Managed by the Association of European Border Regions by an Action Grant (CCI2017CE160AT082) agreed with the Directorate General of Regional and Urban Policy, European Commission. Financed by the European Union.

b-solutions

FINAL REPORT BY THE EXPERT

Advice Case: Making cross-border internships worthy
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1. Description of the Legal or Administrative Obstacle in the Specific Context

1.1 The obstacles as presented by EGTC Linieland van Waas end Hulst

The EGTC Linieland van Waas en Hulst consists of municipalities of Beveren, Stekene, Sint-Gillis-Waas (BE) and Hulst (NL). Besides Beveren, it is a sparsely populated region. Beveren includes parts of the second-largest Europe's port area of Antwerp. There is a tendency of population decline in border areas. Therefore, it is important to strengthen the labour market in the regions by maintaining and attracting skilled workers. Cross-border cooperation and specifically enabling cross-border internships in the context of dual and vocational learning is identified important by the EGTC in this regard.

In the port area of Antwerp, there are companies actively involved in the labour market with the specific need for technical skills. A large labour potential is also indicated by the Dutch companies in the border region. At the Flemish border, there are some schools and Hulst has one small technical school. Therefore, students often find internships across the border. However, the EGTC has come across obstacles in these internships. In some situations, they have found these internships across the border are rather unadvisable due to the far-reaching legal and financial consequences for these students.

In some cases, the internship agreements have led to situations where the student is seen as an employee rather than a student. Consequently, the students must meet the conditions of social security in another Member State. This may lead to loss or alteration of certain benefits, such as child benefit and health insurance. This financial impact is seen far-reaching especially that the financial compensation received from the internships remains rather limited.

The same obstacles can be identified for the entire Dutch-Belgian border to both directions of internships. On a more local level the obstacle also concerns the North Sea port. Therefore, the EGTC requests juridical advice on solutions to obstacle-free cross-border traineeships with the aim of providing correct advice for students and educational institutions. On the basis of the report, the ECTG aims to discuss these obstacles at the higher level with Dutch and Belgian authorities in order to seek for a solution.

1.2 Analysis of Existing Obstacles by the Adviser

Regulation (EC) 883/2004 and Implementing Regulation (EC) 987/2009 lay down conflict rules on the coordination of social security systems of the Member States. 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*).[1] The crux of the obstacle of students performing cross-border internships lays in which designation rule is applicable in their case.

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

The EGTC Linieland identifies two categories of students. The first category concerns students of vocational training (*Beroeps Opleidende Leerweg studenten (BOL)* in the Netherlands, *Regulier* in Belgium). These students fall under the legislation of the State of residence. In contrast, students in dual learning (*Beroeps Begeleidende Leerweg studenten (BBL)* in the Netherlands, *duaal* in Belgium) are seen as employees and are subject to the legislation of the State of the internship. Whereas students in vocational training usually do not receive any compensation and perform occasional internships as part of theirs studies, students in dual learning work from 20 hours per week onwards and receive a compensation from their internship provider. However, it is noted that both categories of students receive an internship contract, and not an employment contract.

Following the coordination rules on social security, it is important to assess if the students in these cases are classified as employees or students. In case the student is considered as an employee, under the rules on applicable legislation, they are subject to the social security system of the Member State of the employment (the State in which the internship is conducted). The change in the competent State has consequences for various social security benefits, including sickness and family benefits.[2] As the Regulations provide mere coordination rather than harmonisation of the systems, the Member States lay down their own conditions on the establishment and access to social security benefits.[3] Consequently, the shift in the competent Member State may cause uncertainty for the students and sometimes be unbeneficial in terms of changes in these benefits.

It is to be noted that the underlying analysis is performed from a European perspective, putting emphasis on the European regulations on social security and the CJEU's case-law, leaving a discussion of national legislation on the margin. To map out the obstacle, it is necessary to investigate which factors are relevant in assessing the designation rules under Article 11(3) Regulation 883/2004. In this regard, it is important to consider case law from the Court of Justice of the European Union. In particular for cross-border internships, it is necessary to evaluate whether the factors of working hours, remuneration and the nature of the (internship) activity are relevant facts inducing the shift of the competent Member State.

[2] Article 3 Regulation 833/2004.
[3] Recital 4 Regulation 883/2004, see also Article 48 Treaty on the Functioning of the European Union.

2 Indication of the Legal Dispositions Causing the Obstacle

2.1 Designation rules under Regulation 883/2004

Regulation (EC) 883/2004 and Implementing Regulation (EC) 987/2009 lay down conflict rules on the coordination of social security systems of the Member States. Based on the principle of exclusivity, persons subject to the Regulation[4] are covered by a legislation of one Member State.[5] 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*).[6] Economically inactive citizens, including students, are subject to the legislation of the State of residence (*lex loci domicilii*).[7] The crux of the obstacle of students performing cross-border internships lays in which designation rule is applicable in their case.

With regard to the personal scope, the basic principle is that this Regulation applies to nationals of a Member State who reside in one of the Member States and who are or have been subject to the legislation of one or more Member States.[8] What that legislation is shall be determined in accordance with this Regulation. The principle of exclusivity has always been the principle that underlies the allocation of social security obligations in the EU, both under Regulation 883/2004 and its predecessors, with the exception of Art. 14c or 14septies Regulation 1408/71. Also art. 11, paragraph 3, under a Regulation 883/2004, which is applicable in the present case, designates the state of employment exclusively as the competent Member State (*lex loci laboris*). For the person who performs work as an employee or self-employed person in a Member State, the legislation of that Member State (the state of employment) applies. The competence for social security is then transferred from the state of residence to the state of work. This designation rule is therefore based on the capacity of the insured person, i.e. the person who performs work. The performance of an activity is thus decisive.

Herein lies the distinction between BBL students and BOL students. While the former are regarded as persons performing work, the latter are not regarded as such. The latter therefore do not fall under the conflict rules of art. 11, paragraph 3, sub a Regulation 883/2004. The social security regulation creates an obstacle for an integrated internship system, by not taking into account the capacity of students/trainees who perform internships in another state than their state of residence. The doubt in the present case is caused by the (very) low amount of remuneration – constituting more an indemnity – and the consequent shift of the insurance obligation.

[4] 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.
[5] Article 11(1) Regulation 883/2004. See also CJEU 12 June 1986, 302/84, ECLI:EU:C:1986:242 (Ten Holder) where the Court advocated a strict application of the exclusivity principle.
[6] Article 11(3)(a) Regulation 883/2004.
[7] Article 11(3)(e) Regulation 833/2004.
[8] Article 2(1) Regulation 883/2004.

2.2 CJEU's case-law: qualifying elements under art. 11, paragraph 3, sub a Regulation 883/2004

In the section below general rules – derived from the CJEU's case-law – will be set forth on what aspects of an employment relationship are considered decisive for the qualification as 'a person pursuing an activity as an employed or self-employed person in a Member State' under art. 11, paragraph 3, sub a Regulation 883/2004. This allows to explore what solutions can be considered feasible from an EU-law perspective.

2.2.1 The definition of employed person

The Regulation makes only a distinction between employed and self-employed person and does not apply a separate provision for economic activities performed by interns/students. Therefore, it is necessary to examine to what extend they fall under the notion of an "a person pursuing an activity as an employed person".

In EU law, the term "worker" has been classically defined as a person performing services for and under the direction of another person for which she/he receives the remuneration.[9] This would imply that the type of activities, direction and remuneration are relevant factors to consider whether a person falls under this notion. However, it has been stated by the Court of Justice that the definition of worker used in connection with the free movement of workers does not necessarily coincide with the definition applied in relation to the Coordination Regulations.[10] In *Van Roosmalen*, the Court stated that for the application of the Regulations, the concepts "employee" and "self-employed person" are first to be determined by the national legislation involved. If the national legislation is unclear on the matter, the definition under the Coordination Regulations would be applicable or as a last resort, the concepts would be applied by the articles on the free movement of workers (Article 45 TFEU). [11]

A specific definition under the Coordination Regulations can be found from Article 1(a), which defines employment activity as "any activity or equivalent situation treated as such for the purposes of the social security legislation of the Member State in which such activity or equivalent situation exists." The definition refers to the national legislation of the Member State where the activities are performed, where the national authorities determine the legal qualification based on the nature of the activity.[12] In other words, the competent institution assesses whether the activities constitute work in the meaning of Article 11(3)(a) Regulation 883/2004 and whether it is applicable or not. Therefore, there may be differences between how the issue is approached by Member States, and which factors (working hours, income, regularity) they deem relevant in the assessment. It could be the case that if the working hours and the remuneration of the student are very limited to what is normally offered to employees, that the student is not considered to perform activities as an

[9] CJEU 3 July 1986, C-66/85, ECLI:EU:C:1986:284 (Lawrie-Blum).
[10] CJEU 12 May 1998, C-85/96, ECLI:EU:C:1998:217 (Martinez Sala).
[11] CJEU 23 October 1986, C-300/84, ECLI:EU:C:1986:402 (Van Roosmalen).
[12] See also CJEU 13 October 1993, C-121/92, ECLI:EU:C:1993:840 (Zinnecker).

employee under the national legislation. Subsequently, *lex loci domicilii* would be applied (i.e. the Member State of the student's residence remains competent). The classical notion of worker also excludes those performing mere marginal and ancillary activities.[13] However, the Regulation does not make a reference to the minimal or ancillary nature of the employee's activities.

2.2.2 Amount of working hours in the other state

In the *Kits van Heijningen* case the person concerned performed part-time employment in another country for two days per week, two hours a day.[14] In this case, the ECJ ruled that even a very small amount of work should be taken into account when determining the competent Member State. Otherwise, the person concerned could end up in an 'insurance vacuum', not falling under the scope of any national social security system.

In this case, the person concerned lived in Belgium and was employed in the Netherlands. While working for his Dutch employer, he also worked as a teacher at a Dutch educational institution where he taught for two hours a day on Mondays and Saturdays. He returned to Belgium after each working day. After retiring from his Dutch employer, he continued his work as a teacher. The person concerned applied in the Netherlands for child benefits but this application was rejected, since the person concerned was only insured on the days when he was working as a teacher. The CJEU ruled that there is nothing in article 2(1)[15] of Regulation 1408/71 (predecessor of Regulation 883/2004) which permits certain categories of persons to be excluded from the scope of the regulation on the basis of the amount of time they devote to their activities.[16] Consequently, a person must be considered to be covered by Regulation 1408/71 if he meets the conditions laid down in the applicable conflict rules of the regulation, irrespective of the amount of time which that person devotes to his activities. Thus, a person who is employed for two hours per day, two days a week is covered by the regulation, provided that he meets the conditions.

2.2.3 Type of employment relationship

It is also clear from the court's ruling in the *Franzen, Van den Berg, Giesen* cases that the type of employment relationship, such as part-time work or on-call work, is not relevant in this assessment.[17] In the Franzen case, the person concerned was a Dutch national, residing in the Netherlands. Since November 2002 she had been working, through a so-called 'mini-job' (i.e. 20 hours per week), as a hairdresser in Germany. The Dutch social security institutions argued that, given this mini-job, the person concerned was not entitled to the German *Kindergeld*. Mr. Giesen's wife worked in Germany

[13] CJEU 23 March 1982, C-53/81, ECLI:EU:C:1982:105 (Levin).
[14] CJEU 3 May 1990, C-2/89, ECLI:EU:C:1990:183 (Kits van Heijningen).
[15] Which states: *'This Regulation shall apply to workers who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States or who are stateless persons or refugees residing within the territory of one of the Member States, as also to the members of their families and their survivors'.*
[16] CJEU 3 May 1990, C-2/89, ECLI:EU:C:1990:183 (Kits van Heijningen), para. 10.
[17] CJEU 19 September 2019, joined cases C-95/18 and C-96/18, ECLI:EU:C:2019:767 (Van den Berg and Others).

during certain periods as a 'geringfügig Beschäftigte', that is to say, a person in marginal employment. More specifically, she was a sales assistant in a clothing store and worked under an on-call contract for an equivalent number of hours not exceeding two or three days each month. Mr. Giesen and Mr. Van den Berg were faced with reductions on their (allowance to) state pension benefits, because they worked in mini-jobs in Germany during certain periods, and hence not insured under the German social security system. Consequently, they were exposed to the risk of not being covered for certain domains of social security in neither of the given states.

2.2.4 Conclusions drawn from the legislation and case law

It can be concluded from the legislation and case law, that the final interpretation of Article 11(3)(a) Regulation 883/2004 is left to the competent institutions applying the definition of "employed person" under national law legislation. On the basis of the Coordination Regulations, any person performing economic activities in another Member State, whether in minimal working hours or limited in remuneration, is to be considered as an employee under Article 11(3)(a) Regulation 883/2004 resulting in the change of the social security to the Member State of internship. A view could be taken that the student's internship activities are marginal and ancillary as they perform activities only on a temporary basis, as part of their studies and on a limited remuneration.[18] However, it is up to the competent institution in the Member State of internship to determine whether these arguments are relevant and successful in the assessment, as the Regulation itself does not refer to the "marginal and ancillary" nature of the activities as a relevant factor.

The relevant factors depend on the national approach, however, common factors such as working hours, nature of the activities and regularity of the work can be identified. What seems to be undisputable is the existence of a remuneration – the activities, based on the case law analysed, must be remunerated in some form in order to be considered as an activity as an employed person. This is also seen in the distinction between BOL/BBL-students, where the former is not remunerated and thus issues of changing social security system have not been reported by EGTC.

[18] Based on the definition of "worker" under TEU and TFEU, that does not necessarily coincide with the definition applied under the Regulation.

2.3 Effects on national domains of legislation: to the detriment of the persons concerned?

This section will explore the effects of the shift of competent Member State – pursuant to art. 11, paragraph 3, sub a Regulation 883/2004 – in the case of the cross-border internships. It will merely touch upon the implications in general, and will not discuss them *in extenso*. At the outset of this section, the prevailing 'rules' on a European level will be set forth. These rules will serve as a framework for the further analysis and will allow us to draw a conclusion with regard to finding a solution for the underlying situation. It deals with the question where the students stand in terms of social protection under EU law.

2.3.1 (In)possibilities pursuant to EU case-law

Since the free movement of workers provides only for coordination, and not harmonization, of Member States' legal regimes, this does not affect the substantive and formal differences between the various national social security systems, and thus the differences in rights of the persons affiliated with them.[19] This national sovereign policy choice may be more or less advantageous for mobile workers in the event of relocation. The organisation of the social security system is a matter for the Member States, with Regulation 883/2004 having only a coordinating effect. With such a lack of harmonization, systemic disparities are inevitable. As long as there is no further degree of coordination, the tension between the European division of powers and the freedoms of movement will continue to manifest itself to the detriment (or to the benefit) of mobile citizens.

However, it is settled case law that primary EU law cannot guarantee a worker that relocation to another Member State is neutral in social terms since, depending on the case, such a relocation may be more or less advantageous for the person concerned in that respect, given the differences between Member States' regulations and legislation.[20] In addition to that, while the free movement of workers prohibits less favourable treatment of mobile workers, it does not entitle a worker who has moved to another Member State to claim in the host Member State the same social security benefits as those for which the worker was eligible in the home Member State, in accordance with the legislation of the latter State.[21] Article 45 TFEU also cannot lead to the migrant worker having a right to rely on the same social security benefits in his Member State of residence as he would be eligible for if he were working in that Member State.[22] It should be noted that any other outcome would lead to a system of 'most favoured nation' and encourage 'forum shopping'.

It follows from settled case-law that a migrant worker does not always retain rights to a minimum level of social protection, such as he enjoyed in his state of origin before exercising his freedom of movement. Neither primary nor secondary EU law provides for minimum social security protection as

[19] CJEU 12 June 2012, C-611/10 and C-612/10, ECLI:EU:C:2012:339 (Hudzinski and Wawrzyniak), para. 42.
[20] CJEU 18 July 2017, C-566/15, ECLI:EC:C:2017:562 (Erzberger), para. 33 and 34 and CJEU 13 July 2016, C-187/15, ECLI:EU:C:2016:550 (Pöpperl), para. 24
[21] CJEU 18 July 2017, C-566/15, ECLI:EC:C:2017:562 (Erzberger), para. 33 and 35.
[22] CJEU 19 September 2019, C-95/18 and C-96/18, ECLI:EU:C:2019:767 (van den Berg and Giessen v Franzen), para. 58

long as there is no discrimination. After all, the organisation of the social security system is a matter for the Member States, with Regulation 883/2004 having only a coordinating effect.

2.3.2 Implications of the change of competent Member State to social security benefits

When there is a shift in the competent Member State, it may have implications for the student's eligibility to national social security benefits, for instance (public) health insurance, pursuant to domestic legislation. The most prevalent domains of social security for the students conducting a cross-border internship, appear to be health insurance, work disability, and child benefits.

Under Regulation 883/2004, change of competent Member State might have consequences for health insurance. If a person is subject to the health insurance in another Member State, there may be differences in the conditions, premiums and benefits provided under the health insurance. It is important to consider these effects and consult insurers from both sides of the border on what would be the specific implications in the student's case (for instance, in some cases students in Belgium may remain insured under their parents health insurance).

The same holds true with respect to the eligibility to Belgian and/or Dutch *Kinderbijslag* (i.e., child benefits). As the majority of the students concerned are juveniles, their parents may be eligible to these types of social security benefits. As regards work disability pursuant to Belgian national legislation, if an employee is unable to perform his work due to illness or an accident, his employment contract is suspended. In a first phase, the wages remain at the expense of the employer. If the incapacity for work persists for a longer period of time, the employee receives a replacement income that is reimbursed by the mandatory health insurance.[23]

Whether the shift of competent Member State, due to performing a cross-border internship, may be either beneficial or detrimental to the parents depends on the facts and circumstances of each case. Addressing this issue in detail is beyond the scope of this report and is considered an avenue for future research. These issues should be brought under the attention of the competent authorities of both States.[24]

2.3.3 Implications of the cross-border internship for the taxation of income

Performing a cross-border internship may also have consequences in the domain of taxation. Contrary to the field of social security, taxation of income has not been harmonised, nor coordinated on a European level through a regulation. The division of taxing rights in cross-border situations has been laid down in bilaterally concluded tax treaties. The differences in subjective and objective scope of

[23] See for further elaboration on this issue: https://ec.europa.eu/social/main.jsp?catId=1102&intPageId=4418&langId=nl and https://grenzinfo.eu/nl/informaties/werken-in-een-buurland/werken-in-belgie/ziekte/.

[24] See also Commissie grenswerkers, *Grenswerkers in Europa: een onderzoek naar fiscale, sociaalverzekerings- en pensioenaspecten van grensoverschrijdend werken*, Geschriften van de Vereniging voor Belastingwetenschap.

bilateral tax treaties and European Regulation No. 883/2004 should also be noted. Where bilateral tax treaties deal with divisible income of individuals; Regulation No. 883/2004 deals with indivisible insured individuals. In essence, the conflict rules contained in the bilateral tax treaties are not aligned with the conflict rules of Regulation 883/2004 and the power to tax is not always attributed to one Member State. The parallel application of tax treaties and Regulation 883/2004 leads to complicated situations and even differences in net income.

However, the tax treaty concluded between the Netherlands and Belgium contains a specific provision, geared towards teachers and student, i.e., article 20 (3). This provision stipulates that amounts which a student or business apprentice who is, or was immediately before visiting a Contracting State, a resident of the other Contracting State and who is present in the first-mentioned State solely for the purpose of his education or training receives for the purpose of his maintenance, education or training shall not be taxed in that State, provided that such amounts arise from sources outside that State. Applying this provision to the underlying case, provides that the amounts received by a Dutch student/business apprentice, engaged in an internship in Belgium, present in Belgium solely for the purpose of his education or training (i.e. the internship) shall not be liable to tax in Belgium for the amount received, under the conditions that the amount arises from sources outside Belgium. In particular as regards the latter condition (arising from sources outside Belgium) it remains ambiguous whether the given students meet this requirement as, generally, the Belgian internship provider bears the costs of the internship, including the amount paid to the students.

3 Roadmap towards a Possible Solution of the Obstacle with Indication of the Entities to be Involved in the Possible Solution

3.1 Pre-assessment of whether the case could be solved with the European Cross-Border Mechanism (ECBM)

In its Communication from 2017 "Boosting growth and cohesion in EU border regions", the European Commission proposed different instruments to overcome barriers to cross-border cooperation.[25] Following earlier initiatives on financial support (INTERREG) and institutional obstacles (the European Grouping for Territorial Cooperation; EGTC) for cross-border cooperation, the next step would be to overcome the legal and administrative obstacles. In preparation for the ECBM, a study has been done to the legal and administrative obstacles in EU border regions.[26] The study categorised the gathered obstacles into three types:

1. *EU-related legal obstacles*: caused by the specific status of an EU-border or by EU legislation (or the implementation thereof), where the EU has exclusive or shared competency;
2. *Member State-related legal obstacles*: caused by different national or regional laws, where the EU has no or only limited competence;
3. *Administrative obstacles*: caused by non-willingness, asymmetric cooperation or lack of horizontal coordination, or by different administrative cultures or languages.

The current case of cross-border internships under the Coordination Regulations appears to be an EU-related legal obstacle, caused by existing EU legislation which does not sufficiently take into account the actual cross-border practice (type 1; more specifically the so-called sub-type I.3). As an answer to the remaining gap in the solution to cross-border obstacles and following up the studies, the European Commission has presented in 2018 a proposal for a "mechanism to resolve legal and administrative obstacles in a cross-border context" COM(2018)373 - the so called European cross-border mechanism (ECBM).[27] Article 1 of the proposal immediately makes clear the aim of the ECBM, that is "to allow for the application in one Member State, with regard to a cross-border region, of the legal provisions from another Member State, where the application of the legal provisions of the former would constitute a legal obstacle hampering the implementation of a joint Project". Therefore, the ECBM is aimed at resolving a legal conflict due to different national laws or administrative obligations that are applicable at the same time for the same specific project. Projects in this respect are defined as "any item of infrastructure with an impact in a given cross-border region or any service of general economic

[25] European Commission, Communication "Boosting growth and cohesion in EU border regions", COM(2017) 534 final, p. 14.
[26] J. Pucher, T. Stumm & P. Schneidewind, *Easing legal and administrative obstacles in EU border regions*, Luxembourg: Publications Office of the European Union, 2017
[27] Proposal for a Regulation of the European Parliament and of the on a mechanism to resolve legal and administrative obstacles in a cross-border context COM(2018) 373 final.

interest provided in a given cross-border region" (Article 3(2)). Article 1(2) of the proposal stipulates how the legal or administrative obstacle can be solved by the ECBM: either via a Commitment or via a Statement. The former stands alone, where specific rules of a Member State are applied in the other Member State, but the latter has to be translated in the adoption of national rules.

Despite the fact that the ECBM has been proposed to overcome the legal and administrative obstacles, it appears not to cover the legal obstacles that are caused by EU legislation but is merely limited to the national laws and national implementations of EU rules.[28] Therefore, in the present case where the obstacle is caused by the conflict rules of Regulation 883/2004 *itself*, the ECBM is of no use. Furthermore, the scope of the ECBM appears to be concentrated on specific projects, in a specific border region, during a specific period. Again, that is not the case with regard to the cross-border internships under the rules of Regulation 883/2004.

Instead of the ECBM, the proposed Regulation offers Member States the possibility to 'opt out' for another existing formal or informal structure, that can solve the legal or administrative obstacle.[29] Since the present case is in the cross-border situation between the Netherlands and Belgium, the Benelux Union might be relevant, no matter whether the ECBM will be ever adopted by Council and Parliament. We will briefly touch upon the instruments of the Benelux Union and assess the use of these instruments for this case.[30]

The Benelux Union

Already in 1958 the Benelux Treaty on the establishment of a Benelux Economic Union was signed by the Netherlands, Belgium and Luxembourg, officially institutionalising the cross-border cooperation between the three countries. The main aim of the cooperation is the free movement of persons, goods, capital and services and the Union also entails coordination of economic, financial and social policy; and common trade politics with other countries. As of 2008 a renewed Benelux Treaty was signed, establishing the Benelux Union. The main aims within this Treaty are the continuation and further development of the economic union, encompassing the objectives of the previous Treaty, as well as sustainable development, and cooperation in the field of justice and internal affairs.[31] To do so, the Benelux Union has four legal instruments for policymaking:

1. Decision[32] ('beschikking') in which one or more provisions of the Treaty are implemented. These are directly binding on the three parties;

[28] See also the definition of 'legal provision' under Article 3(2) of the proposed ECBM.
[29] Article 4(2) of the ECBM.
[30] For a more extensive description and study to the Benelux, we refer to the ITEM report '*Statuut voor Limburg'* or, more tailored to the situation in the North Sea port, the ITEM report '*Inventarisatie grensoverschrijdende knelpunten North Sea port'*.
[31] Article 2(2) of the Benelux Treaty.
[32] A relevant decision is that of the establishment of a Benelux Treaty on cross-border and interterritorial cooperation (M(2014)2).

2. Agreements ('overeenkomsten') that are legally binding, but needs to be adopted by each party in national policy;
3. Recommendations ('aanbevelingen') about the functioning of the Benelux. These have no legal binding effect, but are more a commitment between the parties;
4. Directives ('richtlijnen') to the Benelux Council and general-secretariat.

Within the Benelux Union the Contracting Parties make efforts to further develop the economic union, including the necessary coordination of, amongst others, social policies, facilitating and developing a barrier-free internal (labour) market. The present case can be perceived as an obstacle to the internal labour market and the economic union of the Benelux Union, where coordination could be desired. However, the Benelux Union has no legislative power over this field of policy, as social security is a national competency and the coordination rules are covered by the EU Regulation 883/2004.[33] Therefore the Benelux Union, and its instruments, cannot solve the present case by binding legal provisions or act as coordination instrument itself. However, the parties, including the Netherlands and Belgium, have agreed to coordinate the social policies – to the extent possible – within the Benelux Union and to make efforts for the development and deepening of a well-functioning cross-border economic union. In that context, it could be argued that Belgium and the Netherlands have a shared goal, responsibility and platform through the Benelux Union to make the necessary and possible policy options that are available. What can be done, is for example the Article 16-procedure as elaborated under subsection 3.2.3.

3.2 Other Relevant Aspects to this Case

3.2.1 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 provision of information, in fact, offers the person concerned the opportunity to explore the effect of their (financial) situation and would enable them to take additional measures. This applies all the more since, as also follows from the present case, there is no minimum social protection for mobile workers. Moreover, if the person concerned had not made use of his freedom of movement, he would not have been faced possible detrimental income effects or could not have continued with his/her studies.

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.[34] 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

[33] The Regulation 883/2004 replaces other already existing social security coordination instruments, as Article 8(1) stipulates.
[34] Article 5 of the ECBM.

the announced *Border Focal Point* of the European Commission at European level.[35] 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 EGTC Linieland van Waal en Hulst, it can be useful to keep track or contribute to such a Border Focal Point.

3.2.2 Regulation 883/2004 fit for purpose?

In the light of the present case, it can be argued that the conflict rules embedded in both the Regulation (EC) 883/2004 and the Implementing Regulation (EC) 987/2009 are outdated or obsolete, in terms of not sufficiently taking into account new forms of labour, a person's hybrid capacity (student/employer), and the increasing mobility of persons. The applicable conflict rule refers to 'a person pursuing an activity as an employed or self-employed person in a Member State'. This phrasing leaves ample room for discussion and, subsequently, ambiguity. The regulation ought to be amended, and aligned with developments at EU level, including the CJEU's recent case-law, evolving forms of labour, and changes in the national legal orders. Such an update and modernisation would be essential to achieve the regulation's aim of the free movement of persons.

In this respect, reference can be made to the position of posted workers under the Regulations. This type of worker has an employment contract in his home state, and, for a limited period, carries out his work in the territory of a Member State other than the State in which he usually works. Usually, this type of workers is sent by their employer to work in another EU Member State on a temporary basis, in the context of a contract of services, intra-group hosting or hiring out of labour through a temporary agency. This type of workers differs from other types in that they return, or are expected to resume working in the Member State from which he or she is posted after completion of the work or the provision of services for which he or she was posted. [36] Generally, these posted workers won't have to deal with social security institutions in different countries, since the social security institutions in the host state(s) will not be involved. It is to be noted that posting is temporary in nature. Art. 12, para. 1 Regulation 883/2004 provides that a posted worker remains insured for social security in the 'sending state', provided that the anticipated duration of such work does not exceed 24 months and that he/she is not sent to replace another posted person. Their protection as regards mandatory terms and conditions of employment is regulated separately in EU law.[37]

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[35] As mentioned in the Communication "Boosting growth and cohesion in EU border regions", COM(2017) 534 final, p. 6.

[36] Article 4, para 3, under d Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System [2014] OJ L 159. See also para 9 preamble Directive 2018/957 amending Directive 96/71.

[37] Posted workers' are protected through Posting of Workers Directive 96/71 ; Enforcement Directive 2014/67 of Posting of Workers Directive 96/71 and Directive 2018/957 amending Directive 96/71.

In the light of the present case of cross-border internships, it can be argued that an equivalent *sui generis* provision should be incorporated in the social security regulations, tailored to the position of students performing activities in the other state. Akin to the provision on posted workers, a limited duration of time spent in the other state may be relied on as a condition for the application of the favourable provision. Apart from this, it can even be argued that interns/students pursuing an activity in the other Member State, shall be posted akin to the position of posted workers.

The foregoing can also provide an impetus for the discussion of an art. 16-agreement between the competent authorities of both Member States. These authorities should be made more of aware of shortcomings of the regulations, and be incited to adopt particular provisions for particular situations. The implications of the situation at issue appear to be at odds with recital 1 of the preamble of Regulation 883/2004, which states 'The rules for coordination of national social security systems fall within the framework of free movement of persons and should contribute towards improving their standard of living and conditions of employment.' It can be called into question to what extent the conflict rules – as they stand - contribute towards improving their stand of living and conditions of employment. This can be seen in the case of the students performing internships across the border: in some cases, the effect of the Regulation discourages performing these internships, although the internships have a very valuable role in learning and incorporating to the job market.

In this context, it is worthwhile to mention that there is the initiative to revise the Regulation. Until now the Member States have not been able to agree upon a legislative text. This could be taken up as priority under the new Portuguese EU Council presidency.[38]

3.2.3 Article 16-agreement

Despite the fact that the Regulation 883/2004 can be regarded as outdated or obsolete, Article 16 Regulation 883/2004 provides the competent authorities the possibility to deviate from the applicable conflict rules in the interest of the student doing a cross-border internship. The implementing bodies of the Member States concerned (in casu Belgium and the Netherlands) may agree that the Dutch (or Belgian) 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.[39]

[38] See for example: https://epthinktank.eu/2021/01/04/priority-dossiers-under-the-portuguese-eu-council-presidency/ The latest information on the legislative proposal can be found in the 'Legislative train': https://www.europarl.europa.eu/legislative-train/theme-deeper-and-fairer-internal-market-with-a-strengthened-industrial-base-labour/file-jd-revision-of-regulation-on-social-security-labour-mobility-package

[39] 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.

However, in the present case it is clear that the social security rules have a considerable impact on the cross-border economy, as students are potentially hindered to get an internship across the border. Furthermore, as it concerns internships that are only for a specific, limited period of time, linked to education in another Member State, it can be considered undesirable that any changes occur regardless of any financial effects. As mentioned in the previous subsection, the aim of the Regulation is to promote the free movement of workers.[40] The competent authorities of the Member States have the responsibility to what is best in the interest of their citizens and mutual assist each other in doing so.[41] Therefore, it would be preferable if the Dutch and Belgian social security institutions would come to an agreement, following the Article 16-procedure, on the case of cross-border internships. It is very likely that the current obstacle will not only be relevant for the area of the EGTC Linieland van Waal en Hulst, but applies for the whole border region between Belgium 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 and the Netherlands. As elaborated under section 3.1, Belgium and the Netherlands cooperate via the Benelux Union. Within the Benelux Union, the Member States have agreed to foster the cross-border labour market and mobility and therefore coordinate economic and social policies. In this respect, it can well be argued that, again, Belgium and the Netherlands have to make efforts for neutralising the effects of cross-border internships, as it is beneficial for both economies in terms of skills, labour and the retention hereof in the border region. The Benelux Union could also be used as cross-border governance structure to deal with this obstacle. In this respect, competent authorities can come to, for example, a bilateral agreement on the application of the conflict rules for cross-border interns between Belgium and the Netherlands. As mentioned before, especially the employers need to have some knowledge on a foreign social security system in this respect. Information provision is key in this regard. 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 be more attractive for students to exercise their rights of free movement.
- The Regulation should be applied in the best interest of the citizen. In this context, recourse can be had 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-Dutch border. It would, thus, be beneficial to all students performing a cross-border internship, also outside the territory of

[40] Recital 3 and 45 of Regulation 883/2004.
[41] Article 76 of Regulation 883/2004.

Waal en Hulst. This, thus, allows to discuss the issue at the higher level with Dutch and Belgian authorities in order to seek for a solution.

- Internship providers/educational institutes 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.
- Concluding an Article 16-agreement would make cross-border internships worthy again, and contribute to the economy of both States, as more skills would be attracted from across the border (i.e., students). In addition, it would provide an impetus for the employers and businesses in cross-border regions to attract the skills.

3.3 Conclusion

Cross-border cooperation and specifically enabling cross-border internships in the context of dual and vocational learning is identified important by the EGTC with regard to strengthening the labour market in the regions. Therefore, students often find internships across the border. However, the EGTC has come across obstacles in these internships. In some situations, they have found these internships across the border are rather unadvisable due to the far-reaching legal and financial consequences for these students.

Regulation (EC) 883/2004 and Implementing Regulation (EC) 987/2009 lay down conflict rules on the coordination of social security systems of the Member States. The competent Member State is determined by the rules on applicable legislation. The crux of the obstacle of students performing cross-border internships lays in which designation rule is applicable in their case. The EGTC Linieland van Waal en Hulst identifies two categories of students. The first category concerns students of vocational training (*Beroeps Opleidende Leerweg studenten (BOL)* in the Netherlands, *Regulier* in Belgium). These students fall under the legislation of the State of residence. In contrast, students in dual learning (*Beroeps Begeleidende Leerweg studenten (BBL)* in the Netherlands, *duaal* in Belgium) are seen as employees and are subject to the legislation of the State of the internship.

It can be concluded from the legislation and CJEU's case law, that the final interpretation of Article 11(3)(a) Regulation 883/2004 is left to the competent institutions applying the definition of "employed person" under national law legislation. On the basis of the Coordination Regulations, any person performing economic activities in another Member State, whether in minimal working hours or limited in remuneration, is to be considered as an employee under Article 11(3)(a) Regulation 883/2004 resulting in the change of the social security to the Member State of internship. A view could be taken that the student's internship activities are minimal, and should not be considered as employment as they perform activities only on a temporary basis, as part of their studies and on a limited remuneration. However, it is up to the competent institution in the Member State of internship to determine whether these arguments are relevant and successful in the assessment.

As regards solutions, this report proposes several solutions ranging from more tailored information provision to amending the Regulation 883/2004. However, with regard to the present situation, the

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conclusion of an Article 16-agreement between the competent authorities of both States seems the instrument most apt for this case, in particular as it would apply to the entire Dutch-Belgian border, and, hence, would render cross-border internships worthy again.

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