

Explanatory Memorandum to the Framework Agreement on the application of Article 16 (1) of Regulation (EC) No. 883/2004 in cases of habitual cross-border telework

Objective of this agreement

Cross-border telework is not in itself a new phenomenon but since the COVID-19 pandemic it now affects a very large group of workers. It may have a big impact on which competent Member State is competent for the social security of a person. That is why a reflection is warranted on how the conflict rules of the Regulations on social security n° 883/2004 and 987/2009 must be applied on this way of working and if the outcome of these conflict rules is opportune and in line with the freedom of movement and the internal market. The sanitary measures during the COVID-19 pandemic (mandatory/strongly recommended telework) forced employers to allow telework and employees to take it up. This resulted in an explosive accrual of telework. This (partial) telework still persists as a permanent new way of work. Specific measures have been taken during the pandemic and the ensuing period to avoid a change of the competent State for the social security of the worker due to accrued telework⁴. These no-impact measures apply up to and including the 30 June 2023.

Since the physical place of work is a decisive criterion with regard to the applicable social security legislation, teleworking in the Member State of residence may lead to a change in social security legislation if a person does not reside in the state of the employer's premises. This will be the case, for example, as soon as the telework in the state of residence amounts to a share of 25%.

In order to take account of the changed working patterns, this framework Agreement offers a solution which combines the interests of the workers, the employers, and the social security institutions to face the reality of telework until the coordinating Regulations on social security will be adapted. It lays down the rules for the efficient and timely conclusion of individual article 16 agreements for the cases in its scope.

Nature of this agreement

The signatory Member states agree on how to assess individual requests submitted: which Member State will be competent and under which conditions the agreement will be given. It entails a mechanism where the signatory Member States pre-give their agreement (fix their policy) and no regular request-agreement procedure is needed to conclude the individual agreement based on Article 16 of Regulation 883/2004. The juridical basis of the determination of the legislation applicable remains the individual on-request derogation, only the procedure is simplified and legal certainty is offered in advance.

When an Article 16 request is submitted and accepted, the special rule of the framework agreement is applied. When no Article 16 request is submitted, the normal conflict rules determine the competent Member State and the Member State of the residence of the worker must be informed of the cross-border activities. In other words, the employee/employer are offered the possibility to opt-in to the

⁴ <https://ec.europa.eu/social/main.jsp?catId=868&langId=en>

rules proposed by the Framework Agreement by requesting an exception on the basis of Article 16 of the Basic Regulation.

Article 1: definition

This article contains a definition for the purposes of determining the applicable legislation (competent Member State for social security). This general definition encompasses telework activities by employees and self-employed persons, but the latter are excluded from the scope of this Framework Agreement (Article 2(3)(iii)).

The main characteristic of telework is that the employee or self-employed person can carry out their work activity from any location all over Europe and it is thus completely location-independent. This distinguishes telework from all other activities that require or imply the work activity to be carried out at a certain place.

A digital connection (IT link) with the company's infrastructure is an integral part of the definition of working remotely as a teleworker. The teleworker needs to remain connected to the employer's working environment to fulfill the tasks assigned. This IT link must be normally and habitually present but not necessarily during a 100% of the working time (e.g. reading materials or offline grading of tests by a professor). This entails that, as a rule, manual activities outside the employer's premises or business place do not fall within the scope of the definition.

Article 2: scope

An Article 16 agreement implies that an exception is made to the regular conflict rules in Title II of Regulation 883/2004 between the Member State which is competent via these conflict rules and the Member State which requests to become competent. This Framework Agreement covers employees who habitually work in different Member State and whose competent Member State is determined via Article 13(1) of Regulation 883/2004. This article designates the Member State where the employer is established (the statutory seat) or the Member State of residence of the person. The Framework agreement thus only applies to persons whose State of residence and the State where their employer is established are both signatory States.

The Framework Agreement applies to persons who telework in their Member State of residence 25% or more of their total working time and for whom the Member State of residence thus becomes competent under the normal rules of Title II of the Basic Regulation. Only employees who are employed by one single employer (or several employers all situated in the same Member State) are covered.

The Framework agreement only encompasses persons who habitually work in the State where the statutory seat of their employer is established and telework in their State of residence, without pursuing other activities than telework there.

Francis is teleworking from his residence Belgium 40% of his working time and is working 60% in the Netherlands at the premises [branch] of his employer which has its statutory seat in Germany.

As Francis works outside of the signatory State where the statutory seat [registered office or place of business] of his employer is situated the Framework Agreement does not apply.

Lena is teleworking from her residence in Italy for 40% of her working time and is working 60% of her working time in Austria at statutory seat of her employer.

Provided that both Italy and Austria are signatory States, the application of this Framework Agreement can be requested, resulting in the application of Austrian legislation.

Article 3: applicable legislation

When a request is submitted for a person, the signatory Member States conclude an Article 16 agreement derogating from Article 13(1)(a) designating the Member State where the employer(s) is situated as competent, provided that the amount of telework in the Member State of residence is less than 50% of the total working time of that employee. If a person works in the employ of several employers, the total working time of every employer combined will be used as a reference. This implies that the majority of the working time is pursued in the Member State where the employer(s) is situated.

The cross-border telework must be agreed between employer and employee formally or informally. The request for the application of the Framework agreement must be made in consent between them.

Article 4: procedure

Article 18 of the Implementing Regulation states that a request by the employer or the person shall be submitted in the Member State, whose legislation the employee or person concerned requests to be applied. This means that the request must be filed with the competent institution of the Member State where the employer has its statutory seat.

Flexibility

The signatory States are aware that a period of adjustment to the reality of telework merits some flexibility. The central point of view is that any request must be made *pro futuro*. Nonetheless there are situations that warrant flexibility.

Paragraph 2 of the Framework agreement clarifies that a request submitted that includes a past period cannot go back further in time than the entry into force of the Framework Agreement for both signatory States concerned. In other words this Framework Agreement produces no effects prior to the date of entry into force.

Paragraph 3 details the cases where flexibility is warranted and provides for two possibilities which allow a request to be submitted that includes a past period, provided that contributions have already been paid in the signatory State of the employer.

- First, under (i) a general provision that allows for a request to include a past period up to 3 months.
- Secondly, under (ii) a one-shot provision for a year starting from the 1 July 2023 up to and including the 30 June 2024. This period immediately follows the transitional period installed by the Administrative Commission (AC 125/22REV3).
During this period requests can be submitted for a past period up to 12 months, but may not include a period prior to the entry into force of the Framework Agreement.

Request that only include a future period following the submission are in no way impacted by the paragraphs (2) and (3) in Article 4.

Request that do not fall under paragraphs (2) and (3) in Article 4 that include a past period will be processed as a regular Article 16 request in line with Article 6 (1).

Mark is working in France for a French employer since 2018. He has always worked 2 days from home in Germany and has been subject to the German scheme since 2018 (substantial activity). On 1 January 2025 his employer asks for a derogation under the Framework Agreement for the coming two years.

The Framework Agreement applies and therefore the agreement is considered pre-given allowing France to immediately issue the A1 certificate as competent Member State.

Mark's colleague Steven is working in France for a French employer since 2018. He has always worked 2 days from home in Germany and has been subject to the German scheme since 2018 (substantial activity). On 1 January 2025 his employer asks for a derogation under the Framework Agreement a two-year period concerning the 1 October 2024 up to the 1 October 2026. The Framework Agreement does not apply as the request concerns a past period and contributions have been paid in the German Scheme⁵.

Helena is working in Luxemburg for a Luxembourgish employer since 2021. She has always worked 2 days from home in Belgium but has been subject to the Luxembourgish scheme since 2021 (Covid-19/Transition). On 1 January 2025 her employer asks for a derogation under the FA going back to the 1 July 2023 as her employer has continued to pay social security contributions in Luxemburg. The agreement does not apply to Helena as it is submitted after 30 June 2024 and it concerns a retroactive period for more than three months nor falls under the transitional provision⁵.

Paragraph 4 limits the period during which the legislation will be determined per request (and an A1 certificate issued) to a maximum of three years. If the telework fulfilling the conditions of the Framework Agreement continues beyond this date, a new request can be submitted.

If the factual situation changes, this must be notified immediately by the employer or the employee to the issuing Member State. This Member State must re-assess the case and, if necessary, withdraw or terminate the A1 certificate.

Paragraphs 5 and 6 describe the procedural mechanism by which the individual Article 16 agreement is concluded. A simplified procedure is put in place where both Member States pre-give their consent. The competent institution of the Member State of the employer assesses, upon receipt of the request, if the conditions of the Framework Agreement are fulfilled. If this is the case, an A1 certificate is issued (box 3.11 is ticked) and the competent institution of the Member State of residence is electronically informed via EESSI.

If the conditions of the Framework Agreement are not met, the case is dealt with as a regular Article 16 request. The outcome depends on the analysis and evaluation of the Member States involved.

⁵ This request will be considered as an individual Article 16 where competent institution in the signatory State of the Employer can only issue the A1 certificate after it receives the explicit consent by the competent institution in the signatory State of residence.

Article 5: Depositary Member State

For practical reasons, a depositary Member State is designated. This Member State must be one of the signatory States.

Article 6: Final provisions

Paragraph 1 stipulates that the signatory Member States will take into account telework for cases of cross-border telework outside the scope of the Framework Agreement and will not refuse Article 16 request for the sole reason that the habitual cross-border telework is anticipated to last for an indefinite period of time.

Paragraph 2 fixes the validity period of this Agreement.

Paragraph 3 regulates the situation where a State signs the Framework Agreement at a stage where it has already entered into force for at least two other signatory States.

Paragraph 4 regulates the termination by an individual signatory State.

Paragraph 5 regulates the termination of the Framework Agreement itself by all signatory States.

Paragraph 6 states that an issued A1 certificate and the underlying Article 16 agreement, concluded before the termination of the Framework Agreement, will remain valid till the expiry date indicated on the A1 certificate (provided that the factual situation does not change).