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The dark side of the tour. Labour and social security challenges of highly mobile workers in the live performance sector

Frederic De Wispelaere* and Marco Rocca†

Abstract

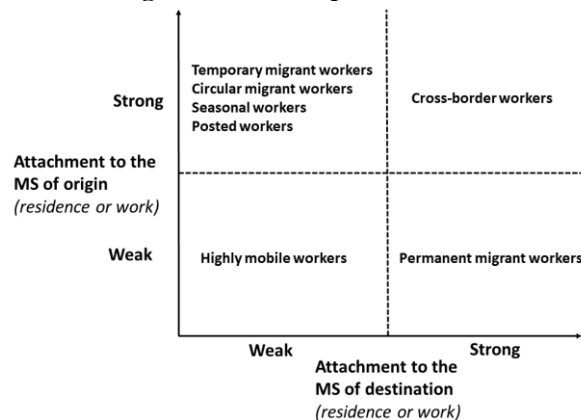
This article discusses challenges related to the social security and employment status of highly mobile workers in the live performance sector. These are persons whose place of employment is not a particular Member State but Europe. As such, these challenges arise from their often-weak connection to a specific Member State. The article provides an overview of a number of problems that mobile artists and their employers encounter under the EU legal framework for posting of workers and social security coordination, and explores some possible solutions.

Key words: highly mobile workers, posting of workers, live performance sector

1. From labour migration to (short-term) labour mobility

In 2017 there were approximately 19 million EU/EFTA movers in the EU/EFTA,^{1,2} including 14 million persons of working age (20-64 years) (Eurostat data). They made up 3.6% of the total population in the EU/EFTA and 4.5% of the total working age population in the EU/EFTA. Consequently, some scholars conclude that the movement of persons of working age is at a low level in the EU/EFTA, especially compared to the US.³ Labour migration is, however, only one type of labour mobility. Several other forms of labour mobility occur in the EU, where persons of working age are to a greater or lesser extent connected to their Member State of origin and host Member State (*Figure 1*). As a result, there were also some 1.9 million cross-border workers in the EU/EFTA in 2017, around 1.8 million postings, and some 1 million persons who normally worked in two or more Member States.^{4,5} Finally, some 25 million trips for professional purposes (e.g. business trips) to another Member State were counted (Eurostat data). Based on the above figures, it could be argued that short-term mobility is a significant part of labour mobility in the EU and its importance is likely to increase in the near future.^{6,7}

Figure 1 Different patterns of labour mobility



Source: De Wispelaere, 2019

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¹ EU: European Union; EFTA: European Free Trade Association (Iceland, Liechtenstein, Norway and Switzerland).

² EU/EFTA movers: EU-28 or EFTA citizens who reside in an EU-28 or EFTA country other than their country of citizenship.

³ Eichengreen [7]

⁴ Fries-Tersch et al. [11]

⁵ De Wispelaere and Pacolet [4]

⁶ Andrijasevic and Sacchetto [1]

⁷ van Ostaïjen and Scholten [22]

The topic of intra-EU mobility has been a hotly debated issue for a long time now, and increasingly so ever since the 2004 enlargement of the EU. This debate encompasses a wide range of issues, sometimes making it hard to pinpoint any one specifically. To only refer to the most glaring recent example, the question of free movement of workers has been particularly present in the Brexit debate. As pointed out by Kilpatrick,⁸ this had also been foreshadowed by the EU-Swiss dispute over migration in 2014. Indeed, in the lead up to the British referendum, then UK Prime Minister David Cameron had obtained a series of ‘concessions’ from the EU in order to try and make the ‘remain’ option more sellable to the British electorate.⁹ One of the four areas of intervention foreseen by the document was free movement of workers. Additionally, in the Brexit debate, this time after the referendum, the leader of the opposition, Jeremy Corbyn, marked his difference by distinguishing the issue of free movement of workers from the one of posting of workers.¹⁰

In this article, we will focus on highly mobile workers in the EU. These are persons whose place of employment is not a particular Member State but Europe (*Figure 1*). As they often have little connection to a specific Member State, this group of workers and their employers face challenges in the field of taxation, social security coordination as well as pay and working conditions.^{11,12} This is of course a very diverse group of workers. In particular, people who are employed in the transport sector seem to fall into this group (truck drivers, pilots, aircrew members and seafarers). Nonetheless, it is not only in the transport sector that workers are highly mobile or have a transnational job. Indeed, in this contribution we aim at drawing the attention to a different kind of highly mobile sector, which is often forgotten in the ongoing policy discussions and decisions at European level. Hence, we will focus on the live performance sector which, as we will show in the next section, is also characterised by a high degree of mobility, involving artists and cultural professionals touring and working abroad. Having drawn a picture of the sector (*Section 2*), we will consider the tensions arising with the legal framework for transnational labour mobility in the EU (*Section 3*), and conclude with some possible solutions (*Section 4*).

2. Size of the group of (mobile) artists and musicians

In the EU, approximately 1.2 million persons are providing ‘creative, arts and entertainment activities’, most of them in Germany, the United Kingdom and France.¹³ Estimating the size of mobile artists and musicians is quite challenging. Theoretically, the size of this group could be estimated on the basis of 1) the number of so-called ‘Portable Documents A1’ issued by the competent Member States to artists and musicians as well as 2) the number of artists and musicians reported in the prior notification tools of the host Member States. A Portable Document A1 establishes the presumption that the holder is properly affiliated to the social security system of the Member State that has issued the certificate. Consequently, it confirms that the person concerned has no obligations to pay contributions in another Member State. At European level, data on Portable Documents A1 are collected and published at sectoral level.¹⁴ However, the sectoral breakdown is not detailed enough to know the size of the group of mobile artists and musicians. Nevertheless, such data may be available at national level. For instance, figures for Belgium¹⁵ show that this group is indeed highly mobile, and that it accounts for a significant proportion of posted workers to another Member State. After all, 13% of the total number of employees providing ‘creative, arts and entertainment activities’ in Belgium were posted to another Member State in 2018. This group represents some 10% of the total number of workers with a Portable Document A1 posted from Belgium to another Member State, mostly to France.

Furthermore, Member States may impose an obligation on a service provider established in another Member State to make a simple declaration to the responsible national competent authorities. Currently, 26 out of 28 Member States have used this opportunity to implement a prior notification tool for incoming posting undertakings and the workers concerned.¹⁶ The United Kingdom is an exception, while the prior notification tool in the Netherlands should be operational in 2020. In 2018, data available in these prior notification tools were collected at European

⁸ Kilpatrick [15]

⁹ A New Settlement for the UK within the EU, OJ 2016/C 69 I/01. These changes were conditional upon the UK voting to remain in the EU.

¹⁰ See for instance Jeremy Corbyn on Andrew Marr Show (BBC), 13.1.2019, <http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/13011901.pdf> : “I’m not against the free movement of people. What I want to end is the undercutting of workers’ rights and conditions [...] and I did in the referendum actually make quite a lot about the whole issue of what’s called the posting of workers directive on that issue”.

¹¹ Niesten [18]

¹² Jorens et al. [12]

¹³ The sector can be classified under NACE code R90 ‘Creative, arts and entertainment activities’ (i.e. ‘cultural employment’). Employment statistics for this NACE code are published by Eurostat on the basis of the EU Labour Force Survey. However, in order to make a correct estimate of the employment in the sector, only NACE R90.01 ‘Performing arts’ should be taken into account. Such detailed figures are not publicly available.

¹⁴ De Wispelaere and Pacolet [4]

¹⁵ Based on figures from the Belgian National Social Security Office (NSSO) – Department for International Relations.

¹⁶ European Commission [9]

level for the first time.¹⁷ Although not all countries provided figures, a number of interesting observations can still be made. First of all, a lot of artists seem to be temporarily providing services in France.¹⁸ Often this will be for a very short period of time (only 1 day).¹⁹ In addition, artists and musicians appear to be an important group of posted persons in Europe. They represent about 3.5% of the workers posted in the EU.²⁰

3. Problems

In some cases of labour mobility, not least in the live performance sector, complexity and legal uncertainty prevail.²¹ In this section, we give an overview of a number of problems that mobile artists and their employers encounter (*Table 1*). Challenges for labour mobility in the live performance sector arise from a number of characteristics of employment in this context. Without going into much detail, one can single out the often short duration of their presence in another Member State (touring), the practice of hiring an artist immediately before posting (for instance, finding a replacement for a specific instrument), the multiple successive Member State involved in a single tour, as well as the possible separation between the state of residence of an artist and the state(s) where they are active. Employment patterns in the sector, outside the issue of mobility, can further complicate the picture, with short-term contracts, overlapping part-time activities, and a combination of employment statuses (employee and self-employed).

A first order of difficulties stems from the decision, taken in the context of the negotiations of the original Posting of Workers Directive,^{22,23} of applying the posting regime from ‘day zero’, that is, from the first moment a worker is sent to another Member State in the context of a provision of services. From this very moment, the posting employer will have to apply the working conditions of the host Member State when it comes to the list of measures included in Article 3(1) of the PWD.²⁴ This is also confirmed by the Practical Guide on Posting released by the EU Commission in 2019.^{25,26} The only *mandatory* exception to this regime is established by Article 3(2), and covers the ‘initial assembly and/or installation of goods’ up to a maximum of 8 days of posting. Interestingly, PEARLE*, the European employers’ association for the live performance sector, has called for an extension of this logic to very short-term postings (such as in the case of touring).²⁷ However, it is clear from the wording of the article, that the present text would not cover activities carried out in the context of a provision of services (hence, not of goods), such as the sending of technicians to set up a theatre scene or concert venue. Other exceptions are possible under the PWD, but these only provide options which Member States are free to integrate in their national transposition.

As a result of this situation, even very short postings, (for instance, a single one-day presence in a different Member State for a tour date), entail the application of the provisions covered by Article 3(1). This difficulty is clearly magnified by the generally small-scale of employers in the live performance sector, which cannot rely on HR departments or expensive legal counsel. Furthermore, one of the main changes introduced by the recent revision of the PWD is the shift from the concept of ‘minimum rates of pay’ to the (broader) concept of ‘remuneration’.^{28,29} Although, this might have reduced the risks for ‘legal’ social dumping,³⁰ it has also increased the difficulty for posting undertaking in identifying the correct amount of wages to be paid to posted workers. However, it should be noted that the difficulties linked to the application of the posting of workers regime from

¹⁷ *De Wispelaere and Pacolet* [3]

¹⁸ For more information, see also the annual report published by ‘Direction Générale du Travail’ on the number of reported incoming posted workers to France.

¹⁹ Based on information from ‘Directions régionales des entreprises, de la concurrence, de la consommation, du travail et de l’emploi’.

²⁰ Based on data for 12 reporting Member States. Data for some important host Member States such as Germany are missing.

²¹ *Niessen* [18]

²² Posting of workers in the EU is regulated by Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 18, 21 January 1997 (hereinafter ‘Posting of Workers Directive’ or ‘PWD’).

²³ *Rocca* [20]

²⁴ Including important elements such as minimum wages (or, better, “remuneration”, after the coming into force of the Revision of the PWD), maximum working time, and so on.

²⁵ *European Commission* [10]

²⁶ “As far as the terms and conditions of employment of posted workers are concerned, Directive 96/71/EC applies to all postings, irrespective of their duration”.

²⁷ See PEARLE*, Call to the EU to address disproportionate administrative burdens and legal gaps in context of posting of workers, Brussels, 3 June 2019.

²⁸ Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

²⁹ *Lhermould* [16]

³⁰ *Rocca* [21]

‘day zero’ are not new. In fact, the Court of Justice had already confirmed, in the *Mazzoleni* case, that the PWD would apply even for postings of a few hours.³¹

The second source of difficulties stems from social security rules. The fact that EU legislation has been coordinating national social security legislation for 60 years is an achievement in itself.^{32,33} However, due to the high mobility of artists and musicians, identifying which social security legislation is applicable can be challenging. Therefore, mobile artists may be uncertain about their rights, while employers might struggle to understand to which national system of social security they should pay their social security contributions.

The stay in another Member State might be too short for an artist to build up rights and to be entitled to access the local social security system. Moreover, an artist can be hired by an employer in order to be posted in another Member State. In that case they must be subject to the legislation of the employer’s country at least 1 month prior to the posting.^{34,35} In the discussion on the revision of the Coordination Regulations,³⁶ there is even the proposal to increase this to 3 months of prior insurance.³⁷ This is, of course, a major obstacle for mobile artists and their employers, notably affecting companies which have no intention of breaking or avoiding regulations.

Further, when artists are active in multiple Member State, thus falling under Article 13 of the ‘Basic’ Coordination Regulation, the specificities of employment patterns in the sector might end up complicating their situation when it comes to social security affiliation. As we cannot explore the panoply of possible scenarios here, we will limit ourselves to just one example. Article 13(3) provides that when a person is active in multiple Member States both as an employed and as a self-employed person, they will be subject to the social security legislation of the Member State where they are active as employees. The Article does not specify thresholds for this rule to apply, nor has this been clarified by a decision of the Administrative Commission. This might cause a situation where a musician is active in a number of Member States, including their own country of residence, as a self-employed freelancer, but is then hired for a limited time as an employee in a different Member State, thus ending up being affiliated in this last country, the limited connection notwithstanding. This is particularly relevant as some very significant markets for the live performance sector, such as France, provide for a presumption of employment relationship for artists.³⁸ This presumption includes an exception for artists active as self-employed in another Member State, posting themselves to France, but this exception does not apply to artists hired in France by a French employer (such as, in our example, a French orchestra) and also active as self-employed in other Member States.

Finally, an orchestra, theatre or dance company that goes on tour for a short period (from a few hours to a few days) to another Member State might be confronted with difficulties when dealing with all the administrative requirements. Touring companies are requested to be able to provide a Portable Document A1 when they go on tour with a group and perform in another Member State, even when a tour only lasts a few days.³⁹ However, competent social security administrations are not always able to provide the requested documents in very short timeframes, if one knows that in some countries it takes weeks to respond to a demand for a Portable Document A1.⁴⁰ In addition, employers have to notify the posting of the artists through the prior notification systems that Member States have implemented for posted workers. Only in a few Member States, there is an exemption for artists. For instance, France,⁴¹ which, as we saw in Section 2 is a very important destination for cross-border mobility in the live performance sector, provides an exception for artists⁴², notably for postings up to 90 days over a year, while Belgium only excludes ‘artists of international renown’ (up to 21 days over a trimester).⁴³

³¹ CJEU, Case C-65/98, 15 March 2001, *André Mazzoleni and Inter Surveillance Assistance SARL*.

³² ‘Basic’ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, and ‘Implementing’ Regulation (EC) no 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (hereinafter jointly referred to as the “Coordination Regulations”).

³³ *Cornelissen and De Wispeleere* [2]

³⁴ *European Commission* [8]

³⁵ See Administrative Commission Decision A2 of 12 June 2009, concerning the interpretation of Article 12 of Regulation (EC) No 883/2004 of the European Parliament and of the Council on the legislation applicable to posted workers and self-employed workers temporarily working outside the competent State.

³⁶ *Lhernould* [16]

³⁷ <https://data.consilium.europa.eu/doc/document/ST-7698-2019-ADD-1-REV-1/en/pdf>

³⁸ Article L762-1 of the French Labour Code.

³⁹ *European Commission* [10]

⁴⁰ *Jorens and Lhernould* [14]

⁴¹ Article L1262-6 of the Labour Code and decree of 4 June 2019, Article 1.

⁴² The exception does not include technicians involved in the assembly and disassembly of installations and equipment.

⁴³ Royal Decree of 20 March 2007.

Table 1 Obstacles linked to the social security and employment status of mobile artists

Mobile artist	Employer
Labour law	
Professional status is unclear (worker or self-employed).	Application of the posting regime from ‘day zero’.
Uncertainties about their wage level.	Difficulties in determining / calculating wages.
	Notification of the artists in the national declaration tools of the host Member States. Only in a few Member States there is an exemption.
	Not always clear if the artists are posted.
Social security law	
Uncertainties about their social protection.	Difficulties in posting an artist when they have not been subject to social security for a month.
Concerns about the (ex)portability of social benefits.	Delay in the issuance of the Portable Document A1 by the competent public authority.
Generally interested in being covered by the social security system of the Member State of residence.	Even for 1 day abroad, a Portable Document A1 is required. Sanctioning in certain countries when the form has not been requested.
	Double payment of social contributions.
	Not always clear if the artists are posted or active in two or more Member States.
	Generally interested in paying social security contributions in the Member State of establishment.

4. Solutions

A first obvious solution is, of course, to better inform mobile artists and their employers about the applicable legislation.⁴⁴ After all, difficulties in accessing information on registration requirements and terms and conditions of employment might often be a reason why existing rules are unknown and consequently not applied. In this respect, Article 5 of Directive 2014/67/EU (i.e. the ‘Enforcement Directive’) states that each Member State should set up a single official national website with the ambition to improve accessibility of information. However, websites implemented on the basis of Article 5 of the Enforcement Directive mostly cover only a part of the information that workers and employers actually need, as no information is available on social security law and tax law, or even on the applicable collective agreements.^{45,46} Ideally, the information published by Member States should be as complete as possible. Moreover, a single European website, possibly managed by the European Labour Authority,⁴⁷ that gives a complete overview of necessary information would certainly be an added value. In fact, Member States have a direct interest in ensuring the quality of the information provided through national websites. Indeed, the revision of the PWD has added, in Article 3(1), an obligation for national authorities to ‘take into account’ the absence or incompleteness of information provided by said websites when determining the proportionality of penalties in case of infringement of the posting rules. Furthermore, one might add that the Court has already shown a clear willingness to assess the proportionality of sanctions introduced by Member States against posting undertaking.⁴⁸ Although this might come as a very late consolation, posting undertakings in the live performance sector might be able to rely on this defense when facing sanctions for failing to respect, for instance, the rules related to remuneration items applicable in a given Member State.

Providing better information will not solve the complexity of the rules or the high administrative burden. Both the Coordination Regulations as well as the Posting of Workers Directive provide for exceptions for the road transport sector and aviation.⁴⁹ This is not yet the case for the live performance sector. Several criteria should help to find out a good (out of the box) solution for the problems in the sector. In that respect, following criteria could be used:

- *Clarification and legal certainty:* is the solution clear, easy to understand and transparent?
- *Protection of social rights:* are the social rights of the persons concerned better protected?

⁴⁴ In this regard, see the publication of Pearle* - Live Performance Europe: “The ultimate cookbook for cultural managers – social security in an international context”.

⁴⁵ *Jorens and De Wispelaere* [13]

⁴⁶ *European Commission* [9]

⁴⁷ Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019 establishing a European Labour Authority, amending Regulations (EC) No 883/2004, (EU) No 492/2011, and (EU) 2016/589 and repealing Decision (EU) 2016/344, Article 5(c).

⁴⁸ See Case C-33/17, 13 November 2018, *Čepelnik d.o.o. v Michael Vavti*, and Joined Cases C 64/18, C 140/18, C 146/18, and C 148/18, 12 September 2019, *Zoran Maksimovic and Others v Bezirkshauptmannschaft Murtal and Finanzpolizei*.

⁴⁹ Recital 15 of Directive (EU) 2018/957 states that “Because of the highly mobile nature of work in international road transport, the implementation of this Directive in that sector raises particular legal questions and difficulties, which are to be addressed, in the framework of the mobility package, through specific rules for road transport”.

- *Administrative burden and implementation arrangements*: is it easy for public authorities, employers, workers to administer the solution without large additional processes or do we have to set up new processes?
- *Financial costs and benefits*: what are the financial costs and benefits for public authorities, employers and employees?

It is unlikely that a single solution will solve all the challenges. It is also not necessary to look for far-reaching solutions. For instance, it would be useful to negotiate an exemption from declaration in the prior notification tools with every Member State separately. An exemption to apply for a Portable Document A1 for artists who are posted for a few days would also be a good solution.⁵⁰ In addition, there are of course solutions that require further elaboration. For instance, to facilitate the identification of persons across borders for the purposes of social security coordination, the idea has been launched by the European Commission to introduce a European Social Security Number.⁵¹ This solution certainly has a number of advantages, not least in safeguarding the social rights of mobile artists. A sectoral approach to the application of posting conditions could also be a solution. After all, the fact that artists must be subject to a social security system for at least one month (in the future perhaps even three months) before being posted is highly problematic.

However, when thinking in terms of sectoral approaches, one should keep in mind how the recent revision of the PWD went in the very opposite direction, by mandating the application of the working conditions listed under Article 3(1) to all sectors of the economy, whereas the previous text only mandated the inclusion of the construction sector, leaving Member States free to extend to other sectors. This change was partly due to specific problems arising from the sectoral approach, the most visible of which might be the situation of the meat processing industry (slaughterhouses) in Germany. This sector had not been included in the German transposition of the PWD, giving rise to a situation where, up to 2014, posting undertaking in this sector could apply wage levels of their Home State.⁵² This even gave rise to complaints from other EU Member States, lamenting the unfair competition vis-à-vis their own companies active in the meat industry.⁵³ Further, the very fact of the recent adoption of the revision of the PWD, and the difficult political negotiation taking place in this context, makes a reopening of the legal text at European level essentially unthinkable. Thus, social partners and associations active in the live performance sector might find it more productive to focus on the possibilities offered to national legislators to better adapt regulations and enforcement regimes to the specificities of individual sectors. After all, Member States are also interested in focusing their limited resources to ensure the application of posting rules in ‘problematic’ sectors, the live performance one arguably not being among those. The lighter regimes introduced by France and Belgium we mentioned in the previous section might provide a good example in this sense.

For flight and cabin crew members, Article 11(5) of the Basic Regulation refers to ‘home base as the only decisive criterion for determining the social security legislation. By introducing the concept of ‘home base’, the legislator aimed to simplify the determination of the applicable legislation for flying personnel. The ‘home base’ should be the location where the person is physically located and with which they have a close connection in terms of their employment. In that regard, it might be useful to define tailor-made coordination rules for the live performance sector as well. For instance, employers could fulfil the social security contributions in the country of the employer, whilst the artist could continue to benefit and claim its social security rights in the country of residence. The national authority where the employer is based would then transfer the amount due for the coverage of the benefits to the country where the artist is resident accordingly. It goes without saying that this idea oversimplifies a very complex problem, dealing in the first place with different levels of social security benefits and contributions. However, stronger coordination rules, even in the absence of a proper EU social security, could go a long way in simplifying things in cross-border situations.

Finally, from a legal, administrative, and social point of view, some kind of ‘harmonised European status’ could be aspired for the group of highly mobile artists.⁵⁴ The idea might sound utopian as differences in labour costs between Member States are still significant. Indeed, in the sector ‘Arts, entertainment and recreation’, the average hourly labour cost varies from only some € 5 in Romania and Bulgaria to some € 42 in Luxembourg. On average, the European hourly labour cost in the sector amounts to some € 25 (Eurostat data). Despite these differences, the live performance sector is well placed to start the debate on harmonisation. It is a sector in which competition is based primarily on the quality of services and reputation, and less on differences in labour costs. A ‘harmonised

⁵⁰ The provisional agreement on the revision of the Coordination Regulations (13.03.2019) only exempts ‘business trips’: “Unless otherwise provided for by Article 16 of the Implementing Regulation, with the exception of *business trips*, where a person pursues his activity in a Member State other than the Member State competent under Title II of the Basic Regulation, the employer or, in the case of a person who does not pursue an activity as an employed person, the person concerned shall inform the competent institution of the Member State whose legislation is applicable thereof in advance.”

⁵¹ https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-5862503_en

⁵² Wagner [23]

⁵³ BBC News, Belgium protests over German low pay in EU complaint, 9.4.2013.

⁵⁴ See also Pieters and Vansteenkiste. At the time, the Authors proposed the creation of a so-called ‘13th State’ for mobile workers in the EU.

European status' could certainly be a solution to the challenges facing the sector. It is, of course, rather a solution that can only be achieved in the medium or long term. However, although this comes from a private sector initiative, the usefulness of some sort of 'European regime' for the social security of highly mobile workers has in a way been validated by the recent creation of RESAVER, a pension fund for researchers, which allows participants to maintain their affiliation when moving between partner institutions situated in different Member States.⁵⁵

⁵⁵ *Degoli* [6]

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