

Applicable legislation: Switzerland-EU rules to continue under bilateral framework

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The new bilateral agreement between Switzerland and the UK governs social security coverage for persons in a cross-border situation. Its provisions are modelled on those set forth in Regulations (EC) Nos. 883/2004 and 987/2009. The two Contracting States are thus continuing with the familiar rules and the high degree of coordination provided by the FMOPA.

Title II of the [new Social Security Convention between Switzerland and the UK](#), which is provisionally applied since 1 November 2021, contains a comprehensive set of conflict-of-law rules. It determines the national social security legislation applicable to persons who are in a cross-border situation between the two Contracting States, and who are not subject to the [Citizens' Rights Agreement](#) (SR 0.142.113.672) (for more on this subject, see Fréchetin, Kati [2021]. Citizens' Rights Agreement: protecting the rights acquired under the Agreement on the free movement of persons. *Social Security CHSS*).

The purpose of the rules on applicable social security legislation in the new convention is to avoid simultaneous liability in both States or gaps in insurance. These rules facilitate the mobility of workers while preserving their rights and clarifying their obligations. The new provisions very largely correspond to the structure and contents of Title II of [Regulation \(EC\) No. 883/2004](#) (SR 0.831.109.268.1), to which Annex II of the [Agreement on the Free Movement of Persons](#) (FMOPA, SR 0.142.112.681) refers. Some minor adaptations have been introduced to reflect a strictly bilateral context. Furthermore, an improvement has been made concerning the situation of family members accompanying a posted worker.

The provisions on implementation and procedures, based on those of the implementing [Regulation \(EC\) No. 987/2009](#) (SR 0.831.109.268.11), are in Title II of Annex 1 of the agreement.

Application is not dependent on nationality

The provisions on applicable legislation in the new convention apply, irrespective of nationality, to persons who are or have been subject to the social security legislation of at least one of the two Contracting States. This covers not only nationals of Member States of the European Union (EU), but also nationals of third countries. In respect of the latter point, the new convention thus has a wider application than the FMOPA, but follows the usual practice adopted in the bilateral agreements concluded by Switzerland in the recent past.

In terms of territory, the new agreement applies to Switzerland and the UK, including Gibraltar, but not to the other British Overseas Territories or to the Crown Dependencies. Therefore, the old [Social Security Agreement between Switzerland and the United Kingdom concluded in 1968](#) (SR 0.831.109.367.1) continues to apply to the Isle of Man and the Channel Islands, which have their own social security systems.

In principle, the new bilateral agreement does not apply to the territories of the Member States of the EU.

The legislation of the State of work is applicable, with exceptions

Persons covered by the convention are subject to the legislation of a single State: as a general rule that of the Contracting State on whose territory the gainful activity is carried out. Special provisions departing from this principle do however apply to certain categories of persons (civil servants, sailors serving on vessels at sea, flight and cabin crew members).

Employed or self-employed workers may be posted to the other Contracting State for a period of 24 months. Within the framework of the Joint Administrative Committee established under the agreement (although this will not meet until the agreement has come into force), the competent authorities of the two States will decide on the minimum periods of insurance required before a posting. However, since the other conditions governing the posting of workers refer to those applicable within the framework of European coordination, it is expected that the length of prior insurance will in general remain at one month for employees and two months for the self-employed.

An escape clause allows the authorities of the two States to agree to a longer posting. In accordance with the practice of the Federal Social Insurance Office (FSIO) applicable to all international agreements, the total length of posting should not in principle exceed six years. Postings, which began under Regulation (EC) No. 883/2004 or the bilateral agreement of 1968 are taken into account when calculating this period.

As a corollary to the applicable legislation rules, the agreement defines the obligation of an employer whose registered office is situated outside the competent Contracting State to pay contributions there. According to the agreement, the employer and his employee may agree that the latter shall fulfil the employer's obligations on its behalf as regards the payment of contributions, without prejudice to the employer's basic obligations. This corresponds to the possibility provided for in Art. 21 para. 2 of Regulation (EC) No. 987/2009. Employed persons subject to compulsory OASI (AHV/AVS) coverage by virtue of the new agreement, and who work for an employer situated in the UK, are not deemed to be employees whose employer is not required to pay contributions ("ANobAG") pursuant to Art. 6 para. 1 of the [Federal Act on Old-Age and Survivors Insurance](#) (OASI; SR 831.10). This also has an impact on their enrolment for occupational pensions and family allowances.

Family members accompanying a posted worker

In the bilateral agreements concluded by Switzerland, a standard provision on the insurance of family members accompanying posted persons or diplomats (civil servants) allows the non-working spouse and children to remain insured with the worker in the latter's State of origin. This is not included in Regulation (EC) No. 883/2004 in the version applicable to Switzerland by virtue of Annex II of the FMOPA.

Applicable legislation in case of activities pursued in both States

A special provision in the bilateral agreement governs the coverage of employed or self-employed persons who are working in Switzerland and the UK simultaneously. This is a bilateralised version of Art. 13 of Regulation (EC) No. 883/2004; in essence it follows the "25% rule", stipulating coverage in the Contracting State of residence if a substantial part of the activities is pursued there. Where this is not the case, a person working as an employee in both States may be subject to the legislation of

- the Contracting State of the registered office of the employer(s),

- the Contracting State that is not the State of residence if the employers' registered offices are situated in Switzerland and in the UK, or
- the Contracting State of residence if the employer does not have a registered office in Switzerland or the UK.

Other provisions, corresponding to those in Regulation (EC) No. 883/2004, govern the coverage of self-employed persons working in both States, persons who are self-employed in one Contracting State and employed in the other, and civil servants pursuing employed and/or self-employed activities in the other Contracting State.

Activities pursued in the EU are neither covered nor taken into consideration when determining the applicable legislation under the new bilateral agreement. Depending on the particular circumstances, it is not impossible that a person working simultaneously in Switzerland, the UK and the EU may be subject to the social insurance system of one of the two Contracting States under the bilateral agreement and also to that of an EU Member State by virtue, for example, of the FMOPA or the protocol on the coordination of social security laid down in the [Trade and Cooperation Agreement](#) (OJ, 2021 L 149/10, p. 10-2539) in force between the UK and the EU. There is no institutional link (triangulation) between these different agreements.

The challenge presented by such situations is not totally unprecedented, given the absence of an “umbrella agreement” covering the FMOPA and the EFTA Convention: such situations may already arise in circumstances involving, for example, activities in Switzerland, an EU Member State and Iceland, Liechtenstein or Norway.

However, it should be emphasised that the Citizens' Rights Agreement protects the situations and rights of persons who exercised their right to free movement before 31 December 2020 and who were covered by the FMOPA on that date; Regulation (EC) No. 883/2004 continues to apply to them as long as they remain in a cross-border situation involving Switzerland and the UK by reason of their nationality, activity or residence. For example, the social security legislation applicable to a British national residing and working in Switzerland on 31 December 2020, who subsequently begins a new activity in the EU – even long after 1 January 2021 – will still be determined in accordance with Art. 13 of Regulation (EC) No. 883/2004. Such persons may be issued with a [Portable Document A1](#) certifying the single legislation that is applicable to them for all their activities.

Procedures analogous to those applied between Switzerland and EU Member States

In the same way as for workers moving between Switzerland and the EU States, cases involving postings between Switzerland and the UK, or activities pursued simultaneously in both Contracting States, are handled by the OASI compensation funds via the online portal developed by the FSIO (Applicable Legislation Portal Switzerland, ALPS), which has been adapted accordingly. The form certifying the legislation applicable to mobile workers will be defined by the Joint Administrative Committee established under the convention. The easiest solution on the Swiss side would be to use the generic certificate currently used in relation to the other bilateral agreements concluded by Switzerland.

Switzerland and the UK have agreed to continue exchanging social security information electronically. To this end, it is expected that the two States will continue to use the current [Electronic Exchange of Social Security Information system](#) (EESSI; available in German, French and Italian only).

Possibility of joining the voluntary OASI/DI scheme under the applicable legal conditions

As of 1 January 2021, nationals of Switzerland, EU Member States, Iceland, Liechtenstein and Norway residing in the UK have the possibility of joining the voluntary old-age, survivors' and invalidity insurance scheme (OASI/DI) if they meet the legal conditions; in particular they must have been insured for at least five consecutive years immediately before leaving the obligatory insurance scheme. Periods of insurance completed in an EU State, or in the UK up to 31 December 2020, do not count towards the prior insurance requirement.

No transitional arrangement on applicable legislation with respect to the 1968 agreement

As of its provisional application on 1 November 2021, the new bilateral agreement replaces the agreement concluded in 1968 between Switzerland and the UK that was applied transitionally since 1 January 2021, except in relation to the Isle of Man and the Channel Islands. Cases that had been settled from 1 January 2021 in accordance with the terms of the 1968 convention, although they were no doubt rare in practice given its brief period of application and the wide protection offered by the Citizens' Rights Agreement, would need to be reconsidered in the light of the provisions of Title II of the new bilateral agreement.

However, posting certificates issued under the bilateral agreement of 1968 remain valid up to the expiry date stated on the document.