ADMINISTRATIVE COMMISSION
FOR THE COORDINATION OF SOCIAL SECURITY SYSTEMS

Subject: **Guidance Note on COVID-19 pandemic**

(Revised version as of 25/11/2021 - AC 074/20REV3)

Non-exhaustive list of identified issues as a result of the COVID-19 pandemic including changes in work patterns, border restrictions, etc. and possible solutions

1. Categories of possible solutions

This Guidance Note contains possible solutions to issues identified in the Regulations in connection with the measures taken by Member States as a response to the COVID-19 pandemic. The possible solutions are categorised in two, as follows:

1	Solutions using the current rules of the Regulations and their inherent flexibility
2	Other suggestions which may be considered (e.g. as we are in a situation of *force majeure*)

Solutions will be shaded accordingly, i.e. those in **grey shading** fall under **Category 2**.

2. Time window of application

Unless specifically mentioned, the solutions proposed in this Guidance Note should be applied for all relevant cases linked to the COVID-19 pandemic during the period of 1 February 2020 and 30 June 2022. The Administrative Commission may prolong this time window in case the pandemic continues beyond this date.

3. COVID-19 exceptional reporting on changes in Member States' legislation[1]

It is very important to continue collecting updated information from the Member States with regards to measures taken on a national level as a consequence of the COVID-19 pandemic. This will allow all Member States to have an up-to-date and precise picture of all national benefits, schemes and legislation introduced by the Member States during the COVID-19 pandemic.

Member States should report information on any changes to, or newly introduced benefits, schemes and legislation, both for those which fall within the scope of Regulations (EC) No

[1] This reporting does not replace the Article 9 Declaration procedure, which will be carried out later this year.

883/2004 and 987/2009. Additional information on COVID-19 based legislation of a social nature which do not fall under the Regulations is also appreciated.

A compilation of changes in Member States legislation reported by the delegations in the context of the consultation carried out in the framework of the guidance note can be found in AC Note 076/20.

4. General principles applying to all cases

- Means of communication between the Member States: EESSI is and remains the preferred communication channel between the Member States during the COVID-19 pandemic. Any recommendation provided within this note which suggest the use of means of communication other than EESSI are mainly addressed at Member States who are not yet EESSI ready, or who are not able to communicate with respect to the issue identified through EESSI.

- Compatibility with national legislation: this note does not oblige Member States to follow any recommendation if it is not compatible with the applicable national law, including data protection and data security legislation.

- Use of supporting evidence other than official documents provided for in the Regulations: Member States are being recommended to accept supporting evidence in support of a claim by a person if it is not possible to receive the official document from another institution within a reasonable period of time. However, Member States are not obliged to accept supporting evidence if it is not permitted under national law, or if this does not contain all the necessary information required by the competent institution to calculate the benefits. On the other hand, when the documents provided by the person contain the necessary information and thus allow the institution to calculate the benefits, the competent institution may preliminary accept them. Retroactive verification through the request/receipt of an official document will allow the institution to verify the entitlement at a later stage.

- *Force majeure* has to be considered on a case-by-case basis, but should not be the starting point for each individual case. When competent institutions assess cases linked to the COVID-19 pandemic, by priority the normal rules should still apply. Consequently, if the normal rules cannot be applied or do not lead to the intended result, the solutions proposed in this Guidance Note may be considered.

5. List of identified issues and possible solutions, by sector

A. Horizontal issues: Cooperation and exchange of data

COVID-19 crisis has created a very complex situation regarding the implementation of Regulation (EC) No 883/2004 and the procedures laid down in Regulation (EC) No 987/2009,

especially the principles of cooperation and exchanges of data. Thus, it is necessary to show *flexibility* and to find *pragmatic and adequate* solutions in this complex situation. Furthermore, Member States may exchange their experience with each other and the Secretariat in order to identify further challenges. This would give all Member States the opportunity to find common solutions for administrative problems.

It should be emphasized that, generally, individuals should not be penalised for not being in a position to finalise an administrative procedure due to the COVID-19 crisis. This applies both if the person concerned is in quarantine and therefore cannot visit the relevant office to carry out the procedure, and also if the relevant office is unable to provide the service due to temporary closures, lack of staff, back-logs, etc.

It is necessary to find pragmatic solutions allowing a balanced approach between access/continued payments of social security benefits on the one hand, and the current difficulties met by social security institutions to ensure their tasks, on the other hand.

Exchanges between institutions, Article 2 of Reg. 987/2009		
Id.	***Issues identified***	***Possible solutions***
H 1	During the pandemic, the usual work routine in relevant institutions is hampered, including due to the restrictions for sending classic (postal) mail to other Member States. This has severe impacts on the communication between institutions, including already possible exchanges through EESSI.	As mentioned in point 4 'General principles applying to all cases', wherever and whenever possible, EESSI should be the preferred way of communication. To the extent national legislations and data protection allow and as mutually agreed to by the concerned parties, if and where an exchange through EESSI is not possible, alternative ways of communication should be used. Furthermore, to the extent national legislations allow, deadlines for answering or providing information to other Member State should be applied flexibly due to the COVID-19 pandemic.
Exchanges between institutions and persons concerned, Article 3 of Reg. 987/2009		
H 2	The COVID-19 pandemic may lead to restricted contacts between institutions and persons concerned.	To the extent national and data protection legislation allow, institutions may in general use distant contact via mail, email, online or by phone in order to settle the

		requests.
H 3	Difficulties to exercise the usual authentication procedure, e.g. to provide electronic signatures.	To the extent national and data protection legislation allow and where appropriate, institutions may temporarily waive the requirements (e.g. of electronic signature of the person concerned during the pandemic and extend deadlines for response, especially when the person concerned is staying or residing in a Member State other than the competent Member State) and explore alternative identification procedures.
H 4	Difficulties to keep time limits laid down by the legislation of the competent Member State.	The time limits laid down by the legislation of the competent Member State may be handled in a rather flexible way by granting short extensions of these limits. If due to quarantine the person concerned does not submit the document to the institution within the time limit specified, the deadline for submitting this document may be extended at the person's request.
Documents and supporting evidence, Article 5 of Reg. 987/2009		
H 5	The COVID-19 pandemic might hamper the usual speed of mutual assistance. Member States have to deal with this delay including e.g. delayed issuance of portable or other documents or inability of the person concerned to obtain a Portable Document from a Member State for reasons connected to COVID-19 (e.g. lack of staff, closure of competent offices, administrative overload, etc.).	In cases of exceptional circumstances caused by the pandemic, where it is e.g. not possible to obtain relevant information via an exchange through EESSI and to the extent national legislations allow, the competent institution may as fall-back position: • (preliminarily) accept suitable alternative documentation/ documents or supporting evidence (e.g. payslips or salary statements that contain the

		necessary information) directly from the person concerned; • (preliminarily) accept scanned documents instead of original documents sent by letter; • grant preliminary benefits. Retroactive verification through the request/receipt of an official document will allow the institution to verify the entitlement once the situation normalises. Please see also point 4 ‘General principles applying to all cases’.
Benefits granted for a definite period or requiring renewed evidence (residence, medical control, birth certificates, life certificates etc.)		
H 6	Delayed (new) certificate of incapacity for work and degree of need for long-term care, Article 27 and 28 of Reg. 987/2009	In the case of benefits granted for a definite period and/or dependent on the incapacity for work/ degree of need for long-term care where the recipient has submitted an application for a further period of benefit, the competent institution may continue to pay the benefit based on the existing decision for granting the benefit or based on the medical documentation provided, if necessary through a preliminary decision. A necessary medical assessment should be carried out as soon as the situation allows.
H 7	Delayed life certificates for the export of pensions	Member States may temporarily suspend the life certificate system or accept life certificates e.g. without electronic signature sent by e-mail, letter or any other verifying document. In case a person has not returned a life certificate to the competent institution in time and the payment of the benefit has been suspended before the pandemic but,

		during the pandemic, that person submits, e.g. by e-mail or telephone, a request for payment of the benefit, it may be paid based on the person’s statement. Persons who during the pandemic period do not provide the life certificate within the prescribed period, may still continue to receive the benefit (preliminarily). After the pandemic, the competent institutions may ask recipients to send a life certificate.

H 8	During the pandemic, medical examinations and administrative checks (Art. 87 of Reg. 987/2009) are hampered. This concerns all branches of social security. There is also a risk of delaying the implementation of medical opinions requested by foreign competent institutions requiring a direct examination of the insured and delays in obtaining the medical opinions from foreign competent institutions.	To the extent national legislations allow and where appropriate, during the COVID-19 pandemic competent institutions may refrain from asking for medical examinations or other administrative checks in already ongoing cases where there is a need to control the person's continued right to paid benefit. On the other hand, to grant an invalidity pension without a medical certificate may not be possible in new cases. Where possible and to the extent national legislations allow, medical assessors may complete the corresponding documents by way of a desk assessment or other appropriate means. Whenever possible and to the extent national legislations allow, certifying physicians and medical commissions may issue decisions based on the collected medical records. In connection with the above, there is also a risk of delaying the implementation of medical opinions ordered by foreign competent institutions requiring a direct examination of the insured person and delays in obtaining the medical opinions from foreign competent institutions.
Extension of other deadlines in the Regulations		
Member States should discuss bilaterally cases where, due to the COVID-19 pandemic, they are facing difficulties to observe other deadlines as stipulated in the Regulations, including those in Decision F2 and Title IV Chapter III on recovery. In cases of difficulties, Member States may agree to suspend the running of any time-period until such difficulties are resolved.		

B. Applicable legislation

General principles:

- Telework is an important instrument to "flatten the curve" of COVID-19 infections.

- Questions concerning applicable legislation should therefore neither delay the beginning of telework nor hinder its continuation.
- Telework in a Member State other than the competent ("usual") Member State of employment due to COVID-19 should not lead to a change of applicable legislation.
- Telework should not be hampered/delayed/interrupted (only) due to the application for a PD A1 and/or an exemption agreement.

Questions arising from teleworking in a Member State other than the competent Member State (esp. cross-border/frontier workers/pluriactive workers)		
AL 1.	(Cross border/frontier) worker (usually) working exclusively in one Member State and starts teleworking in another Member State (e.g. the Member State of residence) due to the COVID-19 pandemic OR Pluriactive worker, usually working in more than one Member State, increases activity in Member State of residence due to COVID-19 telework.	Please refer to the note by the Secretariat on the application of Title II of Regulation (EC) No 883/2004 during the COVID-19 pandemic, note AC 075/20
AL 2.	Necessity to apply for a PD A1 (Art 15, 16 IR) in case of COVID-19 telework	In order to ensure that telework as an important instrument to "flatten the curve" can be quickly, comprehensively and continuously applied and with a view to ECJ case-law generally allowing for a retroactive application and issuance of PD A1, application for and issuance of a PD A1 are only necessary in case of an explicit request from a competent institution, including institutions in the MS of telework. Existing PD A1 issued under Article 13 remain valid (until expiry date).
Delayed/prolonged postings due to COVID-19		

AL 3.	Posted workers in possession of PD A1 whose activity was planned to start after the outbreak of the COVID-19 pandemic and the posting is delayed due to the pandemic.	a. Situation 1: If the end of the posting period does not change to a later date as stated in the original PD A1 and no immediate new posting is planned after this date: no action (i.e. application for an updated PD A1) necessary. b. Situation 2: If the end of the posting period will be later as stated in the original PD A1 and/or an immediate new posting is planned after this date so the actual duration of the first posting is relevant: new application and issuance of a new PD A1 with updated dates (to the extent legally possible).
AL 4.	Interruption period between two periods of posting in Decision A2 point 3(c), example: Posted workers whose posting period ended prematurely e.g. called back by employer, and needs to continue the posting period at a later stage.	• Situation 1: If the interruption is less than two months and the end of posting period will not change to a later date: no action (i.e. application for an updated PD A1) necessary. • Situation 2: If the interruption is more than two months, the end of posting period will be later and/or an immediate new posting is planned after this date: new application and issuance of PD A1 with updated dates (to the extent legally possible). • Situation 3: If the interruption is less than two months, the end of the posting period will be later and/or an immediate new posting is planned after this date: New application and issuance of PD A1 with updated dates. Issuing institutions while obeying general rules (e.g. max. duration of posting) may use their discretionary power as mentioned in Decision A2 No. 3 (c).

Flexibility in other cases	
AL 5.	With a view to other possible COVID-19 scenarios touching questions of applicable legislation (e.g. posting organized at short notice, workers recruited with a view to being posted, posted workers whose term of posting is expiring), the flexibility expressed in the Regulations and Decisions of the AC (e.g. on prior affiliation in Decision A2) should be used.

C. Unemployment benefits

Unemployment and cross-border/frontier workers		
UB 1.	Cross-border workers employed in a Member State, become unemployed, start receiving UB from Member State of (former) employment and then want to go back to their Member State of residence.	a. Export of UB under Article 65(5)(b) BR. Member State of last employment may waive the 4-week waiting period as already possible in line with Article 64(1)(a) BR. b. For further export questions see below.
UB 2.	Frontier workers who become unemployed and are precluded from moving back to their Member State of residence to claim UB from there due to quarantine measures ordered by the Member State of (former) employment.	Two options may be considered: a. A (former) frontier worker who is prevented from returning home at least once a week due to a quarantine ordered by the Member State of (former) employment may no longer be regarded as frontier worker but as cross-border worker other than a frontier worker, and therefore may be allowed to claim unemployment benefits from the Member State of last employment. b. However, the competent Member State and the Member State of residence can agree otherwise on a case-by-case analysis. Access to unemployment benefits directly from the Member State of residence thus may remain possible even though he/she did not

		immediately return to that Member State, under the same conditions as persons under quarantine in the Member State of residence (waiving of requirement to be available for a certain period).
UB 3.	Partially/intermittently unemployed (cross-border/frontier) workers who meet all conditions to be entitled to the corresponding benefit but are not fully available in the Member State of employment due to border restrictions. This case covers also posted and pluriactive workers who became unemployed abroad but could not return to the competent Member-State due to border restrictions.	Temporary border restrictions preventing the concerned persons from leaving the Member State of residence or entering the Member State of employment should not be a reason to exclude the concerned persons from benefit entitlement if all other conditions for entitlement are met. In case the competent institutions are implementing flexible rules or approaches as regards national rules for entitlement (registration/or availability of the worker) in order to take account of the quarantine situation for instance, such flexibilities shall apply equally both to local and to cross-border workers in order to ensure application of the equal treatment principle.
UB 4.	Member State of (former) employment is not able to deliver a PD U1 within the usual period.	In cases of exceptional circumstances caused by the pandemic, where it is e.g. not possible to obtain relevant information via an exchange through EESSI and to the extent national legislations allow, relevant competent institutions may as fall back position use alternative documents/documentation as described in case H5 and in line with point 4 'General principles applying to all cases'. Acceptable alternative documents agreed on a bilateral basis between institutions may be any document(s) containing information suitable for calculation and granting of a preliminary benefit, such as payslips and salary declarations showing

		details of social security coverage in the Member State of last employment.
Export		
UB 5.	An unemployed person exporting UB from the competent Member State to another Member State cannot register with the employment services in the Member State to which he/she has gone within seven days due to obligatory quarantine when entering the Member State of destination or because the relevant employment services are not operating as usual.	The situation may be treated as exceptional case in line with Article 64(1)(b) BR in which the period for registration may be extended.
UB 6.	Unemployed persons who exported their UB for an initial period of three months are precluded from going back to the Member State paying the benefit in order to continue receiving the benefits from there, because they are obliged to stay in quarantine in the Member State where they were looking for work, or for other reasons, such as no availability of flights.	Although exceptional, this scenario may occur in different variations. Therefore, an assessment on an individual case-by-case basis may be appropriate using one or both of two following solutions : a) The Member State paying the benefit may consider extending the period of export for a further period until the person can return to that Member State. This extension of export would be possible in line with Article 64(1)(c) BR. b) A delayed return to the competent Member State due to COVID-19 pandemic may also be treated as “exceptional case” as in Article 64 (2) BR without the loss of the person’s entitlement to benefits.

UB 7.		

D. Sickness benefits

	General	
S 1	Residence in a Member State other than the competent Member State: • Registration process with a valid PD S1 delayed or PD S1 with limited time period • Frontier workers	Member States should ensure that frontier workers are not denied access to healthcare providers in the competent Member State due to COVID-19 pandemic. Competent institution should issue a new PD S1 covering the period of treatment or confirm that issued documents cover the new period. As far as practicable for both the competent Member State and the Member State of residence (both EESSI ready regarding S_BUC_01a/EESSI applications available), a SED S072 may be issued in order to facilitate the registration process in the Member State of residence. Eventually, ensure possible entitlement through EHIC or PRC.
S 2	Stay outside the competent Member State - Necessary medical treatment: • Persons holding an EHIC, which is/becomes out of date • Persons not holding an EHIC	Whenever possible exchange of information through EESSI shall be preferred. Please see also point 4 '<u>General principles applying to all cases</u>'. In case EESSI exchange is not possible, Member States should swiftly issue a PRC, e.g. via email (to the extent data protection allows), if possible also allowing online applications.

Planned treatments		
S 3	Non COVID-19 related planned treatments Planned medical treatment in another Member States via PD S2, E123, DA1, DA002 with a limited period of validity.	If the treatment is postponed, exchange of information through EESSI shall be preferred to the extent it is possible. Please see also point 4 'General principles applying to all cases'. Otherwise, Member States should swiftly issue a new PD S2 or E123 via email or confirm that issued documents cover a new period.
S 4	COVID-19 related planned treatments Treatment for COVID-19 patients transported for treatment to another Member State other than the competent Member State	This particular situation only concerns both the very few Member States that have had to cope with the need to urgently send COVID-19 patients abroad and the receiving Member States of the patients. Bilateral talks took place in order to secure processes at stake with respect to the Regulation provisions and to avoid uncertainties due to the emergency. So far, it is noted that the retroactive issuance of a S2 for each patient remains a useful solution, in order to certify the decision concerning planned treatment and the reimbursement of costs in accordance with the provisions of Title IV of Regulation (EC) No 987/2009. Sending Member States remain free to determine how they intend to deal with related issues, such as remaining costs and/or direct billing to the patient resulting from medical treatment or fees arising from medical transport. They may have decided that related costs should be fully borne by the patients' healthcare insurance. However and since those issues fall outside the scope of the Regulations, bilateral talks

<table>
<tr><td></td><td></td><td>between the sending and the receiving Member State are necessary in order to clarify how those choices can be integrated in the reimbursement processes.</td></tr>
<tr><td>S 5</td><td>Necessary medical treatment provided to uninsured persons.</td><td>If such person have no right to reside, they should receive (basic) medical assistance from the Member State of stay until departure (such an assistance may be medical assistance as in Art. 3(5)(a) BR.).</td></tr>
<tr><td colspan="3">Compensation for loss of work-related income by the competent Member State for persons on preventive compulsory quarantine imposed by another Member State <u>and/or</u> for closure of schools</td></tr>
<tr><td colspan="3">Member States have adopted compensation measures for loss of income due to the national obligation of confinement or for closure of schools. These temporary measures may present different features (as a social security benefit or simply residence based). Accordingly, persons may face two types of situations: difficulties as regard access to any compensation of loss of income measure (competent Member State measures are outside the scope of social security + Member State of quarantine has adopted only measures falling within the scope of social security) or, on the contrary, possible situation of overlapping of benefits (social security benefits as regards a loss of income from the competent Member State + national measures from the Member State of residence based outside the scope of social security).

As regards measures falling within the scope of Regulation (EC) No 883/2004, the principle of assimilation of facts (laid down in Article 5) should apply in such situations, also as regards schools (accompanying measures regarding the closing of schools for children under a certain age for instance).</td></tr>
<tr><td>S 6</td><td>Compensation for loss of work-related income by the competent Member State for persons on preventive compulsory quarantine imposed by another Member State and/or for closure of schools</td><td>Member States are to carry out an assessment to determine if the compensation is a social security benefit to be declared under the coordination regulations. Member States should notify the AC accordingly.

<u>If a social security benefit</u>: documents certifying the quarantine issued by the Member State that ordered the quarantine should be accepted by the competent Member State.</td></tr>
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		<u>If not a social security benefit</u>: Member States should assess whether the measure is a social advantage under Article 7 of Regulation (EU) No 492/2011.
S 7		

NB: Until the revision taking place on 25 November 2021 (i.e. for the period between 1 February 2020 and 24 November 2021), the text of these points of the Guidance Note on COVID-19 pandemic read as follows:

Delayed/prolonged postings due to COVID-19		
AL 3.	Posted workers in possession of PD A1 whose activity was planned to start between 01.02.2020-31.12.2020, i.e. after the outbreak of the COVID-19 pandemic, and the posting is delayed due to the pandemic.	a. Situation 1: If the end of the posting period does not change to a later date as stated in the original PD A1 and no immediate new posting is planned after this date: no action (i.e. application for an updated PD A1) necessary. b. Situation 2: If the end of the posting period will be later as stated in the original PD A1 and/or an immediate new posting is planned after this date so the actual duration of the first posting is relevant: new application and issuance of a new PD A1 with updated dates (to the extent legally possible).

Reimbursement		
UB 7.	Difficulties in meeting the reimbursement deadlines in Article 70 IR due to the current constraints and difficult working conditions in employment agencies and institutions.	Extension for six months, parallel to extension for reimbursement for sickness benefits. (see proposal for a Decision in Annex 2).

S 6	Compensation for loss of work-related income by the competent Member State for persons on preventive compulsory quarantine imposed by another Member State and/or for closure of schools	Member States are to carry out an assessment to determine if the compensation is a social security benefit to be declared under the coordination regulations. Member States should notify the AC accordingly (please see in Annex a specific template for reporting such benefits/schemes and other changes in national legislation related to COVID-19). If a social security benefit: documents certifying the quarantine issued by the Member State that ordered the quarantine should be accepted by the competent Member State. If not a social security benefit: Member States should assess whether the measure is a social advantage under Article 7 of Regulation (EU) No 492/2011.
Reimbursement		
S 7	Reimbursement deadlines in Article 67 of Reg. 987/2009.	Extension for six months, parallel to extension for reimbursement for unemployment benefits. (see proposal for a Decision in Annex 2)

ADMINISTRATIVE COMMISSION
FOR THE COORDINATION OF SOCIAL SECURITY SYSTEMS

Subject: The application of Title II of Regulation (EC) No 883/2004 and Articles 67 & 70 of Regulation (EC) No 987/2009 during the COVID-19 pandemic

<u>Note from the Secretariat of 15 May 2020 (AC 075/20)</u>

I. Introduction

With the aim to contain the spread of the COVID-19 pandemic and to safeguard public health, many Member States have adopted social distancing measures, including confinement measures with the consequence of an increase in telework (home-office) activities.

The increase in telework activities can be a source of concern for workers who reside in one Member State and work exclusively in another one, and for workers who carry out an activity in two or more Member States. This is mainly due to the sudden increase in professional activities carried out in a Member State, which in some cases is different from the one where the person is insured.

From the information collected within the Administrative Commission since the start of the COVID-19 pandemic, it appeared clearly that the majority of Member States have decided, on a unilateral basis or in agreement with one or more other Member States, that the obligation to telework in the Member State of residence would not lead to a change of the applicable legislation. In that context, a number of delegations raised questions about the flexibility which could be acknowledged regarding the application of the Regulations on the coordination of social security systems. The main concerns were related to changes in the applicable legislation due to telework activities, and difficulties for the competent institutions to meet the deadlines for claims related to the reimbursement of certain benefits.

Moreover, the COVID-19 pandemic has also put an additional strain on the resources of competent institutions. They are facing demanding teleworking conditions, a high influx of requests for information and applications for existing and newly introduced benefits, which may be made worse by a possible shortage of staff when they have to provide benefits and assistance to the persons most in need. This leads, in particular, to difficulties for competent institutions to deal with certain requests within the deadlines specified in the Regulations, such as deadlines for the introduction and settlement of claims in the area of sickness, and for the reimbursement of unemployment benefits.

The Secretariat would like to present its interpretation on how to deal with different scenarios related to the application of certain rules in the Regulations during the COVID-19 pandemic.

II. The determination of the applicable legislation pursuant to Title II of Regulation (EC) No 883/2004 should not change during the COVID-19 pandemic

The applicable legislation, which applies to persons in accordance with Title II of Regulation (EC) 883/2004, should not change because of the COVID-19 pandemic. The current situation, which led amongst others, to border restrictions, advice from national health authorities to work from home, and temporary closure of various workplaces, has prevented many persons from actually performing their employed or self-employed activity in the Member State where they normally pursue their activity. It also led to a shift in the working time situation of many employed and self-employed persons who normally pursue an activity in two or more Member States.

This interpretation may be reinforced by the fact that the COVID-19 pandemic creates an exceptional situation for which it appears possible to invoke a case of *force majeure,* if all conditions of that notion are met.

For example, according to a consistent case law, the determination of the applicable legislation must have regard to the nature of the employment *as defined in the contractual documents*[2]. It is necessary to derogate from the general rule of connection to the Member State of employment *only in specific situations which demonstrate that another connection is more appropriate*[3]. That case law is based on the general principle that a person employed in the territory of one Member State is to be subject to the legislation of that Member State, even if he/she resides in the territory of another Member State.

In the current COVID-19 pandemic, the contractual documents have (in principle) not been changed and the workers have not chosen to perform their activity outside the Member State where they are normally employed; they may be prevented from getting to their normal or usual place of work due to the restrictions imposed by national measures to combat the COVID-19 pandemic. Furthermore, that situation is not (currently) meant to last for several more months. Therefore, in accordance with the case law, there seems to be no reason justifying that "*another connection (to another Member State) would be appropriate*" and to depart from the *lex loci laboris* general principle.

That interpretation is reinforced by the reason behind the fact why cross-border and mobile workers cannot get to their place of work, *i.e.* the current COVID-19 pandemic.

III. The finding under point II is reinforced by the possible application of the notion of *force majeure*

[2] See *Format Urządzenia i Montaże Przemysłowe*, C-115/11, EU:C:2012:606, para. 44.
[3] *X.*, C-570/15, EU:C:2017:674, para. 27.

It results from a consistent case law that the concept of *force majeure* does not have the same scope in the various spheres of application of EU law; its meaning must be determined by reference to the legal context in which it is to operate[4].

In the area of social security Regulations, the Court of Justice held that "*That concept must be understood more broadly as designating abnormal and unforeseeable circumstances outside the control of the unemployed person, the consequences of which, in spite of the exercise of all due care, could not be avoided except at the cost of excessive sacrifice*"[5].

That judgement was given in the context of a different branch of social security, but still in the sphere of application of Regulation (EEC) No 1408/71 (replaced by Regulation (EC) No 883/2004), so that, as required by the Court in that ruling (para. 26), the meaning of the concept is determined by reference to the same legal context in which it is to operate.

Because of its links with the principle of proportionality[6], *force majeure* is a general principle of EU law, which may, where appropriate, be invoked even in the absence of explicit provisions[7]. The spread of the coronavirus leading to the acknowledgment of a pandemic by the World Health Organisation (WHO) is undoubtedly to be regarded as an "*abnormal and unforeseeable circumstances which were outside the control of the unemployed person*". These circumstances, which were out of the control of national authorities as well as persons falling under the scope of Regulations (EC) Nos 883/2004 and 987/2009, made it impossible for many cross-border and mobile workers to get to their normal place of employment. There is therefore no wish from either the employer or the worker to change the applicable social security legislation. There is also no reason demonstrating that a connection to the legislation of the Member State of residence due to an increase in telework activities would be more appropriate. There are only circumstances that prevent the workers from getting to their place of work.

Therefore, during the COVID-19 pandemic, the rules of Title II on the determination of the legislation applicable should be applied as they were before the beginning of the pandemic.

IV. Practical examples

a) Applicable legislation

Due to the COVID-19 pandemic, the working patterns of many employers and workers have been disrupted due to confinement measures taken by national authorities with the implication

[4] *Vilkas*, C-640/15, EU:C:2017:39, para. 30.

[5] *Perrotta*, C-391/93, EU:C:1995:240.

[6] See to that effect, the Commission notice of 1988 concerning force majeure in European agricultural law, C(88) 1696 (OJ C 259, 6.10.1988, p. 10).

[7] See Case 71/87, *Inter-Kom*, EU:C:1988:186, para. 10 to 17 and Case C-12/92, *Huygen and Others*, EU:C:1993:914, para. 31.

that persons have to telework from their place of residence, which is different from their normal country of employment.

In a number of cases, such a change in the working time pattern does not lead to a change in the applicable legislation. This is because the amount of working time in the Member State of residence will not amount to 25% of the total working time over a reference period of 12 months (as provided in Article 14(8) of Regulation (EC) No 987/2009). This concerns mainly persons who reside in a Member State and work in another, and where the start of the telework activity due to the COVID-19 pandemic will not amount to 25%. Nevertheless, in some other cases, the change in the working time may tip the balance. This concerns, in particular, workers who are active in two or more Member States, but are not insured in the Member State of residence since the working time in that Member State amounts to, for example, 20%.

In these cases, where the persons concerned have to telework due to national measures related to the COVID-19 pandemic, the activities carried out via telework in the country of residence are not to be taken into account – also when they become substantial and exceed the 25% working time threshold over a reference period of 12 months. Therefore, an exceeded threshold should not lead to a change in the applicable legislation.

The same reasoning also applies to persons who, for example, start a new employment, and due to the application of national measures during the COVID-19 pandemic, they cannot travel to the country of employment and are asked to telework until the end of the application of those national measures. These persons are to be insured in the country of new employment.

Beyond telework, some posted workers had to remain in the country of secondment due to the COVID-19 pandemic. Again, that factual situation has no impact on the legal situation of those workers who are deemed to keep the status they had the day before the entry into force of national measures adopted during the COVID-19 pandemic.

Moreover, formally, the national measures, adopted on a unilateral basis and taking into account the interests of the workers, in conjunction with the application of the notion of *force majeure*, are in compliance with Title II of Regulation (EC) No 883/2004. Consequently, they should not be supplemented by agreements based on Article 16 of Regulation (EC) No 883/2004.

b) Settlement of claims

In the area of sickness benefits, claims based on actual expenditure have to be introduced to the debtor country and settled within the timeframe foreseen under the provisions of Article 67 of Regulation (EC) No 987/2009.

Nevertheless, and as explained above, due to the COVID-19 pandemic and the related national measures, some social security institutions are meeting difficulties to fulfil their obligations as set out in the Regulations. Again, the same reasons by pre-empting the application of the abovementioned provision imply that the running of any time-period and the ending of deadlines for reimbursement of expenses are suspended during the application of measures linked to it.

For example, this means that the running time-period specified in Article 67(1) and (2) of Regulation (EC) No 987/2009 is suspended if the end of the 12 months occurs during the application of national measures adopted during the COVID-19 crisis. Similarly, the 18 months period referred to in Article 67(5) shall be suspended. In these cases, the time-period shall restart as soon as the application of domestic measures linked to the COVID-19 crisis is lifted.

Similarly, the same concept should apply to the deadlines stipulated in Article 70 of Regulation (EC) No 987/2009, in relation to reimbursement of unemployment benefits.

With a view to avoiding difficulties, which may arise from the lifting of national measures in an uncoordinated matter, Member States may agree upon specific measures in accordance with Article 35(3) and Article 65(8) of Regulation (EC) No 883/2004, in particular with the adoption of a Decision of the Administrative Commission.