The judicial finetuning of the EU rules determining the applicable social security legislation

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Abstract
The conflict rules enshrined in Regulation 883/2004 on the coordination of social security were created six decades ago to offer those who exercise free movement rights ‘constant social security protection’. The main idea was to ensure that beneficiaries are always subject to the legislation of a single Member State and to indicate which Member State that was. Because beneficiaries were above all ‘standard’ employees working on a full-time basis for an indefinite period of time, it was initially quite easy to determine the ‘competent’ Member State. The processes of flexibilization, digitalization, enlargement and globalization, however, have posed new and often formidable challenges. In today’s dynamic labour market it is often particularly difficult to identify the applicable legislation, issues arise as regards swift and frequent switches in the applicable legislation, increased worker and company mobility may affect social security rights and problems have arisen because of the possible fraudulent use of the rules determining the applicable legislation. This contribution analyses some of the recent CJEU case law on topics like working in to or more Member States, posting, abuse and fraud, employment and/or residence outside the EU and gaps in in social security protection by EU workers. The overarching question is how, in the view of the CJEU, the classic conflict rules are to be applied so as to ensure cross-border movers continue to enjoy constant social security protection.

Keywords
Regulation 883/2004, simultaneous working, posting, employment and/or residence outside the EU, abuse and fraud, gaps in social protection

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I. Introduction

To facilitate the cross-border movement of persons within the European Union (EU) the EU legislation has set in place an extensive regime for the coordination of social security systems. The hard core of this regime, which is governed by Regulations 883/2004 and 987/2009, consists of the rules determining the applicable legislation. These are conflicts rules that avoid a person who moves from one Member State to another ending up in a situation in which no legislation is applicable to him/her at all (negative conflict of law) or one in which the legislation of two or more Member States applies (positive conflict of law). The goal is to ensure that a person who moves between Member States is, at any point in time and in whatever circumstances s/he may find herself/himself in, subject to the social security legislation of a single Member State ('single State rule').

Regulation 883/2004 prescribes which Member State must apply its legislation in a given cross-border situation. The leading rule is the *lex loci laboris*: the ‘competent State’ is the one in whose territory workers or self-employed persons pursue their activities, regardless of where they reside (Article 11(3)(a) of Regulation 883/2004). Some exceptions exist to the State of employment principle. First, posted workers remain covered by the legislation of the Member State from which they are sent (Article 12). Second, persons who pursue activities in more than one Member State are subject to the legislation of either the Member State in whose territory they reside or the one where their employer is based (Article 13).

The application of these rules appears to be increasingly complex. The rules date back to the 1960s when workers usually moved to other Member States to work on a full-time basis and for an indefinite period for a single employer. In such cases it was, and still is, quite easy to determine the Member State of employment and thus the applicable social security legislation. Today, that is often far more difficult. Various developments account for this.

A first one concerns the flexibilization and digitalization of the labour market. In the wake of these processes, new ‘atypical’ forms of work have merged. Part-time work, fixed-term work, on-call contracts, employment agency work, platform-work, teleworking etc. have offered new work opportunities not only for sedentary workers but also for cross-border workers. Today, it is perfectly possible that an IT specialist living in the Netherlands works a few days a week from the office of his German employer and the other days from home to complete assignments for a client based in Spain. A professor of the University of Lisbon may also hold a position at the European University Institute in Florence while doing empirical fieldwork in Cyprus and Malta. In such situations, what is the competent State?

A second development that has made the application of the rules determining the competent State more complex involves the enlargement of the Union. The accession of new Member
States in the early 2000s not only implied a territorial expansion of the (labour) market, but also increased differences in national social legislation and social costs for employers. Companies in some Member States enjoy the competitive advantage of having relatively ‘cheap’ employees whom they can post to Member States that are more ‘expensive’. Companies founded in the latter States may decide to relocate their seat and/or main place of business to ‘cheaper’ Member States and to post their employees to other States, including the one from which they relocated. More generally, to profit from differences in national social rules, companies make use of often ingenious legal constructions, which make it often particularly difficult to determine whether in a given situation the State of employment principle, the posting exception or a special rule for persons active in more than one Member State is applicable.

The third development concerns globalization. The EU social security regulations coordinate the Member States’ systems to facilitate cross-border movement within the Union. The basic assumption is that the regime applies to persons who are working and living in the territory of the Member States. Yet, in today’s globalized economy and labour market, it is perfectly possible that an employer based in one Member State hires workers residing outside the Union and posts these to other Member States. An employer may recruit workers residing in other Member States to perform activities outside the Union. In such situations, can the workers concerned benefit from the coordination regime and, if so, in which Member State are they insured?

The application of the ‘classic’ conflict rules in the rapidly and continuously changing (European) labour market is challenging. Next to the questions that relate to identifying the competent State in a given situation, issues arise as regards swift and frequent switches in the applicable legislation, the social implications of both worker and company mobility and the possible fraudulent use of the rules determining the applicable legislation. Ideally, such questions are to be addressed by the EU legislative institutions, but chances that the conflict rules will be significantly altered in the near future would seem to be quite small. As a result, questions on how to interpret and apply the rules, and how to demarcate Articles 11, 12 and 13 of Regulation 883/2004, must often be answered by courts and the Court of Justice of the European Union (CJEU) in particular. This contribution presents and analyses some of the main issues that the CJEU recently has had to address or may face in forthcoming years. The overarching question is how, in the view of the CJEU, the classic conflict rules are to be applied to non-standard forms of work.

2. The simultaneous pursuit of activities in two or more Member States

The rise of flexible work patterns has increased the number of persons working in two or more Member States and, hence, the practical significance of Article 13. In brief, and for present purposes most relevant, persons who normally carry out activities as a (self-)employed person in more than

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5. In December 2016 the European Commission published a proposal for amending Regulation 883/2004, which fine tunes but does not fundamentally alter the structure of the regime for determining the applicable legislation, COM(2016)815 final. The proposal includes a few amendments of the conflict rules for posted workers. The interinstitutional negotiations on the proposal have not yet been completed. However, on 19 March 2019 the negotiating teams of the Council, the Parliament and the Commission have reached a provisional agreement. See General Secretariat of the Council, Proposal for a Regulation amending Regulation 883/2004 on the coordination of social security systems and Regulation 987/2009 laying down the procedure for implementing Regulation 883/2004 – Analysis of the final compromise text with a view to agreement, 7698/19 Add 1 Rev 1 of 25 March 2019.
one Member State are subject to the legislation of the Member State of residence, provided they also work in that State.\(^6\)

One controversial issue that has arisen in relation to this ‘multi-activity rule’ concerns easy and frequent switches in the applicable legislation. Article 14 of Regulation 1408/71,\(^7\) the predecessor of Regulation 883/2004, stipulated that workers who are normally active in several Member States are subject to the legislation of their country of residence, provided that they carry out ‘part’ of their activities there. No minimum requirements were set for that ‘part’. Hence, accepting a part-time job of only a few hours a week in the country of residence could imply a change in the applicable legislation. A risk of manipulation even existed. For example, a frontier worker who preferred to be insured in the Member State of residence could arrange this by agreeing with the employer to work a few hours from home.\(^8\)

Such changes of the competent Member State are problematic. They imply legal uncertainty, cause administrative burdens and/or may negatively affect entitlement to, or accrual of, social security benefits. Both the EU legislature and the CJEU have recognized this issue and addressed it. The legislature has inserted in Regulation 883/2004 the rule\(^9\) that persons who normally carry out activities as an employed person in more than one Member State are only subject to the legislation of the Member State of residence when they pursue a ‘substantial’ part of their activities in this Member State. This means that a ‘quantitatively substantial part’ of the work must be carried out in the Member State of residence, taking into account inter alia the working time and/or the remuneration. A share of less than 25% of the working time or the remuneration constitutes an indicator that the requirement is not satisfied.\(^10\)

The CJEU has responded in a comparable manner to the issue of too easy shifts in the applicable legislation under the regime of Regulation 1408/71. It did so in \(X\), which involved a resident of Belgium who was employed by a Dutch employer. Mr. \(X\) worked 93.5% of the time in the Netherlands, the rest in Belgium, mainly from home. It was undeniable that Mr. \(X\) performed ‘part’ of his work in his country of residence, but the CJEU nevertheless concluded that Article 14 (now Article 13) could not be applied. It found that Article 14 presupposes that the worker in question ‘normally carries out significant activities’ in two Member States. The fact that the person concerned only occasionally carries out activities on the territory of a Member State cannot be taken into account. As regards Mr. \(X\) the CJEU observed that his employment contract did not provide that he had to work in Belgium. Further, the CJEU established that he had

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6. Article 13(1)(b)–(d) Reg. 883/2004.
7. Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, [1997] OJ L 28, p. 1.
8. COM(2010) 794 final, p. 7.
9. In addition, the legislature has established that ‘marginal activities’ must be disregarded for purposes of determining the applicable legislation under Article 13 of Regulation 883/2004; Article 14(5)(b) Reg. 987/2009. No legislative definition of ‘marginal activities’ exists but according to the European Commission this concerns activities that ‘are permanent in nature but insignificant in terms of time and remuneration’. Specifically, it involves activities that account for less than 5% of the worker’s regular working time and/or his/her overall remuneration. Practical guide on the applicable legislation in the European Union (EU), the European Economic Area (EEA) and in Switzerland, Brussels, 2013, at 27. See further E. van Ooij, ‘Highly Mobile Workers Challenging Regulation 883/2004: Pushing Borders or Opening Pandora’s Box?’ 5 Maastricht Journal of European and Comparative Law (2020), p. 673. See also Case C-89/16 Radoslaw Szoja v. Sociálna poisťovňa and WEBUNG, s.r.o., EU:C:2017:538, in which the CJEU held that the marginal activities rule is mandatory in nature.
10. Article 13(1)(a) Reg. 883/2004 juncto Article 14(8) Reg. 987/2009.
performed approximately only 6.5% of the work in Belgium, mostly from home. In such circumstances, someone in the situation of Mr. X cannot be said to be ‘normally employed’ in both Belgium and the Netherlands. Hence, Mr. X fell under the Dutch legislation.11

Thus, both Regulation 883/2004 and Regulation 1408/71 now provide for a threshold requirement that may reduce the risk of switches in the competent State. This, however, is not to say that this risk no longer exists. On the contrary, in the past year the problem has fully surfaced. In these Covid-19 times, working from home has grown enormously in importance and has often even become the norm. Many workers now work far more than the aforementioned 25% at home, and often even 100%. For those who live in a Member State other than the one in which their employer is based, this strictly speaking implies a change in the applicable legislation; they are now formally subject to the legislation of the country of residence and no longer to that of the country of employment. In practice, however, administrative authorities often have not applied and/or enforced the rules determining their legislation as the applicable one by, for instance, granting temporary waivers for teleworking activities.12

In another case named X the issue of shifts in the competent State presented itself in another manner. The case concerned a Dutch national and resident, Mr. X, who had agreed with his Dutch employer to take unpaid leave for a period of three months. During this period, Mr. X worked as a ski instructor in Austria. As employees who are on such unpaid leave remain insured under Dutch social security legislation, the competent authorities demanded payment of social insurance contributions. Mr. X objected: while on leave, he had only worked in Austria and he would thus only be subject to Austrian legislation for the period in question.

The CJEU sided with the Dutch authorities. In determining whether Article 14 of Regulation 1408/71 was applicable in the case at hand, it first considered whether someone like Mr. X must still be regarded as being an employed person in the Netherlands. The CJEU recalled previous case law according to which a person retains the status of worker for purposes of social security coordination during a period of parental leave where s/he ‘is covered, even if only in respect of a single risk, on a compulsory or optional basis, by a general or special social security scheme, irrespective of the existence of an employment relationship’.13 From this the CJEU in X drew the conclusion that because Dutch legislation provides that a person who takes unpaid leave for a certain period of time leave is considered to be employed for social security purposes, s/he must also be regarded as an person for purposes of the conflict rules.14 Subsequently, the CJEU explored whether a person like Mr. X can also be said to be normally employed in the State of temporary employment, in casu Austria. The CJEU held that a person can be regarded as being employed there if s/he ‘habitually carries out significant activities’ there.15 As this indeed seemed to be the case, Mr. X was to be regarded as being employed in two Member States. Hence, the competent

11. Case C-570/15 X v. Staatssecretaris van Financiën, EU:C:2017:674, para. 29.
12. See e.g. statements of the Dutch (https://pers.svb.nl/coronavirus-en-wonen-of-werken-over-de-grens-de-sociale-verzekering-verandert-niet; https://www.svb.nl/nl/bbz-bdz/covid19/thuiswerken), Belgian (https://campaigns.neranova.fgov.be/e-e12fc4a04b4844ea34e146770399f455be5cda09d7b56ce) and German (https://dvka.de/de/arbeitgeber_arbeitnehmer/coronainfo/coronav/coronav.html) authorities. See also M. Weerepas and G. Essers, ‘Coronamaatregelen voor Thuiswerkende Grenswerkers: een Zegening?’, 32 Grensoverschrijdend Werken (2020), p. 5.
13. Case C-543/03 Christine Dodd and Petra Oberholzer v. Tiroler Gebietskrankenkasse. EU:C:2005:364, para. 34.
14. Case C-569/15 X v. Staatssecretaris van Financiën, EU:C:2017:673, para 25.
15. Ibid., para. 26.
State was his State of residence. Mr. X could be obliged to continue pay contributions in the Netherlands.

The CJEU’s ruling in this X case is in order. If a person who, like Mr. X, takes unpaid leave to temporarily work in another Member State would fall outside the scope of the conflict rule of Article 13, he would be subject to the legislation of the Member State of temporary employment (*in casu* Austria). Both at the beginning and at the end of the leave period, he would be faced with a switch in the competent State. The CJEU’s ruling ensures a person like Mr. X’s continuation of social insurance protection in the Member State that may be regarded as his ‘ordinary’ State of employment.

### 3. Posting

The conflict rules of Regulation 883/2004 are not only relevant for workers but also for employers. The reason may be clear: the applicable legislation determines the contributions employers have to pay for or on behalf of their workers. Especially since the enlargement of the Union, contribution rates among the Member States differ considerably. It thus may not surprise that many companies have sought to find ways to have the social security laws of a ‘cheaper’ Member State apply to their workers.¹⁶ Because the applicable social security laws cannot be freely chosen, and rather must be determined on the basis of objective factors such as place of work, registered office or residence,¹⁷ many companies have (re)organized their activities and construed legal structures to have the for them most beneficial social security legislation applicable.¹⁸

#### A. Article 12

Whatever specific business model or strategy is chosen, posting often constitutes a key element of it. Article 12 of Regulation 883/2004 facilitates posting by exempting posted workers for a period of 24 months from the legislation applicable in the State to which the works are posted (the host State). During this period the employers only have to pay the comparatively low social security contributions in the State from which the workers are posted (the home State). To protect workers, however, Article 12 prescribes a number of conditions. In brief, the provision can only be invoked if the posting company normally carries out activities in the home State (and, hence, is not a letterbox company), maintains a direct relationship with the employee during the posting¹⁹ and does not send an employee to replace another posted worker.

1. The ‘non-replacement condition’. The CJEU was asked to clarify this last ‘non-replacement condition’ in *Alpenrind*. The case concerned an Austrian company, Alpenrind, which operates a slaughterhouse. Alpenrind had the meat cut and packaged for a certain period by employees posted by a Hungarian company. Before and after that period, the same work was done by employees posted from another Hungarian company. Does, the CJEU was asked, the non-replacement condition also apply in situations of successive posting by different employers?

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¹⁶. Compare N. Rennuy, ‘Shopping for Social Security Law in the EU’, 58 *Common Market Law Review* (2021), p. 13.
¹⁷. Case C-345/09 *J. A. van Delft and Others v. College voor zorgverzekeringen*, EU:C:2010:610, para. 52 and 54.
¹⁸. L. Berntsen and N. Lillie, ‘Breaking the Law? Varieties of Social Dumping in a Pan-European Labour Market’, in M. Bemaciak (ed.), *Market Expansion and Social Dumping in Europe* (Routledge, 2015), p. 43.
¹⁹. Case C-202/97 *Fitzwilliam Executive Search Ltd v. Bestuur van het Landelijk instituut sociale verzekeringen*, EU:C:2000:75, para. 24.
Advocate-General (AG) Saugmandsgaard Øe answered the question in the negative. He pointed out that the condition at hand was inserted in the early 1960s to avoid employers circumventing the maximum duration for posting by continuously rotating posted staff. The ‘non-replacement condition’ thus would be meant to combat abuses of the posting, which would not occur when multiple employers post the workers. The CJEU did not follow its AG. It rather stressed the prime status of the State of employment principle and its aim to guarantee equality of treatment of all persons occupied in the territory of a Member State. As Article 12 derogates from this main rule, it must be interpreted restrictively. It follows, so the CJEU observed, that the recurrent use of posted workers to fill the same post, even though the employers responsible for posting workers are different, does not comply with the Article 12(1) of Regulation No 883/2004.

Alpenrind is important, for various reasons. First, and in general terms, the ruling confirms and strengthens the predominantly social aim of the rules determining the applicable legislation. The case law on free movement of services may be based on a dominance of economic values over social values, but under the regime of Regulation 883/2004 the order of dominance is reverse. The State of employment principle ranks first, the economic exception for posting only second. Second, Alpenrind confirms that the leading State of employment principle does not only protect mobile workers against underpayment or exploitation. It also protects national, non-mobile workers against job competition from foreign workers. Because of the exception contained in Article 12, local workers may have to compete with posted workers, but only for a limited period of time. Alpenrind implies that a posted worker cannot be replaced by another posted worker, even if two or more employers are involved. Companies based in the host State may still save costs by contracting ‘cheap’ posted workers from companies based elsewhere in the Union, but, in principle, they can no longer have the same work done by a carousel of posted workers sent by different employers.

While Alpenrind also strengthens the social protection of posted workers, it is noted that this protection remains relatively weak. As the CJEU recently confirmed in Walltopia, Article 12 does not preclude that a person is recruited with a view to being posted to another Member State. The person concerned must be subject to the legislation of the home State, but once that condition is met, s/he can be immediately posted. Further, once a given posting has

20. Opinion of Advocate General Saugmandsgaards Øe in Case C-527/17 Alpenrind GmbH and Others, EU:C:2018:52, para. 87–96.
21. C-527/17 Salzburger Gebietskrankenkasse and Bundesminister für Arbeit, Soziales und Konsumentenschutz v. Alpenrind GmbH and Others, EU:C:2018:669, para. 99. The CJEU added that it is therefore irrelevant that the different employers of the workers concerned have their registered office in the same Member State (in casu Hungary) or that they may have personal or organizational links. Ibid., para. 100.
22. Case C-341/05 Laval un Partneri Lid v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning I, Byggetian och Svenska Elektrikerförbundet, EU:C:2007:809.
23. To be sure, this does not imply that such carousels are wholly outlawed. In particular, no legal certainty exists on how much time may pass between two posting before one can speak of a replacement. See N. Rennuy, 58 CMLR (2021), p. 21.
24. Case C-451/17 ‘Walltopia’ AD v. Direktor na Teritorialna direktia na Natsionalnata agenthsia za prihodite – Veliko Tarnovo, EU:C:2018:861, para. 34.
25. See Art.14(1) Reg.987/2009.
26. The Administrative Commission for the Coordination of Social Security Systems has held that a posted worker must have been subject to the legislation of the home State for in principle one month. See Decision A2 of the Administrative Commission. However, this is not a ‘hard’ legal requirement. Compare comments of N. Rennuy, 58 CMLR (2021), p. 23.
ended, the worker can be posted again for another assignment as no waiting-period between several postings exist. If one adds to this that Regulation 883/2004 does not include a ‘home-coming requirement’, one may conclude that no legal obstacles exist to workers being posted for their entire career.27

2. Temporary-work agencies and the condition of ‘normally’ carrying out activities in the Member State of establishment. Team Power concerned the condition that the employer must ‘normally’ carry out activities in the State of establishment. The EU legislature has specified that this condition must be understood as referring to an employer who ‘ordinarily performs substantial activities, other than purely internal management activities, in the territory of that Member State’.28 Hence, letter-box companies do not satisfy this requirement. In determining whether or not other companies do so, ‘all criteria characterising the activities carried out by the undertaking in question’ must be taken into account, and these ‘must be suited to the specific characteristics of each employer and the real nature of the activities carried out’.29 What, so the CJEU was asked in Team Power, does this concretely imply for temporary-work agencies?

Team Power is Bulgarian temporary-work agency that solely assigned workers to Germany. All its turnover was generated by its activities in Germany. In Bulgaria itself Team Power only employed administrative and managerial staff. In assessing whether Team Power satisfied the condition of ‘normally’ pursuing activities in the State of establishment, the CJEU observed that temporary-work agencies perform essentially three types of activities: the selection, the recruitment and the assignment of temporary agency workers to user undertakings.30

The CJEU recognized that none of those activities constitute ‘purely internal management activities’. That concept only covers managerial activities ‘which are intended to ensure the effective internal functioning of the undertaking’.31 Yet, could these activities be considered as ‘substantial activities’? For the purposes of Article 12, is it sufficient that an undertaking like Team Power selects and recruits workers in the State of establishment or does this provision demand that it also assigns temporary workers there? The CJEU observed that ‘although the activities of selecting and recruiting temporary agency workers are of particular importance for temporary-work agencies, the sole purpose of those activities is the subsequent assignment by the agencies of such workers to user undertakings’. It is only the assignment of such workers to user undertakings that actually generates that turnover. It follows, so the CJEU found, that a temporary-work agency can only benefit from Article 12 if, in the Member State in which it is established, it carries out the activities of assigning temporary workers.32

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27. To be sure, the EU legislative institutions intend to combat this by introducing, first, the requirement that workers have been affiliated to the legislation of the home State for a minimum period of three months before they can be posted and, second, by introducing the rule that a worker who has been posted for 24 months can only be posted again after two months. See Articles 2(8)(a) and 2(8)(aa) of General Secretariat of the Council, Proposal for a Regulation amending Regulation 883/2004 on the coordination of social security systems and Regulation 987/2009 laying down the procedure for implementing Regulation 883/2004 – Analysis of the final compromise text with a view to agreement, 7698/19 Add 1 Rev 1 of 25 March 2019.

28. Article 14(2) Reg. 987/2009.

29. Ibid.

30. Case C-784/19 ‘TEAM POWER EUROPE’ EOOD v. Direktor na Teritorialna direktsia na Natsionalna agentsia za prihodite – Varna. EU:C:2021:427, para. 45.

31. Ibid., para. 46.

32. Ibid., para. 62.
This interpretation of the notion of ‘substantial activities’ certainly was not the only possible one. One could, as Advocate General (AG) Campos Sánchez-Bordona had done in his Opinion in the case, just as well regard the selection and recruiting of temporary workers as ‘le cœur de métier’\(^{33}\) of temporary-work agencies. Like its AG, the CJEU could have concluded that an agency that in the State where it is established only employs staff that select and recruit temporary workers and posts these workers only to other Member States, does ‘normally carry out’ activities in the former State. The CJEU refused to follow its AG, however, and it explained why. Such an alternative interpretation could encourage undertakings ‘to choose the Member State in which they wish establish themselves on the basis of the latter’s social security legislation with the sole aim of benefitting from the legislation which is most favourable to them in that field, and thus to allow “forum shopping”’. The social objective of the coordination regime could be undermined if undertakings were to exploit differences between the national social security systems. In particular, ‘such exploitation of that legislation would be likely to have a “race to the bottom” effect on the social security systems of the Member States or might even lead to a reduction in the level of protection that they offer’. Furthermore, allowing temporary-work agencies like Team Power to profit from Article 12, could create a ‘distortion of competition between the various possible modes of employment in favour of recourse to temporary agency work as opposed to undertakings directly recruiting their workers, who would be affiliated to the social security system of the Member State in which they work’\(^{34}\). The CJEU concluded that a temporary-work agency can only benefit from Article 12(1) of Regulation 883/2004 if it carries out ‘significant part’ of its activities of assigning temporary agency workers in the territory of the Member State where it is established.\(^{35}\)

The CJEU thus opposes ‘forum shopping’ by temporary-work agencies because it fears that possibly large inflows of temporary workers from other Member States might affect the social security protection and employment opportunities of national, non-mobile workers in the host State. One may wonder whether this risk is as serious as the CJEU suggests and whether the non-application of Article 12(1) in a given case should not be regarded as a disproportional hampering of the employer’s freedom to provide services. This, however, is not the case. As the CJEU rightly stresses, the social security advantage that Article 12(1) provides does not follow from the mere exercise of that freedom.\(^ {36}\) It rather constitutes an advantage the EU legislature offers and that service providers otherwise would not enjoy. Hence, the EU legislature, in principle, is entitled to attach to that advantage the conditions it deems appropriate. The strong emphasis the CJEU places on the dangers of ‘forum shopping’ does not imply that the motives of the undertakings concerned are decisive for the application of Article 12. The relevant question is whether or not the a ‘significant part’ of the activities is carried out in the State of establishment. Also undertakings that are driven by ‘ordinary’ economic motives rather than differences in social legislation and contributions must satisfy that criterion.

\(^{33}\) Opinion of Advocate General Campos Sánchez-Bordona in Case 784/19 ‘TEAM POWER EUROPE’ EOOD v. Direktor na Teritorialna direktia na Natsionalna agentzia za prihodite – Varna, EU:C-2020:1018, para. 57.

\(^{34}\) Case C-784/19 ‘TEAM POWER EUROPE’ EOOD, para. 63.

\(^{35}\) Ibid., para. 66.

\(^{36}\) Ibid., para. 61.
B. Article 13

Companies that do not normally carry out activities in the home State and/or do not maintain a direct link with employees during the posting cannot benefit from Article 12 of Regulation. In recent years, however, some of such companies have sought to rely on Article 13, which provides for exceptions to the State of employment principle for workers who normally pursue activities in two or more Member States. Particularly interesting for such companies is the rule that workers who are active in more than one Member State and who do not pursue a substantial part of their activities (<25%) in the State of their residence are subject to legislation of the Member State in which the employer is registered or has its main place of business. Application of this specific conflict rule is not subject to a time limit, the requirement that either the employer or the posted worker carries out activities in the competent State or the existence of an employment bond between the employer and employee prior to the posting. Moreover, it does not take much for a company to move its registered office or place of business to another Member State: it suffices to move the place where ‘the essential decisions of the undertaking are adopted and where the functions of its central administration are carried out’.37

Yet, can companies that use posted workers for their cross-border activities actually benefit from the ‘multi-activity rule’ enshrined in Article 13? This provision has never been designed for posting but rather for workers who (themselves) have decided to work in more than two States. Specifically, the provision applies, in principle, to persons who simultaneously or alternatively38 pursue activities in multiple States as well as to highly mobile workers (e.g. international lorry drivers, artists, IT-ers) normally working in multiple Member States on more than a merely one-off basis.39 Nonetheless, recent CJEU judgments demonstrate that companies that fall outside the scope of Article 12 because they do not normally carry out activities in the home State can benefit from Article 13 provided the workers they post are ‘normally’ employed in two or more Member States (1) and that they themselves can actually be regarded as the employer (2).

1. Normally working in two or more Member States. The CJEU addressed the question of whether posted workers can be regarded as being ‘normally’ employed in two or more Member States in Format I (2012) and Format II (2021). The two cases concerned one and the same construction company, named Format, which recruited workers in Poland and subsequently posted them to the building projects in other Member States. The company Format did not habitually carry out activities in Poland.

In Format I the CJEU found that because the ‘multi-activity rule’ only applies when a person is ‘normally’ employed in the territory of two or more Member States, it cannot be relied upon ‘if employment in the territory of a single Member State constitutes the normal arrangement for the person concerned’.40 In the case at hand, the latter indeed was the case. The worker concerned performed work for Format continuously for several months in a single Member State, namely France, on the basis of two separate contracts. Thereafter, on the basis of a next fixed-term employment

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37. Article 14(5a) Reg. 987/2009.
38. Article 14(5)(b) Reg. 987/2009 and Case C-115/11 Format Urządzenia i Montaż Przemysłowe sp. z o.o. v. Zakład Ubezpieczeń Społecznych, EU:C:2012:606, para. 33.
39. European Commission, Practical Guide on the Applicable Legislation in the European Union (European Commission, 2013), p. 26. The Practical Guide is an informative text of non-binding nature. Case C-613/17 SF v. Inspecteur van de Belastingdienst, EU:C:2019:381, para. 41.
40. Case C-115/11 Format I, para. 40.
contract, he worked in Finland. Between each of the contracts, when the work was finished, the worker obtained unpaid leave and the contract concerned was then terminated early. The CJEU concluded that in such circumstances a worker cannot be said to be ‘normally employed’ in two or more Member States.41

Format II involved a Polish worker who worked for Format for approximately 13 months in France, subsequently for two months in the United Kingdom, and thereafter for almost another two years again in France. All these work activities were performed on the basis of a single employment contract and during directly consecutive periods. Did this imply that Article 14(2) of Regulation 1408/71 (the predecessor of Article 13(1) of Regulation 883/2004) could be relied upon? Again, the CJEU responded in the negative. It observed that in order to determine whether a person should be considered to be normally employed in two or more Member States or, conversely, whether they work merely occasionally in several Member States, regard must be had, in particular, to the duration of periods of activity and to the nature of the employment as defined in the contractual documents, as well as to the actual work performed, and, more generally, the characteristics and modalities of the activities pursued by the undertaking concerned.42 In casu the CJEU established that the worker concerned had performed virtually all activities in France. The multi-activity rule cannot be applied to persons who perform activities in a single Member State for a period so long that those activities ‘should be regarded as the normal working arrangement for the person concerned’.43 The CJEU added a few observations on the relationship between the posting provision (Article 14(1)(a) of Regulation 1408/71; Article 12 of Regulation 883/2004) and the ‘multi-activity rule’. As regards the former, the CJEU observed that the EU legislature made an exception to the State of employment principle to facilitate the temporary and short-term posting of a worker to another Member State for a maximum period of 12 months. In order to ensure a consistent interpretation of the provisions of Article 14(1)(a) and 14(2) of Regulation 1408/71, the CJEU held that

a person who performs, during successive periods of work, paid employment activity in different Member States must be regarded as being normally employed in the territory of two or more Member States for the purposes of Article 14(2) of Regulation No 1408/71, so long as the duration of the uninterrupted periods of work completed in each of those Member States does not exceed 12 months. Only such an interpretation is capable of preventing circumvention of the principle laid down in Article 13(2)(a) of that regulation.44

From Format II one may deduce that an undertaking which does not normally carry out activities in the State of establishment, and hence falls outside the scope of Article 12 of Regulation 883/2004, can profit from Article 13 when it consecutively posts workers to other Member States for projects lasting less than 24 months. This conclusion is to be welcomed. While the ‘multi-activity rule’ has never been drafted with posted workers in mind, its application serves the interests of both employers and employees. If undertakings like Format could profit from neither Article 12 nor Article 13, they and their employees would be faced with a change in the applicable legislation.

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41. Case C-115/11 Format I, para. 49.
42. Case C-879/19 Format Urządzenia i Montaż Przemysłowe v. Zakład Ubezpieczeń Społecznych I Oddział w Warszawie, EU:C:2021:409, para. 22.
43. Ibid., para. 29.
44. Ibid., para. 35.
each time a posting begins and ends. The resulting administrative burden and complications could hamper the employer’s freedom to provide cross-border services. Like Article 12, Article 13 thus promotes that freedom by allowing for the continued application of a single Member State, namely the home State. Further, especially in case of short-term postings, switches in the applicable legislation could work out negatively for the posted workers as their affiliation to the legislation of host State may be too short for being entitled to social benefits. The continued application of the legislation of the home State, for a maximum period of 24 months, thus may enhance their social protection.

The precise conditions under which a company that posts workers to other Member States can benefit from Article 13 are, however, not clear yet. To be regarded as being normally employed in multiple States, it does not suffice if the workers occasionally also perform some work in another Member State. A certain regularity of successive work assignments in various Member States is required. When such a repetitive work pattern between two or more Member States exists will have to be assessed on a case-by-case basis and by considering all relevant factors (e.g. wording of the employment contract, how the work is carried out in practice, duration of the work assignments, nature of the work, etc.). In *Balandin* the CJEU suggested that Article 13 could be invoked by Holiday on Ice, a Dutch company that organizes ice-skating shows, and had posted skaters to perform shows in various other EU Member States. Comparedly, in *Bogdan Chain AG Bot* concluded that a Polish national, who lived in Poland and was sent by a temporary employment agency based in Cyprus to various Member States to carry out work, fell within the scope of Article 13. The periods of the posting as well as the periods in between these postings were relatively short and some of the postings took place on the basis of the same employment contract. In the view of the AG, Article 13 captures activities that are ‘consecutively and usually’ – so as a rule rather than ‘exceptionally or temporarily’ – performed in the territory of two or more Member States. If Article 13 would not be applicable, the workers would be faced with a change in the applicable laws whenever they are sent to another Member State. This would hamper the employer’s freedom to provide services, and possibly affect the workers’ social security rights. The CJEU’s view on the issue at hand in *Bogdan Chain* is unknown: the referring CJEU withdrew its preliminary request shortly after the AG delivered his Opinion.

2. **Employer.** An employed person who is active in multiple Member States but does not pursue substantial activities in the State of residence is, in most situations, subject to the legislation of State where the employer has its registered office or place of business. It is, however, not always so easy to determine who must be regarded as the employer, as the case of *AFMB* demonstrates. The case involved international long-distance lorry drivers who live in the Netherlands and initially were employed by Dutch transport undertakings. The drivers performed their activities in various Member States, but not, or hardly any, in the Netherlands itself. In 2011, however, some legal changes were effectuated. The transport undertakings entered into fleet management agreements

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45. Case C-477/17 *Raad van bestuur van de Sociale verzekeringbank v. D. Balandin and Others*, EU:C:2019:60, para. 45.
46. Opinion of Advocate General Yves Bot in Case C-189/14 *Bogdan Chain v. Atlanco LTD*, EU:C:2015:345, para. 56.
47. Ibid., para. 65–70.
48. The referring Polish court withdrew the case by order of 11 June 2015, EU:C:2015:432. On the background see F. Shouldice and L. O’Brien, ‘EU Court Entertained Bogus Case on Welfare Rights’, EU Observer 21 December 2015 (euobserver.com/investigations/131569, accessed 19 August 2021).
49. Article 13(1)(b) Reg. 883/2004.
with a newly created company, named AFMB, based in Cyprus. Under these agreements, AFMB was responsible for the management of the vehicles on behalf and at the risk of the transport undertakings. AFMB also concluded employment contracts with international long-distance lorry drivers residing in the Netherlands. According to the terms of those contracts, AFMB was named as the employer of those workers and Cypriot employment law was declared to be applicable. *De facto* nothing changed: the lorry drivers continued to live in the Netherlands and they still carried out virtually all of their activities in other Member States. As the lorry drivers did not or hardly work in the Netherlands, the applicable legislation was the one of the Member States where the employer is based. Yet, in a case like this one, who is actually the employer? Is this the one who has concluded the employment contract or rather the one who *de facto* acts as the employer? Phrased differently, should the term ‘employer’ in Article 13 be understood as a formal or rather as a substantive concept?

In the CJEU’s view the latter holds true:

> [A]n international long-distance lorry driver must be regarded as being employed, not by the undertaking with which he or she has formally concluded an employment contract, but by the transport undertaking that has actual authority over him or her, that does, in reality, bear the costs of paying his or her wages, and that has the actual power to dismiss him or her.50

The CJEU explained that the single State rule would not be guaranteed if the term ‘employer’ could be determined solely on the basis of formal considerations such as the conclusion of an employment contract. If that were possible, undertakings or employers would be allowed to choose the social security legislation applicable to them and their employees. That, so the CJEU found, would be at odds with previous case law in which it was held that the conflict rules depend not on the free choice of the employed person, employers or competent national authorities, but rather on the objective situation of that employed person.51 Further, Regulation 883/2004 would be unable to achieve the aims of facilitating the exercise of freedom of movement rights, and of contributing towards improving the standard of living and employment conditions, if employers could resort to purely artificial arrangements in order to exploit the EU legislation with the sole aim of obtaining an advantage from the differences that exist between the national rules. In particular, such exploitation would be likely to have a ‘race to the bottom’ effect on the social security systems of the Member States and perhaps, ultimately, reduce the level of protection offered by those systems.52

The CJEU’s conclusion in *AFMB* is to be welcomed. Most of the workers involved were initially subject to Dutch social security legislation, continued to perform the same work, had not relocated and were solely faced with a possibly long-term if not permanent change in social insurance cover because of legal constructions that solely existed on paper. The CJEU persuasively expresses its view that such legal manoeuvring aimed at making commercial profit53 at the expense of social

50. Case C-610/18 *AFMB and others Ltd v. Raad van bestuur van de Sociale verzekeringsbank*, EU:C:2020:565, para. 75.
51. Ibid., para. 67 (referring to Case C-543/13 *Raad van bestuur van de Sociale verzekeringsbank v. E. Fischer-Lintjens*, EU: C:2015:359, para. 38 and the case-law cited).
52. Ibid. para 69.
53. The website of AFMB even contained the following quote from the transport companies it had contracted: ‘Since we placed our drivers with [AFMB], we have saved approximately 25% on our wage costs. The advantage on a […] driver is more than €18,000. As a result, our competitive position compared to transporters who work with Eastern European drivers has improved enormously in a financial sense, while our quality has remained the same. Our clients really appreciate that we have them served by well-trained Dutch drivers!’. Centrale Raad van Beroep, 20 September 2018, NL:CRVB:2018:2878, point 5.2.9.
protection is at odds with very aims of Regulation 883/2004. While, as noted above, one cannot exclude the possibility that Article 13 may possibly be applied to frequent short-term postings, AFMB thus makes clear that Article 13 does not constitute for employers providing services in other Member States a ‘genuine’ alternative for Article 12.

4. Abuse and fraud

When reading the AFMB case the question pops up of whether the company AFMB was possibly abusing EU law. The referring national court indeed had asked the CJEU whether the company, in case it would have to be regarded as the employer, did so. In his Opinion, AG Pikamäe did consider the issue. It is established case law that a finding of an abusive practice requires, first, that it is apparent from a combination of objective circumstances that, despite formal observance of the conditions laid down by EU rules, the purpose of those rules has not been achieved and, second, that the actor concerned seeks to obtain an undue advantage. In the AG’s view, these requirements were satisfied as the ‘sophisticated legal arrangement’ used by AFMB was aimed at artificially acquiring the status of employer for the purposes of Article 13 so as to cut down on social security costs.

The CJEU did not address the issue. Because it concluded that not AFMB but its Dutch contract partners were to be regarded as employer, it saw no need to do so. The CJEU’s silence is understandable. A company like AFMB seeks to gain a competitive advantage from differences in social legislation at the expense of workers’ rights. Such forms of ‘social dumping’ or ‘regulatory arbitrage’ certainly may be regarded as objectionable, but this does necessarily lead to the conclusion that there is an abuse of rights. AFMB was exercising fundamental freedoms, which are guaranteed by primary EU law and, in principle, can be exercised without there being a need to explain why they are exercised. Can the exercise of fundamental freedoms or rights (ever) be labelled as abusive? If so, is the doctrine of abuse of rights the proper tool to protect social aims or rights? The TFEU’s fundamental freedoms are not absolute and can be regulated to further social aims. Indeed, this is how one could read the ruling in AFMB: companies like AFMB are free to invent legal constructions to benefit optimally from the internal market, but their activities can be conditioned by social parameters such as set by a provision like Article 13.

The above is not to say that the doctrine of abuse of EU law has no significance within the framework of Regulation 883/2004. It has, especially as regards the enforcement of Articles 12 and 13

54. See e.g. Case C-110/99 Emsland-Stärke GmbH v. Hauptzollamt Hamburg-Jonas, EU:C:2000:695, para. 52–53 and Case C-423/15 Nils-Johannes Kratzler v. R+V Allgemeine Versicherung AG, EU:C:2016:604, para. 38. See further e.g. R. de la Feria and S. Vogenauer (eds.), Prohibition of Abuse of Law: A New General Principle of EU Law? (Hart Publishing, 2011).

55. Opinion of Advocate General Priit Pikamäe in Case C-610/18 AFMB e.a. Ltd v. Raad van bestuur van de Sociale verzekeringsbank, EU:C:2020:565, para. 72–83.

56. L. Berntsen and N. Lillie in M. Bernaciak (ed.), Market Expansion and Social Dumping in Europe, p. 44, who define this concept as ‘strategizing about the regulatory treatment of a transaction in the selection between two (or more) alternative regulatory regimes from different sovereign countries’.

57. Moreover, the boundary between informed use and abuse or uniformed use or mistakes is a thin and blurred one. C. Talleraas, ‘Reconciling Transnational Mobility and National Social Security What Say the Welfare State Bureaucrats’, 45 Journal of Ethnic and Migration Studies (2019), p. 159–162.

58. L. Berntsen and N. Lillie in M. Bernaciak (ed.), Market Expansion and Social Dumping in Europe, p. 45.

59. Case C-106/16 Proceedings brought by Polbud – Wykonawstwo sp. z o.o. in liquidation, EU:C:2017:804; Case C-212/97 Centros Ltd v Erhvervs v. og Selskabsstyrelsen, EU:C:1999:126.
and the recognition of so-called A1-certificates. These are documents that are issued by the institution of a competent Member State and state that the person concerned is subject to the legislation it administers. The basic notion is that A1-certificates are binding for the institutions of other Member States, which are prohibited to apply their own legislation and to demand from the worker and/or employer concerned payment of social security contributions. A1-certificates serve the single legislation rule and avoid double payment of contributions.

In practice, it appears that the institutions in the competent State often grant the certificates on request from the employers without verifying whether the conditions imposed by, in particular, Article 12 of Regulation 883/2004 are met. This practice of merely ‘rubber-stamping rather than investigating’ applications for A1-certificates affects the rights of both posted workers and sedentary workers in the host States. Unsurprisingly, institutions in the host Member States have expressed concerns. For years, they have argued that they cannot be obliged to blindly accept all A1-certificates and that they, certainly in cases of suspected fraud, should simply be allowed to apply their own legislation. The classic response of the CJEU has been that as long as an A1-certificate has not been withdrawn or invalidated by the institution that has issued it, it retains its binding force. If the host State’s institution has doubts as to whether the conditions of Article 12 (or Article 13) have been satisfied, it should contact the issuing institution in the competent State and ask it to reconsider the correctness of the certificate. If the two institutions involved fail to resolve their disagreement, they can refer the matter to the Administrative Commission for the Coordination of Social Security Systems for mediation and, if need be, address the CJEU for dispute settlement.

This dialogue and conciliation procedure, however, does not function well in practice and certainly has not taken away all concerns about the non-compliance with Article 12. In the course of the years, the CJEU has increasingly been called upon to recognize that A1-certificates do not have to be recognized in case of established fraud. The CJEU long resisted, but finally gave in, partially, in Altun. The case concerned a Belgian construction company which had subcontracted the work at its sites to Bulgarian undertakings posting workers to Belgium. The workers concerned possessed ‘Bulgarian’ A1-certificates, but the Belgian authorities had strong indications that the employers concerned carried out no significant activity in Bulgaria, as required by Article 12 of Regulation 883/2004. They requested the competent Bulgarian authority to withdraw the

60. N. Rennuy, ‘Posting of Workers: Enforcement, Compliance, and Reform’, 22 European Journal of Social Security (2020), p. 213.

61. For a summary of the case law on this procedure see Case C-2/05 Rijksdienst voor Sociale Zekerheid v. Herbosch Kiere NV, EU:C:2006:69. The case law is now codified in Article 76(6) Reg. 883/2004 and Article 5 and 6 Reg. 978/2009.

62. See in particular Case C-620/15 A-Rosa Flussschiff GmbH v. Union de recouvrement des cotisations de sécurité sociale et d’allocations familiales (Urssaf) d’Alsace and Sozialversicherungsanstalt des Kantons Graubünden, EU:C:2017:309, para. 51.

63. Case C-359/16 Criminal proceedings against Ömer Altun and Others, EU:C:2018:63. It must be noted that, in Altun the CJEU was asked for the first time whether the A1-certificates also apply in the case of fraud (hence, criminal proceedings). In contrast to earlier cases whereby the questions concerned assumed misapplication or legal uncertainties in relation to A1-certificates and whether or not these were to be respected in those circumstances. On this ruling see in particular H. Verschueren, ‘The CJEU’s Case Law on the Role of Posting Certificates: A Missed Opportunity to Combat Social Dumping’, 27 Maastricht Journal of European and Comparative Law (2020), pp. 484–502. In Case C-370/17 Caisse de retraite du personnel navigant professionnel de l’aéronautique civile (CRPNPAC) v. Vueling Airlines SA v Vueling Airlines SA and Jean-Luc Poignant, EU:C:2020:260 the CJEU essentially confirmed the main conclusions drawn in Altun.
certificates, but received no satisfactory response. The Belgian authorities asserted that the A1-certificates had been fraudulently obtained. Were they entitled to disregard the certificates?

According to the CJEU, they indeed are, provided some quiet strict conditions are observed. After having confirmed previous case law on posted workers, the probative value of A1-certificates and the aforementioned procedural rules for settlement of disputes between social security institutions, the CJEU established that the prohibition of fraud and abuse of rights constitutes a general principle of EU law. Findings of fraud are to be based on a consistent body of evidence that satisfies both an objective and a subjective factor. The objective factor concerns the fact that the conditions for obtaining and relying on an A1-certificate are not met. The subjective factor corresponds to the intention of the parties concerned to evade or circumvent the conditions for the issue of that certificate, with a view to obtaining the advantage attached to it. When the institution of the host Member State has evidence suggesting that both conditions are met, and that an A1-certificate has been obtained fraudulently, it can ask the issuing authority to reconsider and, where appropriate, to withdraw it. If the latter institution fails to do so within a reasonable period of time, the evidence concerned can be relied on in judicial proceedings and serve as the basis for a ruling allowing the institution in the host State to disregard the A1-certificate.

Altun thus recognizes the possibility to disregard A1-certificates, but the conditions are quite strict. First, only a national court can do so to the exclusion of social security institutions. Second, a national court can only disregard a certificate after it has established that the social security institutions involved have been unable to settle the dispute. Altun leaves the dialogue procedure untouched and demands it to be followed. Third, a national court can only disregard an A1-certificate in cases of fraud. In practice it will not in all cases be so easy to get all relevant information as regards the subjective component relating to the intention of those involved, who often will be based in the territory of another Member State. Altun permits nationals courts to derogate from the EU principles of mutual trust and recognition. What the practical impact of the ruling will be, remains to be seen.

5. Employment and/or residence outside the EU

As indicated in the Introduction, a third development that poses challenges for Regulation 883/2004 and the rules determining the applicable legislation concerns globalization and international migration in particular. At first glance, this may perhaps surprise. In principle, the coordination regime for social security only applies to persons who move within the EU. The EU migration directives and international agreements that the EU and/or the Member States have concluded with third countries govern the social security status of persons. The CJEU, however, has recognized that the ‘internal’ social security regime may produce ‘extra-territorial effects’. Persons who are working or residing...
outside the EU for an employer established within the EU may benefit from the protection the regime offers.69 In two recent cases, SF and Balandin, the CJEU specified the conditions under which they may do so.

A. Employment outside the Union

The case SF involved a Latvian national who resided in Latvia and was employed by a Dutch company. SF worked as a seafarer on board a vessel flying the flag of the Bahamas and performed his activities outside the territory of the European Union. In order to determine whether SF could be required to pay social contributions in the Netherlands, the CJEU proceeded in two steps. The first step concerned the applicability of Regulation 883/2004. The CJEU confirmed previous case law according to which this Regulation may apply to a worker who carries out activities outside the territory of the European Union when his employment relationship retains a ‘sufficiently close connection’ with that territory.70 In casu that requirement was fulfilled as SF lived in Latvia and his employer was based in the Netherlands.71

The second step involved the determination of the competent Member State. It was plain that the State of employment principle, the rule for posted workers and the rules for persons pursuing activities in more than one Member State were all not applicable. The only provision that could possibly be applied was Article 11(3)(e) of Regulation 883/2004, according to which persons to whom no other conflict rule applies are subject to the legislation of the State where they reside. No certainty existed though, as this provision, as the European Commission had interpreted it, would only cover economically non-active persons.72 The CJEU, however, found that this provision aims to prevent persons falling within the scope of the coordination regime being left without social security cover because there is no legislation applicable to them. Hence, a person like SF, to whom no other conflict rules applies, can invoke Article 11(3)(e) as residual rule and, hence, is subject to the legislation of his State of residence, in casu Latvia.73

From the perspective of the overall aim of avoiding gaps in social protection, the CJEU’s ruling in SF, and its construction of Article 11(3)(e) as a safety net provision, is logical and desirable. From the specific perspective of persons who live in but work outside the EU for a European employer, however, this is not necessarily so. Up until SF the ruling in Aldewereld taught that, at least under the regime of Regulation 1408/71, the legislation of the Member State where their employer is established was applicable to them.74 SF implies that such persons are now subject to the legislation of Member State of residence. Hence, for this group, SF implies a change in the competent State. While the inclusion of Article 11(3)(e) in Regulation 883/2004, as well as the wording of this provision, as such provides a basis for this change, the application of the State of residence principle nonetheless fits uneasily in the system of conflict rules. That system links beneficiaries to the

69. See further G. Vonk, ‘Social Security Protection of Migrants from Outside Europe’, in F. Pennings and G. Vonk (eds.), Research Handbook on European Social Security Law (Edward Elgar Publishing, 2015), p. 446.
70. Case C-631/17 SF v. Inspecteur van de Belastingdienst, EU:C:2019:381, para. 22 (citing case C-266/13, L. Kik v. Staatssecretaris van Financiën, EU:C:2015:188, para. 42).
71. Ibid. para. 24.
72. Practical Guide, para. 41.
73. Case C-631/17 SF, para. 47.
74. Case C-60/93 R. L. Aldewereld v. Staatssecretaris van Financiën, EU:C:1994:271.
legislation of the Member States to which they as economic agents are most closely connected. As economically non-active persons do not have such a connection with any Member State, it makes perfect sense that the laws of the State of residence apply to them as a safety net. However, persons like SF do have economic ties with the legislation of the Member State where their employer is based. They have no such link with the State of residence. Furthermore, like the State of employment principle, *Aldevereld* implied that employers pay the same social security contributions for employees working outside the EU regardless of where they reside. *SF* implies that employers are now obliged to pay contributions in the Member States where their employees happen to reside, thereby creating inequality ‘on the workfloor’. One wonders whether this is the most logical solution.

B. Residence outside the Union

*Balandin* involved the reverse situation in which the persons concerned live outside but work within the EU. The case concerned a Russian and a Ukrainian national who worked for Holiday on Ice, a company based in the Netherlands. The skaters came to the Netherlands on the basis of a Schengen visa, followed training there for a few weeks and then performed in shows in other EU member states. In order to ascertain whether the Dutch social security institutions were obliged to issue an A1-certificate, the CJEU had to determine whether, first, Regulation 883/2004 was at all applicable and, second, whether the Netherlands was the competent State.

The first point was controversial as the two skaters were third-country nationals and, as such, did not fall within the scope of Regulation 883/2004. However, Regulation 1231/2010 has extended the application of the coordination regime to third-country nationals, provided they ‘legally reside in the territory of a Member State’. AG Wahl believed the skaters did not satisfy this condition as, in brief, they were only temporarily present in the EU on the basis of a visa. The CJEU, however, concluded that the two did meet the lawful residence requirement. The CJEU reasoned that Regulation 1231/2010 uses ‘residence’ for another purpose, and thus gives the term a different meaning than Regulation 883/2004 does. The latter distinguishes the concept of ‘residence’, the ‘place where a person habitually resides’, from the notion of ‘stay’, which means ‘temporary residence’, to determine the Member State with which EU citizens have the closest connection and what the competent state is. Regulation 1231/2010, however, merely aims to extend the personal scope of Regulations 883/2004 and 987/2009 to third-country nationals to promote their social protection. Therefore, so the CJEU found, both the fact that third-country nationals are merely temporarily staying in the EU and the fact that they retain their centre of interest in a third country are no obstacle for them to be ‘legally resident in the territory of a Member State’ for the purposes of Regulation 1231/2010.

75. Opinion of Advocate General N. Wahl in Case C-477/17 *Balandin and Others*, EU:C:2018:783, para. 45.
76. Article 21(2) Reg. 987/2009 provides in this regard that an employer who does not have a place of business in the Member State whose legislation is applicable and the employee may agree that the latter may fulfil the employer’s obligations on its behalf as regards the payment of contributions without prejudice to the employer’s underlying obligations.
77. Article 1 Reg. 1231/2010. Regulation (EU) No 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality, [2010] OJ L 344/1.
78. Wahl in Case C-477/17 *Balandin and Others*, EU:C:2019:60, para. 74–84.
79. Case C-477/17 Balandin and Others, para. 36–38.
80. Ibid., para. 38–45.
The CJEU’s reasoning, and in particular its holding that third-country nationals who temporarily stay in the EU on the basis of Schengen visa, are legal residents for purposes of Regulation 1231/2010, and hence can benefit from the coordination regime for social security, is at the least notable. Yet, one can only welcome the extension of the coordination regime to third-country nationals like the two skaters as it may promote both free movement of services of EU companies and social protection of their employees, even if they are only temporarily staying in the EU.

The subsequent question that arose was, of course, in which Member State such third-country nationals are insured. In Balandin the CJEU did not say much. As stated earlier, it referred to Article 13 of Regulation 883/2004 and left it to the referring Dutch court to determine whether any of the specific conflict rules contained in that Article was applicable to the two skaters. This observation of the CJEU surprises a bit as Article 13 does not seem to contain a conflict rule designed for situations involving persons who habitually reside in a third country. Taken literally, however, one could apply – as the competent Dutch social security institution indeed did in the case at hand – Article 13(1)(b)(i), which stipulates that a person who normally pursues an activity as an employed person in two or more Member States for a single employer outside the State of his/her residence is subject to the legislation of the Member State where the employer has its registered office or place of business (in casu the Netherlands).

6. Gaps in social security protection

The coordination rules for social security, including the conflict rules, facilitate free movement of persons but only to a limited extent. The provisions determine which Member State must apply its legislation in a given case, but they do not guarantee that a beneficiary is actually insured for a given social risk or entitled to receive a specific benefit. The relevant requirements are laid down by national laws and it is perfectly possible that cross-border movers end up in a situation in which they lack insurance cover or entitlement to benefits.

A. Exclusivity and the power of a non-competent Member State to grant benefits

Such gaps may exist, first of all, as a result of the single State rule. To ensure respect for this rule the conflict rules enshrined in Articles 11–13 of Regulation 883/2004 produce ‘exclusive effect’: the Member State that is assigned as the competent State must apply its legislation in a given case, whilst non-competent Member States are, in principle, prohibited to do so. Indeed, exclusive effect still fully applies for duties to pay social security contributions. This is logical: double or multiple duties to pay contributions hamper free movement. In as far as benefits are concerned, exclusivity is less obvious. The single State rule may have the advantage of simplicity, promote legal certainty and prevent administrative problems that the simultaneous application of multiple legislations might cause. Yet, why would a non-competent State be categorically deprived of the power to grant benefits to, for example, residents working in another Member State? If the persons concerned cannot claim benefits in the competent State, why should the State where s/he resides not be entitled to fill the gap in protection? In 2008, in Bosmann, the CJEU indeed

81. See footnote 35 and accompanying text.
82. Case C-477/17 Balandin and Others, para. 46.
83. Case 102/76 H.O.A.G.M. Perenboom v. Inspecteur der directe belastingen te Nijmegen, EU:C:1977:71.
84. C-352/06 Brigitte Bosmann v. Bundesagentur für Arbeit – Familienkasse Aachen, EU:C:2008:290.
recognized that exclusive effect does not have to be, and indeed is not, absolute. A non-competent State, so the CJEU held, is allowed to grant benefits to persons who, according to the conflict rules, are subject to the legislation of another Member State. More generally, from the Bosmann case law it follows that non-competent Member States may award benefits to persons insured elsewhere, provided a ‘connecting factor’ exists between the case at hand and national territory\(^{85}\) (e.g. residence\(^{86}\) or unlimited income tax liability\(^{87}\)) and the award does not lead to a cumulation of benefits.\(^{88}\)

This case law certainly does not always help to fill all gaps in the coordination regime. Franzen I and Franzen II illustrate this. The cases involved inter alia a Dutch national, Mrs. Franzen, who by virtue of residence in the Netherlands was entitled to, and indeed did receive, Dutch child benefits. After she accepted a job as a hairdresser in Germany for 20 hours a week, the Dutch authorities withdrew the benefits as she was no longer subject to Dutch legislation. Germany had become the competent State, but, because of the low salary she earned, Mrs. Franzen was not covered by any statutory social insurance scheme in Germany, with the exception of a scheme against accidents. Did, so the CJEU was asked, the exclusive effect of the rules determining the applicable legislation imply that a person like Mrs. Franzen can no longer enjoy benefits in her State of residence? The CJEU applied Bosmann. Regulation 883/2004 does not preclude a worker from receiving child benefits under the legislation of her Member State of residence.\(^{89}\)

This did not imply, however, that Mrs. Franzen could actually claim benefits in the Netherlands. In Franzen I the CJEU had attached significance to a hardship clause, which allowed the Dutch administrative authorities to derogate from the relevant Dutch insurance rules to avoid ‘an unacceptable degree of unfairness’. Having read the judgment, the Dutch authorities concluded they were still not obliged to award Mrs. Franzen child benefits as Dutch law did not allow for the hardship clause to be applied to persons working in other Member States. The case was sent back to the CJEU, which concluded in Franzen II that neither Regulation 883/2004 nor the TFEU provisions on free movement of workers oblige a non-competent Member State like the Netherlands to grant child benefits to residents working in another Member State.\(^{90}\) The CJEU suggested the problem at hand could best be solved by using Article 16 of Regulation 883/2004, which permits two Member States to agree ‘on exceptions to the principle of single applicable legislation in the interest of certain categories of persons or certain persons.’ That possibility, so the CJEU stated, is particularly appropriate where, as in the case of Mrs. Franzen, the law of the Member State of employment ‘does not confer on the migrant worker an entitlement to benefits which he would have enjoyed […] in his Member State of residence’.\(^{91}\)

From a free movement and social protection perspective, the outcome of the Franzen case is disappointing, if not problematic. If a non-competent Member State refuses to assume responsibility, or in a case when no Article 16 agreement can be concluded, gaps in social protection continue to exist. Notably, the CJEU did not accept suggestions made by AGs Szpunar and AG Sharpston on how best to fill such lacuna. In Franzen I AG Szpunar found it ‘regrettable’ and ‘unacceptable’ that

\(^{85}\) Case C-394/13 Ministerstvo práce a sociálních věcí v. B, EU:C:2014:2199.
\(^{86}\) Case C-352/06 Bosmann.
\(^{87}\) Joined Cases C-611/10 and C-612/10 Waldemar Hudzinski v. Agentur für Arbeit Wesel – Familienkasse and Jaroslaw Wawrzyniak v. Agentur für Arbeit Mönchengladbach – Familienkasse, EU:C:2012:339.
\(^{88}\) Case C-382/13 C.E. Franzen and Others v. Raad van bestuur van de Sociale verzekeringsbank, EU:C:2015:261, para. 65.
\(^{89}\) Ibid., para. 54–66.
\(^{90}\) Joined Cases C-95/18 and C-96/18, Sociale Verzekeringsbank v. F. van den Berg and Others, EU:C:2019:767, para. 66.
\(^{91}\) Joined Cases C-95/18 and C-96/18 Van den Berg and Others, para. 65.
someone like Mrs. Franzen could lose social protection altogether just because she had exercised her free movement rights. To solve the problem, he proposed that in the case of workers having short-term on-call or minor employment contracts the application of the legislation of the competent State should be temporarily suspended. For as long as the competent State excludes such workers from social security protection, the legislation of the State of residence should rather be applied.92 In *Franzen II* AG Sharpston recognized the significance of the single State rule, but found that this does not free non-competent Member States from limitations imposed by the TFEU free movement rules. Specifically, from the ruling in *Hudzinski and Wawrzyniak* the AG drew the conclusion that while a non-competent Member State may refuse to grant benefits to persons covered by another Member State’s legislation, it must respect the principle of proportionality.93 In her view, the total ejection of a person like Mrs. Franzen from the Dutch system had to be regarded as a disproportionate infringement of the TFEU rules on free movement of workers.94

The CJEU did not follow the AGs and this may not truly surprise. Virtually anyone will agree that situations as the one of Mrs. Franzen are hard to compare with the overall aim of Regulation 883/2004 to offer social protection and, hence, should be avoided. The tricky question is, however, how and by whom this should be done. The AGs essentially argued that the problem concerned must be solved by the non-competent State because this State, when it denies benefits to residents who have taken up employment in another Member State, hampers freedom of movement. Yet, this does not persuade. Of course, the lack of any social protection may discourage the exercise of the right to freedom of movement. However, the problem in in a case like *Franzen* does not primarily result from the refusal of the non-competent Member State to grant benefits to residents who have decided to work elsewhere. Such a problem exists because the competent Member State has chosen not to offer protection to a certain group of workers or persons. Mrs. Franzen’s problem was caused by German law, not by Dutch law. Implicitly, the AGs say that a non-competent State (like the Netherlands) infringes EU law on free movement of workers when it refuses to grant benefits to compensate for the fact that the competent State (like Germany) has opted not to offer social protection to a given group of working persons. A non-competent State is free to help out residents wholly deprived of social protection in the competent State (*Bosmann*), but it would be odd, and indeed undesirable, if EU law would have to be interpreted to oblige one Member State to solve social protection problems caused by another.

92. Opinion of Advocate General Maciej Szpunar Case C-382/13 *C.E. Franzen and Others v. Raad van bestuur van de Sociale verzekeringbank*, EU:C:2014:2190, para. 80–93.

93. Joined Cases C-611/10 and C-612/10, *Hudzinski and Wawrzyniak*, para. 78. The case concerned *inter alia* a Polish worker, Mr. Wawrzyniak, who had been posted to Germany and was still subject to Polish legislation. In Germany, however, he was subject to income tax legislation, which also provided for the payment of child benefits. Mr. Wawrzyniak’s application for such benefits was rejected on the ground that his wife already received a comparable benefit in Poland. The rejection was not a partial one in the sense that the amount of the Polish benefit was deducted from the amount that could be claimed. The rejection was total: the mere fact that his wife received a Polish child benefit was a ground for rejecting a German benefit for Mr. Wawrzyniak altogether. The CJEU recognized that Germany, as a non-competent State, was not obliged to award family benefits to someone like Mr. Wawrzyniak, but did hold that the total refusal to award child benefits disproportionally hampered freedom of movement. In particular, the German rule under consideration was not justifiable in particular because the German child benefits were financed by tax revenue and in principle granted to all those who are subject to unlimited income tax liability in Germany.

94. Opinion of Advocate General Eleanor Sharpston in Joined Cases C-95/18 and C-96/18 *Sociale Verzekeringsbank v. F. van den Berg and Others*, EU:C:2019:252, para. 33–48.
In a case like *Franzen*, it would make most sense to have the problem at hand solved by Germany.\(^95\) This, however, EU law cannot order. A competent State like Germany is free to offer or not offer social protection and to establish substantive eligibility criteria, provided it applies these in a non-discriminatory manner. For as long as it merely facilitates freedom of movement through coordination rather than harmonization, EU law cannot directly force or order a Member State like Germany to adapt its labour policy and social benefit system. So, in situation where a lack of social protection results from the choice of the competent State not to offer insurance or benefits to a given group of persons, EU law provides no effective remedy. The competent and the non-competent State may assume social responsibility either on their own or together via an Article 16-agreement, but EU law does not oblige them to do so.

**B. Gaps in social protection resulting from disparities in national legislation**

Gaps in social protection do not only arise when the competent State denies insurance or benefits. They may also result from disparities in national law, especially as regards long-term benefits, such as old-age and invalidity pensions. The coordination rules of Regulation 883.2004 – in most cases – do not rest on the single State rule. A person who has been subject to the legislation of multiple Member States is not entitled to a single pension under the legislation of the Member State where he works or resides at the moment s/he reaches retirement age or acquires invalidity status. Rather, such a person may claim pension in each Member State where they have been insured for the risk of invalidity in accordance with the so-called *pro rata* method.\(^96\)

Claimants of such pensions may fall between two stools, as is illustrated by the case *Vester*. Ms. Vester, a Dutch national, lived in Belgium, had worked for many years in the Netherlands. She lost her job and very shortly thereafter became unfit for work. After having received a Belgian sickness benefit for one year, she applied for a subsequent invalidity benefit in both Belgium and the Netherlands. Belgian legislation does provide for a right to invalidity after one year, but Ms. Vester’s application was refused because she had been insured there only for a very short time (four days).\(^97\) Ms. Vester’s application for a Dutch pension was rejected on the ground that she had not been incapable for work, as required by Netherlands legislation, for at least *two* years.

The CJEU faced a tricky coordination problem. In essence, Ms. Vester could not claim an invalidity benefit because Belgian legislation provided for a waiting-period of one year, whereas the Netherlands had opted for a two-year waiting period. As such, these are wholly legitimate policy choices, which EU law has to respect. Moreover, the competent authorities in the two States had applied the 883-coordination rules for invalidity benefits as such correctly. Yet, the simultaneous application of Belgian and Dutch legislation did lead in Ms. Vester’s case to a situation which was hard to compare with the notion of freedom of movement. The CJEU recognized this and ordered the Netherlands to help out Ms. Vester. The CJEU established that the Netherlands legislation confers upon non-migrant workers a right to receive benefits for incapacity to work for two

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95. Note that in the year of the request for a preliminary ruling of *Franzen I*, 2013, the German government changed the social security coverage for persons having these so-called *mini-jobs*. Such employees are now also, in principle, socially insured for old-age benefits. See www.buzer.de/s1.htm?g=SGB%2BVI%2B31.12.2012&a=5, accessed 19 August 2021.

96. See Article 46 Reg. 883/2004, which essentially refers to the *pro rata* system that also applies to old-age pensions.

97. Article 57 Reg. 883/2004 permits the competent institution to refuse to provide benefits in respect of periods completed under the legislation it applies if those periods are less than one year and if, taking only those periods into account, no right to benefit is acquired under that legislation.
years, whereas migrant workers like Ms. Vester only have a right to benefit for one year. The principle of sincere cooperation,\textsuperscript{98} so the CJEU found, requires the Dutch authorities to correct the situation and to do what is necessary to achieve the aim of Article 45 TFEU.\textsuperscript{99} Specifically, that objective can be attained by granting workers like Ms. Vester benefits for incapacity to work during the second year of incapacity to work required of them under Netherlands law.\textsuperscript{100}

Few would disagree with the outcome of Vester. Ms. Vester had been subject to Dutch legislation, and hence had paid contributions thereunder, for most of her working life and she had only been insured in Belgium for a very short time (of only 4 days). So, it is nothing but logical that the CJEU imposed the responsibility to fill the gap in protection on the Netherlands. The CJEU’s reasoning, however, does not excel in clarity, leaving the broader implications of the ruling uncertain. In Vester the CJEU ultimately orders the Netherlands to grant benefits, basing this conclusion on the duty of sincere cooperation in combination with the duty to facilitate free movement. These two duties, however, are general in nature and could, if applied, in Franzen very well have led to another conclusion than the one the CJEU reached in that case. The rationale behind the difference between the outcomes in the two cases is not readily apparent. Perhaps the reason concerns the fact that the Netherlands was a non-competent State in Franzen, whereas in Vester it did have the power, and even the duty, to apply its own legislation. Further, Ms. Vester, unlike Ms. Franzen, had fully contributed to the financing of the social benefit system concerned for many years. Denying her invalidity benefit would seem to be at odds with the notion that the exercise of free movement rights should not lead to the loss of social security rights under systems to the financing of which they themselves have significantly contributed.\textsuperscript{101}

More in general, the CJEU case law on how to fill gaps in social security protection in cross-border situations is still limited in scope and undeveloped. The CJEU has indicated that a non-competent Member State may in principle grant benefits (Bosmann), encouraged Member State authorities to conclude Article 16-agreements (Franzen), and reminded Member States of their duty to show solidarity and to tackle the problems under consideration (Vester), but more is needed to actually fill the existing lacuna.\textsuperscript{102}

7. Concluding remarks

The coordination regime, and the rules determining the applicable social security legislation in particular, were created six decades ago to offer those who exercise free movement rights ‘constant social security protection’\textsuperscript{103}. The main idea was to ensure that beneficiaries are always subject to the legislation of a single Member State and to precisely and clearly indicate which Member State that was. Because beneficiaries were above all ‘standard’ employees working on a full-time

\textsuperscript{98} Article 4(3) TEU. See also Case C-3/08 Ketty Leyman v. Institut national d’assurance maladie-invalidité (INAMI), EU:C:2009:595 and Case C-165/91 Simon J. M. van Munster v. Rijksdienst voor Pensioenen, EU:C:1994:359.

\textsuperscript{99} Case C-134/18 Maria Vester v. Rijksinstituut voor ziekte- en invaliditeitsverzekering EU:C:2019:212, at 45 (citing Case C-3/08 Leyman, para. 49).

\textsuperscript{100} Case C-134/18 Maria Vester, para. 48.

\textsuperscript{101} Compare Case C-515/14, Commission v. Cyprus, EU:C:2016:30, para. 34 and the case-law cited.

\textsuperscript{102} In the scholarly literature it has been proposed to insert a provision in Reg. 883/2004 specifying the general duty of sincere cooperation and requiring from Member States to take more concrete measures aimed at filling gaps and facilitating free movement. See in particular F.J.L. Pennings and G. Essers, ‘Gaps in Social Security Protection of Mobile Persons: Options for Filling these Gaps’, 17 European Journal of Social Security (2020), pp. 15.

\textsuperscript{103} P. Watson, Social Security Law of the European Communities (Mansell, 1980), p. 249.
basis for an indefinite period of time, there was the unwritten assumption that they would satisfy the eligibility criteria in the competent State and thus be able to actually claim benefits there.

Because of the processes of flexibilization, digitalization, enlargement and globalization, however, it has become increasingly difficult to achieve these coordination objectives. Increased geographical and job mobility have made it today far more complex to determine the competent State. With the rise of new patterns and forms of work there is also an increased risk of sudden and more frequent switches in the applicable legislation. Short-term or partial affiliation to a given social security system today is more common than before. Accordingly, beneficiaries of the coordination regime may not be able to actually enjoy benefits. In a dynamic labour market, it is increasingly difficult to actually guarantee cross-border workers and movers an actual constant social security protection. Moreover, employers increasingly look for ‘greener’ (cheaper) social security pastures elsewhere in the Union, possibly at the expense of their employees. In an ideal setting, it would be the EU legislature who pro-actively identifies gaps in the coordination regime and fill these. Yet, anno 2021, the EU setting is not ideal in the sense that chances that the social security Regulation will be significantly altered to adjust to the new circumstances are quite small. A structural solution to problems such as the ones discussed in this contribution is not on the horizon, leaving it up to national social security authorities and policy makers as well as courts, including the CJEU, to tackle these on a case-by-case basis.

Declaration of conflicting interests
The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding
The author(s) received no financial support for the research, authorship and/or publication of this article.

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