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Towards a new framework for applicable legislation

New forms of mobility, coordination principles and rules of conflict

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NEW FORMS OF MOBILITY, COORDINATION PRINCIPLES AND RULES OF CONFLICT

INTRODUCTION

Now that we are celebrating 50 years since the adoption of the EU regulations on social security for migrant workers, the Regulations themselves are at a watershed. The environment in which Regulation 1408/71 operates has changed in several ways since it was introduced in 1971. One of the most important changes has been to the nature of migration itself, with new patterns of work, including increasingly flexible labour markers reflected by the increasing use of the posting arrangements of the Regulation. The Regulation was set up at a time when workers had a full-time, permanent employment relationship and 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. People in general migrated for better working opportunities and conditions, including higher wages. Today there is greater diversity with a range of different types of migrant workers including for example, cross-border frontier workers, temporary migrant workers, pan-European management personnel, contributing to a growing pan European labour market. In particular migrant workers that are often working for short periods abroad are more in favour of further belonging to their social security system of origin and less of being integrated in their country of short employment.

It has been argued that the characteristics of new forms of mobility challenge the principles of the rules to determine the applicable legislation. A mobile worker, moving for relatively short periods, on short-term contracts, could be faced with a number of different social security schemes. The different legal statuses in the EU-countries, which may include for example, various definitions of employed/self-employed, and multiple criteria for minimum coverage, with short periods of insurance in many countries not providing any benefits, may leave European citizens without (adequate) social security cover.

Does this now imply that these “new forms of mobility” necessitate the revision of the provisions on applicable legislation within the Regulations? Do we have to look for separate rules of conflict for specific categories of migrant workers?

However, before we address this question we need to identify what is new about these “new forms of mobility”? It is clear that many of the groups of persons that are often proposed as a new and distinct category of mobile worker, are not in fact new, but are variants of categories of mobile workers that have existed for a long time. As such, the Regulation has applied to them for several decades. Some of these categories of mobile workers are moving between countries more frequently than in the past. However, whether this justifies a separate category, is questionable. Nevertheless there are growing numbers of mobile workers with increasing numbers of pan-European management personnel - managers working for different branches of multinationals and moving on a virtually continuous basis from one country to another. But even here, it is perhaps more an increase in numbers and intensity of migration than the appearance of a new form of mobility.

This report will first analyze the new patterns of mobility to determine whether there are in practise new forms of mobility that are common to all sectors of the economy. Part 1.1 will present some examples of increased mobility that call for more adequate solutions within the

applicable legislation. Part 1.2 will examine the argument that "new" categories of mobile workers require new and separate conflict rules. Part 2 analyses some core concepts (workplace, employer and residence), to determine whether they contain solutions for some of the problems identified. Part 3 analyzes the core principles derived from the EC Treaty and the possible conflicts which might occur between the interests of the different stakeholders - employee, employer or social insurance institution. Thus Part 3 identifies the fundamental principles behind the Regulation and asks whether these principles need to be adapted to provide more adequate solutions to some of the problems identified. Specifically this section presents and explores a new model containing different trade-offs and balances between the three key stakeholders and a revision to the traditional rule of single applicable legislation and *lex loci laboris*. Part 4 builds on the first three Parts to analyze in depth the strengths and weaknesses of possible solutions taking the case of a person who is simultaneously employed in more than one Member State as a case study to examine the basic principles of single legislation applicable, lex loci laboris and lex domicilii. Finally Part 5 proposes some recommendations for further work.

1. NEW FORMS OF MOBILITY

1.1. The concepts of “new forms of mobility”

In the absence of a definition of “new forms of mobility”, we suggest classifying the forms of mobility in three groups:

- forms of mobility which are not new but which have not been ruled adequately so far (e.g. frequent and recurrent cross-border professional migration);

- forms of mobility which are not new but which have become more frequent with new forms of technology and new means of communication. This includes, for example, consulting and expertise, transport, complex multi-company technical or productive projects, more than one employment-contract at the same time etc. These types of activities should be identified more exhaustively through a survey by the Commission.

- and actual new forms of mobility, supported by new types or forms of labour contracts, (such as fixed-term contract, interim contracts, tele-work, new types of self-employment), new work organization (international groups with integrated HR policy, bases in the transport sector, etc., network and platform work with e-transfer of intellectual work).

This operation of categorization is crucial as it enables us to distinguish which situations require new rules - and what type of rules - and those which only need to be adapted to the existing legislation.

The next section looks at some examples of new forms of mobility.

1.1.1. Some concrete examples of new (or less new) forms of mobility which need to be ruled adequately

Example 1: Mobile jobs and new forms of work organization

In addition to ongoing questions concerning jobs which, by their nature, include international mobility (seafarers, lorry drivers, airplane crew, etc.) and for which problems are long standing, an important issue concerns the rules applicable to employed persons (and self-employed) who permanently exercise their activity in more than one Member State from a base which can be the company seat (or subsidiary or branch) or their own residence (where they may have installed an office).

An example is a business manager who is employed by a company in Paris where she goes one day a month to report on her activity but resides in Poland near the German border. Each week, she spends three working days in Germany, one day in Slovakia and one day in the Czech Republic. Is it relevant to subject her to the French social security system (Art. 13 (1) of Regulation 883/2004) where she works only one day per month? Or would it be better for her to be subject to the legislation where she has her main activity (Germany) or the legislation of the place of residence (Poland -although one concern with this solution is that she has no more links to Poland than her residence, therefore it would be necessary to know if she has been previously subject to Polish legislation), or give her the choice, provided there are connections between her and the chosen legislation.

Example 2: Tele-work

An important telecommunication company has its headquarters in Luxembourg, where several hundred people are employed. In accordance with the European social partners' Framework Agreement on tele-work of 16 July 2002 (see also COM(2008) 412final on the implementation of this agreement) and the agreement on tele-work signed by Luxembourgian tele-workers on 21 February 2006, the employer plans to allow the employees who reside more than 20 minutes away from the company and who have certain functions to tele-work 3 days a week. Seventy-five employees whose residence is in France are interested.

However, the company head hesitates to sign the agreement, wondering where the contributions of these employees would have to be paid.

Coordination regulations provide that the applicable legislation is that of the State of work. However, this raises the question of where the State of work is situated? According to the Administrative Commission, tele-work is exercised at the place where work is actually undertaken (e.g. at home). If such an interpretation is correct, transnational tele-work would correspond to the case of persons working simultaneously in more than one Member State. Therefore, under Regulation 1408/71 and Article 13(1) 883/2004, the State of residence would be the competent State since employees would mainly work in France (3 days per week). This solution would imply an additional administrative burden (and additional costs since contributions are higher in France than in Luxembourg). Confronted with additional costs, the employer might decide to withdraw his proposal.

The Situation of tele-work might also raise difficulties when applying other conflict rules. Another example this time is related to posting. A person moves temporarily with her husband from Belgium to the Netherlands. She has a Belgian employer, with whom she continues to have an employment contract. She now carries out tele-work for her Belgian employer from her temporary home address in the Netherlands. Her Belgian employer has no office or no other activity in the Netherlands. Can the posting provisions apply in these circumstances? Are the posting provisions excluded as she decides on her own will to join her husband and was not sent by her employer?

The fact that neither Regulation 1408/71 nor Regulation 883/2004 addresses conflicts of law related to tele-work or to new forms of work where the workplace is virtual or multiple is unsatisfactory. This subject should be considered both in the light of the free movement of workers and of the EU goal of developing and securing tele-work.

In order to encourage tele-work, it would be reasonable to consider that the workplace is situated where the employer is located. After all this is a place where employees have to go on a regular basis to receive instructions, have their work record evaluated, to attend training and meetings, etc. This would also guarantee the equality of treatment between regular employees and tele-workers, as provided by the European agreement. The alternative solution, which would be to apply the law of the State of residence of the employee, may not be favourable to the employee and be a source of social dumping.

Example 3: Hyper-mobility within international groups

An international group based in Dublin employs several thousand people of over 50 different nationalities. This group has subsidiaries and branches in 15 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 200 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. The HR management is complex because, with the exception of the case of posting, the workplace legislation is applicable. It falls within the purview of the employer, if the identity the employer can be determined (systems of co-employment, of multiple employment, of sub-contracts, etc. make it hard to know the identity of the employer) to apply the local administrative rules in order to ensure that the employee is covered and pays the local contributions. Nevertheless also these cases could be regarded as being simultaneous employment which could result in a different applicable legislation than the one of the actual place of activity. (These examples show that the situation of persons who are simultaneously active has to be made more explicit.)

This obligation creates an important burden for the employer. Furthermore, it is unclear whether the systematic application of the workplace social security legislation is advantageous for the migrant worker, in particular if his or her career also includes extra-EU periods of employment.

One approach would be to make the posting provision applicable to cases in which, during the duration of the cross-border mission, the labour contract with the usual employer is maintained but frozen, while the employee is subject to another labour contract for the duration of the mission with the host company. Many concepts would have to be defined, to start with the concept of 'group' (some definitions already exist in the framework of labour law and business law directives, such as e.g. in Directive 94/45 in the European Works' Council, which could serve as a reference).

For other patterns of frequent mobility, Article 13 of Regulation 883/2004 is helpful as it provides more structured solutions. It is also more precise (see Article 14(5) and subseq. of the forthcoming implementation regulation, especially concerning the concept of simultaneous/consecutive activities and the bridges between these two situations). It could be suggested that the Administrative Commission be tasked with reflecting on developments in these concepts, as well as the concept of "main activity" exercised in the State of residence. Article 17 of Regulation 1408/71 (Article 16 (1) of Regulation 883/2004) could also be used for patterns of frequent mobility, in order to avoid frequent or inadequate changes of applicable legislation.

Example 4: Short-term contracts

For persons who are employed under short-term contracts (fixed-term or interim contracts) which imply frequent changes of legislation, one further change could be examined which concerns frontier workers when they are not posted or fully unemployed. For these people the distinction between the legislation applicable during the working period (workplace legislation) and the unemployment period (law of residence) sometimes creates unjustified problems and some of the Members of the Think Tank propose to clearly choose for one of both options.

1.2. Approach by categories?

1.2.1. Should the specificity of some categories of activities/employees be taken into account?

This section considers various responses to these new forms of mobility: Do they require a fundamental rethink of the actual (principles) of the coordination rules or are only smaller adaptations or clarifications required? Should new conflict rules be drawn up that are specifically adapted to these categories?

It appears that the increase in mobility may question the adequacy of the connecting factors in the conflict rules (such as for example, “who is the employer, where is the workplace and where is the residence of a person”*),* rather than the general principles.

Generally, it can be acknowledged that linking rules of conflicts with categories of employees is not a convincing approach. In addition, in the absence of a definition of “new forms of mobility”, traditional forms of mobility are sometimes confused with new forms of mobility. It appears, in line with the CASSTM (*see document of 4 October 2007, 278/07 REV*), that very few situations seem to require specific treatment.

The concept of “category” implies that a group of persons share the same characteristics which nobody else shares. In this meaning, posting does not belong to a category as such since everybody can be posted: posting is only a particular form of mobility for which specific rules of conflict have been designed. The claim for particular statuses must therefore be analyzed carefully.

To introduce a new set of sub categories would run counter to the policy pursued over the past decade towards increasing simplification, consolidation and reduction of exceptions. Once open, the lid of exceptions and sub categories would be difficult to close and precedents, once set, may lead to an increasing number of claims for special treatment. This would cause fragmentation and diminution of the regulations.

It has been suggested that, in fact, new forms of mobility are variants of traditional forms of mobility, for example, home based air-crews are a variation of the issues of transport workers in general. This perspective may lead towards an argument that Regulations 1408/71 and 883/04 are in fact reasonably well adjusted to new forms of mobility – it is rather an agreement over the interpretation of the concepts, including posting rules and Article 17, and importantly, effective implementation, that is required rather than any wholesale change to the principles or operative concepts of the Regulations.

Responses to the Administrative Commission also suggest that a large proportion of the problems with ‘new forms of mobility’ are procedural and administrative. These include for example, that administrations have difficulties managing the frequent changes in worker's situation, problems of data exchange, lack of information exacerbated by a lack of knowledge of rules on the part of employers and workers.

This suggests that the solutions might, at least in part, be found in administrative improvements and adjustments, for example, better knowledge of the regulations among national administrators, further improvement in cooperation between national institutions, more efficient exchange of information (which will be helped by the introduction of an electronic data exchange), and improving information to the workers and employers at EU and national level. These administrative problems and their solutions are of course not specific to ‘new’ forms of mobility but apply equally to ‘old’ forms of mobility.

This might in fact reveal that, when administered effectively, the existing rules are largely adequate to cope with new forms of mobility.

However this conclusion does not preclude that attention must be paid to the issues raised by increasing mobility within certain sectors.

Although there is some interest in adopting specific rules for **researchers and artists**, it has not yet been established that their situation justifies specific rules. Nevertheless recently it has been argued that Article 17 (of Regulation 1408/71) agreements should be used more frequently to take into account the special situation of researchers (Council Conclusions of 30 September 2008 – 13571/08). We recommend that surveys be carried out by the

Commission to identify the mobility patterns in these sectors, in order to determine whether they are particular categories with specific needs, or not. Additional problems relate to the fact that these persons can find themselves in different situations according to the activities they perform implying different possible rules that might be applicable. Nevertheless in this context another phenomenon has to be mentioned. There are more and more occasions where the Commission proposes measures mainly in other fields but which also concern aspects of social security (instruments on researchers, the blue-card initiative, the framework initiative for access to employment of third country nationals etc.) It should be strongly recommended that experts in the field of social security should be invited to address the social security aspects of these initiatives. In the past this has not always been the case.
The Expert Group working under DG RTD supervision (Era Green Paper, realizing a Single Labour market for Researchers), came more or less to the same conclusion, asking nevertheless to explore the opportunity and feasibility of specific rules of conflict for mobile researchers:

- Competence of single national legislation throughout, or for part of, the research career. The choice of the legislation applicable may depend on the type of mobility and could include:
    - application of the legislation of the first Member State in which the researcher has worked, as a researcher (for a given length of time);
    - applicable legislation chosen by the researcher, provided there is a close connected with the country and the chosen country does not object;
    - application of the legislation of the State of residence (this may give rise to definitional questions).

- Promoting posting procedures through:
    - improving information for researchers and research institutes;
    - inviting the Administrative Commission to encourage Art. 17 agreements (Regulation 1408/71) for researchers to avoid hindrances for the free movement of these persons."

Airplane crews and international lorry drivers are actual categories since they share a specificity linked with their activity: going from one place to another in the EU without exercising most of their activity in one Member state which makes the principle of *lex loci laboris* inapplicable. These two categories are already taken into account by the coordination rules, explicitly by Regulation 1408/71. Regulation 883/2004 does not have a specific provision for this category, so the normal provision for persons engaged in an occupational activity in more than one Member State applies. Suggestions made by the Commission in favour of making special applicable rules of conflict explicit under Regulation 883/2004 must be supported, although references to the seat of the company, the branch or a permanent representation should be adapted to the concept of "home base" (and an equivalent concept for lorry drivers). A solution could be envisaged that is in conformity with the conflict rules applicable in the field of labour law.

For **posted employees or "self posted"** self employed workers, it must be recalled that Regulation 883/2004 has already modified applicable rules, making them more flexible and accessible. The fact that the implementation regulation will facilitate the administrative burden thanks to the dematerialization of procedures, makes no further improvement necessary. The main challenge consists of improving the level of cooperation between national administrations, which does not depend on amendments to the applicable texts. The only exception concerns the necessity to define whether posting is compulsory or not when its conditions are met. In other words, employers and employees should know if there is an option or not between posting and expatriation. Another point which could be further clarified is the concept of "similar activity" in cases of posted self employed persons.

Some **multi national organizations and their representatives** are pressing for a lex specialis to facilitate the international movement of employees. One option would be for the employee who is highly mobile within a multinational organization to retain one legislation throughout her or his career. One question is, which legislation and who decides on the criteria? What would be the risks? While for senior staff, attractive occupational and private insurance may be part of the remuneration package which makes these people less affected by changes to the applicable legislation, there might be scope to offer less favourable terms to less senior staff. Multi national organizations are also interested in going a step further to a completely separate system to facilitate the international 'in house' movement of employees which could potentially link up with other non EU schemes (an "opt out" from any statutory social security scheme of any Member State and thus also from coordination under Regulations 1408/71 or 574/72). A less radical solution could be to extend the posting procedure (or make it clear that it applies) to movement within an international concern where the employment contract is suspended during the period of a new employment contract with the branch office (etc.) in another Member State. It might be useful for the Think Tank to construct a model of such a system in order to better examine this proposal.

It has to be highlighted that these categories of persons are presented as examples where we think the need for further examination is most urgent. This does not rule out that other categories are also confronted with problems. Other groups could be included in the future work of the Think Tank as necessary.

2. DEFINITION OF CORE CONCEPTS

The issues identified above make it clear that some new forms of mobility will require new definitions and thinking on the impact on the coordination rules of the concepts of "employer", "workplace" and "residence" which must be redrafted in order to take into account new technologies and new methods of communication. Indeed, the physical location becomes much less relevant in a virtual economy with complex structure and organization of firms.

2.1. The concept of « workplace »

With new means of communication and technologies, it may be difficult to identify the location of the physical workplace. Administrative criteria (such as the seat of the employer) may be out of date.

Although it is not the role of the coordination regulations to define precisely what the workplace is and where it is located, they can set rules which enable the goals of coordination to be met, such as to resolve conflicts of law and define a single and mandatory applicable legislation. Therefore it could be advisable to follow the example for "residence" (Art. 11 of the new implementing Regulation) and give some guidelines to identify the workplace in cases of doubt. When activities are exercised in multiple States, the legislation of a State where a minor activity is exercised should not be considered competent and more importantly, neither should the legislation of a State where no activity is completed. Otherwise, the priority of the workplace legislation would not be respected.

Regarding workers whose activity is by nature mobile (airplane crews, lorry drivers etc.), rules of conflict should be disconnected from the seat or location of the employer. New rules of conflict should be linked with the actual activity: home base such as defined by Regulation 1899/2006 for airplane crew or an equivalent for road and railway transportation based on concrete criteria, such as where the driver loads the lorry and returns after delivery (*with comparison with rules of conflict set by Regulation 593/2008 on the law applicable to contract obligations and Regulation 44/2001 on conflicts of jurisdiction*).

In addition to these 'classical' groups of workers who have to work in several Member State because cross border transport cannot function otherwise, there also other groups that should not be neglected where the identification of the workplace can cause problems. Experience shows that especially in cases where work does not need to be carried out in a fixed place (such as for example, a shop, a building site or an industrial plant) but can be undertaken, for example, from a computer sited anywhere and linked to the internet) workers are very flexible to determine for themselves their workplace or workplaces and thus "choose" the applicable legislation which best suits their requirements.

2.2. The concept of « employer »

With modern business organizations, it can be very hard to identify the employer or the sole employer. Connected to this is the problem that ownership of the equipment and employment of the personnel increasingly rests with different undertakings, staff being typically employed by global employment companies.

It is not the role of coordination rules to define precisely the concept of employer or to decide who the employer is in particular situations. After all the ECJ has ruled that the definition of

"employed" and "self employed" activity belongs to national legislations. In addition, the theme of new forms of mobility is not directly connected with the concept of employer, except for intra-group mobility when an employee can be subject to simultaneous contracts. In such a case, clarification is needed on how to define, from a social security perspective, the identity of the employer. This question challenges the distribution of competence between the national and Community levels.

Nevertheless an important point is whether the employer is situated inside or outside the EU. While Regulations 1408/71 and 883/2004 apply to companies located within the EU area, some companies fall outside their scope by being seated outside the EU. The application of bilateral conventions between Member States and third countries is not efficient. It is also an illegal process regarding the distribution of competence between the EU and Member States. The Commission should invite Member States to further reflect on this subject (taking into account experience gained with Art. 14 (11) of the new Implementing Regulation).

2.3. The concept of "residence"

The concept of "residence" is loosely defined by Regulation 1408/71 as the place of "usual stay". Many elements sharpen the concept:

- In the framework of Regulation 1408/71, it is a factual concept based on a set of objective and subjective elements (will of the person) and not on administrative criteria which, taking into account the national legislation on residence, would usually define it by linking the concept of residence with the length of stay. Therefore the concept of residence, in the light of social security coordination rules, differs from the concept of residence under Directive 2004/38 and should not be influenced by it.

- it belongs to each legislation to decide if a person resides or not on its territory. In the recent *Bosmann* case (C-352/06), the Court ruled that " *it is for the referring court to determine whether Mrs Bosmann's return to the family residence in Germany at the end of each working day is relevant for the purposes of deciding whether she 'resides', within the meaning of the German legislation, in that State*" (§36).

- If there is a doubt or a dispute between Member States concerning the location of the residence of a person, the ECJ applies the concept of the "center of interests" of the person. This is the method chosen by the new system of coordination, with minor changes, except the fact that if it is impossible to set the place of residence on the basis of legal criteria, it should be based on the intention of the person. The clarification introduced by Art. 11 of the new Implementing Regulation will add clarity. This is an important issue which requires further investigation.

Residence should remain the second rule of competence after the workplace, both as a substitute that is applicable to inactive persons and as a subsidiary criterion when the workplace principle is not relevant or does not lead to justifiable results. This assertion must be confronted with personal situations and remains subject, in this regard, to the test of proportionality. This is to say, when applied to active persons, two limits should be set to the application of the *lex domicilii*: the State of residence should not be competent if only a small part of the professional activity of the person is carried out there (unless e.g. no other Member State can be considered as the State of main activity); it should not be competent if the administrative burden on the employer is too heavy.

3. FUNDAMENTAL PRINCIPLES OF COORDINATION RULES: FINDING A BALANCE BETWEEN STAKEHOLDERS (EMPLOYEES, EMPLOYERS, INSURANCE INSTITUTIONS)?

The difficulties and lack of clarity confronting highly mobile and flexible workers, raise another, more fundamental, debate on whether there is a fundamental conflict between the objectives of the rules determining applicable legislation – whether they are intended to support the market or to protect workers and other mobile individuals, and consequently, what should be the point of departure for revision (if there is a need for such) – the mobile individual or the employer? In a broader sense, the discussion leads to questioning the fundamental principles on applicable legislation on which the Regulations have rested for the last half century: in particular the rule of the single applicable legislation and *lex loci laboris*. The question is perhaps not so much whether *lex loci laboris* should be replaced by other connecting factors but whether the fundamental principle of insurance under one legislation only, is still appropriate?

The Think Tank took the opportunity to revisit the fundamental principles on applicable legislation and in this light we will discuss core topics in this report. Options will be investigated without respect for boundaries and taboos. Two central, often interconnected, questions, which in turn give rise to numerous further questions, will be developed to allow us to propose a new model for conflict rules. These are:

- should the coordination rules try to seek a different balance between stakeholders (employees, employers, insurance institutions)?

- should the coordination rules adapt the single legislation applicable principle and review the *lex loci laboris* rule of conflict?

An alternative framework could be proposed that would try to find a different balance between the three stakeholders involved in the implementation of the Regulations: the employees, the employers and the insurance institutions.

3.1. EU Citizens' interests at the heart of coordination regulation

It is important to remind ourselves that workers remain at the heart of the coordination rules. The first principle stated in the preamble to Regulation 883/2004 directly reflects the task the Community has set itself in Article 2 of the EC Treaty - to promote, *inter alia*:

- a high level of employment and of social protection,
- the raising of the standard of living and quality of life.

Thus, recital 1 of preamble of Regulation 883/2004 states 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*". I.e., in support of the fundamental aim of the Community set out in Article 2 of the EC Treaty, the coordination of social security is to facilitate free movement of persons and, at the same time, contribute to improving the standard of living and conditions of employment of people exercising the right to free movement.

It is notable that the statement is not that free movement will, through more efficient allocation of factors of production, increase everyone's, including people moving within the Community's, standard of living and conditions of employment, but that it will specifically

improve the standard of living and conditions of employment of people exercising their right to free movement.

It may be derived from this statement that free movement should, as a minimum, not *reduce* the standard of living and conditions of employment (including social security rights) for mobile workers and other citizens. The recent *Bosmann* case (C-352/06) could reinforce this principle (*see below*).

Regulation 883/2004 is clear: coordination rules are made to serve the interests of workers. In this respect, the fact that almost all provisions concern benefits, leaving little space for coordination of contributions, is illustrative. The preamble goes in the same direction:

- Recital 5 asserts the principle of equality of treatment – that a person exercising his or her right to free movement is treated neither better nor worse than a host Member State national: "*It is necessary, within the framework of such coordination, to guarantee within the Community equality of treatment under the different national legislation for the persons*".

- Recital 13 asserts the "rights and advantages" of persons moving within the Community and their dependants and survivors: "*The coordination rules must guarantee that persons moving within the Community and their dependants and survivors retain the rights and the advantages acquired and in the course of being acquired".*

- Recital 44 states that the objective of the whole exercise is "*to guarantee … the right to free movement of persons…*".

One (the most important) role of social security is to protect the interests of workers and other citizens from the operation of the market which might otherwise leave people exposed and vulnerable. Essentially, it is a social contract gained through struggle to share the risks of ill health, bearing and bringing up children, disability, unemployment, old age and other eventualities so as to maintain the standard of living and quality of life and prevent poverty during the life course.

If coordination mechanisms prevent loss of rights consequent on free movement, they do not create new rights at national level. Notwithstanding *Bosmann* (C-352/06), recurrent ECJ cases show that provisions on applicable legislation are not intended to safeguard a minimum standard. Should one Member State have only a very low level of social protection and leave it up to the individual to safeguard sufficient coverage by way of private insurance the rules on applicable legislation would not prohibit that this legislation becomes applicable (*see below*). The case of the self employed mentioned under Article 14(a)(4) of Regulation 1408/71 ("*If the legislation to which a person should be subject in accordance with paragraph 2 or 3 does not enable that person, even on a voluntary basis, to join a pension scheme, the person concerned shall be subject to the legislation of the other Member State which would apply apart from these particular provisions…*") is the only exception which could be taken as an example for a minimum coverage. It is interesting to note that this safety net has not been transposed into the new Regulation 883/2004.

Bearing in mind this context, it is interesting to investigate two approaches to see how they can be combined:

- taking into account the interests of stakeholders in addition to those of citizens in the implementation of coordination rules;

- applying the coordination rules in order to guarantee the highest possible benefits among Member States with which citizens are connected.

3.2. Is there a need for a different balance between stakeholders?

3.2.1. Should coordination rules try to search for a better balance of interests?

Current coordination rules, as well as those set out in new Regulation 883/2004, face criticism. However, criticizing current rules of conflict is insufficient if no alternative solution is suggested.

Thus, we propose exploring a new framework which could lead to more flexible and tailored rules of conflict than those introduced 50 years ago. Regulation 883/2004 has not itself modified the historical foundations on which the system of conflict of law has been built. Keeping in mind that coordination rules have been designed to serve the interests of migrant persons, the goal would be to reach a better balance of interests: to take more account of employees' interests, but at the same time to take real account of companies' needs, and to evaluate the impact on national social security administrations.

Attacked from all sides by EC Treaty principles – European citizenship, freedom of movement, free movement of services and goods, etc. – coordination regulations look like a too-technical system, outdated and therefore subject to being overruled by more fundamental principles. Several recent ECJ cases are directly based on EC Treaty rules, leaving aside coordination rules (see for instance *Nemec* (C-205/05) *and Bosmann* (C-352/06)). Even if one could question this development in ECJ caselaw, the tendency perhaps illustrates the lack of adaptation of Regulations 1408/71 and - although yet not applicable - Regulation 883/2004.

The coordination provisions were set up with a clear market integration function and as such the rules on applicable legislation (in particular through the *lex loci laboris*) had as their main function to contribute in setting up the internal market. However, the European social integration of today has other objectives. EU citizenship is a clear example. It is the person that comes to the centre of interest (irrespective of his or her economic status), and no longer only the worker.

Also, it must not be forgotten that the determination of the competent legislation has a direct impact on the employer. Even if s/he is not located in the competent state, s/he is subject to all social security obligations in connection with the employee(s) concerned. This is a good reason to try to reach a better balance between the interests of the employees and the employers, by avoiding unclear or unrealistic rules of conflict.

It seems to be necessary to revisit the main purposes of the of coordination legislation to ask whether the rules are always in tune with the goals of free movement of workers? Two examples can serve to illustrate the point:

-is it relevant to subject a person to the social security scheme of a country with which he/she will have been in contact for only a very short period of time throughout the course of his or her career, for instance a researcher doing his or her post-doc abroad before settling down in one Member State for the rest of her/his career?

- is it relevant to subject highly mobile workers, such as performing artists, to a different competent legislation each time they change the country in which they work?

In order to reflect on a better balance of interests between stakeholders in the framework of free movement of workers, European citizenship and internal market principles, a set of questions can be asked, among which are:

- Should employers and/or employees be allowed, in specific circumstances, to choose the applicable legislation or to "opt out"?
- Should employers be allowed, in specific circumstances, to opt out of national social security schemes, for instance in order to tailor better fitting coverage for their highly-mobile employees?
- Should the principle of single legislation applicable be called into question?
- Should the "*lex loci laboris*" be adapted?
- Should the concept of "workplace", if not contested, be reshaped in light of new forms of mobility and what problems would this resolve? The same question arises for the concept of "employer", which is becoming increasingly difficult to grasp due to new and complex forms of work organization, and also for the concept of "residence".
- Should the application of "Article 17 agreements" (under Regulation 1408/71) be more transparent and, at the same time, encouraged?

3.2.1.1. Balancing the Stakeholders' interests: a relevant challenge?

Besides the idea of "interest of workers" which must be clarified, it is relevant to assess the place of the "interests of employers" in the structure of rules of coordination. Indeed, if these rules are based of Articles 39 and 42 EC Treaty (free movement of persons), they must be combined with other fundamental principles of the EU, mainly the internal market and principles of EU Citizenship. Indeed, the posting rules derive from the principle of free movement of services.

It is, however, interesting that to date no reference has been made to Art. 49 EC Treaty as the legal basis for the coordination regulations. Does this suggest that priority should be given to the interests of the employees? In the case of *Vogler* on the other hand, the ECJ pointed out that the differences between national social security schemes give rise to restrictions on the freedom of movement laid down by Articles 8a, 48, 52 and 59 of the EC Treaty (now, Articles 18, 39, 43 and 49) (see *Vogler*, Case 242/99, r.o. 22).

The interest of employers has become more visible in ECJ cases. In order to evaluate the compatibility with EU "social legislation", European judges often take into account the administrative and economic burden (e.g. *Mazzoleni*, C-165/98) and, recently, the consequences on "small and medium-sized undertakings" (e.g. *Michaeler*, C-55/07 and C-56/07). The ECJ tries to balance economic and social principles (e.g. *Laval*, C-341/05 and *Viking*, C-438/05), although economic matters prevail. Should this trend apply to social security coordination rules?

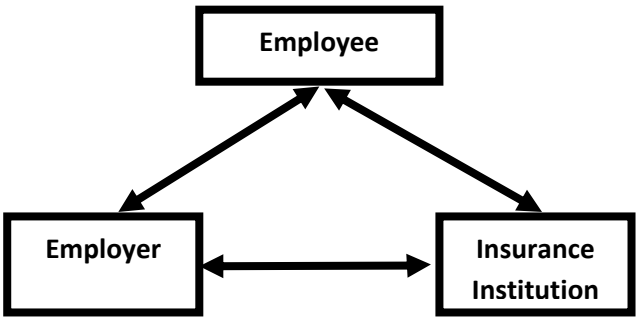
Even Article 39 EC Treaty can be interpreted in connection with the interests of the employer, which the ECJ admitted in the *Clean Car Services* case of 7 May 1998 (case C-350/96) : "*The rule of equal treatment in the context of freedom of movement for workers, enshrined in Article 48 of the EC Treaty, 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*".

If the interests of employers and employees can converge in some situations, they are opposite in others. The reconciliation of their interests, as well as those of the national social security administrations, could be one the important challenges for tomorrow's new rules of conflict of law. The principle of proportionality could play a key role.

For example, is it justified to require and 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 several situations, none of the three stakeholders benefit from the effective application of the rule of conflict (see example below).

Should propositions of amendments of coordination rules be made, it is necessary to carry out an **impact assessment** in order to know which parties are favoured and which are disadvantaged.



Whenever the legislator intends to examine new approaches to coordination in the field of applicable legislation, the following elements for consideration should help to make the advantages and disadvantages of any model under discussion more evident and so help to find a rational solution.

Whatever options are envisaged, the legislator must cross-check them with these – often contradictory – interests:

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 (this is a point we cannot deal with in this exercise)

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 (this is a point we cannot deal with in this exercise)
- 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. In any case, the EC Treaty does not oblige policy makers to take into account of all these aims on the same level. It appears that **only a balanced solution** is justified which takes into account the (or at least some of the) interests of all the parties concerned. This is why it seems advisable that every new approach to coordination that is proposed should include an **impact assessment** for the stakeholders.

3.2.1.2. Balancing the Stakeholders' interests: the unclear stance of the European Court of Justice

The question remains however if the three actors involved should be attributed the same weight? Or does the interest of the employee take priority over that of the employer? Is there a risk that employers and national administrations might undermine the fundamental interests of mobile workers and citizens to be protected against loss of income leading to an increase in the risk of poverty at critical and vulnerable moments during the life-course? 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. Can we draw the conclusion that the Regulations are set up to protect the interest of the employee rather than to facilitate the administrative cooperation?

ECJ case law should throw some light on the question.

Did the ECJ place the interest of the three parties involved on an equal footing? 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 (Manpower, Case 35/70, r.o. 10). In this case clear reference is made to the three parties. Case law which was later confirmed in e.g. *Fitzwilliam* (Case 202/97, r.o. 28) or *Plum* (Case 404/98, r.o. 19). Both 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.

More generally, however, the ECJ has pointed out that, according to its case law, the provisions of Title II of Regulation 1408/71 constitute a complete and uniform system of conflict rules and that 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 1408/71 are not left without social security cover because there is no legislation applicable to them (see e.g. *Luijten*, Case 60/85; *Kits van Heijninghen*, Case 2/89; *De Paep*, Case 196/90, r.o. 18; *Fitzwilliam*, Case 202/97, r.o. 20; *Kuusijärvi*, Case 275/96, r.o. 28; *Brusse*, Case 101/83, r.o.

14). The reason for one single legislation applicable is clear. Free movement would be hindered if both workers and employers were subject to double social security charges for insurance against the same risks under the different legal systems. The conflicts between different legal systems could therefore operate to the detriment of the migrant. This all fits within the market integration function. These provisions clearly go in the direction of prevalence for the worker. As the ECJ made clear in the Case *Brusse*, it is precisely in order to achieve that aim that the general principle laid down in Article 13 (2) (a) of Regulation 1408/71 provides that a worker is to be subject to the legislation of the Member State in whose territory he is employed.

However, in the same case, the ECJ pointed out that this general principle is nevertheless subject to the special provisions of Articles 14 to 17. In certain specific situations, the unreserved application of the rule set out in Article 13 might create, instead of prevent, administrative complications for workers as well as for employers and social security authorities, which would entail delays in the forwarding of employees' files and, therefore, place obstacles in the way of their freedom of movement (*Brusse*, Case 101/83, r.o. 16). Here again, the Court seems to emphasize the interests of the three parties as forming part of the objectives of the conflict rules in the Regulation. In this last case, the three different parties are named and the interests of all three should be taken into account. However, the reasoning of the Court appears to suggest that notwithstanding the fact that administrative complications should also be avoided for the social security institutions and the employer, the priority is to serve the interest of the employee, which could be jeopardised if his or her case were to be delayed. This would form an obstacle to the free movement of workers. Central in the reasoning of the Court is the avoidance of administrative complications, not the height of benefits or contributions to be paid. The Court therefore seems to follow a somewhat narrow approach of the interest of the employee. One could indeed question whether the limited administrative complications are always in the interest of the employee, compared to presumably the higher level of benefits one could receive in another Member State. The latest *Bosmann* (C-352/06) case also confirms this statement. If someone wishes to receive a higher benefit or even a benefit at all, it will depend on the Member State concerned and its national legislation. This seems to indicate that in case of a conflict between the lesser administrative complications in the case of the application of the legislation of Member State A versus the higher benefits for an employee in the case of the application of the legislation of Member State B, the Court would follow the first option. It might be questioned to which extent such reasoning would make the objectives of the Regulations which, as discussed above, aim to contribute towards improving the standard of living, contrary to the principles of the EC Treaty? The coordination of the conflict rules therefore does not seem to immediately guarantee the objective of applying the coordination rules in order to guarantee the highest possible benefits among Member States, with which citizens are connected.

If we look at the case law on the general principles of free movement rather than at the secondary legislation, there is a similarity between the free movement of persons and the free movement of services. There is growing convergence under the Articles 39, 43, 49 and even Article 18 EC Treaty on citizenship, notwithstanding the fact that all these articles reflect different interests. Impediments to the different freedoms are not allowed, unless they are justified by public interest requirements. In addition, the measures have to be proportionate. However, in the case of *Terhoeve* (Case C-18/95), the ECJ made clear that Art. 48 of the EC Treaty (now 39) precludes a Member State from levying, on a worker who has transferred her/his residence from one Member State to another in the course of a year in order to take up employment there, higher social security contributions than those which would be payable, in similar circumstances, by a worker who has continued to reside throughout the year in that Member State without the first worker also being entitled to additional social benefits. The Court clearly states that considerations of an administrative nature or difficulties of a technical nature, linked to particular methods for levying tax and

social security contributions, cannot justify derogation by a Member State from the rules of Community law (*Terhoeve*, Case C-18/95, r.o. 45). This case law was also repeated under the framework of the free movement of services (see e.g. *Commission vs Germany*, Case 205/84). Could it perhaps be deduced from this case law, as well under the free movement of workers, as under the free movement of services, that administrative simplification which is in the interest of the social security institutions, cannot be invoked? Is the interest of the social security institutions therefore clearly of less importance than the interest of the workers and the employers? Which justification can one take into account with respect to the employer in the case of an obstacle to the free movement of workers? Thus can we reach the conclusion that the interests of the employee always have “the deciding vote”?

4. IMPLEMENTATION AND INSTRUMENTAL PRINCIPLES

4.1. Introduction

After defining the conceptual framework, we now want to apply these ideas to an example of a conflict rule that includes in practice the necessary issues, i.e. the worker who performs activities in two Member States, one in his or her State of residence.

In the forthcoming year more examples will be worked out.

A simple example could help to understand the problems raised by the implementation of some coordination rules and the different ways to approach them: a frontier worker resident in Member State A works in Member State B ; s/he intends to take up a second part-time job in his or her State of residence (Member State A).

This case, dealing with persons who are simultaneously active in more than one Member State, is a very good illustration of the problems which exist when the single legislation principle, which prevails today, has to be applied. Indeed, Regulation 1408/71 (Article 14(2)(b)) and Regulation 883/2004 (Article 13(1)(a)) follow the same principles concerning an employee with different employers at the same time in more than one Member State: it is the Member State of residence which is competent and this State also has to take into account the activities exercised in the territory of other Member States as if they were exercised in its territory. This solution might be a disadvantage for all three parties:

- the employer in State B will have to pay contributions in State A
- the employee will lose benefits of State B
- the administration of State A will receive contributions for a job exercised in another Member State.

This situation leads to the necessity to examine new patterns for coordination rules, which could include (all these possibilities will be elaborated later in the text):

- Keeping the single legislation but changing the competence;
- Giving the employee a choice of which Member State is competent under the single legislation principle;
- Giving the employee a choice of double coverage;
- Getting rid of the single legislation principle;
- Promoting “Article 17 agreements”;
- For determining the competent legislation, separating out contributions and benefits.

4.2. The principle of single legislation applicable

4.2.1. A principle sustained by Regulation 883/2004

The principle of single legislation applicable is today a core principle of the coordination regulations : “*the provisions of Title II of the regulation, of which the said article forms part, constitute a complete and uniform system of conflict rules the aim of which is to ensure that workers moving within the Community shall be subject to the social security scheme of only Member State, in order to prevent more than one legislative system from being applicable and to avoid the complications which may result from that situation”* (see *Van Poucke*, C-71/93).

The *Van Poucke* case brings together all the relevant elements. The principle of single legislation applicable is a way to avoid complexities and difficulties due to multiple affiliations in more than one Member State. Problems in cases concerning the applicability of more than one legislation can be experienced in the cases under Article 14(c) (introduced together with the extension of Regulation 1408/71 to self-employed workers), where the Regulation itself provides for such dual coverage or the EU-Switzerland agreement, which has opened an option regarding the legislation applicable for sickness benefits in kind.

Nevertheless, the principle of single legislation applicable has been strengthened by Regulation 883/2004 (where exemption with the application of more than one legislation is no longer provided) whereas, in the meantime, it was introducing the residence criterion for inactive migrants.

4.2.2. Keeping the single legislation but changing the competence?

With regard to new forms of employment, in particular fixed-term contracts and part-time contracts, the principle of single applicable legislation may be poorly adapted to some situations of simultaneous work in more than one Member State. Taking into account these situations could highlight the modernity of coordination rules and their coherence with the Lisbon strategy.

As in Regulation 1408/71, Regulation 883/2004 gives priority to the place of work as a criterion for defining the applicable legislation. The question is whether, in some situations, this criterion is relevant. *Lex loci Laboris* has been chosen, among other reasons, for its practicality: the capacity to locate employment at a precise place or, at least, in a precise Member State where the migrant spends most of his/her professional career.

Lex loci laboris was therefore also chosen between other options, such as the place of residence, the place of the seat of the employer or even the country of the nationality of the person concerned. The idea was to clearly link the social security rights of the migrant to the legal system of the country to which s/he is most attached in her or his daily life. The *lex loci laboris* was therefore not only in line with the initial social security schemes to be coordinated, but also reflects the idea that social security is a complement to waged work. It is also considered to be most suitable as it usually coincides with the law of the worker's place of residence while taking into account the place of the nationality of the migrant is of course not relevant. It also coincides with the rule of conflict applicable in the area of labour law (see Convention of Rome of 1980 and Regulation 593/2008). Choosing the residence of the worker could also encourage the employer to choose on the basis of the level of contributions as they might differ between the States. The result of the choice of the *lex loci laboris* is that competition, as regards workers, takes place according to the terms applicable to the market where the job is performed. As such, social security follows the lines of the Posting Directive 96/71. It is only when the nature of some types of employment renders the strict application of the rule of the law of work place impossible, that alternative connecting factors were established.

These explanations do not prevent us from considering an alternative rule of conflict which would affect the lex laboris principle, but also in some situations the lex domicilii principle too, without jeopardizing principle of one legislation applicable.

4.2.3. A principle at stake: the example of simultaneous activities in two Member States

If we return to the example of persons who are simultaneously active in more than one Member State, under the existing rules, as already noted, it is the State of residence which will be competent for both employments.

The employee usually does not know that s/he has to report these situations to the competent institution in the Member State where s/he resides (Art. 12(a) of Regulation 574/72): in practice, there is very often double coverage. Therefore, it may only become clear very late in the day (e.g. when a pension is claimed) that the Regulation has not been followed with all the negative consequences for the employee and his or her employer (retroactive refund/payment of contributions and benefits – in accordance with the national legislation of the two Member States concerned which, in the end, also leads to the payment of double contributions depending on the national rules).

In the cases where the employee knows about her or his obligation, s/he endangers his or her principal employment because the employer may not be willing to apply a foreign legislation (that of the Member State of residence, Art. 14, 2b (i)). S/he wants to maintain the procedures and legal consequences as for all the other employees working in the firm unless the specific employee is very valuable.

Under the existing provisions, it is not possible for the employer to agrees with his or her employee that it is up to the employee to register and pay the contributions in the Member State of residence (Art. 109 of Regulation 574/72 does not cover these cases as the work is exercised in the same territory as the employer has his or her place of business). This, fortunately, will be changed by the new Implementing Regulation (Art. 21(2)). Nevertheless, if the employee does not agree or if s/he agrees but does not pay, it remains the obligation of the employer to pay the contributions. Therefore, the employer is threatened with having 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).

Other consequences of the application of the legislation of only one Member State have to be further analysed. It is correct that the competence of only one Member State safeguards the person concerned from paying more contributions than a person exercising both activities in the State of residence. This is especially important if this legislation contains limits for the payment of contributions. Let us assume this limit is set at 4000 € a month. If the income from a principal activity in the Member State of residence is 4000 €, no additional contributions have to be paid if an additional 400 € is earned in the Member State of second employment. But, depending on the structure of income in the State of residence and in the State of the other employment, this may not always be advantageous to the employee because there might also be legislation in the Member State of the second employment which excludes employees with income less than e.g. in total 450 € a month (exclusion of minor employments but adding of the income gained in all activities to determine if this threshold is passed). In this case, if income in the other Member State is higher, contributions will have to be paid although the new employment is below the threshold. For instance, if the income in the Member State of second employment (which again is the State of residence) is 400 €, therefore below the cap of 450 €, it will still be subject to compulsory coverage if income in the State of main employment is more than 50 €. However, this would be the same if both employments were exercised in the State of residence, although the people concerned usually do not understand this consequence of the Regulation.

In the example above, there are also negative effects due to the single applicable legislation principle, which should not be underestimated. The correct application of the principle, that from the moment a small second activity in the State of residence is taken up, only the legislation of that Member State applies, 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 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. The “rich” Member

States usually provide better benefits (e.g. higher family benefits) than the “poor” Member States. Therefore, the change of competence linked with the fact that the person takes up a second job in his or her State of residence will lead to the loss of e.g. the family benefits from the Member State of main activity.

The application of the legislation of the State of residence in also impractical for institutions which prefer to have to deal only with situations within their boundaries.

4.2.3.1. Simultaneous activities in more than one Member State: Lex domicilii replaced by the legislation of the State of main activity?

In the case of simultaneous employment for more than one employer in the territory of two or more Member States both Regulation 1408/71 and Regulation 883/2004 determine the Member State of residence as the competent one. A change in the rule of conflict could imply, in the example of persons who are simultaneously active in more than one Member State, that it is not the State of residence which would be competent, but the State where the major part of the activity (a substantial part of the activity?) is exercised.

It has been argued that the relevant provision of Regulation 883/2004 will have to be amended in the near future because the consequences outlined above are not the intention of the legislator. Nevertheless, this would not change the consequences dramatically as it would merely shift all the problems from the Member State of residence to the Member State of the main activity. This could also result e.g. in the refusal of the employer of a small second employment in the Member State of residence from employing the person as s/he would have to apply the legislation of a foreign State where the main job is located.

But it has to be admitted that in the majority of cases, it would not interfere with the principal activity in the other Member State and thus the economic base of the person concerned would not be endangered. Also, the benefits from this Member State would not be lost. So, although this may not be the best solution it is nevertheless a better balanced solution than the existing one.

4.2.3.2. *Lex Loci Laboris* and the principle of proportionality

In general, rules of conflict receive an abstract and objective application. In exercising its competence in the field of Regulation 1408/71, the Community legislation is of course bound by the general principle of proportionality as enshrined in Art. 5 of the EC Treaty. However, as the ECJ has made clear, the Council has wide discretion regarding the choice of the most appropriate measures for attaining the objectives of Art. 51 (now 42) of the EC Treaty (see *Vougioukas*, Case 443/93, par. 35; *Vogler*, Case 242/99, par. 24). Nevertheless, should a more personal and subjective application be encouraged, and would such a method correspond better to the principle of proportionality?

Some cases, including old cases (i.e. *Miethe*, C-1/85, in the area of unemployment benefits), take into account personal situations. Should this technique be formalized and extended? In addition, if ensuring that free movement of workers remains the goal of the coordination rules, many solutions drawn from the application of Regulation 1408/71 and 883/2004 may be considered as incompatible with Articles 42, 39 or even 18 of the EC Treaty. This is the case, e.g., for frequently mobile workers who have to change legislation every time they take up a new job: by not ensuring continuity in the applicable legislation, this system is an impediment to their freedom of movement.

More generally, the set of rules of conflict designed by the regulations provide security to stakeholders through their uniform application in Member States, but when it comes down to individuals, this may not be the case.

The adequacy of the *lex loci laboris* has, as already noted, been regularly questioned. The fundamental idea is that the migrant worker would be subject to the legal system of the country to which s/he is most attached. This is the idea of *belonging* to a social security system. When determining the connecting factor, it is important to look at the most appropriate and best related link to the circumstances. One approach is to choose the place where the worker concerned has a sufficiently close link with the State and society. In the case of *Aldewereld* (Case 60/93) the ECJ made clear that even in the absence of a conflict rule expressly referring to the situation in question (person concerned was employed by an undertaking in the Community, but was working wholly outside the Community), the application of Community law cannot be excluded. The fact that the activities are carried out outside the Community, is not sufficient to exclude the application of Community rules on free movement of workers, as long as the employment relationship retains a sufficiently close link with the Community. The Court rejected in that respect also the possibility that the person concerned could, due to the absence of a corresponding rule, choose which legislation would be applicable. This possibility of choosing was not explicitly foreseen in Regulation 1408/71, with exception of Art. 16 for diplomatic missions and counselors. In that respect, the Court determined that the application of the State of residence as connecting factor, is an ancillary rule and therefore priority had to be given to the place of the seat of the employer (*Aldewereld*, Case 60/93, r.o. 21-24).

In conclusion, we should explore how the principle of proportionality, with the assistance of the concept of the "connecting factor" from international private law, could be effectively combined in a structured way with the conflict rule of the *lex loci laboris*.

4.2.4. Giving the employee a choice of which Member State is competent under the single legislation applicable principle?

It must first be recalled that there is not a direct choice of the legislation applicable in the current system of coordination. The choice is indirect through factual elements, such as the place of residence, the location of the employer, of the workplace, etc.

Should there be a direct choice? In the applicable coordination scheme, rules of conflict of law are compulsory. National legislations, employees and/or employers, even with their consent, cannot derogate from them.

Allowing citizens and/or employers, or some categories of either or both, to choose the legislation applicable appears unacceptable for the following reasons:

- it is in complete contradiction with the fact that rules of conflict are compulsory. It also goes against the principles of exclusivity - it is in contradiction with statutory national social security schemes, most of which are based on the principle of solidarity and therefore compulsory

- leaving a choice of affiliation would encourage social dumping
- the possibility of a choice might be an illusion for employees since it would be hard for them to choose a legislation which is not the employer's choice. Employers could coerce potential or existing employees to choose a jurisdiction that suits the employer rather than the employee - pressure that would be difficult for employees to resist.

Although giving a free choice might perhaps be in line with the rules concerning labour law and international private law, there is a fundamental difference between labour law and social security law. While labour law belongs to private law and as such belongs to the private sphere of negotiation between two parties (employer and employee, notwithstanding the fact that it is often not easy to identify the free choice of the employee), social security

law belongs to the public field, which determines, in particular, that private parties do not have the possibility to depart from the legal principles.

Despite these arguments, it is worth exploring the possibility of an option available to employees in order to determine if there are potentially more positive than negative effects. One alternative would be to give employees the choice between the legislation of the Member State of residence and that of the Member State where the major (substantial) part of the activity is exercised. This possibility would lead to decisions by the employees based in particular on the question under which legislation contributions are lower and which legislation offers the best benefits (including the aspect of continuing with previous insurance coverage).

Employees would decide - taking into account the outcome of these two questions. This would require accurate information as well as a capacity of combining a short term vision with a mid or a long term perspective. However, employers might try to influence the employees to make a choice which best fits their (the employers) purposes. In conclusion, not only would it be difficult for the employees to make the right decision, but their choice would certainly be influenced – and biased – by the employer who does not necessarily have the same interests.

A guarantee could be built in similar to the one that exists under the provisions of international private labour law, according to which the fact that parties have chosen a particular law, would not, where all other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of the rules of the law of that country. The choice of law made by the parties can also not deprive the employee of the protection offered to him or her by the mandatory rules of the law which would be applicable in the absence of choice, on the basis of objective criteria. One could e.g. imagine to install a conflict rule as a guarantee according to which "free" choice could not deprive the application of the social security protection of the country to which the employee concerned is most attached. On the other hand, however, this would not solve the problem as the next task would be to decide the country to which the employee is most attached: would that be the country with the highest benefits? Or in the case of e.g. a worker, who works in Member State A for an employer based in Member State B, where s/he is also living, it could be argued that it is perhaps country B to which s/he is most attached.

In conclusion, the right for the employee to choose the legislation applicable requires, at least, a correction mechanism similar to that which exists in the area of international labour law.

4.2.5. Getting rid of the single legislation principle?

4.2.5.1. A principle already applied today: distinction between applicable legislation and applied legislation

Without even referring to the *Bosmann* case (C-352/06) and the perspective opened on the grounds of Article 42 of the EC Treaty, the principle of single legislation applicable has never prevented coordination rules to provide that the legislation applied be different from the one applicable. Hence, for sickness benefits, Regulations 1408/71 and 883/2004 provide for the intervention of the legislation of stay or residence, the final cost of benefits being supported by the competent legislation.

The distinction between applicable legislation and applied legislation has been designed in the interest of workers. It could be extended to situations for which rules of conflict lead to inconsistent solutions.

4.2.5.2. The *Bosmann* case (C-352/06): a new paradigm combining a principal and a subsidiary legislation applicable?

The exclusive application of the competent institution is linked to the principle of single applicable legislation. The case law of the ECJ has evolved on this subject. After allowing simultaneous application of two legislations, provided it leads to a supplementary social protection, it returned to a traditional analysis. For the ECJ, rules of conflict of law imply that the legislation of only the legislation of the designated Member State can apply, for benefits (see *Ten Holder*, C-302/84) or contributions (see *Commission v./ France, CSG and CRDS*, C-169/98 and C-34/98). This prohibition has been recalled in the *Bosmann* case (C-352/06). However, the *Bosmann* case (C-352/06) revives the debate. Influenced by the concept of European citizenship, 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.

Although the ECJ denies it, this case affects the principles set, for instance, in *Ten Holder* and *Luitjen.* Indeed, without harmonization of national schemes, it was traditionally ruled that "*the EC Treaty offers no guarantee to a worker that extending his activities into more than one Member State or transferring them to another Member State will be neutral as regards social security. Given the disparities in the social security legislation of the Member States, such an extension or transfer may be to the worker's advantage in terms of social security or not, according to circumstance. It follows that, in principle, any disadvantage, by comparison with the situation of a worker who pursues all his activities in one Member State, resulting from the extension or transfer of his activities into or to one or more other Member States and from his being subject to additional social security legislation is not contrary to Articles 48 and 52 of the EC Treaty if that legislation does not place that worker at a disadvantage as compared with those who pursue all their activities in the Member State where it applies or as compared with those who were already subject to it and if it does not simply result in the payment of social security contributions on which there is no return*" (*Hervillier e.a.*, C-393/99 and C-399/99).

The *Bosmann* case (C-352/06) raises many theoretical and practical questions. From a theoretical point of view, it is true that neither the *lex loci laboris* rule of conflict nor the single legislation applicable principle is formally violated by the ruling of the Court. If *lex domicilii* can be a source of benefits for the residents, it seems to be only by the unilateral decision of the State of residence.

From a practical point of view, there are many problems. The German judge will not be able to turn down a claim if family benefits are subject only to a condition of residence in Germany, unless s/he considers that Regulation 1408/71 prevents the application of a second simultaneous national legislation. German authorities may introduce in to their domestic law a provision stating that "*family benefits are granted to all persons resident on the German territory, with the exclusion of persons who are subject to another EU legislation according to coordination rules of Regulation*". However, such a provision would probably be seen as a typical indirect discrimination based on nationality. The option opened by the ECJ would therefore turn into an obligation.

These remarks require the evaluation of the scope of the case.

We could take the view that the reasoning is limited to family benefits, especially since such benefits can already be simultaneously provided, in specific circumstances, by two legislations. In this light, *Bosmann* (C-352/06) could be seen as an extension to the original method of coordination applied to family benefits. Nevertheless, such an interpretation could

be restrictive. Indeed, the reasoning of the Court based on Article 42 EC Treaty, could apply to all social security branches: "*the provisions of Regulation No 1408/71 must be interpreted in the light of Article 42 EC Treaty which aims to facilitate freedom of movement for workers and entails, in particular, that migrant workers must not lose their right to social security benefits or have the amount of those benefits reduced because they have exercised the right to freedom of movement conferred on them by the EC Treaty*" (r.o. 29). Taking the example of healthcare benefits in kind: is it conceivable that a person working in a Member State and residing in another be entitled to healthcare coverage in the latter State if the workplace legislation does not provide healthcare insurance?

At least three other questions are raised by the *Bosmann* case (C-352/06).

The first question is whether *Bosmann* (C-352/06) applies when the competent State provides less favourable benefits than the State of residence. Could the equivalent of a "Vanbraekel supplement" soon be claimed by mobile EU citizens comparing benefits in Member States?

The second question is whether the subsidiary legislation could be other than that of the State of residence. Let us take the example of a person who is employed by two employers in two Member States and who resides in one of them. S/he is subject to the legislation of the State of residence according to Article 13(1)(a) of Regulation 883/2004. What if, for instance, family benefits are not available in the State of residence, whereas s/he would be entitled to them in the State of second employment? The same question could be transposed to other social security branches and to situations where benefits provided by the competent State are less favourable than those of another Member State with which s/he is closely connected.

More generally, the *Bosmann* case (C-352/06) could establish a new paradigm for coordination rules:

- considering the level of benefits in order to determine the legislation(s) applicable
- simultaneous application of two legislations for benefits when it is in the interests of workers
- suspension of the application of workplace legislation for part-time jobs or fixed-term jobs if it is not favourable to workers.

Taking into account the possible consequences of the interpretation of the *Bosmann* case (C-352/06), it could be suggested that the Commission takes an initiative to clarify this case.

4.2.5.3. New options for simultaneously applicable legislations? The automatic application of all workplaces legislations

Another solution would also be possible: In cases of simultaneous employment by different employers, the legislation of all the Member States in which an activity is exercised could apply automatically, breaking the principle of single legislation applicable. This would mean that, notwithstanding the weight of each job, e.g. the Member State of main employment would be competent for this employment, whereas the State of residence would cover the employment pursued in this State.

However, this system would not lead automatically to a balanced situation. First, there would be problems if the legislation of either of the two Member States contains limits for paying contributions. There is a danger that more contributions are paid than compared to a worker who has no cross border activity. This is a disadvantage for the employee (usually, employers pay the contributions on all the income they pay, also in cases of a second employment of the employee).

In addition, this solution could necessitate fundamental changes to the provisions on benefits. In the family benefits chapter, there are already provisions for simultaneous entitlement to these benefits due to the exercise of a gainful employment (up until now naturally only for two different parents who are active in two different Member States). But up until now, there are no provisions concerning e.g. a person who is entitled at the same time to EHIC from two different Member States. Would such a division necessitate a cost sharing between the competent institutions for benefits in kind granted during a stay in a third Member State? However, there are such situations today in the cases of Annex VII of Regulation 1408/71 without any additional provisions.

From the employers', and also from the institutions' point of view, this system of simultaneous application of two legislations is the ideal solution as they only have to apply their domestic law without taking into account the employment exercised in another Member State. Still, it seems unbalanced since an automatic competence of all the Member States involved could be too much of a financial burden for the employee and thus hinder him or her from exercising his or her right of free movement. Therefore, this solution could contradict the principles established by the ECJ on the base of the EC Treaty unless a similar provision is introduced as already provided in Article 14(d)(2) of Regulation 1408/71 which tries to safeguard the contribution level of only one Member State. Since the ECJ has validated Annex VII, it could be expected that such a solution would not be contrary to the principles of the EC Treaty. But since it would be based on an automatic application of two legislations, a system which does not apply up until now, it could be regarded as a deterioration of the situation of the employees in such circumstances and therefore not justified.

Another approach would be to give the person concerned a choice to have the legislation of both Member States applicable where an activity is exercised. In such a case, three solutions are conceivable:

- Either one Member State (that one with the minor activity?) has to take into account for the calculation of the contributions the activity exercised in the Member State where the major part of the activity is exercised (principle as laid down in Art. 14 (d)(2) of Regulation 1408/71). This is fair from the point of view of the employee who does not have to pay more contributions than a person who exercises both activities there. It seems also to be in conformity with the EC Treaty because the ECJ has not invalidated Annex VII of Regulation 1408/71 which is based on the same principles; in addition it is based on a choice of the person most concerned. But from an administrative point of view this would be a very complicated solution.

- Or both legislations can be applied without taking into account the activity exercised in the other Member State**.** This is easy from the point of view of the administration but could lead to more contributions than only under the legislation of one Member State (for civil servants we have already today such a solution – Article 14(f) of Regulation 1408/71 as for these cases no provision comparable to Art. 14(d)(2) has been provided). Nevertheless it could be argued that this is the choice of the employee – so s/he should be well informed before s/he makes that choice. But we do not have to underestimate the power of employers in these cases. They might press their employees to make use of that choice to avoid the payment of contributions in another Member State. This danger should be put on the negative side of that solution. If we want to further examine the possibilities of that solution we have nevertheless to analyse in greater depth the principles elaborated by the ECJ that applicable legislation is not allowed to result in double contributions which do not lead to additional benefits. It could be expected that at least in some branches (benefits in cash as e.g. pensions, sickness cash benefits) there could always be

additional entitlements so that this could be in line with the principles of the EC Treaty understood in combination again with the possibility for a choice of the person concerned. Anyhow, the concrete meaning of the ECJ rulings which established the "no double contribution without additional benefits" principle has to be further examined whenever we think about double coverage.

- There is also a third way which would allow opting out for specific branches. The employee could be allowed to let the single legislation principle apply e.g. to health care whereas for pensions the legislation of both Member States should apply. This solution would be tremendously complex, not acceptable for the employers (e.g. health care contributions under the legislation of Member State B, pension contributions under the legislation of Member State A for the employer residing in that Member State A) and also not in the interest of the institutions.

4.2.5.4. Opting out

Could employees be allowed, in some circumstances, to opt out when the solution of the rule of conflict is not favourable?

Let us take an example which illustrates the advantages of the opt out system. A housekeeper is employed in a small hotel in Mons (Belgium) where she works 30 hours/week. Although she resides in Maubeuge (France), she is affiliated to the Belgian social security scheme as Belgium is her workplace. This is where her contributions are paid until the day she finds an additional fixed-term job in a hotel in Maubeuge, where she works 10 hours / week. According to Article 14(2)(b)(ii) of Regulation 1408/71 and 13(1) of Regulation 883/2004, the legislation of the place of residence becomes applicable not only for her activity in France but also for her activity in Belgium. The small Belgian business is therefore compelled (in theory) to pay contributions in France, at the French rate. Not only is it an additional administrative burden for the Belgian employer, but it is uncertain that this rule of conflict is favourable for the employee.

In such a case, the employee would be interested in opting out if this possibility was available.

Such an opt out could be admissible for important reasons in connection with the person and for objective matters. For instance, is it reasonable – and does it encourage mobility of workers – that an unemployed person, being provided a good social security coverage in his or her State of residence and taking up a part time job for a short period in another Member State, be subject to the legislation of the workplace, for a short period and perhaps with a lower level of protection or even without actual coverage for some branches? A solution could perhaps be found through the following interpretation of Regulation 883/2004. As a recipient of unemployment benefits could be regarded as exercising an employed activity (Article 11 (2) of Regulation 883/2004) the taking up of a part time work in another Member State could be seen as a simultaneous exercise of more than one activity as an employed person; thus due to Article 13 (1) (a) of Regulation 883/2004 the legislation of the State of residence continues to be applicable for the receipt of unemployment benefits, which in such a case could be regarded as the exercise of a significant part of the activity.

In any case, an opt out system is not allowed to lead to a lack of social security coverage or to a coverage by a private insurance company or occupational coverage. It could only lead to the application of a national scheme falling within the scope of coordination rules and with which the person is connected through professional and/or personal links.

However, just as we noted with the possibility of free choice with respect to the applicable legislation, here also the imbalance of power between employer and employee and the scope for the former to exert pressure on the latter, may lead to severe problems.

A more sophisticated solution could be to separate the applicable legislation for benefits and contributions (see below).

It must be added that "Article 17 agreements" already include a form of opting out in the hands of national institutions which can decide to use this possibility as well as the way to use it. Perhaps Article 17 could be reworded in order to standardize the conditions and circumstances of its application (see below).

4.2.5.5. Separating contributions and benefits?

For short and frequent mobility (other than posting), when the strict application of the general principles of the Regulation would result in very short insurance careers in different Member States, it could be natural to suggest that the employees remain affiliated to their habitual national scheme.

In order to sort out the problem of short and/or frequent mobility, one solution could be the separating out of benefits and contributions: contributions would be subject to normal rules of conflict whereas for benefits, the employee would continue to receive those of the habitual legislation applicable. Such a system deserves to be explored thoroughly in order to balance the pros and cons for the stakeholders, the risks of inappropriate payments and the mechanisms of compensation that would need to be established.

The standard case for opt out would therefore be a person who continuously has short term contracts in various Member States such as e.g. performing artists. However, it could also be a solution for double activities in two Member States (when the second activity is minor and/or for a short term), especially if coordination rules stick to the single legislation principle and do not change the State of residence principle.

The concrete application of such a model requires answers to many questions. Should the duration of short term be defined? Could the 12 month rule of Article 48 of Regulation 1408/71 be a helpful guideline? Should this model not apply if the person concerned has already been subject to the legislation of the Member States to whose legislation the person would now become subject for a short period – e.g. 5 years coverage in Member State A, afterwards 30 years coverage in Member State B and finally the intention to work for only 6 months in Member State A before retiring? Etc.

If we look into the benefit side of the model, many questions also arise. The person shall be treated as if s/he had always been subject only to the legislation of the previously competent Member State. As a second step, the details of how these periods would be included in the pension calculation have to be settled (fictitious continuation of the previous insurance history, taking into account of the income received abroad etc?). Naturally, every branch of social security has to be examined separately. It seems that the same principles could also apply to family benefits and unemployment benefits (the persons concerned could be more interested in receiving these benefits in the previous State of employment than in the Member State of the short term contract – leaving aside the specific provisions for frontier workers).

On the other hand, the separating of benefits and contributions seems to be of no importance for sickness benefits in kind as employed persons usually can receive these benefits in both states (the State of employment and the State of residence). The fundamental question will be to decide whether this principle will apply to all benefits in the

same way or if the division should be tailored for each branch of social security (which would make it very complex). The goal of protecting the workers' interests must be balanced with the administrative complexity of the system envisaged.

The contribution side is the next thing to be examined. The easiest way for the employer would be if s/he had to pay the contributions due to the rules applicable under the legislation of the Member State where s/he has her or his place of business. Nevertheless, in cases of double activities, this model has to be further analysed. When we stick to the single legislation principle for the payment of contributions, this once again would help only one employer (place of residence or of the major activity depending on the criteria we choose). To include other solutions than the single legislation principle in to this model would make it too complex for the time being.

In conclusion, this model would result in the contributions being paid in a Member State which is set by applicable legislation and the (or some) benefits being granted under the legislation of another Member State (where the person has been covered up until now).

This could create problems. First, the contributions will not any longer correspond to the benefits. This could be an advantage or a disadvantage for the person concerned. Imagine that s/he paid much higher contributions than the pension entitlements s/he obtains in the Member State which remains competent for rewarding these periods. This would be very difficult to defend as a balanced solution. On the other hand, it is not justified that one Member State receives the contributions and the other one has to pay the benefits. Therefore, this model would necessitate a transfer of contributions between Member States (this model is up until now only exists for EU-staff members) or a reimbursement of benefits including cash benefits – also something which would be totally new (leaving aside the refund of unemployment benefits under Article 65 (6) and (7) of Regulation 883/2004).

This model remains interesting especially from the point of view of the employee (in the long run) but also as a rule for the employer. For the institutions this would probably be linked with quite complex procedures. Nevertheless there is still much to be examined and this model would need extensive revisions to major parts of the Regulations.

4.2.6. Promotion and restructuration of "Article 17 agreements" (of Regulation 1408/71 – Article 16(1) of Regulation 883/2004)

"Article 17 agreements" cannot lead to a whole category of persons systematically applying a derogatory rule of conflict. Its use must remain exceptional. However, it is interesting to analyze whether, in the interest of persons who are concerned, the compulsory application of rules of conflict can be subject to derogations, e.g. when the coverage of the competent legislation is non-existent, incomplete or impractical either for the employee and/or the employer. Such circumstances could lead to the application of a substitute or an additional legislation.

For instance, if we consider that, in some circumstances (e.g. when the employee has two jobs in two Member States), the choice given to the employee is not balanced because it does not take into account the wishes of the employer, a more flexible use of agreements under Article 17 could be envisaged. For this purpose, it would be sufficient to lay down, as a general rule, the single legislation principle and then encourage Member States to conclude such arrangements to allow the simultaneous application of two legislations, e.g. when the employee has two different jobs in two Member States.

Until now, many Member States have not made agreements with the effect that the legislations of two different Member States apply. Therefore, clear guidelines (e.g. decision of the Administrative Commission) would be necessary. This would have the advantage that

the employers would also be formally involved but would, at the same time, diminish the position of the employee. In addition, there is no entitlement for Member States to conclude such agreements.

However, there is a danger that encouraging extended use of Article 17 agreements and setting up bilateral and multilateral arrangements outside the Regulation, might compromise and undermine the Regulation itself.

5. RECOMMENDATIONS

After reflecting on new models for applicable legislation, and applying it to one concrete example (simultaneous activity in more than one Member State), we believe that the following recommendations can be made:

A. With respect to new forms of mobility in general

1) Apart from a very limited number of activities such as tele-work, there are very few really new forms of mobility. However, due to the development of new technologies, there are some old forms of mobility which must receive more adequate responses.

2) New forms of mobility include new forms of employment, such as fixed-term contracts and part-time contracts. Along with the Lisbon strategy, these forms of employment must receive better fitted solutions within the framework of coordination rules.

3) In order to decide whether some specific rules of conflict need to be designed for some special categories of employment, such as e.g. researchers, artists, airplane crew, intra-group mobility, surveys on mobility patterns must be undertaken.

4) The impact on coordination rules of the concepts and definitions of “employer”, “workplace” and “residence” must be rewritten in order to take into account new technologies and new means of communication. The physical location is much less relevant in a virtual economy with complex organization of firms. This will go some way toward finding adequate solutions for some of the problems identified.

B. With respect to the fundamental principles on applicable legislation of the Regulation

5) It is necessary to combine free movement of workers with internal market principles and European citizenship in order to better balance interests between the different stakeholders: employees, employers and national social security institutions.

6) All amendments of coordination rules should be subject to an impact assessment in order to know which stakeholders are favoured and which are negatively affected (we have given an example for such an impact assessment which could be applied to any other category of case).

7) Rules of conflict of law must be subject to an individual assessment in order to verify that the impediments to free movement of workers they imply are not greater than the advantages of having uniform and abstract rules of conflict. The principle of proportionality must also be applied to other stakeholders: rules of conflict must not set too heavy a burden, compared to the advantages for the employees, on employers and/or national social security administrations.

8) Even when restricted to specific situations, the right of employees to choose the applicable legislation is not recommended. Not only would the choice be very hard to make (lack of information, combination between short, medium and long term perspective), but it would likely to be biased by the influence of the employer.

9) Rules of conflict of law, right to opt out for the employee:

Employees should be given the right to opt out when the applicable legislation designated by rules of conflict leads to unfair solutions considered objectively and subjectively, hindering freedom of movement. The right to opt out must conform to the principle of proportionality applied to employers and to administrations.

10) The application of a legislation which is not competent, already allowed for sickness benefits following the *Bosmann* case (C-352/06), should be extended to other branches when, after an impact assessment and an individual evaluation, rules of conflict lead to inconsistent solutions.

11) The impact of the Bosmann case (C-352/06) on coordination rules should be assessed with regard to a better balance between parties and the principle of proportionality applied to all stakeholders. A legislation applicable by priority and another legislations applicable by subsidiary might become the new rule.

12) Article 17 agreements (Regulation 1408/71) should be concluded within a standardized format, under the supervision of the Administrative Commission, when the competent legislation is, incomplete or impractical either for the employee and/or the employer. Clear criteria might be drafted for the application of these Article 17 agreements.

C. With respect to the simultaneous activity in more than one Member State

13) Conflict of law and simultaneous activities in two Member States: The application of the legislation of the State of residence to a worker who exercises two jobs simultaneously in two Member States is usually unfavourable to all stakeholders. Another rule of conflict should be adopted.

14) Even if it does not resolve all of the problems, the application of the legislation of the place where the main professional activity is carried out would be more appropriate than the lex loci domicilii for employees whose main activity is located in the State where they do not reside.

15) As an alternative: When two employments are exercised simultaneously by the same person in two Member States, the legislation of each Member State would apply for the employment exercised on its territory, either automatically or by decision of the employee. Such a rule of conflict would be subject to a prior impact assessment and to the test of proportionality applied to all stakeholders.

16) Another alternative: Whereas contributions would still be paid according to the usual rules of conflict, benefits would be provided by the “habitual legislation applicable” or “previously competent”.
This model, favourable to employees, needs further exploration in order to assess its technical and administrative feasibility. Nevertheless the group would not recommend this approach until all the ramifications have been thoroughly examined.

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