The Application of the Conflict Rules of the European Social Security Coordination to Telework During and After the COVID-19 Pandemic

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Abstract
During the COVID-19 pandemic, the normal use of European conflict rules determining the applicable social security legislation was temporarily suspended to avoid changes in the applicable legislation as a result of telework, which was being obliged or recommended. The purpose was to avoid the consequences of such a change. However, these forms of remote work are expected to remain in existence after the pandemic, even when the suspension of the conflict rules is no longer in place. So, the question arises whether the suspension of the strict application of the conflict rules should be prolonged after the pandemic, or whether these conflict rules should be applied differently or even amended. First, this article discusses the measures that were taken during the pandemic. Next, it will highlight the consequences if the temporary measures are not prolonged after the pandemic for the determination of the applicable social security legislation. It will explore the possible re-interpretation of or even amendments to these rules in order to adapt them to the continuation of telework.

Keywords
conflict rules, cross-border work, EU social security coordination, free movement of workers, telework

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1. Introduction

The COVID-19 pandemic has thoroughly shaken up our way of working. More specifically, the prevalence of telework has significantly increased throughout Europe (Eurofound, 2020). This surely applies to those employees who work across borders as well. At a certain point in time, borders were closed; but even once the borders were re-opened, telework was mandatory or recommended where possible. This meant that employees who worked across the borders of Member States no longer performed some or any of their activities in the Member State in which their employer was established; instead, they worked online in the Member State in which they were residing, or in another Member State still. After the pandemic, telework is expected to remain part of many employees’ working patterns.

The online exercise of activities from one’s place of residence or another place can affect the social security legislation that applies to them due to the conflict of law rules of the European social security coordination.1 The basic principle is the State of employment principle: an employee is subject to the social security legislation of the state of employment.2 However, a person who pursues activities in more than one Member State is subject to specific rules laid down in this coordination.3 In the event of telework, the application of those rules could lead to a change in the applicable social security legislation, with consequences for the determination of the employee’s and employer’s social security contributions and the social security benefits to which the employee and their family members are entitled.

In order to prevent such a change, the application of those rules was temporarily suspended during the pandemic. Part 2 shall briefly discuss these measures. Still, even after the pandemic, our way of working will indubitably have experienced a permanent change. Where possible, telework will have taken hold as a common way of working. So, the question arises: will the rules on the determination of the applicable social security legislation in the case of cross-border employment between two or more Member States be re-applied after the pandemic? Part 3 shall examine the potential consequences of such a move and whether these rules should be interpreted or applied differently, or even modified to avoid a possible change in the applicable social security legislation because of telework. In Part 4, a brief conclusion shall be given.

The concept of “telework” is used in this contribution. By this, we mean the performance of work activities offsite using information technology rather than at the employer’s location of business. I shall confine myself to telework performed by employees within the EU.

2. Suspension of the Application of Conflict of Law Rules on Social Security During the Pandemic

Ever since the beginning of the pandemic, attention has been given to the complications that could arise from applying conflict rules regarding social security in the context of closed borders between Member States and mandatory or recommended telework. Indeed, strict interpretation of these conflict rules could lead to a change in the applicable social security legislation for cross-border

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1. This social security coordination is laid down in Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009.
2. Article 11(3)(a) of Regulation (EC) No 883/2004.
3. Article 13 of Regulation (EC) No 883/2004.
employees and their employers. Those conflict rules are laid down in Articles 11 to 16 in Regulation (EC) No 883/2004. Pursuant to settled case law of the Court of Justice, they constitute a complete and uniform system of conflict rules. They are intended to prevent the simultaneous application of a number of national legislative systems and the complications that might ensue, and also to ensure that persons covered by that regulation are not left without social security coverage because there is no legislation applicable to them. Furthermore, those conflict rules are binding to both the Member States and the persons in question. In each case, the person concerned is subject to the legislation of a single Member State only, even if they work in more than one Member State.

The basic principle of these conflict rules is the State of employment principle (lex loci laboris): an employee is subject to the social security legislation of the Member State from where the employee is working. This basic principle is founded on the right of a migrating worker to equal treatment with workers in the host Member State. The worker’s place of residence and the employer’s place of establishment are irrelevant for that matter. In the Partena case, the Court of Justice argued that the concept of the “location” of an activity is not determined by Member States’ legislation but by Union law to avoid, inter alia, more than one Member State considering its territory as the place of employment. The Court further assumed that the concept of “location” is the place “where, in practical terms, the person concerned carries out the actions connected with that activity.”

The measures taken during the COVID-19 pandemic have affected the location of activities. Mandatory or recommended telework and the closure of borders resulted in workers who usually work in a certain Member State now performing their work partially or completely in their country of residence (or elsewhere). This was the case for frontier workers, for instance, who normally work in one Member State and reside in another. Due to this change in workplace, the typical application of the conflict rules would have resulted in a change in the applicable social security legislation for these workers. If they were to exclusively perform remote work, they would be subject to the legislation of the actual state of employment only by virtue of the State of employment principle of Article 11(3)(a) Regulation EC 883/2004. If they were to perform part of their work remotely, they would be covered by Article 13 Regulation (EC) No 883/2004, which contains the conflict rules for a situation in which one is working in two or more Member States simultaneously. The basic principle of Article 13 is that when a worker executes a substantial part of their activities in the Member State of residence, the legislation of that Member State applies. Article 14(8) Regulation (EC) No 987/2009 specifies that a share of less than 25% of working time indicates that a substantial part of the worker’s activities is not being

4. See, for instance: Case C-631/17 Inspecteur van de Belastingdienst, ECLI:EU:C:2019:381, para 33 and Case C-135/19 Pensionsversicherungsanstalt, ECLI:EU:C:2020:177, para 46.
5. See, for instance: Case C-345/09 van Delft, ECLI:EU:C:2020:610, para. 52; Case C-89/16 Szoja, ECLI:EU:C:2017:538, para. 42; Cases C-95/18 and C-96/18 van den Berg, ECLI:EU:C:2019:767, para. 50.
6. Article 11 (1) Regulation (EC) No 883/2004.
7. Article 11(3)(a) Regulation (EC) No 883/2004.
8. See recital 17 of Regulation (EC) No 883/2004. This was expressly confirmed by the Court of Justice in Case C-527/16 Alpenrind, ECLI:EU:C:2018:669, paras 94 and 95.
9. Case C-137/11 Partena, ECLI:EU:C:2012:593, paras 53 and 54.
10. Case C-137/11 Partena, ECLI:EU:C:2012:593, para. 57. Elsewhere, the Court confirmed that it is necessary to have regard for the “actual situation” and not only what is determined as the place of employment in, amongst others, the employment contract: Case C-115/11 Format I, ECLI:EU:C:2012:606, paras 44 and 45.
pursued in the relevant Member State. If the worker involved does not pursue a substantial part of
their activities in the Member State of residence, and if they are employed by one employer, then
the legislation of the Member State in which the employer’s registered office or place of business
is situated applies.11

The application of these conflict rules means that for, inter alia, frontier workers who spend
25% or more of their working time teleworking from home, the legislation of their Member State
of residence becomes applicable. This means, for instance, that the worker is subject to the con-
tribution duty of the Member State of residence. These contributions are usually withheld from
one’s wages. Therefore, the amount of those contributions may have a positive or negative impact on workers’ net wages. The same applies to the employer’s contribution duty, which
could affect the employer’s total labour cost. Furthermore, the employer will have to join the
social security system of the country of residence for that employee, which in itself involves a
number of extra administrative obligations. Additionally, during that time, the employee shall
be subject to the legislation of the country of residence regarding various branches of social secu-
ritiy: for instance, the right to family benefits and the build-up of pensions. Frontier workers shall
also no longer be able to rely on specific provisions that apply to persons who do not reside in the
Member State to whose social security system they are subject, such as provisions relating to the
right to sickness benefits. By virtue of these provisions, frontier workers have the right to medical
care in both Member States involved at the expense of the Member State in which they are
insured.12

Due to COVID-19 measures, the application of provisions relating to posting also came under
pressure, such as the maximum period of 24 months.13 Indeed, in some cases, posted workers had to
stay in the host Member State for longer than 24 months. As a result, the conditions for posting were
theoretically no longer being met. The posted worker would no longer be subject to the legislation
of the sending country, but instead to that of the country in which the posted worker was actually
working. To avoid changes in the applicable social security legislation for workers during the pan-
demic for only a short period of time (at least, that was the original idea), and all the ensuing legal
and administrative consequences, the European Commission made a statement in its guidelines
about free movement of workers during the COVID-19 outbreak on 30 March 2020. “In situations
that could lead to a change in the Member State of insurance of the worker, Member States should
make use of the exception provided for in Article 16 of Regulation (EC) No 883/2004 with a view to
maintaining the social security coverage unchanged for the worker concerned. To apply for such
an exception, the employer must submit a request to the Member State whose legislation the worker
requests to be subject to” (European Commission, 2020: point 8).

So, the Commission referred to the possibility provided by Article 16 of Regulation (EC) No
883/2004 for the competent authorities or institutions of two or more Member States to, by
common agreement, provide for exceptions to the conflict rules laid down in Articles 11 to 15
of Regulation (EC) No 883/2004 in the interest of certain persons or categories of persons. In
Part 3, we shall further examine this possibility stipulated in Article 16 of Regulation (EC) No
883/2004.

11. Article 13 also contains specific conflict rules in cases where the employee works for more than one employer. For more
details on the application of this provision, see Part 3.
12. See, inter alia, the application of Articles 18 and 19 of Regulation (EC) No 883/2004.
13. Application of Article 12 of Regulation (EC) No 883/2004.
Parallel to this, the Member States have agreed within the framework of the Administrative Commission for the Coordination of Social Security Systems\textsuperscript{14} to take the necessary measures to avoid a change in the applicable social security legislation for employees and self-employed persons as a consequence of COVID-19 measures. The European Labour Authority has issued a report with an overview of the various measures taken by Member States (European Labour Authority, 2021). It is apparent from the separate country fiches in Part II of this report that certain Member States (such as Austria) have not taken any specific measures, while others (such as Belgium, Czechia, Denmark, France, Germany, Ireland, Latvia, The Netherlands, Portugal, Slovakia, and Sweden) have taken unilateral measures, whether or not in consultation with, \textit{inter alia}, neighbouring countries. The report further shows that some Member States (such as Austria) have not taken any specific measures, while others (such as Belgium, Czechia, Denmark, France, Germany, Ireland, Latvia, The Netherlands, Portugal, Slovakia, and Sweden) have taken unilateral measures, whether or not in consultation with, \textit{inter alia}, neighbouring countries. The report further shows that some Member States (such as Austria) have not taken any specific measures, while others (such as Belgium, Czechia, Denmark, France, Germany, Ireland, Latvia, The Netherlands, Portugal, Slovakia, and Sweden) have taken unilateral measures, whether or not in consultation with, \textit{inter alia}, neighbouring countries.

The diversity of measures taken by Member States is remarkable. What is more, these measures were often introduced without a formal legal decision or explicit legal basis in EU law, except for Article 16 of Regulation (EC) No 883/2004. Agreements made between the Member States can be qualified as "gentlemen’s agreements". Basically, they are a derogation from the rules on the determination of the applicable legislation; previously, the Court of Justice had stated these rules were binding and Member States could not deviate from them.\textsuperscript{16}

It is generally accepted that these measures were taken within the context of a \textit{force majeure}; however, social security regulations provide no actual legal basis for this, excluding the possibility provided for by Article 16 of Regulation (EC) No 883/2004. Consequently, the continuation of these forms of agreements after the pandemic is neither advisable nor possible from both a policy and legal point of view.

3. The Application of the Conflict Rules Governing Social Security After the Pandemic

One might assume that these temporary measures shall no longer be applied once the \textit{force majeure} created by the pandemic expires. The fact remains, however, that various forms of telework will continue to subsist after the pandemic, and that the applicable social security legislation for workers might change as a result of the normal application of existing conflict rules. In this part, I will first examine under which precise conditions telework is going to lead to a change in the

\textsuperscript{14} This Administrative Commission consists of representatives of the Governments of the Member States. See Articles 71 and 72 of Regulation (EC) No 883/2004.

\textsuperscript{15} For Belgium, see: https://campaigns.eranova.fgov.be/r-342899687108657a56ac918ffa36f80b3139a96f9063559f.

\textsuperscript{16} See footnote 5.
applicable social security legislation. Then, I will consider whether these rules can be interpreted differently within the context of telework. I will also delve into how the conflict rules might be adapted to the increasing occurrence of telework. Finally, I will explore whether agreements can be made between Member States or possibly at the company level, as well as the potential consequences.

3.1. Application of the Existing Conflict Rules

As mentioned earlier, when applying the conflict rules, one has to take into account the place in which a worker’s activities are actually carried out. In the case of telework, this might lead to a change in the applicable social security legislation, when the conflict rules connected to the exercise of activities in two or more Member States are applied as laid down in Article 13 of Regulation (EC) No 883/2004. Article 14(5) of Regulation (EC) No 987/2009 specifies that these rules apply to an employee who simultaneously or alternately pursues activities for one or more employers on the territory of two or more Member States.

Article 13(1)(a) of Regulation (EC) No 883/2004 states that if a substantial part of the activity is pursued in the Member State of residence, the legislation of the Member State of residence applies. Article 14(8) of Regulation (EC) No 987/2009 stipulates that this should mean a quantitatively substantial part of all activities, without necessarily being the major part of those activities. This provision specifies a number of criteria for determining whether a substantial part of the activities is pursued in a Member State, such as the working time and remuneration. An overall assessment is required, with a share of less than 25% in respect of those criteria indicating that a substantial part of the activities is not pursued in a Member State. In reality, this means that teleworking from home for one day a week while working at the employer’s premises for four days a week is not sufficient to consider the activities at home as “substantial”. In that case, the worker in question remains active in two or more Member States; but, in accordance with Article 13(1)(b) of Regulation (EC) No 883/2004, the legislation of the Member State in which the employer’s registered office or place of business is situated remains applicable, and teleworking will probably not affect the applicable legislation. The same applies when the telework is not done from the employee’s place of residence but from a temporary place of stay, such as a second home or a holiday destination. In that case, no activities are pursued at the place of residence; hence, the rule stating that the legislation of the Member State in which the employer’s registered office or place of business is situated applies.

17. Article 1(j) of Regulation (EC) No 883/2004 defines residence as the place where a person “habitually resides”. Article 11 of Regulation (EC) No 2009/987 establishes a person’s residence based on the centre of that person’s interests (based on, for example, the duration and continuity of presence on the territory of the Member States concerned, family status, and family ties). Regarding the application of social security regulations, one can only reside in one particular place: Case C-589/10, Wencel, ECLI:EU:C:2013:303, paras 50 and 51. For more detail: Practical Guide (2013: 42-53).

18. The Court of Justice stated that the duration of periods of activity and the nature of the activities as laid down in the employment contract need to be taken into account, and that it certainly must concern work that was actually performed: Case C-570/15 X v Staatssecretaris van Financiën, ECLI:EU:C:2017:674, para 21. Also see: Practical Guide (2013: 30-32).

19. Article 14(5) of Regulation (EC) No 987/2009 specifies the meaning of registered office or place of business as: “The registered office or place of business where the essential decisions of the undertaking are adopted and where the functions of its central administration are carried out.”
Moreover, based on Article 14(5b) of Regulation (EC) No 987/2009, “marginal activities” may not be taken into account when applying the conflict rule of Article 13 of Regulation (EC) No 883/2004. The Practical Guide describes those as activities accounting for less than 5% of a worker’s regular working time or overall remuneration (Practical Guide, 2013: 27). In one particular case, the Court of Justice judged that, out of all the hours worked during the year in question, 6.5% of time pursued in another Member State (including telework from home that was not provided for in the employment contract) was not sufficient to apply the rules on the performance of activities in two or more Member States. The Court argued that it needs to involve significant activities. The intention is, _inter alia_, to prevent the conflict rules from being manipulated through the exercise of such “marginal activities”, such as teleworking from home for a couple of hours per week, and thus basically from introducing a choice (Van Ooij, 2020: 579). Admittedly, it can be difficult to apply these 25% or 5% thresholds in practice. The criteria used in Article 14(8) of Regulation (EC) No 987/2009 and in the Practical Guide leave plenty of room for interpretation and legal insecurity (De Wispelaere et al., 2021: 130; Schoukens, 2019: 101-104; Strban et al., 2020: 37-38; Van Ooij, 2020: 580-580).

It cannot, however, concern a temporary or _ad hoc_ situation. Indeed, Article 14(7) of Regulation (EC) No 987/2009 refers to the permanent nature of the activities in two or more Member States, whereas the activities in another Member State of a temporary or _ad hoc_ nature fall within the scope of the provisions on posting. So, it has to concern activities that are normally pursued in the Member States involved. Therefore, in the event of occasional telework, the rules on simultaneous employment in two or more Member States would not apply. Article 14(10) of Regulation (EC) No 987/2009 further specifies that, for the application of provisions on simultaneous employment in two or more Member States, the situation projected for the following 12 months needs to be taken into consideration. However, it is not always clear how this rule should be applied in reality: for instance, it is not always possible to estimate the amount of time someone will spend pursuing activities in two or more Member States on a structural or _ad hoc_ basis in the following 12 months. It is, for example, unclear what the possible consequences would be in the case of a temporary break from telework, and whether the basic State of employment principle should be re-applied during that break.

20. For an application of this rule: Case C-89/16 _Szoja_, ECLI:EU:C:2017:538.
21. Case C-570/15 _X v Staatssecretaris van Financiën_, ECLI:EU:C:2017:674, paras 18 and 19. See also Case C-610/18 _AFMB_, ECLI:EU:C:2020:565, para 46.
22. Case C-570/15 _X v Staatssecretaris van Financiën_, ECLI:EU:C:2017:674, para 28. This is also apparent from the term “normally” in Article 13(1) of Regulation (EC) No 883/2004. In this respect, the Court specified as follows: “In order to determine whether a person should be considered to be normally employed in two or more Member States or, conversely, whether they work merely occasionally in several Member States, regard must be had, in particular, to the duration of periods of activity and to the nature of the employment as defined in the contractual documents, as well as to the actual work performed, where appropriate, namely, _inter alia_, the way in which the employment contracts concluded between the employer and the worker concerned have been performed in practice in the past, the circumstances surrounding the conclusion of those contracts and, more generally, the characteristics and modalities of the activities pursued by the undertaking concerned.” Case C-879/19 _Format II_, ECLI:EU:C:2021:409, para. 22. Also see Case C-570/15 _X v Staatssecretaris van Financiën_, ECLI:EU:C:2017:674, para 21.
23. Indeed, the Court of Justice itself struggled with these provisions in Case C-115/11 _Format I_, ECLI:EU:C:2012:606; Case C-879/19 _Format II_, ECLI:EU:C:2021:409 and Case C-570/15 _X v Staatssecretaris van Financiën_, ECLI:EU:C:2017:674. For more on these application and interpretation issues, see: De Wispelaere et al. (2021: 132-137); Van der Mei and van Ooij (2022: 141-145); Van Ooij (2020: 582-584).
So, the situation in which someone is considered to be working in two or more Member States simultaneously differs from a posted worker’s situation, as is apparent from Article 14(7) of Regulation (EC) No 987/2009. If one pursues activities in another Member State on a temporary or ad hoc basis only, the rules on posting might possibly apply. In accordance with Article 12 of Regulation (EC) No 883/2004, the employee in question would in that case remain subject to the legislation of the sending Member State. However, it is contested whether this rule applies in the case of telework, particularly if the employer did not order the employee to telework from another Member State but only consented to it. This is the case, for instance, with a so-called “workation”, when a worker asks permission to work from abroad for a certain period of time, such as from a second home or holiday destination. It also happens when an employee combines their activities in another Member State with the temporary care for a dependent family member who lives in that state. Some, including the Belgian National Office for Social Security, are of the opinion that the posting rule could be applied in such cases, provided that the other conditions for that rule are also met (Maes and Vets, 2021: 249-251). However, it appears from informal information that not all Member States share that view. I am of the opinion that the posting rule can be applied when the employer has given the employee permission to temporarily work online from another Member State. Indeed, the application of this posting rule does not require the employee involved to deliver a service to a client in that other Member State, contrary to what is required for the application of the Posted Workers Directive 96/71/EC. After all, the main objective of the posting rule is to prevent a worker who temporarily pursues their activities from another Member State from becoming subject to a different social security system during this short period of time. Still, I would limit the application of this rule to those situations in which the employer has actually given permission for such an arrangement.

However, the posting rule does not apply if a person who resides in a particular Member State and is subject to the social security of that state is recruited by an employer in another Member State and exclusively teleworks from home. One of the requisites for the application of the posting rule is indeed that the worker is already subject to the social security legislation of the so-called sending state. If the posting rule does not apply, then the State of employment principle has to be applied so that the worker is subject to the legislation of the Member State in which they actually work, even if it concerns a short period.

It is clear that the application of the current conflict rules to situations in which workers perform their activities completely or partially online from a remote location may lead to a change of the applicable social security legislation. This has consequences, whether positive

24. To sum up, the conditions for the application of the posting rule are the following: the posting may not exceed a period of 24 months; a direct relationship must remain between the employee and the employer; the employer has to pursue substantial activities in the sending state; prior to the posting, the worker was already subject to the social security legislation of the country in which the employer is established; and the worker is not sent to replace a previously posted worker. Also see Article 14(1) and (2) of Regulation (EC) No 987/2009 and Decision No A2 of 12 June 2009 of the Administrative Commission [2010] OJ C 106 (hereafter: Decision No A2).

25. In order to clarify this, the European Commission submitted a proposal in 2016 (COM(2016) 815). The proposal makes a clear difference in the provision on posting in Article 12 of Regulation (EC) No 883/2004 between a posting within the meaning of Directive 96/71/EC and the “sending” of a worker without a service being provided to a client in another Member State. This proposal is still pending at the time of writing.

26. See, for instance, Case C-202/97 Fitzwilliam, ECLI:EU:C:2000:75, para. 28 and Case C-359/16 Altun, ECLI:EU:C:2018:63, para. 32.

27. See Article 14(1) of Regulation (EC) No 987/2009. Decision No A2 mentions a previous period of one month.
or negative, for the net incomes of the workers involved and the employer’s labour costs, as explained in Part 2. In any case, it is evident that very flexible forms of work, such as the emerging forms of telework or working from a remote location, were not considered when the current conflict rules were formulated. Therefore, the question arises as to whether these rules can be applied differently compared with what has been assumed thus far, or even whether they should be adapted.

3.2. Re-Interpretation of the Conflict Rules

The Court of Justice has always pointed out that the conflict rules should be interpreted in the light of the purpose of Article 48 Treaty on the Functioning of the European Union (TFEU), which is to contribute to the establishment of the greatest possible freedom of movement for migrant workers. In Format I, the Court stated that any administrative complications, which resulted from the application of the conflict rules and could place obstacles in the way of freedom of movement, should be avoided. The prevention of administrative complications in case a person were to become subject to a different applicable social security legislation for only a short period of time is also why the Court accepted the posting rules as a deviation from the State of employment principle.

Indeed, in the case of telework, one can question whether these objectives can be met through the strict application and interpretation of the conflict rules; for instance, if this would lead to a brief change in the applicable social security legislation. In any case, this would be an argument in favour of applying the posting rule to ad hoc telework from a different Member State than that in which the employer is established, even if this is on the worker’s initiative. For more structural telework, national institutions could be given more discretion with regard to the application of the conflict rules, such as the 25% and 5% rules, the period of 12 months during which the regularity of activities in two or more Member States are assessed, or to the requirement of a one-month subject period to the sending country’s legislation prior to a posting job (De Wispelaere et al., 2021: 172). However, such a flexible interpretation of the rules entails the risk of Member States interpreting and applying those rules differently, which could lead to conflicts between Member States and legal uncertainty (Rennuy, 2021: 30). Furthermore, one could assume that in the event of online work, using the tools provided by the employer (e.g., a laptop) means the activities are actually performed at the employer’s place of business, which is also the place from which the instructions are given (Strban et al., 2020: 44).

Of course, these are creative ways of interpreting and applying the current rules; but it is doubtful whether Member States are willing to go to these lengths and whether the Court of Justice would eventually accept such creative interpretations. Indeed, in the recent past, the Court has maintained strict application of the conflict rules. Such a creative interpretation could possibly be supported.

28. See, amongst others, the opinion of Advocate General Szpunar in Case C-570/15 X v Staatssecretaris van Financiën, ECLI:EU:C:2017:182, paras 37 and 38. Also see: De Wispelaere et al. (2021); Schoukens (2019); Strban et al. (2020).
29. Case C-137/11 Partena, ECLI:EU:C:2012:593, para 46; Case C-610/18 AFMB, ECLI:EU:C:2020:565, para. 63 and Case C-784/19 Team Power Europe, ECLI:EU:C:2021:427, para. 58.
30. See footnote 31.
31. See, for instance, Case C-631/17 Inspecteur van de Belastingdienst, ECLI:EU:C:2019:381 and Cases C-95/18 and C-96/18 van den Berg, ECLI:EU:C:2019:767.
and confirmed by a decision or recommendation of the Administrative Commission, although these have no binding legal force.\footnote{Case 98/80 Romano, ECLI:EU:C:1981:104.}

### 3.3. Amending the Conflict Rules

Another possibility to avoid the unwanted consequences of a change in the applicable social security legislation due to performing telework is to adapt the current conflict rules. For instance, the Court of Justice has pointed out that in special cases, the strict application of the State of employment principle can result in the creation rather than avoidance of administrative complications for the employee, employer, and social security institutions. This could hamper the exercise of the right to free movement.\footnote{In that sense, Case C-570/15 X v Staatssecretaris van Financiën, ECLI:EU:C:2017:674, para. 16; Case C-359/16 Altun, ECLI:EU:C:2018:63, para. 31; Case C-610/18 AFMB, ECLI:EU:C:2020:565, para 43 and Case C-784/19 Team Power Europe, ECLI:EU:C:2021:427, para. 35.}

So, it might be necessary to adopt and apply special rules in order to achieve the basic objective of social security coordination, which is to promote the free movement of workers.

An obvious adaptation would be to increase the 25% rule in Article 14(8) of Regulation (EC) No 987/2009 that is the basis for determining whether the activities in the country of residence are “substantial”. This percentage could be raised up to 40%, for instance, which would mean the social security legislation of the employer’s place of business would remain applicable if the worker teleworked from their place of residence for up to two days per week. However, even a 40% rule has the risk of being arbitrary, since teleworking for more than an average of two days per week would not fall within the scope of this rule, which in turn would mean that the country of residence’s legislation would become applicable. Alternatively, the 40% rule could be made applicable only in situations in which the employee is advised to perform part of their activities from home or to telework only, and not to other forms of cross-border work, such as in the transport sector.

Another idea is to explicitly incorporate temporary non-structural telework or “workations” within the scope of the posting rule, and thus to create more legal certainty on the matter. Such a specification could be introduced in Article 14 of Regulation (EC) No 987/2009, for instance.

In addition, inspiration can be found in the current conflict rules based on a fictitious place of work. Article 11(2) of Regulation (EC) No 883/2004 stipulates that for the purposes of the conflict rules, the persons receiving cash benefits because or as a consequence of their professional activity shall be considered to still be pursuing this activity. Therefore, regardless of the fact they no longer pursue any activities in practice, they are still considered to be pursuing the activities that entitle them to the benefits they receive. So, a frontier worker who receives a sickness benefit and is at home and non-active during that time is still considered to be working in the Member State in which they were working prior to their illness. Hence, this worker remains subject to the social security legislation of that Member State. In accordance with Article 11(3)(e) of Regulation (EC) No 883/2004, as an economically non-active person, this person would be subject to the social security legislation of the country of residence during this time were it not for this fiction. So, it concerns a fictitious exercise of activities, and the application of the conflict rules is determined on the basis of this fiction.

Another example is the provision in Article 11(4) of Regulation (EC) No 883/2004. Activities that are normally performed on board a seagoing vessel that sails under the flag of a certain Member State are considered as activities that are performed on the territory of that Member State as regards
the application of the conflict rules. Article 11(5) of Regulation (EC) No 883/2004 also works with a fiction: that is, activities as a flight crew or cabin crew member performing air passenger or freight services shall be deemed activities pursued in the Member State where the home base, as defined in Annex III to Regulation (EEC) No 3922/91, is located. This fiction also applies if the worker pursues activities in two or more Member States in practice. These examples show that fictitious places of work are integrated in the conflict rules of the regulation.

By analogy, in the case of telework, a rule could be introduced stating that this kind of work is considered as work that is performed at the employer’s registered office or place of business. If such a fiction were to be introduced, there would be only one place of work, which would make the State of employment principle applicable: i.e., the applicable legislation is that of the Member State in which the fictitious work is performed. This fiction would only apply if part and not all activities were performed online. In the latter case, the State of employment principle would apply.

A precise definition of telework has to be formulated, though, as well as a specification of the kind of online work that would be covered by this fiction. Furthermore, the location of the employer’s registered office or place of business would have to be determined. Article 5a of Regulation (EC) No 987/2009 specifies that for the application of the conflict rules, “registered office or place of business” is that in which the essential decisions of the undertaking are adopted and the functions of its central administration are carried out. This definition will probably have to be fine-tuned in order to avoid the employer from choosing the location of the registered office or place of business through artificial constructions in such a way that employees are subject to the most favourable social security legislation for the employer. As regards the application of the conflict rules concerning employment in two or more Member States, which are laid down in Article 13 of Regulation (EC) No 883/2004, that danger is real. For instance, the employer in question is not required to pursue substantial activities in the country of establishment, there are no time limitations for the application of this provision, and the employee is not required to have been subject to the social security legislation of the Member State involved beforehand – yet, these are all requirements for the application of the provisions on posting. Incidentally, the Court of Justice has recently pointed out the danger of artificial constructions to invoke Union law in order to take advantage of the differences between the national regulations. This would amount to the employer being able to choose the social security legislation to which it is subject, and therefore have the opportunity of “forum shopping”. The Court indicated that such a practice could lead to downward pressure

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35. On this provision, the Court of Justice of the European Union (CJEU) recently decided that the premises (“crew room”) used by workers at the airport at which they normally start and complete their work day, and from which they have to reside within one hour, must be regarded as constituting a “home base” within the meaning of Article 11(5) of Regulation (EC) No 883/2004. Therefore, the social security legislation of the Member State within which this airport is located is applicable even if staff members use these premises only for a few minutes per day, with the remaining working time spent on board the aircraft: Case C-33/21 INAIL and INPS v Ryanair, ECLI:EU:C:2022:402, paras 71 and 73.

36. Also see Article 14(5a) of Regulation (EC) No 987/2009.

37. The current definition leaves plenty of room for the employer to go “forum shopping” through the relocation of its registered office or place of business (Rennuy, 2021: 27-28). For that reason, the Commission submitted a proposal in 2016 to further specify this definition (COM(2016) 815 final). Negotiations between the Council and the European Parliament on this proposal are ongoing at the time of writing. For the most recent state of affairs, see: Council document of 17 December 2021 nr. 15068/21 ADD1.
on Member States’ social security systems and, eventually, possibly on the level of protection offered by these systems.\(^{38}\)

It remains uncertain whether or not such adaptations are politically feasible, particularly considering the deadlock in negotiations currently between the Council of Ministers and the European Parliament regarding the Commission’s proposal in December 2016 to amend the social security regulations. In order to amend the conflict rules, a proposal from the Commission is first required, followed by a qualified majority in the Council and a simple majority in the European Parliament. Even if the Commission would be prepared to make such proposals, it remains unclear whether the required majorities would be obtained. In any case, such a proposal would have to be coupled with a detailed impact assessment. Moreover, a proposal on the amendment of the conflict rules for telework could possibly open Pandora’s box, exposing other bottlenecks regarding the application of these conflict rules, such as the application to other flexible forms of work as in the arts sector (also see: De Wispelaere et al., 2021; Schoukens, 2019; Strban et al., 2020; Van Ooij, 2020: 573-574).\(^{39}\)

### 3.4. Bilateral and Multilateral Agreements between the Member States

It remains unclear whether an adaptation of the conflict rules will ever see the light of day. The Member States could, however, make bilateral or multilateral agreements on the determination of the applicable legislation that deviate from the general rules. Article 8(2) of Regulation (EC) No 883/2004, for instance, provides that two or more Member States can, if necessary, conclude conventions with each other based on the principles of this regulation and in keeping with the spirit thereof. In principle, these provisions could be used to decide on special conflict rules regarding telework through such bilateral and multilateral agreements between Member States. However, this provision requires that these agreements are based on the principles of the regulation and in keeping with the spirit thereof. The precise meaning of this is unclear, and the Court of Justice has not yet had the opportunity to express its opinion on the matter. As indicated earlier, though, the objective of the conflict rules laid down in the regulations is to promote the free movement of workers, *inter alia*, by removing or reducing administrative and other thresholds. Therefore, agreements between Member States that aim at achieving this objective specifically for forms of telework should not be contrary to this provision.

In addition, Article 16 of Regulation (EC) No 883/2004 provides the possibility for two or more Member States, the competent authorities of these Member States, or the bodies designated by these authorities to provide for exceptions to the conflict rules in Articles 11 to 15 in the interest of certain persons or categories of persons by common agreement. So, this provision provides Member States with the possibility to, by common agreement, deviate from these conflict rules if their strict application would clash with the interests of certain persons. However, all Member States involved have to be in agreement. It is not a choice that is given to the employers or workers, although they can submit a request to the Member States involved.\(^{40}\) The Practical Guide illustrates this with the

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38. Case C-610/18 *AFMB*, ECLI :EU :C :2020 :565, para 69 en Case C-784/19 *Team Power Europe*, ECLI :EU :C :2021 :427, paras 62-64.

39. De Wispelaere et al. (2021: 172-173) also refer to the difficulties in creating a specific conflict rule for a certain category of workers or a specific situation, such as defining the exact personal and material scope of such a specific rule.

40. Article 18 of Regulation (EC) No 987/2009 stipulates that such a request should be submitted, whenever possible in advance, to the competent authority or the body designated by the authority of the Member State whose legislation the employee or person concerned is requesting be applied.
commonly used possibility to extend the maximum duration of the posting through such agreements (Practical Guide, 2013: 18). Another possibility is to use such agreements to regulate the situation in which the legislation of the wrong Member State was applied in the past. The provision cannot be invoked, however, if the sole purpose is to realise certain administrative advantages for the Member States themselves (Practical Guide, 2013: 18).

Recently, the Court of Justice too suggested in one of its judgments that Member States could make use of the possibility to provide a deviation from the application of the conflict rules through Article 16 of Regulation (EC) No 883/2004 if the strict application of those conflict rules would be disadvantageous to certain persons. In this case, the Court suggested to deviate from the principle of single applicable legislation if the applicable law of the Member State of employment does not confer on the migrant worker an entitlement to old-age pension or child benefits that the worker would otherwise have enjoyed had they remained unemployed in the Member State of residence.41

This provision can also be implemented to decide on special rules for a group of workers. An illustration of such a deviation for a specific group is the Agreement concerning Rhine Boatmen, in which specific conflict rules for this category of workers were agreed upon between Belgium, Germany, France, Luxembourg, the Netherlands, and Liechtenstein.42 This agreement states that, in principle, applicable to these workers is the legislation of the Member State in which the registered office of the undertaking that owns the vessel on which the Rhine boatmen work is located.

So, Article 16 offers a very broadly formulated possibility and could also be used by the Member States to, by common agreement, deviate from the conflict rules as regards teleworkers. For instance, Member States could agree to prolong the temporary measures that deviate from the applicable conflict rules completely or partially after the pandemic; or, they could even agree on other conflict rules. However, the first signs from the competent administrations do not show a lot of enthusiasm for these possibilities. One reason is probably a fear that this will open Pandora’s box, and that workers and employers who are involved in other forms of flexible work will want to invoke those diverging agreements.

### 3.5. Agreements at the Company Level

It has become apparent that in practice, employers are already preparing themselves for the situation that telework will remain in existence after the pandemic. For instance, some companies have already made agreements allowing employees to telework under certain conditions for part of their normal working time. Remarkably, a separate regulation is often in place for frontier workers. For example, for employees who do not reside in the Member State in which the employer is established and where the work is normally pursued - as is the case for frontier workers - telework is limited to one day per week; conversely, employees who do reside in this Member State are allowed to work from their home or another place in that Member State for two or more days per week (Weerepas et al., 2021: 17).43 The aim of this difference in treatment is to avoid frontier workers becoming subject to the social security legislation of the Member State of residence due to the 25% rule that applies to determine whether activities in the Member State of residence are

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41. Cases C-95/18 and C-96/18 van den Berg, ECLI:EU:C:2019:767, para. 65.
42. Agreement of 23 December 2010 on the Determination of the Legislation Applicable to Rhine Boatmen, on the Basis of Article 16(1) of Regulation (EC) No 883/2004.
43. For a reference to common practices in Luxembourg, see Robert (2021: 16).
“substantial”. Other employees who reside in the Member State in which the employer is established and who telework for more than 25% of their total activities would remain subject to the legislation of that Member State. By introducing this deviation for frontier workers, employers aim to prevent the possible negative consequences for them of a change in the applicable legislation and avoid a situation in which employees within a single organisation are subject to different social security systems.

Of course, the question is whether this difference of treatment complies with Union law. Indeed, Article 45 of the TFEU and Article 7(1) of Regulation (EC) 492/2011 prohibit every distinction on grounds of nationality in respect of any conditions of employment. Article 7(4) states that any clause of a collective or individual agreement or any other collective regulation shall be null and void insofar as it lays down discriminatory conditions in respect of workers who are nationals of the other Member States. This prohibition of discrimination on grounds of nationality has a horizontal effect and is to be respected by employers as well.\textsuperscript{44} Furthermore, this prohibition includes indirect forms of discrimination that might occur by the use of criteria that could affect migrant workers more than national employees.\textsuperscript{45} The employee’s place of residence is such an indirect form of discrimination on grounds of nationality.\textsuperscript{46} The company regulation of telework would make a distinction between employees based on their place of residence, which is particularly disadvantageous to migrant workers, such as frontier workers. Such a measure is only acceptable if it is objectively justified; and, if it were objectively justified, it would still have to be of such a nature as to ensure achievement of the aim pursued, and not go beyond what was necessary for that purpose.\textsuperscript{47} One could justify this distinction by arguing that if frontier workers telework for more than one day per week, this would result in a change of the applicable social security legislation for them and their employers, which would entail a number of consequences regarding frontier workers’ and their employers’ contributions, administrative burden and loss of rights (see above). However, as regards an indirect distinction on grounds of nationality, the Court of Justice has, thus far, rejected every justification relating to an increased financial burden or possible administrative difficulties, including in private relationships. Indeed, in its judgement in \textit{Erny}, the Court explicitly states that: “\textit{Justifications, which are based on the increase in financial burdens and possible administrative difficulties, must be rejected. Grounds of that kind cannot, in any event, justify the failure to comply with the obligations arising out of the prohibition of discrimination based on nationality set out in Article 45 TFEU ... as neither the scope nor the content of those grounds of justification is in any way affected by the public or private nature of the disputed provisions.}”\textsuperscript{48}

One might possibly argue that frontier workers are not in a comparable situation to employees who work in the Member State in which they also reside; so, a difference in treatment would be in

\textsuperscript{44} For a recent horizontal application, see, for instance: Case C-172/11 \textit{Erny}, ECLI:EU:C:2012:399; Case C-24/17 \textit{Österreichischer Gewerkschaftsbund}, ECLI:EU:C:2019:850.
\textsuperscript{45} Case C-172/11 \textit{Erny}, ECLI:EU:C:2012:399, para. 39; Case C-24/17 \textit{Österreichischer Gewerkschaftsbund}, ECLI:EU:C:2019:373, para. 70.
\textsuperscript{46} See, for instance, Case C-542/09 \textit{Commission v Netherlands}, ECLI:EU:C:2012:346, para. 55.
\textsuperscript{47} Case C-542/09 \textit{Commission v Netherlands}, ECLI:EU:C:2012:346, para. 55; Case C-172/11 \textit{Erny}, ECLI:EU:C:2012:399, para 41; Case C-24/17 \textit{Österreichischer Gewerkschaftsbund}, ECLI:EU:C:2019:373, para. 71.
\textsuperscript{48} Case C-172/11 \textit{Erny}, ECLI:EU:C:2012:399, para. 48. See also Case C-542/09 \textit{Commission v Netherlands}, ECLI:EU:C:2012:346, para. 58.
compliance with the prohibition of discrimination. Still, with regard to the applicable terms of employment, I do not think that one can argue that frontier workers are not comparable to employees who work in their country of residence. This would amount to rendering inoperative the prohibition of discrimination on grounds of nationality, on which workers migrating within the Union can rely.

4. Conclusion

During the COVID-pandemic, the normal use of the European conflict rules determining the applicable social security legislation was temporarily suspended due to the telework that was being obliged or recommended in order to avoid changes in the applicable legislation as a result of said telework. The purpose was to avoid the consequences of such a change. However, these forms of remote work are expected to remain in existence after the pandemic, even when the suspension of the conflict rules is no longer in place. So, the question arises whether the suspension of the strict application of the conflict rules should be prolonged after the pandemic, or whether these conflict rules should be applied differently or even amended. A number of options were examined. It is apparent from this analysis that this matter raises various legal and policy questions. Interpretation and application difficulties and the resultant uncertainty may certainly lead to a situation in which workers and employers refrain from cross-border employment, which naturally goes against the objectives of the free movement of workers and the social security coordination (Van Ooij, 2020: 596). It is not clear, however, how this can be avoided.

Nevertheless, our analysis does show that the conflict rules laid down in the regulations are no longer suited to hybrid and very flexible forms of work. This is also apparent from the research reports mentioned above on highly mobile forms of work. The pending proposals by the Commission from 2016 do not provide real answers to this issue, nor do they come up during the debates between the Council and European Parliament. The new forms of work, of which telework is just one, call into question the original principle of the European conflict rules concerning social security: that is, the State of employment principle, which is still based on a physical workplace. A solid debate is required on the question of whether these conflict rules should be amended to this reality, and, if so, how. If the European legislator fails to do so, it will probably be up to the Court of Justice to adapt the interpretation to the current rules (Schoukens, 2019: 97; Van Der Mei and Van Ooij, 2022: 155). However, the Court recently showed its reluctance to interpret these conflict rules creatively, perhaps because it is of the opinion that the reinterpretation or reformulation of these rules is the legislator’s job. Still, Member States have the possibility to make agreements in which they provide for deviations from the European conflict rules for certain categories of workers. It remains unclear, though, whether the Member States are willing to make such agreements, and which rules would be agreed upon for which groups of persons.

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49. Case C-172/11 Erny, ECLI:EU:C:2012:399, para. 40.
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