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The Framework Exemption Agreement – Social Security Protection for Cross-Border Teleworkers in the EU and EFTA

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Summary: Social security has always been an important aspect of the EU cross border employment, ensuring that migrant workers are protected by the social security coordination system. With the rise of cross-border telework, there has been a need to adapt EU social security regulations to accommodate the changing nature of work. Therefore, it was enacted a temporary special regulation to protect cross-border teleworkers in EU/EEA. It was implemented during the Covid-19 and expired on June 30, 2023. Even after the pandemic, the popularity of the telework has continued and an enactment of a new Exemption Agreement seemed to be necessary. The EU's Exemption Agreement, in force, is relevant only for cross-border telecommuters/teleworkers who regularly telework in their state of residence, and the general provisions of the EU social security coordination rules will not be applied automatically to them. Instead, the Framework Exemption Agreement (hereinafter: Agreement) facilitates between the signatory states the conclusion of individual derogations in the interest of a category of employed cross-border teleworkers and their employer(s). Legally speaking, the Exemption Agreement based on the application of Article 16 (1) of Regulation (EC) No. 883/2004 in cases of habitual cross-border teleworking employees. The aim of this paper is to introduce the legal framework and essential procedurial issues of the Exemption Agreement on the EU social security coordination and to formulate some critical views on it.

Key words: social security, EU social security coordination, Exemption Agreement, cross-border teleworkers in EU

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1. 1 Introduction

Mainly due to the Covid-19 pandemic the flexible working models, especially remote work,[1] have become increasingly well-spread in recent years – telework is on the rise.[2],[3] A key component of EU cross-border employment has always been social security, which guarantees migrant workers' protection through a social security coordination system. With the rise of cross-border telework,[4],[5] especially during the Covid-19 pandemic, there has been a need to adapt EU social security coordination regulations to accommodate the changing nature of work.[6],[7] Therefore, it was enacted a temporary special regulations, implemented during the Covid-19,[8] what expired on June 30, 2023.[9] Even after the pandemic, the popularity of the telework has continued and an enactment of a new exemption agreement[10]

[1] VARTIAINEN, M. (2021). Telework and remote work. In Oxford Research Encyclopedia of Psychology. Available at: https://oxfordre.com/psychology (12.12.2024)

[2] POPOVICI, V., POPOVICI, A.-L. (2020). *Remote Work Revolution: Current Opportunities and Challenges for Organizations*. Economic Sciences Series Volume XX, Issue 1, 468–472.

[3] ADRJAN, P. et al. (2021). *"Will it stay or will it go? Analysing developments in telework during COVID-19 using online job postings data"*, OECD Productivity Working Papers, No. 30, OECD Publishing, Paris, Available at: https://doi.org/10.1787/aed3816e-en.

[4] According to the Article 1 (c) of the Framework Agreement, the term "cross-border telework" refers to an activity that can be done from anywhere and at the employer's location or place of business as long as it: 1. is conducted in a Member State or Member States other than the one where the employer's location or place of business is located and 2. relies on information technology to stay in touch with the business's or employer's workplace and stakeholders/clients in order to complete the responsibilities that the employer or clients, in the case of self-employed individuals, give to the employee.

[5] Framework Agreement on the application of Article 16 (1) of Regulation (EC) No. 883/2004 in situations involving regular cross-border telework.

[6] BOYANOVA, M. *Social Security for a new Era of Remote Work: A Cross-Border Agreement* (2023) Available at: https://kunskap.aspia.se/blogg/social-security-for-a-new-era-of-remote-work-a-cross-border-agreement (12.12.2024)

[7] COCQUYT, W. *Cross-Border Remote Working: New Social Security Rules Forthcoming* (2023) Available at: https://www.fragomen.com/insights/cross-border-remote-working-new-social-security-rules-forthcoming.html (12.12.2024)

[8] SPASOVA, S., GHAILANI, D., SABATO, S., VANHERCKE, B. *Social protection for atypical workers during the pandemic* (2022). Available at: https://www.etui.org/sites/default/files/2022-04/Social%20protection%20for%20atypical%20workers%20during%20the%20pandemic-2022.pdf (12.12.2024)

[9] *New European Framework Agreement for Cross-border Teleworking in Social Security Law* (2023) Available at: https://ogletree.de/blog-posts/new-european-framework-agreement-for-cross-border-teleworking-in-social-security-law/?lang=en (12.12.2024)

[10] The substantial heart of this new exception agreement based on the Article 16 (1) of Regulation (EC) No 883/2004 (BR) provides for the option of exceptions from the applicable legislation specified under Title II of this Regulation. It facilitates between the signatory states the conclusion

seemed to be necessary.[11],[12] This article's goal is to present the Exemption Agreement on the EU social security coordination's legislative foundation and key procedural concerns while also articulating some critical opinions about it. The research question is that the Exemption Agreement can provide a comprehensive solution for social security coverage for EU cross-border workers.

A teleworking Exemption Agreement[13] still allows flexible cross-border teleworking patterns in EU member states, in EEA states[14] and in Switzerland. It provides the option to make an exemption from the main rule[15] and pattern[16] of the social security coordination regulations. As a main rule, an employee's social security protection based on his/her own state of residence.[17] Due to the new EU

of individual derogations in the interest of a category of employed teleworkers and their employer(s).

11 The Administrative Commission for the Coordination of Social Security Systems' Ad Hoc Working Group conducted discussions and produced the framework agreement on habitual cross-border telework. The Administrative Commission was tasked with making sure that the rules governing the coordination of social security systems were properly implemented.

12 *Cross-border telework in the EU, the EEA and Switzerland* (2023). Available at: https://socialsecurity.belgium.be/en/internationally-active/cross-border-telework-eu-eea-and-switzerland (12.12.2024)

13 Exemption Agreement based on the exemption to Articles 11 to 15 of the BR. It means that in the interest of specific individuals or groups of individuals, two or more Member States, their respective competent authorities, or the bodies appointed by these authorities may, by mutual consent, arrange for exceptions to Articles 11 to 15.

14 Iceland, Lichtenstein and Norway.

15 The main provisions of applicable legislation are in the Article 11–15 in BR.

16 Coordination rules do not remove substantive differences between national systems, including the possible negative effects of crossing borders due to different levels and standards of social protection in each country, nor do they compensate for such effects. Being able to physically and legally cross at least one border (free movement of persons, including workers, self-employed, posted workers, frontier workers, seasonal workers, etc.) between EU Member States, EEA states, and Switzerland, as well as having access to social security benefits without facing discrimination on the basis of nationality, was one of the most crucial prerequisites from the start. In short, ensure that physical free migrants in the EU, EEA, and Switzerland have the right to social security. The free movers actually cross at least one of the states listed above.

17 According to the Article 13 of the BR, a person who normally pursues an activity as an employed person in two or more Member States is subject to: "(a) the legislation of the Member State of residence if he pursues a substantial part (min. 25% of the work) of his activity in that Member State or if he is employed by various undertakings or various employers whose registered office or place of business is in different Member States, or (b) the legislation of the Member State in which the registered office or place of business of the undertaking or employer employing him is situated, if he/she does not pursue a substantial part of his activities in the Member State of residence."

Exemption Agreement, employers and cross-border teleworkers can apply for an exemption based on a bilateral telework (exemption) agreement.[18]

The EU's Exception Agreement, in force, is relevant only for cross-border telecommuters/teleworkers[19] who regularly telework in their state of residence, and the general provisions of the EU social security coordination rules will not be applied automatically to them.[20] This new agreement states that cross-border teleworkers can continue to be insured in the member states where their employer is located while working primarily in their home country, provided that the majority (51%) of the work is completed in the employer's country, provided certain requirements are met.[21]

The Exemption agreement facilitates between the signatory states the conclusion of individual derogations in the interest of a category of employed cross-border teleworkers and their employer(s).[22] It is essential for workers participating in cross-border operations inside the European Union to be aware of the relevant social security laws. Legally speaking, the Framework Exemption Agreement applies Article 16 (1) of Regulation (EC) No. 883/2004 to employees who regularly work remotely across borders.

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[18] *EU Framework agreement on cross-border telework* (2023). Available at: https://www.ilmarinen.fi/en/about-ilmarinen/current-topics/news-and-articles/2023/eu-framework-agreement-on-cross-border-telework-1.7.2023/ (12.12.2024).

[19] In the context of EU social security coordination there is a fundamental difference between cross-border regular worker and the cross-border teleworker. The main difference is physical presence in the workplace. The regular cross-border worker is physically crossing the physical borders and work in the workplace of other country than his/her state of reseidence, while telework is a work without presence in the physical premise of the employer (remote, but in case of social security coordination a cross-border elements must be involved).

[20] *European Union: Several EU Member States Agree on Exception to Existing Social Security Rules for Cross-border Teleworking* (2023). Available at: https://www.fragomen.com/insights/european-union-several-eu-states-agree-on-exception-to-existing-social-security-rules-for-cross-border-teleworking.html (12.12.2024).

[21] KOVACHEVA, N., TSVETKOVA, P. *Remote workers – Framework agreement in place regarding social security.* Available at: https://www.ey.com/en_se/tax/remote-workers-framework-agreement-in-place-regarding-social-security (12.12.2024).

[22] *Cross-border telework in the EU, the EEA and Switzerland* (2023). Available at: https://socialsecurity.belgium.be/en/internationally-active/cross-border-telework-eu-eea-and-switzerland (12.12.2024)

2. The context of the EU social security coordination regulations

The EU social security coordination[23] regulations (883/2004 (Basic Regulation (hereinafter: BR) and 987/2009 (Implementing Regulations (hereinafter: IR[24]) are essential to ensure the free movement of persons within the European Union, the European Economic Area (EEA) and Switzerland.[25] They guarantee for free movers – among 31 states – their social security rights basically irrespective of the State in which they work, reside or stay.[26],[27]

Since the beginning of the European integration development, social security coordination law has been a vital component of the free movement of individuals.[28] As a fundamental starting point, the coordination regulations do not remove substantive differences between national social security systems.[29] However, it is mandatory to determine the applicable legislation for cross-border free movers, therefore only one MS's social security provisions might be applicable.[30] Since the Exemption Agreement covers only teleworker employees therefore the focus point of this article will be on them and dispenses other categories, such as self-employed, etc.[31,32]

23 The EU offers common regulations to safeguard a person's social security entitlements when he/she relocates inside Europe (EU 27 plus Iceland, Liechtenstein, Norway, and Switzerland) under the auspices of the EU social security coordination plan. After BREXIT the United Kingdom is subject to particular coordination regulations. The social security coordination regulations do not substitute a single European system for national ones. Every nation is allowed to choose who is covered by their laws, what benefits are offered, and under what circumstances.

24 As from 1 May 2010, new Regulations on modernised coordination (Regulations 883/2004 and 987/2009) apply.

25 This study will not address the problem of cross-border teleworkers who are third-country nationals (TCNs).

26 *Cross-border telework in the EU, the EEA and Switzerland* (2023). Available at: https://socialsecurity.belgium.be/en/internationally-active/cross-border-telework-eu-eea-and-switzerland (12.12.2024).

27 BOGOESKI, V. (ed.), RASNAČA, Z. (ed.). *Research Report of ECONSTORE, Report on the social security rights of short-term third-country national migrant workers* (2023). Available at: https://www.econstor.eu/bitstream/10419/300297/1/1870863607.pdf (12.12.2024).

28 This is referred to as the non-discrimination based on citizenship or equal treatment concept.

29 Each state covered by the territorial scope of the BR, has its own social security legislation and system. The obligations and rights under these schemes are the same for all nationals in that country, whether local or from other EU and EEA states and Switzerland.

30 According to the Article 11, par. 1 Reg. 883/04 (BR), one and only one state is the competent state.

31 JORENS, Y. *Cross-Border Employment and Social Security: The Legal Framework*, December 2022, DOI: 10.1007/978-3-031-18854-1_4

32 HAJDÚ, J. *Social protection of (im)migrants by the EU social security coordination scheme.* Pravne Teme: Casopis Departmana za Pravne Nauke Univerziteta u Novom Pazaru / legal issues 5:(9), 2017 pp. 8–26.

According to the Article 11 (1) of the BR, the state where a worker is insured is primarily stipulated by where the work is performed (see the principle of lex loci laboris).[33] However, the BR's general premise of lex loci laboris cannot be used when the worker conducts their activity in multiple MSs.[34] Therefore, in accordance with Article 13 (1) (a) of the BR, a person who typically works in two or more EU Member States will be governed by the laws of the Member State in which they reside if they conduct a significant portion of their work in that Member State (i. e., more than 25%, as defined by Article 14 (8) of the Implementation Regulation EC 987/2009) (the lex loci domicilii principle). However, marginal activity[35] will not be considered when applying Article 13 of the BR according to Article 14 (5) (b) of the Implementation Regulation EC 987/2009. This means that even before the COVID-19 pandemic occasional telework from home was not taken into account and did not influence the applicable legislation.[36],[37]

For this reason, if a worker conducts a significant portion of their activities in their MS of residence, they will be governed by the laws of that MS, as stated in Article 13 (1)(a) of the BR. The laws of the MS of the employer will be applicable if he/she does not pursue a significant portion of their activities in that MS (Article 13 (1) (b)). It should be emphasized in this regard that the Exemption Agreement for cross-border teleworkers is founded on Article 16 (1) (BR) to exempt cross-border teleworkers from the application of Article 13 (1) in Regulation 883/2004/EC.[38]

Telework may result in a shift in the insurance situation when it comes to cross-border work. Teleworking in the Member State of residence may result

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33 Lex Loci Laboris translates to "law of the place of work."

34 The general norm, known as the State of employment principle (lex loci laboris), for the applicable social security laws is contained in Article 11(3)(a) of Regulation EC 883/2004's coordination rules. According to this Article, anyone doing work-related activities in a Member State is governed by that Member State's laws. Because they operate in multiple Member States, cross-border teleworkers find it especially difficult to identify the applicable laws. In these circumstances, the same Regulation's Article 13 is applicable.

35 Marginal activity is defined as activities that make up less than 5% of normal working hours or pay. It requires a case-by-case investigation to determine its relevance.

36 ACETO, F. *Cross-border telework and social security: A new multilateral Framework Agreement.* Available at: https://global-workplace-law-and-policy.kluwerlawonline.com/2023/09/25/cross-border-telework-and-social-security-a-new-multilateral-framework-agreement/ (12.12.2024).

37 Case C-570/15 X v Staatssecretaris van Financiën, ECLI:EU:C:2017:674, paras 28 and 29. In this instance, the European Court of Justice decided that an individual is not to be regarded as normally employed in the territory of two Member States if, during the course of a year, he/she worked only 6.5% of the total number of hours for an employer based in one of the Member States (that is, the State in which he/she resides).

38 VERSCHUEREN, H. *The Application of the Conflict Rules of the European Social Security Coordination to Telework During and After the COVID-19 Pandemic* June 2022 European Journal of Social Security 24(2):79-94 DOI: 10.1177/13882627221107042.

in changes to social security laws if an individual does not live in the state where the employer's premises are located, as the physical place of work is a determining factor with respect to the applicable social security legislation under the EU social security coordination scheme. For instance, this will be the case after telework in the state of residency reaches a quarter of the total..[39] Since work that was formerly done at the employer's location is now done remotely from the employee's home state, this shift is particularly likely to occur if telework accounts for more than 25% of an employee's working hours.[40]

Furthermore, there is the option to depart from this regulation via the Exemption Agreement on cross-border telework. According to the terms of the agreement, the employer and employee may request an exemption from the EU Regulation on Social Security (BR) regulations, allowing the employee to be covered by the social security laws of the state in which their firm has its statutory seat.[41]

3. The outline of the Exemption Agreement concerning cross-border telework within the EU/EEA/Switzerland

During the COVID-19 epidemic, the EU Commission's Administrative Commission on Social Security for Migrant Workers[42] implemented provisional regulations for home offices and telework as a precursor to the Exemption Agreement. They made it clear that telework carried out because of COVID-19 in a Member State other than the employer's state shouldn't result in a change in the insurance

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39 *Cross-border telework in the EU, the EEA and Switzerland* (2023). Available at: https://socialsecurity.belgium.be/en/internationally-active/cross-border-telework-eu-eea-and-switzerland (12.12.2024).

40 European Labour Authority *What's the latest on cross-border telework and social security?* (2023) Available at: https://eures.europa.eu/whats-latest-cross-border-telework-and-social-security-2023-11-13_en (12.12.2024).

41 *EU agreement on remote work* (2023). Available at: https://www.etk.fi/en/work-and-pensions-abroad/insurance-while-working-abroad/remote-work-and-work-abroad/eu-agreement-on-remote-work/ (12.12.2024).

42 Article 71 of the BR states that the Administrative Commission, which is made up of a government representative from each Member State, is specifically tasked with addressing any administrative or interpretive issues resulting from this Regulation's provisions and encouraging more collaboration among the Member States.

status.[43] However, as of June 30, 2023,[44] these extraordinary pandemic-related precautions were no longer in effect. The Exemption Agreement, a multilateral framework agreement based on Regulation (EC) 883/04 on social security, which governs social security duties in cross-border teleworking, went into effect on July 1, 2023.[45]

The Exemption Agreement is relevant for cross-border teleworkers who regularly work in their residence state and also in the state of employer's premise. As long as the majority (51%) of the work is done in the state of the employer's premises member state, cross-border teleworkers can continue to be covered in the state where their employer is located while working mostly in their home country under this new agreement. This guarantees that a cross-border teleworker employee can work longer hours in their home state without imposing social security duties on the employer in that state. Although this agreement is required, it only applies in specified circumstances and has certain prerequisites that must be met.

As previously mentioned, the Exemption Agreement complies with Regulation (EC) No. 883/2004 on the coordination of social security systems (BR), article 16, which permits competent authorities to grant exceptions by consensus in the best interests of certain individuals or groups of individuals. According to the agreement, employees would still be covered by the social security laws of the member state where the employer has its registered seat, provided that article 16 of the agreement specifically requests it: 1. who work regularly in the state where their employer's statutory seat is located; 2. who have a single employer (or several employers with a registered seat in the same member state); 3. a cross-border teleworker who regularly works in their home state and completes the remainder of their work in the state where their employer is located; 4. a cross-border teleworker who works up to 49% of the time in their home state over a 12-month period;[46] 5. Both the employer and the employee must consent

[43] NATALI, D., POCHET, P., ŠĆEPANOVIĆ, V., KEUNE, M. *Covid-19 and the world of work in Europe* Transfer – Volume 28 Issue 1, February 2022.

[44] European Labour Authority *What's the latest on cross-border telework and social security?* (2023). Available at: https://eures.europa.eu/whats-latest-cross-border-telework-and-social-security-2023-11-13_en (12.12.2024).

[45] DE PAUW, B., VERSCHUEREN, H. *The Framework Agreement on the applicable social security law in case of habitual cross-border telework after the pandemic.* ERA-forum: scripta iuris europaei / Academy of European Law [Trier] Heidelberg: Springer, 24 3 (2023) p. 467–480. Available at: https://doi.org/10.1007/S.12027-023-00766-5 (12.12.2024),

[46] The primary rule for cross-border labour in EU regulation 883/2004 (BR) states that if an employee works in their home country for 25% or more of the time, they become an affiliate of that country's social security system and must pay social payments in that state. According to the

to apply (note that the Exemption Agreement is not required to participate); additionally, the employer and employee must consent to the request being forwarded to the appropriate social security organization;[47] 6. Only when both participating countries (MSs) have signed the Exemption Agreement does it take effect.[48]

3.1. The scope of the Exemption Agreement

A. Territorial scope. Majority of the EU member states: Austria, Belgium, Croatia, Czechia, Finland, France, Germany, Ireland, Italy, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden. The involved EEA and EFTA countries: Norway, Liechtenstein and Switzerland. Other states have declared their intention to apply the Agreement (namely Bulgaria, Cyprus, Estonia, Greece, Hungary, Latvia, Romania and Iceland), but have not yet signed it. The United Kingdom and Denmark has indicated that they will not sign it.[49]

Furthermore, the territorial area of the Exemption Agreement also includes the states bound by bilateral social security agreements with the signatory governments.[50]

On July 1, 2023, the Agreement became operative. At least two states had to sign it as a prerequisite. It ends after five years and will automatically be renewed every five years after that. All signatory states may opt to terminate the Agreement.

B. Personal scope. Generally speaking, the Exemption Agreement applies to all cross-border teleworkers to whom Article 16 (1) of the Basic Regulation may be applied, so long as the individuals' residence is in a signatory State and

new framework agreement, employees can work up to 49% of their job remotely in their home country over the course of a year, provided that the employer's location is used for the remaining portion of the work.

47 The application should be submitted in the state where the employer resides when an employer and employee wish to apply in line with the framework agreement. Both the employer and the employee must sign the application, indicating their approval to its submission. Applying for a group of employees is another option.

48 VANTHUYNE, N. *EU framework agreement on cross-border telework: Which countries are participating?* (2023). Available at: https://www2.deloitte.com/be/en/blog/tax-alerts/2023/EU-framework-agreement-on-cross-border-telework--Which-countries-are-participating-.html (12.12.2024).

49 *Cross-border telework in the EU, the EEA and Switzerland* (2023) Available at: https://socialsecurity.belgium.be/en/internationally-active/cross-border-telework-eu-eea-and-switzerland (12.12.2024).

50 SCHOUKENS, P., EVERAET, G. *Reflection on Telework in Social Security Coordination.* October 2023
Zbornik Pravnog fakulteta u Zagrebu 73(2-3):373-390, DOI: 10.3935/zpfz.73.23.8.

the employer's or undertaking's registered office is located in another signatory State.[51]

The degree of cross-border telework is a key factor in deciding how the Exemption Agreement is applied:

a) In the worker's home state, cross-border telework accounts for less than 25% of working hours. Under normal circumstances, the employee is still covered by insurance in the state where they work. It is necessary to notify their state of residence, nevertheless.
b) In the worker's home state, cross-border telework accounts for 25% to 49% of working hours, and both states have ratified the Exemption Agreement. In this instance, the employee may be insured in the employer's state (with both the employer and the employee's consent) for a maximum of three years, renewable, upon request to the employer's state under the Exemption Agreement.
c) At least 25% of working hours are spent working remotely in the worker's home state, and at least 50% of working hours are spent working remotely in one or both states that are not signatories to the Exemption Agreement. The worker's home state should be informed in such cases. The employee will often have insurance in their home state. However, they may be able to obtain insurance in the employer's state by requesting an exemption under Article 16 of Regulation 883/2004. This requires the consent of both participating states.[52]

The Agreement does not, however, apply to anyone who: 1. regularly engage in activities other than cross-border telework in their home state (such as customer visits or missions); 2. regularly engage in activities in a third state; or 3. are self-employed.

3.2. The Procedural Modus Operandi of the Exemption Agreement

When a request for cross-border teleworkers is made, the signatory Member States reach an agreement under Article 16 that deviates from Article 13 (1) (a) by designating the Member State in which the employer is located as competent, so long as the employee's total working time in the Member State of residence is less than 50% of telework. The total working hours of all employers combined

[51] GOLDNER LANG, I. (2018). *Intra-EU Mobility of EU Citizens and Third-Country Nationals: Where EU Free Movement and Migration Policies Intersect or Disconnect?* SSRN Electronic Journal. 10.2139/ssrn.3545929.

[52] European Labour Authority *What's the latest on cross-border telework and social security?* Available at: https://eures.europa.eu/whats-latest-cross-border-telework-and-social-security-2023-11-13_en (12.12.2024).

shall be considered as a reference if an individual works for multiple employers based in the same Member State. This suggests that the employer or employers spend the majority of their working hours in the Member State in which they are located. The employer and employee must expressly agree on cross-border telework. Their mutual consent is required before the Agreement may be applied.[53]

According to Article 18 of the Implementation Regulation EC 987/2009, after the two parties have decided to proceed with this process, the employer must file a request in the Member State whose laws the employee or other individual in question wishes to have applied. This implies that the request needs to be submitted to the appropriate organization in the Member State where the employer is legally based.

Additionally, this Agreement establishes a streamlined process in which both states provide their prior consent. This means that after receiving the request, the employer's state's competent institution determines whether the Agreement's requirements have been met. If the assessment is positive, an A1 certificate will be granted, and Article 4(5) of the Agreement's EESSI (Electronic Exchange of Social Security Information)[54] will notify the (former) competent State of residence. The matter is handled as a standard Article 16 (BR) request if the Agreement's requirements are not fulfilled.

Before the date of enter into force, the Agreement has no implications. An A1 certificate may be applied for until July 1, 2024, with retroactive effect until July 1, 2023, as long as the employer's Member State has received social security contributions. The retroactive effect is only available for three months after July 1, 2024.

Article 4(4) of the Agreement states that an agreement under Article 3 may be applied for a maximum of three years at a time, with extensions available upon fresh request. As stated in Article 6(2), this Agreement will come into effect on July 1, 2023, provided that at least two States have signed it (NB: a need that has been fulfilled). The Agreement is signed for five years, after which it will automatically be extended for an additional five years without a review procedure.[55]

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[53] Article 3 of the 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.

[54] The Directorate-General for Employment, Social Affairs, and Inclusion (DG EMPL) of the European Commission created the IT system. According to EU regulations on social security coordination, the system facilitates the faster and more secure exchange of information between the social security institutions of EU member states regarding relevant laws, illnesses, occupational diseases, workplace accidents, pensions, unemployment benefits, and family benefits. Citizens can apply for social security benefits and documentation using this digital cloud service when they move within the EU.

[55] ACETO, F. (2023). *Cross-border telework and social security: A new multilateral Framework Agreement.* Available at: https://global-workplace-law-and-policy.kluwerlawonline.com/2023

4. Critical observations

Apparently the Exemption Agreement is a necessary – and in my view transitional – intervention to the EU's social security coordination system, but it has some deficits. Few of the most striking discrepancies will be highlighted in thefollowing section it the paper.

1. When a cross-border teleworker works in the country of residence for purposes other than teleworking, the Agreement is not applicable. A definition for identifying the relevant legislation (competent Member State for social security) can be found in Article 1 of the Exemption Agreement as a starting point. Employees and independent contractors who engage in telework are included in this broad description; however, they are not covered by this Agreement (Article 2(3)(iii)).

Through successive legislation amendments and CJEU case law, the initial coverage of Regulation 3/1958 (wage earners and assimilated workers) was gradually expanded to include the current personal reach of EU social security coordination laws. According to Article 2 of Regulation 883/04 (BR), which is currently in effect, all citizens of Member States who are or have been subject to the laws of one or more Member States, as well as their family members and survivors, are generally and completely covered, regardless of whether they are employed or self-employed and live in a Member State.

This implies that whether an individual has been insured as self-employed or employed, Regulation 883/04 (BR) is still applicable. It is therefore difficult to defend the Exemption Agreement's exclusive limitation to cross-border teleworker employees and exclusion of independent (self-employed) contractors.

Article 13(1-2)(a) and (b) of the BR state that an individual who typically engages in employment or self-employment in two or more Member States is subject to either (a) the laws of the Member State in which they reside if a significant portion of their activities (25%) of their activities are conducted there, or (b) the laws of the Member State where the center of interest of their activities is located, if they do not reside in one of the Member States in which they conduct a significant portion of their activities. These laws are very similar for EU migrant employed persons and self-employed individuals.

The Exemption Agreement may be expanded or simply adhered to to the same personal scope since the Title II (Determination of the Legislation Applicable)

/09/25/cross-border-telework-and-social-security-a-new-multilateral-framework-agreement/ (12.12.2024).

special rules under Article 13 of the BR apply to both employees and/or self-employed individuals who work in two or more Member States.

In actually, telework's primary feature is that it allows employees or independent contractors to conduct their work from any location throughout Europe or perhaps the world. As a result, the limitation outlined in Article 1 of the Exemption Agreement is impractical and needless. I believe that cross-border telework should also be included by the full personal scope of the BR.

2. Restrictions for cross-border teleworkers include the requirement that they regularly work in both their home country and the state where their employer maintains a registered office. The premise is that a teleworker's location has no bearing whatsoever on the telework itself. This sets telework apart from all other kinds of activities that necessitate or suggest that the work be done at a specific location (for example, the employer's workplace or premises in the event of an employment connection).

Nonetheless, telework relies on an IT link—a digital connection—to the organization's center and infrastructure, without the remote worker's physical presence. Even though the teleworker must stay connected to the employer's workplace in order to complete the activities assigned, it is an essential component of the definition of a teleworker. This IT link needs to be consistently and regularly available, but not always for the entirety of working hours (e. g. reading materials or offline grading of tests by a professor). This means that, generally speaking, manual labour performed off-site from an employer's location does not qualify as telework.

The example of highly mobile migrant labourers may be brought up to illustrate this point.[56] Within the EU social security coordination system, they are a well-known group of physical migrant workers. According to the definition, "highly mobile workers"[57] are those whose place of employment is not in a single Member State; they either work in multiple Member States, cross borders frequently because of their line of work, or cross borders daily to work in a Member State other than their permanent residence (e. g. frontier workers).[58]

[56] REWUCHA, A. Crossing borders and moving frontiers: Coordinating European social security for modern cases of global mobility. December 2024. *European Journal of Social Security*. 26(4). DOI: 10.1177/13882627241298227.

[57] DE WISPELAERE, F. and ROCCA, M. (2020). *The dark side of the tour: labour and social security challenges of highly mobile workers in the live performance sector, ERA Forum*. Available at: https://doi.org/10.1007/ s12027-020-00600-2 (12.12.2024).

[58] RASNAČA, Z. *Essential but unprotected: highly mobile workers in the EU during the Covid-19 pandemic* (2020). Available at: https://etui.org/publications/essential-unprotected-highly-mobile-workers-eu-during-covid-19-pandemic (12.12.2024).

Additionally, the special rule of Article 13 (1) (a) and (b) of the BR applies when determining the appropriate laws in cases of engaging in employment and/or self-employment activities in two or more Member States. A person who typically works as an employed person in two or more Member States is subject to the following laws: (a) the laws of the Member State in which they reside if they conduct a significant portion of their activities there (25 percent), or if they work for multiple employers or undertakings with registered offices or places of business in different Member States, or (b) the laws of the Member State where the employer or undertaking they work for has its registered office or place of business if they do not conduct a significant portion of their activities in the Member State of residence.

As a remedy, I believe that highly mobile cross-border teleworkers should also be included under Article 13 (1) (a) and (b) of the BR.

3. There is an additional problem to determing residence for persons who seek social security coverage for workations, home office in holiday homes, or mobile work while traveling within Europe (digital nomads in EU+EEA) *are not covered by this regulation.*

The Implementing Regulation's (IR)[59] Article 11 on the factors used to determine residence regulations states: 1. In cases where the institutions of two or more Member States disagree on the determination of the residence of an individual to whom the Basic Regulation applies, these institutions will collectively determine the individual's center of interests based on a comprehensive evaluation of all relevant facts, including, if applicable: (a) the length of time and continuity of presence on the territory of the Member States in question; (b) the individual's circumstances, including: (ba) the type and particulars of any activity practiced, specifically the location, stability, and length of any employment agreement; (bb) the individual's family status and relationships; (bc) the engagement in any non-remunerated activity; (bd) the source of income for students; be. the person's housing situation, specifically the permanence of that situation; (bf) the Member State where the individual is considered to reside for taxation reasons. 2. The individual's intention, as it emerges from the facts and circumstances, particularly the reasons behind the move, should be regarded as decisive for determining that person's actual place of residence in cases where the institutions

[59] 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.

involved cannot agree after considering the various criteria based on pertinent facts (enrolled above).[60]

4. The next problem is when the cross-border teleworker employee has more than one employer and they are situated in different countries.

In this case the central interest of the cross-border teleworkers, relationg to social security protection, should be taken into consideration. According to my opinion, in such instances, the cross-border teleworker's state of residence should be notified. According to the general provisions of the BR, the regular worker (not teleworker) will be insured in their state of residence.[61]

However, requests for exemption under Article 16 of Regulation 883/2004 (BR) can be made, which could allow them to be insured in the state of the employer. In that case both states involved must approve this.

5. Several aspects of taxation, data protection, and employment legislation are not covered by the Exemption Agreement.

Given that the EU social security coordinating plan does not address these difficulties, it is not surprising. They are unavoidably very important in cross-border telework activities. As a result, we will briefly discuss each of them here.[62]

A.

Regarding *employment law*, a framework agreement on telework was established in 2002. It was the first agreement to be implemented at the national level by the social partners and was negotiated in 2001/2002. The social partners viewed telework as a means for businesses and public service organizations to modernize their work structures as well as a means for employees to balance their personal and professional lives, allowing them more freedom to complete their jobs.[63]

[60] 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.

[61] VAN DE PERRE, S. *EU framework agreement on cross-border telework: State of play.* Available at: https://www.taxathand.com/article/30129/Belgium/2023/EU-framework-agreement-on-cross-border-telework-State-of-play (12.12.2024),

[62] NIESTEN, H. (2023). Frontier Workers' Tax and Social Security Status in Europe – Optimizing the Legal Status in a Changing Landscape. In: *International Tax Studies (ITAXS)*. Amsterdam. Vol. 5 (2022), no. 10; 32 p. Available at: SSRN: https://ssrn.com/abstract=4380311 (12.12.2024).

[63] JORENS Y. *Cross-Border Employment and Social Security: The Legal Framework.* December 2022, DOI: 10.1007/978-3-031-18854-1_4,

In this context, teleworkers are defined as follows in the telework framework agreement: "Telework is a form of organising and/or performing work, using information technology, in the context of an employment contract/relationship, where work, which could also be performed at the employers' premises, is carried out away from those premises on a regular basis." Furthermore, telework is optional and predicated on mutual consent between the employer and employee. Changing to telework has no impact on one's job standing. Nonetheless, it is seen as an unusual work arrangement. The same rights that apply to similar employees at the employer's location also apply to teleworkers, albeit it could be essential to take into account the unique circumstances of telework.[64]

The employer is responsible for the following: 1. relevant written information needs to be provided to the teleworker when engaged in telework; 2. data protection; 3. providing, installing and maintaining equipment; 4. costs directly caused by telework; 5. providing appropriate technical support facilities; 6. health and safety; 7. giving similar employees at the employer's location the same access to training.[65]

B.

As for *tax law*. The EU Exemption Agreement on telework does not apply to tax matters. Rules on taxation remain unchanged. Each EU state follows its own national tax laws and bilateral income tax agreements. Tax agreements generally follow a so-called six-month rule according to which a country has a right to tax income if the employee stays there for more than six months. If the employee stays and works overseas for longer than six months, they must report their wage income to their home country.[66]

As it was discussed above, teleworkers who work remotely in their home state for at least 25% but less than 50% of their total working hours are covered by the Exemption Agreement. The employee is required to work in the employer's home country for a minimum of 50% of their working time. It is largely the employee – whose personal income is being taxed – who is responsible for

[64] RASNAČA, Z. *Essential but unprotected: highly mobile workers in the EU during the Covid-19 pandemic*. ETUI, The European Trade Union Institute. (2020) Europe/Brussels. Available at: ttps://www.etui.org/publications/essential-unprotected-highly-mobile-workers-eu-during-covid-19-pandemic. (12.12.2024).

[65] GABAGLIO, E. *Framework Agreement on Telework* (2022). Available at: https://resourcecentre.etuc.org/sites/default/files/2020-09/Telework%202002_Framework%20Agreement%20-%20EN.pdf (12.12.2024).

[66] SOFIANU, C., RĂUT, D. *Taxation of cross-border teleworking: trends and concerns at the European level.* Available at: https://www.internationaltaxreview.com/article/2e1hezs5d849yj54u7qio/sponsored/taxation-of-cross-border-teleworking-trends-and-concerns-at-the-european-level (12.12.2024),

proving that they have lived and worked in their employer's home country for more than half of their working time.[67]

Tax agreements include special regulations on how the tax liability status is defined: in addition to residence, permanent housing, family relations and living situation base all play a key role when assessing the employee's tax liability in the country in question. These issues should be taken into account in taxation and possible registration under the tax system of another state.[68]

Since distance work situations vary so much, both employees moving overseas and companies sending employees abroad must find out about taxation in their particular situation.[69]

Decisions on taxation are made by calendar year, retroactively. Surprising tax decisions can be avoided by preparing for the situation in advance and finding out about the employee's tax status before filing a tax return. Employers and employees may need to sort out salaries paid and taxes withheld in two different countries: the employer's and employee's home countries. According to the tax agreements, taxation and how it is divided is agreed between the countries' tax administrations in case there are issues subject to interpretation.[70]

C.

Regarding *data protection*, on the one hand, the framework agreement on teleworker employment addresses the topic in passing. However, every EU member state is subject to the General Data Protection Regulation, or GDPR. The GDPR is directly applicable in all EU member states because it is an EU regulation. Article 88 of the GDPR specifically addresses employment-related matters.[71]

It declares that Member States may establish more detailed regulations to guarantee the protection of rights and freedoms with regard to the processing of employees' (including cross-border teleworkers') personal data in the context of employment through legislation or collective bargaining agreements, specifically

67 ANDERSON, K. *Taxation of cross-border teleworkers and their employers* (2022). Available at: https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/taxation-cross-border-teleworkers-and-their-employers (12.12.2024),

68 ANDERSON, K. Opinion of the European Economic and Social Committee on Taxation of cross-border teleworkers globally and the impact on the EU (C/2024/2479). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023IE0860 (12.12.2024),

69 VALÉRIO, C. *A Framework for Taxation of Telework Income in the European Union: How Late?* Available at: https://www.ibfd.org/sites/default/files/2024-06/etf-4-taxation-of-remote-workers.pdf (12.12.2024),

70 NIKULA, A. *Taxation of Telework in the EU* (2023). Available at: https://suomi-seura.fi/taxation-of-telework-in-the-eu/ (12.12.2024),

71 European Commission: *Legal framework of EU data protection* (2024). Available at: https://commission.europa.eu/law/law-topic/data-protection/legal-framework-eu-data-protection_en (12.12.2024).

for the purposes of hiring, carrying out the terms of the employment contract, including fulfilling legal or collective bargaining obligations, managing, organizing, and planning the work, promoting equality and diversity in the workplace, ensuring workplace health and safety, protecting the property of the employer or customer, exercising and enjoying employment-related rights and benefits on an individual or group basis, and ending the employment relationship.

6. The limitation of the activation within a certain intervals (25–49.9 %) is solicitous.

Necessarily there are some valid questions relating to this issue: Why only upto 49.9 percent in the state of residence and maintain coverage under the social security scheme in the state of the employer? In one hand, it is very difficult to measure precisely the percentage of the pursued activity, on the other hand, there is no real reason why the applicable legislation should be changed.[72] According to my opinion, in case of cross-border telework – without physical move by the teleworker – such kind of percentage-based mathematical instrument should be ignored and the principle of lex loci domicilii is proposed to be applied.

7. There is a question why cross-border telework regulated by multi-bilateral Exemption Agreement (on contractual ground) after the Covid pandemic on 1 July 2023.

Instead it should be a sui generis modification of the 883/04 and 987/2009 Regulations and in line with it the migrant cross-border (either doing activity in one other member state than his/her own residence (Article 11 of the BR) or cross-border teleworkers doing his/her activity in two or more state (Article 13 of the BR) teleworkers might be a new category under the Title II on Determination of the legislation applicable of the BR.[73]

For example, an employee resides in MS „A" and is employed by a company in MS „B". The employee works from home on a laptop and/or a smartphone connected to his/her employer's IT environment. According to the Exemption Agreement in force, if the employee works from home in MS „A" more than 25 percent of his/her time but less than 50 percent, and the rest of time the employee works in MS „B", the employer and the employee can apply for an A1

[72] HADZIC, D. *Framework Agreement for Social Security Enacted* (2023). Available at: https://kpmg.com/xx/en/our-insights/gms-flash-alert/flash-alert-2023-143.html (12.12.2024),

[73] European Labour Authority *What's the latest on cross-border telework and social security?* (2023). Available at: https://eures.europa.eu/whats-latest-cross-border-telework-and-social-security-2023-11-13_en (12.12.2024),

Form under the Agreement to be covered by MS „B" social security and avoid switching to MS „A" social security system.

According to my view, if the cross-border teleworker works only in one Member State and resides in another, the Article 11 (General rules) of the BR should be applicable. Keep in mind that telework is an atypical form of employment in terms of the place of work – where the teleworker pursuing his/her activity – is different from the employer's location, because he/she not neceserily move to work in the state of the employer's premise. Instead the teleworker mainly works in the place of the his/her state of residence, usually his/her home (except digital nomas and workation, etc.). Primarely the main interest (receive full social security protection) of the cross-border teleworker's is to keep his/her social security protection in the state of his/her own residence from where usually the telework activity is done. According to this view, when a cross-border teleworker does business in two or more states, the same strategy and solution may be used. While this approach is undoubtedly pertinent to the coordination of EU social security, proper and potentially comprehensive solutions are still needed for the employment and tax challenges.

5. Conclusions

The Exemption Agreement on the social security protection of teleworkers appears to be a step in the right direction toward progressively standardizing the system of cross-border teleworking. But there is still no comprehensive (covering all kinds of cross-border teleworkers (under employment contract) and self-employed people) and unified (covering employment, social security, taxation, and data protection, etc.) European answer to them. Furthermore, the limitations include its restricted personal scope, which only applies to employees performing telework through a digital connection in, at least, two signatory states. This makes it difficult to determine which jobs are appropriate for telework and which are done on the employer's property, necessitating that workers understand which can be done from home. Some offline duties, like reading materials or offline test marking, can be classified as telework, according to the Explanatory Memorandum.[74]

It is important to note that neither the Agreement nor the Explanatory Memorandum states who is responsible for supervising the evaluation of the actual performed working time (problem of percentage intervals: 25–49.9%). Additionally,

[74] Article 1 of the 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.

the Agreement's applicability is restricted to combinations involving two relevant states, even if all additional countries have signed the Agreement. This limitation arises from the use of Article 16 of the BR. The parties concerned need to be aware of those rules and make a request to the authorities, which still need to evaluate the case and provide a decision. Therefore, it remains questionable whether it is sufficient to provide the necessary flexibility in light of the new work reality.

Nevertheless, I agree with Fenicia Aceto that there is a demand for a new Coordination Regulation as the existing coordination rules are outdated in light of modern and fast-changing working practices, including atypical work patterns and digitalisation. In 2016, the European Commission proposed to amend Regulation EC 883/2004 and Implementation Regulation EC 987/2009.[75] Since 2019, ongoing trialogues between the Council, Commission and Parliament have not yielded an agreement thus far.[76] Social security coordination remains a complex field where finding common ground is difficult. The significance of this problem was further highlighted by the Agreement, as not all Member States have yet signed it. [77]

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[76] European Commission, Commission staff working document. Impact assessment. Initiative to partially revise Regulation (EC) No 883/2004 of the European Parliament and of the Council on the coordination of social security systems and its implementing Regulation (EC) No 987/2009, SWD(2016) 460, Brussels, 2016.

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