

## Migrant workers and European social law: of a respectable age or time for a rebirth?

### A. 70 years of intra-European-Migration

#### 1. The early 20<sup>th</sup> Century: from WO II to labour migration

Migration within the Europe has known a long history and witnessed substantial movements of people. Intra- European migration has been rising since WW II, although this long-term trend is characterized by some sharp fluctuations. Behind this long term trend lies considerable diversity, and it hides highly diverging patterns across countries of destination and by type of migration, such as labour migration, family migration and humanitarian migration.

The peace treaties at the end of WWII laid the foundation for the new geopolitical landscape of after-war Europe, and created large population movements within Europe and into Europe. In addition the process of decolonization gave rise to considerable migration flows towards Europe's colonial powers. Population movements from the former colonies to the mother countries were initially facilitated by former colonial powers granting rights to citizens of former colonies. The end of World War II marked a turning point in the dynamics of European migration. Western Europe, was gradually transforming into an immigration area. Citizens of former colonies moved to Europe, sometimes for political reasons, but more often for economic reasons.<sup>1</sup> In countries without a colonial history, bilateral guest-worker agreements were the only source of migrant labour. According to which some countries had to open their labour markets to foreign workers (the so-called "guest workers") through programs of active recruitment, Europe's former colonial powers the UK, France, Belgium, and the Netherlands were, by contrast, able to draw on a vast supply of unskilled workers. An inability to secure workers (especially white workers) from Europe meant that policy-makers had little choice but to rely on (or, which was more often the case, to tolerate) colonial migrants.<sup>2</sup> The foundation, 70 years ago, of the European Community, implied a new step in labour migration. The Ohlin Report of 1956 that has considerably influenced the Spaak Report presented to the Messina intergovernmental conference, and consequently the Treaty of Rome of 25 March 1957,<sup>3</sup> tried to answer the question whether the creation by a small group of six states of an organization dedicated to economic integration would have an impact on the protection of social rights within these states, and if so, whether it would call for compensatory measures. This question received a generally optimistic answer at the time.<sup>4</sup> The ILO experts were confident that international competition within a Common Market would not be an obstacle to a gradual rise in living standards. Improved living and working conditions would result automatically from productivity gains in each state, notably through pressure from trade unions. Given the productivity differentials of workers in each state, it would be artificial and hence undesirable to establish a uniform level of social protection across the Community. The authors made two exceptions to this general conclusion. They noted the distortions of competition that could result from inadequate protection in some states for the principle of equal pay for men and women for equal work, which could give them an unfair comparative advantage in industries employing a large proportion of female labour. The same remark applied regarding fixing weekly working hours and paid holidays – for the authors, the inadequate degree of organization of the workforce in some states could lead to a lower level of protection for workers in these states, to the detriment of healthy competition. Nonetheless, the Ohlin Report did not deem necessary the

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<sup>1</sup> DUSTMANN, C en FRATTINI, T. *Immigration: The European Experience*. Centre for Research and Analysis of Migration, University College London, 2011, 6 p.

<sup>2</sup> HANSEN R, "Migration to Europe since 1945: its history and its lessons", *The political Quarterly*, vol.74, 1, 2003, s.p

<sup>3</sup> DE SCHUTTER, O., "The Balance Between Economic and Social Objectives in the European Treaties". *Revue Francaise des Affaires sociales*, 2006,5, s.p.

<sup>4</sup> See also BARNARD, C., *EU employment law*, Fourth Edition, Oxford, Oxford University Press, 2012, 5 and following

harmonization of protection levels within the European Economic Community. Its authors argued that the same result could be achieved by the Member States signing up to the same international conventions on these matters, negotiated within the ILO or the Council of Europe – the first project of the text that in 1961 would become the European Social Charter was already known at the time. Crucial was however, the establishment of a European labour Market as key to the realisation of a Common Market. Free circulation of Labour should facilitate a balancing in the terms and conditions of competition. It is therefore not surprising that the free movement of workers became so crucial. The foundation of the European Economic Community in 1957 and its subsequent expansion, establishing an ever-larger common market with free movement of people, goods and capital therefor affected migration movements. The economic boom and the consequent labour shortages in the early 1960s led. to new patterns of migration. This was motivated by the strong economic growth in some European countries and the coincidence of people’s desire to find better paid work with requirements of the industrial economies of North West Europe for cheap unskilled labour. In fact, migration was mainly encouraged to satisfy demands for unskilled labour.<sup>5</sup> Recruitment of a migrant unskilled workforce was usually regulated by bilateral agreements. An important feature of these migration movements was that they were considered as temporary, and migrants were expected to return to their home countries after the economic boom had ebbed. In the absence of any contractual or legal arrangements as to their temporary status, however, a large fraction of immigrants settled permanently.<sup>6</sup>

The phase of rapid growth in Western Europe in the 1950s and 1960s was followed by an economic slump in the 1970s, leading to a sharp increase in unemployment in most countries, and therefor. brought the recruitment of foreign workers to a halt. Because of the oil price shock and the ensuing economic stagnation, the fight for jobs became harder. Foreign workers came to be a threat and their presence discussed in the public arena. The end of active recruitment seems to have been a clear signal that those who wanted to stay would have to attain permanent residence and therefore also brought their families.<sup>7</sup> Only after 1970 Europe turned into a continent of immigration. Europe’s migration balance with the rest of the world became highly positive (1970-79 +1.9 million, 1980-89: +1.6 million, 1990-93: +1.1 million).

## 2. Migration motives “on the move”

Until the 1990s, the vast majority of migrants could conveniently be classified under the categories “family reunification”, “labour migration” and “asylum”. Since the 1990s, however, migration motives have become increasingly diversified, including a growing number of young people migration to attend higher education. Also the motives for migration changed. According to Eurostat, in 2012, 32% of migrants received a residence permit for family reasons, 23% for work, 22% for education, and 23% for other reasons including asylum. Moreover, it should be noted that these categories report only the main migration motives as captured in the official statistics. In practice, these categories reflect migration motives as accepted in admission labels. Both may shift during the time. International students, for example, might become labour migrants upon graduation, and subsequently seek family reunification. Lastly, migration is often not limited to moving from country A to country B but may involve several successive destinations.

Before 2004, the actual movement of labour within the EU was very limited, and most EU-level discussion tended to complain about the absence of labour mobility. Only 4 per cent of EU citizens have ever lived in another EU state and in 2002 just 1.5 per cent of EU workers lived in a different

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<sup>5</sup> ROBERTS, S.,

<sup>6</sup> DUSTMANN, C en FRATTINI, T. *Immigration: The European Experience*. Centre for Research and Analysis of Migration, University College London, 2011, 6 p.

<sup>7</sup> DUSTMANN, C en FRATTINI, T. *Immigration: The European Experience*. Centre for Research and Analysis of Migration, University College London, 2011, 7 p.

Member State, a figure which had remained unchanged for over 30 years.<sup>8</sup> Reasons often given for the failure of labour mobility are a lack of language skills, problems getting educational and professional qualifications recognised and restrictive practices which exclude workers from other countries.<sup>9</sup> Most international labour migration within the EU has been taken place by relatively unqualified manual workers, not professionals. Language skills (or the lack of them) clearly inhibited the mobility of professional workers.<sup>10</sup>

Only a few old Member States opened their labour markets with no or mild transitional measures. Given this institutional variation and other important factors, such as geographic, linguistic or cultural distances, the EU enlargements had heterogeneous effects on migration flows across Europe. After EU accession of 8 Central and Eastern European countries in 2004 the UK, Sweden and Ireland allowed citizens of these countries to work in their labour markets immediately, which led to large-scale labour immigration from Poland, but also from countries like Latvia, Slovakia and Lithuania. Although new EU citizens could freely travel to these countries, taking up an employee job was illegal. Consequently, many new accession citizens engaged in illegal work relationships.<sup>11</sup> Meanwhile, Germany did not open its labour market to A8 workers immediately.

Whereas after 1989 the volume of potential East to West migration was first overestimated, this new labour migration was initially underestimated, particularly migration to certain countries. For example, projections of migration to the UK on the eve of EU enlargement suggested that between 5,000 and 13,000 new migrants would come from CEE countries each year<sup>12</sup>, whilst projections for the EU-15 suggested 180,000 migrants in the first year, rising to around 220,000 per year over time. In practice, it is estimated that as many as half a million Polish citizens had moved to the UK, by 2007 alone. This finding suggests that with open borders an increasing number of individuals in the EU8 consider the option to work abroad, since after the EU accession the option to return or migrate again became always available.

Another aspect of these new migration patterns is that small numbers of new immigrants started to arrive in Poland, Romania and Bulgaria, partly to cope with the local demand for cheap labour. Up until the late 1980s, there was almost no migration into Poland. Thereafter, and particularly after EU enlargement, the number of foreign migrants entering the country increased rapidly. A much more prominent example, meanwhile, is the Czech Republic where, between 1993 (when the state was established) and 2002, some 145,000 foreigners officially immigrated, and the net migration was positive at some 75,000. By 2002, the number of (legal) foreign residents in the country was 232,000, representing approximately 2.3 per cent of the total resident population.

To a certain extent however, internal mobility within the EU remains rather limited. In 2005 a Eurobarometer Survey demonstrated that only 4% ever moved to another Member State and fewer than 3% ever moved to another country outside the EU by that time.

#### Eurobarometer Survey

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<sup>8</sup> DOBSON J.R., SENNIKOVA I, "from fundamental freedom to political and economic 'hot potato' in 50 years: Labour mobility and migration within the eu", *Journal of Business Economics and Management*, 8,2, p. 677

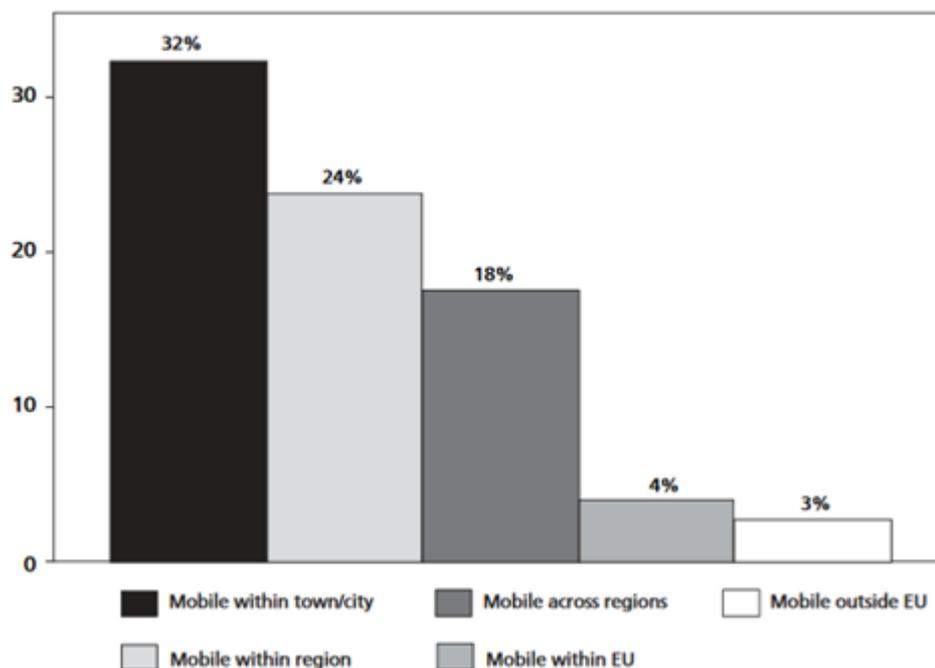
<sup>9</sup> DONAGHEY J. en TEAGUE P, "The free movement of workers and social Europe: maintaining the European ideal," *Industrial Relations Journal*, 1.11. 2006, s.p.

<sup>10</sup> MARSDEN, D, "The effects of 'merit pay' on motivation in a public service." *British Journal of Industrial Relations*, 1994, 32 (2). p. 4

<sup>11</sup> C. Dustmann, T. Frattini., "Immigration: The European Experience", Centre for Research and Analysis of Migration University College of London 2011, 9.

<sup>12</sup> C. Dustmann, M. Casanova, M. Fertig, I. Preston, C.M. Schmidt, "The impact of EU enlargement on migration Flows", Home Office Online Report 25/03 Research Development and Statistics Directorate 2003, [http://www.ucl.ac.uk/~uctpb21/reports/HomeOffice25\\_03.pdf](http://www.ucl.ac.uk/~uctpb21/reports/HomeOffice25_03.pdf).

**Figure 5 Past mobility, by distance of move (%)**



The Motivation for long-distance mobility can be found in different reasons :

- Actual wage i.e. the decision to move is based on the expected wage income from employment, net of migration costs. Actual differences in wage are not likely to be the main reason for mobility.
- Their future employment and wage prospects
- Family and social networks
- The housing market
- Housing and social capital seem to be of importance. As mortgage payments or rent constitute the largest part of a household's budget, housing market conditions and housing policies are likely to influence the decision on changing residence or taking up a new job.

The number of EU-27 citizens migrating to a Member State other than their own country of citizenship increased on average by 12% per year during the period of 2002-2008 and peaked in 2007.

The recent period of intra-European migration (2008–2012) is marked by a financial and economic crisis and declining labour demand across Europe, hitting certain European countries harder than others. Consequently, migration flows from Eastern to Western Europe in general have decreased considerably, although they seem to have partly bounced back in the most recent years. The increased unemployment rates in many destination countries have also fostered return migration.<sup>13</sup> At the same time, a second wave of labour migration has been observed from southern to northern European countries, since countries such as Spain, Portugal and Greece have been affected most severely by the economic and financial crisis.<sup>14</sup> Due to the combination of increased emigration and declining immigration, the net migration in some southern European countries has turned negative.

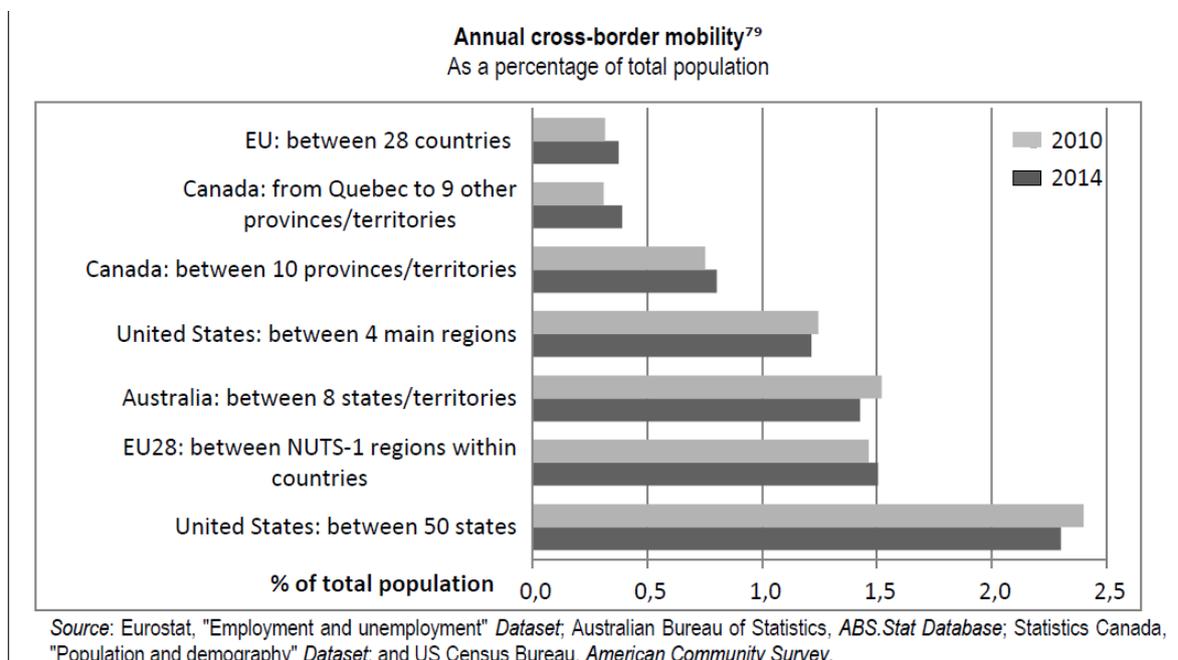
<sup>13</sup> A. Zaiceva, K.F. Zimmermann, "Returning home at times of trouble? Return migration of EU enlargement migrants during the crisis", IZA DP No. 7111 2012.

<sup>14</sup> M. Benton, M. Petrovic, "How free is free movement? Dynamics and drivers of mobility within the European Union", Migration Policy Institute Europe 2013.

### 3. The share and composition of intra-European-migrants

Intra-European migrants comprise an important share of the population in many European countries, often accounting for half of all migrants in the country (based on citizenship), and in some countries such as Luxemburg, Cyprus, Ireland, Malta, Belgium or Netherlands they even outnumber non-EU foreign citizens. Data shows that intra-EU migrants are changing in their social composition: while once they were predominantly low-skilled economic migrants—like ‘guest-workers’ from South to North—more recently they tend to be better educated, highly skilled labour migrants, and they also partly come with other motivations, such as to retire and to study. There are by now strong migration flows of retired people from North to South as well as movements of the highly skilled particularly between the different countries of Northern and Central Europe. A quite recent development is the increase in migration of students and of retired people. Significant numbers remain within the destination country after the end of their studies either as labour migrants or following family formation with a person resident in the destination country.<sup>15</sup>

One can notice some rowing intra-EU labour mobility, although in general the level remains lower than migration within the US.

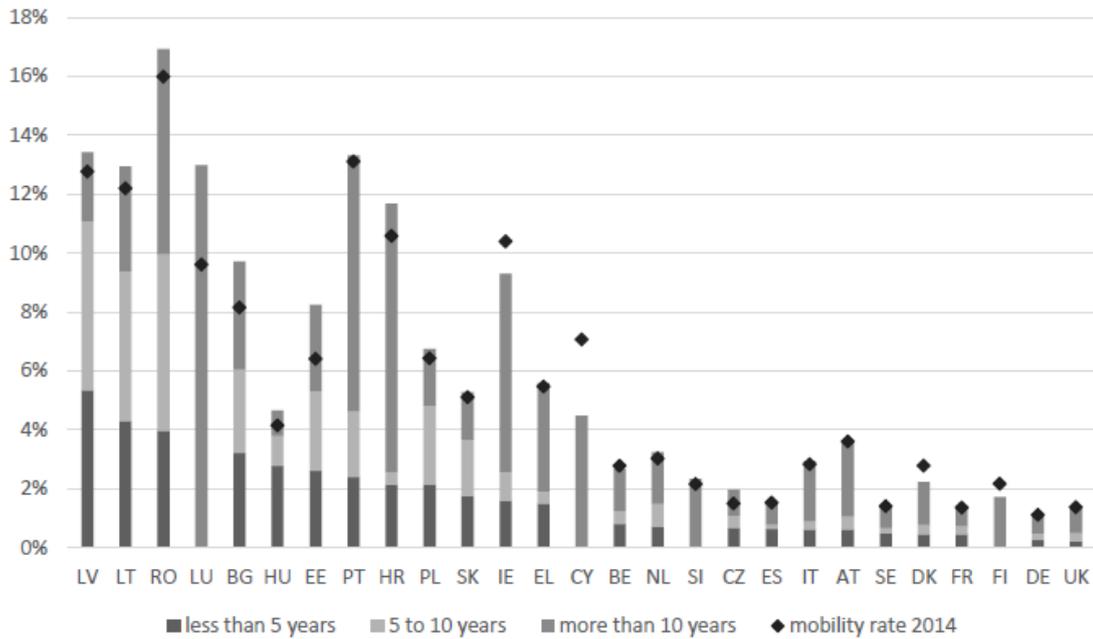


The following table shows the total number of nationals who even migrated to another EU-28-country and are still residing there in 2014.

In general Germany and UK are the countries with the largest positive net migration, while several other Member States (Slovakia, Bulgaria, Latvia, Lithuania, Croatia, Poland, Romania, Ireland, Portugal, Greece and Spain) knew an overall net migration with Spain the biggest negative flow.

<sup>15</sup> Eurostat statistical books, "Migrants in Europe: a statistical portrait of the first and second generation", Publications Office of the European Union 2011, <http://ec.europa.eu/eurostat/documents/3217494/5727749/KS-31-10-539-EN.PDF/bcf27a60-7016-4fec-98c5-e8488491ebbd>.

Figure 9 Mobility rate of nationals of working age (20-64), by years of residence abroad, 2015



NUMBER OF NATIONALS LIVING IN ANOTHER EU-28 MEMBER STATE AS SHARE OF TOTAL POPULATION IN COUNTRY OF CITIZENSHIP, BY YEARS OF RESIDENCE ABROAD.

TOTAL NUMBER IS USED FOR FI, CY, SI AND LU AS ONE OR MORE OF THE NUMBERS FOR AGE GROUPS ARE BELOW RELIABILITY LIMITS OR HAVE LOW RELIABILITY.

MT IS EXCLUDED BECAUSE FIGURES ARE BELOW RELIABILITY LIMITS.

SOURCE: EU-LFS 2015, MILIEU CALCULATIONS.

(see Milieu, 2016: Annual Report on Intra-EU Mobility, 2017, Project Network Statistics FMSSFE, Brussels, European Commission, DG Employment, Social Affairs and Inclusion, <http://ec.europa.eu/social/main.jsp?catId=1154&langId=en>, 41. )

Looking to the composition, in 2015, 11.3 million EU-movers of working age were living in a EU Member State other than their country of citizenship, i.e. 3.7% of the total working age population. Of these around 8.5 million were employed or looking for work.

Table 1 Composition of intra-EU mobility by different types, EU-28 citizens in the EU-28, 2015

Type of mobility	Extent
<b>'Long-term' EU-28 movers of working age (20-64 years) living in EU-28*</b> (Eurostat figures)	11.3 million
<i>(as share of the total working-age population in the EU-28<sup>40</sup>)</i>	<i>(3.7%)</i>
EU-28 movers of working age living in EU-28*(EU-LFS figures)	10.5 million <sup>41</sup>
...of which <b>active EU-28 movers</b> (employed or looking for work)**	8.5 million <sup>42</sup>
<i>(as share of the total labour force in the EU-28)</i>	<i>(3.6%)</i>
<b>Cross-border workers (20-64 years)**</b>	1.3 million
<i>(as share of the total employed in the EU-28)</i>	<i>(0.6%)</i>
<b>Number of postings<sup>43</sup></b> (of employed and self-employed), (no. of PDs A1)***	2 million
<b>Annual return mobility (20-64 years) (2014)****</b>	630,763
<i>(as share of EU-28 mobile workers)</i>	<i>(6%)</i>
Retired EU-28 movers (all ages)	1.4 million

\*SOURCE: EUROSTAT MIGRATION STATISTICS, 2015

\*\*SOURCE: EU-LFS 2015

\*\*\*SOURCE: HIVA-KU LEUVEN, ADMINISTRATIVE DATA PD A1 QUESTIONNAIRE,

\*\*\*\*SOURCE: EUROSTAT MIGRATION STATISTICS, 2014; APPROXIMATION OF NUMBER OF NATIONALS RETURNING TO THEIR COUNTRY OF ORIGIN AGGREGATE EXCLUDES SLOVAKIA, WHOSE DATA ARE NOT AVAILABLE. THE 2014 FIGURE IN TABLE 11 IS SLIGHTLY LESS BECAUSE FURTHER COUNTRIES WERE EXCLUDED FROM THE AGGREGATE (SEE EXPLANATION BELOW TABLE 11).

\*\*\*\*\* SOURCE: EUROSTAT MIGRATION STATISTICS, 2014, SHARE OF EU-28 NATIONALS IMMIGRATING TO THEIR COUNTRY OF CITIZENSHIP (RETURNEES) FROM EU-28 NATIONALS LEAVING THEIR COUNTRY OF CITIZENSHIP (OUTFLOWS), AGE GROUP 20-64; FIGURE IS BASED ON THE TWO TOTALS EXCLUDING EL, CY, FR, PT AND SK AS COUNTRIES OF CITIZENSHIP DUE TO LACK OF FIGURES

(see Milieu, 2016: Annual Report on Intra-EU Mobility, 2017, Project Network Statistics FMSSFE, Brussels, European Commission, DG Employment, Social Affairs and Inclusion, <http://ec.europa.eu/social/main.jsp?catId=1154&langId=en>, 24.)

## B. The new challenges from migration on the European labour Market

Together with the changes in the intra-EU- mobility, also the economic environment has changed leading to another European labour market . Since the outbreak of the financial and economic crisis, the demand for increased flexibility in employment relations has risen. The continuous growth of the usage of advanced ICT tools has also contributed to this demand. New patterns of work, including increasingly flexible labour markets with hyper-mobile workers became the new tendency. The time i that a worker had a full-time, permanent employment relationship and that the migrant worker was someone – usually a male - who moved to his work-state (with or without his family) and at the end of his career returned to his state of origin, has passed. Often, these people coming from low-wage countries migrated for better working opportunities and conditions, including higher wages

However, new business models have developed giving rise to innovative flexible and mobile constructions with a changing nature of work.

### 1. *The emergence of new types of labour contracts*

The evolution of the European labour market has led to new types or forms of labour contracts:

#### ➤ *Interim management*

Interim management consists of an employment relationship in which a company hires out workers to other companies. As this hiring out usually has a specific purpose, the term of the contractual relationship is usually fixed or limited. This hiring out of workers is the main goal of the company, but unlike temporary employment agencies, the workers are limited to highly trained and specialised experts. The task of interim managers consists of solving specific management questions, technical challenges or assisting in economically difficult times.<sup>16</sup>

#### ➤ *Telework :*

As a result of the evolutions in the information technology and due to demands for more flexibility by the employer and often by the employee more work-private balanced working conditions, the worker is more and more uncoupled from the traditional work space. Telework, ie a form of organising and/or performing work, using information technology, in the context of an employment contract/relation, where work, which could also be performed at the employer's premises, is carried out away from those premises on a regular basis, is a quick growing phenomenon <sup>17</sup>

#### ➤ *Casual work:*

The global concept of casual work refers to contractual relations without the obligation for the employer to provide stable and continuous work. Casual work can be described as 'work which is irregular or intermittent with no expectation of continuous employment. The amount of work usually depends on the fluctuations in the employers' workload'.<sup>18</sup> Casual work may include several forms with each their own characteristics.

#### ➤ *On-call work and zero-hour contracts*

On-call work or on-call employment involves a continuous employment relationship between an employer and an employee on an irregular basis. The employer does not have the contractual obligation to provide work for the employee. Instead, employers can 'call in' the employee when needed.<sup>19</sup> Some contracts provide information about working hours, e.g. a minimum or maximum. Other contracts, zero-hour contracts, specify no minimum number of working hours.

#### ➤ *Employee sharing*

Employee sharing is an employment relationship in which a group of employers jointly hires workers. A distinction is made between strategic employee sharing and ad-hoc employee sharing. Strategic employee sharing is based on a network of different employers that hires workers of choice. These workers are then sent on individual work assignments with other participating employers of the same network. Secondly, when not enough work is available, the same employer can transfer the worker to another company, while maintaining the initial contract between employer 1 and the employee. This phenomenon is called ad-hoc employee sharing, which is similar to temporary agency work.

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<sup>16</sup> EUROFOUND, *New forms of employment*, Publications Office of the European Union, Luxembourg, 103

<sup>17</sup> Article 2 European Framework Agreement on Telework, 2002

<sup>18</sup> European Parliament, *Atypical Work in the EU*, SOCI 106, 2000.

<sup>19</sup> EUROFOUND, *New forms of employment*, Publications Office of the European Union, Luxembourg, 46.

### ➤ *Voucher-based work*

Voucher-based work is a form of employment where an employer acquires a voucher from a third party, which is usually a governmental authority. This voucher is used as payment, instead of cash or a bank transfer. When the voucher is exchanged, the social security contribution is automatically transferred to the social insurance instance.<sup>20</sup> The main goal of this system is to battle undeclared work in sensitive sectors (e.g. household services and agriculture). Also, the administrative obligations related to hiring someone are reduced to a minimum.

For workers, the voucher system may lead to job insecurity because there is only little guarantee of continued usage and thus employment. Depending on national legislation, sometimes a guaranteed minimum hourly wage and other social protection is provided.<sup>21</sup>

### ➤ *Portfolio work*

Portfolio work is usually described as the practice of working for a number of clients or employers simultaneously.<sup>22</sup> Workers hold multiple jobs or contracts in various areas of activity and with various companies.<sup>23</sup> The legal form of this kind of employment depends on the case: either work in the form of labour contracts or work in the form of self-employment is common.<sup>24</sup>

## 2. *The new work organization*

Apart from new labour contracts, also the work organization has changed: Here we can refer to:

### ➤ *Network and platform work with e-transfer of intellectual work:*

The *crowd* refers to a pool of workers, *digital workers* or *crowdworkers*, available through all kinds of networks and new communication methods. *Crowdsourcing* is generally described as ‘the activity of outsourcing business tasks to an independent mass of people via the internet’.<sup>25</sup> An online platform enables organisations or individuals to access an indefinite and unknown group of other organisations to solve specific problems or to provide specific services or products in exchange for payment.<sup>26</sup> The ‘sharing economy’ is an often-used term to describe the different kinds of electronic platforms used to share tasks with a larger group of people or workers. There is growing economic activity taking place where services are provided by a non-professional to another non-professional through the mediation of an electronic platform allowing these private persons to perform limited activities within the sharing economy without too much entrepreneurial risks or administrative burdens. Furthermore, the sharing economy refers to the possibility to share the instruments necessary to complete the required tasks, such as in the case of the *Uber* business model. The most well-known example being Uber but there are many other examples in a wide variety of sectors like taxi transport, hiring of rooms, cooking for neighbours, helping in daily activities, or even leaving your dog out. One can hardly imagine the wide variety of possibilities offered. The activities of crowdworking are based on individual tasks or projects instead of a continuous workflow. These activities can be divided into subtasks.<sup>27</sup> Examples of activities that are regularly performed through

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<sup>20</sup> EUROFOUND, *Aspects of non-standard employment in Europe*, Eurofound 2017, Dublin, 31.

<sup>21</sup> EUROFOUND, *New forms of employment*, Publications Office of the European Union, Luxembourg, 99.

<sup>22</sup> C. HANDY, *The age of unreason*, London, Arrow Books, 1995.

<sup>23</sup> D. CHIPMAN, ‘A glossary of managerese: Management terms’, *Across the Board*, Vol. 30, p. 39.

<sup>24</sup> EUROFOUND, *New forms of employment*, Publications Office of the European Union, Luxembourg, 103.

<sup>25</sup> J. HOWE, *The rise of crowdsourcing*, *Wired Magazine*, 2006, 14, 1.

<sup>26</sup> A. GREEN and S.A. BARNES, *CrowdEmploy Part I: Crowdsourcing for paid work. An empirical investigation into the impact of crowdsourcing for paid work on employability*, Warwick, Warwick Institute for Employment Research/Institute for Prospective Technological Studies, 2013.

<sup>27</sup> A. FELSTINER, ‘Working the crowd: Employment and labor law in the crowdsourcing industry’, *Berkeley Journal of Employment & Labour Law*, 2011, 32, 143.

crowdsourcing in the ICT sector are: image design, video production, data collection, surveys, transcriptions, writing.<sup>28</sup>

➤ *International groups with integrated HR policy:*

International groups employ quite often thousands of people of different nationalities. This group has subsidiaries and branches in several EU countries and everywhere around the world. A subdivision of the Human Resources (HR) Office, known as the “European and International Division”, deals with the careers of hundreds of high-level managers who often transfer their workplace from one business location to another. Hence, during the course of their career, some managers have a permanent job in as many as ten different EU countries. This leads to a situation of co-employment, multiple employment, of sub-contracts, etc. ...It leads to situations of triangular relationships characterized by the simultaneous existence of two employment contracts.

Common to all these new forms of labour contracts and models of work organization, is that they resulted in new forms of employment across EU Member States, which are still quite unmapped and sometimes legally dubious. Often these new forms of employment are described as atypical employment relations contrary to the Standard Employment Relation (SER). The Standard Employment Relation (SER) is the established one-to-one employment relation. The CJEU has stated that *‘the essential feature of an employment relation is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration’*.<sup>29</sup> This case law has remained unchanged over the years. The CJEU has furthermore explained the concept of subordination, i.e. a worker is not free to choose which services the collaborative platform provides. In the context of atypical employment, the digital platform often is an important factor in an employment relation, or even officiates as the employer. The existence of subordination is not necessarily dependent on the actual exercise of management or supervision on a continuous basis,<sup>30</sup> which is an often-used argument in the pro labour contract argumentation of some forms of atypical employment.

### C. *The impact of new labour contracts and migration patterns on the social protection of migrant workers*

This growing flexibility and new forms of labour within a pan European labour market has led to a wide variety of different types of migrant workers that have other aspirations. The typical migrant worker as described above focused on **fully integrating in the social security systems of the State of the new workplace**. When migrating at a later age, the biggest problems these persons were confronted with were related to the possible export of retirement benefits. However, the migrant workers of today who are often working for shorter periods abroad do not as such aim to be integrated in their country of short employment, but are more willing to further belong to their social security system of origin. This is however not really the objective of the coordination regulations on social security for migrant workers. These trends therefore do question the fundamental starting points of European social security and labour law with respect to the applicable legislation to migrant workers and to what extent the current rules and principles are still fit to guarantee the protection of the migrant worker.

#### 1. *The current framework of applicable legislation*

Both social security law and labour law regard the professional ties of the worker with a certain State as the ultimate connecting factor. This state of the *lex loci laboris* (in social security law), or the place

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<sup>28</sup> EUROFOUND, *New forms of employment*, Publications Office of the European Union, Luxembourg, 107.

<sup>29</sup> Case 66/85, Lawrie-Blum ECLI:EU:C:1986:284

<sup>30</sup> Case Danosa, ECLI:EU:C:2010:674

of habitual employment (in labour law) is considered as the territorial connecting factor of integration for mobile workers. The coordination regulations have introduced a single abstract connecting factor based on the place where the professional activity is performed that should guarantee that the person concerned gains full access to the welfare state he is most connected with. From the moment a Member State is designated by the conflict rule of the Regulation, this state is the competent state and the legislation of this state will be applied. The aim of the conflict rules is rather straightforward: the mandatory application of one single legislation. The objectives were clearly defined by the ECJ: those provisions are intended not only to prevent the simultaneous application of a number of national legislative systems and the complications which might ensue, but also to ensure that the persons covered by Regulation No 1408/71 (now 883/2004) are not left without social security cover, because there is no legislation which is applicable to them.<sup>31</sup> However, when the Member States lay down the conditions creating the right or the obligation to become affiliated to a social security scheme, they are under an obligation to comply with the provisions of the Community law in force<sup>32</sup>. In particular, those conditions may not have the effect of excluding persons from the scope of the legislation at issue to whom it applies. The country appointed has therefore to apply its legislation, which leads to the general rule that the conflict rules are compulsory and have a so-called strong and exclusive effect. Although it is for the legislature of each Member State to lay down the conditions creating the right or the obligation to become affiliated to a social security scheme or to a particular branch under such a scheme, it must be emphasized that this does not mean that the Member States are entitled to determine the extent to which their own legislation or that of another Member State is applicable.<sup>33</sup> The exclusive application is linked to the principle of single applicable legislation. It implies that no other state may levy contributions and in principle not grant benefits either. It is true that this principle has evolved<sup>34</sup> as the ECJ has accepted that also countries that are non-competent are allowed to award entitlement to benefits. A person may not lose purely national rights from a state he would be entitled to if EU law did not apply and, even if this person is subject to the legislation from another state by virtue of the regulation.<sup>35</sup> Although the Court of Justice theoretically did not abandon the *lex loci laboris* rule and the single applicable legislation, it created a situation where a worker can claim protection under a non-competent state with whom he has a certain link and this on the basis of the well-known principle that free movement may not lead to the loss of nationally acquired rights, yet this time not applied to the loss of benefits, but to the question of competence.

The connecting factor of the *lex loci laboris* is the place of work. It is this legislation that will further define the concept of work, and who is an employed or self-employed person<sup>36</sup>. It is therefore up to national law - and more in particular social security law, and not labour law - of the state where the activity is performed to define who is covered by the coordination regulations. Whether a person works for the purposes of the *lex loci laboris* and if this is done as employed or self-employed person depends entirely on the social security legislation of the state in which the activity or equivalent situation is performed. Also the concept of work is defined by the national authorities, although Europe will further define its borderlines. This was clarified in the case *Partena* with respect to the

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<sup>31</sup> Case 2/89, *Kits van Heijningen*, ECLI:EU:C:1990:183, § 12.

<sup>32</sup> Case 275/81, *Koks*, ECLI:EU:C:1982:316, § 10

<sup>33</sup> Case 276/81 *Kuijpers* ECLI:EU:C:1982:317, § 14

<sup>34</sup> See also *Rennuy, N.*, *The emergence of a parallel system of social security coordination*, *Common Market Law Review*, 2013, 289-320.

<sup>35</sup> See Case 352/06, *Bosmann* ECLI:EU:C:2008:290: the ECJ finds that if Germany, which is not the competent State (the citizen works in the Netherlands and resides in Germany), is not compelled to provide family benefits to residents under Regulation 1408/71, this does not preclude that German authorities provide such benefits when they are subject to a condition of residence on its territory and thus granted to all residents.

<sup>36</sup> See article 1 (a) and (b) Regulation 883/2004 that defines an activity as an employed person as an activity or equivalent situation treated as such for the purpose of the social security legislation of the Member State in which such activity or equivalent situation exists.

presumption of a state with respect to the location of this activity. In this case the Belgian legislator had enacted a provision according to which persons designated as agents of a company or association which is liable to pay Belgian corporation tax or the Belgian tax on non-residents, to pursue in Belgium a professional activity as self-employed persons. The Court was of the opinion that the concepts of 'employed' and 'self-employed' activity referred to in Article 13 et seq. of Regulation No 1408/71 refer to activities which are regarded as such for the purposes of the social security legislation of the Member State in whose territory those activities are pursued.<sup>37</sup> Therefore, those concepts, in terms of their content, fall under the legislation of the Member States in whose territory the employed or self-employed activity is pursued. Accordingly, for the purposes of Article 13 et seq. of Regulation No 1408/71, the determining of the location of the person's professional activity — which, as is apparent from the 10<sup>th</sup> recital of that regulation, is the basis as a general rule for determining the legislation applicable — precedes qualifying that activity as an employed or a self-employed activity.<sup>38</sup> However, unlike the concepts of 'employed' and 'self-employed' activity, the concept of the 'location' of an activity must be considered to be a matter, not for the legislation of the Member States, but for EU law and, consequently, for interpretation by the Court. If that concept was also a matter for the legislation of the Member States, it could be subject to contradictory definitions or interpretations by the Member States in question and could lead, for any given person, to the cumulative application of different legislation to the same activity. That overlapping could result in that person having to pay a double social insurance contribution for a single income and would thus penalise a person who had exercised his right to freedom of movement as enshrined in EU law, which would be manifestly contrary to the objectives of Regulation No 1408/71. In that regard, 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. By irrebuttably presuming that persons designated as agents of a company or association which is liable to pay Belgian corporation tax or the Belgian tax on non-residents who pursue in Belgium a professional activity as self-employed persons, the provisions of national law in question are thus liable to lead to a definition of the location of an activity which does not correspond to the definition resulting from the preceding paragraph of this judgment and are thus liable to be contrary to EU law.

The Court agrees, as the Belgian government claims, that the presumption at issue in the main proceeding may prevent social security fraud consisting of eluding the otherwise obligatory social security scheme for self-employed persons by artificially relocating the activity of agents of companies established in Belgium. However, by making that presumption an irrebuttable one, the national legislation at issue goes further than is strictly necessary for attaining that legitimate objective of combating fraud since it thereby acts as a general impediment to those persons' ability to prove, before the national court, that the location of their activity is actually in another Member State where they carry out, in fact, the actions connected with that activity.<sup>39</sup> So the Court of Justice slightly limits the faculty of a State to determine the location of economic activities. Although the ECJ does not exclude that the presumption might achieve that legitimate objective, its irrebuttable nature goes beyond what is necessary. So the definition of work is left to the national authorities but at the same moment Europe defines the limits to the determination of its location. However, in a changing virtual world where it is more and more commonly accepted that work should not be carried out in a fixed place (such as for example, a shop, a building site or an industrial plant), but can be undertaken from a computer site anywhere and linked to the internet, it will become very difficult to fill in the concept of place of work. Workers are very flexible to determine for themselves their workplace or workplaces and thus "choose" the applicable legislation which best suits their requirements.

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<sup>37</sup> See eg Case C-340/94 de Jaeck ECLI:EU:C:1997:43, §34 and Case C-221/95 Hervein and Hervillier ; ECLI:EU:C:1997:47 § 22

<sup>38</sup> See Case 137/11, Partena ECLI:EU:C:2012:593; § 50-52

<sup>39</sup> See Case 137/11, Partena ECLI:EU:C:2012:593; § 60

The concrete protection, i.e. the extent to which these persons are entitled to further benefits (entitlement to benefits) is a question that will be answered by national law be it within the limits of European law. The Member State defines as long as one does not contravene European law- the conditions leading to the right to benefits<sup>40</sup> the acquisition or the loss of benefits<sup>41</sup> or the height of benefits... Depending on the national legislation - often excluding benefits in case of short periods of insurance - this may result in leaving the migrant workers without the appropriate social security cover.

## 2. *The lex loci laboris: characteristics and justification*

This principle of the *lex loci laboris* is however very volatile. From the moment, the person concerned starts to work in another Member State, the *lex loci laboris* principle will immediately lead to a change of applicable legislation. It is only exceptionally that the person will remain subject to its previous legislation e.g. in the case of posting and that a certain time gap further exists before getting insured to the next Member State.<sup>42</sup> This constant change of the current legislation, when changing the place of employment, does not take into account that the links someone might have with a legislation evolve over time. In no respect it is the intention that the person would remain subject to its previous legislation, regardless whether is in the interest of the person concerned.

But when questioning the appropriateness of this rule, one has to question why one has chosen for this connecting factor of the *lex loci laboris*? Several reasons can be mentioned here:

- It is well known that it is in line with the initial social security schemes of the founding states to be coordinated and that were focusing on the circle of insured persons who were to the majority economically active persons. The *lex loci laboris* was also the common rule under the international conventions at that stage, as e.g. the European Convention on the social security of migrant workers, that was used as example for and almost fully copied in the initial regulation 3/58;
- It also fits in the concept of the free movement of workers. The *lex loci laboris* mirrors the principle of equal treatment of workers in the state of work. Any conflict rule other than the *lex loci laboris* could also induce a differential treatment between sedentary persons and migrants;
- Social security can be considered as complement to wage work on a labour market and it allows a fairer competition. Choosing a connecting factor linked to the conditions of the worker would allow employers to minimize their contribution duties by choosing e.g. employees who are resident in a state with lower social security contributions. To the same extent linking to the seat of the employer would lead to the possibility for forum shopping as by relocating the seat of the employer, one could choose another social security legislation. From that perspective it would be the optimal situation that any differential in contribution rates to be paid by the employer could be avoided. The *lex loci laboris* could guarantee a secure level playing field as employers would now compete on the same territory on equal terms. As such, competition as regards workers shall take place according to the terms applicable to the market where the job is performed (cf. Directive 96/71), an idea that we also know in labour law;
- There is a general interest for the worker, but also for the employer, that the labour law, social security law and fiscal law of the same state would apply as it would be easier to

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<sup>40</sup> Case 110/79, Coonan ECLI:EU:C:1980:112 § 15

<sup>41</sup> Case 1/78, Kenny ECLI:EU:C:1978:140 § 16

<sup>42</sup> Of in principle two years. Also for inactive persons, a certain timeframe is possible as inactive persons will remain during a certain period further subject to the legislation of the country they were economically active. It is only when they receive a benefit for an unlimited period of time, that they will become subject to the legislation of the Member State of Residence.

administer and to achieve more coherent results. But we all know that this parallel is far from perfect as fiscal law refers to the *lex loci laboris* and the *lex loci domicilii*, while under labour law it is the choice of law and the *lex loci laboris*;

- It is also seen as most suitable as it usually coincides with the law of the worker's place of residence while the place of nationality is hardly relevant.

The *lex loci laboris* would in principle lead to a plurality of applicable legislations in the case of a person who is simultaneously employed in several Member States. For that reason, specific conflict rules designate the single applicable legislation in case of simultaneous employment. In order to determine whether a person should be considered to be normally employed in two or more Member States or, conversely, whether they work merely occasionally in several Member States, regard must be had, in particular, to the duration of periods of activity and to the nature of the employment as defined in the contractual documents, as well as to the actual work performed, where appropriate.<sup>43</sup>

### 3. *Lex loci laboris: inappropriate for the current labour market?*

The new forms of labour contracts and patterns of work, demonstrate the difficulties the application of the *lex loci laboris* poses and the fact that this rule is far from being in the interest of the worker concerned.

It suffices to enumerate a few problems:<sup>44</sup>

- Telework raises the issues where the workplace of the worker is? As a matter of fact the coordination regulations rely on the state of work as the connecting factor. According to the Administrative Commission, telework is exercised at the place where work is actually undertaken (e.g. at home). A person can do telework on her computer or telephone at home or while travelling and such mode of working can amount to a significant part of employment activity. This would lead to the application of the rules for workers who are simultaneously working in more than one Member State.<sup>45</sup> In case substantial home work would be undertaken, it will be the place of residence that will be the competent state. Unnecessary to say that such a situation might lead to possible manoeuvres by the employer who could by defining the time - substantial or not - , a teleworker is working at home, influence the applicable legislation and jeopardizing possible social dumping. A pure occasionally activity at home is however not sufficiently to trigger the rules that one is normally employed in two Member States. The Court of Justice very recently clarified that where the working from home is not explicitly reflected in contractual documents and as such does not constitute a structural pattern, the main conflict rule of the *lex loci laboris* will further apply. Moreover, out of all the hours he worked during the year in question, only approximately 6.5% were performed in that Member State, mostly by working from home.<sup>46</sup>

The actual regulatory framework is not adapted to these situations of a virtual workplace.

But is it even still possible to locate the place of work in a virtual economy as we indicated above?

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<sup>43</sup> See case C-115/11 *Format Urządzenia i Montaż Przemysłowe*, C-115/11, EU:C:2012:606, paragraph 44

<sup>44</sup> See also JORENS, Y., LHERNOULD, JP, FILLON, JC., KOLDINSKA, K. and SPIEGEL, B., "Think Tank Report 2009, "Intra-group Mobility", Project trESS (Training and Reporting on European Social Security), European Commission, DG Employment, Social Affairs and Equal Opportunities, Brussels, 2009, 25 p. and JORENS, Y., LHERNOULD, JP, FILLON, JC., ROBERTS, S., and SPIEGEL, B., "Think Tank Report 2008, "Towards a new framework for applicable legislation. New forms of mobility, coordination principles and rules of conflict", Project trESS (Training and Reporting on European Social Security), European Commission, DG Employment, Social Affairs and Equal Opportunities, Brussels, 2008, 34 p.

<sup>45</sup> See article 13(1) Regulation 883/2004

<sup>46</sup> Case C-570/15, X versus Staatssecretaris van Financiën, ECLI:EU:C:2017:674

- Or what about a worker who is employed under short term contracts, be it fixed-term or interim contracts? Such workers could be confronted with frequent and constant changes of legislation. Or let us look at the particular forms of casual work like on-call contract. Under the coordination regulations there are - contrary to labour law - no specific minimum requirements for the *lex loci laboris* to apply. In its Case *Franzen* the ECJ stated that minor employment (two or three days a month) “so called mini-jobs” leads to the application of the *lex loci laboris* under condition that this work, leads to some insurance –mini-jobs were freed from all social security insurance, except for benefits for accidents of work - and this even for the days of inactivity. The legislation of the Member State of employment continues to be applicable for as long as the person concerned is employed in the territory of that Member State. To that end, the existence of an employment contract and the type of employment, whether partial or casual, or even the number of hours worked by the employee, are irrelevant. As long as one performs insured work, one is subject to this legislation. There is no condition of quantitative or qualitative nature of the activity under the Regulations, apart from the fact that the activity must be insured under that legislation. Any activity or equivalent situation treated as such for the purpose of social security legislation of the Member State in which such activity or equivalent situation exists<sup>47</sup>, leads to the application of the legislation of that state.
- Or let us refer to the situation of workers employed within international groups. The *lex loci laboris* would imply the application of different legislations throughout the career within the international group. But also quite often these people would be confronted with situations of simultaneous employment leading to a different rule of applicable legislation than the one of the actual place of activity.

The examples above demonstrate the difficulties and challenges the application of the *lex loci laboris* poses today. One could ask whether it is in the interest of a highly mobile worker to become subject to a different competent legislation each time they change the country in which they work. This principle of the *lex loci laboris* now stands for 70 years, which is a respectable age. Perhaps it may be an idea to reflect on an alternative principle in particular when evolutions in work patterns have led to a situation where keeping with this principle would not serve the interests of the migrant workers, the main objective of this regulatory framework.

#### 4. *To a revision of the fundamental principles ?*

The difficulties these new patterns of mobility encounter, do not only require a cosmetic solution, but could be seen as a moment to question some of the fundamental principles of these coordination regulations and to find out if the general principle of the *lex loci laboris* is still adopted to the actual situation. If we all agree that the rights of mobile workers are not safeguarded, should we then not reflect about a new fundamental vision? But is it sufficient that the rights of migrant persons are at stake to question these fundamental principles? When dealing with social security, three parties are involved with different interests: the worker (employee or self-employed person); the employer (with respect to funding) and the social security institution (that administers). Could one argue that the interests of the worker are predominant? The Regulation finds its legal basis in the free movement of persons.

The preamble to the Coordination Regulations clearly state in recital 1 that The rules for coordination of national social security systems fall within the framework of free movement of persons and should contribute towards improving their standard of living and conditions of employment. Free movement should not lead to a reduction of the standard of living and the conditions of employment. To the same extent this preamble also states that the coordination rules must guarantee that persons moving within the Community and their dependants and survivors retain the rights and the

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<sup>47</sup> Article 1 (a) and (b) Regulation 883/2004

advantages acquired and in the course of being acquired (recital 13) . The coordination measures should guarantee that the right to free movement of persons can be exercised effectively.

To the same extent almost the whole regulation is a framework with provisions about benefits.

In the Case *Manpower* (C-35/70) the Court declared that Article 13 (1) (a) of Regulation 3/58 aims at overcoming the obstacles likely to impede freedom of movement of workers and at encouraging economic interpenetration while avoiding administrative complications for workers, undertakings and social security organisations<sup>48</sup>. In this case clear reference is made to the three parties. These cases, however, are concerned with the posting provisions, which also derive from the free movement of services, and is more closely related to the interests of the employer. The legal bases of the coordination regulations are based on the free movement of persons and perhaps surprisingly do still not mention the free movement of services. But this not imply that the interests of the employers are ignored: Even the principle of free movement of persons can be interpreted in connection with the interests of the employer, which the ECJ admitted in the *Clean Car Services* case: "The rule of equal treatment in the context of freedom of movement for workers, enshrined in Article 48 of the EC Treaty, may also be relied upon by an employer in order to employ, in the Member State in which he is established, workers who are nationals of another Member State"<sup>49</sup>.

Whatever options are envisaged when changing the Regulations, it could be important to take into account the interests of the different parties involved. The interests of employers and employees can converge in some situations, they are opposite in others. The interest of the actors involved are different and of course one cannot take them all into account. The legislator must cross-check the options for a better conflict rule with these – often contradictory – interests.<sup>50</sup>

On the side of the **employee**:

- No change in the insurance career to build up long-term benefits (especially pensions)
- Get the highest possible benefits (e.g. no loss of benefits from the home country – especially e.g. long term care, family benefits);
- Safeguard the necessary flexibility so that the employer does not have to choose another employee whose status would be easier to manage and get rid of the less flexible employee who insists on a social security situation that is contrary to the interests of the employer;
- Pay the lowest contributions (at least: no contributions which do not lead to additional benefits);
- Have the legislation of the same Member State applicable in the fields of social security, taxation and labour law – as only this arrangement leads to easy to administer and coherent results.

On the side of the **employer**:

- Be confronted only with the home social security scheme because only this one is well-known;
- As above - have the legislation of the same Member State applicable in the fields of social security, taxation and labour law – as only this concentration leads to easy to administer and coherent results ;

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<sup>48</sup> Case C-35/70, *Manpower*, ECLI:EU:C:1970:120 § 10, see also Case 202/97, *Fitzwilliam*, ECLI:EU:C:2000:75 r.o. 28) or Case, 404/98, *Plum* ECLI:EU:C:2000:607.§ 19)

<sup>49</sup> Case C-350/96, *Clean Car Services*, ECLI:EU:C:1998:205

<sup>50</sup> See eg JORENS, Y., LHERNOULD, JP, FILLON, JC., ROBERTS, S., and SPIEGEL, B., "Think Tank Report 2008, "Towards a new framework for applicable legislation. New forms of mobility, coordination principles and rules of conflict", Project trESS (Training and Reporting on European Social Security, European Commission, DG Employment, Social Affairs and Equal Opportunities, Brussels, 2008, 16-17.

- Make full use of the competitive advantages of the free market (use these possibilities to have the cheapest labour force) – at least not to have to pay more contributions than the local competitors;
- Be flexible enough so that (the high ranking) employees are willing to move (if the negative impact on the employees is too great this could hinder any cross border activity of the employer).

On the side of the **institutions**:

- Have only contribution payers resident in the relevant Member State (as any cross border execution of contribution debts is cumbersome and takes a long time);
- Taking into account situations in other Member States is always more complicated than taking account only of the better known arrangements in the “home” State (e.g. income in one State could be different from the notion “income” in the other State);
- Avoid disputes with the institutions of other Member States.

These lists clearly show that solutions which take into account all these different and sometimes competing interests are impossible to find. A balanced approach is desirable which takes into account the (or at least some of the) interests of all the parties concerned. This might be one the biggest challenges for the coordination regulations. This is why it seems advisable that every new approach to coordination that is proposed should include an **impact assessment** for the stakeholders.<sup>51</sup>

If the interests of the workers are given priority this implies that changes to the rules on applicable legislation, should - at the very least - not be to the short or long-term disadvantage of mobile workers when compared to the current arrangements.

## 5. *Some options and solutions for a new paradigm*

When choosing for a new option that should better take into account the interest of the new migrant workers, two starting points should be taken into consideration:

- Every conflict rule should in the first place try to guarantee that there are sufficient personal links between the person concerned and the applicable legislation. Making someone subject to a state to which one has no real connections, is at the detriment of the person concerned, which is even strengthened in the case when the person is at the same time deprived from the protection in the state they work. The rules that today apply to the situations of hyper mobility demonstrate this danger.

Someone who works in two states, one of them being the state of residence, will be subject to this last state under condition that substantial activities will be exercised there. One might argue that this rule is appropriate as working and residing are two often used connecting factors, but this does however not exclude that negative effects may apply. The employer will have to apply foreign social security legislation (not only payment of contributions but also other aspects such as e.g. payment of sickness cash benefits if this is the obligation of the employer under the applicable legislation). If substantial activities are taken up in the State of residence, only the legislation of that Member State applies, which deprives the person of all benefits (with the exception of sickness benefits in kind) from the State of the main professional activity (which was originally competent). This can be an important

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<sup>51</sup> See eg JORENS, Y., LHERNOULD, JP, FILLON, JC., ROBERTS, S., and SPIEGEL, B., "Think Tank Report 2008, "Towards a new framework for applicable legislation. New forms of mobility, coordination principles and rules of conflict", Project trESS (Training and Reporting on European Social Security, European Commission, DG Employment, Social Affairs and Equal Opportunities, Brussels, 2008, 15.

disadvantage because, sometimes in border regions, there are “rich” Member States where the main employment is exercised and “poor” Member States where the persons reside as frontier workers. If they do not perform substantial activities there, a system is set up to designate the applicable legislation either by the place of registered office or the place of business of the employer and the place of residence of the worker as connecting factor.

- He is subject to the legislation of the state in which the registered office or place of business of his employer is situated, failing that;
- The laws of the state in which the registered office or place of business of the employer is located, other than his state of residence, if his employers have their registered office or place of business in two states, one of which is the state of residence, failing that,
- The legislation of the state of residence, if at least two employers have their registered office or place of business in different Member States other than the state of residence.
- The connecting factor of being subject to the place of registered office of the employer is even more questionable. This is defined as the place where the essential decisions of the undertaking are adopted and where the functions of its central administration are carried out<sup>52</sup>. As it is even not required that one has to undertake normally its activities there, one can easily relocate its business which might lead to unfair competition.
- Is it justified to require an employer to pay the contributions of an employee who works for her/him for only a few hours per week, perhaps on a short-term contract in another Member State? In practice, employers do not always respect this rule, either for lack of information or because of the administrative burden implied?
- In the second place one could wonder if it is appropriate that the social security situation of a person is volatile and that it should not be better to avoid a switch of the legislation every time someone changes his workplace? Should one also not look for a protection as long as possible under the same state as long as one maintains its closest links in this state? Has social security also not the objective to cover long periods? The current implementing regulation defines that for the determination of the applicable legislation dealing with simultaneous activities the institutions concerned shall take into account the situation projected for the following 12 calendar months.<sup>53</sup> This is far too short, not realistic and could be extended. Situations should indeed not only be considered at one particular moment, but above all throughout their duration, thereby taking into account their characteristics and giving a more systematic character .

The highly mobile migrant workers are an example of the new societal developments and the new coming trends in mobility of EU citizens. In case the Coordination Regulations want to cope with these challenges in the forthcoming decades, one should dare to fundamentally reflect about the following options and changes in line with the above mentioned starting points:<sup>54</sup>

- To reconsider the notion, included in Regulation (EC) No. 593/2008 of 17 June 2008 (Rome I), according to which the place where the activity is performed is the **place from which the employee habitually carries out his or her work** in performance of the contract; for the self-employed worker this may be the place from which the activity is carried out, or the centre of interest of his or her activity in the sense of Article 13 (2)(b) of Regulation (EC) No. 883/2004;
- The general introduction of the **notion of the activity’s centre of interest**, with criteria to be defined, in order to take certain specific activities into account as well (artists, sales representatives, sportsmen *etc.*) or the performance of activities in different Member States,

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<sup>52</sup> Article 14 (5a) Regulation 987/2009.

<sup>53</sup> Article 14 (10) Regulation 987/2009.

<sup>54</sup> See in this respect our opinion in JORENS, Y. (ed), SPIEGEL, B., (ed), FILLON, J-C, and STRBAN, G., “Think Tank report 2013: Key challenges for the social security coordination: Regulations in the perspective of 2020 52-54”, Project trESS (Training and Reporting on European Social Security), European Commission, DG Employment, Social Affairs and Equal Opportunities, Brussels, 2013, 52-54.

this centre of interest thereby corresponding to the habitual place of principal activity wherever possible;

- To refer to the **notion of the closest link** of the activity to a Member State in order to determine the applicable legislation in a number of specific situations, in the first place those in which employees are posted or self-employed workers post themselves, but also other forms of temporary mobility, such as intra-group mobility or teleworking or the simple fact that an employment contract in a State is suspended for a short period to perform another activity in another State under a temporary contract.

The returning element in the search for solutions for the challenges is to better take into account, in the long term, the real conditions of the activities, to make sure that the applicable legislation is that of the State of the activity's centre of interest, that of the place where the principal activity is habitually performed, or that of the activity's closest link, all of which may overlap, or even be related to each other, and to avoid that the applicable legislation changes too much over a short period of time.

The 'closest link' principle could - without any doubt - be applied in the field of applicable legislation as well as in the field of provision of benefits (although these two fields are very much interrelated). Concerning **applicable legislation** it seems that today the solutions provided under Regulation (EC) No. 883/2004 in the vast majority of cases already correspond to the closest link principle. Usually the Member State where a gainful activity is exercised is the one to which a person has the closest link. Nevertheless, a careful examination of all cases seems to be advisable. It is, for example, evident that Article 13 (3) of Regulation (EC) No. 883/2004 does not respect this principle when self-employment is the main activity and the simultaneous employed activity is only very small and occasional one. Nevertheless, under today's coordination the Member State in which the employed activity (a little bit above the limit of being marginal) is exercised is determined as the competent State, while the closest link would make the Member State in which the self-employed activity is exercised the competent State. The same applies to cases in which activities are usually exercised in one Member State, but occasionally other activities are also exercised abroad (under the assumption that today Article 13 of Regulation (EC) No. 883/2004 is not applied, but that the Member States concerned regard this situation as consecutive cases of Article 11 (3)(a) of Regulation (EC) No. 883/2004). Such situations could concern e.g. artists with consecutive contracts, but also inter-convertible transferees who cannot benefit from the posting rule under Article 12 of Regulation (EC) No. 883/2004. Under the closest link principle, these situations would remain under the competence of the Member State where usually the activities are or have been carried out

As many employees are also working beyond the European Union - certainly if it is difficult to determine the place of work of someone in a virtual world - the Coordination Regulations should no longer, in their geographical scope of application, be limited to dealing with situations in which all persons concerned are present or perform their activity within this scope. Instead, primarily with regard to the applicable legislation and in the way that Article 14 (11) of the implementing Regulation already rudimentarily does, they should introduce provisions that cover situations in which all or a part of the persons concerned do not reside or are not established within their geographical scope of application, from the moment a professional activity is performed completely, partially or temporarily within this scope. Obviously, the resulting obligations would be enacted subject to international treaties which the European Union is part of in the framework of its external competences, thereby improving the coherence at the internal and external levels of coordination.

This does not imply that all the problems are now solved. One of the issues that might rise is if it will be the intention of the person concerned or the decision of a neutral observer based on objective criteria that will be decisive? Consider that a person starts his/her career in the home country and after ten years of activity there takes up a new job in another Member State for twelve months. One could say that the closest link still exists with the home country, as after these twelve months this

person intends to come back and end his or her career there, while another person is convinced that the Member State of new activity is the one to which the closest link exists, because he or she intends to continue working there for the rest of his or her active life. Another issue which should be considered is whether only the situation of the employed person has to be taken into account or if also the situation of the employer is relevant. For example, an enterprise which develops computer software could say that the closest link of all employment relationships of the programmers employed by that enterprise logically is to the place where this enterprise has its registered office, while under today's coordination the place where the programmers actually perform their work (usually from their home-offices) is decisive.

The application of this principle could shed some new light on the fundamental principles behind the conflict rules and the coordination regulations. It would also be better in line with safeguarding the balance of interest of the different stakeholders as well as finding a more coherent framework between the rules on the free movement of workers, the internal market principles and European citizenship.