

# Training module 4 – EU labour mobility regulatory framework: social security coordination and highly mobile workers

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Trainer

# Introduction of the trainer



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Overview training module

# Overview training module

- ✓ Indication of the competent state (Title II): recapitulation of main rule and main exceptions to the main rule
  - Lex loci laboris (workers/SE)
  - Posting
  - Simultaneous performance of the professional activities
  - Transportation work
  
- ✓ Legal value of the A1 form (case law)
  
- ✓ Cases of highly mobile workers
  - Civil aviation workers
  - Maritime transport workers
  - Other transportation workers (road and inland waterways)
  - Researchers
  - Shareholder directors
  - Platform work and virtual (home) work

## 2.1 Recapitulation - Indication of the competent state

(Title II): the principle of *lex loci laboris*

# Indication competent country: principle

- Main principle:

one and only one state is the competent state

(article 11, par. 1 Reg. 883/04)

- Exclusive and overriding effect of determination of competent state

# Quiz-intermezzo 1

- Case where a person is wage earner in country A and has also a self-employed side-activity in country B (where he/she resides)
- Principle of “only one competent” state (excluding and overriding effect) is to be applied:
  - for each professional activity performed: meaning that for every involved professional activity, the competent state is the state where that activity is performed?
  - or
  - for the totality of all activities performed: only one state will be competent for the two activities involved in the case?
- Compare old article 14 sub c Reg. 1408/71 and annex VII Reg. 1408/71
  - **Hervein II** (C-393/99 & C-394/99)



# Indication competent country: place of work / place of residence

- Which country is competent? Main principle:
  - for employed and self-employed persons:  
“lex loci laboris” (art. 11, par. 3 sub a)  
(the place where one is effectively working)
  - for professionally non-active persons:  
“lex loci domicilii” (art. 11, par. 3 sub e)  
(the place where the person habitually resides) = residual clause

*(any other person to whom subparagraphs (a) to (d) do not apply shall be subject to the legislation of the Member State of residence, without prejudice to other provisions of this Regulation guaranteeing him benefits under the legislation of one or more other Member States.” )*

## 2.2 Recapitulation: Exceptions to the principles

# Exceptions on the main principles

- 2 main exceptions to the rules concerning the determination of the competent state:
  - **Posting of workers / posting of self-employed (article 12/article 16 applied on posting)**
    - = Possibility to send workers for a (brief) period to another member state while keeping them insured under the social security system of the country of origin / Possibility to be sent as SE for a (brief) period to another member state while remaining insured under the social security system of the country of origin
  - **Simultaneous performance of activities in more than one MS (article 13)**
    - Can be various combinations of work as employed and/or self-employed worker

# Exceptions: Simultaneous performance of activities in more than one MS - employed

## 1. Activities as an employed person in two or more MS (art. 13 par 1 Reg 883/2004):

- A person who normally pursues an activity as an employed person in two or more Member States shall be subject
- (a) to the legislation of the Member State of residence if he/she pursues a substantial part of his/her activity in that Member State.
- (b) if he/she does NOT pursue a substantial part of his/her activity in the Member State of residence:
  - (i) to the legislation of the Member State in which the registered office or place of business of the undertaking or employer is situated if he/she is employed by one undertaking or employer.
  - (ii) to the legislation of the Member State in which the registered office or place of business of the undertakings or employers is situated if he/she is employed by two or more undertakings or employers which have their registered office or place of business in only one Member State.
  - (iii) to the legislation of the Member State in which the registered office or place of business of the undertaking or employer is situated other than the Member State of residence if he/she is employed by two or more undertakings or employers, which have their registered office or place of business in two Member States, one of which is the Member State of residence.
  - (iv) to the legislation of the Member State of residence if he/she is employed by two or more undertakings or employers, at least two of which have their registered office or place of business in different Member States other than the Member State of residence.
- > Substantial? min. 25% in terms of working time and remuneration (art. 14, 8 Reg. 987/09)

## Quiz intermezzo 2

A person normally pursues an activity as an employed person in two or more Member States (B/GER) and he/she **does NOT pursue a substantial part of his/her activity** in his/her Member State of residence (LUX).

The registered office of the employer is **outside the territory** of the EER/CH (for example India).

What is the competent state?

# Exceptions: Simultaneous performance of activities in more than one MS – self-employed

## 2. Activities as a self-employed person in two or more MS (art. 13 par 2 Reg 883/2004):

- *MS of residence* if he pursues a substantial part of his activity in that Member State; or
  - *MS in which the centre of interest of his activities is situated, if he does not reside in one of the Member States in which he pursues a substantial part of his activity.*
- >Substantial? min. 25% in terms of turnover, working time, number of services rendered, income (art. 14, 8 Reg. 987/09 )
- >Centre of interest? fixed and permanent place of business from which the self-employed undertakes his activities; the habitual nature or the duration of the activities pursued, the number of services rendered, and the intention of the person concerned are relevant (art. 14, 9 Reg. 987/09)

# Exceptions: Simultaneous performance of activities in more than one MS: employed – SE - CS

## 3. Simultaneously active as an employed person in one MS and as a self-employed in another MS:

- MS in which the person performs activities as an employed person (art. 13 par 3 Reg. 883/04)
  - Quid if multiple WE-activities are combined with multiple SE-activities?

## 4. Civil servant in one MS and employed or self-employed in other MS:

- MS in which civil servant (art. 13 par 4 Reg. 883/2004)

# Exceptions: Transportation work – new rules under Reg 883/2004

- Article 14, par. 1 sub b Reg. 1408/71
  - *a worker employed in international transport in the territory of two or more Member States as a member of travelling or flying personnel and who is working for an undertaking which, for hire or reward or on own account, operates transport services for passengers or goods by rail, road, air or inland waterway and has its registered office or place of business in the territory of a Member State, shall be subject to the legislation of the latter State, with the following restrictions:*
    - *(i) where the said undertaking has a branch or permanent representation in the territory of a Member State other than that in which it has its registered office or place of business, a worker employed by such branch or agency shall be subject to the legislation of the Member State in whose territory such branch or permanent representation is situated;*
    - *(ii) where a worker is employed principally in the territory of the Member State in which he resides, he shall be subject to the legislation of that State, even if the undertaking which employs him has no registered office or place of business or branch or permanent representation in that territory;*
- Disappears in Reg. 883/04 → main rule (art 11) and exceptions (articles 12, 13)



# Exceptions: Transportation work – new rules under Reg 883/2004

- Yet reappeared (over time again) as specific rule for
  - Civil aviation (activity as flight crew or cabin crew): article 11 par. 5
    - Home base
  - Maritime transport (activity as an employed or self-employed person normally pursued on board of a vessel at sea): article 11 par 4 and art. 15, par 3 Reg. 987/2009
    - Flag state
- Road transport and inland waterway transport? No → standard rule = lex loci laboris (art 11) and art. 12/13?

## Quiz-intermezzo 3

- A truck driver leaving every Sunday evening from DK driving to ITA and back at the end of the week to DK
  - Is this a case of posting?
  - or
  - Is this a case of simultaneous activities?
- Compare: university professor who in average, once a month, goes abroad for a couple of days (conference, teaching on invitation, research meeting,...)
  - Does he/she need to be posted for every mission?
  - or
  - Is this a case of simultaneous activities?
- In both cases: does it matter to differentiate between the two rules in order to determine the competent state?
- See also below (transportation workers)

## 2.3 Legal value of the A1 form

# Exceptions: forms and cooperation administrations

- the social security administrations of MS have to:
  - co-operate (article 76, 4 Reg. 883/04)
  - lend one another their good offices and act as though implementing their own legislation (article 76, 2 Reg. 883/04)
  - respond to all queries within a reasonable period of time (article 76, 4 Reg. 883/04)
  - without delay provide or exchange all data necessary for establishing and determining the rights and obligations of persons to whom the basic co-ordination Regulation applies (article 2, 2 Reg. 987/09)
- to confirm to which social security system a person who works in a cross-border situation is subject, the competent Member State delivers an A1-certificate (= former E-101 certificate).
  - Forms confirm underlying legal situation; they are not a constituting element (see below legal value forms)
- Paper forms → SED's

# A1 form (applicable legislation)

**A1** 

Coordination of Social Security Systems

Certificate concerning the Social Security legislation which applies to the holder

**3. STATUS CONFIRMATION OF YOUR POSITION**

<input type="checkbox"/> 3.1 Posted employed person	<input type="checkbox"/> 3.2 Employed, working in two or more States
<input type="checkbox"/> 3.3 Posted self-employed person	<input type="checkbox"/> 3.4 Self-employed, working in two or more States
<input type="checkbox"/> 3.5 Civil servant	<input type="checkbox"/> 3.6 Contract staff
<input type="checkbox"/> 3.7 Mariner	<input type="checkbox"/> 3.8 Working as an employed person and as a self-employed person in different States
<input type="checkbox"/> 3.9 Working as a civil servant in one State and as an employed/self-employed person in one or more other States	<input type="checkbox"/> 3.10 Flight or cabin crew member
<input type="checkbox"/> 3.11 Exception	<input type="checkbox"/> 3.12 Working as an employed / self-employed person in the State referred to under 2.1

# Replacing the “old E101”

Sample, not for official use

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## APPLICATION FOR CERTIFICATE A1 (E101)

POSTING OF WORKER / WORKING IN TWO OR MORE STATES

**ESTONIAN SOCIAL INSURANCE BOARD**  
 Information phone: 16006 (only in Estonia)  
 Calling from abroad: +372 612 1360  
 E-mail: [info@etsib.ee](mailto:info@etsib.ee)  
 Webpage: [www.etsib.ee](http://www.etsib.ee)

Necessary for the validity of Estonian social security (health, pension, and unemployment insurance) for the period of working abroad

During the validity of the certificate, the employer shall pay social tax, contributions to mandatory funded pension (in case of a person insured by state pension), and unemployment insurance premium to the Estonian Tax and Customs Board, and the employee shall have valid insurance protection in the database of the Estonian Health Insurance Fund

**Please fill in CAPITAL LETTERS**  
 The fields marked with \* are required

### 1. PERSONAL INFORMATION OF THE EMPLOYEE

*1.1 Personal identification code			
*1.2 Surname			
*1.3 Forename			
1.4 Previous names			
1.5 Gender SE in case of a foreign personal identification code	Male <input type="checkbox"/> Female <input type="checkbox"/>	1.6 Date of birth (dd/mm/yy) SE in case of a foreign personal identification code	
*1.7 Place of birth			
*1.8 Nationality		*1.9 Existence of valid right of residence / residence permit required for EU citizens from EU countries	Yes <input type="checkbox"/> No <input type="checkbox"/>
*1.10 Address in the state of residence	Street, house or apartment no. City/Village/County	Postal code	State
*1.11 Address in the state of stay Add the temporary address abroad	Street, house or apartment no. City/Village/County	Postal code	State
*1.12 Is the employee simultaneously a civil servant (in Estonia or abroad)?			Yes <input type="checkbox"/> No <input type="checkbox"/>
*1.13 Is the employee simultaneously operating as a self-employed person (in Estonia or abroad)?			Yes <input type="checkbox"/> No <input type="checkbox"/>

### 2. INFORMATION ON THE ESTONIAN EMPLOYER (UNDERTAKING OR SELF-EMPLOYED PERSON)

*2.1 Name			
*2.2 Commercial registry code			
*2.3 Address State the address on which to send the form	Street, house no. City/Village/County	Postal code	State
*2.4 Does the employer rent out work force?			Yes <input type="checkbox"/> No <input type="checkbox"/>
*2.5 Is the employer operating at the territory of Estonia?			Yes <input type="checkbox"/> No <input type="checkbox"/>
*2.6 Mark the activities Estonian 2-5 digit Classification of Economic Activities (SMTAA) code <a href="https://ar.treko.ee/ee/etsib/0016_02">https://ar.treko.ee/ee/etsib/0016_02</a>			

## Exceptions: Legal value certificate – from a rather formalistic approach....

- **Banks(C-178/97) & Fitzwilliam (C-202/97) / Herbosch-Kiere(C-2/05)**
- An E-101 certificate, issued by a Member State, is binding on the social security institutions of other Member States, even if that certificate is incorrect.
- **Rosa Flussschiff GmbH (C-620/15)**
- Confirmation of previous ruling + the binding effect of the A1-certificate is also applicable, even if the authorities of the Member State notice that the circumstances under which the employee is working do not comply with the conditions to be subject to the social security system of the member state.

# Exceptions: Legal value certificate – towards some opening towards rejection if fraud....

- **Altun** (C-359/16)
- National courts can set aside fraudulent A1-declarations,
  - *Addressing fraud and abuse of law are general principles of EU law*
- on the conditions that the decision is...
  - Based on data suggesting fraud (objective and subjective element)
  - The authorities of the receiving MS asked the authorities of the sending MS for reconsideration or withdrawal (*'reconsideration procedure'*)
  - The authorities of the sending MS fail to take the data and facts into account within a reasonable time
  - National court respect principles of fair trial
- reconfirmed case law: Commission/B (Case C 356/15) and Alpenrind (C-527/16)



# Exceptions: Legal value – how to apply “Altun”?

- ***Vueling Airlines*** (C-370/17 and C-37/18)

Uncertainty about the Altun-criteria: Is the domestic court able to disregard a fraudulent A1-certificate immediately (e.g based on national penal procedure)? (broad interpretation of the Altun-decision) or should he wait until the reconsideration procedure is started (limited interpretation of the Altun-decision)?

The ECJ ruled that the domestic court can only disregard the A1-certificate if...

- The procedure based on fraudulent data was started (requires possibly a suspension of the national procedure)
- The authorities of the sending MS fail to take handle the question or to take a decision within a reasonable time.
- Consequently: A judge or domestic court cannot merely disregard a fraudulent A1-certificate. The conditions set out in the Altun-judgment must be followed (limited interpretation)

## 2.4 Cases of highly mobile workers

# Highly mobile workers: civil aviation workers

- Legal basis (relevant articles/cases)
  - Article 11, par. 5 Reg 883/2004
  - Annex III sub Q Reg. 3922/91 as amended by Reg. 965/2012 and 83/2014 ('home base')/update Reg 883/2004 (pending)
  - **Nogueira & others** (C-168/16 and C-169/16) – Not social security but labour law!
- Activity as flight crew or cabin crew member performing air services = activity pursued in MS where the **home basis** is located
- Home basis defined in 'annex III' of original Reg. 3922/91: the location nominated by the operator to the crew member from where the crew member normally starts and ends a duty period or a series of duty periods and where, under normal conditions, the operator is not responsible for the accommodation of the crew member

# Highly mobile workers: civil aviation workers II

- Concept of home base interpreted on the basis of criteria determined in the aviation sector and that is agreed between the worker and the employer
- Eer (operator) is obliged to nominate a home base for its crew members
- Compare Reg. 83/2014 changed the concept: operator *assigns* (and not nominates) a home base → more stable, but Eer 'biased'?
- Quid different home bases? Art. 16 Reg.987/09
- Quid home base outside EU?
  - Article 11 and/or 13 prevailing again?
- Quid if workers resides outside EU and home base within EU?
- Quid if personnel works mainly from outside EU?

# Highly mobile workers: maritime transport

- Legal basis (relevant articles/cases)
  - Article 11, par. 4 Reg 883/2004: flag state
  - Article 15, par. 3 Reg. 987/2009: duty information Eer and administration
  - **SF** v Inspecteur Belastingdienst (C-631/17)
- An activity as an employed or self-employed person normally pursued on board a vessel at sea flying the flag of a MS shall be deemed to be an activity pursued in the said MS (flag state)
- If remunerated for such an activity by an undertaking or a person whose registered office or place of business is in another MS, the person shall be subject to the legislation of the latter MS if he/she resides in that state
- The undertaking or person paying the remuneration shall be considered as the Eer for the purpose of the said legislation

# Highly mobile workers: maritime transport II

- **SF (C-631/17):**
- In case of seafarers who maintain their residence in their MS of origin, whilst working for an Eer established in a MS on board a vessel flying the flag of a third state and travelling outside of the territory of the EU, the applicable national legislation for social security matters is that of the MS of residence of that person
  - Seafarer residing in LV
  - Eer in the NL
  - Flag: Bahamas
  - Vessel sailed over the German part of the continental shelf of the North Sea
- Extensive interpretation residual clause (art. 11 par 3 sub e)

# Highly mobile workers: road transport

- Legal basis (relevant articles/cases)
  - Article 13 par 1 sub b I Reg. 883/2004 (simultaneous activities)
  - **AFMB Ltd vs SVB (C-610/18)**
- *MS in which the registered office or place of business of the undertaking or employer employing him is situated, if he does not pursue a substantial part of his activities in the Member State of residence*

**AFMB Ltd C-610/18 (Art 14 Reg 1408/71):** employer of an international long-distance lorry driver is the undertaking which has actual authority over that long-distance lorry driver, which bears in reality, the costs of paying his or her wages, and which has the actual power to dismiss him or her

It is thus not the undertaking with which that long-distance lorry driver has concluded an employment contract and which is formally named in that contract as being the employer of that driver

- Employer by facts ('material Eer') and not by contract ('formal Eer')
- Transversal application of case? Art. 13, par. 1 Reg 883/04 and art. 11, par 4 Reg 883/04

# Highly mobile workers: road transport II

- Distinction between:
  - Posting of workers
  - Simultaneous performance of activities in more than one MSIs important (other competence rules; other conditions) but sometimes not so easy in practice (see quiz 3)
- ➔ Simultaneous performance of activities when (art. 14 par. 5 Reg. 987/09) :
  - while maintaining an activity in one Member State, simultaneously exercising a separate activity in one or more other Member States, irrespective of the duration or nature of that separate activity;
  - continuously pursuing alternating activities, with the exception of marginal activities, in two or more Member States, irrespective of the frequency or regularity of the alternation



# Highly mobile workers: director-shareholders

Legal basis: article 13 par. 3 Reg. 883/04

- Issue of simultaneous activities and diverging qualifications labour activities in MS
  - Director-shareholders / working shareholders in legal person
    - → qualified differently across MS: 'wage-earners' / 'self-employed'
    - → each country competent for qualification of activities on territory (De Jaeck/Hervein)
- Multiple activities (more than two activities in two MS):
  - Cascade approach?
    - 1) WE-activities prevail over SE-activities
    - 2) Residence indicates eventual competent state (art. 13 par. 1)

## Quiz-intermezzo 4

- Only one competent state → in case of WE and SE → MS of WE-activity prevails (art. 13 par 3 Reg. 883/04)
  - Can the competent state (WE-activities) requalify on the basis of its own legislation the professional 'self-employed' activities performed in the country where the person works as SE?
- or
- Does the competent state (WE-activities) have to respect the legal qualification given by the country where the person has his/her self-employed activities ?
- Example: John works as employee in Belgium for Belgian employer (80% of time); apart from this he has a mandate of director in a French company (qualified for French social security as employee), accounted for 20% of his overall work time
  - Competent state = B
  - Qualification of mandate activities?

# Highly mobile workers: researchers

- Legal basis
  - Articles 179-180 TFEU: European Research Area → research mobility
- Expert group on research mobility (2010) + LERU paper
  - Researcher mobility is more than intra EU movement
    - Short time mobility (multiple short-term stays)
    - Frequent change of research center/university
    - Transmigration
    - Researchers working simultaneously in different countries for different research entities
    - Research cooperation and virtual workplace(s) → employer?
    - Extra-EU mobility (third country researchers)
    - Sabbaticals
    - ...(in combination)

# Highly mobile workers: researchers II

- Existing exceptions – not easy to differentiate in practice
  - Posting
  - Simultaneous activities
  - Article 16: do not always lead to solutions. Adm. Commission (on art. 16): not to use it for specific groups of workers, but only for only for specific situations that may face all workers
- Tension with research mobility
  - Undefined time element of moving researchers:
    - migration, transmigration, mobility?
  - Research networks
    - absence of concrete link of research with specific place
    - who is employer?
- Quid extra EU movement/mobility?
  - Return? Family?
  - Intra EU mobility and growing legal complexity with 3rd country
- Growing understanding to have them connected to a single state from the beginning of research career (clicking system)

# Highly mobile workers: virtual and platform workers

Legal sources: **Partena** (C-137/11) and **X vs SvF** (C-570/15)

- Applicable legislation rules (*lex loci laboris*) are very ‘physical’; there where you work physically/geographically is indicating the competent state
- How do these rules apply to virtual work (platform work/telework/...)?
  - ✓ Action connected with the work activity (**Partena**; C-137/11)
  - ✓ Marginal partial teleworking at home (**X vs SvF**; C-570/15)

# Highly mobile workers: virtual and platform workers II

## *Diverse national classification of platform (non-standard) workers → consequence classification Reg.?*

- When does activity turn into professional activity (beyond marginal nature) and who decides on this? Hervein-De Jaeck logic? Quid multiple activities?
- Increase in number/variety of non-standard workers and “in-between” situations
  - “In-between”: activity as employed or as self-employed for Reg. 883/2004?
  - Cfr. Case law from era when SE did not belong to scope coordination Reg.
    - Unger (C-75/63), de Cicco (C-19/68), Janssen (C-23/71), Brack (C-17/76), Walsh (C-143/79), Van Roosmalen (C-75/63),...

# Highly mobile workers: virtual and platform workers III

- Marginal activities in various Member States
  - EU Reg 883/2004
    - See national qualification
      - Increasing use of thresholds (diverse across MS!) → increase number of marginal ‘non-workers’ (use Lex loci domicilii)?
    - Marginal >< substantial activities
      - 5% rule – even though of professional nature → coordination rules do not give effect (Art. 14(5)(b) Reg 987/2009 / X vs SvF C-570/15 / interpretation Adm Comm) → only for simultaneous activities?
      - 25% rule – simultaneous activity – if marginal → not relevant indicating competent state (residence)
      - Marginal work = irregular regarding work time / income patterns → calculate %?
- Potential impact **Bosmann** (C-352/06) and **Franzen** (C-382/13) → due to logics ‘Petroni’ principle → neutralizing exclusive effect Title II
  - ‘better’ protection national law (residence) than that provided under EU Reg (*lex loci laboris*)
  - Coordination at its limits when faced with systems of too different protection level
- Voluntary insurance: art. 14 Reg. 883/2004 → voluntary < mandatory

# Thank you

- For discussion....
  - The “transportation” clause to be reintroduced again? Common criteria for all transportation workers?
  - SEDs → too much translating the old paper form? Towards European IT-tools that can monitor and control performance of activity?
- Questions?