
Kraków, 25 January 2019

SOCIAL SECURITY OF 'POSTED WORKERS' IN THE PROPOSALS FOR THE REVISION OF REGULATIONS 883/2004 & 987/2009

As representatives of Labour Mobility Initiative Association (LMIA), a non-governmental think tank involved in the matters related to the freedom to provide services and intra-European work mobility, regarding our expertise in the academic and practical field of the issue, we are deeply concerned by some of the amendments to the Coordination Regulations, especially those proposed by the European Parliament.

KEY ISSUES

1. **Subject to the legislation.** In draft Recital 16 *in fine* of the Preamble to the Regulation 883/2004, the European Commission's and the European Parliament's proposals replace the concept of being 'subject to the legislation of the Member State' with 'a prior link to the social security system'. This goes against the latest CJEU judgment in C-451/17 Walltopia and may result in excluding the most vulnerable persons from the benefits of coordination.

POINT OF CONSIDERATION In Recital 16 a reference to 'the legislation of the Member State' is needed instead of a reference to 'the social security system'. This would provide the wording consistent with Title II of the Regulation 883/2004. A reference to 'the legislation' is more inclusive and has a broader meaning than to 'the social security system'. It provides legal clarity in line with the recent case law and improves employability of vulnerable persons.

2. **The non-replacement condition** - The current interpretation of the 'non-replacement condition' set out in Article 12 Regulation 883/2004 differs from the concept developed in Directive 2018/957 and it may create unequal treatment of the sent workers subject to the sequence in which they are sent. If over-interpreted it allows only the first worker sent to the same place and the same work to enjoy the benefits of coordination. It imposes the negative consequences not so much on employers as on workers.

POINT OF CONSIDERATION - The non-replacement condition used in Article 12 should be consistent with the definition recently adopted in the revised Posting of Workers Directive 2018/957. The non-replacement condition should apply only after the maximum period of the continued application of the legislation of the sending Member State elapses. Under no circumstances should the 'non-replacement condition' prevent workers from the benefits of coordination.

3. **The largest share of work activities** - The new concept of 'the largest share of work activities' (Art. 13 Regulation 883/2004), as the only factor determining applicable legislation for persons pursuing their work activities in two or more Member States undermines one of the greatest achievements of coordination - the certainty of law. 'The largest share of work activities' may be assessed with certainty only *ex post* and may change frequently. As a result workers and their families will be affected by fragmentation of social security contributions and frequent shifts of applicable legislation.

POINT OF CONSIDERATION - Stable affiliation to the single legislation should be guaranteed for persons pursuing their activities in two or more Member States. Frequent changes of the applicable legislation and uncertainty thereof are contrary to the purpose of coordination. The European Commission's proposal and the Council's proposal seem to avert such consequences.

4. **Letterbox companies - no instruments to fight or prevent this abusive practice.** The ongoing revision of the Regulation 987/2009 brings about a unique opportunity to provide competent institutions with an easy-to-use practical tool to tackle the matter of 'letterbox companies'. Nonetheless, the current proposals are missing effective regulations in this regard.

POINT OF CONSIDERATION - We recommend adding new elements when identifying potential 'letterbox companies'. More attention should be paid to the lack of true intention of running business in the Member State of establishment as well as to personal or financial connections with client(s) in a host Member State.

BACKGROUND

On 13 December 2016, the European Commission tabled a proposal to revise Regulation 883/2004 on the coordination of social security systems and its implementing Regulation 987/2009¹. On 21 June 2018, the Council (EPSCO) reached its General Approach² in this regard. On 23 November 2018, the European Parliament's EMPL Committee finalized its Report³ and subsequently adopted the negotiation mandate.

European Union social security coordination rules are based on the principles intended to put the protection of insured persons above the interest of the Member States.

One of the profound achievements in this respect is the principle of the **single applicable legislation**⁴:

‘It is necessary to subject persons moving within the Community to the social security scheme of only one single Member State in order to avoid overlapping of the applicable provisions of national legislation and the complications which could result therefrom.’
[Recital (15) of the Preamble to the Regulation 883/2004]

This principle is intended to serve three aims:

1. to prevent simultaneous coverage of a number of social security systems,
2. to prevent persons from being left without social security cover, because there is no applicable legislation to them,
3. to avoid administrative complications, which may result from frequent shifts of applicable legislation.

To achieve these aims, an ‘algorithm’ has been designed that ‘pins’ a person moving between Member States to the legislation of one Member State only. This legislation is determined *ex lege*, which means that it is not an act of a free choice of any person, undertaking or a Member State⁵.

Although the Commission⁶ has clearly stated that amendments determining the applicable legislation for sent persons were only to clarify the meaning of the terms ‘*posted worker*’ and ‘*sent person*’, the European Parliament in the legislative process has exercised its right to alter this intention by proposing the substantial changes to the ‘algorithm’ itself.

¹ COM(2016) 815 final - 2016/0397 (COD).

² 10295/18, Interinstitutional File: 2016/0397 (COD).

³ A8-0386/2018, (COM(2016)0815 - C8-0521/2016 - 2016/0397(COD)).

⁴ Title II of the Regulation 883/2004/EU.

⁵ This ‘algorithm’ has been provided for in Title II of the Regulation 883/2004/EU and implemented in Title II of the Regulation 987/2009/EU.

⁶ See the fifth reason of the Explanatory Memorandum in COM(2016) 815 final.

EXPLANATORY NOTES TO THE KEY ISSUES

1. Subject to the legislation

In the Proposal for revision of the Regulation 883/2004, in Recital (16) *in fine* of the Preamble, the Commission has used the notion of ‘*a prior link to the social security system*’, instead of being ‘*subject to the legislation of the Member State*’⁷:

(16) (...) Moreover, the rules providing for the continuation of the applicable legislation should **only apply to persons who had a prior link to the social security system** of the Member State of origin⁸.

First and foremost, it should be pointed out that both terms cannot be equated, as ‘*subject to the legislation*’ has a broader meaning than a ‘*link to the social security system*’. Secondly, one should ask: was there an intended purpose for using the notion with a clearly narrower meaning or perhaps it was just an unintentional error?

Upon a thorough analysis, one may believe that **it looks like an unintentional error**. Otherwise it would mean that the Commission deliberately wants to exclude from the benefits of coordination all persons recruited with a view to being sent, who were not insured under the legislation of the Member State of their residence immediately before the start of employment⁹. This includes the most vulnerable ones, like:

- students;
- previously unregistered workers;
- unemployed persons with no right to social benefits.

Moreover, the Commission’s proposal is in direct conflict with the recent CJEU judgment in Walltopia¹⁰, which states that ‘*an employee recruited with a view to being posted to another Member State must be regarded as having been ‘just before the start of his employment ... already subject to the legislation of the Member State in which his employer is established’ (...), **even if that employee was not an insured person under the legislation of that Member State immediately before the start of his employment**, if, at that time, that employee had his residence in that Member State (...)*’.

⁷ Art. 12 (1) Regulation 883/2004 in conjunction with Art. 14 (1) Regulation 987/2009.

⁸ COM(2016) 815 final.

⁹ Art. 11 (3) (e) Regulation 883/2004: any other person to whom subparagraphs (a) to (d) do not apply shall be subject to the legislation of the Member State of residence (...)

¹⁰ Cf. judgment of the CJEU of 25 October 2018 in C-451/17 Walltopia, par. 51.

2. The non-replacement condition

According to Article 12(1) of Regulation 883/2004:

‘A person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted by that employer to another Member State to perform work on that employer’s behalf shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such work does not exceed 24 months and that **he / she is not sent to replace another person.**’

The aim of this ‘special rule’ is to ensure the continued application of the single legislation in the case when a worker is sent to another Member State to temporarily perform work there. In such the case, there is no reason to change the applicable legislation. However, if an undertaking circumvents ‘the temporary nature of posting’ by sending continuously rotating workers to perform the same task in the same place for unlimited time, the ‘non-replacement condition’¹¹ serves as a ‘punishment’ for such circumvention. As a result a worker sent to replace another worker may be directly subject to social security legislation of the receiving MS.

The major problem with the non-replacement condition is that **it imposes the ‘punishment’ not so much on employers as on workers** being sent to replace other persons. Such workers, due to no fault of their own, may be deprived of the benefits of the social security coordination. For this reason, fairness of the non-replacement condition should be called into question.

Due to the ambiguous wording of the expression ‘sent to replace another person’, the competent authorities and national courts have had a problem in determining its correct understanding which continues to this day.

This is mainly due to the fact the literal interpretation of this expression seems to disregard the principles of coordination which are intended to put protection of the insured persons above other interests, especially to avoid unnecessary frequent changes of applicable legislation.

Having regard of the above, the ‘non-replacement’ condition must not be interpreted as:

1. allowing only a single posting to the same place and the same work;
2. allowing to disregard the principle of certainty of law;
3. creating unequal treatment of the sent workers subject to the sequence in which they are posted, even by various employers and from various Member States (‘the first come, first served’ absurd).

¹¹ For more details concerning that condition see the Opinion of Advocate General H. Saugmandsgaard Øe of 31 January 2018 in C-527/16 Alpenrind.

Such the above over-interpretation of the 'non-replacement condition' would mean that during the posting, both the employer and the worker would be uncertain of the applicable legislation - contrary to the principle of the certainty of law¹². Where it turns out that the worker is not lucky enough to carry out his task as the first one in the same place, he would be deprived of benefits of coordination only because another worker, even sent by another employer and from another Member State, was lucky enough to have performed the same work in the same place first. At this point it is worth mentioning that the concept of the 'same work in the same place' is also ambiguous to such an extent that it has not had the uniform interpretation and it still triggers disputes concerning its proper understanding.

3. *Lex loci laboris*... *maioris*?

When it comes to determining the single applicable legislation for workers, the rule of *lex loci laboris* generally applies:

'(...) a person pursuing an activity as an employed or self-employed person in a Member State shall be subject to the legislation of that Member State'¹³

But *lex loci laboris* is not at all applicable to people who habitually pursue their work activities in two or more Member States. Let us imagine:

- a bus driver, a travel guide or railroad personnel who pass through several MSs every week on irregular routes,
- an architect supervising construction works alternately in various MSs,
- a gardener in Basel who lawns grass in three MSs within the vicinity of the same city,
- an assistant to an MEP working in France, Belgium, Luxembourg and in the MS of the MEP's election,
- a violinist playing in orchestras based in three MSs, each of them performing concerts in various countries.

Applying the *lex loci laboris* rule to workers who habitually work in more than one MS would jeopardize all the above-mentioned aims of the single applicable legislation principle with many harmful complications for workers, employers and institutions.

In this case, Article 13 Regulation 883/2004 makes the necessary derogation from a general rule of *lex loci laboris*¹⁴, because it eliminates the collision of various social security legislations by pointing at one legislation only in the situations where *lex loci laboris* would require a frequent change or simultaneous application thereof.

¹² See e.g. par. 100 and 97 of the Opinion of Advocate General H. Saugmandsgaard Oe of 31 January 2018 in C-527/16 Alpenrind.

¹³ See Art. 11(3)(a) Regulation 883/2004.

¹⁴ '(18) In specific situations which justify other criteria of applicability, it is necessary to derogate from that general rule', Recital (18) of the Preamble to Regulation 883/2004.

Practical situations may include people working in two or more MSs for one employer in the situations where:

- an employer established in the same MS as the one in which a worker resides, assigns him/her tasks in more than one MS, one of them being the MS of his/her residence,
- an employer established in the same MS as the one in which a worker resides, assigns him/her tasks in more than one MS, none of them being the MS of his/her residence,
- an employer established in MS other than the place of residence of the worker, assigns him/her tasks in more than one MS, one of them being the MS of his/her residence.

More complex cases involve work for more than one employer established in the same MS, where:

- one employer assigns tasks in one MS, and the other one does it only in another MS,
- each employer assigns tasks in two different MSs,
- none of the tasks is to be performed in the MS of worker's residence.

Or work for more than one employer established in different MSs, where:

- each employer assigns tasks in the MS of its establishment,
- each employer assigns tasks in two MSs,
- each employer assigns tasks in the third MS.

The most complex cases involve the combination of employment and self-employment carried out by the same person in two or more MSs.

In accordance with the current Coordination Regulations, the social security legislation in the above-mentioned cases is determined based on three positive criteria:

1. the place of residence of the insured person, combined with
2. the place of the insured person's substantial activity, or failing that
3. the place of establishment of the employer.

In the ongoing revision process, the Council has proposed to improve the 'algorithm', by clarifying the notion of '*the place of establishment of the employer*', and specifying the set of detailed criteria of what '*registered office or place of business*' means, whereas **the European Parliament simply deleted all the criteria**, and replaced them with a **new concept of 'the largest share of work activities**:

1. A person who normally pursues an activity as an employed person in two or more Member States shall be subject to: (...)

(b) the legislation of the Member State in which he/she performs the largest share of his/her work activities, if he/she does not reside in one of the Member States in which he/she pursues a substantial part of his/her activity as an employed person (...) [Proposed Art. 13 (1)

(b) Regulation 987/2009]

The expression is to be interpreted as follows:

For the purposes of the application of point (b) of Article 13(1) of the basic Regulation, the largest share of his/her work activities shall be determined by comparing the average weekly hours worked in each Member State where the person pursues an activity. [proposed Art. 14 Paragraph 8a. Regulation 987/2009]

The European Parliament's concept *prima facie* looks simple, but *de facto* it introduces a new rule, which can be described as ***lex loci laboris maioris***. In the situations where **the principle of single applicable legislation demands to derogate from *lex loci laboris***, the new ***lex loci laboris maioris* does exactly the opposite**.

What may be the consequences?

1. First of all, **'the largest share of work activities' can be assessed only *ex post***, so *lex loci laboris maioris* undermines one of the greatest achievements of coordination – the certainty of law.
2. Secondly, legislation of **the largest Member States located in the geographical centre of the EU** will be most frequently applicable for mobile workers, simply because statistically they will spend most of their working hours there.
3. Thirdly, *lex loci laboris maioris* will force **frequent changes of the applicable legislation** for EU workers exactly in the situations where they should be prevented.
4. Fourthly, keeping verifiable records of '*average weekly hours worked in each Member State*' will be an **unprecedented burden imposed on mobile workers**, especially for those who work in multiple MSs and for multiple employers.
5. Fifthly, it is a common fact that **abuse and fraud are fuelled by the lack of the certainty of law**. Particularly, regarding the cases where the social contributions are to be paid and which institution is competent to enforce them. *Lex loci laboris maioris* creates exactly this kind of uncertainty.
6. Next, the **number of disputes** between competent institutions will increase **beyond the administrative capacities**, as it will be exceptionally difficult to determine applicable legislation without having any doubts.
7. Last, but not least, workers' families will experience **uncertainty of law**.

Regardless of the above, before implementing *lex loci laboris maioris* one would have to know the answer at least to the following questions:

1. Who will be responsible for the calculation of the '*average weekly hours worked in each Member State*' for persons working for multiple employers?
2. How to calculate, claim and transfer already received benefits after '*average weekly hours worked in each Member State*' prove to be in a different Member State than anticipated?

3. Which institution will be the competent institution to issue a PD A1 certificate in cases where *'the largest share of work activities'* is impossible to predict in advance?
4. In which social security system should the employer register a worker who earlier habitually worked in a few Member States, but does not have any calculation available of his/her *'average weekly hours worked in each Member State'*?
5. If a Croatian employer hires a Croatian worker and later this worker works for another employer in Iceland and it turns out that *'the largest share of his work activities'* appears to be in Iceland, will the Croatian employer be obliged to register him in the Icelandic social security legislation and transfer all social contributions there?

4. The tool for identifying 'letterbox companies'

Various sources¹⁵ confirm that the most problematic circumvention of the current provisions on posting of workers are 'letterbox companies' operating solely as 'posting platforms'. They cause political tensions between Member States followed by accusations of turning a blind eye when issuing PD A1 certificates.

Identifying 'letterbox companies' is difficult, since the current Coordination Regulations lack effective criteria making it possible to objectively and effectively distinguish 'letterbox companies' from normally operating genuine service providers.

In most cases 'letterbox companies' are being registered as subsidiaries in indigent Member States where non-wage labour cost is low, with the aim of employing workers there and sending them back to the Member State of the parent company where the non-wage labour cost is high.

How to fight 'letterbox companies' without creating barriers to genuinely operating service providers? How to distinguish genuine undertakings carrying out cross-border services on a commercial basis from the ones operating solely as 'posting platforms' for their parent entities? Well, the most distinctive features of a typical 'letterbox company' are as follows:

1. it has no true intention of running business in the MS of its establishment;
2. it provides services to one or a group of permanent clients in a host MS;
3. it has personal or financial connections with its client(s) in a host MS;
4. it does not pursue any sales activities in the Member State of its establishment¹⁶.

¹⁵ See e.g. A Hunters Game: How Policy Can Change to Spot and Sink Letterbox-type Practices, Brussels 2016; Stop Letterbox Companies (EFBWW campaign); K. Sørensen, K. E. (2015). The fight against letterbox companies in the internal market, *Common Market Law Review*, 52(1); Committee of the Regions' opinion (2013/C17/12).

¹⁶ For a detailed description of the proposed criteria, see: M. Benio, M. Kiełbasa, S. Schwarz: 'Letterbox companies' - proposal for an effective identification tool, LMIA 2018.

It appears that in order to distinguish a 'letterbox company' from a genuine undertaking providing cross-border services, **more attention should be paid to the relation with clients**, because typical 'letterbox companies' exclusively or predominantly post workers to related entities, and therefore the entire or a predominant part of their income in the Member State of establishment is obtained by providing services to related entities.

The ongoing revision of the Coordination Regulations brings about a unique opportunity to provide competent institutions with an easy-to-use practical tool on the basis of the information provided by posting undertakings during the application process to combat '*letterbox companies*' without creating administrative barriers for genuine service providers. One may hope it will not be wasted.

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