



MoveS Webinar

“Posting of workers: latest developments and prospects in social security and labour law”

18 March 2022

Funded by the



Your host today



Prof. dr. Filip Van Overmeiren

Filip Van Overmeiren is a Professor at Ghent University and at Brussels University and Director within Deloitte Belgium. He is a lawyer and academic with around 20 years of experience in national and international social law, with a specialization in cross-border employment and international social security law and a specific interest for international coordination of social security, free movement of workers, posted workers and the social status of individuals. He has a broad network in both academia as well as within national and supranational institutions. He is a regular speaker at conferences with several publications regarding international employment.



Agenda



Content	Timeslot	Presenter
Introduction	11:00 – 11:10	Prof. dr. Filip Van Overmeiren
The Posted Workers Directive anno 2022	11:10 – 11.40	Prof. dr. Sophie Robin- Olivier
Update on posting of workers under Regulation 883/2004	11:40 – 11:20	Prof. dr. Dolores Carrascosa Bermejo
Questions and Answers	12:10 – 12.30	ALL
Break	12:30 – 12:40	
Post-Covid posting of workers from a labour and social security point of view	12:40 – 13:10	Prof. dr. Herwig Verschueren
Questions and Answers	13.10 – 13:30	ALL

Housekeeping rules



- **Questions?:**
 - Ask them live during the Q&A sessions (by using the 'raise hand' button)
 - Or use the Zoom chat function
 - Before Q&A, participant interaction only via chat
- A **Replay version** of the webcast and the presentation slides will be available after the webcast and can be accessed through the EC's webinar meeting page and will be posted on LinkedIn



Introduction to MoveS

EU-wide network
of independent legal experts
in the fields of
free movement of workers (FMW) &
social security coordination (SSC) & posting

Key facts about MoveS



- Funded by the European Commission (DG EMPL units E1 'FMW' and E2 'SSC')
- 32 countries covered (EU/EEA/CH/UK)
- Implemented by Eftheia, Deloitte, University of Ljubljana, University of Poitiers
- Four-year project (2022-2025)

Objectives of MoveS



Objective 1

- To provide high-quality legal expertise in the areas of FMW, SSC and posting
 - **Legal Reports**
 - **Bimonthly Monitoring Reports**
 - **Ad hoc requests and comparative assessments**

Objectives of MoveS



Objective 2

▪ To disseminate expertise and increase experts' and practitioners' knowledge by means of:

- **National seminars**
- **Webinars**
- **Information tools & communication**
- **Training for EC staff**

Seminars and Webinars

- 8 one-day seminars a year
- 3 webinars
- Audience: Representatives of competent authorities and institutions, social partners, NGOs, judges, lawyers and academics

Seminars 2022

	Date	Country (City)
1.	29/03	Portugal (Lisbon)
2.	May 2022	Denmark (Copenhagen) & Sweden
3.	June 2022	Belgium (Brussels)
4.	September 2022	Iceland (Reykjavík)
5.	October 2022	Spain (Madrid)
6.	October 2022	Romania (Bucharest) & Italy
7.	November 2022	Poland (Warsaw)

Webinars 2022

	Date	Topic
1.	18/03	Posting of workers: latest developments and prospects in social security and labour law
2.	24/06	Free Movement in the gig economy
3.	18/11	Remote work and FMW/SSC

Cooperation and networking

- **MoveS webpage (EUROPA)**
 - <https://ec.europa.eu/social/main.jsp?catId=1098&langId=en>

- **MoveS LinkedIn group:**
 - MoveS – free movement and social security coordination
 - <https://www.linkedin.com/groups/4291726>

Contact us at:
MoveS@eftheia.eu



Posting of workers: latest developments and prospects in social security and labour law

Our speakers today



Sophie Robin-Olivier

Sophie is a Professor of Law at the Sorbonne School of Law, since 2011. Before joining Sorbonne, she taught at other Law schools, in France and abroad (US, Japan, Argentina, Italy...). She teaches EU Law (Institutional and Substantive), Comparative Law and Labour and Employment Law and Anti-discrimination Law, in French and English. Her research focuses mostly on EU social law and Free movement of persons.



Dolores Carrascosa Bermejo

Dolores is PhD in Law at Carlos III University since January 2003. She is lecturer in ICADE and UCM (positive assessment as Senior Lecturer by ANECA); researcher (member of many Research Projects) and consultant with more than 20 years' experience. She has worked in different areas related to Labour Law and Social Security, with a Spanish, EU and comparative approach, combining a theoretical and practical background.



Herwig Verschueren

Herwig is a Professor of International and European Labour and Social Security Law at the University of Antwerp (Belgium), since 2004. Herwig has worked as a civil servant at the European Commission in the field of free movement of workers and the co-ordination of social security schemes. His current teaching and research concentrates on European social law and more specifically on the legal position of migrating EU citizens with regard to labour and social security rights.



The Posted Workers Directive anno 2022

Sophie Robin- Olivier
Professor of Law, Sorbonne School of Law (France)

The Posted Workers Directive – anno 2022

I- The Transformation of Posting

II- Evolution of EU law/directive on posting

III- Are further changes needed?

I- The transformation of posting

- **Posting is a way for businesses to provide services, in their domain of activity, in other Member states**

- **Posting has become (for a part) a system of exploitation of workers**

Posting as a way, for businesses to provide services, in their domain of activity, in other Member states

- **A larger market for European companies**

Extension of the territorial scope of the economic activities of EU businesses

Example: *Bezirkshauptmannschaft Hartberg-Fürstenfeld*, C-219/20
(10/02/2022)

- **This can include temporary work agencies, which activity consists in assigning workers to users...**

Example : ECJ, *Webb*, 279/80 (1981)

Posting has become (for a part) a system of exploitation of workers

- **Posting (under Directive 96/71) as a business model**

Examples: ECJ, *Danieli* C-18/17 (2018) ; Bouygues Travaux public, C-17/19 (2020) ;
Team Power Europe, C-784/19 (2021)

- **Including worst form of exploitation: forced labour?**

Example: *Terra Fecundis*

ECJ, *Bouygues Travaux public*, C-17/19 (2020)

The operation – Supply of cheap workforce

“24 After being awarded contracts for the construction of a new generation nuclear reactor, a pressurised water reactor known as ‘EPR’, in Flamanville (France), Bouygues, a company established in France, formed with two other undertakings, for the performance of those contracts, a limited partnership, which subcontracted the contracts to an economic interest grouping that included, among others, Welbond, a company also established in France. That grouping itself used subcontractors, including Elco, a company established in Romania, and Atlanco Ltd, a temporary employment company established in Ireland with a subsidiary in Cyprus and an office in Poland.

25 Following a complaint about the accommodation provided for foreign workers, strike action by temporary Polish employees concerning the absence or inadequacy of social security cover for accidents, the discovery that there had been more than one hundred unreported workplace accidents, and an investigation initially by the Nuclear Safety Authority and then by the police, Bouygues, Welbond and Elco were prosecuted for offences committed between June 2008 and October 2012, in particular, as regards Bouygues and Welbond, on charges of concealed employment and the unlawful provision of workers, and, as regards Elco, on a charge of concealed employment.”

II- Evolution of EU law/directive on posting

➤ **Free market dominates over workers' protection**

➤ **Evolution towards social rights' protection**

➤ **Most recent cases**

Free market dominates over workers' protection

- Before Directive 96/71 (regulation of posting)
- Under Directive 96/71 of 16 December 1996 concerning the posting of workers in the framework of the provision of services

Example: ECJ, *Laval un Partneri* C-341/05 (2007)

Evolution towards social rights' protection

- Directive 2014/67 of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services

- ECJ, *Sähköalojen ammattiliitto*, C-396/13 (2015)

- Directive 2018/957 of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services

- Recent case law developments

Recent case law developments

- ECJ, *Danieli* C-18/17 (2018): means to combat frauds
- ECJ, *Bouygues Travaux public*, C-17/19 (2020): application of national **labour law** can help address frauds (which cannot be done under social security rules)
- ECJ, *Team Power Europe*, C-784/19 (June 2021) : the ECJ insists on the need to avoid “**forum shopping**” and a “**race to the bottom**”

ECJ, *Bouygues Travaux public*, C-17/19 (2020)

Nature and effect of the “declaration prior to the engagement of employees” provided for by the French code du travail?

“E 101 Certificate, issued by the competent institution of a Member State, under Article 14(1)(a) or Article 14(2)(b) of Regulation No 1408/71, to workers who are employed in the territory of another Member State, and an A 1 Certificate, issued by that institution, under Article 12(1) or Article 13(1) of Regulation No 883/2004, to such workers, ***are binding on the courts or tribunals of the latter Member State solely in the area of social security***”

ECJ, *Team Power Europe*, C-784/19 (June 2021)

Team Power Europe has been registered in the company register of the Republic of Bulgaria since 22 May 2017. Its commercial purpose is the provision of temporary work and work placement services in that Member State and in other countries

“a temporary-work agency established in a Member State must, in order for it to be considered that it ‘normally carries out its activities’, within the meaning of Article 12(1) of Regulation No 883/2004, in that Member State, carry out a significant part of its activities of assigning temporary agency workers for the benefit of user undertakings established and carrying out their activities in the territory of that Member State”

Most recent cases

➤ ECJ, *Rapidsped* C-428/19 (8 July 2021)

➤ ECJ, *Bezirkshauptmannschaft Hartberg-Fürstenfeld*, C-219/20 (Feb. 2022)

ECJ, C-428/19, *Rapidsped* (8 July 2021)

Road transport / Drivers demand that their Hungarian employer applies Art. 3 of Directive 96/71 on remuneration, and pays remuneration according to French law, since they are regularly posted in France

- Reference to *Ammattiliitto* to determine whether a daily allowance is part of the minimum wage
- Interesting development on a bonus granted to drivers « calculated on the basis of the savings made in the form of reduced fuel consumption in relation to the journey made »

Tension between environmental objectives and road and drivers' safety

« positive impact on society » but « a fuel-saving bonus might encourage certain drivers to freewheel when going downhill »

ECJ, *Bezirkshauptmannschaft Hartberg-Fürstenfeld*, C-219/20 (Feb. 2022)

National legislation providing for a **five-year limitation period** for failure to comply with obligations relating to the remuneration of posted workers is contested by the employer of posted workers

« The cross-border nature of a situation involving the posting of workers and the proceedings to be brought against such an administrative offence are liable to render the work of the competent national authorities relatively complex and thus **justify the setting of a sufficiently long limitation period to enable the competent national authorities to bring proceedings and penalise such an administrative offence** »

« importance attributed, by Directive 96/71, to the obligation relating to the minimum rate of pay, service providers posting workers to the territory of a Member State can reasonably be expected to retain evidence of the payment of wages to those workers for several years »

« Article 9(1)(c) of Directive 2014/67 expressly authorises Member States to require service providers established in another Member State to deliver certain documents, including proof of payment of wages, after the period of posting, at the request of the competent authorities, within a reasonable period of time »

On the right to effective judicial remedy and especially the principle of equality of arms

« the setting of a five-year limitation period for an administrative offence relating to the underpayment of posted workers does not appear to be such as to expose a diligent economic operator to the risk of not being in a position effectively to make known its views on the evidence on which the authorities intend to base their decision to penalise it for committing such an administrative offence or to the risk of not being able to present its case, including its evidence, before a court »

« Article 5 of Directive 96/71, read in conjunction with **Article 47 of the Charter** and **in the light of the general principle of EU law relating to the right to good administration**, must be interpreted as not precluding national legislation providing for a five-year limitation period for failure to comply with obligations relating to the remuneration of posted workers »

III- The need to further changes?

➤ **May depend on the impact of ELA on frauds in posting**

2020: Five pilot inspections targeting the construction, agriculture, and transport sectors

« The level of involvement of ELA varied from the coordination and support of preparatory actions and follow-up measures to participation (observation) on the field »

➤ **Imposing and extending subcontracting liability at EU level**

Art. 12 of Directive 2014/67: only a possibility for Member states

Limited (direct subcontractor of the employer can be liable)

➤ **Prohibition of the provision of personnel by foreign temporary employment agencies or companies whose sole activity is the provision of personnel, in certain sectors or in general**

Example: in Germany, poor working conditions in the meat sector led to the adoption of a statute (Gesetz zur Verbesserung des Vollzugs im Arbeitsschutz" of 22.12.2020 - ASKG) to improve worker protection, which prohibits self-employment and temporary work in the meat industry

As of January 1, 2021: **no self-employed workers** can work in the entire processing chain of the meat industry (slaughtering, cutting and processing of meat)

As of April 1, 2021: **no temporary workers** can be assigned, in this sector

Thank you for your attention!

Our speakers today



Sophie Robin-Olivier

Sophie is a Professor of Law at the Sorbonne School of Law, since 2011. Before joining Sorbonne, she taught at other Law schools, in France and abroad (US, Japan, Argentina, Italy...). She teaches EU Law (Institutional and Substantive), Comparative Law and Labour and Employment Law and Anti-discrimination Law, in French and English. Her research focuses mostly on EU social law and Free movement of persons.



Dolores Carrascosa Bermejo

Dolores is PhD in Law at Carlos III University since January 2003. She is lecturer in ICADE and UCM (positive assessment as Senior Lecturer by ANECA); researcher (member of many Research Projects) and consultant with more than 20 years' experience. She has worked in different areas related to Labour Law and Social Security, with a Spanish, EU and comparative approach, combining a theoretical and practical background.



Herwig Verschueren

Herwig is a Professor of International and European Labour and Social Security Law at the University of Antwerp (Belgium), since 2004. Herwig has worked as a civil servant at the European Commission in the field of free movement of workers and the co-ordination of social security schemes. His current teaching and research concentrates on European social law and more specifically on the legal position of migrating EU citizens with regard to labour and social security rights.



Update on posting of workers under Regulation 883/2004

Dolores Carrascosa Bermejo
PhD in Law, Carlos III University (Spain)

Introduction

Requirements for applying conflict rules:

- For posting (Art. 12)
- For activities in two or more MS (Art. 13)

Posting control problems (SS public law)

- Disregarding fraudulent PDA1

Considering:

- Case-law
- Last provisional agreement on amendment of Coordination Regulations (Dec 2021).
Rejected.

Introduction: point of view

Posting and international competition between companies

Posting under the Directive:

- Prevent social dumping+ clear advantages for PW
- Courts: foreign labour law is applicable
- Neutralize the advantage for less developed MS

Posting under Coordination Regulations:

- Exception to *lex loci laboris*. Social dumping?
- What is more protective for PW? Stability?
- Courts: foreign SS law is not applicable

PDA1 issuing and notification under Art. 12

Issuing:

- Preferably before posting (also possible during/after posting)
- Proper assessment of relevant facts (AC Rec A1 point 5)
- Retroactive PDA1 has binding effect (Banks and others C-178/97 par. 52-57 & Alpenrind C-527/16 par. 70)
- Even issued after inspection host MS (Alpenrind par. 77)

Prior notification:

- Notification to host MS via EESSI
- Inform sending MS in advance (AmReg. 987 Art 15.1.a) except
 1. Business trips (short term) (AmReg. 987 Art 1.2.eb)
 2. Exceptional cases, up to 3 days later (AmReg. 987 Art 15)

PDA1 requirements employees under Art. 12 (1/2)

1. **Maintain direct labor relationship** throughout posting

- Employee: TCN legally staying (Balandin C-477/17)
- Employer: temporary employment agency TEA
- No double-posting (AC Dec A2 point 4)
- Relevant criteria (AC Dec A2 point 1.3)
- *Controlled by **sending and host MS***

2. **Previous attachment to SS** of home MS immediately before posting. Not necessarily working for the posting company (Walltopia C-451/17)

- one month immediately before recruitment (AC Dec A2 point 1.4), *in the future possibly three months (AmReg. 987 Art 14.1)*
- *Controlled by **sending MS***

PDA1 requirements employees under Art. 12 (2/2)

3. **Substantial ordinary business activity** in sending MS

- No letterbox company (AC Dec A2 point 1.5; AC Rec A1 point 5)
- Also applicable to TEA (Team Power Europe C-784/19)

4. **Anticipated duration** does not exceed 24 months

- Not possible if project lasts more, unless Article 16 agreement between institutions (Brusse C-101/83)
- Brief interruptions, 2 companies in the same host MS, Posting to different MS (AC Dec A2 point 3)
- Counter resets after 2 months (AmReg. 987 Art 14.1.aa)

5. **No replacement** of a previously posted worker

- Exception: former PW lasted less than 24 months
- No permanent tasks: abusive posting (Alpenrind C-527/16)

PDA1 requirements for selfemployed Art. 12

Perform **similar activity** temporarily in another MS

1. Can work temporarily as employed worker in host MS paying contributions as self-employed in sending MS (Banks C-178/97)
2. Self-employed for some time before posting, nowadays 2 months or less (AC Dec A2 point 2) **in the future: at least 3 months (AmReg. 987)**
3. Maintain capacity to work in sending MS (Reg. 987 Art 14.3)
4. Anticipated duration does not exceed 24 months
5. No ban on replacement. **In the future: replacement ban will apply to all types of workers (AmReg. 987 Art. 12)**

PDA1 multiState rule under Art. 13

Employees or self-employed working **simultaneously or alternately** in two or more MS **on a regular basis**.

- No need for substantial activities in sending MS
- No time limit and no replacement ban
- No previous insurance requirement

Problems:

- Distinguish alternate working from successive posting

Requisites:

- Predictable repeated work in the next 12 months
- Depending on nature of employment and duration of periods of activity (Hackenberg C-13/73)
- Consecutive contracts (Format C-115/11). Unique contract, periods exceeding 24 months (Format II C- 879/19).
- Lack of host MS and duration info (Concl Bogdan C-189/14)

PDA1 competent MS under Art. 13 (1/2)

Residence MS determines applicable law (total contributions). Info exchange EESSI + cooperation procedure between national Administrations (Reg 987 Art. 16)

1. Employees :

- MS of residence + substantial employment (at least 25%)
- Headquarters of the company MS (1 company)
- Headquarter of the company MS where the employee does not reside (2 or more companies, one in MS of residence)
- MS of residence (2 or more companies outside MS of residence)

(*) Actual employer not the formal one (AMFB 610/18) (authority and payment)

2. Self-employment in 2 or more MS (Art. 13. 2)

3. Mixed: employee in one MS + self-employed in another (Art 13.3)

PDA1 competent MS under Art. 13 (2/2)

Very **confusing**. Several pending preliminary rulings:

- **C-58/21 Austria** (Art. 13.2.b interpretation) early retirement of a lawyer in AT (<10% of activity + turnover) while provide services in DE and CH where resides.
- **Case E-1/21 Liechtenstein**. Concept of registered office in trucking service and Article 16 Reg 987 procedure (challenging definitive determination)
- **C-661/21 Belgium**. Road transport EU authorisation and procedure to disregard fraudulent authorisation

Amendment of Coordination Regulations:

- Working in a MS and receiving unemployment benefit in another: insured in the latter MS (AmReg 883 Art. 13.4.a)
- Registered office or place of business concept (AmReg 987 Art. 14.5.a)
- Reassessment of PDA1 Art. 13 every 24 months (AmReg 987 Art. 14.10)
- Residence outside the EU: residence in the MS where s/he works the major part (AmReg 987 Art. 14.12)

PDA1 binding effect

Coordination is based on **loyal /sincere cooperation**

- PDA1 have Social Security **binding effect** on the host MS Administration -including Courts- (C-Nikless C-474/16).
- Until PDA1 is not **withdrawn or declared invalid** by issuing MS Administration (Rgto 987 art. 5; FTS C-202/97; Herbosch C-2/05), **no other Social Security legislation can be applied** (Commission vs Belgium C-356/165)
- In case of **disagreement** ► long and non-decisive dialogue and conciliation procedure must be initiated without delay (Reg 987 Art 5 + AC Decision n° A2):PDA1 **retroactively** issued, **not complying** requirements or **fraudulent** PDA1 (Altun C-359/16).

(*) AC Conciliation board opinion not legally binding

- **Solutions:** home MS Courts + Infringement proceedings under Article 259 TFEU (Altun)

Host MS Courts disregarding PDA1

Disregard (host MS) ≠ withdrawal /invalidate (issuing MS)

Altun (C-359/16) Belgium: criminal procedure

- EU law cannot be used for abusive or fraudulent ends (Paragraph 48 case-law?)
- **1st Requirement:** issuing institution fails to carry out review within (considering evidence) a reasonable period of time
- **2nd Requirement:** fraudulent nature of PDA1 –objective and subjective- proved in a fair trial (safeguards // rebut data)

Vueling (C-370/17 and C-37/18) France. Confirmed Altun

- Administrative dialogue procedure must be promptly initiated (prior fair trial)

Bouygues travaux publics (C-17/19) France

- PDA1 are binding only regarding social security
- Prosecution for undeclared work (lack of insurance)+payment of social security contributions or equivalent damages?

Pending Case: Belgium C-410/21 PDA provisionally withdrawn?

Perspectives

- **A neutral third party** must decide within a reasonable period of time: Fast procedure before Court of justice, voluntary or compulsory arbitration before ELA or AC...
- In the case of **withdrawal of the PDA1**: protection of posted workers involved must be guaranteed (Article 16 Agreements + special measures for TCN).

Provisional agreement December 2022:

- Defects in the issuing of the PDA1 (not compulsory data is included) 30 working days (Reg 987 Art. 5.1a)
- Reinforcement of cooperation between institutions: dialogue and conciliation procedure inside the Regulations with stricter deadlines (Reg 987 art.19.a)
- Combat fraud + error part of proper implementation of Basic Regulation: exchange information //personal data (Reg 987 Recital 25, and Article 2.2) + Concept of fraud (Reg. 987 art. 2.4)

Thank you for your attention!



Questions and Answers

Webinar Break

12.45-12.55

18 March 2022

Our speakers today



Sophie Robin-Olivier

Sophie is a Professor of Law at the Sorbonne School of Law, since 2011. Before joining Sorbonne, she taught at other Law schools, in France and abroad (US, Japan, Argentina, Italy...). She teaches EU Law (Institutional and Substantive), Comparative Law and Labour and Employment Law and Anti-discrimination Law, in French and English. Her research focuses mostly on EU social law and Free movement of persons.



Dolores Carrascosa Bermejo

Dolores is PhD in Law at Carlos III University since January 2003. She is lecturer in ICADE and UCM (positive assessment as Senior Lecturer by ANECA); researcher (member of many Research Projects) and consultant with more than 20 years' experience. She has worked in different areas related to Labour Law and Social Security, with a Spanish, EU and comparative approach, combining a theoretical and practical background.



Herwig Verschueren

Herwig is a Professor of International and European Labour and Social Security Law at the University of Antwerp (Belgium), since 2004. Herwig has worked as a civil servant at the European Commission in the field of free movement of workers and the co-ordination of social security schemes. His current teaching and research concentrates on European social law and more specifically on the legal position of migrating EU citizens with regard to labour and social security rights.



Post- Covid posting of workers from a labour and social security point of view

Herwig Verschueren

Professor of International and European Labour and Social Security law,
University of Antwerp (Belgium)

Starting point

- Telework/online work will continue after the pandemic
- Including cross-border telework
 - Working from another MS than the MS where the work is 'normally' pursued or where the premises of the employer are situated
 - Working from home
 - Working from a temporary place of stay (such as 'workation')
 - Working from 'the cloud'
 -

Starting point

- Telemwork challenges the '*lex loci laboris*' principle
 - Where is the 'workplace' in a virtual world?
- What about the applicable employment and social security law?

Legal sources

- Applicable employment law
 - Rome I Regulation 593/2008
 - Revised Posting of Workers Directive 96/71 (PWD)
- Applicable social security law
 - Regulation 883/2004 (Basic Regulation, BR)
 - Regulation 987/2009 (Implementing Regulation, IR)

Applicable employment law

Applicable employment law: Rome I

- No specific measures taken during the pandemic
 - So: legal situation will not change after the pandemic
- Rome I (Article 8):
 - Free choice by the parties of the applicable legislation
 - This choice may not derogate from mandatory and more favourable provisions of the 'objectively applicable law':
 - Country of 'habitual place of work'
 - In the absence of such a place: country of the place of business through which the employee was recruited (formal criterion)
 - Escape clause: the country with the contract is more closely connected.

Applicable employment law: Rome I

- The 'habitual place of work' has primacy
 - broad definition given by the CJEU
- How to determine the 'habitual place of work'?
 - 'the country in which or, failing that, from which the employee habitually carries out his work'
 - The place where or from which the work is **primarily physically pursued**
 - CJEU (*Koelzsch; Nogueira*): international transport
 - the place from which the worker leaves and to which he/she returns after an assignment, the place in which he/she receives orders and instructions and where the work tools are situated

Applicable employment law: Rome I

- Habitual place of work 'shall not be deemed to have changed if the worker is temporarily employed in another country'
 - Recital 36: 'if the employee is expected to resume working in the country of origin after carrying out his tasks abroad'
 - In case of posting: the sending country remains the 'habitual place of work'

Applicable employment law: Rome I and telework

- What is the applicable law when teleworking?
 - **Temporary character** of telework
 - The intention to resume work at the premises of the employer (for instance after the pandemic)
 - Telework does not impact on the 'habitual place of work'

Applicable employment law: Rome I and telework

- **Structural character** of the telework
 - Where is the centre of the activities?
 - Residence of the employee
 - Place of business where orders and instructions are given; where the work tools are situated

Applicable employment law: Rome I and telework

- **Structural activities in more than one MS**
 - No 'habitual place of work' can be identified
 - Country of the place of business through which the employee was recruited
 - What if the employer himself/herself is only digitally active?
 - Where is the 'place of business'?
 - Is there a 'closer connection' with another MS?
 - Country where the employee is physically present?

Applicable employment law: Rome I and telework

- Introduction of the notion of 'virtual place of work'
 - The platform or the website of the employer?
 - But: risk of manipulation by the employer
- Overall objective of Rome I: protection of the weaker party
 - Would plead for a conflict rule linked to the residence of the employee

Applicable employment law: Posting Directive

- PWD:
 - Temporary service provision '**in the territory of a MS** other than the State in which he normally works'
 - There must be a 'client' in that other MS
 - Subcontracting
 - Intergroup postings
 - Temporary employment agency
 - There must be a sufficient link with the host State
 - CJEU *Dobersberger, van den Bosch*
 - 'Hardcore' provisions of the 'host state' apply

Applicable employment law: PWD and telework

- PWD does not seem to apply as such in case of telework from home, from a temporary place of stay or from the cloud
 - No 'client' in the MS from which the teleworker is working
 - However, some MSs consider such workers as posted workers and apply the provisions of the PWD as implemented in their legislation (for instance Belgium)

Applicable employment law: PWD and telework

- What if a 'teleworker' is posted, i.e. sent to work to provide a service for a client in another MS?
 - PWD only applicable if the employee physically moves
 - If not: PWD is not applicable
 - Only the service moves (electronically); CJEU *Bundesdruckerei*
 - What if the employee moves but also continues to work online for some days from another MS?
 - Is the PWD only applicable for the days during which this employee physically works in the host MS?

Applicable social security law

Social security coordination

- EU social security coordination: rules on the determination of the applicable legislation (Articles 11 to 16 BR)
 - Unicity of the applicable legislation
 - General principle: *Lex loci laboris*
 - Special rules in case of posting (Art. 12 BR) and multi-state employment (Art. 13 BR)

Social security: telework and applicable legislation

- CJEU, *Partena*, C-137/11: *'... 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'*.
 - Refers to where the work is **physically** carried out

Social security: telework and posting

- Posting under the social security coordination (Art. 12 BR)
 - Working on behalf of the employer for a limited period of time in another MS
 - Legislation of the sending MS remains fully applicable
 - **Even if there is no provision of service to a 'client' in that MS**
 - Differs from the PWD

Social security: telework and posting

- Are the posting provisions applicable in case of teleworking?
 - What if the worker is ordered to telework by the employer?
 - What if he/she teleworks at his/her own initiative ('workation')?
 - Different practices amongst the MSs
 - If it is not posting: legislation of the 'host' MS would be applicable, even for a short period of time

Social security: telework and multi-state activity

- Telework may trigger the application of **multi-state activity** (Article 13 BR) and could lead to a change in the applicable legislation
 - Requires an element of 'permanent' situation, such as repeated and regular telework from another MS
 - Projection for the following 12 months (Art. 14(7) and (9) IR)

Social security: telework and multi-state activity

- If there is **substantial activity in place of residence**: legislation of that MS applies
 - 25% rule of Art. 14(8) IR
- **If there is no substantial activity in the place of residence**
 - Application of the legislation of the MS where the employer is situated (with some exceptions)

Arrangements during the pandemic

- 'unilateral arrangements' and 'bilateral arrangements'
 - Guidelines of the Admin. Com.
 - Disregard telework by cross-border workers
 - Very different and non-coordinated legal arrangements
 - Informal administrative practices
 - National law
 - Bilateral measures, such as 'Article 16' agreements
 - Unilateral measures, such as A1s on the basis of Article 12 BR (posting)
- Disputable legal bases
- Applicable until 30 June 2022?
 - Will these arrangements be prolonged?

What if the temporary arrangements are not prolonged?

- Possible change in the applicable legislation
- Consequences:
 - Administrative complications
 - Impact on net income: payment of contributions by both employer and employee, and self-employed persons
 - Shift in the entitlement to benefits/responsibility
 - Sickness; pensions; unemployment; family; ...
 - Increasing lack of coherence with the applicable employment and tax law

Possible scenarios

- Apply the rules as they are and take the consequences
- Adapt the rules
- Agree on other arrangements

Apply the existing rules

- Risk of legal uncertainty
 - How permanent is the situation?
 - How to prove the 25% threshold?
 - Is 'workation' posting?
- Risk of short-term change in applicable legislation
- Risk of artificial arrangement to circumvent the rules
- Growing concern, particularly in border regions
 - Growing pressure on decision makers

Introduce new rules

- Raising 25% threshold of Art. 14(8)IR?
 - To which level? 40%?
 - How to define the scope?
 - Only for 'work from home'?
 - For all kinds of online work?
- Special rule of 'workation'?
 - To be integrated in the posting rule?

Introduce new rules

- Introduce concept of 'fictitious place of work'
 - Compare Art. 11(2):
 - 'For the purposes of this Title, persons receiving cash benefits because or as a consequence of their activity as an employed or self-employed person **shall be considered to be pursuing the said activity.**'
 - Compare Art. 11(4) and 11(5):
 - 'an activity as an employed or self-employed person normally pursued on board a vessel at sea flying the flag of a Member State **shall be deemed to be an activity pursued in the said Member State.**'
 - 'An activity as a flight crew or cabin crew member performing air passenger or freight services **shall be deemed to be an activity pursued in the Member State where the home base... is located**'

Introduce new rules

- Introduce concept of 'fictitious place of work'
 - To consider online work as pursued in the MS where the work is normally physically pursued or where the employer is located
 - How to define
 - 'normally'?
 - 'online work'?
 - only telework from home?

New or prolonged agreements between MSs?

- Art. 8(2) BR: bilateral agreements
 - *'Two or more Member States may, as the need arises, conclude conventions with each other based on the principles of this Regulation and **in keeping with the spirit thereof**'.*
 - Is it possible to derogate from the conflict rules of the regulations?
- Art. 16 BR:
 - Agreements between two or more MSs
 - Framework agreements or individual agreements
 - 'in the interest of certain persons or categories of persons?'
 - Are MSs prepared to use this tool?

Different treatment between local and cross-border workers?

- Employers allowing employees to telework for 2 or 3 days a week, except for cross-border workers (maximum of 1 day)
 - To avoid change in applicable social security legislation
 - Residence clause as an indirect discrimination on grounds of nationality or an obstacle to the free movement
 - Are the situations comparable?
 - Justified?
 - Administrative reasons?
 - Financial reasons?

To conclude

- Telework has an impact on the applicable employment and social security law
- Consequences are not always clear and may change over time

Thank you for your attention!



Questions and Answers

**Thank you for your
attention!**



MoveS Webinar

“Posting of workers: latest developments and prospects in social security and labour law”

18 March 2022

Funded by the

