the amount of the unemployment benefit, account is only taken of earnings in Denmark.

If the unemployed migrant worker wants to return to his previous State of residence or go to another Member State to seek work, he may export his unemployment benefit for 3 months (Article 64 of Regulation (EC) no. 883/2004; See Chapter 12: Mobile European workers in case of Unemployment).

## **10 Cross-border workers**

### **10.1 Who has cross-border worker status?**

A cross-border worker is an employee who works in one Member State (State of employment) and lives in another (State of residence). It is essential that he retains his normal place of residence outside the State of employment. If the cross-border employee moves to the State of employment, he becomes a migrant worker (see chapter 13). A resident who moves to a neighbouring State but continues to work in his original State of employment (migrant resident), is also a cross-border or a frontier worker.

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

### **Example**

- A resident of Salzburg in Austria works as a laboratory technician in a pharmaceuticals company in Germany and, despite the fact that he has rooms there where he stays during the working week, does not move to Germany. European legislation guarantees him free access to the German labour market and also ensures that he does not thereby lose the social rights he previously acquired in Austria.

Under the legislation applicable a cross-border employee may also be given “frontier worker status”. In this case there will also be a definition of a cross-border worker in this legislation. The ensuing specific status of cross-border workers entails rights and/or obligations which depart from the principles generally in force. The definition of cross-border worker provided in the Regulation on the coordination of social security systems is broader than that contained in double taxation treaties, which often leads to confusion and to wrong conclusions. It is therefore very important to continue to draw this distinction between fiscal and social aspects in a coherent manner.

## 10.1.1 Social security

The coordinating Regulation (EC) no. 883/2004 provides certain special rules for frontier workers, in particular as to where such a worker should be treated in case of illness or claim benefits in case of full-time unemployment.

Regulation (EC) no. 883/2004 Article 1, paragraph f stipulates who is to be considered as a frontier worker, i.e. a cross-border worker who in principle returns to his country of residence in principle every day and at least once a week.

### **Article 1, paragraph f of Regulation (EC) no. 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;”*

Persons who stay mainly in the country of employment and return to their country of origin less frequently than once a week are not considered frontier workers. Unlike frontier workers, they do not have the right to choose where to claim benefits in kind from health insurance. Nevertheless, non-frontier workers may choose whether they wish to obtain unemployment benefits from the country of residence or the country of employment.

In case of an immediate return to his country of residence, a non-frontier worker must register as a job-seeker with the local employment office (unemployment benefit fund). This unemployment benefit is calculated in accordance with the rules applicable in the country of residence (Regulation (EC) no. 883/2004, Article 65, paragraph 5, letter a).

A non-frontier worker who does not return to his Member State of residence, must make himself available to the employment office of the Member State whose legislation last applied to him. The non-frontier worker is entitled to unemployment benefit in accordance with the rules applicable in the country of employment, and the unemployment benefit is calculated likewise in accordance with the rules applicable in the country of employment. If he returns to the country of residence after establishment of the entitlement in the country of employment, Article 64 of Regulation (EC) no. 883/2004 applies (export of unemployment benefit for 3 months).

## 10.1.2 Taxation

Although the OECD model convention has no specific provisions for frontier workers, bilateral double taxation treaties concluded by neighbouring States may well include mention of “frontier workers”.

If a double taxation treaty does make such special rules for frontier workers, a stricter definition usually applies than that used for the purposes of social security (Article 1, paragraph f of Regulation (EC) no. 883/2004). As well as the required criteria these definitions generally also include geographical conditions: commuting must take place within a clear and objectively delineated frontier area.

This specific frontier worker status gives rights and/or obligations which differ from the generally applied State of employment principle. Workers treated as frontier workers for the purposes of taxation are taxed in their State of residence on income earned in the neighbouring State.

### 10.1.3 Lack of coordination

The application of different definitions of the term “frontier worker” can lead to a lack of coordination. A situation can arise where the employee is covered by social insurance in the State of employment and remains liable to tax in his State of residence. This can be both advantageous and disadvantageous.

## 10.2 Access to the labour market

Articles 1 to 6 of Regulation (EEC) no. 1612/68 guarantee the “free movement” of EEA nationals in the single labour market. Such workers may accordingly work in another Member State without a work permit, although restrictions apply partially for nationals of Bulgaria and Romania (cf. Chapter 2 of this Guide). Regulation (EEC) no. 1612/68 stipulates that EEA nationals who carry out an activity on the territory of another Member State shall benefit from the same rights as nationals, irrespective of their nationality (provided they are EEA nationals). The “Free movement of employees” Regulation (EEC) no. 1612/68 also applies to frontier workers.

Non-EEA nationals, “third country nationals”, do not enjoy this freedom of movement.

#### **Example:**

→ An employee living in France with French nationality may work in Belgium without a work permit, even if he is not resident in Belgium. However, this right does not apply to his Algerian spouse, if she has not taken French nationality and/or the family does not move to Belgium. In this last case employees are known as “migrant workers” (see chapter 9). If the family moves, the right of the spouse to take up employment can be invoked under Article 23 of the Residence Directive 2004/38/EC.

## 10.3 Social security

### 10.3.1 Applicable social security law

The frontier worker is registered with social security pursuant to Regulation (EC) no. 883/2004 Article 11, paragraph 3, letter a. If he was previously covered by social insurance in another Member State - for example in the Member State where he lives because he previously worked there - he then “moves” from the one social security system to the other, notwithstanding the fact that he retains his normal place of residence in the original Member State (State of residence).

He may reasonably claim that he retains close personal links with his State of residence. He is also present there on a regular basis. Generally his family is also there. He can therefore also opt to pass “difficult” periods, for example sickness, invalidity and/or unemployment in his State of residence. This is not only the case for cross-border employees. If European legislation offered no guarantees of this, this could constitute an obstacle to the free movement of workers.. Regulation (EC) no. 883/2004 therefore contains a number of practical provisions to make this possible. It should also be noted that these practical provisions in the coordinating regulation give much less choice to “frontier workers”.

### 10.3.2 Sickness and maternity

#### 10.3.2.1 Medical benefits

In principle cross-border or frontier workers have a claim on the medical services of the Member State where they pay their contributions, i.e. the State of employment.

The worker and his family nonetheless maintain close personal ties with their country of residence. They must be able to receive medical treatment in their country of residence. The cross-border or frontier worker as well as the family members insured along with him are consequently registered with the institution of the country of employment (competent Member State). In the event 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) no. 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.*

Pursuant to Article 18, paragraph 2, family members of frontier workers insured along with them are entitled, without prior authorisation, to benefits in kind during their stay in the competent Member State. If this Member State is listed in Annex III of Regulation (EC) no. 883/2004, however, the family members of frontier workers who reside in the same Member State as the latter, are entitled, in that Member State, to benefits in kind which they can prove to be medically necessary during their stay.

**Examples**

- A frontier worker lives in Germany and works in Denmark (competent State). The family members of the frontier worker are “registered with the Danish social security.” They are entitled to benefits in kind in the country of residence, Germany, but not to any Danish benefits in kind, because Denmark is listed in Annex II of Regulation (EC) no. 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.” They are entitled to both Danish and German benefits in kind, because Germany is not listed in Annex II of Regulation (EC) no. 883/2004.

The health insurance fund of the country of employment (competent Member State) will send a Form S1 to the worker every year (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 must submit to the insurance institution of his country of residence (health insurance fund).

The right to choose is, pursuant to Regulation (EC) no. 883/2004, ended (abruptly), if the worker discontinues his activities in the country of employment (competent Member State) because he has become unemployed. The new Regulation (EC) no. 883/04 nonetheless stipulates that the frontier worker retains the right to choose in a limited number of situations.

Pursuant to Article 27 of Regulation (EC) no. 883/2004, a frontier worker who retires and gets a retirement pension only from the competent State (the former country of employment), is entitled to benefits in kind in the competent Member State without prior authorisation, if he stays in the competent State. The latter must have opted thereto and be listed in Annex IV.

**Examples**

- A pensioner with a German pension lives in Spain. He pays the contribution for health and nursing insurance in Germany. This pensioner is entitled to Spanish benefits in kind and Spanish cash benefits (care allowance). During the stay in the competent Member State (Germany), he is entitled to all German benefits in kind because Germany is listed in Annex IV.
- A pensioner on a Danish pension lives in France. He pays no contributions for health insurance in

Denmark, because the Danish social security system is financed through taxes. This pensioner is entitled to French benefits in kind. He pays no contributions to the statutory health insurance in France, but may take out supplementary health insurance on a voluntary basis. Denmark refunds the costs for the benefits in kind received in France. During his stay in the competent State (Denmark) he 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).

#### **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 resides in France and has worked in Germany for 10 years. He becomes incapacitated for work and is entitled to a German and French disability pension (pro-rata). He is also entitled to French sickness benefits in kind, because both France and Germany are listed in Annex V.
- A frontier worker resides in the Netherlands and has worked in Germany for 10 years. He becomes incapacitated for work and is entitled to a German and to a Dutch reduced earning capacity pension (pro-rata). He is not entitled to German healthcare benefits, because the Netherlands and Germany are not both listed in Annex V.

#### **10.3.2.2 Sickness benefits**

The frontier worker is in principle entitled to the sickness benefit from the Member State in which he was required to contribute, namely from the country of employment. Certain Member States have waiting periods before a worker is entitled to continued salary payments in case of sickness and/or sickness benefits. This is the case for instance in Belgium, Denmark, Finland, France, Ireland, Norway, Austria, etc. Regulation (EC) no. 883/2004, Article 6 protects the frontier worker from gaps in his entitlement to the continued payment of wages in case of sickness and/or to sickness benefits. It is of vital importance therefore to submit Document S1 in good time.

The coordinating Regulation (EC) no. 883/2004 provides no right to choose between the country of residence and the country of employment with regard to the entitlement to sickness benefits. Pursuant to Article 21 of Regulation (EC) no. 883/2004, the cash benefits and the wages will most likely be continued to be paid in another Member State (country of residence). This means that the frontier worker may stay in the territory of his country of residence without any problems, whilst he receives sickness benefits from the country of employment. Depending on the agreements concluded by and between the country of residence and the country of employment, the sickness benefits are paid out either directly by the health insurance fund of the country of employment or indirectly by the health insurance fund of the country of residence.

#### **Article 21 of Regulation (EC) no. 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 the application of this Article, in particular as regards the medical examination, are stipulated in the implementing Regulation (EC) no. 987/2009, Articles 27 and 87. 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 (country of employment) – sets out procedures for the affiliates, for the institutions of the Member State of residence and for the competent institution. Article 87 on medical examination and administrative checks is also important.

### **10.3.3 Occupational diseases: where can frontier workers get treatment?**

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

Frontier workers may, however, also get treatment in the country of residence, in the event of an occupational accident or disease. The benefit provider in the country 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 for an occupational accident, the proof must normally be accepted by an existing health insurance scheme (e.g. the European Health Insurance Card – EHIC).

Document DA1 (formerly E 123) from the accident insurance relating to the non-cash benefits is as a rule issued first after an investigation of the accident, and then sent to the liaison office in the country of residence and/or to the affiliates.

Note: If you receive an invoice from the doctor for the treatment of the consequences of an accident, you must forward it to the accident insurance institution in the country of employment or to the international liaison office in the country of residence. These will verify whether the costs can be covered by the accident insurance and whether the amount billed corresponds with the rates in force. You are strongly advised against settling the bill yourself, because if you have been overcharged, you cannot claim the overpaid sums from the benefit providers (doctor, physiotherapist, etc.).

## **10.4 Unemployment**

### **10.4.1 Unemployment benefits**

In principle, a cross-border worker could claim unemployment benefits in the Member State in which he is required to pay contributions, i.e. the country of employment (competent Member State). This however does not apply to frontier workers in the event of full unemployment. The country of residence must moreover register them in the local social security system immediately. The other cross-border workers, i.e. workers who return less frequently than once a week to their country of residence, have the right to choose.

Gaps in social security may occur when switching from one social security system to the other because of possible waiting period requirements, but also because of the fact that the worker has for a long time – or perhaps never – paid social security contributions in the country of residence. Regulation (EC) no.



883/2004, Article 61 consequently lays down special rules on aggregation of periods of insurance, employment or self-employment (cf. Chapter 3.5.4).

When ascertaining the entitlement to unemployment benefits, as well as when determining the amount and duration thereof, the competent Member State (country of residence) must therefore always take into account the periods of insurance completed in other Member States, in order to make sure that the worker does not lose any of his entitlements to unemployment benefits acquired elsewhere. Form U1 (formerly E301) is required by way of proof that the worker was previously registered with social security in another Member State. Form U1 is a “declaration as to the periods which are to be taken into consideration for the granting of unemployment benefits.” This form must be submitted with the application for unemployment benefit to the unemployment benefit fund (employment office) of the Member State in which the entitlement to unemployment support can be granted. Form U1 can be obtained from the competent unemployment benefit fund of the Member State where the frontier worker was previously affiliated.

Most Member States grant unemployment benefits based on earnings. The unemployment benefit of a frontier worker is calculated pursuant to Article 62 of Regulation (EC) no. 883/2004. The competent institution (unemployment benefit fund) of a Member State, pursuant to the legislation of which the amount of former remuneration is considered exclusively when calculating the benefit, proceeds accordingly to take into account exclusively the remuneration that the person concerned received in his last employment, according to said legislation.

The unemployment benefit is calculated on the basis of the remuneration that the frontier worker received in the Member State, whose legislation applied to him during his last employment.

In the case of full unemployment, a distinction must be drawn between cross-border workers who are frontier workers, and those who are not (known as non-frontier workers). This is not the case for short-time work or other temporary loss of working hours.

## 10.4.2 The frontier worker who becomes partially or intermittently unemployed

### **Article 65 of Regulation (EC) no. 883/2004: Unemployed persons who resided in a Member State other than the competent State**

*1. A person who is partially or intermittently unemployed and who, during his last activity as an employed or self-employed person, resided in a Member State other than the competent Member State shall make himself available to his employer or to the employment services in the competent Member State. He shall receive benefits in accordance with the legislation of the competent Member State as if he were residing in that Member State. These benefits shall be provided by the institution of the competent Member State.*

#### **Examples**

- A frontier worker who resides in Portugal and works in Spain (competent Member State), is entitled to Spanish unemployment benefit in the event of temporary unemployment. The Spanish unemployment benefit fund must also take into account periods of insurance completed in other Member States (e.g. Portugal).
- A non-frontier worker, who resides in Portugal and works in Belgium (competent Member State), is entitled to Belgian unemployment benefit in the event of temporary unemployment. The Belgian unemployment benefit fund must also take into account periods of insurance completed in other Member States (e.g. Portugal).

### 10.4.3 The frontier worker who is wholly and definitively unemployed

In case of full unemployment (= complete abandonment of the employment relationship), a frontier worker must contact the employment office (unemployment benefit fund) of his country of residence (Regulation (EC) no. 883/2004, Article 65, paragraph 2).

#### **Article 65, paragraph 2, section 1 and 2 of Regulation (EC) no. 883/2004:**

*2. A wholly unemployed person who, during his 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 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 available to the employment services of the Member State in which he pursued his last activity as an employed or self-employed person.*

Pursuant to Regulation (EC) no. 883/2004, Article 11, paragraph 1c, he is subject to the legislation of the country of residence, i.e. the unemployment benefit is calculated in accordance with the regulations applicable in the country of Residence (Regulation (EC) no. 883/2004, Article 65, paragraph 5, a).

#### **Article 65, paragraph 5, section a of Regulation (EC) no. 883/2004:**

*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 had been subject to that legislation during his last activity as an employed or self-employed person. Those benefits shall be provided by the institution of the place of residence.*

The remuneration received during the last employment in another Member State is taken into consideration (Regulation (EC) no. 883/2004, Article 65).

#### **Article 65, paragraph 3 of Regulation (EC) no. 883/2004:**

*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 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 chooses also to register as a person seeking work in the Member State in which he pursued his last activity as an employed or self-employed person, he shall comply with the obligations applicable in that State.*

#### **Example**

→ A frontier worker, who resides in France and works in Luxembourg, is entitled to French unemployment benefit in the event of permanent and definitive unemployment. This applies also if he was never registered with social Security in France and/or has Luxembourgish citizenship. The French unemployment benefit is calculated on the basis of the remuneration earned in Luxembourg.

In addition, the frontier worker may register as a jobseeker in the country where he was last employed (Regulation (EC) no. 883/2004, Article 65, paragraph 2, section 2). Registration in the country of residence has priority nonetheless (Regulation (EC) no. 987/2009, Article 56, paragraph 2).

#### **Article 65, paragraph 2, section 2 of Regulation (EC) no. 883/2004:**

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

### **Article 56, paragraph 2 of Regulation (EC) no. 987/2009**

*Where the legislation applicable in the Member States concerned requires the fulfilment of certain obligations and/or job-seeking activities by the unemployed person, the obligations and/or job-seeking activities by the unemployed person in the Member State of residence shall have priority.*

Claims to unemployment benefits from the employment office (unemployment benefit fund) are not based on registration. There is no real right to choose between the country of residence or the country of employment.

### **10.4.4 Non-frontier worker who becomes permanently and definitively unemployed**

“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 a right to choose between unemployment benefits from the country of residence or the country of employment.

In case of an immediate return to his country of residence, a non-frontier worker must register as a job-seeker 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 country of residence. This unemployment benefit is calculated in accordance with the rules applicable in the country of residence (Regulation (EC) no. 883/2004, Article 65, paragraph 5, letter a).

A non-frontier worker who does not return to his Member State of residence, must make himself available to the employment office of the Member States whose legislation last applied to him. The non-frontier worker is entitled to unemployment benefit in accordance with the rules applicable in the country of employment, and the unemployment benefit is calculated likewise in accordance with the rules applicable in the country of employment. If he returns to the country of residence after unemployment benefits have already been claimed in the country of employment, Article 64 of Regulation (EC) no. 883/2004 applies (export of unemployment benefit for 3 months).

#### **Example**

- A non-frontier worker who resides in Paris (France) and works in Berlin (Germany), is entitled to French unemployment benefits upon returning to France in the event of permanent and definitive unemployment. The duration and amount are based on the legislation in force in France.
- If the non-frontier worker does not return to France (Member State of residence), and registers with the German unemployment office, he is then entitled to German unemployment benefit, the duration and amount of which are based on the legislation in force in Germany.
- After drawing unemployment benefit for 6 months in Germany, the non-frontier worker registers as a jobseeker with the French employment office. Initially, he is entitled to another 3 months of German unemployment benefit. After 3 months, he is entitled to French unemployment benefit based on the legislation in force in France.

## **10.5 Taxation**

### **10.5.1 Rules on taxation concerning frontier workers**

The rules on taxation can be found in the applicable “Bilateral treaty to prevent double taxation” that the State in which the cross-border or frontier worker lives has concluded with his State of employment. The OECD model convention adopts the State of employment principle as the general rule (article. 15, paragraph 1 OECD) If the cross-border or frontier worker also carries out activities in the State of employment

for an employer from this State, there is no exemption to this principle under the 183-day rule (Article 15, paragraph 2 OECD) and his income is taxed in the state of employment.

For a number of cross-border employees the OECD model convention sets out specific rules. This applies inter alia to teachers, public employees, sea-going or flying personnel in the international transport sector etc.

Although no provision is made in the OECD model convention, neighbouring States sometimes, but not always, decide to introduce special rules for "frontier workers" in their double taxation treaties. In this event frontier workers' income is not taxed in the State of employment, but in the State of residence.

Not every cross-border worker, however, is regarded as a frontier worker. Double taxation treaties often contain strict criteria, stricter than those applying to social security legislation (article 1, paragraph b of Regulation (EC) no. 883/2004). As well as regularly returning to his State of residence, the worker must also live and work within a well-defined border area. The double taxation treaty makes it clear what should be understood by the fiscal border area. It will also govern where an employee is taxed if he lives and works within the border area but also carries out activities outside the zone for his employer (e.g. when posted elsewhere).

## 10.5.2 Examples for rules on taxation concerning frontier workers

### Double taxation treaty between France and Germany

The treatment of frontier workers is defined in the double taxation treaty concluded between France and Germany in July 1959, amended for the last time on 21 December 2001. This treaty stipulates that frontier workers are in general taxed in their country of residence.

From a fiscal point of view defined in the double taxation treaty concluded between France and Germany, the frontier worker must live and work within a designated border area and must in principle return every day to his place of residence. He loses his status of frontier worker if he works in the border area throughout the year, but does not return to his official residence for 45 days, or if he works outside the border area for more than 45 days per year.

Border area for frontier workers residing in France

- On the French side: all the cities and municipalities situated in the departments of the lower Rhine (67), the Upper Rhine (68) and the Moselle (57).
- On the German side: All the cities and municipalities situated in an area within ca. 30 kilometres from the border.

Border area for frontier workers residing in Germany

- For these border workers, the border area falls within ca. 20 km on either part of the border.

The frontier workers in the civil service in general pay their taxes in the country of employment.

There are specific rules for temporary frontier workers.

### Double taxation treaty between Germany and Switzerland

No border areas are defined in the double taxation treaty between Germany and Switzerland. The relevant case law consequently assumes that a daily return cannot be expected in the following cases, and that a person is not a frontier worker from Germany liable for tax in Switzerland, if

- there is a legal obligation for the worker to reside in Switzerland;

- the distance between the place of residence and workplace is more than 110 kilometres;
- the commute takes more than one hour and a half each way;
- the employer assumes the accommodation and overnight stay costs in Switzerland.

Frontier workers from Germany in Switzerland who, owing to occupational reasons, do not return to their place of residence for more than 60 days in a calendar year (known as adverse days) (the number of days is reduced for part-time employment), are taxed in Switzerland.

### **Double taxation treaty between France and Switzerland**

The income tax for frontier workers who reside in France and work in Switzerland is payable in France, if the party concerned is engaged in gainful employment in one of the Cantons of Basel City, Basel Country, Bern, Jura, Soleure, Valais, Vaud or Neuchâtel and returns to France every day (the person concerned has the right not to return to his place of residence for a maximum of 45 working days per year).

### **10.5.2 Tax advantages for frontier workers**

If a cross-border worker is taxed as a non-resident in the State of employment, the question is whether the State of employment should give him the same tax advantages (tax free allowances, deductions for dependent partner and children, professional expenses etc) as those given to a national employee. The Court of Justice delivered a pertinent judgment in the Schumacker case (C-279/93). The State of employment must only do so if the cross-border worker has insufficient (residual) income in his State of residence.

#### **Schumacker Decision (C-279/93):**

*Article 48 (old) of the Treaty must be interpreted as precluding the application of rules of a Member State under which a worker who is a national of, and resides in, another Member State and is employed in the first State is taxed more heavily than a worker who resides in the first State and performs the same work there when, as in the main action, the national of the second State obtains his income entirely or almost exclusively from the work performed in the first State and does not receive in the second State sufficient income to be subject to taxation there in a manner enabling his personal and family circumstances to be taken into account.*

For the coordination of social security (Regulation (EC) no. 883/2004), the State of work principle applies. There are no exceptions for cross-border and frontier workers. If at the same time a double taxation treaty with a frontier worker's clause is in force, a frontier worker may be faced with different rules for taxation (State of residence) and the payment of social security contributions (State of employment). Depending on the geographical direction in which he works, this can work to his advantage or disadvantage.



# Multinational workers

## 11.1 General

A multinational employee is an employee who conducts his professional activities in more than one Member States at any given time. Neither the country where the employer is based nor the country of residence of the employee necessarily have to be one of these countries of employment. It could thus be a resident of Switzerland who, working for a French international hotel chain, conducts quality inspections in the French and Swiss subsidiaries of the group. But it could also be a Swiss resident who, working for this French employer, carries out quality inspections in Germany, Austria and Liechtenstein.

The European regulatory framework 1612/68 and 883/2004 also guarantees the right of free movement for this group of employees and ensures that they do not lose their accumulated social rights.

In the event of multinational employment this is a case of the connections between the applicable social security legislation, income taxation and employment legislation. Different guidelines apply to each of these areas of the law.

The allocation rules for the mandatory social security are defined in the coordinating Regulation (EC) no. 883/2004, Article 13, paragraph 1: there is no free choice. Thus, a person who is for instance concurrently employed in France, self-employed in Germany and a civil servant in Luxembourg is insured in one Member State.

The guidelines concerning income taxes can be found in the bilateral double taxation treaties which the country of residence of the employee has concluded with each of his countries of employment (article 15 paragraphs 1, 2 and 3 of the OECD model convention). Here again there is no mention of a right of choice. Unlike social security, it is possible for a person to be taxed in several states, without being doubly taxed (salary splitting).

The only area in which there is any choice is the employment legislation declared applicable, although this is also restricted by a number of international and national legal principles and decisions (Regulation (EC) no. 593/2008 and the national labour legislation, in particular with a view to Directive 96/71/EC on posting).

These guidelines are explained below. It is a somewhat complex issue. Therefore this will once again be applied to four concrete examples which, because of their frequent occurrence, can also be considered as standard cases.

In a fair number of cases a multinational employee will not be covered by social insurance in his country of residence. He then falls into a similar position as the "cross-border employee": i.e. covered by social insurance in one Member State and resident in another Member State. Regulation (EC) no. 883/2004 thus provides the multinational employee the same guarantees of social security benefits and services as the cross-border employee. Chapter 10: Cross-border workers set out the rules applicable to health insurance, disablement, retirement pension, unemployment and family benefits.

## 11.2 Social security

### 11.2.1 General principle

Regulation (EC) no. 883/2004 requires exclusiveness with regard to the social security law in force (Article 11, paragraph 1). Consequently, only one social security law may apply to a multinational worker (even if he has concluded several contracts of employment with different employers from different Member States). The Regulation uses the principle of the country of employment (Regulation (EC) no. 883/2004, Article 11, paragraph 3, a) as the main rule, so it is contrary to this system when “two or more countries of employment” are concerned. There are therefore special rules for multinational workers.

The national social security institutions must inform citizens about their rights under the new regulation and support them in asserting those rights. Every solicited institution must apprise the applicant of the decision taken as well as of the applicable legislation. Conversely, the worker is required to report such changes to his employment relationship, which may have effects on the application of the legislation to the competent institution.

#### **Article 16 Regulation (EC) no. 987/2009: Procedure for the application of Article 13 of the basic Regulation**

*1. 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.*

#### **Article 13 of Regulation (EC) no. 883/2004: Pursuit of activities in two or more Member States**

*1. A person who normally pursues an activity as an employed person in two or more Member States shall be subject to:*

*(a) the legislation of the Member State of residence if he pursues a substantial part of his activity in that Member State or if he is employed by various undertakings or various employers whose registered office or place of business is in different Member States, or*

*(b) the legislation of the Member State in which the registered office or place of business of the undertaking or employer employing him is situated, if he does not pursue a substantial part of his activities in the Member State of residence.*

*(...)*

*3. A person who normally pursues an activity as an employed person and an activity as a self-employed person in different Member States shall be subject to the legislation of the Member State in which he pursues an activity as an employed person or, if he pursues such an activity in two or more Member States, to the legislation determined in accordance with paragraph 1.*

*(...)*

*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.*

Particular regulations for workers in international transport (flying or travelling personnel) are no longer included in the new regulation, so that the same regulations apply as for all other persons who are normally employed in several Member States. The social security provisions of the country of residence must consequently be applied to workers who normally carry out their activities in several Member States, if those workers carry out an essential part of their activity there. The implementing Regulation (EC) no. 983/2009 (Article 14) defines “essential” as a share of the working time and/or share of the wages of at least 25%. A forecast for the next 12 months is made to determine where that part of the activity is carried

out. Unfortunately, neither the new regulation nor the implementing regulation provides a definition of “normally.”

### 11.2.2 Working in more than one Member State?

In such a situation, it is necessary to determine with which State the closest ties are. If a person works in more than one Member State, in which he carries out an essential part (25%) of his activity – whether on an employed or self-employed basis – then he is subject to the legislation of the state in which he resides.

If a worker is active in more than one Member State for different companies or employers with a place of business in different Member States, he is likewise subject to the legislation of the state in which he resides.

If a person does not reside in the state in which he carries out an essential part of his activity (as an employed person) or which constitutes the centre of his (self-employed) activity, the following rules apply:

- Workers are subject to the legislation of the Member State in which their employer has his registered office or domicile;
- Self-employed workers are subject to the legislation of the Member State in which the centre of their activity is located;
- 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 employed activity is established takes priority;
- Employees in the civil service are always subject to the legislation of their administrative authority, even if they exercise activities as employed and/or self-employed persons.

#### **Examples**

- A worker is normally employed by a company in Italy and Slovenia. He lives in Italy. The company has its registered office in Slovenia. He carries out an essential part (25%) of his activity in Italy. The Italian legislation applies for that worker.
- A worker is normally employed in a company in Germany and in France. The company has its registered office in the Czech Republic. He carries out the major part of his activity in France, and the part of his activity carried out in Germany is not essential (1 day of telework at home). The Czech legislation applies to this worker.

### 11.2.3 Applicable law provisions for workers who are still active as self-employed persons also.

The principle of exclusiveness applies in such cases. A person who is employed by a company in one Member State and at the same time carries out self-employed activity in another Member State is subject to the legislation of the Member State in which he carries out his activity as an employed person (Regulation (EC) no. 883/2004, Article 15, paragraph 3).

#### **Example**

- A person residing in Austria is employed in Austria and Germany by a company that has its registered office in France, and is active as a self-employed person in Poland. He works in Austria 3 days a month on average (not an essential part). This person is registered with social security in accordance with the legislation of the Member State in which the company has its registered office, i.e. in France.



## 11.2.4 Applicable law provisions for workers who are still active as civil servants

If a person is employed in a Member State as a civil servant and carries out an activity as an employed person in another Member State, he is subject to the legislation of the Member State to which the administrative unit that employs him belongs (Regulation (EC) no. 883/2004, Article 13, paragraph 4).

### Examples

- A civil servant of an Austrian administrative unit carries out an activity as an employed person in Germany and a self-employed activity in the Czech Republic. In such a case, the applicable legislation is that of the Member State in which the administrative unit to which the civil servant belongs is located. The civil servant is registered with social security in Austria. The German employer must have his worker registered with social security in Austria. The civil servant's place of residence has no role to play.
- A worker lives in the Netherlands. He is employed on a full time basis by a Dutch employer and works in the Netherlands. At the same time, he is active as a civil servant for 4 hours in Belgium. The Dutch employer must have his worker registered with social security in Belgium.

## 11.2.5 Applicable law provisions for transport workers

Regulation (EC) no. 883/2004 provides no special rules any longer for transport workers. A person who is employed as a member of the travelling or flying personnel of a company engaged in the international transport of people or goods by rail, road, air or inland navigation, is subject to the legislation of the Member State in which the company has its registered office. If the activity is carried out mostly on the territory of the Member State of residence, that person is subject to the legislation of the country of residence.

If the person is employed by a branch or permanent representation, however, he is subject to the legislation of the State in whose territory the branch or permanent representation is located. If the activity is carried out mostly on the territory of the country of residence, he is subject to the legislation of the country of residence.

### Examples

- A worker resides in Germany, and works for a transport company which has its registered office in Austria and engages in international transport in Italy, France and Germany. He works (travels) on average 50% in Italy, 30% in France, 10% in Germany and 10% in Austria. The worker must be registered with social security in Austria. If the worker moves to France or Italy, he must be registered with social security in France or Italy.
- A worker resides in Germany, and works for a transport company which has its registered office in Austria and engages in international transport in Italy, France and Germany. He works (travels) on average 50% in Italy, 40% in France and 10% in Germany. The Austrian company has a branch in Italy. The worker must be registered with social security in Italy.

## 11.2.6 Transitional regulations

As regards cross-border matters, which exist already on 1 May 2010, Regulation (EC) no. 883/2004, Article 87, paragraph 8 entails no changes concerning the applicable social security legislation. The former rules stipulated in Regulation (EEC) no. 1408/71 will initially continue to apply, but not beyond 30 April 2020. The precondition for said extension however, is that there are no legal changes in the employment relationship. The person concerned may petition to have Regulation (EC) n. 883/2004 apply thereto. If

such an application is filed by 31 July 2010, the matter will be subject to the rules of Regulation (EC) no. 883/2004 retroactively as of 1 May 2010.

### **Example**

→ A worker has been employed normally for a company in Germany and Belgium since 1 April 2008. The scope of the activity carried out in Germany is not essential. The company has its registered office in Poland. Pursuant to Regulation (EEC) no. 1408/71, the German legislation applies initially. As of 1 May 2010, the Polish legislation is to apply to such a case pursuant to Regulation (EC) no. 883/2004. Pursuant to Article 87, paragraph 8 of said regulation, German law remains applicable however, for as long as the prevailing situation does not change. The worker may, however, petition to have Polish law applied.

## **11.3 Taxation**

### **11.3.1 General principles**

The rules on taxation can be found in the applicable “Bilateral treaty to prevent double taxation” that the State in which the worker lives has concluded with his State of employment. These rules determine which Member State is entitled to tax the worker’s income. In this way, the double taxation of the same income is avoided. It is essential for multinational workers to have a good grasp of what insiders call the “183-day rule”.

Most “double taxation treaties” follow the OECD model convention. There are successive versions of the OECD model convention on which the bilateral treaties may be based.

The OECD-model convention states that the taxation of income from work (wages) in first instance is allotted to the State of residence. However the State of employment will tax wages earned for work carried out on its territory (the State of employment principle).

The State of residence nevertheless retains its right to levy taxes on this income if the following conditions are satisfied:

- a.** the 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
- b.** wages are paid by or on behalf of an employer who does not live in the State of employment, and
- c.** 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 worker’s income will be taxed in the State of employment with retrospective effect and thus from the first day of his presence.

For transport workers in the shipping and air transport sectors Article 15, paragraph 3 of the OECD model convention makes an exception to the above principles.

### **11.3.2 Transport worker**

For sea-going or flying personnel Article 15, paragraph 3 of the OECD model convention establishes an exclusivity principle. They are taxed in one treaty state, the place where the employer has his registered offices.

For employees in international road transport fiscal coordination is less unambiguous. Exclusivity is generally not guaranteed. In most double taxation treaties lorry drivers are subject to the same rules (State of employment conditional on the 183 day rule) as “other” employees (see 11.3.3).

### **Example**

→ There is no State of registration principle, such as that applying to the shipping and air transport sectors, for a resident of the Netherlands who works for a Luxembourg-based international transport company driving to all European destinations. As a result he is subject to the State of work principle, conditional upon the 183-day rule. This means that for the days he works in Luxembourg, he will also be taxed there (salary-splitting). If he works for fewer than 183 days in the other Member States, he will be taxed for those days in the State of residence (the Netherlands).

### **11.3.3 “Other” multinational workers**

For “other” employees the State of employment principle applies (Article 15 paragraph 1 OECD model convention), conditional upon the 183-day rule (Article 15 paragraph 2 OECD model convention). But this by no means implies an exclusivity principle. The multinational worker may find himself in a situation where he is taxed by two or more Member States (salary-splitting for taxation purposes). The bilateral double taxation treaties guarantee only that the same income or parts thereof will not be liable to tax in two or more Member States.

### **11.3.4 Taxation in the State of residence**

If a part of the income of (the family of) the multinational worker is taxable in the State of residence, this State will tax the income “progressively” (i.e. taking into account the real income position). The worker is treated as having unlimited tax liability.

The State of residence first calculates theoretical tax based on all income earned domestically or abroad (“global income”). As a resident, the worker is entitled to the customary deductions, tax-free sums, family tax allowances etc. Only after calculating the tax theoretically due does the State of residence exempt the earned income already taxed in other Member States.

### **11.3.5 Taxation in other State(s) of employment than the State of residence**

If a part of the multinational worker’s income is taxable in Member State other than his State of residence, such Member State may only tax the income earned there, and at the rate applying to non-residents. However, when the greater part of his income is earned in this Member State, the worker is entitled to the same tax advantages - such as professional expenses tax free allowances, deductions for dependent children, etc. - as national workers. In this event it is possible that in these Member State will also apply “progressive” taxation, i.e. taking account of the worker’s global income.

## **11.4 Employment legislation**

Free choice applies in principle with reference to the labour legislation in force. The choice must however be made expressly. 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 pursuant to Regulation (EC) no. 593/2008 Article 8 (cf. Chapter 4 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 the worker can actually lay claim to the protective provision of the objectively applicable law at all times.

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

Each Member State has the judicial freedom and sovereignty to declare elements of labour law to be mandatory law. This is done because non-compliance with such elements is considered a threat to the public order in the Member State. It also hinders “social dumping.” It is therefore important for a worker who has a multinational position to obtain information beforehand from the trade unions of the country of employment as to which legal and contractual working conditions (collective agreements) are mandatory on the territory of that country.

In practice, it is not often that no express choice of law is made in the case of a multinational employment. The choice is determined by certain factors. The search for a connection to the applicable social security law can be an argument. Often however, additional social benefits are agreed in the contract of employment or in the collective agreements in case of sickness, incapacity to work, or old age.

## 11.5 Typical examples

### 11.5.1 International driver

Employer is established in	Employee lives in	Employee works simultaneously in:
Denmark	Germany	All EU Member States

#### 11.5.1.1 Social security

This lorry driver is registered with social security in the country of the employer, Denmark (Regulation (EC) no. 883/2004, Article 11, paragraph 3, letter a). If more than ca. 25% of his pay is earned – or of his working time is spent – in Germany, the Danish employer must register the worker with social security in Germany according to German law (Regulation (EC) no. 883/2004, Article 1, paragraph 1). By way of confirmation of the applicable German legal system, the worker then gets Document A1, which is issued by the competent body of the Member State (Germany).

#### 11.5.1.2 Taxation

Income earned on the days that he worked in Denmark will be taxed in Denmark (salary-splitting). Working days outside Denmark, if he worked for fewer than 183 days in the other Member States, are subject to tax in Germany. In determining the amount of income tax due, the State of residence (Germany) will exempt the part of the income taxed in Denmark. The “exemption with progression following the proportional method” is applied. That means that the income is taxed progressively in Germany.

#### 11.5.1.3 Employment law

A German goods lorry driver, working for a Danish international goods transport business driving to destinations in different Member States, will logically opt for the employment law of the employer’s State. In

this way a symbiosis with the applicable social security law is achieved. The main proportion of taxation will be in Germany (salary-splitting).

INTERNATIONAL DRIVER	MEMBER STATE
Employer is established in	Denmark
Employee lives in	Germany
Employee works in	All EU Member States
Covered by social security in	Denmark or Germany (> 25%)
Taxable in	Denmark (Danish salary) and Germany
Choice of employment legislation	Denmark and/or Germany

## 11.5.2 Construction worker

Employer is established in	Employee lives in	Employee works simultaneously in
The Netherlands	Belgium	Belgium and the Netherlands

### 11.5.2.1 Social security

This worker, who has worked in both Member States from the moment he was hired, is pursuant to Regulation (EC) 883/2004, Article 13, paragraph 2, subject to the social security legislation of Belgium, i.e. the Member State in which he resides and in which he carries out an essential part of his activity. The Dutch employer has to pay the Belgian social security contribution for the entire salary in Belgium. The worker is issued an A1 declaration by the competent body of the Member State under whose social security system he is covered by way of confirmation of the applicable legal system. The A1 declaration may in principle apply for an unspecified period, but must be extended at regular intervals.

### 11.5.2.2 Taxation

To establish where the worker is taxed, the Dutch-Belgian double taxation treaty must be consulted. Since 2003, rules for frontier worker have no longer been included in this treaty. This means that the income from work carried out on Belgian territory is subject to Belgian income taxes. The income from work carried out on Dutch territory (Dutch wages) - where the employer is established - is subject to the Dutch taxation (Article 15, paragraph 1 of the Dutch-Belgian double taxation treaty).

The construction worker's income is therefore split for tax purposes (salary-splitting). His pay is divided into a part taxed in Belgium and a part taxed in the Netherlands, in proportion to the number of days he has worked on Dutch or Belgian territory respectively.

### 11.5.2.3 Employment law

The construction worker - resident in Belgium - who works for a Dutch construction company and works on construction sites in both the Netherlands and Belgium can conclude an employment contract under either Dutch or Belgian law. If Dutch employment law and the Dutch collective agreement are chosen, Belgian mandatory rules and collective agreements will apply to work activities carried out in Belgium where these are more advantageous than the Dutch employment law and working conditions. As well as Regulation EC 593/2008 (Articles 3, 8 and 9), the Directive on posting (96/71/EC) will apply as implemented in Belgium.

Belgian employment law and working conditions could equally be chosen. If Belgian employment law is chosen, Dutch employment law and working conditions (the collective agreement for the construction sector) will apply to work activities carried out in the Netherlands where these are more advantageous than the Belgian conditions.

#### 11.5.2.4 Summary

To ensure the maximum coherence between taxation, social security and employment law and working conditions, the obvious first choice would be Belgian employment law and Belgian working conditions (collective agreement): this multinational worker is in any case compulsorily subject to the Belgian social security and his income is also partly taxed in Belgium.

CONSTRUCTION WORKER	MEMBER STATE
Employer is established in	The Netherlands
Employee lives in	Belgium
Employee structurally employed in	The Netherlands and Belgium ( > 25%)
Covered by social insurance in	Belgium
Taxable in	The Netherlands and Belgium (salary-splitting)
Choice of employment legislation	Belgian law (Construction collective agreement) plus – if more favourable - additional applicable Dutch labour law (plus Construction collective agreement) for work executed on Dutch territory

#### 11.5.3 Multinational sales representative working as a salaried employee

Employer is established in	Employee lives in	Employee works simultaneously in
France	Belgium	Germany (50%), Luxembourg (10%), Belgium (15%), the Netherlands (20%), France (5%)

#### 11.5.3 Social security

This sales representative is, pursuant to Regulation (EC) no. 883/2004, Article 13, paragraph 1, letter b (i), subject to the social security law of the Member State where his employer has his registered office -- in this case in France. The French employer has to pay social security contributions for the entire salary in France. The worker is issued an A1 declaration by the competent Member State under whose social security system he is covered, by way of confirmation of the legal system, i.e. that of France.

#### 11.5.3.2 Taxation

The double taxation treaties between the country of residence, Belgium, and France, Germany, the Netherlands and Luxembourg must be taken into account for taxation purposes. For activities carried out in France, the sales representative is taxed in France. The double taxation agreements between Belgium and Germany, the Netherlands and Luxembourg include the "183 day rule." If the sales representative works in the Netherlands, Germany and Luxembourg fewer than 183 days, and the French employer has no permanent establishment in the Netherlands, Germany and Luxembourg, the tax collection competence is assigned fully (100%) to the country of residence (Belgium).

### 11.5.3.3 Employment law

The choice is nearly unlimited. In the absence of an express choice of law, the law of the country of the employer applies (Regulation (EC) no. 593/2008, Article 8, paragraph 3). Nevertheless, it is better in this situation to choose French labour law and the French working conditions (wage agreement), because the sales representative is registered with social security and liable for tax in France. Incidentally, the mandatory labour law of Belgium, the Netherlands, Germany and Luxembourg must be applied.

MULTINATIONAL SALES REPRESENTATIVE:	MEMBER STATE
Employer is established in	France (no permanent establishment in other countries)
Employee lives in	Belgium
Employee works in	Belgium (<25%), Luxembourg, France (5%), the Netherlands, Germany.
Covered by social insurance in	France
Taxable in	Belgium (95%; < 183 days in Luxembourg, the Netherlands, Germany) and France (5%)
Choice of employment legislation	France

### 11.5.4 Multinational teacher (frontier worker)

Employer is established in	Employee lives in	Employee works simultaneously in
Belgium: State music school 1: The Netherlands: Private Music school 2:	The Netherlands	The Netherlands (90%) and Belgium (10%)

#### 11.5.4.1 Social security

This multinational teacher – a civil servant in Belgium and a “normal” worker in the Netherlands --- is, pursuant to Regulation (EC) no. 883/224, Article 13, paragraph 4 subject to the Belgian social security legislation. The worker is issued a declaration by the competent body of the Member State under whose social security system he is covered, i.e. Belgium, by way of confirmation. The Dutch employer must pay the Belgian social security contributions for the worker in Belgium.

#### 11.5.4.2 Taxation

This multinational worker (teacher) is taxed according to the double taxation treaty between the Netherlands and Belgium. The Dutch salary is taxed in the Netherlands. The Belgian salary in Belgium (unlimited tax liability). The Belgian income is taken into account by the Dutch tax office (exemption subject to the application of progressive tax rates).

#### 11.5.4.3 Labour law

This multinational worker (teacher) has in principle the right to choose the applicable law (Regulation (EC) no. 593/2008, Article 3). In practice, the Belgian civil service law (including the wage agreement) is applied, and in the Netherlands the Dutch labour law (including the wage agreement) is applied.

TEACHER	MEMBER STATE
Employer is established in	Belgium and the Netherlands
Employee lives in	The Netherlands
Employee works in	Worker in the Netherlands (90%) and civil servant in Belgium (10%)
Covered by social insurance in	Belgium
Taxable in	Belgium (unlimited tax liability) and the Netherlands (unlimited tax liability)
Choice of employment legislation:	Practice: Belgium (Civil servant) and the Netherlands

# 12 Jobseekers

## 12.1 General

Chaque Every citizen of a Member State in the European Economic Area (EEA) has the right to work and stay in another Member State. For an unemployed worker - who is a national of one of the Member States - there are special rules and facilities. For example these apply to an Austrian unemployed worker who goes to seek work in the Netherlands. However, they also apply to a Czech jobseeker who wants to seek work in Ireland or a Danish jobseeker who wants to work in Spain. This chapter also describes the rules that apply to jobseekers who find a temporary job and then become unemployed again.

Someone who wants to seek work in another Member State is faced with a number of questions such as

- How can I look for work whilst maintaining my unemployment benefit?
- What formalities must I comply with? (registration with employment offices, etc.);
- What is the position regarding my right of residence while I am looking for work and working?
- What is my right to unemployment benefit I become unemployed again?

## 12.2 Finding employment across borders: EURES

The European Commission set up the EURES project to meet the needs of jobseekers, workers and employers.

A European network of more than 850 EURES advisers is on hand at this time to provide support to workers and jobseekers. You will find the respective current directory at <http://ec.europa.eu/eures>. The EURES advisers are qualified employees who can inform and advise jobseekers, workers and employees



on cross-border matters concerning living and working conditions, the labour market, social security and social and tax law in Europe. They moreover advise the employment offices on the cross-border employment and personnel searches.

## 12.3 Job-seeking while retaining national unemployment benefit

Article 64 of the European coordinating Regulation (EC) no. 883/2004 guarantees that a jobseeker may, under certain conditions, “take along” his national unemployment benefit in another Member State for three months. This three-month period may be extended to six months maximum by the competent employment office or the competent institution (Regulation (EC) no. 883/2004, Article 64, 1, c). This regulation offers jobseekers a unique possibility, namely to explore the labour market in another member State, and to find work there while continuing to draw their unemployment benefit. For jobseekers from Norway, Liechtenstein, Iceland and Switzerland, Article 69 of Regulation (EEC) no. 1408/71 continues to apply.

An EU citizen does not need a work permit. EU citizens can simply invoke Article 64 of Regulation (EC) no. 883/2004. For non-EU citizens (known as citizens from third countries) who are legally staying on the territory of a Member State, this is somewhat more complicated. Although what is known as the subjective scope of application of Regulation (EC) no. 883/2004 was recently extended to this group of workers by Regulation (EC) no. 1231/2010, an exception was made for Article 64 of Regulation (EC) no. 883/2004. The retention of the entitlement to unemployment benefits pursuant to Article 64 of Regulation (EC) no. 883/2004 requires the person concerned to register as an unemployed worker with the employment office of every Member State to which he moves. The aforementioned provision should therefore apply only to a third-country national, if that person is entitled, owing to his residence permit or his permanent resident status, to register as an unemployed worker in the Member State to which he moves, and to carry out an occupation lawfully in that country.

### **Article 64 of Regulation (EC) no. 883/2004: Unemployed persons going to another Member State**

*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 entitlement to unemployment benefits in cash under the following conditions and within the following limits:*

*(a) before his 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 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 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 ceased to be available to the employment services of the Member State which he 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 left, provided that the total duration for which the benefits are provided does not exceed the total duration of the period of his 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 is entitled to benefits under paragraph 1(c), he shall continue to be entitled to benefits under the*

legislation of that Member State. He shall lose all entitlement to benefits under the legislation of the competent Member State if he 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 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.

To be able to avail himself of this rule, the unemployed worker must apply for an U2 form (formerly E 303) to the unemployment benefit fund (competent institution) of his country of residence. Once the jobseeker has registered as such with the competent employment office, he must submit this U2 form (declaration concerning the continued entitlement to unemployment benefit) to the unemployment benefit fund of the Member State in which he seeks employment.

Further details concerning the exchange of information, the cooperation and mutual assistance between the institutions and employment offices of the competent Member State, and the Member State to which the person moves to seek employment, are provided in Article 55 of the implementing Regulation (EC) no. 987/2009.

## 12.4 Right of residence while seeking work

There is (as yet) no specific European rule governing the right of residence for jobseekers. In the Antonissen case (C-292/89), the European Court of Justice ruled that a jobseeker has an automatic right to remain in another Member State for 6 months whilst seeking work. If at the end of these 6 months the jobseeker can show that he is still looking for work and that there is a real chance that he will find it, he cannot be forced to leave the Member State.

### **Directive 2004/38/EC, recital no. 9**

*Union citizens should have the right of residence in the host Member State for a period not exceeding three months without being subject to any conditions or any formalities other than the requirement to hold a valid identity card or passport, without prejudice to a more favourable treatment applicable to job-seekers as recognised by the case-law of the Court of Justice.*

## 12.5 Right of residence during periods of work

The right of residence - in the case of both temporary and permanent residence - is regulated by Directive 2004/38/EC (see chapter 6). The EU citizen maintains his right of residence in the event of involuntary unemployment (following one year's work). Where he is unemployed following a temporary contract of employment with a duration of shorter than one year or he has become involuntarily unemployed within the first twelve months of residence, he maintains his right of residence for 6 months. In this case, the employee must, though, register as a jobseeker at an employment office.

## 12.6 Guarantees of unemployment benefit after a period of work

If the jobseeker finds work in the Member State, it may happen that he subsequently becomes unemployed again. How does this affect his entitlement to unemployment benefit, and in which Member State should he apply? Regulation (EC) no. 883/2004 offers a number of guarantees.

## 12.6.1 Mutual recognition of periods of work and employment

In many Member States entitlement to unemployment benefit is dependent on the condition that the unemployed person has worked during a certain set period preceding the application for benefit (waiting time). Employees who make use of the right to the free movement of workers would be at a disadvantage in the acquisition of their benefit rights if periods of insurance completed in other Member States were not recognised. To prevent such interruptions in social insurance, Member States are obliged to recognise periods of insurance completed in other Member States and to take them into account when determining access to and the amount and duration of unemployment benefit. This essential and fundamental coordinating principle is included in Article 48 TFEU (cf. Chapter 1).

The aggregation rule in Article 61 of Regulation (EC) no. 883/2004 governs the coordination of unemployment (cf. Chapter 3.5 of this Guide).

To prove that he was previously covered by social security in case of unemployment in another Member State, an unemployed worker must submit the U1 form (formerly E 301) to the unemployment benefit fund to which he is applying for the social benefit. The U1 form is issued upon request by the unemployment benefit fund of the Member State where the worker was previously employed. Form U1 is a “declaration concerning the periods that are to be taken into consideration for the granting of unemployment benefits.” This form indicates also the occupation that the worker exercised, his salary, and the reason why the contract of employment was terminated.

## 12.6.2 Calculation of the amount and duration of the unemployment benefit

In most Member States, the unemployment benefit is calculated on the basis of the salary that the worker earned during a certain period prior to becoming unemployed. The institution of the competent Member State calculates unemployment benefits in accordance with Article 62 of Regulation (EC) no. 883/2004.

## 12.6.3 Possible scenarios

A number of situations may arise:

- a. The jobseeker finds no work and returns to his State of residence within 3 months;
- b. The employee works temporarily and subsequently returns immediately to his State of residence;
- c. The employee works temporarily and subsequently seeks new work in the State of employment;
- d. The employee works temporarily and subsequently seeks work for a short time in the State of employment, but finally returns to his State of residence;
- e. The jobseeker finds permanent work and remains living in his State of residence;
- f. The jobseeker finds permanent work and comes (possibly with his family members) to live in the State of employment.

### a) The jobseeker finds no work and returns to his State of residence within 3 months;

If the jobseeker finds no work and returns to his country of residence within 3 months, he is in principle entitled to continue to draw his domestic unemployment benefit there. Pursuant to Regulation (EC) no. 883/2004, Article 64, paragraph 2, section 4, the entitlement in the competent state does not apply any more in the competent Member State, if the jobseeker returns only after the expiry of the 3-month period; the competent institution (unemployment benefit fund) may authorise a delayed return in exceptional cases.

### **Example**

- A Dutch jobseeker is entitled to 18 months of Dutch unemployment benefit as of 1 January 2011. On 1 February 2011, she registers as a jobseeker in Stockholm (Sweden). After two months, she returns to the Netherlands. On 1 June 2012 she registers as a jobseeker in Berlin (Germany). She is still entitled to draw one more month of Dutch unemployment benefit. She was not entitled to Dutch unemployment benefit from 1 July 2011 to 31 August 2011. On 1 September 2011 she returned to the Netherlands. Pursuant to Dutch social law, she is still entitled to 13 months of Dutch unemployment benefit.

### **b) The employee works temporarily and subsequently returns immediately to his State of residence;**

In this case, the worker becomes unemployed after he has worked temporarily. He has not resided in the Member State where he worked, but has stayed there temporarily. He was not a frontier worker, because he did not return to his country of residence at least once a week. He returned to his country of residence immediately when his temporary activities ended. Since he continued to live officially in the other Member State during his activity, pursuant to Regulation (EC) no. 883/2004, Article 65, paragraph 2 he is entitled to unemployment benefit that will be paid by the competent institution of his country of residence.

The worker must naturally prove that he was registered with social security in the Member State where he worked temporarily by submitting the U1 form (formerly E 301). (Declaration concerning the periods which are to be taken into consideration for the granting of unemployment benefit). He must apply for this form to the unemployment benefit fund of the Member State where he worked last. The unemployment benefit fund of the country of residence will recognise the "foreign" periods of insurance on the basis of said U1 declaration.

- If a Polish worker has worked temporarily in Belgium, he will in principle be entitled to a Polish unemployment benefit upon returning to his country of residence, Poland, upon producing the Belgian U1 form (formerly E 301), as if he had worked in Poland.

### **c) The employee works temporarily and subsequently seeks new work in the State of employment;**

The employee is entitled to unemployment benefit in accordance with the legislation of the country of employment in which he stayed temporarily but did not reside, pursuant to Regulation (EC) no. 883/2004, Article 65, paragraph 2.

In determining the entitlement to unemployment benefit as well as to the amount and duration thereof, the unemployment benefit fund of the country of employment, where the worker stayed whilst seeking employment, must take into account the periods of social security completed in the former country of employment (the country of residence). The worker must apply for a U1 form (formerly E 301) in his former country of employment, and submit it to the unemployment benefit fund of the country of employment where he stayed whilst actively seeking employment and where he registered as a jobseeker.

- If a Polish worker becomes unemployed after his temporary activity in Belgium, and continues to stay there in order to seek employment, he is in principle entitled to claim Dutch unemployment benefit. He must submit a U1 form (from Poland) by way of proof that he was previously registered with social security in Poland to the Belgian unemployment benefit fund (known by the initials RVA). The U1 form (from Poland) is issued by the Polish unemployment benefit fund.

### **d) The employee works temporarily and subsequently seeks work for a short time in the State of employment, but finally returns to his State of residence;**

Pursuant to the legislation of the country of residence, the worker is entitled to unemployment benefit from the country where he stayed temporarily, pursuant to Regulation (EC) no. 883/2004, Article 65,

paragraph 2 and paragraph 3. However, if two months after obtaining unemployment benefit from the unemployment benefit fund of the country of employment, the worker decides to return to his country of residence, because he can find no work in the country of employment, the entitlement to unemployment benefit is governed by Regulation (EC) 883/2004, Article 65, paragraph 3 and paragraph 5.

**Article 65, paragraph 5, letter b) of Regulation (EC) no. 883/2004**

*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 was last subject shall firstly receive, on his 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 receives benefits under the legislation to which he was last subject.*

- If, after his 4-month temporary job in Belgium, the Polish worker becomes involuntarily unemployed, he is in principle entitled to Belgian unemployment benefit. He must of course register with the Belgium unemployment office, and must submit to the unemployment benefit fund in Belgium a U1 form (from Poland) by way of proof that he was previously registered with social security in Poland. The U1 form is issued by the Polish unemployment benefit fund.
- If he does not manage to find work again in Belgium, he may, pursuant to Regulation (EC) no. 883/2004, Article 65, paragraph 5, letter b return to his country of residence (Poland) to seek actively employment there whilst continuing to draw his Belgian unemployment benefit. If the Polish job-seeker produces a U2 form (formerly E 303), the Belgian unemployment benefit is paid by the Belgian unemployment benefit fund for 3 months maximum. If after 3 months in Poland the worker has still not found work, he will not be entitled to Polish unemployment benefit.

**e) The jobseeker finds permanent work and remains living in his State of residence**

In this event there is a cross-border employee, who lives in a different Member State from that in which he works. If the employee returns to his place of residence each day, or at least once a week, he is a frontier worker. The unemployment rules for both types of cross-border employees are described in chapter 10.

**f) The jobseeker finds permanent work and comes (possibly with his family members) to live in the State of employment.**

In this event the worker is said to have emigrated. The employee and his family move to another Member State, where he will live and work from now on. He thus becomes a migrant worker. The unemployment benefit rules for migrant workers are described in chapter 9.

## 12.7 Medical insurance

### 12.7.1 During the job-seeking period

The jobseeker who retains his unemployment benefit whilst going to seek work in another Member State must, if he has statutory medical insurance, ask for the European Health Insurance Card (EHIC) from his insurers. The European Health Insurance Card guarantees that the unemployed person and his family members are entitled to medical care and sickness benefits in the State where they are staying.

In the event of sickness, it may happen that the worker is unable to return within the period of 3 months, as a result of which the entitlement to continuation of unemployment benefit is lost. In the event of circumstances beyond the worker's control, and under very exceptional circumstances, this rule may be waived. It is of the very greatest importance in such a situation to contact the unemployment benefit service that issued form U2.

## 12.7.2 During periods of employment

If the employee finds work in the Member State where he went to seek employment, he will then be covered by social insurance there too (Article 13, paragraph 2 Regulation (EC) no. 1408/71). If he becomes sick during this period, he is entitled in principle to benefits and payments under his local medical insurance. In a number of Member States, however, sickness payments or benefits are only made after the employee has been covered by social insurance or employed for a given time (the “waiting period”). To prevent an interruption in insurance cover, the coordinating regulation states that corresponding periods in other Member States must be recognised and taken into account for satisfying waiting time requirements. By producing form E104 (Statement of periods of insurance, employment and residence in a particular Member State), issued by the medical insurance service in the Member State where the jobseeker was most recently insured, he can demonstrate in the Member State where he works that he was previously covered by social insurance in another Member State.

If the worker finds employment in the Member State in which he has sought work, he is registered with social security there as well (Regulation (EC) no. 883/2004, Article 11, paragraph 3, letter a). He is moreover taxed in the country of employment.

If he falls sick during this period, he is in principle entitled to the health insurance benefits. In certain Member States, social benefits in case of sickness are taken into account only after the worker was registered with social security or worked for a certain period (known as the waiting period). To avoid gaps in the period of insurance, the coordination Regulation stipulates that the corresponding periods for meeting the waiting period in other Member States must be recognised and counted. The worker can use Form E-104 (declaration concerning the aggregation of periods of insurance, employment or residence), issued by the health insurance fund of the Member State where the jobseeker was last registered with social security, to declare in the Member State in which he works that he was previously registered with social security in another Member State.

# 13

## The pensioner abroad

### 13.1 Who is a pensioner?

The chapter entitled “The pensioner abroad” deals with pensioners who, e.g. 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 migrant worker who has worked in Poland, Ireland and France and receives an Irish, Polish and French pension – or about a former Belgian frontier worker, who gets a Belgian and a Dutch pension.

## 13.2 Social security

The principle of exclusiveness applies to the social security obligation. This means that the worker, pensioner, etc. can only be subject to the legislation of one Member State. Pursuant to Regulation (EC) no. 883/2004, Article 13, paragraph 3, letter e, a pensioner is in principle registered with social security in the country of residence (*lex loci domicilii*). The pension may be exempted from the social security obligation of the country of residence (Regulation (EC) n. 883/2004, Article 16).

The principle of exclusiveness is not absolute. A pensioner is registered with social security in the country of residence (*lex loci domicilii*). In very many cases, pensioners must pay health insurance contributions in a Member State other than the country of residence (*lex loci pensionado*). A distinction must be drawn between:

- Single pensioner: Pensions from one Member State;
- Double pensioner: Pensions from several Member States.

### 13.2.1 „Double pensioner“

#### **Article 23 of Regulation (EC) no. 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. Pursuant to Regulation (EC) no. 883/2004 Article 23, this double pensioner is covered by healthcare and nursing insurance in Germany. The double pensioner is entitled to the German benefits in cash and in kind. Pursuant to Regulation (EC) no. 987/2009, he pays the contribution on his total income (German and French pensions) to the German healthcare and nursing insurance.

#### **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.*

### 13.2.2 „Single pensioner“

#### **Article 24 of Regulation (EC) no. 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 has no Spanish pension. Pursuant to Regulation (EC) no. 883/2004 Article 24, 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.

The single pensioner pays health insurance contributions through his pension in Germany (Regulation (EC) no. 883/2004 Article 30 is applied).

### **Article 30 Regulation (EC) no. 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 single pensioner is entitled to benefits in kind also during his stay in the competent Member State without prior authorisation (Regulation (EC) no. 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). This Member State must have opted for this eventuality and must be listed in Annex IV of Regulation (EC) no. 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 the German benefit in kind without authorisation. Germany is listed in Annex IV.
- A single pensioner – with a British pension – may not claim the British benefit in kind in the United Kingdom without authorisation. The United Kingdom is not listed in Annex IV of Regulation (EC) no. 883/2004.

Article 28 of Regulation (EC) no. 883/2004 (Special rules for retired frontier workers; cf. under 10.3.2.1 of this Guide) applies to former frontier workers.

## **13.3 Taxation**

A pensioner, who receives a foreign disability or retirement pension, must pay for these pensions in his country of residence. Exceptions are made in several double taxation treaties. The right of the source country (the country that paid the income) then applies. This holds also for civil servant pensions. Occupational pensions (supplementary care) etc. are usually taxed in the home country.

If the applicable double taxation treaty assigns taxation for the statutory and/or supplementary pension to the paying Member State (the country that paid the income), the Member State in which the pensioner lives does not tax the pension. The country of residence will tax the entire pension and benefit income. Once the income tax has been calculated, the foreign income is exempted from domestic income tax on the grounds of the applicable double taxation treaty. The income liable for tax is usually taxed by applying progressive rates.



## 13.4 Typical cases

FAMILY A RESIDES IN BELGIUM					
Statutory pensions from		Contributions	Benefit in kind	Benefit in cash	Pension taxation
Woman pensioner	Germany	Germany	Germany + Belgium	Germany	Germany
Pensioner <sup>(1)</sup>	Germany + The Netherlands	The Netherlands	Belgium + The Netherlands	The Netherlands <sup>(2)</sup>	German pension in Germany, Dutch pension in Belgium

(1) Pensioner was registered with social security for the longest period in the Netherlands

(2) There is no benefit in cash in the event of need for care in the Netherlands

FAMILY B RESIDES IN ITALY					
Statutory pensions from		Contributions	Benefit in kind	Benefit in cash	Pension taxation
Woman pensioner <sup>(1)</sup>	Germany The Netherlands	Germany	Germany Italy	Germany	German pension in Germany Dutch pension in Italy
Pensioner	Germany Italy	Italy	Italy	Italy	German pension in Germany Italian pension in Italy

(1) Woman pensioner was registered with social security for the longest period in Germany.

FAMILY B RESIDES IN THE NETHERLANDS					
Statutory pensions from		Contributions	Benefit in kind	Benefit in cash	Pension taxation
Woman pensioner	Germany The Netherlands	The Netherlands	The Netherlands	The Netherlands <sup>(2)</sup>	Germany The Netherlands
Pensioner <sup>(1)</sup>	Germany Italy	Germany	Germany The Netherlands	Germany	

(1) Woman pensioner has been registered with social security for the longest period in Germany.

(2) There is no benefit in cash in the event of need for care in the Netherlands

If a pensioner receives a foreign benefit in cash in the event of need for care, and at the same time a benefit in kind for the same purpose provided by the institution of the country of residence, then the foreign benefit in cash will be reduced by the amount of the benefit in kind from the country of residence (Pursuant to Regulation (EC) no. 883/2004, Article 34: Overlapping of long-term care benefits).



# PART III

## SOURCES OF INFORMATION



## SOURCES OF INFORMATION

The sources of information described below are available in a large number of languages. The links included here will take you to the English language versions. Click through to change the language.

### **EURES mobility portal**

→ <http://ec.europa.eu/eures>

The EURES mobility portal features information instruments that provide help and support to workers and jobseekers who wish to go to another Member State to live and/or work there. If you click on the “Living and Working” tab on the EURES website, you will go to the database on living and working conditions. When you select a Member State, you get information about establishment, schools, taxes, the cost of living, healthcare, social security, the comparability of qualifications, etc. The “labour market information” database is another valuable instrument that contains information on recent labour market developments, broken down by country, region, and job. It is available in all languages.

### **Information on the free movement of workers**

→ <http://ec.europa.eu/social> => [Going to another country](#) => [Working in another EU country](#)

Very detailed sources of information on the freedom of movement of EU citizens, non-EU citizens, posting of workers, EU enlargement (transitional provisions), etc. This general website on labour law contains in particular Directive 96/71/EC concerning the posting of workers. The information is available in all languages.

### **Information on living, working and travelling in the EU**

→ <http://ec.europa.eu/youreurope> and <http://europa.eu/eu-life>

Excellent and very detailed sources of information on living and working in the Member States. The information is very extensive and available in every language. If you have questions about the EU, Europe Direct can help you. For example: I would like to move to another European country. How do I apply for a residence permit? Answers to these and other questions can be obtained from the central information service Europe Direct.

### **Report on EU citizenship**

→ [http://ec.europa.eu/justice/policies/citizenship/policies\\_citizenship\\_intro\\_en.htm](http://ec.europa.eu/justice/policies/citizenship/policies_citizenship_intro_en.htm)

This website contains the report on EU citizenship 2010. This report goes over the rights and advantage of EU citizenship, which brings citizens close to the EU. It explains the major obstacles that citizens still encounter in their daily lives, when they avail themselves of their EU rights across borders, and delineates the measures planned so that they can assert their rights.

## Right of residence of EU citizens as well as citizens from third countries

→ [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/free\\_movement\\_of\\_persons\\_asylum\\_immigration/index\\_fr.htm](http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/index_fr.htm)

EU website on the right to move and to reside in the territory of the Union, plus information on immigration by third-country nationals, entry and stay of highly qualified workers (EU Blue Card) etc.

## Legal information on EU social security coordination

→ <http://ec.europa.eu/social> =>Going to another country =>EU Social Security Coordination

This website contains important information on the coordination of social security. You can access introductory texts in all languages on the most important Regulations, such as (EC) no. 883/2004, (EC) no. 987/2009, etc.

## TRESS network on the coordination of social security

→ [www.tress-network.org](http://www.tress-network.org)

trESS is the number one website about social security coordination. Tress stands for "training and reporting on European Social Security." Available in all the EU languages, this website provides information on the coordination Regulations (EEC) no. 1408/71, (EC) no. 883/2004, (EC) no. 987/2009, as well as on the corresponding implementing regulations. It also contains the case law of the Court of Justice.

## Social security systems in the Member States

→ [www.missoc.org](http://www.missoc.org)

MISSOC is the EU's Mutual Information System on Social Protection / Social Security. It is available in English, French and German and provides detailed, comparable and regularly updated information on the national social security systems.

MISSOC publishes the comparable tables on social security in 31 countries (the 27 EU Member States as well as Iceland, Liechtenstein, Norway and Switzerland) and 12 major areas of protection: financing, healthcare, sickness, maternity, disablement, old age, survivorship, occupational accidents and diseases, family, unemployment, guaranteed minimum income, care.

## EUIsses

→ <http://ec.europa.eu/eulisses>

EUIsses is a new EU web portal offering the visitor easy access to EU and national information on the social security rights and obligations of citizens on the move in Europe. EUIsses only gives information on pensions. The purpose of EUIsses is to provide these citizens with EU and national information on their social security rights and obligations. Answers are also given to frequently asked questions. In addition, it is intended that the visitor should use the links provided to the national bodies for social security and the online services offered by these institutions.

## Labour law and the organisation of work

→ [http://europa.eu/legislation\\_summaries/employment\\_and\\_social\\_policy/employment\\_rights\\_and\\_work\\_organisation/index\\_fr.htm](http://europa.eu/legislation_summaries/employment_and_social_policy/employment_rights_and_work_organisation/index_fr.htm)

The European Union has minimum regulations concerning workers' rights and the organisation of work. These regulations concern mass redundancies, insolvency and company transition, consultation and information of workers, working time, equal treatment and equal pay as well as posted workers. The regulations are supplemented by framework agreements between the European social partners. Labour law information is available at [www.labourlawnetwork.eu](http://www.labourlawnetwork.eu)

Posting: [http://ec.europa.eu/youreurope/citizens/work/contact/index\\_fr.htm](http://ec.europa.eu/youreurope/citizens/work/contact/index_fr.htm)

## OECD Model Convention

→ [http://www.oecd.org/document/37/0,2340,en\\_2649\\_33747\\_1913957\\_1\\_1\\_1\\_37427,00.html](http://www.oecd.org/document/37/0,2340,en_2649_33747_1913957_1_1_1_37427,00.html)

The Organisation for Economic Cooperation and Development website contains the OECD model convention to prevent double taxation plus related supporting information (commentaries etc.).

## “Taxes in Europe” Database

→ [http://ec.europa.eu/taxation\\_customs/taxinv/welcome.do](http://ec.europa.eu/taxation_customs/taxinv/welcome.do)

The “Taxes in Europe” Database (TEDB) is an online information service of the European Commission that provides information (in English) on the most important taxes in the EU Member States. Access is free of charge. The system contains information on some 600 taxes in all Member States, made available to the Commission by the national authorities.

## Ploteus & Euroguidance

→ <http://ec.europa.eu/ploteus> & <http://www.euroguidance.net>

The aim of PLOTEUS is to help pupils and students, jobseekers, workers and employees, parents, occupational counsellors and teachers in seeking training and further training programmes in Europe. Euroguidance promotes mobility by helping educational and occupational counsellors and interested persons to explore the possibilities available to European citizens in Europe. Select one of the links therein to see how Euroguidance can help you.

## Recognition of professional qualifications

→ [http://ec.europa.eu/internal\\_market/qualifications](http://ec.europa.eu/internal_market/qualifications)

This site contains the European rules governing the recognition of professional qualifications as well as the directives that govern certain professions. Furthermore, it includes explanations on EU legislation for temporary mobility, the automatic recognition of professional qualifications, and the recognition of work experience in certain activities.





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