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Practical guide

The legislation that applies to workers

in the European Union (EU),
the European Economic Area (EEA)
and in Switzerland

Social Europe

Modernised
EU Social Security Coordination

European Commission

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Introduction

Why do we need this guide?

Article 76 of Regulation 883/2004 requires Member States[1] to communicate with each other and promote the exchange of experience and best administrative practice to facilitate the uniform application of Community law. This principle is underpinned by the principle of exchanging information in an efficient manner between institutions and the obligation of citizens and employers to provide accurate and timely information.

This Guide is intended to provide, at the various practical and administrative levels involved in implementing specific Community provisions, a valid working instrument to assist institutions, employers and citizens in the area of determining which Member State's legislation should apply in given circumstances.

The rules at a glance

The guiding principle is that persons to whom the Regulations apply are subject to the legislation of a single Member State only[2]. In the case of employed and self-employed persons the legislation of the Member State where the activity is carried out usually applies. This principle is referred to as *lex loci laboris*. Persons receiving certain short-term cash benefits based on their employment or self-employment are also subject to the legislation of the Member State of activity. Any other person is subject to the legislation of the Member State of residence.

However, in some very specific situations, criteria other than the actual place of employment are justified. Such situations include the posting of workers to another Member State for a temporary period and where a person is working in two or more Member States and certain categories of workers such as civil servants.

The rules for determining which Member State's legislation is to apply are set out in Articles 11 – 16 of Regulation 883/2004[3] and the related implementing provisions are set out in Articles 14 - 21 of Regulation 987/2009[4] (hereinafter referred to as the Regulations). These rules are also interpreted by the Administrative Commission for the Coordination of Social Security Systems (hereinafter called the Administrative Commission) in Decision No A2.

This Guide is divided into two parts:

- Part I dealing with Posting of workers
- Part II dealing with the pursuit of an activity in two or more Member States

[1] In the following text, the term "Member State" also refers to the EFTA Member States as soon as the Regulation 883/2004 becomes applicable to them.
[2] Article 11 (1) of Regulation 883/2004
[3] Regulation (EC) No 883/2004 of the EP and of the Council of 29 April 2004 on the coordination of social security systems OJ L 166, 30.4.2004, corrigendum OJ L 200, 7.6.2004, amended by Regulation (EC) No 988/2009 OJ L 284, 30.10.2009
[4] Regulation (EC) No 987/2009 of the EP and of the Council of 16 September 2009 laying down the procedure or implementing Regulation 883/2004, OJ L 284, 30.10.2009

Part I: Posting of workers

1. Which social security system is applicable for employees temporarily posted to another Member State?

Sometimes an employer in one Member State ("the posting State") will want to send an employee to work in another Member State ("the State of employment")[5]. Such employees are known as *posted workers*.

Under Community rules, workers moving within the European Union must be subject to a single social security legislation[6]. Under the Regulations the social security scheme applicable to those who for reasons of work move from one Member State to another is, generally speaking, that established by the legislation of the Member State of new employment.

In order to give as much encouragement as possible to the freedom of movement of workers and services, to avoid unnecessary and costly administrative and other complications which would not be in the interests of workers, companies and administrations, the Community provisions in force allow for certain exceptions to the general principle referred to above.

The main exception is the requirement to maintain the attachment of a worker to the social security scheme of the Member State in which the undertaking which employs him normally operates (the posting State), whenever the worker concerned is sent by that undertaking to another Member State (the State of employment) for a period of time which from the outset is limited (a maximum of 24 months), and provided that certain conditions, discussed below in more detail, continue to apply.

These situations – which give exemption from the payment of insurance contributions in the State of employment – better known as **posting of workers,** are governed by Article 12 of Regulation 883/2004.

The rules, which cover both employed people and self-employed people, are described below.

2. How is the posting of workers defined in the specific community legislation?

In line with the above mentioned provisions of the Regulation, a person who works as an employed person in the territory of a Member State on behalf of an employer **which normally carries out its activities in that State** who is sent by that employer to another Member State to perform work there **for that employer** continues to be subject to the legislation of the posting State provided that:

the anticipated duration of that work does not exceed 24 months
and
- **s/he is not sent to replace another posted person.**

The posting arrangements are intended to facilitate employers (and workers) who have a requirement for people to work on a temporary basis in another country. Accordingly, they may not be used to staff enterprises or contracts on an ongoing

[5] " The State of employment" is the State in which the person goes to pursue an activity as an employed (or self-employed) person as defined in Article 1(a) and 1(b) of the Basic Regulation.
[6] (Article 11 (1) of Regulation 883/2004

basis through repeated postings of different workers to the same positions and for the same purposes.
Accordingly, in addition to the temporary nature of the posting and the fact that it is not designed to replace another worker, there are several important points to note about this special rule.

In the first instance, the employer must **normally carry out its activities** in the posting State. Additionally, the rule that the worker 'pursues an activity on behalf of an employer' means that there must exist throughout the period of posting a **direct relationship** between the posting employer and the posted worker.

3. What criteria apply to determine if an employer normally carries out its activities in the 'posting' state?

The expression "which normally carries out its activities there" means an undertaking which ordinarily carries out **substantial activities** in the territory of the Member State in which it is established. If the undertaking's activities are confined to internal management, the undertaking will not be regarded as normally carrying out its activities in that Member State. In determining whether an undertaking carries out substantial activities, account must be taken of all criteria characterising the activities carried out by the undertaking in question. The criteria must be suited to the specific characteristics of each undertaking and the real nature of the activities carried out.

The existence of substantial activities in the posting State can be checked via a series of objective factors and the following are of particular importance. **It should be noted that this is not an exhaustive list, as the criteria should be adapted to each specific case and take account of the nature of the activities carried out by the undertaking in the State in which it is established. It may also be necessary to take into account other criteria suited to the specific characteristics of the undertaking and the real nature of the activities of the undertaking in the State in which it is established:**

- the place where the posting undertaking has its registered office and its administration;
- the number of administrative staff of the posting undertaking present in the posting State and in the State of employment – the presence of only administrative staff in the posting State rules out *per se* the applicability to the undertaking of the provisions governing posting;
- the place of recruitment of the posted worker;
- the place where the majority of contracts with clients are concluded
- the law applicable to the contracts signed by the posting undertaking with its clients and with its workers;
- the number of contracts executed in the posting State and the State of employment;
- the turnover achieved by the posting undertaking in the posting State and in the State of employment during an appropriate typical period (e.g. turnover of approximately 25% of total turnover in the posting State could be a sufficient indicator, but cases where turnover is under 25% would warrant greater scrutiny)[7].
- the length of time an undertaking is established in the posting Member State.

[7] In principle, the turnover can be assessed on the basis of the published accounts of the undertaking for the previous 12 months. However, in the case of a newly established undertaking turnover from the time they commenced business (or a shorter period, if that would be more representative of their business) would be more appropriate.

When assessing substantial activity in the Posting State it is also necessary for institutions to check that the employer requesting a posting is the actual employer of the workers involved. This would be particularly important in situations where an employer is using a mix of permanent staff and agency staff.

Example:

> Company A from Member State X has an order to do painting work in Member State Y. The work is expected to take two months. Along with seven members of its permanent staff company A needs in addition three temporary workers from temporary work agency B to be sent to Member State Y; these temporary workers have already been working in company A. Company A requests work agency B to post these three temporary workers to Member State Y along with its seven workers.
>
> Provided that all the other conditions of posting are met, the legislation of Member State X will continue to apply to the temporary agency workers – as to the permanent staff members. Temporary work agency B is, of course, the employer of the temporary workers.

4. When is it possible to speak of a direct relationship between the posting undertaking and the posted worker?

A number of principles emerge from the interpretation of the provisions and from Community case law and daily practice governing when a **direct relationship** exists between the posting undertaking and the posted worker. These include the following:

- responsibility for recruitment;
- it must be evident that the contract was and still is applicable throughout the posting period to the parties involved in drawing it up and stems from the negotiations that led to recruitment;
- the power to terminate the contract of employment (dismissal) must remain exclusively with the 'posting' undertaking;
- the 'posting' undertaking must retain the power to determine the "nature" of the work performed by the posted worker, not in terms of defining the details of the type of work to be performed and the way it is to be performed, but in the more general terms of determining the end product of that work or the basic service to be provided;
- the obligation with regard to the remuneration of the worker rests with the undertaking which concluded the employment contract. This is without prejudice to any possible agreements between the employer in the posting State and the undertaking in the State of employment on the manner by which the actual payments are made to the employee;
- the power to impose disciplinary action on the employee remains with the posting undertaking.

Some examples:

a) Company A based in Member State A sends a worker temporarily abroad to perform work in company B situated in Member State B. The worker continues to hold a contract with company A only from which he is entitled to claim remuneration.

Solution: Company A is the employer of the posted worker since the worker's claim for remuneration is directed at company A only. This is

true even if company B refunds the remuneration in part or in full to company A deducting it as operating expenses from tax in Member State B.

b) Company A based in Member State A sends a worker temporarily abroad to perform work in company B situated in Member State B. The worker continues to have a contract with company A. His corresponding claims to remuneration are also directed at undertaking A. However, the worker concludes an additional work contract with company B and receives also remuneration from company B.

Solution a): For the duration of his employment in Member State B the worker has two employers. When he works exclusively in Member State B, the legislation of Member State B applies to him pursuant to Article 11 (3) (a) of Regulation 883/2004. This implies that the remuneration paid by company A is taken into account for determining the social insurance contributions payable in Member State B.

Solution b): If from time to time the worker works also in Member State A, the provisions of Article 13 (1) of Regulation 883/2004 must be used to assess whether the legislation of Member State A or that of Member State B is applicable.

c) Company A based in Member State A sends a worker temporarily abroad to perform work in company B situated in Member State B. The employment contract with company A is suspended for the period of the worker's activity in Member State B. The worker concludes an employment contract with company B for the period of his activity in Member State B and claims his remuneration from that company. Solution: This is not a case of posting since a suspended employment relationship does not contain sufficient labour law ties to warrant the continued application of the legislation of the posting State. Pursuant to Article 11 (3) (a) of Regulation 883/2004 the worker is subject to the legislation of Member State B.

If the social security legislation of Member State B applies in principle, an exception may be agreed in both cases (examples 2 and 3) in accordance with Article 16 of Regulation (EC) No. 833/2004 taking account of the fact that the employment in Member State B is of a temporary nature, provided that such an exception is in the interest of the worker and an application to this effect is made. Such an agreement requires the approval of both of the Member States involved.

5. What about workers recruited in one Member State for posting in another?

The rules on posting of workers can include a person who is recruited with a view to be posted to another Member State. However, the Regulations do require that a person being posted to another Member State is attached to the social insurance system of the Member State in which his employer is established immediately before the start of his employment[8]. A period of at least **one month** can be considered as meeting this requirement, with shorter periods requiring a case by case evaluation taking account of all the factors involved[9]. Employment with any employer in the

[8] Article 14 (1) of Regulation (EC) No 987/2009
[9] Administrative Commission Decision A2

posting State meets this requirement. It is not necessary that during this period the person worked for the employer requesting his posting. The condition is also fulfilled by students or pensioners or someone who is insured due to residence and attached to the social security scheme of the posting State.

All the normal conditions that apply to the posting of workers in general, also apply to such workers.

Some examples to clarify what the term attachment to the social security scheme "immediately before" the start of the employment means in particular cases:

a) On 1 June, employer A based in Member State A posts among others workers X, Y and Z to Member State B for a period of ten months to perform work on behalf of employer A.

b) Worker X started his employment with employer A on 1 June. Immediately before the start of his employment he had been living in Member State A being subject to the legislation of Member State A since he attended a course at university.

c) Worker Y started his employment with employer A also on 1 June. He had lived in Member State A immediately before the start of his employment; he was a frontier worker and as such had been subject to the legislation of Member State C.

d) Worker Z who also started his employment with employer A on 1 June had worked in Member State A since 1 May. As a result of this employment he was subject to the legislation of Member State A. However, immediately before 1 May worker Z had been subject to the legislation of Member State B for ten years as a result of an employment relationship.

Solution: One of the requirements for the continued application of the legislation of the posting State is that the social security legislation of the posting State must have applied to the worker immediately before his posting. But it is not required that the worker was employed in the posting undertaking immediately before his posting. Workers X and Z were subject to the legislation of Member State A immediately before 1 June and hence meet the requirement for the continued application of the legislation of the posting State in this respect. Worker Y, however, was subject to the legislation of Member State C immediately before 1 June. Since he was not subject to the legislation of the posting State immediately before his posting, he will in principle be subject to the legislation of Member State B, in which he actually works.

6. What if a worker is posted to work in several undertakings?

The fact that a posted person works at various times or during the same period in several undertakings in the same Member State of employment does not rule out the application of the provisions governing posting. The essential and decisive element in this case is that the work must continue to be carried out on behalf of the posting undertaking. Consequently, it is necessary always to check the existence and continuation throughout the posting period of the direct relationship between the posted worker and the posting undertaking

Posting to different Member States which immediately follow each other shall in each case give rise to a new posting within the meaning of Article 12 (1). The posting provisions do not apply in cases where a person is normally simultaneously employed in different Member States. Such arrangements would fall to be considered under the provisions of Article 13 of the basic Regulation.

7. Are there situations in which it is absolutely impossible to apply the provisions on posting?

There are a number of situations in which the Community rules *a priori* rule out the application of the provisions on posting.

In particular, when:

- the undertaking to which the worker has been posted places him/her at the disposal of another undertaking in the Member State in which it is situated;
- the undertaking to which the worker is posted places him/her at the disposal of an undertaking situated in another Member State;
- the worker is recruited in a Member State in order to be sent by an undertaking situated in a second Member State to an undertaking in a third Member State without the requirements of prior attachment to the social security system of the posting State being satisfied;
- the worker is recruited in one Member State by an undertaking situated in a second Member State in order to work in the first Member State;
- the worker is being posted to replace another posted person;
- the worker has concluded a labour contract with the undertaking to which he is posted.

In such cases the reasons which prompted stringent exclusion of the applicability of posting are clear: the complexity of the relations stemming from some of these situations, as well as offering no guarantee as to the existence of a **direct relationship** between the worker and the posting undertaking, contrasts starkly with the objective of avoiding administrative complications and fragmentation of the existing insurance history which is the *raison d'être* of the provisions governing posting. It is also necessary to prevent wrongful use of the posting provisions.

In exceptional circumstances it would be possible to replace a person who has already been posted, provided the period allowed for the posting has not been completed. An example where this might arise would be a situation where a worker was posted for 20 months, became seriously ill after 10 months and needed to be replaced. In that situation it would be reasonable to allow another person to be posted for the remaining 10 months of the agreed period.

8. What about self-employed people temporarily working in another Member State?

Sometimes a person who is normally self-employed in one Member State ("the posting State") will want to go to work temporarily in another Member State ("the State of employment").

Like posted employees, it would cause administrative difficulties and confusion if a self-employed person temporarily working in another Member State became subject to the legislation of the State of employment. Also, the self-employed person might lose out on benefit.

The Regulations therefore provide a special rule for self-employed persons working temporarily in another Member State which resembles - but is not identical to - the rule for posted employees.

This rule provides that a person **normally self-employed in the posting Member State** who pursues a **similar** activity in the Member State of employment continues to be subject to the legislation of the posting State provided that the anticipated duration of that work does not exceed 24 months[10].

9. What criteria apply to determine if a person is normally self-employed in the posting state?

The Regulations provide that a person "who normally pursues an activity as a self-employed person" means a person who habitually carries out substantial activities in the territory of the Member State in which he/she is established. In particular this applies to a person who

- has pursued his/her self-employed activity for some time before the date when he/she moves to another Member State, and
- fulfils any necessary requirements for his/her business in the Member State in which he/she is established and continues to maintain there the means to enable him/her to exercise his/her activity on his/her return.

When determining whether a person is normally self-employed in the posting Member State it is important to examine the above criteria. Such examination could involve assessing if the person;

- keeps an office in the posting State;
- pays taxes in the posting State;
- maintains a VAT number in the posting State;
- is registered with chambers of commerce or professional bodies in the posting State;
- has a professional card in the posting State.

The Regulations require that a self-employed person wishing to avail of the posting arrangements "must have already pursued his activity for some time" before the date of posting. In this regard a period of two months can be considered as satisfying this requirement, with shorter periods requiring a case by case evaluation[11].

10. What does 'similar' activity mean?

When determining whether a person is going to another Member State to pursue a "similar" activity to that pursued in the posting State, account must be taken of the actual nature of the activity. It does not matter how this type of activity is categorised in the State of employment i.e. whether it is designated as employment or self-employment.

In order to determine if the work is "similar", the work which the person sets out to perform must be determined in advance, before departure from the posting State.

[10] Article 12.2 of Regulation 883/2004
[11] Administrative Commission Decision A2

The self-employed person should be able to prove this, for example by producing contracts regarding the work.

In general, self employed activity in the same sector would be regarded as pursuing a similar activity. However, it must be recognised that even within sectors, work can be very diverse and it may not always be possible to apply this general rule.

Examples:

a) A is a person who normally works as a self employed carpenter in State X and moves to State Y where he works as a self-employed butcher. He would not be regarded as pursuing a "similar activity" as the employment in State Y bears no similarity to his work in State X.

B runs a construction company in State X and accepts commissions relating to the installation of piping and wiring systems. B signed a contract in the State Y for the works consisting in installing the wiring system and repairing the foundation.

b) B may take advantage of the provisions of Article 12(2) because he/she is intending to move to the State Y to take up a similar activity, that is, an activity within the same sector (construction).

c) C pursues activities as a self-employed person in the State X which consists in providing transport services. C temporarily moves to the State Y to perform a contract installing the wiring system and repairing the foundation. Due to the fact that the activity performed in the State Y differs from the activity pursued in the State X (different sectors: X – transport, Y – construction), C cannot take advantage of the provisions of Article 12(2) of the basic Regulation.

d) D is a self-employed solicitor specialising in criminal law in State X. He secures an assignment in State Y advising a large undertaking on corporate governance. While the area he is working in is different, nevertheless, he is still active in the legal area and so can avail of the posting provisions.

11. What procedures must be followed in the case of a posting?

An undertaking which posts a worker to another Member State, or in the case of a self-employed person the person himself/herself, must contact the competent institution in the posting State and wherever possible this should be done in advance of the posting.

The competent institution in the posting State shall without delay make information available to the institution in the State of employment on the legislation that is to apply. The competent institution in the posting State must also inform the person concerned, and his/her employer in the case of an employed person, of the conditions under which they may continue to be subject to its legislation and the possibility of checks being made throughout the posting period to ensure these conditions are met.

An employee or self-employed person to be posted to another Member State or his employer shall be provided with an attestation A1 (formerly E 101 certificate) from the competent institution. This attestation certifies that the worker comes within the special rule for posted workers up to a specific date. It should also indicate, where

appropriate, under what conditions the worker comes within the special rules for posted workers.

12. Agreements on exceptions to the legislation governing posting

The Regulations provide that a posting period may not last any longer than 24 months.

However, Article 16 of Regulation 883/2004 permits the competent authorities of two or more Member States to reach agreements providing for exceptions to the rules governing applicable legislation, and that includes the *special rules* governing posting already outlined above. Article 16 agreements require the consent of the institutions of both the Member States involved and can only be used in the interests of a person or category of persons. Accordingly, while administrative convenience may well result from agreements between Member States, the achievement of this cannot be the sole motivating factor in such agreements, the interests of the person or persons concerned must be the primary focus in any considerations.

For example, if it is known that the anticipated duration of a posting for a worker will extend beyond 24 months, an Article 16 agreement must be reached between the posting State and State/s of employment if a worker is to remain subject to the legislation applicable of the posting State. Article 16 agreements might also be used to permit a posting retrospectively where this is in the interest of the worker concerned, e.g. where the wrong Member State's legislation was applied. However, retrospection should only be used in very exceptional cases.

When it can be foreseen (or becomes clear after the posting period has already commenced) that the activity will take more than 24 months, the employer or the person concerned shall submit, without delay, a request to the competent authority in the Member State whose legislation the person concerned wishes to apply to him/her. This request should be sent wherever possible in advance. If a request for an extension of the posting period beyond 24 months is not submitted or if, having submitted a request, the States concerned do not make an agreement under Article 16 of the Regulations to extend the application of the legislation of the posting State, the legislation of the Member State where the person is actually working will become applicable as soon as the posting period ended.

13. Once a posting has been completed when can a person apply for another posting?

Once a worker has ended a period of posting, no fresh period of posting for the same worker, the same undertakings and the same Member State can be authorized until at least two months have elapsed from the date of expiry of the previous posting period. Derogation from this principle is, however, permissible in specific circumstances[12].

On the other hand, if the posted worker could not complete the work due to unforeseen circumstances, he, or his employer, may request an extension of the initial posting period until the completion of such work (up to 24 months in total) without taking into account the necessary break of at least two months. Such request must be submitted and substantiated before the end of the initial posting period.

[12] See also Administrative Commission Decision A2

Examples:

a) Worker A is posted from Member State A to Member State B for 12 months. During that period he falls seriously ill for three months and cannot pursue and complete the anticipated work in Member State B. Because he could not complete the work due to unforeseen circumstances, he, or his employer, can request a three month extension of the initial posting period continuing immediately after the original 12 months have elapsed.

b) Worker B is posted from Member State A to Member State B for 24 months in order to perform construction work there. During that period it becomes evident that, because of difficulties with the project, the work cannot be completed by the end of the 24 months. Even though worker B is unable to complete the work due to unforeseen circumstances, an extension of the initial posting period continuing immediately after the 24 months have elapsed cannot be granted by the posting State. The only way in which this can be dealt with is if the institutions concerned conclude an Article 16 agreement (see point 12). In the absence of such an agreement the posting will finish after 24 months.

14. What is the position in relation to postings already authorised and started under regulation 1408/71? Do these periods count towards the 24 months period allowed under regulation 883/2004?

Regulation 883/2004 does not contain any explicit provision on aggregation of posting periods completed under the old and new Regulations. However, the clear intention of the legislator was to extend the maximum possible period of posting to 24 months.
Therefore, under the new Regulations, once the worker has ended a posting period of 24 months in total, no fresh period of posting for the same worker, the same undertakings and the same Member State can be granted (except in the context of an Article 16 agreement)[13].
The following examples illustrate how periods completed under both Regulations should be treated.

a) Posting E 101 form issued from 1.5.2009 until 30.4.2010 → continued posting under Regulation 883/2004 until 30.4.2011 possible.

b) Posting E 101 form issued from 1.3.2010 until 28.2.2011 → continued posting under Reg. 883/2004 until 28.2.2012 possible.

c) Posting E 101 form issued from 1.5.2008 until 30.4.2009 + E 102 form from 1.5.2009 until 30.4.2010 → no continued posting possible under Reg. 883/2004 as the maximum posting period of 24 months is already completed.

d) Posting E 101 form issued from 1.3.2009 until 28.2.2010 + E 102 from 1.3.2010 until 28.2.2011 → no further extension possible under Reg. 883/2004 as the maximum posting period of 24 months has already been completed.

[13] See also Administrative Commission Decision A3

e) Request for a posting on 1.4.2010 until 31.3.2012. This period cannot fall under the posting provisions of Reg. 1408/71 because it is longer than 12 months. An Article 17 agreement is therefore necessary.

15. Suspension or interruption of the posting period

Suspension of work during the posting period, whatever the reason (holidays, illness, training at the posting undertaking etc.) does not constitute a reason which would justify an extension of the posting period for an equivalent period. Therefore the posting will end precisely upon expiry of the programmed period, irrespective of the number and duration of events which prompted the suspension of activity.

Derogation from this principle is, however, permissible according to Decision No A2 in specific circumstances if the posting period does not exceed 24 months in total (see point 13).

In case of sickness of 1 month a posting period which was initially programmed to take 24 months cannot be extended to 25 months from the beginning of the posting.

In case of longer suspension of work it is up to the persons concerned either to stick to the previously programmed period of posting or to end the posting with a view to arranging a new posting by the same person, taking into account the necessary break of at least two months as mentioned under point 13, or another person if the relevant criteria are met.

16. Notification of changes occurring during the posting period

The posted worker and his employer must inform the authorities in the posting State of any change occurring during the posting period, in particular:

- if the posting applied for has, in the end, not taken place or was terminated ahead of schedule.
- if the activity is interrupted other than in the case of brief interruptions arising from illness, holidays, training etc. (see under point 13 and 15)
- if the posted worker has been assigned by his employer to another undertaking in the posting State, in particular in the event of a merger or a transfer of undertaking.

The competent institution in the posting State should, where appropriate and upon request, inform the authorities in the State of employment in the event of any of the above occurring.

17. Provision of information and monitoring of compliance

In order to ensure proper use of the posting rules, the competent institutions in the Member State to whose legislation the workers remain subject, must ensure that appropriate information is made available to both employers and posted workers of the conditions which apply to the posting (e.g. via information leaflets, websites), alerting them to the possibility that they may be subject to direct controls designed to check that the conditions which permitted the posting continue to exist.

While providing undertakings and workers with every guarantee to avoid obstacles to the freedom of movement of workers and the free provision of services, the competent institutions of the posting and the employment States, individually or in cooperation, shall take responsibility for all initiatives designed to check the existence and the continuation of the conditions which characterize the specific nature of posting (direct relationship, substantial activities, similar activity, maintenance in the State of residence of the means to pursue self-employed activity etc.).

The procedures to be followed where competent authorities disagree on the validity of posting arrangements, or the appropriate legislation which should be applied in particular cases, are set out in Decision A1 of the Administrative Commission.

Part II: Pursuit of activity in two or more Member States[14]

1. Which social security system is applicable to persons normally working in two or more member states?

There is a special rule for persons normally working in two or more Member States[15]. This rule is designed, as are all the rules for determining applicable legislation, to ensure that the social security legislation of only one Member State is applicable. Accordingly, the Regulations provide that a person normally working in two or more Member States is subject to:

(i) the legislation of the **Member State of residence**[16] if he works for one employer[17] in different Member States and pursues a **substantial part of his activity**[18] in the Member State of residence;

Example:

Mr. X lives in Spain. His employer is established in Portugal. X works two days a week in Spain and three days in Portugal. As X works two out of five days in Spain, he performs a 'substantial part' of his activity there. The Spanish legislation is applicable.

(ii) the legislation of the **Member State of residence** if he is employed by **various undertakings** or **various employers** whose registered offices or places of business are in **different Member States**;

Example:

Mr. Y lives in Hungary. Y has two employers, one in Hungary and one in Romania. He works one day a week in Hungary. The other four days, he works in Romania.
As Y is working for various employers established in different Member States, Hungary, as Member State of residence, is the competent Member State.

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

Example:

Mrs. Z is employed by an undertaking in Greece. She works one day at home in Bulgaria and the rest of the time, she works in Greece. As one day a week amounts to 20% of the activity, Z is not performing a 'substantial part' of her activity in Bulgaria. The Greek legislation will apply.

[14] Article 13 of Regulation 883/2004
[15] In the following text, the term "Member State" will also refer to the EEA Member States and Switzerland as soon as Regulation 883/2004 becomes applicable to them: Regulation 1408/71 remains applicable as a whole in relations between EU Member States and the EEA countries and Switzerland, as long as the relevant agreements listed in Article 90 of Regulation 883/2004 have not been modified.
[16] Article 1(j) of Regulation 883/2004 defines residence as the place where a person habitually resides. The elements for determining residence are contained in Article 11 of Regulation 987/2009
[17] Or for various undertakings or various employers whose registered offices or places of business are all situated in one Member State.
[18] See Section 3 for the definition of "substantial activity".

(iv) If a person pursues his activity as an employed person in two or more Member States on behalf of an employer established outside of the territory of the European Union, and if the person resides in a Member State without pursuing substantial activity there, s/he shall be subject to the legislation of the Member State of residence.

Example:

Ms. P is living in Belgium. Her employer's undertaking is established in the United States. P usually works half a day per week in Italy and three days a week in France. P also works one day a month in the United States. For the occupational activities in Italy and France, the Belgian legislation is applicable according to Article 14 (11) of Regulation 987/2009.

These rules are similar in nature to those contained in Article 14 of Regulation 1408/71 but are simplified. In particular, the revised rules remove the special provisions of Regulation 1408/71 relating to travelling or flying personnel and introduce the concept of 'a substantial part of the activity'.

These rules therefore apply to a large number of workers, including self-employed persons (see Section 9). For example, airline staff, international truck drivers, train drivers, international couriers, computer experts and other professionals who work, for example, for 2 days in one Member State and 3 days in another Member State, are all covered by these rules.

If the residence of a person working in more than one Member State and the registered office or place of business of that person's employer are situated in the same Member State, then the legislation of this Member State will always be applicable. In this case, it is not necessary to determine whether or not a substantial part of the activity is performed in the Member State of residence.

Under Article 11 (2) of Regulation 883/2004, persons receiving cash benefits because of or as a consequence of their activity as an employed or self-employed person[19] shall be considered to be pursuing the said activity. A person who simultaneously receives a short-term benefit from one Member State and pursues an activity in another Member State shall therefore be considered to pursue two activities in two different Member States, to which the rules of Article 13 apply. If the benefit paid in the Member State of residence derives from "a substantial part" of the person's activities, then the person will be subject to the legislation in the Member State of residence.

However, the Member States agreed that persons receiving unemployment benefit in their Member State of residence and simultaneously pursuing part-time professional or trade activity in another Member State should be subject exclusively to the legislation of the former State as regards both the payment of contributions and the granting of benefits,[20] and recommended that agreements providing for this solution should be concluded under Article 16 (1) of Regulation 883/2004.

In the situation where a person simultaneously receives a long-term benefit[21] from one Member State and pursues an activity in another Member State, this shall not be

[19] Like for example sickness benefits in cash or unemployment benefits.
[20] For further details please see the Administrative Commission's Recommendation No U1 of 12.6.2009, OJ C 106 of 24.4.2010.
[21] Invalidity, old-age or survivors' pensions, pensions received in respect of accidents at work or occupational diseases, or sickness benefits in cash covering treatment for an unlimited period.

regarded as pursuing activities in two or more Member States and the applicable legislation shall be determined according to the rules of Article 11 (3) of Regulation 883/2004.

2. When can a person be regarded as normally pursuing an activity in two or more member states?[22]

The Regulations provide that a person who 'normally pursues an activity as an employed person in two or more Member States' signifies a person who:

(a) while maintaining an activity in one Member State, simultaneously exercises a separate activity in one or more other Member States, irrespective of the duration or nature of that separate activity;

(b) continuously pursues alternating activities, with the exception of marginal activities, in two or more Member States, irrespective of the frequency or regularity of the alternation.

The provision was adopted in order to reflect the various cases already dealt with by the Court of Justice of the EU. The intention is to cover all possible cases of multiple activities with a cross-border element and to distinguish activities for one employer from activities for two or more employers who have their registered offices or places of business in the territory of different Member States.

The first situation (letter (a)) covers the cases where additional employments in different Member States are carried out simultaneously because more than one employment contract is in force at the same time. The second or additional activity could be exercised during paid leave, during the weekend, or in the case of part-time work, two different activities for two different employers may be undertaken on the same day. For example, a shop assistant in one Member State would still be covered by this provision if s/he worked as an employed taxi driver during the weekends in another Member State.

The second situation (letter (b)) covers persons with only one employment contract, who normally carry out activities for their employer in the territories of more than one Member State. It is not relevant how often this alternation takes place. Nevertheless to avoid possible manipulation of the applicable legislation, marginal activities shall be excluded. This helps to avoid misuse if, for instance, an employer employs a person only in one Member State, but to ensure the application of the legislation of another Member State via Article 13 of Regulation 883/2004, obliges the person concerned to also work for a very short period in another Member State. In such cases, the marginal activity shall not be taken into account when determining the applicable legislation.

Activities of a marginal extent are activities that are permanent but insignificant in terms of time and economic return. It is suggested that, as an indicator, activities accounting for less than 5% of the worker's regular working time[23] and/or less than 5% of his overall remuneration should be regarded as marginal activity. Also the nature of the activities, such as activities that are of a supporting nature, that lack independence, that are performed from home or in the service of the main activity,

[22] Article 14 (5) of Regulation 987/2009.

[23] According to Directive 2003/88/EC concerning certain aspects of the organisation of working time "Working time shall mean any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice. In that context, on-call time where the worker is required to be physically present at a place specified by his employer, shall be regarded as wholly working time, irrespective of the fact that, during periods of on-call time, the person concerned is not continuously carrying on any professional activity."

can be an indicator that they concern marginal undertakings. A person who pursues "activities of a marginal extent" in one Member State and also works for the same employer in another Member State, can not be regarded as normally pursuing an activity in two or more Member States and is therefore not covered by Article 13 (1) of Regulation 883/2004. In such a case, the person is treated, **for the purpose of determining the applicable legislation**, as having an activity in one Member State only. If the marginal activity generates social security affiliation, then the contributions shall be paid in the competent Member State for the overall income from all activities.

What is not explicitly mentioned is the situation of a person who is pursuing several different activities but only one at a given time, and it is clear that these activities are only very short alternating undertakings carried out on a regular basis. For example, a singer has a long contract in his/her Member State of residence and during the summer season s/he has a short contract with an opera-house in another Member State. After the short contract, s/he will undertake a new contract with an opera-house in the Member State of residence. If it is accepted that s/he will customarily exercise such short activities abroad and afterwards again pursue an activity in the Member State of residence – such cases can also be regarded as an activity in more than one Member State and the applicable legislation shall be determined following the rules of Article 13 of Regulation 883/2004 in conjunction with Article 14 (10) of Regulation 987/2009.

For the **distinction between multiple activities and posting**, the duration and nature of the activity in one or more Member States shall be decisive (whether it is permanent or of an ad hoc or temporary nature[24]).

3. How is substantial activity defined?[25]

A '**substantial part of employed activity**' pursued in a Member State means that a quantitatively substantial part of all the activities of the worker is pursued there, without this necessarily being the major part of those activities.

For the purposes of determining whether a substantial part of the activity of an employed person is pursued in a Member State, the following indicative criteria shall be taken into consideration:

- the working time[26]; and/or
- the remuneration

If in the context of carrying out an overall assessment it emerges that at least 25% of the person's working time is carried out in the Member State of residence and/or at least 25% of the person's remuneration is earned in the Member State of residence this shall be an **indicator** that a **substantial part of all the activities of the worker is pursued** in that Member State.

While it is obligatory to take account of working time and/or remuneration, this is not an exhaustive list and other criteria may also be taken into account. It is for the designated institutions to take into account all relevant criteria and to undertake an overall assessment of the person's situation before deciding on the applicable legislation.

[24] Article 14 (7) of Regulation 987/2009
[25] Article 14 (8) of Regulation 987/2009
[26] See footnote No 23

In addition to the above criteria, when determining which Member State's legislation is to apply, the assumed future situation in the following 12 calendar months **must** also be taken into account[27]. However, past performance is also a reliable measure of future behaviour and thus when it is not possible to base a decision on planned work patterns or duty rosters, it would be reasonable to look at the situation over the previous 12 months and to use this for assessing substantial activity. Where a company has only been recently established, then the assessment can be based on a suitable shorter period of time.

So, for example:

> Mr. X is a computer consultant. He works in Austria and Belgium for a company based in Belgium. He lives in Austria where a substantial part of his activity is carried out, i.e. at least 25% of his work is carried out there and/or 25% of his remuneration derives from there. Since he resides in Austria and satisfies the requirement that a substantial part of his activity is carried out in Austria, that State's legislation is applicable. See Section 1 (i) above. If, on the other hand less than 25% of his work (or remuneration earned) was in Austria, the legislation of the Member State where the company has its registered office or place of business would be applicable.
>
> Ms. Y is a lawyer. She works in Austria for a law firm whose place of business is in Austria, and she works in Slovakia for another law firm whose place of business is in Slovakia. She lives in Hungary. The Hungarian legislation is applicable. See Section 1 (ii) above.
>
> Ms. Z is a lawyer. She works for two different law firms, one in Italy and one in Slovenia, which is also the State in which she lives. Most of her activity is in Italy and she does not satisfy the substantial activity requirement in her State of residence. Nevertheless, the legislation of the State of residence applies because she is employed by different enterprises whose places of business are in different Member States. See Section 1 (ii) above.
>
> Mr. P is a pilot. He works for a company whose registered office is in France and from where he receives his remuneration. He resides in Spain but a substantial part of his activity is not pursued there. The French legislation applies. See Section 1 (iii) above.
>
> Mr. T is employed by a company whose registered office is in the Netherlands. Mr. T has never worked in the Netherlands. The company provides truck drivers to various international transport companies. The employee does not work in the Netherlands nor in Poland where he resides. As he does not pursue any part of his activity in the Member State of residence, the legislation of the Netherlands applies.

4. Substantial activity and international transport workers

As already indicated, the specific rules applicable to international transport workers contained in Regulation 1408/71 have not been carried forward to the new

[27] Article 14 (10) of Regulation 987/2009

regulations. Accordingly, the same general provisions which apply to persons working in two or more Member States also apply to international transport workers. This section of the guide is intended to provide assistance in dealing with the particular working arrangements which apply in the international transport sector. However, where it is clear from an initial assessment that a worker is substantially employed in their State of residence, there should be no need for institutions to apply the special criteria suggested in the following paragraphs.

In **assessing the "substantial part of the activity"** for this group of workers it is considered that working time is the most appropriate criterion on which to base a decision. However, it is also recognised that dividing activity between two or more Member States may not always be as straightforward for a transport worker as for those in "standard" employment. Accordingly, a closer examination of the working arrangements may be needed in order to determine the applicable legislation in such cases when the working hours in the Member State of residence are difficult to estimate.

Some transport workers have set work patterns, routes to be travelled and estimated journey times. A person seeking a decision on applicable legislation should make a reasonable case (e.g. by providing duty rosters or travel calendars or other information) to apportion the activity between time spent working in the State of residence and time spent working in other Member States.

Where the working hours spent in the Member State of residence are not available, or when it is not clear from the circumstances as a whole that a substantial part of the activity is spent in the Member State of residence, then another method other than working hours can be used for determining whether or not a substantial part of the activity is pursued in the Member State of residence. In this regard it is suggested that the activity is broken down into different elements or incidents and a judgement concerning the extent of activity in the state of residence is made on the basis of the number of elements occurring there as a percentage of the total number of incidents in a given period (as outlined in Section 3, the assessment should be based as far as possible on work patterns over a 12 month period)

In the case of road transport, the focus could be on loading and unloading of cargo and the different countries in which this takes place, as illustrated in the following example.

Example 1:

A truck driver lives in Germany and is employed by a Dutch transport company. The worker's activities are mainly in the Netherlands, Belgium, Germany and Austria. In a given period, e.g. a week (let's take a week in this example to keep it simple, but it can be any other time period[28]), he loads the truck 5 times and offloads the truck 5 times. In total there are 10 elements (5 loadings, 5 off loadings). During this week he loads and offloads once in Germany, his state of residence. This amounts to 2 elements which equals 20% of the total and is thus an indication that there is not a substantial part of activity pursued in the State of residence. Therefore Dutch legislation will apply as the Netherlands is the Member State of the employer's registered office.

[28] This timeframe purely serves as an example. It does not prejudge the determination of the 12 month period for this purpose. This is discussed under Section 3.

In the case of airlines, instead of the number of loadings and off loadings, one could make use of the number of take-offs and landings and their locations.

Example 2:

An airline crew member lives in the UK, is employed by an employer whose registered office/place of business is in the Netherlands, and starts and ends shifts at a home base in Amsterdam whereby travel to and from work is not part of working activity. In one day s/he flies a route of Amsterdam – London – Amsterdam – Barcelona – Amsterdam – Rome - Amsterdam. During this day there are 12 elements. 1/6th of the activity (one landing and one take-off) takes place in the UK, which does not constitute a substantial part of activity. Therefore Dutch legislation will apply as the Netherlands is the Member State of the employer's registered office.

Given the broad range of working arrangements that can apply in this sector, it would be impossible to suggest a system of assessment which would suit all circumstances. When assessing substantial activity, the Regulations specifically provide for an assessment of working time and remuneration. However, the Regulations provide for these to be used as indicators in the framework of an overall assessment of a person's situation. Accordingly, it is possible for the designated institutions who are responsible for determining applicable legislation to use measures other than those outlined in the Regulations and this Guide which they consider to be more suited to the particular situations with which they are dealing.

5. Over what period should substantial activity be assessed?

See Point 3. How is substantial activity defined.

6. What should happen when duty rosters or work patterns are subject to change?

It is recognised that working arrangements, e.g. for international transport workers, can be subject to frequent change. It would not be practical, nor in the interests of the worker to review the applicable legislation every time their duty roster changed. Accordingly, once a decision is made on the applicable legislation this should, in principle and provided that the information given by the employer or person concerned was truthful to the best of their knowledge, not be subject to review for a period of at least the following 12 months. This is without prejudice to the right of an institution to review a decision it has made where it considers that such a review is warranted.

The objective is to ensure legal stability and avoid the so-called "yo-yo" effect, especially for highly mobile workers, such as those in the international transport sector.

Therefore:

- The applicable legislation under Article 13 (1) of Regulation 883/2004 shall be determined and in principle remain stable for the following 12 calendar months.

- The assumed future situation for the following 12 calendar months shall be taken into account.
- If there are no indications that the work patterns will change substantially in the following 12 months, the designated institution shall base the overall assessment on the working performance of the past 12 months and use this to project the situation for the following 12 months.
- However if the person concerned is of the opinion that the situation in relation to their work pattern has changed or will change substantially, this person or his/her employer can request a reassessment of the applicable legislation, before the 12 month period expires.
- If there is no past working performance or the employment relationship lasts for less than 12 months, the only possible option is to use the data already available and to ask the persons concerned to provide any relevant information. In practice, this would lead to the use of the work patterns established since the start of the working relationship, or the assumed working activity for the following 12 months.

It should be noted that the arrangements outlined in this section relate only to the work pattern of a worker. If any other significant change occurs in a person's situation over the 12 month period after a decision on applicable legislation has been made, e.g. change of employment or residence, the worker and/or his/her employer are required to notify the designated institution so that the question of applicable legislation can be reviewed.

As has been already indicated, it is of course always open to the designated institution to review a decision on applicable legislation where it considers such a review is warranted. If the information given during the initial process to determine the applicable legislation has not been intentionally wrong then any changes arising from such a review should only take effect from a current date.

7. Determining registered office or place of business

Where a person working in more than one Member State does not pursue a substantial part of his/her activity in the Member State of residence, then the legislation of the Member State where the registered office or place of business of the employer or undertaking *employing* him or her is situated is applicable.

The term "**registered office or place of business**" is not defined in Regulation 883/2004, but there is ample guidance in the case law of the Court of Justice of the European Union and in other EU regulations to assist those making decisions in determining the location of the place of business of an undertaking which employs the person.

As a general principle "brass plate" operations, where the social insurance of the employees is linked to a purely administrative company without having transferred actual decision-making powers, should not be accepted as satisfying the requirements in this area. The following guidelines are designed to assist institutions in assessing applications where they feel they may be dealing with a "brass plate" operation.

In a case related to the area of taxation (*Planzer Luxembourg Sarl* C-73/06), the Court of Justice ruled that the term "business establishment" means the place where the essential decisions concerning the general management of a company are adopted and where the functions of its central administration are carried out. The Court of Justice elaborated on this in the following terms:

> "Determination of a company's place of business requires a series of factors to be taken into consideration, foremost amongst which are its registered office, the place of its central administration, the place where its directors meet and the place, usually identical, where the general policy of that company is determined. Other factors, such as the place of residence of the main directors, the place where general meetings are held, the place where administrative and accounting documents are kept, and the place where the company's financial, and particularly banking, transactions mainly take place, may also need to be taken into account[29]".

The term "registered office or place of business" can differ from sector to sector and can be adjusted according to the area in which it is applied, for example in the operation of air services[30], or in the road transport sector[31].

Having regard to the above, it is clear that in order to be considered as the registered office or place of business of an undertaking, some conditions must be satisfied. It is suggested that the following criteria could be examined by the institution of the place of residence, on the basis of the available information or, in close cooperation with the institution in the Member State where the employer has its registered office or place of business:

- the place where the undertaking has its registered office and its administration;
- the length of time that the undertaking has been established in the Member State;
- the number of administrative staff working in the office in question;
- the place where the majority of contracts with clients are concluded;
- the office which dictates company policy and operational matters;
- the place where the principal financial functions, including banking, are located;
- the place designated under EU regulations as the place responsible for managing and maintaining records in relation to regulatory requirements of the particular industry in which the undertaking is engaged;
- the place where the workers are recruited.

If, having considered the criteria outlined above, institutions are still not in a position to eliminate the possibility that the registered office is a "brass plate" operation, then the person concerned should be made subject to the legislation of the Member State in which the establishment is situated with which he or she has the closest connection in terms of the performance of employed activity. That establishment shall be considered to be the registered office or place of business employing the person concerned for the purposes of the Regulations.

[29] Case C-73/06, Planzer Luxembourg, [2007] Rec.p. I-5655, paragraph 55.
[30] In the case of air services the "principal place of business" is defined in Regulation 1008/2008 as "the head office or registered office of a Community air carrier in the Member State within which the principal financial functions and operational control, including continued airworthiness management, of the Community air carrier are exercised".
[31] In the case of road transport, Regulation 1071/2009 (effective from 4th December 2011) requires amongst other things that undertakings "engaged in the occupation of road transport operator shall have an effective and stable establishment in a Member State". This requires a premise in which documents are located relating to core business, accounting, personnel management, driving time and rest, and any other document to which the competent authority must have access in order to verify compliance with the conditions laid down in Regulation 1071/2009.

In this determination, it should not be forgotten that this establishment actually *employs* the person concerned, and that a direct relationship exists with the person in the sense of Part I.4 of this Guide.

8. What procedures must be followed by a person in the event that s/he is working in two or more member states?

A person normally employed in two or more Member States must notify this situation to the designated institution of the Member State in which s/he resides[32]. An institution in another Member State which receives a notification in error should, without delay, forward such a notification to the designated institution in the person's Member State of residence. Where there is a difference of views between the institutions of two or more Member States on where the person concerned is resident, this should first be resolved between the institutions by using the relevant procedure and SEDs[33] for determining the Member State of residence.

The designated institution in the **Member State of residence** must determine which Member State's legislation is applicable while taking account of the procedures outlined in this Guide. This determination must be made without delay and shall initially be on a provisional basis. The institution in the place of residence must then inform the designated institutions in each of the Member States in which an activity is pursued and where the employer's registered office or place of business is located of its determination using appropriate SEDs. The applicable legislation shall become definitive if it is not contested within two months of the designated institutions being informed of the determination by the designated institution of the Member State of residence.

Where the legislation to be applied has already been agreed between the Member States concerned on the basis of Article 16 (4) of Regulation 987/2009 a definitive decision can be made from the outset. In such circumstances the requirement to issue a provisional decision will not apply.

The competent institution of the Member State whose legislation is determined to be applicable shall without delay inform the person concerned of this fact. The institution can either use a letter or the Portable Document A1 (certificate attesting the applicable legislation[34]). If the competent institution issues a PD A1 for informing the person on the applicable legislation, it can do this either on a provisional or definitive basis. If the institution issues a PD A1 to indicate that the determination is provisional, it must issue a new PD A1 to the person concerned once the determination has become definitive.

An institution can also opt to immediately issue a definitive PD A1 to inform the person concerned. However, if the competence of this Member State is contested and the final competence differs from the initial one as determined by the designated institution of the Member State of residence, then the PD A1 must be immediately withdrawn and replaced by a PD A1 issued by the Member State which has ultimately been determined as competent. More information about the PD A1 can be found in the Guidelines on the use of the Portable Documents[35].

[32] A list of social security institutions in the Member States can be found at http://ec.europa.eu/employment_social/social-security-directory/
[33] SED = structured electronic document. See Article 4 of Regulation 987/2009.
[34] See Article 19 (2) of Regulation 987/2009
[35] See http://ec.europa.eu/social/

A person normally employed in two or more Member States who fails to notify the designated institution of the Member State in which s/he resides of this situation will also be made subject to the procedures of Article 16 of Regulation 987/2009 as soon as the institution in the Member State of residence is made aware of the person's situation.

9. What about self-employed persons who are normally self-employed in two or more Member States?

There is a special rule for persons normally self-employed in two or more Member States which provides that a person normally self-employed in two or more Member States is subject to:

- the legislation of the Member State of residence if s/he pursues a substantial part of his or her activity in that Member State;
- the legislation of the Member State in which the centre of interest of his or her activity is situated if he does not reside in one of the Member States in which he pursues a substantial part of his activity.

The criteria for assessing substantial activity and a person's centre of interest are outlined in Sections 11 and 13.

10. When can a person be regarded as normally pursuing an activity as a self-employed person in two or more Member States?

A person who "normally pursues an activity as a self-employed person in two or more Member States" refers in particular to a person who simultaneously or alternatively exercises one or more separate self-employed activities in the territories of two or more Member States. The nature of the activities does not matter when making this determination. However, marginal and ancillary activities that are insignificant in terms of time and economic return, shall not be taken into account for the determination of the applicable legislation on the basis of Title II of Regulation 883/2004. The activities remain relevant for the application of national social security legislation; if the marginal activity generates social security affiliation, then the contributions shall be paid in the competent Member State for the overall income from all activities.

Care needs to be taken not to confuse temporary postings as provided for under Article 12 (2) of Regulation 883/2004 and the provisions relating to someone who pursues an activity in two or more Member States. In the former, the person is performing an activity in another Member State for a finite period. In the latter, activities in different Member States are a normal part of how the self-employed person conducts his/her business.

11. How is a substantial part of self-employed activity defined?

A 'substantial part of self-employed activity' pursued in a Member State of residence means that a quantitatively substantial part of all of the activities of the self-employed person is pursued there, without this necessarily being the major part of these activities.

For the purposes of determining whether a substantial part of the activity of a self-employed person is pursued in a Member State, account **must** be taken of:

- the turnover;
- the working time;
- the number of services rendered; and/or
- the income

If in the context of carrying out an overall assessment it emerges that a share of at least 25% of the above criteria are met, this is an indicator that a substantial part of all the activities of the person is pursued in the Member State of residence.

While it is obligatory to take account of these criteria, this is not an exhaustive list and other criteria may also be taken into account.

Example:

Bricklayer X performs activities as a self-employed person in Hungary, where he is also residing. Sometimes during the weekend he also renders his services as a self employed person to an agricultural company in Austria. Bricklayer X is working 5 days a week in Hungary and maximum 2 days a week in Austria. X therefore performs a substantial part of his activities in Hungary and the Hungarian legislation is applicable

12. What procedures must be followed by a self employed person in the event that s/he is working in two or more member states?

The procedures to be followed in order to determine the applicable legislation for a self-employed person working in two or more Member States are the same as those which apply to an employed person as outlined in Section 8. above. The self-employed person should contact the institution in the Member State of residence on his or her own behalf.

13. What criteria apply when determining where the centre of interest of activities is located?

If a person does not reside in one of the Member States in which s/he pursues a substantial part of his/her activity, s/he shall be subject to the legislation of the Member State in which the centre of interest of his/her activities is located.

The centre of interest of activities should be determined by taking account of all the aspects of that person's occupational activities, notably the **following criteria**:

- the locality in which the fixed and permanent premises from which the person concerned pursues his/her activities are situated;
- the habitual nature or the duration of the activities pursued;
- the number of services rendered; and
- the intention of the person concerned as revealed by all the circumstances.

In addition to the above criteria, when determining which Member State's legislation is to apply, the assumed future situation in the following 12 calendar months must also be taken into account. Past performance can be also taken into account as far as it gives a sufficient reliable picture of the self-employed person's activity.

So, for example:

> Ms. XY is self-employed. She pursues the substantial part of her activities in Austria and also works as a self-employed person in Slovakia. She resides in Austria. The Austrian legislation is applicable since she pursues the substantial part of her activities in this Member State and also resides there.
>
> Mr. YZ is self-employed. He pursues part of his activity in Belgium and part in the Netherlands. He lives in Germany. He has no permanent fixed premise. However, he works mostly in the Netherlands and earns most of his income there. It is his intention to build his business in the Netherlands and he is in the process of acquiring a permanent premises. Mr. YZ is subject to the legislation of the Netherlands since he does not reside in any of the Member States in which he works but it is his intention as supported by the circumstances, including his future plans, to make the Netherlands the centre of interest of his activity.

14. What is the situation in relation to a person who is both employed and self-employed in different member states?

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. Where, in addition to being self-employed, he pursues an activity as an employed person in more than one Member State the criteria of Article 13 (1) of Regulation 883/2004, outlined in Section 1, will apply.

15. Are there any special arrangements in place for a person working in more than one Member State where the legislation applicable has already been decided under regulation 1408/71?

Article 87 (8) of Regulation 883/2004 provides that if, as a result of the introduction of the new Regulation, a person would be subject to the legislation of a Member State other than the one already determined in accordance with Regulation 1408/71, then the previous decision will continue to apply provided the relevant situation remains unchanged.

The first requirement for applying Article 87 (8) is that, as a result of Regulation 883/2004 coming into force, a person would be subject to the legislation of a Member State other than that already determined in accordance with Title II of Regulation 1408/71[36].

The second requirement of Article 87 (8) is that the relevant situation remains unchanged.

The purpose of this provision is to prevent many changes of applicable legislation on the changeover to the new Regulation and to allow a "soft landing" for the person concerned with regards to the legislation applicable if there is a discrepancy

[36] The Administrative Commission agreed that Article 87(8) of Regulation 883/2004 shall be applicable also for Rhine boatmen whose applicable legislation was previously determined according to Article 7(2) of Regulation 1408/71.

between the legislation applicable (competent Member State) under Regulation 1408/71 and the legislation applicable under Regulation 883/2004.

The discussion in the Administrative Commission showed that simple rules need to be established and applied coherently by all designated institutions so that the criteria used are perceived as fair, workable and transparent.

Under Regulation 1408/71, the designated institution of the competent Member State is to issue a certificate to the person concerned stating that s/he is subject to its legislation (Article 12a of Regulation 574/72). Under Regulation 883/2004, the designated institution of the competent Member State shall also inform the person concerned and provide, on request, an attestation on the applicable legislation (Articles 16 (5) and 19 (2) of Regulation 987/2009). As the competent Member State last determined under Regulation 1408/71 and which issued the certificate on applicable legislation is best equipped to check if the situation remains unchanged after the entry into force of Regulation 883/2004, **it has been agreed that:**

- If necessary, the competent Member State as last determined under Regulation 1408/71 and which issued the certificate on applicable legislation (form E101) shall assess if the relevant situation remains unchanged and provide a new attestation on applicable legislation if the situation remained unchanged (Portable Document A1).

A change in the relevant situation refers to the factual situation of the person concerned which was decisive for the latest determination of the applicable legislation under Regulation 1408/71. **Therefore:**

- A change of the "relevant situation" as referred to in Article 87 (8) of Regulation 883/2004 means that after the entry into force of Regulation 883/2004, one of the decisive criteria/elements for the determination of applicable legislation under Title II of Regulation 1408/71 changed, and this change would lead to the person concerned being subject to the legislation of a Member State other than that lastly determined in accordance with Title II of Regulation 1408/71. As a rule, a new employment, in the meaning of a change of the employer, the termination of one of the employments or the cross-border change of residence is a change of the relevant situation. In cases where there is a difference of views, the institutions involved shall seek a common solution.

- The expiry of an attestation on applicable legislation (form E101, Portable Document A1) is not regarded as a change in the 'relevant situation'.

- A person who wishes to be subject to the legislation of the Member State which would be applicable under Regulation 883/2004 should make an application in accordance with Article 87 (8) of this Regulation to the designated institution in that Member State or to the designated institution of the Member State of residence if s/he is pursuing an activity in two or more Member States.

  Example:

  Starting from 1.1.2010 a person is exercising an employed activity for only one employer in France where he resides and in Spain where the employer is established. In France, only 15% of the activity is exercised. France is the competent Member State only according to Art. 14 (2)(b)(i) of Regulation 1408/71, but not according to Art. 13 (1)(a) of

Regulation 883/2004. This means that Article 87 (8) does apply and the person continues to be covered by the French legislation after the entry into force of Regulation 883/2004, unless he opts for the Spanish legislation by virtue of Article 87 (8) of Regulation 883/2004.

As regards the application of Regulations 883/2004 and 987/2009 on the basis of Article 90 of Regulation 883/2004, it should be stated that whenever there is a relation involving Switzerland or the EEA Member States, or activities, regardless of their share, are performed in Switzerland or the EEA, Regulation 1408/71 is applicable as a whole until the appropriate agreements have been modified in the light of the Regulation 883/2004.

16. From what date will the applicable legislation apply where a person, who is subject to the transitional arrangements requests to be assessed under regulation 883/2004?

As already indicated, a person whose applicable legislation was determined in accordance with Regulation 1408/71 can apply to be made subject to the legislation which is applicable under Regulation 883/2004. If the person made their request by the 31st July 2010 then the change in applicable legislation should take effect from the 1st May 2010, i.e. the date from which the new Regulations became applicable. Where a request was received after the 31st July 2010, i.e. later than three months after the new Regulations became applicable, any decision made, takes effect from the 1st day of the month following that in which the application was made.