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Guidance Note on telework
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**ADMINISTRATIVE COMMISSION
FOR THE COORDINATION OF SOCIAL SECURITY SYSTEMS**

Subject: Guidance Note on telework

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.