

“New ways of work: a challenge for maintaining the lex loci laboris principle in (EU) social security coordination”

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Definitions non-standard work/highly mobile work

- **‘Standard work’**: employee in a full-time permanent job, working on the premises of the Eer
- **‘Deviations’**: Self-employed work, virtual work, work for ‘multiple employers’, multiple jobs, highly mobile work,...
- **‘Highly mobile work’?**
 - HMW are workers whose professional activity imply a regular change of work place (across borders), without having a prior fixed pattern.(Pieters – Schoukens; 2020) The change of work place is either the consequence of a continuous physical movement of the worker, a continuous or regular change of physical workplace and/or the possibility to provide at any time the work physically from distance (disconnect the physical performance of work from the place where the work outcome is delivered to).
 - a person who performs various work activities for a shorter or longer period that takes place in two or more Member States. The work pattern may consist of activities taking place at the same time, as well as alternating project-based activities (Eva Van Ooij; 2022)

Rules (Title II)

Indication competent country: principle

- Main principle:

one and only one state is the competent state
(article 11, par. 1 Reg. 883/04)

- Exclusive and overriding effect of determination of competent state

Rules (Title II)

Indication competent country: place of work / place of residence

- Which country is competent? Main principle:
 - for employed and self-employed persons:
“lex loci laboris” (art. 11, par. 3 sub a)
(the place where one is effectively working)
 - for professionally non-active persons:
“lex loci domicilii” (art. 11, par. 3 sub e)
(the place where the person habitually resides) = residual clause

(any other person to whom subparagraphs (a) to (d) do not apply shall be subject to the legislation of the Member State of residence, without prejudice to other provisions of this Regulation guaranteeing him benefits under the legislation of one or more other Member States.”)

Rules (Title II)

Exceptions on the main principles

- 2 main exceptions to the rules concerning the determination of the competent state:
 - **Posting of workers / posting of self-employed (article 12/article 16 applied on posting)**
 - = Possibility to send workers for a (brief) period to another member state while keeping them insured under the social security system of the country of origin / Possibility to be sent as SE for a (brief) period to another member state while remaining insured under the social security system of the country of origin
 - **Simultaneous performance of activities in more than one MS (article 13)**
 - Can be various combinations of work as employed and/or self-employed worker

Rules (Title II)

Exceptions: Simultaneous performance of activities in more than one MS - employed

1. Activities as an employed person in two or more MS (art. 13 par 1 Reg 883/2004):

- A person who normally pursues an activity as an employed person in two or more Member States shall be subject
- (a) to the legislation of the Member State of residence if he/she pursues a substantial part of his/her activity in that Member State.
- (b) if he/she does NOT pursue a substantial part of his/her activity in the Member State of residence:
 - (i) to the legislation of the Member State in which the registered office or place of business of the undertaking or employer is situated if he/she is employed by one undertaking or employer.
 - (ii) to the legislation of the Member State in which the registered office or place of business of the undertakings or employers is situated if he/she is employed by two or more undertakings or employers which have their registered office or place of business in only one Member State.
 - (iii) to the legislation of the Member State in which the registered office or place of business of the undertaking or employer is situated other than the Member State of residence if he/she is employed by two or more undertakings or employers, which have their registered office or place of business in two Member States, one of which is the Member State of residence.
 - (iv) to the legislation of the Member State of residence if he/she is employed by two or more undertakings or employers, at least two of which have their registered office or place of business in different Member States other than the Member State of residence.
- > Substantial? min. 25% in terms of working time and remuneration (art. 14, 8 Reg. 987/09)

Rules (Title II)

Exceptions: Simultaneous performance of activities in more than one MS – self-employed

2. Activities as a *self-employed person* in two or more MS (art. 13 par 2 Reg 883/2004):

- *MS of residence* if he pursues a substantial part of his activity in that Member State; or
 - *MS in which the centre of interest* of his activities is situated, if he does not reside in one of the Member States in which he pursues a substantial part of his activity.
- >Substantial? min. 25% in terms of turnover, working time, number of services rendered, income (art. 14, 8 Reg. 987/09)
- >Centre of interest? fixed and permanent place of business from which the self-employed undertakes his activities; the habitual nature or the duration of the activities pursued, the number of services rendered, and the intention of the person concerned are relevant (art. 14, 9 Reg. 987/09)

Rules (Title II)

Exceptions: Simultaneous performance of activities in more than one MS: employed – SE - CS

3. Simultaneously active as an employed person in one MS and as a self-employed in another MS:

- MS in which the person performs activities as an employed person (art. 13 par 3 Reg. 883/04)
 - Quid if multiple WE-activities are combined with multiple SE-activities?
 - Director-shareholders / working shareholders in legal person
 - → qualified differently across MS: 'wage-earners' / 'self-employed'
 - → each country competent for qualification of activities on territory (De Jaeck/Hervein)

4. Civil servant in one MS and employed or self-employed in other MS:

- MS in which civil servant (art. 13 par 4 Reg. 883/2004)

Transportation work – (reinventing the rules under Reg 883/2004)

- Article 14, par. 1 sub b Reg. 1408/71
 - *a worker employed in international transport in the territory of two or more Member States as a member of travelling or flying personnel and who is working for an undertaking which, for hire or reward or on own account, operates transport services for passengers or goods by rail, road, air or inland waterway and has its registered office or place of business in the territory of a Member State, shall be subject to the legislation of the latter State, with the following restrictions:*
 - (i) where the said undertaking has a branch or permanent representation in the territory of a Member State other than that in which it has its registered office or place of business, a worker employed by such branch or agency shall be subject to the legislation of the Member State in whose territory such branch or permanent representation is situated;
 - (ii) where a worker is employed principally in the territory of the Member State in which he resides, he shall be subject to the legislation of that State, even if the undertaking which employs him has no registered office or place of business or branch or permanent representation in that territory;
- For road, air, (water)
- Disappears in Reg. 883/04 → main rule (art 11) and exceptions (articles 12, 13)

Transportation workers: reinventing the rules?

Yet reappeared (over time again) as specific rule for:

- **Civil aviation** (activity as flight crew or cabin crew)
 - Home base (art. 11, par. 5 Reg 883/2004)
 - Annex III sub Q Reg. 3922/91 as amended by Reg. 965/2012 and 83/2014 ('home base')
 - **INAIL and INPS v. Ryanair (C-33/21)**
 - *'premises intended to be used by staff, known as the 'crew room''*
- **Maritime transport** (activity as an employed or self-employed person normally pursued on board of a vessel at sea)
 - Flag state (art. 11, par. 4 Reg 883/2004)
 - Article 15, par. 3 Reg. 987/2009: duty information and administration
 - **SF v Inspecteur Belastingdienst (C-631/17)**

Transportation workers: reinventing the rules?

- **Road transport**

- No specific rule under Reg 883/2004 → standard rule = lex loci laboris (art 11) and art. 12/13?
- **AFMB Ltd vs SVB (C-610/18)**

- **Inland waterway transport**

- No specific rule under Reg 883/2004 → standard rule = lex loci laboris (art 11) and art. 12/13?
- But see: art. 16 agreement for Rhine Boatmen
 - Main coordination principle: Signatory State where the seat of the commercial operator (*'exploitant'*) is located
 - But several exceptions based on situation

From migration to (high) mobility (1957 – 2025)

- Original default case underlying Regulations 3 and 1408/71: ‘one time migrant’
- Towards mobility of different work groups
 - Posting and simultaneous work rules under stress
 - ‘self-employed’ and posting?
 - Interim workers and posting?
 - Mobile workers
 - Delineation posting and simultaneous work?
 - Status of the ‘e-forms’ and ‘cooperation’ between administrations
 - Reconditioning posting and simultaneous work
 - See current rules Reg 883/2004 and Impl Reg 987/2009 (incorporating case law)
 - Relevance of practical guide!
 - Still up to date to face reality?

Platform and virtual workers

Legal sources/basic case law: **Partena** (C-137/11) and **X vs SvF** (C-570/15)

- Applicable legislation rules (*lex loci laboris*) are very ‘physical’; there where you work physically/geographically is indicating the competent state
- How do these rules apply to virtual work (platform work/telework/...)?
 - ✓ Action connected with the work activity (**Partena**; C-137/11)
 - ✓ Marginal partial teleworking at home (**X vs SvF**; C-570/15)

Platform and virtual workers II

Diverse national classification of platform (non-standard) workers → consequence classification Reg.?

- When does activity turn into professional activity (beyond marginal nature) and who decides on this? Hervein-De Jaeck logic? Quid multiple activities?
- Increase in number/variety of non-standard workers and “in-between” situations
 - “In-between”: activity as employed or as self-employed for Reg. 883/2004?
 - Cfr. Case law from era when SE did not belong to scope coordination Reg.
 - Unger (C-75/63), de Cicco (C-19/68), Janssen (C-23/71), Brack (C-17/76), Walsh (C-143/79), Van Roosmalen (C-75/63),...

Impact of Platform Work Directive (Dir. 2024/2831)

- New legal presumption (art. 5, par. 1): *“The contractual relationship between a digital labour platform and a person performing platform work through that platform shall be legally presumed to be an employment relationship where facts indicating direction and control [...]”*
- But (art. 5, par. 3): *“The legal presumption shall not apply to proceedings which concern tax, criminal or social security matters. However, Member States may apply the legal presumption in such proceedings as a matter of national law.”*

Telework I

- **Telework is 'location-independent' (see Explanatory Memorandum to the Framework Agreement)**
 - Creates difficulties with the *lex loci laboris*
- **Framework Agreement of 2023 does not deal with High mobility as such**
 - Only habitual telework in state of residence (does not need to be from home: art. 2, par 2, Framework Agreement)
 - Only applicable if 2 (not more) Signatory States are involved
 - Employed by one or more undertakings or employers which have their registered office or place of business in only one other signatory State
 - Not applicable to:
 - Persons who habitually pursue an activity other than cross-border telework in the State of residence
 - Persons who habitually pursue an activity in a state other than the state of residence or the Member State of the registered office or place of business of the undertaking or employer
 - self-employed.

Telework II

- **Applicable legislation**
 - Application on request of employer and employee
 - Telework in State of residence between 25% and 50% of total working time: Member State of the registered office or place of business of the undertaking or employer
 - Less than 25%: Member State of the registered office or place of business of the undertaking or employer (art. 13, 1, (b) Reg. 883/2004)
 - More than 50%: Member State of residence (art. 13, 1, (a) Reg. 883/2004)
- **Risk if forum shopping by application on request?**
- **Practical relevance?**
 - Only used by a small percentage of those who fall under its scope (possibly because of tax concerns)

Conclusions

- Divergent approaches towards different groups of non-standard/highly mobile workers
- Possible ways forward?
 - Influence of recent review of practical guide?
 - Common approach for highly mobile workers?
 - Transportation: back to basics?
 - Click-system?
 - 13th State?
 - Residual rule of *lex domicilii* for Highly mobile workers that prevents changes of applicable legislation in a period of 24 to 60 months (Eva Van Ooij)?
 - Applicable system in relation to recipient of service?

Questions?