HUNGARIAN LABOUR LAW
E - J O U R N A L

Social Security Law Applicable to Cross-Border Teleworking

An approach to the framework agreement on cross-border teleworking in the EU, EEA and Switzerland

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Abstract

New forms of work developed by information and communication technologies have revealed the insufficiency of the provisions of EU Regulation nº 883/2004 to determine the applicable Social Security legislation facing new work realities such as cross-border teleworking.
Agreement on habitual cross-border teleworking increases "substantiality" of article 13.1 of the EU Regulation nº 883/2004, so that people who carry out habitual cross-border teleworking will be subject to the legislation of the State where the employer has its headquarters, provided that the cross-border teleworking carried out in the State of residence is less to 50% of the total working time.

Keywords: teleworking, digital work, Social Security, applicable law, migrant workers

1. Introduction

The purpose of Title II of Regulation (EC) No 883/2004 is to determine the single legislation applicable in situations of dual coverage in which a migrant worker may find themselves as a result of exercising their right to free movement, mainly in the context of migration or when the place of residence and the place where the person carries out their professional activity do not coincide[1].

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1 Dolores Carrascosa Bermejo: *Community coordination of social security. Applicable law and old age in Regulation 1408/71.* (CES Studies Collection) Madrid, 2004. 129.

Without detracting from the delimiting effort of the Regulation itself, which was conceived at a time when the most common form of work was that carried out physically in the State of residence, the new forms of work brought about by the development of new information and communication technologies have highlighted the inadequacy of this regulation in the face of new working realities such as teleworking[2]. Its emergence in the wake of the COVID-19 health crisis and the restrictions on freedom of movement due to the closure of borders, against an invisible and devastating enemy that was already inside[3], forced Member States to develop emergency regulations to address this issue, but only from a national perspective and ignoring those of an international nature[4].

Left out were those work activities carried out in the form of cross-border teleworking, i.e. work carried out by means of ICT from the Member State of residence of the workers for companies physically located in other Member States.

Despite the apparent novelty of this labour reality, rejected by some author[5], the truth is that the first step towards its regulation was taken back in 2002 through the European Framework Agreement on Telework (AMET), although, due to its lack of regulatory effectiveness, it proved to be an insufficient instrument for regulating such situations[6].

The entry into force on 1 July 2023 of the Framework Agreement on the application of article 16.1 of Regulation (EC) No 883/2004 in cases of regular cross-border teleworking clarifies the criteria for determining the applicable social security legislation in this particular form of employment. It does so by establishing rules for the efficient and timely conclusion of individual agreements based on article 16 of the Regulation; establishing the individual exception, upon request, as the legal basis for determining the applicable legislation, simplifying the procedure and ensuring legal certainty[7].

2. A (brief) approach to the concept of cross-border teleworking

The growing development of new information and communication technologies has been reflected in the labour market, among many other aspects, in the development of new forms of work and

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2 Marta Fernández Prieto: Border workers: particularities within the framework of the European Union. *Revista Galega de Dereito Social,* 17/2023. 62.

3 José María Miranda Boto: Free movement after (?) Covid-19. Challenges in terms of restrictions, new family models and digitalisation. *Revista Labos,* Vol. 3., 1/2022. 51.

4 José María Miranda Boto: *Transparent and predictable working conditions. Challenges for Spanish law in the transposition of Directive (EU) 2019/1152*. Valencia, Tirant lo Blanch, 2023. 34.

5 Daniel Pérez del Prado: *Law, Economics and Digitalisation. The impact of artificial intelligence, algorithms and robotics on employment and working conditions.* Valencia, Tirant lo Blanch, 2023. 164.

6 "A tool of little use, due to its content and nature." Francisca Fernández Prol: International Teleworking: transnational and mobile (or international digital nomadism). *Journal of the Ministry of Labour and Social Economy,* 154/2022. 107.; "The AMET is open to criticism, both for its legal enforceability and its unambitious content." Tomás Sala Franco: International and EU regulations on teleworking. In: Tomás Sala Franco (Dir.): *Teleworking.* Valencia, Tirant Lo Blanch, 2020. 59.

7 Explanatory memorandum to the Framework Agreement on the application of article 16.1 of Regulation (EC) No 883/2004 in cases of regular cross-border teleworking.

the dispersion of jobs[8]. The incorporation of computer elements and supports has contributed to the breakdown of the traditional association between the provision of work and the workplace, moving towards the disappearance of the workplace and its replacement by digital or virtual spaces[9], allowing work to be carried out from locations outside the workplace, including from the worker's own home[10].

In the absence of unanimity[11], and the brief definition offered by the relevant Spanish legislation – remote work carried out through the exclusive or prevalent use of computer, telematic and telecommunications means and systems[12] –, legal doctrine has identified certain elements that must be present in this particular form of work in order for it to be classified as teleworking[13]. Thus, some authors have identified the existence of a geographical or spatial element, since the work is performed remotely; an instrumental element, in that the work is carried out using computer and communication technologies; and an organisational element, as a consequence of this new form of work, which differs from the traditional face-to-face nature of work performed at the workplace[14]. Other authors have also considered a personal element to be necessary, as the provision of services under this modality must be carried out by a natural person[15]; as well as a quantitative element, measured in terms of time spent, which justifies the habitual nature of the work provided under the teleworking modality[16].

From the combination of all these elements, with varying degrees of intensity, different classifications or sub-modalities have emerged, which legal doctrine has also identified as teleworking. Thus, taking into account the spatial element, we could identify forms of teleworking from home, teleworking in telecentres or itinerant teleworking[17]; while, if we consider the technological element, there could be situations of offline teleworking or online teleworking[18].

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8 Jesús Mercader Uguina: *The future of work in the age of digitalisation and robotics.* Valencia, Tirant lo Blanch, 2017. 28.

9 Jesús Lahera Forteza: The transformations of the workplace. *Revista Documentación Laboral,* 118/2019. 23.

10 This has many advantages, but also disadvantages, from the point of view of the company, society and the worker themselves. In this regard, Ángela Martín-Pozuelo López: An approach to the concept, modalities and main advantages and disadvantages of teleworking. In: Sala Franco (Dir.) op. cit. 27–37. [hereinafter: Martín-Pozuelo López (2020a)]. In the same vein, Susana Rodríguez Escanciano: Teleworking and its sources of regulation. Special consideration of collective autonomy. *Revista Galega de Dereito Social,* 11/2020. 43–44.

11 Martín-Pozuelo López (2020a) op. cit. 17.

12 Article 2 of Law 10/2021, of 9 July, on remote working; a definition which, as noted by reputable doctrine, must be supplemented by that offered by the same regulation for remote working, namely, "a form of work organisation or performance of work activities whereby the work is carried out at the worker's home or at a place chosen by the worker, for all or part of the working day, on a regular basis". José Fernando Lousada Arochena – Alexandre Pazos Pérez – Ricardo Pedro Ron Latas: *Remote working and teleworking. Labour, procedural and social security regulations; transnational teleworking.* Ed. Madrid, Tecnos, 2022. 72–73.

13 For more in-depth information on the characteristics of teleworking, see Esperanza Macarena Sierra Benítez: *The content of the employment relationship in teleworking.* Seville, Economic and Social Council of the Regional Government of Andalusia, 2011. 34–49.

14 "For conceptual purposes, teleworking consists of three defining elements: the topographical – the work is done remotely –; the second element: the use of new information and communication technologies; and the third element, the organisational: it is a new way of working and represents a break with the traditional model of work organisation". Inmaculada Ballester Pastor: Teleworking and individual rights: striking new balances. *Revista Documentación Laboral,* Vol. III., No. 121. (2020) 13.

15 "Excluding from this concept the services provided by companies or legal entities." Martín-Pozuelo López (2020a) op. cit. 18.

16 Lousada Arochena–Pazos Pérez–Ron Latas op. cit. 73.

17 Modalities that Martín-Pozuelo refers to as "pure forms" of teleworking. Martín-Pozuelo López (2020a) op. cit. 22–23.

18 Within this, in turn, there could be situations of connection or communication with the company via a one-way or two-way line. Martín-Pozuelo López (2020a) op. cit. 25.

In line with the above elements, the 2002 European Framework Agreement on Telework (AMET)[19], signed by the European Trade Union Confederation (ETUC), the Union of Industrial and Employers' Confederations of Europe (UNICE), the European Association of Craft, Small and Medium-Sized Enterprises (UEAPME) and the European Centre of Public Enterprise (CEEP), defined teleworking in its second article as "a form of organisation and/or performance of work, using information technology within the framework of a contract or employment relationship, in which work that could also be performed on the premises of the undertaking is performed outside those premises on a regular basis"[20].

In the absence of international regulations on this matter[21], the AMET represented an important step forward in the treatment of teleworking at European level, a field that had been unexplored until then, offering greater security to teleworkers employed by others in the EU by including aspects relating to its voluntary nature, employment conditions, data protection, health and safety at work, work organisation, training, collective rights, etc[22]. However, despite the fact that its provisions were incorporated into the Interconfederal Agreement for Collective Bargaining (AINC) of 2003 and subsequent years[23], there is broad consensus that its lack of regulatory effectiveness completely undermined its content[24]. Furthermore, it deliberately omitted any reference to transnational teleworking[25].

Of all the elements described, which must necessarily coincide, the spatial or geographical element is the most significant in cases of cross-border teleworking, as the worker carries out their work from a country other than that in which the company for which they provide their services is located.

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19 Revised in 2009.

20 A definition which, as Ballester Pastor points out, incorporates a new element, as this concept of teleworking from AMET requires "the concurrence of four elements: the use of ICT; a salaried legal relationship; that the work is carried out outside the employer's premises – although it may be carried out inside –; and that the work thus defined is regular". Ballester Pastor op. cit. 18.

21 The ILO regulated home-based work in general terms in its Convention No. 177 (1996), understanding that this modality occurs when work is carried out at the worker's home or at another location of their choice, other than the company's premises, in exchange for remuneration and for the purpose of producing a product or providing a service in accordance with the company's specifications. Article 1(a) of ILO Convention No. 177, ratified by Spain in May 2022. The same definition was provided by ILO Recommendation No. 184 of the same year on home work. In detail, Ana Isabel Pérez Campos: *International teleworking. Current situation and proposals for regulation*. Navarra, Thomson Reuters Aranzadi, 2022. 67–72.; Nuria García Piñeiro: The International Labour Organisation and remote working: Spain's ratification of Convention No. 177 on home work. *Revista Española de Derecho del Trabajo,* 255/2022.

22 A detailed study of the content of the AMET in Sierra Benítez op. cit. 152–168.; Javier Thibault Aranda – Ángel Jurado Segovia: Some considerations regarding the European Framework Agreement on Telework. *Labour Issues Journal,* 72/2003.; Lourdes Mella Méndez: General commentary on the Framework Agreement on telework. *Labour Relations Journal,* 1/2003.

23 An incorporation that "in no case is equivalent to its adoption into domestic law„. Lidia De la Iglesia Aza: Digitalisation and internationalisation of labour relations: transnational and international teleworking. *Revista Galega de Dereito Social,* 17/2023. 121. Consequently, "state collective bargaining was limited to recommending the application of the AMET adapted to the Spanish reality". Pérez Campos op. cit. 95.

24 "This is the first agreement reached under the voluntary negotiation process provided for in article 139.2 TEU, and the negotiating parties themselves deny its normative force." María Dolores Santos Fernández: The Framework Agreement on Telework: collective bargaining and telework. Two realities at Community level. *Trabajo: Revista iberoamericana de relaciones laborales,* 14/2004. 51.

25 "The reason given by the Commission for not including specific rules for this type of teleworking in the EWA was, in its opinion, the lack of need, as it understood that there were no specific problems arising from this type of remote working compared to those arising from other international labour relations". Ángela Martín-Pozuelo López: *Transnational teleworking in the European Union. International competition and applicable law.* Valencia, Tirant lo Blanch, 2022. 44–45.

Under this model, companies find it easier to recruit professionals from other countries[26], eliminating geographical distances[27] and retaining talent within the company, although sometimes this is also done in order to reduce recruitment costs by resorting to labour in countries with lower wage levels[28].

It is therefore the foreign element that characterises cross-border teleworking[29], giving it a specific regime that focuses in particular on determining the law applicable to the employment contract[30], determining jurisdiction[31] and the law applicable to social security[32].

Within the European Union, the Framework Agreement on the application of article 16.1 of Regulation (EC) No 883/2004 in cases of regular cross-border teleworking[33] contributes to this last issue, the study of which is the subject of this paper.

3. Determination of the applicable social security legislation. The insufficiency of Title II of Regulation (CE) Nº 883/2004

In the absence of specific supranational regulations[34], the essential rule for determining the social security legislation applicable to cases of cross-border teleworking is Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems[35].

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26 As Miranda Boto points out, "workers are not the only beneficiaries of free movement; employers also benefit from the fundamental freedom to hire in the country of their choice." José María Miranda Boto: The search for transnational employment: current issues. In: Jaime Cabeza Pereiro – Francisca Fernández Prol (Coords.): *Employment Policies*. Navarra, Thomson Reuters Aranzadi, 2013. 122.

27 An interesting reflection on the consequences of globalisation on the labour market in Miguel Rodríguez-Piñero Royo: The international mobility of workers: general aspects and distinction of cases of international mobility. *Journal of the Ministry of Employment and Social Security,* 132/2017. 18–23.

28 "Companies around the world now also have the possibility of hiring workers located anywhere on the planet to meet their needs, without this necessarily implying a reduction in the coordination and efficiency of their production processes or a significant alteration in their cost structure. On the contrary, they can achieve a reduction, even a very significant one, in the latter." Wilfredo Sanguineti Raymond: The difficult social and legal problems of transnational teleworking. *Revista Trabajo y Derecho,* 98/2023.

29 Ángela Martín-Pozuelo López: Teleworking and Private International Law: the specific regime of transnational teleworking. In: Sala Franco (Dir.) op. cit. 101. [hereinafter: Martín-Pozuelo López (2020b)].

30 A detailed study on this subject can be found in Luis Francisco Carrillo Pozo: The law applicable to multi-location employment contracts: the Rome I Regulation. *Journal of the Ministry of Employment and Social Security,* 132/2017. 129–162.

31 An insightful analysis of the determination of jurisdiction can be found in De la Iglesia Aza op. cit., 145–152.

32 "When teleworking is carried out in its alternative form in several Member States, regardless of other classifications based on other elements, it is easy to intuit its accommodation within the sphere of the Coordination Regulations. Pure teleworking, on the other hand, presents more problems. In the latter case, the teleworker will, in principle, always provide services from the same Member State. Nevertheless, it could be argued that, even in these cases, the transnationality requirement necessary for the application of these Regulations is met, as at least the national social security systems of two different Member States are involved. This would be the case where the teleworker's employment relationship has some foreign element, for example, if the employer is located in a Member State other than the Member State from which the teleworker works". Ángela Martín-Pozuelo López: The international aspect of teleworking: international teleworking and its problems. In: Tomás Sala Franco – Eva López Terrada (Eds.): *International labour relations*. Valencia, Tirant lo Blanch, 2022. 304.

33 Effective date July 2023.

34 "A flagrant regulatory gap,, in the opinion of Lousada Arochena – Pazos Pérez – Ron Latas op. cit. 333.

35 As well as Regulation (EC) No. 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No. 883/2004 on the coordination of social security systems. Regarding its virtual application to cases of cross-border teleworking, Martín-Pozuelo argues that "with the advancement of NICTs, teleworking enables previously unthinkable 'virtual mobility', which can also generate conflicts of laws that require coordinated responses at the supranational level,,, despite the absence of any reference to teleworking in the coordination regulations, "this lack of specific

Conceived as a uniform set of conflict rules[36], Title II of Regulation (EC) No 883/2004[37] provides for a series of rules for coordinating the different national social security legislations to which a worker may be subject as a result of exercising the right to free movement[38]. However, as will be explained, these provisions are not entirely adapted to a growing labour reality in which, through information and communication technologies, work is routinely carried out from a Member State other than that in which the company is located[39]. In addition to this difficulty in identifying the applicable social security legislation, due to the aforementioned absence of any reference to teleworking in the coordination regulations[40], there is also the controversy surrounding the determination of whether the content, in a broad sense, of work carried out under a cross-border teleworking arrangement should be considered to have been carried out in the worker's State of residence, from where they connect and use ICT means to carry out their work, or in the other State where the company or employer is located, from where the appropriate instructions for carrying out the work are given, from where the work is organised and received, etc[41]. In relation to the concept of State of residence, a concept that Regulation (EC) No 883/2004 vaguely defines as "the place where a person habitually resides", the Court of Justice has taken it upon itself to define and whose criteria have been incorporated into article 11 of Regulation (EC) No 987/2009, where it is established that, in the event of a disagreement between the institutions of two or more Member States as to the determination of a person's residence, the institutions concerned shall establish by mutual agreement the centre of interest of the person concerned, taking into account all available information. The article then lists a number of factors that institutions must take into account when determining the State where a person's centre of interest is located. These elements range from the duration and continuity of their presence in the territory of the Member States concerned to the personal circumstances of the person concerned, such as the nature

regulation makes it necessary to resort to the rules currently in place in order to try to frame, as best as possible, cases of teleworking that may fall within the scope of the Community coordination rules". Martín-Pozuelo López (2020b) op. cit. 117.

36 In the words of the Court of Justice of the European Union itself, its purpose is none other than the "creation of a comprehensive and uniform system of conflict-of-law rules, the aim of which is to subject workers who move within the Community to the social security system of a single Member State in order to avoid the accumulation of applicable national laws and the complications that may arise therefrom". Case C-71/93, *Van Poucke*, (ECLI:EU:C:1994:120).

37 Articles 11 to 16.

38 As Miranda Boto points out, "the drafting of rules governing references and conflicts was planned in order to ensure continuity in the successive application of the different systems, without directly modifying them". José María Miranda Boto. *The powers of the European Community in social matters*. Navarra, Thomson Reuters Aranzadi. 2009. 261.

39 "This requires solutions to be devised outside the scope of traditional social law on mobility, based instead on the traditional conflict rules identifying jurisdiction and applicable law." Fernández Prol op. cit. 111.

40 "There are no specific conflict rules within its framework for teleworking or virtual work, where the application of the general *lex loci laboris* rule raises many questions." Dolores Carrascosa Bermejo – Óscar Contreras Hernández: Intra-Community movement of workers to and from Spain. Facts and figures. Leuven, 2022. POSTING.STAT Project VS/2020/0499, 20.

41 On this particular point, Fotinopoulou Basurko rejects "proposals aimed at supporting the creation of a virtual locus for the performance of services, as this would lead us to use as a virtual locus, for example, the IP address of the computer, the location of the website or that of the digital platform; which, in general terms, would give rise to the application of the legal system designated by the worker's domicile and/or residence or, where applicable, some other place chosen by the company, but in any case locations not necessarily linked to the employment relationship. In essence, I understand that the geographical location of the computer from which the functions are performed loses all meaning in this context, given the absence of a relationship of proximity between the place where the work is performed and the results of the activity carried out". Olga Fotinopoulou Basurko: Transnational work. Present and future challenges in the provision of extraterritorial services. *Revista Labos,* Vol. 4, 1/2023. 40.

and specific conditions of the activity pursued, if any, and in particular the place where the activity is habitually pursued, the stability of the activity and the duration of the employment contract, their family situation, the pursuit of other unpaid activities, in the case of students, their source of income, accommodation, in particular its degree of permanence, or the Member State in which the person is considered to have their tax residence[42].

The purpose of the provisions of Title II of the Regulation is to ensure that workers in transnational situations are subject to the social security system of a single Member State, avoiding the accumulation of applicable national legislation and the resulting complications[43]. This is provided for in article 11, which establishes that persons to whom the Regulation applies shall be subject to the legislation of a single Member State[44]. This avoids situations of double contributions[45] – positive conflict[46] – or, worse still, no contributions – negative conflict – in any State[47]. As a result, when the law of one Member State is applicable, the application of the legislation of another Member State is excluded[48].

However, as will be analysed below, the application of the general rule of Regulation (EC) No 883/2004, or some of its exceptions, will depend on whether the cross-border teleworking for which Social Security legislation is to be determined is carried out permanently in the territory of a single Member State or, on the contrary, in two or more Member States[49].

In general, the sole applicable rule will be that of the place of work *(lex loci laboris)*[50]. This is provided for in article 11.3 itself[51], which establishes that a person who is employed or self-employed in a Member State is subject to the legislation of that Member State[52]; civil servants are subject to the legislation of the Member State to which the administration employing them belongs[53]; persons

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42 José Manuel Pazó Argibay: *Unemployment protection in European Union law. Special attention to the case law of the Court of Justice*. Madrid, Ed. Cinca, 2021. 140.

43 Case 60/85, *Luijten,* (ECLI:EU:C:1986:307).

44 "The uniqueness of the applicable law is a principle inherent to Community coordination, since, together with the mandatory nature of the conflict rule, it implies the exclusive application of the designated national legislation". Carrascosa Bermejo (2004) op. cit. 122.

45 "The principle of uniqueness becomes the main guarantee that migrant workers have against double contributions, as its application prevents the simultaneous development of two legal relationships of compulsory affiliation." Carrascosa Bermejo (2004) op. cit. 122.

46 If these situations of double contributions „do not provide double protection". Yolanda Maneiro Vázquez: Conflicting rules in the system of coordination of social security schemes. *Journal of the Ministry of Employment and Social Security,* 132/2017. 254.

47 "Neither lacune nor cumul". JM Servais: *Droit Social de L´Union Européenne*. Brussels, Éditions Bruylant, 2008. 280.

48 Cit. case 60/85, (ECLI:EU:C:1986:307).

49 "Thus, in determining the applicable Social Security law, the type of international teleworking that distinguishes between permanent or pure international teleworking and temporary or hybrid teleworking has a particular impact." Pérez Campos op. cit. 147.

50 "This is an ideal connection, as it is there that the benefits of the professional activity for which contributions will be made are generated, and it also avoids social dumping by promoting equal contributions between national and foreign workers." Dolores Carrascosa Bermejo: Coordination of national social security systems. In: María Emilia Casas Baamonde – Román Gil Alburquerque (Eds.): *Social Law in the European Union. Application by the Court of Justice*. Madrid, Ed. Francis Lefebvre, 2018. 531.

51 With the exceptions provided for in articles 12 to 16 of Regulation (EC) No 883/2004 itself.

52 "This centre of attraction generated by the activity is the most powerful magnet for attracting workers to a piece of legislation." Maneiro Vázquez op. cit. 253.

53 "Provided that they remain active, and without any retroactive effects being applied to previous activities in another Member State." In detail, Maneiro Vázquez op. cit. 256.

receiving unemployment benefits under the legislation of the Member State of residence are subject to the legislation of that Member State[54]; or that of persons called up or recalled for military or civil service in a Member State, to the legislation of that Member State[55]. As a closing clause, article 11.3 subjects persons not covered by the above cases to the legislation of the Member State of residence[56].

For their part, paragraphs 4 and 5 of article 11 link the activity, whether employed or self-employed, normally carried out on board a ship at sea to the legislation of the flag Member State[57]; and the activity of flight crew or cabin crew members in the framework of the provision of passenger or freight air transport services to the legislation of the State where the base is located[58].

Consequently, in application of article 11.3 for the purposes of the study at hand, if we understand that teleworking is carried out on a permanent basis in a Member State[59], which is common in this modality, the legislation of that State would apply[60].

Despite the apparent clarity of the provision, designed for traditional cases where the worker and the company are located in the same place, identifying the law of the place of work as the applicable law in matters of social security, the debate arises as to the appropriateness of this criterion in cases of cross-border teleworking[61]. The answer could be affirmative if we understand that, despite being carried out through ICT means, if the location or domicile of the company or employer is in another Member State, the applicable law would be that of the latter State[62]. However, the factual reality of

54 In this regard, Pazó Argibay op. cit. 163–190.

55 Maneiro Vázquez op. cit. 257.

56 "EU law has therefore resorted to the *lex loci laboris* as the main connecting factor, because from a contributory perspective, activity is a natural criterion, as opposed to residence, which acts in the background, as a cause and/or consequence." Iván Antonio Rodríguez Cardo: Problems of applying social security in space: the conflict of laws in Regulation 883/2004. Cristina Sánchez-Rodas Navarro (Dir.): *Regulations coordinating social security systems in the European Union.* Murcia, Ediciones Laborum, 2021. 45.

57 However, a person who is employed on board a vessel flying the flag of a Member State and who is remunerated for this activity by an undertaking or a person whose registered office or place of business is in another Member State shall be subject to the legislation of the latter Member State if he or she resides in that State. Article 11.4 Regulation (EC) No 883/2004.

58 "'Base' means the place assigned by the operator to each crew member, where he or she usually starts and ends one or more periods of activity and where, under normal conditions, the operator is not responsible for the crew member's accommodation. […] The legislation applicable to flight and cabin crew members must remain stable and the principle of 'home base' must not entail frequent changes in the applicable legislation due to the working patterns of the industry or seasonal demands." Eva López Terrada: The regulatory sources for determining the applicable law in matters of social security in international labour relations. In: Tomás Sala Franco – Eva López Terrada (Eds.): *International labour relations*. Valencia, Tirant lo Blanch, 2022. 265.

59 Although in the context of a self-employed company director, the Court of Justice ruled that "the concept of 'place of business' for an activity refers to the specific place where the person concerned carries out the activities related to that activity", an interpretation widely accepted by legal doctrine. Case C-137/11, *Partena*, (ECLI:EU:C:2012:593). "In accordance with European case law, this place of performance coincides with the specific place where the person performs the acts related to their activity". Ángela Martín-Pozuelo López: Community coordination of social security: challenges for 2022. *International and Comparative Journal of Labour Relations and Employment Law,* Vol. 10, 2/2022. 165.

60 As Martín-Pozuelo points out, „In the case of transnational teleworking, it is most common for the teleworker to carry out all or a significant part of their work in the place where they reside. Therefore, in most cases, the applicable law will be that of the Member State of residence." Martín-Pozuelo López (2020b) op. cit. 133.

61 „All these rules are designed for the physical mobility of the worker, so they are ill-suited to cross-border online teleworking." Dolores Carrascosa Bermejo: Social Security in post-pandemic international teleworking and in the specific case of digital nomadism. *Revista Labos,* Vol. 4, 1/2023. 61.

62 An interpretation that is both contested and defended in equal measure. Carrascosa Bermejo points out that „in my view, the best solution would be to apply the law where the employer's headquarters are located, understood as an updated reinterpretation of the *lex loci laboris* with regard to virtual work or, if you prefer, an ad hoc connection that identifies it as a fictitious place of teleworking." Dolores Carrascosa Bermejo: International teleworking and applicable Social Security legislation: state of the art

the work performed, i.e. the performance of the work in the State where the worker is located, from where he or she connects via ICT means, and from where he or she is physically located during the performance of the work, would strongly conflict with the hypothetical legal fiction of subjecting these situations to the legislation of the Member State where the company is located[63].

The provisions of article 12 of Regulation[64], which aims to determine the social security law applicable to persons who, while normally pursuing their activity in a Member State, are sent by their employer to perform work in another Member State, retaining their connection to the legislation of the first State, provided that the duration of such work does not exceed twenty-four months and that the person is not sent to replace another person who has been sent[65]. It is clear that, in the situation described, the worker temporarily moves to a second Member State to carry out their work in person, which is not the case in the cases of cross-border teleworking under consideration[66]. On the other hand, the necessary time limit established in this article would exclude this situation from the necessary regularity of teleworking analysed here[67].

A second possible application can be found in article 13 of the Regulation, which deals with determining the applicable social security law in cases of activities carried out in two or more Member States[68]. To this end, the Regulation requires that this activity in two or more Member States be carried out "normally", leaving aside this type of occasional or sporadic work. Furthermore, in the case at hand, this possibility would only be valid, and with certain nuances, in cases of hybrid or alternating cross-border teleworking[69], i.e. where the work is carried out some days by teleworking

and prospects in EU coordination regulations. *International and Comparative Journal of Labour Relations and Employment Law,* Vol. 10, 2/2022. 243.

63 "In transnational work, the question arises again as to whether the reference for determining in which State the professional activity is carried out is the place of residence or where the establishment for which the person works is located. There are well-founded arguments in favour of the first option, but it cannot be denied that some discussion could arise." Jesús Cruz Villalón: The specialities of transnational teleworking. *Coruña Yearbook of Comparative Labour Law,* Vol. XIV, 2022. 105.

64 This is the position that has been largely adopted by scientific doctrine, which excludes "cases of teleworking from the scope of article 12 of the basic Regulation because they do not constitute genuine posting of workers for these purposes". See, for example, Martín-Pozuelo López (2020b) op. cit. 143.

65 In-depth analysis of the law applicable to social security for workers temporarily posted within the European Union, Javier Gárate Castro: *Temporary posting of workers in the context of transnational provision of services*. Valencia, Tirant Lo Blanch, 2012. 57 et seq.; Beatriz Gutiérrez-Solar Calvo: *Temporary posting of workers in the European Union*. Navarra, Ed. Aranzadi, 2000. 31 et seq; Óscar Contreras Hernández: *Posting of workers in the European Union: current status and new horizons*. Albacete, Ed. Bomarzo, 2020. 43 et seq.

66 Interpretation in line with the ruling of the Court of Justice of the European Union C-549/13, *Bundesdruckerei,* (ECLI:EU:C:2014:2235).

67 "There is a tendency to confuse international teleworking with the transnational movement of workers […] these are two different realities that can coexist in practice, insofar as neither has a clear and defined legal treatment". Pérez Campos op. cit. 58.

68 This situation applies, as established in article 14.5 of Regulation (EC) 987/2009, to "a person who simultaneously or alternately pursues one or more different activities in two or more Member States for the same undertaking or employer or for several undertakings or employers".

69 Martín-Pozuelo López (2020b) op. cit.178.

from a Member State and other days in person in the State where the company is located[70]. Only then could we properly speak of work being carried out in two Member States[71].

In these cases, article 13.1 provides for the application of the legislation of the Member State of residence if a substantial part of the activity is carried out in that Member State. If this is not the case, the legislation of the Member State in which the company or employer has its registered office or domicile shall apply; obviously, in cases where the worker is only employed by one company. Conversely, if the worker is employed by two or more companies, the applicable legislation shall be, as established in article 13.1, ii), iii) and iv): the legislation of the Member State in which the companies or employers have their registered office or domicile when the person is employed by two or more companies or employers having their registered office or domicile in a single Member State; or the legislation of the Member State, other than the Member State of residence, in which the company or employer has its registered office or place of business, where the person is employed by two or more companies or employers having their registered offices or places of business in two Member States, one of which is the Member State of residence; or to the legislation of the Member State of residence, where the person is employed by two or more companies or employers, and at least two of them have their registered offices or places of business in different Member States other than the Member State of residence.

It is therefore what Regulation (EC) No 883/2004 refers to as the "substantial part" of the activity, the central element or centre of gravity that determines which legislation applies[72]. For a more specific definition of this element, reference should be made to Regulation (EC) No 987/2009[73], which defines in article 14.8 what is to be understood as a substantial part of the activity as a quantitatively important part of the whole activity, whether self-employed or employed, without necessarily being the largest part of those activities.

Article 14.8 of Regulation (EC) No 987/2009, which is applicable, then provides a series of criteria for determining the substantial part of an activity, whether employed or self-employed. Thus, in the case of salaried activities, the factors to be assessed are working time or remuneration, and in the case of self-employed activities, they are turnover, time spent on those activities, the number of services provided or income. In both cases, as established in the implementing regulation, reaching a percentage of 25% in an overall assessment of the criteria indicated will be an indicator that a substantial part of the activities is carried out in the Member State concerned.

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70 Although, as Cruz Villalón points out, transnational teleworking "tends to be full-time due to its very nature, as it is carried out from the outset at a significant physical distance from the establishment for which the services are provided". Cruz Villalón op. cit. 97.

71 A situation that article 14.5 of Regulation (EC) No 987/2009 defines as "a person who simultaneously or alternately pursues one or more different activities for the same undertaking or employer or for several undertakings or employers in two or more Member States".

72 Maneiro Vázquez op. cit. 272.

73 Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems.

Therefore, and up to this point in the analysis, in the proposed scenario of a cross-border teleworker under a hybrid teleworking model, the applicable legislation would be that of the Member State from which they provide teleworking services if it can be proven that a substantial part of the activity is carried out in that State, with the threshold set at 25%, taking as a reference for determining this percentage the situation envisaged for the following 12 calendar months[74]. Otherwise, the applicable legislation would be that of the Member State where the company that employs them has its registered office or domicile.

As will be discussed below, the Framework Agreement on regular cross-border teleworking, which came into force on 1 July 2023, raises the threshold of 25% for determining the substantial part of the activity, in an attempt to clarify the applicable social security legislation for this specific group and, in particular, to prevent the change in applicable social security legislation from encouraging social dumping practices.

Regulation (EC) No 883/2004, in article 13.2, also provides for special provisions for self-employed persons who pursue their activity in two or more Member States, subjecting such activity to the legislation of the Member State of residence, if a substantial part of their activity is carried out in that Member State, or to the legislation of the Member State in which the 'centre of interest' of their activities is located, if they do not reside in one of the Member States in which they carry out a substantial part of their activity. For the purposes of determining where the 'centre of interest' of a self-employed person's activities is located, all aspects of their professional activities shall be taken into account, in particular the place where the fixed and permanent establishment of the person's activities is located, the habitual nature or duration of the activities carried out, the number of services provided and even the will of the person concerned[75].

It should also be noted that 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 the activity as an employed person or, if he pursues that activity as an employed person in two or more Member States, the applicable legislation shall be that of the Member State where he pursues the substantial part of his activity[76].

In any case, once the above rules have been applied and the applicable legislation determined, persons who pursue their activity in two or more Member States shall be treated as if they pursued all their activities, whether employed or self-employed, and received all their income in the Member State concerned[77].

In view of the foregoing, the validity of the criteria set out in article 13 of Regulation (EC) No 883/2004 for determining the legislation applicable to situations of regular cross-border teleworking

74 Article 14.10 of Regulation (EC) No 987/2009, implementing regulation.

75 Article 14.9 of Regulation (EC) No 987/2009.

76 Article 13.3 of Regulation (EC) No 883/2004.

77 Article 13.5. Ibid.

is indeed limited, insofar as the regulation itself reduces this possibility to situations of hybrid teleworking, which is certainly residual in transnational situations, and provided that 25% of the activity can be proven to be substantial in a given Member State.

Furthermore, as has been pointed out, there is the added difficulty involved in determining whether work carried out under a teleworking arrangement should be considered to have been carried out in the worker's State of residence, from where they connect and use ICT means to carry out their work, or in the other State where the company is located, from where the appropriate instructions for carrying out the work are given, from where the work is organised and received, in short, from where the employer exercises their supervision and control. This place, in accordance with the provisions of article 14.5 bis of Regulation (EC) No 987/2009, corresponds to the place where the fundamental decisions of the company are taken and where its central administration functions are exercised. This is certainly a very general definition and, as some author points out, other criteria provided by the Administrative Commission (CACSS) must be taken into account, such as the place where the registered office and administration of the undertaking are located; the number of administrative staff in the offices concerned; the length of time the undertaking has been established in the Member State; the place where the selection and recruitment of employees takes place; the place where most contracts with customers are concluded; the office that determines the company's policy and operational aspects; and so on[78].

The apparent solution to this situation has come from article 16 of Regulation (EC) No 883/2004, which provides for the possibility for Member States to adopt, by common agreement, exceptions to the general and specific rules analysed for determining the applicable legislation[79].

Thus, paragraph 1 allows for the possibility that two or more Member States may, by common agreement, provide for exceptions to the rules for determining the applicable legislation in the field of social security set out above[80]. Therefore, an agreement by all Member States is not required, as only two are sufficient for its conclusion. However, article 16.1 specifies that this agreement altering the criteria for determining the applicable legislation must be made "for the benefit of certain persons or categories of persons", never in a general manner[81], a condition that fits perfectly with the specific category of persons who carry out their work under a regular cross-border teleworking arrangement.

78 Ángela Martín-Pozuelo López: The provision of services in several Member States in the Community coordination regulations: the great forgotten struggle with social dumping, until now? *Revista Labos,* Vol. 2, 3/2021. 106.

79 And those of articles 14 and 15 of Regulation (EC) No 883/2004, relating to situations of "voluntary insurance or optional continued insurance" and "contractual agents of the European Communities" which, for reasons of unsuitability to situations of regular cross-border teleworking, have not been addressed in this paper.

80 A loophole or "closing rule" that is justified by the „high degree of rigidity of the system of conflict rules provided for in Title II, a system whose application without nuance, in certain specific cases, could harm the migrants it seeks to protect". Martín-Pozuelo López (2020b) op. cit. 166.

81 As an example of its exceptional nature, article 18 of Regulation (EC) No 987/2009, which regulates the procedure for applying article 16 of the basic Regulation, refers to a "request for exceptions" to articles 11 to 15 of Regulation (EC) No 883/2004.

This has been the certainly controversial route[82] chosen by the Member States that are signatories to the Framework Agreement on the application of article 16.1 of Regulation (EC) No 883/2004 in cases of regular cross-border teleworking, which is analysed below.

4. The framework agreement on the application of article 16.1 of Regulation (CE) Nº 883/2004 in cases of regular cross-border teleworking

On 1 July 2023, the Framework Agreement on the application of article 16.1 of Regulation (EC) No 883/2004 in cases of regular cross-border teleworking came into force[83].

As can be seen from its own explanatory memorandum, the Framework Agreement is the result of reflection on how the conflict rules in the coordination regulations should be applied to this particular form of work, and whether the result of applying these rules is appropriate and in line with freedom of movement and the internal market. It also highlights the need to reconcile the interests of workers, employers and social security institutions in order to address the reality of teleworking until the coordination regulations are adapted in this regard.

Drawing attention to the flexibilisation and digitalisation of the labour market, as well as the increase in cross-border teleworking, the Agreement itself highlights in its background the inadequacy of the current rules for determining the applicable social security legislation for regular cross-border teleworking, which is the ultimate reason for its adoption[84].

The Agreement itself concludes the sequence of Communications and Guidance Notes[85] which, in this regard, were issued urgently by the Administrative Commission in response to the Covid-19 health crisis, subject to the evolution of the pandemic[86]; necessary due to the well-known restrictions on free movement which, justified on security grounds, forced workers to carry out their work from their own homes, many of them in the territory of another Member State[87].

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82 "Although these agreements may resolve situations arising from problems in adapting the rules of Title II, it would not be advisable to resort to them as the main solution for a particular situation such as teleworking." Martín-Pozuelo López (2022) op. cit. 118. In an apparently more critical position, Desdentado Bonete argues that "What is surprising about this rule is the freedom granted to agreements between the states or institutions involved, which may determine a genuine derogation from the general rule of *ius loci laboris*. For this reason, the risks have been pointed out that some practices covered by this authorisation may constitute a breach of the principle of equal treatment for migrant workers and a means of social dumping." Aurelio Desdentado Bonete: Posted workers and frontier workers in European social security: from Regulation 1408/1971 to Regulation 883/2004. *Journal of the Ministry of Labour and Social Affairs,* 64/2006. 27.

83 Published in Spain in the Official State Gazette number 185, of 4 August. It is concluded for a period of 5 years and will be automatically extended for further periods of 5 years.

84 "Given that Regulation (EC) No 883/2004 was adopted at a time when teleworking was not so common". Background 2 of the Framework Agreement.

85 Although "they are not legally binding and are not even published in the Official Journal of the EU [...] they are very relevant because they arise from the majority consensus among the administrations involved, with a political commitment to compliance". Carrascosa Bermejo (2023) op. cit. 63.

86 With the clear objective of „preventing transnational pandemic teleworking from leading to a change in national social security egislation, which had been applicable until then". Carrascosa Bermejo (2022) op. cit. 239–240.

87 A concise and comprehensive overview of the content of these guidance notes can be found in Carrascosa Bermejo (2023) op. cit. 72 et seq.

In a dual conceptual and practical framework, article 1 of the Agreement defines the concept of cross-border teleworking, with article 2 then setting out its scope of application.

Thus, cross-border teleworking subject to regulation is any activity that can be carried out from any location, including the employer's premises or home, and which, on the one hand, carried out in one or more Member States other than that in which the employer's premises or home are located and, in addition, relies on information technology to remain connected to the employer's or company's working environment, as well as to stakeholders/customers, in order to perform the tasks assigned by the employer or customers[88].

A priori, the definition of teleworking offered by the Agreement does not present any particular novelty with respect to other definitions of a doctrinal or conventional nature discussed at the beginning of this paper. It is noteworthy, however, that although the title of the Agreement expressly refers to the "habitual" nature of the cross-border teleworking that is the subject of the regulation, this condition is not mentioned in the definition provided in article 1.

The definition does seem to place greater emphasis on highlighting subordination to the company[89], emphasising the permanent connection with the employer's working environment in order to carry out the tasks assigned. In this regard, the definition indicates a certain preference on the part of the signatory states to link the development of teleworking to the state where the company is located.

Article 2 of the Framework Agreement is devoted to defining its scope of application. It does so in two ways, positive and negative, expressly defining which cases of cross-border teleworking would be included in its subjective scope, and then listing those cases that would, a priori, be excluded.

To begin with, the exception rule contained in the Framework Agreement will apply in cases of cross-border teleworking provided that the States involved, both the State of residence and the State where the company's headquarters or registered office is located, are signatories to the Agreement. Once this condition is met, it will apply to persons who would be subject to the legislation of the State of residence as a result of regular cross-border teleworking, pursuant to article 13.1 of Regulation (EC) No 883/2004[90], and who are employed by one or more companies that have their registered office or place of business in a single different signatory State.

Article 2 of the Framework Agreement expressly and broadly excludes from its scope persons who habitually pursue an activity other than cross-border teleworking in the State of residence, persons who habitually pursue an activity in a third State and persons who are self-employed[91]. However, article 6 of the Agreement provides for exceptions to these exclusions, in a kind of endless spiral, by

88 In the case of self-employed workers.

89 Or with clients.

90 In accordance with sections 8 and 10 of article 14 of Regulation (EC) No 987/2009, as applicable.

91 A list which, in the opinion of Cruz Villalón, "leads us to conclude that it will be applied exceptionally, in view of the number of cases that are excluded". If we add to this the fact that transnational teleworking is mainly carried out on a full-time basis in the worker's State of residence, "the cases in which the rule of the reference framework agreement will apply will be marginal". Cruz Villalón op. cit. 106.

leaving open, once again, the possibility of resorting to article 16.1 of Regulation (EC) No 883/2004 to conclude individual agreements, in situations not covered by the Agreement itself, in which the special situation of regular cross-border teleworking could be taken into account on an individual basis.

Once these framework requirements are met, persons who regularly telework across borders will be subject to the legislation of the State in which the employer has its registered office or domicile, provided that the cross-border teleworking carried out in the State of residence is less than 50% of the total working time. Therefore, the Framework Agreement on regular cross-border teleworking considerably extends the percentage of "substantiality" required for the activity in the State of residence for that legislation to be applicable.

In this way, the signatory states to the Agreement show a clear preference for the application of the legislation of the state where the company's headquarters or registered office is located, although this is subject to the aforementioned threshold[92].

It should be noted that the Agreement does not take effect automatically, but requires a request from the employer or the person concerned in accordance with the procedure laid down in article 18 of Regulation (EC) No 987/2009, to which the Agreement expressly refers in article 4.1. Such a request, addressed to the competent authority of the Member State whose legislation the worker wishes to benefit from, must be made, as indicated in article 18 of the implementing Regulation, "whenever possible in advance" and never if it refers to periods prior to the entry into force of the Agreement itself. Therefore, a request for an exception with retroactive effect is not possible.

If the request relates to earlier periods, even though the Framework Agreement was already in force, certain exceptions are provided for which would allow it to be accepted, such as if Social Security contributions were paid during that period, or if the worker was otherwise covered by the Social Security system of the signatory State in which the employer has its registered office or domicile, and either the period requested prior to the date of submission of the application does not exceed three months, or the application is submitted no later than 30 June 2024, and the period prior to the date of submission of the application does not exceed twelve months[93].

Once the application has been approved, the legislation applicable to the regular cross-border worker will be determined under the Framework Agreement for a maximum period of three years, without prejudice to a possible extension, subject to a new application and for the same period of duration.

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92 A flexible interpretation or reinterpretation of the *lex loci laboris*, already pointed out by renowned doctrine: "The best solution would be to apply the law where the employer's headquarters are located, understood as an updated reinterpretation of the *lex loci laboris* with regard to virtual work or, if preferred, an ad hoc connection that identifies it as a fictitious place of teleworking". Carrascosa Bermejo (2022) op. cit. 243.

93 Retroactivity, although conditional in this case, is possible in agreements signed under article 16 of Regulation (EC) No 883/2004, as understood by the Court of Justice in its Judgment C-454/93, *Van Gestel*, (ECLI:EU:C:1995:205). As López Terrada points out, "nothing in the wording of the provision allows us to conclude that the possibility of granting exceptions to Member States under this provision can only be exercised with regard to the future". López Terrada op. cit. 279.

5. Conclusions

Since the entry into force on 1 July 2023 of the Framework Agreement on the application of article 16.1 of Regulation (EC) No 883/2004 in cases of habitual cross-border teleworking, persons who habitually telework across borders shall be subject to the legislation of the State in which the employer has its registered office or domicile, provided that the cross-border teleworking carried out in the State of residence is less than 50% of the total working time.

Thus, the signatory states to the Agreement are inclined to bring this new labour reality closer to the legislation of the state where the company or employer's headquarters or domicile is located, but this is done in a rather vague manner and by increasing the quantitative requirements of the activity carried out in the state of residence. If we add to this the reality of transnational teleworking, carried out on a full-time basis in the worker's State of residence, and the generous list of exclusions in article 2, its virtual application becomes residual.

It is regulated by article 16.1 of Regulation (EC) No 883/2004, which allows for the adoption of agreements derogating from the rules for determining the applicable social security legislation for the benefit of certain persons or categories of persons. Despite the significant adherence of Member States to this Framework Agreement, if we consider that this new labour reality is here to stay, it would be desirable for it to be addressed through the express incorporation of specific provisions applicable to cross-border teleworking into the rules for determining the applicable legislation set out in Title II of the Regulation itself.

The long-awaited amendment of the coordination Regulations would be a good opportunity for their incorporation without the need for prior voluntary accession.