

## EU - CRITERIA FOR DETERMINING THE PLACE OF RESIDENCE

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### Definition of “residence”<sup>i</sup>

#### Residence and temporary stay

Article 1(j) and (k) of Regulation 883/2004 make a distinction between “residence” (the place where a person *habitually* resides) and “stay” (*temporary* residence). The Court of Justice held that the Member State of “residence” within that meaning is “**the State in which the persons concerned habitually reside and where the habitual centre of their interests is to be found.**”<sup>ii</sup>

#### The habitual centre of interests

The habitual centre of interests must be determined on the basis of the facts, having regard to all circumstances which point to a person’s real choice of a country as his or her State of residence.<sup>iii</sup> The Member States may in principle provide (in their national legislation) for additional conditions, for as long as these criteria are compatible with the EU law. Additional conditions might also be imposed by national legislations in line with a national definition of “residence but in accordance with EU law.”<sup>iv</sup>

#### Temporary stay

The term “stay”<sup>v</sup> is characterized by its temporary character and by the intention of the person to return to his or her place of residence as soon as the underlying purpose for the stay in another country has been reached. “Stay” thus requires the physical presence of the person concerned outside of his or her habitual place of residence. It can be deduced from this principle that any such person can have only one place of residence within the meaning of the Regulations<sup>vi</sup>. 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<sup>vii</sup>.

### Criteria for determining the place of residence

The criteria for determining residence are explicitly non-exhaustive (“in particular” in the words of the Court of Justice in *Swaddling*, and “may include”, as indicated by Article 11 of Regulation 987/2009), and apply whenever the place of residence of a person has to be determined:

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- family situation (family status and family ties);
- duration and continuity of presence in the Member State concerned;<sup>viii</sup>
- employment situation (nature and specific characteristics of any activity pursued, in particular the place where such activity is habitually pursued, the stability of the activity, and the duration of the work contract);
- exercise of a non-remunerated activity;
- in the case of students, the source of their income;
- housing situation, in particular how permanent it is;
- the Member State in which the person is deemed to reside for taxation purposes;
- reasons for the move;
- the intention as it appears from all the circumstances.

#### Objective and subjective criteria

These criteria distinguish between elements related to the objective features of habitual residence such as the duration and continuity of presence on the territory of a Member State and elements applying to the person's situation.

#### Personal intention must be supported by factual evidence

The intention of the person concerned must be assessed "as it appears from all the circumstances". That means that it, must be supported by factual evidence, i.e. it can only be taken into account where it is supported by the objective facts and circumstances. The mere declaration that a person considers or wants to have his or her residence in a specific place is not sufficient. A person who moves to another country without maintaining any substantive links to his or her country of origin can no longer be regarded as "residing" there even when he or she intends to return to that country. This applies, for instance, when the migrating person does not leave any member of his or her family, any house or rented apartment or any address under which he or she can still be reached in the country of origin.

#### Criteria are not exhaustive

The elements or criteria for determining residence identified above are not exhaustive. They only apply "where appropriate", i.e. not all criteria can be used in all situations. They are derived from the relevant case-law of the Court of Justice and Article 11(1) of Regulation 987/2009, but other criteria may also play a role. Frequently, institutions simply assume that the place of residence is identical with the place where a person has declared to have his or her home address. However, while registration can be taken as an indication of the person's

intention, it is in no way decisive and it cannot be used either as a precondition for accepting that a person resides in a specific place.

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<sup>i</sup> Excerpt from from: Practical guide on the applicable legislation in the European Union (EU), the European Economic Area (EEA) and in Switzerland - European Commission – Employment, Social Affairs and Equal Opportunities (December 2013)

<sup>ii</sup> Case C-90/97 *Swaddling* [1999] ECR I-1075, paragraph 29

<sup>iii</sup> Case C-76/76 *Di Paolo* [1977] ECR 315, paragraphs 17 to 20, and Case C-102/91 *Knoch* [1992] ECR I-4341, paragraphs 21 and 23

<sup>iv</sup> As regards the introduction of a right-to-reside test, reference is made to the case C-140/12 *Brey*, not yet reported, and to further jurisprudence of the Court of Justice on this issue

<sup>v</sup> Or any form of a presence in a Member State which is not habitual residence

<sup>vi</sup> Case C-589/10 *Wencel*, not yet reported, paragraphs 43 to 51

<sup>vii</sup> Case C-13/73 *Hakenberg* [1973] ECR 935, paragraphs 29 to 32

<sup>viii</sup> It is, however, not possible to require a certain minimum period of residence, Case C-90/97 *Swaddling* [1999] ECR I-1075, paragraph 30