

CROSS-BORDER TELEWORK AND THE COORDINATION OF SOCIAL SECURITY SYSTEMS

For reasons already widely known, the rendering of work under telework regimes or under hybrid systems has significantly increased. If, when rendered inside borders, telework already raises relevant and complicated practical issues, cross-border telework (where an employee renders his/her work in a country for an employer located in another country) is, for now, one of the Employment Law areas where a higher level of uncertainty on the applicable legal solutions persists, being that, within this scope, the questions around the definition of the applicable Social Security system one of the more pressing ones.

These issues will for sure increase in Portugal, particularly if one takes into consideration that a new type of visa (the so called “digital nomads visa”) for the performance of remote work in Portuguese territory for persons or legal entities domiciled or with headquarters located abroad, was recently introduced in the Portuguese Immigration Law.

As it is almost always the case, the Law will evolve at a slower pace than the reality it aims to regulate. However, some guidelines start to emerge that will help us to navigate these “new waters”.

Within this context, the European Commission’s Administrative Commission for the Coordination of Social Security Systems (“ACSS”) has recently issued a Guidance Note on cross-border telework, specifically related to the applicable Social Security system under the Regulations on social security systems coordination – Regulation (EC) 883/2004 and 987/2009.

According to ACCSS, cross-border telework is work performed:

- (i) Outside the employer’s premises or the business place where the same work is normally carried out;
- (ii) In a Member State other than the one where the employer’s premises or the business place are located; and
- (iii) Using information technology to remain connected to the employer’s or business working environment as well as stakeholders/clients in order to fulfil his/her tasks assigned by the employer or clients (in case of self-employed persons).

ACCSS stresses that this definition only covers the concept of “same work”, i.e., the same activities that the employee previously carried out at the employer’s premises and when the telework takes place further to an agreement between the employer and the employee, in accordance with national law.

Following the Guidance Note, the principle of *lex loci laboris* – the law of the place where the work is rendered - has to remain the main principle for the determining the applicable legislation. Some exceptions are possible within a context of cross-border telework, namely:

- The one provided in article 12 of Regulation 83/2002, that foresees the possibility of maintaining the application of the Social Security system of the country of origin, provided that the performance of telework in another country is of temporary nature (in other words, it shall not be part of the habitual working pattern). ACCSS provides the following as examples of situations of cross-border telework which would be covered by article 12: (i) an employer has to shut down part of its offices building to renovate them and the employee is required to perform telework

during that time, (ii) the employee needs to temporarily telework because he/she has to take care for children or other members of the household, (iii) an employee agrees with the employer that he/she will telework during the following 4 weeks to better focus on a specific project, (iv) an employee stays at the holiday place and starts to work there for another month before returning home and resuming work in the office, (v) any other comparable cases where there is an agreement between the employer and the employee.

- Situations in which the telework is, on a regular basis, performed in more than one Member State, and article 13 of the Regulation 83/2002 applies. In this case the applicable system will be the one of the country of residence, provided that a substantial part of the activity is carried out there (at least 25% of the activity).
- For any other situations, the Guidance Note highlights and encourages the possibility of the Member States to execute specific agreements to introduce exceptions to the general rule of *lex loci laboris* for specific cases or groups of persons.

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