

A REFLECTION ON TELEWORK IN SOCIAL SECURITY COORDINATION

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Telework has become prevalent during the COVID-19 pandemic, which has changed the way we look at work. However, the current EU rules for social security coordination were not designed to accommodate telework, with the lex loci laboris principle being understood in practical terms. During the pandemic, the European Commission initially suspended the coordination regulation rules to prevent sudden changes for workers, which caused unintended consequences and potential discrimination against intra-community migrants. To address these issues, options include changing the legal text of the coordination regulation, reinterpreting coordination rules, or concluding bilateral or multilateral agreements. Failure to take action could lead to continued discrimination by companies. In this regard, if no legislative action is taken, at least a common approach within the context of the Administrative Commission should be envisaged to ensure uniformity at the European level. The recent developments within the context of the Administrative Commission at least seem to go in that direction.

Keywords: telework; EU social security coordination; cross-border work; COVID-19 pandemic; lex loci laboris principle; discrimination

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1. INTRODUCTION

Almost 25 years ago I met my colleague Professor Potočnjak in Zagreb for the first time, at the occasion of a Council of Europe mission dealing with the minimum standards of the European Code of Social Security. We ran into each other close to the premises of the current Faculty of Law and were introduced by the local representative of the Ministry of Social Affairs accompanying our team. It was a meeting that we will never forget as Professor Potočnjak kindly invited our little group of foreign experts to dinner in the mountains surrounding the city of Zagreb. It was at the same time the beginning of a long-lasting cooperation between our teams, which resulted in some very enjoyable moments, where we discussed in depth the role of (supplementary) pensions and social security in Croatia, the Balkan region and in Europe as a whole. Although we are now celebrating his retirement, we are confident that our cooperation will continue, not only with Professor Potočnjak himself but also with the next generation that are now taking over the many positions he took at the University and (Croatian) society at large. The further development of his legacy is thus guaranteed, and we are pleased that we can take part in it. Part of his legacy is the continuous discussion on future developments in society and the impact they may have on the organisation of social security. For this reason, we decided to single out the topic of new forms of work for this volume, and more particularly of the growing position telework may take in the coming years in labour relations. This will affect the design of social security schemes, not in the least of the coordination regulations 883/2004 and 987/2009, which guarantee smooth transitions between national systems when people make use of their right to move freely (as workers). But what happens if the transnational element is constituted by virtual movement, without actual physical movement? Can we then still speak about mobility? Are the coordination rules to be applied and how will the rules indicating the competent state function in case of cross border telework? These and many more reflections will be addressed in the coming pages. We hope they reflect the discussions we had in the past with Professor Potočnjak.

When we look at our current disposition of social security coordination, we see, with the *lex loci laboris* principle, a clear conceptualisation of “work” being connected to a specific “workplace”. “Telework” conceptually challenges these preconceptions.¹ In this brief contribution we wish to touch upon some of the main aspects with regards to the impact of telework on social security coordination within the European Union.

¹ Opinion of Advocate General Szpunar in Case C-570/15, *X v Staatssecretaris van Financiën*, ECLI:EU:C:2017:182, paras 37 and 38.

For the purposes of this paper we will consider “telework” as the practice of working while using information technology from a different location than the working premises of the employer.² Within this concept several sub-categories can be distinguished: “hybrid working” or “telecommuting”, “remote work” and “working from home”.³ Because these concepts do overlap in some instances, we will limit ourselves in this contribution to the overarching concept of telework, rather than dealing with the specific sub-categories individually.

We will discuss the current disposition of telework and EU-legislation (II), the impact that the COVID-19 pandemic had on telework and the coordination rules within the EU (III), some of the challenges telework might pose in the future (IV) and possible ways forward considering our current legal framework.

2. TELEWORK AND EU LEGISLATION

In its current form, Regulation (EC) No. 883/2004 (hereafter: the coordination regulation) does not recognize the concept of “telework” and we thus have to make use of the concepts actually in place. The coordination regulation uses the “place of work” as the main connecting factor. It is therefore clear from the outset that, because of the disconnect between the concepts of “work” and “workplace” as mentioned above, we will always in a sense be trying to square the circle.

(a) The *lex loci laboris* principle and the *Partena* judgement

In concrete terms, Article 11, (3), a) of the coordination regulation contains the *lex loci laboris* principle, which is the main rule to determine the applicable

² Verschueren defines the concept as: “The performance of work activities offsite using information technology rather than the employer’s location of business”, see: Verschueren, H., *The Application of the Conflict Rules of the European Social Security Coordination to Telework During and After the COVID-19 Pandemic*, European Journal of Social Security, vol. 24, no. 2, 2022, p. 80.

³ “Hybrid working” and “telecommuting” indicate working both at the premises of the employer, while also using information technology to work from a different location than the premises of the employer (not necessarily from home); “remote work” indicates working using information technology from a different location than the premises of the employer, with only very rarely being present at the premises of the employer; “working from home” indicates working using information technology from the personal home (in some cases specifically the domicile). Combinations of these concepts are to a certain extent possible (e.g. working from home in a hybrid manner).

social security legislation in case of cross-border work within the EU.⁴ The competent state is in an exclusive manner determined by the place where one is working. Further in the coordination regulation, we can find two main exceptions to this basic rule. Those exceptions are ‘posting’⁵, on the one hand, and ‘simultaneous performance of activities in multiple Member States’⁶, on the other. Next to these two main exceptions, Article 16 of the coordination regulation provides for the possibility for *two or more Member States, the competent authorities of these Member States or the bodies designated by these authorities to by common agreement provide for exceptions to Articles 11 to 15 in the interest of certain persons or categories of persons*, which was important for telework in a cross-border context during the COVID-19 pandemic (see *infra*).

The place of work as the main connecting factor for social security coordination in the EU should be considered to be the *place where in practical terms, the person concerned carries out the actions connected with that activity*, as was clarified by the *Partena* judgement of the Court of Justice of the European Union.⁷ This means that concepts such as “virtual workspace” or “digital workplace” still have no impact on our legal understanding of the location where the work takes place, which, conversely, has to be understood in a rather physical sense.⁸ When teleworking in a cross-border context, people are working from a physical location (e.g. the home of the worker) in a Member State different from the Member State where the premises of the company are located, where they normally perform their work when not teleworking. In such cases, the physical location from which one is teleworking, has to be taken into consideration when applying the rules of the coordination regulation. In *X v Staatssecretaris van Financiën*, the Court of Justice of the European Union, however, ruled in a somewhat more nuanced manner.⁹ It held that in certain instances telework

⁴ The territorial scope of the Regulation also includes – both concerning their territory and their citizens – all the states which are part of the EEA (next to the Member States of the European Union, the European Economic Area also includes Iceland, Liechtenstein and Norway) and Switzerland.

⁵ Art. 12 Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

⁶ Art. 13 Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

⁷ Case C-137/11, *Partena*, 57, ECLI:EU:C:2012:593.

⁸ For a possible way to broaden the interpretation of the conflict rules to include similar concepts see: Strban, G.; Carrascosa Bermejo, D.; Schoukens, P.; Vukorepa, I., *Analytical report 2018: Social security coordination and non-standard forms of employment and self-employment: Interrelation, challenges and prospects*, Publications Office of the European Union, Luxembourg, 2020, p. 44.

⁹ Case C-570/15, *X v Staatssecretaris van Financiën*, EU:C:2017:182.

has an impact which is too marginal to be taken into consideration to determine the applicable social security legislation. Advocate General Szpunar clarified that when *working from home is not explicitly reflected in contractual documents, does not constitute a structural pattern and amounts to a relatively small percentage of the overall working time, it is inappropriate to rely on that circumstance for the purposes of applying the designation rules.*¹⁰ Since the COVID-19 pandemic, however, contractual stipulations regarding telework on a regular basis became more widely used by companies (see *infra*).

(b) Exceptions

Because of the decoupling of “work” and “workplace” in the case of telework, work can be easily performed across borders. The main rule to determine the applicable social security legislation is the *lex loci laboris* principle, but exceptions to that main rule do exist for situations of posting and the ‘simultaneous performance of activities in multiple Member States’ (see *supra*). With regards to posting, it is still debated whether the possibility exists for people to telework if the employer only consents to an employee teleworking from another Member State, rather than effectively being sent to said Member State by the employer.¹¹ Although the social security administrations of some Member States allow it, it is questionable whether it falls within the original intentions of the exception of posting in the coordination regulation, certainly when read in conjunction with the Posted Workers Directive.¹²

‘Simultaneous performance of activities in multiple Member States’ is quite common in the context of cross-border telework, certainly when we look at frontier-workers who telework from home on a regular basis. Without going into too much detail with regards to all the different possible scenarios foreseen under Article 12 of the coordination regulation, teleworking ‘from home’ is relevant when assessing the exact applicable social security legislation. Both self-employed workers and employees who are working in more than

¹⁰ Opinion of Advocate General Szpunar in Case C-570/15, *X v Staatssecretaris van Financiën*, ECLI:EU:C:2017:182.

¹¹ Verschueren, *op. cit.* fn. 2, p. 86.

¹² Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services; it has to be stressed, however, that the meaning of ‘posting’ in the Posted Workers Directive and the coordination regulation are not exactly the same and that besides the difference in the scope of application of both legal instruments, the Posting Directive requires that, for posting, the posted employee provide a service to a client in the Member State where he or she is posted, which is formally not required by the coordination regulation.

one Member State are socially insured in the Member State of their residence if they perform a substantial part of their activities in that Member State.¹³ In line with the *Partena* judgement, the work ‘from home’ is thus taken into consideration.

3. TELEWORK DURING THE COVID-19 PANDEMIC

As was mentioned above, in the normal context of the coordination regulation, the applicable legislation is determined by the *lex loci laboris* principle, with the ‘place’ of work being the location *where, in practical terms, the person concerned carries out the actions connected to that activity*.¹⁴ As a consequence of the COVID-19 pandemic, borders were closed and intra-community migrants who normally regularly crossed borders to work were unable to perform their work on the premises where they would normally do so.¹⁵ Because of this, the actual ‘place’ of work of these workers in the sense of the *Partena* judgement could thus have changed as a consequence of which the risk existed that the competent Member State also would have changed in some instances with regards to the applicable social security legislation (see *supra*). In addition, large groups of employees were also encouraged or mandated to telework during the time of the pandemic.¹⁶

(a) Initial reaction

When the COVID-19 pandemic hit the European Union, the original intent of the European Commission was to make sure that the sudden closure

¹³ In the overall assessment of the concept of a substantial activity, a share of 25% of the working time and/or remuneration is an important indicator for the qualification of an activity as substantial (see Article 14, 8 of Regulation (EC) No. 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No. 883/2004 on the coordination of social security systems).

¹⁴ Case C-137/11, *Partena*, 53, ECLI:EU:C:2012:593.

¹⁵ This group of workers was made up in large part – but not exclusively – by frontier workers, with of course some frontier workers – often those who were considered to be essential workers – still performing their work on their normal work premises.

¹⁶ In some countries, such as Belgium, this specifically meant that one had to work ‘from home’, meaning the place of domicile, excluding the possibility to work from a second or third home. Of course, the degree to which people were mandated or just encouraged to telework often depended on the possibility for workers to effectively work from home – with essential workers being excluded from these mandates – and the degree to which governments assessed the situation of the pandemic itself, varying over time and between different countries.

of borders would not lead to abrupt changes in the applicable social security legislation for large groups of workers. The idea was that the COVID-19 pandemic represented a *force majeure*, which precluded (mainly frontier) workers from making use of their normal rights of freedom of movement and were, therefore, not capable of performing their work in a normal manner.

In early 2020, the Commission published the “Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak”.¹⁷ These guidelines were merely soft-law that, however, provided for an integrated approach on the EU level.¹⁸ In point 8 of the guidelines, the Commission recommended that Member States make use of Article 16 of the coordination regulation to conclude agreements in effect to suspend the normal application of the coordination rules as a consequence of possible factual changes *that could lead to a change in the Member State of insurance of the worker*. In addition to that, the Member States also came to the understanding within the Administrative Commission¹⁹ that they would take measures to make sure no changes in the applicable legislation would occur as a consequence of COVID-19 measures. Although the approaches of the individual Member States varied considerably, the actual outcome was a clear suspension of the normal application of the coordination rules.²⁰ Teleworkers thus remained insured under their original employer.

(b) New realities being created

The suspension of changes in the applicable legislation produced some unforeseen consequences. Similarly to the concept of social security shopping²¹, some employees and employers sought to minimize their social security contributions by making use of the suspension of the conflict rules, certainly

¹⁷ European Commission, *Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak*, OJ C 1021, 30.3.2020, pp. 12-14.

¹⁸ Friedery, R., *Pandemic, Free Movement Restrictions and EU Soft Law*, in: *International Law and Crisis – Impact and Challenges, Collection of Papers from the International Academic Online Conference 22nd – 23rd of April 2021*, Comenius University in Bratislava, Faculty of Law, Bratislava, 2021.

¹⁹ The Administrative Commission for the Coordination of Social Security Systems.

²⁰ European Labour Authority, *Impact of teleworking during the COVID-19 pandemic on the applicable social security: Overview of measures and/or actions taken in the EU Member States to facilitate a flexible approach to the applicable social security of teleworking cross-border workers*, European Labour Authority, Bratislava, 2021.

²¹ For more on the concept of “social security shopping”, see: Strban; Carrascosa Bermejo; Schoukens; Vukorepa, *op. cit.* fn. 8; Rennuy, N., *Shopping for social security law in the EU*, *Common Market Law Review*, vol. 58, no. 1, 2021, pp. 13–38.

after borders gradually reopened and the suspension of the rules was still in place. In addition, workers also relocated during the period of the pandemic. In these cases, workers made use of the suspension of the conflict rules to set up realities that came very close to the concept of a “workation”.²² Examples come to mind of people remaining socially insured in the country where they were originally insured, where, for example, the social contributions are low, while at the same time temporarily relocating to a holiday destination to start teleworking from that location. It must be clear that these cases clearly fall outside of the original intentions of the Commission’s guidelines, but happened nevertheless. The practice of suspending the application of the conflict rules because of the *force majeure* of border closures, at the same time allowing people to cross borders within the Union for the pursuit of a more favorable climate while teleworking – while simultaneously also remaining socially insured under more favorable conditions elsewhere – at least indicated an inconsistency that had no basis in formal EU law.

4. CHALLENGES OF TELEWORK IN OUR CURRENT CONTEXT

The digitalization of the workplace has a profound impact on our preconceived notions of work. Where in the past, work was in an overwhelming number of instances performed in a specific location, the COVID-19 brought the reality of a disconnect between ‘work’ and ‘workplace’ to a large number of households throughout the European Union.²³ This disconnect challenges the system of social security coordination which places significance on the actual place of work in terms of the *Partena* judgement, since the place of work, when working from home, is effectively ‘from home’ (see *supra*). This has specific consequences for the working conditions of frontier workers who, in practical terms, are capable of teleworking. In addition, telework might also bring with it broader socio-economic implications which are at this stage rarely discussed.

²² For more on the concept of “workation”, see: Verschueren, *op. cit.* fn. 2, p. 86; “workation” normally only applies to cases of posting, but similar situations arise when the conflict rules were suspended, and people remained socially insured in their original state of insurance.

²³ See De Wispelaere, F., *Grensarbeid en telewerk in beeld in Rapport van de Benelux*, in: *ITEM conferentie “De Toekomst van werken/thuiswerken vanuit een grensoverschrijdend perspectief”*, ITEM, Maastricht, 2022. Of course, a level of disconnect between the concepts of ‘work’ and ‘workplace’ has always existed for some kinds of professions – such as, for example, writers – the penetration of this disconnect within the wider society is definitely a relatively new phenomenon.

(a) Discrimination of intra-community migrants

One of the main problems with telework within the current legal framework is the fact that employers might be encouraged to differentiate between their employees in favor of those who are residents of the Member State where the premises of the company are located to the detriment of intra-community migrants who reside in a different Member State. Employers might actually be afraid of situations where the applicable social security legislation for their employees could change. Let us clarify this with an example:

Company A is located in the Netherlands and has two employees. Employee Y is a Dutch national who resides in the Netherlands, while employee Z is a German national who resides in Germany. Since the end of the COVID-19 pandemic, company A wishes to provide for the possibility for their employees to work from home on a regular basis, while at the same time continuing to work at the premises of the company.²⁴ However, while company A is willing to allow for more than one day of teleworking per week for employee Y, it does not permit employee Z to work from home for more than one day per week. This is because, for employee Z, the applicable social security legislation would change from the Dutch to the German, since for employees working in multiple Member States the applicable legislation is the one of the Member State of residence when more than 25% of the working time is performed in the Member State of residence.²⁵

The practice of not allowing frontier workers the same rights with regards to telework is not uncommon since the later stages of the COVID-19 pandemic, as several companies already made company-level agreements to that extent.²⁶ Since workers who want to telework for more than one day a week could in these cases certainly be dissuaded from working in a cross-border context, one could raise the question if this form of differentiation at company level between EU citizens would constitute a form of discrimination prohibited by Art. 45 of the TFEU and Art. 7 of Reg. (EC) 492/2011. Verschueren, in our opinion, correctly assessed that it indeed would, arguing that frontier workers and workers who reside in the Member State where they work in the instance of telework are in a comparable situation with regards to the applicable terms

²⁴ So called 'hybrid work', see I. Introduction.

²⁵ Art. 14, 8 Regulation (EC) No. 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No. 883/2004 on the coordination of social security systems.

²⁶ Verschueren, *op. cit.* fn. 2, p. 91.

of employment.²⁷ Possibly the Court of Justice of the European Union could bring more legal certainty on the matter in the future – in the absence of any further changes to the current legal framework (see *infra*).

(b) Socio-economic implications

When we look at telework, it is mainly a white-collar phenomenon.²⁸ Blue-collar workers are rarely in a situation where they could be capable of working from home, since there is a close connection between their ‘work’ and their ‘workplace’. For white-collar workers however, it became perfectly clear during the COVID-19 pandemic that this is not necessarily the case. There are socio-economic challenges stemming from this decoupling. Employees got to enjoy certain advantages of working from home, such as more flexibility in their working hours. However, it became clear not only to employees, but also to employers, that it is not always necessary for white-collar workers to be working at the employer’s premises.

Just as when discussing the issue of ‘social dumping’ with regards to the coordination regulation, low labor costs remain an incentive for employers to change jurisdictions. However, let it be clear that the labor market, with the decoupling of ‘work’ and ‘workplace’, is not merely European, but global in its nature. European workers are comparatively ‘expensive’ in this regard.²⁹ We mainly saw a large-scale exodus of blue-collar work – particularly in the manufacturing industry – from Europe to overseas low cost jurisdictions in the last few decades, but the insistence of European white-collar workers on telework or even hybrid work as part of the normal terms of employment, could contribute to a similar phenomenon for white-collar workers, as well.³⁰ If this is the case, it will have definitive effects on the labor market, which, in turn, will have consequences for social law as a whole. More research from a multidisciplinary angle on the impact of telework on possible offshoring of white-collar jobs is, however, needed.

²⁷ *Ibid.*, pp. 92-93.

²⁸ See Berki, G., *Telework: Statistics & challenges*, MoveS, 1.12.2022.

²⁹ Rising energy costs could also be a real burden in this regard. Of course, telework might also have a positive influence on the overall cost structure of companies, since not all workers have to work at the premises of the company, companies require less office space, thus having a positive effect on comparative rental and heating costs.

³⁰ See Everaet, G., *The Future of White-Collar and Blue-Collar Work: Where Does one Work?*, presentation, 2022; available at: <https://lirias.kuleuven.be/retrieve/683742>. Of course, this would not be equally the case for all white-collar jobs. Jobs where, for example, language skills in comparatively small European languages are a prerequisite, or certain jobs in the legal profession are, at first glance, less at risk.

5. THE WAY FORWARD?

Although legal practice deals with the concept of telework within the context of the coordination regulation, it is clear that telework was not envisaged when the coordination regulation was designed, with its focus on the place of work to determine the applicable social security legislation. As a consequence, some challenges still exist. The question remains how we will deal with these challenges in the future. Legislative action could be taken, and the coordination regulation could be amended to reflect the new reality of telework, but other scenarios are also possible.

(a) Legislative action

With regards to telework, Verschueren listed some possible amendments to the coordination regulation and its implementing regulation that would strive to deal with the unwanted possible changes in the applicable social security legislation as a consequence of cross-border telework.³¹ The changes proposed include among others an increase of the 25%-rule³² to 40%, a fictitious place of work – similar to the rules for crews of seagoing vessels³³ – as well as the insertion of a legal definition of telework. Considering these proposals on a more abstract level, it should be clear that whatever approach is chosen when redesigning the coordination regulation, in our opinion some goals need to be kept in mind. It goes without saying, every new rule should be tested in the light of Articles 45 and 48 of the TFEU, but the possibility of forum shopping is to be avoided. In addition, the discriminatory practices in the workplace to the detriment of intra-community migrants as a consequence of telework should be dealt with and the administrative burden on workers and employers should remain as low as possible. Furthermore, it would be wise not to make too specific rules for telework as we know it today, since the conceptualization of ‘telework’ will possibly change in the future, as well³⁴ – meaning that some

³¹ Verschueren, *op. cit.* fn. 2, p. 88.

³² Art. 14, 8 Regulation (EC) No. 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No. 883/2004 on the coordination of social security systems.

³³ Art. 11, (4) Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

³⁴ Today we almost unconsciously equate the concept of telework with teleworking a few days a week or with working from home, because these are the most common appearances of the concept as we know it today. With the changing of technology and its influence on the way we work, this could change quite quickly in the future, as well.

room for discretion for the administration(s)³⁵ in this regard could be useful, otherwise the amendments made to the coordination regulation will probably again soon be out of date. The big advantages of amending the coordination regulation are, of course, that it creates more legal certainty and that uniformity at the EU level is ensured.

(b) No changes to the current legal framework?

Without changes to the coordination regulation and its implementing regulation, three scenarios are still possible. We could either see no action and nothing will change in the current disposition, the Court of Justice of the European Union could reinterpret certain coordination rules, or finally, the Member States could make agreements based on Article 16 of the coordination regulation with regards to telework.

If no action were taken, the risk of discrimination at the company level to the detriment of intra-community migrants with regards to the terms of employment relating to telework would remain a problem (see *supra*). The Court of Justice of the European Union could provide clarification on the matter but would find itself between the devil and the deep sea. If the Court were to clarify that these practices would constitute discrimination, companies could, to an extent, be dissuaded from hiring intra-community migrants.³⁶ Conversely, if the Court determines that it is a justified differentiation, companies could continue the practice and frontier workers who value teleworking could be dissuaded from working in a cross-border context. Accordingly, both outcomes have consequences which stand in opposition to the goals set forth in Articles 45 and 48 of the TFEU.

Alternatively, the Court could also take a more active role. Several options exist, but in essence the Court would try to ensure that the coordination rules remain in line with the purposes of Articles 45 and 48 of the TFEU. In that regard, the best option is to provide more discretion to the Member States with regards to the interpretation of the conflict rules. The way the 25%-rule of Article 14, 8 of Regulation 987/2009 would be interpreted for example could be changed.³⁷ The risk, however, exists that the approaches between diffe-

³⁵ Possibly only within the context of the Administrative Commission for the Coordination of Social Security Systems, to make sure uniformity on the EU level is safeguarded.

³⁶ Or, to be more precise: to be inclined to take into consideration the social security system of the Member State of residence of the worker involved, rather than looking to the relevant skills of the worker with regards to the labour market.

³⁷ Verschueren, *op. cit.* fn. 2, p. 87

rent Member States would vary considerably, leading to a lack of an EU-wide approach, consequently undermining legal certainty.³⁸ There is, however, also a limit on how far the Court could go in re-interpreting the coordination rules. If it were to start revising earlier jurisprudence on a fundamental level, such as the basic principles of the *Partena* judgement, the impact would not only limit itself to telework, but the whole system of the coordination regulation itself could be undermined. Still, the question remains how far the Court would be willing to go in this regard, as it might be hesitant to place itself in what is essentially the position of the legislator.

Finally, Member States themselves could take the initiative to conclude agreements based on Article 16 of the coordination regulation. Member States could, in the form of bilateral or multilateral agreements, provide solutions for teleworkers, as they can deviate from the normal conflict rules *in the interest of certain persons or categories of persons*. Although some of the social security administrations seem to have reservations with regards to this practice³⁹, some Member States already took the opportunity to conclude such agreements pertaining to cross-border telework.⁴⁰ In the agreement between Austria and Germany for example, telework can consist of up to 40% of the working time in the Member State of residence, without the applicable legislation changing to the Member State of residence.⁴¹ Of course, the issue with such a strategy is that a wide variety of agreements might come into existence to the detriment of an EU-wide approach.

(c) A new framework agreement?

During the writing of this paper, an initiative for a framework agreement on telework was taken in the context of the Administrative Commission. In short, the 'Framework Agreement on the application of Article 16 (1) of Regulation (EC) No. 883/2004 in cases of habitual cross-border telework' aims to alleviate some of the issues that cross-border telework poses to the coordination of

³⁸ Rennuy, *op. cit.* fn. 21, p. 30.

³⁹ Verschueren, *op. cit.* fn. 2, p. 91.

⁴⁰ Examples are: *Rahmenvereinbarung über die Anwendung von Artikel 16 Absatz 1 der Verordnung (EG) Nr. 883/2004 bei gewöhnlicher grenzüberschreitender Telearbeit zwischen Deutschland und Österreich*; and *Framework Agreement on the application of Regulation (EC) No 883/2004 regarding habitual cross-border telework between Austria and the Czech Republic*.

⁴¹ *Rahmenvereinbarung über die Anwendung von Artikel 16 Absatz 1 der Verordnung (EG) Nr. 883/2004 bei gewöhnlicher grenzüberschreitender Telearbeit zwischen Deutschland und Österreich*.

social security within the European Union.⁴²

For the agreement to take effect, at least two Member States have to sign it. If that happens, it will be applicable from 1 July 2023. Germany, Belgium and the Netherlands have already shown their intention of signing the agreement. It remains to be seen how many other Member States will follow. Under the framework agreement, teleworkers will remain insured in the Member State of their employer if four conditions are cumulatively met:

1. both the Member State in which the employer's undertaking is located and the employee's Member State of residence have signed the framework agreement;
2. the employee has only one employer or several employers established in the same Member State, other than the Member State of residence of the employee;
3. the employee is teleworking only from his or her Member State of residence or from the Member State where the employer is located;
4. the employee spends less than 50% of the total working time on cross-border telework from his or her Member State of residence.

For the Member States signing the Framework Agreement it would mean that, in principle, telework from a holiday destination would not be possible, since telework would only be possible from the Member State of residence or from the Member State where the employer is located. On the other hand, the issue of the discrimination of intra-community migrants might still remain. The changing of the threshold of working in one's own Member State from 25% to no more than half of the working time might decrease the number of situations in which discrimination arises, but in essence, the root cause of the possible discrimination itself is not dealt with.

6. CONCLUSION

Telework became a new reality during the COVID-19 pandemic for large parts of the labor market that influenced the way we look at work. It is, however, clear that our current rules for social security coordination in the European Union were designed with a distinct idea about work and its connection to a specific location in mind. Telework does not fit within these preconceived notions, with the concept 'place of work' in the context of the *Partena* jud-

⁴² Framework Agreement on the application of Article 16 (1) of Regulation (EC) No. 883/2004 in cases of habitual cross-border telework.

gement clearly referring to the actual practical place of work, which creates friction when workers telework on a regular basis, as it could lead to a change in jurisdiction with regards to social security legislation. Thus, when the COVID-19 crisis hit, the European Commission in the first instance tried to deal with the impact of the border closures by suspending the normal application of the rules of the coordination regulation in order to avoid a sudden change in the applicable legislation for large groups of workers. This, however, led to the unintended consequence of new realities being created, which was, in turn, aggravated because of the several extensions of the suspension of the conflict rules.

The fact that the conflict rules were not designed for telework as such creates the challenge of possible discrimination on the company level to the detriment of intra-community migrants, which goes against the original intentions of Art. 45 of the TFEU. Telework itself, however, might lead to changes in the structure of the labor market and make labor cost a real issue for European white-collar workers in a globalized labor market.

Several options exist to deal with the difficulties that telework raises. If one considers the current framework, a change in the legal text of the coordination regulation and its implementing regulation is probably the wisest option, in the absence of which the possibility exists for the Court of Justice of the European Union to reinterpret the coordination rules, or for the Member States to use Article 16 to conclude bilateral or multilateral agreements. Without this intervention companies remain incentivized to discriminate between their employees to the detriment of intra-community migrants, which goes against the purposes of primary EU law. Some Member States already made use of their possibility to conclude agreements on the basis of Article 16 of the coordination regulation, but an EU-wide response would be preferable. In this regard, if no legislative action is taken, at least a common approach within the context of the Administrative Commission should be envisaged to ensure uniformity at the European level. To that end the proposed framework agreement is a step in the right direction. It remains to be seen what the eventual outcome might be. It is clear, however, that the final word on telework has not yet been spoken, as this new form of work is here to stay.

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Sažetak

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**PROMIŠLJANJA O RADU NA DALJINU U KONTEKSTU
KOORDINACIJE SUSTAVA SOCIJALNE SIGURNOSTI**

Rad na daljinu postao je prevladavajući način obavljanja rada tijekom trajanja pandemije bolesti COVID-19, zbog čega se promijenio i način na koji promišljamo o radu. Ipak, postojeća pravila EU-a o koordinaciji sustava socijalne sigurnosti nisu osmišljena na način da se u njih uklopi koncept rada na daljinu, s praktičnim shvaćanjem načela lex loci laboris. Tijekom pandemije Europska komisija je inicijalno suspendirala pravila o koordinaciji sustava socijalne sigurnosti kako bi se spriječile iznenadne promjene za radnike, što je dovelo do neželjenih posljedica i potencijalne diskriminacije radnika koji se kreću unutar Europske unije. Suočavanje s navedenim problemima uključuje nekoliko mogućnosti: izmjenu pravila o koordinaciji sustava socijalne sigurnosti, drukčije tumačenje postojećih pravila ili sklapanje bilateralnih odnosno multilateralnih ugovora. Nedjelovanje u tom smislu moglo bi dovesti do kontinuirane diskriminacije od strane trgovačkih društava (poslodavaca). Ako se ne poduzmu nikakve pravne mjere, trebalo bi barem predvidjeti zajednički pristup u okviru Administrativne komisije za koordinaciju sustava socijalne sigurnosti, a kako bi se osigurala ujednačenost na razini Europske unije. Čini se da nedavni razvoj u okviru Administrativne komisije ide u tom smjeru.

Ključne riječi: rad na daljinu, pravila o koordinaciji sustava socijalne sigurnosti Europske unije, prekogranični rad, pandemija bolesti COVID-19, načelo lex loci laboris, diskriminacija

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