Free movement of workers and rights that can be derived

Jan Cremers([1]), AIAS

In this contribution a non-exhaustive overview is provided of several aspects of free movement of workers in the EU. The author has been (and is) involved in several research projects on the posting of workers, the coordination of social security and workers rights in a cross-border context; this article is part of work in progress. It starts with an overview of the different relevant aspects of workers rights and provisions in three policy fields (social security, working conditions, labour and contract law). In the following sections these policy fields are briefly sketched out. In the last section some of the pending problems are listed.

1. Introduction

The ideal of European cooperation was from the very beginning connected to the notion that citizens should gain from free movement. The 1957 Rome Treaty establishing the European Economic Community contained several provisions to ensure free movement of workers (Treaty of Rome, 1957, Articles 48–51). Free movement of workers meant in particular that workers who were nationals of one Member State had the right to go to another Member State to seek employment and to work there. As a consequence European citizens obtained, after the Treaty of Rome was signed, the right to work in all Member States of the European Community. The Treaty underpinned the extension of residence, labour and equal treatment rights.

The coordination of national social security became one of the first regulated fields of cooperation in the European Community related to these free movement principles. It was a pillar of the European Community legislation from the start (Council of the EEC, 1958). The coordination was (and is), in particular, based on the principle that persons moving within the EU are subject to the social security scheme of only one Member State. The coordination rules aim to guarantee equal treatment and non-discrimination.

In the field of working conditions and labour law the basic idea was that the migration of workers from one country to another would bring the worker under the application of the so-called *lex loci laboris* principle, which means that the regulations of the new state of residence apply. An exception to this principle was the so-called posting of workers, where workers temporarily stayed in another Member State in order to provide services (under the subordination of their posting company in the home country). As these posted workers were not supposed to seek permanent access to the labour market their position with regard to the applicable working conditions and labour rights was at least ambiguous. Some countries had a regulatory framework that made their labour legislation and collective agreements generally binding for all workers on their territory, other countries excluded temporarily posted workers from abroad from this application.

2. EU legislation related to the free movement of workers

As the plans for creating the EU internal market were drawn up, accompanied by the dismantling of internal frontiers in Europe, the mobility of workers and free movement in general came to occupy an even more central position in the socioeconomic approach of the European institutions. And although the European Commission has on a number of occasions reported that the expectations of the mid-eighties about mobility in Europe have not been realised, the Commission at the same time has acknowledged that the opening up of the markets in Europe brought with it some unexpected side effects (European Commission 2008a). Recruitment of a foreign workforce brought with it the risks of social dumping, while the relocation of production

([1]) Jan Cremers is a former MEP. At the moment he is working at the Amsterdam Institute for Advance Labour Studies of the University of Amsterdam. He is mainly dealing with projects related to European industrial relations, the free movement of workers, workers participation and European company law. E-mail: j.cremers@uva.nl

Issue → Category ↓	**(a) Social security** (Reg. 883/2004 and Reg. 987/2009)	**(b) Working conditions and pay**	**(c) Labour law, contract law**
1. EU citizens	As nationals, or?	As nationals	As nationals
2. Self employed EU citizen	As nationals, or?	As nationals	As nationals
3. Posted workers	Home country	Directive 96/71	Home country

and competition waged in the sphere of taxation and social security created new tensions between regions. In the following scheme three separate fields of social policy are defined. The scheme is simplified as third-country workers, trans-frontier workers, seasonal workers and cross-border temporary agency work are not listed here. But of course the same legal mapping can be done for these groups and categories.

We summarise the core aspects of these fields and will treat the legal dimension in the sections that follow. A fourth field that is especially important for third-country workers, namely the area of work and residence permits and visas, is not treated here.

(a) Social security

As referred to in the introduction the coordination of social security goes back to the genesis of the European Community. The first regulation in this area stems from 1958. Later on Regulation 1408/71 governed for more than 25 years the coordination of agreements on social security in Europe. In recent years the European legislator has introduced a root-and-branch revision of this regulation. This was prompted by the fact that the regulation had constantly grown in size as the result of numerous amendments and additions. The coordination as such was and is based on the principle of application of one piece of legislation at a time in cases of employment occurring in one or more than one Member State. Persons moving within the EU are thus subject to the social security scheme of only one Member State. The coordination rules aim to guarantee equal treatment and non-discrimination. Workers have the right to settle with their families in their new host country and have to be treated equally with national workers in that host country. Although the form and content of the social security provisions belong to the competences of every individual Member State, the coordination of the different systems in cross-border situations has been subject to a dynamic process of legislation and modification. The aim was, and remains, to achieve mutual coordination, not harmonisation, of social security regimes across the EU Member States in order to regulate matters of cross-border concern. The intention was further, and remains, to guarantee the social security of migrating workers and their relatives. In the new Regulation 883/2004 and its implementation Regulation 987/2009 the principle of the country where the work is pursued remains the basic premise of the coordination principle. Workers who move to another country in Europe have the right to be treated as if they were citizens of that Member State.

(b) Working conditions (including pay)

For pay and conditions of employment in the case of migration for work purposes the country of employment principle applied (and applies); discrimination on grounds of nationality is prohibited. This means that workers who come from abroad to work in a country other than their country of origin on their own initiative, in principle have the same rights as the national citizens. They also have the same instruments to derive these rights, whether through a union membership or another type of collective representation, whether through individual action or by the path to justice. However, over a longer period of time different types of temporary work abroad were introduced. In some areas EU legislation is planned and/or pending (notably with regard to seasonal work and third-country workers). Pay and other working conditions of seasonal workers were often formulated in the underlying bilateral agreements between Member States. For other workers like for instance those involved in commuting cross-border work, a mixture of case-law and legislation has established a certain *acquis*. On the question of pay and conditions of employment for posted workers — workers sent to deliver services for temporary periods — a legal vacuum prevailed for a long time. In some countries (such as Belgium), national laws existed in this area or, to be more precise, a combination of generally binding laws and collective agreements that had to be observed by foreign employers with respect to the working conditions of their posted workers. In other countries, the legal machinery was lacking to make the country of employment principle apply in this area until the mid-nineties when the posting of workers directive (Directive 96/71) was concluded.

(c) Labour and contract law

One of the problematic aspects of the monitoring and enforcement of workers rights in the cross-border context is that of the applicable labour contract. In general terms the Rome Convention on the law applicable to contractual obligations (1980) defines the rules in this area. In Article 3 it provides that in general, 'A contract shall be governed by the law chosen by the parties'. However, we have seen in the recent past that notably in the case of temporary work abroad, as seasonal or posted workers, this notion can lead to confusion resulting in unequal treatment of workers.

Even more problematic is the position of workers who are defined in one Member State as being self-employed, when in fact their work and the associated work relationship, according to the definitions applying in another EU country, come entirely under the definition of an employment contract. In the context of cross-border working this means that the self-employed status can be abused in order to circumvent the rules in force (relating to social security, working time, pay and other conditions of employment, safety, and contributions to collective benefits).

3. Social security in a cross-border context

Although the form and content of the social security provisions belong to the competences of every individual Member State, the coordination of the different systems in cross-border situations has been subject to a dynamic process of EU legislation and modification. Regulation No 3 of the Council of the European Economic Community that ruled the social security of migrant workers since its adoption in 1958 has been modified 14 times. Its successor, Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, provided for many exceptions to its main rule on the legislation applicable — *lex loci laboris*. It has been amended and updated on numerous occasions in order to take into account not only developments at Community level, including judgments of the Court of Justice as a result of permanent questioning of the scope and content of the coordination rules by national courts, but also changes in legislation at national level([2]). Such factors made the Community coordination rules complex and lengthy. Replacing these rules was necessary in order to contribute to an improvement of the standard of living and conditions of employment of EU citizens that make use of their right of free movement. In 2004 the European legislator concluded modernised social security coordination rules (Regulation EC 883/2004) in order to simplify the current rules. Regulation 883/2004 would come into force after the settlement of implementing legislation and the Implementing Regulation (Regulation EC 987/2009) was concluded in April 2009. The new rules came into effect from 1 May 2010. The idea was to limit the number of specific rules for different categories of professional activities.

In a publication *EU Coordination of national social security in multiple cross-border situations* the differences between the 'old' and the 'new' regimes were explored (Cremers, 2010). The legislator aimed at further simplification and modernisation of the coordination rules, but also wanted to address unfair competition in the context of cross-border employment and to establish a dominant role for the Member State where a significant part of the activities is performed in the case of employment activities in two or more Member States. The modifications had one additional aim: the limitation of the number of specific rules for different categories of insured persons and/or professional activities. Regulation 883/2004 removed several derogation rules for special groups that were unnecessarily complicating the coordination system. Therefore, the rules no longer include for instance a specific exemption for flying and travelling personnel in international transport.

The formulated basic principles of this coordination can be summarised as follows:

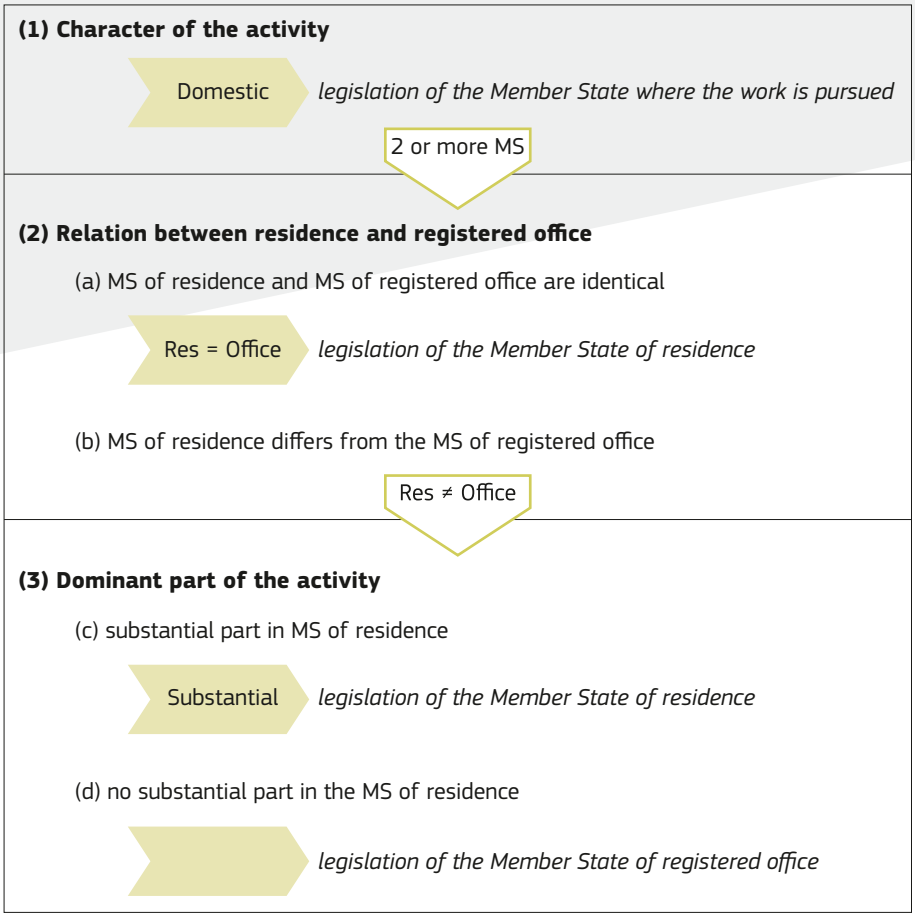
- application of the *lex loci laboris*, which means, as a general rule, that the legislation of the Member State in which the person pursues his/her activity as an employed or self-employed person is applicable;
- the determination of the legislation applicable and the responsible competent authority;
- the definition of a broad range of legislative matters concerning different branches of social security;
- the possibility to export benefits and to aggregate insurance periods;
- the coordination and systematic calculation of benefits.

EU citizens that exercise the right of free movement of persons are subject to the social security scheme of only one single Member State. As a general rule the legislation of the Member State in which the person involved pursues his/her activity as an employer or self-employed person is determined as the applicable legislation. In the coordination framework as formulated, derogation from the general rules is made possible in specific situations that justify other criteria of applicability.

In the following scheme that was originally produced for the transport sector the general application of the rules is illustrated.

([2]) Several authors have reviewed the jurisprudence of the European Court of Justice. For instance Christensen, A. and Malmstedt, M. (2000). *Lex Loci Laboris* versus *Lex Loci Domicilii* — an Inquiry into the Normative Foundations of European Social Security Law. *European Journal of Social Security*, 2/1, 69–111.

Scheme: Determination of the applicable legislation



Source: Jan Cremers (2010) *Coordination of national social security in the EU — Rules applicable in multiple cross-border situations*, AIAS Working Paper 10–89, University of Amsterdam.

4. Pay, working conditions and applicable labour law

The basic principle of the European model was respect for the well-balanced regulatory framework for social policy, including social security and labour standards that existed in the EU Member States. This regulatory framework was characterised by a mixture of labour legislation and collective bargaining and this mixture was different in every country. European social policy was also about how to live and deal with that diversity. The introduction of free movement principles in the European Union created an attractive open market for businesses. Along with the removal of internal borders in Europe, the Member States and the European Commission started to work out an unrivalled deregulation agenda. After the introduction of the internal market principles some Member States had clear rules regarding the working conditions that applied for everyone working on their territory, other Member States had rules with regard to the applicable labour standards and legislation that did not necessarily apply to a temporary foreign workforce.

However, mobility of a temporary nature was low and was mainly restricted to managerial staff or specialised workers with working conditions that were often above average. And even in the construction and installation sectors where a division of labour between general contractors and specialised subcontractors did not halt at national borders the working conditions of the skilled workers that were temporarily posted to large infrastructure in another country were not causing serious risks of social dumping on a large scale. As the EU legislation on working conditions for workers temporary posted to another Member State was concluded the principle of respect for the national social policy frame was applied. There was a hard core of minimum prescriptions formulated and next to that Member States could decide on general mandatory rules (or public policy provisions) applicable within their territory as long as these rules did not lead to discrimination or protection of their market. But quite soon problems arose as the relationship was construed between the working conditions of workers involved in temporary cross-border activities and the free provision of services. The posting of workers directive (96/71/EC) provided a possibility

to apply, in a non-discriminatory manner, conditions of employment that can be seen as public policy provisions. Two court cases in the 1990s seemed to underpin this idea. In the *Rush Portuguesa* case (CJEU C-113/89, 1990) the CJEU ruled that 'Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established; nor does Community law prohibit Member States from enforcing those rules by appropriate means'. The *Arblade* case (CJEU C-369/96, *Arblade and others*, 1999) confirmed that provisions classified as public order legislation are those provisions that are crucial for the protection of the political, social and economic order. Both statements were seen as a confirmation of the Member States' competence to define the regulatory framework for the protection of every worker who pursues his/her activity on the country's territory.

However, CJEU judgements related to the free provision of services (*Rüffert* C-346/06 in 2008, *Commission* v. *Luxembourg* C-319/06 in 2008) created a situation whereby foreign service providers do not have to comply with mandatory rules that are imperative provisions of national law and that therefore do have to be respected by domestic service providers. According to the CJEU and the European Commission it is not up to the Member States to define unilaterally the notion of public policy or to impose all the mandatory provisions of their employment law on suppliers of services established in another Member State. The internal market is thus no longer functioning as a market of cross-border activities, but interferes directly in the national regulatory frame. As a consequence the basic principle of *lex loci laboris* can no longer be kept upright([3]).

An employment contract is defined by the bond of subordination it establishes between a worker and another party (or an undertaking that belongs to someone else). The worker delivers services to the other party in the form of labour for wages. The other party is traditionally conceived as the owner of an undertaking or business unit, which engages a group of workers in the production of goods or the delivery of services. In this situation it was and is relatively easy to define the employment relationship and to distinguish between a contract *of* service (a labour relationship) and a commercial contract (for the provision of services). To a certain extent all countries had serious problems in the past in defining at national level a regulatory scheme for the demarcation between these two forms: contracts of service and contracts for services. But most states reached a compromise through case-law and national regulation for the distinction between on the one hand employers, genuine self-employed and small entrepreneurs, and, on the other hand, employees.

After the free movement principles were introduced these national solutions no longer functioned adequately. What is well regulated in one Member State can be completely absent in another Member State. The consequences in cross-border situations are risks of regime shopping and social dumping. And of course the equal treatment of workers comes under serious threat. For undertakings this can create a complete distortion of competition and a race to the bottom as the level playing field is completely missing.

One of the problematic aspects of the control and enforcement of the labour standards for workers that work only temporarily abroad (like seasonal and posted workers) is the question of the applicable labour contract. In general terms the Rome Convention defines the rules in this area. The posting of workers directive stipulates in recital 9:

> *'Whereas, according to Article 6 (1) of the said Convention, the choice of law made by the parties is not to have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under paragraph 2 of that Article in the absence of choice'.*

Later on this is further specified in Article 2.2:

> *'For the purposes of this Directive, the definition of a worker is that which applies in the law of the Member State to whose territory the worker is posted'.*

But in several court cases (*Laval* C-341/05 in 2007, *Commission* v *Luxembourg* C319/06 in 2008) the CJEU only refers to the rules applicable in the home country. The wording in the posting directive makes that reference of the applicable labour legislation at least questionable. In my view this is a serious inconsistency in the rulings([4]).

In recent publications, the European Commission admits that adequate implementation and effective application and enforcement are key elements guaranteeing the effectiveness of the applicable EU rules (European Commission 2007a and b, 2008b). But the Commission has so far neglected the problems related to the control of the existence of a labour contract and of the compliance with the corresponding

([3]) In a longer article I have elaborated the different aspects of this shift and the consequences for equal treatment, Rules on Working Conditions in Europe: Subordinated to Freedom of Services?, *EIRJ*, September 2010.

([4]) Cremers, J. (2008), Conflicting interpretations of the posting of workers directive, *CLR-News* 3-2008, Brussels.

working conditions. The CJEU has exclusively handed over and restricted this competence to the country of origin. Obtaining information on the country where the work is pursued depends on the cooperation of the home country. A reply to requests for information can take some time and the employer and the workers have often disappeared. In the latest CJEU rulings the application and control of host country labour standards are even seen as restrictions to the free provision of services. Additional administrative domestic rules and provisions should not hinder this free provision. This fight against the 'administrative burden' makes systematic and effective control in the host country an illusion.

5. Pending issues

The modification of the rules for coordination of national social security systems and the application of mandatory national rules on working conditions within the framework of free movement of persons has led to a series of debates with the legislator about the home versus the host country. The debate is on the one hand related to the social security treatment of persons moving within the EU that pursue activities in Member States other than the country of origin. On the other hand the first indications of bypassing the applicable rules through the establishment of postbox companies have been signalled and have led to question marks related to the role of agencies in an open labour market and the possibility to keep the *lex loci laboris* principle applicable in the field of labour law and pay.

The main change that is relevant for the application of the social security coordination rules is the introduction of the notion 'substantial'. The term 'substantial' did not figure in Regulation 1408/71. In practice, the decision on whether the Member State legislation of the registered office or place of business, or the legislation of the Member State of residence applied depended on national choices and differed accordingly. Regulation 883/2004 introduces the term 'substantial part of his/her activity' in Article 13.1 as the fundamental benchmark for the application of the legislation of the Member State of residence or the legislation of the Member State in which the registered office or place of business is situated. This distinction is decisive for the determination of the legislation.

Against the background of the provisions of Regulation 883/2004 and its implementing Regulation 987/2009 this has led to the following pending issues:

(a) In order to determine whether the legislation of the Member State of residence or the Member State of registered office has to be applied it is necessary to define the wording 'substantial part of his/her activity'.

(b) In case of shifting and dynamic employment in multiple cross-border situations a procedure is needed in order to guarantee transparent determination of the legislation applicable.

(c) This procedure includes a decision-making process on the legislation determined and on the duration of the decision made and the necessary flexibility in the system to be applied.

(d) Finally, the question has to be answered if there are specific arguments that justify derogations from the general rule. If yes, it has to be decided which exceptions are acceptable and under which competence these exceptions can be formulated.

The modification and renewal of Regulation 1408/71 have gone a long way. With the conclusion of the implementing legislation the new rules can be made operational. Concrete experience with the application of the new rules is still missing and it will probably take several years before enough practical consequences can be found. As a consequence it is too early to draw hard conclusions related to the applicable procedure. According to the formulated rules, the institution of the Member State of residence has the lead at the beginning of the process. The provided scheme of the determination of the applicable legislation illustrates the step-by-step procedure that has to be applied. With regard to the first two steps there are no substantial controversies. In fact, the main worries can be all linked to the interpretation of Article 14.8 of the implementing legislation (in our scheme Step 3) and pinpoint the wording and definition of the 'substantial part of the activity', the duration of the attestation and the like.

The risks of distortion of competition and regime-shopping that were present under the old regime will probably decrease once the Member States of residence (of the employee concerned) work out the determination of the applicable legislation according to the new rules. This is also necessary in the fight against postbox offices established with their employers' registered office or place of business in a country with neither a link to the actual residence of the worker nor to the place where the work is pursued.

The application of the country of origin principle, according to which the Member States cannot regulate the labour conditions of the workers involved in activities of service providers from other Member States, can destroy the balance between the protection of employees on the one hand and market opening on the other hand. One of the main conclusions of a practical evaluation of posting that was executed in 2011 is that the use of the posting mechanism ranges from normal and decent

long-established partnerships between contracting partners to completely fake postbox practices of labour-only recruitment. Notably for those that are unemployed in low wage countries it is sometimes the only way out of a life without perspectives; being posted then becomes one of the channels for the cheap recruitment of labour under the cover of unverifiable invoices for the provision of services (Cremers, 2011). In March 2012 the European Commission has tabled an initiative for an enforcement directive with the aim to improve, enhance and reinforce the way in which the posting of workers directive (96/71/EC) is implemented, applied and enforced in practice across the EU. The enforcement should improve by establishing a general common framework of appropriate provisions and measures for better and more uniform implementation and application of the directive, including measures to prevent any circumvention or abuse of the rules (Andor, 2011). The content of these proposals will not be assessed here. However, if the basic philosophy is again soft law or even deregulation, often proclaimed under the more popular but also misleading terms self-regulation, decentralisation or tailor-made policy, the result will be a divergence between winners and losers. Equal treatment is reserved for those that have the possibilities and the means to shape their labour market positions or role in society. For those that stay in the dependent and vulnerable positions the outcome is exploitation and marginalisation.

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