

GUIDE FOR THE DETERMINING BODY WORKSHOP
Thursday 18 January 2024, 4.00 pm - 4.45 pm

Determining body: authority determining the applicable social security legislation
Issuing authority: authority issuing the certificate of belonging to the navigation of the Rhine (attestation d'appartenance à la navigation du Rhin (AANR)) and the operator's certificate (CE)

I. Objective of the round table

Objective:

- Correctly identify the operator's (actual) place of business.
Is the operator mentioned on the certificate of belonging to the navigation of the Rhine the de facto operator?
 - *It should be noted that the Treaty on the Functioning of the European Union (TFEU) enshrines the right to freedom of establishment within the EU. The search for a favourable business climate for one's own company is perfectly legitimate. However, this location must also be the company's actual place of establishment and must not be a letterbox company or some other type of (fictitious) construction.*

Interest of the issuing authority:

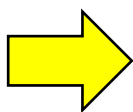
- Maintain authentic and up-to-date registers based on accurate information.
- To create a level playing field for all inland navigation operators.

Interest of determining body:

- Affiliation with the social security scheme of the correct Member State.
 - Payment of contributions and benefits in and by the correct Member State;
 - Recognise and deal with fictitious constructions earlier.
- To create a level playing field for all inland navigation operators.

How do we get there?

- a. How do issuing authorities keep their registers authentic and up to date? What is needed to do this? How can the exchange of data between issuing authorities contribute to this objective? (**Issuing authorities workshop**)
- b. How can a risk situation, i.e. the fact that the owner and the operator are established in different Member States, be detected, and examined earlier? Can the exchange of data between the issuing authority and the determining body contribute to this, and if so, in what way(s)? (**National delegations workshop**)
- c. If the determining body receives a signal of a risk situation¹, it may carry out an additional assessment of the risk of paying contributions in the wrong Member State or of a fictitious construction.
If the determining body considers that this risk is real, it may contact the determining body of the other CASS Member State.
How to check whether the situation is at risk and how to exchange data with determining bodies in other Member States? (**Determining bodies workshop**)



II. Participants by Member State

- Authorities in all CASS countries determining the applicable security legislation (determining bodies)
- Interested government representative(s)

III. Relevant documents

- Regulation (EEC) no. 2919/1985
- Regulation (EC) no 883/2004
- Regulation (EC) no. 987/2009

¹ For example, from a third party such as the issuing authority, the social partners or the signalling of a trend in implementation practice.

- Derogation agreement on the legislation applicable to Rhine boatmen
- Introductory document (CASS)
- CCNR recommendation on the issue of the Rhine navigation certificate (AANR) and the operator's certificate (EC)
- CASS Decision No. 7
- Standardised questions set (CASS)

IV. Objective and schedule of the workshop for determining bodies:

The aim of this workshop is to gather information with a view to improving cooperation between Member States to ensure that the applicable social security legislation can be correctly determined.

To do this, you need to be able to determine who actually operates the boat and where the operator is actually based.

Description of the problem:

If it subsequently appears that the de facto operator of the Rhine boat is established in a country other than the one previously assumed - on the basis of the AANR - the employees of the Rhine boat in question have subsequently been affiliated to the wrong social security scheme and the contribution payments have been made in the wrong country. The rectification of the payment of contributions in the wrong Member State and the payment of benefits by the wrong Member State creates problems for the Rhine boatman, the employer and the implementing authority. The longer social security contributions have been paid in the wrong Member State, the more difficult it becomes to rectify the situation. Factors likely to complicate rectification include the expiry of limitation periods, the payment and reimbursement of contributions via the employer or the employer's bankruptcy.

It is therefore important that a risk situation is recognised in good time and that, in cooperation with the other Member State, potential abuses are avoided or can be dealt with in good time.

In the case of work in two or more Member States, Article 16 of EC Regulation No. 987/2009 (hereinafter: the "Implementing Regulation") generally regulates the starting point for mutual consultation (i.e. the issue of an A1) and mutual cooperation between the Member States to determine (provisionally) the applicable social security legislation. However, this article does not apply if the applicable legislation is determined on the basis of the Derogation Agreement.

Possible solution:

At the CASS meeting on 2 December 2022, the development of a mutual consultation procedure based on the principle of loyal cooperation underlying the mechanisms for coordinating cross-border social security schemes under Regulation (EC) No 883/2004 was discussed. This is to prevent a situation arising where, due to a lack of information exchange, contributions and/or benefits are unduly paid in the non-competent Member State for a long blast, while the Rhine boatman is insured in another CASS Member State.

The launch of a mutual consultation procedure requires a starting point on the basis of which the determining body of one Member State begins a consultation with the determining nation body of the other Member State (information flow C in the diagram).

In this workshop, we assume that the determining body receives a signal of a risk situation.

This signal of a risky situation may come, for example, from:

- *An occasional third party, for example the social partners who inform the determining body of a suspicious situation.*
- *The issuing authority in your own Member State. The national delegations workshop will consider whether the issuing authority in your own Member State can send a signal to your authority if the owner and the operator are established in different Member States. (For example, if the owner in Member State A transfers his business from Member State A to Member State B).*
- *The determining body of Member State A which notifies the determining body of Member State B.*

On the basis of this signal, the determining body assesses whether to contact the sister organisation in the other Member State: the starting point for the mutual consultation procedure.

During this workshop, you will be able to discuss how to carry out a successful consultation procedure.

You will find below a number of questions/topics that may help you to start the discussion. Some of these questions are also addressed in the other workshops. In this way, the issues are examined from different angles.

The main questions below are detailed in the appendix to this document to help you answer them.

These main questions can help the rapporteur to provide feedback at the plenary session.

Workshop proceedings and main questions :

A. Introduction, getting to know each other's organisation and interests.

B. Discussion of a number of questions

1. Exchange of views on the starting point of a mutual consultation procedure (information flow C of the diagram).
How will it be determined whether the fact that the owner and operator are established in different Member States constitutes a risk situation? When will the determining bodies consult each other?
2. Exchange of views on a common review framework for the mutual consultation process
During the workshop, you can use the A3 printed document "Standardised question set" to take notes in the blank columns added.
Who does what? What can the Member State which issued the AANR examine, and what can the Member State which issued the CE examine? Which body in your Member State is responsible for carrying out checks? What facts need to be examined to determine the (de facto) operator and the place of establishment? Do the social partners have a role to play in providing information?
3. How can data exchange be organised between the determining bodies of the CASS member states? By secure e-mail? Via EESSI? Appoint contact persons?
4. Are the measures considered sufficient to effectively correct any errors, or are additional measures required?

A. Introduction, getting to know each other's organisation and interests.

- Presentations
- Appointment of the rapporteur

B. Discussion of a number of issues

1. Exchange of views on the starting point of a mutual consultation procedure (information flow C of the diagram)

The determining body in Member State A examines the signal from the issuing authority indicating that the owner and the operator are not the same and that the place of establishment of the operator has been transferred to Member State B. If the determining body considers that there is a risk situation, a more detailed examination is carried out. On the basis of this examination, it will be determined whether it is appropriate to contact the other Member State.

For example, consider the following questions:

- How do you determine whether the fact that the owner and the operator are established in different Member States constitutes a risk situation?
- Do you think that some Member States are more exposed to the risk of wrongly receiving contributions or not receiving contributions due?
- How is a risk assessment carried out? When is it useful to contact the other Member State? What could be the indicators of such a risk situation? Think, for example, of the amount of contributions, the amount of benefits, working conditions, etc.?

2. Exchange of views on a common review framework for the mutual consultation process

If the examination warrants it, the sister organisation will be contacted.

Verification of the operator's actual place of establishment may involve several Member States. The Member State where the operator claims to be established (the Member State which issued the EC) and the Member State which has indications that the place of establishment is in its Member State (the Member State which issued the AANR, where the owner is established).

If this situation arises, it is a good idea for these two Member States to work together to determine who the operator is and where he is (actually) based. In this respect, it may be useful for the CASS Member States to agree on an examination framework, i.e. what actually needs to be examined and which Member State is authorised to do so. In this context, a document has been created: "Standardised questions set"².

For the purposes of this workshop, several columns have been added to the tables in the "Standardised questions set" document to enable you to complete the answers. During the workshop, the printed document will also be available in A3 format for notes.

Using the questions in this document, you can discuss the following points, for example:

- When is a check useful/possible? When the Rhine boatman first joins your social security scheme or afterwards?
- In your Member State, who is responsible for checking that the EC has been issued correctly, i.e. who checks that the operator named on the EC is actually the operator?
- What specific examination questions do you consider relevant? Is it possible to establish priorities?
- Which Member State is responsible for carrying out which part of the examination (division of responsibilities between the AANR Member State and the EC Member State)?
- Which authority within the Member State is able to find this data?
- Are there any essential questions missing from the "Standardised questions set" document?

Also consider the following questions:

- In your Member State, is it possible to contact the issuing authority in your Member State to request information? (For example, to recognise trends, such as the fact that many operators wish to relocate to your Member State, while the owner is established in another Member State. Or vice versa: that, in your Member State, several operators are relocating to another Member State, while the owner(s) remain(s) established in your Member State).
- If you need information from the issuing authority in the other Member State, can you obtain it via the liaison body?
- Can visiting the owner and/or operator to provide information/explanations prevent contributions from being paid in the wrong Member State or rectify the situation (earlier and more flexibly)?
- Can the social partners play an informative role?

² See also the practical example (appendix 1)

- Is there any point in agreeing to withdraw or issue A1 certificates?
- Is it important to declare an employer/contractor bankrupt? If so, how does the authority know that there is a bankruptcy? What are the consequences of bankruptcy for the determining body?

3. How can data exchange be organised between the determining bodies of the CASS member states?

For example, consider the following questions:

- How can the data be provided at file level?
- Can data be exchanged by (secure) e-mail?
- Can the data in a database be supplied via an electronic tool?
- Telephone contact? Appoint contact persons?
- Can data be exchanged via EESSI?
- If the determining body issues an A1 certificate for a Rhine boatman, does it also inform sister organisations in other Member States? If so, how? A1 copy via EESSI?

Note: The EESSI process is used for the purposes of applying Article 16 of Regulation (EC) 987/2009.LA_BUC 03 and SED A008 are used in both senses. Although they are officially intended for the procedure under Article 16 of the Regulation, and although this article does not apply to cases directly covered by the Exemption Agreement, they can actually be used to set up a notification procedure.

- What are the response times?
- How is feedback provided to the relevant issuing authorities? Is this done via the liaison bodies?

4. Are all the measures considered sufficient to effectively correct any errors?

Practical example

The owner (limited liability company) of the boat is established in Member State A and the operator (on paper) in Member State B. To this end, the limited liability company in Member State A has concluded an operating agreement with the limited liability company it has set up in Member State B.

There is some commercial activity in Member State B:

- The limited liability company rents space in Member State B and has a secretary. In addition, a director of the GmbH has been appointed. This director is from Member State B.

However, the boat is actually operated through the SARL's office in Member State A:

- The owner (from Member State A) of the boat organises the staff on board the boats;
- The charter is organised from Member State A;
- The boat's navigation is planned from Member State A;
- Staff planning is carried out from Member State A;
- All the crew's (telephone) contacts are made via the office in Member State A;
- In the event of damage to the boat, this is discussed at the office in Member State A;
- A dismissal comes from Member State A, via an e-mail address in Member State B (!), but signed by the secretary in Member State A!

What investigations can Member State A carry out?

Member State A may investigate the shipowner established in Member State A. This company in Member State A will have signed an operating contract with the foreign operator. What are the contents of these contracts and are they in accordance with the operating contract? Or does practice deviate from what was agreed on paper? An important criterion is, for example, who concludes the transport contracts. And who ultimately decides which (transport) activities are to be undertaken.

Member State A may also check that the actual financial revenue actually ends up in the Member State of establishment declared by the operator. This can be done, for example, by checking the accounting documents (is it a tax structure or not?).

What investigations can Member State B carry out?

It should be noted, however, that Member State A has no means of requesting or auditing the annual accounts of a foreign company if the operator indicates that it is established in another CASS Member State. For this information, Member State B must intervene.

Cooperation between Member States A and B

If the financial structure put in place by the owner of the boat is clever, it becomes very difficult to get a clear idea of who is actually operating the boat. To check where the actual operating activities are taking place, it is therefore important for the two Member States to cooperate and for both countries to carry out checks in their own countries and inform each other of the results. It makes sense, then, to agree on a common examination framework (what specific questions are relevant for determining the actual place of establishment of the operator?) and to determine which Member State takes which action?

In doing so, it is important to look beyond paper agreements and examine what the actual relationship is between the parties and with the vessel (compare with the lorry drivers in the AFMB case).³

In this practical example, the limited liability company in Member State A transferred the operation of at least 10 boats to a limited liability company in Member State B in this way.

If, after investigation, it turns out that the operator mentioned in the AANR is not the actual operator of the vessel, and that the actual operator is established in another Member State, this must be corrected in the AANR so that the social security legislation of the correct Member State is also applied to the crew members of the vessel.

By cooperating with each other and fighting against such constructions, it is possible to avoid major financial problems (double levying of contributions, recovery of benefits) for Rhine boatmen and to create fairer conditions for all Rhine navigation entrepreneurs.

³ Court of Justice of the EU: The de facto employer is decisive for the application of the social security system. The employer of heavy goods vehicle drivers employed in international road transport is the transport undertaking which exercises effective authority over those drivers, bears their wage costs and has the effective power to dismiss them. The application of the social security system depends on the place of establishment of this de facto employer. It is not, by definition, the company with which the said lorry driver has concluded a contract of employment and which is formally presented in that contract as being the employer of that same driver. This is the answer of the Court of Justice of the European Union to the questions of the Centrale Raad van Beroep (Dutch Central Appeals Board). <http://curia.europa.eu/juris/liste.jsf?num=C-610/18>

Appendix 2

