Représentant les avocats d'Europe
Representing Europe's lawyers

CCBE GUIDELINES WITH A VIEW TO A HOMOGENEOUS APPLICATION OF THE PRINCIPLES PRESENT IN REGULATION 1408/71/EC BY SOCIAL SECURITY ORGANISATIONS

Conseil des barreaux européens – Council of Bars and Law Societies of Europe
association internationale sans but lucratif
Avenue de la Joyeuse Entrée 1-5 – B 1040 Brussels – Belgium – Tel.+32 (0)2 234 65 10 – Fax.+32 (0)2 234 65 11/12 – E-mail ccbe@ccbe.org – www.ccbe.org

CCBE guidelines with a view to a homogeneous application of the principles present in Regulation 1408/71/EC by social security organisations

I. Introduction

The present guidelines aim to facilitate the application of Regulation EC 1408/71 by social security organisations in the different Member States, and in particular by social security organisations for lawyers which exist in some of these States, in the interest of lawyers in cross-border practice within the European Union.

They include:

- first, a reminder of the main principles of Directive 98/5/EC of the European Parliament and of Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained (hereafter referred to as the Establishment Directive),
- second, the main principles of Regulation 1408/71/EC[1] on the application of social security schemes to employed and self-employed persons and their families moving within the Community (hereafter referred to as the Regulation).

Lawyers who practise within the framework of the Establishment Directive are subject to a number of problems in the field of social security: in which country should they pay their subscriptions? Which social security regime is applicable? How does the calculation for retirement pension works? etc.

All these issues are dealt with by Regulation EC 1408/71 which aims at co-ordinating the applicable laws and not at harmonising them as distinct national regimes remain.

The CCBE would like to encourage co-ordination between different national schemes applicable having regard to the various principles applicable to free movement of lawyers.

The CCBE would like to invite social security organisations to refer to the Regulation itself[2] as the present guidelines addresses only the main general principles and not the exceptions or special cases.

II. Guidelines

II.1 Legal framework applicable to cross-border practice:

Lawyers' cross-border practice can be temporary or permanent.

The first Directive applicable to lawyers was Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services.

It enabled a lawyer to go to another Member State to temporary practise his/her professional activity.

Article 4 of the said Directive provides that: "[the lawyer] *shall remain subject to the conditions and rules of professional conduct of the Member State from which he comes without prejudice to respect for the rules, whatever their source, which govern the profession in the host Member State*".

[1] It should be specified that the regulation will in the end be replaced by Regulation 883/2004/EC of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems. This new Regulation will simplify and update existing rules. Its scope is wider as it should apply to any person covered by social security law. It does not question the main principles of Regulation 1408/71. It will not enter into force before 2006). Direct link to the Regulation: http://www.europa.eu.int/comm/employment_social/soc-prot/schemes/index_en.htm

[2] http://www.ccbe.org/doc/conferenceRome_260304/doc/1971R1408_en.pdf

There is accordingly no specific provision with regard to social security within the framework of temporary practice in another Member State, the lawyer remains subject to his/her social security regime.

However, Regulation 1408/71/EC includes several specific provisions in the case of secondment. Secondment is a type of temporary exercise of the professional activity although it includes a notion of permanence as opposed to the free movement of services as its duration is for a maximum of 12 months (renewable for another period of 12 months). In this case, the Regulation foresees the application of the law of the Home State as far as social security is concerned.

The second Directive which is applicable to lawyers is the Establishment Directive 98/5/EC to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained.

Under this Directive, any lawyer from an EU Member State has the right to practise his/her profession on a permanent basis in another Member under his/her home title, provided that he/she registers with the Host bar.

Under this Directive the host bar has to proceed to the registration of the lawyer given his/her certificate of registration with the relevant home authority.

The lawyer registered in the host Member State who practises under his/her home professional title can practise as an employed lawyer of another lawyer, of an association of lawyers or of a public or private undertaking, provided that the practice of the legal profession in this quality is authorised in the host Member State.

For example, a German lawyer "*Rechtsanwalt*" can decide to go to Italy to establish himself there as a lawyer and practise permanently under his home title "*Rechtsanwalt*". Once established, he can practise many activities since he can provide legal advice not only in his home State law or in European law, but also in host State law, i.e. Italian law in this case.

The lawyer practising under his/her home professional title, which proves an effective and regular activity of at least three years in the host Member State, and in the law of that State, including Community law, may access the legal profession of the host Member State without having to satisfy an adaptation period of a maximum duration of three years or an aptitude test.

If we take the above example, the German lawyer will be able, after three years of practice, to become an Italian lawyer without being obliged to take the aptitude test. Indeed, the Directive abolished the obligation of an aptitude test for a lawyer who is established and has practised local law for three years.

It means that the lawyer as from his/her registration under Article 3 of the Directive (and without having to wait for three years after which he could choose to become a lawyer of the host Member State) will have the same rights and duties as his/her fellow colleagues of the Home State for the provisions which may exist within the Bar regarding social security

The opposite situation would create discrimination which is contrary to principles of Community law.

Within the framework of this Directive, difficulties linked to social security are likely to arise.

The aim of the CCBE is to avoid a lawyer having to pay subscriptions for his/her pension scheme and/or social security scheme both in the home and host Member States, that he/she can benefit from benefits to which he/she is entitled and that the period of practice in another Member State is taken into account for his/her rights to a pension.

The CCBE recommends therefore to relevant social security organisations and to its member bars to find a solution under the provisions of Regulation 1408/71/EEC to these difficulties which are likely to arise for lawyers willing to establish.

II.2 Regulation 1408/71/EC applicable to social security issues

The Regulation is applicable to lawyers whether they are self-employed or employed, and to their families.

The branches of social security covered by the Regulation are listed under Article 4:

sickness and maternity benefits;
invalidity benefits, including those intended for the maintenance or improvement of earning capacity;
old-age benefits;
survivors benefits,
benefits in respect of accident at work or occupational diseases;
death grants;
unemployment benefits;
family benefits[3].

The present regulation applies to general or special social security regimes, contributory or non contributory, and to regimes linked to the duties of the employer.

The main principles of the Regulation are on the one hand linked to (1) the determination of the law applicable and on the other hand to the (2) right to social security benefits.

(1) Determination of the law applicable (article 13)[4]

- **Principle of the unique character and exclusivity of the law applicable**

Any lawyer, whether he is self-employed or employed, can only be subject to the law of one Member State.

It means that he can be subject only to one social security regime and that combination of applicable national laws should be avoided.

- **Application of the law of the country where the professional activity is carried out (Lex Loci Labori)**

The social security regime exclusively applicable to the lawyer is that of the country where he practises his professional activity, whether employed or self-employed.

The fact that the lawyer resides in the territory of another Member State or that if he is employed, the registered office or place of business of the undertaking or individual employing him is located in the territory of another Member State do not enable him to depart from this principle.

The self-employed worker being subject to the regime of the State where he works is a general principle totally consistent with the free movement principle, as the aim of this Regulation is to ensure equality of treatment for the right to social security benefits as any citizens of this Member State (Article 3).

[3] The future Regulation adds at Article 3, paternity benefits and pre-retirement benefits.
[4] Article 11 of the future Regulation provides for that persons to whom this Regulation applies are subject only to the law of one Member State.

Therefore, no Member State other than that whose legislation is made applicable is entitled to collect subscriptions (combination of subscriptions is forbidden). The country where benefits are provided should be the same as that where subscriptions are paid.

Therefore, within the framework of the Establishment Directive, and as the Regulation provides for the application of the law of the country to determine the applicable social security regime, only the social security regime of the host Member State is applicable from the registration with the bar of that State on.

- **Exceptions to the Lex Loci Labori principle**

Some exceptions are however provided for:

- The cases of secondment, i.e. a temporary activity in the territory of another Member State not exceeding 12 months (with the possibility of an extension of 12 further months if the competent authority of the Member State in whose territory the person concerned has entered to work gives its consent), during which the law of the Home State remains applicable (Article 14 (1), letters (a) and (b) for employed activity, Article 14b (1), letters (a) and (b) for self-employed activity)[5].

- When the professional activity is normally performed in the territory of two or more Member States, the subsidiary residence criterion is applied to determine the law applicable as far as social security is concerned. However, if the activity is practised in a Member State other than the State of residence, the residence criterion does not apply but the general principle of lex loci labori does (Article 14 (2) for employed activity, Article 14b (2) for self-employed activity)[6].

- As far as old-age insurance is concerned and should the above criteria not enable the non salaried worker to be registered, even on a voluntary basis, with such a regime, the latter will be subject to "*the legislation of the other Member State which would apply apart from these particular provisions, or should the legislations of two or more Member States apply in this way, he shall be subject to the legislation decided on by common agreement amongst the Member States concerned or their competent authorities*". (Article 14a (4)).

To take the above example and to summarise it, the German lawyer practising under his/her home title of "*Rechtsanwalt*" under the Establishment Directive in Italy only will be subject to the Italian social security regime.

If the same lawyer practises on a permanent basis both in Italy and in other Member States and if his/her residence is in Italy, then only the Italian social security regime will be applicable.

If this lawyer practises on a permanent basis both in Italy and in other Member States and if his/her residence is in another Member State, then he/she will be subject to the social security regime of that Member State, provided that he/she also practises his/her profession there.

(2) The right to benefits

1. Principle of equality of treatment

Any lawyer, whether he/she is employed or self-employed, and the members of his/her family, shall benefit from the same benefits in any new Member State as the citizens of that State.

[5] Article 12 of the future Regulation includes the same rule in case of secondment which must not exceed 24 months whether it is an employed or self-employed activity.

[6] Article 13 of the future Regulation specifies that the person who practises an employed or a self-employed activity in two or several Member States is subject to the law of the country of residence, if he/she practises "*a substantial part of his/her activity in this Member State*".

2. Principle of the preservation of acquired rights or rights in the course of being acquired

The lawyer cannot loose the right to social security benefits only because he/she changed residence in a Member State other than the one where he acquired his/her rights as a worker. On the contrary, he/she should be able to preserve the rights to some benefits. This is the principle of preservation of acquired rights whose corollary is the exportation of benefits.

A distinction should be made between the three following categories of benefits:

- *Category I*: invalidity, old-age or survivors' cash benefits, pension for accidents at work or occupational diseases and death grants
- Category II: special non-contributory cash benefits
- *Category III*: sickness, maternity benefits; unemployment benefits; family allowances; contributions for children dependent on the holder of a retirement pension or orphan rents

- ***Category I: Principle of waiving of the residence clause for long-term benefits (Article 10 (1)):***

For invalidity, old-age or survivors' cash benefits, pension for accidents at work or occupational diseases and death grants, the rule is that residence clauses are waived.

This means that the different pensions or benefits acquired under the legislation of one or more Member States shall not be subject to any reduction, modification, suspension, withdrawal or confiscation on account of the fact that the benefiting lawyer resides in the territory of a Member State other than that in which the institution responsible for payment is located.

This principle applies both to the payment of benefits and to the acquisition of rights to benefits.

- ***Category II: Condition of residence in the State awarding the benefit for special non contributory benefits (Article 10a):***

Those benefits, which are listed for each Member State in Appendix IIa of the Regulation, are granted exclusively in the territory of the State of residence, in accordance with the legislation of that State.

This means that the lawyer who leaves that State is not entitled to receive these benefits in his new country of residence.

This rule, which departs from the principle of exportation of benefits, must be interpreted very strictly and only concerns benefits which have both a special and non-contributory features.

- ***Category III: Principle of preservation of acquired rights for short-term benefits (Title III):***

This category includes, as mentioned above, sickness-maternity benefits, unemployment benefits, family allowance, children on the holder of a retirement pension or orphan rents.

The preservation of acquired rights means that the lawyer may benefit from his benefits if he resides in a Member State other than that in which he is registered with (the competent State) or if he temporarily resides in a Member State other than the competent State.

The mechanism stated in the Regulation works in general as follows:

a) If the lawyer resides in a Member State other than that where he is registered with or where he is entitled to benefits, he then receives in the State of residence:

- Benefits in kind, which are provided by the country of residence on behalf of the competent State concerned. The latter shall pay back the amount granted by the country of residence (Article 19(1) (a)).

- Cash benefits, which are granted by the social security body in the competent State, unless otherwise agreed between the State of residence and the competent State (Article 19(1) (b)).

b) If the lawyer spends some time in a Member State other than the one where he is registered with (e.g. the competent State), then:

- cash benefits will be paid back in accordance with the table of the competent State;
- benefits in kind will be paid back in accordance with the list set out in the legislation of the State on the territory of which the benefits were performed or the products bought.

3. The mechanism of aggregation

In order to maintain acquired rights and rights in the course of being acquired, competent institutions have to think as if the whole working life had been completed in a sole territory.

The competent institution of a Member State whose legislation makes the acquisition, retention or recovery of the right to benefits subject to the completion of the periods of insurance or residence shall take account of any period completed under the legislation of another Member State as if they had been completed under its own legislation.

These periods of subscription, employment or residence must be taken into account for the opening and preservation of a right to benefits as well as for the calculation of the benefits whose amount would depend on the duration of the working life (old-age, survivors', invalidity) so that the lawyer can benefit from rights to benefits as if these periods had been completed on the territory of the Member State concerned.

This means that there cannot be any waiting period before benefiting from the rights to benefits (Article 18 for sickness insurance, Article 38 for invalidity, Article 45(1) for old-age and death).

For example, if a lawyer has benefited from a social security regime for two years in the country A and that the rule in country B where he will work and register with, is to pay social subscriptions for 12 months before benefiting from benefits, the lawyer will immediately get all benefits in country B because the subscriptions he paid in country A should be considered as if they had been completed under the legislation of country B.

4. The mechanism of pro-rata payment

This principle, which is the corollary of the aggregation one, works for the calculation of rights. It means that when the aggregation of periods completed in different Member States, the lawyer will receive only a part of the national benefit, in accordance with the period effectively completed in this State. This concerns long-term benefits such as a retirement pension (Article 46 (2) (b)).

These two mechanisms, i.e. aggregation and pro-rata payment, are not necessary when the person concerned may, due to the periods of insurance and residence completed in the Member State concerned, claim benefits as any other citizen of that State.

Old-age and death: Article 46 regulates the way the rights to old-age benefits are awarded.

The organisation of the Member State where the right is open calculates first the amount of the benefit as it should be in theory should all periods of work have been completed on its territory.

On the basis of that amount, it sets the effective amount of the benefit under the pro-rata calculation of the periods completed under the legislation of its territory in accordance with the total duration of the periods of insurance or residence completed under the laws of the Member States concerned (mechanism of pro-rata payment).

The highest amount (amount of the individual benefit or the pro-rata benefit) will be kept.

These various ways of (direct or proportional) calculation may apply separately in each Member State where a right is open, the person concerned is receiving one or several individual pensions and/or one or several pro-rata payments of the pensions.

The benefits acquired in another Member State under a voluntary or optional insurance would not be taken into account and, in any case, Articles 46a, 46b, and 46c dealing with anti-accumulation rules, should be considered.

III. Conclusion

The CCBE recommends to social security organisations specific to lawyers to consult each other whenever there is a difficulty in order to find a solution in accordance with Regulation 1408/71 in the interests of the lawyer concerned.

February 2005