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Title

Residence

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References:

- **Recital(s):** 16 BR 11 IR
- **BR :** Art. 1(j); Art. 11(3)(e)
- **IR:** Art. 11
- **AC Decision (s) :** Decision A1
- **ECJ CASE Law:** Case 302/1984 Ten Holder; Case 76/76 Di Paolo; Case C-90/97 Swaddling v Chief Adjudication Officer;

Comments:

The role of residence in relation to the determination of applicable legislation

- Under the EU social security coordination system the prevailing principle to determine the legislation applicable to a person is that of *lex loci laboris*. This principle was designed for coordination rules that concerned only economically active persons (and members of their family). Already under Regulation 1408/71 residence determined the applicable legislation for a specific group of non active persons, namely the post actives persons. In fact Article 13(2)(f), was inserted into the Regulation 1408/71 by Regulation 2195/91¹, in response to the Court Judgment in Case 302/84 Ten Holder
- The progressive extension of the scope of the Regulation to new categories of persons², together with the accession of MS whose systems rely on residence explains why residence has become more and more important in the coordination rules as far as the determination of applicable legislation is concerned. Regulation 883/04 achieves the extension of the personal scope of the coordination rules to all persons who are, or have been, subject to legislation that is within the scope of the Regulation of a Member State (see note on Non-active persons). Article 11 BR contains rules for determining the applicable legislation for economically active persons as well as for non active persons (see Article 11 (2) and 3 (e)). For non-active persons, the legislation of the state of residence applies in principle, without prejudice to the specific provisions of Title III.

¹ OJ L 206

² Regulation 1606/98 of 29 June 1998 extended the rules to civil servants covered by a special scheme for civil servants. (OJ L 209, 25 July 1998) and Regulation 307/99 of 8 February 1999 to students (OJ L 38 12 February 1999).

Definition

- The definition of "residence" is unchanged under Regulation 883/04 in comparison with Regulation 1408/71 and is defined in Article 1(j) as "the place where a person habitually resides". The European Court of Justice, in its leading judgments in Case 76/76 Di Paolo and Case C-90/97 Swaddling, gave guidance on the Community meaning of residence for the purpose of the coordination rules. It set out a range of factors that should be taken into account in order to ascertain where a person's centre of interest lies. The Court's case-law on the meaning of "habitual residence" remains a source of guidance to institutions and competent authorities in determining the residence of persons within the meaning of the new Regulations.
- Despite the existence of this case-law, practice has shown that in more complicated circumstances Member States and institutions have experienced difficulties in determining a person's place of residence and in certain cases there has also been disagreement between Member States as to a person's place of residence. Such uncertainty and disagreements are very often to the detriment of the person concerned as, without a determination of residence, applicable legislation and entitlement to benefits cannot be determined.

Practical implementation by the institutions

- Article 11 of Regulation 987/2009 is inspired by the above-mentioned case law and provides guidance on how to determine a person's residence in cases where there is a dispute between the institutions of two or more Member States. This guidance is given with the dual objective of facilitating cooperation between social security institutions and allowing persons covered by the Regulation to access their rights as quickly as possible.
- The guidance in Article 11(1) IR consists of a checklist of issues or criteria that can be used in assessing a person's residence. Depending on the situation, not all the issues in the list may be relevant or need to be assessed. The list is only indicative Article 11(1) makes clear that, in keeping with the ECJ's case-law, the aim of the institutions should be to reach agreement on "the centre of interests of the person concerned". Articles 11(1)(a) and (b) then list the various factors ("elements") that are appropriate for the institutions to take into account in assessing a person's centre of interests.
- In practical terms, it is important that the situation of each person should be treated individually. Not one factor listed in Article 11(1) should be given precedence over another. Institutions must act flexibly according to the facts of each particular situation and according to the information that is available. If particular information on a certain factor is not available, the institutions should still try to determine a person's centre of interests on the basis of information concerning other factors. The intention of the person concerned in moving his residence, although listed under Article 11(2), is also a factor that can be taken into account in reaching agreement on residence under Article 11(1).
- Article 11(2) acts as a form of "tie-breaker" for those cases, presumably rare, where institutions cannot reach an agreement by application of the factors listed in Article 11(1). In such cases, the intention of the person concerned, as it appears from the various facts and circumstances set out in Article 11(1), is decisive. A person's intention does not need to be explicit and can be assessed according to a range of circumstances concerning his move. Where the person has made an explicit statement of his intention, this statement can only be considered as decisive where it is consistent with the other facts and circumstances concerning his move.

What if no common agreement is reached between the institutions on the place of residence of a person

(that is, on applicable legislation)?

A) vis à vis the person concerned

- When the institutions fail to establish common agreement on a person's residence, Article 6(1) IR applies. The person concerned shall be made provisionally subject to the legislation of one of the Member States in accordance with the order of priority stipulated by Article 6(1) and benefits may be provisionally granted on the basis of Article 6(2) IR.

B) vis à vis the institutions involved

- The institutions shall follow the dialogue and conciliation procedure provided for by Decision A1 of the Administrative Commission (see note on dialogue and conciliation procedure). Eventually when an agreement is found the provisions of Chapter III of Title IVI of Regulation 987/09 (dealing with financial provisions) should apply and, in particular, Article 73 "provisionally paid benefits in cash or contributions".

To go further:

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