



# Analytical Report 2017

The interrelation between  
social security coordination law and labour law

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 **FreSsco**  
FREE MOVEMENT OF WORKERS and  
SOCIAL SECURITY COORDINATION



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## **FreSsco - Free movement of workers and Social security coordination**

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## EXECUTIVE SUMMARY

This report studies the interrelationship between social security law and labour law in cross-border situations. More specifically, it focuses on the conflicts between the conflict of rules contained in Regulation (EC) No 883/2004 (social security) and labour law (Regulation (EC) No 593/2008 – ‘Rome I’ as well as EU labour law Directives) and what the practical consequences are for persons moving within the EU.

In all Member States labour law and social security law fulfil separate but complementary functions. Put simply, labour law governs the employment contract (including salary), whereas social security law is aimed at offering (income) protection when a social risk occurs. Labour and social security law thus both have their own ‘territory’. At national level, in internal situations lacking a cross-border element, the two fields of law are usually well adjusted to each other. The simultaneous application of labour law and social security may lead to either overlap in entitlements or no entitlements at all, but in internal situations national legislatures can, and often indeed will, take measures for such situations. In cross-border situations, however, problems may arise as regards the interrelationship between the two fields of law, especially where in one and the same situation the labour law of one Member State and the social security law of another are to be applied.

To achieve a proper understanding of the legal issues that may arise **this report first maps and analyses common notions** that are used in both fields and have similar or slightly different meanings, with a view to identifying the bridges between them. These notions are: the concept of worker; self-employed person; employer; social security; social assistance and social protection; pension and equality of treatment (or non-discrimination).

The **concept of worker** constitutes a key concept of both EU social security law and EU labour law. It has been used to define the personal scope of the relevant Treaty provisions and/or secondary EU law measures and/or to determine whether or which national legislation is applicable in a given case. Because of the close ties that exist between social security law and labour law at national level it would be desirable if the concept of “*activity as an employed person*”, as used in Regulation (EC) No 883/2004, had a meaning similar to ‘*worker*’ in the field of EU labour law. However, this is not the case. A person who performs activities as an employed person in the sense of Regulation (EC) No 883/2004 does not necessarily qualify as a worker for purposes of EU labour law. Conversely, a person who is regarded as a worker for labour law purposes is not necessarily covered by Regulation (EC) No 883/2004. Because the concept of worker may be described by EU law or national law, one cannot speak of a single concept that has an identical meaning in all Member States and in all fields of EU law, including labour and social security law. Nonetheless, the hard core of the concept is similar, or at least comparable. In whatever EU provision or EU legal instrument the term is used, it refers to a person who “*performs services for and under the direction of another person in return for which he receives remuneration*”. In other words, the concept of worker is generally defined by three criteria: (i) performance of (economic) activities, (ii) subordination and (iii) remuneration. The comparative analysis of some sub-concepts such as **frontier worker, part-time worker, posted worker, fixed-term worker or employed/self-employed person** does not show any inconsistency either. The difference of approach between labour and social security law has no consequence. For instance, the possible difference in definition of ‘employed’ or ‘self-employed activity’ between labour law and social security law does not appear to be problematic.

Regulation (EC) No 883/2004 does not provide for a definition of ‘**employer**’. In the field of labour law one occasionally does find a definition. For example, Council Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work<sup>1</sup> defines ‘employer’ as ‘any natural or legal person who has

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<sup>1</sup> Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, OJ L 183, 29.6.1989, p. 1-8.

an employment relationship with the worker and has responsibility for the undertaking or the establishment'. The logic of this definition – the employer is simply the person with whom a worker has an employment relationship or contract – may be assumed to extend to all labour law provisions or instruments that, as a rule, lack a definition of the term 'employer'. The term 'employer' as such is not so controversial, but complex contractual or organisational settings exist in which tricky questions may arise as to who is the employer or has to act as such. The difference of approach between labour law and social security law does not appear to be a source of concern.

**Social security** is a notion that is referred to in several Union legislative documents in the field of labour law and social security law, but also others, without providing any definition. In the area of coordination rules, the notion of social security is rather clear. It refers to a list of branches equivalent to risks; it excludes social assistance. The scope of social assistance has been reduced with the introduction of the notion of special non-contributory cash benefits – SNCBs – which are social security benefits even if they also have characteristics of social assistance. There was a need for a broader term than social security which would cover also elements of social assistance. Still when the broader expression 'social protection' is used in Union law, its connection with social security remains unclear. The introduction of the term 'social protection', which might occasionally even replace the term social security, might give rise to some uncertainty. Another question is whether occupational schemes, which are referred to in several employment law Directives, are within or outside of the scope of social security. All in all, there is a need to clarify the meaning and scope of the concept of 'social security' in EU instruments, thus indirectly of 'social assistance' and 'social protection'.

The word '**pension**' raises problems. From the wording used by Union instruments, several conclusions can be drawn. Firstly, EU legislation predominantly defines and uses the term supplementary pension/scheme over the term occupational pension/scheme. Secondly, although relevant Directives do not use identical wording when defining supplementary pension schemes and supplementary pensions, the wording is nevertheless compatible. It always covers only occupational schemes established in accordance with national law and practice. Thirdly, it seems that depending on the purpose of the Directive, the term sometimes covers only schemes for employed persons, while on other occasions it encompasses schemes covering both employed and self-employed persons. Actions could be undertaken to clarify the use of the term 'supplementary' pensions and to reconsider the legislative practice of inconsistent and simultaneous use of the notions 'occupational' and 'supplementary' as synonyms.

The principle of **equality of treatment** is less sophisticated in social security coordination than it is in EU labour law instruments. Firstly, the concepts of harassment, positive action and occupational requirement are not incorporated into Regulation (EC) No 883/2004. Secondly, the method used to identify indirect forms of discrimination is different from the method in the labour law Directives. Thirdly, the concept of direct discrimination is not defined in the coordination Regulations. Actions could be undertaken to reconcile the approaches. The amendment of Article 4 of Regulation (EC) No 883/2004 could be envisaged in order to modernise the definition of the notion of 'direct discrimination'. The definition of the concept of 'indirect discrimination' in Regulation (EC) No 883/2004 could be revised as well.

In part 3 the study focuses on the **analysis of existing instruments on determining the applicable labour law in cross-border situations and how these instruments could be improved and better aligned to the social security coordination rules of conflict of law.**

Three conclusions can be drawn from the analytical comparison between the social security/labour rules of conflict of law. Firstly, Regulation (EC) No 883/2004 contains provisions on applicable legislation that have an exclusive effect (single state rule) and are of a compulsory nature. By contrast, Regulation (EC) No 593/2008 allows party autonomy in choosing the applicable legislation and contains a default hierarchy of connecting factors in the absence of a choice. Secondly, under Regulation (EC) No 883/2004 only one legislation is applicable for collecting social security contributions and

in principle also for granting benefits. This exclusive effect of the single Member State rule is especially important in situations where a person is working in several Member States (be it for the same employer, or for several employers), as to prevent possible complications due to overlapping. On the other hand, Regulation (EC) No 593/2008 does not prescribe a comparable single state rule. It only contains rules on the applicable law for individual employment contracts, which could result in a single employment contract being subject to labour laws of several Member States. Thirdly, there is a difference in connecting factors. As opposed to Regulation (EC) No 883/2004, Regulation (EC) No 593/2008 does not use the place of residence as a relevant connecting factor. Furthermore, Regulation (EC) No 593/2008 primarily uses habitual place of work, and subsequently place of hiring as a connecting factor. However, Regulation (EC) No 883/2004 uses the Member State of employment as a connecting factor in the case of pursuing an activity in one Member State, while in the case of simultaneous employment it refers to the Member State of registered office or place of business.

Based on these differences of perspective, there may be conflicts of conflict rules. The study puts emphasis on four concrete examples and how they can be solved. The first example deals with a mismatch between connected labour law rights and social security entitlement (length of parental leave different from length of parental allowance); the second and third examples envisage a conflict between similar labour law and social security rights with a double risk of overlapping of rights or a gap of rights (sickness cash benefit versus continued payment of salary; statutory unemployment benefits versus companies' unemployment benefits); the last example deals with the classification of an employed/self-employed activity. The analysis carried out shows that certain solutions can be found in order to avoid conflicts:

- The *Bosmann* principle, according to which the coordination Regulations do not preclude a non-competent State from providing its social security benefits may be used to fill a gap of rights when social security and labour entitlements have a different length.
- A constructive interpretation by courts of Article 8 of Regulation (EC) No 593/2008 (Rome I) and the use of circumstantial methods may facilitate the identification of one single legislation applicable common to both fields.
- Alternatively, it would be possible for courts to apply the solution of the *Paletta* case, which would imply considering that the social security rules of conflict of law prevail over labour law rules.

It could be envisaged to introduce into EU legislation a provision stipulating that when the workers' rights vis-à-vis their employer also fall within the scope of statutory social security, they are subject to the rules of conflict of law set out in social security coordination Regulations. Alternatively, the European Commission (EC) could produce guidelines/non-binding rules in favour of a constructive interpretation of rules of conflict of law inserted in Regulation (EC) No 593/2008 with the ultimate goal of identifying one single legislation applicable common to social security and labour relationship.

An alternative worth considering would be to change the system of determining the applicable legislation to make sure that the applicable legislation is that of the State of the activity's centre of interest (the activity's closest link).<sup>2</sup> The closest link rule would have to be equally applicable in labour and social security law. This option would remain extremely difficult to implement in practice.

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<sup>2</sup> More in Jorens, Y., Spiegel, B. (eds) et al: Key challenges for the social security coordination Regulations in the perspective of 2020, Think Tank report 2013, p. 55 *et seq.*



# 1. INTRODUCTION

## 1.1. *EU legal competence and legal framework in the field of labour law and social security*

The drafters of the original EEC Treaty anticipated that the economic integration process and, more specifically, the creation of a common market comprising freedom of movement for goods, services, workers and capital would automatically lead to social progress. In their view, there was no need to confer upon the Union (then Community) institutions specific powers for the development of a European social policy. Labour law and social security law were and would in principle remain domains to be regulated by the Member States. In the course of the years, however, the Union and its Member States have (increasingly) recognised that differences between national social policies may affect the functioning of the common internal market and, vice versa, that the operation of that market may undermine such social policies and the rights they provide or protect. Hence, legislative intervention at EU level was deemed necessary to ensure a properly functioning market, to add a social dimension to that market to and, more generally, develop a common policy specifically aimed at protecting and strengthening social rights. A European social policy, including the fields of labour law and social security, has emerged, has matured, and today constitutes one of the pillars on which the entire Union rests.

EU **labour law** is multi-faceted and fragmented. Title X of the TFEU<sup>3</sup> (“Social Policy”) sets a list of matters that can be covered at EU level, such as improvement of the working environment to protect workers’ health and safety, working conditions, protection of workers where their employment contract is terminated, information and consultation of workers, representation and collective defence of the interests of workers and employers, including co-determination. As regards these topics the EU possesses powers to adopt legislation and other measures, which it has used to enact numerous EU legislative instruments. In addition, EU labour law encompasses equality and fundamental rights. Article 19 gives competence to the Union to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation and the EU has expressed its commitment to social rights by adopting the Charter of Fundamental Rights of the European Union<sup>4</sup> and the initiative for a European Pillar of Social Rights.<sup>5</sup>

All in all, few labour law matters are immune to EU involvement, but it has to be recognised that the EU’s role remains limited. EU labour law focuses on health and safety at work, non-discrimination, workers’ information and consultation, restructuring and social rights, cross-border employment relationships and free movement of workers, but its role is limited as regards labour law topics such as the conclusion of an employment contract, the terms of the contract, salary, modification, dismissal *etc.* Crucial questions of labour law such as the status of trade unions, of employees’ representatives, of collective bargaining remain predominantly national matters.

EU labour law measures take different forms. They may consist of binding measures such as Regulations or, more often, Directives setting minimum requirements to be guaranteed by the laws of the Member States. Directives do not affect the right of Member States to apply provisions which are more favourable to employees. Alternatively, soft law measures are used to encourage cooperation and coordination between Member States in the area of employment. Social partners also play a great role in the construction of EU labour law. The EC has the task of promoting the consultation of management and labour at Union level. Should management and labour so desire, the

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<sup>3</sup> Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47-390.

<sup>4</sup> OJ 202, 7.6.2016, p. 389 (consolidated version).

<sup>5</sup> The European Pillar of Social Rights sets out a number of key principles and rights to support fair and well-functioning labour markets and social security systems. Communication from the Commission Establishing a European Pillar of Social Rights, COM/2017/0250 final.

dialogue between them at Union level may lead to contractual relations, including European agreements which can be annexed to a Directive.

Also in the field of **social security law**, competences are shared between the Member State and the EU. However, the role of the EU in this field is more limited than in the field of labour law. It is up to the Member States to set in place social security systems and to shape them in the way they deem appropriate. EU law does not detract from the powers of the Member States to organise their social security systems.<sup>6</sup> It only influences the substance of national social security systems directly by ensuring equal treatment of men and women,<sup>7</sup> and indirectly by supporting and complementing activities of the Member States<sup>8</sup> and encouraging cooperation between the Member States.<sup>9</sup> To this end the so-called social Open Method of Coordination<sup>10</sup> was developed. Most importantly, the role of the EU consists of the coordination of national social security systems. From the late 1950s, it has been recognised that the disparities between territorially organised social security systems may hamper the exercise of the right to free movement of workers and, nowadays, all EU citizens.<sup>11</sup> Nowadays, social security systems are coordinated (linked to each other) by Regulation (EC) No 883/2004 on the coordination of social security systems (basic Regulation) and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 (implementing Regulation).<sup>12</sup>

**Table 1: Summary of Union competence in the fields of labour and social security**

Competence		Article of the TFEU	Field	Legislative procedure
EU	Main	45, 46, 48	FM workers – internal market – social security coordination	Ordinary procedure
		153	Social policy (Title X)	- Ordinary procedure (Article 294), - Special procedure + unanimity (153/1/ċ, d, f, g) - Open method of coordination (153/2/a)
		157	Equal pay (men/women)	Ordinary procedure
		18	Antidiscrimination (based on nationality)	Ordinary procedure
		19	Antidiscrimination (on more grounds)	Council unanimously (after consent of the EP)
	Other	20,21	EU citizenship	Ordinary procedure / Special procedure
		56, 59	FM service (posting of workers)	Ordinary procedure
		148, 149	Employment (Title IX)	Open method of coordination
		COM 2017/0250/final	European Pillar of Social Rights	Reaffirms rights and principles that are already present in the EU acquis
	MS	153/ 5	<ul style="list-style-type: none"> <li>• pay,</li> <li>• right of association,</li> </ul>	If EU would regulate then possibility of annulment procedure (Article 263)

<sup>6</sup> So also e.g. the judgment of 7 February 1984, *Duphar*, C-238/82, EU:C:1984:45; the judgment of 17 June 1997, *Sodemare*, C-70/95, EU:C:1997:301; and the judgment of 26 September 2000, *Engelbrecht*, C-262/97, EU:C:2000:492. No common Union scheme is emphasised also in C-503/09 *Stewart*, EU:C:2011:500. Respect of the special characteristics of national social security legislation is emphasised also in Regulation (EC) 883/2004 (preamble, recital 4).

<sup>7</sup> See extensively Strban, G. Gender Differences in Social Protection, MISSOC Analysis 2012/2, [http://missoc.org/MISSOC/INFORMATIONBASE/OTHEROUTPUTS/ANALYSIS/2012/MISSOC\\_Analysis\\_2\\_FINAL\\_EN.pdf](http://missoc.org/MISSOC/INFORMATIONBASE/OTHEROUTPUTS/ANALYSIS/2012/MISSOC_Analysis_2_FINAL_EN.pdf).

<sup>8</sup> Article 153 TFEU.

<sup>9</sup> Article 156 TFEU.

<sup>10</sup> Communication from the Commission 'A renewed commitment to social Europe: Reinforcing the Open Method of Coordination for Social Protection and Social Inclusion', COM/2008/0418 final.

<sup>11</sup> Cornelissen, R. 50 Years of European Social Security Coordination, in: Eichenhofer, E. (Hrsg.), 50 Jahre nach ihrem Beginn – Neue Regeln für die Koordinierung sozialer Sicherheit, ESV, Berlin, 2009, p. 21.

<sup>12</sup> Regulation (EC) No 883/2004 on the coordination of social security systems, OJ L 166, 30.4.2004, p. 1, with later amendments, and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, OJ L 284, 30.10.2009, p. 1, with later amendments.

			<ul style="list-style-type: none"> <li>• right to strike (incl. lock-outs)</li> </ul>	
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## **1.2. Identification of problematic interrelations between social security and labour law**

In all Member States labour law and social security law fulfil separate but complementary functions. Crudely simplified, labour law governs the employment contract, and salary in particular, whereas social security law is aimed at offering cash/in kind protection when a social risk occurs. Labour and social security law thus both have their own 'territory'. Therefore, at national level, in internal situations lacking a cross-border element, the two fields of law are usually well adjusted to each other. As a rule, it is relatively clear which rules are to be applied when. For example, in the event of unemployment, national legislatures will usually indicate whether the person concerned is entitled to a severance allowance (labour law) and/or an unemployment benefit (social security law). Comparably, for purposes of income protection in the event of sickness, national legislatures will as a rule clearly indicate when the sick worker is entitled to either continued payment of salary or to a sickness benefit. The simultaneous application of labour law and social security may lead to either overlapping entitlements or no entitlements at all, but in internal situations national legislatures can, and often indeed will, avoid such situations.

In cross-border situations, however, problems may arise as regards the interrelationship between the two fields of law, especially where in one and the same situation the labour law of one Member State and the social security law of another are to be applied.

An area of problematic interrelations is found in the context of the **suspension of the main obligations of the employment contract**. By virtue of principles of (labour) contract law, which are applied in most Member States, the absence of the employee entails that the salary normally does not have to be paid by the employer. Social security can apprehend these situations by providing a benefit in cash serving as a replacement income when the absence is due, for instance, to an illness, to an accident at work, or to pregnancy/maternity. Social security schemes fill a gap; they compensate for the non-payment of salary. In countries where the employer is not forced by law or by collective agreement to continue to pay the salary during the period of suspension, the social security benefit allows for a continuity of income *in lieu*.

Problems may arise when labour law rules pursue the same objectives as social security and require payment of the salary by the employer during the period of absence. Labour law and social security law fulfil the same function by different means and for different reasons. At national level, there normally are rules (*e.g.* anti-overlapping/coordination rules) ensuring the coherence between the continued payment of salary (labour law) and entitlement to cash benefits (social security). For instance, an employee who is on sickness leave will continue to be paid by the employer for a certain period of time after which s/he will receive the cash benefit paid by the social security scheme. Inconsistencies arise in cross-border situations where the employee is subject to different country systems.

The lack of coordination with regard to the resolution of the conflicts of law (social security legislation applicable *versus* labour legislation applicable) may lead to *undue advantages* for the person concerned. For example, the absent employee continues to receive his or her salary on the basis of the rules of the (applicable) labour law of Member State A, whereas s/he also receives benefits in cash from Member State B where s/he is socially insured. However, and paradoxically, the lack of coordination of social security and labour conflict rules may have as a result that both Member States conclude that the other one should be in charge of the payment in order to avoid double payment. In the end, even though the person concerned is entitled to benefits in both Member States, s/he may not receive any benefit.

The lack of coordination of the rules of conflict of law may lead to a *gap in protection*. This could be the case when in Member State A the law applicable to the employment

contract provides no continued payment of salary by the employer (the social security scheme offers a cash sickness benefit instead) whereas the social security law of Member State B provides no cash benefit (but the employer is obliged to continue the payment of the salary based on labour law rules). If the labour law of Member State A and the social security law of Member State B are applied strictly and without any coordination, the employee will receive no benefit at all. Intermediate situations may occur due to the absence of coordination of the labour/social security rules of conflict of law. For instance, the law applicable to the employment contract may require of the continued payment of salary by the employer for a period of six weeks, whereas the competent country for social security serves a cash benefit only after a period of three months. With strict application of the labour law of one Member State and the social security law of the other Member State, the employee would suffer a gap of one and a half months of protection.

Other problems may occur when the employment rules of one Member State (applicable under labour law conflict rules) do not match with the substantial social security rules of the other Member State (competent under social security conflict rules). This is the case for instance when a person is entitled to parental leave for six months in a Member State (labour law) whereas the scheme of the Member State competent for social security provides a parental allowance for four months. As a result of the separate application of both legislations, for two months of the parental leave the person concerned will not be entitled to a parental allowance, undermining the effective enjoyment of the right to parental leave.

The suspension of the main obligations of the employment contract may be another area of problematic interaction between labour and social security law. In some countries, companies' regulations require that the employer provides a supplementary coverage for certain social risks. The whole protection granted to the employees will therefore be the result of the statutory social security benefits and of the company's benefits. This system applies, for instance, for healthcare benefits and for pensions. If the labour law applicable to the contract differs from the social security law, the employee may enjoy undue rights (e.g. if additional payments made under the employer's supplementary scheme top up high-level social security benefits) or face unfair gaps of rights (additional payments by the employer's supplementary scheme do not cover the actual costs because the social security benefits granted in the other country are low). It is unlikely that the employer's supplementary scheme will be perfectly in tune with the statutory social security benefits of another country. Again, the difficulty results from the lack of coordination of labour and social security rules of conflict of law, as a result of which the employee may be subject to the law of two different countries, one for labour law and one for social security law.

Another area of problematic interrelations is the **termination of the employment contract**. An example will help understand the challenges. Whereas the loss of a job may give rise to unemployment benefits granted by a social security scheme, labour law may provide the payment of various sums in relation to the notice period, to severance allowance, to annual leave compensation and/or to other financial compensations in relation to the work activity. Companies' regulations may even provide the equivalent of (supplementary) unemployment benefits. In cross-border situations the simultaneous application of the social security rules of Member State A and of the labour law of Member State B may reveal the same inconsistencies as depicted above. A jobless person may, for instance, at the same time receive a certain amount of money from his or her former employer which is ill-adapted in comparison to the unemployment benefits also provided by Member State B. The rationale behind each national rule is jeopardised by the transnational dimension of the case and the lack of coordination between labour and social security rules.

The ***Paletta I case***<sup>13</sup> of the Court of Justice of the European Union (CJEU) is a good example of concrete problems deriving from the interrelations between social security and labour law in cross-border situations and the solutions that could be applied.

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<sup>13</sup> Judgment of 3 June 1992, *Paletta I*, C-45/90, EU:C:1992:236.

According to the German law on the continued payment of wages applicable at the time, the employer had to continue paying wage for a period of up to six weeks to any employee who, after the commencement of his or her employment and through no fault of his or her own, became incapable of working. In the dispute, the employer refused to pay on the ground that he did not consider himself bound by the medical findings made in Italy. The CJEU therefore had to determine whether the benefits provided by the employer by way of continued payment of wages constitute sickness benefits within the meaning of the coordination Regulations. The CJEU answered in the affirmative and held that *"the benefits in question are granted to the worker only in the event of illness and that their payment for a period of up to six weeks suspends payment of the daily sickness benefits"* (§17). The CJEU added that *"the employer may be regarded as the 'competent institution' within the meaning of the Regulation"* (§21).

The *Paletta I* case poses a thorny question. If the continued payment of salary by the employer is classified as social security for the purposes of the coordination Regulations, does this mean that an employer – as the "competent institution" – should continue to pay the salary when the legislation identified on the grounds of social security coordination rules of conflict of law requires so, even if the labour legislation applicable to the employment contract does not impose such an obligation?

Let us take a concrete example. Mrs X works in Member State A, where in the event of an accident at work the employer is required to maintain the salary in full for one year. Mrs X is subject to the social security of Member State A by virtue of the rules of conflict of law contained in Regulation (EC) No 883/2004. The employment contract is governed by the law of Member State B, which provides no continued payment of salary by the employer but instead provides for a typical social security cash benefit. Must the employer maintain the salary based on the social security law applicable under Regulation (EC) No 883/2004? The *Paletta I* case does not directly address this question. Two interpretations are conceivable. According to the broad interpretation, *Paletta* means that the employer must continue to pay the salary if this is required by the country competent for social security, since this advantage is classified as a social security cash benefit. It does not matter in this case if the employment contract is governed by the law of a country that does not have such requirement. The broad interpretation is supported by Article 1 (q) of Regulation (EC) No 883/2004, which stipulates that the material scope covers *"scheme[s] relating to an employer's obligations in respect of the benefits set out in Article 3(1)"*. According to the narrow interpretation, Regulation (EC) No 883/2004 cannot lead to an extra-territorialisation of duties imposed on employers. Even if Regulation (EC) No 883/2004 designates Member State A as the country competent for what concerns social security, the employer cannot be forced to maintain the salary if the employment contract is governed by the law of Member State B, where such requirement does not exist. In the broad interpretation of *Paletta*, the rules of conflict of law of Regulation (EC) No 883/2004 prevail over the labour law rules which are neutralised for the purpose of continued payment of salary. In the narrow interpretation, both sets of rules of conflict of law remain unrelated and act separately.

The Union is aware of the risks encountered by a lack of coordination between labour and social security rules of conflict of law. As far back as in 1972, the EC proposed a Regulation on the rules of conflict of law in the field of employment relationships, referring explicitly to the case of continued payment of salary and to the compensation for an accident at work/occupational disease. In essence, the EC suggested that the workers' rights vis-à-vis their employer which also fall within the scope of statutory social security are subject to the rules of conflict of law set out in the coordination Regulations.<sup>14</sup> In other words, the EC was of the opinion that social security rules should prevail over labour law rules with a view to unifying the legislation applicable in case of work suspension. If the proposal had been adopted, this would have meant, in the case of Mrs X, that the law of country A would have been applicable. The employer would have been forced to continue to pay the salary in full for one year despite the fact that this

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<sup>14</sup> OJ, 72/C 49/02 p.26.

commitment is not provided by the law governing the contract. The proposal, however, was not adopted.

## 2. MAPPING OF COMMON NOTIONS

### 2.1. Worker

#### 2.1.1. General

'Worker' (or 'employed person') constitutes a key concept of both EU social security law and EU labour law. It has been used to define the personal scope of the relevant Treaty provisions and/or secondary EU law measures and/or to determine whether or which national legislation is applicable in a given case. Because of the close ties that exist between social security law and labour law at national level it could be convenient if the concept of "activity as an employed person", as used in Regulation (EC) No 883/2004, had a meaning similar to 'worker' in the field of EU labour law. However, this is not the case. A person who performs activities as an employed person in the sense of Regulation (EC) No 883/2004 does not necessarily qualify as a worker for purposes of EU labour law. Conversely, a person who is regarded as a worker for labour law purposes is not necessarily covered by Regulation (EC) No 883/2004.

The concept of worker may be defined by national law or EU law. It constitutes an autonomous concept specific to EU law, unless the EU instrument in question makes express reference to definitions under national law.<sup>15</sup> Regulation (EC) No 883/2004 indeed refers to national law (as regards "activity as an employed person")<sup>16</sup> and the same holds true for EU labour law Directives on topics like temporary agency work,<sup>17</sup> part-time work,<sup>18</sup> parental leave<sup>19</sup> or transfer of undertakings.<sup>20</sup> Other provisions or measures, such as Article 45 TFEU and Regulation (EU) No 492/2011 on freedom of movement for workers within the Union,<sup>21</sup> and the Directives on working time<sup>22</sup> and equal treatment in employment matters do not refer to national law and thus provide for an autonomous EU concept of worker.

Because the concept of worker may be described by EU law or national law, one cannot speak of a single concept that has an identical meaning in all Member States and in all fields of EU law, including both labour and social security law. Nonetheless, the hard core of the concept is similar, or at least comparable. In whatever EU provision or EU legal instrument the term is used, it refers to a person who "performs services for and under the direction of another person in return for which he receives remuneration".<sup>23</sup> In other

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<sup>15</sup> Judgment of 14 October 2010, *Union syndicale Solidaires Isère*, C-428/09, EU:C:2010:612, paragraph 27-28.

<sup>16</sup> Article 1(a) of Regulation (EC) No 883/2004.

<sup>17</sup> Article 3(1)(a) of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, OJ L 327, 5.12.2008, p. 9.

<sup>18</sup> Clause 2.1 of the Framework Agreement on part-time work, concluded on 6 June 1997 annexed to Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, OJ L 14, 20.1.1998, p. 9,

<sup>19</sup> Clause 1(2) of the revised Framework Agreement on parental leave, concluded on 18 June 2009 annexed to Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC, OJ L 68, 18.3.2010, p. 13.

<sup>20</sup> Article 2(1)(d) of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ L 82, 22.3.2001, p. 16.

<sup>21</sup> Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, OJ L 141, 27.5.2011, p. 1.

<sup>22</sup> Directive 2003/88/EC of the European Parliament and of the Council, of 4 November 2003, concerning certain aspects of the organisation of working time, OJ L 299, 18.11.2003, p. 9. This Directive does not define the term worker but the CJEU has held that the term has an autonomous EU law meaning; judgment of 14 October 2010, *Union syndicale Solidaires Isère*, C-428/09, EU:C:2010:612, paragraph 28.

<sup>23</sup> Judgment of 10 September 2014, *Haralambidis*, C-270/13, EU:C:2014:2185, paragraph 28 and judgment of 4 December 2014, *FNV Kunsten Informatie en Media*, C-413/13, EU:C:2014:2411, paragraph 34.

words, the concept of worker is generally defined by three criteria: (i) **performance of (economic) activities**, (ii) **subordination** and (iii) **remuneration**.<sup>24</sup>

Where EU legislation refers to national law, the precise meaning of these criteria may not be identical. However, it is plain that national legislatures and courts are not entirely free to define the concept and, in particular, to exclude certain categories of persons from the scope of application of the rule or instrument in question. It is settled case law that the legal characterisation of the relationship between the two parties concerned under national law, the specific or *sui generis* nature of that relationship or the form it takes are all irrelevant for the purposes of determining whether a person must be classified as a worker.<sup>25</sup> Further, the fact that the EU legislature has chosen to refer to national law does not imply that it has waived its power to determine the scope of the legal instrument concerned. The last word on the personal scope of such instruments is for the EU legislature or the Court of Justice.<sup>26</sup>

The first of the three abovementioned elements of the concept of worker, **performance of activities**, comprises various sub-elements or requirements.

First, there is a need for a cross-border element. The required cross-border element is not only present when a national of a Member State enters into an employment relationship with an employer based in another Member State, but also when a Union citizen has (first) been employed,<sup>27</sup> self-employed,<sup>28</sup> living<sup>29</sup> or studying<sup>30</sup> in another Member State and subsequently returns to his or her home State to work. The Union citizen who has never exercised his or her free movement rights cannot acquire the status of worker.<sup>31</sup>

Second, the activities performed must be economic in nature. Often, the mere fact that a remuneration is paid will suffice. The nature of the work or the specific context in which activities are performed are in principle of no relevance. Thus, sport activities,<sup>32</sup> prostitution<sup>33</sup> and work performed for religious communities<sup>34</sup> or international organisations<sup>35</sup> may all suffice for acquiring worker status. There are, however, exceptions. For example, EU citizens who work in the context of sheltered employment programmes primarily serving social policy objectives<sup>36</sup> or occupy certain posts in the public service may not acquire worker status.

Third, the CJEU has established that Union citizens can only be classified as a worker when the activities performed are "effective and genuine" and not on such a small scale as to render them "marginal and ancillary".<sup>37</sup> Part-time work may suffice, but the CJEU has never indicated how many hours must actually be worked.<sup>38</sup> The requirement does

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<sup>24</sup> An additional requirement that only applies to Article 45 TFEU and Regulation (EC) No 492/2011 is that the person concerned must hold the nationality of one of the Member States. Judgment of 29 October 1998, *Awoyemi*, C-230/97, EU:C:1998:382, paragraph 29.

<sup>25</sup> Judgment of 20 September 2007, *Kiiski*, C-116/06, EU:C:2007:536, paragraph 26; judgment of 31 May 1989, *Bettray*, C-344/87, EU:C:1989:226, paragraph 16 and judgment of 11 November 2010, *Danosa*, C-232/09, EU:C:2010:674 paragraph 40.

<sup>26</sup> Judgment of 17 November 2016, *Betriebsrat der Ruhrlandklinik*, C-216/15, EU:C:2016:883, paragraph 32.

<sup>27</sup> Judgment of 26 January 1999, *Terhoeve*, C-18/95, EU:C:1999:22.

<sup>28</sup> Judgment of 27 June 1996, *Asscher*, C-107/94, EU:C:1996:251.

<sup>29</sup> Judgment of 18 July 2007, *Hartmann*, C-212/05, EU:C:2015:437.

<sup>30</sup> Judgment of 11 July 2002, *D'Hoop*, C-224/98, EU:C:2002:432.

<sup>31</sup> Judgment of 16 June 1994, *Steen*, C-132/93, EU:C:1994:615.

<sup>32</sup> Judgment of 12 December 1974, *Walrave and Koch*, C-36/74, EU:C:1974:140, paragraph 4-5; judgment of 15 December 1995, *Bosman*, C-415/93, EU:C:1995:463, paragraph 73.

<sup>33</sup> Judgment of 18 May 1982, *Adoui and Cornaille*, C-115/81, EU:C:1982:183.

<sup>34</sup> Judgment of 5 October 1988, *Steymann*, C-196/87, EU:C:1988:475, paragraph 20 and judgment of 7 September 2004, *Trojani*, C-456/02, EU:C:2004:488, paragraph 42.

<sup>35</sup> Judgment of 27 May 1993, *Schmid*, C-310/91, EU:C:1993:221, paragraph 20 and judgment of 3 October 2000, *Ferlini*, C-411/98, EU:C:2000:530, paragraph 43.

<sup>36</sup> Judgment of 31 May 1989, *Bettray*, C-344/87, EU:C:1989:226, paragraph 17; judgment of 26 March 2015, *Fenoll*, C-316/13, EU:C:2015:200.

<sup>37</sup> Judgment of 23 March 1982, *Levin*, C-53/81, EU:C:1983:105, paragraph 17.

<sup>38</sup> See below 2.2.4.



not only relate to work but possibly also to the nature of the work. So, for example, a person working in a sheltered employment context may not perform “effective and genuine work” when the activities performed are a method of re-education and rehabilitation.<sup>39</sup> It is doubtful whether the requirement of “effective and genuine work” must be satisfied for purposes of all EU legal instruments.<sup>40</sup> For example, to fall within the personal scope of Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I)<sup>41</sup> no minimum number of hours is required. Further, an EU citizen who has accepted a job in another Member State and only performs “marginal and ancillary” activities may not hold work status but is certainly entitled to claim equal treatment as regards access to employment and employment conditions.<sup>42</sup>

The second element, **subordination**, implies that the work must be performed for and under the direction of another person. This condition of subordination demarcates free movement of workers from the right to establish in other Member States as a self-employed person. Put simply, a worker has a boss, who gives instructions on what to do and how to work and pays him or her a salary. A self-employed person is his or her own boss and is paid by those who buy his or her products or receive his or her commercial services.<sup>43</sup>

As regards the third element of the concept of worker, namely **remuneration**, it is immaterial how much remuneration is paid,<sup>44</sup> how it is calculated<sup>45</sup>, from which funds it is paid<sup>46</sup> or whether it is offered in cash or in kind.<sup>47</sup> Yet, a remuneration must be paid; unpaid voluntary work is not covered.

In principle, the three criteria are requirements for obtaining and retaining the status of worker. In some cases, however, the status or a specific right linked to it, such as the right of residence, can be retained even though the person concerned no longer satisfies the three criteria.<sup>48</sup> The three criteria of (genuine and effective) work, subordination and remuneration are notably general and may be applied and interpreted differently in the various Member States. Difficulties arise as regards flexible forms of labour, such as on-call contracts, zero-hour contracts, short-term work,<sup>49</sup> fixed-term work, temp-work, ‘volunteers’, ‘bogus-work’ or internships.<sup>50</sup> Whether or not these types of work suffice for acquiring worker status depends, and must be determined by relying, on all relevant circumstances. Practice demonstrates significant differences in how the criteria are applied in the Member States, triggering much legal uncertainty and the risk that many flex-workers are excluded from the concept of workers and the rights attached to it.<sup>51</sup>

### 2.1.2. Frontier worker

Regulation (EC) No 883/2004 provides for a specific definition of frontier worker. It concerns any person who pursues “*an activity as a (self-)employed person in a Member*

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<sup>39</sup> See e.g. judgment of 31 May 1989, *Bettray*, C-344/87, EU:C:1989:226, paragraph 17 and judgment of 26 March 2015, *Fenoll*, C-316/13, EU:C:2015:200, paragraph 39-41.

<sup>40</sup> Judgment of 4 December 2014, *FNV Kunsten Informatie en Media*, C-413/13, EU:C:2014:2411.

<sup>41</sup> Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6-16.

<sup>42</sup> Article 1-7(1) of Regulation (EC) No 492/2011.

<sup>43</sup> See below 2.3.6.

<sup>44</sup> Judgment of 7 September 2004, *Trojani*, C-456/02, EU:C:2004:488.

<sup>45</sup> Judgment of 14 December 1989, *Agegate*, C-3/87, EU:C:1989:650, paragraph 41.

<sup>46</sup> Judgment of 30 March 2006, *Mattern and Cikotic*, C-10/05, EU:C:2006:220, paragraph 22 and judgment of 17 March 2005, *Kranemann*, C-109/04, EU:C:2005:187, paragraph 17.

<sup>47</sup> Judgment of 5 October 1988, *Steymann*, C-196/87, EU:C:1988:475, paragraph 14.

<sup>48</sup> Article 7(3) of Directive 2004/38/EC and judgment of 19 June 2014, *Saint Prix*, C-507/12, EU:C:2014:2007, paragraph 47.

<sup>49</sup> Cf. judgment of 1 October 2015, *O*, C-432/14, EU:C:2015:643, paragraph 24.

<sup>50</sup> See e.g. judgment of 9 July 2015, *Balkaya*, C-229/14, EU:C:2015:455, paragraph 52.

<sup>51</sup> O'Brien *et al*, *infra*.

*State and who resides in another Member State to which he/she returns as a rule daily or at least once a week”.*<sup>52</sup>

In EU labour law no definition can be found of the concept. In essence, ‘frontier worker’ does not constitute a separate legal concept or status to which certain rights are attached. This is not to say that frontier workers, as they are understood in common parlance – so persons who work in one Member State and live in another Member State not too far away from the border with the State of employment – do not enjoy labour law and related rights. When they satisfy the requirements for worker status, they can enjoy all the rights linked to that status. The mere fact that they have decided not make use of the right to live in the State where they work does not alter this. Thus frontier workers must be treated equally to the host State’s workers in respect of the terms and conditions of employment, fiscal advantages and social advantages, as guaranteed by Article 45 TFEU and Regulation (EC) No 492/2011. Frontier workers’ right to equal treatment as regards the latter advantages also extends to benefits (e.g. student financial aid, certain types of family benefits) which, under the law of the State of employment, are granted on the basis of residence.<sup>53</sup> However, loss of worker status implies for the former frontier worker that s/he loses entitlement to equal treatment as regards such residence-based social advantages.<sup>54</sup>

The right of frontier workers to claim equal treatment as workers of the State of employment as regards social advantages, as guaranteed by Article 7(2) of Regulation (EC) No 492/2011, is particularly important in the field of social security. From Article 36(2) of Regulation (EC) No 492/2011 it follows that this Regulation does not affect Regulation (EC) No 883/2004. In other words, if Regulation (EC) No 883/2004 is applicable, and does not give a frontier worker a right to claim benefits in the State of employment, the frontier worker in principle cannot rely on Article 7(2) of Regulation (EC) No 492/2011 to claim such a benefit. For example, a wholly unemployed frontier worker is, as follows from Article 65(5) of Regulation (EC) No 883/2004, entitled to unemployment benefits in the State of residence. S/he cannot invoke Article 7(2) of Regulation (EC) No 492/2011 to claim such benefits in the State of employment (too). The same in principle holds true for SNCBs, even though, as the CJEU held in *Hendrix*, the duty resting on national authorities and courts in particular to interpret national law in accordance with EU free movement law may in some cases lead to the opposite conclusion.<sup>55</sup>

However, where Regulation (EC) No 883/2004 is not applicable in a given case, Article 7(2) of Regulation (EC) No 492/2011 may serve as a safety net provision for frontier workers. For example, in *Meints* the CJEU accepted that a frontier worker who had lost his job at a farm (and who received an unemployment benefit in his State of residence) could in the State of employment claim a special social benefit granted to agricultural workers who had been made redundant. That benefit was not covered by Regulation (EC) No 883/2004, but the frontier worker concerned could claim equal access to it, as it did constitute a social advantage for purposes of Article 7(2) of Regulation (EC) No 492/2011.<sup>56</sup> Similarly, in *Commission v France* the CJEU concluded that a French rule was at odds with Article 7(2) of Regulation (EC) No 492/2011. The rule excluded frontier workers residing in Belgium from entitlement to supplementary retirement pension rights set in place by collective agreements (which thus did not constitute statutory benefits within the meaning of Regulation (EC) No 883/2004).<sup>57</sup>

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<sup>52</sup> Article 1(f) of Regulation (EC) No 883/2004.

<sup>53</sup> Judgment of 31 May 1979, *Even*, C-207/78, EU:C:1979:144, paragraph 22.

<sup>54</sup> Judgment of 31 May 2001, *Leclere*, C-43/99, EU:C:2001:303, paragraph 61.

<sup>55</sup> This may especially be the case where national law contains a derogation clause according to which a residence requirement may be waived when its application leads to an ‘unacceptable degree of unfairness’. Judgment of 11 September 2007, *Hendrix*, C-287/05, EU:C:2007:494, paragraph 57.

<sup>56</sup> Judgment of 27 November 1997, *Meints*, C-57/96, EU:C:1997:564, paragraph 51.

<sup>57</sup> Judgment of 24 September 1998, *Commission v France*, C-35/97, EU:C:1998:431, paragraph 51.

### 2.1.3. Part-time/full-time worker

Regulation (EC) No 883/2004 itself does not make a distinction between full-time and part-time workers. Its application does not depend on a minimum number of working hours or a minimum amount of work. Nonetheless, the number of working hours may be relevant. First, if national legislation makes insurance conditional upon a minimum amount of work, and excludes for example 'mini-jobs',<sup>58</sup> this may imply that the person concerned is subject to national social security legislation but may not be insured according to the legislation applicable. Second, the number of working hours or the amount of work may be relevant for purposes of determining the legislation that applies to persons who are economically active in more than one Member State.<sup>59</sup>

In the field of EU labour law the distinction between full-time work and part-time work plays a more prominent role. First, there is the Directive concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC,<sup>60</sup> which, in essence, prohibits discrimination against part-time workers vis-à-vis full-time workers in respect of employment conditions.<sup>61</sup> Part-time workers are defined as persons who "*have an employment contract or employment relationship as defined by the law, collective agreement or practice in force in each Member State*" and "*whose normal hours of work, calculated on a weekly basis or on average over a period of employment of up to one year, are less than the normal hours of work of a comparable full-time worker.*"<sup>62 63</sup>

Second, in the cross-border context of free movement of workers the number of working hours is relevant for the classification as a worker. As noted above, the CJEU has held that part-time workers may acquire worker status under Article 45 TFEU provided that the work they perform is "effective and genuine". The CJEU has never laid down a minimum number of hours in order to determine whether this requirement is satisfied. Ten or perhaps even less hours a week may do, however, depending on and taking into account all other relevant factors.<sup>64</sup> A low number of working hours may be an indication that the work is to be regarded as marginal and ancillary, but this presumption may be rebutted by other factors such as the number of days of paid leave, possible entitlement to payment of wages in the event of sickness, whether or not employment is covered by a collective labour agreement, or the duration of the employment relationship.<sup>65</sup>

### 2.1.4. Posted worker

Regulation (EC) No 883/2004 provides that a person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities and who is posted by that employer to another Member State to perform work on that employer's behalf shall continue to be subject to the legislation of the first

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<sup>58</sup> Judgment of 23 April 2015, *Franzen*, C-382/13, EU:C:2015:26, paragraph 1. Exclusion in such a context does not violate the right to equal treatment regardless of gender as guaranteed by Directive 79/7/EEC. Judgment of 14 December 1995, *Megner and Scheffel*, C-444/93, EU:C:1995:442, paragraph 32.

<sup>59</sup> See Article 13(3) of Regulation (EC) No 883/2004.

<sup>60</sup> Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, OJ L 14, 20.1.1998, p. 9, as amended by Council Directive 98/23/EC of 7 April 1998, OJ L 131, 5.5.1998, p. 10, as well as Article 4 of Directive 2006/54/EC and Articles 1 and 2 as well as Article 6(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16.

<sup>61</sup> Clause 4 of the Framework Agreement on Part-time Work.

<sup>62</sup> Clause 2(1) *juncto* Clause 3(1) of the Framework Agreement on Part-time Work. The comparable full-time worker is a "*full-time worker in the same establishment having the same type of employment contract or relationship, who is engaged in the same or a similar work/occupation, due regard being given to other considerations which may include seniority and qualification/skills.*" Clause 3(2) of the Framework Agreement on Part-time Work.

<sup>63</sup> In case the Directive does not apply, part-timers may perhaps rely on Article 157 TFEU. See judgment of 10 January 2006, *Bilka*, C-170/84, EU:C:1986:204, paragraph 31 and judgment of 27 June 1990, *Kowalska*, C-33/89, EU:C:1990:265, paragraph 16.

<sup>64</sup> Judgment of 18 July 2007, *Geven*, C-213/05, EU:C:2007:438, paragraph 30.

<sup>65</sup> Judgment of 4 February 2010, *Genc*, C-14/09, EU:C:2010:57, paragraph 26.

Member State for 24 months.<sup>66</sup> The term “posted” is to be determined on the basis of the law of the Member State from which the posted worker is sent and where the employer normally carries out the activities. The coordination Regulations set conditions concerning the posting employer. In particular, the requirement of normally carrying out activities refers to “an employer that ordinarily performs substantial activities, other than purely internal management activities, in the territory of the Member State in which it is established (Article 14(2) of Regulation (EC) No 987/2009).

In the field of labour law, posted workers do not fall under Article 45 TFEU. It is the employer who, as a provider of services, sends his workers to other Member States to perform work for a limited period of time. The legal status of the workers concerned in labour law matters is governed by Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (the Posting Directive),<sup>67</sup> which in brief obliges the receiving State to apply certain mandatory terms and conditions of employment to workers posted to their territory.

This Directive defines ‘posted worker’ as a “*worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works*”.<sup>68</sup> Whether the person concerned is actually a worker is determined by the laws of the Member State to which s/he is posted, not the laws of the ‘sending’ Member State.<sup>69</sup> In order to assess whether a posted worker temporarily carries out his or her work in a Member State other than the one in which s/he normally works, all factual elements characterising such work and the situation of the worker shall be examined. Such elements may include in particular: the work is carried out for a limited period of time in another Member State; the date on which the posting starts; the posting takes place to a Member State other than the one in or from which the posted worker habitually carries out his or her work according to the Rome I Regulation; the posted worker returns to or is expected to resume work in the Member State from which s/he is posted after completion of the work or the provision of services for which s/he was posted; the nature of activities; travel, board and lodging or accommodation is provided or reimbursed by the employer who posts the worker and, if so, the manner in which this is provided or the method of reimbursement and any previous periods during which the post was filled by the same or by another (posted) worker.<sup>70</sup> In addition, it is required that the employer normally carries out substantial activities in the State of establishment. Whether or not this is the case must be determined on a case-by-case basis taking into account a variety of factors, including the place where the undertaking has its registered office and administration, uses office space, pays taxes and social security contributions and, where applicable, in accordance with national law has a professional licence or is registered with the chambers of commerce or professional bodies; the place where posted workers are recruited and from which they are posted; the law applicable to the contract concluded by the undertaking with the workers and/or clients; the place where the undertaking performs its substantial business activity and where it employs administrative staff; and the number of contracts performed and/or the size of the turn-over realised.<sup>71</sup>

If we compare the concept of posting under the two instruments, some key differences can be observed. First, whereas posting is limited in time (24 months) according to Regulation (EC) No 883/2004, the Posting Directive sets no maximum amount of time as long as it is “*for a limited period*”. Secondly, for the coordination Regulations, the workplace must be situated in the country where the employer carries out its activities,

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<sup>66</sup> Article 12(1) of Regulation (EC) No 883/2004. Self-employed persons can also post themselves to another Member States. Article 12(2) of Regulation (EC) No 883/2004.

<sup>67</sup> Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 18, 21.1.1997, p. 1.

<sup>68</sup> Article 2(1) of Directive 96/71/EC.

<sup>69</sup> Article 2(2) of Directive 96/71/EC.

<sup>70</sup> Article 4(3) of Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System, OJ L 159, 28.5.2014.

<sup>71</sup> Article 4(2) of Directive 2014/67/EU.

whereas for the Posting Directive the normal workplace may be situated anywhere. The Directive has therefore a more flexible approach to posting. Thirdly, whereas the coordination Regulations do not link posting with the existence of a habitual place of work (this is why it is possible to recruit a person with a view to being posted to another Member State; see Article 14(1) of Regulation (EC) No 987/2009) this link is made by the Posting Directive. Finally, if self-employed posting is known by coordination rules, it is ignored by the Posting Directive. In sum, if the Directive looks at posted workers more with the perspective of their activity pattern, the coordination Regulations put the emphasis on the worker's employer. For example, a worker employed by a Polish company, who normally works in Slovakia, can be posted under Posting Directive 96/71/EC, but not under Regulation (EC) No 883/2004.

This said, in both instruments, the classification of some activities or of some work patterns is difficult, in particular transportation activities.

#### 2.1.5. Fixed-term worker

EU social security coordination law does not provide specific rules for fixed-term work; EU labour law does.<sup>72</sup> The Directive concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP offers fixed-term workers a right to equal treatment with comparable permanent workers in respect of employment conditions, and orders Member States to take measures to prevent abuse arising from the use of successive fixed-term employment contracts or relationships. The term 'fixed-term worker' is described as a "*person having an employment contract or relationship entered into directly between an employer and a worker where the end of the employment contract or relationship is determined by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event.*" Article 45 TFEU does not contain specific rules for fixed-term work. Expiry of the employment contract or relationship, however, will lead to the loss of the status of worker, unless EU law provides otherwise.<sup>73</sup>

#### 2.1.6. Employed/self-employed person

For purposes of social security coordination, the meaning of the terms "activity as an employed person" and "activity as a self-employed person"<sup>74</sup> is determined by the law of the Member State in which the activity concerned is performed.<sup>75</sup> The significance of the precise meaning of the two terms, and how to demarcate them from each other, has decreased, as it is no longer relevant – as was the case under Regulation (EEC) 1408/71 on the application of social security schemes to employed persons and their families moving within the Community<sup>76</sup> – to define the scope of the coordination regime but only – or mainly – to determine the applicable legislation to persons who perform activities in more than one Member State.<sup>77</sup>

For purposes of labour law the meaning of 'worker', and how it should be demarcated from "self-employed person", is more relevant. Labour law provisions or directives usually apply to 'workers', and define these either as an autonomous concept or by reference to national law. Separate definitions of the term 'self-employed' are rarely

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<sup>72</sup> Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ L 175, 10.7.1999, p. 43.

<sup>73</sup> See e.g. Article 7(2) of Directive 2004/38/EC, which stipulates that a Union citizen who is no longer a worker may retain the status of worker in a number of circumstances for purposes of the right of residence.

<sup>74</sup> Below we will discuss the terms 'worker' and 'self-employed person'. Sometimes other terms can be found such as 'self-employed migrant worker' (see e.g. Article 48 TFEU) or 'self-employed worker' (see e.g. Article 2(a) of Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, OJ L 180, 15.7.2010). This terminology is confusing, but does not imply the existence under EU law of a third category next to worker or self-employed person.

<sup>75</sup> Article 1(a) and (b) of Regulation (EC) No 883/2004.

<sup>76</sup> Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, OJ L 149, 05.07.1971, p. 0002-0050.

<sup>77</sup> Article 13 of Regulation (EC) No 883/2004.

found.<sup>78</sup> The unwritten assumption is that a self-employed person is someone who pursues economic activities, is paid for these, but does not find him or herself in a relationship of subordination vis-à-vis the person for whom the activities are carried out. The criterion that draws the demarcation line between the two concepts is that of subordination.

This line is not always so easy to draw. The CJEU has clarified that the formal categorisation as a self-employed person under national law does not exclude the possibility that a person may have to be treated as a worker if “*that person’s independence is merely notional, thereby disguising an employment relationship*”.<sup>79</sup> However, whether or not for example company directors have a relationship of subordination vis-à-vis the company may be quite hard to establish. From the case law it follows that the mere fact that a person is a member of the board of directors of a capital company is not enough in itself to rule out subordination. All relevant factors must be considered, such as the circumstances in which the director was recruited, the nature of the duties entrusted to him or her, the context in which those duties were performed, the scope of the person’s powers and the extent to which s/he was supervised within the company as well as the circumstances under which the person could be removed.<sup>80</sup>

## **2.2. Employer**

Except in some specific circumstances like for mariners, Regulation (EC) No 883/2004 does not provide for a definition of “employer”. In the field of labour law one occasionally does find a definition. For example, Council Directive 89/391/EEC defines ‘employer’ as “*any natural or legal person who has an employment relationship with the worker and has responsibility for the undertaking and/or establishment*”.<sup>81</sup> The logic of this definition – the employer is simply the person with whom a worker has an employment relationship or contract – may be assumed to extend to all labour law provisions or instruments that, as a rule, lack a definition of the term employer.

The term ‘employer’ as such is not so controversial, but complex contractual or organisational settings exist in which tricky questions may arise as to who is the employer or has to act as such. The employer may but is not always the natural or legal person with whom the worker has concluded a contract. In the context of temporary agency work the employer indeed is the agency with whom the temporary agency worker has concluded a contract and not the company to which s/he is sent and under whose supervision s/he actually carries out the activities.

For purposes of transfer of undertakings, however, the contractual partner may not be the employer. Consider *Albron*,<sup>82</sup> in which the question arose whether in the context of a group of companies either the specific company with whom workers had concluded an employment contract or the company within that group to which they had been posted had to be regarded as the employer. In the CJEU’s view, the company with whom the worker has a substantive employment relationship, and not the contractual company was to be regarded as the employer.

Sometimes employers’ obligations may even rest on natural or legal persons who have no employment contract nor an employment relationship with the worker. This holds true, for example, in the context of the Posting Directive and sub-contracting. The

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<sup>78</sup> See, however, Article 2(a) of Directive 2010/41/EU, which defines the self-employed as “all persons pursuing a gainful activity for their own account, under the conditions laid down by national law”.

<sup>79</sup> Judgment of 4 December 2014, *FNV*, C-413/13, EU:C:2014:2411, paragraph 35 and judgment of 13 January 2004, *Allonby*, C-256/01, EU:C:2004:18, paragraph 71.

<sup>80</sup> Judgment of 11 November 2010, *Danosa*, C-232/09, EU:C:2010:674, paragraph 54, and judgment of 9 July 2015, *Balkaya*, C-229/14, EU:C:2015:455, paragraph 47.

<sup>81</sup> Article 3(b) of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, OJ L 183, 29.6.1989, p. 1-8.

<sup>82</sup> Judgment of 21 October 2010, *Albron*, C-242/09, EU:C:2010:625, paragraph 32.

principal contractor with whom the worker has no employment contract or employment relationship may be liable for the employer's duty to pay salary.<sup>83</sup>

### **2.3. Social security/social assistance/social protection**

**Social security** is a concept that is used in several Union legislative instruments in the field of labour law<sup>84</sup> and social security law<sup>85</sup> as well as migration law.<sup>86</sup> These instruments, however, do not provide a definition of the concept. For the purposes of this report there is no need to engage in a lengthy analysis as to how the term is to be understood under various international instruments. It suffices that the CJEU has made clear that – at least for the purposes of the coordination regime – a benefit can be regarded as a social security benefit when it is (i) granted without any individual and discretionary assessment of personal needs on the basis of a legally defined position and (2) concerns the branches of social security listed in Article 3 of Regulation (EC) No 883/2004, namely sickness benefits, maternity and equivalent paternity benefits, invalidity benefits, old-age benefits, survivors' benefits, benefits in respect of accidents at work and occupational diseases, death grants, unemployment benefits, pre-retirement benefits and family benefits.<sup>87</sup>

Social security is to be distinguished from **social assistance**, which by virtue of Article 3(5) of Regulation (EC) No 883/2004 is excluded from the scope of the coordination regime. Nowadays, in the context of Regulation (EC) No 883/2004 social assistance has a narrow scope as it refers only to benefits which cannot be related to one of the specific branches of social security listed in Article 3 of Regulation (EC) No 883/2004. General social assistance is excluded from the scope of application of the coordination Regulations. On the contrary, benefits which have characteristics both of social security legislation and of social assistance – read special non-contributory cash benefits<sup>88</sup> – are included in the coordination Regulations.<sup>89</sup>

Although social assistance is out of the scope of Regulation (EC) No 883/2004, it is not outside of the scope of EU law. First, social assistance constitutes a social advantage for purposes of Article 7(2) of Regulation (EU) No 492/2011. Social advantages are defined very broadly and it is not always required that the benefit is linked with the employment relation. They are all those advantages which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and the extension of which to workers who are nationals of another Member State therefore seems suitable to facilitate their mobility within the Union.<sup>90</sup> Second, EU citizens who are not workers or otherwise economically active can claim equal treatment as regards social assistance in a Member State other than the one of which they hold the nationality under Article 24 of Directive 2004/38/EC on the right of

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<sup>83</sup> Cf. judgment of 12 October 2004, *Wolff and Müller*, C-60/03, EU:C:2004:610, paragraph 45. Cf. also Article 12 of Directive 2014/67/EU.

<sup>84</sup> E.g. Directive 1999/70/EC on fixed-term work, Directive 97/81/EC on part-time work, Directive 2008/104/EC on temporary agency work, Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer, Directive 2014/67/EU on the enforcement of posting Directive 96/71/EC, Directive 2001/23/EC on transfers of undertakings, businesses or parts of undertakings or businesses, Decision (EU) 2016/344 on establishing a European Platform to enhance cooperation in tackling undeclared work.

<sup>85</sup> E.g. TFEU (Articles 21, 48, 153, 156), social security coordination Regulations (EC) No 883/2004 and (EC) No 987/2009, Directive 79/7/EEC.

<sup>86</sup> E.g. Residence (or Citizens' Rights or Free Movement) Directive 2004/38/EC, and certain immigration Directives, like the Long-term Residence Directive 2003/109/EC, Researchers Directive 2005/71/EC, Blue Card Directive 2009/50/EC, and Single Permit Directive 2011/98/EU.

<sup>87</sup> Judgment of 2 August 1993, *Acciardi*, C-66/92, EU:C:1993:341.

<sup>88</sup> Article 3(3) *juncto* Article 70 of Regulation (EC) No 883/2004.

<sup>89</sup> See further H. Verschuere, "Special non-contributory cash benefits in Regulation (EEC) No 1408/71, Regulation 883/2004 and case law of the ECJ," *European Journal of Social Security*, Special Issue on 50 Years of European Social Security Coordination, Nos 1-2/2009, p. 217-234.

<sup>90</sup> Judgment of 31 May 1979, *Even*, C-207/78, EU:C:1979:144. See further Langer, R, Article 45 TFEU, in Fuchs, M.; Cornelissen, R., *EU Social Security Law*, C.H. Beck-Hart-Nomos, 2015, p. 28.

citizens of the Union and their family members to move and reside freely within the territory of the Member States.<sup>91</sup>

A third related concept is that of **social protection**. It is a relatively new concept that can be found in various EU law provisions or instruments. Article 153 TFEU confers competence upon the EU as regards "social security and social protection of workers" as well as "the modernisation of social protection systems". Further, Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents confers upon long-term residents the right to equal treatment as regards "social security, social assistance and social protection as defined by national law".<sup>92</sup> Finally, Directive 2010/41/EU on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity<sup>93</sup> deals with the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity in relation to only 'social protection' systems'.<sup>94</sup> A clear definition, however, cannot be found in any of these sources. On the one hand, it seems to constitute an umbrella concept that covers social security, social assistance and other benefits or programmes for persons in need of such protection. On the other hand, in some specific contexts such as Article 153 TFEU and Directive 2003/109/EC, the term seems to have a narrower meaning covering forms of aid that supplement – and thus not include – social security and social assistance.

#### **Notion of Social security/social assistance/social protection: proposed actions**

**Proposition 1:** Explore options for clarifying the meaning and scope of the concept of 'social protection' and how it relates to the notions of 'social security' and 'social assistance'.

## **2.4. Pension**

A pension system is an important part of every country's social security or protection system. It can be organised through public or private providers, and can be further subcategorised based on various specific criteria such as legal regulation (statutory or contractual), management (state, insurance companies, pension funds, banks), participation (mandatory, quasi-mandatory or voluntary), personal scope (work-related or non-work-related), sources of financing (contributory or tax-financed), financing modalities (pay-as-you-go, funded, book reserves or insurance contracts), etc.<sup>95</sup> Regarding the main theoretical division of pension forms, we can differentiate between public schemes and private schemes.

**Public pension schemes** are often referred to as statutory, because they are regulated by legislation. Regardless of whether the schemes are general or special, contributory or non-contributory, they are covered by Regulation (EC) No 883/2004 on the coordination

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<sup>91</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance), OJ L 158, 30.4.2004, p. 77-123.

<sup>92</sup> Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16, 23.1.2004, p. 44-53.

<sup>93</sup> Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, OJ L 180, 15.7.2010, p. 1-6.

<sup>94</sup> OJ L 180, 15.7.2010, p. 1.

<sup>95</sup> Vukorepa, I. (2012). "Mirovinski sustavi: kapitalno financiranje kao čimbenik socijalne sigurnosti" (Pension Systems: Funded Schemes as Social Security Factors), Zagreb: Pravni fakultet Sveučilišta u Zagrebu, pp. 170-178.



of social security systems.<sup>96</sup> Pursuant to Article 1(w), for the purpose of the coordination rules, the term "pension" is defined broadly, covering not only pensions but also lump-sum benefits which can substitute pensions, and payments in the form of reimbursement of contributions and, subject to the special provisions concerning the various categories of benefits (Title III), revaluation increases or supplementary allowances.

In 2009, Regulation (EC) No 883/2004 was amended<sup>97</sup> by Regulation (EC) No 988/2009<sup>97</sup> and adapted in order to take into account recent developments in Member States. Many new and some old Member States had undertaken systemic reforms of their public pension systems. Some contributory pay-as-you-go schemes were reduced and in addition contributory funded schemes were developed. These funded schemes (often operated by private pension funds) provide benefits in respect of which periods of time are of no relevance for the benefit calculation. Hence, Article 52(5) of Regulation (EC) No 883/2004 was amended so that it excludes the *pro-rata* calculation of benefits, subject to such schemes being listed in part 2 of Annex VIII.

**Private pension schemes** (which can exceptionally be in the field of Regulation (EC) No 883/2004 only if Member States have made a declaration to that effect; see Article 1 (I)) can be provided **on a collective basis** through occupational schemes (hence linked to the employer, based on the concept of deferred wage and sometimes involving social partners in their designing and implementation) **or on an individual basis** through individual schemes in the form of personal accounts or insurance contracts (where participation is not linked to employment).<sup>98</sup> In theory, occupational and individual schemes supplement state-provided social security pension schemes, and hence they both are considered as supplementary schemes.<sup>99</sup> Nevertheless, **EU secondary legislation uses the notion of supplementary pension schemes** (supplementary pensions) **in a more narrow sense, covering only occupational pension schemes for employed and/or self-employed persons**. This conclusion can be derived from two EU Directives, the only ones that define the terms "supplementary pension schemes" and "supplementary pensions":

- Directive 98/49/EC on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community<sup>100</sup>:
  - "*supplementary pension scheme*" means any occupational pension scheme established in conformity with national legislation and practice such as a group insurance contract or pay-as-you-go scheme agreed by one or more branches or sectors, funded scheme or pension promise backed by book reserves, or any collective or other comparable arrangement intended to provide a supplementary pension for employed or self-employed persons; (Article 3)
  - "*supplementary pension*" means retirement pensions and, where provided for by the rules of a supplementary pension scheme established in conformity with national legislation and practice, invalidity and survivors' benefits, intended to supplement or replace those provided in respect of the same contingencies by statutory social security schemes; (Article 3)

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<sup>96</sup> Article 3, paragraphs 1 and 2 of Regulation (EC) No 883/2004.

<sup>97</sup> Regulation (EC) No 987/2009.

<sup>98</sup> When private schemes are state-promoted e.g. in the form of tax advantages, state subsidies, or regulated as an alternative to statutory schemes (conditional opt-out option) they can be considered as a mix of public and private (i.e. mixed schemes).

<sup>99</sup> Vukorepa, I. (2012), *op cit.*, p. 19. See also: European Commission (2010). "Private pension schemes: Their role in adequate and sustainable pensions", Luxembourg: Publications Office of the European Union, <http://ec.europa.eu/social/BlobServlet?docId=4853&langId=en>, p. 6; The Social Protection Committee (2008). "Privately managed funded pension provision and their contribution to adequate and sustainable pensions", <http://ec.europa.eu/social/BlobServlet?docId=743&langId=en>, pp. 5-8. OECD (2005). Private Pensions, OECD classification and glossary, <http://www.oecd.org/finance/private-pensions/38356329.pdf>, p. 29.

<sup>100</sup> Council Directive 98/49/EC of 29 June 1998 on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community, OJ L 209, 25.7.1998, p. 46-9.

- Directive 2014/50/EU on minimum requirements for enhancing worker mobility between Member States by improving the acquisition and preservation of supplementary pension rights<sup>101</sup>:
  - *"supplementary pension scheme" means any occupational retirement pension scheme established in accordance with national law and practice and linked to an employment relationship, intended to provide a supplementary pension for employed persons; (Article 3)*
  - *"supplementary pension" means a retirement pension provided for by the rules of a supplementary pension scheme established in accordance with national law and practice; (Article 3)*

In addition, only one Directive defines "occupational social security" (i.e. Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation).<sup>102</sup>

However, other pieces of EU legislation make reference to some of the complementary terms without defining them. For example, reference to "occupational pension schemes" can be found in the preamble of Directive (EU) 2016/2341 on the activities and supervision of institutions for occupational retirement provision – IORP II<sup>103</sup> (preamble No 2, 3, 4, 5, 7, 9 etc). The term "occupational social security" schemes is used in Article 6(2) of Directive 2000/78 establishing a general framework for equal treatment in employment and occupation.<sup>104</sup> Reference to "supplementary occupational or inter-occupational pension schemes" can be found in Articles 6 and 8 of Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer.<sup>105</sup> Reference to "supplementary schemes" can be found in Article 3(4)(b) of Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.<sup>106</sup>

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<sup>101</sup> Directive 2014/50/EU of the European Parliament and of the Council of 16 April 2014 on minimum requirements for enhancing worker mobility between Member States by improving the acquisition and preservation of supplementary pension rights Text with EEA relevance, OJ L 128, 30.4.2014, p. 1-7.

<sup>102</sup> Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, OJ L 204, 26.7.2006, p. 23-36. Article 2(1)(f) defines "occupational social security schemes" as schemes not governed by Directive 79/7/EEC, whose purpose is to provide workers, whether employees or self-employed, in an undertaking or group of undertakings, area of economic activity, occupational sector or group of sectors with benefits intended to supplement the benefits provided by statutory social security schemes or to replace them, whether membership of such schemes is compulsory or optional.

<sup>103</sup> Directive (EU) 2016/2341 of the European Parliament and of the Council of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision (IORPs) (Text with EEA relevance), OJ L 354, 23.12.2016, p. 37-85.

<sup>104</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000. Article 6(2) prescribes *"Notwithstanding Article 2(2), Member States may provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex."*

<sup>105</sup> Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer, OJ L 283, 28.10.2008, p. 36-42. Article 8 prescribes that *"Member States shall ensure that the necessary measures are taken to protect the interests of employees and of persons having already left the employer's undertaking or business at the date of the onset of the employer's insolvency in respect of rights conferring on them immediate or prospective entitlement to old-age benefits, including survivors' benefits, under supplementary occupational or inter-occupational pension schemes outside the national statutory social security schemes."* CJEU case law that interpreted the appropriateness of the level of protection adopted by a Member State is the following: relevant for the scope of the Member State's responsibility is the judgment of 25 January 2007, *Robins and Others*, C-278/05, EU:C:2007:56, the judgment of 25 April 2013, *Hogan and Others*, C-398/11, EU:C:2013:272, and the judgment of 24 November 2016, *Webb-Sämann*, C-454/15, EU:C:2016:891.

<sup>106</sup> Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ L 82, 22.3.2001, p. 16-20. Article 3(4)(b) prescribes the obligation for Member States to adopt necessary measures to protect the interests of employees and of persons no longer

Hence, we can draw several conclusions. Firstly, EU legislation predominantly defines and uses the term 'supplementary pension/scheme' over the term 'occupational pension/scheme'. Secondly, although relevant Directives do not use identical wording when defining supplementary pension schemes and supplementary pensions, the wording is nevertheless compatible. It always covers only occupational schemes established in accordance with national law and practice. Thirdly, it seems that depending on the purpose of the Directive, the term sometimes covers only schemes for employed persons (Directive 2014/50/EU), while on other occasions it encompasses schemes covering both employed and self-employed persons (Directive 98/49/EC and Directive 2006/54/EC).

Furthermore, it is worth mentioning that in addition to the rights provided by the abovementioned Directives, protection of pension rights can also be based on the directly applicable TFEU provisions, especially Article 45 TFEU on free movement of workers and Article 157 TFEU on equal pay. For example, in *Commission v Cyprus*,<sup>107</sup> the CJEU ruled that an age-related criterion which deters workers from leaving their Member State of origin in order to work in another Member State, or within an EU institution, or other international organisation and which has the effect of creating unequal treatment between migrant workers, on the one hand, and civil servants who have worked in Cyprus, on the other, is contrary to Articles 45 TFEU and 48 TFEU and under Article 4(3) TEU. In *Casteels*,<sup>108</sup> which concerned a worker employed successively by the same employer in several Member States, the CJEU adjudicated that a non-inclusion of the years of service completed by a worker for the same employer in establishments of that employer situated in different Member States and pursuant to the same coordinating contract of employment is not compatible with Article 45 TFEU. There is also elaborate case law on the application of Article 157 TFEU on equal pay to occupational (supplementary) pensions, because they fall under the concept of differed pay (e.g. *Garland*, *Bilka-Kaufhaus*, *Worringham*, *Barber* etc).<sup>109</sup>

#### **Notion of pension: proposed actions**

**Proposition 1:** Explore possibility of revision of the use of the term "supplementary" pensions (schemes), since in theory it is much broader term than in EU legislation where it covers only "occupational" pensions (schemes)

**Proposition 2:** Reconsider the legislative practice of inconsistent and simultaneous use of the notions "occupational" and "supplementary" as synonyms, and envisage legislative improvements

### **2.5. Equality of treatment/non-discrimination**

The CJEU has played a pioneer role in defining the concept of non-discrimination. In particular, it has construed Article 45 TFEU, which stipulates that free movement for workers "shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment", as to cover not only direct but also indirect discrimination on grounds of nationality. The latter involves rules or measures that

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employed in the transferor's business at the time of the transfer in respect of rights conferring on them immediate or prospective entitlement to old-age benefits, including survivors' benefits, under supplementary schemes.

<sup>107</sup> Judgment of 21 January 2016, *Commission v Cyprus*, C- 515/14, EU:C:2016:30.

<sup>108</sup> Judgment of 10 March 2011, *Casteels*, C-379/09, EU:C:2011:131.

<sup>109</sup> See C. Barnard, (2012). *EU Employment Law*, 4th ed., Oxford University Press, pp. 481-498.

differentiate on the basis of criteria other than nationality but which in fact lead to the same result as nationality criteria do. More precisely, according to well-settled case law, national conditions, rules or practices must be regarded as indirectly discriminatory “where, although applicable irrespective of nationality, they affect essentially migrant workers [...] or the great majority of those affected are migrant workers, where they are indistinctly applicable but can more easily be satisfied by national workers than by migrant workers or where there is a risk that they may operate to the particular detriment of migrant workers”.<sup>110</sup> There is no need to prove that a national of another Member State is in practice actually affected. It suffices that the measure or rule is “intrinsicly liable” to affect migrants more than non-mobile nationals. Rules that do so may be justified “by objective considerations independent of the nationality” and if they are necessary for, and proportionate to, the legitimate aim pursued by the national law.<sup>111</sup>

In addition, it follows from the case law that Article 45 TFEU may prohibit nationality-neutral measures that are “liable to restrict freedom of movement for workers”.<sup>112</sup> Any restriction however minor may be prohibited.<sup>113</sup> A distinction can be made between national rules that can be said to discriminate on grounds of migration and national rules that are truly non-discriminatory. The former concern national rules that deny a given right or benefit to workers/persons who have exercised free movement rights that is granted to those who do not move. The prohibition of such measures may imply a right to export benefits<sup>114</sup> or entitle nationals who return home to a given right.<sup>115</sup> The test for possible justification is essentially the same as the one applicable to measures that indirectly differentiate on grounds of nationality. The prohibition of “truly” non-discriminatory obstacles, *i.e.* rules that make no direct or indirect distinction between nationals and non-nationals or between mobile and non-mobile persons so far has proven not to have much practical significance. In fact, it is only in the famous *Bosman* ruling that the CJEU actually condemned such rules (*in casu* rules concerning the transfer system in professional football) on the ground that they directly affected access to the labour market in other Member States.<sup>116</sup>

The case law of the CJEU in the context of Article 45 TFEU has been a point of reference for the legislature (when drafting the labour law Directives) and for the CJEU for the interpretation of the social security coordination Regulations.

In the field of social security coordination, the concept of equality of treatment is rather basically understood. Pursuant to Article 4 of Regulation (EC) No 883/2004, “[U]nless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof”. Nationality is the exclusive ground targeted.

The CJEU has given a constructive interpretation of Article 4. It refers to the core distinction between direct and indirect discrimination. This provision indeed “prohibits not only overt discrimination based on the nationality of the beneficiaries of social security schemes but also all covert forms of discrimination which, through the application of other distinguishing criteria, lead in fact to the same result”.<sup>117</sup> The CJEU indicates that “conditions imposed by national law must be regarded as indirectly discriminatory where,

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<sup>110</sup> Judgment of 23 May 1996, *O’Flynn*, C-237/94, EU:C:1996:206:paragraph 18.

<sup>111</sup> Judgment of 10 March 1993, *Commission v Luxembourg*, C-111/91, EU:C:1993:92: paragraph 12; judgment of 23 May 1996, *O’Flynn*, C-237/94, EU:C:1996:206: paragraph 19.

<sup>112</sup> Judgment of 11 January 2007, *Lyyski*, C-40/05, EU:C:2007:10: paragraph 37; judgment of 17 March 2005, *Kranemann*, C-109/04, EU:C:2005:187: paragraph 30.

<sup>113</sup> Judgment of 1 April 2008, *Government of the French Community and Walloon Government*, C-212/06, EU:C:2008:178: paragraph 52.

<sup>114</sup> Judgment of 22 May 2008, *Nerkowska*, C-499/06, EU:C:2008:300: paragraph 46.

<sup>115</sup> Judgment of 11 July 2002, *D’Hoop*, C-224/98, EU:C:2002:432: paragraph 31.

<sup>116</sup> judgment of 15 December 1995, *Bosman*, C-415/93, EU:C:1995:463: paragraph 103. For an unsuccessful application of reliance on the prohibition of non-discriminatory rules see judgment of 27 January 2000, *Graf*, C-190/98, EU:C:2000:49.

<sup>117</sup> Judgment of 25 June 1997, *Mora Romero*, C-131/96, EU:C:1997:317, paragraph 32.

*although applicable irrespective of nationality, they affect essentially migrant workers or where the great majority of those affected are migrant workers, as well as conditions which are applicable without distinction but can more easily be satisfied by national workers than by migrant workers or where there is a risk that they may operate to the particular detriment of migrant workers”;*<sup>118</sup> The CJEU suggests a complementary approach in the same case: *“unless it is objectively justified and proportionate to its aim, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect the nationals of other Member States more than the nationals of the State whose legislation is in point and if there is a consequent risk that it will place the former at a particular disadvantage”*. Indirect discrimination can be justified *“by objective considerations independent of the nationality of the workers concerned, and if they are proportionate to the legitimate aim pursued by the national law”*.<sup>119</sup>

In relation to access by economically inactive mobile Union citizens to social benefits, the Commission proposed to amend Article 4 of Regulation (EC) No 883/2004 to make reference to the limitations in Directive 2004/38/EC. It would read as follows:

*“1. Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof.*

*2. A Member State may require that the access of an economically inactive person residing in that Member State to its social security benefits be subject to the conditions of having a right to legal residence as set out in Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States”*.<sup>120</sup>

At this stage of the revision procedure, this amendment may not be adopted and Article 4 could remain unchanged.<sup>121</sup>

All in all though, the principle of equality of treatment is less sophisticated in social security coordination than it is in EU labour law.

Indeed, various labour law Directives aim at establishing a framework for equal treatment. They refer to the concepts of ‘equal treatment’ and ‘non-discrimination’. Unequal treatment is not unlawful. This only holds true for treatment that can be labelled as discrimination. In other words some differences of treatment are not discriminatory. The goal of the Directives is to combat the differences of treatment which are discriminatory.

In labour law the major division lies between **direct and indirect forms of discrimination**. For instance, for the purpose of Directive 2000/78/EC laying down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, the “principle of equal treatment” means that *“there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to”* in the Directive. The same definition applies to Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, which lays down a framework for combating discrimination on the grounds of racial or ethnic origin.<sup>122</sup> Directive

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<sup>118</sup> Judgment of 21 September 2000, *Borawitz*, C-124/99, EU:C:2000:485, paragraph 25.

<sup>119</sup> Judgment of 21 September 2000, *Borawitz*, C-124/99, EU:C:2000:485, paragraph 26.

<sup>120</sup> Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004, 13 December 2016, COM(2016) 815 final.

<sup>121</sup> See text of the partial general approach agreed by the EPSCO Council held on 23 October 2017: 2016/0397 (COD).

<sup>122</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, p. 22-26.

2006/54/EC makes the same distinction. A definition of the two forms of discrimination is provided by the Directives:

- direct discrimination occurs where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in the Directive<sup>123</sup>;
- indirect discrimination occurs where an apparently neutral provision, criterion or practice would put persons protected against discrimination at a particular disadvantage compared with other persons.<sup>124</sup>

The comparison method is key to establishing a discrimination. It is essential to identify the comparator given that it is not required to refer to someone in an identical situation.<sup>125</sup> Another element of flexibility is that the comparator can be found in the past<sup>126</sup> or may even be hypothetical.<sup>127</sup>

Except for discrimination on the grounds of age, only indirect discrimination is justifiable. The conditions upon which a provision, criterion or practice is objectively justified are defined by the Directives: there has to be "a legitimate aim" and "the means of achieving that aim" must be "appropriate and necessary".<sup>128</sup>

Harassment is deemed to be a form of discrimination when "an unwanted conduct" related to one of the grounds protected against discrimination "takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment".<sup>129</sup>

The concept of occupational requirements is used to justify a difference of treatment which *a priori* should be classified as discriminatory. Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in the Directive does not constitute discrimination "where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate".<sup>130</sup> The CJEU referred to the occupational requirement in the field of age discrimination<sup>131</sup> and of gender discrimination.<sup>132</sup>

Labour law Directives also contain the concept of positive action: "With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to" any of the grounds referred to in the Directive.<sup>133</sup> The CJEU has held that, as a derogation from an individual right, the concept of positive action must be interpreted strictly.<sup>134</sup> For instance, in the context of gender equality, "[N]ational rules which guarantee women absolute and unconditional priority for appointment or

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<sup>123</sup> Article 2(2)(a) of Directive 2000/78/EC; Article 2(2)(a) of Directive 2000/43/EC; Article 2(1)(a) of Directive 2006/54/EC.

<sup>124</sup> Article 2(2)(b) of Directive 2000/78/EC; Article 2(2)(b) of Directive 2000/43/EC; Article 2(1)(b) of Directive 2006/54/EC.

<sup>125</sup> Judgment of 12 December 2013, *Hay*, C-267/12, EU:C:2013:823 ("it is required not that the situations be identical, but only that they be comparable and, on the other hand, the assessment of that comparability must be carried out not in a global and abstract manner, but in a specific and concrete manner in the light of the benefit concerned", §33).

<sup>126</sup> "has been" in a comparable situation.

<sup>127</sup> "would be" in a comparable situation.

<sup>128</sup> Article 2(2)(b)(i) of Directive 2000/78/EC; Article 2(2)(b) of Directive 2000/43/EC.

<sup>129</sup> Article 2(3) of Directive 2000/78/EC; Article 2(3) of Directive 2000/43/EC; Article 1(c) of Directive 2006/54/EC.

<sup>130</sup> Article 4(1) of Directive 2000/78/EC; Article 4 of Directive 2000/43/EC; Article 14(2) of Directive 2006/54/EC.

<sup>131</sup> Judgment of 12 January 2010, *Wolf*, C-229/08, EU:C:2010:3.

<sup>132</sup> Judgment of 15 May 1986, *Johnston*, C-222/84, EU:C:1986:206.

<sup>133</sup> Article 7(1) of Directive 2000/78/EC; Article 5 of Directive 2000/43/EC; Article 3 of Directive 2006/54/EC.

<sup>134</sup> Judgment of 17 October 1995, *Kalanke*, C-450/93, EU:C:1995:322, paragraph 21.

*promotion go beyond promoting equal opportunities and overstep the limits of the exception in Article 2(4) of the Directive*".<sup>135</sup> Positive action is thus only understood as a way to afford additional opportunities.<sup>136</sup>

Could labour law Directives be a source of inspiration for coordination rules?

First, concerning the concepts of harassment, positive action and occupational requirement which are not incorporated into Regulation (EC) No 883/2004, at first glance their importation is not necessary, but the question would need to be clarified.

Second, the method used to identify indirect forms of discrimination in coordination rules is different from the method used in the labour law Directives. In the context of the coordination rules, the CJEU indeed insists on the fact that the criterion used affects "essentially" the migrant workers and considers that a provision which is only "liable" to affect nationals of other Member States can be indirectly discriminatory. No statistics are required, contrary to solutions applicable to Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security.<sup>137</sup> The CJEU may alternately search in the group of workers if there is "*a considerably higher percentage of women affected as compared with the percentage of men so affected*".<sup>138</sup> Statistics or no statistics? The difference in method is striking. A harmonisation of the methodology between equality of treatment Directives and the coordination Regulations could be relevant. The same question arises about the method of **justification of indirect discrimination**. The social security wording differs indeed from the labour law Directives, which focus on the fact that the means of achieving the aim are "appropriate and necessary" whereas the objective considerations must only be "proportionate" to the aim under the coordination rules. With regard to the justifications admitted, there is not much unity as well between the labour law Directives and the coordination Regulations. In the field of labour law, economic grounds may be an objective justification<sup>139</sup> as well as a necessary aim of social policy.<sup>140</sup> Could they also be admitted in the area of social security coordination?

Third, the concept of **direct discrimination** is not defined in the coordination Regulations. It would need to be seen if the thorough definition retained by the labour law Directives, which include past and hypothetical comparators,<sup>141</sup> would be worth incorporating into the Regulation.

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<sup>135</sup> Judgment of 17 October 1995, *Kalanke*, C-450/93, EU:C:1995:322, paragraph 22.

<sup>136</sup> Judgment of 28 March 2000, *Badeck*, C-158/97, EU:C:2000:163, paragraph 60-63.

<sup>137</sup> Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ L 6, 10.1.1979, p. 24-25. Judgment of 20 October 2011, *Brachner*, C-123/10, EU:C:2011:675 ("Article 4(1) of Directive 79/7 must be interpreted as meaning that, taking into account the statistical data produced before the referring court and in the absence of evidence to the contrary, that court would be justified in taking the view that that provision precludes a national arrangement which leads to the exclusion, from an exceptional pension increase, of a significantly higher percentage of female pensioners than male pensioners", paragraph 68).

<sup>138</sup> Judgment of 6 December 2007, *Voß*, C-300/06, EU:C:2007:757, paragraph 44.

<sup>139</sup> Judgment of 13 May 1986, *Bilka*, C-170/84, EU:C:1986:204, paragraph 36.

<sup>140</sup> Judgment of 13 July 1989, *Rinner-Kühn*, C-171/88, EU:C:1989:328, paragraph 14.

<sup>141</sup> See, e.g., Article 2(2)(a) of Directive 2000/43/EC: "direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin".

**Notion of equality of treatment / non-discrimination: proposed actions**

**Proposition 1:** Envisage the amendment of Article 4 of Regulation (EC) No 883/2004 in order to modernise the definition of the notion of 'direct discrimination'.

**Proposition 2:** Envisage the revision of the definition of the concept of 'indirect discrimination' in Regulation (EC) No 883/2004.

**Proposition 3:** Explore to what extent the concepts of positive action and occupational requirement could be incorporated into Article 4 of Regulation (EC) No 883/2004.



### 3. APPLICABLE LAW

#### 3.1. Presentation of rules determining the applicable law

##### 3.1.1. Social security coordination rules: Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009

One of the most important and most discussed subjects of social security coordination law is the one on applicable legislation. The conflict rules contained in Regulation (EC) No 883/2004 seek to avoid so-called negative and positive conflicts of laws, which could occur if only national social security rules would be applicable. For instance, a person who works in Member State A whose social security legislation (for a given risk) covers only residents but who resides in a Member State B whose legislation (for the same risk) only applies to workers, would face a negative conflict of laws and not be subject to the legislation of either one of these Member States. Vice versa, if that same person worked in Member State B and resided in Member A, s/he would face a positive conflict of laws and fall under the legislation of both Member States.

This is the reason why Regulation (EC) No 883/2004 provides for a complete and uniform system of conflict rules that seeks to ensure that persons moving within the Union are subject to the social security system of only one Member State. These rules have exclusive and overriding effect. The first effect – which is relevant to avoid positive conflicts of laws – means that in principle only one legislation is applicable for purposes of collecting social security contributions and granting benefits.<sup>142</sup> Hence, the possibility of other Member States' social security schemes being simultaneously applicable is excluded. The only exception is family benefits, where priority and anti-overlapping rules apply.<sup>143</sup>

The overriding or binding effect – which is relevant to avoid positive conflicts of laws – means that the designated social security system has to be applied, regardless of national conditions contained in national legislation. National legislation has to be applied, even if it as such would not include the EU migrant in its social security system,<sup>144</sup> and even if persons would not derive any benefits from such system.<sup>145</sup>

Since the ruling of the CJEU in *Bosmann*<sup>146</sup> the exclusive effect of the rules determining the applicable legislation is no longer as absolute as it used to be. Mrs Bosmann, a Belgian national, was residing in Germany. She was bringing up her two children on her own. The children were living and studying in Germany. Hence, Germany, as the competent State, granted Mrs Bosmann child benefits. Later on she took up employment in the Netherlands. According to the general principle of *lex loci laboris*, the Netherlands became the competent State and Germany refused to pay child benefits any longer. However, Mrs Bosmann was disadvantaged by this provision of the coordination Regulations, since she could not be entitled to the corresponding child benefits in the Netherlands because Dutch law does not provide for children who are 18 years or older a right to family benefits. The CJEU held that while Germany (a non-competent State) was

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<sup>142</sup> In Recital 15 of the Regulation (EC) No 883/2004 we can read that “it is necessary to subject persons moving within the Community to the social security scheme of only one single Member State in order to avoid overlapping of the applicable provisions of national legislation and the complications which could result therefrom.”

<sup>143</sup> The question which family benefits overlap or do not overlap is raised especially after the CJEU judgment of 8 May 2014, *Wiering*, C-347/12, EU:C:2014:300. See also the Commission proposal to amend the coordination Regulations of December 2016: COM(2016) 815 final. For more on the coordination of family benefits, see G. Strban, “Family benefits in the EU – is it still possible to coordinate them?”, *Maastricht Journal of European and Comparative Law* 5/2016, p. 775.

<sup>144</sup> Y. Jorens and F. Van Overmeiren, “General Principles of Coordination in Regulation 883/2004”, *European Journal of Social Security (EJSS)*, 1-2/2009, p. 72.

<sup>145</sup> E.g. Dutch pensioners had to pay sickness insurance contributions from their pension in the Netherlands, even when they resided in Spain and utilised healthcare there; judgment of 9 February 2011, *van Delft and Others*, C-345/09, EU:C:2010:610.

<sup>146</sup> Judgment of 20 May 2008, *Bosmann*, C-352/06, EU:C:2008:290.

not obliged to provide child benefits to residents, the coordination Regulations did not preclude the German authorities from applying German legislation to residents like Mrs Bosmann and thus to award family benefits. The CJEU has confirmed *Bosmann* in *Hudziński and Wawrzyniak*.<sup>147</sup> The CJEU went even further. In the *Bosmann* case, there was no entitlement to family benefits in the competent Member State (the Netherlands), therefore, Germany could still provide family benefits on the basis of national law.<sup>148</sup> However, in the *Hudziński and Wawrzyniak* case, there was an entitlement to family benefits in Poland. Polish seasonal and posted workers were not disadvantaged by exercising the right to free movement and working in Germany. They neither lost nor suffered any reduction of family benefits. Thus, a Member State which is not the competent State retains the possibility of applying its legislation and granting benefits to the person concerned, provided there are specific and particularly close connecting factors between the territory of that State and the situation at issue and provided that the “predictability and effectiveness” of the 883-conflict rules are not disproportionately affected.<sup>149</sup>

The general rule is that the applicable legislation is the one of the Member State where the person moving within the Union performs economic activities, *i.e.* the *lex loci laboris* principle. Special rules are provided for posted workers and (self-posting) self-employed persons,<sup>150</sup> and persons active in two or more Member States at the same time.<sup>151</sup> From the case law of the CJEU it follows that certificates on applicable legislation (now A1, former E101) issued by the institution in the competent State are binding on both the social security institutions of the Member State in which the work is carried out and the courts of that Member State, even where it is found by those courts that the conditions under which the worker concerned carries out his or her activities clearly do not fall within the material scope of Regulation (EC) No 883/2004.<sup>152</sup>

Special rules apply also to persons active in international transportation, mariners, persons working as workers and self-employed persons at the same time, civil servants with other activities, diplomatic and consular personnel, and professionally non-active persons.<sup>153</sup> Non-active migrants are as a rule subject to the legislation where they reside (*lex loci domicilii*).<sup>154</sup>

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<sup>147</sup> Judgment of 12 June 2012, *Hudziński and Wawrzyniak*, C-611/10, EU:C:2012:339.

<sup>148</sup> See also judgment of 23 April 2015, *Franzen*, C-382/13, EU:C:2015:261 (but this time in reverse compared to the decision in the *Bosmann* case, since the Netherlands as the Member State of residence was urged to apply a hardship clause, because there was no entitlement to pension and family benefits in Germany as the Member State of work).

<sup>149</sup> Judgment of 11 September 2014, *B.*, C-394/13, EU:C:2014:2199.

<sup>150</sup> Article 12 of Regulation (EC) No 883/2004 stipulates that a person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted by that employer to another Member State to perform work on that employer’s behalf continues to be subject to the legislation of the first Member State (from which s/he is posted). Condition is that the anticipated duration of such work does not exceed 24 months and that s/he is not sent to replace another posted person. It should be noted that posting rules might be distinctive in labour law, social security law and tax law.

<sup>151</sup> Practical guide – The applicable legislation in the EU, EEA and in Switzerland, <http://ec.europa.eu/social/main.jsp?catId=868>.

<sup>152</sup> Judgment of 27 April 2017, *A-Rosa Flussschiff*, C-620/15, EU:C:2017:309.

<sup>153</sup> Y. Jorens and F. Van Overmeiren, “General Principles of Coordination in Regulation 883/2004”, *European Journal of Social Security (EJSS)*, Nos 1-2/2009, p. 73.

<sup>154</sup> H.-D. Steinmeyer, “Title II Determination of the legislation applicable”, in M. Fuchs and R. Cornelissen (eds), *EU Social Security Law* (C.H. Beck, Hart, Nomos, 2015), p. 144.

**Table 2: Summary of applicable social security legislation for employed and self-employed persons based on Regulation (EC) No 883/2004**

		Legal bases	Applicable legislation		
<b>Pursuit of activity in one MS</b>		Article 11	MS of employment/self-employment		
<b>Posted persons</b>		Article 12	<p>The posting MS (for max. 24 months)</p> <ul style="list-style-type: none"> <li>for employees performing work on the employer's behalf in another MS → the posting MS is that in which the posting undertaking/employer employs the worker, provided it also normally carries out its activities in that MS;</li> <li>for self-employed persons when going to pursue a similar activity in another MS → the posting MS is that in which a person is normally self-employed;</li> </ul>		
<b>Pursuit of activities in two or more MSs</b>	Simultaneous employment	Article 13(1)	If substantial part of activity in MS of residence	MS of residence	
			If <u>no</u> substantial part of activity in MS of residence	If employed by one undertaking or employer	MS of registered office or place of business
		If employed by two or more undertakings or employers which have their registered office/ place of business in only one MS		MS of registered office or place of business	
		If employed by two or more undertakings or employers which have their registered office/ place of business in two or more MSs, one of which is MS of residence		MS of registered office or place of business (but not MS of residence)	
		If employed by two or more undertakings, at least two of which have their registered office or place of business in MS other than the MS of residence	MS of residence		
	Simultaneous self-employment	Article 13(2)	If substantial part of activity in MS of residence	MS of residence	
			If no residence in MS of activities	MS of the centre of interest of activities	
Simultaneous employment and self-employ.	Article 13(3)	MS of employment			

### 3.1.2. Labour law: Regulation (EC) No 593/2008 (Rome I)

Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I)<sup>155</sup> contains special provisions relevant for determining the governing law of employment contracts with an international element. It can be considered as a sister Regulation to the Brussels I Regulation (Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters), which is relevant for the

<sup>155</sup> Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6-16.

jurisdiction of courts in international disputes.<sup>156</sup> Regulation (EC) No 593/2008 applies to contracts concluded after 17 December 2008.<sup>157</sup> Historically, it was preceded by the 1980 Rome Convention on the applicable law to contractual obligations, which is still applicable to Denmark by virtue of its opt-out from civil justice instruments including the Rome I Regulation, as well as to some overseas territories of the Member States which are not considered EU territories under the TFEU.<sup>158</sup> Hence, case law interpreting provisions of the Rome Convention (1980) is also relevant for the comparable provisions to Regulation (EC) No 593/2008.

The Rome I Regulation establishes in Article 8 **rules for determining the applicable law to international employment contracts**.<sup>159</sup> The provision gives parties the freedom to choose the applicable law, but limits party autonomy to protect the employee as the weaker party (second sentence of Article 8(1)). For the latter purpose Article 8 prescribes a default hierarchy of connecting factors relevant for the determination of the governing law (Article 8(2) to (4)). In addition, Article 9 protects the public interest of the law of the forum (and of the law of the performance of obligations, by prescribing application of their overriding mandatory provisions).

The basic rule is that parties can **choose the applicable law**, subject to two sets of limitations: 1) non-derogable provisions of law of the Member State that would be applicable in the absence of choice, and 2) overriding mandatory rules of public interest (further elaborated below). In the absence of choice, **subsidiary criteria** are to be applied in the following hierarchical order: 1) habitual place work, 2) place of hiring, and exceptionally 3) another law with a closer connection (escape clause).

**Habitual place of work** is defined as “*the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract*” (Article 8(2)). In the *Koelzsch* case<sup>160</sup> the CJEU was asked to clarify this provision. Mr Koelzsch was a truck driver who was habitually resident in Germany but had a contract of employment with a company based in Luxembourg. His contract designated Luxembourg law as the governing law. His work involved transporting goods mainly from Denmark to Germany, but also to other Member States. Mr Koelzsch was dismissed and challenged the dismissal as contrary to *German* law. The CJEU found that the tests for determining the place where the employee ‘habitually carries out his work’ also apply in situations where the employee carries out work in several Member States. This connecting factor must be given a broad interpretation,<sup>161</sup> and be understood as referring to the place in which or from which the employee actually carries out his working activities and, in the absence of a centre of activities, to the place where he carries out the majority of his

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<sup>156</sup> Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, p. 1-32.

<sup>157</sup> Article 28 of Regulation (EC) No 593/2008.

<sup>158</sup> European Commission (2016). “Practical Guide: Jurisdiction and applicable law in international disputes between the employee and the employer”, Luxembourg: Publications Office of the European Union, [http://ec.europa.eu/justice/civil/files/employment\\_guide\\_en.pdf](http://ec.europa.eu/justice/civil/files/employment_guide_en.pdf), p. 7.

<sup>159</sup> Article 8 reads as follows:

“1. *An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article.*

2. *To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.*

3. *Where the law applicable cannot be determined pursuant to paragraph 2, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated.*

4. *Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply.”*

<sup>160</sup> Judgment of 15 March 2011, *Koelzsch*, C-29/10, EU:C:2011:151.

<sup>161</sup> Judgment of 15 March 2011, *Koelzsch*, C-29/10, EU:C:2011:151, paragraph 45.

activities.<sup>162</sup> In the light of the nature of work in the international transport sector, account should be taken of all the factors which characterise the activity of the employee, in particular the place from which the employee carries out his transport tasks, receives instructions concerning his tasks and organises his work, and the place where his work tools are situated. Account should also be taken of the places where the transport is principally carried out and where the goods are unloaded, and of the place to which the employee returns after completion of his tasks.<sup>163</sup>

A broad interpretation of the concept of 'habitual place of work' was recently also provided in *Nogueira and Others*, which concerned cabin crew workers.<sup>164</sup> Although the case concerned the Brussels I Regulation,<sup>165</sup> the CJEU's interpretation could also be relevant for the Rome I Regulation. The CJEU recalled *Koelzsch* and highlighted the need to use a circumstantial method in identifying the habitual place of work. It concluded that, although the concept of 'home base' (airport) cannot be equated with the concept of 'place where the employee habitually carries out his work', the home base may constitute a significant indication for its determination.

Furthermore, it is to be pointed out that the rule on habitual place of work covers also cases of temporary **posting of workers**, to the effect that the law applicable to such contracts remains in principle the law of the country where the work is habitually carried out regardless of the temporary posting. Nevertheless, Directive 96/71/EC on the posting of workers establishes certain overriding mandatory rules in the area of employment contracts that should be respected, such as *e.g.* rules on the minimum wage, maximum working periods and minimum paid annual holidays *etc.*<sup>166</sup>

**Place of hiring** is defined as "*law of the country where the place of business through which the employee was engaged is situated*" (Article 8(3)). In *Voogsgeerd*<sup>167</sup> the CJEU confirmed that the "place of hiring" is a **subsidiary criterion** to the primary criterion of "habitual place of work".<sup>168</sup> Hence, it gave a restrictive interpretation of the linking factor "place of hiring", pointing that it 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*".<sup>169</sup> Furthermore, "*possession of legal personality does not constitute a requirement that must be met by the place of business of the employer within the meaning of that provision*",<sup>170</sup> but some degree of permanence is required.<sup>171</sup> Consequently, not only the subsidiaries and branches but also other units, such as offices of an undertaking, can constitute places of business through which an employee was engaged.<sup>172</sup>

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<sup>162</sup> *Ibid*, paragraph 46.

<sup>163</sup> *Ibid*, paragraph 48-49.

<sup>164</sup> Judgment of 14 September 2017, *Nogueira and Others*, C-168/16, EU:C:2017:688. Between 2009 and 2011, employees of Portuguese, Spanish and Belgian nationality were hired by Ryanair or by Crewlink, then assigned to Ryanair, as cabin crew (air hostesses and stewards). All the employment contracts were drafted in English, subject to Irish law and included a jurisdiction clause providing that the Irish courts had jurisdiction. In those contracts, it was stipulated that the work of the employees concerned, as cabin crew, was regarded as being carried out in Ireland given that their duties were performed on board aircraft registered in that Member State. Those contracts nevertheless designated Charleroi airport (Belgium) as the employees' 'home base'. Those employees started and ended their working day at that airport, and they were contractually obliged to reside within an hour of their 'home base'.

<sup>165</sup> Regulation (EU) No 1215/2012, repealed by the recast Regulation (EU) No 1215/2012.

<sup>166</sup> For more see Article 3 of Directive 96/71/EC.

<sup>167</sup> Judgment of 15 December 2011, *Voogsgeerd*, C-384/10, EU:C:2011:842. At the headquarters of Naviglobe in Antwerp, Mr Voogsgeerd entered into a permanent contract of employment with another company, Navimer, established in Luxembourg. Luxembourg law was chosen. Nevertheless, when he received a notice of dismissal, Mr Voogsgeerd challenged it before a court in Antwerp on the grounds that it was in breach of Belgian law, which, he argued, should apply to the contract by virtue of the fact that he was hired through a company established in Antwerp.

<sup>168</sup> Paragraph 35.

<sup>169</sup> Paragraph 50 and 52.

<sup>170</sup> Paragraph 58.

<sup>171</sup> Paragraph 55.

<sup>172</sup> paragraph 54.

**Other law with a closer connection is known as the 'escape clause'.** It prescribes that where it appears from the circumstances as a whole that the contract is more closely connected with a country other than habitual place of work or place of hiring, then the law of that other country shall apply (Article 8(4)). The rule is comparable to the general rule provided in Article 4(3) and (4) of the Rome I Regulation, which calls for the application of the law that is more/most closely connected to the contract. It allows courts to disregard the law of the place where the work is habitually carried out or the law of the place of the business through which the employee was engaged, and apply the law of another country where it appears from the circumstances of the case as a whole that the contract is more closely connected with that other country.

The CJEU interpreted this "**escape clause**" in *Schlecker*.<sup>173</sup> *Schlecker*, a German undertaking with branches in a number of Member States, had employed Ms Boedeker to manage the operations of the business in the Netherlands. After 12 years, Ms Boedeker was informed that her position was abolished and she was invited to take over another position in Germany. She brought an action against *Schlecker* claiming that Dutch law should apply to her contract and therefore the unilateral transfer back to Germany was unlawful. The CJEU held that "*priority must be given to the nexus between the employment contract at issue and the country where the employee habitually carries out his work; the application of that criterion precludes consideration of the secondary criterion of the country in which the place of business through which the employer was engaged is situated*".<sup>174</sup> However, where it is apparent from the circumstances as a whole that the employment contract is more closely connected with another country, it is for the national court to disregard the connecting factors and to apply the law of that other country.<sup>175</sup> Accordingly, the referring court must take account of all the elements which define the employment relationship and single out one or more as being, in its view, the most significant.<sup>176</sup> Among the significant factors suggestive of a connection with a particular country, account should be taken in particular of the country in which the employee pays taxes on the income from his or her activity and the country in which s/he is covered by a social security scheme and pension, sickness insurance and invalidity schemes. In addition, the national court must also take account of all the circumstances of the case, such as the parameters relating to salary determination and other working conditions.<sup>177</sup>

Concerning **provisions that limit party autonomy**, we can thus identify two sets of rules: 1) non-derogable provisions of law of the Member State that would be applicable in the absence of choice, and 2) overriding mandatory rules of public interest.

**Non-derogable provisions** of law of the Member State are provisions that would be applicable in the absence of choice and protect employees as the weaker party by limiting party autonomy (second sentence of Article 8(1)). It concerns provisions which cannot be derogated from by agreement or which can only be derogated from to the employees' benefit.

**Overriding mandatory rules** are prescribed in Article 9. From the provision's wording it can be concluded that it protects public interests of the 'law of the forum' (obligatory), and of the law of the performance of obligations in so far as it would render the contract unlawful (optional).<sup>178</sup> An explanation for this rule can be found in the preamble to

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<sup>173</sup> Judgment of 12 September 2013, *Schlecker*, C-64/12, EU:C:2013:551.

<sup>174</sup> Paragraph 32.

<sup>175</sup> Paragraph 36.

<sup>176</sup> Paragraph 40.

<sup>177</sup> Paragraph 41.

<sup>178</sup> Article 9 (Overriding mandatory provisions) reads as follows:

*"1. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.*

*2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.*

Regulation (EC) No 593/2008, which states that “*considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. The concept of ‘overriding mandatory provisions’ should be distinguished from the expression ‘provisions which cannot be derogated from by agreement’ and should be construed more restrictively*”.<sup>179</sup> Hence, this implies a very narrow interpretation of the concept, since it contradicts the basic principle of party autonomy. However, this seems to have been subtly extended in *Nikiforidis*.<sup>180</sup> This case concerned a Greek national employed since 1996 as a teacher at a primary school in Nuremberg run by Greece. From October 2010 to December 2012, Greece reduced Mr Nikiforidis’ gross remuneration, which had previously been calculated in accordance with German collective bargaining law. Mr Nikiforidis brought legal proceedings in Germany claiming additional remuneration for the period from October 2010 to December 2012 and seeking to obtain payslips. The CJEU firstly emphasised the importance of the principle of legal certainty<sup>181</sup> and foreseeability of the substantive rules applicable to the contract,<sup>182</sup> and secondly emphasised that Regulation (EC) No 593/2008 harmonises conflict-of-law rules concerning contractual obligations and not the substantive rules of the law of contract.<sup>183</sup> Therefore, the CJEU concluded that Article 9(3) of the Rome I Regulation must be interpreted as precluding the court of the forum (German court) to apply overriding mandatory provisions other than those of the State of the forum (Germany) or of the State of the performance of obligation (*in casu* also Germany), but at the same time as not precluding the court (German court) from taking other overriding mandatory provisions into account as matters of fact in so far as this is provided for by the national law applicable to the contract, *i.e.* German law.<sup>184</sup>

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*3. Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.”*

<sup>179</sup> Preamble, Recital 37 of Regulation (EC) No 593/2008.

<sup>180</sup> Judgment of 18 October 2016, *Nikiforidis*, C-135/15, EU:C:2016:774.

<sup>181</sup> Paragraph 46.

<sup>182</sup> Paragraph 47.

<sup>183</sup> Paragraph 52.

<sup>184</sup> Paragraph 55.

**Table 3: Summary of applicable law provisions for employment contracts based on Regulation (EC) No 593/2008**

		Purpose of norms	Parties consumed right to choose	Absence of choice
<b>Applicable law</b>		Party autonomy	Law of the MS chosen	Hierarchical order (subsidiary criterion): <ul style="list-style-type: none"> <li>• habitual place work (broad interpretation),</li> <li>• place of hiring (narrow interpretation),</li> <li>• other law with a closer connection (escape clause)</li> </ul>
<b>Limitations</b>	Non-derogable provisions that would be applicable in the absence of choice (Article 8(1))	Protection of weaker party (employee)	Hierarchical order (subsidiary criterion): <ul style="list-style-type: none"> <li>• habitual place work (broad interpretation),</li> <li>• place of hiring (narrow interpretation),</li> <li>• other law with a closer connection (escape clause).</li> </ul>	Not relevant
	Overriding mandatory rules (Article 9) – restrictive interpretation	Protection of public interest	Law of the forum (mandatory) Law of the performance of obligations in so far as they would render the contract unlawful (optional)	Law of the forum (mandatory) Law of the performance of obligations in so far as they would render the contract unlawful (optional)

The Rome I Regulation also contains a non-exhaustive list of matters which are governed by the applicable law (Article 12). Among the issues governed are: interpretation, performance, the consequences of a breach of obligations, including damages, the various ways of extinguishing obligations, and the consequences of nullity of the contract. The Regulation also contains conflict rules for determining the existence and validity of a contract or any term thereof (Article 10), the formal validity of a contract (Article 11) and the incapacity to conclude the contract (Article 13).

### 3.1.3. Key differences

Based on the legal analyses of rules determining the applicable legislation, we can identify several differences between the social security coordination rules (Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009) and the rules determining the legislation applicable to contractual obligations, more specifically to employment contracts (Regulation (EC) No 593/2008 – Rome I).

First, Regulation (EC) No 883/2004 contains provisions on applicable legislation that have exclusive effect (single state rule) and are compulsory in nature.<sup>185</sup> Regulation (EC) No 593/2008, however, allows for party autonomy in choosing the applicable legislation and contains a default hierarchy of connecting factors in the absence of a choice (employee’s place of habitual work, employer’s place of business through which employee was engaged, *i.e.* place of hiring, and escape clause referring to other law with a closer connection).

Second, under Regulation (EC) No 883/2004 only one legislation can be applicable (at the same time, to the same person or situation) for purposes of collecting social security contributions and – in principle also – for granting benefits.<sup>186</sup> This exclusive effect is especially important in situations when the person is working in several Member States (be it for the same employer, or for several employers) and prevents possible complications and overlapping. The Rome I Regulation, however, does not prescribe a

<sup>185</sup> F. Pennings (2015). *European Social Security Law*, 6th ed., Intersentia, p. 81-83.

<sup>186</sup> Exception to a single country rule applies to some categories of benefits, *e.g.* family benefits or old-age pension. See point 3.1.1.



comparable single state rule. It contains only rules for the applicable law for the individual employment contracts, which could, as explained above, result in a single employment contract being subject to labour laws of several Member States. The situation is getting even more complex if a person is simultaneously employed by several employers in more than one Member State. Namely, each employment contract could be subject to applicable labour laws of several States (law of choice, non-derogable provisions of law of the Member State that would be applicable in the absence of choice, and the overriding mandatory provisions protecting public interests of the law of the forum), while for the collection of social security contributions and social security benefits there would be only one competent Member State. Although priority must be given to the nexus between the employment contract and the place of habitual work, following the judgment in the *Schlecker* case,<sup>187</sup> the law of a Member State where social security contributions are being paid could be used as an indication of a 'closer connecting factor' that would lead the courts to apply that law also to the employment contract/s.

Third, there is a difference in connecting factors. Unlike Regulation (EC) No 883/2004, the Rome I Regulation does not use the place of residence as a relevant connecting factor. Furthermore, it uses as a connecting factor primarily the habitual place of work, and subsequently the place of hiring. Differently, Regulation (EC) No 883/2004 uses as a connecting factor the Member State of employment in the case of pursuing activity in one Member State, while in the case of simultaneous employment it refers to the legislation of the Member State of residence or to the Member State of the registered office or place of business (if the person does not pursue a substantial part of his or her activity in the Member State of residence).

### **3.2. Conflicts of conflict rules: practical cases**

#### **3.2.1. Mismatch between connected labour law rights and social security entitlement: the example of parental leave *versus* parental allowances**

In Member State A, national law provides for a right to parental leave for a period of six months. The neighbouring Member State B has opted for a shorter period of four months. In both Member State A and Member State B the right to parental leave is accompanied by a cash benefit for the period of leave.

As such, there is nothing legally wrong with the choice made by each of the two Member States and, as a rule, in internal situations no problems (have to) arise. In cross-border situations, however, problems do occur.

Consider the example of Mrs Z., who works 3 days in Member State A and two days in Member State B for the same employer. She resides in Member State B. Therefore, the competent State under the social security coordination rules is Member State B. Mrs Z. and her employer have agreed that the employment contract is governed by the labour law of Member State A.

In case Mrs Z. wishes to take up parental leave she is entitled to leave of 6 months, in accordance with the laws of Member State A. In order to obtain parental allowances, however, Mrs. Z will have to turn to the authorities in Member State B, as this is the competent State for persons who perform activities as an employed person in two Member States and perform activities that can be labelled as 'substantial' in the State of residence.<sup>188</sup> Thence, Mrs Z. is entitled, in accordance with the legislation Member State B, to a parental benefit of four months.

A problem thus exists: she is entitled to six months of parental leave, but is entitled to a parental benefit of only four months. The lack of entitlement to benefits for two months is, from the perspective of EU law, problematic for two reasons. First, Mrs Z. is or may be discouraged from taking up employment in Member State A as she, unlike workers who

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<sup>187</sup> Judgment of 12 September 2013, *Schlecker*, C-64/12, EU:C:2013:551, paragraph 32 and 40-42.

<sup>188</sup> Article 13(1)(a) of Regulation (EC) No 883/2004.

work and live there, is not entitled to a parental allowance for the entire period during which she is entitled to parental leave. Second, her right to parental leave, which is "a particularly important principle of EU social law" and guaranteed by both Article 33(2) of the Charter<sup>189</sup> <sup>190</sup> and Directive 2010/18/EU implementing the revised Framework Agreement on parental leave,<sup>191</sup> is undermined.

In order to solve this problem faced by Mrs Z., it could be considered whether Member State B could be obliged by EU law to pay a person in this situation the parental allowance for six months. This, however, does not seem to be the case. Member State B is entitled to freely choose for how long parental benefits will be paid (and to adjust the duration of the entitlement to the benefit to the duration of the parental leave). Perhaps, if the legislation of Member State B were to provide for a clause that allows to extend the duration of entitlement to a period longer than four months so as to avoid 'unreasonable consequences',<sup>192</sup> the argument could be made that Member State B must use such a clause to fill the gap at hand. However, in the absence of such a clause, EU law does not seem to oblige national legislature to extend entitlement to benefits nor does it require national courts to read such an extension in national law.

However, to solve the problem it might be argued that EU law obliges Member State A to award her benefits for the two months in question. For purposes of social security though, thus including parental allowances, Member State A is not the competent State, but the argument may be deduced from the *Bosmann* case law that a non-competent State is not prevented from applying its own legislation and granting a benefit in accordance with that law.<sup>193</sup> The conditions which the CJEU has imposed in this regard<sup>194</sup> on a non-competent State arguably are satisfied in the case of Mrs Z. First, as Mrs Z. (habitually) works in Member State A, the required connecting factor between her case and Member State A is present. Second, it is hard to see how the predictability and effectiveness of the rules of Regulation (EC) No 883/2004 would be disproportionately affected.

### 3.2.2. Conflicts between similar labour law and social security entitlements: the example of sickness cash benefits *versus* continued payment of salary

Sickness insurance constitutes a classic branch of social security law. Some Member States, however, have decided to 'privatise' such insurance by not giving sick workers a right to an income-replacing cash benefit, but rather by entitling them, by virtue of labour law, to continued payment of salary by the employer. Each Member State is entitled to make its choice in this regard, but the diverging policy choices they have made can cause problems in cross-border situations. Consider the following example.

*The labour laws of Member State A impose on the employer the obligation to continue to pay salary for the duration of the sickness for a period of one year. This duty is logically accompanied by a prohibition to dismiss the sick employee. After that one year, the employee is entitled on the basis of the social security laws of Member State A to sickness benefits. The social security laws of Member State B provide for sickness benefits in cash from the moment sickness is established.*

*Mr K resides in Member State A. His employer is based in Member State B. Mr. K works two days per week in Member State A and three days per week in Member State B. The*

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<sup>189</sup> Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391-407.

<sup>190</sup> Judgment of 7 September 2017, *H. v Land Berlin*, C-174/16, EU:C:2017:637: paragraph 44.

<sup>191</sup> Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC, OJ L 68, 18.3.2010, p. 13.

<sup>192</sup> *Cf.*, by analogy, judgment of 11 September 2007, *Hendrix*, C-287/05, EU:C:2007:494, paragraph 57.

<sup>193</sup> Judgment of 20 May 2008, *Bosmann*, C-352/06, EU:C:2008:290, paragraph 28. For a detailed presentation, see 3.1.1.

<sup>194</sup> Judgment of 12 June 2012, *Hudzinski and Wawrzyniak*, C-611/10, EU:C:2012:339, paragraph 59; judgment of 11 September 2014, *B.*, C-394/13, EU:C:2014:2199, paragraph 30.

*employment contract stipulates that the law governing the contract is that of Member State B. Mr K gets sick. Should he turn to his employer in Member State A or should he rather apply for cash benefits in Member State B?*

For the purposes of Regulation (EC) No 883/2004 Member State A is the competent State. Mr K works for the same employer in two Member States and he performs a substantial part of his activities in the State of his residence, Member State A.

For the purposes of labour law Mr K falls under the legislation of Member State B. Mr K and his employer have chosen the law of Member State B as the law governing their employment contract. They are perfectly entitled to do so. Under Regulation (EC) No 593/2008 (Rome I) this may very well be regarded as the objectively applicable law.

In principle, we thus have at hand here a conflict of conflict of law rules: for the purposes of one and the same risk, namely income protection in the event of sickness, Regulation (EC) No 883/2004 and the Rome I Regulation 'refer' Mr K to a different Member State. Problems (of interpretation) arise.

If Mr K applies for cash benefits in Member State B, the competent institution will probably refuse to award a benefit on the ground that Member State B is not competent under Regulation (EC) No 883/2004. If Mr K subsequently applies for a benefit in Member State A this will be rejected too, as the legislation of that Member State stipulates that the sick worker is not entitled to a cash benefit but to continued payment of salary by the employer. If thereupon Mr K turns to the employer, he again is likely to face a negative response. The employer, who is based in Member State B, will probably argue that he is subject to the labour law of Member State B and not the labour law of Member State A. Thus, even though Mr K is subject to the legislation of two Member States, he probably cannot claim any income compensation in either one of them. Mr K falls between two stools.

### **How can such a problem be solved?**

**Option 1.** This option would be to apply the coordination rules of Regulation (EC) No 883/2004 for social security also to national labour laws that have 'privatised' sickness insurance, by obliging employers to continue to pay salary to sick employees. In fact, one could argue that the CJEU has already offered this solution in *Paletta I*, in which it held that benefits such as those paid by an employer by way of continued payment of salary constitute sickness benefits for the purposes of Regulation (EC) No 883/2004.<sup>195</sup> One could thus adopt a broad interpretation of the ruling (compare section 1.2 above) according to which national labour laws providing for a duty for employers to pay sick employees are subject to Regulation (EC) No 883/2004 and, hence, its conflict rules. *In casu* this would imply that Mr K is under the legislation of Member State A entitled to continued payment of his salary by his employer.

However, this is a particularly broad interpretation of *Paletta I*. A narrower reading is certainly possible too. It is to be noted that the issue at hand in that case did not concern the conflict rules of Regulation (EC) No 883/2004. Moreover, the case did not involve a conflict between the conflict rules of Regulation (EC) No 883/2004 and those contained in the Rome I Regulation. The social security rules and the labour laws that applied to Mr Paletta were those of one and the same Member State, namely Germany. Hence, from *Paletta* not much more can be deduced than that an employer can be obliged by the laws of the State competent according to Regulation (EC) No 883/2004 to pay sick employees when the employment contract by virtue of the Rome I Regulation is governed by the labour laws of the same State. If the latter is not the case, no clear or definite conclusions can be drawn from *Paletta I*, in particular as regards the relationship between the conflict rules of Regulation (EC) No 883/2004 and those contained in the Rome I Regulation.

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<sup>195</sup> Judgment of 3 June 1992, *Paletta I*, C-45/90, EU:C:1992:236 : paragraph 19.

Of course, applying the Regulation (EC) No 883/2004 conflict rules is a quite simple and efficient method for solving issues such as the one at hand. Yet, *Paletta I* – nor any other judgment of the CJEU – can be interpreted to mean that – as regards labour laws prescribing employers to pay sick employees – the Regulation (EC) No 883/2004 conflict rules replace the conflict rules of the Rome I Regulation. Even if one follows the – as such logical – reasoning that because labour laws prescribing continued payment of salary fall within the scope of Regulation (EC) No 883/2004, they are also subject to the conflict rules of Regulation (EC) No 883/2004, this does not imply that the Rome I Regulation does not apply. There is nothing in the Treaties that indicates that the social security coordination rules have priority over the conflict rules contained in the Rome I Regulation.

Such replacement or priority would also be problematic, especially from the perspective of the employer or the Member State of his establishment. In the case of Mr K, the employer is subject to the labour laws of Member State B, which do not impose any obligations on him to pay sick employees. The employer may assume that not he but social security institutions are responsible for income compensation of sick employees. It would be odd, and at odds with legal certainty, if he would be obliged to pay continued salary because another Member State, *in casu* Member State A, has chosen to privatise sickness insurance. EU law leaves Member State B free to regulate income protection for sick employees via its social security system rather than by labour laws imposing duties on the employer. Member State A is free to make the reverse choice, but application of the conflict rules for social security would imply an ‘export’ of labour law duties (including not only the duty to continued salary but also the prohibition/rules concerning dismissal of sick employees). This, arguably, unduly undermines the legitimate choice that Member State B has made. Finally, it must be kept in mind that the aim of the conflict rules of Regulation (EC) No 883/2004 and the Rome I Regulation are not identical. In particular, the latter is mainly aimed at protecting the weaker party to an employment, namely the worker, and therefore seeks to identify the Member State having the closest connection with the contract as the ‘competent State’. Regulation (EC) No 883/2004 does not necessarily pursue that aim and may even designate a Member State that has no link at all with the employment contract as the competent State. This holds true, for example, in the case of a worker who works for one employer in Member State X, for another one in Member State Y, and resides in Member State Z. State Z is competent even though the person does not perform any work there.

All in all, the conflict rules of Regulation (EC) No 883/2004 do not overrule or set aside the conflict rules of the Rome I Regulation. The two instruments co-exist; their conflict rules may have to be applied simultaneously. To solve the problem that arises in the case of Mr K alternative solutions may have to be explored.

**Option 2.** This option could consist of a possible right of Mr K to claim sickness benefits in Member State A. Member State A is as such entitled to opt for a system with continued payment of salary. However, it is also under a duty, following from the general EU law duty of sincere cooperation, to respect the principles of freedom of movement and equality of treatment regardless of nationality. No doubt, Mr K faces an obstacle to his free movement rights, and EU law demands from national authorities and courts in particular to possibly find in their national laws possibilities of eliminating such obstacles.<sup>196</sup> This might very well be possible. It may safely be assumed that Member State A, like virtually if indeed not all other Member States, will intend to ensure that no worker who becomes ill is deprived of income (protection). For employees who become sick but do not or no longer have an employer (*e.g.* employees whose fixed-term contract expires or who receive an unemployment benefit) and thus cannot benefit from the right to maintain salary, Member State A may very well have provided for a social security sickness benefit to fill the otherwise existing gap in income protection. If such a safety net indeed exists under the law of Member State A, it could be argued that Mr K, who does not have an employer who can be obliged by the labour law of Member State A

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<sup>196</sup> Cf. judgment of 13 November 1990, *Marleasing*, C-106/89, EU:C:1990:395, paragraph 8, and judgment of 26 September 2000, *Engelbrecht*, C-262/97, EU:C:2000:492, paragraph 40.

to pay the salary, can make the argument that he, like other workers who have no employer, ought to have the right to a sickness benefit. Whether he can actually do so will probably depend on national law and how it is construed. There is no duty to interpret national law *contra legem*, but especially if the law of the Member State provides for some kind of hardship clause, Mr K's claim for a sickness benefit may be successful.

**Option 3.** To solve problems as the one in the case of Mr K, a solution could in the alternative be sought in the Rome I Regulation. In particular, one may ask the question whether under the Rome I Regulation not the labour law of Member State B but the labour law of Member State A must be regarded as the applicable one. Mr K and his employer have chosen the law of Member State B as the law governing their employment contract, and this in principle seems to be in accordance with Article 8 of the Rome I Regulation. However, one could explore the possibility of 'using' *Schlecker* and argue that the law of Member State A should be regarded as the applicable law governing the employment contract. In principle, or at first glance, this does not seem possible. Mr K works in Member State B three days a week and his employer is based there. The labour law of Member State B would thus seem to have the closest connection with the employment contract. However, looking at all circumstances, including the fact that two days per week Mr K also works in Member State A, lives there and is subject to the social security legislation of Member State A, can one possibly claim that there is a closer connection with Member State A? Upon reading *Schlecker* the answer would still seem to be 'no'. Yet, *Schlecker* was a 'pure' labour law case in which the question of a conflict of the conflict rules for labour law and social security law did not arise. In the light of the duty for national authorities and courts to construe national law in the 'spirit' of the fundamental right to freedom of movement, it could perhaps be asserted that the authorities/courts in Member State A must disregard the law of Member State B, where most of the work is carried out, and rather apply its own laws, if this appears necessary to protect someone in the position of Mr K from being denied any income protection in the event of sickness.

### 3.2.3. Conflicts between similar labour law and social security entitlements: the example of statutory unemployment benefit *versus* companies' unemployment benefits

Mr W works in Member State A and resides in Member State B, where he returns every day. He loses his job in the framework of a social plan agreed by social partners in country A. According to Article 11(3)(c) of Regulation (EC) No 883/2004 he is now insured in Member State B, where he is registered as a jobseeker. He also registers as a jobseeker in Member State A, where he is eligible to a monthly payment stipulated by the social plan and covering the loss of employment. In Member State B social security institutions provide a statutory unemployment benefit. Is he entitled to both benefits?

This case features a typical situation where advantages pursuing the same objective are attributed by one country on the grounds of social security (Member State B) and by the other country on the grounds of labour law (Member State A). Mr W should in theory receive both advantages, since he is subject to the social security legislation of Member State B according to rules of conflict of law of Regulation (EC) No 883/2004, and to the employment law of Member State A according to the rules of conflict of law of Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I).<sup>197</sup>

In the current EU legal system, there is no specific rule that coordinates both systems of conflicts of law (the purpose of which would be to determine one single legislation applicable) or that provides for anti-overlapping mechanisms of social security / labour law benefits. At national level, it would be necessary to explore whether Member State A or Member State B incorporate rules aiming to avoid undue aggregation of benefits. For instance, Member State B may subject the benefit to the condition of absence of another similar financial support. Such a national anti-overlapping rule could however be

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<sup>197</sup> The work is carried out in Member State A (see rule of conflict of law, Article 8(2) of the Rome I Regulation).

problematic. Indeed, applying the anti-overlapping rule of Member State B would mean that Member State A would have to bear all the costs whereas Member State B would be released from all financial charges. This unfair distribution of burden would be the consequence of the absence of coordination at EU level.

Nevertheless, it seems possible to expose three options at EU level for avoiding double payment.

### **Option 1: constructive interpretation of Article 8 of Regulation (EC) No 593/2008**

The application of one single legislation (Member State A or B) could be the result of constructive interpretation of Article 8 of the Rome I Regulation. Two sub-options deserve to be exposed.

In sub-option a), the advantage provided by the social plan in Member State A is considered as an element of the individual employment contract. Article 8, which resolves conflicts of law for individual employment contracts, would therefore be the relevant source. It could be argued that the employment contract is in reality governed by the law of Member State B and not by the law of Member State A (even if it is the country where Mr W carries out his work). Indeed Article 8(4) of the Rome I Regulation stipulates that *"Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply"*. It should be possible for a court to hold that, since the employment contract is terminated, the situation of Mr W has become more closely connected to Member State B, where he is socially insured. In *Schlecker*,<sup>198</sup> the CJEU ruled that *"among the significant factors suggestive of a connection with a particular country, account should be taken in particular of the country in which the employee pays taxes on the income from his activity and the country in which he is covered by a social security scheme and pension, sickness insurance and invalidity schemes"*.<sup>199</sup> The CJEU also ruled that *"where a contract is more closely connected with a State other than that in which the work is habitually carried out, the law of the State where the work is carried out must be disregarded in favour of the law of that other State"*.<sup>200</sup>

Based on these assertions, it may be possible to consider that, despite the identification of a place where the work was habitually carried out by Mr W (Member State A), the social security coverage in Member State B could explain the application of the labour law of that country by virtue of Article 8(4) "closer connecting factor". In the end, the social security and labour law rules of conflict of law would lead to the same competent country.

Alternately and toward the same end, domestic courts could consider that the Member State where Mr W habitually carries out his performance is no longer the country where he was employed but the country where he is registered as a jobseeker and from which he receives unemployment benefits. Consequently, the labour law of Member State B would be competent pursuant to Article 8(1) of the Rome I Regulation.

In **sub-option b)**, the advantage provided by the social plan would not be considered as an element of the individual employment contract. Instead it would be classified as a collective agreement. Article 4 of the Rome I Regulation could nevertheless lead to the same solution as in option 1. Article 4(3) and (4) of the Rome I Regulation indeed refer also to the more/most "closely connecting factor" escape clause to determine the legislation applicable. The CJEU seems to apply this criterion in a flexible way.<sup>201</sup>

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<sup>198</sup> Judgment of 12 September 2013, *Schlecker*, C-64/12, EU:C:2013:551.

<sup>199</sup> Paragraph 41.

<sup>200</sup> Paragraph 39.

<sup>201</sup> Judgment of 6 October 2009, *ICF*, C-133/08, EU:C:2009:617 (*"It is apparent from the Giuliano and Lagarde report that the draftsmen of the Convention considered it essential 'to provide for the possibility of applying a law other than those referred to in the presumptions in paragraphs 2, 3 and 4 whenever all the circumstances*

Alternatively, it would be possible to assume that the “characteristic performance of the contract” used to identify the law applicable under the meaning of Article 4(2) of the Rome I Regulation has become country B since the loss of work.

Two final remarks need to be made about sub-options a) and b). The first one is that the solution envisaged builds a bridge between social security and labour rules of conflict of law. The ultimate goal is to identify one single legislation applicable by interpreting the labour rules of conflict of law, therefore without any need for amendment of any of the labour/social security rules of conflict of law in place. The second one is a consequence of the first remark. The courts play a key role for the application of this method. In order to encourage them to do so, the European Commission (EC) could publish a practical guide or any other communication document.

## **Option 2: exporting the “Paletta” broad interpretation to unemployment benefits**

In the *Paletta I* case<sup>202</sup> the CJEU ruled that a labour law benefit (continued payment of salary during sickness) was to be classified as a sickness benefit under Regulation (EC) No 883/2004. According to a broad interpretation (see 1.2 and 3.2.2) above), *Paletta I* means that the employer must maintain the salary if this is required by the competent Member State under social security coordination rules even if the employment contract is governed by the law of another Member State that does not have such requirement.

Applying this interpretation of *Paletta I* to the case study would mean that since Member States A and B both offer unemployment benefits, by virtue of the rules of conflict of law set out in Regulation (EC) No 883/2004, Member State B would be competent and would thus provide its unemployment benefit. Therefore, the company should not have to pay the unemployment benefit (even if it is required by labour law rules) since Member State A is not competent. This solution implies that the social security rules of conflict of law prevail over the labour law rules.

### 3.2.4. Employed or self-employed activity: social security law *versus* labour law classification?

Mrs T resides in Member State A, where she works for a delivery platform two days per week. She also works for an employer in Member State B three days per week. Member State A considers that she should pay her social security contributions in Member State A by virtue of Article 13(1)(a) of Regulation (EC) No 883/2004. The social security competent institution of Member State A indeed considers that she carries out two employed activities. This assessment is based on a ruling of a labour court of Member State A which classifies the platform activity as an employment relationship. Member State B also claims the social security contributions, arguing that the platform activity in Member State A is self-employment according to its national social security law rules. Therefore, pursuant to Article 13(3) of Regulation (EC) No 883/2004, the law of Member State B would be applicable.

In this case it is uneasy to determine whether someone is carrying out the activity as an employed person or under a self-employed status. The challenge is to determine the extent to which labour law concepts impact the application of social security rules of conflict of law. Concretely, which Member State has the power to decide whether an

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*show the contract to be more closely connected with another country’. It is also apparent from that report that Article 4(5) of the Convention leaves the court ‘a margin of discretion as to whether a set of circumstances exists in each specific case justifying the non-application of the presumptions in paragraphs 2, 3 and 4’ and that such a provision constitutes ‘the inevitable counterpart of a general conflict rule intended to apply to almost all types of contract’. It thus follows from the Giuliano and Lagarde report that the objective of Article 4(5) of the Convention is to counterbalance the set of presumptions stemming from the same article by reconciling the requirements of legal certainty, which are satisfied by Article 4(2) to (4), with the necessity of providing for a certain flexibility in determining the law which is actually most closely connected with the contract in question”, paragraph 58-59).*

<sup>202</sup> Judgment of 3 June 1992, *Paletta I*, C-45/90, EU:C:1992:236, paragraph 19.

activity exercised is employment or self-employment for the purpose of social security coordination rules, and under which category of national rules (labour or social security) given that the choice made will enable the identification of the relevant social security rule of conflict of law?

In a case dealing with the application of social security coordination rules the CJEU held that *"the terms 'employed person' and 'self-employed person' in the regulation refer to the definitions given them by Member States' social security legislation, regardless of the nature of the activity for the purposes of employment law"*<sup>203</sup>. The CJEU added in the same case that *"'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"*.<sup>204</sup> If we go back to the case study, from the perspective of Regulation (EC) No 883/2004 this means that since the platform activity is carried out in Member State A the classification of this activity should be made under the social security legislation of this Member State. Consequently, the fact that labour rules applicable in that country classify it as "employed activity" is irrelevant. The fact that social security rules of Member State B classify it as "self-employed activity" is also irrelevant.

This case study is interesting as it shows that although the same notions are applied in both branches of law (social security and labour) and receive a different meaning, this does not necessarily mean that the correct functioning of the rules of conflict of law set out in Regulation (EC) No 883/2004 is under threat. In the case study the classification of the platform activity as employment or self-employment will be operated under the social security rules of the Member State where that activity is exercised. This operation of classification will be key to ultimately determine the social security legislation applicable to the worker, but it will not prevent labour law instruments from having their own classification of the platform activity. For instance, in the case study, if the social security legislation of Member State A classifies the activity as self-employed, the social security legislation of Member State B will be competent pursuant to Article 13(3) of Regulation (EC) No 883/2004. All contributions will be levied in Member State B. At the same time, if the platform activity is classified as employment by labour rules of Member State A, all consequences attached to this classification in the field of labour will apply. If the classification of the activity given rise to difficulties in the context of a cross-border situation and therefore needs to be addressed for the resolution of a conflict of labour law, the competent court will first have to classify the platform contract according to its own legislation (*lege fori*). Pursuant to Article 5 of Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters,<sup>205</sup> the competent court should be located in Member State A as it is the place of performance of the obligation. The solution found about the classification of the contract will be the first step before the resolution of the conflict of labour law.<sup>206</sup>

### **Better coordination between labour law and social security rules of conflict of law: proposed actions**

**Proposition 1:** Envisage the pros and cons of introducing into EU legislation a provision stipulating that when the workers' rights vis-à-vis their employer also fall within the scope of statutory social security, they are subject to the rules of conflict of law set out in the coordination Regulations.

<sup>203</sup> Judgment of 30 January 1997, *de Jaeck*, C-340/94, EU:C:1997:43, paragraph 19.

<sup>204</sup> Paragraph 23.

<sup>205</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, p. 1-23.

<sup>206</sup> If the platform activity is classified as employed by the labour court of Member State A, Article 8 of the Rome I Regulation will be relevant to identify the law applicable to that employment contract.



**Proposition 2 (alternative to proposition 1):** Produce guidelines / non-binding rules in favour of a constructive interpretation of rules of conflict of law inserted in Regulation (EC) No 593/2008 (Rome I) with the ultimate goal of identifying one single legislation applicable common to social security and labour relationship; an application of the *Bosmann* principle.

**Proposition 3 (complementary to proposition 2):** Encourage the negotiation of Article 16 agreements aiming to resolve the risks of overlapping of benefits and of gaps of benefits due to the difference of solutions between labour law and social security rules of conflict of law.

## 4. CONCLUSION

This report studies the interrelationship between social security law and labour law in cross-border situations. It tries to better understand the synergies between labour and social security legislation and what the practical consequences are for the persons concerned.

The study focuses on **common notions** used with similar or slightly different meanings in both fields with a view to identifying the bridges between them. The main conclusion of the study is that, in general, the differences of approach are acceptable and do not give rise to specific problems. A global harmonisation of notions between labour and social security law is not necessary as such. The absence of synergies between labour and social security legislation have no practical consequences for the persons concerned and can be justified by the internal coherence of each instrument.

This does not mean that improvements cannot be made. The **concept of social security** is for instance too unstable. Its meaning and its scope, in particular with regard to close notions such as 'social protection' and 'social assistance', would need to be rethought in favour of a more horizontal approach involving all labour and social security instruments, perhaps in line with other international instruments. The **notion of 'pension'** also lacks consistency. From the wording used by Union instruments, several conclusions can be drawn. Firstly, EU legislation predominantly defines and uses the term supplementary pension/scheme over the term occupational pension/scheme. Secondly, although relevant Directives do not use identical wording when defining supplementary pension schemes and supplementary pensions, the wording is nevertheless compatible. It always covers only occupational schemes established in accordance with national law and practice. Thirdly, it seems that depending on the purpose of the Directive, the term sometimes covers only schemes for employed persons, while on other occasions it encompasses schemes covering both employed and self-employed persons. Actions could be undertaken to clarify the use of the term 'supplementary' pensions and to reconsider the legislative practice of inconsistent and simultaneous use of the notions 'occupational' and 'supplementary' as synonyms. The principle of **equality of treatment** is less sophisticated in social security coordination than it is in EU labour law: coordination rules could be revised with a view to refining the concepts of direct and indirect discrimination.

The study also **focuses on the analysis of existing instruments on determining the applicable labour law in cross-border situations and how these instruments could be improved and better aligned to the social security rules of conflict of law**. This question is very sensitive. The lack of coordination for the resolution of the conflicts of law (social security legislation applicable *versus* labour legislation applicable) may indeed lead to undue advantages or to a gap in protection. The wall between labour and social security conflict rules bring inconsistencies which go against the interests of the Union citizens, of the social security institutions and of the employers.

There are solutions to the problems encountered. First of all, courts could interpret both sets of rules of conflict of law in such a way as to facilitate the identification of one single legislation applicable common to both. Second, courts could use, where relevant, the '*Bosmann* principle' in order to fill gaps between labour law/social security entitlements. Third, conflicts between the conflict of law rules could be solved by giving priority to the rules contained in Regulation (EC) No 883/2004, even though this also has its disadvantages. This solution could be found by courts on a case-by-case basis or by the EU legislature, which could introduce such a priority rule in EU legislation. Finally, an alternative worth considering would be changing the system of determining the applicable legislation to make sure that the applicable legislation is that of the State of the activity's centre of interest (the activity's closest link). A closest link rule would have to be equally applicable in labour and social security law. Such an option, however, would remain extremely difficult to implement in practice.

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