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## *b-solutions*

# FINAL REPORT BY THE EXPERT

**Advice case title:** Continued remuneration of the sick cross-border worker
**Advised entity:** Grenzinfopunkt Aachen-Eurode
**Experts:** Sander Kramer, Susanne Sivonen (with help of Marie-Sophie Hoogervorst & Pim Mertens)
**Date:** 03 October 2023

# Contents

# 1. Executive summary

People working as cross-border workers and become ill face two major difficulties when becoming ill, especially concerning the following issues:
i) How their status as a sick employee is monitored in their country of residence so that they can be sure to not being confronted with a suspension of payments by the competent authority in the country in which they are socially insured.
ii) How applicable employment law is related to applicable social security law when it comes to establishing the incapacity for work and to sickness payments and re-integration measures.

The above-mentioned problems form an obstacle when working in another country than the country of residence. Determining the exact problems, especially when it comes to cooperation between the authorities involved in the competent EU-Member-State and the EU-Member-State of residence, would form a major step to more legal certainty.

The Cross-border Info Point Aachen-Eurode ("Grenzinfopunkt Aachen-Eurode") pointed out that the problems that arise are related to the application of articles 27 and 87 of regulation (EC) No 987/2009. These articles stipulate specific rules concerning the establishment of incapacity for work. However, in practice the compliance to these rules seem to pose major difficulties, especially if it concerns employers as the “competent authority” that are responsible for paying cash benefits.

In addition to the already existing problems, we noted increasing difficulties of adherence to the applicable national and EU-rules if the situation involves employers as “competent authorities” that employ people who need to be socially insured in a country other than the country where the employer is seated. Employers often do not realise that the application of the social security system of another country can also entail the application of a longer duration of cash benefits and other rules concerning the monitoring of incapacity for work. In the Netherlands for example the employer has to pay wages for 104 weeks, in Germany six weeks and in Belgium four weeks. Due to the fact that these obligations arise out of (mandatory) national labour law, it is often debated whether an employer needs to adhere to these rules.

This report addresses the national legal frameworks in the Netherlands, Belgium and Germany when it comes to sickness benefits. The report highlighted these differences and the complications for the EU coordinating framework. In the Netherlands, when an employee falls ill, the employer is responsible for continuing to pay the salary during the first two years of illness. During this period, the employer is obligated to promote the reintegration of the employee into the company. If the illness persists beyond this period, the employee may be eligible for benefits under the WIA. When an individual is not entitled to (the continuation of) salary paid by an employer, he might be eligible for sickness benefits under the *Ziektewet*. In Belgium, when an employee becomes ill, the employer continues to pay the salary for the first 30 days of sickness. After this period in which the salary continued to be paid, the health insurance fund takes over the payment of sickness benefits. In Germany, if an

employee falls ill, the employer continues to pay the salary for the first six weeks of illness. After the six weeks, the health insurance (*Krankenkasse*) takes over the payment of sickness benefits. The duration of the benefit may vary, but in general, employees can receive sickness benefits for up to 78 weeks within a timeframe of three years.

Furthermore, this report sets out the relevant legislation and case-law on a European level. In particular, the *Paletta* and *Rindone* cases are dealt with, when it comes to finding a solution for the issues described above. Also art. 27 and 87 of Regulation 987/2009 are considered in more detail. The report concludes with some general observations when it comes to finding a solution for these cross-border cases.

# 2. Description of the obstacle with indication of the legal/administrative provisions causing the obstacle

## 2.1 The obstacles as presented by Grenzinfopunkt Aachen-Eurode

The Grenzinfopunt Aachen-Eurode (Cross-border Information Point) informs and advises cross-border workers and employers concerning the impact of cross-border working on social security and taxation in the Netherlands, Germany and Belgium. They report to have confronted with two major difficulties in the monitoring and continued reimbursement of incapacitated cross-border workers, who work in another country than their country of residence. More specifically, the case applicant has observed increasing challenges in adhering to national and EU regulations on the payment of sickness benefits, particularly when employers serve as "competent authorities" employing individuals who are subject to social insurance in a different country than where the employer is based. According to the case applicant, in most instances, the applicable social security will be determined by the employee's country of residence. Employers often overlook the fact that application of another country's social security system may lead to longer durations of cash benefits and additional regulations regarding monitoring of incapacity, due to the differences in national social security and employment law. For instance, in the Netherlands, employers are required to pay wages for 104 weeks, while in Germany, it is six weeks, and in Belgium, four weeks. These obligations, stemming from national employment law, frequently spark discussion over whether employers must adhere to them. Conversely, sickness benefits provided by health insurance are typically governed by social security law. In certain scenarios, employees are entitled to both forms of benefits: ongoing remuneration from the employer and sickness benefits from health insurance. This dual entitlement can sometimes create complications regarding the hierarchy of benefits.

The case applicant is seeking for more legal certainty by determining the exact obstacles, and to increase the cooperation between the authorities involved. Particularly, they are looking for advice on the following two questions:

i) How is the status of a sick cross-border worker monitored in their country of residence, in order to ensure that the worker is not confronted with a suspension of payments by the competent authority in the country in which they are socially insured?

ii) How is applicable employment law related to applicable social security law when it comes to establishing the incapacity for work and to sickness payments and re-integration measures for a cross-border worker?

## 2.2 Analysis of Existing Obstacles by the Adviser

To provide advice on the earlier questions, this report will look into the relevant legal framework related to sickness payments and their monitoring, considering both social security and labor law. This report will be based on EU regulations and the national laws of the Netherlands, Germany, and Belgium. More specifically, focus will be placed on comparing how sickness benefits are regulated in these three countries, their monitoring procedures, duration of such benefits, and the responsible party for paying them.

## 2.3 Legal framework

### 2.3.1 On the EU-level

In the EU, Regulation (EC) 883/2004 and Implementing Regulation (EC) 987/2009 lay down rules on the coordination of social security systems of the Member States – i.e., dedicating under which Member State's social security legislation a cross-border worker is covered. Based on the principle of exclusivity, persons subject to the Regulation[1] are covered by legislation of one Member State.[2] The competent Member State is determined by the rules on applicable legislation. By the main rule, the legislation of the State of employment is applicable (*lex loci laboris*).[3]

Article 3 lays down the material scope of the Regulation, including sickness benefits. In the *Molenaar* case, the Court of Justice elaborated on the distinction of two types of sickness benefits: in kind and in cash.[4] While sickness benefits in kind are intended to supply, make available, pay directly or reimburse the costs of medical care, products or services (i.e. the healthcare itself), benefits in cash seek to replace and provide for income in case of sickness. It is these types of sickness benefits that this case

[1] According to Article 2 of Regulation 883/2004, the Regulation applies to nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member State, family members and survivors.

[2] Article 11(1) Regulation 883/2004. See also C-302/84 *Ten Holder*, ECLI:EU:C:1986:242 where the Court advocated a strict application of the exclusivity principle.

[3] Article 11(3)(a) Regulation 883/2004.

[4] C-160/96 *Molenaar*, ECLI:EU:C:1998:84. Benefits in kind can also be payed in cash, when in return for exchange for a particular medicine or service. Benefits in cash, on the other hand, provide for income to buy such provisions.

concerns. This distinction is also particularly relevant since it means that these benefits can be exported, thus insured persons (cross-border workers) residing outside the competent Member State (generally, the state of employment) are entitled to cash benefits by the competent institution of that State. Thus, either the State where the cross-border worker is insured export these benefits, or by agreement among the institutions, these benefits can also be paid by the state of residence at the expense of the competent state.[5]

### *CJEU Paletta I 1992: extending rules to employers liable for sickness benefits in cash*

Because the Paletta I ruling today is still relevant to performance in payroll deductions, in part because of the clear judgment of the Court, it is useful to have a clear understanding of the facts of this case.[6]

Moreover, pursuant to the *Paletta* ruling, these rules do not only apply to competent *institutions* liable to pay for the sickness benefits in cash, but also to *employers* liable for such payments.[7] In this case four Italian employees (all members of the same family Paletta) of the German employer Brennet AG went on holiday to Italy. During their holiday they all called in sick, albeit during different periods of time. The German *Lohnfortzahlungsgesetz* obliged employers to pay the salary for six more weeks in case of sickness. Although the procedure of calling in sick was followed correctly, Brennet refused to continue to pay their salaries. In previous years the family also called in sick when they were on holiday but back then Brennet still agreed to pay their salaries. Even though the Paletta family members provided Brennet with a statement given by the Unità Sanitaria Locale, Brennet doubted whether the Paletta family members were really ill. Brennet did not consider himself to be bound by the statements given by physicians abroad. The Paletta family ordered the payment of their salaries but the judge asked some preliminary questions to the Court in Luxemburg, one of them being whether the payments made by the employer on the basis of the *Lohnfortzahlungsgesetz* are sickness benefits as meant in the regulation 1408/71 (now 883/2004). The consequence of a positive ruling is that employers are bound by the regulation. The court ruled that whether a payment qualifies as such a benefit depends on the constitutive elements of the benefit, especially its aim and the conditions for granting the benefit, and not the fact whether or not the payment is qualified as a social benefit under domestic law.[8] The fact that the employer pays for the benefit, is not relevant. This means that just because the benefit is paid by the employer does not mean that the material scope of the regulation is not fulfilled. The Dutch obligation to continue to pay wages (Art. 7:629BW) also meets these criteria and thus falls under the regulation.[9]

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[5] Article 21 Regulation 883/2004, F. Pennings, 'European Social Security Law: Chapter 11 'Sickness benefits', Intersentia 2010, p. 150-152.

[6] S. Montebovi, *Activering en privatisering in de Nederlandse ziekte- en arbeidsongeschiktheidsregeling in grensoverschrijdende situaties*, Maklu uitgevers 2016, p. 64.

[7] C-45/90 *Paletta* ECLI:EU:C:1992:236, F. Pennings, 'European Social Security Law: Chapter 11 'Sickness benefits', Intersentia 2010, p. 153-155.

[8] C-45/90 Paletta ECLI:EU:C:1992:236, par 16.

[9] F. Pennings, *Europees socialezekerheidsrecht*, Monografieën Sociaal recht, Deventer: Wolters Kluwer 2022, par. 5.3.5 referring to *Kamerstukken II* 1995/96 24 439, nr. 3, p. 50: https://zoek.officielebekendmakingen.nl/kst-24439-3.pdf. See also Wet uitbreiding loondoorbetalingsplicht bij ziekte, *Kamerstukken II* 1995-1996, 24 439, nr.11, b.Europeesrechtelijke aspecten: https://zoek.officielebekendmakingen.nl/kst-24439-3.html

The constitutive elements have later been converted into two cumulative conditions that need to be met in order for the payment to be qualified as a benefit as meant in Article 3 of the regulation. The first conditions entails that the payment needs to relate to one of the social security branches mentioned in Article 3. The second condition requires that the payment is granted solely to the beneficiary on the basis of a legally defined position, so without an individual and discretionary assessment of personal needs. In the end, the conclusion was that the payments made by the employer on the grounds of the *Lohnfortzahlungsgesetz* qualified as sickness benefits as meant in the regulation and so the material scope was fulfilled. The consequences of the regulation therefore also extent to the continued salary payments in case of sickness.

In respect to the supervision and monitoring procedures, Article 27 of the Implementing Regulation 987/2009 states that the state of residence is responsible for the monitoring and medical investigation of the worker. If the legislation of the competent Member State requires that the insured person presents a certificate in order to be entitled to cash benefits, the insured person must ask the doctor of the State of residence who established his or her state of health to certify his or her incapacity for work and its probable duration. Furthermore, the institution in the state of residence may be required to carry out any necessary administrative checks or medical examinations in accordance with the legislation applied by their institution. The report of the examining doctor, indicating in particular the probable duration of the incapacity for work, shall be sent by the institution of the place of residence to the competent institution without delay.

Pursuant to the judgment of the Court of Justice in *Rindone* and Article 87 of the Implementing Regulation, the competent institution has the right to check the findings of the medical report, by requesting to have the worker examined by a doctor of their choice, either by sending one or choosing one from the state of stay of the worker. Article 87 of the Implementing Regulation provides that, by way of derogation from the principle of free administrative cooperation laid down in Article 76(2) of the Basic Regulation, the actual expenses for these checks shall be reimbursed by the debtor institution, which had requested the checks, to the institution which was requested to carry them out.

The competent institution may only require the worker to return to the competent State only if it is not detrimental to the health of the worker, and pay for the cost of travel and accommodation. If the competent state does not make use of this opportunity, they are bound by the medical report conducted in the state of residence.[10] In each individual case, therefore, it should be examined whether travel is detrimental to the health of the person concerned. This approach seems more in line with the current conception of illness, where, on the contrary, activation is also paramount, than appears from the *Rindone* judgment.[11] Moreover, in the case of illness, it is not necessarily the case

[10] Article 87 Regulation 987/2009, C-22/86 *Rindone*, ECLI:EU:C:1987:130, F. Pennings, 'European Social Security Law: Chapter 11 'Sickness benefits', Intersentia 2010, p. 153-154.
[11] F. Pennings, *Europees socialezekerheidsrecht*, Monografieën Sociaal recht, Deventer: Wolters Kluwer 2022, par. 11.2.3. referring to B. Schulte, 'Konfliktfelder im Verhältnis zwischen mitgliedstaatlichem und

that one cannot travel. According to the Dutch concept of illness, one is ill if one cannot perform one's own work for medical reasons. Thus, that still says nothing about one's general state of health. Also, the maximum period of illness under Dutch regulations is so long - two years - that a general rule that a sick person cannot travel can lead to undesirable results.

### *CJEU Paletta II 1996: European rules must be applied unless the person alleging abuse or fraud also knows how to prove these allegations*

The Paletta ruling was very controversial, especially in Germany.[12] After this ruling, the national court granted Paletta's claim. Supported by the commotion in Germany, the employer did not resign and filed a revision request with the German court. The latter turned to the Court of Justice with new questions. This led to the second *Paletta* judgment.[13]

The question put to the Court was to what extent the national court can take into account abuse by the interested party when applying the control provision. The Court replied that the interested parties cannot invoke Community law in cases of abuse or fraud. Therefore, national courts may take into account abuse or deception by the interested party on the basis of objective evidence. They may then deny him recourse to provisions of Community law. Whether there is such abuse or deceit must be considered in the light of the objectives pursued by the provisions in question.

The employer must provide evidence to enable the national court to establish, where appropriate, that there has been abuse or fraud. If that is the case, the employee cannot be considered sick. In other words, the control provision (Art. 22 new Implementing Regulation) cannot be invoked in cases of abuse or deceit, but the burden of proof that there has been deceit or abuse lies with the employer.

There is very little or no other case law on abuse or deceit in coordination cases. The Paletta judgment is therefore, for the time being, leading in dealing with that type of case. This means that the European rules must be applied unless the person alleging abuse or fraud also knows how to prove those allegations.

### *Medical findings from the country of residence or stay have the same legal value as the statements from the competent member state*

Noteworthy in this regard is paragraph 8 of Article 27 of the Implementing Regulation which explicitly states, as already emphasized by the Court in the *Rindone* and *Paletta* judgments, that the medical findings from the country of residence or stay have the same legal value as statements from the competent Member State (= the Member State of the employer). In addition to Article 27, Article 87 of VO 987/2009 plays an important role. It concerns the medical examination and administrative

europäischem Recht', in E. Eichenhofer en M. Zuleeg (red.), Die Rechtsprechung des Europäischen Gerichtshof zum Arbeits- und Sozialrecht im Streit, Schriftenreihe der Europäischen Rechtsakademie Trier, Köln 1995, p. 11.

[12] See S. Montebovi, *Activering en privatisering in de Nederlandse ziekte- en arbeidsongeschiktheidsregeling in grensoverschrijdende situaties*, Maklu uitgevers 2016, p. 70.

[13] C-206/94 Paletta ECLI:EU:C:1996:182.

control and completes Article 27 with which it must also be read in conjunction. Paragraphs 1 and 2 of Article 87 focus on medical examination; paragraph 3 concentrates on administrative control. If Articles 87 and 27 of VO 987/2009 diverge, priority should be given to Article 27 since it counts as a lex specialis vis-à-vis Article 87, a lex generalis.[14] As indicated above, since May 2010 the Rindone judgment has been incorporated in Regulation 987/2009 and thus proves to be relevant even today.

### *Additional instruments: special requirements which must be met during the medical examination and of aspects to which attention should be paid in that examination*

Article 87(1), second sentence concerns the opportunity the competent institution is given: 'The debtor institution shall inform the institution of the place of stay or residence of any special requirements, if necessary, to be followed and points to be covered by the medical examination.'

This means that the medical examination in the country of residence takes place in accordance with the legislation of that state, as was the case under the previous Regulations, but the applicant (the institution of the country of employment) can indicate what the requirements are under its own legislation and also what the foreign doctor should pay special attention to during the medical examination. On the basis of this new provision, the competent institution - in this investigation, the employer who must apply the continued payment of wages scheme under the Dutch Civil Code - can thus indicate to the controlling institution in the other Member State what special attention should be paid to when reporting sick and carrying out the corresponding examination. The foreign institution charged with monitoring the incapacitated employee can thus, for example, be explicitly asked to describe what the possibilities of the sick employee are with regard to the employee's own work or suitable work, as the *Wet Verbetering Poortwachter* prescribes.[15]

The addition of this additional provision in Regulation 987/2009 provides an opportunity to reduce the differences between (reports of) medical examinations in the member states because the competent institution can request an examination focused on its wishes (obligations). For example, the employer in the Netherlands can indicate what he considers necessary in the medical report of the foreign institution. In the absence of this option, the situation is genuine that the employer does not agree (at all) with the investigation by the foreign institution and therefore delays or postpones the payment of wage replacement benefits. On that defect, the employer can no longer be able to lean on it since the Regulation has this addition.

Not only does this new element reduce the legal uncertainty for the employee, it also shortens the time that can be lost in case the employer wants additional information and has to contact the controlling institution abroad again. On the other hand, this new possibility cannot guarantee that the difference between the medical reports in the member states will always be resolved. Consequently,

[14] S. Montebovi, *Activering en privatisering in de Nederlandse ziekte- en arbeidsongeschiktheidsregeling in grensoverschrijdende situaties*, Maklu uitgevers 2016, p. 81.
[15] Cf. S. Montebovi, *Activering en privatisering in de Nederlandse ziekte- en arbeidsongeschiktheidsregeling in grensoverschrijdende situaties*, Maklu uitgevers 2016, p. 83.

in the event of differences leading to (interpretation) problems, it will still be necessary to rely on efficient and close cooperation between the social security institutions.[16]

### 2.3.2 Netherlands

In the Netherlands, sickness benefits are regulated by, inter alia, the *Burgerlijk Wetboek* (Dutch Civil Code, hereafter: DCC), the *Ziektewet* (Sickness Benefits Act) and the *Wet werk en inkomen naar arbeidsvermogen* (Capacity for Work Act). When an employee falls ill, the employer is responsible for continuing to pay the salary during the first two years of illness.[17] During this period, the employer is obligated to promote the reintegration of the employee into the company.[18] If the illness persists beyond this period, the employee may be eligible for benefits under the WIA.[19]

When an individual is not entitled to (the continuation of) salary paid by an employer, he might be eligible for sickness benefits under the *Ziektewet*.[20] The individual must, however, meet special requirements in order to be eligible for these benefits. A benefit under the *Ziektewet* may be granted to individuals who do have an employer but for example have become ill due to pregnancy or organ donation.[21] Individuals who are self-employed or individuals who receive an unemployment benefit but have been ill for more than 13 weeks may be eligible for a sickness benefit as well. This sickness benefit is provided by the UWV (Employee Insurance Agency) and generally amount to 70% of the daily wage. The employer contributes premiums to the UWV to finance these benefits.

In addition to the above-mentioned legal instruments, there is also an act called the 'Eligibility for Permanent Incapacity Benefit (Restrictions) Act' (hereafter: EPIBA). In Dutch this act is called the 'Wet verbetering poortwachter' and it obliges an employer to take a number of steps within a certain period of time in order to make sure that employees can get back to work as soon as possible. Its aim is therefore also to keep as many employees working as possible.

Article III of the EPIBA amends the seventh book of the DCC. This part of the DCC specifically deals with labour contracts and the duties and rights of both employers and employees that derive from having concluded such a contract. Article 658a of the seventh book of the DCC is one of the many articles added to the DCC since the entry into force of the EPIBA. It contains a few important obligations an employer needs to adhere to of which the first one is already prescribed in the first paragraph. According to this paragraph, an employer needs to promote the reintegration of an ill employee into the company. This includes adjusting the tasks, working times, workstation and working hours (if possible). In case it has been established that the labour the employee used to do can no longer be

[16] Recital 2 and 9 Regulation 987/2009.
[17] Article 629 paragraph 1 of the 7th book of the DCC.
[18] Article 658a of the 7th book of the DCC.
[19] Article 47 of the WIA.
[20] Article 29 paragraph 2 of the ZW.
[21] An employee may also be eligible for the sickness benefit if he/she falls under the no-risk policy, if his/her contract gets terminated due to the illness or if the employee becomes ill within four weeks after the contract ended.

performed by him and there is no other suitable work for him, the employer needs to take action to find the employee a suitable job but in a different company. The employer is in this regard obligated to take measures and give instructions as timely as possible to make sure that the employee can start with performing those suitable tasks. Paragraph three states that the employer needs to make a plan of action and needs to evaluate this plan with the employee and adjust the plan if necessary.

Article 660a is another example of the provisions added to the DCC. This article obligates the employee to follow up the instructions given by the employer or expert appointed by the employer. These instructions can include reasonable regulations with regard to reintegration or could ask the employee to collaborate with setting up the plan of action and later evaluating and adjusting this plan. This plan of action is also mentioned in article 25 of the WIA. In the WIA it is stated that the plan of action needs to be evaluated periodically but also obliges the employer and employee to write a report on the process of reintegration. This report needs to be submitted to the Employee Insurance Agency as well and needs to give a description of all the things that have been done to help the employee return to work as soon as possible. If the Employee Insurance Agency is of the opinion that the measures taken were not sufficient, the employer risks being obliged to have to continue to pay the salary for one more year.

In lower legislation such as the *Regeling procesgang eerste en tweede ziektejaar*[22] more rules are laid down which concern the steps that need to be taken as a bare minimum in order to fulfill the conditions regarding reintegration.

### 2.3.3 Belgium

In Belgium, sickness benefits are regulated by the health insurance system. When an employee becomes ill, the employer continues to pay the salary for the first 30 days of sickness. The percentage of the salary that is paid can differ per type of job.[23] The employer is entitled to send a physician for verification of illness from the first day of illness onwards.[24] After this period in which the salary continued to be paid, the health insurance fund takes over the payment of sickness benefits.

The employee receives an allowance from the health insurance fund based on a percentage of their salary. The exact amount and duration of the benefit may vary depending on specific circumstances. The health insurance system is financed through social contributions paid by both the employer and the employee. For persons who are still ill after a year, the allowance from the health insurance fund will be converted to a disability allowance. When someone is ill for such a long period, the medical council of the *Rijksinstituut voor ziekte- en invaliditeitsverzekering* (RIZIV, this is a public institute for social security) may give that person a visit for a medical check-up. This council is made up of three

[22] This regulation could be loosely translated as 'Regulation of the process of the first and second year of illness'.
[23] Arbeidsongeschiktheid | socialezekerheid.be (socialsecurity.be)
[24] Afwezig wegens ziekte: waar en wanneer kan je werkgever een controlearts sturen? | gezondheid.be

physicians that are all somehow involved with that person's case.[25] The allowance amounts to a certain percentage of the person's former gross salary. This percentage depends on one's family situation.[26]

### 2.3.4 Germany

In Germany, sickness benefits are regulated by the *Krankengeld* system (Sickness Benefit).[27] If an employee falls ill, the employer continues to pay the salary for the first six weeks of illness.[28] The employee must submit a special note provided by a physician within the first three days of illness and therefore disability to work.[29] After the six weeks, the health insurance (*Krankenkasse*) takes over the payment of sickness benefits. The benefit paid by the insurance usually amounts to 70% of the gross salary. The duration of the benefit may vary, but in general, employees can receive sickness benefits for up to 78 weeks within a timeframe of three years. Health insurance is financed through premiums paid by both the employer and the employee. Health insurers are obligated to bring in medical professionals to examine the person when there are doubts about his or her illness.[30] After 78 weeks, one can receive '*Arbeitslosengeld*' (unemployment benefits) at the *Arbeitsagentur* (the Federal Employment Agency). It is best to request this benefit two months before the 78 weeks of sickness benefits have passed.[31]

### 2.3.5 Conclusions

Over the years, the responsibility for the sick employee has been placed much more on employer and employee.[32] Under national law, an obligation to continue to pay wages is an employment law provision, but in a cross-border work situation, the continued payment of wages is qualified as a performance within the meaning of Regulation 883/2004. In the *Paletta I* judgment, the CJEU ruled that the purpose and award conditions of the continued payment of wages justify characterizing such statutory benefits as an Article 3 benefit within the meaning of the Regulation. The same applies to the Dutch wage continuation scheme of Article 7:629 BW. When analysing these wage payment obligations in a cross-border context, it becomes clear that a sharply defined dividing line between labor law and social security law is very difficult to interpret.[33]

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[25] Invaliditeit en blijvende ongeschiktheid - Papenvest medical.

[26] Berekening van uw arbeidsongeschiktheidsuitkering als werknemer/werkloze - RIZIV (fgov.be).

[27] How the payment of sickness benefits is regulated can be found in §44 until and including §51 of the SGB V (5th book of the German Civil Code).

[28] Krankengeld | BMG (bundesgesundheitsministerium.de).

[29] Entgeltfortzahlung: Was bedeutet das? – Arbeitsrecht 2023 (arbeitsrechte.de).

[30] §275(1) SGB V.

[31] Nach dem Krankengeld - Arbeitsagentur oder Jobcenter? (sovd-sh.de).

[32] For instance in the Netherlands, in the early 2000s, this system review was taken even further by extending the salary continuation period from 52 weeks to 104 weeks (2004) as well as by the *Wet verbetering poortwachter* (2002) which gives primary responsibility for absenteeism guidance, reintegration and resumption of work in the first two years with the employers and employees.

[33] See for instance J. Riphagen, 'Wederzijds begrip: de aansluiting tussen het arbeidsrecht en sociaalzekerheidsrecht opnieuw bezien', in: Jacobs, A.T.J.M. en Pennings, F. (red.), Een inspirerende

On the one hand, in the Netherlands, the private law relationship between employer and employee is based on a contract with labour law provisions and on the other hand, employer and employee also make use of public law regulations governing rights and obligations, such as premium payments and the *Wet Verbetering Poortwachter*. This dual nature of the continued payment of wages obligation makes it difficult for employee and employer not easy to implement Dutch law in a cross-border work situation. Indeed, it is not only about the monetary obligation of the employer, as briefly cited above, but much more. Monitoring and reintegration have become comprehensive obligations that in a cross-border context are not (cannot be) fulfilled in the same way as in a national context.

It is notable that Art. 3(2) of the regulation is vaguely worded.[34] As a result, it is not clear where the boundaries of the "the systems concerning the obligations of an employer or a shipowner" lie. Given the rest of the text of this article paragraph, the obligations are limited to the statutory schemes and benefits of Art. 3(1). However, employers are increasingly subject to legal obligations, including in the context of prevention and reintegration in case of illness, e.g. *Wet Verbetering Poortwachter.* This means that an employer must also make reintegration efforts with regard to a sick employee who resides in another member state. There is still little clarity on this issue and implementation practice seems to be dealing with it pragmatically for the time being. After all, some national regulations make it a condition that sufficient reintegration efforts are made prior to the application, or during the receipt of benefits. The Regulation may then be necessary to treat facts in another Member State as if they occurred in the competent Member State.

# 3. Description of possible solution(s) and other relevant aspects to this case

### *Information Provision*

This research once again makes evident the importance of testing national legislation for border effects and providing adequate information for mobile citizens.

The privatization of the Sickness Benefits Act (*Ziektewet*) placed not only the responsibility for the reintegration process on employers and employees, but also the responsibility for obtaining and interpreting the information related to that reintegration.[35] Since the responsibility for the continued payment of wages was placed on the employer and extended to 104 weeks, the UWV's role as a

Fase in het sociaal recht, Zutphen: Paris 2007, p.227-238. See also CRvB 14 september 2005, LJN AU3050, RSV 2006/338.

[34] Cf. F. Pennings, *Europees socialezekerheidsrecht*, Monografieën Sociaal recht, Deventer: Wolters Kluwer 2022, par. 5.3.5. Regulation 1408/71 was somewhat more comprehensive on this point. Article 4(2) stated: 'as well as ... the obligations of the employer .... in respect of the benefits referred to in paragraph 1'. However, there is no indication in either the explanatory memorandum or the legislative text that the legislature chose a different interpretation, narrower or more expansive, than this common reading.

[35] Cf. S. Montebovi, Activering en privatisering in de Nederlandse ziekte- en arbeidsongeschiktheidsregeling in grensoverschrijdende situaties, Maklu uitgevers 2016, p. 132.

provider of information and as a source of inquiries has fallen away. Since the privatization of the Sickness Benefits Act and, in particular, since the *Wet Verbetering Poortwachter*, the employer has relied on himself to be fully informed about Dutch legislation and also bears responsibility for correct implementation. Formally, all necessary information is available to the parties involved (employer and employee), through the BW and the other laws and regulations. Whether the employer and employee from another member state can find their way around this is doubtful. A reintegration process is not that simple. Therefore, the Dutch government could (or should) ask itself whether it can assume that all parties involved are sufficiently informed. The provision of information previously arranged through the UWV has fallen away. The UWV website and brochures offer only a limited solution. The information gap resulting from the privatization of the Sickness Benefits Act must now be filled by the market or by parties themselves.

In this aspect, a proposal of the ECBM can be interesting. In order to be able to solve cross-border obstacles, the proposed text introduces a Cross-border Coordination Point.[36] Such Cross-border Coordination Point is a contact point, responsible for gathering obstacles, coordinate and support the implementation of a solution and implement the procedures that are set out. The idea follows from the announced *Border Focal Point* of the European Commission at European level.[37] This Border Focal Point will have to assess the actions of the Commission on the cross-border dimension, provide support on obstacles and share experiences and good practices. A current idea of the Euregion Meuse- Rhine is to set up such Border Focal Point also at Euregional level. For the *Grenzinfopunkt Aachen-Eurode*, it can be useful to keep track or contribute to such a Border Focal Point.

### *Article 16-agreement*

Despite the fact that the Regulation 883/2004 can be regarded falling short when it comes to the clarity on the material scope embedded in art. 3(2), article 16 Regulation 883/2004 provides the competent authorities the possibility to deviate from the applicable conflict rules in the interest of sick cross-border workers. The implementing bodies of the Member States concerned (in casu Belgium, Germany and the Netherlands) may agree that the Dutch (or Belgian or Germany) social insurance scheme applies, but employees and their employers do not readily make use of this possibility. If the Dutch legislation is designated, the Belgian employer must follow the Dutch social security rules. This is complex for employers from an administrative point of view. Dutch legislation, e.g. the obligation to continue paying wages ('loondoorbetalingsverplichting'), is often unknown abroad. Therefore, sometimes the preference is for a private insurance rather than a salary continuation obligation.[38]

As mentioned in the previous subsection, the aim of the Regulation is to promote the free movement of workers.[39] The competent authorities of the Member States have the responsibility to what is best

[36] Article 5 of the ECBM.
[37] As mentioned in the Communication "Boosting growth and cohesion in EU border regions", COM(2017) 534 final, p. 6.
[38] See Commissie grenswerkers, *Grenswerkers in Europa: een onderzoek naar fiscale, sociaalverzekerings- en pensioenaspecten van grensoverschrijdend werken*, Geschriften van de Vereniging voor Belastingwetenschap, p. 223-224.
[39] Recital 3 and 45 of Regulation 883/2004.

in the interest of their citizens and mutual assist each other in doing so.[40] Therefore, it would be preferable if the Dutch, Belgian and German social security institutions would come to an agreement, following the Article 16-procedure, on the case of sick cross-border workers. It is very likely that the current obstacle will not only be relevant for the area of the Euregio Meuse-Rhine, but applies for the whole border region between Belgium, Germany and the Netherlands. In that aspect, it would be beneficial not to have a case-by-case solution but a mere broader solution between the implementing bodies of Belgium, Germany and the Netherlands.

In short, the arguments for application of Article 16 Regulation 883/2004 are as follows:

- It is the most feasible solution, since amending the Regulation 883/2004 would proof to be a tedious process and requires political will of both states involved.

- The aim of the Regulation is to promote free movement (see e.g. Recital 3 and 45 of the regulation's preamble). Through an agreement pursuant to Article 16 (most) obstacles would be removed and it would less troublesome for sick employees/foreign employers to exercise their rights of free movement resp. to adhere to the rules embedded in the Regulation 883/2004 and foreign labour law, e.g. *Wet Verbetering Poortwachter.*

- The Regulation should be applied in the best interest of the citizen. In this context, recourse can be to Article 76 of the Regulation, stipulating that Member States must cooperate and mutually assist each other for the benefit of citizens. Thus, in a certain sense both Member States are obligated to find a solution for the underlying issue.

- Reaching an Article 16-agreement applies to the entire Belgian-German-Dutch border. It would, thus, be beneficial to all cross-border workers falling ill, also outside the territory of the Euregio Meuse-Rhine.

- Employers in border regions could be asked to put forward their views and reservations as regards an Article 16-agreement. For instance, these institutions might be reluctant in applying complex foreign law.

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[40] Article 76 of Regulation 883/2004.

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