

Highly Mobile Workers and the Coordination of Social Security in the EU

Citation for published version (APA):

van Ooij, E. C. (2022). Highly Mobile Workers and the Coordination of Social Security in the EU: Opening and Closing Pandora's Box. [Doctoral Thesis, Maastricht University]. Eleven.
<https://doi.org/10.26481/dis.20220929eo>

Document status and date:

Published: 01/01/2022

DOI:

[10.26481/dis.20220929eo](https://doi.org/10.26481/dis.20220929eo)

Document Version:

Publisher's PDF, also known as Version of record

Please check the document version of this publication:

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Today, it is no longer unthinkable that a resident of Amsterdam works part-time for a French employer that holds office in Brussels while working two days from home per week next to having an own consultancy company. Nor are eyebrows raised when a professor holds a position at the Humboldt Universität in Berlin and at the same time teaches at European University Institute in Florence while doing empirical fieldwork in the south of Spain. These are not hypothetical or far-fetched examples, but actual reality.

In the light of flexibilization, digitalization and a speedup of physical and virtual mobility all over the globe, multiple possibilities of operating on the labour market companies and working persons have been created. Fuelled by globalization, new 'atypical' forms and patterns of work have merged. Moreover, these Covid-19 times demonstrate that work relationships can also very well be virtual. More than ever, work can go (virtually) beyond the borders of the Member States and even the European Union. This is a challenge for the social security schemes aiming to provide social security protection to the working person that assumes the 'standard' employment features in one or another way. This 'thinking in boxes' of standard employment features is no longer effective in a post-globalized world.

When people work across borders within the European Union, in addition, EU social security law is applicable. This EU coordination instrument coordinates the applicable social security legislation in cross-border worker situations. Since the very beginning of the European Union, it has been recognized that the organization of social security law is essential to realize the right to free movement of workers in practice. EU social security law seeks to encourage economic interpenetration, while avoiding administrative complications, especially for workers and undertakings, without persuading national Member States' social, labour and tax policies.

EU social security law, enshrined in Regulations 883/2004 and 987/2009, ought to coordinate in such a way that it facilitates the free movement of workers preventing a positive or negative conflict of law. A person working across borders should, in principle, not be left without social security cover or lose any accrued social rights, nor be eligible to two benefits of the same kind from different statutory schemes. In doing so, the conflict rules of EU social security law provide for one social security legislation applicable to them ('single State rule'). Thereby it also embraces the principle of non-discrimination, allows for the aggregation of periods of insurance and prescribes the portability of benefits in

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cases where a person works or resides in another EU Member State. At the same time, EU law may, in principle, not interfere with the Member States' own social security legislation. It remains at all times the competent Member State that organizes and decides on the substantive social security protection.

As a main rule, the competent Member State shall be deemed to be that country in which the person performs work activities (*lex loci laboris*). Hence, EU social security law accentuates the place of performance in order to determine the competent Member State regarding social benefits. That being so, there is equality between the workers 'on the work floor' and allows fair competition between workers to take place according to the terms applicable to the market where the job is performed. However, the increase of mobility today is putting the adequacy of the current conflict rules into question again. In a context of flexibilization and digitalization, it can no longer be taken for granted that the current EU coordination instrument provides a worker with social security protection under any national social security scheme.

Nonetheless, Regulation 883/2004 has already recognized certain forms of mobility, which justify some derogations from the main connecting factor to the State of employment (*lex loci laboris*). Article 12 is foreseen for temporary short-term mobility (with a maximum duration of 24 months) and has its origins based on the idea of providing services EU-wide. Article 13 of Regulation 883/2004 takes the worker as a starting position and is targeted at long-term mobility between two or more Member States (there is, in principle, no time limit provided for by the legislator). Both provisions may designate the social security legislation of the country of residence, the *lex domicilii*. Furthermore, the legislator recognized the phenomenon of constant mobility of persons working onboard a vessel at sea or as flight and cabin crew. These persons fall under the scope of Article 11(4) connecting to the flag of the vessel respectively Article 11(5) relating to the home base of the airline company. Lastly, for those situations not foreseen, there is the possibility to conclude a special agreement adapted to the needs of a particular working environment and in the interest of the working persons.

When a person is rather performing various work activities in two or even more Member States, s/he thinks and acts beyond national borders. Such a mobile worker engages, in fact, with two aspects of mobility. On the one hand, there is mobility in the sense of crossing geographic territories and potential borders and various territories (geographic mobility). On the other hand, there is mobility relating to movements in the form and patterns of the work engagement, such as, when a person moves from job to job, or in and out of different work relationships (job mobility). This research refers to 'highly mobile workers' (HMWs) to clarify its focus on persons engaging in both forms of mobility.

HMWs pursuing multiple activities are likely to be confronted with constant *irregular* mobility. Increased geographical and job mobility have made it far more complex today to determine the competent State. It is, therefore, that this research focuses on the multi-activity rule of Article 13 of Regulation 883/2004.

Workers and their employers are at the heart of cross-border work activities. It is these people who experience the EU coordination instrument in a practical sense. Their rights and obligations are coordinated by EU social security law. It is, therefore, these people that feel the effects of a well or less well-functioning coordination instrument. This is in various ways, such as by means of paying more or less contribution or receiving of social benefits, the organization of a change in affiliation of a social security scheme when moving or taking on another job, and, by doing so, dealing with different administrative procedures and approaches. Therefore, this research took the individual worker perspective as a central starting point.

In view of the rapidly changing European labour market, with various forms of work combined with irregular work patterns that are performed on the territory of several Member States, it seems more important than ever to map out mobility-related issues and to explore possible routes towards more legal certainty regarding social security protection transcending national borders.

This research departed from the idea that increased high mobility in the European labour market unavoidably leads to legal uncertainties related to EU social security law that ought to coordinate national social security schemes, while having a binding, exclusive and mandatory effect. Testing the law in its extremities helps the identification of its' flaws and strengths, which can be useful indicators for possible routes towards a more 'highly mobile' friendly EU social security framework.

The following research question served as a guideline: *Which problems do the HMWs encounter in relation to Article 13 of Regulation 883/2004 determining the applicable social security legislation and how could such mobility-related issues be addressed by EU social security law?* In the attempt to answer this question, this research predominantly applied a classic doctrinal legal research method to study the relevant EU provisions and rules. Furthermore, it related to the social reality as tangibly as possible by employing fictitious samples that illustrated the practical challenges for HMWs and by having taken account of various perspectives and policy levels. In this way, this research was conducted in two steps with the aim to, firstly, identify legal and practical mobility-related issues that HMWs encounter in relation to Article 13 of Regulation 883/2004 determining the applicable

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social security legislation applicable to them; and, secondly, exploring routes that could contribute to increased legal certainty for the HMW.

Accordingly, PART I consisted of Chapters 2 and 3 and describes the current *status quo* of social security legislation applicable to HMWs while identifying possible legal and practical obstacles such workers could face. Also, it highlights how the Court of the European Union (CJEU) has approached these obstacles. PART II explored various possible routes towards more legal certainty for HMWs in Chapters 4 and 5 while highlighting feasibility and challenges of multiple actions and policy implementation levels in Chapter 6.

Chapter 2 analysed the multi-activity rule of Article 13 of Regulation 883/2004 in-depth. On the basis of an illustrative case of a highly mobile worker in the performing arts, *in casu* a violinist pursuing activities in the Euregion situated around the borders of Belgium, Germany and the Netherlands. It identified several elements of legal and practical ambiguities. Moreover, it demonstrated that the conflict rule Article 13 itself can unintentionally lead to instability through a frequent switch of the legislation applicable, the so-called ‘yo-yo-effect’. The in-depth analysis revealed various issues of legal uncertainty related to the scope, the application and practical implementation

Concerning the delineation of the scope of Article 13 of Regulation 883/2004, there is a lack of precision in the legal texts that can cause a lack of clarity. For (self-)employed persons, they need to work ‘normally’ in two or more Member States. However, it is unclear whether or not certain small or non-traditional work activities are considered work, whether intermittent periods of non-working are acceptable and how to prove foreseeability and/or predictability of the activity and place of performance.

Once it is clear that the multi-activity rule is applicable to a certain situation, there are still ambiguities in the application. The legal provision applies an imperative hierarchy on the basis of the work classification, i.e., civil servant, employed or self-employed for the purpose of the Regulations. This is not always easy to grasp for the working person, especially not when similar activities are classified differently under various national social schemes. In case a person is engaged as a civil servant by two different Member States, not unthinkable in education institutions, the multi-activity rule does not provide a solution. Hence, national implementing authorities apply their ‘own’ logic, causing legal uncertainty for external stakeholders. This is also true for the assessment of the substantial part of activities for (self-)employed persons, which has much to determine with regard to the decision on the applicable law. It is unclear which aspects are taken into account and how these aspects are balanced during the assessment process. Also here, it is unclear when ‘small’ activities become marginal activities and are thus disregarded or not. Moreover, ambiguities in the

legal text can be amplified by the fact that the Regulation itself is only a coordination instrument, and thus allows differences in interpretation and assessment procedures by national implementing authorities. A highly mobile worker may be confronted with different ambiguous effects with different national implementing authorities.

Practically seen, it concluded that there is unavoidably an extra (administrative) workload for HMWs and their employers by virtue of informing and/or providing information permitting a correct application of the conflict rules. Particularly, the HMW, being confronted with constant irregular mobility, is likely to find difficulties in proving in advance the significance of the work activity, the place of performance and thus knowing the effects in social reality concerning the social security insurance position on the short, medium and long term.

Chapter 2 concluded that the multi-activity rule of Article 13 of Regulation 883/2004, in its present form and the method of implementation, is ill-equipped to cope with today's trends of mobility.

That there are issues of interpretation regarding social security protection in relation to mobility across borders is also demonstrated by the increasing preliminary questions that have been referred to the Court of Justice of the European Union. **Chapter 3** provided an in-depth and critical overview of the case law of the Court of Justice of the European Union on issues related to the conflict rules of EU social security law. The interpretation issues presented to the CJEU seem to have a common denominator and thus similar root cause, i.e., the departure of the standard employment engagement in the sense of a stable, open-ended and direct arrangement between a dependent, full-time employee and her/his employer.

Concerning legal clarity on the scope of the multi-activity rule, the CJEU made clear that the multi-activity rule enshrined in Article 13 of Regulation 883/2004 requires work activities to be of significance and not be pursued just every now and then in the two *X* cases. Both of the *X* cases resulted in the decision that the applicable law did not shift due to a temporary other occupation (skiing lessons in the winter season during unpaid leave) or working from home across borders (without having agreed in advance with the employer), resulting in legal stability for the working person and employer involved.

The importance of a stable and continuous affiliation to one scheme was also apparent in the case of *Balandin*. Here, the CJEU indicated that an interruption of non-activity between work assignments could be acceptable when there is an irregular work pattern intrinsic to the occupation. Indeed, the CJEU ruled that frequent and multiple short-term postings to

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various Member States based on a single employment contract can fall within the scope of Article 13 in *Format II*, be it with a restriction in the posting period to the same limitation as to the classical posting provision under Article 12 (24 months). This prevents frequent shifts of the social security legislation, which is in the genuine interest of the working person, their employer as well as national implementation authorities.

At the same time, the CJEU intervened in *AFMB* to employ the multi-activity rule for purely artificial arrangements in the employer's interest. So far, the Court has been reluctant to balance the right of free movement of services and establishment against the right of free movement persons of workers and apply the doctrine of abuse of rights. It did, however, admit the interference of fraud related to A1-certificates in the *Altun* case. Accordingly, national courts may derogate from the EU principles of mutual trust and recognition when there is a serious suspicion of fraudulent application and after having taken action by the national implementing authorities following the dialogue procedure. Although it is not up to the CJEU to sit in the legislator's chair, it has explicitly taken a strong stance against 'law shopping' in *Team Power*. Here, the CJEU concluded that a temporary-work agency can only benefit from a posting under Article 12 if it carries out a 'significant part' of its activities of assigning temporary agency workers in the territory of the Member State where it is established. Accordingly, undertakings that are also driven by 'ordinary' economic motives rather than profiting from the differences in social legislation and contributions must satisfy that criterion.

In some cases where a person is confronted with a 'gap' in social security protection due to a shift of the applicable social security legislation, the CJEU calls on the national Member States to find a solution. In that context, the CJEU allows the Member States to grant a benefit, even if they are not obliged to do so (*Bosmann*). This may become mandatory when there is a problematic gap in social security protection that is not in line with the fundamental right to the free movement of workers (*Vester*). However, this line of reasoning has only been applied to the minority of judgments. By contrast, the CJEU restrained itself from compelling a Member State to intervene in *Franzen II*, where Ms. Franzen was confronted with no social security protection due to limited social insurance related to the work form of *mini-job* attributed by the competent State. Hence, it lacks, so far, a clear silver thread on when the Member States 'must' find a solution and when this is a natural consequence of pursuing work activities across borders.

Chapter 3 concluded that, overall, the CJEU has been applying of a well-considered case-by-case approach so far, while smoothing certain 'sharp edges'. Yet, a common guiding principle is lacking at this point in time. In most judgments, the CJEU holds on to the uniform and complete system of conflict rules. However, the EU coordination instrument

counts on the fact that, once a social security scheme is applicable, it provides relatively adequate social security protection. That cohesion no longer seems to be self-evident in the context of flexibilization and competition that takes place on a global scale. One can expect that the last word on this matter has not yet been delivered.

Based on the findings of the first two chapters, **Chapter 4**, the beginning of PART II, was the first step in exploring possible ways towards achieving more legal certainty for HMWs. It did so through the lens of the current framework of EU social security law. Chapter 4 first investigated options to increase transparency and clarity regarding when to apply Article 13 of Regulation 883/2004. Second, it explored options to transcend implicit assumptions and boundaries integrated with the assessment procedure of Article 13, which are no longer suitable to work situations deviating from the typical employment situation. Lastly, it addressed a paved-way solution proposed by the CJEU, that is, allowing the non-competent Member State the power to grant social benefits when their national scheme allows them to do so (*Bosmann-principle*).

Regarding increasing transparency and clarity in terms when applying Article 13 of Regulation 883/2004, two possible paths for improvement were indicated, i.e., clarifying certain definitions and assessment criteria and proactively informing the working EU citizen about her/his social security position. Assessment elements that are in a clear need of clarification are the concepts of marginal activity, ‘normally’ working’ in two or more Member States and the establishment of the substantial part of activities. Another approach to achieve clarity would consist of a (temporarily) waiver option for each of these requirements in situations when this would foster a continuous affiliation to one social security scheme. The latter has been applied, in essence, by the implementation authorities with regard to the Covid-19-pandemic. Furthermore, Chapter 4 highlighted the importance for stakeholders to be well-informed about their social security protection position to avoid sudden (negative) surprises. It stated that it is desirable that stakeholders are informed proactively, thus *ex ante* and in a reasonably short time. It also suggested that, when a situation arises with unexpected negative social security due to frequent shifts in the applicable legislation, national implementing authorities could proactively propose an appropriate solution, such as an Article 16-agreement.

In its second Section, Chapter 4 explicitly demonstrated that specific assessment criteria assume a certain significance, regularity and duration of the work activity related to the standard employment engagements. With a classical employment engagement, these features are indeed known in advance. However, this contrast to the ‘on-demand’ and more fluid labour market dynamics that some working people are engaged in. In order to create more legal stability for HMWs, it was suggested to accept periods of inactivity

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between work activities with the aim to prevent HMWs from being excluded from the scope of the multi-activity rule. Another option discussed is the consideration of a longer period in time when assessing a multi-activity situation, for instance, 24 or 36 months instead of 12 months. This could support the identification of the most stable connecting factor for constant irregular work situations, with a more continuous affiliation to one social scheme as a result. A third proposed option consisted of a more goal-oriented or teleological approach towards Article 13 of Regulation 883/2004 by employing a legal fiction that would enable continuity of affiliation with one social security scheme for HMWs.

In its last Section, the proposed ‘crash barrier’ by the CJEU, in terms of the ‘*Bosmann-principle*’, it made a call for clarification regards which social benefits rights may be eligible for a claim *à la Bosmann*, for example, by including an index to the Regulations, and under which conditions. Overall, Chapter 4 demonstrated various possible routes to mitigating issues of legal uncertainty for HMWs without having to amend the current system of conflict rules of Regulation 883/2004, yet, maximizing the effectiveness and implementation for HMWs under the current system of conflict rules.

Chapter 5 went one step further by exploring possible routes towards legal certainty going beyond the current conflict rules and even the EU social security law framework as known today. By doing so, three lines of analysis have been pursued. Firstly, the possibilities to amend the system of conflict rules of Regulation 883/2004 with the introduction of a special conflict rule for HMWs. One possible – more suitable – connecting factor could consist of employing the *lex domicilii* (social security scheme of the State of residence) by default or, alternatively, be attached to the social law of the society having the ‘closest’ integration link. It also discussed a right of option, as the working person her/himself is best suited to assessing the work dynamics and patterns.

The second Section dared to question the principle of the ‘single State rule’ and investigated the idea to shift from unicity in the applicable legislation towards plurality by attaching social rights and obligations to the person her/himself. By doing so, a co-existence of different insurance systems may occur. At first sight, this sounds incompatible with ‘single State rule’. Notwithstanding, the concept of attaching social rights and obligations to the person her/himself is not new, although it is no longer embedded in the current method of the EU coordination instrument.

The last line of the routes discussed in Chapter 5 consisted of three ‘out-of-the-box’ solutions expanding or supplementing the scope of application of Regulation 883/2004. The first idea consisted of the introduction of an obligation clause to comply with the spirit

of the Regulations. Such an appeal towards the national governments of the Member States could ensure implementation proactively preventing workers from falling in between two stools due to the EU coordination instrument. Building on this, the second idea pleaded for the establishment of an (EU) hardship fund that counterbalances disproportioned negative effects on the social security protection of EU citizens pursuing activities across borders. Lastly, it revitalized an old idea in a new format, i.e. the introduction of a virtual Member State.

In sum, Chapter 5 showed various alternative routes increasing legal clarity and stability for HMWs going beyond the current coordination framework while respecting the national social security schemes. These latter proposals were maybe the most forward-looking and inclusive for HMWs, however, requiring rather brave political gestures and leadership as to be realized in practice.

A difference in social reality can only be achieved after having assessed the feasibility, which depends on various factors, such as the legal competencies, required procedures, national implementation capacity and – maybe foremost – the political willingness pleading for an ‘upgrade’ of legally binding and enforceable measures. **Chapter 6** provided, therefore, an overview of implementation options on various action levels promoting legal certainty for HMWs viewed from EU social security law. It appeared that improvements can be made from an EU law perspective while respecting the national social security schemes and within the method of coordination of the applicable social law. The Chapter closed with a suggestion of which possible routes could be employed on which policy implementation action level.

Based on the findings of PART I and PART II, it can be said that there is no straightforward solution towards more legal certainty for the heterogeneous group of HMWs. Nonetheless, as long as there is inherent legal uncertainty present within EU social security law, this inevitably trickles down to the national authorities implementing the law and, accordingly, all those involved in various cross-border economic activities in two or more Member States. Moreover, when ignoring mobility-related issues, the method of coordination of the applicable social security law may eventually fail in its objective, that is, to guarantee social security protection for HMWs in reality.

In that context, the closing part of this research proposed various solution strategies to create more legal certainty for HMWs, be it on a more meso-level with a soft law approach or a macro-level with an enforceable hard law approach: The solution strategies in **Chapter 7** have one central focal point as a recommendation, which is taking into account a certain continuity of affiliation when applying the ‘single State rule’ to ensure

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the efficiency and actual effectiveness of the conflict rules determining the applicable social security legislation within the EU. Hence, there are various possible routes towards legal certainty and continuous social security protection for HMWs, the real possible impact is only dependent on the European and Member State's political wills and determination.