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CONTENT

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COORDINATION OF SOCIAL SECURITY

1 What is social security?

Social security are statutory schemes that are established in order to protect persons in a social situation that triggers a need for compensation of lost earnings. Social security establishes solidary schemes to which each person contributes and has reciprocal rights to benefits when needed. A social security scheme will therefore in general entail a correlation between an obligation to contribute and a right to receive a benefit. Social security is therefore not social assistance, which is offered regardless of any contributions.

Within the EU a scheme is regarded to be a social security scheme when the benefit is provided based on objective conditions without regards to the persons individual needs for compensation.

The terms social security may cover the following areas:

- Sickness benefits
- Maternity and equivalent paternity benefits
- Invalidity benefits
- Old-age benefits
- Survivor's benefits
- Benefits in respect of accidents at work and work-related injuries
- Death grants
- Unemployment benefits
- Pre-retirement benefits
- Family benefits

Social security only regards statutory schemes. Private schemes such as private pensions, insurances or schemes governed by collective agreements are not comprised.

It may give rise to special difficulties to distinguish social security law from labour law as labour law – e.g. the Danish Salaried Employees Act – may contain provisions on rights on e.g. sickness or parental leave. However, according to the Court of Justice of the European Union (CJEU) the choice-of-law for such provisions must be governed by the coordination rules on social security. cf. rulings from the Court of Justice of the European Union C-45/90 (EU:C:1992:236), *Paletta* and C-327/92 (EU:C:1995:144), *Rheinhold and Mahla*.

The Danish social security system is residence based. Persons who are resident in Denmark have social security rights and may therefore be comprised by the health system and earn seniority for the pension purposes. The Danish system is mainly financed through taxes and only minor actual social security contributions exist. In Denmark, there is in general no correlation between contributions and entitlements.

Among other EU/EEA countries it is common that the social security system is based on an insurance principle, which imply that the individual makes contributions and thereby earn the right to coverage if need be. The contributions are made by both the employer and the employee. Typically, each party pays an equal part or the employer pays 2/3 of the total contributions. Tus, the social security coverage may only comprise economically active persons and possibly the members of their families. Certain schemes may, however, cover everyone who is resident in a country.

1.1 What is coordination of social security?

Both within and outside the EU/EEA, each country has its individual social security system. This implies that each country may design its own system according to which social security benefits are granted and also define to whom and under which condition such benefits should be given.

When a person travels cross-border, the national rules may collide so that a person may risk either to gain double coverage or to obtain no coverage, should the person for example fall ill or become unemployed. In order to ensure that the different countries' systems work properly in parallel, international rules on coordination of social security have been introduced. International rules on coordination of social security typically decide whether a person is covered by the social security legislation of one country or another (choice-of-law rules) and prevent double coverage. The rules may also govern the right for the person to export a benefit (for example old-age benefits) to another country (the right to benefits and the obligation to contribute).

Within the EU/EEA the coordination rules in general imply the following:

1. That only the rules of a single Member State may apply at a time (exclusive effect) (see CJEU C-352/06 (EU:C:2008:290) *Bosmann*).
2. That it is mandatory for Member States to apply the national legislation, which the coordination rules designate (the binding effect) (see CJEU C-2/89 (EU:C:1990:183), *Kits van Heijningen* and Regulation 883/2004, Article 5(b).
3. The social security system must be designed so that it provides an actual coverage (the practical effect) (See CJEU C-196/90 (C:1991:381), *De Paep*).
4. The applicable designated legislation cannot be deviated from even if it does not provide the individual with advantageous coverage. (The inescapable effect) (see CJEU C-160/96 (EU:C:1998:84), *Molenaar*).

It is for each Member State to decide which national authorities are to manage various administrative tasks in connection with the coordination.

1.2 What is the basis for coordination of social security within the EU?

The basis for the coordination rules on social security is the rules of the internal market. The rules on free movement of workers, including in particular Article 45 TFEU (Treaty on the Functioning of the European Union), form the framework for how coordination may take place. The EU coordination rules must be interpreted in the light of free movement of workers and must promote the mobility of persons. The EU rules are authoritatively interpreted by the Court of Justice of the European Union, which has produced a rich case-law on the understanding of the rules within the framework of Article 45 TFEU.

Within the EU, special rules govern the coordination of social security. The rules are laid down in Regulation 883/2004 (Basic Regulation) and Regulation 987/2009 (Implementing Regulation). In Articles 11-16, the Basic Regulation provides rules on which country's rules on social security to apply (choice-of-law rules). In Articles 14-21, the Implementing Regulation provides rules on the procedures to follow when administrating the Basic Regulation.

The scope of the EU rules has been broadened so that the EEA-countries are also comprised by the rules by virtue of a special agreement. Switzerland has adopted the rules as well by an individual procedure. The individual adoption procedures calls for special attention to be paid to the fact whether the EEA-countries and Switzerland have adopted any recent changed to the rules. As of 1 January 2015 both Norway and Switzerland has adopted all substantial changes. In the following, when the EU/EEA-counties are mentioned it is implied that this also includes Switzerland.

The rules of coordination of social security have been adopted on the basis of Article 48 TFEU. The provision was introduced with the Treaty of Lisbon in 2009 and proves for a direct legal basis for coordination of social security, including rules for self-employed persons. The provision does not have direct effect, which means that the EU Regulation should still be interpreted in the light of Article 45 on the free movement of workers, cf. CJEU C-379/09, *(EU:C:2011:131), Casteels*. See also Frans Pennings in *Common Market Law Review 49 (2012)*, page 1787–1798.

The coordination rules must also be interpreted in the light of, and with respect to the limits of other freedom rights, including Article 56 TFEU on the free movement of services, cf. CJEU C-393/99 and C-394/99, *Hervein and Lorthiois*. The coordination rules should promote and be interpreted in the light of free movement of services, cf. CJEU C-35/70 (EU:C:1970:120), *Manpower* and C-202/97 (EU:C:2000:75), *FTS* and C-404/98 (EU:C:2000:607), *Plum*.

The Lisbon Treaty, Article 179 TEUF et seq., provides special rules on the European Union's objective of strengthening its scientific and technological bases by achieving a European research area in which researchers, scientific knowledge and technology circulate freely.

For this purpose the Union shall, throughout the Union, encourage undertakings, including small and medium-sized undertakings, research centres and universities in their research and technological development activities of high quality. It shall support their efforts to cooperate with one another, aiming notably at permitting researchers to cooperate freely across borders in order to benefit from the potential of the free market to its full extent.

This is done in particular through the opening-up of national public contracts, the definition of common standards and the removal of legal and fiscal obstacles to that cooperation, see COM(2000)6 final and Council of the European Union, Conclusions of the Precedency, 7652/1/08 REV 1.

The rules in the Lisbon Treaty Article 179 et seq. on a free market for researchers have been labelled "the European fifth freedom on research mobility" and are thus not only rules of competence but they also provide a material right. On this basis, researchers have a unique status in EU law. The provisions have given cause to specific cases before the CJEU that set the framework for rules (including rules on coordination of social security) to be designed in order to promote the free movement of researchers, cf. CJEU C-39/04 (EU:C:2005:161), *Laboratoires Fournier* and C-10/10 (EU:C:2011:399), *Kommissionen mod Østrig*.

Furthermore, within the EU a special Regulation 1231/2010 has been adopted, which widens the personal scope of the EU coordination rules to also apply to third country nationals. The Regulation has been adopted on the basis of Article 79 TFEU, which is part of the EU justice and home affairs. As Denmark has opted out of this area, the Regulation is not applicable in Denmark.

1.3 What is the basis for coordination of social security outside the EU?

Outside the EU, there are no general rules on coordination of social security. Outside the EU only the common legal principles in the Vienna Convention, Articles 31-33, apply. Furthermore, each state may enter into social security agreements with other states.

Denmark has entered into social security agreements with numerous countries (2016). The countries are:

- Australia
- The Nordic countries
- Canada

- Chile
- India
- Israel
- China
- Croatia
- Macedonia
- Morocco
- New Zealand
- Pakistan
- Philippines
- Quebec
- Switzerland
- Turkey
- United States

1.4 Where do I find further information on the coordination of social security?

Further information on the coordination of social security may be found here:

General guideline *vejledning 9228 af 23. maj 2013 on a General Introduction and Common Rules (in Danish).*

General guideline *vejledning 9229 af 23. maj 2013 on Regulation 883/2004 – Applicable legislation (in Danish).*

Official EU-documents that relate to Regulation 883/2004, including the Practical Guide.

EUR-lex, which is the official source to EU-legislation, including the consolidated Regulation 883/2004 and Regulation 987/2009.

CVRIA, which is the official web site of the Court of Justice of the European Union.

Borger.dk, which provides access to the social security agreements that Denmark has entered into.

GENERAL REMARKS ON THE COORDINATION OF SOCIAL SECURITY WITHIN THE EU

2 What are the conditions for applying the EU rules on coordination of social security?

In order to apply the EU coordination rules on social security a number of conditions must be met.

The conditions are:

a) The situation must be within the personal scope of the Regulations.
b) The situation must be within the geographical scope of the Regulations.
c) The situation must contain a cross-border element.

2.1 Which persons are covered by Regulation 883/2004?

The below text describes which persons are covered by Regulation 883/2004. The Regulation does not cover all persons. It is important to determine if the Regulation is at all applicable, as this will determine, which international rules to apply. If a person falls outside the personal scope of the Regulation, the rules on applicable legislation does not apply for that person. Special legal circumstances apply to Denmark in this regard, please see below.

The Regulation requires that a person is a citizen of an EU/EEA country in order for the Regulation to apply. If the person holds several citizenships, it is sufficient that just one of these is an EU citizenship (EU/EEA and Switzerland).

Regulation 1231/2010 widens the personal scope of the coordination rule so that third country nationals are also comprised. Ireland, the UK and Denmark have in general opted out of such rules. Ireland and the UK have opted in by virtue of individual adoption procedures, yet Denmark has not adopted Regulation 1231/2010. Denmark is therefore not bound by Regulation 883/2004, when the situation in question regards a person, who is not a citizen of an EU/EEA country nor Switzerland. The Regulations are applicable to third country nationals in relation to Ireland and the UK.

It is debated whether Regulation 883/2004 applies to other EU/EEA countries, when the situation involves Denmark. (Since the Danish opt-out cannot be invoked by other Member States, see the discussion in Frans Pennings, European Social Security Law, 5th Edition, Intersentia 2010, page 41f.) The issue will become relevant if a third country national applies for benefits outside Denmark, as it is unclear if other EU countries have an obligation to take facts and circumstances that have occurred in Denmark into account. Pennings introduces the following example:

An interesting question is what the position of Denmark is in this respect. It is clear, of course, that a third-country national cannot invoke the Regulation if he or she first works in Belgium and then moves to Denmark, in order to have periods of insurance aggregated. However, what about the reverse situation? If he or she moves to Belgium, can he or she have his or her Danish periods added to the Belgian ones? Or, even more basically, suppose that he or she wishes to invoke the Regulation since benefit is refused because of nationality, and he or she was first in Denmark, can this person invoke Regulation 859/2003? Or does the period in Denmark not count for the condition that the facts must not be limited to one Member State?

It is discussed whether the person must be resident within an EU country in order to successfully invoke the Regulations. Specific cases from Danish administrative case-law has found that residence is a condition for successfully invoking the Regulation, see decision from the Danish Pension Agency of 12 November 2012 in which the Agency decided on the following regarding a person resident on the Faroe Islands.

"The rules on social security in EC Regulation 883/2004 presumes that one is resident in an EEA country or Switzerland. Therefore, the rules do not apply to you." (PwC translation)

Legal theory has, with reference to CJEU C-331/06 (EU:C:2008:188), *Chuck*, nonetheless hesitantly found that residence within the EU is not a condition, cf. Gijsbert Vonk, *Social Security Rights of Migrants: Links between the Hemispheres* in Social Security and Migrant Workers – Selected Studies of Cross-Border Social Security Mechanisms, Klüwer 2014, page 54.

In the Practical Guide of December 2013 the Administrative Commission has also touched upon the subject. The Guide states on page 33 (English version):

"In the situation where an EU national resides in a third country but works as a flight or cabin crew member from a home base in a Member State, that Member State shall be competent for his/her overall activities within the EU."

Furthermore, the practical guide (December 2013, English version) states on page 43:

"This place of residence does not necessarily have to be within the territorial scope of application of the Regulations, i.e. it may also be in a third country (e.g. in the case of a business representative or another itinerant worker with a permanent address in a third country, who travels for business purposes in different Member States, but returns in the intervals between his or her tours to his or her home country)"

The quotes indicate that the condition of residence within the EU/EEA cannot be sustained.

2.2 To which geographical area does Regulation 883/2004 apply?

The below text describes which geographical area the Regulation applies to. Basically, the Regulation should be understood as a coordination instrument between EU countries. It follows that the Regulation is only relevant if two or more EU countries govern the situation. If two or more EU countries cannot govern the situation – because two or more countries do not have jurisdiction according to international public law – the Regulation is not applicable. No short answer can be given as to which situations are comprised by the Regulation, yet basically it concerns situations that take place within the EU or which have a sufficient connection to the EU.

The rules of the Regulation bind the EU countries to each other and they do not bind third countries (i.e. non-EU/EEA countries). E.g. a Danish university employee, who is resident in Sweden while working in various EU countries, is covered by the Regulation.

Furthermore, by virtue of settled case-law of the CJEU, the mere fact that an employee's activities are performed outside the territory of the EU is not sufficient to exclude the application of the EU rules on coordination of social security, as long as the employment relationship retains a sufficiently close link to the territory of the EU, cf. CJEU C-60/93 (EU:C:1994:271), *Aldewereld*. The Court has thus broadened the geographical scope of the Regulation so that it also applies extraterritorially. This means that the Regulation – under certain conditions – will apply to a person living in the Netherlands who has been employed by a German employer to perform work outside the EU/EEA.

The Aldewereld ruling regards a Dutch citizen, who lived in the Netherlands when he was recruited by a German employer to perform work in Thailand in 1986. Disputes arose between Germany and the Netherlands as to which country could collect social security contributions based of the salary earned in Thailand. If the Regulation applied, a double contribution could not be levied. The CJEU found:

It follows from the case-law of the Court (see to that effect, in particular, the judgment in Case 237/83 Prodest v Caisse Primaire d' Assurance Maladie de Paris [1984] ECR 3153, paragraph 6) that the mere fact that the activities are carried out outside the Community is not sufficient to exclude the application of the Community rules on the free movement of workers, as long as the employment relationship retains a sufficiently close link with the Community. In a case such as this, a link of that kind can be found in the fact that the Community worker was employed by an undertaking from another Member State and, for that reason, was insured under the social security scheme of that State.

This case-law has recently been reaffirmed by CJEU C-60/93 (EU:C:2012:328), *Bakker*, para 28.

The EU case-law on this matter may give reason to uncertainties among national authorities. A decision by the Danish Pension Agency of 10 February 2012 concerned a Norwegian citizen, who was sent to work in Thailand by his Danish employer. The decision indicates that the EU jurisprudence on extraterritoriality enjoys little recognition in Danish administrative case-law. The Danish authority found:

We have based our decision on the fact that you are going to work in Thailand, which is outside the scope of the coordination rules in EC Regulation 1408/71.

The E101DK certificate for social security within the EU/EEA area and Switzerland cannot be applied towards the Thai authorities with the purpose of certifying that your are covered by Danish social security.

Furthermore, we can add that there is no social security agreement between Denmark and Thailand.

Whether you will be comprised by Danish rules on social security must be decided on the basis of national Danish legislation and the Pension Agency does not hold competence to make such decisions.

Council Regulation (EEA) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community. The EC does not include Thailand. (The text is correctly quoted including the syntax error).

The application of the rules in EC Regulation 1408/71, Title II is limited to EU Member States and Norway, Lichtenstein, Iceland and Switzerland and does not contain special provisions on the widening of the geographical scope. (PwC Translation).

In any case, the jurisprudence of the CJEU only concerns the relationship between EU Member States and not the relationship towards third countries. It is always a precondition that all other conditions for applying the Regulation are met, including the presence of a cross-border element, cf. CJEU, C-95/99 EU:C:2001:532), *Khalil*, para 69.

A thorough presentation on the EU case-law on extraterritorial applicability of the Regulations is given by Gijsbert Vonk, *Social Security Rights of Migrants: Links between the Hemispheres* as published in Social Security and Migrant Workers – Selected Studies of Cross-Border Social Security Mechanisms, Klüwer 2014.

Given the uncertainties in Danish administrative case-law, cases concerning extraterritorially may give reason to difficulties. The EU jurisprudence expresses an authoritative interpretation, yet it cannot be guaranteed that the Danish authority will adhere to this. Furthermore, it may be uncertain how the authorities of other relevant EU/EEA countries will handle the EU case-law. An application for an A1

certificate based on the EU jurisprudence on extraterritorial effect should therefore be accompanied by a thorough presentation of the legal and factual circumstances of the case.

The question of, which conditions should be met, in order for the situation to be within the geographical scope of EU law is undergoing development, see Joanne Scott in *The New EU "Extraterritoriality"*, Common Market Law Review 51: 1343–1380, Intersentia, 2014.

2.3 When does a cross-border element exists?

The below text describes when Regulation 883/2004 can be successfully invoked due to the presence of a cross-border element. The condition of a cross-border element is a basic condition for applying EU law in general and thus it also applies to Regulation 883/2004. The basis for the condition is the fact that EU law governs situations between two or more EU countries. If two or more EU countries are not be involved, the Regulation does not apply. A guiding principle for determining whether two or more EU countries are involved is whether or not two or more EU countries could have had jurisdiction, i.e. competence to govern the situation.

The requirements for accepting an adequate cross-border element are probably minimal, as long as just one of the elements that are relevant for determining the applicable legislation is linked to another EU country.

Among the elements that are always relevant for establishing a cross-border situation are:

- Citizenship
- Residency
- Registered office or place of business of the employer
- The place of work

If one or more of the above elements can be linked to different EU countries, a cross-border element exists.

In CJEU C-212/06 (EU:C:2008:178) *Gouvernement de la Communauté française og Gouvernement wallon mod Gouvernement Flamand* the Court found that the fact that a person had not physically moved, yet held a citizenship of another EU country in itself established a cross-border element.

A cross-border element is not established if the facts of the case concern a single EU country and a non-EU country, cf. CJEU C-95/99 EU:C:2001:532), *Khalil*, para 69.

CJEU has in recent case-law found that EU law should be applied under certain conditions despite the fact that a cross-border element was not established. This case law is controversial and will presumably not – or at least very reluctantly - be adopted by national authorities, see Alina Tryfonidou, *Redefining the Outer Boundaries of EU Law: The Zambrano, McCarthy and Dereci trilogy*. European Public Law 18, no. 3 (2012): 493–526. Kluwer Law International BV, 2012.

3 Basic distinctions and terms – Applying the EU-rules to university employees

The below text describes numerous common distinctions that are relevant for applying the EU coordination rules on social security. The distinctions constitute the general framework for coordinating social security. The distinctions are especially relevant for the application of the rules on coordination of social security for international university employees.

3.1 What is a posted university employee?

In Article 12(1), EC Regulation 883/2004 on coordination of social security contains a special rule on posting of employees and in Article 12(2) has a special rule on posting of self-employed persons. Persons comprised by these rules are said to be posted.

It is important to note that the rules do not distinguish between inbound or outbound postings, as this distinction is not relevant to the applicability of the rules. An outbound person is therefore also an inbound person in the sense that and inbound posting is an outbound posting from the perspective of the receiving unit.

The universities typically use the term inbound posting, when a foreigner is hired to the Danish university. The hiring by the Danish university may be the university employee's only employment or main employment. The university employee may also be employed by a foreign university and obtains a sabbatical from this position maintaining full or partial salary during the sabbatical, and during this sabbatical is employed or guesting the Danish university for a limited period of time.

It is therefore important to note that the inbound posting in the sense used by Danish universities is not the same posting term, which is used for the purpose of coordinating social security.

In the following text the coordination rules on social security are described and the terms used are those, which are introduced by the international rules. This means that there may be situations where the facts may imply a posting in the sense used by the universities, yet this is not a posting situation in terms of applying the Regulation.

3.2 Which issues require special attention when a university employee is posted?

University employees (and researchers in particular) give rise to special legal issues concerning coordination of social security. These issues occur because the social security coordination rules are not designed to govern hypermobile employees, i.e. employees that frequently change their work country.

On an EU level, the free movement of researchers have in particular given cause to special considerations. The right to free movement of researchers has been subject to special analysis among authorities as well as legal scientists.

Numerous special issues regarding researchers have been highlighted by Paul Schoukens in *Explicit Competence to Coordinate Social Security of Highly Mobile Workers – The Case of the Moving Reseachers in the EU*, as published in Pravnik, nr. 5-6, 2012. The author highlights the following:

The coordination regulations still reflect the one-time migration

- *The EU coordination regulations were developed mainly considering the social reality of the (long-term) migration of blue collar workers (from poorer regions of the EU to the more industrialised). Yet the reality of the mobile researcher is more complex: there are of course researchers who make a final decision to continue their career in another EU country. Most researchers, however, will go for a limited number of months or years to another country, followed by a period back home or by moving to yet another country.*

  [...]

  If the basic rule does not seem fit to deal with this situation, which exception should we then apply? The rule on posting, meaning that the researcher is to be sent out by an employer to work temporarily in another state (article [12] Regulation 883/2004). But whom do we

consider as employer in a situation of transmigration? Another exception is the rule applicable in the situation where a person works simultaneously in different countries (article 13 Regulation 883/2004). But to apply this rule one has to specify as well whether the person works for one or more employers, and furthermore to what extent the person is performing a substantial amount of work in his country of residence. Elements such as the employer of the researchers, research work and country of residence are not always easily to define in the case of highly mobile researchers (see also below). How to delineate exactly e.g. the research activities that have to indicate whether a sufficient amount of them is performed in the country of residence? Apart from these application problems it is not always evident to differentiate between these two designation rules: when should one apply posting, and when the rule on performance of simultaneous activities? In situations of transmigration as described above it becomes quite difficult to strike the difference.

Place of (research) work (principle of lex loci laboris)

- *Research itself is an activity which may be linked to a specific place (lab, site, etc.), but which is more and more done in multinational teams that carry out their research in multiple countries. Networks of researchers operating in various parts of Europe, or even globally, have an active interchange of ideas and indeed work together although they may never meet in person. Moreover, some research may be linked to a certain place, but specifically not within the country of the employer. An archaeologist, for instance, may do excavations in Greece, while being employed by a Swedish research institute and the project being financed by an international research institute having its European offices in France. Again, the current coordination regulations do provide solutions for such situations, but these are often very complex as concrete realities were not fully considered at the time they were developed. The designation rules start from the logic that the place where a person (physically) works is indicating the competent state (principle of lex loci laboris as enshrined in article 11 Regulation 883/2004). This somewhat archaic approach of physical labour conflicts with the realities of today where quite some researchers work from places, that are remote from the employer, the commissioner of the research and sometimes even from the research team.*

Who is the (research) employer?

- *The traditional assumption that a tenured professor will continue to work in the same tenured post for the rest of his career creates particular problems. For example, transitions to other universities, research institutions or private employers do often conflict with the assumption applied by the national legislator that the researcher is nominated in one public research institution (the professor nominated in the university). Problems may also emerge when the source of the research funding changes, as a result of which it may be rather difficult for the researcher to identify who is to be considered as his employer (for social law). The latter though is important if a posting construction is set-up: during the posting the researcher should keep a bond with his employer (article [12] Regulation 883/2004). When performing simultaneous activities it is similarly important to know whether one works for one or more employers (article 13 Regulation 883/2004).*

[…]

Third-country researchers

- *[…]*
  The EU coordination mechanisms only deal with intra-European mobility; the social security status of someone coming to the European Research Area from outside Europe will be defined by the bilateral arrangements, if they exist, between the country of origin and the EU country s/he is moving to. If, however, such researchers, once in Europe, want to go and work elsewhere

in what is presented to them as the European Research Area, they are faced with major complications. Their situation will then be governed in the best case by two bilateral treaties (country of origin and EU states involved) and the EU regulations. It goes without saying that this will complicate things; moreover the application of a multitude of coordination instruments may even endanger the eventual entitlement to the social security benefits that the researcher built up during his career.

Furthermore, J. Berghman and D. Pieters mentions the following basic challenges for mobile researchers in *Social Security, Supplementary Pensions and New Patterns of Work and Mobility: Researchers' profiles*, published on behalf of the European Commission, 2010:

Basic Problems

We have identified three basic problems which hamper the mobility of researchers: the variety of researcher statuses held by the researchers, the problem of the "short period" and "frequent' character of the mobility and the problem of a group of researchers, often young researchers who end up without social insurance.

2.1. The variety of researchers' statuses

The social security statuses held by researchers throughout Europe are determined on the national level by the Member States and can vary from employed person, selfemployed person, civil servant to student. Questions are raised especially as to the position of the doctoral students, the young (early stage) researchers and post-doctoral researchers with fellowships or scholarships, as they sometimes even end up without social insurance because of their often specific status.

[…]

2.2. The problem of the length and frequency of the researchers' mobility

It is clear that the applicable legislation is not adapted to the "frequent" and "short term" mobility character of the researcher's career path.

Insured researchers moving from one country to another do this frequently for shorter periods of time, therefore when applying Regulation 883/04 one will have frequent changes in the applicable legislation and thus a frequently changing social security position which is also for the administration not always evident. It is often in the interest of the mobile researcher, as it is for any highly mobile person, that the applicable social security law does not change too often.
[…]
2.3. Uninsured mobile researchers

Solving the applicability issues of the EU social security coordination rules does not solve the problem of those researchers (often early stage researchers, researchers with scholarship or study grants not subject to social insurance) who have another professional employment status other than that of employee, self-employed person or civil servant and who are uninsured when taking on a research job in another country. They are not covered by Regulation 883/04 and thus no solutions will be found here.

The above-mentioned topics are further emphasized by the fact that the rules are interpreted differently in various EU countries. It is therefore not certain that the solutions found by way of interpretation of the rules by the Danish authorities are accepted by e.g. the British or the Swedish authorities.

The above issues emphasize numerous challenges, which a Danish university must manage when employing an international researcher. It is, however, also mentionable that the coordination rules provide for some solutions. Such solutions are, however, not always uncomplicated.

The below text describes some of the difficulties mentioned above. In general, it concerns:

- The distinction between the EU rules and the rules applicable outside the EU
- The rules regarding university employees from non-EU countries
- The distinction between civil servant, private employee, self-employed and students
- The distinction between the posting rules and multi-state work
- The rules determining the place of work
- The definition of the employer

3.3 What are the overall possibilities for a university employee to remain covered by Danish social security?

The possibility for remaining covered by Danish social security depends on whether or not there are international rules, which may govern the university employee's situation.

If such international rules exist, it is common that the rules have special provisions on civil servants and posted employees. There may also be special provisions for persons working in several countries.

In the case of Denmark, such rules are especially known within the EU/EEA. It is therefore reasonable to introduce the basic distinction between postings taking place inside the EU/EEA and postings taking place outside the EU/EEA.

Often, international rules set forth a condition on Danish or EU/EEA citizenship. If the university employee does not hold the required citizenship, this may limit the applicability of the rules substantially, and the university employee's situation should be subject to special scrutiny. In this regard, please see the section on posting of university employees, who are not EU/EEA citizens.

3.4 The distinction between posting and multi-state work

The following text describes the rules on how to distinguish the posting provision from the rules on multi-state workers. The issue will often arise in a situation where the university employee is working in several countries for several public employers for a limited/fixed period of time.

When the university employee is posted temporarily, it should – as always – be examined, whether or not the university employee is also performing other business activities, i.e. if the person holds other positions.

The rules are unclear as to exactly when a working pattern should be governed by the posting provision or the rules on multi-state work. If the posting provision applies, the university employee will be covered by the home country's social security schemes (i.e. the country from which the university employee is posted). It is not possible to give a single answer as to which country's social security schemes apply by virtue of the multi-state rules, yet in some cases, the university employee may remain covered by Danish social security due to the fact the university employee is a civil servant in Denmark.

The distinction between the posting provision and the multi-state rules is governed by Regulation 987/2009, Article 14(7). The rule stipulates that if the situation is permanent, it is governed by the multi-state rules. If the work performed abroad is temporary or ad hoc, the posting provision in Article 12

applies. The rule is not very clear and must interpreted considering the fact that that it only applies if the distinction is relevant, i.e. all posting conditions are met as well as the conditions for applying the multi-state rules.

The CJEU has in a number of cases indirectly touched upon the subject. The case law seems to indicate that the posting provision is evaluated first. Only if the posting conditions are not met, the multi-state rules are considered. Hence, once it has been determined that the posting provision is not applicable, the Court will turn to the multi-state rules, cf. CJEU C-178/97 (EU:C:2000:169), *Banks*, 8/75 (EU:C:1975:87), *Foot-Ball Club d'Andlau*, 13/73 (EU:C:1973:92), *Hakenberg*, C-425/93 (EU:C:1995:37), *Calle Grenzshop* and C-115/11 (EU:C:2012:606), *Format*.

Also see F. Pennings, *Social Security Law*, Intersentia, 2010, page 109:

The Regulation does not clearly define when a situation of posting becomes a situation where a person normally works in two Member States for the same employer. If the period of work in the host State is interspersed with intervals during which he or she works in the State of origin, it can, at a certain moment, be said that he or she normally works in two countries.

Also the approach of the Court in this situation is not clear yet. From the scarce case law, we could conclude that it must first be established whether in a given situation the posting criteria are satisfied. Only if these criteria are not satisfied, it has to be considered whether Article 13 (working in two countries) applies. For example, if a person starts to work in another Member State for a period longer than twenty-four months, we cannot call this 'posting', and we can go immediately to Article 13.

For more information on the distinction between posting and the multi-state rules see Oxana Golynker, *Ubiquitous Citizens of Europe: The Paradigm of Partial Migration*, Intersentia, 2006, page 161f; E. Sarai, *Arbeidsgiveravgift og grenseoverskridende arbeidsforhold*, Gyldendal, 2012, page 258ff; P. Schoukens og D. Pieters, *The Rules Within Regulation 883/2004 for Determining the Applicable Legislation*, European Journal of Social Security, Volume 11, Nr 1-2, June 2009, page 110ff.

It has been discussed if the posting provision gives the employee the choice to opt out of the provision, see Y. Jorens and J. Hajdú, *European Report 2009*, TrESS, page 14. In CJEU C-103/13, (EU:C:2014:2334) *Somova*, para. 55, the CJEU rejects the understanding that the choice-of-law rules should present an option for the university employee. If the university employee meets the objective posting conditions, the university employee is covered by the social security rules in his home country (i.e. the country from which he/she is posted).

3.4.1 Frequent short-term travels

One of the situations, which causes problems of interpretation, is frequent short-term travels made on an ongoing basis by the university employee.

By short-terms travels are meant ad hoc travels. Examples of such travels could be a trip to attend a conference or to give a presentation as a guest speaker.

In such situations, it is unclear if each short-term travel should be regarded as a posting or the total travel pattern should be regarded as a whole thus bringing the situation within the scope of the multi-state rules.

Decision A2 by the Administrative Commission, number 3. a), states that the posting to new country discontinues a posting period.

The issue is analysed with particular regard to researchers by J. Berghman and P. Schoukens in The Social Security of Moving Researchers, Acco, 2011, page 47f:

Distinguishing between posting and simultaneous activities
In the past, it was quite difficult to distinguish between posting and simultaneous activities in different countries. Now, Art. 14 (7) of the Implementation Regulation 987/09 makes things a bit clearer by mentioning criteria which can be helpful to distinguish between situations of posting and simultaneous activities: The duration of activity and its' character as permanent, as ad hoc or as temporary nature are important criteria. Another important criterium mentioned in Art. 14 (7) of the Implementation Regulation is the place of work as defined in the employment contract. An overall assessment of all the relevant facts and criteria has to be made.
Taking this into consideration, quite a few of the open questions regarding researchers performing research activities abroad can be answered. For example: In many universities many members of the university staff travel on a very frequent basis (to give talks, present papers, do consultancy or research). These activities have an "ad hoc" or "temporary" character (despite the fact that they take place quite often, they still have a temporary character!). In addition, usually the place of work as defined in the employment contract is the university/institution in the home country. Therefore, after making an overall assessment, the posting provisions (Art. 12 Regulation 883/04) (and not the provisions on the simultaneous activities) will probably be applicable in most cases. Especially in cases of researchers the posting condition "performing work on behalf of the employer" must be interpreted broadly – the nature of research work is a totally different to the one of construction workers, for instance. In case of researchers, the employer very often does not give any "work instructions" at all (on the contrary, the freedom of research plays a major role in many countries) – but the work performed can still be considered as "performed on behalf" of the employer (university, research institution, etc.). This interpretation also goes in accordance with the Decision No A2 of the Administrative Commission for the coordination of social security systems of 12 June 2009. This decision stipulates that "the work shall be regarded as being performed for the employer of the sending State if it has been established that this work is being performed for that employer and that there continues to exist a direct relationship between the worker and the employer that posted him".

If, on the other hand, in the employment contract it is explicitly mentioned that the place of work is in not in one, but in two Member States (Member State A and Member State B), this would be a strong evidence for the simultaneous pursuit of activities in two Member States and thus for the application of Art. 13 Regulation 883/04.

Danish practice includes a decision from the Danish Board of Appeals (Ankestyrelsen) of 10 June 2013 regarding a CEO of a Danish company. The CEO had frequent short-term business visits to numerous EU countries during the fixed-term period he was appointed CEO. Despite the fact that the period as such was fixed, the Danish Board of Appeals decided that the situation should be governed by the multi-state rules. The Board commented:

PwC has in the appeal referred to numerous EU-judgments and argued that the posting provision should be considered first and thereafter the rules on work in several countries.

The information provided cannot in our opinion lead to another result.

Given the decision by the Danish Board of Appeals, it is unclear, how the above mentioned quotation on researches is to be considered by Danish authorities. In general, the rules on the distinction between posting and multi-state work is undergoing development. Danish administrative case law may therefore develop further in the future.

3.4.2 *Parallel posting*

The CJEU has previously accepted that the posting provisions and the rules on multi-state work can be applied simultaneously. Hereby a "parallel" posting occurs. This will for example be the case if the university employee works permanently as a self-employed in his home country as well as in one other EU country and is covered by the home country's social security (by virtue of the multi-state rules). If the university employee is hired to fulfil a temporary task in Denmark, this could be seen as a posting situation and necessarily part of the work performed in various countries. This interpretation was originally brought before the CJEU by the European Commission in the Attorney General opinion *C-425/93 (EU:C:1995:37), Calle Grenzshop*, para 17, which reads:

17. It is conceivable, in principle, for there to be a posting even in the case of employment in the territory of more than one Member State as provided for in Article 14(2), for example, where a person is posted to a third State which is not one of the States where the person is normally employed. In support of its argument the Commission refers to the hierarchical relationship between Article 14(2) and Article 13(2), in conjunction, in some circumstances, with Article 14(1).

The interpretation has also been dealt with by the CJEU C-178/97 (EU:C:2000:169), *Banks*, para 22, 2. sentence, which reads:

In that article, the expression 'self-employed' refers to the activity normally pursued by the person concerned in the territory of one or more Member States, and not the occasional performance of work by him outside that State or those States.

By the conclusive statement *"or those States"* the CJEU seems to have accepted the possibility of a "parallel" posting.

The distinction between the posting situation and multi-state work may give rise to uncertainties among authorities in the EU countries, and it is not certain that the national authorities will apply the described method in a specific case.

As described in section 3.3, the result of an application may depend on how and to which authority the application is filed. It is therefore recommendable that the university considers how the A1 application is managed since it may have an impact on the final result of the decision. It is therefore not always correct to file the application with Udbetaling Danmark.

See section 6.2.1 for an example on a parallel posting.

3.5 *When is it relevant to consider the posting provision instead of the rules on civil servants?*

Despite the fact that the university employee is employed by a Danish public university and as such covered by Danish social security, situations may arise, where this rule cannot be applied. Such situations may be:

1. The university employee employed by a Danish university has another employment with another public entity in another EU country and is considered a civil servant.

If the university employee holds a parallel position as a civil servant, e.g. as a university employee at a Swedish university, the multi-state rule will apply. At the same time, the Danish university will be able to post the university employee to a third EU country, e.g. Sweden.

2. The university employee is not considered an employee since the contract does not constitute an employment relationship.

This may be the case even if the contract is governed by a Danish collective agreement. In such a case, the posting provision for the self-employed may apply in order to maintain Danish social security for the individual.

3.6 How is it determined whether the university employee is a civil servant, employee, self-employed or student?

Various rules apply when you have to determine whether a person is a civil servant, employee, self-employed or student.

The countries have different approaches when it comes to hiring university employees which further complicates the matter. As for junior university employees/Ph.D students there may be a difference as to whether such university employees hold an actual university employment or are students. In the case of senior researchers there may be a difference as to whether such researchers hold an actual university employment or are considered self-employed.

The EU/EEA rules distinguish between the following four basic categories:

1. *Civil servant*. A university employee is considered a civil servant if he/she is considered as such according to the legislation in the country in which the public employer is situated.

2. *Salary earner*. A university employee is considered a salary earner if he/she is considered as such according to the legislation in the country in which the work is performed, cf. Regulation 883/2004, Article 1(a). It is therefore not the rules of the home country (i.e. the country from which the university employee has been posted), which determine the status of the university employee, but the legislation of the work country. If the university employee works in several countries, the legislation in each country should therefore be scrutinized in order to determine whether the university employee is a salary earner.

3. *Self-employed*. A university employee is considered self-employed if he/she is considered as such according to the legislation in the country in which the work is performed, cf. Regulation 883/2004, Article 1(b). The same system applies for employees. If the university employee is working in several countries, the legislation in each country should therefore be scrutinized in order to determine whether the university employee is self-employed.

4. *Students*. If the person does not receive a salary/remuneration, the person is usually not a civil servant, employee or self-employed.

The CJEU has found that when applying the rules on multi-state work in Article 13 of the Basic Regulation, the definitions in Article 1(a) and (b) are to be applied, cf. CJEU C-340/94, (EU:C:1997:43), *De Jaeck*.

3.7 When is a university employee considered a civil servant (in Denmark) – or similar?

The following text describes when a Danish university employee may be considered a civil servant in accordance with the specific international rules that may apply. The actual situation is thus an employment at a Danish university. The text may, however, in general terms also be applied to foreign employments, i.e. persons employed by foreign universities.

International legislation – i.e. regulation or agreement – governs by its own terms when a person can be considered a civil servant.

Regulation 883/2004, Article 1(d) states that a "civil servant" is a person, who is considered to be such or treated as such by the Member State to which the administration employing him/her is subject.

The Regulation leaves it to Danish legislation to define, which persons that are to be considered as civil servants for the purpose of applying the regulation. By virtue of the definition, not only civil servants in a strict sense can be comprised by the term. In addition, persons that are treated as such are comprised.

The term is further defined in the Danish guideline vejledning 9229 af den 23. maj 2013, number 7:

According to the Danish definition, a civil servant or a person treated as such is all public employees, who have a Minister, Regional Council Chairman or City Mayor as supreme superior.

Certain private employees may also be regarded as civil servant such as employees at an independent institution (selvejende institution) or other private institutions and companies, which salary costs are covered by at least 50 % public funding. This required that there is a direct relationship between the salary refund and the public entity, i.e. that the public entity covers the salary by direct funding. (PwC translation).

Employees at a Danish university are civil servants in the sense of the Regulation.

Danish administrative case law includes the decision of the Administrative Board of Appeals of 5 July 2013, which specify the term. The case concerned a posted employee, who was employed by a Danish public institution. In order to maintain Danish social security for the employee, the institution applied the rules on public employments in case of postings abroad. The Board found:

Civil servants:
We find, that you are not to be considered a civil servant in the above mentioned period, due to the fact that you in this period solely works for [the Danish employer] as a freelancer according to the collective agreement between [the Danish employer] and the Danish Union of Journalists on freelance task regarding the production of TV and Radio broadcasts etc.

We have further found it relevant that you in the above mentioned period was not covered by a collective agreement for civil servants.

We have further found it relevant that your salary from the work as a freelancer according to the facts of the presented case has not been covered by public funding.

We find on this basis that you cannot be considered a civil servant or a person treated as such.

You are therefore not covered by the main rule concerning civil servants, who are covered by the legislation in the country by which government the public employer is a part.

The case underlines the fact that the Danish Board of Appeals requires a certain material connection to the Danish employer in order to consider a person to be a civil servant. The basic rules on posting was not applicable either, as the Board of Appeals considered the employment relationship to be inadequate. The Board of Appeals therefore found that there was no employment despite the fact that the contract was governed by a collective agreement.

The Danish Social Security Authority (Udbetaling Danmark) has further clarified Danish case law regarding the Danish concept of civil servant by its decision of 10 December 2013, which reads:

Foundations do normally not hold status as a public entity in Denmark and the foundation's employees such as [...] are normally not regarded to be civil servants. In order for a foundation employee to be considered a civil servant at least 50[..] % of the salary must source from a public entity in Denmark – i.e. it must be stipulated in the contract of the individual that he/she is salaried by e. g. the Danish Ministry of Foreign Affairs. We do not regard such requirements to be met in the present case and we do therefore not regard the individual to be publicly employed in Denmark.

Udbetaling Danmark seems to have very strict requirements when it comes to considering a person employed by an independent institution a civil servant.

3.7.1 How is it determined whether the university employee is an employee or a self-employed person?

The following text describes how employees are distinguished from self-employed persons. The issue may arise in a number of situations. One of the main situations is the case in which the university employee is working in several countries for several public employers. The distinction may however also be relevant in the case of posting (of self-employed persons).

When the rules on multi-state work are applied, i.e. Article 13(1)-(3) of the Basic Regulation, it is decisive, whether the university employee is considered to be an employee or a self-employed person.

The matter is governed by Regulation 883/2004, Article 1(a) and (b).

According to the rules, "salaried activities" means activities or similar treated as salaried activities for the purpose of applying the social security legislation of the Member State in which such activities or similar are performed.

According to the rules, "self-employment" means performance of work or similar activities treated as self-employment for the purpose of applying the social security legislation of the Member State in which such self-employment or similar are performed.

It is thus the national legislation in each country in which the activities are performed that determines whether a person is regarded to be an employee/self-employed in the specific EU/EEA country.

The rules are consolidated by CJEU case law, e.g. C-340/94 (EU:C:1997:43), *de Jaeck*, para 23, which reads:

Accordingly, just as the description 'employed person' or 'self-employed person' for the purposes of Articles 1(a) and 2(1) of the regulation depends on the national social security scheme under which the person is insured, 'a person who is employed' (or 'engaged in paid employment') and 'a person who is self-employed' for the purposes of Title II of the regulation should be understood to refer to activities deemed such by the legislation applicable in the field of social security in the Member State in whose territory those activities are pursued.

In Danish case law Udbetaling Danmark has made a decision on 10 December 2013 on a Danish resident who worked as a board member in a Swedish company. The work was performed in Sweden and in Denmark. According to Swedish law work as a board member was considered activities as an employee,

while work as a board member according to Danish law was considered activities as a self-employed. Udbetaling Danmark found:

Work carried out for the board in Sweden is either to regarded as employed or self-employed activities. The circumstance that the actual work is carried out in Denmark does not mean that the status of the activity changes. We have therefore made a decision for the individual as an employee in his employment relationships with [the Swedish company].

The legal reasoning of Udbetaling Danmark must be regarded as an interpretation contrary to the wording of the Regulation and the case law of the CJEU. It is not likely that the interpretation will be confirmed by the social security authorities in other countries. Until a final clarification is provided by the Danish authorities, it is advisable that the interpretation of the CJEU is regarded to be correct, so that the legislation in each country in which work is performed determine how the activities are classified. As the application for a decision on social security is to be filed with the authorities in the university employee's country of residence, this circumstance may also contribute to remedying any uncertainties as the foreign authorities will probably not apply the Danish interpretation.

In conclusion, it is therefore probably correct to determine the status of any activities in accordance with national legislation in the country of work.

3.8 What is meant by the "location" of the work?

The following text describes how to define the location of the work. The issue is relevant to nearly all situations since it is the location, which is decisive for where the university employee is covered by social security. The rules are probably most relevant when applying the multi-state rules.

The EC Regulation contains no specific definitions for when a person can be said to perform salaried work or be self-employed in a Member State according to Regulation 883/2004, Article 11(3)(a). The CJEU has in its case law defined what is meant, when a person is covered by social security in the country in which the work is located.

In CJEU C-137/11 (EU:C:2012:593), *Partena* the Court found that the concept of the "location" must be understood in accordance with the primary meaning of the words used, as a determination of the place where the person is actually and physically performing the work activities.

In accordance with the Partena ruling, the CJEU has also found that salary earned during employment periods covered by one country's social security schemes cannot be subject to (subsequent) collection of social contributions in other EU countries. Contributions can only be collected in one country on the basis of one income, cf. CJEU ruling of 5 May 1977 in 102/76 (EU:C:1977/71), *Perenboom*, para 14.

Periods, during which the employee receives a benefit or a remuneration from the employer, should also be taken into account when determining the location of the work. The location may, however, not be in the country in which the person is present at the time.

In CJEU 19/67 (EU:C:1967/49), *Van der Vecht* the CJEU found that the time spent by the employer on transporting the employee from the employee's home in one country to the employer's location in another country, should be considered work in the country in which the employer is located even though the employee is present in another country part of the time spent on transportation.

CJEU case law on periods in which an employee receives a cash benefit as a consequence of their employment relationship, has been developing due to previous rulings by the CJEU which the EU countries did not agreed with, see CJEU C-275/96 (EU:C:1998/279), Kuusijärvi on maternity benefits.

According to present rules, a special provision in Regulation 883/2004, Article 11(2) states that persons receiving a cash benefit as a consequence of their salaried employment or self-employment, are considered to perform such activities.

The rule may give reason to issues when posted university employees, who receive a cash benefit from another EU country, may be considered to work in two or more countries, cf. the example on Article 11(2) in the Practical Guide (December 2013, English version), page 23.

Udbetaling Danmark has confirmed that according to Danish practice, the work is said to be carried out in Denmark also during periods in which a university employee receives salary without performing actual work, e.g. holidays, paid leave, redundancy periods, etc. Udbetaling Danmark has confirmed that periods, in which a salary is being paid, which was earned while the employee was covered by the social security of a member state, is to be considered work in that member state when the person is not actually performing any work in the member state in that period.

The Austrian Verwaltungsgeruichtshofs confirmed this understanding in its decision of 19 December 2007 (2007/08/0163). The case concerned holiday pay, which as earned while the employee was covered by Austrian social security. After the employee had terminated his position and commenced a position in another Member State, the employee spent his holidays and collected the Austrian holiday payment. The Austrian Supreme Administrative Court dismissed the arguments of the Austrian social security authority based on Regulation 1408/71, Article 13 (social security in the work country). Due to the holiday payment, the situation should be settled according to Regulation 1408/71, Article 14 (multi-state work).

In general, Udbetaling Danmark (the former Danish Pension Agency) has confirmed that the following periods are to be considered work in Denmark:

a) *The time of earning*, so that the payment of a remuneration is considered work in the period during which the remuneration was earned when the employee has actually performed work, and

b) *The settlement period*, so that a period, during which a remuneration is paid that has been earned while covered by the social security system of a country, is to be considered work in that country when no actual work is being performed by the employee during the settlement period.

In conclusion, the ”location” of an activity is the place where the university employee actually works, yet there are special situations in which exceptions can be made. When applying the rules it may be difficult to predict such special situations beforehand and such periods should therefore not be taken into account. If the actual work pattern of a university employee deviates substantially, the university and the university employee have an obligation to report the change to the authorities.

3.9 How is the ”work” assessed in different EU/EEA countries

According to Regulation 883/2004, Article 1(a)(b), it is up to the country in which the work is performed to determine whether the work is considered salary earner activities or activities as a self-employed according to national law. The terms are referring to national legislation and not terms defined by EU rules.

The qualification of “work” (i.e. salaried work or self-employment) is linked closely to the determination of “location of the work”. The CJEU has interpreted the relationship between these two terms in its ruling in case C-137/11 (EU:C:2012:593), Partena, paragraphs 50-54:

50 The concepts of 'employed' and 'self-employed' activity referred to in Article 13 et seq. of Regulation No 1408/71 refer to activities which are regarded as such for the purposes of the social security legislation of the Member State in whose territory those activities are pursued (see, inter alia, Case C-340/94 de Jaeck [1997] ECR I-461, paragraph 34, and Case C-221/95 Hervein and Hervillier [1997] ECR I-609, paragraph 22);

51 Therefore, those concepts, in terms of their content, fall under the legislation of the Member States in whose territory the employed or self-employed activity is pursued;

52 Accordingly, for the purposes of Article 13 et seq. of Regulation No 1408/71, the determining of the location of the person's professional activity — which, as is apparent from the 10th recital of that regulation, is the basis as a general rule for determining the legislation applicable — precedes qualifying that activity as an employed or a self-employed activity;

53 However, unlike the concepts of 'employed' and 'self-employed' activity, the concept of the 'location' of an activity must be considered to be a matter, not for the legislation of the Member States, but for EU law and, consequently, for interpretation by the Court;

54 If that concept was also a matter for the legislation of the Member States, it could be subject to contradictory definitions or interpretations by the Member States in question and could lead, for any given person, to the cumulative application of different legislation to the same activity. That overlapping could result in that person having to pay a double social insurance contribution for a single income and would thus penalise a person who had exercised his right to freedom of movement as enshrined in EU law, which would be manifestly contrary to the objectives of Regulation No 1408/71.

The distinction is particularly difficult for periods in which actual work is not performed, as the classification by the Member States of such employment periods also means that the location of the work is determined.

3.10 Who is the employer?

How to determine the employer is described in the following. The issue is linked to the actual situation where the unit (university or business) that formally and legally has employed the university employee is not the same unit (to some extent) as the one acting as the actual employer, e.g.by benefitting from the work and exercising the daily management responsibilities.

The starting point for the coordination rules is that they do not determine who the employer is, cf. CJEU ruling in case C-196/90 (EU:C:1991:381), *de Paep*, paragraph 13. See also Y. Jorens and others Think Tank Report 2008, Towards A New Framework Of Applicable Legislation, TrESS, page 10.

Formal or actual employer?
A significant issue is the determination of the university employee's employer. The question is whether the formal or the actual employer should be used. The formal employer is the entity that the university employee has entered into an employment contract with – the legal employer. The real employer is the employer who actually acts as the employer, i.e. is responsible for paying salaries, hires and dismisses the university employee and exercise management responsibilities.

The employer term may vary depending on what rules in the Regulation are applied, since the underlying considerations of the individual provisions are different. This is elaborated below.

3.10.1 The employer term in relation to the posting rules

The posting rules are based on EU rules on freedom of movement (Article 45 and 48 TEUF) and the rules on free movement of services (Article 56 TEUF).

The fact that the rules on free movement of services are considerations of the posting rules, has implied that the CJEU to a wider extent has emphasized the actual employer term to ensure that the actual service provider, i.e. business, is protected. In other words, more focus has been put on the protection of the business' rights, see CJEU ruling in case C-202/97 (EU:C:2000:75), *FTS*. See additional example of the involvement of the actual employer in case C-327/92 (EU:C:1995:144), *Rheinhold & Mahla*, paragraph 31, second sentence. For further details please see CJEU ruling C-35/70 (EU:C:1970:120), *Manpower*, paragraph 17-21:

17. In the legal framework of the present case, the undertaking which has engaged the workers remains their sole employer.

18. The maintenance of the worker's relationship with such an employer for the entire duration of the employment arises in particular from the fact that it is the employer who pays the salary and can dismiss him for any misconduct by him in the performance of his work with the hiring undertaking.

19. Further the hiring undertaking is indebted not to the worker but only to his employer.

20. In consequence it must be recognized that the worker has performed work within the meaning of the abovementioned Article 13 (1) (a) with the hiring undertaking for the undertaking which engaged him.

21. This interpretation is moreover in accordance with the abovementioned objectives.

Thus, the posting rules apply the *actual* employer term. It is recommended that the university before and during the employment sets up processes supporting the maintenance of the desired employer relationship. In addition, there may be situations, where it is relevant to reach an agreement with the university employee if certain actions may not be performed by the university employee without informing the Danish university, e.g. signing a foreign employment contract or receiving remuneration. Such issues may be included in the employment contract with the Danish university.

3.10.2 The employer term in relation to the multi-state rules

The multi-state rules are based on EU rules regarding freedom of movement (Article 45 and 48 TEUF).

The fact that the rules on freedom of movement are considerations of the posting rules, has implied that the CJEU emphasizes the formal employer.

Regulation 883/2004, Article 13(1)(b), determines that the employee is covered by social security in the country where the company or the employer are domiciled are has its place of business. Regulation 987/2009, Article 14(5)(a) determines the employer's domicile or place of business, but it does not determine the employer.

Within labour law, the CJEU has decided that choice-of-law rules that protect salary earners and apply the work country as the main criteria and the employer's place of business as the residual criteria for which country's rules to apply, should be interpreted in the light of the formal employer term, cf. CJEU ruling in case C-384/10 (EU:C:2011:842), *Voogsgeerd*, paragraph 45-52:

45 As stated by the Advocate General in points 65 to 68 of her Opinion, to interpret Article 6(2)(b) in order to determine the undertaking which engaged the employee by taking into account matters that do not relate purely to the conclusion of the contract, would be inconsistent both with the language and with the spirit and purpose of that provision.

[...]

47 Furthermore, schematic interpretation of Article 6(2)(b) requires the – subsidiary – factor laid down in that provision to be applied when it is impossible to situate the employment relationship in a Member State. Consequently, only a strict interpretation of that subsidiary factor can guarantee the complete foreseeability of the law applicable to the contract of employment.

48 Since the factor of the place of business of the undertaking which employs the worker is unrelated to the conditions under which the work is carried out, the fact of the undertaking's being established in one place or another has no bearing on the determination of that place of business.

49 It is only if matters relating to the engagement procedure support the conclusion that the undertaking which concluded the contract in actual fact acted in the name of and on behalf of another undertaking that the referring court might consider that the linking factor in Article 6(2)(b) of the Rome Convention makes a *renvoi* to the law of the country in which the latter undertaking's place of business is situated.

50 Consequently, for the purposes of that assessment, the referring court should take into consideration not those matters relating to the performance of the work but only those relating to the procedure for concluding the contract, such as the place of business which published the recruitment notice and that which carried out the recruitment interview, and it must endeavor to determine the real location of that place of business.

51 In any event, as noted by the Advocate General in point 73 of her Opinion, for the purposes of the last subparagraph of Article 6(2), the referring court can take other elements of the employment relationship into account when it appears that those concerning the two linking factors in that article relating to the place where the work is carried out and to the place of business of the undertaking which employs the worker, respectively, suggest that the contract is more closely connected to a State other than those indicated by those factors.

52 The answer to Questions 1 and 2 must therefore be that the concept of 'the place of business through which the employee was engaged', within the meaning of Article 6(2)(b) of the Rome Convention, must be understood as referring exclusively to the place of business which engaged the employee and not to that with which the employee is connected by his actual employment.

The reasoning of the case may be transferred to Regulation 883/2004 Article 13(1), given that Regulation 883/2004 has the same purpose, protection concerns and regulatory structure as Article 6 of the Rome Convention

The application of the interpretation also promotes that the choice of law within labour law is concordant with the choice of law rules on social security, which is an advantage for the employer and the university employee.

With reference to the Voogsgeerd ruling Udbetaling Danmark has in a single concrete case changed earlier practice and accepted that a Danish branch of a Swedish company constituted an employer (place of business) in Denmark.

Therefore, the *formal* employer is applied in relation to the multi-state rules. It is recommended that the employment relationship with the university employee reflects the desired employee relationship. In addition, there may be situations where it is relevant to reach an agreement with the university employee if there are actions the university employee may not perform without consent from the Danish university. In particular, entering into a formal employment relationship with another employer.

The Court has on several occasions touched upon the employer question, cf. CJEU ruling in C-35/70 (EU:C:1970:120), *Manpower*, paragraph 17-20, CJEU ruling in C-196/90 (EU:C:1991:381), *de Paep*, paragraph 12-13 and CJEU ruling in C-327/92 (EU:C:1995:144), *Rheinhold & Mahla*, paragraph 29-31.

From Danish practice a decision of 8 November 2012 should be mentioned. Udbetaling Danmark changed its practice and considered a Danish branch the independent Danish employer (place of business). See also the above section. In this case, reference was made to CJEU ruling in case C-384/10 (EU:C:2011:842), *Voogsgeerd* on the choice of law rules within labour law, similar to the coordination rules on social security in subject matter and structure. In the Voogsgeerd case, the CJEU stated that any permanent establishment may constitute a place of business, regardless of the legal capacity. The Danish change of practice has been confirmed in recent decisions.

The question of establishing the employer entity has been further discussed by Jorens in Towards new rules for the determination of the applicable legislation in 50 years of Social Security Coordination. Past – Present – Future, European Commission, 2009, of which it appears:

Of course, it cannot be ignored that, at least with respect to the growing flexible labour market, an increasing number of specific forms of mobility related to new forms of labour contracts are appearing: people working with fixed-term contracts; people working temporarily for employers via interim agencies; people, for a short time, at the disposal of heavily integrated companies; people working at home teleworking); people moving constantly within a multinational group or simultaneously working at different plants in different Member States, sometimes with contracts concluded with several branches, etc. But is it always a problem of adopting new rules? Are the problems not also related to the difficult ways of understanding and implementing the basic concepts of the actual conflict rules? Working in an international, intra-organisational network of enterprises is a typical example of that. The related problem is that the ownership of equipment and employment of personnel increasingly rests with different undertakings, employee being typically employed by 'global' employment companies. How do we define the employer? Does it make sense to look at this network of companies as a group of separate enterprises, each with their judicial personality, or should we look at it as one big entity, where the 'mother' company is the leading employer? What is the impact if a contract is concluded with a 'daughter' company? Is the employer the one with whom a labour contract is concluded, or is it rather the mother company who holds authority over the different branches or daughter companies? Let us refer to a recent case before the French Court de Cassation . An employee working for the mother company Oréal ended her contract when she was mutated to the daughter company in China. She concluded a labour contract with this daughter company but was fired when she became pregnant. According to the Court de Cassation, there was an unjustified dismissal as no reclassification took place. Notwithstanding the fact that a contractual relation no longer existed between the mother company and the employee, the court considered that the mother company was still responsible as it took the initiative to put the employee at the disposal of the daughter company. Is the main company therefore the real employer? Would it not be possible in such cases for the employee, during the whole period of employment, to be subject to the place where the main employer is situated? But imagine also the case of an employee transferred to another daughter company with whom he concludes a labour contract while the initial contract with the mother company is frozen and lies dormant. It is foreseen that the person concerned will eventually be reintegrated into the mother company or will obtain a guarantee that, at the end of the period of employment at the daughter company, he will get a new job at the mother company or a similar function somewhere within the group. Can the idea of reintegration be seen as an element for determining the place with the closest connection and as such for determining the most appropriate conflict rule? Would it not be better to look at such a situation from a more life-oriented global approach?

Cour de Cassations decision of November 13 2008 (07-41700) is the French decision quoted above.

3.11 Where is the private employer's "domicile" or "place of business"?

The following describes how it is determined where an employer its domicile or place of business. The issue is particularly relevant to the practical situation where the employer has establishments/permanent establishments abroad.

When the university employee is working in several countries for several public employers, without performing a significant part of the work in the country of residence, it becomes crucial to the choice of law where the employers are domiciled or have their place of business. Even if the employer is a public institution and the employment is a public employment as a civil servant, it is not certain that the employer's domicile or place of business is located in the country in whose administration the university employee is employed.

It follows from Article 14(5) in the implementation Regulation that by the application of section II in the basic Regulation, domicile or place of business is to be interpreted as the place in which the company's significant decision are made and where the administrative functions are carried out.

The provision is a consolidation of CJEU ruling in case C-73/06 (EU:C:2007/397), *Planzer*, which concerns VAT rules. It has been discussed whether the VAT rules constitute a natural starting point for the interpretation of the coordination regulations.

3.12 Is it possible to still apply previous rules on coordination of social security?

The transitional rules in Regulation 883/2004 and the subsequent rule changes are described in the following. The factual situation that relates to the issue will typically be that a university employee has held a position before the rule changes came into force and subsequently may either be covered by the old rules or transferred to the new rules.

On 1 May 2010, the EU countries went from applying Regulation 1408/71 to Regulation 883/2004. The new Regulation involved a modernization of the rules of the previous Regulation. However, the new Regulation continues the way in which the EU legislates on social security in general.

The purpose of the Regulation is to coordinate and some of the most significant provisions decide where the university employee is covered by social security, and which country's social security system the Danish university have to contribute to.

Although new rules have been introduced, the new rules contain transitional provisions, which means that the previous rules in some circumstances still apply. Therefore, it is important to examine which set of rules that apply to each individual situation.

3.12.1 Specific information on the new and previous rules for civil servants

The previous Regulation contained a special provision for persons having more than one employment as a civil servant, cf. Regulation 1408/71, Article 14f. The provision meant that such a person could be covered by the social security system of more than one country simultaneously. The provision has not been transferred to Regulation 883/2004 and in the new Regulation it is unclear what to apply. An authoritative clarification can only be established with a new rule or with a CJEU ruling.

3.12.2 Transitional provisions

Regulation 883/2004 Article 87(8) determines that a person, who was already covered by the choice of law rules in the previous Regulation 1408/71, can remain covered by that Regulation. An almost equivalent provision exists on Regulation 465/2012 in Regulation 883/2004, Article 87(a).

The provision is technically very difficult. The structure and approach to be used to handle the rule systematically correct is described below.

The rule is further commented in the practical guide December 2013, section IV. The description is detailed. Therefore, the comments below will mainly address the issues that have arrived after the practical guide has been published. The issues have been discussed with the European Commission.

Main rule/ Exception	Description of the rule	Comment
Main rule	The person is automatically transferred to the new Regulation from the effective date.	If the university employee has been covered by Danish social security, because the person has been a civil servant in Denmark, the person will automatically be covered by the new Regulation, which contains an equivalent rule.
Exception	If the application of the Regulation will lead the university employee to be covered by the rules of a different country than previously, the person remains covered by social security in the former country.	If the university employee has been covered by the rules in several countries with regard to Regulation 1408/71, Article 14f, the university employee remains covered by this scheme.
Exception 1 to the exception	If the person's previous situation changes (i.e. the factual circumstances change), the university employee will be transferred to the new Regulation automatically.	It is unclear what the term "unchanged situation" covers. The Commission introduces a number of circumstances considered to constitute a change of the situation in the practical guide, including the circumstances that a person changes residence or change employer. However, in case C-443/11 (EU:C:2013:224), *Jeltes*, paragraph 59 the CJEU states: In that regard, it should be noted that the concept of "unchanged situation" is not defined by Regulation No 883/2004. However, as the regulation is not a measure harmonising national social security systems but an enactment intended to coordinate those systems, each Member State retains the power to determine in its legislation, in compliance with European Union law, the conditions pursuant to which benefits may be granted under a social security scheme (see, to that effect, Joined Cases C-611/10 and C-612/10 *Hudzinski and*

		Wawrrzyniak [2012] ECR, paragraph 42). The concept of "unchanged situation" within the meaning of Article 87(8) of that regulation must, consequently, be interpreted by reference to the definition given by national social security legislation (see, by analogy, with regard to the term "employment" within the meaning of Article 71(1) of Regulation No 1408/71, Case C-372/02 *Adanez-Vega* [2004] ECR I-10761, paragraph 33). It would appear problematic for civil servants to consider the situation as changed, if the changed circumstance does not have an impact on the choice of law. Therefore, it is not given that the change of residence or private employer will imply that the university employee is no longer is covered by Regulation 1408/71, Article 14(f). In each case, the national authority should describe when the situation is considered to be changed according to national legislation.
Exception 2 to the exception	The university employee can be comprised by the former Regulation for a maximum period of 10 years from the effective date.	The university employee cannot remain covered by Regulation 1408/71, Article 14(f) after 1 May 2020.
Exception 3 to the exception	The university employee may request that he/she is covered by the new rules.	The university employee may request a change to the authorities in the country whose rules have been applied most recently. The change will become effective as of the following month, when the authorities have received the request. The transitional provision in Regulation 465/2012 stipulates that the request has to be filed with the authorities in the country of residence, see below.

3.13 Change of rules and separate accessions

Regulation 465/2012 has subsequently amended Regulation 883/2004 of 1 May 2010. Regulation 465/2012 introduces significant changes for multi-state workers. Further, the regulation introduces a change in the rules of procedure for civil servants in Regulation 987/2009, Article 15. There is consensus that Regulation 465/2012 became effective as from 28 June 2012 (although the wording of the regulation

implies that it became effective as from 29 June 2012). The specified effective dates apply only to EU countries. The dates do not apply to EEA countries and Switzerland, which have agreed to the rules by the accession agreements, which have their own transitional provisions. If a situation contains an element, which concerns an EEA country or Switzerland, the effective dates in these countries should be used so that all of the countries involved in the situation have agreed to the rules. In this regard, the principle of "lowest common denominator" apply.

Effective date	**New rules**	**Affected country(ies)**
1 May 2010	Regulation 883/2004	EU countries
1 April 2012	Regulation 883/2004	Switzerland
1 June 2012	Regulation 883/2004	EEA
28 June 2012	Regulation 465/2012	EU
2 February 2013	Regulation 465/2012	EEA
1 July 2013	Regulation 883/2004 + Regulation 465/2012	Croatia (new member of the EU)
1 January 2015	Regulation 465/2012	Switzerland
1 January 2016	Regulation 465/2012 extended scope	Switzerland/EFTA Member States
1 January 2017	Regulation 465/2012 extended scope	Switzerland/Croatia

GENERAL INFORMATION ON COORDINATION OUTSDE THE EU/EEA

4 Social security agreement or not

4.1 Does common coordination rules outside the EU/EEA apply?

There are no common coordination rules outside the EU/EEA. There are a number of general agreements on social security, however none of these agreements contain coordination rules.

Denmark has entered bilateral agreements with a number of individual countries, which coordinates choice of law and obligations between Denmark and the individual country.

4.2 How is social security coordinated in case of an agreement on social security?

The factual situation that this issue concerns will typically involve posting from Denmark to another contracting party or posting from abroad to Denmark.

The social security agreements, which Denmark has entered, are all different. The agreements do, however, contain a mutual basic structure.

Usually, the agreements contain provisions on which country's social security rules to apply (choice of law) and which rights and obligations are covered. The main rule is that the work country's rules on social security apply.

Typically, there are rules on civil servants and posted workers.

A description of various tendencies regarding the coordination of social security in bilateral agreements is provided by B. Spiegel in *Bilateral Analysis of Member States' Bilateral Agreements on Social Security with Third Countries*, for the European Commission, 2010.

See also COM(2012) 153 final, *The External Dimension of EU Social Security Coordination*.

See also D. Pieters og P. Schoukens, *The Social Security Co-Ordination Between the EU and Non-EU Countries*, Intersentia, 2009.

4.3 How is social security coordinated in case of no agreement on social security?

If there is no agreement on social security between Denmark and the relevant country, national legislation in Denmark and the other country will determine whether the university employee is covered by the rules on social security.

As there are no coordination rules, the countries are not obligated to take the other country's rules into account. The consequence may be that double coverage occurs. It may also result in no rules being applied.

UNIVERSITY EMPLOYEES POSTED TO DENMARK

University employees posted to Denmark are treated differently depending on whether they are comprised by the EU/EEA rules for coordination of social security.

It is important to note that the rules do not distinguish between being posted to Denmark or being posted from Denmark, as this distinction is of no relevance. Thus, a person posted to Denmark is treated the same way as a person posted from Denmark for the purposes of the Regulation.

The universities often apply the term posted to Denmark in cases where a foreign/external employee is employed by the Danish university. The employment at the university may be the university employee's only employment or main employment. It may also be the case that the university employee is employed with a foreign university and enjoys sabbatical with complete/partial salary, and during this sabbatical is employed at a Danish university/or visits the university (without employment) for a period.

Therefore, it is important to note that the term used with regard to postings to Denmark in the academic world, does not coincide with the posting term used when it comes to coordination of social security, since a posting to Denmark (inbound) would be a posting from another country (outbound) seen from the recipient's view.

In the following the rules for coordination of social security is described and the terms related to the Regulation is used. This means that there may be cases in which a posting to Denmark (inbound) in the view of the academic world occurs, without this being a posting in the sense of the Regulation.

5 Posting to Denmark within the Regulation

The coordination of social security is described below, under the assumption that the university employee in question meets the conditions for being covered by Regulation 883/2004, including being an EU citizen.

5.1 When is the university employee covered by Danish social security – because the university employee is a civil servant employed in Denmark?

The issue concerns the situation, where the university employs a foreigner/external employee. The university employee does not have any other employments.

The university employee, employed by a Danish university, is a civil servant in Denmark, cf. Article 1(d) of Regulation 883/2004. A civil servant (i.e. civil servant or similar) is generally covered by social security in the country by whose administration he/she is employed, cf. Article 11(3)(b) of Regulation 883/2004. Thus, it is of no significance in which EU/EEA country(ies) the university employee is working or the extent of the work.

The potential working period outside Denmark and residence is of no significance. The university employee can work in other EU/EEA countries (and other countries that Denmark has entered a social security agreement with) for a temporary period or an indefinite period and be covered by Danish social security.

5.1.1 The posting rule in the Regulation

The issue concerns the situation, where the university employee is employed at a foreign university and in addition is also a civil servant in another EU/EAA country or Switzerland and obtains sabbatical with complete/partial salary and is posted from the foreign university to perform temporary work in Denmark (posting to the Danish university).

Example

Ezio Fabbrini is an Italian citizen. He has his main employment (90%) at a Swedish university (civil servant) and performs the work in Sweden. Simultaneously he has a secondary job (10%) at the University of Copenhagen (civil servant) and performs that work in Germany.

Ezio Fabbrini's situation is governed by the choice of law rules in Regulation 883/2004, Article 13(a)(b)(iii). Ezio Fabbrini is covered by Swedish social security, since he is working in two countries for to public employers, one of which is in the country of residence. The work in Denmark is not substantial (25% or more), thus Ezio Fabbrini is covered by social security in the country where the other employer is situated.

Ezio Fabbrini is posted by the Swedish university to perform half of the work regarding the Swedish position at Roskilde University as a guest for the coming 18 months.

Since the posting to Roskilde University is temporary, Ezio Fabbrini will be covered by Swedish social security if the remaining conditions for the posting rule are met. Regulation 883/2004 Article 12(1) governs the work performed in Denmark, while Regulation 883/2004 Article 13(1) governs the parallel work in Sweden and Germany.

Roskilde University will not act as employer and will probably not be obligated to meet the employer obligations in Sweden.

If a university employee is posted from a foreign university where the university employees are salary earners (i.e. not civil servants), and the university employee act as a guest at the Danish university (i.e. not employed by the Danish university), the university employee will under these circumstances be posted from the home country and will be covered by the home country's social security according to the posting rules. It should be examined whether the posted university employee has an A1 certificate as documentation that he/she is covered by Danish social security. The Danish university is not acting as an employer and shall not pay any foreign social contributions.

5.1.2 When is the university employee covered by social security in Denmark – because the work is performed in Denmark?

The issue concerns the situation, where the university employee only works in Denmark. The university employee does not perform work in any other countries.

If the university employee is not covered by Danish social security by virtue of his employment as a civil servant, the university employee will generally be covered social security in the EU/EEA country in which the work is performed, cf. Regulation 883/2004 Article 11(3)(a).

It is a precondition for the use of the work country's rules that the work is only performed in a single member state. If that is not the case, certain exemption rules should be considered, see section 3.5 in particular.

The rule that university employees are covered by social security in the country where he/she performs salaried work or self-employment is the main theoretical rule of the Regulation. The practical rule for university employees, however, is that the rule on civil servants apply. However, this rule presupposes that the university is considered the only public employer, for more details see section 3.10.

5.1.3 *When is the university employee covered by social security abroad – because the university employee is posted as a self-employed?*

The issue concerns the situation, where the university employee only works in Denmark and the work in Denmark is performed temporarily. The university employee comes from an EU country (alternatively an agreement country), where the university employee usually performs his university work as a self-employed.

Although the university employee is employed at a Danish university on terms that means that the university employee is a civil servant in Denmark, the university employee will still be covered by the home country's social security (which is typically the country of residence), if the university employee is considered posted as a self-employed. The rules on posting of a self-employed "overrules" the rules on public employment (civil servant).

Attention should be paid to the fact that although the university employee from a Danish perspective is posted to Denmark, from the home country's perspective (i.e. the country which the university employee is posted from) the university employee can be posted and the posting rules can be applied. When it comes to the coordination rules, the university employee is subject to the posting rules and therefore – at least in relation to the choice of law rules – posted.

The university employee may contact the authorities in the home country to clarify whether the home country is considering the university employee as posted as a self-employed in the meaning of the implementation Regulation Article 12(2), cf. Regulation 987/2009 Article 15.

If the university employee is posted to the Danish university as a self-employed, the Danish university is subject to any rules abroad. However, it is common that there are no obligations for the Danish university abroad if the university employee is self-employed abroad. Such rules typically mean that a Danish employer (service recipient) should not pay social contributions in the competent country or in other EU countries. This means that no social security contributions must be paid by the Danish university. The university employee will as a self-employed generally have an obligation to pay contributions in the home country under national legislation. How the contributions are paid and the Danish university's obligations in that respect, should be investigated individually in each case.

From CJEU practice the ruling in case C-178/97 (EU:C:2000:269), *Banks* should be mentioned. The ruling concerns a number of English musicians who were to perform approximately 3 months in Belgium. The musicians were considered salary earners under Belgian law and self-employed under English law. Therefore, the Belgian authority levied Belgian social security contributions. The CJEU stated that since the work in Belgium was limited beforehand, the musicians should be considered posted from the UK, and thus covered by British social security.

5.1.3.1 What are the conditions for posting of self-employed persons to Denmark?

A university employee posted to Denmark will be covered by the home country's social security according to Article 12(2) of Regulation 884/2004, when the following conditions are met:

a) The posting to Denmark does not exceed 24 months. This means that there has to be a time frame for the posting to Denmark, thus making it is possible to predict beforehand whether the condition is met.

b) The person must normally maintain a professional activity in the home country. The person must also have been employed in the home country as a self-employed researcher for an appropriate period prior to the posting. Two months will usually be sufficient.

c) The activity performed in Denmark must be similar to the activity performed in the home country. It will be sufficient that the person does research or similar academic work.

If the person has activities in several EU countries, the authorities in the home country of the university employee might reach the conclusion that the posting rule in Regulation 883/2004, Article 12(2), cannot be applied in relation to the posting to Denmark and the university employee should be treated according to the multi-state rules. Should the authorities reach the conclusion that the multi-state rules apply, the authorities of its own motion ought to make sure that a decision in this effect is reached. If it does not, the university should handle further action under the multi-state rules.

Further, it is important to note that the application for a certification of the applicable law (A1 certificate) must be filed with the authorities in different countries, depending on whether it is a case of posting or from the home country or multi-state work. An application for a decision under the posting rule must be filed in the country where the national rules will apply according to the posting rule. An application for a decision under the multi-state rules should always be filed with the authorities of the university employee's country of residence. Based on experience it is not certain that the authorities of the country of residence is considering whether the situation should instead be handled according to the posting rule and therefore forward the application. It may be crucial on what grounds the application is filed and to which authority the application is filed. The university cannot as such be responsible for ensuring that the application is sent to the authorities in the correct country. The applicant (employer or university employee) is only responsible for the accuracy of the actual information in the application.

5.1.4 What to pay particular attention to when the university employee is posted temporarily or ad hoc (the relationship between posting and multi-state work)?

When the university employee is posted temporarily, it should - as always - be examined whether the university employee also performs other work, i.e. if he/she has other employments.

The rules are unclear in relation to when exactly a work pattern is to be handled according to the posting rule or multi-state rules, in this context see the procedure rule in Regulation 987/2009, Article 16(1).

5.1.5 Multi-state work – several employers

If the university employee's employment at the Danish university only constitute part of the university employee's employment, it is important to consider whether the university employee is covered by the special rules for multi-state workers within the EU/EEA instead of the posting rule. The issue is relevant when the university employee is working in several countries in the EU/EEA and the rest of the world, including Denmark.

Read more on these rules in the section on Multi-state work.

5.2 Posting to countries not governed by the EU/EEA coordination rules

The issue concerns the situation, where the university employee is either posted from a country outside EU/EEA/Switzerland or for some other reason is not covered by the Regulation. It may be the case in particular when the university employee is a non-EU citizen.

If the posted university employee does not meet the conditions for being covered by the EU rules on coordination of social security, it has to be assessed whether a social security agreement covers the university employee's social security.

If a social security agreement does not cover the university employee's situation, the university employee's social security is not coordinated internationally. When the university employee is posted to Denmark from a non-EU/EEA country with which Denmark has not entered a social security agreement, there are no international rules that determine where the university employee is covered by social security.

It will depend on the rules in Denmark and the university employee's home country, respectively, to decide whether the university employee is covered by different social security schemes.

This means
:

a. The university employee may be covered by schemes in both countries simultaneously.
b. The university employee may be covered by no schemes.
c. The university employee may be covered by Danish schemes only.
d. The university employee may be covered by schemes in the home country only.

The question must be resolved in relation to each social security scheme. Thus, the Danish university may have both Danish and foreign obligations according to national legislation.

UNIVERSITY EMPLOYEES POSTED ABROAD

6 What is a posting abroad?

Posting in its traditional meaning is that the university employee is sent by the employer for a limited period of time to perform work somewhere else than the place where the work is usually performed.

The traditional posting typically involves the university employee moving his entire employment to a new place of work for a limited period of time.

However, the development means that international employees - including, in particular, university employees - to a greater extent has a global labour market and increasingly work cross-border in a dynamic and not always pre-defined fixed work pattern.

These facts require that the situation of a posted university employee is understood within the traditional posting rules, but also, if necessary, is seen in the light of other rules, including rules for multi-state workers.

Posted university employees are handled differently depending on whether the posted university employee is covered by EU rules on coordination of social security.

6.1 Posting within the EU coordination rules

Below is a description of the rules on coordination of social security, when the posted university employee meets the conditions for being covered by Regulation 883/2004.

6.2 When can a posted university employee remain covered by Danish social security, when the university employee is a civil servant in Denmark?

The issue concerns the situation, where the university employee is only employed at a Danish university and is posted to another country within EU/EEA or Switzerland to perform work.

A Danish university employee is generally a civil servant, cf. Regulation 883/2004, Article 11(3)(d). A civil servant is generally always covered by social security in the country of employment, cf. Regulation 883/2004, Article 11(3)(b). The nature of the work performed and the countries in which the work is performed within the EU/EEA is of no significance. There is no time limitation.

6.2.1 The posting rule

The issue concerns the situation, where the university employee has several employments as a civil servant in several EU/EEA countries, including Denmark, and is posted from the Danish university to perform temporary work in another EU/EEA country or Switzerland.

Example

Mats Jönsson resides in Sweden and is employed at a Danish university. The work for the Danish university is performed in Denmark. Meanwhile, Mats holds a second job at a Swedish university. This work is performed in Switzerland. Both employments are employments as a civil servant. The work performed in Denmark constitutes 90% of the total employment, while the work performed in Switzerland constitutes 10% of the total employment.

As Mats Jönsson is a civil servant in two countries, the rules on civil servants will probably not apply. Mats Jönsson is covered by the multi-state rules in Regulation 883/2004, Article 13(1).

According to Article 13(1)(b)(iii), Mats Jönsson is covered by Danish social security, since he is working in several countries for several employers that are domiciled in two countries, one of which is the country of residence.

Mats Jönsson is asked to perform temporary work in Sweden. The work must completed during the next 12 months and will constitute half of his Danish employment corresponding to 45% of the total employment.

In such a case, Mats Jönsson should be covered by the posting rules (provided that the remaining conditions are met during the rest of the posting to Sweden). The posting rules mean that Mats Jönsson remains covered by Danish social security. The posting rules applies in parallel with the multi-state rules (Article 13(1)).

See section 3.4 for an elaboration of the relationship between the posting rules and the rules on multi-state work.

6.2.2 When is a salary earner considered to be posted – what conditions apply?

If the university employee is not considered a civil servant, the university employee may remain covered by Danish social security according to the posting rule in the basic Regulation, cf. Regulation 883/2004, Article 12(1).

As a salary earner at a Danish university (in the sense of the Regulation, see section 3.6) the university employee may remain covered by Danish social security provided that five conditions are met:

1. The work performed outside Denmark cannot exceed 24 months (36 months may be possible).
2. The posted university employee must be covered by Danish social security before the posting.
3. There must be an employment-related link between the Danish university and the university employee.
4. The university employee may not replace another posted university employee.
5. The Danish university must have a significant activity in Denmark.

If the university employee (and the university) meet the five above conditions, the university employee will automatically be covered by Danish social security. This is not an option.

6.2.2.1 How is the 24 months' period calculated?

The issue concerns the situation, where the university employee have several employments as a civil servant and is posted temporarily from the Danish university. The total activity abroad exceeds 24 months.

The university employee's stay abroad must be limited to a duration of 24 months. In this connection the question arises, how to interrupt the period abroad with the effect that a new 24 months' period begins.

The question has been solved in the Administrative Commission decision no A2, section 3, point b-c:

b) Brief interruption of the worker's activities with the undertaking in the State of employment, whatever the reason (holidays, illness, training at the posting undertaking ...), shall not constitute an interruption of the posting period within the meaning of Article 12(1) of Regulation (EC) No 883/2004.

c) *Once a worker has ended a period of posting, no fresh period of posting for the same worker, the same undertakings and the same Member State can be authorized until at least two months have elapsed from the date of expiry of the previous posting period. Derogation from this principle is, however, permissible in specific circumstances.*

The provision in point c applies in the case of a posting for the same employer to the same EU country.

In the case of a posting to another EU/EEA country, the provision in section 3, point a, paragraph 2, applies:

a) [...] Posting to different Member States which immediately follow each other shall in each case give rise to a new posting within the meaning of Article 12(1) of Regulation (EC) No 883/2004.

In theory, successive postings could take place for an indefinite period. However, Denmark has interpreted the provision restrictively, and the Danish guidance no 9229 of 23 May 2013, section 37 states:

Successive postings with a duration of two years can after the Danish practice, however, not be under Danish legislation more than twice. This is regardless of whether the person is successively posted to the same country and the same employer or is seconded to another country or for another employer. After secondments to one country for two years and then secondment to the same country or in another country for two years, a person can not be seconded to work in the same country or another country under Danish legislation on social security, unless the person has worked for at least two years in Denmark.

Since decision A2, section 3, point a, paragraph 2, states that "each case" is a new posting, the decision can hardly be interpreted as "in the first case", as it is being interpreted in Danish practice. The Danish interpretation is therefore difficult to reconcile with the interpretation in decision A2. However, it is worth noting that decision A2 is not an actual source of law and therefore Denmark is not bound by its provisions, cf. C-202/97, (EU:C:2000:75), FTS, paragraph 58.

As the Danish legal understanding is consolidated in guidance no 9229 of 23 May 2013, section 37, the university should be prepared for the Danish authorities following this practice. Postings from Denmark are singlehandedly decided by the Danish authorities without the involvement of foreign authorities. It is therefore unlikely to play any practical crucial role that foreign authorities may have a different understanding of the law.

The Appeals Board decision of 24 February 2012 should be mentioned in Danish practice. The decision denied a posting in a situation where the employee had been posted to an EU country on a special agreement according to Regulation 883/2004, Article 16. Subsequently, the employee was sent directly to another EU country without an intervening period of work in Denmark. The Appeals Board held that such a posting on Danish social security required a period of work in Denmark.

6.2.2.2 When is the university employee considered being covered by Danish social security prior to the posting?

The issue concerns the situation, where the university employee has several public employments and is posted temporarily from the Danish university. The university employee has not been living or working in Denmark for a longer period prior to the posting.

It is required that the university employee is covered by Danish social security prior to the posting to be covered by Danish social security according to the posting rules.

In this connection there are three particular issues:

1. The Posting rule in itself only states that the university employee "continues" to be covered by Danish social security. The provision, however, does not state how long the university employee must be covered by Danish social security prior to the posting. The Administrative Commission's Decision A2 states, however, in paragraph 1, section 4, that one month is sufficient. If the period is shorter than one month, an actual assessment has to be made.

2. The rule is designed to prevent university employees from being employed with the direct purpose of being posted without having a connection to the new home country's social security system. However, according to Danish practice there is an additional requirement that the university employee has to be covered by Danish social security before the employment, see the Danish guideline no. 9229 of 23 May 2013, section 35. It is unclear whether the university employees, after a significant period of work Denmark, might still be posted under Danish social security even though the university employee was not covered by Danish social security beforehand.

3. The rule states that the university employee must be covered by Danish social security prior to the posting. However, the rule does not determine on what basis (i.e. which provision of Regulation 883/2004) the university employee must be covered by Danish social security. In Danish practice, it was initially assumed that the university employee should work in Denmark, i.e. be subject to Regulation 883/2004, Article 11(3)(a) (country of work). Individual decisions, however, have stated that university employees in specific cases could/could not, respectively, be considered to be covered by Danish social security on the basis of Regulation 883/2004, Article 13(1) (multi-state work).

The consequence of Danish practice is that the Danish university can only be certain that the condition is met if:

1. The university employee is covered by Danish social security at least one month prior to the employment.
2. The Danish social security prior to the employment is based on work or residence in Denmark.

In other cases, the question should be examined further.

6.2.2.3 When is the condition of an employment-related link between the Danish university and the university employee met?

The issue concerns the situation, where the university employee has several employments as a civil servant and is posted temporarily from the Danish university to a foreign university (or business). The university employee has a formal and genuine employment-related link to the Danish university.

A posting can only take place if the Danish university is still the university employee's actual employer. Thus, there has to be a proper employment-related link (direct relationship) between the university and the university employee. The link must be present at the time of posting and remain throughout the posting period.

A specific assessment of the existence of an employment-related link must be made. The CJEU has provided guidelines on how the assessment should be made, cf. CJEU rulings in case C-202/97, (EU:C:2000:75), FTS and case C-404/98 (EU:C:2000:607), Plum. The CJEU practice is summarized in the Administrative Commission's Decision A2, point 1, Section 5, and the Commission's Practical Guide

(December 2013), page 9ff. The guideline states that the following conditions should be included in the overall assessment:

- *responsibility for recruitment;*
- *it must be evident that the contract was and still is applicable throughout the posting period to the parties involved in drawing it up and stems from the negotiations that led to recruitment;*
- *the power to terminate the contract of employment (dismissal) must remain exclusively with the 'posting' undertaking;*
- *the 'posting' undertaking must retain the power to determine the "nature" of the work performed by the posted worker, not in terms of defining the details of the type of work to be performed and the way it is to be performed, but in the more general terms of determining the end product of that work or the basic service to be provided;*
- *the obligation with regard to the remuneration of the worker rests with the undertaking which concluded the employment contract. This is without prejudice to any possible agreements between the employer in the posting State and the undertaking in the State of employment on the manner by which the actual payments are made to the employee;*
- *the power to impose disciplinary action on the employee remains with the posting undertaking.*

Danish practice is very varied as to which agreements the university employee can enter with a unit in the host country.

To meet this condition the university must make sure:

1. That the university employee does not enter a parallel employment contract in the host country.
2. That the final salary requirement lies with the Danish university (i.e. the university employee can only make a legal claim on the salary against the Danish university).

6.2.2.4 When is the university employee not replacing another posted university employee?

The issue concerns the situation, where the university employee has several employments as a civil servant and is posted temporarily from the Danish university. Another employee, covered by the posting rules in the basic Regulation, Article 12, has previously solved the university employee's tasks.

Posting under Danish social security can only happen if the posted university employee does not replace another posted university employee.

The fact that replacements are not allowed, should be seen in relation to other Danish posted university employees, but also in relation to university employees from other countries. In its Practical Guide (December 2013), page 13, the Administrative Commission has clarified the rule:

From the point of view of the competent institution of posting Member State, the posting conditions may appear to be fulfilled when assessing the posting conditions. However, if an activity in the receiving undertaking of Member State A was previously pursued by a posted worker from posting Member State B, this worker cannot be replaced immediately by a newly posted worker from any Member State. It does not matter from which posting undertaking or Member State the newly posted worker comes from – one posted worker cannot be immediately replaced by another posted worker.

It is unclear whether it is a replacement when one posted person temporally replaces another, or whether there may be further conditions that the last university employee in functional terms replaces the first university employee. One interpretation is found in Schreibner, Wunder, Dern, VO (EG) Nr. 883/2004 *Verordnung zur Koordinierung der Systeme der sozialen Sicherheit*, Beck, 2012, page 108:

Die Voraussetzung, dass die Person keine andere entsandte Person ablösen darf, betriff die Ablösung eines Arbeitsnehmers durch einen anderen nur dann, wenn der Grund für diese Ablösung der Ablauf der Entsendezeit ist (vgl. auch KOM (2010) 194 endg., 7).

Experience shows that whether the condition is met, is only reviewed to a limited extent by the authorities (including Udbetaling Danmark). However, it is discussed whether such a review should be handled in the future. As the problem concerns the factual circumstances, it can be ensured that the condition is met by clarifying the facts of the posting. It should be noted, however, that the posted university employee, whom the Danish university employee replaces, in some situations have not yet resolved his/her social security situation, and therefore does not know whether he/she is posted, but only becomes aware of this subsequently. However, it is provided that if the Danish university and the Danish university employee have produced information on the factual circumstances in good faith and under general vigilance, any decisions on (Danish) social security is irrevocable retroactively (when no fraudulent behaviour has been exercised).

6.2.2.5 How is the employer's activity in the home country determined?

Posting on Danish social security is conditional upon the employer having a significant activity in the home country. There must be a specific assessment of whether sufficient activity exists. The CJEU has provided guidelines on how the assessment should be made, cf. CJEU cases C-202/97, (EU:C:2000:75), FTS and C-404/98 (EU:C:2000:607), Plum. The CJEU practice is summarized in the Administrative Commission's Decision A2, point 1, section 5, and the Commission's Practical Guide (December 2013, English version), page 8f. The guideline states that the following conditions should be included in the overall assessment:

- *the place where the posting undertaking has its registered office and its administration;*
- *the number of administrative employee of the posting undertaking present in the posting State and in the State of employment – the presence of only administrative employee in the posting State rules out per se the applicability to the undertaking of the provisions governing posting;*
- *the place of recruitment of the posted worker;*
- *the place where the majority of contracts with clients are concluded;*
- *the law applicable to the contracts signed by the posting undertaking with its clients and with its workers;*
- *the number of contracts executed in the posting State and the State of employment;*
- *the turnover achieved by the posting undertaking in the posting State and in the State of employment during an appropriate typical period (e.g. turnover of approximately 25% of total turnover in the posting State could be a sufficient indicator, but cases where turnover is under 25% would warrant greater scrutiny);*
- *the length of time an undertaking is established in the posting Member State.*

According to Danish practice, an assessment will be made for the individual unit/authority/business registration number. Thus, it is not possible to aggregate activity within a group of institutions.

Overall, the condition causes difficulties if a unit has a very high percentage of its employees working abroad. Experience shows that the condition can cause particular problems for very small units where a small number of employees working abroad may imply that a relatively large part of the activity is performed abroad.

The condition has traditionally been aimed at private companies and the authorities' practice has placed great emphasis on where the revenue is generated.

It may be difficult to determine the activity of a public institution in this way. In situations where there is doubt as to whether the institution meets the condition, it should be discussed with Udbetaling Danmark, what other criteria to emphasize in view of the university's special nature.

6.2.3 The rules on multi-state work

The issue concerns the situation, where the university employee has several employments as a civil servant and is posted temporarily from the Danish university. The university employee is not only posted to an EU/EEA country or Switzerland, but performs activities in a number of EU/EEA countries for a limited period.

If this is the case, the posting rule may not apply. Instead, read the special sections on multi-state workers for a review of these special EU rules.

6.3 Postings not governed by the EU rules on coordination of social security

The coordination of social security, when the posted university employee does not meet the conditions of being covered by Regulation 883/2004, is described below.

6.3.1 Postings within the EU/EEA

The issue concerns the situation, where the university employee has several employments as a civil servant and is posted temporarily from the Danish university. The university employee does not meet the conditions for applying the Regulation, typically because the university employee is not an EU citizen.

When a Danish university posts a university employee within the EU, it is important to keep in mind whether the rules on coordination of social security apply. The conditions are described above.

When posting university employees, who are not EU/EEA citizens, it is particularly important to note that the university employees do not meet the conditions for applying Regulation 883/2004. If the university employee is not an EU citizen, the coordination rules do not apply.

In such a case, it should be investigated whether there is a social security agreement between Denmark and the EU country in question.

6.3.2 Postings within the Nordic countries

The issue concerns the situation, where the university employee has several employments as a civil servant and is posted temporarily from the Danish university to another Nordic country. The university employee does not meet the conditions for applying the Regulation, typically because the university employee is not an EU citizen.

The Nordic countries have entered a special Nordic Convention (Nordic Convention on social security of 12 June 2012, Danish version), which extends the personal scope of Regulation 883/2004 and therefore may be relevant to the posting of third country citizens. The Nordic Convention is supplemented by an administrative agreement (the Agreement does not apply to Greenland and the Faroe Islands as per December 2014).

6.3.2.1 Who can apply the Nordic Convention?

According to Article 2, the Nordic Convention applies to persons residing in the Nordic countries. Thus, the agreement extends the scope of Regulation 883/2004 to persons residing in a Nordic country regardless of citizenship.

According to Article 5, residence should as a starting point be understood as the country in which a person is registered. However, CJEU ruling of 11 September 2014 in case C-394/13 (EU:C:2014:2199), B overruled that emphasis is only placed on registration when determining residence. Instead, a comprehensive individual assessment under Regulation 987/2009, Article 11, must be made. It is unclear exactly how the Nordic Convention should be interpreted in this area, because the Nordic countries, which are bound by the regulations, would probably need to interpret the Nordic Convention in light of the regulations.

Article 5 in the Nordic Convention in conjunction with the implementation of Article 11 will probably imply that the university may presuppose that the registered address will be considered the residential address, unless the factual circumstances are obviously unsupportive.

It is therefore important that it is clearly emphasized to the authorities, if the facts do not support that the residential address constitutes residence.

The Nordic Convention also means that it is important that the university employee is registered correctly.

The Nordic Convention does not apply in relations between Denmark and the Faroe Islands and Greenland, respectively. These relations are domestic and therefore not regulated by this type of international agreements. Instead, there are often special features in Danish legislation on social security, which take into account the special relationship with the Faroe Islands and Greenland. An example of this is the Danish Act on Benefits in the event of Illness or Childbirth, Sections 4 and 5, which modifies the general conditions on the right to Danish sickness benefit for people in the Faroe Islands and Greenland, and at the same time limits the Danish right if the person receives sickness benefits in the Faroe Islands/Greenland.

6.3.2.2 What are the options in the Nordic Convention to have the university employee remain covered by Danish social security?

The Nordic Convention provides the option to apply Regulation 883/2004, section II, regarding choice of law rules for university employees residing in the Nordic countries who are not EU citizens (third country nationals).

The Convention is important, since Regulation 883/2004 generally does not apply to third country nationals when Denmark is involved due to the Danish EU reservations. This does not mean that non-EU citizens working in the Nordic countries for a Danish university can apply Regulation 883/2004.

Thus, Regulation 883/2004, section II, can be applied in full, thus giving the Danish university the opportunity to apply Article 11(3)(b) regarding civil servants.

If Article 11(3)(b) does not apply, because the third country national has two or more employments as a civil servant in the Nordic countries, the university employee's choice of law will instead be in accordance with Regulation 883/2004, Article 13, on multi-state work.

6.3.2.3 What are the advantages of the Nordic Convention, if the university employee cannot remain covered by Danish social security?

If the university employee is not covered by Danish social security, it is still advantageous to apply the Nordic Convention on social security, since that the questions on social security will be coordinated.

Thus, the university employee is guaranteed to be covered by only one country's social security and social contributions are only payable in one country. If the university employee needs social benefits, questions in this regard will also be coordinated, thus the university employee does not fall between two systems.

6.3.3 Postings outside the EU/EEA

The issue concerns the situation, where the university employee is posted to a non-EU/EEA country or outside Switzerland.

6.3.3.1 What to consider when the university employee is posted to a country with which Denmark has entered a social security agreement

The issue concerns the situation, where the university employee is posted to perform work in a non-EU/EEA country or outside Switzerland, and Denmark has entered a social security agreement with the country in question.

When the Danish university is posting a non-EU/EEA citizen to another country with which Denmark has entered a social security agreement, there is a possibility for the university employee to remain covered by Danish social security and avoid paying social contributions abroad. The social security agreements Denmark has entered with other EU countries are typically long-standing and made before Denmark joined the EU.

To make sure that the agreement is handled correctly, a number of conditions should be clarified:

a) The personal scope of the agreement

It should be clarified which persons the agreement apply to. For example, some agreements only apply to persons who are citizens in the two countries entering the agreement. Although an agreement only covers a limited group of people, it is not unusual that exceptions are introduced, which includes the use of a posting rule so that the posting provision applies to a wider group of people.

b) The material scope of the agreement

It should be clarified which laws the agreement apply to. An agreement may be "broad", i.e. it applies to many of the traditional social security schemes, such as pension, sickness, unemployment insurance and workers' compensation, etc. An agreement may also be "narrow", i.e. it only concerns a narrow area of the traditional social security schemes, e.g. the agreement may only relate to pensions. An agreement may either mention the type of rules it applies to, e.g. "pensions", or it can list the specific schemes to which it applies, e.g. "old age pension, early retirement and ATP".

If the agreement does not cover all social security schemes, it should be further investigated according to Danish law and local law in the work country, which obligations the different schemes places on the university and the university employee, respectively. An example might be the rights and obligations of the university in connection to the Workers' Compensation.

c) Choice of law rules

If the agreement applies to the university employee, it should be further investigated what choice of law rules the agreement contains.

The social security agreements typically contain rules on civil servants who can remain covered by Danish social security. Typically, it is not clear from the wording of the agreement whether a person is a civil

servant and therefore it should be investigated, whether the university employee is comprised by that rule. In cases of doubt, the authorities may review EU practice in this area.

If the rules on civil servants do not apply, most agreements contain posting provisions. When applying the posting provision a number of circumstances should be considered:

- How long can a university employee remain covered by Danish social security?
- What conditions apply to the university employee regarding the period prior to the posting? Is it a requirement that the university employee is covered by Danish social security prior to the posting or is it a requirement that the university employee has had a residence in Denmark prior to the posting?
- What conditions apply in the relation between the university employee and the Danish university? The posting rule can e.g. determine that the university employee has to be posted "for" the Danish university, which may mean that there must be a proper employment-related link between the Danish university and the university employee.

In lack of clear posting rules, the authorities may review the practice that has been developed under the EU/EEA rules on coordination of social security.

Typically, the agreements do not contain rules on multi-state work. If a university employee works in several countries, the application of the Danish rules must be clarified in relation to each country, which may prove difficult.

d) Administration of the agreement

An administrative agreement may be attached to the social security agreement, which determines how the authorities of the countries concerned must work together for the agreement to work in practice. Typically, the agreement also contains more details on how to apply for a certificate of Danish social security. The administrative agreements are found with the social security agreements.

6.3.3.2 What to consider when the university employee is posted to a country with which Denmark has not entered a social security agreement

The issue concerns the situation, where the university employee is posted to perform work in a non-EU/EEA country or Switzerland that Denmark has not entered a social security agreement with. It is of no consequence whether the university employee is an EU citizen.

When the university is posting a university employee to a country with which Denmark has not entered a social security agreement, there are no international framework for the social security rules to apply.

It is each individual country's rules, which determine whether the university employee is covered by various social security schemes. Since all the social security schemes (i.e. pension, sickness, unemployment insurance, work-related injuries insurance, etc.) are governed by individual rules, there cannot be a complete answer as to whether a country's social security rules apply. Each area must be treated separately according to the rules that apply in this area.

This means:

1. The university employee may be covered by the rules in more than one country.
2. The university employee may be covered by Danish rules.
3. The university employee may be covered by the rules in the work country.
4. The university employee may be covered by the rules in none of the countries.

Some schemes – such as illness – may be supplemented by an optional private health insurance. Other schemes – such as pension – may be supplemented by a private pension scheme and other schemes – such as workers' compensation – may not be replaced by a private scheme.

MULTI-STATE WORK WITHIN THE EU/EEA

7 Introduction to the rules on multi-state work

The issue concerns the situation, where the university employee is a multi-state worker within the EU/EEA and Switzerland. The rules become relevant when the university employee works in Denmark and in one additional EU/EEA country or Switzerland.

Also see the example in section 6.2.1 and the description in section 3.4 for a further limitation of the scope of the rules.

Within the EU, there are special rules on multi-state work. The rules are special to the extent that it is not usual in social security agreements to have rules on multi-state work.

The rules constitute an exception to the main rule stating that the university employee is covered by Danish rules, as he/she is a civil servant or only works in Denmark.

The rules assume that a multi-state worker cannot apply the work country's rules, as this would mean an ongoing switch between several countries' rules (the so-called yoyo effect).

When considering the rules it should first be examined if the university employee has a work pattern, which changes to such an extent that the yoyo effect occurs, and the rules on multi-state work can be applied.

The rules on multi-state work give two alternative association criteria to determine which country's rules to apply. The criteria are the university employee's residence or the employer's/university's domicile, respectively. Thus, it is important to examine if one or the other criteria will be decisive when determining in which country the university employee is covered by social security.

The rules on multi-state work are laid down in EC Regulation 987/2009, article 13, and only apply to university employees who are EU/EEA citizens.

7.1 In which country is the university employee covered by social security when the university employee works in several countries for the Danish university?

The issue concerns the situation, where the university employee is a multi-state worker within the EU/EEA and Switzerland for the Danish university. The university employee has no other employment than the Danish employment.

The university employee is a civil servant, cf. Regulation 883/2004, Article 1(d). A civil servant is always covered by social security in the country in whose administration the university employee is employed, cf. Regulation 883/2004, Article 11(3)(b).

When the Danish university employee is a civil servant in Denmark, the university employee is covered by Danish social security.

It does not matter in which EU/EEA country the university employee works, or how much the university employee works abroad.

It does not matter either in which period the university employee works outside Denmark, or where the university employee has his/her residence.

7.2 *In which country is the university employee covered by social security when the university employee is also a salary earner (not a civil servant) at a foreign university?*

The issue concerns the situation, where the university employee is a multi-state worker within the EU/EEA and Switzerland for the Danish university. Parallel to the Danish employment, the university employee is also employed at a foreign university within the EU/EEA/Switzerland. The employment at the foreign university is not considered a public employment under local rules and the university employee is thus considered a salary earner according to the EC regulation.

A multi-state worker who is employed at a Danish university while also being a salary earner (not a civil servant) in another EU country, is usually considered to be covered by social security in the country where the university employee is a civil servant, i.e. Denmark, cf. EC Regulation 883/2004, Article 13(4).

In practice, the rule corresponds to the rule in Regulation 883/2004, Article 11(3)(b), as the rule unconditionally stipulates Danish social security no matter where the university employee works as he/she is a civil servant in Denmark. However, a different procedure apply as the A1 application, according to the rules on multi-state work, must be sent to the university employee's home country, cf. Regulation 987/2009, Article 16(1), while an application according to Article 11(3)(b) must be sent to country to which the public institution is connected, cf. Regulation 987/2009, Article 15.

7.3 *In which country is the university employee covered by social security when the university employee is also a student at a foreign university?*

The issue concerns the situation, where the university employee is a multi-state worker within the EU/EEA and Switzerland for the Danish university. Parallel to the Danish employment, the university employee is also a student at university in another EU/EEA country or Switzerland.

A multi-state worker who is employed at a Danish university while also being a student at a foreign university, will be covered by social security in Denmark as the university employee is a civil servant in Denmark, cf. Regulation 883/2004, Article 11(3)(b).

The university employee will thus only be covered by the Danish rules on social security.

7.4 *Which rules apply when the university employee is also a civil servant at a foreign university?*

The issue concerns the situation, where the university employee is a multi-state worker within the EU/EEA and Switzerland. Parallel to the Danish employment, the university employee is also employed as a civil servant at a foreign university within the EU/EEA/Switzerland. The employment at the foreign university is considered a public employment under local rules according to the EC regulation.

When a university employee is a civil servant at a Danish university while working as a civil servant for a foreign employer in another EU country, the university employee is – according to Danish practice – covered by the ordinary rules on multi-state work, i.e. Regulation 883/2004, Article 13(1-3).

The Danish interpretation is, however, not undoubtedly correct. When regulation 883/2004 became effective on 1 May 2010, the rules were simplified compared to the previously applicable Regulation 1408/71.

The previous Regulation 1408/71 contained a special provision on this exact situation that was not transferred to the new regulation. It is thus unclear how to solve question according to the new Regulation 883/2004.

The uncertainty was summarized by Frans Pennings in European Social Security Law, Intersentia, 2010, page 94, with particular focus on researchers/university employees:

THE LEGISLATION APPLICABLE TO CIVIL SERVANTS
Article 14e of Regulation 1408/71 concerned the case where a person was simultaneously employed as a civil servant in one State and employed or self-employed in one or more other States. This person was insured in the State in which s/he was insured in a special scheme for civil servants. Article 14f of this Regulation concerned the person who is simultaneously employed in two or more Member States as a civil servant and insured in at least one of those States in a special scheme for civil servants. This person was subject to the legislation of each of these Member States. This rule infringed on the principle of unity of the system of determining the applicable legislation and on the exclusive effect of these rules.

The rules on the applicable legislation of Regulation 883/2004 on civil servants are different from those of Regulation 1408/71. Article 13(4) of Regulation 883/2004 provides that the civil servant is subject to the legislation of the Member State to which the administration employing him is subject. Thus Regulation 883/2004 does not make the application of the rule dependent on whether there is a special scheme for civil servants. This makes a difference for countries which do not have such schemes. The Regulation is applicable also to civil servants in general schemes.

Example. A person is employed by Utrecht University in the Netherlands, where the staff has the status of civil servant. He performs his activities in Italy during a period of four years in order to study the remains of a Roman temple. This person is subject to the law of the State where this university is established, i.e. the Netherlands. If this person also works as an employed person in Italy, that does not change the situation. Even if his job at Utrecht University is one day a week and a job in Italy four days a week, he is subject to Dutch law.

Regulation 883/2004 does not give a specific rule for the situation in which a person works in two States as a civil servant. Still, it is not impossible, in particular not for persons working for other than State ministries, for instance, for universities. Most probably in this case the rule applies which the Regulation has on employed persons working in two or more Member States. That means that this person is subject to the system of one country only, i.e. in principle the State where s/he resides if s/he performs a substantial part of his activities in that State

The legal uncertainty is also emphasized by D. Pieters og P. Schoukens in Regulation 883/2004 – A new architecture of co-ordination?:

Strangely enough the double designation rule in article 14 f Regulation 1408/71 dealing with civil servants simultaneously employed in more than one member state, has been deleted. In accordance with this article, the civil servant is made subject to both social security systems in case one of them is a special system (or social security scheme) designed for civil servants. This rule has not been taken over in the new Regulation 883/2004. The question remains though which social security system is eventually applicable to this category of persons. Should we follow the rule for simultaneous activities (making the country of residence competent in case of substantial activities) or should we follow the basic rule specifically designed for civil servants (article 11 par. 3 Reg. 883/2004): "a person shall be subject to the legislation of the member state to which the administration employing him is subject". In the latter case, each country involved would keep competence over its civil servants and consequently the double designation rule would get a much broader application as it is now the case. In the actual Regulation 1408/71, the double designation rule is only to be applied when at least one country has a specific social security system for civil servants in place; see article 14 sub f-).

It is recommendable to support the interpretation used by the Danish authorities as it probably leads to the highest degree of legal certainty and is an expression for a legal understanding, which can be handled in practice by the universities.

7.5 In which country is the university employee covered by social security when the university employee is also a civil servant at a foreign university?

The issue concerns the situation, where the university employee is a multi-state worker within the EU/EEA and Switzerland. Parallel to the Danish employment, the university employee is also a civil servant at a foreign university in another EU/EEA country or Switzerland.

Article 13(1) contains provisions on where the university employee will be covered by social security in various situations.

	The work in your country of residence <u>is</u> significant (more than 25% of the total work/salary)	**The work in your country of residence is <u>not</u> significant (less than 25% of the total work/salary)**
You have one additional public employer in another EU/EEA country besides your Danish university employment. You live in one of the countries where one of your employers is domiciled	You are covered by social security in your country of residence	You are not covered by social security in your country of residence, but covered in the other country where you have an employer
You have at least two additional employers in addition to your Danish university employment, and at least one of these additional employments is a public employment. The employers are domiciled in at least two countries – Denmark not being one of them	You are covered by social security in your country of residence	You are covered by social security in your country of residence

Thus, Article 13(1) deals not only with one situation, but applies to a number of situations in which the university employee works in two or more EU/EEA countries for two or more public employers (i.e. as a civil servant or similar).

Each case should be examined as to how the rules in Article 13(1) apply to the actual situation.

7.6 When is the university employee covered by social security in the country of residence – Article 13(1)(a)

When the university employee is a multi-state worker and has two or more (public) employers (i.e. the university employee has two public employment as a civil servant or similar), the university employee will always be covered by the rules of the country of residence when a significant part of the work is performed in the country of residence.

a) *Two or more employers – at least one employer in the country of residence (no significant work in the country of residence) – Article 13(1)(b)(iii)*

If the university employee has two or more (public) employers located in two EU countries, and one country is the university employee's country of residence, the v employee will be covered by social security in the country that is not the country of residence.

b) *Two or more employers in several countries outside the country of residence (no significant work in the country of residence) – Article 13(1)(b)(iv)*

If the university employee has two or more (public) employers located in two EU countries outside the university employee's country of residence, the university employee will be covered by social security in the country of residence. Thus, the rules of the country of residence apply even though a significant part of the work is not performed in that country.

c) *Two or more employers and additional employment as a self-employed*

If the university employee has two or more (public) employers and also performs work as a self-employed, the choice of law conflict is solved by considering the employment relationship according to Article 13(3), see section 3.4. The work as a self-employed is not taken into consideration.

It is unclear how the employment activities should be assessed in this case. Most correctly would probably be to determine the employment level in the various countries only based on salary earner activities. Thus, the self-employed activities are not taken into consideration even though these activities can be significant compared to the salary earner activities.

7.7 When is the university employee considered to work "normally" as a multi-state worker?

To be able to apply the provisions on multi-state work, the university employee must work "normally" in several countries. It should always first be determined that the university employee can be considered to work "normally" as a multi-state worker, before the university employee's legal position is determined according to Regulation 883/2004, Article 13.

According to Regulation 987/2009, Article 14(5), "normal" work in several countries is when the work is performed either *simultaneously* or *continuously* in several countries.

According to legal practice by the CJEU, the work is "normal" even if it is performed continuously or temporarily. The CJEU states in its ruling of 24 June 1975 in case 8/75 (EU:C:1975:87), *Foot-Ball Club d'Andlau*, that non-regular but casual work in one member state is sufficient for the work to be considered "normal".

7.7.1 Which reference period applies?

The previous provisions in Regulation 1408/71 contains no rules on which reference period to apply, i.e. how often the university employee had to change work country.

It has been suggested to make an internal connection between the rules by applying the posting period as reference period, i.e. 12 months. The conditions have been further described by Frans Pennings in *Regulation 1408/71 and the Room for Manipulation of the Facts* i A. Numhauser-Henning (ed.), Normativa Perspektiv. Festskrift till Anna Christensen. Lund 2000, p. 358f:

This rule, Article 14(2)(b)(i), concerning a person normally engaged in two Member States, still leaves a lot of questions unanswered. When a person is normally employed in the territory of two Member

States? This article does not refer to a particular period of reference for answering this question. Suppose that a person works 11 months a year in Germany and works one month a year in the Netherlands, in which country he resides. Is he also normally engaged in two countries? The answer to this question has not yet been decided by the Court. Some national benefit administrations have developed their own rules on this topic, but it is not known whether these will stand the test of the Court of Justice.

One approach can be that the period of reference is twelve months, as this period is also used as the maximum period for the purpose of posting, After this period, as a main rule, the social security rules of the country of employment are to be applied. One could say, therefore, that this is a relevant period to define whether a person is working in two Member States-- '-. restriction could be that work done during the holiday periods of the main job in the State of residence does not count for this purpose. Although this seems to be a sound restriction, so far no argument can be found for this in the rums, of the Court. Neither is the latter restriction based on a general principle if persons work full-time in State x and in the evening hours in the state of residence or during the week-end, they are not precluded from the application of Article 14(2)(b)(i) either. Another approach is that the period of reference is one week, but in that case the provision would have used the term 'simultaneously' - as Article 14c (to be discussed below) does.

In discussions on this topic it is sometimes argued that the criterion should be whether a person works long enough in a Member State to be insured under the national system. For instance, Member State A applies as a threshold for being insured that one works at least fifteen hours a week or earns 300 euro a month. If a worker works in State B, resides in State A and takes up a job of 2 hours a week (monthly income 200 euro) in State A, the rules of the regulation involve that he falls under the social security rules of State A and, as a result of the national rules, he is not covered. Maybe it is his purpose that this is the case, as in this case no contributions are required, but it may also be that he has overlooked this result. Which of the two is the case is, however, irrelevant, as this approach finds no support at all in the rulings of the Court of Justice and therefore the social security legislation of State A is applicable.16 Another problem is how to define the term 'State of residence'. Suppose that a worker chooses to live 6 months a year in Spain and 6 months a year in Sweden. It may be difficult to decide where he resides and he may argue that he resides in the State which is most attractive to him. Article 1 h defines place of residence' as 'place of habitual residence', but this definition does not answer our question.

Denmark has previously assumed that a university employee should change work country every three months, with reference to CJEU ruling in case 2/89 (EU:C:1990:183), *Kits van Heijingen*, cf. Van Zeben and Donders, *European Journal of Social Security, Volume 3/2, 107-116, 2001*, Kluwer Law international, page 113.

The CJEU's practice does not, however, contain any basis for such an assumption and it has been rejected. The Øresundsaftale (Oresund Agreement) still contains some remnants from previous Danish practice as the legal understanding had been codified in the agreement, and the agreement still contains the provision. Danish practice still use rulings based on Regulation 1408/71 applicable in the EU countries until 1 May 2010, which based on the Regulation's interim provisions may still apply.

Regulation 987/2009 determines the reference period at 12 months, cf. Article 14(10).

7.7.2 What is understood by multi-state work?

According to Regulation 987/2009, Article 14(5), "normal" work can be performed in several countries "simultaneously".

When the university employee changes work country continuously, the work is considered being performed simultaneously in both countries and is thus performed "normally". It is not a condition that the work is performed according to a fixed work pattern; it can be spontaneous and flexible.

Examples from the CJEU of simultaneous work in several countries are found in rulings in the cases C-249/04 (EU:C:2005:329), *Allard*, C-103/06 (EU:C:2008:185), *Derouin*. Two classic examples of simultaneous work in several countries are found in CJEU rulings in the cases C-425/93 (EU:C:1995:37), *Calle Grenzshop* and C-178/97 (EU:C:2000:169), *Banks*.

7.7.3 What is understood by continuous multi-state work?

According to Regulation 987/2009, Article 14(5), "normal" work in several countries can be performed continuously.

When the multi-state worker works continuously in several EU countries, i.e. first in one country and then in another country, it can also be considered "normal" work in several countries.

Regulation 987/2009, Article 14(5), has been modernized by Regulation 465/2012 so that as of 28 June 2012 there is no requirement that the multi-state work must be performed continuously.

It should be sufficient that the work is performed in at least two EU countries during a 12 months' period. This would be the case if the work were first performed for six months in one country and then six months in another country. An example is found in CJEU ruling in case C-121/92 (EU:C: 1993:840), *Zinnecker*.

It has been unclear whether one-off engagements abroad could form the basis for the multi-state work being performed "normally" in several countries. It has been approved in several instances by the CJEU, cf. C-178/97 (EU:C:2000:169), *Banks* and 8/75 (EU:C:1975:87), *Foot-Ball Club d'Andlau*.

The European Commission has defined, in its guidelines (December 2013, English version), page 27, that Regulation 987/2009, Article 14(7), also applies to one-off situations even if it does not appear from the law text. It is a precondition for applying Article 14(7) that both the rules on multi-state work and the posting provision may potentially apply, for which reason the work must be considered as being performed "normally".

If the university employee works continuously in two countries – e.g. the work is performed for nine months in one EU country and then three months in another EU country, it can also be covered by the rules on multi-state work, since the work pattern can be considered "normal", cf. CJEU ruling in case 13/73 (EU:C:1973:92), *Hakenberg*. Contrary to the C-121/92 (EU:C: 1993:840), *Zinnecker* ruling, the CJEU defined that continuous multi-state work also constitute "normal" work.

In the ruling of 4 October 2012 in case C-115/11 (EU:C:2012:606), *Format*, the CJEU did not accept that the work pattern in question could be considered "normal". The employee had entered into short-term individual contracts on a continuous basis which de facto caused the employee to be obliged to work in only one EU country at the time. Between each employment the employee stayed at home for a period in which he did not receive any salary. The CJEU stated that the multi-state work could not be considered to be performed "normally" in several countries since it could not be predicted that the multi-state work should be performed in several countries when the work was performed based on individual contracts.

According to the European Commission the work is predictable when either employment contract(s) has been signed for the following 12 months, or if the nature of the positions causes a change in work country. It is not a condition that it can be predicted beforehand which EU/EEA country the employee will work in,

cf. the European Commission's guidelines (December 2013, English), page 27f. See pending case C-189/14, *Chain*.

7.8 What is understood by "residence"?

According to Regulation 883/2004, Article 13(1)(a), the university employee will be covered by the social security rules in the country where the university employee has his/her "residence".

Determining the university employee's residence is made in accordance with EU law. In Article 1(j) of Regulation 883/2004 there is a definition of the term. According to the provision, "residence" is defined as the place where an individual has his/her habitual residence. Residence as compared to the residence in Article 1(k) of the Regulation which is defined as *temporary residence*. The residence term is defined in detail in Regulation 987/2009, Article 11.

Article 11 stipulates that an overall evaluation should be made and all relevant circumstances should be taken into consideration.

In a number of cases the CJEU has defined the term, see C-90/97 (EU:C:1999:96) *Swaddling*, 76/76 (EU:C:1977:32) *Di Paolo*, C-589/10 (EU:C:2013:303) *Wencel*, 13/73 (EU:C:1973:92), *Hakenberg*, C-102/91 (EU:C:1992:303), *Knoch*.

In December 2013, the European Commission has added a paragraph on the term "residence" in its guidelines based on these rulings. It has previously been discussed if the Regulation contained a differentiated residence term which could lead to different results depending on which chapter in Regulation 883/2004 the ruling should be based, cf. the Finnish comment in Y. Jorens and J. Lhernould, European report 2011, TrESS, 2011, page 22. However, the European Commission rejected this comment and clarified that the same term should be used throughout the entire Regulation.

The CJEU has subsequently in its ruling of 5 June 2014 in case C-255/13 (EU:C:2014:1291), *I*, defined how the term should be understood. The CJEU defines in the ruling's paragraph, page 43-50, how the residence is determined:

43 According to Article 1(j) of Regulation No 883/2004, the term 'residence' refers to the place where a person habitually resides. That term has an autonomous meaning specific to EU law (see, by analogy, Case C-90/97 (EU:C:1999:96), Swaddling, paragraph 28).

44 As the Court has held in relation to Regulation No 1408/71, where a connection may be established between a person's legal situation and the legislation of a number of Member States, the concept of the Member State in which a person resides refers to the State in which that person habitually resides and where the habitual centre of his interests is to be found (see Case 13/73 (EU:C:1973:92), Hakenberg, paragraph 32; C-90/97 (EU:C:1999:96), Swaddling, paragraph 29; and C-589/10 (EU:C:2013:303) Wencel, paragraph 49).

45 In that context, account should be taken in particular of the family situation of the person concerned; the reasons which have led him to move; the length and continuity of his residence; the fact (where this is the case) that he is in stable employment; and his intention as it appears from all the circumstances (see, to that effect, Case C-102/91 (EU:C:1992:303), Knoch, paragraph 23, and C-90/97 (EU:C:1999:96) Swaddling, paragraph 29).

46 The list of factors to be taken into account in determining a person's place of residence, as developed by case-law, is now codified in Article 11 of Regulation No 987/2009. As the Advocate General

observed at point 32 of his Opinion, that list, which is not exhaustive, does not establish any order of precedence for the various criteria set out in Article 11(1).

47 It is apparent from the foregoing that, for the purposes of the application of Regulation No 883/2004, a person cannot have simultaneously two habitual residences in two different Member States (see, to that effect, C-589/10 (EU:C:2013:303) Wencel, paragraph 51), given that, under that regulation, an insured person's place of residence is necessarily different from his place of stay.

48 In that regard, since the determination of the place of residence of a person who is covered by insurance for social security purposes must be based on a whole range of factors, the simple fact that such a person has remained in a Member State, even continuously over a long period, does not necessarily mean that he resides in that State within the meaning of Article 1(j) of Regulation No 883/2004.

49 Indeed, the length of residence in the Member State in which payment of a benefit is sought cannot be regarded as an intrinsic element of the concept of residence within the meaning of Regulation No 1408/71 (see, to that effect, 90/97 (EU:C:1999:96) Swaddling, paragraph 30).

50 It is true that Article 1(k) of Regulation No 883/2004 defines 'stay' as 'temporary' residence. However, as observed by the Advocate General at points 43 to 46 of his Opinion, such a 'stay' does not necessarily involve a visit of short duration.

See the comments to the ruling in M. Cousins *Habitual Residence: Fact or (Legal) Fiction? Commentary on the Case of I v Health Service Executive at the European Court of Justice*, European Journal of Social Security, 2014, vol. 4.

7.9 How is an activity defined as significant?

According to Regulation 883/2004, Article 13(1-2) the university employee is covered by social security in the country of residence if the activity in the country of residence is "significant".

The term "significant" activity is further defined in Regulation 987/2009, Article 14(8), from which it appears that the quantitative part of the work performed in the country of residence should be evaluated. In this connection, the work period and income are taken into consideration.

The provision further defines that when less than 25% of a quantitative evaluation of the employment is performed in the country of residence, this indicates that a significant part of the activity is not performed in the country in question.

The rule clarifies when the activity is significant in case the university employee has one employer, since the work period and income are usually intertwined. However, it becomes more complicated when the university employee has several employers, and the work period and income are disproportionate. By phone Udbetaling Danmark has informed that a case by case evaluation is made according to Danish practice. As Udbetaling Danmark's electronic questionnaire only includes information on working hours, it may indicate that the working hours carry greater weight compared to salary/income.

The working hours should be stated in the application to the Danish authorities. If there is a need for an evaluation including the salary, it is important that the authorities are informed of the factual circumstances forming the basis for the total quantitative evaluation.

7.10 When can a university employee be considered performing work in an EU/EEA country (absolute evaluation)?

It has been discussed whether it requires a certain absolute workload in one EU/EEA country before the university employee can be considered as working in that country. Is it sufficient that the university employee reads an e-mail in the airport for the work being performed in that country?

The question has been heard in principle by the CJEU in its ruling of 3 May 1990 in case 2/89 (EU:C:1990:183), *Kits van Heijingen*, paragraph 10, in which the court notes:

There is nothing in Article 1(a) or Article 2(1) of Regulation No 1408/71 which permits certain categories of persons to be excluded from the scope of the regulation on the basis of the amount of time they devote to their activities. Consequently, a person must be considered to be covered by Regulation No 1408/71 if he meets the conditions laid down in Article 1(a) in conjunction with Article 2(1) of the regulation, irrespective of the amount of time which that person devotes to his activities.

Further comments to the ruling has been made by Frans Pennings in *Regulation 1408/71 and the Room for Manipulation of the Facts*: in: A. Numhauser‑Henning (ed.), Normativa Perspektiv. Festskrift till Anna Christensen. Lund 2000, p. 358f.

For the interpretation of the rules the Kits van Heijningen judgment is relevant. Mr Kits, residing in Belgium retired from his main job and started to work for two days a week as a teacher in the Netherlands, in fact two hours on Monday and Saturday (four hours a week in total). He claimed that according to the rules for determining the applicable legislation, i.e. the article 13(2)(a), the law of the country of work was applicable and he could claim Dutch child benefits for his daughters, who were under the age of eighteen.

A central question was whether a part-time worker, who had retired in his main job, such as Mr Kits, was within the personal scope of the regulation. The Court pointed out that neither Article 2 nor Article 1 (a) of the regulation provisions which exclude from its scope certain categories of workers who only work part-time. Therefore, the Court that Regulation 1408/71 applies to all persons satisfying the conditions of Articles 1 and 2, irrespective of the of hours they work.

This ruling implies that a person can claim for the purpose of having the rules for determining the applicable legislation, that he works in a particular Member State, regardless of the number of working hours. The only criterion for the applicability of Article 13(2) (a) is that he works as an employed person in that State.

As yet, there is no case law which assumes a particular threshold for accepting that a person works in a particular State. Four hours was sufficient in the Kits van Heijningen case, but even this is not the minimum. The minimum is probably where an activity is so small and insignificant that we can no longer call it 'work' or that nobody is or can be employed in that country for less than that amount of time.

The combination of the Kits van Heijningen judgment and the rules for determining the applicable legislation gives employers and employees interesting possibilities to influence their legal position with the effect that benefits can be claimed in the State of residence and not in the State where the person has his main job. Moreover, the rules for determining the applicable legislation are relevant for deciding in which country contributions have to be paid. For this reason Regulation 1408/71 attracts the attention not only of the workers looking for a job at the other side of the border in order to earn more wages or

to terminate their unemployment, but also of employers organizations, pension advisors, consultancy firms etc.

The issue has once more been brought before the CJEU in case C-382/13 (EU:C:2014:2190), *Franzen*. In this case the Dutch court questions whether the choice of law should be interpreted in such a way that an employee, who is domiciled in one EU country covered by the scope of the Regulation, and who for no more than two to three days per month performs salaried work in another EU country under an on-call contract ("oproepcontract"), based on this is covered by the employment country's rules on social security?

The case has been filed by court order of 4 July 2013 and the ruling is expected by the end of 2014 or early 2015. The Advocate General provided his suggested ruling in the case on 1o September 2014 suggesting that the legal considerations from the *Kits van Heijningen* case are reinforced.

Based on current practice (December 2014) no work, which is insignificant according to an absolute evaluation, can be disregarded. See section 3.9.

7.11 When can a university employee be considered performing a proportionate "marginal" activity in an EU/EEA country (relative evaluation)?

Even if a university employee is considered working in an EU country based on a low absolute workload in the country in question, there are rules stating that work which constitutes a *relatively* very small or insignificant part of the total work can be disregarded.

The rule stating that work of a marginal extent can be disregarded when determining which rules to apply under Article 13 in the basis Regulation, is found in Regulation 987/2009, Article 14(5b).

The provision has been included to prevent cases of avoidance and misuse where an employee's work place to a marginal extent has been moved to another EU country to manipulate the result of the choice of law.

It does not appear from the provision how to define "marginal extent". However, the provision has been further defined in the European Commission's guidelines (December 2013, English version), page 27f:

Marginal activities are activities that are permanent but insignificant in terms of time and economic return. It is suggested that, as an indicator, activities accounting for less than 5% of the worker's regular working time and/or less than 5% of his/her overall remuneration should be regarded as marginal activities. Also the nature of the activities, such as activities that are of a supporting nature, that lack independence, that are performed from home or in the service of the main activity, can be an indicator that they concern marginal activities. A person who pursues "activities of a marginal extent" in one Member State and also works in another Member State, cannot be regarded as normally pursuing an activity in two or more Member States and is therefore not covered by Article 13 of Regulation 883/2004. In this situation, the person is treated, for the purpose of determining the applicable legislation, as having an activity in one Member State only. If the marginal activity generates social security affiliation, then the contributions shall be paid in the competent Member State for the overall income from all activities. This helps to avoid misuse if, for instance, a person is obliged to work for a very short period in another Member State to circumvent the legislation of the 'first' Member State becoming applicable. In such cases, the marginal activities shall not be taken into account when determining the applicable legislation. Marginal activities have to be assessed for each Member State separately and cannot be aggregated.

Three legal innovations can be emphasized in the above quote:

1. The activity is marginal when it constitutes less than 5% of the total activities.

2. The activity is marginal when the nature of the work has no independent content or is performed from home.

3. The evaluation is individual for the work performed in each EU country. It is not possible to combine the activities in several EU countries so that the overall activity is not marginal.

It is unclear how to determine the marginal activity when the university employee performs a very small part of the total work as a civil servant. See Regulation 987/2009, Article 14(5b).

Danish practice usually applies 5% as the threshold for when an activity is considered marginal. However, see Udbetaling Danmark's decision of 12 June 2013 (appealed to the Appeals Board):

The employee had been posted from a Danish employer for 36 months and had been covered by Danish social security. During this period, the employee had kept his residence in Denmark and worked approx. 20% in Denmark and 80% abroad. When the posting period ended, the work pattern continued but Udbetaling Danmark considered the work in Denmark to be marginal. The decision can be seen as a very concrete evaluation.

It is unclear if the rule on marginal work applies in a situation where the activity as a civil servant constitute less than 5% compared to the activity as an ordinary salary earner. If the rule applies, the marginal activity should be disregarded so that the activity performed for the Danish university is not included if the activity is marginal/insignificant.

The rule on marginal activity in the implementation Regulation, Article 14(5b), applies to the entire Article 13, i.e. at least for situations covered by Article 13(1-3). Thus, there is hardly basis for disregarding the rule in situations covered by Article 13(4), see the Swedish interpretation, according to which public employment of a marginal extent can be disregarded.

The rules stipulates that notwithstanding the rule on marginal activity, an application on choice of law must always be submitted in situations of multi-state work, cf. the implementation Regulation, Article 14(5b)(2), cf. Article 16(1). In the application, the Danish university should state that the Danish employment is a public employment.

In conclusion, the authorities seem to apply the 5% threshold unless special circumstances are present.

WORKING IN SEVERAL COUNTRIES OUTSIDE THE EU

The applicable rules in the case when the university employee is working for the university in Denmark and simultaneously has a (main) employer in the non-EU/EEA home country will be described in the following.

The issue concerns the coordination of social security, when the university employee has the main employment in a non-EU/EEA country and simultaneously has a secondary job in Denmark.

Example 1

John Johnson is an American researcher and is mainly employed in the United States, where he works 90% of the time. At the same time, he has a secondary job at a Danish university. This employment represents 10% of his working time.

8 The university employee has a secondary job in a country which Denmark has entered a social security agreement with

Internationally, there are a number of social security agreements containing specific rules for multi-state workers. Such specific rules are not contained in Danish social security agreements.

Therefore, the problem is solved through a general interpretation of the social security agreement. As each agreement is different, you cannot give a definitive answer to the result of the interpretation. It is also important to bear in mind that both the Danish authorities and the authorities of the contracting country must accept any interpretation.

A number of main issues that is included in the interpretation of the distribution of jurisdiction is described below.

8.1 Is there an issue of international law with regard to the distribution of jurisdiction?

Initially, it should be examined whether national rules create a situation that requires an international solution.

If national legislation prescribes that the Danish university is obligated to pay social contributions based on the Danish employment alone, and the foreign employer is only required to pay foreign social contributions on foreign earnings, there is generally not a clash of national jurisdiction.

However, it may create both economical and administrative difficulties for the university employee if he/she is covered by the rules of two different countries. In addition, the agreements' purpose is not only the distribution of jurisdiction (negative effect) but also to ensure that a country's legislation actually applies to the university employee (positive effect).

The social security agreement should therefore in all cases be examined to handle the university employee's situation correctly.

8.2 Does the relevant social security agreement provide a single overall solution to the choice of law question?

When a social security agreement does not contain a provision regarding multi-state work, it must be determined through the application of ordinary principles of interpretation, whether the agreement must be understood as if it is always exhaustive and that it designates one country's legislation for all work patterns.

The contracting parties have generally not found it necessary to introduce a specific rule on multi-state work. The reason has traditionally been that multi-state work has not been relevant, especially for overseas territories.

If the agreement should be interpreted as if it governs all the situations exhaustively, and one country's laws must be designated for all employments, a judicial interpretation may determine how the situation should be solved.

Danish authorities (and authorities in the EU/EEA countries) tend to follow the principles established by the CJEU. An example of such a judicial interpretation from the CJEU is found in the ruling C-13/73 (EU:C:1973:92), Hakenberg, paragraphs 15 to 22, where the CJEU ruled that an employment which extended to two EU countries, could only be covered by the rules of a single EU country. The CJEU made this ruling although the situation initially concerned a period when the rules on multi-state work had not yet entered into force.

It follows from the ruling:

15. Since it could not be brought within any of the situations referred to in former Article 13, the occupation in question was covered solely by the general principle laid down by Article 12 of Regulation No 3 before he amendment made by Regulation No 24/64;

16. In these circumstances the answer to the second question must be that the employment in question does not come within the scope of Article 13 (a) in its former version, but within that of Article 12 of Regulation No 3;

17. Article 12 adopts as a criterion of attachment for the purposes of determining the social security legislation to be applied, the fact that wage-earners or assimilated workers are 'employed in the territory of a Member State';

18. It follows both from this Article and an approximation to the exceptions in Article 13 that this provision seeks to ensure that one national legislation is applied and, with this in view, it takes into consideration a worker's employment, assuming that such employment is normally confined to the territory of one and the same Member State;

19. In order to safeguard, given the state of Community legislation at the time in question, the principle that one legislation must apply to an employment which, although of a consistent and continuous nature, extend over the territories of several Member States and comes within the application of Article 12, the features of the activity in question must be analysed in order to establish whether it has a predominant connection with the territory of one or other of the States concerned;

20. For this purpose not only must the duration of periods of activity be considered, but also the nature of the employment in question;

21. As regards the kind of activity described by the Cour de Cassation, the predominant connection is to be sought in the working relationships by which a representative is attached to the undertakings for whose interests he is responsible and not in the occasional contacts which he makes with scattered customers;

22. Thus the answer to the first question must be that a business representative pursuing his working activities in the circumstances mentioned in the order referring the questions must be regarded as being

employed in the territories of the two States concerned, the predominating employment, however, for the purposes of determining the legislation to be applied, being that on the territory of the State in which the registered offices of the undertakings which he represents are situated.

Both the Danish and foreign authorities should be consulted in this regard. Since Udbetaling Danmark decide these situations case-by-case, it is recommended that communication with the authorities is written so that verbal instructions are not deviated in a subsequent decision.

If the agreement is interpreted so that multi-state situations are not internationally governed in the social security agreement (non liquet), the general starting point for situations, which is not covered by the scope of a social security agreement is that both countries' rules may apply in accordance with the terms of national law.

8.3 Does the social security agreement govern the situation partially? – Public employment (civil servant)

Should it turn out that the social security agreement generally does not cover the situation completely, certain provisions of the agreement may still apply (partial coverage).

In this context it is particularly important to pay attention to whether the agreement has a provision on public employment, and whether this provision gives Denmark a limited exclusive jurisdiction, at least to regulate this situation.

Initially, it should be examined whether the provision on public employment applies only where the civil servant is performing work on the territory of another EU country. If so, this implies that the work in Denmark for the Danish university does not give rise to a jurisdictional clash.

It should further be examined, whether the wording of the agreement supports the understanding that the provision regarding public employment in any case applies to the work carried out for the Danish university. Although the provision does not apply to the university employee's main employment abroad, the agreement may still determine that the employment as a civil servant is only covered by Danish social security rules.

Indicative for interpretation is the general international law principle of state sovereignty. Denmark as a state should not be subject to demands by the US Government and such claims are also difficult to pursue with reference to international law. Further, it is inappropriate that Danish public funds finance the public American social security scheme.

This allows the Danish university to resolve the choice of law conflict linked to the university's social contribution obligations.

It is important that the individual situation is interpreted specifically in relation to the wording and purpose of the agreement.

8.4 Does the social security agreement govern the situation partially? – The work country's rules

If (part of) the work is not covered by the rule on civil servants, it should be examined whether (part of) the employment is covered by the provision that the work country's rules apply.

In this context, it is important to keep in mind that the choice of law rules of the agreement aim to prevent dual jurisdiction, i.e. that both countries can apply its rules simultaneously and levy social contributions for the same salary earned in the same period.

An example to this is the agreement between Denmark and USA, where Article 6(1) states that:

Except as otherwise provided in this Article, a person employed within the territory of one of the Contracting States shall, with respect to that employment, be subject to the laws of only that Contracting State.

Another example is the agreement between Denmark and China, where Article 3(1) prescribes:

Except as otherwise provided in this section, a person employed or self-employed within the territory of one of the Contracting States shall, with respect to that employment or self-employment, be subject to the legislation of only that Contracting State.

The rule provides that it is only the rules in the work country, which could be exclusively applied. However, the provision is not designed to prevent the frequent changes in legislation, which will be the result of frequent change of work country.

If the part of the work carried out at the Danish university is performed only in Denmark, the Danish university may only be subject to Danish law and will be obligated to pay Danish social contributions.

It will be difficult if the university employee is performing the part of the work related to the Danish employment abroad (i.e. in the country where the main job is performed). In such a situation, it should be considered whether the rule on civil servants will apply partially and thereby cover this work.

8.4.1 Does the posting rule apply?

If it is determined that the provisions of the agreement stating that rules of the work country apply to the part of the work performed for the Danish university, it should be considered whether the posting rule, with reference to its wording and purpose, can be used to have the university employee being covered by Danish social security regarding the part of the work related to the Danish employment but performed abroad.

In this context it should be considered whether the university employee meets all the conditions of a posting. When the posting rules usually require a certain attachment to Denmark prior to the posting (residence or Danish social security), this will probably not be the case for university employees who have their main employment abroad.

8.5 The university employee has a secondary job in a country which Denmark has not entered a social security agreement with

When the university employee is performing work both in Denmark and in a non-EU/EEA country that Denmark has not entered a bilateral social security agreement with, the issue of coordination of social security has not been regulated internationally.

The employee's social security is only governed by national legislation in the involved countries.

COMPLIANCE

9 Rules of procedure

Where the university employee is covered by other rules than those of the work country, the university employee and the employer are under an obligation to determine which country's social security rules apply.

Especially within the EU, a number of rules of procedure have been laid down describing specifically which authority the employer should approach. The rules of procedure in each individual situation have been described below. As a general rule, a certificate of social security coverage must be applied for if the university employee in question does not only work permanently in one country.

As a general rule, an A1 certificate must be obtained certifying which country's rules apply to the university employee. It is, however, important to note that the A1 certificate is merely documentation and the choice of law rules apply even if the certificate has not been obtained. It is always the actual situation of the university employee which determines where he/she is covered by social security, see CJEU ruling in C-345/09 (EU:C:2010:610), *van Delft*.

9.1 Which authority should receive the application for an A1 certificate if the university employee is a civil servant?

Where the university employee is covered by the rules of public employment in Denmark and thus covered by Danish social security under Article 11(3)(b) of Regulation 883/2004, a certificate of Danish social security coverage must be applied for in the country of the administration in question.

The university or the university employee must therefore file the application with the Danish authorities, Udbetaling Danmark – International Social Sikring in the case of a Danish public employment, see Article 15(1) of Regulation 987/2009. Based on the application, the authorities will issue an A1 certificate, see Article 15(2).

In cases where the university employee has only one and the same employment relationship, the electronic application form on the website virk.dk is to be used. The questionnaire may be used by the university employee and by the university. As regards the nature of the work, "other" should be ticked adding that the university employee is a civil servant.

It should appear from the application that Udbetaling Danmark is requested to issue an A1 certificate. Udbetaling Danmark issues the form for one year at a time. It is possible to apply for extension.

See the section *Which authority should receive the application for an A1 certificate if the university employee is covered by the special posting rules?* for a description of the possibility of being exempted from the A1 certificate in connection with short business trips/ad hoc trips.

9.2 Which authority should receive the application for an A1 certificate if the university employee is covered by the rules on multi-state work?

An application regarding determination of applicable law should always be filed with the authority of the university employee's country of residence if the university employee works in two or more countries, Article 16(1) of Regulation 987/2009.

According to the provision, the university employee must file the application. If the university employee is only a civil servant employed by a Danish university and works in two or more countries, he/she will always be covered by Danish social security. If the university employee has no other private employers nor

is a self-employed person in other countries, the applicable legislation follow from Article 11 of the Basis Regulation. If the university employee has another private employer or is a self-employed person, applicable legislation stems from Article 13. As the rules of procedure differ, it is essential to determine which set of rules applies to the university employee.

According to Article 16 of the implementation Regulation, the authorities must make an immediate decision and share this with other relevant authorities. Other authorities are allowed an objection period of two months, after which the decision will be final.

Where the university employee is covered by the rules on multi-state work, the rule that marginal activities are disregarded applies, see Article 14(5)(b) of Regulation 987/2009. It does, however, follow from the second sentence of the provision that the procedure of the implementation Regulation must always be followed. That implies that even if the university employee performs all of his/her main activities in one country and only performs marginal activities in another country, the rule of procedure must nevertheless be followed, and an application to determine the country whose rules should be applied must be filed.

The electronic application form on the website virk.dk is to be used. The questionnaire may be used by both the university employee and by the university. As regards the nature of the work, "other" should be ticked adding the countries in which work is performed.

It should appear from the application that Udbetaling Danmark is requested to issue an A1 certificate. Udbetaling Danmark issues the certificate for one year at a time. It is possible to apply for an extension.

9.2.1 Must an application always be filed when the university employee works in two or more countries?

The rules on multi-state work involve considerations as to when normal work in two or more countries is deemed to exist. These considerations include:

- The multi-state work must be "normal".
- Activity of a marginal nature is disregarded

Due to these considerations, the rules will in certain situations not apply to the university employee although the work is physically performed in two or more countries. This gives rise to asking the question whether an application regarding determination of applicable law should be filed.

It follows from Article 16(1) of Regulation 987/2009 that an employee who performs activities in two or more EU/EEA countries shall inform the institution designated by the competent authority of the country of residence. Thus, the provision does not stipulate that the performed work is "normal" in order for information to the authorities to be required. It therefore sufficient that the work is performed in two or more countries. When the authorities have been informed, they will, based on the information provided, consider whether the work can be regarded as "normal".

It moreover follows from the rules that the authorities must be informed even if the activity performed in a country is marginal, see Article 14(5)(b), second sentence, cf. Article 16, of Regulation 987/2009. This has also been clarified on pages 27 ff of the Practical Guide (December 2013, English version) issued by the European Commission.

The procedure of Article 16 of Regulation 987/2009 remains applicable to all cases in which a person pursues an activity in one State and a marginal activity in another. This follows from the text of Article

16, which applies to all cases where a person pursues an activity in two or more Member States, irrespective of the working pattern.

In summary, this implies that there is no triviality limit as to when an application regarding determination of applicable law must be filed. The main reason for this is that the countries may have different understandings of the rules that need to be aligned.

9.3 Which authority should receive the application for an A1 certificate if the university employee is covered by the special posting rules?

If the university employee is covered by the special posting rules, the application regarding determination of applicable law must be filed with the authorities in the country from which the university employee has been posted, see Article 15(1-2) of Regulation 987/2009.

The authorities may decide single-handedly whether the posting conditions have been met. The authorities are not obliged to coordinate the decision with any other countries. Other countries may, however, ask to be notified of the decisions made.

It should appear from the application that Udbetaling Danmark is requested to issue an A1 certificate although, as a general rule, Udbetaling Danmark always does that in connection with posting to another country. Udbetaling Danmark issues the certificate for the entire posting period.

If the host country has reason to believe that the posting conditions have not been met, the authorities in the host country must approach the authorities in the home country on the matter. Based on this approach, the authorities in the home country are obliged to reassess the situation, see C-178/97 (EU:C:2000:169), *Banks* and C-202/97, (EU:C:200:75), *FTS*.

The electronic application form on the website virk.dk is to be used when the university employee is posted to another country from Denmark. As regards the nature of the work, ”employee” should be chosen irrespective of the university employee’s status in other countries.

If the university employee is covered by social security abroad because he/she has been posted to Denmark, the authorities in the foreign country/home country must be approached.

9.4 When not to apply for a certificate of social security coverage

A certificate of social security coverage is not to be applied for particularly in two situations:

1. The university employee works only in the country whose rules are applied. If the university employee is covered by Danish social security because the university employee is a civil servant, there is no need to apply for an A1 certificate if the work is performed in Denmark only, see Article 15(1) of Regulation 987/2009.

2. The university employee is covered by the posting rule in Article 12 of Regulation 883/2004, and is only on a very short business trip of some days’ duration. It is a general rule in Danish practice that there are no exceptions to the rule that short posting periods do not involve a requirement for applying for an A1 certificate.

The issue was, however, considered by the European Commission in response to a question from a member of the European Parliament; see the written answer of 3 January 2012 from the Commission to question P 011698/2011 of 7 December 2011 from Evelyn Gebhardt:

Parliamentary questions
3 January 2012
P-011698/2011

Answer given by Mr Andor on behalf of the Commission

A posting situation is an objective one, based on the facts of the particular situation. It exists whether or not the person concerned is in possession of the appropriate document. However, the European Court dealt extensively with the legal effects of the posting certificate in its case-law and gave it an important protective role for posted workers.

The worker or employer is therefore advised to request portable document A1 in advance of the posting whenever possible and regardless of the length of the posting period. EU social security legislation does not provide that a posting shorter than one week would not require a document A1 (certificate on applicable legislation), if needed. However, as stated above, document A1 is in no way a prerequisite to qualify a situation as a genuine posting according to Regulation (EC) 883/2004. The European Court clarified already in Case C-178/97 Barry Banks that the certificate on applicable legislation, such as portable document A1, may also have retroactive effect.

The posting situation of a very short period should be dealt with by the relevant national institutions in a flexible manner and with common sense and does not normally require a posting certificate if the posting takes just a few days and no incident such as an accident at work occurs. If necessary, the competent institution of the sending State can issue the certificate retroactively.

With the exception of one recent general complaint by a German organisation, the Commission has not received any complaints linked to the short term posting and delivery of portable document A1 under Regulation (EC) 883/2004 and has therefore no intention to address this issue for the moment.

Based on the answer, the German ministry of labour and social affairs has prepared detailed guidelines on the issue. You may read the guidelines here [link]

The exemption concerns postings under Article 12(1) of the Basis Regulation.

The exemption cannot be applied to the rules on multi-state work because this issue is independently regulated, see Article 14(5)(b), second sentence, cf. Article 16, of Regulation 987/2009

It should be considered whether the exemption may be applied to the rule on public employment in Article 11(3)(b) of the Basis Regulation. As this provision is governed by the same procedure provision as the posting rule, and as the considerations underlying the procedure are identical to those of the posting rule, this speaks in favour of the exemption being applicable.

The university should therefore consider which internal procedure to follow and determine which employees to recommend applying/not applying for, respectively.

ADMINISTRATIVE PROCEDURE

When authorities make a decision as to which country's social security rules apply, the individual authorities will follow the local/national rules of procedure to make a decision. It is the administrative law rules on e.g. application format/form, consultation with the parties and deadlines of the individual country that apply.

Usually, international coordination rules include a number of provisions as to how the authorities should work together. The rules may have implications to citizens as the rules are intended to ensure that the citizen's inquiry is processed in a concerted manner.

10 Am I entitled to file the application with a foreign authority in Danish or English?

Within the EU/EEA, citizens may approach the authorities in any of the official languages of the EU/EEA countries, see Article 76(7) of Regulation 883/2004. The provision refers to Article 290 of the Treaty (now Article 342 TEUF), which is further clarified in Regulation 1/1958, as amended. As regards the Nordic countries, the provision has been supplemented by the Nordic Language Convention The Nordic Language Convention.

To facilitate the administrative procedure, we do, however, recommend that foreign institutions are approached in English.

Outside the EU/EEA, i.e. when agreements on social security are applied, it is common for the agreement or the related administrative agreement to entitle the applicant to file an application for certificate of social security coverage in the official languages of the countries that have entered into the agreement irrespective of which authorities in these countries to address. Moreover, official bilingual standard forms have often been prepared. If, say, an English-speaking university employee moves to Denmark, the university employee will be entitled to communicate with Udbetaling Danmark in English.

10.1 What will I do if my application falls between two competent authorities?

Within the EU/EEA, the authorities are obliged to work together to ensure a smooth administrative procedure. Therefore, the authorities may in principle be addressed and asked to cooperate with the foreign authorities. However, based on experience, such cooperation may sometimes be more ideal than real.

If a decision cannot be made, the university should contact Udbetaling Danmark – International Social Sikring for detailed instructions as to which measures the university employee should take.

10.2 What will happen if the application is filed with the authorities in the wrong country?

Sometimes the application will end up with the wrong authorities. This may be due to either an error or to the authorities not accepting the assumptions applied for filing the application with the authorities in question.

In principle, the authorities should forward the application to the authorities in the correct country and inform the applicant of this. Alternatively, the authorities should provide guidance as to which foreign authorities to contact.

It is, however, a good idea to investigate yourself how the application should be sent on.

10.3 The case involves a deadline – how to interrupt the deadline?

In certain cases the authorities will indicate a deadline for further processing steps; e.g. in relation to the filing of additional information or a deadline for complaints.

As a general rule, the deadline may be interrupted in accordance with the national rules of the authorities. It is therefore important to establish the date from which the deadline is calculated and when and how it is interrupted.

The deadline may, however, also be interrupted by filing the documentation with the authorities in another EU country, e.g. Udbetaling Danmark – International Social Sikring. In that case, the Danish authorities is obliged to forward the documentation to the foreign authorities.

HOW TO HANDLE AND COMPLY WITH DANISH SOCIAL SECURITY LEGISLATION

11 To which university employees does this apply?

The Danish university as well as the university employee must comply with Danish social security rules if he/she is covered by Danish social security.

12 What does it mean to the Danish university that the university employee is covered by Danish social security?

If the university employee is covered by Danish social security, Danish social security rules must be applied to the university employee irrespective of his/her place of residence and work.

The employer's ordinary obligations relate in particular to the following matters:

12.1 Contributions to ATP (Danish Labour Market Supplementary Pension Scheme)

The university must ensure ongoing contributions to ATP. This applies whether or not the university employee is liable to taxation in Denmark. Typically, employees working outside Denmark will not pay tax in Denmark on the salary earned from working abroad.

12.2 Contributions to other funds

In continuation of the ATP contribution, the university is also required to make contributions to various other funds, i.e. AES (Danish Labour Market Occupational Disease Insurance), AUB (Employers' Reimbursement System), etc. Collection should be made automatically as a result of the ATP reporting.

12.3 Handling of workers' compensation insurance

The university must ensure that the university employee is covered by the insurance for accidents at work. To the extent that the university is a self-insured, public institution, this should not give rise to any further measures.

13 What does Danish social security coverage mean to the Danish university and the university employee abroad?

When the university employee is covered by Danish social security, the university employee will, as a general rule, be treated as if he/she worked and resided in Denmark.

A number of additional circumstances may, however, apply.

13.1 Contributions to ATP

The university employee must pay contributions to ATP. The university will be responsible for ensuring that the amount is withheld on a current basis. Contributions to ATP requires that the Danish employee has a Danish civil registration (CPR) number. This may be obtained by contacting ATP.

13.2 Sickness benefits in the country of residence outside Denmark

If the university employee is covered by Danish social security but resides in another EU/EEA country, the university employee is entitled to full health coverage under the national legislation of the country of residence, see Article 17 of Regulation 883/2004. Family members that are not engaged in active employment are also covered.

To ensure that the right is administered correctly, the university employee should register his/her right in the country of residence. This is done by the university employee asking the Danish municipality to issue

an S1 certificate. The authorities in the country of residence must be notified of the S1 certificate, see Article 24 of Regulation 987/2009. If the university employee has never resided in Denmark, the authorities of the municipality in which the university is situated must be approached.

13.3 Sickness benefits outside the country of residence and outside Denmark

If the university employee is covered by Danish social security but stays in another EU/EEA country than Denmark and his/her country of residence, the university employee is entitled to the treatment that becomes necessary, from a medical point of view, during his/her stay taking into account the nature of the services and the expected duration of the stay. The treatment is provided under the national legislation of the country of residence, see Article 19 of Regulation 883/2004. Family members that are not engaged in active employment are also covered.

To ensure that the right is administered correctly, the university employee should arrange for the issue of a European Health Insurance Card documenting the right in the country of residence, see Article 25 of Regulation 987/2009. The detailed rules for issuing the European Health Insurance Card are available from Decision on S1.

13.4 The university employee becomes entitled to Danish child and youth benefits

As a general rule, the university employee is entitled to Danish child and youth benefits under the Danish rules.

If the university employee has not been covered by Danish social security before being employed by the Danish university, the ordinary conditions concerning waiting period apply to the benefits.

However, within the EU, the university employee will be able to "fill" the Danish waiting period through insurance periods earned in another EU country in the period up until Danish social security coverage.

Denmark has previously interpreted the rules to the effect that it was not possible to aggregate foreign periods until also Danish periods had been earned. The CJEU has, however, rejected this interpretation, see ruling in C-257/10 (EU:C:2011:839), *Bergström*.

The university employee will be entitled to full Danish family benefits. As of 1 January 2014, the benefits are income-related. In practice, this is done on the basis of the salary appearing from the university employee's Danish preliminary tax assessment and the subsequent final tax assessment notice. Income that does not appear from the preliminary tax assessment/final tax assessment notice will not be taken into account. That effectively implies that salaries comprised by the Special Tax Scheme for Researchers under Section 48 E-F of the Danish Withholding Tax Act do not affect the level of the Danish child and youth benefits.

The university employee's family may also be entitled to family benefits from other EU/EEA countries. The university employee is entitled to the highest of the benefits. It depends on the specific situation of the family whether Denmark is to pay the full benefit or only part of it. Application for the benefit is to be filed with Udbetaling Danmark who coordinates with the foreign authorities, possibly in cooperation with the university employee, subject to further instructions.

13.5 Unemployment benefits

The university employee covered by Danish social security is entitled to join a Danish unemployment insurance fund and to receive benefits from this fund on an equal footing under Danish legislation.

The waiting period until the benefits may be received may be "filled" through insurance periods from another EU/EEA country earned in the period until the university employee achieves Danish social security coverage. The right is administered by means of a so-called U1 certificate which may be obtained from the authorities with which the university employee has so far been insured against unemployment.

If the university employee has been covered by unemployment insurance in another EU/EEA country in the period until Danish coverage, it is important that the university employee joins a Danish unemployment insurance fund immediately. If this does not happen, it will not be possible to aggregate periods, thus achieving a right to Danish unemployment benefits from day 1.

13.6 What should the university do if the university employee is covered by foreign social security?

13.6.1 Danish social security aspects

If the university employee is not covered by Danish social security, the university is not required to contribute to this. Within the scope of Regulation 883/2004, this implies that the Danish university is not required to contribute to ATP and make the related contributions to AUB, AES, etc.

Moreover, the Danish university is not responsible for handling any aspects under the Danish workers' compensation insurance legislation with respect to the university employee.

If the university employee falls sick, the university employee is not entitled to salary or other benefits during sickness under Danish legislation, i.e. the Danish Sickness Benefits Act, the Danish Salaried Employees Act, etc. The university is not entitled to any reimbursement of Danish sickness benefit upon payment of salaries. The coordination rules do not apply to rights under collective agreements, see Article 1(l) of Regulation 883/2004.

The Danish legislation governing maternity leave does not apply. The university is not entitled to any reimbursement of Danish maternity benefit upon payment of salaries. The coordination rules do not apply to rights under collective agreements, see Article 1(l) of Regulation 883/2004.

If the employee is covered by foreign social security under an agreement on social security, parts of the Danish social security legislation may not be comprised by the agreement; consequently, the coverage of the university employee must be handled under Danish legislation. It follows from the individual legislation when a university employee may remain covered by the legislation during periods of work abroad.

13.6.2 Handling obligations abroad

If the university employee is subject to a social security scheme abroad, this will involve an obligation on the part of the university and the university employee to pay social contributions to that country's social security system under national legislation. The obligation exists irrespective of the university being permanently established in that country, see Article 21(1) of Regulation 987/2009.

If the university is not permanently established (domiciled or place of business) in the country in which the university employee is covered by social security, national schemes often require the university to register in order to be able to make the social contributions. Fundamentally, it has been discussed whether the requirement for national registration is in conflict with the principle of assimilation of facts in Article 5 of Regulation 883/2004; it will probably, however, be very difficult to initiate a fruitful discussion with foreign national authorities.

If the university is not permanently established (domiciled or place of business) in the country in which the university employee is covered by social security, Article 21(2) of Regulation 987/2009 provides the option for the university to enter into an agreement with the university employee to the effect that the university employee pays the social contributions on behalf of the employer. The authorities in the country in which the university employee is covered by social security must be notified of the agreement.

13.6.2.1 Possibility of entering into payment agreements

Article 21(2) regulates the possibility for the university employee to fulfil, on behalf of the university, the obligations resting on the university with respect to payment of contributions; without prejudice, however, to the employer's underlying obligations.

The provision thus seems to presuppose that the payment to be made by the university employee is in addition to the employee's salary, i.e. that the university must pay its contribution to the university employee, after which the university employee pays the contribution to the foreign authorities.

The provision does not, however, actively consider the possibility of passing on the entire obligation to the university employee so that the university employee is obliged to settle his/her own and the university's contributions out of his/her gross salary. Therefore, the provision probably does not rule out this possibility.

In a Danish context, the provision should be viewed in light of the university's obligation to pay the collectively-agreed salary to the university employee. In that connection the Danish Agency for Higher Education has in a letter dated 7 July 2014 reproduced the opinion of the Danish Agency for Modernisation, Ministry of Finance in its e-mail of 2 July 2014 as follows [translated into English by PwC]:

"Re your inquiry of 22 January 2014 concerning social security:

If an employee, employed by a Danish public employer, is covered by social security in another EEA country than Denmark, the general rule is that the employer must pay social contributions in the EEA country in question. Departure from this is allowed only subject to agreement between the employer and the employee, see authority granted in Article 21 of the Implementation Regulation, to the effect that the employee pays the social contributions.

In the opinion of the Danish Agency for Modernisation, Ministry of Finance, an agreement between an employer and an employee on the employee's payment of social contributions is not in breach of the existing collective agreement. This is substantiated by the employee only being entitled to a collectively-agreed gross salary. This gross salary includes any payment of social contributions or taxes. Therefore, the employee's collectively-agreed salary is not reduced. The employee's entitlement according to the collective agreement to a certain gross salary has been determined without any assumption of the employee being entitled to a specific net salary. The social contributions are thus payable from the employee's net salary.

In an e-mail of 6 February 2013, the Danish Agency for Modernisation, Ministry of Finance observed that the a Danish public employer does not have the option of entering into an agreement with the employee on a reduction of the collectively-agreed salary. This is still the general rule, adding, however, that payment of social contributions is not to be regarded as a reduction of the gross salary.

Moreover, it should be noted that the authority granted in Article 21 of the Implementation Regulation with respect to the above agreement does not impose any obligation to enter into such agreement, but is merely an option open to the parties."

If the university employee does not make the payment, the employer will under Article 21(2) have a subsidiary obligation to pay the amounts. The subsidiary obligation should also be viewed in light of the national authorities not as a general rule being allowed to waive claims for social contributions due to the rules prohibiting state aid; reference is made to CJEU ruling in case C-75/97 (EU:C:1999:311), *Belgien mod Kommissionen* and case C-251/97 (EU:C:1999:480), *Frankrig mod Kommissionen*. Thus, the coordination rules do not consider the relationship between the university and the university employee if the university employee defaults on the payment obligation.

HOW TO COMPLY WITH THE RULES ON AND HANDLE PAYMENT OF FOREIGN SOCIAL CONTRIBUTIONS

14 To whom does this apply?

The Danish university and the university employee must comply with foreign social security rules if the employee is covered by social security abroad.

14.1 What does it mean to the university that the university employee is covered by social security abroad?

When the university employee is covered by social security abroad, he/she must comply with the social security rules of that country irrespective of where the employee resides and works.

The obligations of the employer are thus regulated completely under national rules in the country in question. However, the Danish university is entitled to equal treatment with local employers in that country.

14.2 Should the university register in the country where the university employee is covered by social security?

It is completely up to the national rules to decide how the university is to handle its obligations. Most EU countries have adopted schemes requiring that the university in its capacity as employer register to be able to pay the employer's share of the contributions.

If the university employee is not covered by social security in his/her country of residence, it may be necessary to register the employee or that he/she obtains an ID number to be able to be covered by the national social security scheme.

14.3 May the university employee pay on behalf of the university?

Article 21(2) of Regulation 987/2009 provides the possibility for a Danish university, which does not have a place of business in the EU country whose legislation is applicable, to agree with the university employee that he/she meets the university's obligations on behalf of the university. However, the Danish university is always liable for the underlying obligation. The Danish university must send notice of such an arrangement to the competent institution of the EU country state in question.

The way in which this rule is administered may vary a lot between the different EU/EEA countries. The university should therefore look into the below rules in respect of the individual EU country before any agreement is reached with the university employee:

- Does the EU country even allow an agreement to be made under which the university employee pays the contribution on behalf of the Danish university?
- Is the agreement an agency situation under which the university employee pays on behalf of the university or is the obligation actually being transferred directly to the employee?
- What requirements are made of the Danish university if the university employee fails to meet the payment obligation?
- What does the authority granted to the university employee entail?
- In what way does the transfer of the payment obligation to the university employee affect the amount to be paid?

The non-uniformity in the manner in which agreements are entered means the university must be careful when applying this approach.

DESCRIPTION OF SOCIAL SECURITY ABROAD

Below you will find a brief description of social security schemes abroad.

You will find a list of the approximate obligations in:

- Sweden
- Germany
- United Kingdom
- France

You will moreover find descriptions of social security schemes in the follow countries:

- China
- USA

The descriptions may be used to gain a general understanding of the costs that may be imposed on the Danish university.

SUMMARY OF THE APPROXIMATE OBLIGATIONS ABROAD

Below is a list of the approximate costs that may be incurred by university, i.e. employer's contributions (2014):

Country	Contribution rate	Comment
Sweden	21.54%	
France	45%	There is a cap on some contributions
Germany	19.275%	There is a cap on some contributions
United Kingdom	13.8%	

The amounts express the estimated percentage rates of the gross salary. A specific clarification should always be made of the employee's social security status to allow the determination and estimation of the individual costs in each individual case.

CHINA

Please find below a brief description of the coordination rules between Denmark and China. You will moreover find a brief description of the Chinese rules.

15 Coordination rules between Denmark and China

Denmark has entered an agreement on social security with China (Social security agreement with China). The agreement consists of a main agreement and an implantation agreement. Both parts became effective as from 1 May 2014.

15.1 The substantial scope of the agreement on social security

The scope of the agreement is "narrow", which means that it only applies to public pensions, see Article 2(a). As regards Denmark, the agreement concerns ATP (the Danish Labour Market Supplementary Pension) and the Danish national pension.

A university employee may still be covered by Danish rules on ATP and national pension and may be exempted from contributing to the Chinese Basic Old-Age Insurance for Employees.

Other schemes such as accidents at work are still regulated under Danish and Chinese law.

15.1.1 Civil servants

The agreement on social security contains special provisions on civil servants, see Article 6.

The agreement provides that civil servants remain covered by social security in the country in whose administration they are employed even though their work is performed in another country. This means that Danish university employees (who are civil servants) will be covered by Danish social security (pension) even though the work is performed in China.

However, the agreement provides no delimitation of the persons to be covered by the provision. The Danish Ministry of Children, Gender Equality, Integration and Social Affairs clarified in February 2014 that the term "civil servant" is to be delimited as specified by Article 1(d) of Regulation 883/2004.

This means that university employees will be covered by the term "civil servant".

15.1.2 Posting from Denmark

Article 4 of the agreement on social security provides the possibility of posting Danish employees to China under Danish social security.

Posting from Denmark is conditional on:

- The employer is domiciled in Denmark
- The employee has a Danish residence prior to the posting
- The length of the posting period may not exceed three years. It is possible, however, to ask for the authorities' exceptional acceptance of posting from Denmark for a duration of up to five years

The posting rule also applies to accompanying family members.

The posting rule will in general not be relevant for Danish universities.

15.1.3 Family members

The agreement also regulates the applicable law of the university employee who remains covered by Danish social security either as a civil servant or a posted university employee and who is accompanied by family members to China.

Family members will also be covered by Danish social security if the family members themselves are not engaged in active employment.

It is unusual for an agreement on social security to include provisions on family members in relation to a provision on civil servants. Normally provisions on family members only apply to posted employees.

15.1.4 The agreement on social security is relevant throughout China

Chinese law has since 2011 made it mandatory for foreign enterprises to pay Chinese social contributions. There may, however, be certain areas in China where in practice no such contributions are charged.

The Danish Ministry of Children, Gender Equality, Integration and Social Affairs has stated (February 2014) that the negotiations of the agreement on social security were not based on the assumption that mandatory social contributions should not be charged but that the implementation of the charge could be lengthy.

15.2 The Chinese social security system – what's the cost?

The Chinese social security system includes the following coverage and contributions:

Coverage	**University contribution**	**University employee contribution**
Pension	20%	8%
Sickness insurance	10%	Approx. 2%
Unemployment benefits	1%	0.2%
Maternity benefits	0.8%	0%
Workers' compensation	1% (depending on industry)	0%
Total	**32.8%**	**10.2%**

15.2.1 Contribution cap

A cap has been introduced to the contributions implying that social contributions are charged on an annual maximum amount of RMB 208,548 (2014) for the employer.

A cap has been introduced to the contributions implying that social contributions are charged on an annual maximum amount of RMB 208,901. (2014) for the university employee.

15.2.2 Expenses for social contributions

	University		University employee	
	Annual 2014 (RMB)	Monthly 2014 (RMB)	Annual 2014 (RMB)	Monthly 2014 (RMB)
Cap on basis of charge	208,548	17,379	208,901	17,379
Contribution	32.8%	32.8%	10.2%	10.2%
Contribution cap	64,404	5,700	21,308	1,775

15.2.3 Application for reimbursement of social contributions

Foreign university employees staying and working for a temporary period in China may at the end of their stay apply for reimbursement of the social contributions paid.

In this connection, the university should discuss with the university employee who handles this application.

Different administrative processes are linked to such an application that vary depending on the office administering the reimbursement.

15.2.4 Coverage obtained by the university employee in China

As a general rule, the university employee will be covered in China on an equal footing with Chinese citizens under Chinese law.

The university employee will therefore be covered when social contributions are paid. There are, however, various waiting periods in Chinese law to be observed by the university employee.

The waiting period in respect of Basic Old-Age Insurance is 15 years and will therefore in reality provide no entitlement to any benefit.

The waiting period in respect of unemployment benefits is one year.

USA

Please find below a brief description of the coordination rules between Denmark and the US. You will moreover find a brief description of the US rules.

16 Coordination rules between Denmark and the US

Denmark has entered an agreement on social security with the US (Social security agreement with USA). The agreement consists of a main agreement and an implementation agreement. Guidance notes have moreover been issued (guidance no. 49 of 6 August 2008, Danish version) on the agreement. Both parts became effective as from 1 October 2008.

16.1 The substantial scope of the agreement on social security

The scope of the agreement is "narrow" which means that it only applies to public pensions, see Article 1(b). As regards Denmark, the agreement concerns ATP (the Danish Labour Market Supplementary Pension), the Danish national pension and early retirement pension.

An employee may still be covered by the Danish rules on ATP, national pension and early retirement pension and may be exempted from contributing to the American old-age insurance program.

Other schemes such as accidents at work and sickness insurance are still regulated under Danish and US law.

16.1.1 Civil servants

The agreement contains special provisions on civil servants, see Article 6(7)(b).

The agreement determines that civil servants remain covered by social security in the country in whose administration they are employed even though their work is performed in another country. This means that Danish university employees (who are civil servants) will be subject to Danish social security (pension) even though the work is performed in the US.

The provision only applies to Danish and US citizens. However, Denmark must observe its obligations under EU law in respect of non-discrimination of EU citizens under the Danish administration of the agreement, see CJEU ruling in C-55/00 (EU:C:2002:16), *Gottardo*. The interpretation of this ruling is in process (December 2014).

The agreement provides no delimitation of the persons to be governed by the provision. Usually, the Danish authorities apply the term "civil servant" as specified by Article 1(d) of Regulation 883/2004.

This means that university employees will be covered by the term "civil servant".

16.1.2 Posting from Denmark

Article 6(2) of the agreement on social security provides the possibility of posting Danish university employees in the US under the Danish social security.

Posting from Denmark is conditional on:

- The employer is domiciled in Denmark
- The employee has a Danish residence prior to the posting
- The length of the posting period may not exceed three years

The provision not only applies to Danish and US citizens but also citizens from other countries such as Sweden and Germany if they have a residence in Denmark.

The posting rule applies moreover to so-called back-to-back postings which means that the university employee is at first posted in another country under Danish social security and is subsequently sent directly to the US. University employees may in this case remain covered by Danish social security even though the total length of the posting period exceeds three years. The posting period in the US may not, however, exceed three years. It is a condition that the employee is covered by Danish social security during his/her first posting.

The posting rule will in general not be relevant for Danish universities as the university employees (when they are EU citizens) will be covered by the rule on civil servants.

The posting rule will, however, be relevant for non-Danish citizens and university employees accompanied by family members.

Udbetaling Danmark has previously made decisions under the posting rule even though the employee in question was a civil servant.

16.1.3 Family members

The agreement also regulates the applicable law of the university employee who remains covered by Danish social security while posted and who is accompanied by family members to the US.

Family members will also be covered by Danish social security if the family members themselves are not engaged in active employment.

Family members accompanying a university employee, who is covered by Danish social security under the posting rules (but not the rule applying to civil servants), will also be covered by Danish social security (pension) during the posting period.

16.2 The US social security system – what's the cost?

Below is a general description of the costs that the university may incur from having the university employee covered by US social security.

16.2.1 Short-term postings

Conditions:

1. The Danish university employee works temporarily in the US (typically six months).
2. The Danish university employee is employed (not studying or in post-doctoral fellowships) (or: the university has not been approved or pre-approved by an acknowledged validating agency under the rules of the US Department of Education, see 34 CFR § 600.2 (1997)).
3. The Danish university employee has residence status for either tax or non-tax purposes in the US.
4. There are no certificates or documentation available on Danish coverage.
5. All the work is performed in the US.
6. The Danish university is assumed not to be a public institution or under the management of such an institution.

16.2.2 The university employee resides and works in the US as a non-resident on one of the following visas: F, J, M or Q

The salary is not subject to FICA (US Federal Insurance Contributions Act) if the university employee is a non-resident for federal income tax purposes based on a special exemption rule depending on the type of visa, see section 3121(b) (19) of the US *Internal Revenue Code*. Typically, persons staying in the USA on one of the above visas will be treated as non-residents. The university employee must provide a W-4 form for his/her employer establishing his/her status as a non-resident.

16.2.3 Other situations

The US social security system includes the following coverage and contributions:

Coverage	**University contribution**	**University employee contribution**
Old-age, survivors, and disability insurance	6.2%	6.2%
Medicare (health insurance)	1.45%	1.45%
Total	**7.65%**	**7.65%***

*The university employee is moreover to pay a supplementary contribution of 0.9% (2014) of the part of the salary exceeding USD 200,000.

The various elements of the US social security scheme are collectively referred to as FICA (Federal Insurance Contributions Act). FICA covers social security benefits including old-age, survivors and disability insurance (OASDI). It moreover includes Medicare (health insurance).

The Danish university and the university employee share the obligations under FICA.

The university employee's share is withheld from his/her salary (except for additional health insurance tax on salaries exceeding USD 200,000, see below).

The employer is obligated to report salaries subject to FICA and to withhold the annual FICA contribution based on forms W-2 and 941.

The university employee's share of contributions to old-age insurance and survivors and disability insurance is 6.2% of the gross salary and 6.2% of the gross salary for the employer, however, only in respect of salaries up to a certain limit. This limit was USD 117,000 in 2014 and will be USD 118,500 in 2015.

Health insurance is levied at a general unlimited rate of 1.45% for both employers and employees.

An additional health insurance tax is levied on salaries which exceed a limit depending on the status of the applicant. This additional health insurance tax is only levied on employees and is levied at a rate of 0.9%.

The employer must withhold the health insurance tax from the part of the annual salary which exceeds USD 200,000. The actual liability in respect of the additional health insurance tax is calculated based on the employee's annual US tax return (forms 1040 and/or 1040NR). The additional health insurance tax is levied on salaries which exceed the below limits:

1. USD 200,000 for persons who are reporting as single or the head of a household
2. USD 250,000 for taxpayers who are married and report as a couple
3. USD 125,000 for spouses reporting individually

Certain exceptions may apply. The above information is based on US tax legislation in force at 16 December 2014 and the assumptions that were made at the outset. Exceptions in respect of different types of visa may occur.

16.2.4 Expenses for social contributions

The amounts are approximate as not all contributions are limited:

	University		**University Employee**	
	Annual 2014 (USD)	Monthly 2014 (USD)	Annual 2014 (USD)	Monthly 2014 (USD)
Cap on basis of charge	117,000	9,750	117,000	9,750
Contribution	7.65%	7.65%	7.65%	7.65%
Contribution cap	8,950	746	8,950	746

The employee must moreover pay an additional contribution of 0.9% (2014) on salaries exceeding USD 200,000.