

Think Tank Report 2009

Intra-group Mobility

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Contents

Introduction

- 1 Intra-group mobility and the rules of conflict in social security and labour law
 - 1.1. Intra-group mobility under the coordination framework
 - 1.2. What lessons can we learn from intra-group mobility in labour law?
 - 1.3. Up to a modification of the conflict rules for social security: taking into account the balance of interests theory
 - 1.4. Towards a simple insertion of a new rule of conflict in Regulation 883/2004 or a complete reorganisation of Title II?

- 2 The concept of intra-group mobility: problems of definition
 - 2.1. What is a network or group of companies?
 - 2.2. The concept of intra-group mobile worker
 - 2.3. The concept of mobility within a network

- 3 Choice of the rule of conflict: proposal for a new conflict rule
 - 3.1. Some preliminary remarks
 - 3.2. The new conflict rule

INTRODUCTION

In our previous Think Tank report¹ we indicated that one of the most important changes that has taken place during the past 50 years in the field of social security for migrants concerns the nature of migration itself, where migrant workers move for short periods in an increasingly flexible labour market. Today, new types of migrant workers, including temporary migrant workers and pan-European management personnel, increasingly contribute to a pan-European labour market. These new patterns of migration, which are often described as "new forms of mobility" are, at least in part, a result of new forms of work organisation new types of labour contracts in the EU Member States.

The characteristics of these new forms of mobility challenge the principles of the conflict rules on applicable legislation in the coordinating regulations. However, in our previous report of 2008 we have already emphasised that the concept of 'new forms of mobility' needs to be approached with a certain amount of caution. Some of the groups of persons that are frequently described as a new and distinct category of mobile workers are in fact not new, but are variants of categories of mobile workers that have existed for long time. In many cases, what is new is that people are moving more frequently (with shorter intervals, for shorter periods) than they did in the past. In addition, some new forms of mobility are often (modern) variants of traditional forms of mobility (e.g. aircrew personnel and international transport workers). The first conclusion drawn from this insight is that the actual framework of conflict rules contained in Regulation 1408/71 and in the forthcoming Regulation 883/2004 is better adjusted to these new forms of mobility than is generally believed, and what is needed therefore is clearer interpretation of the concepts used in the conflict rules rather than for new conflict rules themselves. Nevertheless, some forms of mobility, both new or less new, may not be adequately provided for and require further investigation. One example is intra-group mobility.

We can consider some of these issues with reference to the following example. An employee of Belgian nationality joins an international German business concern/group, the head-quarters of which is based in Berlin. He is recruited in Belgium. After being employed at different branches of the multinational group in Italy, Estonia, the UK and Greece, he returns to his country of origin, where he is appointed to the position of Director of the Belgian subsidiary company. Some years later, he is posted to the parent company in Berlin. On returning to Brussels, he is appointed General European and North American Manager, based at the Brussels branch. He is responsible for the various subsidiary companies of this multinational organisation across Europe and North America. He receives his instructions from, and reports to, the parent company in Berlin. This scenario raises the question which social security legislation is applicable to this employee during his or her career?

The growing mobility of workers within a network of companies and multinationals is gaining a considerable amount of interest both in the Member States themselves and at the level of the European Union. The Lisbon Strategy and the European Employment Strategy consider greater geographical and labour mobility as an important factor for the creation of new jobs. The desire for better adaptation of the labour arrangements to the changes in labour markets highlights the interest in a general framework for labour mobility. For example, the European Commission has recently announced the publication of a directive on intra-corporate transferees, which deals with

¹ Jorens, Y., Lhernould, J.P., Fillon, J.C., Roberts, S., and Spiegel, B., "Think Tank Report 2008, Towards a new framework for applicable legislation – New forms of mobility, coordination principles and rules of conflict", 34 p.

the posting of workers within a corporate group of firms (with reference to a Pan-European labour permit). Furthermore, the European Commission has also announced that a communication on intra-group mobility will be launched in 2010. The growing interest in the legal problems connected to intra-group mobility, also raises the question to what extent the existing framework of applicable legislation in the coordination regulations adequately takes into account the specific characteristics of this type of mobility. As a continuation of the work performed in 2008, the European Commission has, therefore, requested in that that the trESS Think Tank reflects on the possibility of developing a separate system of conflict rules for intra-group mobility.

This report is divided into three parts. **Part 1** describes the framework and the application of the current rules on applicable legislation in relation to intra-group mobility using examples to illustrate the difficulties and shortcomings of these rules. Comparisons are made with the rules of conflict in the area of labour law. Special consideration is given to the question whether the possible introduction of new rules of conflict for intra-group mobility would imply the reorganisation of the structure of Title II or whether it would be sufficient to limit ourselves to adapting the existing conflict rules to intra-group mobility?

Part 2 analyses the concept of intra-group mobility within groups or networks of companies. It examines the main characteristics of intra-group mobility, how to distinguish between intra-group mobility and other categories of workers, and the circumstances in which the general rule and a separate conflict rule would be applicable? Given that some of the specific conflict rules, for example, posting or simultaneous employment in two or more Member States, will also apply to intra-group mobility, a definition, that permits a clear distinction with the specific conflict rules is required.

Part 3 builds on the previous two parts to consider the possible criteria for selection of a new rule of conflict and the connecting factors and necessary conditions. This part will outline a proposal for a new rule of conflict. The Think Tank, however, wants to emphasise that the actual decision as to whether to adopt a separate rule and, in particular, what that rule should look like belongs to the appropriate political institutions. The remit of the Think Tank is confined to identifying and setting out the different options and to making proposals.

1. INTRA-GROUP MOBILITY AND THE RULES OF CONFLICT IN SOCIAL SECURITY AND LABOUR LAW

1.1. Intra-group mobility under the coordination framework

1.1.1. Examples of intra-group mobility

Employees who move within undertakings organised on a multinational level and belonging to the same group, might currently fall under different rules of conflict. Several situations might occur, leading to the application of different rules. It should be noted that the description of the rules of conflict refers to the forthcoming framework of Regulation 883/2004 and Regulation 987/09.

Example 1: Posting (single employment relationship is retained with the “old” employing enterprise)

This is a typical example of intra-group mobility and often the only form of intra-group mobility recognised in the national legislations of the Member States.

An enterprise in Member State A posts an employee to an enterprise in Member State B; if the posting conditions are fulfilled, the legislation of Member State A remains applicable through Art. 12 (1) of Reg. 883/2004. In the case of posting for a longer period than that provided for by the posting provisions the legislation of Member State B applies unless an Art. 16 of Reg. 883/2004 agreement is concluded.

The main requirement is that the posting conditions are met. This, however, is often not the case. Within multinational companies, it often happens that an enterprise in Member State A sets up a special entity in this Member State which is mandated to take care of the personnel sent abroad. Persons to be posted get an employment contract with this special entity. However, in these circumstances, the posting provisions will not apply as the key condition that the employer (new entity) performs significant activities in this Member State is not fulfilled. This is because this separate entity only deals with administrative issues for the (posted) employees and cannot, therefore, be considered to be performing its main activities in the sending state. Thus the posting conditions cannot apply and the legislation of Member State B becomes applicable unless an Art. 16 of Reg. 883/2004 agreement is concluded.

Example 2: New employment relationship with “new” enterprise (but only one employment relationship)

The employee is, for example, posted by the enterprise in Member State A to the enterprise in Member State B for a period covered by the posting provisions of the Regulations but has to conclude a second employment relationship with the enterprise in Member State B (for example, to be allowed under the legislation of Member State B to conclude contracts for the enterprise or, for example, to be able to obtain certain payments or allowances). In our example the employee concludes an agreement with, for example, another subsidiary company, while the initial employment contract from the employee with the first employer has not really ended, but is turned into a ‘sleeping’ agreement, i.e. a frozen labour contract, according to which the initial labour law relationship will become active again from the moment the employment relationship in the second state comes to an end. This is a complicated situation, where the application of the conflict rules under Regulation 883/2004 might be questioned. Although the posting conditions are fulfilled (Art. 12 (1) of Reg. 883/2004) with regard to the first employment contract, it is generally believed that

the posting provision of Reg. 883/2004 cannot be applied due to the second employment relationship. The conclusion is the same even when the content of this second labour agreement is limited and only concluded to adapt some of the wage and labour conditions to the local labour situation. Therefore the *lex loci laboris* principle under Art. 11 (3) (a) of Reg. 883/2004 applies and the person is covered by the legislation of Member State B, unless Art. 16 of Reg. 883/2004 agreements are concluded. Indeed it is believed - although a different opinion exists in some Member States - that the conclusion of a local contract with the receiving company contradicts the posting provisions, in particular that a person must perform further activities on behalf of the sending company. However, this consequence should be questioned as it is neither in the interest of the employer nor of the employee. This strict refusal to apply the posting provisions in such circumstances might, however, be questioned, as we will discuss in more detail below.

Example 3: Simultaneous activities in more than one Member State (but only one employment relationship either with enterprise in Member State A or with enterprise in Member State B)

Intra-group mobility can lead to simultaneous activities in two or more Member States for the same company in the group. In practice this situation does not cause considerable problems. The legislation of the Member State of residence will apply in such cases if a substantial part of the activities is exercised there under Art. 13 (1) of Reg. 883/2004, otherwise the legislation of the Member State where the employing enterprise is situated, will apply.

The problem here is to distinguish simultaneous activities from subsequent postings. Art. 14 (7) of Reg. 987/09 could give some initial guidance, but perhaps some further clarification is required.

Example 4: Simultaneous activities in more than one Member State (employment relationships with both enterprises - in Member State A and in Member State B)

Intra-group mobility can also lead to simultaneous activities for different companies of the group. Just as in the previous situation, it does not cause many problems.

The legislation of the Member State of residence will always apply in accordance with Art. 12 (1) of Reg. 883/2004.

It might be envisaged, however, to change the conflict rules in this situation. In the previous Think Tank report we have clarified that the application of the legislation of the state of residence to a worker who is simultaneously exercising two jobs in two Member States is usually unfavourable to all stakeholders. It might be considered in this to also apply, as in the previous situation, the legislation of the place where substantial activities are carried out - or perhaps the legislation of each Member State for the employment exercised on its territory (which would, of course, imply breaching the principle that only the legislation of one Member State applies).

Other Examples:

While the previous examples deal with employed workers within an intra-group mobility situation, the application of the provisions for self employed could also apply. In several countries, management activities or activities in leading functions are considered to be self employment. So there might also be cases of

- Posted self employed under Art. 12 (2) of Reg. 883/2004;
- Simultaneous exercise of self employment in more than one Member State under Art. 13 (2) of Reg. 883/2004;

- Simultaneous exercise of employment and self employment in two Member States under Art. 13 (3) of Reg. 883/2004.

Other situations can also be envisaged, where civil servants are included. Let us, for example, imagine a situation where researchers at a research institution/university are going temporarily to a connected university or scientific institution to gain experience and where these researchers could be seen as civil servants or covered by a special scheme for civil servants. Or what is to be said of an artist who has a contract with an orchestra that concludes different contracts with music halls or opera houses based in other Member States? If we interpret intra group mobility in a broader sense where we would include in the concept of a 'group' all situations of a network in which companies are not legally connected between them, but can be considered for the worker as a group of interrelated companies with which he carries out his professional activities, these cases could be of interest.

More often, the situation will arise, where companies situated in third countries are involved. Due to the increasing number of multinational companies the situation will frequently arise that an employee will also be working for an employer established outside the European Union. The new regulatory framework of 883/2004 takes into account to a certain extent in Art. 14 (11) of Reg. 987/09 the situation where an employer is based outside the European Union.

1.1.2. Intra-group mobility in the conflict rules of the Regulation

The examples described above show that workers who move from one company to another, all of which are members of a network or group of companies will, in many of these situations (especially when the situation cannot be regarded as posting), fall under the general rule of applicable legislation, i.e. the *lex loci laboris* for each successive period of employment abroad. The difference with respect to the general rule of *lex loci laboris* is essentially that the employment activity in another Member State is a result, and part, of a career track within a network group to which the different employers belong. The worker concerned will also keep a link with her or his previous employer, i.e. through a normal labour contract, a frozen labour contract or some other link. Indeed, it should not be required that there is still a traditional labour contract with the previous employer. It may be that the labour contract has come to an (preliminary) end, but that a further link exists through, for example, a gentleman's agreement in which the parent company, with whom the employee was connected, agrees that after the employment at the other connected company comes to an end, the employee is guaranteed a similar position, either within the parent company or in another company belonging to the group. What is important is the labour contract with the second and consecutive employers.

The above examples also show that situations of intra-group mobility are not explicitly regulated under the Regulation and that these situations might fall under different provisions of the Regulation, which is clearly not always to the benefit of the employee and/or the employer. The examples also show that the distinct situations of posting, simultaneous employment in different Member States and intra-group mobility become increasingly blurred and that further clarification of the concept of intra-group mobility is needed to distinguish between the different situations. Situations of intra-group mobility might also occur when people are simultaneously employed in different Member States. But it is mainly when activities are performed in a Member State and the posting provisions cannot be applied, that difficulties arise in practice and a clear need for regulation is perceived.

Indeed it is not always easy to answer the question to what extent intra-group mobility differs from temporary employment in another Member State under the mechanism of posting. In the case of

intra-group mobility, the activities that the employee is going to perform for example in the subsidiary company abroad could be understood as being to the benefit of the company when the person is now working temporarily rather than on behalf of the previous "sending" companies such as is the case under the posting provisions. Nevertheless, from an economic point of view, the employee always carries out the activities in the interest of the group as a whole irrespective of which part of the group and under which country's labour law it is exercised.

More fundamentally however, the person concerned will conclude a labour contract with the new "receiving" company. It is generally believed that a local labour contract with the receiving company is contrary to the posting provisions and not acceptable (although it might be questioned whether the same conclusion should be made when this local "contract" contains only a few local adaptations to the labour conditions, as opposed to a situation, where completely new labour and salary conditions are introduced). In fact, according to the national legislation in some Member States (e.g. Finland), it is also possible to keep the original relationship for the purposes of social security, but only in a situation in which the new contract does not define the substantial characteristics of the labour relationship.

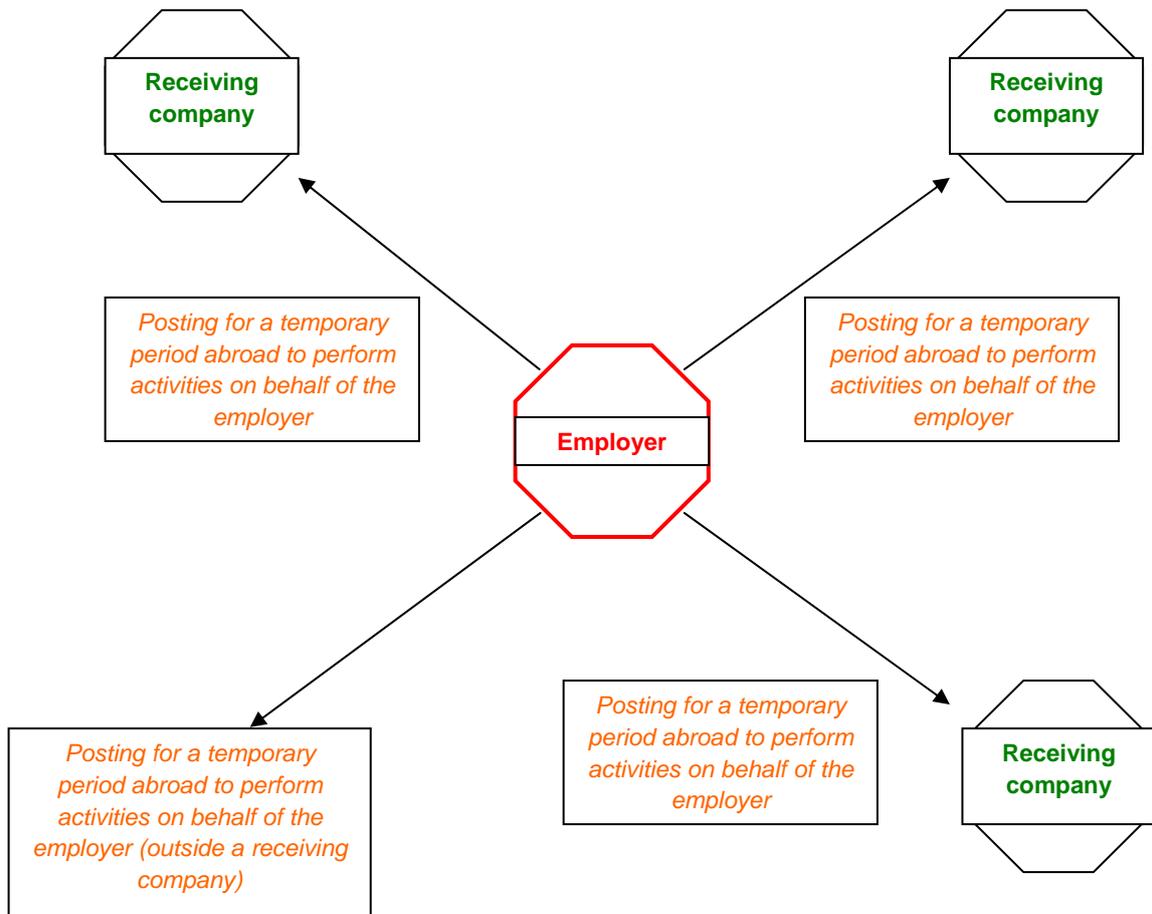
Another condition under the posting provisions is that a posted worker may not be sent to replace another worker which may, in many cases, exclude moving employees within a group from fulfilling the conditions of posting.

One intra-group mobility scenario is where someone continues their career path after having worked in a subsidiary company, in a second subsidiary company without first returning back the initial sending company. Fortunately Decision No. A2 of the Administrative Commission has clarified under No. 3 (a) 2nd paragraph that such posting from one Member State to another Member State without any interim activity in the sending state does not hinder the application of the posting provision with regard to this new posting. Finally it may be the case that employees during their mobile career path are posted to network companies situated outside the European Union or to companies situated within the European Union, but however not belonging to the group.

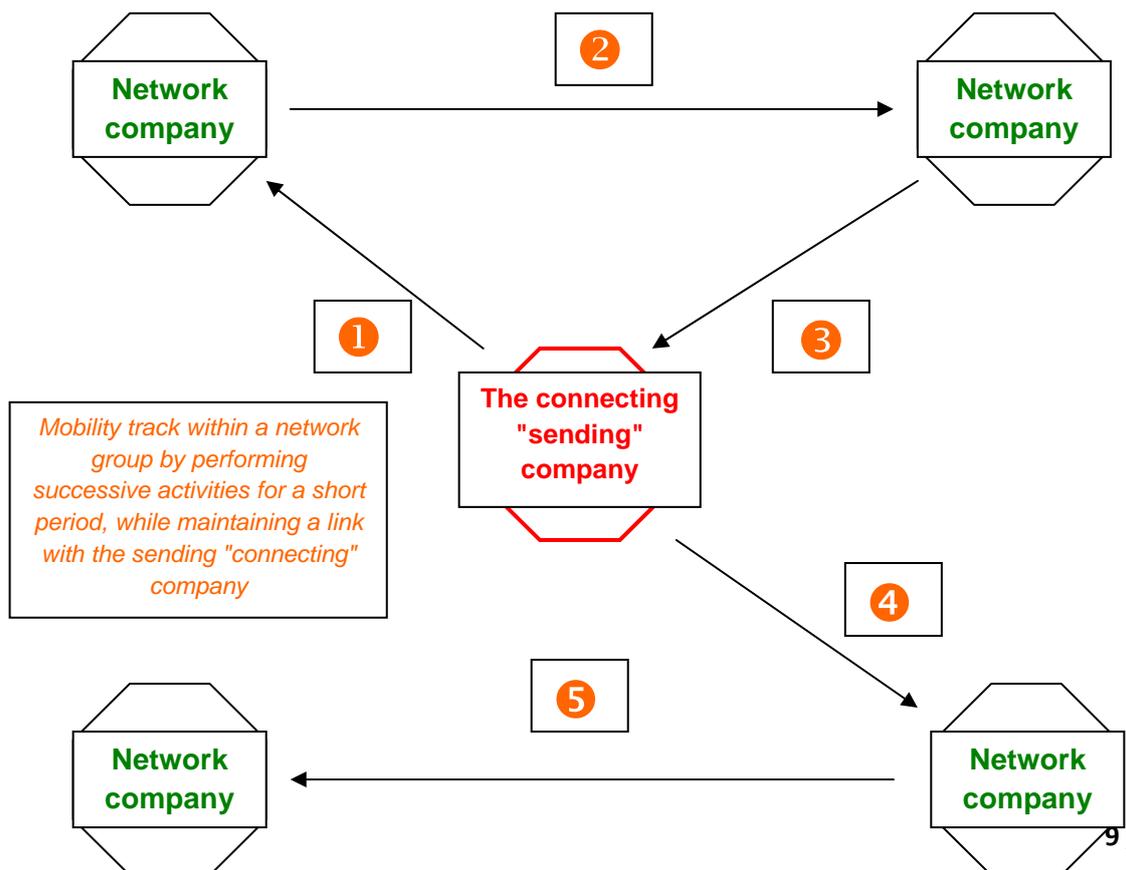
Intra-group employment also differs from the situation envisaged under Article 13 of Regulation 883/2004, dealing with simultaneous employment, as most of the time the person concerned will not actually be working simultaneously for two companies, but rather the employment will take place consecutively.

The three following graphics illustrate the different situations of mobile persons with a network or a group of companies.

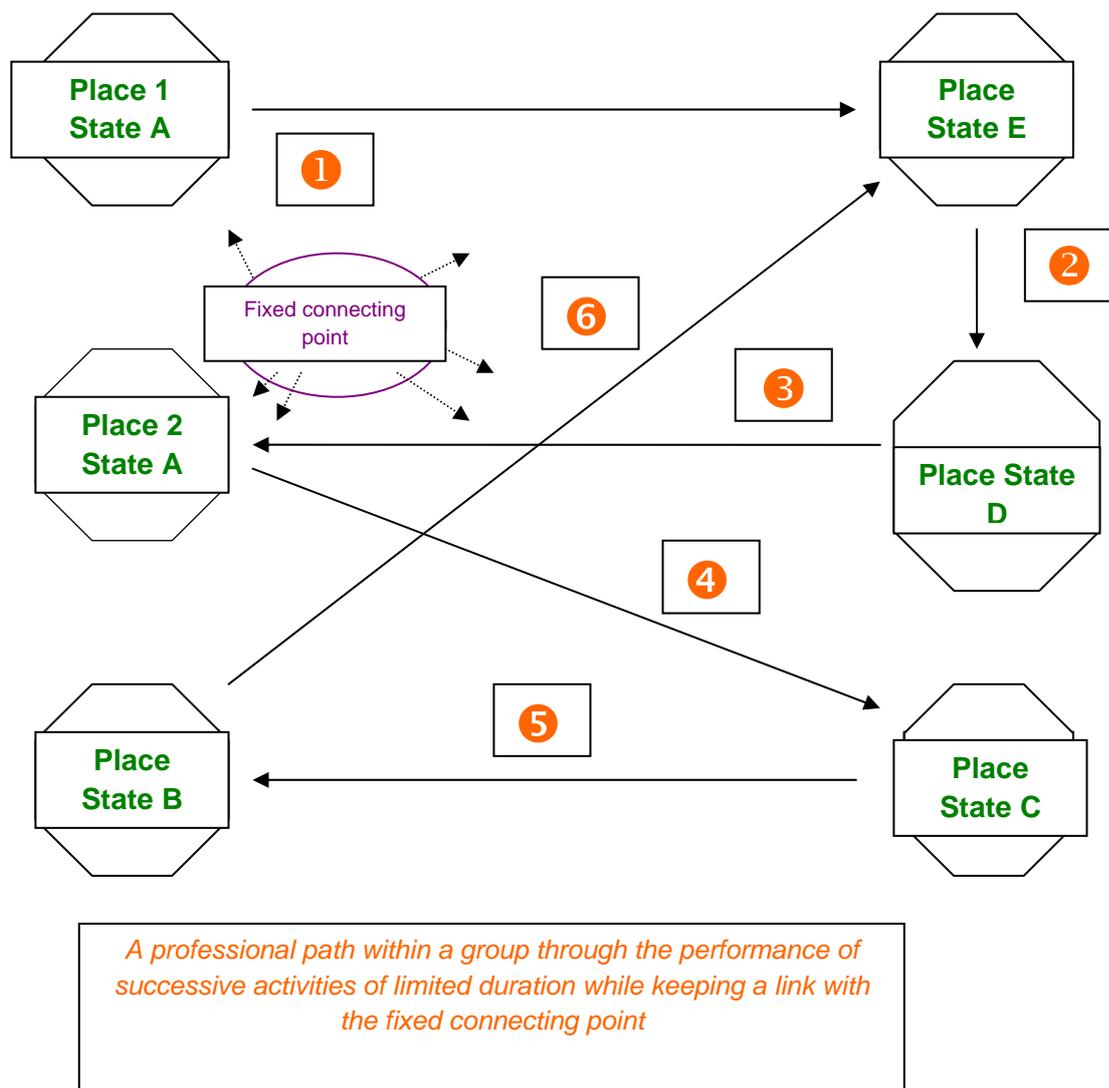
Graphic 1: the situation of posting



Graphic 2: the situation of intra-group mobility



Graphic 3: Professional mobility as self-employed



1.2. What lessons can we learn from intra-group mobility in labour law?

1.2.1. Intra-group mobility and applicable law

The previous chapter has shown that the concept of intra-group mobility as such is not explicitly referred to in social security law. That raises the question whether labour law takes intra-group mobility into account?

Looking at the position under labour law might be helpful for several reasons. Firstly, solutions under labour law might provide examples that may be applicable to social security law. Secondly, under labour law the place of business of an employer is also frequently used to determine which labour law is applicable. As a similar connecting factor might be an option under social security law, it may be helpful to see how this concept is interpreted in labour law? And finally, consistent solutions between labour law and social security law is advisable as, - for the employee as well as for

employer -, it is often difficult to understand why they would be subject to country A for social security, but subject to country B with respect to labour law.

Discovering what the applicable labour law is in an international situation is can be a very difficult exercise. The law applicable to employment contracts is currently regulated by the European Regulation 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (also called Rome I-Regulation). This Regulation codifies the Rome Convention of 19 June 1980. It will apply to employment contracts concluded after 17 December 2009.

Article 8 of the Regulation deals with "individual employment contracts". As there is no specific rule of conflict for cross-border intra-group forms of mobility, Article 8 has to be read together with the general rules of conflict contained in the Regulation.

The starting point is the freedom of choice by the parties concerned. According to Article 3 of the Regulation, *"a contract shall be governed by the law chosen by the parties"*. Consequently, parties may, when signing a contract, decide which law will apply to their contractual relationships. Therefore, it is permitted, in a cross-border intra-group mobility situation, to subject the labour contract to the legislation of the "outgoing" or "incoming" state or to any other legislation, including non -EU legislation. From a labour law perspective, the fact that two companies are involved and that the labour agreements of the employee concluded with both of these companies are closely connected with each other and to one or another extent interrelated, is of no importance. They remain two individually concluded labour agreements, for which the applicable labour law has to be determined separately.

Nevertheless, in order to protect the employee it is determined that the choice of the applicable legislation by the parties may not *"have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law (i.e. the so-called mandatory provisions) that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article"*. This will be in the first place *"the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract"*. The reference to "from which" is new under Regulation 593/2008. The goal is to clarify the status of international mobile workers such as truck drivers or air crew and to submit them to the mandatory rules of the law of the place where they start and finish their work duties. The Regulation adds that *"the country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country"*. This sentence can refer to posted workers, but not necessarily so, as there is no definition of posting.

The only conditions that these provisions appear to imply, are, on the one hand, that a person is only temporarily working in another Member State – although contrary to social security law, no fixed period is determined and temporary employment might involve a period of several years, as determined in the case law of the Court of Justice on free movement of services – and on the other hand, that the employee remains, during her or his temporary employment abroad, subject to the employment contract concluded with the employer who has sent her or him abroad.

Under international labour law, it is therefore perfectly possible that two simultaneously applicable legislations will coexist. In the case of posting, it is even possible that the labour law provisions of three states are applicable: firstly the chosen law; secondly the mandatory provisions of the 'objective' applicable legislation, i.e. the legislation that would apply if parties have not made a choice (the place of habitual employment) and thirdly, the overriding mandatory provision of, for example, the country of temporary employment. Indeed, as described in Article 9 of Regulation

593/2008, nothing can restrict the application of the overriding mandatory provisions of the law of the forum.

The lack of clarity of the concept of 'mandatory provisions' and the fact that this concept is interpreted differently under the legislation of the different Member States, were two of the reasons that have led to the adoption of the Posting Directive 96/71 which has priority over Regulation 593/2008.

Where the Posting Directive 96/71 is not applicable, it is necessary to refer to Regulation 593/2008. This is not unimportant as some situations of posting might not be considered as such under Directive 96/71. The concept of posting under the Posting Directive 96/71 is, however, broader than the concept under the social security Regulations, and explicitly refers to intra-group posting in Article 1 (3). The Directive applies to companies which "*post workers to an establishment or to an undertaking owned by the group in the territory of a Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting*". A definition of the concept of group is however not provided for in the Directive.

While it is required that an employment relationship is concluded between the sending company and the employee, it is not required that this posting took place in the framework of an agreement between the sending and the receiving company. In parallel, the sending company will indeed hardly have any relationship with the receiving company, apart from belonging to the same group, and quite often it will be the receiving company that has authority over the employee.

The only requirement is that an employment relationship exists with the sending company. No answer is given to the question whether there can be another employment contract with the second company and if the contract with the posting company can be a dormant one, but it can be presumed that this is the case. While the Posting Directive 96/71 therefore does not preclude the situation that an employment contract is concluded with the second "receiving" company, it is – as mentioned above – generally considered as being contradictory to the posting conditions under the regulatory framework for social security.

The rationale of Directive 96/71 is to provide that "*Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down: - by law, regulation or administrative provision, and/or - by collective agreements or arbitration awards which have been declared universally applicable (...): (a) maximum work periods and minimum rest periods; (b) minimum paid annual holidays; (c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes; (d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings; (e) health, safety and hygiene at work; (f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people; (g) equality of treatment between men and women and other provisions on non-discrimination.*"

1.2.1.1. The concepts of habitual employment and place of business of the employer as connecting factors under labour law

Under Regulation 593/2008, a person is normally subject to the place of habitual employment. This concept could be interpreted (until now the European Court of Justice has had no opportunity to express its opinion on this concept but we can refer - taking into account the "*Gleichlauf*" between the two instruments - to Regulation 44/2001 on jurisdiction and the recognition and enforcement of

judgments in civil and commercial matters – which we will discuss further - that contains a similar concept) as the place, where an employee has established the effective centre of her or his working activities, which is the place, where or from which the employee actually performs the essential part of her or his duties vis-à-vis the employer (see case C-37/00, *Weber*, 44 and 49; see also *ECJ Rutten v. Cross Medical Ltd*, case C-383/95; *ECJ, Mulox*, case C-125/92).

The fact that a person is temporary employed abroad has no impact on the place of habitual employment.

In such cases the conclusion of a labour contract between the employee and the second employer in her or his country of temporary employment has no impact. In the preamble to the Rome I - Regulation it is now clarified that concluding a labour agreement with a second employer does not have any impact on the temporary character of a period of employment abroad. In many circumstances, the labour contract with the second employer will be very closely, but not inextricably bound up with the first labour agreement. As it is the intention that after temporarily performing activities abroad at the place of a second (subsidiary) company, the employee will exercise further activities at the sending parent company and will therefore remain integrated with the first employer, a different treatment to the situation when no second labour agreement is concluded is not justified. For that reason the posting provisions remain applicable. We can observe here a clear distinction with the posting provisions under the social security Regulations where it is generally accepted that for the application of these provisions it is not permitted to conclude a labour contract with the second employer.

In a case where a worker would continuously commutes between two or more countries or works (successively) in different countries, and where it is not possible to determine the place of habitual employment, “*the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated*”, in accordance with Article 8 (3) of Regulation 593/2008. This rule of conflict could apply to intra-group mobility, for instance in the case of employees who are highly mobile and who therefore cannot be seen as habitually carrying out their activities in one Member State. It might perhaps also apply in cases in which an employee has concluded an employment contract with an international firm and performs activities for different branches or offices of that firm – where these branches do not have an own legal personality – in different countries and which can be seen as part of the international firm.

1.2.2. Intra-group mobility under the Regulation on Jurisdiction of Judgments

Now we make a small side-step to Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, as under this Regulation the Court of Justice was confronted with some situations of intra-group mobility. Also these cases have very clearly shown that this type of mobility is not given specific treatment in the absence of tailored provisions. The first case concerns a French employee of the Glaxosmithkline international group. He had worked for this international group for 20 years in Africa on the basis of two employment contracts, one concluded with a company of the group based in the UK and the other one with a French company of the group. After he had been dismissed by the second employer and the first company refused to reintegrate him, he brought proceedings before a French court, in connection with the place of his domicile. He sought to justify the jurisdiction of the French tribunal under Article 6 (1) of Regulation 44/2001 which provides that “*a person domiciled in a Member State may also be sued (...) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings*” (*ECJ case C-462/06, Glaxosmithkline*). The Court of Justice denied him the right to do

so, considering that Article 6 (1) does not apply to employment contracts. This solution may not be helpful to the employee, however it is consistent with the wording of the text and it also avoids an even more unbalanced outcome between employers and employees concerning conflicts of jurisdiction.

In another case (ECJ case C-462/00, *Pugliese*), an employee had two successive contracts of employment with two different employers. The employee had concluded a labour contract with Aeritalia for employment in Italy. Shortly after, she was transferred to Germany to work for Eurofighter, a company closely related to Aeritalia, with whom she concluded another labour agreement. When Aeritalia was taken over, the new Italian company refused to continue to pay certain of Mrs Pugliese's travel and lodging costs. During her employment in Germany, the first Italian labour agreement was suspended. The question was whether the German court has jurisdiction to resolve the dispute between the employee and the first employer, where the employee has carried out her work for the second employer in Germany, while the contract concluded with the first employer concerns the place of work in Italy. According to the Court, in a dispute between the employee and the first employer, the place where the employee performs his obligations to a second employer can be regarded as the place where s/he habitually carries out her or his work, when the first employer, with respect to whom the employee's contractual obligations are suspended, has – at the time of the conclusion of the second contract of employment – an interest in the performance of the service by the employee to the second employer in the place decided on by the latter. In a case where the first employer has an interest in the direct performance of the activities for the second employer, the Court in the country of second employment is also competent. It is required that an interest must be determined and this is done by taking all circumstances into consideration: important considerations are, for example, that the second contract is envisaged when the first was being concluded; that the first contract was amended on account of the second contract; that there is an organisational or economic link between the two employers; that there is an agreement between the two employers providing a framework for the coexistence of the two contracts; that the first employer retains management powers in respect of the employee; and that the first employer is able to decide on the duration of the employee's work for the second employer. This case law appears to give competence to the court of the country of temporary employment abroad.

For the Court; the contract in the country of temporary employment impacts on the choice of the competent court.

1.2.3 The different presumptions under labour law and social security law

The above description of the situation under labour law demonstrates how far these rules differ from the social security provisions. The conflict rules under labour law and social security law, embark from a different point of departure. The fundamental objective of the framework of the Regulations on social security is to avoid disadvantages for the employee and her or his employer but also to avoid administrative complications as a result of the simultaneous application of two country's legislations. A fundamental objective of the conflict rules are, therefore, to make the employee subject to one and only one social security legislation, which is most often the country of normal employment. This is also known as the system of exclusive and mandatory application of the conflict rules.

Labour law does not start from the presumption that the persons concerned would only be subject to the labour law system of one country. On the contrary, the existence of a principle of protectionism and favouritism for the "weaker" contracting party, i.e. the employee, alongside the general principle of freedom choice (all principles under the international private law rules), results

in a situation, where an employee will in most of the time fall under the labour law system of more than one country. It might even be possible that three systems are simultaneously applicable under labour law. Under labour law, the court in the receiving state is also given a broader role to protect the employee, than she or he is given under social security law. The adoption of the Posting Directive 96/71 has led to a situation where some labour law provisions of the country of temporary employment are guaranteed in addition to the labour law that is applicable on the basis of the general principles of international private law. The coexistence of two simultaneously applicable legislations is thus confirmed.

Many questions also remain open under labour law. The parameter of the rules of the temporary workplace legislation (when relevant) is not precisely defined and is subject to interpretation. The fact that labour law takes into consideration the protection of workers' interest, does not, however, exclude that internal market goals are also taken into account. In addition, there are multiple criteria used to resolve the conflicts of law and the conflicts of jurisdiction: the habitual workplace, the temporary workplace, the country where the place of business through which the employee was engaged is situated, the last place where the employee habitually carries out her or his work, the country from which the employee habitually carries out her or his work, the domicile of the employer, the domicile of the employee, the choice of the parties, the place to which the contract is most closely connected. All of these concepts cause problems of interpretation.

Thus the situation of intra-group mobile workers is becoming increasingly blurred, and is far from clear under both social security law and under labour law. There is clearly a need for better regulation of their situation, even more so when the absence of legislation on intra-group mobility at the national level is taken into account.

1.3. Up to a modification of the conflict rules for social security: taking into account the balance of interests theory

In our Think Tank report of 2008 on new forms of mobility, we elaborated the theory of the balance of interests, i.e. that conflict rules should seek a balance of interests between the different stakeholders: employees, employers and national social security institutions.

The choice of a new connecting factor should therefore also depend on the question concerning to what extent the interests of the stakeholders are taken into account.

For an employee (in particular if a more generous system of social security or pension insurance is applicable) it might be worthwhile to avoid the application of different legislations and to remain subject to the same legislation throughout her or his career and not change insurance career in order to build up long term benefits.

For an employer, it might be worthwhile for all her or his employees to remain subject to the same legislation. From a perspective of human resource policy, an employer might be tempted to make all her or his personnel subject to one legislation, presumably the social security scheme of the country where the employer is established, in particular as this is the best known to him or to choose a country where he could make full use of the competitive advantages of the free market and subject all the employees to the country with the lowest contributions. Particularly within international business concerns/groups, the risk exists that an employer sets up a separate branch or company in the Member State that is most attractive to him or her and lets all of the employees conclude a contract with this company. Choosing a connecting factor as the place, where the employer is established or has his administrative seat, could run the risk that an employer deliberately establishes himself in a country with the cheapest social security contributions.

This last problem is also well known in international labour law. We have already seen that where it is impossible to find out where an employee is habitually working, as a subsidiary connecting factor, the place where the employer is established is chosen. But what should be understood by "the place, where the employer is established"? Is this the factual seat of an organisation or the statutory seat, when they do not coincide with each other? Should this concept be looked at from a factual or rather a normative perspective? The factual perspective means where an employee has joined the company, or normative, and implies looking at where the labour contract has been concluded with the employer? It has to be admitted that this terminology used in international labour law is also far from being clear, although a more formal approach appears to be chosen. The chosen terminology that the person concerned will be subject to the laws of "the place of business through which the employee was engaged" seems to refer to the place of contract and to be based on a formal approach. Indeed the general framework for the determination of labour law also starts from a contract, i.e. the labour contract and not the labour relationship. Such a formal choice would however be contrary to the interests of the employee and not in conformity with the principle of the protection of the employee as contained in Article 8 of Regulation 593/2008. A formal approach with respect to the place, where the employer is established and the employee is recruited, could lead to abuse and to an indirect choice of law, where the applicable legislation could be influenced without guaranteeing the employee a minimum level of protection. For that reason, it is recommended to look at the place, where the employer is based and with whom the employee is closely connected, i.e. where or from where the employee normally arranges her or his activities and is as such integrated in the labour organisation and the career path is decided.

1.4. Towards a simple insertion of a new rule of conflict in Regulation 883/2004 or a complete reorganisation of Title II?

The possibility of introducing a new conflict rule for intra-group mobility could also be an opportunity to restructure the order of the conflict rules of Title II of Regulation 883/2004 itself. The problem is that several of the existing conflict rules, such as posting or simultaneous employment, also fit perfectly in to the migration patterns of people working intra-group, leading to difficulties when making the distinction between the different situations. Indeed, we are here confronted with a similar, but different situation, where there is no priority of one rule over the other.

In its current version, Title II of Regulation 883/2004 is structured around three levels: the general rules of Article 11 (i.e. the *lex loci laboris*, adapted for civil servants, an exception made for cross-border unemployed persons, particular adaptation for people undertaking military service, a supplementary rule for residents and adapted for people pursuing activities on board a vessel), all with their unique connecting factor; followed by the special rules of Article 12 (in particular the situations of posting for employed, as well as self employed persons) and the specific rules of Article 13, which focus on the simultaneous performance of activities in two or more Member States. These three main divisions are followed by some complementary rules for voluntary insurance, the auxiliary staff of the European Communities and the general possibility provided by Article 16 to deviate from all previous rules.

Reorganisation of the entire framework would have as its main advantage the opportunity to achieve a more integrated approach and to provide justification for special rules that depart from the general rules by structuring them as part of a general re-organisation. Adding only an additional rule might indeed give the impression that the direction of travel is again towards a very categorical and casuistic approach, where special rules are introduced for different professional categories, often perhaps without justification. It might also offer the opportunity to consider and take account of "new forms of mobility".

This structure, would also be organised around three levels - this time around the concept of intra-group mobility.

The starting point for reflection about a new Title II would therefore be that we include intra-group activities as a special aspect in order to deal with situations where intra-group mobility is not taken account of within the existing framework, i.e. in specific situations where someone works successively for different companies belonging to the same group and the posting provisions are not applicable (e.g. because a local labour contract has been concluded with the second employer).

The first level would provide the general rules, i.e. for those persons who do not perform intra-group activities or do not perform any activity and where the situation is clearly connected to one single Member State: either the place of work or the place of residence. One idea might be to include some further clarification with respect to the concept of 'workplace' for workers, whose activities are by nature mobile, such as airplane crews, lorry drivers, etc. (the concept of home-base) or other situations resulting from new means of communication and technology, such as telework or shelf work with e-transfer of intellectual work.

The second level would contain specific provisions that depart from the general rules adapted to persons performing activities within a network and whose situation contains a cross-border element (intra-group mobility). Apart from the provisions of posting for employees and self-employed persons (which would also remain applicable to situations outside a network), this level could also include special provisions for people working intra-group and eventually also special provisions for other specific professional categories, not because such as they belong to a particular professional category, but because of the specificity and the network character of their activities (we have already mentioned that artists and researchers could be considered to work within networks).

The third level will, in particular, again contain specific rules for persons who do not work within a network, but who normally perform their professional activities in two or more Member States. Here, we are particularly dealing with the provisions of Article 13, where it could be helpful for a more workable definition to be given for simultaneous and successive activities and eventually to provide complementary rules for certain activities or adaptation to well-defined categories.

Summarized, the structure would look as follows:

General framework (Regulation 883/2004, Art. 11: general rules)

Employees → Lex loci laboris

Derogating rules (Regulation 883/2004, Art. 12: special provisions)

Posting of employees/Posting by self employed
→ Remains subject to the previous legislation

Intra-group mobility →
Remains subject to legislation of (to be further determined)

Others ... (artists ? researchers ? ...)
→ Remains subject to legislation of (to be further determined)

Particular provisions (Regulation 883/2004, Art. 13: activities in several Member States)

In this report we are confining ourselves to the situation of intra-group workers. It is assumed that the other conflict rules remain untouched and therefore proposals for a possible modification of other conflict rules, are not presented. In our report of last year, we have however defended the view that some of the current conflict rules could be revised after an assessment on the basis of the balance of interest test.

2. THE CONCEPT OF INTRA-GROUP MOBILITY: PROBLEMS OF DEFINITION

When drafting a possible new conflict rule for intra-group mobility, it is important to first define what should be understood by this concept. What makes this concept different from other forms of cross-border employment? Elements that have to be clarified are the notion of group or network of companies; when an employee working for a network; and when there is mobility within a network. It is not of course the objective of the Coordination Regulation to define in detail what a network of companies is, but rather to limit itself to giving a functional definition that allows the application of the Regulation, i.e. to describe the particular, professional mobility of workers within the European Union.

2.1. What is a network or group of companies?

The concepts of network or group, business concern, subsidiary and branch are hardly defined in the national law of the different Member States. And where it is defined, as, for example, in Poland, Finland, Latvia and Lithuania, the definition can only be found in commercial law and not in labour or social security law. As one has no definition in the relevant laws, one should look for the main characteristics of a network for the purposes of coordination. A network could be seen as a compilation of independent companies under a controlled management or leadership or the dominance of one company over the other companies, mostly through holding a majority of votes or a majority of property over all others, where – apart from the individual interest of each of the independent companies – an ‘interest’ of the network group exists. Between these members of a network, which are usually independent judicial entities, there exists an organisational link, mainly an economic unit. The company policy of the various companies is particularly influenced by their membership of a broader unit and network. Frequently, these companies have a centralised policy making directorate, at another company that can – to a greater or lesser extent – also determine the policy of this company.

Although there is a clear economic connection between the different companies and we can certainly – from an economic perspective - speak of a unity and network, from a judicial point of view, the situation is entirely different. From this perspective it is seen rather as a fiction. Thus the

factual economic situation and the judicial normative approach differ to a further extent in that respect from each other. An employee is usually only contractually bound to one employer and a judicial legal entity of a network as a concept does not exist. This does not exclude that in certain national legislations an embryonic recognition of a network can be found. A French employee, who is put at the disposal of a foreign subsidiary, receives protection from the parent company through the right to integration back into the parent company, in case the person concerned is made redundant by the subsidiary company. This is also the case in Spain and in the Netherlands under certain circumstances, where judges do not always consider an employer to be a person with whom the employee has concluded a formal labour agreement, but also the whole network of companies to which the company belongs. These examples show that sometimes the responsibility of a separate member of a network could switch to the network of companies and where also other members of the group, in particular the parent company, would assume joint responsibility. Essentially, however, from a legal perspective, companies have to be treated as separate judicial entities.

Is the situation different in EU law? Is the concept of 'network' known in EU law? The concept of network can be found in some EU provisions. We can refer to Directive 2001/86 of 8 October 2001, supplementing the statute for a European company, with regard to the involvement of employees, where a subsidiary of a company is defined as an undertaking over which a company exercises a dominant influence defined in accordance with Directive 94/54 on European works councils. Other examples are the Council Directive 90/435 of 23 July 1998 on a common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, where however the concept itself is not clearly defined. The status of 'parent' company is attributed to a company when it has a minimum holding of 10% of the capital of a company of another Member State. The subsidiary is in that respect seen as a company in which at least 10 % the capital of which is held by another company. Member States, however, have the option to replace the criterion of a capital holding by one of voting rights. The objective of this Directive was to abolish withholding of taxes on payments of dividends between associated companies of different Member States and to prevent double taxation of parent companies on the profits of their subsidiaries. In this Directive, the dominance of one company over another is expressed in financial terms. Would it not be better to look instead at human resource policy to determine whether one company controls another. ?

The control might be indirect, for example, if the parent company A controls a subsidiary company B that in turn controls a company C, it is clear that company A now also controls company C.

In addition Council Directive 94/45 of 20 September 1994 on the establishment of a European work council or a procedure on community level groups of undertakings for the purposes of informing and consulting employees (now: Directive 2009/38), defines the group of undertakings as a controlling undertaking and its controlled undertakings. A controlling undertaking is defined as an undertaking which can exercise a dominant influence over another undertaking by virtue, for example, of ownership, financial participation or the rules which govern it. A dominant undertaking is presumed, without prejudice to prove to the contrary, when – in relation to another undertaking – directly or indirectly, this company holds a majority of that undertaking's subscribed capital; or controls a majority of the votes attached to that undertaking's share capital; or can appoint more than half of the members of that undertaking's administrative, management or supervisory body.

This last directive on the European works council is interesting for another aspect, as it defines the scale of a network, i.e. how many companies have to be included and from which point it becomes a community-wide network. While the fiscal directive discussed above only requires that companies have their fiscal domicile in a Member State of the European Union and that two Member States are concerned; and no minimum requirements are set up, relating to the number of employees; the

Council Directive 94/45 (now Directive 2009/38) on the European works council contains much more detailed provisions. Under the European works council an undertaking of community scale is any undertaking with at least a thousand employees within the Member States and at least 150 employees in each of at least two Member States. A group of undertakings of community scale has the following characteristics: at least one thousand employees within the Member States, at least two group undertakings in different Member States and at least one group undertaking with at least 150 employees in one Member State and at least one other group undertaking with at least 150 employees in another Member State. From the moment companies of this size are active in two Member States, the European works council directive applies, regardless of the fact that another part of the group might be situated outside the European Union.

A minimum definition of community scale seems therefore to be appropriate, not at least as to avoid any misuse and abuse of the intra-group mobility rule. Otherwise it would be possible to define a network or group of companies just by the presence of two companies in different Member States, even if they both have only a few employees. Taking into account that the minimum scale of a network group company is now described in an EU-instrument and in addition, in the field of social law, the Think Tank is of the opinion that it is more appropriate to follow this definition and refer to this directive, rather than to invent a new definition of a community-wide group of undertakings within the Regulation.

2.2. The concept of intra-group mobile worker

But when does someone belongs to such a network, or more particularly, how do we define an employee who works for a network group? Which conditions have to be fulfilled before this rule can apply?

It is necessary that the employee has a labour contract with one of the companies belonging to the network group. Employees who work for the group, but only have a contract with an external company, as well as self-employed people, even if they work on a regular basis or are even almost full-time for the group, as for example, consultants, financial auditors, lawyers,, could not be considered as an employee of a network group company.

The employee should also follow a certain career track within the group, i.e. it is important to be employed for at least two minimum successive periods of activity in two different companies belonging to the group, while keeping the necessary link with both entities. Most often, – but not necessarily – the contract an employee has with the first "sending" employer inside the group, will not as such end when the employee concludes another labour contract with the second company of the group, but will rather be frozen and be reactivated when the employee finishes her or his contractual obligations with the second company. Mobility will take place within a group strategy: the fact that the employee concerned has a labour contract with a second employer, should be a requirement for the application of the intra-group mobility rules of conflict, in order to make a clear distinction with the alternative rule of conflict based on posting (which international groups will still be able to use (see below)). But this labour contract with the receiving company should not have an impact on the relationship with the first "sending" company, with whom the employee concerned might still have a – even very loose – link. This link could be a labour contract, an active one or a frozen one, although this is not absolutely necessary as his or her mobility track might also be the result of one or another verbal agreement within the company (when the labour contract with the second firm comes to an end, the employee is guaranteed further employment either within the first company or within another company of the group) or of a human resource policy or intra-group regulation of the network or even an individual decision.

It might of course also be the case that an employee is sent by her or his first employer to another company within the group, without having concluded a labour contract with this second company. The posting provisions would apply here. This might, however, still be seen as intra-group mobility, in the case that both companies belong to the same network and the period of temporary employment within the other company results from a human resource policy of the group or a contract concluded between both companies. In that case, the employee would be to one extent or another extent at the disposal of a second company, i.e. the activities she or he performs there are not as such on behalf of the first company, but rather for the benefit of the second one, although it might be very difficult to distinguish the interests of the individual entities of a group from the general interest of the group as a whole.

2.3. The concept of mobility within a network

The employee will perform different activities successively within a network group of companies, either through an exclusive connecting factor (a unique permanent contract) or through cumulative connecting factors (a frozen contract with successive active contracts or permanent active contracts followed by complementary active contracts). It is not necessary that the worker concerned should have worked for a previous period for the first "sending" company before being employed by another linked company in the group. We can envisage situations, where an employee concludes a labour contract with a company that provides for immediate employment with a subsidiary company. In a case where employment is with another company, that is external to the network company, the period of intra-group mobility would come to an end, however, a new career track within the network could re-start from the moment all the necessary conditions are fulfilled again. One question is whether the performance of an activity or the same group, but outside the European Union brings an end to the period of intra-group mobility under the conflict rules or whether that employment outside the EU could be seen as a temporary suspension of movement within the EU? Within the logic of the Regulation, one could consider employment outside the European Union as an interruption, so that the special conflict rule would only re-apply when once all the conditions are again fulfilled.

Intra-group mobility requires successive periods of activity in at least two different companies or entities of the group, although these successive periods of activity might be unlimited in number and without the need to return to the first sending employer, before being employed at another company within the group or the requirement to return before leaving the group or retiring. It is not necessary for the first "sending" employer to be the parent company or the dominant company within the network. It is sufficient that this company belongs to the network group. There might be also a situation, when an employee employed by a subsidiary is sent to the parent company for a period of years, to gain experience and knowledge. Intra-group mobility can therefore also take place between a dominant or parent company and a subsidiary company; or between a subsidiary company and a dominant parent company; or between two subsidiary companies. The only condition is that all companies are in one or another way related to each other within a network.

The last important aspect relates to the question of the timeframe within which these successive phases of intra-group mobility should take place? In other words, what is the maximum period of employment within each network group company covered by this provision? It might be tempting to look at this intra-group mobility from a lifetime perspective, where employees within a group such as, for example, managers, would only switch from one company within the network to another every five to ten years or perhaps might obtain a position within another connected company a few years before retirement, which on the past history could be, considered to be a further period of employment within the group, allowing the person concerned to remain insured under the legislation of a previous state of employment. In that respect, a distinction must be made between

social security law and labour law. From a labour law perspective it is usual when discussions take place around the applicable labour law, to examine the employee's history to determine whether she or he was only temporarily employed within another company, so as to remain further subject to the country or the place of habitual employment. 'Temporary' might in this respect be a relative concept, where, for example, the fact that an employee has worked for a company abroad for six years, after having worked for 30 years for that company in another country, might still be seen as relatively limited and temporary. From a social security perspective however, decisions on the applicable legislation have to be taken beforehand. From that perspective, it seems more advisable to limit the conflict rules on intra-group mobility to situations, where the employee concerned changes between companies relatively frequently and the periods of successive employment would therefore be limited in duration. In that respect, a period of two years seems to be an appropriate timeframe, as it would also have a certain symmetry with the posting provision. It might indeed be very difficult to justify why a longer period would be permitted for intra-group mobility than under the posting provisions.

But what should be the position if it is known from the outset that the period of employment for a connected company abroad will be for a longer period than 24 months? If the period of work were to last more than two years, then the general rule of the *lex loci laboris* would again become applicable.

This would be a similar situation to the posting provisions, where it is necessary would have to rely on Article 16 agreements (Regulation 883/2004) to could extend the duration of the activities for each of the companies up to a maximum five years.

The main objective of a special rule for intra-group mobility is to extend and to guarantee the social protection of the employee concerned to remain under the social security system of one country. Which country that should be is discussed below.

3. CHOICE OF THE RULE OF CONFLICT: PROPOSAL FOR A NEW CONFLICT RULE

3.1. Some preliminary remarks

After having discussed the different conditions for intra-group mobility, we would like to focus in this chapter on a proposal for a possible new conflict rule. As was mentioned earlier, the role of the Think Tank is to provide the responsible political institutions with a draft for discussion, the final decision is of course up to these institutions.

An important first issue is the question to what extent a separate rule for intra-group mobility would be obligatory or that the person concerned/network could choose to continue to rely on the general provisions? The same question can also currently be asked with respect to the posting provisions. There is not only the question whether the posting provisions need to be seen as an exception to the general *lex loci laboris* rule, but also whether the posting construction must be applied when the posting conditions are fulfilled. Or, does the Regulation permit a choice between posting and expatriation? Even if an employee fulfils all the posting conditions, an employer might nevertheless prefer to apply the general rule of *lex loci laboris*, in a case, for example, where the state of employment would be more beneficial to the employer with respect to the level of contributions. We know however that it is the aim of the conflict rules that administrative complications are avoided, not that the person will receive the highest benefits.

A posting declaration is not a mandatory as the posting provisions are also applicable on the evidence of the factual circumstances. The fact that in principle that someone must apply for posting, may not, therefore, be seen as an argument in favour of the non-compulsory application of these provisions. Thus in many instances the posting provisions are seen as being obligatory and do not provide the possibility of choice for the person concerned.

For intra-group mobility it might be much more appropriate to explicitly decide that the application of the particular conflict rule would be optional. That does not immediately imply that the persons concerned would have a fully free choice – free choice is, although fully present in international labour law, not foreseen under the social security Regulations with the exception of EU auxiliary personnel. This provision could, therefore, necessitate a joint decision between the group and the employee concerning the latter's career track within the group.

However, for intra-group mobility, the question might be less problematic. Indeed, posting and intra-group mobility cover different situations: whereas posting implies that there is no labour contract between the receiving company and the worker, such a contract is required in our definition of intra-group mobility. Therefore, a situation cannot be simultaneously subject to the posting and the intra-group mobility rules of conflict. However, the question of an option could be raised between the intra-group mobility and the general rules of conflict (*lex loci laboris*, simultaneous activities). In this case, we may consider that the special intra-group mobility rule of conflict should prevail and should apply, but we may also leave open the possibility for a choice. As a consequence, it could be decided either to follow either the general rule of the *lex loci laboris* or the special rule for intra-group mobility. This would allow groups, notwithstanding that they fulfil the conditions, not to apply the specific provision. It would also permit a distinction to be made with posting, which fits the logic of free movement of services in the internal market, which is clearly not the case for intra-group mobility.

We have already pointed out that an important difference with the posting provisions is that in the case of intra-group mobility a labour contract is concluded with the second employer. Having a local contract with the second employer has hitherto in the main been considered to be contrary to the posting provisions. Social security law differs in that respect from labour law where a local contract is permitted under the posting provisions. The preamble to the new Regulation 593/2008 on applicable labour law states that work carried out in another country should be considered as temporary, when the employee, after carrying out his or her tasks abroad, resumes work in the country of origin. It is also explicitly mentioned in the preamble to this Regulation that concluding a second local labour agreement with the receiving company does not preclude the employee from being regarded as carrying out his or her work temporarily in another country. As it is not the intention of the parties to integrate into the local labour market, where the activities are temporarily performed, and as it is foreseen that the person concerned will return to his state of sending, his or her assignment abroad will not lead to a modification of the law applicable to the labour contract. But could the same reasoning also not be extended to social security law? Could it not be argued that owing to the continuation of the connections the employee has with the "sending" employer and due to the temporary character of employment in the second state, the posting provisions could apply in such a case, particularly if the local labour contract with the receiving company only contains some minor adaptations to the local situation? In this case there is a parallel as the parties have the intention that the employee remains connected to her or his original employer and that the employee would again be employed by this employer after the temporary employment abroad. This would also introduce coherence with labour law.

A reason for the different approaches and reasoning between labour law and social security law might perhaps be found in the fact that, contrary to labour law, where the intention of the parties is

the determinant factor, the conflict rules under social security are only intended to prevent the simultaneous application of a number of national legislative systems and the complication which this might cause, and to ensure that the persons covered by the Regulation are not left without social security cover, because there is no legislation applicable for them (see eg. *Luijten*, Case 60/85; *Kits van Heijningen*, Case 2/89; *Fitzwilliam*, Case 202/87; etc.). Social security law, therefore, seeks the prevention of administrative complications, not only for workers, but also for employers and social security authorities, as this would cause obstacles and impediments for the freedom of movement of the former. But might it not also be appropriate to apply the posting provisions in social security law at least to cases of intra-group mobility, as the relationship between the initial employer and the employee does not come to an end, but is only suspended as long as the labour agreement with the second employer continues to exist.

One of the most important elements is to find out which connecting factor should be used to define the Member State whose legislation remains applicable? The place of habitual work of the employee, which refers back to the general rule of *lex loci laboris*, might potentially lead to continual changes of the applicable legislation, as the worker concerned has labour contracts with, and works for, different companies in different places. Therefore, a connecting factor linked to the employer should be used. However, if this is the case, there are different options such as, for example, the place of recruitment, the location of the company headquarters or the place of first stable employment in a company of the group, etc. Each of these connecting factors has its advantages and disadvantages. However, we believe that it is particularly important to take the balance of interests into account. We have already mentioned above that using the place of recruitment as a connecting factor might disadvantage the employee, as it could encourage employers to set up an administrative business or company in a Member State with lower social contributions and to conclude all their contracts with employees in that country. On the other hand taking company headquarters as the connecting factor would not be any better as this might frequently be a country with which the employee has very little real connection, other than that the general decision-making authority of the group is located there. Frequently, employees would not be working in, and would only have a minor legal attachment to that country. Although the company headquarters might take the economic decisions for the whole group, it is often the case that the employee does not have a labour contract with that company but works in a separate legal entity. In addition, in a globalised world, the headquarters of a network group companies might, in many cases, be situated outside the European Union, giving rise to problems of application.

For these reasons, it is believed that the place of first stable and effective work in a company of the group might be the most appropriate connecting factor. This can be considered as the normal place of employment, where the employee has her or his centre of interests and from where they will arrange the next steps of their career path. In addition, it would also give a solution to the situation, where it is the policy of a multinational group to let all employees conclude a contract with one and the same company.

3.2. The new conflict rule

Taking into account the above arguments, the following proposal for conflict rules could be made:

- It seems appropriate to add after Article 1 (a) and (b) in Regulation 883/2004 a definition of intra-group or network group of companies. This new definition could be

"(ba) "group of companies" means a network group of companies or a group with a community-wide dimension with a dominant company that exercises control over other connected companies, as defined under Directive 2009/38 of 6 May 2009 on the establishment of a

European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees;”

- New Article 12 (3): one might restructure the special provisions of Article 12 by making additional titles as follows: title (A) posting of employees, title (B) posting of self-employed people and (C) intra-group mobility of employees.

“(3) A person who has normally performed work activities in a Member State on behalf of an employer being part of a group of companies and who afterwards exercises successive activities as an employed person in other Member States to the benefit of other employers being part of the same group of companies may choose together with his/her employer to remain subject to the legislation of the Member State where that first employer is established, on condition that the duration of each of the new periods of activities as an employed person does not exceed 24 months; that these successive periods are not interrupted by a period of activity on behalf of an employer who does not belong to the group of companies or for a period of inactivity of more than (three) months and not assimilated to a period of activity due to Article 11 (2) and that a labour contract is concluded between the person concerned and each of the successive employers, regardless of the link that the employee might keep with the first employer.”

This definition contains the following characteristics:

- the start of a career within a company that is part of the group;
- the successive periods of activity within other companies of the group in different Member States with a maximum of two years each; should the activity would last more than two years, the general rules would apply unless agreements under Article 16 of Reg. 883/2004 are concluded.
- the continuation of a career path, as it is requested that the period is not interrupted by any activity for a company outside the group or for a period of inactivity of more than (three) months and which is not assimilated to periods of activity, allowing as such to also cover periods of holidays, training and development within another company of the group, sickness, etc.
- the condition that a labour contract would be concluded with each of the successive employers, while the employee concerned keeps a link with the connected company, regardless of how this link looks, i.e. without the necessity of still keeping a (frozen) labour contract. What is important is that the movement takes place within a group strategy. It has to be recalled that situations without a new work contract usually will be regarded as normal posting under Article 12 (1).

In that respect, it seems preferable that paragraphs 1 and 2 of Article 14 of Regulation 987/09 are also adapted, or duplicated, with respect to intra-group mobility, where – if new conflict rules are enacted – it might also be considered whether it would be appropriate to insert these provisions into the text of Regulation 883/2004.

- Finally, it might be also be appropriate to introduce a decision of the Administrative Commission to clarify the concepts used in this provision, such as, for example, ‘company of first stable and effective work’, which periods of interruption are permitted, the link with the connected company, the modalities for the application of the provisions of intra-group mobility.