

TABLE OF CONTENTS

Preface and acknowledgments	xi
Glossary of terms	xv
Latin terms	xvii
List of abbreviations	xix
List of tables and figures	xxiii
Chapter 1: Introduction	1
1 The research in a nutshell	1
2 Setting the scene	3
2.1 The conflict rules	3
2.2 The conflict rules and mobility	7
2.3 Highly mobile workers (HMWs)	10
2.4 Issues of legal uncertainty	12
3 Research purpose	15
3.1 Research aims	15
3.2 Research questions	16
4 Methodology	17
4.1 Research method	17
4.2 Research scope	22
4.2.1 Legal scope	22
4.2.2 Personal scope	25
4.2.3 Temporal scope	29
4.2.4 Territorial scope	29
5 Relevance and added value	30
6 Research limitations	35
7 Structure of the book	36

Part I

Chapter 2: Highly mobile workers challenging Regulation 883/2004: Pushing borders or opening Pandora’s box? 41

- 1 Introduction 41
 - 1.1 Setting the scene: A changing European labour market 41
 - 1.2 Approach 42
 - 1.3 Outline 44
- 2 EU social security law 45
- 3 Article 13: Working in various Member States 46
 - 3.1 When is a person pursuing activities in two or more Member States? 47
 - 3.1.1 Observing all activities 47
 - 3.1.1.1 What are marginal activities? 48
 - 3.1.2 Location of activities in two or more Member States 51
 - 3.1.2.1 ‘Normally’ working in two Member States 52
 - 3.2 How must Article 13 be applied? 57
 - 3.2.1 The classification of work 57
 - 3.2.1.1 The hierarchy between work classifications 58
 - 3.2.1.2 The substantial part of activities for (self-)employed persons 59
 - 3.2.2 The connecting factor 60
- 4 Practical challenges for HMWs 63
- 5 Closing remarks: Article 13, a marriage between strict requirements and legal ambiguities? 69
 - 5.1 Conclusion 69
 - 5.2 Reflections 71

Chapter 3: The judicial finetuning of the EU rules determining the applicable social security legislation 73

- 1 Introduction 73
- 2 The simultaneous pursuit of activities in two or more Member States 75
- 3 Posting 78
 - 3.1 Article 12 79
 - 3.1.1 The ‘non-replacement condition’ 79

3.1.2	Temporary-work agencies and the condition of ‘normally’ carrying out activities in the Member State of establishment	81
3.2	Article 13	83
3.2.1	Normally working in two or more Member States	84
3.2.2	Employer	87
4	Abuse and Fraud	88
5	Employment and/or residence outside the EU	92
5.1	Employment outside the Union	92
5.2	Residence Outside the Union	94
6	Gaps in social security protection	95
6.1	Exclusivity and the power of a non-competent Member State to grant benefits	96
6.2	Gaps in social security protection resulting from disparities in national legislation	99
7	Conclusion	101

Part II

Chapter 4: Possible routes towards legal certainty for highly mobile workers under current Regulation 883/2004 105

1	Introduction	105
1.1	Setting the scene	105
1.2	Approach	107
1.3	Outline	110
2	Increasing transparency and clarity in terms and rules <i>ex ante</i>	110
2.1	Introduction	110
2.2	Clarifying assessment criteria	110
2.2.1	Introduction	110
2.2.2	‘Marginal activity’: Define or abolish	111
2.2.3	Define ‘substantial part of activities’	118
2.2.4	An assessment framework for ‘normally’ working in two or more Member States	121
2.3	Informing proactively	125
2.3.1	Introduction	125
2.3.2	Information on work classification for social security purposes	126
2.3.3	Non-binding <i>ex ante</i> A1-certificate outlook	129

TABLE OF CONTENTS

	2.3.4	Article 16-agreements	132
3		Transcending the limits of the EU social security law	137
	3.1	Introduction	137
	3.2	Upgrading the underlying assumptions of pursuing activities across borders	137
	3.2.1	Introduction	137
	3.2.2	Including periods of inactivity into the concept of ‘normally’ working	141
	3.2.3	Observing a longer period in time of work	144
	3.2.4	Expanding the possibilities of a legal fiction	147
4		A social security ‘crash barrier’ by the CJEU?	153
5		Conclusion	159

Chapter 5: Possible routes towards legal certainty for highly mobile workers while thinking out-of-the-(pandoras)-box **163**

1		Introduction	163
	1.1	Setting the scene	163
	1.2	Approach	164
	1.3	Outline	165
2		Adapting the system of conflict rules of Regulation 883/2004	166
	2.1	Introduction: A special conflict rule for HMWs	166
	2.2	Lex domicilii for HMWs	168
	2.3	The closest link principle	171
	2.4	Right of option for the applicable law	176
3		Expanding the system of conflict rules of Regulation 883/2004	180
	3.1	Introduction: From unicity towards plurality	180
	3.2	Extending the <i>Bosmann-principle</i> : option for double affiliation	182
	3.3	Separating the benefits from the contributions	184
4		Going beyond the existing framework	190
	4.1	Introduction: Expanding or supplementing Regulation 883/2004	190
	4.2	A clause of mutual responsibility for disproportionate ‘gaps’ in social security protection	192
	4.3	A (EU) hardship fund	197
	4.4	A virtual Member State	201
5		Conclusion	208

Chapter 6: Feasibility and implementation challenges on multiple action levels	211
1 Introduction	211
1.1 Setting the scene	211
1.2 Approach	211
1.3 Outline	212
2 A short sketch of social policy competences of the EU	212
2.1 The TFEU and social security measures	213
2.2 The legislative procedure of legislative acts in the area of social security	217
2.3 Alternative: A flexible European integration approach	219
2.4 Alternative: Soft law options	222
3 Legal policy instruments and different levels of action	224
3.1 Introduction	224
3.2 Macro-level: Hard and soft law options on a supranational and national level	225
3.2.1 EU hard law	225
3.2.2 EU soft law	226
3.2.3 National hard law	229
3.3 Meso-level: Implementation rules	230
3.4 Micro-level: The HWW and the employer engaging in cross-border activities	233
4 Conclusion	234
5 Annexes	236
5.1 ANNEX I Overview of possible policy actions and EU social security law on various action levels	236
5.2 ANNEX II Overview of proposed routes Chapters 4 and 5 towards more legal certainty for HMWs and possible policy implementations	241
Chapter 7: Concluding remarks and policy recommendations	245
1 Introduction	245
2 Research outcome regarding legal uncertainty for HMWs	246
2.1 Findings of PART I	246
2.1.1 EU social security law and highly mobile workers	246
2.1.2 Reflections I	248
2.2 Findings of PART II	249

TABLE OF CONTENTS

2.2.1	Towards more legal certainty and stability for highly mobile workers within the conflict rules	249
2.2.1.1	Increase clarity and transparency	249
2.2.1.2	Inform stakeholders proactively	250
2.2.2	Possible routes towards continuous social security protection for highly mobile workers in the light of EU law	250
2.2.2.1	Introduce a conflict rule for HMWs	251
2.2.2.2	A shift from unicity to plurality	251
2.2.2.3	Counterbalance disproportionate negative effects	252
2.2.2.4	Introduce a virtual Member State for HMWs	252
2.2.3	Reflections II	253
3	Closing Pandora's box: Recommendation and considerations towards more legal certainty for HMWs	254
3.1	The way forward	254
3.2	Some resolution strategies	258
3.2.1	Resolution strategies at the European level	258
3.2.1.1	Two short-term strategies: Providing financial relief and incentives	259
3.2.1.2	Two long-term strategies: Amending Regulation 883/2004	261
3.2.2	A short-term resolution strategy at the national level	264
3.3	Final remarks	265
	Bibliography	269