



Recent developments at EU level on free movement of workers, FMW during COVID-19 pandemic

**MoveS Seminar
France, 11 June 2021**

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Directorate-General for Employment, Social Affairs and Inclusion

Unit D1 – Free movement of workers, EURES

Facts and figures

2020 Annual report on intra-EU labour mobility (figures for 2019):

- *About 17 million EU citizens live or work in another MS*
- *13 million long-term EU-28 movers of working age (20-64 years)*
- *Of which 9.9 million active EU-28 movers (employed or looking for work)*
- *1.5 million cross-border workers (frontier workers)*
- *4.6 million postings (number of PDs A1 issued to employed and self-employed in 2019, for ca. 3.06 million persons)*

Overview

- 1. The European Labour Authority*
- 2. Free movement of workers in time of pandemic*

European Labour Authority - ELA

- *Established on 31.7.2019, Regulation (EU) 2019/1149*
- *ELA's seat is Bratislava (CY, BG, LV contenders)*
- *EP filed an action to CJEU on Council's seat decision*
- *Financial autonomy on 26 May 2021*
- *National liaison officers*
- *Full operational capacity by 2024*
- *Around 140 staff members*

ELA's tasks

- *Facilitate access to information for individuals and employers on labour mobility*
- *Coordinate [EURES](#)*
- *Facilitate cooperation and the exchange of information between MSs*
- *Coordinate and support concerted and joint inspections*
- *Carry out analyses and risk assessment on FMW issues*
- *Support MSs with effective application and enforcement of relevant EU law*
- *Support EU Member States in tackling undeclared work*
- *Mediate disputes between MSs on the application of relevant EU law.*

ELA – state of play

- *The first Executive Director: Mr Cosmin Boiangiu*
- *Staff: +/- 70 people in total at ELA to reach 144 in 2024 including 27 NLOs who joined in September*
- *Budget: EUR 30 million in 2021, EUR 50 million in 2024*
- *Move to Bratislava's seat foreseen for September 2021*
- *More information: <https://ela.europa.eu>*

Covid-19 pandemic

- *At the beginning of the crisis - no coordination*
- *In some MSs considerable regional regulatory differences (e.g. Germany, Belgium)*
- *No EU competence in the health policy and border management*
- *FMW may be subject to limitations justified on grounds of public policy, public security or public health*

- *Sudden disruption of free movement in March 2020 due to the pandemic caused problems for:*
- *EU workers who wanted to start new employment in another MS*
- *Frontier workers and their employers due to “closed borders”*
- *Agriculture without access to seasonal workers (mostly from eastern Europe and TCN) – and local workforce not suitable to replace this workforce*
- *Posted workers and other forms of “highly mobile workers” (cross-border provision of services, maritime transport)*

Covid restrictions

- *National anti-pandemic and health measures must respect principles of EU law on FMW, in particular the general principles of necessity and proportionality*
- *Since March 2020, COM adopted a number of Guidelines and Communications with the aim of supporting anti-pandemic efforts of MSs and safeguarding the free movement within the EU*

Covid-19 Guidelines on FMW

- ***Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak (OJ C 102I, 30.3.2020)***
- *Principle of non-discrimination - Member States should treat cross border workers and national workers in the same manner.*
- *Necessity and proportionality of measures*
- *Non-exhaustive list of "essential workers"*
- *Principle that frontier workers in general should continue crossing borders if work in the sector concerned is still allowed in the host Member*

Seasonal workers

- ***Guidelines on seasonal workers in the EU in the context of the COVID-19 outbreak (OJ C 235I, 17.7.2020) + EP resolution of 19.6.2020 + Council's Conclusions of 9.10.2020***
- *The message from the EU institutions: there is a need to fully enforce the provisions regarding mobile EU and third-country workers, including seasonal workers, and cooperate to ensure a comprehensive monitoring of the process*

Follow-up actions to Commission Guidelines

- *The European Platform tackling undeclared work organised a seminar on 'Tackling undeclared work among seasonal (including mobile) workers: developments, trends and good practices' on 16 March 2021*
- *The Commission held a dedicated hearing with the European Social Partners on 26 March 2021*
- *The European Labour Authority initiated an Action Plan on seasonal workers and will soon start the awareness raising campaign*

Council Recommendation on coordinated approach to free movement restrictions

- *Council's Recommendation on a coordinated approach to free movement restriction in response to Covid-19 pandemic (OJ L 337 of 14.10.2020), amended in 02/2021 (ECDC web Re-open EU)*
- *Aims to avoid fragmentation and disruption, and to increase transparency and predictability for citizens and businesses.*
- *Measures should be proportionate and respect differences in epidemiological situation*



14-day COVID-19 case notification rate per 100 000 population and test positivity, EU/EEA weeks 14 - 15



Testing rate < 300 per 100 000 population
No data available
Not included

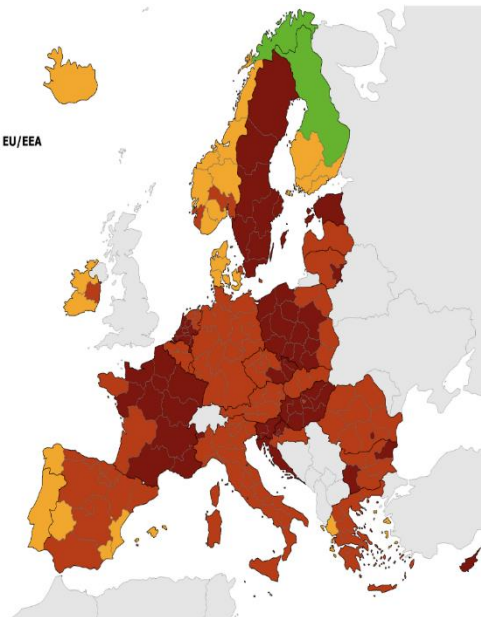
Regions not visible in the main map extent

Azores
Guadeloupe and Saint Martin
La Reunion
Martinique
Canary Islands
Guyane
Madera
Mayotte

Countries not visible in the main map extent

Malta
Liechtenstein

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The boundaries and names shown on this map do not imply official endorsement or acceptance by the European Union. ECDC. Map produced on: 26 Apr 2021



EU Digital Covid-19 Certificate

- *Commission Proposal on 17 March 2021, political agreement between EP and the Council on 20 May 2021*
- *Aim: Facilitate the safe free movement of citizens within the EU during the COVID-19 pandemic.*
- *To ensuring non-discrimination: test and recovery certificates are covered in addition to vaccine certificates.*
- *Applicable as from 1 July 2021*

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FMW and restrictions due to public health - cross-border workers working in health and care sectors

prof. Kristina Koldinská
MoveS visiting expert

Health care and social services workers

- „multiple issue“
 - TCN affected
 - Women affected
 - Socially weak affected



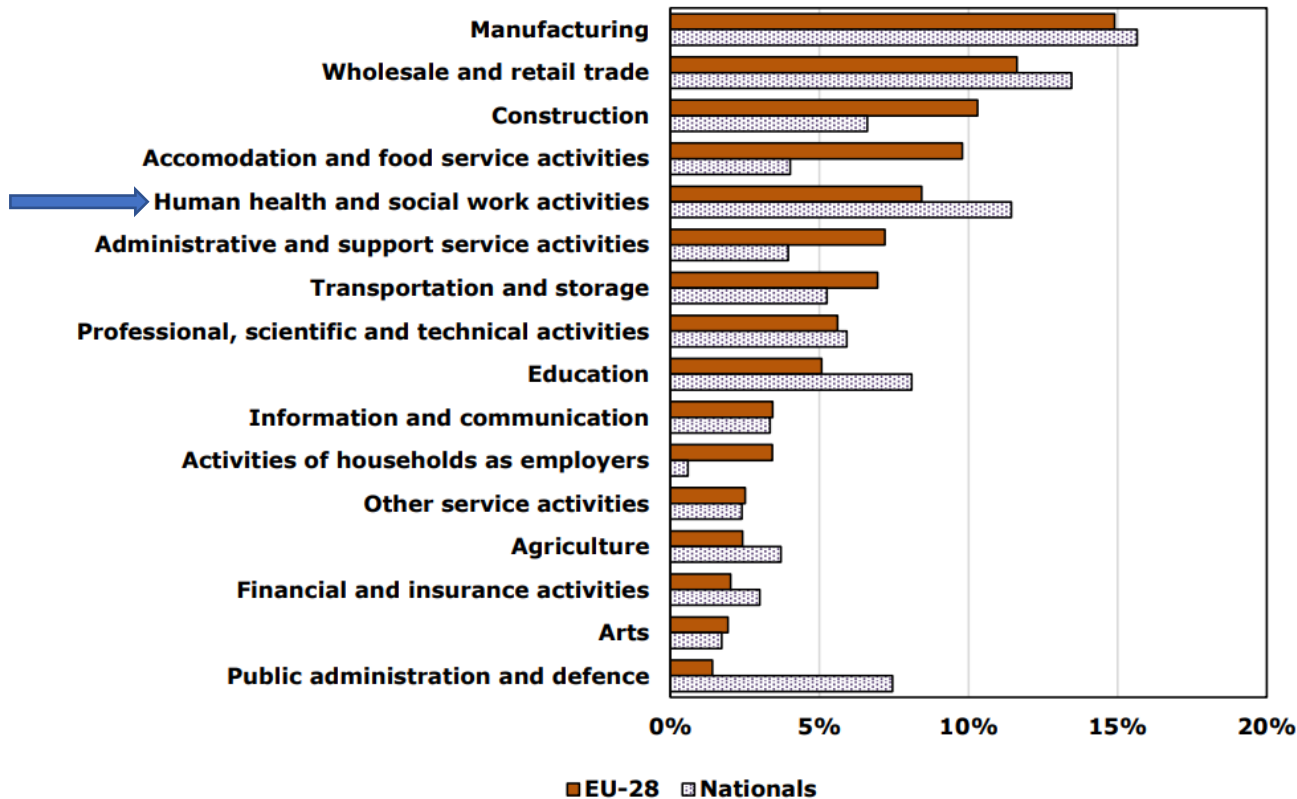
- During covid times:
 - Nurses
 - Doctors
 - Care workers
- ➔ **NEEDED**



Some facts

- migrant workers working in key sectors, which will vary from country to country, who may be less likely to lose their jobs during the pandemic but may be at higher direct risk of exposure to the virus (i.e. health and social care, long-term care);
- 13% of key workers in the European Union are migrants
- key occupations in the EU: teaching professionals, agricultural workers, personal care workers, and cleaners or helpers
- More than 33% of cleaners and helpers are migrants, mostly women and often from outside the EU; almost 20% of personal care workers and 10% of health professionals are migrants
- at least 10 EU Member States (Belgium, France, Italy, Germany, Ireland, Luxembourg, the Netherlands, Spain, Switzerland and the United Kingdom) depend on foreign-born workers in health-care services
- In 2016 as many as 41% of doctors and 26% of nurses in Ireland were foreign born, and as low as 1% of doctors and 0.5% of nurses in the Slovak Republic were foreign born
 - Promoting the Health of Migrant Workers in the WHO European Region during COVID-19: Interim guidance

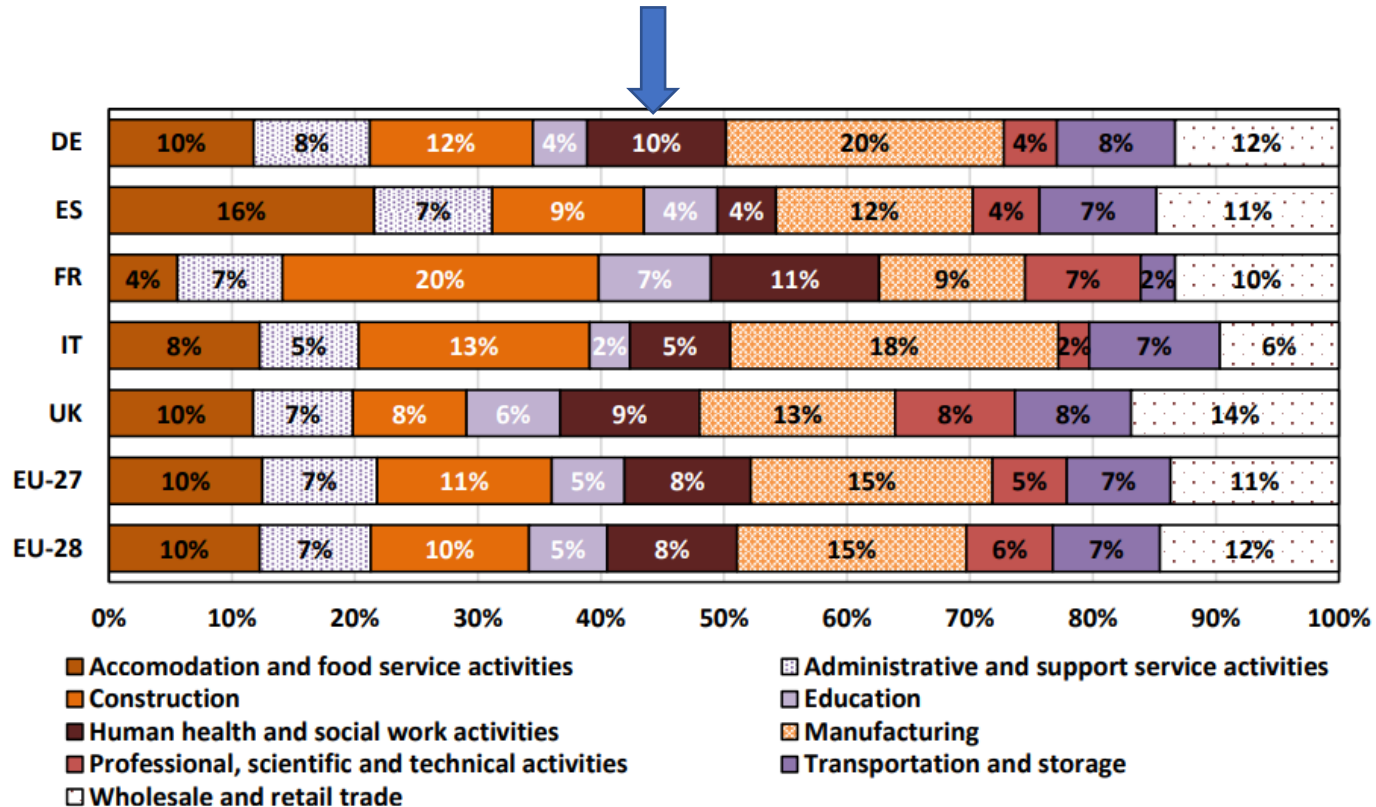
Sectors of activity of EU migrant workers



SOURCE: EU-LFS 2019, SPECIFIC EXTRACTIONS PROVIDED BY EUROSTAT, MILIEU CALCULATIONS.

TOTALS EXCLUDE MOVERS BORN IN THEIR COUNTRY OF RESIDENCE.

Distribution of migrant workers – sectors – main recipient countries



SOURCE: EU-LFS 2019, SPECIFIC EXTRACTIONS PROVIDED BY EUROSTAT, MILIEU CALCULATIONS.

Some fact during pandemic

- Some areas with the highest rates of infection have faced shortages of medical personnel, despite the fact that these countries/regions (for instance the region of Lombardy in Italy or New York City in the US) have some of the best developed healthcare systems in the world.
- Health services trade could therefore help relieve pressure from domestic healthcare systems. Countries that restrict foreign healthcare workers from working in them risk cutting off their populations from significant resources needed to respond to the pandemic.
- in the UK, nearly 3,000 migrant doctors, nurses, and paramedics (and their family members) have had their visas extended for a year to assist in the fight against COVID-19. 29% of doctors in the UK have obtained their education in another country.

Recommendations

- FMW in health sectors - allowing health workers to move more easily across borders—at least on a temporary basis—would increase access to health services.
- Collaboration in movement of health services - collaboration across countries both on the import and export of health services would help mobilize a pool of health professionals to fight emerging health issues and alleviate capacity constraints on domestic healthcare systems, especially if not all systems are affected at the same time.
- cross-border telemedicine - allows patients to be screened while in quarantine, decreasing the risks of exposure to healthcare professionals, inside facilities where patients and doctors are in different locations and part of the diagnosis or treatment is done via webcam.
 - *World bank – trade and Covid Guidance note*

FMW restrictions – legal basis

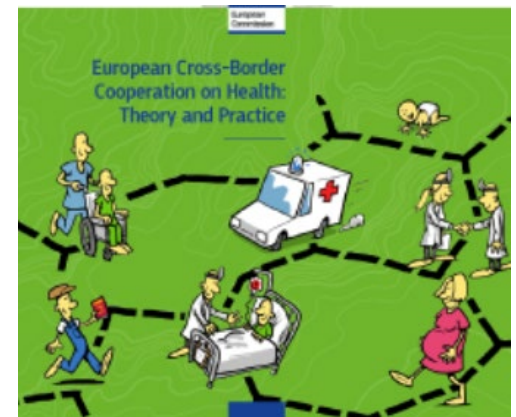
- Article 21 TFEU– right of EU citizens to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties
- Article 45 TFEU – FMW shall be secured within the Union - subject to limitations justified on grounds of public policy, public security or public health
- Art. 67 TFEU – no boarder controls

Dir 2004/38 – restrictions to FMW – public health

- Art. 27
- Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or **public health**. These grounds shall not be invoked to serve economic ends.
- Art. 29
- The only diseases justifying measures restricting freedom of movement shall be the diseases with **epidemic potential** ... if they are the subject of protection provisions applying to nationals of the host Member State.
- ...
- 3. Where there are serious indications that it is necessary, Member States may, within three months of the date of arrival, require persons entitled to the right of residence to undergo, free of charge, a medical examination to certify that they are not suffering from any of the conditions referred to in paragraph 1. Such medical examinations may not be required as a matter of routine.

Specific EU reaction to Covid

- C(2020) 2153 final COMMUNICATION FROM THE COMMISSION Guidelines on EU Emergency Assistance in Cross-Border Cooperation in Healthcare related to the COVID-19 crisis



Free movement of health professionals

- It is imperative that critical workers are able to reach their destination without delay.
- Member States should facilitate the **smooth border crossing for health professionals and allow them unhindered access to work in a healthcare facility in another Member State**

Emergency Medical Teams

- Member States or specialist NGOs can send appropriately qualified teams of medical personnel across borders, in response to requests for assistance
- Originally 8 European Emergency Medical Teams - could be expanded through the activation of additional EU financial support

Recognition of Health Professional Qualifications

- Many health professions such as doctors with basic medical training, a number of medical specialisations, such as respiratory medicine, immunology or communicable diseases and nurses of general care - under the Directive on the recognition of professional qualifications [\(12\)](#).
- In cases of temporary and occasional service provision, only a simple declaration may be required for these professionals without any need to wait for a decision from the host Member State authorities.
- For other health professions, a mutual recognition procedure can take place, if the competent authorities deem it necessary to compare the substance of the training



Sharing Clinical Knowledge and Expertise in the EU: COVID19 CMSS (Clinical Management Support System)

- Member States' competent authorities and healthcare professionals are encouraged to use the *COVID19 CMSS (Clinical Management Support System)* in order to ensure a quick exchange of knowledge and experience between clinicians from across the EU and EEA on how to manage patients with severe COVID-19.

Specific EU reaction to Covid II.

- Communication from the Commission
Guidance on free movement of health professionals and minimum harmonisation of training in relation to COVID-19 emergency measures – C/2020/3072
 - 1. Recognition and permission to work for health professionals in cross-border situations**
 - 2. Early graduation for sectoral health professions or temporary adaptations of the curricula due to the crisis**
 - 3. Recognition of health professionals with qualifications from outside the EU/European Free Trade Association (EFTA) Member States**

National measures

- temporary licencing of doctors with foreign medical degrees facilitated (Italy);
- recruitment in the national health services facilitated (Spain);
- current applications for the recognition of foreign qualifications of health professionals expedited (e.g. Belgium, Germany, Ireland, Luxembourg, Spain);
- foreign-trained health workers in non-medical occupations in the health sector allowed (e.g. France).
- Extensions of visas due to expire (UK has decided that doctors, nurses and paramedics with visas due to expire before 1 October 2020 will have them automatically extended for one year)

BUSINESS CITIZENS

Free temporary accommodation for cross-border workers active in the health and care sectors

Coronavirus / Covid-19

20.11.2020

Keywords : [Employment](#) [Housing](#)

The Luxembourg government offers **employees in the health and care sector who reside in Germany, Belgium or France** the possibility of **accommodation**, under certain conditions, **temporarily and free of charge in Luxembourg** in accommodation structures such as hotels or holiday homes.

Who are eligible cross-border workers?

> anyone who:

- > **works in the hospital sector in Luxembourg**, regardless of their qualifications and the nature of their work; **and**
- > resides in **Germany, Belgium or France**;

> any **health professional** who:

- > **works in the care sector** for:
 - > an accommodation establishment for the elderly or the disabled; **or**
 - > for an assistance and care network in Luxembourg; **and**
- > resides in **Germany, Belgium or France**.



Please note that this provision is only valid from the moment that **phase 3 or higher of the hospital scale-up plan** (*plan de montée en charge*) has been triggered at national level.

Future steps

COM(2020) 405 final Proposal for a Regulation on the establishment of a **Programme for the Union's action in the field of health –for the period 2021-2027**

- general objectives:

(1) protect people in the Union from serious cross-border threats to health;

(2) improve the availability in the Union of medicines, medical devices and other crisis relevant products, contribute to their affordability, and support innovation;

(3) **strengthen health systems and the healthcare workforce**, including by digital transformation and by increased integrated and coordinated work among the Member States, sustained implementation of best practice and data sharing, to increase the general level of public health.



Lessons learned?

- Common and coordinated reaction needed X only national, ad hoc responses (solidarity or competition?)
- Social workers and care workers – not taken into account, not discussed EU wide
- ? Need for changes in:
 - Mutual recognition of diplomas
 - Concept of key occupations at EU level

Cross-border telework and Covid-19

Impact on mobile workers' status

MoveS Seminar

11 June 2021, Paris

Pr Jean-Philippe Lhernould, University of Poitiers

I- Labour legislation applicable

Background

- Does telework affect the legislation applicable (and how)?
 - Specific rules on telework (passage to telework, work equipment, privacy, equality of treatment with other employees...)
 - Rules applicable for working time,
 - Rest period,
 - Health & safety
 - Leave (e.g. sickness)
 - fixed-term contracts
 - contract termination...

Free choice of law

- An individual employment contract is governed by **the law chosen by the parties** (art. 8, Reg. 593/2008 “Rome I”)
 - Applicable to cross-border telework relationship
 - Ex. F. works for a French company located in Lille. He resides near the border in Belgium from where he does habitual remote work. French law is applicable by agreement. The company’s collective agreement will also be applicable to him since the concept of “law” includes collective agreements (Cour de cassation, 5 Nov. 1991, case 90-40.163), unless the collective agreement stipulates territorial application
- Only the chosen law?
 - The contract is **also governed** by the law (only for its more protective non amendable provisions) which, in the absence of choice, would have been applicable = “**objective law**” of the contract

Which law is (objectively) applicable to the contract?

- Article 8, Rome I: connecting factors
 - *Lex loci laboris*
 - Law of the place of engagement
 - Law of the country where the contract is more closely connected
- Impact of the law objectively applicable
 - May govern exclusively the contract
 - May apply in addition to the law chosen by the parties

Option1: Lex loci laboris (temporary telework)

- The contract is 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** (art. 8(2))
 - **Occasional tele-work** (eg. during pandemic) should not affect identification of workplace where company is located
 - Example: **Z habitually works in Germany. For a 6 month-period during pandemic, he worked full-time from home (Austria).** Whether his employment contract stipulates that German law is applicable or not, German law will govern the contract

Lex loci laboris (temporary telework)

- **Overriding mandatory provisions** of the law of the country of telework) could anyhow apply (if law of the forum)?
- And/or provisions “territorially applicable” dealing with **collective rights / administrative matters / criminal matters?**
 - Criminal employment law, fundamental freedoms, right to strike, health & safety provisions, “protected employees” ...
 - **Ex. M. is Russian. He resides in Strasbourg. He works remotely for a Swiss company during the pandemic period.** By agreement, the contract is subject to the Swiss law. He should need a work permit / prior declaration to hiring (“DPUE”) to telework from France?

Lex loci laboris (permanent telework)

- Identification of the place of work
 - “in order to determine the meaning of the words '**place ... where the employee habitually carries out his work**' (...) in a case where the employee carries out his work in more than one Contracting State, the Court's previous case-law must be taken into account when determining the place with which the dispute has **the most significant link**, while taking due account of the concern to afford proper protection to the employee as the weaker party to the contract (case C-383/95, Rutten)
 - “Where the work entrusted to the employee is performed in the territory of more than one Contracting State, it is important to define **the place of performance of the contractual obligation**, (...) as being the place **where or from which the employee principally discharges his obligations** towards his employer (case C-125/92, Mulox).

Lex loci laboris (permanent telework)

- Identification of place of work
 - “refer to the place where the employee has established **the effective centre of his working activities and where, or from which, he in fact performs the essential part** of his duties *vis-à-vis* his employer” (Rutten)
 - “the place where **the employee actually performs the work** covered by the contract with his employer” (Rutten)
 - the relevant criterion for establishing an employee's habitual place of work (...) is, in principle, the place **where he spends most of his working time** engaged on his employer's business (C-37/00, Weber)

Lex loci laboris (permanent telework)

- **If only remote work**

- Law applicable should be that of country of residence = habitual workplace (see case law + wording of Art. 8(2) :“from which”)

- **If mix of remote work/ on-site work**

- Solution may depend on the **proportion between remote work and on-site work**
- However, since tele-work is a specific form of work, could it be “**as if work was performed from the company location**”, effective centre of his working activities there?
- Country of residence could constitute effective centre of working activities only if on-site work is marginal?

Lex loci laboris (permanent telework)

- Identification of place of work: French case law
 - Employee of an English company working from home in Paris
 - « **Since the place of work was contractually set at his residence in Paris**, without noting elements from which it would have resulted that the habitual place would not in France... » = French law (Cour de cassation, 19 Jan. 2017 case 15-22.835)
 - Employee of an English company working 4 days / week from home (Lille, France) without employer's formal consent
 - “...the employer never agreed to the transfer of the employee's place of work to France, and that **the employee's tolerance to work at home for part of the week** when he was no longer domiciled in the UK **could only be construed as a precarious derogation from the terms of the contract** fixing the location of his workstation in London...” (Cour de cassation 27 Nov. 2013, case 12-24.880)

Lex loci laboris (permanent telework)

- If workplace (under Rome I) is in the country of telework
 - Scenario 1: Parties have not chosen the law applicable to the contract
 - **Law of country of telework applies entirely and exclusively** to the employment contract
 - P works remotely from Strasbourg. Since March 2020 he works 90% of his time from home. The employment contract has been amended accordingly. He is subject to French employment law (+ application of the overriding mandatory provisions of the law of the forum)
 - Scenario 2: Parties have chosen the law where company is established
 - **Law of country of telework applies for its “non amendable” provisions** if they are more protective than the law chosen
 - P works remotely from Strasbourg. Since March 2020 he works 90% of his time from home. The employment contract, which is governed by German law by agreement, has been amended accordingly. He is subject to French employment law concerning (inter alia) the maximum amount of weekly working time (if more protective than German law)
 - Scenario 3: Parties have chosen law of country of telework

Option 2: Law of the place of engagement

- The criterion of the country in which the employee ‘habitually carries out his work’ (...) must be broadly construed, whereas the criterion of ‘the place of business through which [the employee] was engaged’ (...) **can apply only in cases where the court hearing the case is not in a position to determine the country in which the work is habitually carried out**
 - Connection factor **unlikely to apply** in cases of cross-border telework

Option 3: Exception clause

- “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.
- “**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. 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**” (Case C-64/12, Schlecker)
- The search for the closest link “**must not automatically result in the application, in all cases, of the law most favourable to the worker**” (Schlecker).

Exception clause

- **Even if workplace is at home, could the place where the company is located be that of the closest connection?**
 - Place where employee has been hired, place of key meetings, trainings, HR events (promotion interviews, sanctions, dismissal...), place of work community = centre of gravity of relationship?
 - Place of social security affiliation / tax?
 - If so, would prevail over the criterion of habitual workplace
- Exception clause should prevail over *lex loci laboris* only in rare cases

Exception clause

- If closest connection **with country where company is established**
 - Scenario 1: Parties have not chosen the law applicable to the contract
 - **Law of country where company is established applies entirely and exclusively** to the employment contract
 - P works remotely from Strasbourg for a German company. Since March 2020 he works 90% of his time from home. The employment contract has been amended accordingly. He is subject to German employment law (+ application of the overriding mandatory provisions of the law of the forum / “territorial provisions”)
 - Scenario 2: Parties have chosen the law of another country
 - **Law of country where company is established applies for its “non amendable” provisions** if they are more protective than the law chosen
 - P works remotely from Strasbourg for a German company. Since March 2020 he works 90% of his time from home. The employment contract, which is governed by French law by agreement, has been amended accordingly. He is subject to German employment law concerning (inter alia) the maximum amount of weekly working time (if more protective than French law)
 - Scenario 3: Parties have chosen law where company is established

II- Social security legislation applicable

Background

- No statistics on telework and cross-border telework
- Strong suspicion that telework increased during pandemic especially in border areas
- Various situations
 - Work exclusively carried out abroad by (frontier) worker in one MS before pandemic, then full-time or part-time telework in MS of residence during pandemic
 - Work performed in 2 MS before pandemic, then full-time or part-time in MS of residence through telework
 - Telework being temporary or meant to become (full-time / part-time) permanent

Background

- Does telework affect the legislation applicable (and how)?
- In the context of the pandemic
 - Who pays **sickness benefits in cash** (replacement income)?
 - How (and where) does worker have access to **healthcare**?
 - Who pays (partial) **unemployment benefits**?
 - Where are **contributions** paid?

Option 1: Law where activity is pursued?

Lex loci laboris

“a person pursuing an activity as an employed person in a Member State shall be subject to the legislation of that Member State” (Art. 11(3)(a) – general rule)

Law where activity is pursued

- How to locate the place where activity is pursued?
 - **Home or company's place?**
 - No indication in Reg. 883/2004, in 987/2009, by AC nor by EC practical guide
 - “the concept of the ‘location’ of an activity must be understood, in accordance with the primary meaning of the words used, as referring to the place where, **in practical terms**, the person concerned carries out the actions connected with that activity” (Partena, case C-137/11)
 - “that it is incumbent on the institution concerned, whatever the wording of those contractual documents, to base its findings on the employed person’s actual situation” (Format I, case C-115/11)

Law where activity is pursued

- If activity entirely and permanently carried out from home
 - **Residence** is where the activity is pursued = social security law of that country
 - “an employed person is to be subject, in social security matters, to the legislation of the Member State in which he or she works” / if duration of the uninterrupted periods of work completed in a MS exceeds 12 months, Article 13 is applicable (Format II)
- If activity partly and/or temporarily carried out from home
 - Can the **place where company is situated** be identified as place where activity is pursued? Yes, if...
 - Company is the place where instructions are given, remuneration is paid, important events take place (recruitment, evaluation interviews, dismissal interview...), where the work community is situated + equal treatment of colleagues
 - In both cases, “close link” with country where employer is located (the search for “close link” being at the core of title II)
 - “In order to determine whether a person should be considered to be normally employed in two or more Member States or, conversely, whether they work merely occasionally in several Member States, regard must be had, in particular, to the **duration of periods of activity** and to the nature of the employment as defined in the contractual documents, as well as to the **actual work performed**, where appropriate, namely, inter alia, the way in which the employment contracts concluded between the employer and the worker concerned **have been performed in practice in the past**, the circumstances surrounding the conclusion of those contracts and, more generally, the **characteristics and modalities of the activities pursued by the undertaking concerned**” (Format II, Case C-879/19)

Option 2: Pursuit of activities in 2 MS?

“A person who normally pursues an activity as an employed person in two or more MS shall be subject:

(a) to the **legislation of the MS of residence** if he/she pursues a substantial part of his/her activity in that MS; or

(b) if he/she does not pursue a substantial part of his/her activity in the MS of residence: (i) to the **legislation of the MS in which the registered office or place of business** of the undertaking or employer is situated if he/she is employed by one undertaking or employer” (Art.13(1)(a))

NB: If factual approach prevails = **2 MS of work** in case of “**part-time telework**”

Pursuit of activities in 2 MS

“A ‘substantial part of employed activity’ pursued in a MS shall mean a **quantitatively substantial part of all the activities** of the employed or self-employed person pursued there, without this necessarily being the major part of those activities.

The following indicative criteria shall be taken into account: (a) in the case of an employed activity, the **working time and/or the remuneration** (...)

In the framework of an overall assessment, **a share of less than 25 %** in respect of the criteria mentioned above shall be an indicator that a substantial part of the activities is not being pursued in the relevant Member State Reg. 987/2009, Art.14(8).

NB: Flexibility for assessing the 25% rule = the institutions concerned shall take into account the **situation projected for the following 12 calendar months** (Reg. 987/2009, Art.14(10)) + “**past performance** is also a reliable measure of future behaviour and thus when it is not possible to base a decision on planned work patterns or duty rosters, it would be reasonable to look at the situation over the previous 12 months and to use this for assessing substantial activity” (practical guide).

Pursuit of activities in 2 MS

- Example 1: **Telework 2 days/ week in Brno where employee resides,** and 3 days in Bratislava where employer is located= CZ social security law
- Example 2: In 2020, the person worked from home in Brno for 4 months and in Bratislava the rest of year, but **in 2021 work should be 90% in Bratislava** = SK social security law

Pursuit of activities in 2 MS

- **Temporary (occasional) activities** in 2 MS, as the result of a combination remote work / company work, **should be disregarded**
 - “A person **who normally pursues** an activity as an employed person in two or more MS shall be subject...”
 - “the fact that a person works in a MS **merely occasionally** cannot be taken into account for the purposes of application of Art. 14(2)(b)(i) of Reg. 1408/71”(case C-570/15, X.)

Pursuit of activities in 2 MS

- **Marginal activities** are disregarded
 - Activities that are permanent but insignificant in terms of time and economic return. It is suggested that, as an indicator, **activities accounting for less than 5%** of the worker's regular working time and/or less than 5% of his/her overall remuneration should be regarded as marginal activities (Art. 14(5)(b) Reg. 987 + practical guide)
 - However, “the situation of a Danish worker, residing in Denmark and employed exclusively by an undertaking with its seat in Germany, who in the course of that employment relationship, regularly, **for several hours each week and for a period not limited to 12 months** pursues his activity partly in Denmark, falls under Article 14(2)(b)(i) [person normally employed in 2 MS] of Regulation No 1408/71” (case C-425/93, Calle Grenzshop Andresen)

Consequence: back to *lex loci laboris* conflict of rule

Pursuit of activities in 2 MS

- Drawbacks of Article 13 (Reg. 883/2004)
 - Tough case by case implementation
 - Risk of frequent change in legislation applicable (if place of residence / distribution of working time change)
 - Risk of instrumentation / fraud (through location of place of residence + distribution of working time between 2 MS)
 - Unequal treatment of employees belonging to the same work community

Pursuit of activities in 2 MS

- As a derogation, **Article 13 (Reg. 883/2004) must be applied strictly (Format II)**
 - “ As is clear from [the lex laboris rule of conflict], **it is necessary to derogate from the general rule of connection to the MS of employment only in specific situations which demonstrate that another connection is more appropriate**” ”(case C-570/15, X.)
 - “ To accept that application of Article 14(2) of Regulation No 1408/71 could be justified in circumstances in which a person, who out of the total hours worked in one year for his employer established in one MS carried out **only 6.5% of those hours (at home) in another MS, without such an arrangement having been agreed with his employer in advance**, would be inconsistent with the fact that **connection to the MS of residence is a derogation and would create a risk of the conflict rules contained in Title II of that regulation being circumvented**”(case C-570/15, X.).

Option 3: Posting

“ A person who pursues an activity as an employed person in a MS on behalf of an employer which normally carries out its activities there and who is posted by that employer to another MS to perform work on that employer’s behalf shall continue to be subject to the legislation of the first MS, provided that the anticipated duration of such work does not exceed 24 months and that he/she is not sent to replace another posted person” (Art. 12(1), special rule).

Posting

- Irrelevant rule of conflict
 - teleworker is not providing a cross-border service + no service recipient
 - Telework is usually voluntary (or made compulsory by State/local authority regulations)

Commission guidelines

- Scenario 1: “If you are a frontier worker working exclusively in a MS other than the MS of residence”
 - You are currently insured in the MS of employment. **If you are now unable to work in your ordinary MS of employment, and for a temporary period, you have to work from home, this situation should in principle not lead to a change** in the applicable legislation as regards your social security coverage, since that situation is temporary. You will continue to be entitled to all social security benefits from the MS of employment.

NB: consistent with the idea that Article 11(3)(a) refers implicitly to the habitual workplace + no “normal activity” in the MS of residence + coherence with Title II objectives (search for close link+ continuity of affiliation) + consistent with case C-570/15 (“**occasional activities**”).

Commission guidelines

- Scenario 2: “If you are working in both the MS of employment and the MS of residence and you are insured in the MS of employment because your activity in the MS of residence is not substantial (less than 25% of your working time)”
 - You are currently insured in the MS of employment. **Now that the activity in your MS of residence is going to increase, it may become substantial** (understood as more than 25% of your working time over a period of 12 months).
 - In that case, the legislation of your MS of residence could become applicable under Article 13 (...) only if the average working time over a period of 12 month exceeds 25% of your total working time in all MS. Therefore, **the fact that for the next few weeks you will be performing a substantial activity in your MS of residence, this should not have an impact on your social security situation.**

NB: consistent with Art.14(10) Reg. 987/2009: “the institutions concerned shall take into account the situation projected for the following 12 calendar months” + “past performance is also a reliable measure of future behaviour and thus when it is not possible to base a decision on planned work patterns or duty rosters, it would be reasonable to look at the situation over the previous 12 months and to use this for assessing substantial activity (practical guide).

Commission guidelines

- What if the **above scenarios are not applicable** to your case and as a result of the COVID-19 pandemic, **you may end up with a change in the MS of social insurance?**
 - As a result, this may lead to a change in your MS of social security insurance, you may **ask your employer to submit a request to the competent authority of the MS whose legislation you wish to continue to be applied**, to continue to be subject to its legislation.
- The employer should substantiate this request **that it is in your best interest to remain insured** in the Member State where you are currently covered
- + reminder that MS can conclude **‘Article 16 agreements’**

(Source: Covid-19 - Information for frontier workers and posted workers)

MS initiatives

- Several MS (BE, CH, DE, FR, LU...) have **unilaterally decided to extend the rule according which periods of telework on the national territory due to the Covid-19 crisis should not be considered as work in that country** for the purpose of determining the legislation applicable.
 - Law of country where employer is located /habitual workplace continues to be applicable
 - 25% rule is neutralized
- NB: no binding effect of such informal and unilateral decisions**

Article 16 agreements?

“Two or more MS, the competent authorities of these MS or the bodies designated by these authorities may by common agreement provide for exceptions to Articles 11 to 15 in the interest of certain persons or categories of persons“

Conclusion

- One single place of activity? Activities in 2 MS? Posting?
- One underlying Title II objective
 - **continuity of insurance in the same MS**
 - Continuity vs facts (close link)?
- **Need for an *ad hoc* rule of conflict** distinguishing two cases: exclusive remote work / work shared between home and company
- In the meantime: “**the concept of the ‘location’ of an activity** must be considered to be **a matter**, not for the legislation of the Member States, but **for EU law** and, consequently, for interpretation by the Court” (case C-137/11, Partena).

Recent developments concerning cross-border access to health care / free movement of patients

Anne Pieter van der Mei

Cross-border access to healthcare and the corona crisis	Corona patients	EU solidarity - RescEU
	Other patients whose treatment has been postponed because of corona – waiting lists	
Testing the system for cross-border access to health care	Increase in cross-border patient flows?	
	Power of the competent State to give residents preferential access?	
Case of the CJEU	C-777/18 WO	
	C-243/19 A (Jehovah's Witness)	
	C-636/19 Y v CAK (pending)	
	C-535/19 A (pending)	

Current system for cross-border access to healthcare

Regulation 883/2004		Patients' Rights Directive		56 TFEU
Starting-point		When 883 does not apply (No EHIC, no S2)		When PRD does not apply (eg: long-term care, vaccination programmes, organ transplants)
				As source of interpretation of PRD
Unforeseen treatment (19)		Unforeseen treatment	If EHIC cannot be used, eg private provider, benefits not covered in MS of treatment	C-311/08 Commission v Spain
				Planned treatment (20)
Reimbursement	19 EHIC, 20 S2	Patient pays		=PRD
	Between institutions (35)	Right to be paid back by competent institution (7(1))		
	Full (35)	Up to maximum in competent MS (7(4))		
	As though insured in MS of treatment	As though treatment had been received at home		
Planned treatment: PA rules allowed for hospital care and heavy equipment treatment				

Planned treatment or unforeseen treatment?
883/2004

19 Unforeseen treatment		20 Planned treatment	
Becomes necessary on medical grounds		Travel to other MS with the purpose of obtaining treatment	
During a temporary stay in another MS		Which is appropriate to his/her condition	
Necessary to prevent that an insured person is forced to return, before the end of the planned duration of stay, to the competent Member State to obtain the necessary treatment			
Condition	EHIC	Condition: PA – S2	Covered by legislation in MS of residence Not available with medically acceptable period of time
Borderline?	C-777/18 WO	Appointment for medical examination, ‘if necessary’ surgery next day	
	C-636/19 CAK	Second opinion in other MS, diagnosis worse than expected	
Burden of proof, motive, length of stay, availability of treatment at home			

Planned treatment I

Prior authorization	PA-rules allowed for hospital care (1 night) and care involving heavy medical equipment
Right to PA	Covered by legislation in MS of residence
	Not available with medically acceptable period of time
Reimbursement ex 35 without PA (Elchinov)	Right to PA is unlawfully rejected (Vanbraekel)
	PA could de facto not be requested or not wait for decision competent organ
C-777/18 WO	Appointment made end of Sept, appointment 17 Oct, surgery 18 Oct
	De facto impossible?
	A national rule that wholly excludes possibility of reimbursement because no PA is requested is precluded by PRD and 56 FTEU (= C-636/19 CAK)

Planned treatment II

Case C-243/19 A (Jehovah's Witness)	Child of Jehovah's witness needs open heart surgery				
	Possible in Latvia, but only with blood transfusion				
	A request for PA for son to have surgery without blood transfusion in Poland – rejected				
	Surgery is covered by Latvian legislation, but can same or similar treatment be obtained in Latvia within medically acceptable period of time?				
CJEU	883/2004	20 883/2004: right to PA if treatment cannot be provided on time at home			
		Requires all circumstances to be considered in determining medical the patient's <i>medical</i> condition, but not <i>personal</i> choices as regards medical care			
	Discrimination on ground of religion	Indirect, but justification for reasons of financial stability			
	PRD	8(5): right to PA if treatment cannot be provided on time at home			
		PA-rules need justification	Financial stability: No because of 7(4)		
			Maintaining treatment capacity	Yes	PA allowed but check 8(5)
		No	No PA		

Other issues

Prior authorization by e-mail under PRD?

Residence for the economically inactive: the Health Insurance Requirement: C-535/19

Power of the MS of treatment to refuse treatment

Art.4(3) PRD: This shall be without prejudice to the possibility for the Member State of treatment, where it is justified by overriding reasons of general interest [...] to adopt measures regarding access to treatment aimed at fulfilling its fundamental responsibility to ensure sufficient and permanent access to healthcare within its territory.

Covid-19 impact on the distinction between EU citizens and third country nationals

MoveS Seminar

11 June 2021, Paris

Pr Sophie Robin-Olivier, La Sorbonne school of Law

University Paris 1

Structure of the presentation

I- Distinction between EU workers and TCNs: a corner stone of FMW

II- A distinction eroded by the crisis

III- Equality set in stone?

I- Distinction between EU workers and TCNs: a corner stone of FMW

Regulation 1612/68: equal treatment is limited to nationals of Member states

ECJ confirmed

Article 45 TFEU prohibiting discriminations on nationality to ensure free movement of workers only applies to nationals of Member states

Meade 238/83 (1984)

Article 18 TFEU (prohibiting discriminations on nationality) does not “apply to cases of a possible difference in treatment between nationals of Member States and nationals of non-member countries”

Vatsouras C-22 and 23/08 (2009)

More recently, solution confirmed by Advocate general Szpunar (X v. Belgium, C-930/19)

Justification?

No justification for limiting equal treatment is explicit in the TFEU

Article 18 covers discriminations on nationality « Within the scope of application of the Treaties »

Article 45 guarantees freedom of movement for « workers » within the Union

But EU integration (early on) and EU citizenship (later on) require a special treatment for nationals of Member states...

The limitation of the equal treatment rule to nationals of Member states is not absolute nor immutable

- Right to family reunification benefiting to EU mobile citizens includes equal treatment of family members, who are not nationals of a Member state
- All Directives concerning legal migrations contain provisions granting TCNs equal treatment with nationals, in some precise domains

...

For a comparative analysis of the rights of EU mobile workers and third country nationals: Ferdinand Wollenschläger, Ann Pieter van der Mei, Sophie Robin-Olivier, Herwig Verschueren, *Analytical report on the legal situation of third-country workers in the EU as compared to EU mobile workers* (Publications Office of the European Union, 2018)

II- A distinction eroded by the crisis

- Essential workers are not divided along the line of nationality
- Example of Health professionals and Seasonal workers

The new category of “essential workers in critical occupations”

The European Commission Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak listed ***critical occupations, for which free movement of workers is considered essential***

Health professionals, personal care, supply of food, food manufacturing and processing, transportation...

EP, LIBE Non-legislative report on new avenues for legal labour migrations 26/04/2021

G. whereas the COVID-19 pandemic has highlighted our ***intense reliance on frontline workers and the key role that migrant workers play in providing frontline services in the EU***, where populations are rapidly ageing and where ***13 % of key workers are immigrants on average***; whereas ***COVID-19 has significantly affected migrants, their families, host communities and home countries, and has also exacerbated existing vulnerabilities that migrant workers and their families face across the EU, impeding their mobility, access to the labour market, right to decent working conditions, and access to social and health care***;

The case of health professionals

Communication from the Commission « Guidance on free movement of health professionals and minimum harmonisation of training in relation to COVID-19 emergency measures – recommendations regarding Directive 2005/36/EC »

2020/C 156/01, 08.05.2020

Objectives of the text

- facilitation of the **recognition of qualifications** for cross-border movement
- ensuring the free movement of health professionals to the largest extent possible

EU Commission:

Member States may employ health professionals with diplomas from third countries by granting them a different status than that of a full member of one of the professions for which minimum training requirements are harmonised in the EU

Member states mobilized their migrant health workforce by:

- facilitating the temporary licencing of doctors with foreign medical degrees (Italy)
- facilitating recruitment in the national health services (Spain)
- expediting current applications for the recognition of foreign qualifications of health professionals (Belgium, Germany, Ireland, Luxembourg, Spain)
- allowing foreign-trained health workers in non-medical occupations in the health sector (France)

OECD, Managing international migration under covid-19, 10.06.2020

The case of seasonal workers

All seasonal workers are extremely vulnerable - both EU nationals or third country nationals

Essential workers (agri-food and tourism sectors) but very precarious (working and living conditions), a situation exacerbated by the COVID-19 pandemic + risk of spreading of infectious diseases (locked-in)

EC guidelines on seasonal workers in the EU in the context of the covid-19 outbreak (16.7.2020)

- Equal treatment of **EU citizens**
- The rights to benefit from the core terms and conditions of employment of the host Member State for **posted workers**
- The right to suitable living and working conditions, including physical distancing and appropriate hygiene measures ; the right to OSH and social security, **for all seasonal workers**

III- Equality set in stone?

- **Recent evolutions**
- **Prospective / Proposal**

EP, LIBE Non-legislative report on new avenues for legal labour migrations

26/04/2021

Improving intra-EU mobility

13. Highlights the fact that the intra-EU mobility of TCNs is a key component of the EU's legal migration policy, as it provides clear added value that cannot be achieved at Member-State level; recalls that the free movement of workers helps to match demand with supply in the EU's labour markets and can also contribute to labour market adjustments and overall economic growth in times of crisis

14. Calls on the Member States to enhance coordination between national authorities related to schemes on the intra-EU mobility of TCNs...

15. Emphasises that more harmonised and supple rules facilitating intra-EU mobility would act as an incentive for TCNs, represent a positive measure for employers, and help the Member States to fill gaps in their labour markets and boost their economies; stresses, moreover, that enhanced intra-EU mobility would allow TCNs already in the EU to improve their integration prospects

16. Notes that ***more recently adopted directives on students, researchers and intra-corporate transferees grant more far-reaching mobility rights to TCNs than legal migration directives adopted earlier, such as the original Blue Card Directive and the Long-Term Residents Directive***

17. Recommends that, ***as a first step towards simplification, rights to intra-EU mobility be enhanced across the existing legal migration directives; reiterates that the Commission should propose appropriate legislative action***

Opinion of the committee on employment and social affairs for the Committee on Civil Liberties, Justice and Home Affairs
on new avenues for legal labour migration (2020/2010(INI)) 15/01/2021

34. ...calls on the Commission and the Member States to protect seasonal workers, who are essential for strategic economic sectors in the EU and to establish clear rules as regards their rights and ***underlines that they should be guaranteed equal treatment and protection with their local counterparts***; calls on the Commission to ***undertake urgent actions regarding the general situation of the employment and health and safety conditions of posted TCNs and seasonal workers***, including the role of temporary work agencies, recruiting agencies, other intermediaries, and subcontractors, and to identify protection gaps and the possible need to revise the existing legislative framework (...); ***stresses that not only are the lessons learned valid concerning the COVID-19 crisis, they should also strengthen evidence-based policy-making to address the shortcomings of EU and national legislation in times of crises and normality***;

Revision of the Blue Card Directive Agreement reached by the European Parliament and the Council 17/05/2021

New rules for the entry and residence of highly skilled workers from outside the EU

Enhanced possibility to move and work between EU Member States (after 12 months)

Facilitated recognition of professional skills for occupations in the information and communication technologies sector

Prospective / Proposal

- Distinction between EU citizens and TCNs only out of the domain of work (economic activities)
- Full equal treatment for work mobility within the EU

Example: recognition of qualifications for intra-EU mobility

Derogatory tax and social security measures applicable to frontier teleworkers due to the COVID-19 crisis

Paris

June 11, 2021



The multi-level approach to cross -border cooperation, and the role of the MOT

MOT, appropriate responses for each level

AT THE LOCAL LEVEL: A network of 80 members



AT THE NATIONAL LEVEL: institutional partners



AGENCE NATIONALE DE LA COHÉSION DES TERRITOIRES



AT THE EUROPEAN LEVEL: Alliance and partnerships



Tax regime for cross-border workers

- ▶ General principle: **taxation in the State of residence** , not in the State of the activity. In that case, the State of residence of the cross-border worker pays **financial compensation** to the other State.
- ▶ Basis of the principle: a cross-border worker who is employed in a State other than that of his or her place of residence, **returns, as a rule**, to his or her State of residence every day.
- ▶ A certain **flexibility** exists; thus, in FR-CH the status of frontier worker can be recognized to the resident of one State who does **not join during forty -five days per year his domicile** in the other country (exchange of letters of 21 and 24 February 2005).
- ▶ Exception: the canton of Geneva, where cross-border workers are taxed at source on their net salaries; taxation is therefore collected in the State of work.

In this case, the canton pays financial compensation to the neighboring French departments (Ain and Haute-Savoie).



Tax regime for cross-border workers: COVID-19 time

- ▶ Telework became the rule
- ▶ Signature of **gentleman's agreements** at the beginning of the crisis; renewed several times and still in force, until the end of June 2021 (FR-CH, FR-LU, FR-DE, FR-BE, IT-CH, CH-DE, CH-AT etc.)
- ▶ Standard provisions: as an exceptional and temporary measure, **days worked in the State of residence**, at home and for an employer located in the other contracting State, **due to measures taken to control the spread of COVID19, shall be considered as days worked in the State in which the person would have performed his or her salary-earning employment** in the absence of such measures.
- ▶ Arrangement as if the employee's situation has not changed (as well as its consequences in terms of tax payments and compensations by neighboring States)



Social security system for cross -border workers

- ▶ Principle: According to the European regulation n°883/2004, any person who normally carries out an activity as an employee in two or more States is subject to the legislation of the State where he/she carries out a **substantial part of his/her activity** .
- ▶ Basis of the rule: According to the implementing regulation n° 987/2009, the salaried activity is said to be "**substantial**" when it represents at least **25% of the** employee's **working time and/or salary** .





Social security system for cross -border workers : Covid-19 time

- ▶ Telework became the rule
- ▶ **This 25% limit was assessed in a flexible manner during the exceptional period of Covid.**
- ▶ The French resident cross-border worker who normally works in Switzerland was therefore able to continue to be affiliated to and benefit from the Swiss social security system (+LU, BE, DE...).
- ▶ Currently, some European countries are lobbying the European Commission to raise the threshold from 25% to 50%



Generalized telework : consequences

- ▶ If telework remain the rule
- ▶ All bilateral agreements would have to be reviewed. Indeed, **the compensation systems are designed to better balance the distribution of revenues but also of the costs incurred by cross-border work** (residence costs or costs related to the location of employment, public facilities and services, infrastructure, etc.).
- ▶ Widespread telework changes the situation. For example:
 - more residence costs due to a more important presence of teleworkers;
 - reduced infrastructure costs for the country of residence;
 - reduction of hosting costs for the country of work (reduction of working space in particular), etc.
- ▶ This will increase administrative burden/complexity for businesses ...



More information : www.espaces-transfrontaliers.eu

Contact : Mission Opérationnelle Transfrontalière

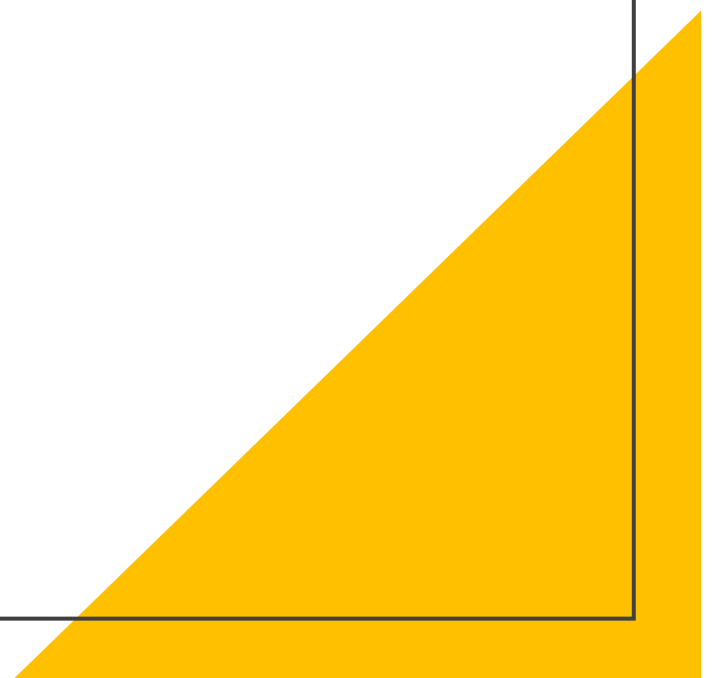
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The impact of the Covid-19 crisis on Free movement: the French administration perspective

Michaël Robin, French Labour inspector



Posted workers by an interim agency from Portugal to France in the construction sector

Case 1 - End of March 2020

Company behaviour

- Regular provision of services on French territory
- Posting of hundreds of workers
- Company under close surveillance by the control services of the “Grand Est” region and other French regions
- Controls carried out in the past - traceability of the company and location of postings (“SIPSI” posting e-tool)
- Questions about the conditions of the company's operations in France

Collective accommodation for workers

- Organization of the accommodation by the interim agency in connection with the users of the workforce : renting of houses or apartments
- Alerting by some workers on the conditions related to their accommodation / health crisis context but also on the working conditions / collective but especially individual protection

Control by labour inspection

- Taking into account of the information and organisation of an intervention in situ (workplace and accommodation)
- On-site control of the services declared to the labour administration organized: 3 work sites concerned without activity
- Control of 2 lodgings (rented apartments): observation of the presence of the workers on the spot - a major part returned to Portugal and the occupants present to intervene on site as needed. 4 workers met.
- Exchanges which revealed anxiety in connection with the sanitary crisis but choice of the workers to remain on the spot to intervene if necessary.
- The foreign company did not fail in its obligations as an employer. The implementation of a sanitary protocol was questionable to avoid the birth of an epidemic.
- Follow-up by labour administration: Formal reminder to the employer: hygiene rules to be respected and provision of means for workers to be protected.

Suspicion of “short-time work” fraud committed by a company established on Luxembourg territory, with a permanent establishment in France and which employs personnel from Portugal to be posted by the entity located in Luxembourg (case of intra-group mobility) - construction sector

Case 2 - January 2021

Background

- Information on the postings using the SIPSI posting e-tool
- Location of the company in France and the social and fiscal environment of this entity - mobilization of authorised “LTI” (fight against illegal work) partners
- Identification of the manager
- Identification of the workers concerned by the posting
- Location of the accommodation

Focused control

- Researches on the internal application of the Ministry of Labour to check whether the French entity has applied for compensation under the short-time work scheme
- Positive result of the research: requests made for all or part of the company's workforce
- Referral to the France/Luxembourg liaison office to find out the company's situation in the Grand Duchy and the status of its workforce
- Information confirming that the company's workforce is fully employed in Luxembourg (25 people), but that 10 people in France have requested compensation for short-time work , even though these 10 people were not officially declared to the French relevant authorities on behalf of the French company
- Research / on the requests made and the workers concerned
- Establishment of the fraud and statement of facts by means of a report transmitted to the French courts + formal information to the authorities of the labour inspection of Luxembourg - damage estimated at more than 20 000 euros.



EFFAT

European Federation of Food Agriculture and Tourism Trade Unions

EFFAT Demands on mobility and Migration

***MoveS seminar
11 June 2021***



EFFAT Sectors largely depend on the work of mobile and migrant workers:

They make up a significant proportion of those harvesting our fields, packing and processing our food, as well as those cleaning our houses and allowing the hospitality sector to run. Covid cast light on long standing issues.

Main challenges:

- Undeclared work
- Poor wages – illegal wage deductions
- Lack of proper social security coverage
- Deplorable Housing conditions
- Unrecorded working hours/Illegal wage deductions
- Sexual harassment
- Often involved in subcontracting or other business practices to escape employer liability
- Particularly challenging the conditions of undocumented migrant

Type of mobility:

- Posting is becoming a less recurrent practice (New Directive brought improvements). Agriculture and fisheries less than 2% total posting. Not so frequent anymore even in food industry
- EU citizens move within the framework of free movement of workers as cross-borders/migrant workers (equal treatment)
- Third country nationals are mainly already residing or are undocumented. Seasonal workers directive poorly used



EFFAT Demands on mobility and migration

- **Social conditionality of CAP subsidies for a truly sustainable primary sector**
- **An EU initiative on subcontracting tackling abusive practices and leading to direct employment**
- **Ensuring full social security coverage for all, also using digital tools**
- **Regulating labour intermediaries**
- **Decent and affordable accommodation for all mobile and migrant workers**
- **Common EU standards for effective labour inspections and complaint mechanisms**
- **Support for trade union counselling services and a stronger role for ELA**
- **A truly inclusive EU migration policy**

EFFAT Webinar on 21
June to present EFFAT
[Demands](#)

1. Social conditionality of CAP subsidies for a truly sustainable primary sector

- CAP payments to become conditional on respect of applicable working and employment conditions and employers' obligations resulting from relevant collective agreements, as well as EU and national social and labour laws and ILO Conventions.
- As a vast proportion of workers employed in agriculture are mobile and migrant workers, social conditionality must also cover the respect for mobile and migrant workers' rights in its scope.
- This is the only way to ensure that a major part of the EU budget, financed by EU taxpayers, contributes to raising labour standards in one of the most precarious sectors of the economy.
- Social conditionality is an easily applicable solution that would help in improving working conditions, while tackling unfair competition which affects all farmers and workers in the agriculture sector

2. An EU initiative on subcontracting tackling abusive practices

- ▮ The initiative **must ban subcontracting in certain sectors.**

In some of our sectors (e.g., the meat sector) the industry's core activities, although performed at the clients' facilities, are carried out by subcontracted workers doing exactly the same tasks in the same workplaces as employees directly employed by the client company.

- ▮ The initiative should institute **a general system of joint and several (full chain) liability**

The current fragmented approach to subcontracting chain liability should be replaced by a general system of joint and several (full chain) liability covering both cross-border and domestic situations.

The system should cover at least sanctions, back payments and compensation in case of non-respect of the applicable legislation and/or collective agreements. Such an initiative should also limit the subcontracting liability to a maximum three tiers and **tackle collective bargaining dumping across the subcontracting chain.**

3. Full social security coverage for all, also using digital tools

1. The abolition of all periods of employment exempted from social security contributions.
2. **New cross-border digital tools and enhanced digital cross-border coordination.**
 - ▣ The launch of the **European Social Security Pass (ESSP)** should be confirmed and anticipated. The ESSP should include a **European Social Security Number (ESSN)** for all workers in the EU to ease the portability of social security benefits and the verification of social security coverage.
 - ▣ A **European business register to fight letterbox companies** must be created to ensure more transparency and facilitate the exchange and availability of company information at EU-level.
3. **Supplementary welfare allowances accessible to migrant workers in case they lose their jobs.** This would help migrant workers when they have not been working long enough to qualify for certain entitlements. The migration status should not be affected.

4. Regulating the role of labour intermediaries

1. **Regulating the role of recruiting, placement agencies and other intermediaries at EU level.**

Their operations should be recorded in a European register and become more transparent. They should be obliged to comply with strong minimum requirements and quality standards. Recruiting costs, as well as travel expenses, must be entirely borne by employers. Labour intermediaries must provide reliable information to workers about their labour, social, and civil rights in the country of destination before departure. The information must be provided in the workers' own language or a language they understand and in a clear and transparent manner, regardless of the duration of their contract.

2. **The abuses of the Temporary Agency Work Directive 2008/104 (TAWD) should be addressed.**

EFFAT calls for better enforcement and an assessment of the TAWD, specifically related to decent working conditions and full and equal treatment for both mobile and migrant workers on fixed-term employment contracts with a temporary work agency.

5. Decent and affordable accommodation

1. EFFAT calls for an EU legally binding instrument ensuring decent housing for all mobile and migrant workers.

Accommodation must ensure a decent standard of living according to clear criteria on size, number of tenants, quality, health and safety standards and price. Those standards shall apply to accommodation provided directly or indirectly by the employer, as well as to private accommodation.

Accommodation costs should not reduce the remuneration paid to workers to a level below that of the statutory minimum wages. A maximum price, which needs to take into consideration the net remuneration and the quality of the accommodation, needs to be set. It is essential that the rental contract is decoupled from the employment contract in order to avoid further dependency on the employer. The rent is not to be automatically deducted from the pay. As a minimum, the protection of Directive 2014/36 should be extended to all mobile workers.

6. Common EU standards for effective labour inspections and complaint mechanisms

1. An EU Directive setting minimum standards on labour inspections and complaints

This Directive should build on the ILO Convention No. 81. It should regulate the functioning of national enforcement authorities responsible for labour inspections, as well as their powers and obligations.

Various aspects should be covered, such as entry to workplaces without notice, examinations, interviews with workers and employers, access to documents (including digital access).

It should allow victims, as well as third parties, including trade unions, to file complaints.

2. Member States should strengthen labour inspections and complaint mechanisms.

The staff of enforcement agencies has to increase in number and they should be properly trained, including training on European legislation and cross-border situations.

The European Labour Authority (ELA) should be given greater powers, in particular with respect to joint and concerted inspections and the fight against undeclared work.

7. Supporting Trade Union counselling services and a stronger role for ELA

1. A dedicated EU budget line to support trade union counselling services

Such a specific budget line does not exist, despite the key role trade union counselling services play to ensure the fair inclusion of mobile and migrant workers in the labour markets. An option could also be to extend the use of already existing budget lines by providing them with more resources.

Projects such as [Fair Mobility](#), the *European Migrant Workers Union (Germany)*, *Ancora in campo*, *STOP Caporalato* (Italy) and many others should be supported by EU funding accessible to national and EU social partners.

2. The role of ELA (European Labour Authority) must be strengthened.

ELA should support trade unions and other actors assisting mobile and migrant workers in a more operational manner, such as through information awareness campaigns and through exchanges of good practices. These initiatives should include training sessions for seasonal and other mobile workers about their rights and how to enforce them and report abuse.

8. A truly inclusive EU migration policy

1. **An EU common asylum policy is urgently needed.**

The EU should be recognised as a single territory for the purpose of protection and distribution of asylum seekers. Reinforced rights on access to work and equal treatment are needed.

2. **Undocumented, must be able to enforce their labour rights without risking deportation.**

3. **Labour migration pathways must be improved including possibilities to apply from within the country.**

4. **Social inclusion measures.**

These include non-discriminatory policies alongside measures to facilitate the access to education, health care, housing, and **pathways to regularise undocumented workers** present on the European territory.

5. **The whole EU social acquis should be interpreted in a way that fully protects all workers, including third-country nationals and undocumented workers.**

6. **The Seasonal Workers Directive should be revised.**

The protection and rights enshrined in the Directive should apply to all migrants already in an EU Member State, including those who are undocumented, ensuring full and equal treatment. Member States should also **provide seasonal workers with pathways to long-term resident status** after consecutive years of seasonal work.

Next Steps (non exhaustive)

- CAP Triologue Negotiations – Social conditionality
- Advocacy work in view of upcoming legislative initiatives (883/04, Minimum Wage, Due Diligence, Gender Pay Transparency)
- Liaising with EU Institutions to push for new binding measures + enforcement Guidelines seasonal workers and Council conclusions
- EU Social security Pass
- EC study on subcontracting
- ELA Campaign on Seasonal workers (inspections, workshops, awareness raising campaign)
- Active participation in ELA Working Groups
- Bilateral meetings between sending and receiving countries



Thanks

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