C/2024/594

11.1.2024

ADMINISTRATIVE COMMISSION FOR THE COORDINATION OF SOCIAL SECURITY SYSTEMS
DECISION No H14

of 21 June 2023

concerning the publication of the Guidance note on COVID-19 pandemic, the note on the interpretation of the application of Title II of Regulation (EC) No 883/2004 and Articles 67 and 70 of Regulation (EC) No 987/2009 during the COVID -19 pandemic, the Guidance note on telework applicable for the period between 1 July 2022 and 30 June 2023 and the Guidance note on telework applicable from 1 July 2023

(Text with EEA relevance)

(C/2024/594)

THE ADMINISTRATIVE COMMISSION FOR THE COORDINATION OF SOCIAL SECURITY SYSTEMS,

Having regard to Article 72 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems ([1]), under which the Administrative Commission is responsible for dealing with all administrative questions or questions of interpretation arising from the provisions of Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 of the Parliament and of the Council.

Having regard to Title II of Regulation (EC) No 883/2004 and articles 67 and 70 of Regulation (EC) No 987/2009.

Whereas:

(1) Member States were affected by the consequences of the COVID-19 outbreak crisis in an unexpected way. Many of them adopted social distancing measures, including confinement measures with the consequence of an increase in telework (home-office) activities, with the aim to contain the spread of the COVID-19 pandemic and to safeguard public health.

(2) The crisis put an additional strain on the resources of competent institutions. It also significantly affected usual work procedures in the relevant institutions in the Member States and created an exceptional situation where the normal operation of procedures, including reimbursement procedures, was not possible.

(3) The increase in telework activities was likely to be a source of concern for workers who resided in one Member State and worked exclusively in another one, and for workers who carried out an activity in two or more Member States. Therefore, it was necessary to determine how the provisions of the Regulations on social security coordination would apply, under these exceptional circumstances.

(4) The circumstances were such so as to render the case-law of the European Court of Justice relevant, according to which *force majeure* can be invoked if a non-compliance with legal obligations is attributable to circumstances beyond one's control, which are abnormal and unforeseeable and the consequences of which could not have been avoided despite the exercise of all due diligence (cf. the judgment of the Court of Justice of 13 July 1995, C-391/93, *Perrotta*, EU:C:1995:240).

(5) Hence, on 17 June 2020, the members of the Administrative Commission endorsed the Guidance note on COVID-19 pandemic, supplemented by the note on the interpretation of the application of Title II of Regulation (EC) No 883/2004 and Articles 67 and 70 of Regulation (EC) No 987/2009 during the COVID-19 pandemic ([2]). The respective note sets out that changes in the aspects taken into account in determination of the applicable legislation caused by the COVID-19 pandemic should not affect the determination.

([1]) OJ L 166, 30.4.2004, p. 1.
([2]) Note on the interpretation of the application of Title II of Regulation (EC) No 883/2004 and Articles 67 and 70 of Regulation (EC) No 987/2009 during the COVID-19 pandemic, AC 075/20.

(6) At the time of the agreement on the Guidance note COVID-19 pandemic, the Administrative Commission decided not to publish these guidelines in the Official Journal in order to remain flexible and extend the deadlines in view of the difficult context encountered during the pandemic.

(7) The Guidance note on COVID-19 pandemic included guidance on the legislation applicable to telework, recommending that telework in a Member State other than the competent ('usual') Member State of employment, due to COVID-19, should not lead to a change of applicable legislation. That Guidance was at first applicable until 31 December 2020 ([3]), but its application was subsequently extended by the members of the Administrative Commission for continued reasons of *force majeure*, first until 30 June 2021 ([4]) and then until 31 December 2021 ([5]). A revised version of the Guidance note on COVID-19 pandemic was relevant as of 25 November 2021 until the end of the latest extension set to 30 June 2022 ([6]). In this revised version a few deletions in the text were made, which are listed at the end of the Guidance note on COVID-19 pandemic in Annex I.

(8) As said above, during the pandemic, telework increased considerably enabling categories of professions and businesses to pursue their activity and remained, to a certain extent, a way of working. Nevertheless, the Administrative Commission agreed that as of 1 July 2022 the *force majeure* was no longer present. It was, however, necessary to assess how the current legal framework should be interpreted and if it was fit for the purpose of an increased amount of telework or hybrid work (meaning a combination between work in the premises of the employer and telework), in normal working circumstances not linked to the pandemic. Therefore, the Administrative Commission adopted in June 2022 a Guidance note on telework ([7]). Its purpose was to interpret the existing legal framework for the special situation of telework, which might necessitate a rather flexible approach to meet the general aims of Title II of Regulation (EC) No 883/2004.

(9) As this interpretation of the existing legal framework could lead to results others than those under the Guidance note on Covid-19 pandemic previously agreed in view of the then reigning exceptional circumstances, it was decided that a transition period could be advisable, during which there would still be no change in the applicable legislation. This transition period, which was first set to run until 31 December 2022 and was then extended until 30 June 2023 ([8]), was necessary to avoid hardship for the persons and enterprises concerned in the context of the freedom of movement of workers.

(10) During the transition period some diverging views appeared with regard to its interpretation. Following the discussions during the meetings of the Administrative Commission, the interpretation should be that the transition period covered both cases which started already before 1 July 2022 as well as those which started after this date, for the period until 30 June 2023.

(11) At the same time, the Administrative Commission set up during the transition period an Ad-hoc group to examine the subject of telework and discuss further, among others, the interpretation of Articles 12, 13 and 16 of Regulation (EC) No 883/2004. Based on the report of the Ad-hoc group on telework from March 2023, the Administrative Commission decided that a modification of the text of the Guidance note on telework was necessary for the future. Therefore, a new Guidance note on telework applicable from 1 July 2023 ([9]) was adopted by the Administrative Commission in June 2023. It reflects the outcome of the works of the Ad-hoc group and also provides for appropriate clarification of the transition period between 1 July 2022 and 30 June 2023 under the previous guidance.

(12) Citizens and employers do not have access to the internal documents of the Administrative Commission and can only refer to the information on the websites of the competent institutions, which could result in the information being removed at one stage.

([3]) Guidance note on Covid-19 pandemic, AC 074/20
([4]) Guidance note on Covid-19 pandemic, AC 074/20REV
([5]) Guidance note on Covid-19 pandemic, AC 074/20REV2
([6]) Guidance note on Covid-19 pandemic, AC 074/20REV3
([7]) Guidance Note on telework, AC 125/22REV2
([8]) Guidance Note on telework, AC 125/22REV3
([9]) Guidance Note on telework applicable from 1 July 2023 (AC 137/23)

(13) In order to facilitate uniform application of Union law, to ensure the principle of transparency and availability of information towards citizens and to create legal certainty in case there would be a conflict on the question of the applicable legislation as understood in view of the then reigning exceptional circumstances as well as to ensure that the documents are traceable in the future, it appears necessary to adopt this decision.

(14) Thus, it decides to publish the Guidance note on COVID-19 pandemic (AC 074/20REV3) as well as the note on the interpretation of the application of Title II of Regulation (EC) No 883/2004 and Articles 67 and 70 of Regulation (EC) No 987/2009 during the COVID-19 pandemic (AC 075/20), which also provides the appropriate interpretation of the Guidance note on COVID-19 pandemic concerning its application in time, and also the Guidance note on telework applicable for the period between 1 July 2022 and 30 June 2023 (AC 125/22REV3) as well as the Guidance note on telework applicable from 1 July 2023 (AC 137/23),

HAS DECIDED AS FOLLOWS:

1. The following documents shall be published as Annexes to this Decision:
   a. the Guidance note on COVID-19 pandemic applicable for the period between 1 February 2020 and 30 June 2022 (AC 074/20REV3), as Annex I,
   b. the note on the interpretation of the application of Title II of Regulation (EC) No 883/2004 and Articles 67 and 70 of Regulation (EC) No 987/2009 during the COVID-19 pandemic (AC 075/20), as Annex II,
   c. the Guidance note on telework applicable for the period between 1 July 2022 and 30 June 2023 (AC 125/22REV3), as Annex III, and
   d. the Guidance note on telework applicable from 1 July 2023 (AC 137/23), as Annex IV.

2. This Decision shall be published in the *Official Journal of the European Union*. It shall apply from the date of publication.

The Chair of the Administrative Commission
Christina JANZON

ANNEX I

ADMINISTRATIVE COMMISSION FOR THE COORDINATION OF SOCIAL SECURITY SYSTEMS

Subject: Guidance Note on COVID-19 pandemic

(Revised version as of 25/11/2021 - AC 074/20REV3)

Non-exhaustive list of identified issues as a result of the COVID-19 pandemic including changes in work patterns, border restrictions, etc. and possible solutions

1. **Categories of possible solutions**

This Guidance Note contains possible solutions to issues identified in the Regulations in connection with the measures taken by Member States as a response to the COVID-19 pandemic. The possible solutions are categorised in two, as follows:

1	Solutions using the current rules of the Regulations and their inherent flexibility
2	Other suggestions which may be considered (e.g. as we are in a situation of *force majeure*)

Solutions will be shaded accordingly, i.e. those in **grey shading** fall under **Category 2**.

2. **Time window of application**

Unless specifically mentioned, the solutions proposed in this Guidance Note should be applied for all relevant cases linked to the COVID-19 pandemic during the period of 1 February 2020 and 30 June 2022. The Administrative Commission may prolong this time window in case the pandemic continues beyond this date.

3. **COVID-19 exceptional reporting on changes in Member States' legislation** ([1])

It is very important to continue collecting updated information from the Member States with regards to measures taken on a national level as a consequence of the COVID-19 pandemic. This will allow all Member States to have an up-to-date and precise picture of all national benefits, schemes and legislation introduced by the Member States during the COVID-19 pandemic.

Member States should report information on any changes to, or newly introduced benefits, schemes and legislation, both for those which fall within the scope of Regulations (EC) No 883/2004 and 987/2009. Additional information on COVID-19 based legislation of a social nature which do not fall under the Regulations is also appreciated.

A compilation of changes in Member States legislation reported by the delegations in the context of the consultation carried out in the framework of the guidance note can be found in AC Note 076/20.

4. **General principles applying to all cases**

— Means of communication between the Member States: EESSI is and remains the preferred communication channel between the Member States during the COVID-19 pandemic. Any recommendation provided within this note which suggest the use of means of communication other than EESSI are mainly addressed at Member States who are not yet EESSI ready, or who are not able to communicate with respect to the issue identified through EESSI.

— Compatibility with national legislation: this note does not oblige Member States to follow any recommendation if it is not compatible with the applicable national law, including data protection and data security legislation.

([1]) This reporting does not replace the Article 9 Declaration procedure, which will be carried out later this year.

— Use of supporting evidence other than official documents provided for in the Regulations: Member States are being recommended to accept supporting evidence in support of a claim by a person if it is not possible to receive the official document from another institution within a reasonable period of time. However, Member States are not obliged to accept supporting evidence if it is not permitted under national law, or if this does not contain all the necessary information required by the competent institution to calculate the benefits. On the other hand, when the documents provided by the person contain the necessary information and thus allow the institution to calculate the benefits, the competent institution may preliminary accept them. Retroactive verification through the request/receipt of an official document will allow the institution to verify the entitlement at a later stage.

— *Force majeure* has to be considered on a case-by-case basis, but should not be the starting point for each individual case. When competent institutions assess cases linked to the COVID-19 pandemic, by priority the normal rules should still apply. Consequently, if the normal rules cannot be applied or do not lead to the intended result, the solutions proposed in this Guidance Note may be considered.

5. List of identified issues and possible solutions, by sector

A. Horizontal issues: Cooperation and exchange of data

COVID-19 crisis has created a very complex situation regarding the implementation of Regulation (EC) No 883/2004 and the procedures laid down in Regulation (EC) No 987/2009, especially the principles of cooperation and exchanges of data. Thus, it is necessary to show *flexibility* and to find *pragmatic and adequate* solutions in this complex situation. Furthermore, Member States may exchange their experience with each other and the Secretariat in order to identify further challenges. This would give all Member States the opportunity to find common solutions for administrative problems.

It should be emphasized that, generally, individuals should not be penalised for not being in a position to finalise an administrative procedure due to the COVID-19 crisis. This applies both if the person concerned is in quarantine and therefore cannot visit the relevant office to carry out the procedure, and also if the relevant office is unable to provide the service due to temporary closures, lack of staff, back-logs, etc.

It is necessary to find pragmatic solutions allowing a balanced approach between access/continued payments of social security benefits on the one hand, and the current difficulties met by social security institutions to ensure their tasks, on the other hand.

Exchanges between institutions, Article 2 of Reg. 987/2009		
Id.	Issues identified	Possible solutions
H 1	During the pandemic, the usual work routine in relevant institutions is hampered, including due to the restrictions for sending classic (postal) mail to other Member States. This has severe impacts on the communication between institutions, including already possible exchanges through EESSI.	As mentioned in point 4 'General principles applying to all cases', wherever and whenever possible, EESSI should be the preferred way of communication. To the extent national legislations and data protection allow and as mutually agreed to by the concerned parties, if and where an exchange through EESSI is not possible, alternative ways of communication should be used. Furthermore, to the extent national legislations allow, deadlines for answering or providing information to other Member State should be applied flexibly due to the COVID-19 pandemic.
Exchanges between institutions and persons concerned, Article 3 of Reg. 987/2009		
H 2	The COVID-19 pandemic may lead to restricted contacts between institutions and persons concerned.	To the extent national and data protection legislation allow, institutions may in general use distant contact via mail, email, online or by phone in order to settle the requests.

H 3	Difficulties to exercise the usual authentication procedure, e.g. to provide electronic signatures.	To the extent national and data protection legislation allow and where appropriate, institutions may temporarily waive the requirements (e.g. of electronic signature of the person concerned during the pandemic and extend deadlines for response, especially when the person concerned is staying or residing in a Member State other than the competent Member State) and explore alternative identification procedures.
H 4	Difficulties to keep time limits laid down by the legislation of the competent Member State.	The time limits laid down by the legislation of the competent Member State may be handled in a rather flexible way by granting short extensions of these limits. If due to quarantine the person concerned does not submit the document to the institution within the time limit specified, the deadline for submitting this document may be extended at the person's request.
Documents and supporting evidence, Article 5 of Reg. 987/2009		
H 5	The COVID-19 pandemic might hamper the usual speed of mutual assistance. Member States have to deal with this delay including e.g. delayed issuance of portable or other documents or inability of the person concerned to obtain a Portable Document from a Member State for reasons connected to COVID-19 (e.g. lack of staff, closure of competent offices, administrative overload, etc.).	In cases of exceptional circumstances caused by the pandemic, where it is e.g. not possible to obtain relevant information via an exchange through EESSI and to the extent national legislations allow, the competent institution may as fall-back position: — (preliminarily) accept suitable alternative documentation/ documents or supporting evidence (e.g. payslips or salary statements that contain the necessary information) directly from the person concerned; — (preliminarily) accept scanned documents instead of original documents sent by letter; — grant preliminary benefits. Retroactive verification through the request/receipt of an official document will allow the institution to verify the entitlement once the situation normalises. Please see also point 4 'General principles applying to all cases'.
Benefits granted for a definite period or requiring renewed evidence (residence, medical control, birth certificates, life certificates etc.)		
H 6	Delayed (new) certificate of incapacity for work and degree of need for long-term care, Article 27 and 28 of Reg. 987/2009	In the case of benefits granted for a definite period and/or dependent on the incapacity for work/ degree of need for long-term care where the recipient has submitted an application for a further period of benefit, the competent institution may continue to pay the benefit based on the existing decision for granting the benefit or based on the medical documentation provided, if necessary through a preliminary decision. A necessary medical assessment should be carried out as soon as the situation allows.

H 7	Delayed life certificates for the export of pensions	Member States may temporarily suspend the life certificate system or accept life certificates e.g. without electronic signature sent by e-mail, letter or any other verifying document. In case a person has not returned a life certificate to the competent institution in time and the payment of the benefit has been suspended before the pandemic but, during the pandemic, that person submits, e.g. by e-mail or telephone, a request for payment of the benefit, it may be paid based on the person's statement. Persons who during the pandemic period do not provide the life certificate within the prescribed period, may still continue to receive the benefit (preliminarily). After the pandemic, the competent institutions may ask recipients to send a life certificate.
H 8	During the pandemic, medical examinations and administrative checks (Art. 87 of Reg. 987/2009) are hampered. This concerns all branches of social security. There is also a risk of delaying the implementation of medical opinions requested by foreign competent institutions requiring a direct examination of the insured and delays in obtaining the medical opinions from foreign competent institutions.	To the extent national legislations allow and where appropriate, during the COVID-19 pandemic competent institutions may refrain from asking for medical examinations or other administrative checks in already ongoing cases where there is a need to control the person's continued right to paid benefit. On the other hand, to grant an invalidity pension without a medical certificate may not be possible in new cases. Where possible and to the extent national legislations allow, medical assessors may complete the corresponding documents by way of a desk assessment or other appropriate means. Whenever possible and to the extent national legislations allow, certifying physicians and medical commissions may issue decisions based on the collected medical records. In connection with the above, there is also a risk of delaying the implementation of medical opinions ordered by foreign competent institutions requiring a direct examination of the insured person and delays in obtaining the medical opinions from foreign competent institutions.
Extension of other deadlines in the Regulations		
Member States should discuss bilaterally cases where, due to the COVID-19 pandemic, they are facing difficulties to observe other deadlines as stipulated in the Regulations, including those in Decision F2 and Title IV Chapter III on recovery. In cases of difficulties, Member States may agree to suspend the running of any time-period until such difficulties are resolved.		

B. **Applicable legislation**

General principles:

— Telework is an important instrument to 'flatten the curve' of COVID-19 infections.

— Questions concerning applicable legislation should therefore neither delay the beginning of telework nor hinder its continuation.

— Telework in a Member State other than the competent ('usual') Member State of employment due to COVID-19 should not lead to a change of applicable legislation.

— Telework should not be hampered/delayed/interrupted (only) due to the application for a PD A1 and/or an exemption agreement.

Questions arising from teleworking in a Member State other than the competent Member State (esp. cross-border/frontier workers/pluriactive workers)		
AL 1.	(Cross border/frontier) worker (usually) working exclusively in one Member State and starts teleworking in another Member State	Please refer to the note by the Secretariat on the application of Title II of Regulation (EC) No 883/2004 during the COVID-19 pandemic, note AC 075/20

	(e.g. the Member State of residence) due to the COVID-19 pandemic OR Pluriactive worker, usually working in more than one Member State, increases activity in Member State of residence due to COVID-19 telework.	
AL 2.	Necessity to apply for a PD A1 (Art 15, 16 IR) in case of COVID-19 telework	In order to ensure that telework as an important instrument to 'flatten the curve' can be quickly, comprehensively and continuously applied and with a view to ECJ case-law generally allowing for a retroactive application and issuance of PD A1, application for and issuance of a PD A1 are only necessary in case of an explicit request from a competent institution, including institutions in the MS of telework. Existing PD A1 issued under Article 13 remain valid (until expiry date).
Delayed/prolonged postings due to COVID-19		
AL 3.	Posted workers in possession of PD A1 whose activity was planned to start after the outbreak of the COVID-19 pandemic and the posting is delayed due to the pandemic.	a. Situation 1: If the end of the posting period does not change to a later date as stated in the original PD A1 and no immediate new posting is planned after this date: no action (i.e. application for an updated PD A1) necessary. b. Situation 2: If the end of the posting period will be later as stated in the original PD A1 and/or an immediate new posting is planned after this date so the actual duration of the first posting is relevant: new application and issuance of a new PD A1 with updated dates (to the extent legally possible).

AL 4.	Interruption period between two periods of posting in Decision A2 point 3(c), example: Posted workers whose posting period ended prematurely e.g. called back by employer, and needs to continue the posting period at a later stage.	— Situation 1: If the interruption is less than two months and the end of posting period will not change to a later date: no action (i.e. application for an updated PD A1) necessary. — Situation 2: If the interruption is more than two months, the end of posting period will be later and/or an immediate new posting is planned after this date: new application and issuance of PD A1 with updated dates (to the extent legally possible). — Situation 3: If the interruption is less than two months, the end of the posting period will be later and/or an immediate new posting is planned after this date: New application and issuance of PD A1 with updated dates. Issuing institutions while obeying general rules (e.g. max. duration of posting) may use their discretionary power as mentioned in Decision A2 No. 3 (c).
Flexibility in other cases		
AL 5.	With a view to other possible COVID-19 scenarios touching questions of applicable legislation (e.g. posting organized at short notice, workers recruited with a view to being posted, posted workers whose term of posting is expiring), the flexibility expressed in the Regulations and Decisions of the AC (e.g. on prior affiliation in Decision A2) should be used.	

C. **Unemployment benefits**

Unemployment and cross-border/frontier workers		
UB 1.	Cross-border workers employed in a Member State, become unemployed, start receiving UB from Member State of (former) employment and then want to go back to their Member State of residence.	a. Export of UB under Article 65(5)(b) BR. Member State of last employment may waive the 4-week waiting period as already possible in line with Article 64(1)(a) BR. b. For further export questions see below.
UB 2.	Frontier workers who become unemployed and are precluded from moving back to their Member State of residence to claim UB from there due to quarantine measures ordered by the Member State of (former) employment.	Two options may be considered: a. A (former) frontier worker who is prevented from returning home at least once a week due to a quarantine ordered by the Member State of (former) employment may no longer be regarded as frontier worker but as cross-border worker other than a frontier worker, and therefore may be allowed to claim unemployment benefits from the Member State of last employment. b. However, the competent Member State and the Member State of residence can agree otherwise on a case-by-case analysis. Access to unemployment benefits directly from the Member State of residence thus may remain possible even though he/she did not immediately return to that Member State, under the same conditions as persons under quarantine in the Member State of residence (waiving of requirement to be available for a certain period).

UB 3.	Partially/intermittently unemployed (cross-border/frontier) workers who meet all conditions to be entitled to the corresponding benefit but are not fully available in the Member State of employment due to border restrictions. This case covers also posted and pluriactive workers who became unemployed abroad but could not return to the competent Member-State due to border restrictions.	Temporary border restrictions preventing the concerned persons from leaving the Member State of residence or entering the Member State of employment should not be a reason to exclude the concerned persons from benefit entitlement if all other conditions for entitlement are met. In case the competent institutions are implementing flexible rules or approaches as regards national rules for entitlement (registration/or availability of the worker) in order to take account of the quarantine situation for instance, such flexibilities shall apply equally both to local and to cross-border workers in order to ensure application of the equal treatment principle.
UB 4.	Member State of (former) employment is not able to deliver a PD U1 within the usual period.	In cases of exceptional circumstances caused by the pandemic, where it is e.g. not possible to obtain relevant information via an exchange through EESSI and to the extent national legislations allow, relevant competent institutions may as fall back position use alternative documents/documentation as described in case H5 and in line with point 4 'General principles applying to all cases'. Acceptable alternative documents agreed on a bilateral basis between institutions may be any document(s) containing information suitable for calculation and granting of a preliminary benefit, such as payslips and salary declarations showing details of social security coverage in the Member State of last employment.
	Export	
UB 5.	An unemployed person exporting UB from the competent Member State to another Member State cannot register with the employment services in the Member State to which he/she has gone within seven days due to obligatory quarantine when entering the Member State of destination or because the relevant employment services are not operating as usual.	The situation may be treated as exceptional case in line with Article 64(1)(b) BR in which the period for registration may be extended.
UB 6.	Unemployed persons who exported their UB for an initial period of three months are precluded from going back to the Member State paying the benefit in order to continue receiving the benefits from there, because they are obliged to stay in quarantine in the Member State where they were looking for work, or for other reasons, such as no availability of flights.	Although exceptional, this scenario may occur in different variations. Therefore, an assessment on an individual case-by-case basis may be appropriate using one or both of two following solutions : a) The Member State paying the benefit may consider extending the period of export for a further period until the person can return to that Member State. This extension of export would be possible in line with Article 64(1)(c) BR.

		b) A delayed return to the competent Member State due to COVID-19 pandemic may also be treated as 'exceptional case' as in Article 64 (2) BR without the loss of the person's entitlement to benefits.
UB 7.		

D. **Sickness benefits**

General		
S 1	Residence in a Member State other than the competent Member State: — Registration process with a valid PD S1 delayed or PD S1 with limited time period — Frontier workers	— Member States should ensure that frontier workers are not denied access to healthcare providers in the competent Member State due to COVID-19 pandemic. — Competent institution should issue a new PD S1 covering the period of treatment or confirm that issued documents cover the new period. — As far as practicable for both the competent Member State and the Member State of residence (both EESSI ready regarding S_BUC_01a/EESSI applications available), a SED S072 may be issued in order to facilitate the registration process in the Member State of residence. — Eventually, ensure possible entitlement through EHIC or PRC.
S 2	Stay outside the competent Member State - Necessary medical treatment: — Persons holding an EHIC, which is/becomes out of date — Persons not holding an EHIC	Whenever possible exchange of information through EESSI shall be preferred. Please see also point 4 'General principles applying to all cases'. In case EESSI exchange is not possible, Member States should swiftly issue a PRC, e.g. via email (to the extent data protection allows), if possible also allowing online applications.
Planned treatments		
S 3	Non COVID-19 related planned treatments Planned medical treatment in another Member States via PD S2, E123, DA1, DA002 with a limited period of validity.	If the treatment is postponed, exchange of information through EESSI shall be preferred to the extent it is possible. Please see also point 4 'General principles applying to all cases'. Otherwise, Member States should swiftly issue a new PD S2 or E123 via email or confirm that issued documents cover a new period.
S 4	COVID-19 related planned treatments Treatment for COVID-19 patients transported for treatment to another Member State other than the competent Member State	This particular situation only concerns both the very few Member States that have had to cope with the need to urgently send COVID-19 patients abroad and the receiving Member States of the patients.

		Bilateral talks took place in order to secure processes at stake with respect to the Regulation provisions and to avoid uncertainties due to the emergency. So far, it is noted that the retroactive issuance of a S2 for each patient remains a useful solution, in order to certify the decision concerning planned treatment and the reimbursement of costs in accordance with the provisions of Title IV of Regulation (EC) No 987/2009. Sending Member States remain free to determine how they intend to deal with related issues, such as remaining costs and/or direct billing to the patient resulting from medical treatment or fees arising from medical transport. They may have decided that related costs should be fully borne by the patients' healthcare insurance. However and since those issues fall outside the scope of the Regulations, bilateral talks between the sending and the receiving Member State are necessary in order to clarify how those choices can be integrated in the reimbursement processes.
S 5	Necessary medical treatment provided to uninsured persons.	If such person have no right to reside, they should receive (basic) medical assistance from the Member State of stay until departure (such an assistance may be medical assistance as in Art. 3(5)(a) BR.).

Compensation for loss of work-related income by the competent Member State for persons on preventive compulsory quarantine imposed by another Member State and/or for closure of schools

Member States have adopted compensation measures for loss of income due to the national obligation of confinement or for closure of schools. These temporary measures may present different features (as a social security benefit or simply residence based). Accordingly, persons may face two types of situations: difficulties as regard access to any compensation of loss of income measure (competent Member State measures are outside the scope of social security + Member State of quarantine has adopted only measures falling within the scope of social security) or, on the contrary, possible situation of overlapping of benefits (social security benefits as regards a loss of income from the competent Member State + national measures from the Member State of residence based outside the scope of social security).
As regards measures falling within the scope of Regulation (EC) No 883/2004, the principle of assimilation of facts (laid down in Article 5) should apply in such situations, also as regards schools (accompanying measures regarding the closing of schools for children under a certain age for instance).

S 6	Compensation for loss of work-related income by the competent Member State for persons on preventive compulsory quarantine imposed by another Member State and/or for closure of schools	Member States are to carry out an assessment to determine if the compensation is a social security benefit to be declared under the coordination regulations. Member States should notify the AC accordingly. If a social security benefit: documents certifying the quarantine issued by the Member State that ordered the quarantine should be accepted by the competent Member State. If not a social security benefit: Member States should assess whether the measure is a social advantage under Article 7 of Regulation (EU) No 492/2011.

S 7		

NB: Until the revision taking place on 25 November 2021 (i.e. for the period between 1 February 2020 and 24 November 2021), the text of these points of the Guidance Note on COVID-19 pandemic read as follows:

Delayed/prolonged postings due to COVID-19		
AL 3.	Posted workers in possession of PD A1 whose activity was planned to start between 01.02.2020-31.12.2020, i.e. after the outbreak of the COVID-19 pandemic, and the posting is delayed due to the pandemic.	a. Situation 1: If the end of the posting period does not change to a later date as stated in the original PD A1 and no immediate new posting is planned after this date: no action (i.e. application for an updated PD A1) necessary. b. Situation 2: If the end of the posting period will be later as stated in the original PD A1 and/or an immediate new posting is planned after this date so the actual duration of the first posting is relevant: new application and issuance of a new PD A1 with updated dates (to the extent legally possible).

Reimbursement		
UB 7.	Difficulties in meeting the reimbursement deadlines in Article 70 IR due to the current constraints and difficult working conditions in employment agencies and institutions.	Extension for six months, parallel to extension for reimbursement for sickness benefits. (see proposal for a Decision in Annex 2).

S 6	Compensation for loss of work-related income by the competent Member State for persons on preventive compulsory quarantine imposed by another Member State and/or for closure of schools	Member States are to carry out an assessment to determine if the compensation is a social security benefit to be declared under the coordination regulations. Member States should notify the AC accordingly (please see in Annex a specific template for reporting such benefits/schemes and other changes in national legislation related to COVID-19). If a social security benefit: documents certifying the quarantine issued by the Member State that ordered the quarantine should be accepted by the competent Member State. If not a social security benefit: Member States should assess whether the measure is a social advantage under Article 7 of Regulation (EU) No 492/2011.
Reimbursement		
S 7	Reimbursement deadlines in Article 67 of Reg. 987/2009.	Extension for six months, parallel to extension for reimbursement for unemployment benefits. (see proposal for a Decision in Annex 2)

ANNEX II

ADMINISTRATIVE COMMISSION FOR THE COORDINATION OF SOCIAL SECURITY SYSTEMS

Subject: The application of Title II of Regulation (EC) No 883/2004 and Articles 67 & 70 of Regulation (EC) No 987/2009 during the COVID-19 pandemic

Note from the Secretariat of 15 May 2020 (AC 075/20)

I. Introduction

With the aim to contain the spread of the COVID-19 pandemic and to safeguard public health, many Member States have adopted social distancing measures, including confinement measures with the consequence of an increase in telework (home-office) activities.

The increase in telework activities can be a source of concern for workers who reside in one Member State and work exclusively in another one, and for workers who carry out an activity in two or more Member States. This is mainly due to the sudden increase in professional activities carried out in a Member State, which in some cases is different from the one where the person is insured.

From the information collected within the Administrative Commission since the start of the COVID-19 pandemic, it appeared clearly that the majority of Member States have decided, on a unilateral basis or in agreement with one or more other Member States, that the obligation to telework in the Member State of residence would not lead to a change of the applicable legislation. In that context, a number of delegations raised questions about the flexibility which could be acknowledged regarding the application of the Regulations on the coordination of social security systems. The main concerns were related to changes in the applicable legislation due to telework activities, and difficulties for the competent institutions to meet the deadlines for claims related to the reimbursement of certain benefits.

Moreover, the COVID-19 pandemic has also put an additional strain on the resources of competent institutions. They are facing demanding teleworking conditions, a high influx of requests for information and applications for existing and newly introduced benefits, which may be made worse by a possible shortage of staff when they have to provide benefits and assistance to the persons most in need. This leads, in particular, to difficulties for competent institutions to deal with certain requests within the deadlines specified in the Regulations, such as deadlines for the introduction and settlement of claims in the area of sickness, and for the reimbursement of unemployment benefits.

The Secretariat would like to present its interpretation on how to deal with different scenarios related to the application of certain rules in the Regulations during the COVID-19 pandemic.

II. The determination of the applicable legislation pursuant to Title II of Regulation (EC) No 883/2004 should not change during the COVID-19 pandemic

The applicable legislation, which applies to persons in accordance with Title II of Regulation (EC) 883/2004, should not change because of the COVID-19 pandemic. The current situation, which led amongst others, to border restrictions, advice from national health authorities to work from home, and temporary closure of various workplaces, has prevented many persons from actually performing their employed or self-employed activity in the Member State where they normally pursue their activity. It also led to a shift in the working time situation of many employed and self-employed persons who normally pursue an activity in two or more Member States.

This interpretation may be reinforced by the fact that the COVID-19 pandemic creates an exceptional situation for which it appears possible to invoke a case of *force majeure,* if all conditions of that notion are met.

For example, according to a consistent case law, the determination of the applicable legislation must have regard to the nature of the employment *as defined in the contractual documents* ([1]). It is necessary to derogate from the general rule of connection to the Member State of employment *only in specific situations which demonstrate that another connection is more appropriate* ([2]). That case law is based on the general principle that a person employed in the territory of one Member State is to be subject to the legislation of that Member State, even if he/she resides in the territory of another Member State.

In the current COVID-19 pandemic, the contractual documents have (in principle) not been changed and the workers have not chosen to perform their activity outside the Member State where they are normally employed; they may be prevented from getting to their normal or usual place of work due to the restrictions imposed by national measures to combat the COVID-19 pandemic. Furthermore, that situation is not (currently) meant to last for several more months. Therefore, in accordance with the case law, there seems to be no reason justifying that '*another connection (to another Member State) would be appropriate*' and to depart from the *lex loci laboris* general principle.

That interpretation is reinforced by the reason behind the fact why cross-border and mobile workers cannot get to their place of work, *i.e.* the current COVID-19 pandemic.

III. **The finding under point II is reinforced by the possible application of the notion of *force majeure***

It results from a consistent case law that the concept of *force majeure* does not have the same scope in the various spheres of application of EU law; its meaning must be determined by reference to the legal context in which it is to operate ([3]).

In the area of social security Regulations, the Court of Justice held that '*That concept must be understood more broadly as designating abnormal and unforeseeable circumstances outside the control of the unemployed person, the consequences of which, in spite of the exercise of all due care, could not be avoided except at the cost of excessive sacrifice*' ([4]).

That judgement was given in the context of a different branch of social security, but still in the sphere of application of Regulation (EEC) No 1408/71 (replaced by Regulation (EC) No 883/2004), so that, as required by the Court in that ruling (para. 26), the meaning of the concept is determined by reference to the same legal context in which it is to operate.

Because of its links with the principle of proportionality ([5]), *force majeure* is a general principle of EU law, which may, where appropriate, be invoked even in the absence of explicit provisions ([6]). The spread of the coronavirus leading to the acknowledgment of a pandemic by the World Health Organisation (WHO) is undoubtedly to be regarded as an '*abnormal and unforeseeable circumstances which were outside the control of the unemployed person*'. These circumstances, which were out of the control of national authorities as well as persons falling under the scope of Regulations (EC) Nos 883/2004 and 987/2009, made it impossible for many cross-border and mobile workers to get to their normal place of employment. There is therefore no wish from either the employer or the worker to change the applicable social security legislation. There is also no reason demonstrating that a connection to the legislation of the Member State of residence due to an increase in telework activities would be more appropriate. There are only circumstances that prevent the workers from getting to their place of work.

Therefore, during the COVID-19 pandemic, the rules of Title II on the determination of the legislation applicable should be applied as they were before the beginning of the pandemic.

([1]) See *Format Urządzenia i Montaże Przemysłowe*, C-115/11, EU:C:2012:606, para. 44.
([2]) *X.*, C-570/15, EU:C:2017:674, para. 27.
([3]) *Vilkas*, C-640/15, EU:C:2017:39, para. 30.
([4]) *Perrotta*, C-391/93, EU:C:1995:240.
([5]) See to that effect, the Commission notice of 1988 concerning force majeure in European agricultural law, C(88) 1696 (OJ C 259, 6.10.1988, p. 10).
([6]) See Case 71/87, *Inter-Kom*, EU:C:1988:186, para. 10 to 17 and Case C-12/92, *Huygen and Others*, EU:C:1993:914, para. 31.

IV. **Practical examples**

a) **Applicable legislation**

Due to the COVID-19 pandemic, the working patterns of many employers and workers have been disrupted due to confinement measures taken by national authorities with the implication that persons have to telework from their place of residence, which is different from their normal country of employment.

In a number of cases, such a change in the working time pattern does not lead to a change in the applicable legislation. This is because the amount of working time in the Member State of residence will not amount to 25 % of the total working time over a reference period of 12 months (as provided in Article 14(8) of Regulation (EC) No 987/2009). This concerns mainly persons who reside in a Member State and work in another, and where the start of the telework activity due to the COVID-19 pandemic will not amount to 25 %. Nevertheless, in some other cases, the change in the working time may tip the balance. This concerns, in particular, workers who are active in two or more Member States, but are not insured in the Member State of residence since the working time in that Member State amounts to, for example, 20 %.

In these cases, where the persons concerned have to telework due to national measures related to the COVID-19 pandemic, the activities carried out via telework in the country of residence are not to be taken into account – also when they become substantial and exceed the 25 % working time threshold over a reference period of 12 months. Therefore, an exceeded threshold should not lead to a change in the applicable legislation.

The same reasoning also applies to persons who, for example, start a new employment, and due to the application of national measures during the COVID-19 pandemic, they cannot travel to the country of employment and are asked to telework until the end of the application of those national measures. These persons are to be insured in the country of new employment.

Beyond telework, some posted workers had to remain in the country of secondment due to the COVID-19 pandemic. Again, that factual situation has no impact on the legal situation of those workers who are deemed to keep the status they had the day before the entry into force of national measures adopted during the COVID-19 pandemic.

Moreover, formally, the national measures, adopted on a unilateral basis and taking into account the interests of the workers, in conjunction with the application of the notion of *force majeure*, are in compliance with Title II of Regulation (EC) No 883/2004. Consequently, they should not be supplemented by agreements based on Article 16 of Regulation (EC) No 883/2004.

b) **Settlement of claims**

In the area of sickness benefits, claims based on actual expenditure have to be introduced to the debtor country and settled within the timeframe foreseen under the provisions of Article 67 of Regulation (EC) No 987/2009.

Nevertheless, and as explained above, due to the COVID-19 pandemic and the related national measures, some social security institutions are meeting difficulties to fulfil their obligations as set out in the Regulations. Again, the same reasons by pre-empting the application of the abovementioned provision imply that the running of any time-period and the ending of deadlines for reimbursement of expenses are suspended during the application of measures linked to it.

For example, this means that the running time-period specified in Article 67(1) and (2) of Regulation (EC) No 987/2009 is suspended if the end of the 12 months occurs during the application of national measures adopted during the COVID-19 crisis. Similarly, the 18 months period referred to in Article 67(5) shall be suspended. In these cases, the time-period shall restart as soon as the application of domestic measures linked to the COVID-19 crisis is lifted.

Similarly, the same concept should apply to the deadlines stipulated in Article 70 of Regulation (EC) No 987/2009, in relation to reimbursement of unemployment benefits.

With a view to avoiding difficulties, which may arise from the lifting of national measures in an uncoordinated matter, Member States may agree upon specific measures in accordance with Article 35(3) and Article 65(8) of Regulation (EC) No 883/2004, in particular with the adoption of a Decision of the Administrative Commission.

ANNEX III

ADMINISTRATIVE COMMISSION FOR THE COORDINATION OF SOCIAL SECURITY SYSTEMS

Subject: Guidance Note on telework (AC 125/22REV3)

Note of 13 May 2022, revised on 7 and 14 June 2022 and on 14 November 2022

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

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

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

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

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

In normal working circumstances, Title II of Regulation (EC) No 883/2004 will apply as before the Pandemic. It is necessary to understand better the impact of the existing legal framework of Regulations (EC) No 883/2004 and 987/2009 on telework and to safeguard a common interpretation in all Member States, as this has not been done before the Pandemic. Therefore, this Guidance Note will show ways how to interpret the existing legal framework for the special situation of telework, which might necessitate a rather flexible approach to meet the general aims of Title II of Regulation (EC) No 883/2004.

As this interpretation of the existing legal framework could lead to results others than those under the Guidance previously agreed, a short transition period could be advisable, during which there would still be no change in the applicable legislation. This transition period is necessary to avoid hardship for the persons and enterprises concerned, in particular, in the context of the freedom of movement of workers.

I. Definition of cross-border telework

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

Cross-border telework is work performed:

a) outside the employer's premises or the business place where the same work is normally carried out,

b) in a Member State different from the one where the employer's premises or the business place are located and

c) using information technology to remain connected to the employer's or business's working environment as well as stakeholders/clients in order to fulfil his/her tasks assigned by the employer or clients, in case of self-employed persons.

It is important to note that this definition covers only the same work. An employee who works at the premises of his/her employer's client working with or on the client's ICT system usually would not fall under this definition as this is not the same work this employee exercises at his/her employer's premises or business place.

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

II. **Legislation applicable to teleworkers**

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

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

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

1) **Interpretation of Article 12 in relation to telework**

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

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

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

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

Following this interpretation, Article 12 of Regulation (EC) No 883/2004 applies to any telework, which has been agreed upon (formally or informally) between the employer and the employee. It could be argued that, in these cases, the application of Article 12 is in the interest of the employer, which is an important element for any case under this Article. As the past years during the Pandemic have shown, telework is usually in the interest of the employer as well as the employee, leading to more flexibility, higher efficiency, and lower rent operating costs for the employer. These interests normally are not affected differently by the telework being carried out across the border. Subsequently, there is no need to differentiate in whose interest or on whose initiative the telework is being performed, which would also alleviate the administrative burden for the competent institutions who have to assess individual cases. If telework were contrary to the effectiveness of the work of the employee, the employer would not agree to such a request for telework.

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

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

— An employer has to shut down some rooms of the offices building to renovate them. All the employees working in these rooms are sent home to perform teleworking.

— The employee can only continue to work from home, because e.g. s/he has to care for sick children, aged relatives, small children or is the partner of such a person (otherwise this employee would have e.g. to take paid or unpaid leave and would not any longer be in a position to exercise the work, which is important for the employer).

— An employee agrees with the employer that s/he will telework during the following 4 weeks to better concentrate on a specific project.

— An employee stays at the holiday place and starts to telework there for another month before returning home and resuming work in the office.

— Any other comparable cases, where there is an agreement between the employer and the employee concerned. In case of doubt as to whether a concrete case could be subsumed under this category, an agreement under Article 16 of Regulation (EC) No 883/2004 is advisable to avoid disputes between Member States.

If Article 12 of Regulation (EC) No 883/2004 applies to telework, the 'full package' (e.g. Decision No. A2 or the 'Practical Guide') has to be taken into account. The text of the same Article 12 does not allow an interpretation under which telework in another Member State should be limited to periods shorter than 24 months. Nevertheless, continuous telework in a Member State without any timely limit would be excluded from Article 12 as it is not of an ad hoc or temporary nature and supposed to be longer than the 24 months.

2) **Interpretation of Article 13 in relation to telework**

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

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

Article 13 of Regulation (EC) No 883/2004 and Article 14 of Regulation (EC) No 987/2009 can apply as a rule to telework. Since the 25 % criterion, in the framework of an overall assessment, is indicative and as telework constitutes a new reality for workers and employers, which has not been considered before, that criterion could be interpreted in a flexible and more adequate way according to the situation concerned which would have to be examined for the following 12 months, during which work is usually performed in the office and in the form of telework.

What distinguishes telework from other forms of work exercised outside the employer's premises or the business place is that the employee remains connected to the employer's working environment, allowing the employee to carry out the same tasks s/he would have at the employer's premises, thus leaving no significant impact on the way the work is performed depending on the employee's location. In fact, when teleworking from home, in addition, as a rule, 100 % of the facilities used by the worker are provided by the employer.

This flexible solution adjusted to telework could avoid disadvantaging frontier workers in border regions, who otherwise would be restricted in their possible implementation of hybrid work compared to national workers. Thereby it could be prevented that companies would treat their workers on a discriminatory basis depending on the place where the work is carried out. Cross-border telework would also have no effect on the local labour market where the telework is being carried out.

The following situations could be covered:

— a switch between work at the premises of the employer and telework on a weekly basis;

— longer intervals are foreseen;

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

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

Although the interpretation proposed of Articles 12 and 13 of Regulation (EC) No 883/2004 already allows to consider some aspects of the special situation of telework, agreements under Article 16 of Regulation (EC) No 883/2004 on exceptions to the general rules on applicable legislation, in the interest of certain persons or categories of persons, remain the tool to address the new/atypical work situations in all other cases.

The following possibilities exist:

— **Individual Article 16 agreements** that can be concluded for each individual case by the Member States involved;

— **Group of persons Article 16 agreements** that can be concluded for groups of persons by the Member States involved (which could cover specific categories of persons as e.g. the employees of specified employers or also e.g. all teleworkers who are frontier workers when working in the premises of the employer);

— **Multilateral Article 16 agreements** that more than two Member States could agree to conclude for specific groups of persons;

— **EU-wide Article 16 parameters** - Member States could agree on specific parameters under which Article 16 agreements should/can be concluded; this would only be a recommendation from the Administrative Commission, as the competence to conclude an Article 16 Agreement still lies with the competent authorities or the bodies designated by them for this task.

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

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

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

— telework due to family reasons such as hospitalisation of a relative or need for constant or increased care of a relative;

— telework with the aim of facilitating the exercise of the activity by people with disabilities.

III. **Entry into force of this guidance note and transitional measures**

The interpretation proposed in this note is due to be used from 1 July 2022 and cover any organisation of telework from that date. Nevertheless and given that the previous guidance of the Administrative Commission has been applied for the last two years, an abrupt change of applicable legislation, on 1 July 2022, might be detrimental to a large number of teleworkers.

In addition to the protection of the workers, there might be some technical and administrative difficulties, in some cases, to determine the applicable legislation. Preparing Article 16 agreements could take some time, especially if Member States opt for such agreements for groups of persons or multilateral agreements.

Therefore, it can be regarded as justified, during a period of 12 months, not to change the way Title II has been applied until the end of June 2022. This period of time should give time to employers, employees, any other person concerned as well as the relevant institutions to determine the legislation applicable to employees, in accordance with the flexible interpretation of the Regulations proposed under Part II of this note, until 30 June 2023.

ANNEX IV

ADMINISTRATIVE COMMISSION FOR THE COORDINATION OF SOCIAL SECURITY SYSTEMS

Subject: Guidance Note on telework applicable from 1 July 2023

Note of 21 June 2023 (AC 137/23)

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

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

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

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

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

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

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

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

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

I. Definition of cross-border telework

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

1. is carried out in a Member State or Member States other than the one in which the employer's premises or the place of business are situated and

2. is based on information technology to remain connected to the employer's or business's working environment as well as stakeholders/clients in order to fulfil the employee's tasks assigned by the employer or clients, in case of self-employed persons.

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

Examples

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

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

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

II. Legislation applicable to teleworkers

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

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

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

1) Interpretation of Article 12 in relation to telework

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

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

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

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

Following this interpretation, Article 12 of Regulation (EC) No 883/2004 applies to any telework, which has been agreed upon explicitly (formally or informally) between the employer and the employee. It can be argued that, in these cases, the application of Article 12 is in the interest of the employer, which is an important element for any case under this Article. As the past years during the Pandemic have shown, telework is usually in the interest of the employer as well as the employee, leading to more flexibility, higher efficiency, and lower rent operating costs for the employer. These interests normally are not affected differently by the telework being carried out across the border. Subsequently, there is no need to differentiate in whose interest or on whose initiative the telework is being performed, which would also alleviate the administrative burden for the competent institutions who have to assess individual cases. If telework were contrary to the effectiveness of the work of the employee, the employer would not agree to such a request for telework.

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

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

— An employer has to shut down some rooms of the offices building to renovate them. All the employees working in these rooms are sent home to perform teleworking.

— The employee can only continue to work from home, because e.g. s/he has to care for sick children, aged relatives, small children or is the partner of such a person (otherwise this employee would have e.g. to take paid or unpaid leave and would not any longer be in a position to exercise the work, which is important for the employer).

— An employee agrees with the employer that s/he will telework during the following 4 weeks to better concentrate on a specific project.

— An employee stays at the holiday place and starts to telework there for another month before returning home and resuming work in the office.

— Any other comparable cases, where there is an agreement between the employer and the employee concerned. In case of doubt as to whether a concrete case could be subsumed under this category, an agreement under Article 16 of Regulation (EC) No 883/2004 is advisable to avoid disputes between Member States.

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

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

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

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

2) **Interpretation of Article 13 in relation to telework**

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

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

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

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

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

— a switch between work at the premises of the employer and telework on a weekly basis (e.g. one day per week every week);

— longer intervals are foreseen (e.g. one week every six weeks);

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

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

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

The following possibilities exist:

— **Individual Article 16 agreements** that can be concluded for each individual case by the Member States involved

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

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

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

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

— telework due to family reasons such as hospitalisation of a relative or need for constant or increased care of a relative;

— telework with the aim of facilitating the exercise of the activity by people with disabilities.

— **Multilateral Article 16 agreements** that more than two Member States could agree to conclude for specific groups of persons

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

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

III. **Entry into force of this Guidance note**

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