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# GUIDE FOR **MOBILE EUROPEAN WORKERS**

EUROPEAN TRADE UNION CONFEDERATION (ETUC) 2017

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The “**Guide for European Mobile Workers**” was published for the first time in 2004 and then in a second, revised edition in 2007. The third edition represented a thoroughly revised version of the first two editions, particularly with regard to Regulation (EC) no. 987/2009 of the European Parliament and of the Council of 16 December 2009 laying down the procedure for implementing Regulation (EC) no. 883/2004 on the coordination of social security systems (amended by Regulation (EC) 988/2009), which came into force on 1 May 2010. This fourth edition is largely an updated version of the Guide that reflects changes in the legal situation as of 2017.

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

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# INTRODUCTION

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

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

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

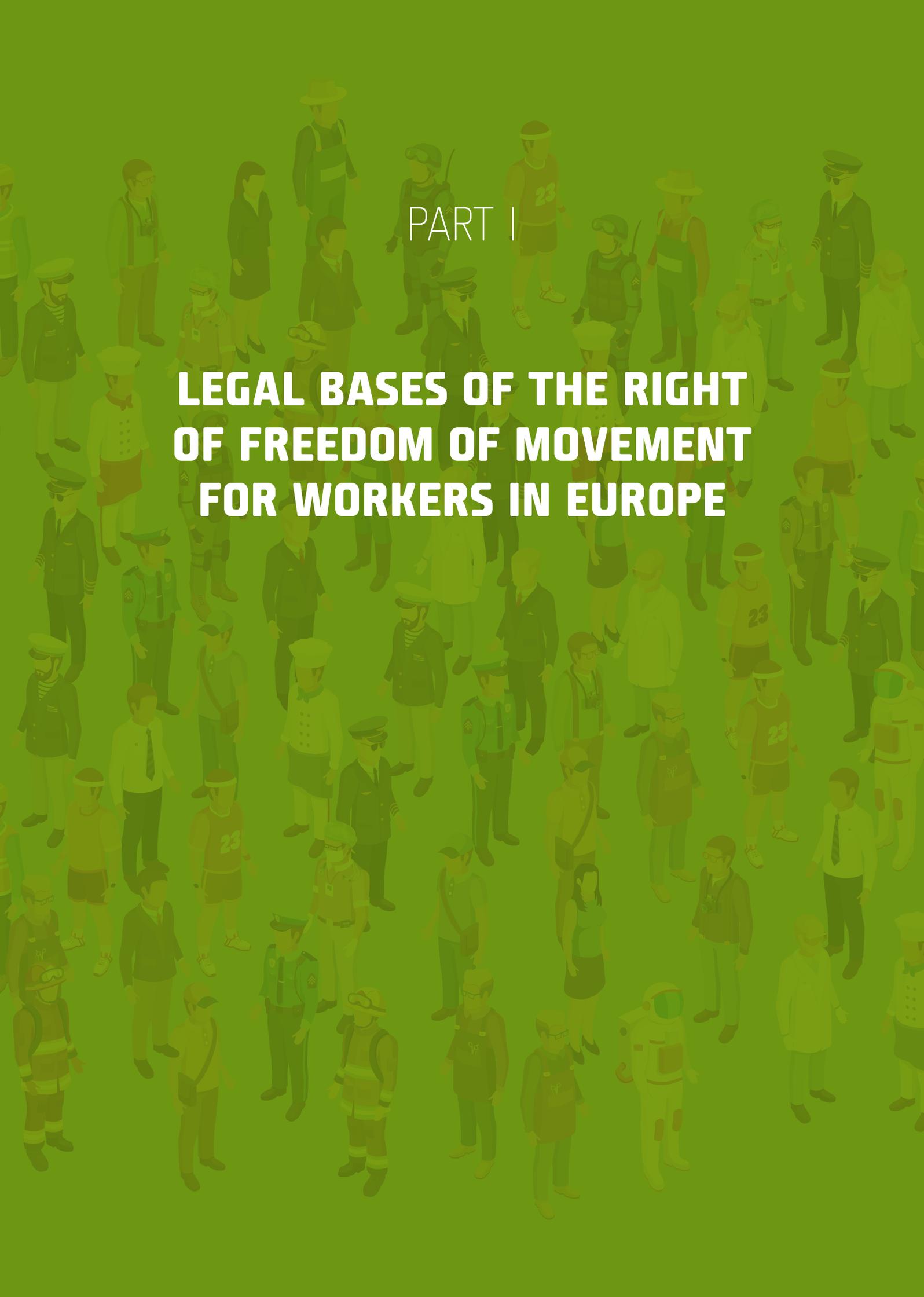
The European Trade Union Confederation (ETUC) represents the interests of workers at European level with a strong social dimension that puts the interests and the well-being of working people in the foreground, promotes social justice and fights against exclusion and discrimination. The regional trade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

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

Part I of this publication explains a number of important European treaties, regulations and directives that deal with social insurance systems, including family benefits, and employment law. We also briefly consider the basic principles of the OECD Model Convention to prevent double taxation, which have influenced almost all the European bilateral double taxation treaties. The application of all this in practical cross-border employment situations is discussed in greater detail in Part II (Chapters 8 to 13).

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PART I

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

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**T**he principle of the free movement of persons applies within the European Union<sup>1</sup> and the European Free Trade Association. For the European worker, this means that he has the right to move to another Member State to work or to look for a job.

The legal basis of freedom of movement for workers is Article 45 of the Treaty on the Functioning of the European Union (TFEU)<sup>2</sup>. Freedom of movement is also a fundamental right guaranteed by Article 15, paragraph 2 of the Charter of Fundamental Rights of the European Union. It is based on the Community principle of non-discrimination on the grounds of nationality, which means that a migrant worker must be treated in the same way as nationals with regard to access to work, conditions of work and employment, and social and tax benefits. To achieve freedom of movement, the Council of the European Union has issued regulations and directives<sup>3</sup> setting out certain common rules and principles that ensure that application of the different national systems of Member States does not harm persons who exercise their right to free movement.

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

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- 1 The European Union currently (December 2017) consists of 28 member states. The European Free Trade Association (EFTA) comprises the four countries of Iceland, Liechtenstein, Norway and Switzerland. The European Economic Area (EEA) is made up of the EU member states and Iceland, Liechtenstein and Norway. The expression “the EEA and Switzerland” covers the same countries as “EU/EFTA”.
  - 2 The TFEU has been in force since 1 December 2009. Until 30 November 2009, under the numbering system introduced by the Maastricht Treaty, the regulation on the freedom of movement of workers was Article 39 of the Treaty Establishing the European Community (EC Treaty, TEC); under the previous numbering system, which applied until 30 October 1993, it was Article 48 of the EC Treaty.
  - 3 E.g. Regulation (EEC) No. 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community; repealed by Regulation (EU) no. 492/2011 of 5 April 2011 on freedom of movement for workers within the Union. Regulation (EEC) No. 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community; superseded by Regulation (EC) No 883/2004 of 29 April 2004 on the coordination of social security systems and the implementing Regulation (EC) 987/2009. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

# CHAPTER 1.

## THE EU TREATY

The Treaty on European Union (TEU) defines various basic rights of European citizens. The Treaty on the Functioning of the European Union (TFEU), which has been in force since 1 December 2009, also sets out a number of fundamental basic rights of European citizens.

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

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

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

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

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

### **Article 21 TFEU (ex Article 18 TEC)**

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

### **Article 45 TFEU (ex Article 39 TEC)**

- (1) Freedom of movement for workers shall be secured within the Union.*
- (2) Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.*
- (3) It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
  - a) to accept offers of employment actually made,*
  - b) to move freely within the territory of Member States for this purpose,*
  - c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;*
  - d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.**
- (4) The provisions of this Article shall not apply to employment in the public service.*

**Article 46 TFEU (ex Article 40 TEC)**

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

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

**Article 48 TFEU (ex Article 42 TEC)**

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

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

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

- a) refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure; or*
- b) take no action or request the Commission to submit a new proposal; in that case, the act originally proposed shall be deemed not to have been adopted.*

The rights defined in the TEU are regulated in particular in Regulation (EC) no. 492/2011 on freedom of movement for workers within the Community, in Regulation no. 883/2004 on the coordination of social security systems and in Regulation no. 987/2009 laying down the procedure for implementing Regulation (EC) no. 883/2004 on the coordination of social security systems, and in the directives on the right of residence, etc.

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

# CHAPTER 2. REGULATION (EC) 492/2011 ON FREEDOM OF MOVEMENT FOR WORKERS

## 2.1. THE RIGHT OF EU CITIZENS TO TAKE UP EMPLOYMENT

EU Regulation 492/2011<sup>4</sup>, which governs the rights of cross-border workers and migrants and their families, is based on the prohibition of discrimination on the grounds of nationality under Articles 18 and 45(2) of the TFEU. Citizens of the Member States of the European Economic Area (EEA, i.e. the Member States of the European Union plus Liechtenstein, Norway and Iceland) have free access to the labour market in the other EEA countries and therefore do not need a work permit; as workers they enjoy freedom of movement (although some restrictions still apply to Croatia). Under another agreement on freedom of movement (Bilateral Agreements I between Switzerland and the European Union), Swiss citizens have the same rights with regard to access to the labour market as citizens of the EU/EEA.

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

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

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

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

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

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<sup>4</sup> Regulation (EU) No. 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union entered into force on 16 June 2011, replacing the previously applicable Regulation (EEC) No. 1612/68 of 15 October 1968 on freedom of movement for workers within the Community. Regulation (EU) No. 492/2011 was amended with effect from 12 May 2016 by Regulation (EU) 2016/589 of the European Parliament and of the Council.

**Article 7 of EU Regulation 492/2011:**

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

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

However, social advantages must not be confused with statutory social security payments. The coordination of statutory social security is governed by the applicable regulations (see Chapter 3).

**Examples:**

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

**Other examples (Articles 7(1) and 7(4) of EU Regulation 492/2011):**

- A Greek doctor goes to work in Germany, having first worked in a comparable post in Greece. Under the German collective wage agreement for all federal employees (Bundesangestelltentarifvertrag, BAT), all such employees – including doctors – are entitled to promotion to a higher salary scale after a number of years’ service in German hospitals. The European Court of Justice found that the (comparable) years of service in Greece must be counted and treated as on a par with years of service in Germany (ECJ ruling in case C-15/96 (Schöning-Kougebetopoulou); at the time of the ECJ ruling EEC Regulation 1612/68 was still in force).
- Case C-514/12 between the Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken Betriebs GmbH and the Austrian province of Salzburg (Land Salzburg) concerned differing methods of allowing for previous periods of service. The law of the Province of Salzburg governing the assignment of civil servants (Salzburger Landesbediensteten-Zuweisungsgesetz) stipulated that “a contractual agent [employee] shall advance every two

years to the next pay step in his grade". From the date of commencement of employment with the present employer, periods of service were counted in full; only 60% of periods of employment with previous employers was counted. The ECJ decided in this case that differentiation between periods of service with one particular employer and service with other employers was an infringement of European rules on freedom of movement (Article 45 TFEU and Article 7 of Regulation (EC) 492/2011).

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

### **Article 8 of Regulation (EC) 492/2011)**

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

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

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

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

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

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

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

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

Employed persons who are nationals of one of the Member States of the EEA (and Switzerland) have an automatic right to work in another Member State. Employed persons who are not citizens of a Member State (or Switzerland) – “third-country nationals” – do not have an automatic right to work in another Member State. They need a work permit, for which the employer must submit an application to the responsible authority. If an EEA worker is married to a non-EEA citizen (third-country national) and lives and works in another Member State, the spouse also has the right to take up paid employment in the host country (country of residence).

His/her right to take up employment in the country of residence was previously guaranteed under Article 11 of Regulation (EEC) 1612/68; now this right is enshrined in Article 23 of the Residence Directive 2004/38/EC.

Article 23 of Directive 2004/38/EC

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

### Examples:

- A Finnish employer recruits an Italian worker who is married to an Argentinean woman. Both spouses are automatically entitled to reside and take up employment in Finland – under Article 1 of Regulation (EC) 492/2011 for the EU citizen, and under Article 23 of Directive 2004/38/EC for his spouse. Therefore, no work permit is necessary for the non-EEA citizen.
- A Bosnian nurse living in Bosnia-Herzegovina – a country which has not (yet) joined the European Union – does not automatically have the right to work in Austria. A work permit is necessary for this. Even if the Bosnian nurse is married to a German man who is working as a cross-border worker in Austria but living in Bosnia-Herzegovina, she is not allowed to work in Austria. If the couple moves to Austria, there is no longer any need for a work permit.
- An Israeli ballerina lives in Amsterdam (Netherlands) and works in Antwerp (Belgium). Because she is not an EU citizen, she may only work if she has a work permit. She is entitled to Belgian family allowances (social security payments) under Regulation 883/2004 on the coordination of social security (or under Regulation 1231/2010 which extends Regulation 883/2004 to nationals of third countries). She has no entitlement to Belgian maternity allowances (social advantage) under Article 7(2) of Regulation (EC) 492/2011. She is entitled to child allowances but not maternity allowances because third-country nationals come within the scope of the social security coordinating Regulation 883/2004 but are not covered by Regulation (EC) 492/2011 on the free movement of workers.

## 2.3. THE RIGHT OF CITIZENS OF THE NEW MEMBER STATES TO TAKE UP EMPLOYMENT

The European Union has been enlarged in recent years. It grew from a group of 15 countries into one of 25 with the accession to the Union on 1 May 2004 of ten new Member States (Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia – known as the 2004 accession countries). Then on 1 January 2007, another two new Member States (Bulgaria and Romania – the 2007 accession countries) joined the Union, bringing the total number of members to 27. On 1 July 2013 Croatia became the 28<sup>th</sup> Member State of the EU.

Upon each enlargement, the “old” and new Member States agreed on transitional arrangements. Under these arrangements, the right to free movement of workers – a politically sensitive issue – is introduced gradually. The result of this is essentially that the original system, under which residents of the new Member States needed a work permit to work in an “old” Member State, may be retained for a specified period.

**The transition period is divided into three phases (2 years + 3 years + 2 years) and limited to seven years in total:**

Years after accession	Conditions for maintaining the protective clause
Phase 1: 0-2 years after accession	None
Phase 2: 2-5 years after accession	Unilateral formal notice by the Member State to the EU Commission
Phase 3: 5-7 years after accession	Reasoned formal statement in the event of a serious disruption of the labour market or fear thereof

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

For Croatian citizens, the first phase of the transitional regulations pertaining to the free movement of workers ended on 30 June 2017. By this date the Member States were required to inform the Commission of whether they wished to retain the restrictions on the access of Croatian nationals to their labour markets for the next three years or whether they were prepared to allow Croatian workers full access to their labour markets.

- Belgium, Cyprus, France, Germany, Greece, Italy, Luxemburg and Spain decided to allow Croatian workers full access to their labour markets. These countries will therefore implement the EU regulation on the free movement of workers in full from 1 July 2015.
- Austria, Malta, the Netherlands, Slovenia and the United Kingdom will retain the restrictions for a further three years.
- The remaining Member States had already granted Croatian workers comprehensive rights to freedom of movement from 1 July 2013.

The transitional arrangements for Croatia will finally expire on 30 June 2020.

The transitional regulation applies only to the free movement of workers. Cross-border provision of services is possible from the first day of accession.

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

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

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

# CHAPTER 3. REGULATION (EC) 883/2004 ON THE COORDINATION OF SOCIAL SECURITY SYSTEMS

## 3.1. GENERAL

The coordination of social security systems is based on Regulation (EEC) no. 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community and Council Regulation (EEC) 574/72 laying down the procedure for implementing Regulation (EEC) no. 1408/71. These two regulations guarantee equal treatment and social security services for all nationals of EU Member States, irrespective of their place of residence or employment. They have both been amended on several occasions since 1971 to bring them into line with changing national legislation systems and to include advancements resulting from decisions of the Court of Justice of the European Communities. These amendments have contributed to the complexity of the coordinating Community rules and have led to Regulation (EC) no. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

The modernised coordination system consisting of Regulation (EC) no. 883/2004 (the Basic Regulation)<sup>5</sup> and the accompanying implementing Regulation (EC) no. 987/2009<sup>6</sup> has been in force in the **EU Member States** since **1 May 2010**.

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

The modernised coordination system also applies from **1 April 2012** to Switzerland and from **1 June 2012** to the **EEA countries** of Norway, Iceland and Liechtenstein.

Since **1 January 2016** EC Regulations 883/2004 and 987/2009 also apply **between the four EFTA countries** of Switzerland, Iceland, Norway, and Liechtenstein.

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

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

Therefore Regulation (EEC) no. 1408/71 and Regulation (EEC) no. 574/72 continue to apply only for the purpose of:

- Council Regulation (EEC) no. 1661/85 of 13 June 1985 laying down the technical adaptations to the Community rules on social security for migrant workers with regard to Greenland;
- and the “old” third-country Regulation 859/2003 in relation to Great Britain for as long as the relevant principles are not adapted to Regulation (EC) 883/2004 and Regulation (EC) 987/2009.

In December 2016 the European Commission proposed a revision of the EU regulations on the coordination of social security systems<sup>7</sup>. The proposed revision seeks to amend four areas of coordination:

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

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

ETUC’s position on the revision proposals has been published on the ETUC website: <https://www.etuc.org/documents/etuc-position-ec-proposal-revision-regulation-8832004-coordination-social-security-systems#.WjzvBX-Wzcs>

At present it is still unclear whether these revision proposals will be adopted without amendment and if they are, when they will come into force. It therefore seems inappropriate to describe the proposals in more detail at this point.

Regulations (EC) no. 883/2004 and no. 987/2009 do not replace national legislation but merely coordinate the different national social protection systems so that persons who wish to avail themselves of their right to free movement are not penalised by comparison with persons who have always resided and worked in the same country. The provisions of the coordinating regulations are geared to closing any possible gaps in the different branches of social security for mobile persons in Europe (workers, pensioners, students, self-employed individuals, etc.).

The EU coordination provisions thus merely specify which national system a mobile citizen is governed by. They prevent a person having double social insurance or – in cross-border cases – none at all. The practical effect for mobile workers is that their rights and obligations in the area of social security systems are guaranteed in principle under EU law but the form that these rights and obligations take continues to be determined by the national legislation of their states of employment and/or residence.

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<sup>7</sup> Proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 883/2004 on the coordination of social security systems and regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004, COM (2016) 815 final

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

- determination of which country's social security legislation applies;
- the mandatory aggregation of periods of insurance in the various Member States in relation to social benefits in the event of sickness, accident, disablement, retirement and death and in relation to family benefits;
- the exportability of social security services;
- the coordination of calculation methods for social security benefits.

Regulation (EC) no. 883/2004 pertains only to statutory social security systems, not supplementary social insurance schemes (company pensions, private health insurance, additional private health and disablement insurance, etc.).

The EU coordination provisions do not apply either to social and medical assistance: these benefits are usually granted on the basis of the financial circumstances of the individual involved.

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

## 3.2. RULES FOR DETERMINING THE APPLICABLE SOCIAL SECURITY LEGISLATION

Regulation (EC) 883/2004 sets out the principles of the social security law that applies in relation to the free movement of workers within the European Union (EU) and the European Free Trade Association (EFTA). These provisions establish in which Member State mobile European workers are covered by social insurance. They determine which social security law applies in a given case and prevent a mobile person in Europe (worker, pensioner, student, self-employed individual, etc.) not being covered by any social security system or being covered simultaneously by two legal systems.

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

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

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

Nature of the occupational activity	Competent Member State
<p><b>Frontier workers</b> with employee or self-employed status</p> <p>Article 1(f) of Regulation (EC) 883/2004: "frontier worker" means any person pursuing an activity as an employed or self-employed person in a Member State and who resides in another Member State to which he returns as a rule daily or at least once a week.</p>	<p>Article 11(3)(a) of Regulation (EC) no. 883/2004: the Member State in which the activity as an employed or self-employed person is pursued</p>
<p><b>Civil servants</b></p>	<p>Article 11(3)(b), Regulation (EC) no. 883/2004: the Member State of the administration that employs them</p>
<p><b>People working on ships</b></p>	<p>Article 11(4), Regulation (EC) no. 883/2004: the Member State of the flag flown by the vessel or Member State of the employer if he resides in that State</p>
<p><b>Flight crew or cabin crew member</b> performing air passenger or freight services</p>	<p>Article 11(5), Regulation (EC) 883/2004, added under Article 1(4) of Regulation (EU) 465/2012: Member State in which the "home base" as defined in Annex III to Regulation (EEC) no. 3922/91 is located</p>
<p>Posted persons</p>	<p>Article 12, Regulation (EC) no. 883/2004: the Member State of the origin of the posting, provided that the anticipated duration of such work does not exceed 24 months and that the employee is not sent to replace another person</p>
<p>Persons gainfully employed in two or more EU States, e.g.</p> <ul style="list-style-type: none"> <li>• two or more activities on a part-time basis</li> <li>• personnel in international transport</li> <li>• alternating telework</li> </ul> <p>Article 16(1), Regulation (EC) no. 987/2009: <b>A person who pursues activities in two or more Member States</b> shall inform the institution designated by the competent authority of the Member State of residence thereof.</p> <p>Article 21(2), Regulation (EC) no. 987/2009: <b>An employer</b> who does not have a place of business in the Member State whose legislation is applicable and the employee may agree that the latter may fulfil the employer's obligations on its behalf as regards the payment of contributions without prejudice to the employer's underlying obligations. The employer shall send notice of such an arrangement to the competent institution of that Member State.</p>	<p>Article 13(1), Regulation (EC) no. 883/2004, supplemented by Regulation (EU) 465/2012, Article 1(6):</p> <p>a) the Member State of residence if he/she pursues a <b>substantial part of his/her activity in that Member State</b></p> <p>b) if he/she does <b>not pursue a substantial part of his/her activity in the Member State of residence:</b></p> <p>the Member State in which the registered office or place of business of the undertaking or employer is situated</p> <p>i) if he/she is employed by an undertaking or employer</p> <p>ii) or if he/she is employed by two or more undertakings or employers which have their registered office or place of business in only one Member State</p> <p>iii) the Member State in which the registered office or place of business of the undertaking or employer is situated other than the Member State of residence if he/she is employed by two or more undertakings or employers, which have their registered office or place of business in two Member States, one of which is the Member State of residence; or</p> <p>iv) the Member State of residence if he/she is employed by two or more undertakings or employers, at least two of which have their registered office or place of business in different Member States other than the Member State of residence.</p> <p>A share of <b>less than 25%</b> of the working time and/or the remuneration is an indicator that it is not a substantial activity [Article 14(8), Regulation (EC) no. 987/2009]</p>
<p>Persons who pursue self-employment in two or more States</p>	<p>Article 13(2), Regulation (EC) no. 883/2004: The State of residence if he pursues a substantial part of his activity in that Member State or the State in which the centre of interest of his activity is situated</p>
<p>Persons who pursue employed and self-employed activity in several Member States concurrently</p>	<p>Article 13(3), Regulation (EC) no. 883/2004: The Member State in which he pursues an activity as an employed person</p>

## Examples

- A resident of Portugal works in Spain but returns to Portugal at least once a week. This employee is a frontier worker. He is subject to the social security system of the country in which he works, Spain (Regulation (EC) 883/2004, Article 11(3)(a)).
- A Swedish company posts its personnel manager to Denmark for 18 months. Since he is a posted worker providing services, the employee remains subject to Swedish social security (Regulation (EC) 883/2004, Article 12(1)).
- A resident of Italy works for a French company in both France (50%) and Italy (50%). He is subject to the social security system of a single Member State, in this case Italy, the country in which he both lives and works. The French employer must accordingly make social security contributions in Italy (Regulation (EC) 883/2004, Article 13(1)).
- A resident of Austria is employed by a German company as a maintenance mechanic. He works in Italy and Switzerland. The employee is subject to the social security legislation of a single Member State, in this case Germany, where his employer is based (Regulation (EC) no. 883/2004, Article 13(1)(b)).
- A resident of France is self-employed in France and has part-time employment in Germany. Under Article 13(3) of Regulation (EC) no. 883/2004, he is insured in the State of employment, i.e. in Germany, as an employee, but also for his self-employed activity.<sup>8</sup>
- A Dutch woman who receives a survivor's benefit from the Netherlands is insured in the Netherlands in accordance with Article 11(3)(e) of Regulation (EC) no. 883/2004. If she takes what is known as a mini-job in Germany, the Dutch social security law no longer applies; instead, in accordance with Article 13(a) of Regulation (EC) no. 883/2004, German social security law will apply. Mini-jobs are situations of minor employment providing a monthly income of at most €50 (as at 2017); special social security rules apply to them.

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

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

### **Regulation (EC) 883/2004, Article 16**

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

<sup>8</sup> Under Regulation (EEC) no. 1408/71, Article 14c and Annex VII, persons who are employed and self-employed in two different Member States at the same time are usually required to register with social security in both countries.

## 3.3. AGGREGATION OF PERIODS OF INSURANCE

### 3.3.1. The switch to another social security system

A person who works in a Member State is also subject to that country's social security system (*lex loci laboris*, Regulation (EC) no. 883/2004, Article 11(3)(a)). The legal system of the relevant Member State may not impose on EU citizens any conditions as to nationality or place of residence for access to the social security system. However, problems may arise when switching from one social security system to another. In many Member States, a person is entitled to social security services only after he has paid social security contributions for a certain time ("waiting period"). Conditions are often attached to the duration and/or the scope of social security services.

Many mobile European workers were already insured in their Member State of origin. They are therefore entitled to benefits acquired via the social security system. If the social security system of the new country of employment sets conditions on waiting periods or with regard to services, gaps in social security could ensue when they change system. The European regulations, in particular Article 45 TFEU, consider this as a hindrance to the free movement of workers. Article 6 of Regulation (EC) no. 883/2004 consequently contains provisions which require the periods of insurance acquired in other Member States to be taken into account when calculating the right to social security benefits (i.e. in the aggregation rules):

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

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

- the acquisition, retention, duration or recovery of the right to benefits,*
  - the coverage by legislation, or*
  - the access to or the exemption from compulsory, optional continued or voluntary insurance,*
- conditional upon the completion of periods of insurance, employment, self-employment or residence shall, to the extent necessary, take into account periods of insurance, employment, self-employment or residence completed under the legislation of any other Member State as though they were periods completed under the legislation which it applies.*

### 3.3.2. Proof of periods of insurance

Previously, European forms (E-forms) contained all the information required to define and justify a citizen's rights and were used to transfer information between the social insurance institutions of the different Member States.

Information is now exchanged between social insurance institutions using electronic forms known as Structured Electronic Documents (SEDs). In some cases the information that a citizen is required to provide is presented in the form of a document that the citizen can submit to the other social insurance institution, e.g. in order to receive medical treatment in his country of residence. There are ten portable documents (PDs) in all, including the European health insurance card. Apart from the card, they are paper forms.

Overview of SEDS and PDs:

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

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

In its Articles 11 to 16, the coordinating Regulation no. 883/2004 stipulates where cross-border mobile workers are to be insured, thereby preventing such workers being covered by two social security systems or by none at all. The possible problem of waiting periods is solved through the above-mentioned provisions on the aggregation of periods of insurance.

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

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

## 3.4. THE RIGHT TO EXPORT BENEFITS

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

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

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

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

Unemployment benefits, however, may be exported only for a very limited period of no more than three months; in some member states this can be extended to a maximum of six months (Regulation (EC) 883/2004, Article 64).

### **Examples**

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

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

## 3.5. SPECIAL PROVISIONS ON THE DIFFERENT TYPES OF SOCIAL SECURITY BENEFITS

### 3.5.1 Sickness and maternity benefits

A person (and his family) who is insured in one Member State and resides in another is entitled to **benefits in kind** from the competent body in the place of residence for the account of the responsible competent body of the first Member State. If this person stays in the competent state for any reason, he is entitled, without further ado, to benefits in kind in that State. However, special regulations apply to the family members of frontier workers (this is described in more detail in Chapter 10.3).

Insured persons who stay in a state other than the competent Member State are entitled to benefits in kind that are proven to be medically required during their stay: the type of benefits and the likely period of stay are to be taken into consideration. These benefits are granted by the host Member State. Cash benefits, on the other hand, are paid by the Member State of affiliation (i.e. their home country).

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

As regards **cash benefits**, a person and his family members who live or are staying in a Member State other than the competent Member State are entitled to cash benefits provided by the competent institution, i.e. the institution with which the person was insured at the time he applied for the benefit.

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

The provision provides mobile workers protection throughout Europe against gaps in their entitlement to the payment of their wages in the event of sickness, to sick pay and/or to remuneration for medical costs, but only if they were previously covered by statutory health insurance in another Member State. Workers must be able to provide proof thereof to the health insurance body of their new place of residence or employment by means of Form S1 (Statement on the aggregation of periods of insurance, employment and residence).

- In Belgium, an individual does not acquire a right to sick pay until he has been covered by social insurance for a period of six months. An Irish worker who works in Belgium and falls sick after three months is nonetheless entitled to Belgian sick pay if he can provide proof that he had been covered by the Irish health insurance system (Form E 104 or S1) for at least three months (Regulation (EC) no. 883/2004, Article 6).
- A nurse lives and works in Ireland. She then goes to Denmark to work and live there. After three weeks, she falls sick. In Denmark, a worker is entitled to sick pay paid by the employer from the first day of sickness if he has worked in Denmark for at least 74 hours during the eight weeks prior to the first day of sickness. If the sickness lasts longer than two weeks, or if there is no entitlement to sick pay from the employer upon becoming unable to work, the municipality pays the sick pay, provided that the worker had been gainfully employed for the last 13 weeks before falling ill and had worked for at least 120 hours during that period. If the Irish nurse can produce a Form S1 that proves that she was covered by health insurance for more than eight weeks or 13 weeks in Ireland before taking up her duties, the Irish and the Danish periods of insurance are equated and aggregated. In this way, the Irish nurse who emigrates to Denmark is nonetheless entitled to Danish health insurance benefits.

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

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

## 3.5.2. Benefits for accidents at work and occupational diseases

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

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

Accident insurance benefits

- Functional rehabilitation (prostheses and aids);
- Retraining and return to work;
- Medical treatment (costs of the physician and medicines);
- Daily subsistence allowance to offset the loss of wages as a result of an occupational accident;
- Benefits in kind in the event of permanent disablement or survivor's benefit in the event of death.
- Workers do not pay contributions to accident insurance; contributions are paid exclusively by the employer.

Article 36 of Regulation (EC) no. 883/2004 stipulates the following concerning the right to benefits in kind and in cash in respect of accidents at work and occupational diseases: **Benefits in cash** are essentially provided by the competent institution of the country of employment in accordance with the legal regulations in force in that country. A person who has sustained an accident at work or has contracted an occupational disease and who resides or stays in a Member State other than the competent Member State is entitled to special **benefits in kind** in the event of accidents at work and occupational diseases. These benefits are provided by the institution of the place of residence or stay in accordance with the legislation that applies to it, as though the individual in question were insured under its legislation.

A frontier worker or migrant worker who was initially insured in one Member State for 20 years and then in another Member State for one year and who sustains an accident at work or contracts an occupational disease is entitled only to one cash benefit (compensation) from the Member State in which he was last covered by social insurance (single pension method; no proportional calculation or partial pension from several Member States).

### Example

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

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

In the case of occupational diseases where the person who contracted the disease was previously exposed to the same risk in two or more EU Member States, only the accident insurance of the country in which the person most recently exercised the activity which caused the disease is responsible (Regulation (EC) no. 883/2004, Article 38).

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

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

### **Regulation (EC) no. 883/2004, Article 40(1): Rules for taking into account the special features of certain legislation**

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

### 3.5.3. Incapacity for work

Cross-border workers and frontier workers are in principle entitled to a disability pension (reduced earning capacity pension) from the Member State (the State of employment) in which they are registered with social security. Under Articles 6 and 7 of Regulation (EC) no. 883/2004, disability pensions are creditable in and can be exported to another Member State. This means that the cross-border worker can without any problem stay in the territory of his State of residence or elsewhere while receiving a disability pension from his former State of employment.

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

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

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

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

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

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

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

There are two types of legislation concerning disability benefits in the Member States. Member States with Type A legislation are those in which the level of disability benefits depends on the duration of the period of insurance or residence; these states are listed in Annex VI of Regulation (EC) no. 883/2004: the Czech Republic, Estonia, Ireland, Greece, Croatia, Latvia, Hungary, Slovakia, Finland, Sweden and the United Kingdom. These systems are subject to special coordination (single pension). The other Member States are classified as Type B in Regulation (EC) no. 883/2004.

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

In other countries, the amount of the pension does not depend on the period of contribution (risk-based systems). Accordingly, the amount of the pension is the same regardless of whether the affiliate was insured for five, ten or 20 years before he became disabled. In these countries, however, you have a right to a disability pension only if you are actually insured at the time you become disabled. Even if you stopped working only shortly before that point, you will not normally be entitled to a disability pension.

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

Persons who have been insured in several countries:

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

- People who were first insured in a Member State in which the amount of the disability pension depends on the length of the periods of insurance and then in a country in which the pension does not depend on the length of these periods receive two pensions: one from the first country which corresponds to the periods of insurance completed under its legislation, and a second from the country in which they were insured when their disability commenced.
- People who were first insured in a country in which the amount of the pension does not depend on the length of the period of insurance and then in a country in which the pension does depend on these periods receive two separate pensions, each of which corresponds to the length of the periods of insurance in those different countries.

Calculation of pension: pro-rata or partial pension coordination

Article 52 of Regulation (EC) no. 883/2004 (Award of benefits) specifies how the amount of the benefit is calculated. Each Member State must carry out three calculations:

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

- 1) National pension calculation: independent benefit/pension

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

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

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

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

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

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

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

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

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

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

### Coordination cases and examples

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

- A worker works for one year in Sweden (risk-based system listed in Annex VI). He had previously worked for 15 years in Latvia (risk-based system, likewise listed in Annex VI). In the event of disablement, this worker is – irrespective of his previous insurance – entitled only to the total Swedish disability pension (“single pension”). Under Regulation (EC) no. 883/2004 Article 44(1) he is entitled to a Swedish disability pension as if he had always been registered with social security in Sweden.

This special coordination system ensures that the worker is entitled to a disability pension (“single pension”).

Case b) The worker has worked only in Member States with a risk-based system which are not listed in Annex VI of Regulation (EC) no. 883/2004: pro-rata coordination.

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

In this second example it is assumed that the disablement was established in both countries. However, assessment criteria often vary widely in the individual States. The decision as to the degree of disablement is taken by the institutions of the State in which the workers were insured and in accordance with the legislation in force in those states. Only Belgium, France and Italy accept the degree of disablement established by each other (Regulation (EC) no. 883/2004, Annex VII).

If the disablement in this second example is established only in the Netherlands but not in Belgium, then this worker is entitled to the full Dutch disability pension. If the reverse is the case and the disablement is recognised only in Belgium and not in the Netherlands, he is entitled only to a Belgian partial pension.

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

- A migrant worker lives and works for 15 years in Austria (cumulative system) and then for 10 years in Germany (cumulative system). In the event of disablement, this worker is entitled under Article 46 or 52 of Regulation (EC) no. 883/2004 to a pro-rata (10/25) German disability pension (partial pension) and a pro-rata (15/25) Austrian disability pension (partial pension). If the disablement is recognised under German law but not under Austrian law, then the worker is entitled only to a pro-rata (15/25) Austrian disability pension.

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

- A worker worked for 15 years in Germany (cumulative system) and then for 10 years in the Netherlands (risk-based system). In the event of disablement, he is entitled to the full Dutch disability pension. If the disablement is recognised under German law, he is entitled to a pro-rata (15/25) German disability pension. Under Article 52 of Regulation (EC) no. 883/2004, the Netherlands must then carry out two calculations: it must calculate the Dutch full pension minus the pro-rata (15/25) German disability pension and then the pro-rata (10/25) Dutch disability pension. Under Regulation (EC) no. 883/2004, Article 52(3), the worker concerned is entitled to the higher amount.

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

- A worker works for 20 years in the Czech Republic (risk-based system) and then for ten years in Luxembourg (cumulative system). In the event of disablement, this worker is entitled under Article 46 or 52 of Regulation (EC) no. 883/2004 to the pro-rata (10/30) Luxembourg and the pro-rata (20/30) Czech pension. If he is declared 100% disabled under Luxembourg law but 0% disabled under Czech law, he is entitled only to a pro-rata (10/30) Luxembourg disability pension. He must turn to the social security authorities of his place of residence to cover the ensuing income gaps.

For more information, please contact the competent insurance institutions.

### 3.5.4. Retirement pension

In principle, mobile European workers can claim a retirement pension from all the Member States in which they have at some point been registered with social security. In each case the retirement pension is proportional to the accumulated periods of insurance during which the worker was actually covered (partially or pro-rata).

The application for a retirement pension is governed by Article 45 of implementing Regulation (EC) no. 987/2009, under which the claimant can submit the application for a retirement pension to the institution of his State of residence or to the institution of the Member State whose legislation most recently applied to him. If the legislation that the institution of the worker's place of residence applies did not apply to that worker at any time, then the worker must submit his application to the institution of the Member State whose legislation applied to him most recently. The timing of the application is binding for all participating institutions. The application procedure is governed by Articles 46 to 48 of implementing Regulation (EC) 987/2009, which cover the certificates and information to be submitted to institutions, the processing of claims by the participating institutions, and the notification of the decisions to the claimant.

Owing to a lack of Europe-wide approximation, the national pension systems vary widely. Many systems are insurance schemes for workers (e.g. Spain, Ireland, Belgium, Portugal); others are insurance schemes (basic pensions) for the country's citizens (e.g. the Netherlands, Sweden, Denmark). The pension entitlement age also varies from one Member State to another (e.g. the Netherlands: 65; Norway: 67; France: 60-62, depending on the year of birth). Some countries provide for the possibility of early retirement with or without reductions (e.g. Germany, Belgium, Luxembourg), but others do not. The accumulation of pensions varies considerably as well. There are pensions that are proportional to earned income (Belgium, Germany, France, etc.), while in other Member States (e.g. the Netherlands, Denmark) statutory retirement pensions are independent of earned income.

There are also specific coordinating provisions for retirement and survivor's pensions. Each Member State in which a person was insured pays a retirement pension to that person when he reaches retirement age. The competent institution must take into account all periods completed in accordance with the legislation of every other Member State irrespective of whether they were completed in a general or a special system. If, however, the legislation of a Member State makes the provision of certain benefits

contingent upon the requirement that the periods of insurance were completed only in a certain occupation, or self-employment, or a profession, the competent institution of that Member State is required to take into account those periods completed in accordance with the legislation of other Member States only if they were completed in a corresponding system.

There are also rules as to how the competent institutions calculate benefits and define provisions on the overlapping of benefits (Regulation (EC) no. 883/2004, Articles 52-59).

A person who draws benefits in accordance with the legislation of different Member States the total amount of which is below the minimum benefit provided for in the legislation of the State of residence must obtain a supplementary benefit from the institution of the State of residence.

Under Article 7 of Regulation (EC) no. 883/2004, retirement and survivor's pensions are to be paid out automatically in another Member State. This means that the frontier worker may stay on the territory of his State of residence or elsewhere while receiving a retirement pension from a former country of employment.

The following coordinating principles apply to statutory retirement pensions:

- The pension entitlements acquired in one Member State are guaranteed. The repurchase of statutory retirement pensions, reimbursement of contributions or transfer to another Member State are not possible.
- The pension entitlements acquired in one Member State are paid upon attaining the pensionable age in force for that Member State. Retirement pensions are paid directly in other Member States (Regulation (EC) no. 883/2004, Article 7: "Waiving of residence rules"). This does not apply to supplementary social benefits which do not depend on the payment of contributions (known as special non-contributory cash benefits; listed in Chapter 9 and in Annex X of Regulation (EC) no. 883/2004).
- If, because of waiting periods, a mobile European worker was not affiliated with social security long enough in a Member State to be entitled to an (early) retirement pension, the periods of insurance completed in other Member States must be taken into consideration, in order to qualify for such a pension (Regulation (EC) no. 883/2004, Article 52). If a mobile European worker was registered with social security in a Member State for less than a year, this retirement pension is generally paid not by that Member State but by the Member State where the worker was most recently registered with social security (Regulation (EC) no. 883/2004, Article 57).

### Examples

- A worker works in Germany. He had previously lived in the Netherlands for five years (but had not necessarily worked there) and had worked in Belgium for ten years. Upon turning 63, he applies for his German retirement pension. Whether he is entitled to a Belgian early retirement pension depends on the periods of insurance during which he was registered with social security. At the age of 63, he is entitled to a Belgian retirement pension through the aggregation of the periods of insurance in Belgium, the Netherlands and Germany. However, although he is entitled to a Belgian retirement pension at 63, that does not mean that he will also get a Dutch retirement pension at that age. The statutory retirement pension in the Netherlands is paid only upon reaching the age of 65.
- A French worker has at some point worked as a frontier worker in Germany for ten months. As he was registered with social security in Germany for less than one year, he is not entitled to a German retirement pension (Regulation (EC) no. 883/2004, Article 57). However, the worker is entitled to a retirement pension for that period which is paid by the State in which the worker last worked (France). However, if the French worker at some point spent ten months working in France and then worked as a frontier worker in Germany, he also receives a French pension because he is entitled to this after just one quarter (three months).

- A Swedish worker worked as a salaried employee in Germany for four years. Under German law, he is not entitled to a German retirement pension because he was not registered with social security for at least five years (waiting period). However, if the worker was also registered with social security in another Member State for at least a year, he is nonetheless entitled to a German retirement pension through the recognition and aggregation of all these periods.

Regulation (EC) no. 883/2004, Article 52 (Award of benefits) sets out the calculation of pensions. Each Member State must carry out three calculations:

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

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

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

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

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

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

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

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

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

**Example:**

- An Austrian laboratory assistant worked for 23 years in Austria, then two years in Germany, and then another 15 years in Italy. He was registered with social security for a total of 40 years. The Italian pension service carries out the following pension calculations. The Italian retirement pension is calculated on the basis of the Italian legislation. Then the theoretical pension which he would have obtained if he had been registered with social security in Italy for 40 years is calculated. Finally, the proportional or pro-rata pension is calculated. This corresponds to 15/40 of the theoretical retirement pension. The Italian

national pension is compared with the proportional (pro-rata) retirement pension, and the higher amount is paid. Such a calculation must also be carried out in Austria and in Germany. Germany has a waiting period of five years. The German national (independent) pension is therefore not calculated. The laboratory assistant is entitled only to a German pro-rata pension.

The rules of the coordinating Regulation (EC) 883/2004 relating to the application for and calculation of statutory pensions do not apply to supplementary pension entitlements (company supplementary pensions etc.), which are governed by Directive 98/49/EC on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community. The mobile European worker must therefore claim his supplementary pensions, occupational pension, etc. himself. It is particularly important that he keeps the relevant data carefully and has regular contact with the relevant retirement and/or pension funds, in order to prevent subsequent pension gaps caused by mobility (see also Chapter 6).

### 3.5.5. Unemployment benefits

With regard to unemployment benefits, the competent institution of a Member State takes into account the periods of insurance or employment or self-employment as if they were completed in accordance with the legislation in force for it. Under Regulation (EC) no. 883/2004, the rules for taking into account periods of insurance completed abroad now apply also to the self-employed.

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

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

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

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

*(1) The competent institution of a Member State whose legislation provides for the calculation of benefits on the basis of the amount of the previous salary or professional income shall take into account exclusively the salary or professional income received by the person concerned in respect of his last activity as an employed or self-employed person under the said legislation.*

*(2) Paragraph 1 shall apply where the legislation administered by the competent institution provides for a specific reference period for the determination of the salary which serves as a basis for the calculation of benefits and where, for all or part of that period, the person concerned was subject to the legislation of another Member State.*

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

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

#### **Example**

- A citizen of Greece worked for five years in Greece. He then moved to Germany. After working for three months in Germany, he lost his job. In Germany, a person is entitled to unemployment benefit only after he has been employed and subject to compulsory insurance there for at least 360 days. The Greek worker is entitled to German unemploy-

ment benefit because he can prove, through aggregation and equalisation, periods of employment totalling five years and three months (Regulation (EC) 883/2004, Article 61). Under Article 62 of Regulation (EC) no. 883/2004, the benefit is calculated exclusively on the remuneration earned in Germany.

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

### 3.5.6. Family benefits

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

Family benefits include benefits paid in the first years of the child's life if one of the parents is not engaged in gainful employment or works only part-time and stays at home to raise the child (child-minding allowances).

Chapter 8 of Regulation (EC) no. 883/2004 sets out which Member State has primary responsibility for paying family benefits and how an accumulation of family benefits is prevented. In certain Member States, such as Belgium, family allowances are provided on the basis of paid employment. Other Member States, e.g. Germany and the Netherlands, provide family benefits only if the children reside on their territory. Under Article 67 of Regulation (EC) no. 883/2004, a worker is entitled to family benefits in accordance with the legislation of the competent Member State (the State of employment) for family members as though the family members resided in that Member State.

#### Example

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

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

If a worker lives with his family in a Member State other than the one in which he is registered with social security, two systems of family benefits may apply at the same time (benefit accumulation). Often the family is also entitled to family benefits in accordance with the legislation of the State of residence. To prevent double family benefits being paid or none at all, priority rules apply in the event of overlapping claims.

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

*(1) Where, during the same period and for the same family members, benefits are provided for under the legislation of more than one Member State, the following priority rules shall apply:*

*a) in the case of benefits payable by more than one Member State on different bases, the order of priority shall be as follows: firstly, rights available on the basis of an activity as an employed or self-employed person, secondly, rights available on the basis of receipt of a pension and finally, rights obtained on the basis of residence;*

*(b) in the case of benefits payable by more than one Member State on the same basis, the order of priority shall be established by referring to the following subsidiary criteria:*

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

## Examples

**One parent is a frontier worker working in the neighbouring State.** As a result of the priority rules, the State that pays benefits on the basis of activity as an employed or self-employed person takes priority over the State that pays benefits on the basis of a pension or of place of residence.

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

## Notes:

- These rules apply without restriction only if you are a citizen of an EU or EFTA country.
- In the case of separated couples, the place of employment of the other parent is still used to determine priority. It is immaterial whether the parents are married, not married, separated or divorced, or whether maintenance claims exist.
- Important: If children from different relationships live together in one household, the family benefits department should be asked to clarify what entitlement to family benefits attaches to which parent.
- Under the EU regulations, single persons with a child (where the other parent is dead or unknown and the single parent has sole custody) who work abroad are treated in the same way as couples in which both parents work abroad.

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

### Example

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

# CHAPTER 4.

## EUROPEAN LABOUR LAW

### 4.1. GENERAL

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

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

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

- Regulation (EU) no. 1215/2012 (“Brussels Ia”) on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters
- Regulation (EC) no. 593/2008 (“Rome I”) on the law applicable to contractual obligations
- Directive 96/71/EC concerning the posting of workers and Directive 2014/67/EU on the enforcement of Directive 96/71/EC

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

## 4.2. COMPETENT LABOUR COURT: REGULATION (EU) 1215/2012

Regulation (EU) no. 1215/2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters ("Brussels Ia") is a revised version of Regulation (EC) no. 44/2001 ("Brussels I"). Regulation (EU) 1215/2012 regulates the international competence of the courts in relation to defendants whose place of residence is in an EU Member State and the recognition and enforcement of judgements passed by other EU Member States. This regulation also applies to mobile European workers.<sup>9</sup>

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

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

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

### **Examples**

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

### **Regulation (EU)1215/2012, Article 22**

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

### **Example**

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

### **Regulation (EU) 1215/2012, Article 23**

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

- 1. which is entered into after the dispute has arisen; or*
- 2. which allows the employee to bring proceedings in courts other than those indicated in this Section.*

<sup>9</sup> International jurisdiction in complaints lodged against defendants established in Iceland, Norway or Switzerland is defined in the Lugano Convention on jurisdiction and the enforcement of judgements in civil and commercial matters. Revised in 2007, the Lugano Convention has since 1 May 2011 been in force in all its contracting states, i.e. the Member States of the European Union (and Denmark), Norway, Iceland and Switzerland. Liechtenstein has not joined the Lugano Convention.

**Example**

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

## 4.3. APPLICABLE LABOUR LAW: REGULATION (EC) 593/2008

### 4.3.1. Legal considerations

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

Regulation (EC) no. 593/2008 on the law applicable to contractual obligations (“Rome I”) applies to contractual obligations in civil and commercial matters which have a connection with the law of different States. This regulation turns the Rome Convention of 1980 into a legal instrument of the EU while updating and at the same time replacing it. Together with Regulation (EU) no. 1215/2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (“Brussels Ia”) and Regulation (EC) no. 864/2007 on the law applicable to non-contractual obligations (“Rome II”), the regulation thereby establishes a set of binding rules for private international law with respect to contractual and non-contractual obligations in civil and commercial matters. Both the Vienna Action Plan of 1998 and the Hague Programme of 2004 with its action plan stress the significance of harmonised rules concerning the conflict of laws in implementation of the principle of the mutual recognition of judgements in civil and commercial matters. As regards labour law, Regulation (EC) no. 593/2008 contains the following provisions:

*(34) The rule on individual employment contracts should not prejudice the application of the overriding mandatory provisions of the country to which the worker is posted in accordance with Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.*

*(35) Employees should not be deprived of the protection afforded to them by provisions which cannot be derogated from by agreement or which can only be derogated from to their benefit.*

*(36) As regards individual employment contracts, work carried out in another country should be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out his tasks abroad. The conclusion of a new contract of employment with the original employer or an employer belonging to the same group of companies as the original employer should not preclude the employee from being regarded as carrying out his work in another country temporarily.*

### 4.3.2. Free choice of law

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

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

**Example**

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

**4.3.3. Mandatory provisions****Regulation (EC) 593/2008, Article 8: Individual employment contracts**

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

In addition, overriding mandatory provisions must always be taken into account (Regulation (EC) no. 593/2008, Article 9). These are rules broader in scope than the protection of individual workers. These rules are applied in the general interest (“police and public order laws”); they cover issues such as statutory minimum wages, labour protection laws, etc. Each Member State has its own overriding mandatory provisions (priority rules).

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

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

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

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

**Example**

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

# CHAPTER 5.

## TAX COORDINATION: DOUBLE TAXATION TREATIES

### 5.1. GENERAL

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

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

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

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

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

The European double taxation treaties are based largely on the Model Tax Convention of the Organisation for Economic Cooperation and Development (OECD). This convention provides in general for taxation of income in the source State, although exceptions from the source State principle are possible. For example, it is possible to agree that frontier workers are taxed in their country of residence (see Chapter 10).

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

#### **OECD Model Tax Convention, Article 4: Resident**

*(1) For the purposes of this Convention, the term “resident of a Contracting State” means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein.*

*(2) Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then his status shall be determined as follows:*

*a) he shall be deemed to be a resident only of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident only of the State with which his personal and economic relations are closer (centre of vital interests);*

*b) if the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be a resident only of the State in which he has an habitual abode;*

*c) if he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident only of the State of which he is a national;*

*d) if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.*

*(3) Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident only of the State in which its place of effective management is situated.*

Two standard methods are used to prevent double taxation: the exemption method and the credit method (see Section 5.5).

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

The pay of a frontier or posted worker is often taxed in the country of employment. The question arises as to which Member State – the State of residence or the State of employment – is to grant personal and family-related tax benefits. This problem arises in particular when one parent works in the State of residence and the other in another country.

In the case of cross-border workers, the following question arises: when must the country of employment treat this worker – who is liable to taxation under foreign law (non-resident) – as a domestic taxpayer (fictitious citizen) and grant him the associated tax benefits (deductible expenses etc.)?

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

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

## 5.2. PRINCIPLE OF THE STATE IN WHICH THE WORK IS CARRIED OUT

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

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

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

#### Example:

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

However, double taxation treaties concluded between neighbouring States may make an exception to the principle of the country of employment for cross-border workers; if they do, the country of residence retains the right to taxation (see Section 5.4.3 on cross-border workers).

A different principle often applies, too, to artists (Article 17), athletes (Article 17), (university) instructors (Article 20), and students (Article 20). The salaries and pensions of civil servants (Article 19) are usually taxed in the state of the authorities (country of employment).

## 5.3. MAINTENANCE OF THE PRINCIPLE OF THE COUNTRY OF RESIDENCE SUBJECT TO CERTAIN CONDITIONS

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

### OECD Model Tax Convention, Article 15(2):

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

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

If any of these conditions is not met, a sufficient connection with the Member State of employment is deemed to have been established and the worker will be taxed from his first physical presence day (for a more in-depth examination of such concepts as “183 days of presence,” “permanent establishment,” etc., see Chapter 8: Posted workers). Under tax conventions, temporary cross-border workers are often taxed in the country of employment, because they do not materially meet condition b). If a temporary employment

agency makes a temporary cross-border worker – with whom it has a contract – available to a company in another country, it is considered for the purposes of the tax conventions to be a “formal employer”. When the temporary worker is made available to a company in another country, that company is considered to be the “material employer”; this company is in a position of authority vis-à-vis the employee and pays the temporary worker’s salary.

#### Examples:

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

## 5.4. SPECIFIC RULES

Article 15(2) of the OECD Model Tax Convention lays down strict conditions on when the Member State of residence retains its taxation competence despite the worker carrying out his activities in another Member State.

#### Example

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

### 5.4.1. Multinational workers

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

#### OECD Model Tax Convention, Article 15(3)

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

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

**Example:**

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

For other standard cases of multinational work see Chapter 11 (Multinational Workers).

## 5.4.2. Taxation of pensions and social benefits

The question arises as to where non-statutory occupational pensions, private pensions, social benefits, etc. are taxed. Under Article 18 of the OECD Model Tax Convention they are taxed in the pensioner's Member State of residence. Pensions of individuals in government service, on the other hand, are taxed in the source State (the former country of employment).

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

### **OECD Model Tax Convention, Article 18: Pensions**

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

### **OECD Model Tax Convention, Article 21: Other income**

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

**Example**

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

In taxation treaties between neighbouring Member States, the rules applicable to cross-border workers sometimes depart from the principle of the State in which the work is carried out. Even if there is a strong connection with the country in which the work is carried out, the country of residence retains responsibility for taxation. The term "cross-border worker" is defined in different ways in different double taxation agreements. In principle cross-border workers are people who live near the border in one Contracting State and work near the border in another Contracting State, usually commuting daily from their home to their place of work and back (see Chapter 10).

## 5.5. AVOIDANCE OF DOUBLE TAXATION

Two standard methods are used to avoid double taxation:

### 5.5.1. Exemption method

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

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

### 5.5.2. Credit method

Under the credit method, the tax levied and paid on income earned in one country (source tax) is credited to the tax to be paid in the other country. In the case of frontier workers, this takes the form of the standard deduction or wage tax that is withheld from the worker and paid to the competent tax office.

### 5.5.3. Examples

#### Example 1

A worker resides in Country A, where he worked for five months and earned €12,000. He then worked in Country B for seven months and earned €18,000 in that country. The worker's worldwide income therefore amounts to €30,000. As the worker worked for more than 183 days in Country B, he is liable for tax in that country. If in Country B the tax rate on an income of €18,000 is 25%, he pays taxes amounting to €4,500 (=18.000 € x 25%) in Country B.

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

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

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

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

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

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

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

### Example 2

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

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

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

<b>Theoretical income tax payable</b>	€ 9,000
<b>Tax paid in Country C:</b>	€ 6,300
<b>Tax payable in Country B:</b>	€ 2,700
<b>Total tax payable:</b>	<b>€ 9,000</b>

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

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

<b>Tax payable in Country B:</b>	€ 3.600
<b>Tax paid in Country C:</b>	€ 6.300
<b>Total tax payable:</b>	<b>€ 9.900</b>

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

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

## 5.6. DIFFERENT COMPETENCIES FOR SOCIAL SECURITY AND TAX

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

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

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

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

Thus workers in the international road transport sector are registered with social security in the Member State in which the employer is headquartered (principle of the country of residence, Regulation (EC) no. 883/2004, Article 11(3)(a)) but must often pay tax in the Member State of residence on the wages they earn from activities outside the Member State in which the employer is headquartered. There are different jurisdictions here for the collection of taxes and social security contributions, with a variety of advantages and disadvantages.

### Examples:

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

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

The cross-border worker must therefore be fully informed about his specific rights and obligations. Both employers and tax and social security authorities have a role to play in this regard.

# CHAPTER 6.

## SUPPLEMENTARY PENSION RIGHTS

Directive 98/49/EC on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community was introduced in 1998. It does not apply to statutory pensions, which are coordinated by Regulation (EC) no. 883/2004.

The purpose of Directive 98/49/EC is to protect the rights of workers (affiliates) to supplementary pensions when they move from one Member State to another. This protection applies to both voluntary and compulsory supplementary pension schemes. Directive 98/49/EC requires Member States to take measures which ensure that workers (affiliates) who avail themselves of their right to free movement, and for whom premiums/contributions are therefore no longer paid, retain the pension rights that they have acquired.

When a worker is posted by his employer to another Member State, the directive enables him to continue his supplementary pension. The term "posting" is understood in the sense of Article 12 of Regulation (EC) no. 883/2004.

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

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

To prevent a cross-border information deficit, the directive also contains an obligation to inform.

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

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

Member States must transpose Directive 2014/50/EU on minimum requirements for enhancing worker mobility between Member States by improving the acquisition and preservation of supplementary pension rights into national law by 21 May 2018. The Directive sets out the following minimum requirements for securing the pension and annuity rights of mobile workers:

### **1. Acquisition**

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

### **2. Preservation**

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

### **3. Information**

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

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

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

# CHAPTER 7.

## RIGHT OF RESIDENCE

### 7.1. GENERAL

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

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

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

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

### 7.2. RIGHT OF RESIDENCE FOR UP TO THREE MONTHS

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

May an unmarried partner stay in another Member State if he or she is dependent on the worker who goes to live and work in another Member State? This is only the case in those Member States that allow their own citizens to live with an unmarried partner from another Member State. Cohabitation is regarded as a “social advantage” under Article 7(2) of Regulation (EU) no. 492/2011; (ECJ ruling in case C-59/85 (Reed); at the time of the ECJ ruling EEC Regulation 1612/68 was still in force). On the strength of Article 2(2)(b) of Directive 2004/38/EC, the term “family member” includes the following:

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

## 7.3. RIGHT OF RESIDENCE FOR MORE THAN THREE MONTHS

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

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

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

The residence card for family members who are not Community citizens is not a conventional residence permit, but a special "residence card of a family member of a Union citizen". The card has a purely declaratory value – in other words, it provides written confirmation of the right of residence granted under Directive 2004/38/EC. The residence card must be provided free of charge or at a price that does not exceed the price charged to the country's own citizens for the issue of similar documents.

## 7.4. RIGHT OF PERMANENT RESIDENCE

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

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

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

## 7.5. RIGHT OF RESIDENCE AFTER THE END OF EMPLOYMENT

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

## 7.6. SOCIAL ADVANTAGES AND SOCIAL ASSISTANCE

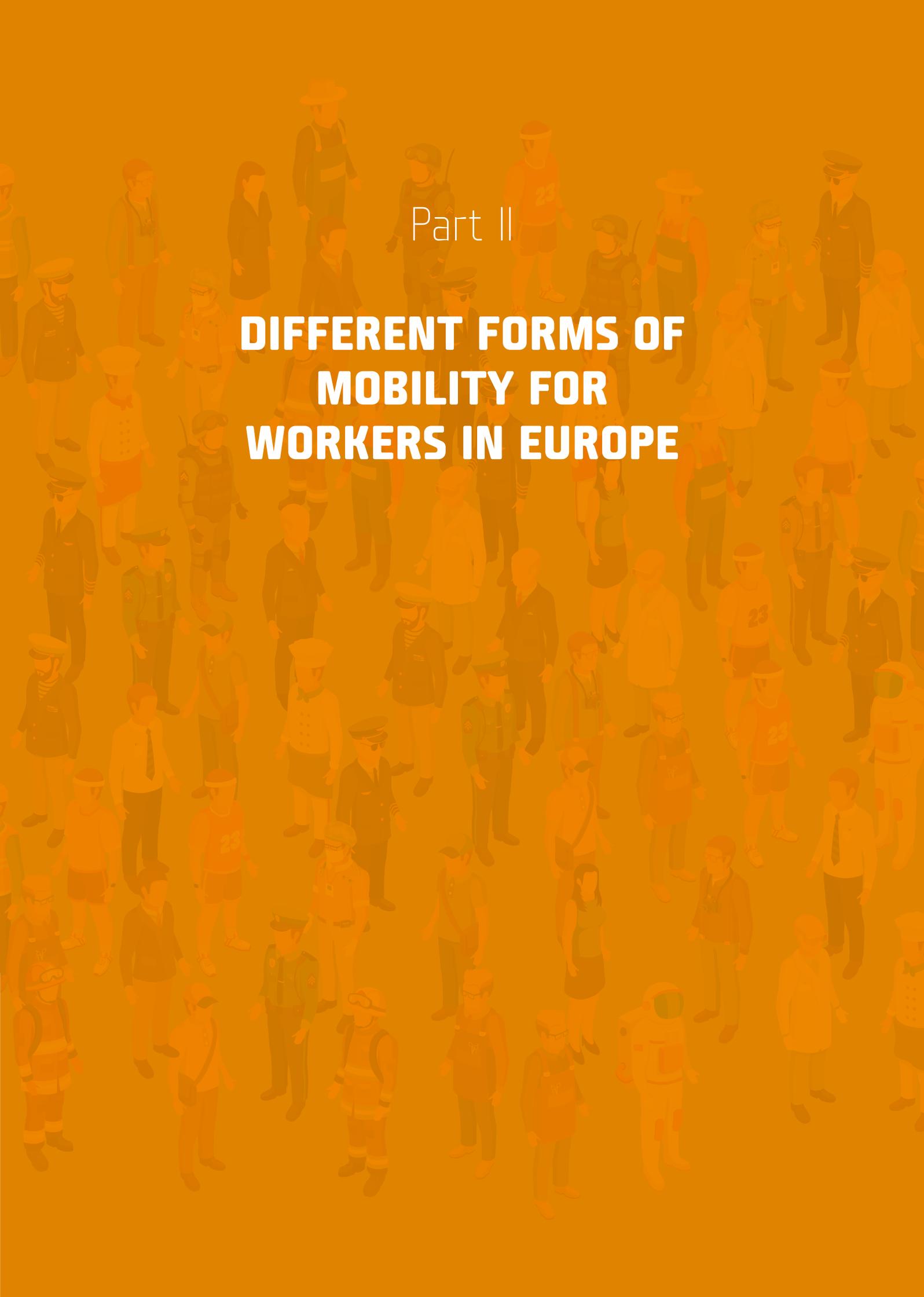
Under Article 24 of Directive 2004/38/EC, EU citizens have the right to identical (“equal”) treatment to the citizens of the host Member State. This right also applies to family members who do not hold the nationality of a Member State but do have the right of residence or the right of permanent residence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

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

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

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

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



Part II

**DIFFERENT FORMS OF  
MOBILITY FOR  
WORKERS IN EUROPE**

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# CHAPTER 8.

## POSTED WORKERS

### 8.1. GENERAL

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

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

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

### 8.2. SOCIAL SECURITY<sup>10</sup>

#### 8.2.1. General

In principle a worker must be registered with social security in the country in which he actually carries out his activities (Regulation (EC) no. 883/2004, Article 11(3)(a)). If a worker is posted, he can nonetheless avail himself of the coordinating Regulation (EC) no. 883/2004, which allows for a temporary exception from the principle of the country of employment. In concrete terms, this pertains to the articles on posting: Regulation (EC) no. 883/2004, Article 12(1) and Article 16(1). The corresponding implementing provisions are contained in Regulation (EC) no. 987/2009, Articles 14 to 21. Decisions A2 and A3 of the Administrative Committee for the Coordination of Social Security Systems are of particular importance.

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<sup>10</sup> Partially from: Practical Guide: The Legislation that applies to Workers in the European Union (EU), the European Economic Area (EEA) and Switzerland.

**Article 12 of Regulation EC 883/2004: Special rules**

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

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

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

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

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

**8.2.2. Duration of the posting**

Article 12(1) of Regulation (EC) no. 883/2004 specifies that initial permission for a departure from the principle of the country of employment with regard to the obligation to register with social security cannot be granted for a period of more than 24 months. This permission is granted by the competent social security institution in the Member State (sending State) in which the worker was originally registered with social security. A company which posts a worker to another Member State – or in the case of a self-employed person, that person himself – must apply to the competent institution in the sending State. This institution issues Document A1 (statement of applicable legislation, formerly E 101). If owing to unforeseen circumstances, the posting of workers in the context of the provision of services lasts longer than originally foreseen, the permission may under Article 16(1) of Regulation (EC) no. 883/2004 be granted for a longer period not to exceed 60 months. Under Article 16 of Regulation (EC) no. 883/2004, however, this requires an agreement between the competent bodies of the sending Member State (sending State) and the receiving Member State (the country of employment).

**8.2.3. Preconditions for posting**

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

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

Firstly, the employee must be normally active in the sending State (see 8.2.3.1). Secondly, the rule that the worker "carries out an occupation for the account of the employer" means that there must be contractual ties between the sending company and the posted worker for the duration of the posting (see 8.2.3.2). Thirdly, the regulations stipulate that the posted worker must already be registered with the social security system of the Member State immediately before the commencement of his employment (see 8.2.3.3).

### 8.2.3.1. Criteria for determining whether an employer normally carries out his activities in the sending state

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

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

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

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

#### Example:

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

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

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

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

#### Examples:

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

In the second and third examples, where the posting is for a limited period, it is possible under Article 16 of Regulation (EC) no. 833/2004 to agree an exception – i.e. to agree that the legislation of Member State B does not after all apply, provided that this is in the interests of the posted worker and that a corresponding application is made. Such an agreement must be approved by the competent institutions of the two Member States concerned.

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

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

#### Examples:

- On 1 June, Employer A established in Member State A posts employees X, Y and Z to Member State B for a period of ten months so that they can perform work on his behalf.
- Employee X starts working for Employer A on 1 June. Immediately before commencing this employment he was living in Member State A, where he was studying at university.
- Employee Y also started working for employer A on 1 June. Immediately before commencing this employment he was living in Member State A; he was a cross-border worker and as such was subject to the legislation of Member State C.
- Employee Z, who also started working for Employer A on 1 June, had been working in Member State A since 1 May. He was consequently subject to the legislation of Member State A. Immediately before 1 May, however, this employee had for ten years been subject to the legislation of Member State B because of an employment relationship.

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

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

In a number of situations, the rules of Regulation (EC) 883/2004 exclude application of the provisions relating to the posting of workers; the posted worker must then be insured in the country of employment.

This applies in particular when:

- The company to which the posted worker is assigned places the worker at the disposal of another company based in the same Member State;
- The company to which the posted worker is assigned places the posted worker at the disposal of another company based in another Member State;
- The worker is hired in one Member State in order to be posted by a company based in a second Member State to a company based in a third Member State, and the requirement of being subject to the social security system of the sending State prior thereto is not met;
- The worker is hired in one Member State by a company based in another Member State in order to work in the first Member State;
- The worker is posted to replace another posted worker;
- The worker has concluded a contract of employment with the company to which he is posted.

In such cases, it is very clear why Article 12 of Regulation (EC) no. 883/2004 does not apply: Articles 11 and 13 of Regulation (EC) no. 883/2004 are applied. The situations that arise in these circumstances are very complex and offer no guarantee that a direct relationship between the worker and the sending company can be maintained. They clearly contradict the fundamental objective of the posting regulations, which is to prevent administrative complications and gaps in social security coverage. Any abuse of the posting provisions must also be prevented. In exceptional cases it may be possible to replace a person who has already been posted, provided that the approved period of posting has not yet run its full course. This situation could occur, for instance, if a worker posted for a period of 20 months falls seriously ill after ten months and has to be replaced. In such a case it would be reasonable to authorise the posting of another person to cover the remaining period of ten months.

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

## 8.2.5. Health insurance during the posting

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

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

## 8.3. TAXATION

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

Most double taxation treaties follow the OECD Model Tax Convention, which is updated at irregular intervals. Posting is governed by Article 15(2)(a) of this convention on "Income from employment" (see Chapter 5).

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

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

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

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

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

- whether the 183 physical presence days must be calculated over a twelve-month period or over a calendar year;
- what exactly should be understood by the term "presence" in the State of employment (under the new OECD Model Convention "presence in the State of employment" must be understood as every day, including part of a day, that the employee spends in the territory of the State of employment. It thus includes days when work is interrupted on account of sickness, holidays, weekends and/or public holidays);
- how the "wage payment criterion" is to be interpreted (who is responsible for the wage costs and what accounting system applies). This is judged on the actual situation. In the case of an agency which operates as the material employer, this leads to taxation in the State of employment);
- if a temporary worker is employed on a cross-border basis, the "borrowing" company is considered to be the material employer, which means that the worker is taxed in the State of employment from the outset;
- what exactly should be understood by a "permanent establishment" (e.g. when does a construction site become a "permanent establishment"?).

## 8.4. LABOUR LAW ON POSTING

### 8.4.1. Regulation (EC) no. 593/2008: applicable labour law

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

Under Regulation (EC) no. 593/2008 (freedom of choice of law) the employer and the employee are free to choose the applicable law. This choice of law does not, however, result in the worker losing the protection he enjoys under the mandatory legal provisions that apply if no choice is made. If no law is chosen, the applicable law is determined in accordance with Article 8 of Regulation (EC) no. 593/2008 (see Chapter 4).

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

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

In addition to Regulation (EC) no. 593/2008, Directive 96/71/EC applies to the posting of workers in the framework of the provision of services. This directive has been transposed into national labour rules (worker posting laws). It aims to harmonise the very varied overriding mandatory rules by determining the areas of labour law that form part of the overriding rules, even if the legislator or case law of a Member State has not yet taken any initiative on this matter. However, there is no harmonisation of content in this context. In other words, with regard to concrete national interpretation of these legal provisions, the principle of subsidiarity continues to apply. In all Member States, therefore, there are legal and administrative provisions that have overriding mandatory priority, but the relevant labour laws differ in the individual Member States.

#### **Article 3(1) of Directive 96/71/EC “Terms and conditions of employment” specifies that:**

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

- *by law, regulation or administrative provision, and/or*
- *by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8, insofar as they concern activities referred to in the Annex:*
  - a) *maximum work periods and minimum rest periods;*
  - b) *minimum paid annual holidays;*
  - c) *the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;*
  - d) *the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings ;*
  - e) *health, safety and hygiene at work;*
  - f) *protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;*
  - g) *equality of treatment between men and women and other provisions on non-discrimination.*

*For the purposes of this Directive, the concept of minimum rates of pay referred to in paragraph 1 (c) is defined by the national law and/or practice of the Member State to whose territory the worker is posted.*

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

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

As already mentioned, this regulation applies not only to legal provisions but also to the provisions stipulated in the collective bargaining agreement for the construction industry and related sectors. Under Article 3(10) of Directive 96/71/EC, every Member State has the option to expand the content and scope of the Directive concerning the posting of workers. Many Member States have made use of this right. Some have actually brought all generally binding wage agreements in all sectors within the scope of the Directive on the posting of workers.

### Example

- A Spanish employer posts a Spanish worker to the Dutch horticultural sector. There is a legal minimum wage in the Netherlands that must be paid to the Spanish worker. The Dutch collective bargaining agreement has been declared generally binding. This means that the wage agreed under the terms of the collective agreement (which is higher than the statutory minimum wage) must be paid. In addition, the collectively agreed working conditions must be adhered to by the Spanish employer.

Furthermore, Directive 96/71/EC, Article 3(1), indent 2, stipulates that if the aforementioned matters are regulated in even more detail in the collective agreements for the construction industry and related sectors, then these sector-specific provisions are to be applied as overriding rules. These related sectors comprise all construction works that pertain to the construction, repair, maintenance and renovation or demolition of buildings (see Annex to the Directive).

### Examples

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

The Directive concerning the posting of workers specifies the minimum standard. It also gives the Member States the option to declare customary practices relating to posting on their territory and other collective agreements as compulsory law (Directive 96/71/EC, Article 3(10)). Some Member States have availed themselves of this possibility. The following Member states have done so for all collective agreements in all sectors: Austria, Belgium, France, Finland, Greece, Italy, Luxembourg, the Netherlands, Portugal, Slovakia, Slovenia and Spain.

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

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

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

#### **Example**

- A worker living in Spain who has been posted to Germany by his Spanish employer continues to be subject to Spanish labour law. Nevertheless, the employment relationship may be “codetermined” by special mandatory provisions (German mandatory overriding provisions) of German labour law. Under European Directive 96/71/EC concerning the posting of workers, these are in particular the matters listed in Article 3(1) as contained in German labour law and the German collective agreement for the construction industry. Whether the German authorities have brought other collective agreements within the scope of the Directive on the posting of workers or have declared other elements of German labour legislation to have overriding priority must be examined. It is important to know which areas of the German labour rules are considered as overriding mandatory provisions. The posted Spanish worker can obtain information on this from organisations such as the German Trade Union Federation (GDB) and/or the “liaison offices” specified in the Directive on the posting of workers.

### 8.4.3. ECJ rulings on the posting of workers

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

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

In a series of rulings (Viking, Laval, Rüffert, Commission vs. Luxembourg), the European Court of Justice (ECJ) has ruled on the links between the fundamental freedoms in the internal market and the protection of workers and fundamental social rights:<sup>11</sup>

- Case C-438/05 Viking (ECJ ruling of 11 December 2007): The Finnish shipping company Viking Line planned to re-flag one of its vessels and to register it in Estonia, so as to be able to employ the crew at the lower Estonian wages. The Finnish Seamen’s Union (FSU) and the International Transport Workers’ Federation tried to prevent this. The ECJ saw the threatened industrial action as a restriction of the freedom of establishment in Article 43 TEC (now: Article 49 TFEU).
- Case C-341/05 Laval (ECJ ruling of 18 December 2007): The Latvian firm Laval had posted a worker from Latvia to Sweden to carry out construction works. Laval had concluded a wage agreement with a Latvian construction workers’ union but not with the Swedish trade union. The Swedish trade unions took industrial action compatible with Swedish law to demand such an agreement. Laval lodged a complaint with the European Court

<sup>11</sup> See Friedrich-Ebert-Stiftung (ed): Der EuGH und das soziale Europa. Für eine Aufwertung sozialer Grundrechte im EU-Rechtssystem. May 2009, in particular, Alexander Schulz: Der Europäische Gerichtshof und das soziale Europa, pp. 3 ff. and Franz C. Mayer, Der EuGH und das soziale Europa, pp. 16-19.

of Justice. In its ruling, the Court upheld the right of the unions to take industrial action to prevent social dumping. In the concrete case at hand, however, the European Court of Justice came to the conclusion that under the Directive on the posting of workers, a Member State is not allowed to make the provision of a service on its territory contingent upon the maintenance of working or employment conditions which go beyond the compulsory provisions or a minimum level of protection. Such a minimum level could be set by nationally fixed minimum wages. However, if there are no minimum wage rules in the country concerned (in Sweden, for instance, wages are negotiated exclusively by the social partners through the collective bargaining system), then industrial action for the protection of workers is not legitimate.

- Case C-346/06 Rüffert (ECJ ruling of 3 April 2008): For the construction of a prison in Lower Saxony (Germany), a German construction company employed a Polish subcontracting company which paid less than the wage agreed in the (German) collective agreement. This practice ran contrary to the law of the state of Lower Saxony on the awarding of contracts, according to which the awarding of public contracts depends on whether the wage agreed in the collective agreement is paid at the site of performance. The European Court of Justice decided that the state of Lower Saxony, when awarding public contracts, cannot prescribe collectively agreed wages if they have not been declared generally binding. Moreover, the Court criticised the fact that this provision concerned only the public sector.
- Case C-319/06 “Commission versus Luxembourg” (ECJ ruling of 19 June 2008): This case concerned a legal rule in Luxembourg according to which the wage paid to posted workers must be automatically adjusted to the cost of living. This indexing concerned all wages, including those which do not fall into the minimum wage category. The European Court of Justice reprimanded this aspect in particular, since it goes beyond the wording of Article 3(1)(c) of the Posting Directive (“minimum rates of pay”). Luxembourg cited the special clause in Article 3(10) of the Posting Directive according to which the Member States may apply terms and conditions of employment on matters other than those referred to in Article 3(1). The ECJ did not, however, concur with this view.

When the Posting Directive<sup>12</sup> was issued, it was generally seen as an important instrument in the fight against “social dumping,” i.e. unfair competition on the basis of wages and working conditions by foreign providers of services in the (labour) market of the host country. However, these four European Court of Justice decisions raise the question of whether the Directive can serve to enforce the principle of “equal pay and working conditions for equal work at the same place.” In the cases of Laval, Rüffert and the Commission versus Luxembourg, the European Court of Justice interpreted the Posting Directive in such a way that it can be considered the maximum directive with regard to matters that can be regulated and with regard to the level of protection that can be demanded and the methods that can be used to ensure that the conditions of employment of all domestic and foreign undertakings in a region or in a sector are equally respected.

<sup>12</sup> In connection with what follows see the posting Directive: proposals for the revision of the resolution adopted by the ETUC Executive Committee on 9/10 March 2010.

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

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

Directive 2014/67/EU on the enforcement of Directive 96/71/EC concerning the posting of workers was adopted in 2014. This “implementing directive” is intended to improve practical application of the posting provisions by addressing issues relating to fraud and circumvention of the provisions and promoting the exchange of relevant information between Member States. Member States were required to transpose the implementing directive into national law by 18 June 2016.

In addition, in March 2016 the Juncker Commission submitted a proposal on revision of the Posting Directive.<sup>13</sup> In October 2017 the Employment Committee of the European Parliament adopted a compromise version in which the principle of “equal pay for equal work in the same place” plays a prominent part. At the end of 2017, consultations between the European Parliament, the Council and the Commission have not yet been concluded.

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13 COM (2016) 128 final of 8 March 2016: Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of the European Parliament and of the Council concerning the posting of workers in the framework of the provision of services

# CHAPTER 9.

## MIGRANT WORKERS

### 9.1. WHO HAS MIGRANT WORKER STATUS?

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

#### Example

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

### 9.2. RIGHT OF RESIDENCE AND ACCESS TO THE LABOUR MARKET

Articles 1 to 6 of Regulation (EU) no. 492/2011 guarantee the free movement of EU nationals in the labour market (see Chapter 2). EU citizens can therefore work in all other Member States without a work permit.

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

If the migrant worker is employed in a Member State, he can automatically claim the same tax and social advantages as national employees (Article 7(2) of Regulation (EU) no. 492/2011). For example, if pay in a specific sector is based on years of service, the years of service which the migrant worker has completed in a comparable sector in another Member State must be recognised and taken into account (decision of the ECJ in case C-15/96 Schöning-Kougebetopoulou).

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

**Example:**

- The Irish nurse and her family members – even if one of them is not an EU citizen – do not need work permits to work in Denmark. In terms of labour conditions, she must be treated in the same way as a nurse of Danish nationality. If there are benefits as a result of length of service in the Danish health care sector, her years of service in Ireland must be taken into account when determining her right to these benefits. If she obtains an employment contract for an indefinite period, she also has the right to remain in Denmark for an initial period of five years, and, if her employment continues, on a permanent basis.

Chapter 2 (Freedom of movement of workers) and Chapter 7 (Right of residence) of this Guide provide further details on this subject.

## 9.3. SOCIAL SECURITY

### 9.3.1. Applicable social security law

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

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

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

### 9.3.2. Unemployment

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

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

A migrant worker needs Form U1 to prove that he was registered as a worker with social security in another Member State. Form U1 is a “statement of insurance periods to be taken into account when calculating an unemployment benefit.” This form must be submitted to the unemployment benefit fund of the new country of employment when applying for unemployment benefit. The migrant worker should request Form U1 from the unemployment office of the “old” Member State of employment before he moves.

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

**Example**

Suppose that the Irish nurse previously worked for five years in Ireland. After four months' work in Denmark she is made redundant due to restructuring. In Denmark an unemployed worker is entitled to earnings-related unemployment benefit if he has been in paid employment and paying his insurance contributions for at least 52 weeks in the previous three years. If the Irish employee can demonstrate using form U1 that she worked for five years in Ireland before taking her Danish job, the Irish insurance period must be recognised by the Danish unemployment service and aggregated with the Danish insurance period. In calculating the amount of the unemployment benefit, account is taken only of earnings in Denmark.

If the unemployed migrant worker wants to return to his previous State of residence or go to another Member State to seek work, he may export his unemployment benefit for three months (Article 64 of Regulation (EC) no. 883/2004; see Chapter 12: The mobile European worker who becomes unemployed).

# CHAPTER 10. CROSS-BORDER WORKERS

## 10.1. WHO HAS CROSS-BORDER WORKER STATUS?

A cross-border worker is an employee who works in one Member State (State of employment) and lives in another (State of residence). It is essential that his normal place of residence remains outside the State of employment. If the cross-border employee moves to the State of employment, he becomes a migrant worker (see Chapter 9). A citizen who moves to a neighbouring State but continues to work in his original State of employment (residential migrant) is also a cross-border or a frontier worker.

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

### Example

- A resident of Salzburg in Austria works as a laboratory technician for a pharmaceuticals company in Germany but does not move to Germany. He is a cross-border worker regardless of whether he lives in Germany during the working week. European legislation guarantees him free access to the German labour market and also ensures that he does not thereby lose the social rights he previously acquired in Austria.

Depending on the applicable legal system, a cross-border employee may also be covered by the legislation on frontier workers. The ensuing special status as a frontier worker entails rights and/or obligations that may deviate from the principles generally in force. The definition of a frontier worker in Regulation (EC) 883/2004 is broader than that contained in various double taxation treaties, which often leads to confusion and to wrong conclusions. It is therefore very important to maintain a consistent distinction between fiscal and social aspects.

### 10.1.1. Social security

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

Article 1(f) of Regulation (EC) no. 883/2004 states that a frontier worker is a cross-border worker who returns to his country of residence normally every day and at least once a week.

#### Article 1(f) of Regulation (EC) no. 883/2004

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

Persons who stay mainly in the country of employment and return to their country of origin less frequently than once a week are not considered frontier workers. Unlike frontier workers, they do not have the right to choose where to claim benefits in kind from health insurance. Non-frontier workers may, however, choose whether they wish to draw unemployment benefits from the State of residence or the State of employment (see Chapter 10.4).

### 10.1.2. Taxation

Although the OECD Model Convention includes no specific provisions for frontier workers, bilateral double taxation treaties concluded by neighbouring States may well refer to “frontier workers”.

If a double taxation treaty does include such special rules for frontier workers, a stricter definition usually applies than that used for the purposes of social security (Article 1(f) of Regulation (EC) no. 883/2004). As well as the required criterion of regular daily return to the State of residence, these definitions generally also include geographical conditions that specify that the frontier worker must commute between his place of residence and place of work within a defined frontier area.

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

### 10.1.3. Lack of coordination

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

## 10.2. ACCESS TO THE LABOUR MARKET

Articles 1 to 6 of Regulation (EU) no. 492/2011 guarantee the free movement of EU citizens in the labour market. Such workers may accordingly work in another Member State without a work permit, although some restrictions apply to nationals of Croatia (see Chapter 2 of this Guide). Regulation (EU) no. 492/2011 stipulates that EU citizens who carry out an activity on the territory of another Member State shall benefit from the same rights as nationals, irrespective of their nationality or place of residence. Regulation (EU) no. 492/2011 on the free movement of employees also applies to frontier workers.

Non-EU citizens – known as “third country nationals” – do not enjoy this freedom of movement.

#### Example:

- An employee living in France with French nationality may work in Belgium without a work permit, even if he is not resident in Belgium. However, this right does not apply to his Algerian spouse if she has not taken French nationality. If the family move to Belgium, the frontier worker becomes a “migrant worker” (see Chapter 9) and the spouse can invoke the right to take up employment under Article 23 of the Residence Directive 2004/38/EC.

## 10.3. SOCIAL SECURITY

### 10.3.1 Applicable social security law

Under Article 11(3)(a) of Regulation (EC) no. 883/2004, the frontier worker is registered with social security in his Member State of employment. If he was previously covered by social insurance in another Member State – for example in the Member State in which he lives because he previously worked there – he then “moves” from the one social security system to the other, even though he retains his normal place of residence in the original Member State (State of residence).

It can be assumed that he retains close personal links with his State of residence and is present there on a regular basis. Usually his family is also there. He can therefore also opt to pass “difficult” periods – for example periods of sickness, invalidity and/or unemployment – in his State of residence. This is not only the case for cross-border workers. If European legislation offered no guarantee of this, this could constitute an obstacle to the free movement of workers. Regulation (EC) no. 883/2004 therefore contains a number of practical provisions intended to close possible gaps in social security provision. It should also be noted that the coordinating regulation give frontier workers almost no “freedom of choice” with regard to these practical provisions.

### 10.3.2 Sickness and maternity

#### 10.3.2.1 Medical benefits

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

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

#### **Article 17 of Regulation (EC) no. 883/2004: Residence in a Member State other than the competent Member State**

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

Under Article 18(2) of Regulation (EC) no. 883/2004, family members of frontier workers insured with them are entitled, without prior authorisation, to benefits in kind during their stay in the competent Member State. However, if this Member State is listed in Annex III of Regulation (EC) no. 883/2004, the family members of frontier workers who reside in the same Member State as the worker are entitled in the competent Member State only to benefits in kind that are proven to be medically necessary during their stay.

#### **Examples**

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

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

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

### 10.3.2.2. Medical benefits for retired frontier workers

Under Article 27 of Regulation (EC) no. 883/2004, a retired frontier worker who receives a retirement pension only from the competent Member State (the former Member State of employment) is entitled without prior authorisation to benefits in kind in the competent Member State if the Member State has opted for this and is listed in Annex IV.

#### Examples

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

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

*(1) A frontier worker who retires is entitled in case of sickness to continue to receive benefits in kind in the Member State where he last pursued his activity as an employed or self-employed person, insofar as this is a continuation of treatment which began in that Member State. The term “continuation of treatment” means the continued investigation, diagnosis and treatment of an illness.*

*(2) A pensioner who, in the five years preceding the effective date of an old-age or invalidity pension has been pursuing an activity as an employed or self-employed person for at least two years as a frontier worker shall be entitled to benefits in kind in the Member State in which he pursued such an activity as a frontier worker, if this Member State and the Member State in which the competent institution responsible for the costs of the benefits in kind provided to the pensioner in his Member State of residence is situated have opted for this and are both listed in Annex V.*

#### Examples

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

### 10.3.2.3. Sickness benefits

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

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

#### **Article 21 of Regulation (EC) no. 883/2004: Cash benefits**

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

The procedures for application of this Article, in particular with regard to the medical examination, are set out in Articles 27 and 87 of the implementing Regulation (EC) no. 987/2009. Article 27 – “Cost benefits relating to incapacity for work in the event of stay or residence in a Member State other than the competent Member State” (the State of employment) – defines procedures for the affiliates (insured persons), for the institution of the Member State of residence and for the competent institution. Article 87 of Regulation (EC) no. 987/2009 on medical examination and administrative checks is also important.

### 10.3.3. Occupational diseases: where can frontier workers be treated?

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

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

To receive medical treatment in the place of residence for an occupational accident, proof of membership of an existing health insurance scheme is normally accepted (e.g. the European Health Insurance Card – EHIC).

The document relating to medical treatment under special conditions reserved for accidents at work and occupational diseases in another EU country – Document DA1 (formerly E 123) – is usually issued by the health insurance authority only after investigation of the accident; it is then sent to the liaison office in the country of residence and/or to the affiliate.

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

## 10.4. THE CROSS-BORDER WORKER WHO BECOMES UNEMPLOYED

### 10.4.1 Unemployment benefits

In principle, a cross-border worker could claim unemployment benefits in the Member State in which he is required to pay contributions, i.e. the Member State of employment (competent Member State). However, this does not apply to frontier workers in the event of full unemployment. The Member State of residence must register them in the local social security system immediately. Other cross-border workers – workers who return to their country of residence less frequently than once a week – have the right to choose in this matter (see Chapter 10.4.4).

When switching from one social security system to another, gaps in social security may occur because of possible waiting period requirements, or because the worker has for a long time paid no social security contributions in the country of residence (or has never paid such contributions). Article 61 of Regulation (EC) no. 883/2004 therefore lays down special rules on aggregation of periods of insurance, employment or self-employment (see Chapter 3.5.4).

When ascertaining the entitlement to unemployment benefits and determining their amount and duration, the competent Member State (the Member State of employment) must always take into account the periods of insurance completed in other Member States. This ensures that the worker does not lose any of his entitlements to unemployment benefits acquired elsewhere. Form U1 (formerly E 301) – “declaration as to the periods which are to be taken into consideration for the granting of unemployment benefits” – is required as evidence that the worker was previously registered with social security in another Member State. This form must be submitted with the application for unemployment benefit to the unemployment benefit fund (employment office) of the Member State in which the entitlement to unemployment support can be granted. Form U1 can be obtained from the competent unemployment benefit fund of the Member State in which the frontier worker was previously insured.

Unemployment benefits in most Member States are related to earnings. The unemployment benefit of a frontier worker is calculated in accordance with Article 62 of Regulation (EC) no. 883/2004. The competent institution (unemployment benefit fund) of a Member State whose legislation specifies that the calculation of benefits is based on the previous level of remuneration considers only the remuneration that the person concerned received in his last employment in line with the country’s legislation.

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

In the case of full unemployment, a distinction is drawn between cross-border workers who are frontier workers and those who are not (“non-frontier workers”). This distinction is not made in the case of short-time work or other temporary loss of work.

## 10.4.2. The cross-border worker who becomes partially or intermittently unemployed

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

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

#### **Examples**

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

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

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

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

*A wholly unemployed person who, during his last activity as an employed or self-employed person, resided in a Member State other than the competent Member State and who continues to reside in that Member State or returns to that Member State shall make himself available to the employment services in the Member State of residence. Without prejudice to Article 64, a wholly unemployed person may, as a supplementary step, make himself available to the employment services of the Member State in which he pursued his last activity as an employed or self-employed person.*

Under Article 11(3)© of Regulation (EC) no. 883/2004 he is subject to the legislation of the Member State of residence – that is, his unemployment benefit is calculated in accordance with the regulations applicable in the Member State of Residence (Regulation (EC) no. 883/2004, Article 65(5)(a)).

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

*The unemployed person referred to in the first and second sentences of paragraph 2 shall receive benefits in accordance with the legislation of the Member State of residence as if he had been subject to that legislation during his last activity as an employed or self-employed person. Those benefits shall be provided by the institution of the place of residence.*

Calculation of these benefits takes into account the remuneration received during the last employment in another Member State (Regulation (EC) no. 883/2004, Article 65).

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

*The unemployed person referred to in the first sentence of paragraph 2 shall register as a person seeking work with the competent employment services of the Member State in which he resides, shall be subject to the control procedure organised there and shall adhere to the conditions laid down under the legislation of that Member State. If he chooses also to register as a person seeking work in the Member State in which he pursued his last activity as an employed or self-employed person, he shall comply with the obligations applicable in that State.*

### Example

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

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

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

*Without prejudice to Article 64, a wholly unemployed person may, as a supplementary step, make himself available to the employment services of the Member State in which he pursued his last activity as an employed or self-employed person.*

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

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

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

### 10.4.4. The non-frontier worker who becomes permanently and definitively unemployed

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

- A non-frontier worker who returns immediately to his Member State of residence must register as a jobseeker with the local employment office (unemployment benefit fund). The non-frontier worker is entitled to unemployment benefits in accordance with the applicable regulations in the Member State of residence. This unemployment benefit is calculated in accordance with the rules applicable in the Member State of residence (Regulation (EC) no. 883/2004, Article 65(5)(a)).
- A non-frontier worker who does not return to his Member State of residence must make himself available to the employment office of the Member State whose legislation last applied to him. The non-frontier worker is entitled to unemployment benefit in accordance with the rules applicable in the Member State of employment and the unemployment benefit is likewise calculated in accordance with the rules applicable in the Member State of employment. If he returns to the Member State of residence after unemployment benefits have already been claimed in the Member State of employment, Article 64 of Regulation (EC) no. 883/2004 applies (export of unemployment benefit for three months).

### Examples

- A non-frontier worker who resides in Paris (France) and works in Berlin (Germany) is in the event of permanent and definitive unemployment entitled to French unemployment benefits if he returns immediately France. The duration and amount of the benefits are based on the legislation in force in France.

- If the non-frontier worker does not return to France (State of residence) and registers with the German unemployment office, he is then entitled to German unemployment benefit, the duration and amount of which are based on the legislation in force in Germany.
- After drawing unemployment benefit for six months in Germany, the non-frontier worker registers as a jobseeker with the French employment office. Initially he is entitled to another three months of German unemployment benefit. After three months he is entitled to French unemployment benefit based on the legislation in force in France.

## 10.5. TAXATION

### 10.5.1 Rules on the taxation of frontier workers

The rules on taxation can be found in the applicable bilateral treaty to prevent double taxation that the State in which the cross-border or frontier worker lives has concluded with his State of employment. The OECD Model Convention (Article 15(1)) adopts the State of employment principle as the general rule. If the cross-border or frontier worker carries out activities in the State of employment for an employer from this State, there is no exemption to this principle under the 183-day rule (Article 15(1) OECD) and his income is taxed in the State of employment.

The OECD Model Convention contains specific rules for a number of cross-border employees. They apply in particular to teachers, public employees, sea-going or flying personnel in the international transport sector etc.

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

Not every cross-border worker, however, is regarded as a frontier worker. Double taxation treaties often contain criteria that are stricter than those that apply to social security legislation (Article 1(f) of Regulation (EC) no. 883/2004). As well as returning regularly – usually daily – to his State of residence, the frontier worker must also live and work within a defined border zone. The relevant double taxation treaty specifies what constitutes the fiscal border zone. It will also define where an employee is taxed if he lives and works within the border zone but also carries out activities outside the zone for his employer (e.g. when posted elsewhere).

### 10.5.2 Examples of rules on the taxation of frontier workers

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

From the fiscal point of view defined in the double taxation treaty concluded between France and Germany, to be classed as a frontier worker and be liable for tax in his State of residence, the worker must live and work within a designated border zone and must return to his place of residence every day. He loses his frontier worker status and hence becomes liable for tax in his State of employment if he works in the border area for a full year but during this year there are 45 or more days on which he does not return to his official place of residence or on which he works outside the border zone.

Border zone for frontier workers residing in France

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

Border zone for frontier workers residing in Germany

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

Frontier workers in the civil service usually pay their taxes in the State of employment.

There are special rules for temporary frontier workers.

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

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

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

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

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

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

## 10.5.3. Tax advantages for frontier workers

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

### **Ruling on the Schumacker case (C-279/93):**

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

With regard to the coordination of social security (Regulation (EC) no. 883/2004), the principle of the State of employment applies. There are no exceptions for cross-border and frontier workers. If a double taxation treaty containing a frontier worker clause is also in force, the rules that apply to a frontier worker with regard to the payment of social security contributions (State of employment) may differ from the rules on taxation (State of residence). This can work to his advantage or disadvantage (see Chapter 5.4 of this Guide).

# CHAPTER 11.

## MULTINATIONAL WORKERS

### 11.1. GENERAL

A multinational employee is an employee who conducts his professional activities in more than one Member State at any given time. The State of employment is not necessarily either the employer's or the employee's State of residence. For example, the multinational worker could be a resident of Switzerland who works for a French international hotel chain and conducts quality inspections of the company's French and Swiss hotels. But it could also be a Swiss national who, working for this French employer, carries out quality inspections in Germany, Austria and Liechtenstein.

Regulation (EU) no. 492/2011 and Regulation (EC) no. 883/2004 also guarantee the right of free movement for this group of employees and ensures that they do not lose their accumulated social rights.

In the event of multinational employment this involves the links between the applicable social security legislation, income tax law and employment legislation. Different guidelines apply to each of these areas of the law.

The rules that define the applicable social security law are set out in Article 13(1) of the coordinating Regulation (EC) no. 883/2004; there is no freedom of choice. A person can only be socially insured in one Member State (the exclusivity principle). For example a person who is concurrently employed in France, self-employed in Germany and a civil servant in Luxembourg is insured in only one Member State.

The rules on income tax are contained in the bilateral double taxation treaties that the employee's State of residence has concluded with each of his countries of employment (Articles 15(1) – 15(3) of the OECD Model Convention). Here again there is no freedom of choice. Unlike the situation with regard to social security, it is possible for a person to be taxed in more than one state without being double-taxed (salary splitting).

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

These coordinating rules are explained below. It is a somewhat complex issue. The rules will therefore again be illustrated by applying them to four concrete examples which, because they occur frequently, can be considered as standard cases.

In many cases a multinational employee is not liable for social insurance in his State of residence. His position is then similar to that of the cross-border worker – i.e. he pays social insurance contributions in one Member State but lives in another. In this situation Regulation (EC) no. 883/2004 gives the multinational employee the same guarantees of social security benefits and services as the cross-border employee. The rules on health insurance, accidents, disablement, retirement pensions, unemployment insurance and family benefits have already been outlined in Chapter 10.

## 11.2. SOCIAL SECURITY

### 11.2.1 General principles

Article 11(1) of Regulation (EC) no. 883/2004 requires exclusivity with regard to the applicable social security law. Consequently, only one system of social security law may apply to a multinational worker, even if he has concluded several contracts of employment with different employers from different Member States. The Regulation adopts the principle of the Member State of employment (Regulation (EC) no. 883/2004, Article 11(3)(a)) as the main rule, but this system cannot handle a situation in which there are two or more countries of employment. There are therefore special rules for multinational workers.

The national social security institutions must inform citizens of their rights under the new regulation and support them in asserting those rights. Every institution that is contacted must apprise the applicant of the decision taken and of the applicable legislation. Conversely, the worker is required to notify the competent institution of any changes to his employment relationship that may affect application of the legislation.

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

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

#### **Article 13 of Regulation (EC) no. 883/2004 as amended by Regulation (EU) no. 465/2012<sup>14</sup>: Pursuit of activities in two or more Member States**

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

<sup>14</sup> Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012 amending Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004

Special rules for travelling personnel in international transport were not transferred from Regulation (EEC) no. 1408/71 to Regulation (EC) No 883/2004; as a result, such personnel are now covered by the same regulations as all other persons who are normally employed in several Member States. Workers who normally carry out their activities in several Member States are therefore subject to the social security provisions of the State of residence, provided that they carry out a substantial part of their activity there. Article 14 of the implementing Regulation (EC) no. 987/2009 defines “substantial” as a share of the working time and/or wages of at least 25%. Where the substantial part of the activity is carried out is determined on the basis of a forecast for the next 12 months. Unfortunately, neither Regulation (EC) No 883/2004 nor the implementing regulation 987/2009 provides a definition of “normally.”

## 11.2.2. Working in more than one Member State

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

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

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

### Examples

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

## 11.2.3. Legal provisions that apply to employees who are also active on a self-employed basis

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

### Example

- A person residing in Austria is employed in Austria and Germany by a company that has its registered office in France, and is active as a self-employed person in Poland. On average, he spends three days a month working in Austria (not a substantial part of his activity). This person is registered with social security in accordance with the legislation of the Member State in which the company has its registered office, i.e. France.

### 11.2.4. Legal provisions that apply to employees who are also active as civil servants

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

#### Examples

- A civil servant attached to an Austrian administrative unit carries out an activity as an employed person in Germany and a self-employed activity in the Czech Republic. In this case, the applicable legislation is that of the Member State in which the administrative unit to which the civil servant belongs is located. The civil servant must register with the Austrian social security system. The German employer must likewise insure his worker with the Austrian social security system. The civil servant's place of residence is irrelevant.
- A worker lives in the Netherlands. He is employed on a full-time basis by a Dutch employer and works in the Netherlands. At the same time, he spends four hours a week working as a civil servant in Belgium. The Dutch employer must insure his worker with the social security system in Belgium.

### 11.2.5. Legal provisions that apply to transport workers

Regulation (EC) no. 883/2004 no longer contains any special rules for transport workers. Persons who are employed as travelling personnel by a company engaged in the international transport business are subject to the legislation of the Member State in which the company has its registered office. If the activity is carried out mostly on the territory of the Member State of residence, the person is subject to the legislation of that Member State.

However, if the person is employed by a branch or permanent representation, he is subject to the legislation of the State in whose territory the branch or permanent representation is located. If a substantial part of the activity (25% or more; Regulation (EC) 987/2009, Article 14(8)) is carried out on the territory of the Member State of residence, he is subject to the legislation of that Member State.

#### Examples

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

## 11.2.6. Transitional regulations

With regard to cross-border matters that were already in existence on 1 May 2010, Article 87(8) of Regulation (EC) no. 883/2004 does not initially introduce any changes for workers in terms of applicable social security legislation. The previous rules specified in Regulation (EEC) no. 1408/71 will continue to apply for the time being, but not beyond 30 April 2020. The precondition for the continuing application of Regulation (EEC) no. 1408/71, however, is that there are no legal changes in the employment relationship. Moreover, the person concerned may apply to have Regulation (EC) no. 883/2004 applied to him. If such an application was filed before 31 July 2010, the matter is subject to the rules of Regulation (EC) no. 883/2004 with retroactive effect from 1 May 2010.

### Example

- A worker has been normally employed for a company in Germany and Belgium since 1 April 2008. He lives in Germany. The scope of the activity carried out in Germany is not substantial. The company has its registered office in Poland. Under Regulation (EEC) no. 1408/71, German legislation applies. Under Regulation (EC) no. 883/2004, Polish legislation would in this case apply from 1 May 2010. However, under Article 87(8) of Regulation (EC) no. 883/2004, German law initially remains applicable provided that the existing situation does not change. The worker may, though, apply to have Polish law applied.

## 11.3. TAXATION

### 11.3.1. General principles

The rules on taxation are contained in the applicable bilateral treaty to prevent double taxation that the worker's State of residence has concluded with each of the States in which he works. These rules determine which Member State is responsible for taxing the worker's income. This prevents double taxation of the same income. In the case of multinational work, the "183-day rule" is crucial.

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

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

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

- the worker is not present in the State of employment for more than 183 days per calendar year (older OECD Model Conventions) or a period of 12 consecutive months (new OECD Model Convention), and
- wages are paid by or on behalf of an employer who is not a citizen of the State of employment, and
- the wages are not paid for work performed in a permanent establishment maintained by the employer in the State of employment.

If any one of these three conditions is not met, the worker's income is taxed in the State of employment with retrospective effect and thus from the first day of his presence.

Article 15(3) of the OECD Model Convention makes an exception to the above principles for transport workers in the shipping and air transport sectors.

### 11.3.2. Transport workers

Article 15(3) of the OECD Model Convention applies the principle of exclusivity to employees aboard a ship or aircraft operated in international traffic, or aboard a boat engaged in inland waterways transport. These workers are taxed in the Contracting State – that is, in the country in which their employer is based.

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

#### Example

- For a citizen of the Netherlands who works for a Luxembourg-based international transport company and therefore drives to all European destinations, the principle of the State of residence does not apply as it would to aviation and shipping personnel. The principle of the State of employment therefore applies, subject to the 183-day rule. This means that for the days he works in Luxembourg, he will also be taxed there (salary splitting). If he works in the other Member States for fewer than 183 days, he will be taxed for those days in the State of residence (the Netherlands).

### 11.3.3. “Other” multinational workers

For “other” employees the principle of the State of employment (OECD Model Convention, Article 15(1)) applies, subject to the 183-day rule (OECD Model Convention, Article 15(2)). Here there is no exclusivity principle. The multinational worker may find himself in a situation in which he is taxed by two or more Member States (salary splitting for taxation purposes). The bilateral double taxation treaties guarantee only that the same part of the worker’s income will not be taxed in two or more States.

### 11.3.4. Taxation in the State of residence

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

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

### 11.3.5. Taxation in States of employment other than the State of residence

If a part of the multinational worker’s income is taxable in a Member State other than his State of residence, the other Member State may tax only the income earned there, and it must do so at the rate applicable to foreign taxpayers (as non-residents or people with limited tax liability). However, if the greater part of his income is earned in this Member State, the worker is entitled to the same tax advantages – such as professional expenses, tax-free sums, family tax allowances, etc. – as national workers. In this event it is possible that this Member State will also apply “progressive” taxation, i.e. taking account of the worker’s global income.

## 11.4. EMPLOYMENT LEGISLATION

Free choice applies in principle with reference to the applicable labour legislation. The choice must, however, be made explicitly. If that is not the case, the choice of law must be sufficiently clear from the provisions of the contract of employment or from the circumstances of the case (Regulation (EC) no. 593/2008, Article 3). The contract of employment should preferably include an express clause regarding the choice of law. This choice of law is nonetheless limited by Regulation (EC) no. 593/2008 Article 8 (see Chapter 4 of this Guide). More specifically, it may not lead to the loss of the protection provided to the worker by the “objectively applicable law,” i.e. the law which would apply if no law was chosen. This means that the worker can effectively claim the protective provisions of the objectively applicable law at all times.

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

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

In practice, it is fairly rare for no express choice of law to be made when a worker is employed on a multinational basis. The choice is determined by several factors. The search for a connection to the applicable social security law can be an argument.

## 11.5. TYPICAL EXAMPLES

### 11.5.1. International driver

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

#### 11.5.1.1. Social security

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

#### 11.5.1.2 Taxation

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

### 11.5.1.3 Employment law

For a German lorry driver who works for a Danish international freight transport business and drives to destinations in different Member States, it is appropriate to opt for the employment law of the employer's State. If the lorry driver works mainly in Germany, the provisions of mandatory German law must be applied. This results in harmonisation with the applicable German social security law and with tax law. The main proportion of taxation will be in Germany (salary splitting).

### 11.5.1.4 Summary

International driver	Member State
<b>Employer is established in</b>	Denmark
<b>Employee lives in</b>	Germany
<b>Employee works in</b>	All EU Member States
<b>Covered by social security in (no free choice)</b>	Denmark, if activity in Germany constitutes less than 25% or Germany if activity there is 25% or more
<b>Taxable in</b>	Denmark (Danish salary) and Germany
<b>Limited choice of employment legislation</b>	Denmark and/or Germany

### 11.5.2. Multinational construction worker

Employer is established in	Employee lives in	Employee works simultaneously in
The Netherlands	Belgium	Belgium (> 25%) and the Netherlands

#### 11.5.2.1. Social security

Under Article 13(2)(a) of Regulation (EC) 883/2004, this worker – who has worked in both Member States since his contract of employment commenced – is subject to the social security legislation of Belgium, i.e. the Member State in which he resides and in which he carries out a substantial part of his activity. The Dutch employer must pay the Belgian social security contributions for the entire salary in Belgium. The worker receives an A1 declaration from the competent body of the Member State under whose social security system he is covered (i.e. Belgium) by way of confirmation of the applicable legal system. The A1 declaration may in principle apply for an unspecified period, but it must be extended at regular intervals.

#### 11.5.2.2. Taxation

To establish where the worker is taxed, the Dutch-Belgian double taxation treaty must be consulted. Since 2003, this treaty no longer includes rules for frontier workers. This means that the income from work carried out on Belgian territory is subject to Belgian income tax from the first day of employment in Belgium. The income from work carried out on Dutch territory (Dutch wages) – where the employer is established – is subject to the Dutch taxation system (Article 15(1) of the Dutch-Belgian double taxation treaty).

The construction worker's income is therefore split for tax purposes (salary splitting). His pay is divided into a part taxed in Belgium (unlimited tax liability) and a part taxed in the Netherlands (limited tax liability), in proportion to the number of days he has worked in each country.

### 11.5.2.3. Employment law

A construction worker resident in Belgium who is employed by a Dutch construction company and works on construction sites in both the Netherlands and Belgium can conclude an employment contract under either Dutch or Belgian law. If Dutch employment law is chosen, work activities carried out in Belgium are subject to the Belgian collective agreement for the construction industry if this is more advantageous than the Dutch employment law and/or Dutch collective agreement. As well as Regulation EC 593/2008 (Articles 3, 8 and 9), the Posted Workers Directive (96/71/EC) will apply as implemented in Belgium.

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

### 11.5.2.4. Summary

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

Construction worker	Member State
<b>Employer is established in</b>	The Netherlands
<b>Employee lives in</b>	Belgium
<b>Employee structurally employed in</b>	The Netherlands and Belgium (> 25%)
<b>Covered by social insurance in</b>	Belgium
<b>Taxable in</b>	The Netherlands and Belgium (salary splitting)
<b>(Limited) choice of employment legislation</b>	Belgian law (collective agreement for the construction industry) plus – if more favourable – additional mandatory Dutch labour law (plus collective agreements for the construction sector) for work executed on Dutch territory

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

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

### 11.5.3.1. Social security

Under Article 13(1)(b) of Regulation (EC) no. 883/2004, this sales representative is subject to the social security law of the Member State in which his employer has his registered office – in this case France. The French employer must pay social security contributions for the entire salary in France. The worker receives an A1 declaration from the competent body of the Member State under whose social security system he is covered, by way of confirmation of the applicable legal system, i.e. that of France.

### 11.5.3.2. Taxation

The taxation situation is governed by the double taxation treaties between Belgium (the State of residence and one of the States of employment), France (headquarters of the employer and one of the States of employment), Germany, the Netherlands and Luxembourg (all States of employment).

For activities carried out in France, the sales representative is taxed in France. The double taxation agreements between Belgium and Germany, the Netherlands and Luxembourg include the “183 day rule.” If the sales representative works in the Netherlands, Germany and Luxembourg for fewer than 183 days and the French employer has no permanent establishment in the Netherlands, Germany and Luxembourg, the responsibility for collecting tax is assigned in full (100%) to the country of residence (Belgium).

### 11.5.3.3. Employment law

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

### 11.5.3.4. Summary

Multinational sales representative	Member State
<b>Employer is established in</b>	France (no permanent establishment in other countries)
<b>Employee lives in</b>	Belgium
<b>Employee works in</b>	Belgium (<25%), Luxembourg, France (5%), the Netherlands, Germany.
<b>Covered by social insurance in</b>	France
<b>Taxable in</b>	Belgium (95%; <183 days in Luxembourg, the Netherlands, Germany) and France (5%)
<b>Choice of employment legislation</b>	France

## 11.5.4. Multinational teacher (frontier worker)

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

### 11.5.4.1. Social security

Under Article 13(4) of Regulation (EC) no. 883/2004, this multinational teacher – a civil servant in Belgium and a “normal” worker in the Netherlands – is subject to Belgian social security legislation. The worker receives a declaration from the competent body of the Member State under whose social security system he is covered, i.e. Belgium, by way of confirmation of the applicable legal system. The Dutch employer must pay the Belgian social security contributions for the worker in Belgium.

### 11.5.4.2. Taxation

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

### 11.5.4.3. Labour law

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

### 11.5.4.4. Summary

<b>Teacher</b>	<b>Member State</b>
<b>Employer is established in</b>	Belgium and the Netherlands
<b>Employee lives in</b>	The Netherlands
<b>Employee works in</b>	Employee in the Netherlands (90%) and civil servant in Belgium (10%)
<b>Covered by social insurance in</b>	Belgium
<b>Taxable in</b>	Belgium (limited tax liability) and the Netherlands (unlimited tax liability)
<b>Choice of employment legislation:</b>	In practice: Belgium (civil servants) and the Netherlands

# CHAPTER 12. THE MOBILE EUROPEAN WORKER WHO BECOMES UNEMPLOYED

## 12.1. GENERAL

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

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

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

## 12.2. FINDING EMPLOYMENT ACROSS BORDERS: EURES

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

A European network, currently consisting of more than 1,000 EURES advisers, is available to provide support to workers and jobseekers. The latest version of the directory can be found at <http://ec.europa.eu/eures>. The EURES advisers are qualified experts who can inform and advise jobseekers, workers and employers on cross-border matters relating to living and working conditions, the labour market, social security and social and tax law in Europe. In addition, they assist the employment offices with cross-border employment and personnel searches.

## 12.3. LOOKING FOR WORK WHILE CONTINUING TO DRAW NATIONAL UNEMPLOYMENT BENEFIT

Article 64 of the European coordinating Regulation (EC) no. 883/2004 guarantees that a jobseeker may, under certain conditions, take his national unemployment benefit with him to another Member State for three months. This three-month period may be extended by the competent service or institution to a maximum of six months (Regulation (EC) no. 883/2004, Article 64(1)(c)). This regulation offers jobseekers a unique opportunity, enabling them to explore the labour market in another Member State and to find work there while continuing to draw their unemployment benefit. An EU citizen does not need a work permit in other EU states. EU citizens can therefore simply invoke Article 64 of Regulation (EC) no. 883/2004. For non-EU citizens (known as citizens of third countries) who are staying legally on the territory of a Member State, the situation is somewhat more complicated. Although Regulation (EC) no. 1231/2010 recently extended the personal scope of Regulation (EC) no. 883/2004 to this group of workers, an exception was made for Article 64 of Regulation (EC) no. 883/2004. Retention of the entitlement to unemployment benefits under Article 64 of Regulation (EC) no. 883/2004 requires the person concerned to register as an unemployed person with the employment office of every Member State to which he moves. This provision should therefore apply to a third-country national only if he is entitled (perhaps on account of his residence permit or his status as a permanent resident) to register as an unemployed person in the Member State to which he moves and to carry out an occupation lawfully in that country.

### **The right to continue to draw national unemployment benefit and the conditions that apply are set out in Article 64 of Regulation (EC) no. 883/2004:**

- (1) *A wholly unemployed person who satisfies the conditions of the legislation of the competent Member State for entitlement to benefits, and who goes to another Member State in order to seek work there, shall retain his entitlement to unemployment benefits in cash under the following conditions and within the following limits:*
- (a) before his departure, the unemployed person must have been registered as a person seeking work and have remained available to the employment services of the competent Member State for at least four weeks after becoming unemployed. However, the competent services or institutions may authorise his departure before such time has expired;*
  - (b) the unemployed person must register as a person seeking work with the employment services of the Member State to which he has gone, be subject to the control procedure organised there and adhere to the conditions laid down under the legislation of that Member State. This condition shall be considered satisfied for the period before registration if the person concerned registers within seven days of the date on which he ceased to be available to the employment services of the Member State which he left. In exceptional cases, the competent services or institutions may extend this period;*
  - (c) entitlement to benefits shall be retained for a period of three months from the date when the unemployed person ceased to be available to the employment services of the Member State which he left, provided that the total duration for which the benefits are provided does not exceed the total duration of the period of his entitlement to benefits under the legislation of that Member State; the competent services or institutions may extend the period of three months up to a maximum of six months;*
  - (d) the benefits shall be provided by the competent institution in accordance with*
- (2) *If the person concerned returns to the competent Member State on or before the expiry of the period during which he is entitled to benefits under paragraph 1(c), he shall continue to be entitled to benefits under the legislation of that Member State. He shall lose all entitlement to benefits under the legislation of the competent Member State if he does not return there on or before the expiry of the said period, unless the provisions of that legislation are more favourable. In exceptional cases the competent services or institutions may allow the person concerned to return at a later date without loss of his entitlement.*
- (3) *Unless the legislation of the competent Member State is more favourable, between two periods of employment the maximum total period for which entitlement to benefits shall be retained under paragraph 1 shall be three months; the competent services or institutions may extend that period up to a maximum of six months.*

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

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

## 12.4. RIGHT OF RESIDENCE WHILE SEEKING WORK

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

### Directive 2004/38/EC, Recital no. 9

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

## 12.5. RIGHT OF RESIDENCE DURING THE PERIOD OF EMPLOYMENT

The right of residence – and in some cases the right of permanent residence – is regulated by Directive 2004/38/EC (see Chapter 6). The EU citizen maintains his right of residence in the event of involuntary unemployment (after one year of employment). If he becomes involuntarily unemployed after completing a fixed-term employment contract of less than a year or he became involuntarily unemployed during the first twelve months, he maintains his right of residence for six months. The worker must, though, register as a jobseeker at an employment office (Directive 2004/38/EC, Article 7(3)).

## 12.6. GUARANTEES OF UNEMPLOYMENT BENEFIT AFTER A PERIOD OF WORK

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

### 12.6.1. Mutual recognition of periods of work and employment

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

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

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

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

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

### 12.6.3. Possible scenarios

The following situations may arise:

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

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

If the jobseeker finds no work and returns to his country of residence within three months, he is in principle entitled to continue to draw his domestic unemployment benefit there. Under Article 64(2) of Regulation (EC) no. 883/2004, the entitlement in the competent Member State ceases to apply if the jobseeker returns only after expiry of the three-month period; the competent institution (unemployment benefit fund) may authorise a delayed return in exceptional cases.

### Example

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

Situation b) The employee works for a while and then returns immediately to his State of residence;

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

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

### Example

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

Situation c) The employee works temporarily and then seeks new work in the State of employment;

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

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

### Example

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

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

It follows from Articles 65(2) and 65(3) of Regulation (EC) no. 883/2004 that the worker is entitled to unemployment benefit in accordance with the legislation of the country of employment in which he stayed temporarily. However, if two months after obtaining unemployment benefit from the unemployment benefit fund of the country of employment the worker decides to return to his country of residence because he can find no work in the country of employment, the entitlement to unemployment benefit is governed by Articles 65(3) and 65(5)(b) of Regulation (EC) 883/2004.

#### **Article 65(5)(b) of Regulation (EC) no. 883/2004**

*However, a worker other than a frontier worker who has been provided benefits at the expense of the competent institution of the Member State to whose legislation he was last subject shall firstly receive, on his return to the Member State of residence, benefits in accordance with Article 64, receipt of the benefits in accordance with (a) being suspended for the period during which he receives benefits under the legislation to which he was last subject.*

#### **Example**

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

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

This situation involves a cross-border employee who lives in a different Member State from that in which he works. If the employee returns to his place of residence each day or at least once a week, he is classed as a frontier worker. The unemployment rules for cross-border workers of both types are described in Chapter 10.

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

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

## 12.7. MEDICAL INSURANCE

### 12.7.1. During the job-seeking period

The jobseeker who retains his unemployment benefit whilst going to seek work in another

Member State must, if he has statutory medical insurance, request the European Health Insurance Card (EHIC) from his insurers. The European Health Insurance Card guarantees that the unemployed person and his family members are entitled to medical care and sickness benefits in the State in which they are staying.

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

### 12.7.2. During periods of employment

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

If he falls sick during this period, he is in principle entitled to health insurance benefits. In a number of Member States, however, sickness payments or benefits are made only after the employee has been covered by social insurance or employed for a given time (the "waiting period"). To prevent a gap in insurance cover, the coordinating regulation states that corresponding periods in other Member States must be recognised and taken into account for satisfying waiting period requirements. In this case it is necessary to use the Structured Electronic Documents SED S040 (Request for periods – Insurance risk type: sickness and maternity) and SED S041 (Reply to Request for periods – Insurance risk type: sickness and maternity); these replace the earlier Form E 104 (Statement of periods of insurance, employment and residence in a particular Member State). The SED S041 is issued by the medical insurance service in the Member State in which the jobseeker was most recently insured.

# CHAPTER 13.

## THE PENSIONER ABROAD

### 13.1. WHO COUNTS AS A “PENSIONER ABROAD”?

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

It also deals, however, with a migrant worker who has worked in Poland, Ireland and France and receives an Irish, Polish and French pension – or a former Belgian frontier worker who gets a Belgian and a Dutch pension.

### 13.2. SOCIAL SECURITY

The social security obligation is subject to the principle of exclusivity. This means that the worker, pensioner, etc. can be subject to the legislation of only one Member State. Under Article 13(3)(e) of Regulation (EC) no. 883/2004, a pensioner is in principle registered with social security in the country of residence (lex loci domicilii).

#### 13.2.1. The right to benefits in kind in the State of residence

##### **Article 23 of Regulation (EC) no. 883/2004: Right to benefits in kind under the legislation of the Member State of residence**

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

##### **Example**

- A pensioner with a German and French pension lives in Germany. Under Article 23 of Regulation (EC) no. 883/2004, this “double pensioner” is covered by healthcare and nursing insurance in Germany. The “double pensioner” is entitled to German benefits in cash and in kind. Under Article 30 of Regulation (EC) no. 987/2009, he pays the contribution on his total income (German and French pensions) to the German healthcare and nursing insurance scheme.

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

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

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

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

**Example**

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

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

**Article 30 Regulation (EC) no. 883/2004: Contributions by pensioners**

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

A pensioner is also entitled to benefits in kind during his stay in the competent Member State without prior authorisation (Regulation (EC) no. 883/2004, Article 27: Stay of the pensioner or the members of his family in a Member State other than the Member State in which they reside – stay in the competent Member State), provided that this Member State has opted for this and is listed in Annex IV of Regulation (EC) no. 883/2004 (More rights for pensioners returning to the competent Member State).

**Examples**

- A “single pensioner” – with a German pension – residing in Spain may claim German benefits in kind without authorisation. Germany is listed in Annex IV.
- A “single pensioner” – with a British pension – residing in Spain may not claim British benefits in kind in the United Kingdom without authorisation. The United Kingdom is not listed in Annex IV of Regulation (EC) no. 883/2004.

Article 28 of Regulation (EC) no. 883/2004 (Special rules for retired frontier workers; see Chapter 10.3.2.2 of this Guide) applies to former frontier workers.

### 13.3. TAXATION

A pensioner who receives a foreign disability or retirement pension must pay tax on this pension in his State of residence. Exceptions are made in a number of double taxation treaties. The right of the source country (the country that paid the pension) then applies. This also holds true for civil servant pensions. Occupational pensions (supplementary pensions) etc. are usually taxed in the State of residence.

If the applicable double taxation treaty assigns taxation of the statutory and/or supplementary pension to the paying Member State (the country that paid the pension), the Member State in which the pensioner lives does not tax the pension. Once the income tax has been calculated, the foreign income is exempted from domestic income tax on account of the applicable double taxation treaty. The taxable income is usually taxed progressively.

### 13.4. TYPICAL CASES

<b>Family A resides in Belgium</b>					
	<b>Statutory pensions from</b>	<b>Contributions</b>	<b>Benefits in kind</b>	<b>Benefits in cash</b>	<b>Pension taxation</b>
<b>Female pensioner</b>	Germany	Germany	Germany +	Deutschland	Deutschland
<b>Pensioner (1)</b>	Germany + The Netherlands	The Netherlands	Belgium + The Netherlands	The Netherlands (2)	German pension in Germany, Dutch pension in Belgium

(1) The pensioner was registered with social security for the longest period in the Netherlands (2) In the Netherlands there are no cash benefits in the event of the need for care

<b>Family B resides in Italy</b>					
	<b>Statutory pensions from</b>	<b>Contributions</b>	<b>Benefits in kind</b>	<b>Benefits in cash</b>	<b>Pension taxation</b>
<b>Female pensioner (1)</b>	Germany The Netherlands	Germany	Germany Italy	Germany	German pension in Germany Dutch pension in Italy
<b>Pensioner</b>	Germany Italy	Italy	Italy	Italy	German pension in Germany Italian pension in Italy

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

<b>Family B resides in The Netherlands</b>					
	<b>Statutory pensions from</b>	<b>Contributions</b>	<b>Benefits in kind</b>	<b>Benefits in cash</b>	<b>Pension taxation</b>
Female pensioner	Germany The Netherlands	The Netherlands	The Netherlands	The Netherlands (2)	Germany The Netherlands
Pensioner (1)	Germany Italy	Germany	Germany The Netherlands	Germany	Germany The Netherlands

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

(2) In the Netherlands there are no cash benefits in the event of the need for care

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



Part III

**SOURCES OF INFORMATION**

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

### EURES mobility portal

<http://ec.europa.eu/eures>

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

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### Information on the free movement of workers

<http://ec.europa.eu/social> => Select “English” => Going to another country? => Working in another EU country

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

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

<http://ec.europa.eu/youreurope> and [https://europa.eu/european-union/life-business\\_en](https://europa.eu/european-union/life-business_en)

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

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### Right of residence of citizens of third countries

[http://eur-lex.europa.eu/summary/chapter/justice\\_freedom\\_security/230106.html?root=230106](http://eur-lex.europa.eu/summary/chapter/justice_freedom_security/230106.html?root=230106)

Information on immigration by third-country nationals, entry and stay of highly qualified workers (EU Blue Card) etc.

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### Legal information on EU social security coordination

<http://ec.europa.eu/social> => Select “English” => Going to another country? => Working in another EU country

This website contains important information on the coordination of social security and links to EC Regulations 883/2004, 987/2009, etc.

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### Social security systems in the Member States

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

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

MISSOC publishes comparable tables on social security in 32 countries (the 28 EU Member States plus Iceland, Liechtenstein, Norway and Switzerland) and 12 major areas of protection: financing, healthcare, sickness, maternity, disablement, old age, survivorship, occupational accidents and diseases, family, unemployment, guaranteed minimum income, long-term care.

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## Labour law and the organisation of work

[http://eur-lex.europa.eu/summary/chapter/employment\\_and\\_social\\_policy.html?root\\_default=SUM\\_1\\_CODED%3D17,SUM\\_2\\_CODED%3D1706&locale=en](http://eur-lex.europa.eu/summary/chapter/employment_and_social_policy.html?root_default=SUM_1_CODED%3D17,SUM_2_CODED%3D1706&locale=en)

The European Union has minimum regulations on workers' rights and the organisation of work. These regulations cover mass redundancies, insolvency and company transition, consultation and information of workers, working time, equal treatment and equal pay, and posted workers. The regulations are supplemented by framework agreements between the European social partners.

Important labour law information is available at [www.labourlawnetwork.eu](http://www.labourlawnetwork.eu)

Labour and employment conditions in connection with the posting of workers: [https://europa.eu/youreurope/citizens/work/work-abroad/posted-workers/index\\_en.htm](https://europa.eu/youreurope/citizens/work/work-abroad/posted-workers/index_en.htm)

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## OECD Model Convention

<http://www.oecd.org/tax/treaties/oecd-model-tax-convention-available-products.htm>

The website of the Organisation for Economic Cooperation and Development contains the OECD Model Convention to prevent double taxation plus related supporting information (commentaries etc.) in English and French.

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## "Taxes in Europe" Database

[https://ec.europa.eu/taxation\\_customs/home\\_en](https://ec.europa.eu/taxation_customs/home_en)

The "Taxes in Europe" Database (TEDB) is an online information service of the European Commission that provides information (in English) on the most important taxes in the EU Member States. Access is free of charge. The system contains information on some 650 taxes in all Member States, made available to the Commission by the national authorities. A search engine makes it easy to look for specific information: [http://ec.europa.eu/taxation\\_customs/tedb/taxSearch.html](http://ec.europa.eu/taxation_customs/tedb/taxSearch.html)

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## Education and training

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

The aim of PLOTEUS is to help pupils and students, jobseekers, workers and employees, parents, occupational counsellors and teachers in seeking training and further training opportunities in Europe. Euroguidance promotes mobility by helping educational and occupational counsellors and interested persons to explore the possibilities available to European citizens in Europe. Follow the links under "What are you searching for?" to see how Euroguidance can help you.

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## Recognition of professional qualifications

<http://ec.europa.eu/growth/single-market/services/free-movement-professionals/>

This site contains the European rules governing the recognition of professional qualifications and the directives that apply to certain professions. It also includes explanations of EU legislation on temporary mobility, the automatic recognition of professional qualifications, and the recognition of work experience in certain activities.



The ETUC is the voice of workers and represents 45 million members  
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