

MoveS

Belgian Seminar

Celebrating Free **Movement** of Workers & Social **Security** Coordination

15 October 2018

REGULATION (EEC) No 1612/68 OF THE COUNCIL
of 15 October 1968

on freedom of movement for workers within the Community

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 49 thereof;

Having regard to the proposal from the Commission;

Having regard to the Opinion of the European Parliament¹;

Having regard to the Opinion of the Economic and Social Committee²;

Whereas freedom of movement constitutes a fundamental right of workers and their families; whereas mobility of labour within the Community must be one of the means by which the worker is guaranteed the possibility of improving his living and working conditions and promoting his social advancement, while helping to satisfy the requirements of the economies of the Member States; whereas the right of all workers in the Member States to pursue the activity of their choice within the Community should be affirmed;

Whereas such right must be enjoyed without discrimination by permanent, seasonal and frontier workers and by those who pursue their activities for the purpose of providing services;

Programme



Welcome by Prof. dr. Filip Van Overmeiren

Opening by EU Commissioner Marianne Thyssen

60 years Social Security Coordination

Lunch

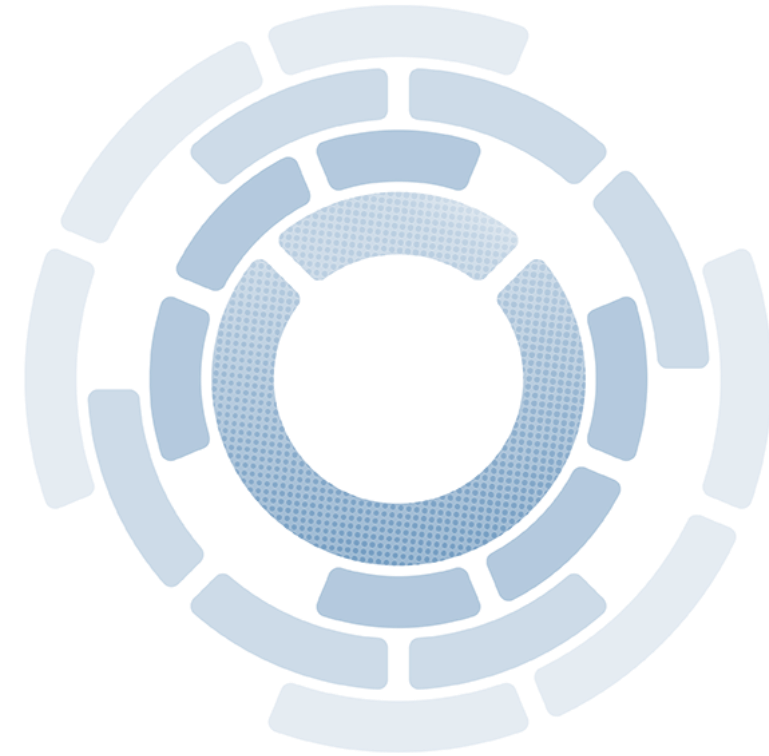
50 years Free Movement of Workers

Coffee break

Mobility Hot Topics Panel

Closing by Director-General EMPL Joost Korte

Apéro



MoveS

EU-wide network
of independent legal experts
in the fields of
Free **M**ovement of Workers (FMW) &
Social Security Coordination (SSC)

- Funded by the European Commission (DG EMPL units D1 'FMW' and D2 'SSC')
- 32 countries covered (EU/EEA/CH)
- Implemented by Eftheia, Deloitte GES & Consulting, University of Ljubljana, University of Poitiers
- Four-year project (2018-2021)

Objective 1



To provide high-quality legal expertise in the areas of FMW and SSC through

- **Legal Reports**
- **Flash Reports**
- **Replies to Ad Hoc Requests**



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Objective 1



Legal Reports

• **Social Security Coordination**

- 'Consequences and possible solutions in cases of lump sum payments of pensions, reimbursement of contributions and waiver of pensions'
- 'Social security coordination and non-standard forms of employment and self-employment - interrelation, challenges and prospects'

• **Free Movement of Workers**

- 'The legal situation of third country workers in the EU as compared to EU mobile workers'

Flash Report

- Provided to the EC on a monthly basis
- Covering national developments impacting FMW and SSC
- Based on the inputs of the 32 countries of the network

Ad hoc support

- When the investigation of specific issues requires a detailed analysis of the national legal framework



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Objective 2



To disseminate expertise and increase experts' and practitioners' knowledge

- seminars
- sharing information
- building networks between stakeholders



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Objective 2



Seminars

- Ca. 10 one-day seminars a year
- Audience: Representatives of competent authorities and institutions, social partners, NGOs, judges, lawyers, academics and HR professionals

2018 MoveS seminar calendar

Date	Country
25/5	Italy
11/6	France - SSC
15/6	France - FMW
3/7	Poland
24/9	Czech Republic
28/9	Cyprus
15/10	Belgium
26/10	Latvia
15-16/11	Austria



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Objective 2



Information sharing and networking

- **MoveS webpage** (EUROPA)

<http://ec.europa.eu/social/main.jsp?langId=en&catId=1098>

- **MoveS LinkedIn group:**

MoveS – free movement and social security coordination

<https://www.linkedin.com/groups/4291726>



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Thank you for your attention!

Contact us at:
MoveS@eftheia.eu

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Opening speech by Mrs. Marianne Thyssen

European Commissioner
Employment, Social Affairs, Skills and Labour Mobility

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Morning Session

60 Years of Social Security Coordination

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Current developments in social security coordination

Mr. David Dion

Head of Unit Social Security coordination, DG EMPL

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60 years of European social security coordination

Prof. dr. Rob Cornelissen
VUB

Overview



Coordination system part of Union law

- Role ECJ. Interaction ECJ/legislature
- Reach and limits coordination

Evolution EU coordination system

- Evolution from Reg. 3 to Reg. 883/2004
 - Pillars Regulation 3
 - Pillars adapted
 - Pillars reinforced
 - 'Hidden' improvements



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Overview (continuation)



Has coordination system been dynamic enough?

- Introduction new branches social security in national legislation. Covered by Reg?
- Nature labour market changed. Impact on rules determining applicable legislation? Open questions

Complexity coordination system

- Various sources European coordination
 - Treaty provisions on freedom, security and justice
 - International agreements EU/third countries
 - Impact Union law as a whole

I. EU social security coordination unique system



- 1958: Regulation 3 based on Art. 51 EEC
- Unique coordination system in the world: role of ECJ
- Power legislature in determining content coordination system is not unlimited.
- It has to respect the objectives of legal basis, as identified by ECJ
- Objective: remove all barriers in sphere social security which impede free movement of workers.

Role ECJ



- Case-law ECJ has played essential role in evolution of Reg. 3 into Reg. 1408/71 and into Reg. 883/2004
- All provisions EU regulations must be interpreted in light objective legal basis
 - Sometimes provision gets meaning not intended by legislature (Bosmann)
 - Legislature cannot violate objective Art. 48 TFEU: risk of invalidity if provision is not in line with objective (Petroni, Pinna)

Interaction ECJ/ legislature



Continuous interaction between legislature and ECJ. Often regulations modified to 'translate' case-law. Sometimes to counter case-law (insofar interpretation was not based on Treaty)

- Modification chapters 'invalidity' and 'pensions' to translate case-law ECJ in 1992
- creation of separate coordination system for '*special non-contributory benefits*' in 1992
- Introduction new criteria and new list of '*special non-contributory benefits*' in line with new case-law in 2005

Reach and limits of coordination



Objective EU Regulations: only coordination

Disparities between Member States' schemes not affected

- Notion "*family member*" (registered partnerships, same-sex-marriage, age limits for children as condition for entitlement to family benefits)
- Notion of "*invalidity*"
- Age conditions for entitlement to old-age pension

Could result in a person having moved between MS is at disadvantage as compared with person not having moved

Reach and limits legislature



Legislature cannot violate objective legal basis, but it may, on some points, offer more protection than a simple coordination

- Since 1972 provisions in Reg. aimed at helping persons unemployed in a MS to seek work in another MS without losing unemployment benefit. Since it is more than simple coordination legislature may make this right subject to limits and conditions (Testa)
- Since 1972 provisions in Reg. aimed at facilitating planned cross-border health care. Facilitates free movement of patients. Reimbursement according to tariffs applicable in MS. Since it is more than simple coordination legislature may make this right subject to condition of having obtained prior authorisation from competent institution (Inizan)

II. Evolution European coordination system.



Pillars Regulation 3

1. Determination applicable legislation
 - General rule: law of MS of work (*lex loci laboris*)
2. Principle of equal treatment
3. Principle of maintenance of rights in process of being acquired
 - Aggregation of periods of insurance as a technique to put together the pieces of career mobile worker
4. Principle of acquired rights
 - Residence clauses for entitlement to most benefits waived
5. Cooperation between institutions
 - Important role Administrative Commission

Evolution to Reg. 883/2004



1958: Regulation 3

- 6 Member States
- EU workers, as well members of their families or survivors

1972: Regulation 1408/71

- Gradual extension from 6 to 15 Member States
- Extension to self-employed (1981) and students (1999)

2018: Regulation 883/2004

- 28 Member States
- EU citizens, as well as members of their families or survivors



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Evolution to Regulation 883/2004



Pillars of Reg. 3 remain in place today

Some pillars have been adapted. Illustrations:

- Workers employed in one MS entitled to **family benefits** for children residing in another MS in accordance with legislation of first MS. No limitation as foreseen by Reg. 3. Reg. 883/2004 contains priority rules for situations where during the same period and for the same children benefits are provided for under legislation 2 or more MS. Guarantees payment of differential supplement up to the highest amount of benefits provided by one of the MS involved. Inspired by case-law ECJ under Reg. 1408/71.
- Principle of maintenance of acquired rights does not apply to "*special non-contributory benefits*". Separate coordination system for such benefits

Evolution to Regulation 883/2004



Some pillars have been reinforced. Illustrations:

- No longer necessary to reside in EU to invoke equal treatment.
- Principle of equal treatment strengthened by Art. 5 Reg. 883/2004 (assimilation of cross-border facts and events)

'Hidden improvements': cooperation between institutions

- Principle of good administration reflected in Reg.
- Provisions aimed at guaranteeing smooth application of reimbursement of costs for health care provided by a MS on behalf of another MS. Role Audit Board



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'Hidden improvements' (continuation)



- Improved procedures for exchange information between institutions. Transmission of data by electronic means. Role Technical Commission. Executive Board set up by Administrative Commission to provide leadership EESSI program.
- In order to avoid that time-consuming procedures for determining competent MS or for calculating benefits result in drawbacks for persons concerned: provisions aimed at provisional application of legislation and provisional granting of benefits



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'Hidden' improvements



- IR requires competent authorities to compile statistics on application EU regulations and to forward them to Administrative Commission. Statistical data help to assess functioning current regulations and to underpin proposals for possible improvements
- Creation of network of national experts on social security coordination (and free movement) matters. Enables MS and EC to get an objective picture of the way EU regulations are applied in various MS. Analytical capacity of network enhances expertise



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III. Has coordination system been dynamic enough?



- Regulations are complicated
- But provide high standard of protection for all EU citizens moving between internal borders, even if not linked to work
- Of importance for overwhelming majority of European citizens
 - Around 238 million EHIC's in circulation. Symbol of Union for many citizens.
- Dynamic: it has to adapt to developments, in particular in national legislation and in social/economic environment.

Response to introduction new social security risks in national legislation



- Regulations only apply to (statutory) systems concerning an exhaustive list of branches social security.
- Reg. do not apply to a branch of social security not mentioned in list (Otte, Valentini)
- 1998 Commission proposal to have an open list rejected in Council
- Apart from 2 minor adaptations, list of branches. Reg. 883/2004 is identical to list of Reg. 3!
- Last 2 decades MS have introduced new risks
- Legislature EU has not adapted list accordingly

Developments in national legislation



- Several MS have introduced 'care insurance' opening entitlement to benefits designed to cover costs of care provided at home by another person.
- ECJ (Molenaar): care allowance is form of financial aid which enables standard of living of persons reliant on care to be improved. Therefore such benefits must be regarded as '*sickness benefits*' for the purposes of EU regulations. Result: benefit must be paid to beneficiary, even if insured person resides in another Member State (Art. 7 Reg. 883/2004).

Finally leading to intervention legislature



- However, treating 'care allowances' in same way as traditional '*sickness benefits*' could, for application of other provisions of regulations, in some situations lead to negative consequences for persons involved. ECJ (Da Silva Martins): in such situations, the other provisions must be interpreted in such a way that the person concerned is not disadvantaged for having moved to another Member State.
- Commission proposal (December 2016): adapts list Art. 3 Reg. 883 to include long-term care benefits. Strengthens legal framework; takes account of specific nature of long term care benefits.

Developments in national legislation



Several MS have introduced parental benefits, intended to compensate a parent for loss of income during time spent raising a child.

ECJ (Hoever-Zachow): such benefits are also intended to meet family expenses. Therefore, they must be treated as "*family benefits*" for purposes of EU regulations

- Result: where a person works in one Member State and lives with his family in another Member State, that person's **spouse** is entitled, under Art. 67 Reg. 883/2004, to receive a family benefit such as a parental benefit from the first state.

Finally leading to intervention legislature



- However, treating parental benefits in same way as traditional '*family benefits*' could, for application other provisions of regulations, in some situations lead to negative consequences for persons involved. ECJ (Wiering): in such situations, parental benefits must be regarded as being of different kind than traditional family benefits.
- Commission proposal (December 2016): insertion of provisions in Reg. 883/2004 aimed at taking into account special nature of parental benefits



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Developments in nature labour market



- Title II: rules determining applicable legislation
- Main choice of law: *lex loci laboris* (same as Reg. 3).
- Special rules for posted workers (Art. 12) and for people 'normally' working in 2 or more MS (Art. 13)
- EU Regulations set up in a time when workers had a full time and permanent job
- No substantial change in EU rules determining applicable social security legislation over last 60 years.



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Developments in nature labour market



- Full time, open-ended employment still accounts for large proportion of jobs
- However, significant rise of new types of work, such as short-time contracts, part-time contracts, on-call contracts, framework contracts, telework
- Also: increase of forms of cross-border mobility which are not new but which have become more frequent: consultants, more than one employment contract at the same time; new work organization: intra-group mobility



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Open questions



- New type of work (e.g. mini-jobs) can lead to lack of social security coverage in MS concerned.
- For mobile workers, this could have consequences for social security coverage in **other** MS involved (Franzen)
- How to solve?
- Borderline between lex loci laboris and Art. 13 (framework contracts, Bogdan)?
- What does “workplace” mean (telework)?

Divergence applicable labour law/social security law



- Directive 2018/957: workers posted to other MS longer than **12** (18) months: labour law of host MS fully applicable
- Reg 883/2004 unchanged: workers 'sent' to other MS longer than **24** months: social security law of host MS applicable

Divergence applicable labour law/social security law



Guiding principle labour law (Rome I): with which MS has worker closest connection in terms of employment?

Guiding principle Reg. 883:2004?

- Art. 13(3): person works as employed person in MS A for 1/2 day a week and 4 1/2 day a week as self-employed in MS B. Is subject to social security legislation MS A.
- Art. 13(1)(b)(iv): worker resides in NL, works 2 days a week in MS B and 3 days a week in D. Is subject to NL social security legislation.

IV. Complexity.



Complexity target of criticism

Partially unavoidable: price to pay in order to achieve goal Art. 48 TFEU: to remove all barriers in sphere social security impeding a genuinely free movement.

Partially legislature can be blamed.

- Annex III Reg. 883: "*restriction of rights...for...*"
- Annex IV: "*More rights for*"
- Annex V: "*More rights for....*"

But not always

Various sources European coordination



- Regulations based on Art. 48 TFEU most important but not only source coordination:
 1. Treaty provisions in area of freedom, security and justice inserted by Amsterdam Treaty
 - Reg. 1231/2010: extension scope Reg. 1231/2010 to third country nationals. Two conditions:
 1. *"Legally residing in a Member State"*. Differing linguistic versions of *"residence"* in Art. 79 TFEU. Notion *"residence"* not same as in Reg. 883/2004. What does it mean? Pending case ECJ (C-477/17)
 2. *"Person must be in a situation which is not confined in all respects within a single Member State"*. Translates case-law ECJ

Reg. 1231/2010



- Problems linked to Protocols 21 and 22.
- DK out.
- Ireland and UK may opt in (or out). For old Reg. 859/2003 extending scope of old Reg. 1408/71, both Ireland and UK opted in. For Reg. 1231/2010 only Ireland opted in. Result: old Reg. 1408/71 continues to have legal effect for all cases where a third country national moves between UK and another Member State (except DK)



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Relationship Reg. 1231/2010 and bilateral agreements?



- 2012 Commission Communication: in cases of conflict the EU social security regulations take precedence over national rules contained in bilateral agreements with third countries.
- Directive 2014/66: *"in the event of intra-EU mobility, and without prejudice to bilateral agreements ensuring that the intra-corporate transferee is covered by the national law of the country of origin, Regulation 1231/2010 shall apply accordingly"*

International agreements EU/third countries



2. International agreements EU with third countries

- EEA agreement and EU/Switzerland agreement
- EU regulations apply also in Norway, Iceland, Liechtenstein and Switzerland, but:
 - It takes a while before adaptations in regulations are integrated in relations between EU and aforementioned countries. Burocratic machinery to adapt developments in EU regulations into annexes of EEA and EU/Switzerland agreements
 - Regulation 1231/2 does **not** apply! (Xhymshiti).

Association agreements EU/third countries



Association agreements with third countries based on Art. 218 TFEU. Require relevant Association Councils to take measures.

- Until now: only Decision 3/80 EU/Turkey. Implementing Decision necessary for making Decision 3/80 operational, never adopted.
- ECJ: Art. 3 Decision 3/80 has direct effect: Turkish workers must, in the field of social security, be treated in the same way as nationals of the host EU Member State (Sürül).
- ECJ: Art. 6 Decision 3/80 has direct effect: pensions (including 'special non-contributory benefits'!) acquired by a Turkish worker in a Member State must be paid to Turkish workers in Turkey without reduction or suspension.

Association agreements EU/third countries



- Common Position EU Council (adopted in 2010 and 2012) based on number of draft Decisions of respective Association Councils. Under negotiation with third countries involved.
- **Some** third country nationals benefit already now from equal treatment
 - ECJ (Kziber) equal treatment provisions in association agreements concluded between EU and Morocco, Tunisia and Algeria have direct effect.



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Impact Union law as a whole



- 3. ECJ: MS free to determine own schemes. But in exercising that power they have to comply with Union law.
- Result: ECJ examines whether in a specific case application of provisions of national law is compatible with Treaty, even if national provision is in line with provisions laid down in EU social security regulations



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Illustrations impact Union law



Free movement of persons

- ECJ (Petersen): residence clause laid down in national legislation as condition for entitlement to unemployment benefit is compatible with Reg. 1408/71 but incompatible with Art. 21 TFEU

Free movement of workers

- ECJ (Walloon government/Flemish government): residence clause in legislation of a region of a Member State as condition for affiliation to a social security scheme incompatible with Art. 45 TFEU insofar as such clause affects nationals of other MS or nationals of that MS having made use of their right to free movement

Illustrations impact Union law



Free movement of workers:

- ECJ (Gottardo): MS may not limit application of social security agreements concluded with third countries to own nationals and must treat other EU nationals equally under terms of agreement. Obligation results from principle of equal treatment laid down in Art. 45 TFEU

Illustrations impact Union law



- Free movement of services:
 - Kohll, Smits-Peerbooms, etc. Created a mechanism for cross-border health care as an alternative to the one established by EU regulations based on Art. 48 TFEU. Case-law 'translated' in Patient Mobility Directive 2011/24
- Efforts made during negotiations leading to Reg. 883/2004 to have case-law ECJ fully integrated in one legal instrument failed due to lack of unanimous support in Council required by Treaty.



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Conclusions



Still a number of shortcomings, challenges and open questions.

- Do rules on determining applicable legislation meet today's and future's requirements?
- Same question as to material scope. Number of benefits continue to be excluded (such as activation measures)
- Lack of synchronisation between between social security, taxation and labour law

Despite shortcomings, the EU social security coordination system provides high standard of protection to virtually all EU citizens

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The future of Social Security Coordination: Is diamond also platinum?

Prof. dr. Yves Jorens
Ghent University

The problem: Territoriality and National borders



Barriers and obstacles faced by migrant workers after Second World War were state borders

- The idea of state sovereignty: every 'sovereign' state's jurisdiction unchallengeable within own frontiers, but limited to those frontiers because other states also sovereign within own territories

Principle of territorial restriction on access to welfare as old as principle of welfare itself

Application of national law could harm people moving within the EU



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The reaction: A story of numbers ...



Regulation No 3/58 (and 4/58)

- Regulation 3/58 took application of the principles of social security coordination further than previous international social security agreements:
 - Revision work started only 5 years after introduced

Regulation No 1408/71 (and 574/72)

- more sophisticated development of Regulation 3/58 that took into account gaps and technical problems that had become evident
- Regulation 1408/71 updated almost every year in response to new evolutions and developments

The reaction: A story of numbers ...



Regulation No 883/2004 (and 987/2009)

- Modernisation and simplification first proposed as early as 1992 to make Regulation “more efficient and user-friendly” and take account of changed circumstances
- Guiding principles and essential elements of the Regulation remain the same with some new adoptions: modernised coordination is not so much about creating new rights, but rather about making existing rights more effective
- More modernisation than simplification?



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Regulation 883/2004: Work in progress ...



Four main issues

- Long-term care benefits
- Unemployment benefits
- Family benefits
- Access of economically inactive citizens to benefits

Some other issues

- Posting rules
- Fraud and error
- Technical amendments (and annexes)



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The reaction: A story of numbers ...



- But is this the end?
- Where to go to after 60 years of evolution?
- Back to some “minor” yearly modifications ...
- Or do we need a more thorough reform?



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The coordination under pressure ...



- No time to lean back ...
- Reality is always quicker than the law
- Challenges for the current framework



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Part I: Changes creating challenges for the existing way of coordination



Endogenous developments at Member State level

- Changes in welfare systems
 - Member States remain competent to shape and run their social security schemes, but several developments took place

Impact on the Regulations

- Different national approaches towards social security present a serious threat to coordination



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Part I: Changes creating challenges for the existing way of coordination



Old problems which could become more and more pressing (no synchronisation between social security, taxation, labour law and schemes of international organization)

Impact on the Regulations

- Regulations only coordinate contributions, and not general taxation
- Regulations contain certain provisions to combat fraud, but ...



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Part I: Changes creating challenges for the existing way of coordination



The family situation and demography

Impact on the Regulations

- Who should be responsible to provide LTC?
- Benefits for carers?
- New kinds of family benefits reflecting new forms of family structure



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Part I: Changes creating challenges for the existing way of coordination



Technical developments

Impact on the Regulations

- Adaptation of rules on applicable legislation
- Do the actual technical choices made by the regulation fit the possibilities created by current digital revolution?



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Part I: Changes creating challenges for the existing way of coordination



Endogenous developments at EU level – institutional challenges

- The parallelism of various legal acts all dealing with cross-border aspects of social security

Impact on the Regulations

- A lack of coherence and legal uncertainty
- The decision-making process

Impact on the Regulations

- Does not allow quick reactions e.g. LTC benefits

Part I: Changes creating challenges for the existing way of coordination



Exogenous developments at global level

- Globalisation of the markets and economic environment

Impact on the Regulations

- Affects the rules on applicable legislation, which maybe should be reformed and updated
- Important side effect is the extension of the geographical framework



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Part I: Changes creating challenges for the existing way of coordination



Exogenous developments at global level

- Migration

Impact on the Regulations

- Growing union of citizens with a new notion of European solidarity
- This might lead to a new conformity test where every restriction is judged against general free movement



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Part II: Broad solutions



A redefinition of the fundamental parameters

- Examination of the personal scope
 - Revision of principle of priority between derived and own rights
 - Strengthen individual rights
- Examination of the material scope
 - Reform material scope to get rid of systematic differences between Member States
 - Open other chapters to activation measures
 - Social assistance

Part II: Broad solutions



A redefinition of the fundamental parameters

- The territorial element
 - Up to regions?
 - More harmonised coordination of social security schemes worldwide?
- A redefinition of equal treatment
 - Who can rely: workers or citizens
 - Which Member States serve as reference point: MS of activity or of residence?
Closest link principle as condition?

Part II: Broad solutions



A redefinition of the fundamental parameters

- Extending the principles also to cases without cross-border elements
 - The problem of reverse discrimination: in accordance with EU law and national law of the Member States
- Introducing a European solidarity mechanism into coordination
 - Achieve transparency when dealing with reimbursement and rethink rules between the MSs if their benefit levels differ

Part II: Broad solutions



A redefinition of the fundamental parameters

- Looking for a fairer burden sharing between Member States
 - Looking for a fairer sharing of burdens
 - What if two MSs are jointly competent for one situation: financial sharing of costs
- Applicable legislation
 - Mechanisms to better take into account the real conditions of activities, the activity's centre of interest



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Part II: Broad solutions



A redefinition of the fundamental parameters

- Replacing the existing rules to define the competent MS with the 'closest link' principle
 - Combining the rules on free movement with internal market principles and European citizenship
 - Switching to closest link principle for rules on applicable legislation as well as in the field of provision of benefits, the MS competent to grant benefits, reimbursement issues, ...
- => Could result in several deviations from current situation

Part II: Broad solutions



Living in an era of technical developments

- Electronic data exchange to keep the application of the Regulations up to date

Institutional and legislative developments

- Strengthen the position of the CASSTM
- Directive instead of Regulation?
- All EU instruments dealing with coordination of social security under one roof



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“Dare to think”



- The current framework should not be considered as even a temporary culmination
- We should keep the challenges in mind if we want the Coordination Regulations to further play their role as the glue between the European citizens on their way to an ever closer social union



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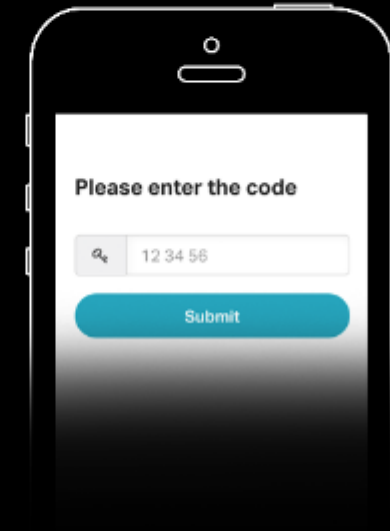
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Is the current Coordination Regulations framework sufficiently adapted to today's challenges?

0

Yes, the Regulations are fully in line with the current societal developments

0

Yes, a minor yearly modification is sufficient (in particular to keep track with CJEU case law)

0

No, we should further change or add some specific titles under the Regulations

0

No, it is time to reflect out of the box and to question even some of the fundamental principles of the Regulations



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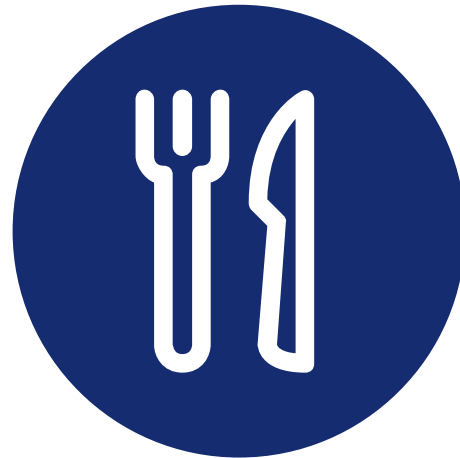
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Questions and discussion



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Lunch (1h00)



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Testimonials (video)

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Afternoon Session

50 Years Free Movement of Workers

Mobility Hot Topics Panel

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Current developments in Free Movement of Workers

Mr. Denis Genton

Head of Unit Free Movement of Workers & EURES, DG EMPL

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50 Years of Free Movement of Workers: a moving acquis

Prof. dr. Herwig Verschueren
University of Antwerp

What is at stake?

- How did it all begin?
- What does Regulation 1612/68 tell us?
- Is it still relevant to a 'worker'?
- Who is a 'worker'?
- What is 'free' and 'equal'?

How did it all begin? From Messina to Rome



- Freeing factors of production, including workers
 - Part of the common market
- Supply/demand-induced
 - Still to be seen in current Article 45(3)TFEU:
 - *'...offers of employment actually made'*
 - Or in current Article 46(d) TFEU
 - *'... the achievement of balance between supply and demand in the employment market in such a way to avoid serious threats to the standard of living and the level of employment in the various regions and industries'.*
- Double objective of equal treatment

How did it all begin?



First regulations reflected this 'employment market instrument' approach

- Access to the labour market of another MS depended on the need for labour there
- Safeguard clause linked to serious imbalances in the workforce



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What does Reg. 1612/68 tell us?



- Shift of paradigm: 3rd recital

*'Whereas freedom of movement constitutes a **fundamental right of workers and their families**; whereas mobility of labour within the Community must be one of the means by which the worker is guaranteed the possibility of **improving his living and working conditions and promoting his social advancement**, while helping to satisfy the requirements of the economies of the Member States ; whereas the right of all workers in the Member States to pursue **the activity of their choice** within the Community should be affirmed'*

- Coined as 'an incipient form of European citizenship'

What does Reg. 1612/68 tell us?



The right to free movement for workers became a personal, individual and fundamental right

- Conditioned the interpretation of the Treaty provisions and the regulation
- Link with the 'internal market' must still be present (cross-border element)

Extension of the scope to

- Family members, including the right to reside
- All 'social and fiscal' advantages as well as housing
- Access to education for children

What does Reg. 1612/68 tell us?



- Confirming horizontal effect (Article 7(4))
- Generous interpretation of the Treaty regime by the legislator preceded later Court judgments
 - Confirmed in the EU Charter and in Regulation 492/2011
- But free movement for workers is not a 'human right'
 - It remains part of the internal market as politically construed





In times of EU citizenship: Is it still relevant to be a 'worker'?



Definitely

Regulation 492/2011

- Directive 2014/54

Directive 2004/38

- The right to reside
- Equal treatment
- Instant integration vs. gradual integration

Also relevant to be a member of the family of a mobile worker

- or of a former mobile worker (*Ibrahim*)



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Who is that 'worker'?



A matter of EU law

- *'If the definition of this term were a matter within the competence of national law, it would therefore be possible for each Member State to modify the meaning of the concept of 'migrant worker' and to eliminate at will the protection afforded by the Treaty to certain categories of person.'* (Unger, 1964)



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Who is that 'worker'?



Very broad concept adopted by the CJEU

- Genuine and effective activity, under subordination and remunerated (*Levin*)

Irrespective of

- Level or origin of the income, motivation, duration of occupation, or net contribution to the host State's economy

Loose degree of connection with the host State's labour market is sufficient

Who is that 'worker'?



Possibility to retain the status of worker

Jobseekers

Members of the family have that status indirectly

- See 3rd and 5th recital of Regulation 1612/68



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Who is that 'worker'?



But, there is an elephant in the room:
which one?



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Who is that 'worker'?



Great legal uncertainty on how to implement this definition to current forms of flexible work and mobility

Significant diversity of Member States' interpretation

Growing degree of discretion in the access to EU rights, according to national preferences

- even referral of burden of proof to the workers

See FresSco analytical report 2015



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Go to www.menti.com and use the code **54 83 15**



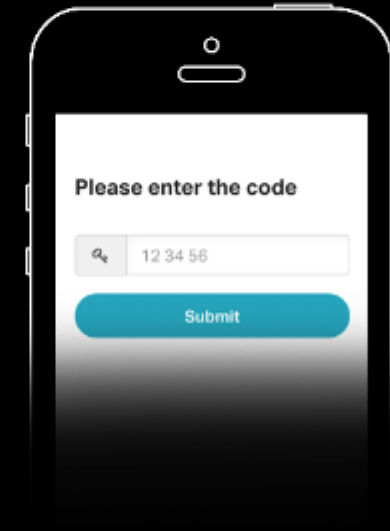
1

Grab your phone

www.menti.com

2

Go to www.menti.com

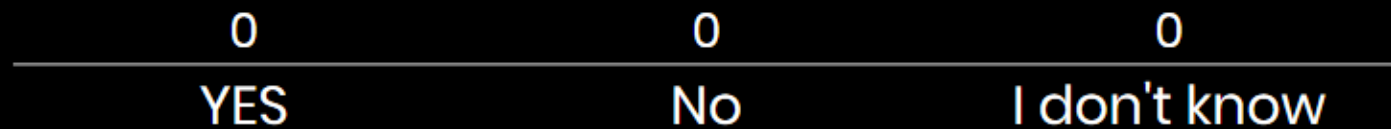


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Enter the code 54 83 15 and vote!

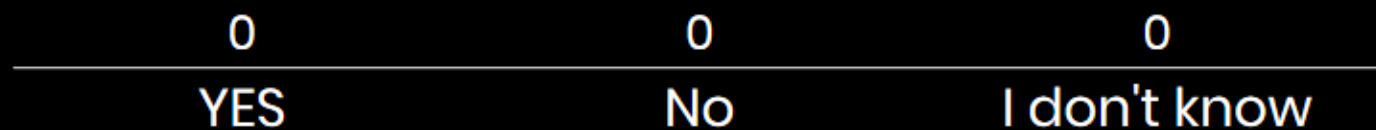
Go to www.menti.com and use the code **54 83 15**

Is Frederica a worker?



Go to www.menti.com and use the code **54 83 15**

Is Maroš a worker?



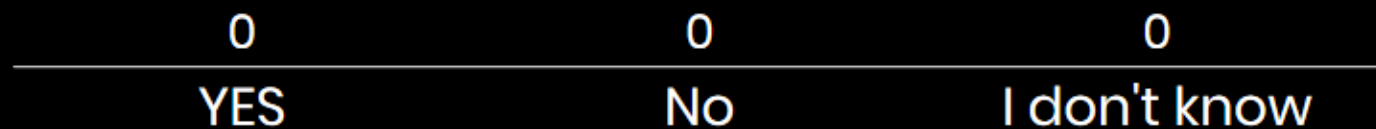
Slide is not active

Activate



Go to www.menti.com and use the code **54 83 15**

Is Cecilia a worker?



Slide is not active

Activate



What is 'free' and 'equal'?



Two sides of the same coin?

- Should there be a trade-off between 'free' and 'equal'?

Exceptions to be interpreted strictly

Prohibition of discriminatory as well as non-discriminatory obstacles to the free movement

- See FresSco analytical report of 2014



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What is 'equal'?



Broad scope of equal treatment

- All advantages that seem suitable to facilitate mobility
- Must not necessarily be linked to employment
- A means of integration of the worker and the family in the host Member State (*Echternach*)

All measures that are intrinsically likely to affect mobile workers more than national workers

- No particular evidence is needed



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What is 'equal'? Borderlines are moving



First hurdle: being qualified as a 'worker'

Position of jobseekers

- Reading of the free movement provisions 'in the light of Union citizenship'
- Benefits related to the integration in the labour market vs. social assistance benefits
- What is 'genuine chance of being engaged'?
- Wiggle room for the Member States



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What is 'equal'? Borderlines are moving



Is being qualified as a 'worker' sufficient?

- Court of Justice
 - *Com. v. NL; Geven, Hartmann, Giersch, Verruga,*
 - **'in principle, a sufficient link of integration'**
 - *'link of integration arises from, inter alia, the fact that, through the taxes which he pays in the host Member State the migrant worker also contributes to the financing of the social policies of that State'*
- This *prima facie* sufficient integration can be **rebutted**

What is 'equal'? Borderlines are moving



Is equal treatment a means of integration or is integration a prerequisite for equal treatment?

- Negative spill-over from citizenship to workers' case law
- Depart from the paradigm shift of Regulation 1612/68
- See UK settlement of 2016 (in-work benefits)
- See introduction in some Belgian legislation of a condition of prior residence of 10 years
- See upcoming amendment to Regulation 883/2004 regarding unemployment benefits

What is 'equal'? Borderlines are moving



Justification (rule of reason)

- Pursuing a legitimate objective; test of appropriateness and proportionality
- Budgetary reasons: may constitute an overriding reason in the public interest
 - See Com. v. Cyprus, C-515/14
- Reasons linked to the functioning of the labour market
 - See UK settlement of 2016

To conclude



Growing impact of Member States' interests in the interpretation and implementation of the right to free movement and the right to equal treatment

Which is at odds with the legacy of Regulation 1612/68



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What is at stake?

Taking back control

MoveS

The future of Free Movement of Workers (post-Brexit)

Prof. dr. Anne Pieter van der Mei
Maastricht University

50 years Free Movement of Workers

The nearby future: the legal status of EU citizens in the UK and UK nationals living in 'Europe'

Free/fair movement of workers/persons between the EU and the UK

Rethinking free movement within the EU?

ECI: ‘Permanent European Union Citizenship’

Noting the ECJ’s view of Union citizenship as a ‘fundamental status’ of nationals of Member States, and that Brexit will strip millions of EU citizens of this status and their vote in European elections, requests the Commission to propose means to avoid risk of collective loss of EU citizenship and rights, and assure all EU citizens that, once attained, such status is permanent and their rights acquired.

**Rechtbank Amsterdam, C/13/640244 / KG ZA 17-1327,
ECLI:NL:RBAMS:2018:605**

1. Does the withdrawal of the UK from the EU automatically lead to the loss of EU citizenship of [UK] nationals and, thus, to the elimination of rights and freedoms deriving from EU citizenship, if and in so far as the EU and the UK do not agree otherwise in the exit-negotiations?

2. If Brexit does imply loss of EU citizenship, should conditions or restrictions be imposed on the maintenance of the rights and freedoms to be derived from EU citizenship?

Verhofstadt/Goerens – Associate EU Citizenship

to insert in the Treaties a European associate citizenship for those who feel and wish to be part of the European project but are nationals of a former Member State [and offer] these associate citizens the rights of freedom of movement and to reside on its territory as well as being represented in the Parliament through a vote in the European elections on the European lists.

From free to fair movement between the EU and the UK

Take back control, while remaining flexible

Genuine work (at least 20h) + high skill level + threshold salary

Restrictions on access to social security

Emergency brake

Free movement within the EU(-27)

From fair to free movement?

Worker status

Direct discrimination

Same-sex marriages and partnerships

MoveS

A look at today's reality: facts and statistics on FMoW and SSC

Prof. dr. Jozef Pacolet / Mr. Frederic De Wispelaere
HIVA KU LEUVEN

Network Statistics FMSSFE



- Network Statistics on Free Movement of Workers, Social Security Coordination and Fraud and Error;
- Composed of expert teams from HIVA (KU Leuven), Milieu Ltd, IRIS (UGent), ICON-
INSTITUT Public Sector GmbH, Szeged University and Eftheia bvba;
- Reports prepared for the European Commission (*in the framework of Contract Nos
VC/2013/0301 and VC/2017/0463*);
- Output:
 - *Annual report on intra-EU labour mobility;*
 - *Statistical report and several thematic reports on EU social security coordination;*
 - *Fraud and error report in the field of EU social security coordination.*



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Free movement of workers

Key figures 2015/2016



Type of mobility	
'Long-term' EU-28 movers of working age (20-64 years) living in EU-28 (Eurostat demography figures)	11.8 million
<i>(as share of the total working-age population in the EU-28)</i>	3.9%
EU-28 movers of working age living in EU-28 (EU-LFS figures)	11 million
...of which active EU-28 movers (employed or looking for work)	9.1 million
<i>(as share of the total labour force in the EU-28)</i>	4%
Cross-border workers (20-64 years)	1.4 million
<i>(as share of the total employed in the EU-28)</i>	0.6%
Number of persons insured in a Member State other than the Member State of (temporary) employment, (no. of PDs A1)	2.3 million
Annual return mobility (20-64 years) (2015)	614,453
<i>(as share of EU-28 nationals leaving their country of origin in 2014)</i>	55%

Stocks EU-28 movers (20-64 yrs) in 2016



- 2016: 11.8 million EU-28 movers of working age across the EU Member States;
- Stock of mobile citizens keeps on growing: increase of 5% on 2015, similar pace as years before;
- Third country nationals still outnumber EU-28 movers (TCNs: 55%;EU-28:44%; EFTA: 1%) at EU level;
- 50% of EU-28 movers in Germany and UK.



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Destination countries: Germany and UK



- Remain by far the main countries of residence (stocks 2016 and inflows 2015);
- Net mobility to DE and the UK around four times higher than to any other Member State in 2015;
- Both stocks and inflows continued to increase, although at a smaller pace than in the years before;
- DE has most movers overall, the UK has most recent movers;
- But Germany overtook UK in inflows in past years;
- Increase in inflows 2009-2015: DE +250%, UK +60%.

Countries of origin



- 2016: around half of all movers across the EU-28 Member States are Italian, Polish, Romanian or Portuguese → increase on 2015 of each of these groups;
- Germans and French further important nationalities;
- 2016: Polish and Romanian by far largest groups of recent movers, followed by Italian, Bulgarian and Portuguese.



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Outflows of nationals 2015



- RO, PL, UK: 100 – 160 thousand
 - Outflows from RO (-19%) and PL (-12%) smaller than 2009 (but RO increasing trend since 2012);
 - RO stronger increase, PL stronger decrease than year before.
- DE, IT, ES: 70-80 thousand
 - Outflows from IT (+103%) and ES (+188%) increased since 2009;
 - Increase also in 2015, but less than before.
- Most of the new Member States still have outflow rates above EU average;
- Highest outflow rates in LT, LV, RO (two to three times as high as cross-country average).

Economic integration



- In 2016, recent EU-28 were more likely to be active (83% at EU level) than nationals (78%), except in Sweden, Germany, the Netherlands and Greece;
- EU-28 level: employment gap between recent EU-28 movers and nationals closed to almost zero;
- employment rate of EU-28 movers further increased;
- unemployed rate further dropped in 2016;
- EU-13 and EU-15 recent movers had almost equally high employment and unemployment rates;
- EU-13 movers continue to be over-represented in elementary occupations and under-represented as professionals.

Social Security Coordination

Reference group



- Includes EU/EFTA residents moving in the EU/EFTA for **professional reasons** ('intra-EU labour mobility') and **other personal reasons** (holiday, planned healthcare, retiring etc);
- Residents (aged 15 and above) from within the EU-28 made some 300 million tourism trips in 2016, for personal or business purposes;
- Retired EU-28 movers: 1.4 million;
- Around one-third of the retired EU-28 movers have never worked in their country before ('mobile pensioners').



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The 'hidden' European welfare state



“The coordination of social security between Member States has been the **most significant development** so far in social policy at the European level. Its success has been remarkable, yet its implementation has been scarcely noticeable. For decades, pensions have been ‘exported’, medical treatment has been available for tourists travelling between Member States, and pro-rata pensions have been payable to those who have spent their working lives in more than one Member State. **Such benefits of EU social security coordination are today taken for granted**”

Eichenhofer, 2000, ‘How to Simplify the Coordination of Social Security’, European Journal of Social Security, Vol. 2, No. 3, p. 231.



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Revealing the 'hidden' European welfare state



- The socio-economic impact of the coordination rules was for a long time an unexplored area;
- No statistics – no problems?
- Several steps have been taken by DG EMPL to collect relevant data within the framework of the Administrative Commission;
- The data collection should allow Member States and the European Commission to be more aware about the impact of the coordination of social security systems;
- Several ad hoc needs for more detailed information on the current situation within the context of the 'Labour Mobility Package'.



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Interesting for several reasons



- Overview of the number of persons involved;
- Overview of the budgetary impact;
- Overview of the experiences on the practical implementation of the rules.



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SSC at a glance, 2016 (1)



	Number	As percentage of total employment, insured persons or benefit recipients	Indicator	As percentage of total social spending	Indicator	Flow/ Total
Applicable legislation						
Total number of PDs A1 issued	2,271,581	0.6%	Number of individual persons with a PD A1 as % in total EU employed population			Flow
Of which						
* To posted workers according to Art. 12 of Regulation (EC) No 883/2004	1,602,724	0.4%	Number of individual persons with a PD A1 as % in total EU employed population			Flow
* To persons active in two or more Member States according to Art. 13 of Regulation (EC) No 883/2004	620,185	0.2%	Number of individual persons with a PD A1 as % in total EU employed population			Flow
* Other categories	44,538					Flow
Cross-border healthcare						
Unplanned healthcare						
Number of EHICS in circulation	238 million	± 40%				
Reimbursement of unplanned necessary healthcare				0.1%	Unplanned treatment as share in total health expenditure related to benefits in kind	Flow
Planned healthcare						
Reimbursement of planned cross-border healthcare				0.03%	Planned treatment as share in total health expenditure related to benefits in kind	Flow
Persons residing in a Member State other than the competent Member State						
Number of certificates in circulation of entitlement to healthcare if the person does not live in the Member State where he or she is insured (PD S1)	1,4 million	0.3%	% of insured persons			Total
Reimbursement of healthcare (sickness benefits in kind) provided to persons residing in a Member State other than the competent Member State				0.3%	Treatment to persons living in a Member State other than the competent Member State as share in total health expenditure related to benefits in kind	Flow
Total cross-border healthcare						
Reimbursement of cross-border healthcare				0.4% (± € 4 billion)	Reimbursement cross-border healthcare as share in total health expenditure related to benefits in kind	Flow

SSC at a glance, 2016 (2)



Unemployment						
Export of unemployment benefits						
Number of authorisations to export unemployment benefit (PD U2)	27,705	0.2%	% of unemployed persons who exported their unemployment benefit			Flow
Aggregation of periods for unemployment benefits						
Number of certificates proving periods of insurance, employment or self-employment completed by a worker in another Member State that are to be taken into account for the award of unemployment benefits (PD U1) (only unemployed migrant workers)	38,831	0.2%	% of unemployed persons			Flow
Family benefits						
Persons entitled to a family benefit	± 450,000 households ± 700,000 children	1.5%	% of the households entitled to a family benefit living abroad	1.6% (± € 1 billion)	Percentage of family benefits paid to households living abroad	Total
Old-age, survivors' and invalidity pensions						
Pensions exported to another Member State	± 2 million persons	2.8%	% of the total number of beneficiaries reporting countries	0.6% (± € 6,5 billion)	% of total expenditure reporting countries	Total
Pensions paid as Member State of residence to pensioners receiving pensions from two or more Member States, one of which is the Member State of residence	± 1 million persons	2.2%	% of the total number of beneficiaries reporting countries	1.6% (± € 10,5 billion)	% of total expenditure reporting countries	Total

Cross-border healthcare (2016 figures) (1)



- Some **238 million EHICs** in circulation;
- A very concentrated use of planned cross-border healthcare within a limited number of EU-15 Member (LU, DE, AT, BE, NL, FR and IT) and Switzerland;
- Bilateral agreements in border areas considerably influence the number of persons travelling abroad to receive planned cross-border healthcare;



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Cross-border healthcare (2016 figures) (2)

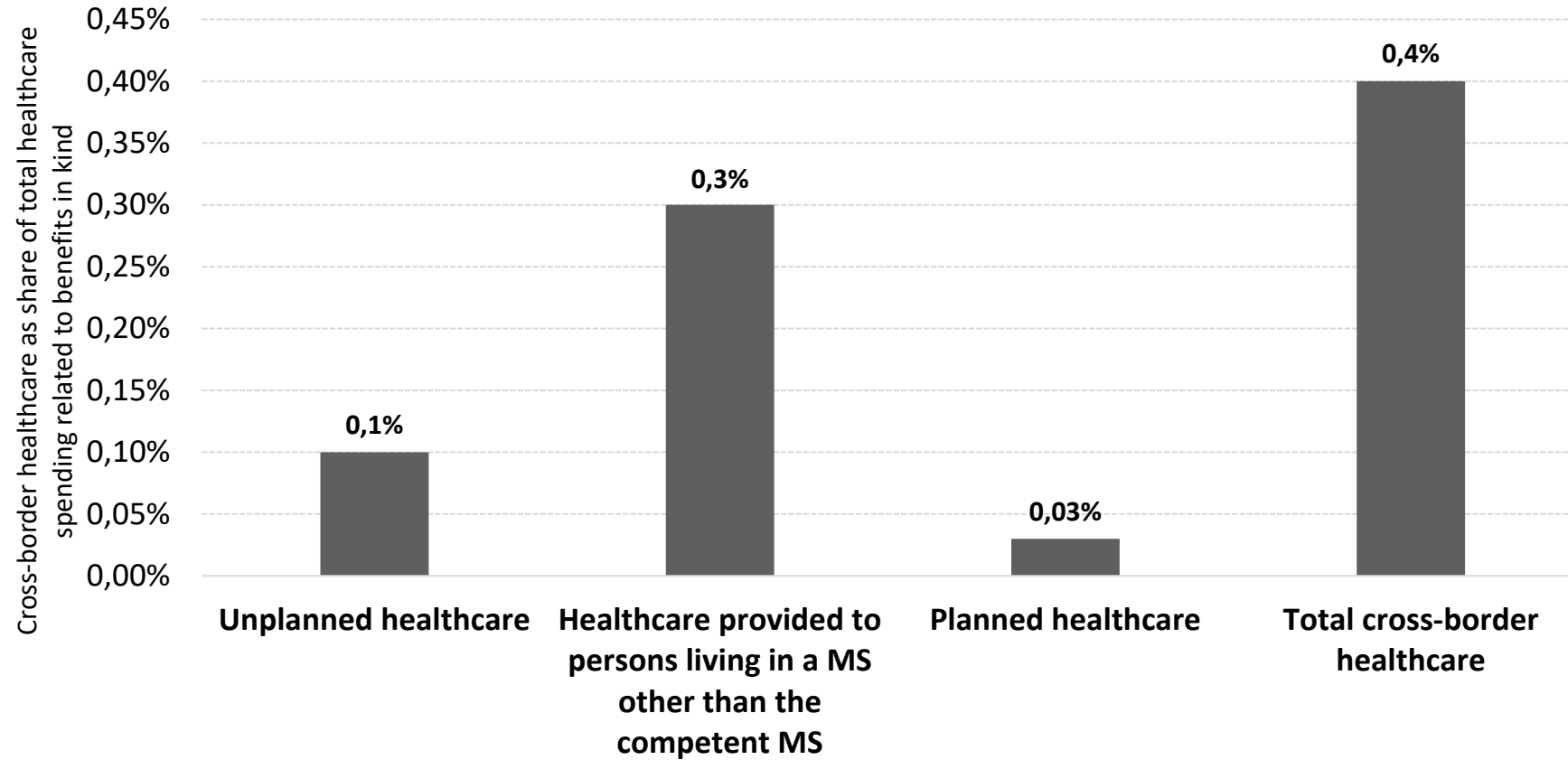


- Approximately **1.4 million** persons reside in a Member State other than the competent Member State;
- This implies that on average **0.3%** of the insured persons reside in a Member State other than the competent Member State;
- Some 70% are workers and some 30% are pensioners;
- Most of the workers are insured Luxembourg, Germany, the Netherlands, Austria and Belgium. This reflects the high number of frontiers workers employed in these Member States;
- Some 61,000 pensioners are insured in the UK and reside in Spain.

Cross-border healthcare (2016 figures) (3)



Expenditure amounts to more than **€ 4 billion**



The importance of collecting data on posted workers



“Sufficient and accurate statistical data in the area of posted workers is of utmost importance, in particular with regard to the number of posted workers in specific employment sectors and per Member State.”

Recital 5 of Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services

“On the basis of evidence provided by the **A1 forms**, the Commission will continue to produce yearly reports on the flows of posted workers throughout the EU Member States. At the same time, the possible set-up by some Member States of more extensive **control systems** and databases concerning the inflow of posted workers in their countries, as provided for by the 2014 Enforcement Directive, will further contribute to monitor aspects of the revised Directive for which data reliability has been found problematic.”

Impact Assessment accompanying the proposal for amending the Posting of Workers Directive (COM(2016) 128 final)



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Funded by the

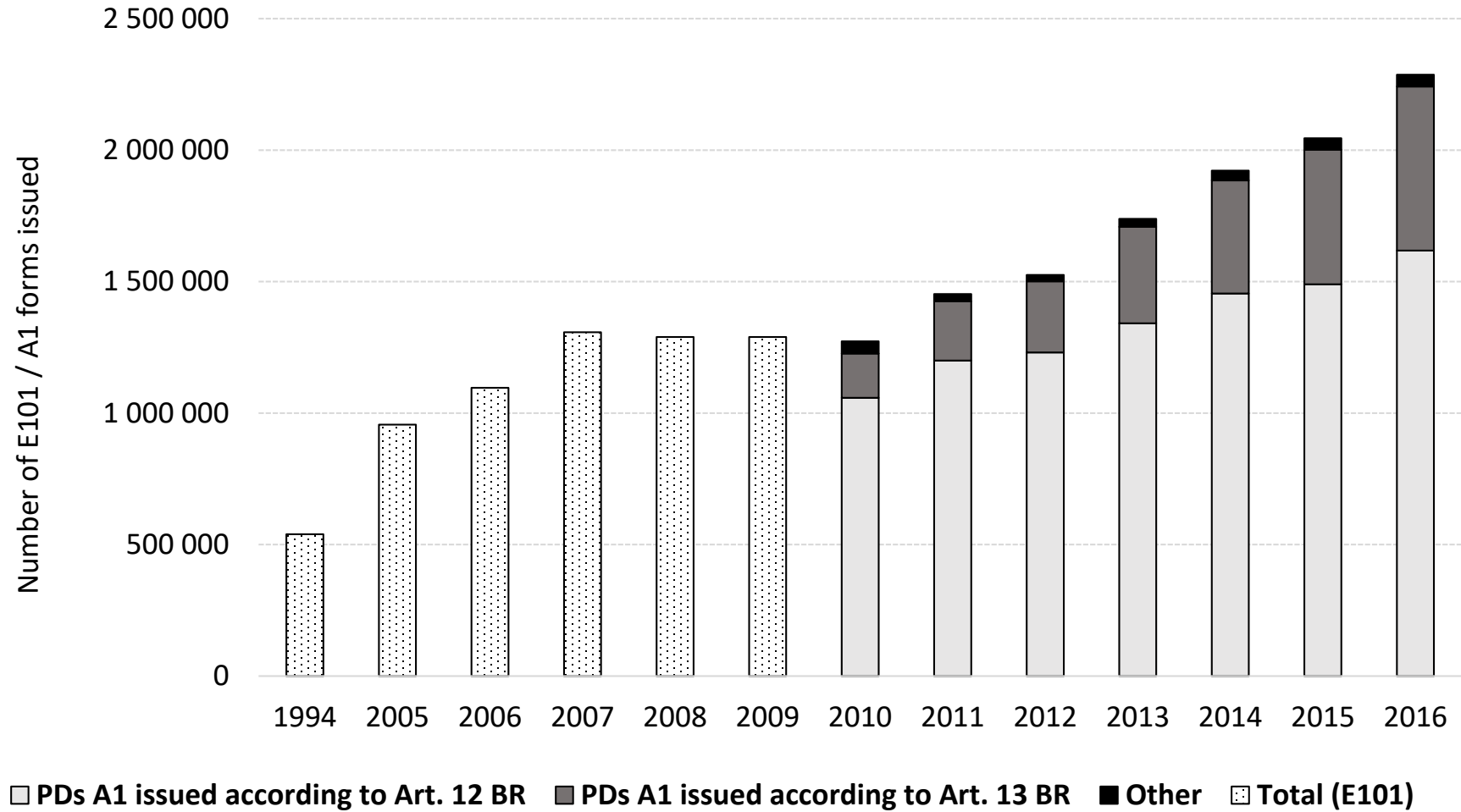
The importance of collecting data on posted workers



It should be noted that the number of PDs A1 issued are only an estimate of the actual number of posted workers for several reasons:

- In some cases, a posting may take place without the institutions being informed of it. Moreover, a PD A1 can also be awarded with retroactive effect;
- The number of PDs A1 issued and its evolution may depend on the number of inspections performed by the enforcement bodies in the host Member State as well as to what extent host Member States have implemented sanctions in case of failure to present a PD A1;
- Due to differences in scope between the Posting of Workers Directive and the Coordination Regulations, the number of issued PDs A1 may not fully reflect the characteristics and the scale of posting under the Posting of Workers Directive in the EU.

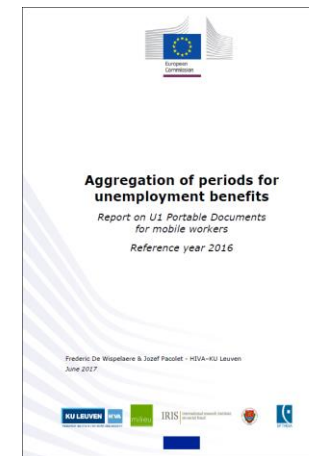
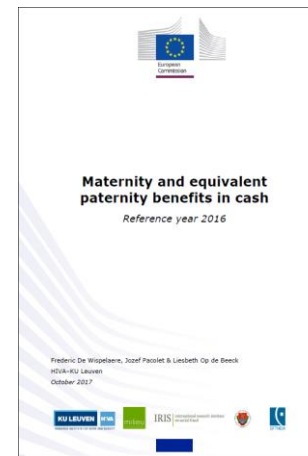
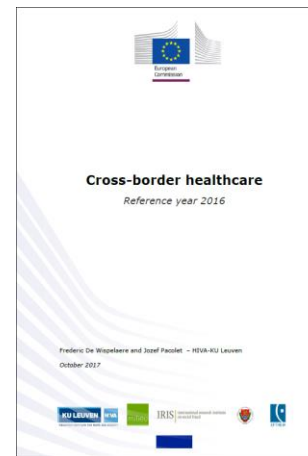
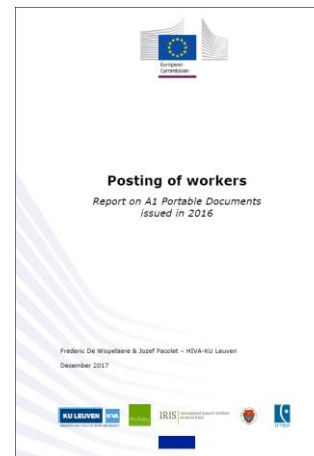
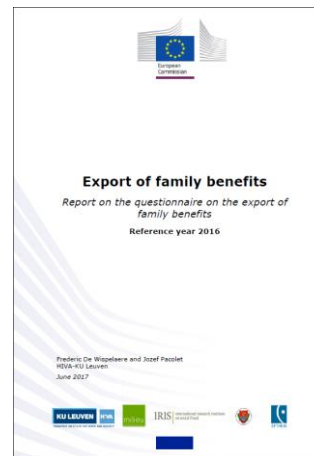
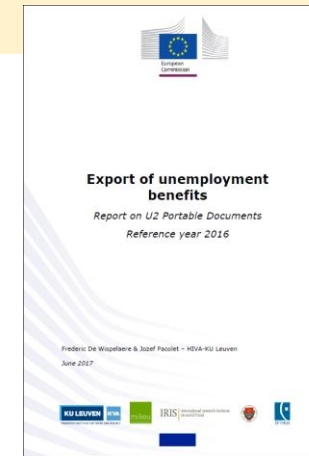
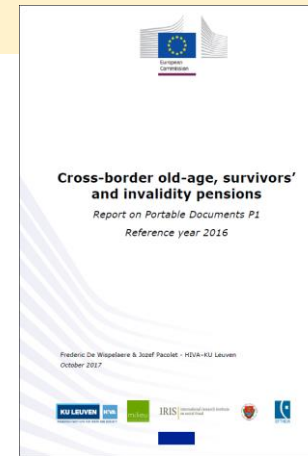
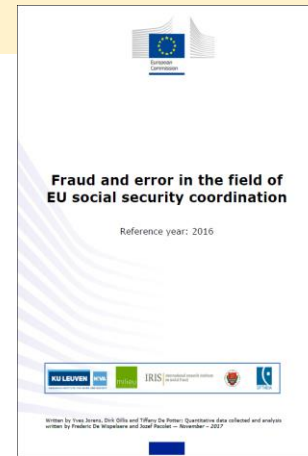
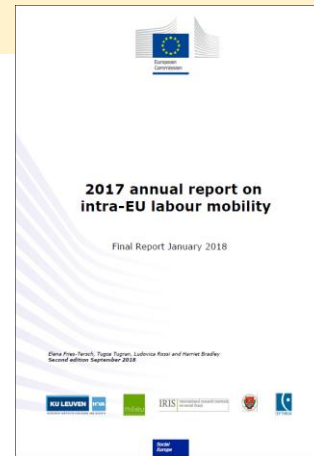
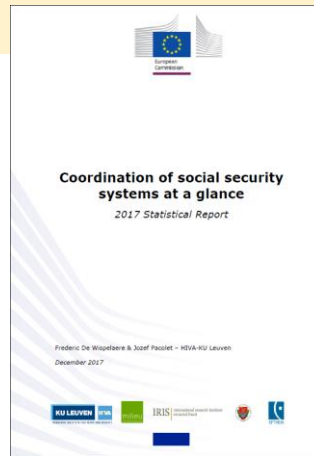
Evolution of the number of E101 / A1 forms issued



Key findings (2016 figures)



- Some 56% of the PDs A1 under Art. 12 BR were issued by EU-15 MSs and 44% by EU-13 MSs;
- Approximately 85% of the postings were received by EU-15 MSs;
- On average 7% of the postings under Art. 12 BR apply to posted self-employed persons;
- Average duration is on average 102 days per posting;
- Average duration is on average 178 days per individual posted person;
- Most persons providing services abroad are employed in the construction sector (some 45% of the PDs A1 issued under Art. 12);
- Intra-EU posting represents less than 1% of total EU employment. 'Much ado about nothing'?
- Some Members States and sectors of activity, are in relative terms confronted with a significantly high percentage of outgoing and incoming posted workers.



University of Ljubljana



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MoveS

Questions and discussion



MoveS

Coffee break (20Min.)



MoveS

Posting in a fair way

Mr. Piet Van den Bergh
ACV Studiedienst



At stake



- Non- and partial payment of social security contributions undermine social security
- Posting is a structural phenomenon
- Non-structural solutions such as ad-hoc exchange of information are insufficient



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In the long run



- “crossroads” EU-level database with information of all cross border salaries, contributions, ... immediately accesible by all national authorities
- Or, payment of social security contributions to host country who transfers to the competent state
- Or, a European social security Fund for transnationals (// old idea of a 13th (29th) state)
- Or....



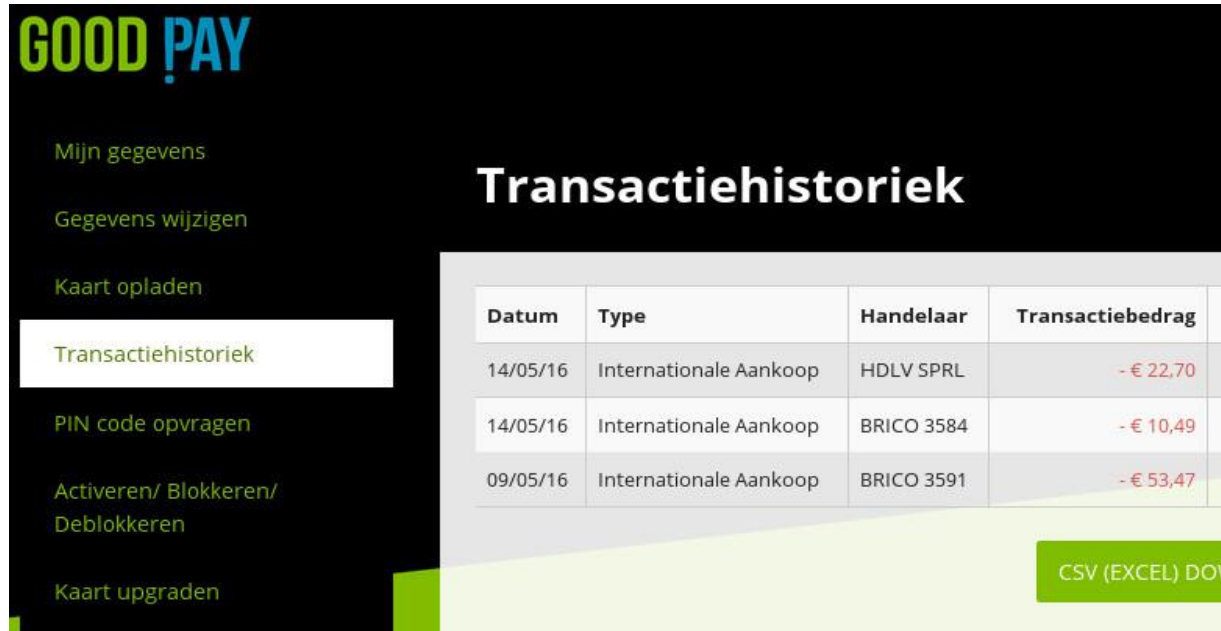
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Inspiration from a new “Belgian” prepaid credit card



- Issued by Prepaid Financial Services Limited, UK
- Money transfers managed by Rabobank, NL
- The Single Euro Payments Area (SEPA) makes transnational payments easy and secure



Transactiehistoriek

Datum	Type	Handelaar	Transactiebedrag
14/05/16	Internationale Aankoop	HDLV SPRL	- € 22,70
14/05/16	Internationale Aankoop	BRICO 3584	- € 10,49
09/05/16	Internationale Aankoop	BRICO 3591	- € 53,47

CSV (EXCEL) DOWN

- A user doesn't even notice the international character of payments
- Single standards and (some) IT

Back to social security contributions



- Payments to another member state / social security institution can be easy
- A single set of standards (lay out) // SEPA is a prerequisite to exchange information efficiently (wage, working time, contributions, ...)
- While remunerations, contributions, working time, ... stay (and should stay) a national competence



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What could it look like?



1. Employer does ex ante declaration (// Limosa) before posting workers to the host country
2. Host country (automatically) accepts and returns a numbered certificate
3. Employer declares the remuneration / work / ... to his regular social security institution (country of origin), mentioning the number of the certificate of the workers concerned
4. Institution of the country of origin (automatically) forwards this information to the host country // single set of standards
5. Host country verifies information and gives feedback (whereby host country is competent to challenge the sufficiency of the wage level)
6. Country of origin must take this feedback into account in as much as this is the competence of the host country (and has to act accordingly)

MoveS

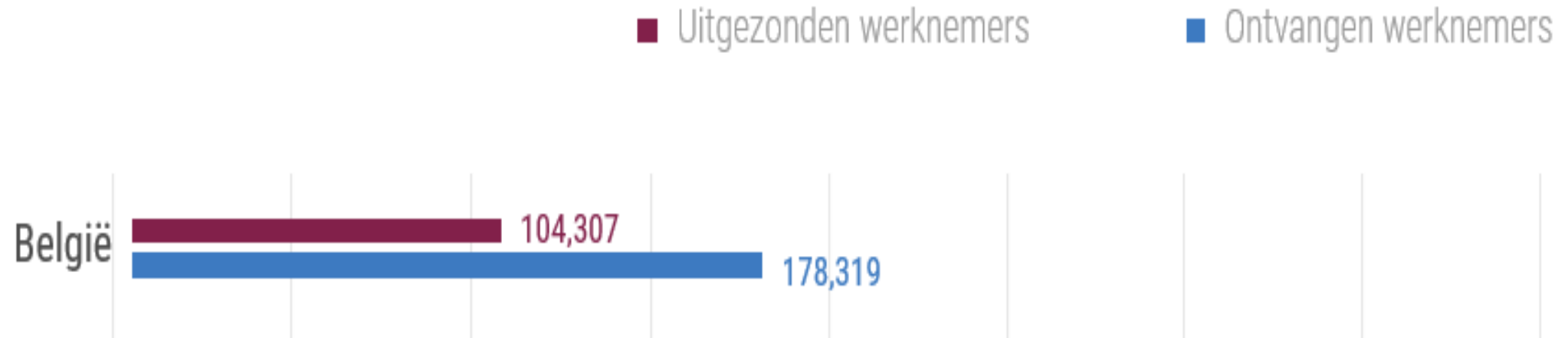
Posted Workers Directive

How will companies deal with the new rules?

Mrs. Monica De Jonghe, Director General

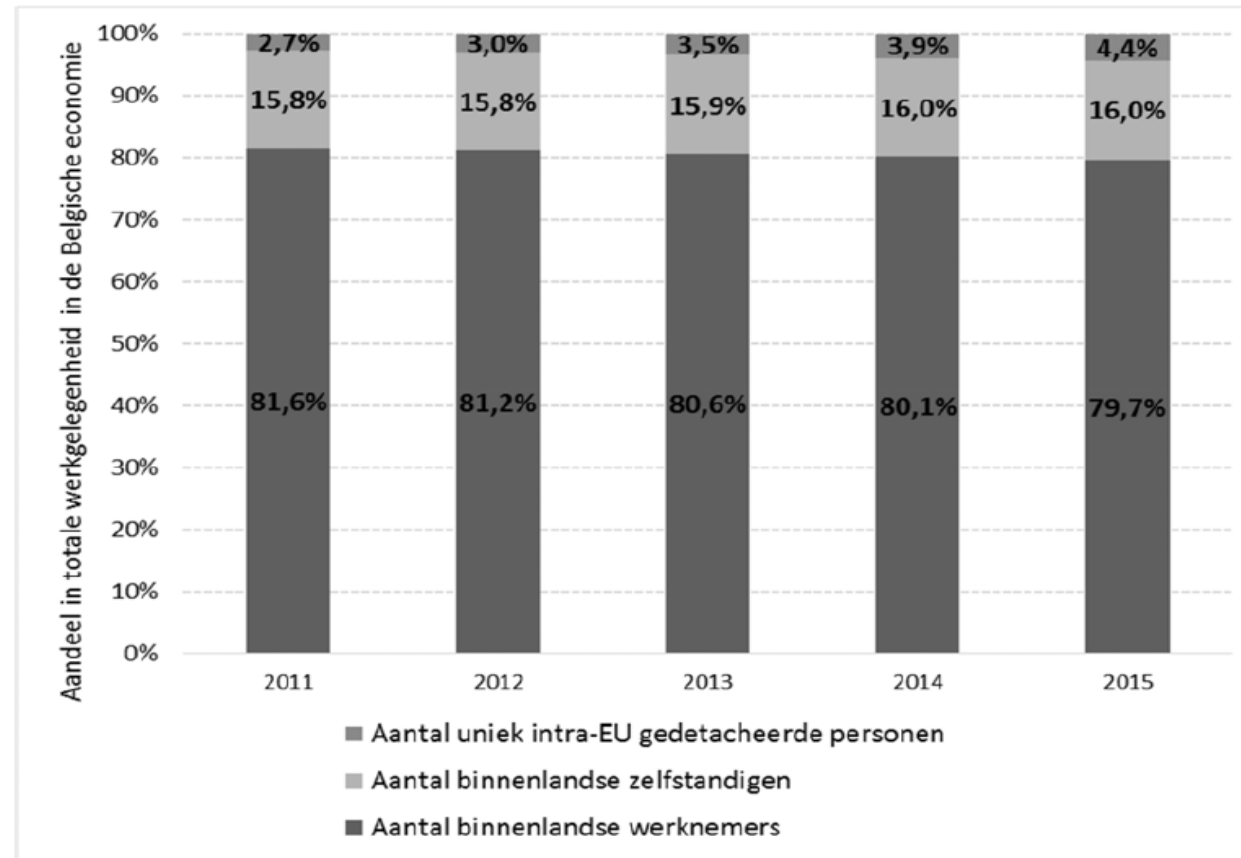
VBO/FEB

PoW ≠ social dumping



PoW ≠ social dumping (study HIVA)

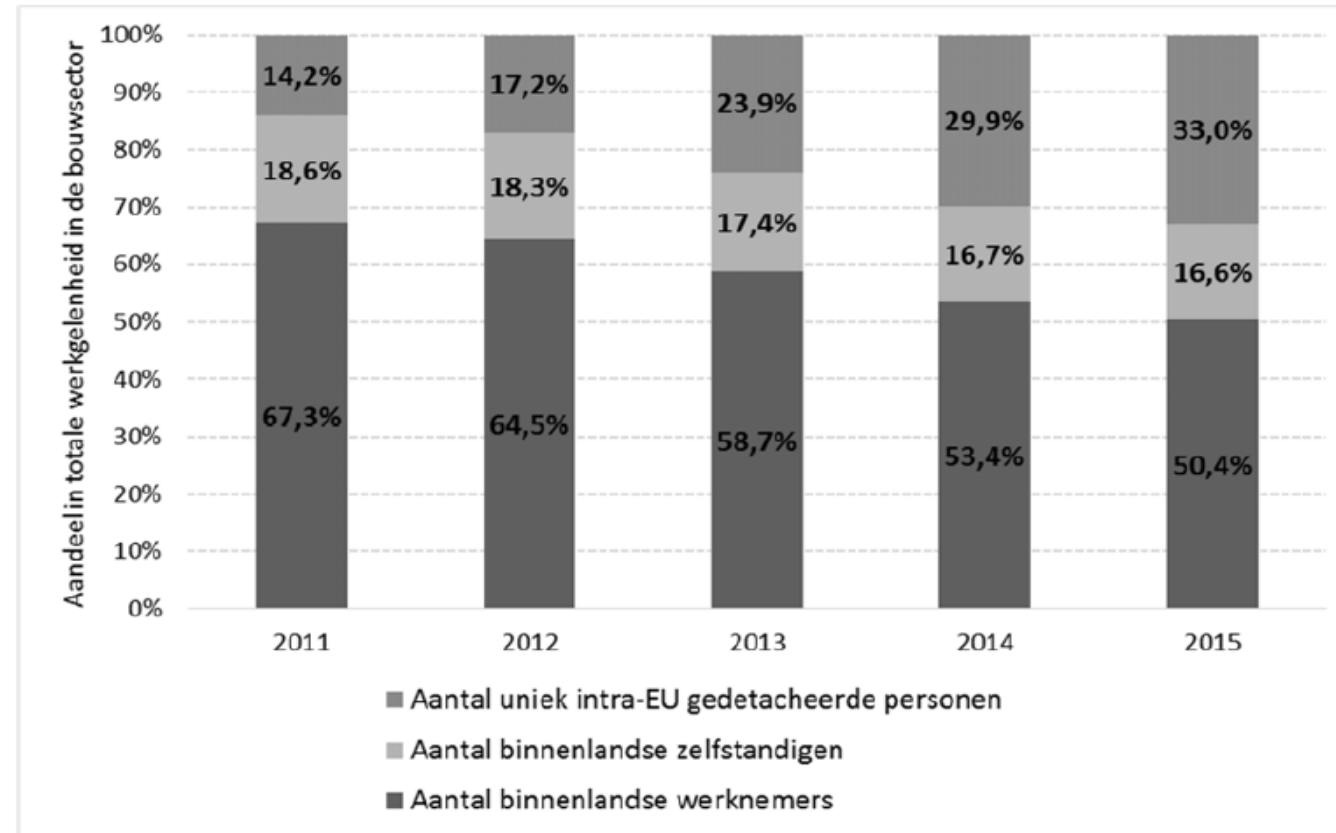
Figuur 3.1 Aandeel van intra-EU detachering in totale werkgelegenheid in de Belgische economie, 2011-2015



Bron Eigen berekening op basis van NBB – Belgostat en RSZ - LIMOSA

PoW ≠ social dumping (study HIVA)

Figuur 3.5 Aandeel van intra-EU detachering in totale werkgelegenheid in de Belgische bouwsector, 2011-2015



Bron Eigen berekening op basis van NBB – Belgostat en RSZ – LIMOSA

PoW ≠ social dumping



- +/- 60% works in construction sector
- Majority of all posted workers are sent from **NL, FR, DE and PL** to BE
- Mostly in construction, metal, ICT, contracting and maintenance, petrochemical and chemical sector, cleaning sector, agricultural sector, engineers and scientists



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PoW Directive: one size fits all?



- Result from political compromise
- Only partial solution for issue of social dumping in construction sector
- Expatriation of highly skilled workers, knowledge workers, engineers, technicians becomes more complex and increases administrative burden with (hardly) any added value
- Have we thrown out the baby with the bathwater?



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What companies need?



- User-friendly access to information on wages and working conditions in host country
- <http://www.employment.belgium.be/defaultTab.aspx?id=38256> : information on wages of so-called “risk” sectors
- User-friendly enough? Do the test....
- Role for Social Partners in National Labour Council and sectors!



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THANK YOU



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University of Ljubljana



MoveS

Binding force of the A1 declaration

Mr. Bruno De Pauw

NSSO, Dept. for International Relations

A1/E101

Current legal framework



Art. 5 Regulation 987:

- A1 binding for SS institutions until withdrawal
- Reconsideration by issuing institution
- If contestation submit to A.C.

Decision A1 A.C.:

- Withdrawal procedure
- Conciliation Board

BUT:

- Cass. FR 2014: Easyjet & Vueling
- Cour d'appel Aix en Provence 2014: Ryanair

A1/E101 Case law



Jurisprudence Court of the European Union:

2000: Banks (C-178/97) & **Fitzwilliam** (C-202/97)

- Posted UK>BE self-employed opera singers
- Posted IE>NL temporary contracts horticulture
- *E101 binding for social security institutions receiving MS*

2006: Herbosch-Kiere (C-2/05)

- Posted IE>BE construction workers
- *E101 binding for judicial authority receiving MS*

2015: X & van Dijk (C-72/14 & C-197/2014)

- Inland vessel NL – Navigation of the Rhine Convention – LU E101
- *E101 not binding if regulation not applicable*

A1/E101

Case law - error



A-Rosa Flussschiff (C-620/15, 24.7.2017)

- Inland vessel on Rhône and Saône 2005-2007
- CH E101 “international transport” but employees concerned only work in France > situation simply cannot correspond to what was indicated on E101
- *E101 binding even in case of manifest incorrectness!*

A1/E101

Case law - fraud



Cussens (C-251/16, 22.11.2017)

- Sixth directive (77/388/EEG) VAT
- Prohibition of abuse with regard to VAT
- Sale 15 holiday homes in IE in 2002 after long running lease agreement
- *Prohibition abuse/fraud is generally applicable, even without national legislation*
- *When entitlement created by abuse or fraud > no protection by legal certainty principle and principle of legitimate trust to object to refusal of granting of the entitlement.*

A1/E101

Case law - fraud



Altun

- BE construction companies – brass plate company BG – Refusal withdrawal by BG
- A1 obtained or used fraudulently
- Hearing 20 June 2017
- Conclusions A-G Saugmandsgaard ØE 9 November 2017

A1/E101

Case law - fraud



Altun (C-359/16, 6.2.2018)

- Prohibition of fraud and abuse of rights is a general principle of EU law
- Objective and subjective factor
- Fraud by deliberate action or omission
- Withdrawal procedure mandatory in case of (even manifest) erroneous A1
- Issuing institution must review within reasonable time
- Fair trial by the national courts – can disregard the A1 certificates and rule on the liability of the persons concerned

① **Burden of proof work state is particularly heavy!**



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A1/E101

Case law - fraud



Commission/Belgium (C-356/15, 11.7.2018)

- BE program Act 31 Dec 2012 "anti-abuse"
- Infringement procedure by EU Commission
- Court confirms dictum ALTUN
- Belgian law not in line with EU acquis communautaire



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A1/E101

Case law - Decision CB&AC



Alpenrind (C-527/16, 6.9.2018)

- A1 binding even if Conciliation Board & Administrative Commission are of the opinion that it has been issued incorrectly
- A1 binding even if issued after decision Member State of work

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Free movement of patients Dream or Reality ?

Mr. Chris Segaert

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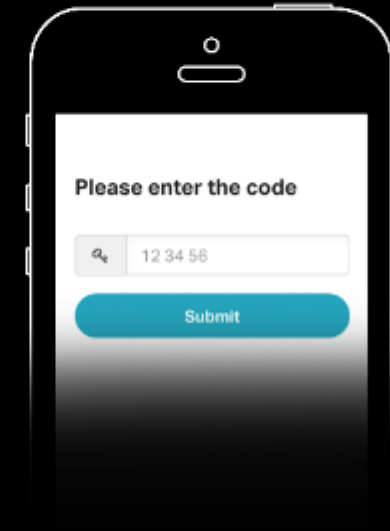
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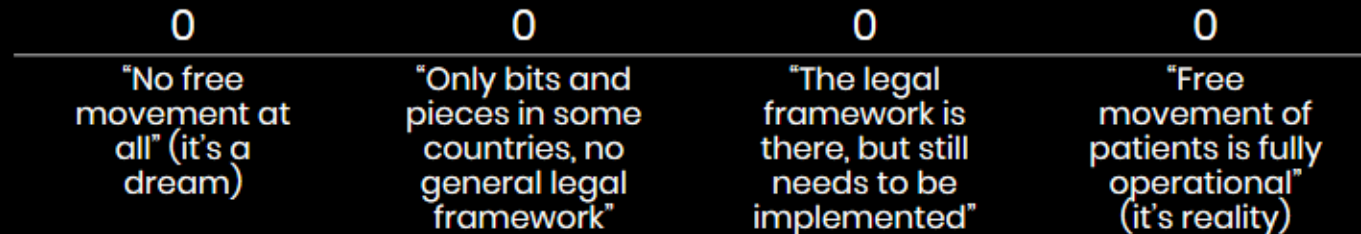
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How has free movement of patients developed in the past decades?



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Legal framework



EU legal framework

- Regulations (EC) 883/2004 and 987/2009
vs Directive 2011/24/EU

National legislation

Parallel procedures, such as

- cross-border cooperation agreements
- cross-border contracting



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EU legal framework



Reg. (EC) 883/2004

- Material scope
 - “classical social security branches
 - health care benefits: only public health care system
- Territorial scope
 - 28 EU-Member States
+ NO, IS, LI (= EEA)
+ CH

Directive 2011/24/EU

- Material scope
 - health care benefits (some exceptions)
 - public and private health care providers
- Territorial scope
 - 28 EU-Member States
+ NO, IS, LI (= EEA)

EU legal framework



Reg. (EC) 883/2004

- Free movement of persons
- *"as if the patient was affiliated in the state providing the treatment"*
- financial settlement between MS

Directive 2011/24/EU

- Free movement of services and goods
- *"as if the patient received the treatment in the state of affiliation"*
- payment up-front – ex post facto reimbursement
- Reg. (EC) 883/2004 has priority, unless insured person explicitly requests application of Directive 2011/24/EU

EU legal framework



Reg. (EC) 883/2004

- Situations covered
 - temporary stay outside the MS where you are insured/resident (“unplanned health care” – EHIC)
 - travelling to another MS for treatment (“**planned health care**” – prior authorisation”)
 - residence outside MS where you are insured

Directive 2011/24/EU

- Situations covered
 - temporary stay outside the MS where you are insured/resident (“unplanned health care”)
 - travelling to another MS for treatment (“**planned health care**” – no prior authorisation save exceptions)

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Belgium = one border area



At the forefront?



access to cross-border health care integrated in national legislation, e.g. in border areas (since 1963)

August 1998 : first Circular Letter on the application of Kohll & Decker rulings

several parallel procedures / more flexible conditions to facilitate access to cross-border access, such as

- agreements in border areas, e.g. IZOM (succeeded by *Ostbelgien-Regelung*), ZOAST, ...
- rehabilitation treatment, pregnant women, ...
- issues of transparency, discrimination, ...

Considerations



a shift towards health care under Directive 2011/24EU

complicated legal framework

- more responsibility / risk put on the patient (e.g. issue of reimbursement on the basis of foreign invoices, ...)

current levels of patient mobility – threat to financial sustainability of MS's health care systems ?

patient mobility – (more) influence on the organisation by MS of their health care systems

Challenges



- impact of new expensive treatments (e.g. gene therapy, ...)
- “integration” of ERNs
- impact of e-health in a cross-border environment
- organise a level playing field for insured persons / patients (☞ information, transparency, ...)
- etc.

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Conclusion



Thank you for your attention !

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EU CITIZENSHIP AND ACCESS TO SOCIAL BENEFITS



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Introduction



- Article 21 TFEU: “every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.”
- These limitations and conditions are further spelled out in Directive 2004/38
- It applies to EU citizens irrespective of their economic participation and to their family members irrespective of nationality



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Access to social benefits or not?



- The wording of the Directive in relation to the social rights of economically inactive mobile citizens and jobseekers lack clarity
- A combined reading of Articles 14, 24 and of paragraph 16 of the preamble of Directive 2004/38 suggests that access to social assistance is not impossible as long as the citizen does not become an unreasonable burden on the social assistance system of the host Member State
- 2009 Guidelines Commission same direction



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ECJ cases changing the legal landscape



- Four important cases *Dano* (C-333/13), *Alimanovic* (C-67/14), *Garcia Nieto* (C-299/14), *Commission v. UK* (C-308/14)
- *Dano*: No sufficient resources means no entitlement to a right of residence under Directive 2004/38 (art. 7(1)(b)). Applying for social assistance means automatically not having any sufficient resources anymore and therefore no right of residence under Directive 2004/38
- Catch 22-situation: Entitlement to social assistance only if you have sufficient resources. If you have sufficient resources there is no need for any social assistance

ECJ cases changing the legal landscape

Why did the ECJ change its case law?



Results project monitoring implementation Directive 2004/38



- In **AT, FI, IE, MT, NL, PT and UK** the ECJ cases have had impact on the national case law restricting the access of inactive EU citizens
- In **DE** new legislation to clarify that every inactive EU citizen (including job seekers) has no access to social assistance benefits for the first five years
- **BE** is champion in expelling EU citizens on the ground of not having sufficient resources
- See Minderhoud, P.E. (2018). [*Social Assistance for Economically Inactive EU Citizens in the Member States*](#). (intern rapport, Nijmegen Migration Law Working Papers Series, no 2018/03). Nijmegen: Radboud University Nijmegen

Conclusion



- Social solidarity as an element of EU citizenship is at a crossroads
- An interpretation where economically non-active EU citizens must always have resources sufficient not to qualify for any social assistance benefit may lead to an effective exclusion of most economically non-active EU citizens
- Challenge how to reconcile free movement rights and equal treatment with the traditional closure of the welfare state
- What type of solidarity is being promoted in the EU, if it is available only for those who do not need it and only when they do not need it?

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Closing of the seminar

Mr. Joost Korte

Director General DG EMPL, European Commission

Prof. dr. Filip Van Overmeiren

Director at Deloitte & Professor at Ghent University and Brussels University

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Network drink

