



# 50 years of Social Security Coordination

Past – Present – Future

50

# EUROPEAN COORDINATION OF SOCIAL SECURITY





# **50 years of Social Security Coordination Past – Present – Future**

Report of the conference celebrating  
the 50th Anniversary of the  
European Coordination of Social Security

Prague, 7 & 8 May 2009

## **Responsible Editor**

Prof. dr. Yves Jorens – Ghent University, Belgium

*This book contains the contributions of the European conference, organised by the Social Law Department of the Ghent University, on behalf of the European Commission, DG Employment, Social Affairs and Equal Opportunities, on 7 and 8 May in Prague, on the occasion of the 50th Anniversary of the European Coordination of Social Security.*

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This text was written at a time when the Lisbon Treaty had not yet entered into force. Therefore, in their contributions the authors still refer to the relevant articles of the old Treaty on European Union and of the old Treaty establishing the European Community.

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# PREFACE



**Mrs Lenia Samuel,**  
*Deputy Director-General*  
*European Commission — Employment, Social*  
*Affairs and Equal Opportunities DG*

Today, 7 and 8 May 2009, we are celebrating the 50th Anniversary of the European Coordination of social Security.

Fifty years is a beautiful age. It immediately makes clear that we are dealing with one of the first domains the European Union was active in. Indeed, the coordination regulations for migrant workers are indispensable for the free movement of workers, one of the basic principles of the European Union and also one of the most tangible examples of the benefits the European Union brings to its citizens.

But today, we are not only celebrating an instrument that has reached a respectable age; we are also celebrating the rebirth of this instrument. I am very pleased to be able to inform you that, two weeks ago, the European Parliament adopted, by an overwhelming majority, the two new coordination regulations that will guide us into the next decades of European history. In 1998 the European Commission proposed a new framework for a regulation on the coordination of social security schemes. After so many presidencies and discussions in the Council, the European Parliament has now, as one of its last important decisions under it

current mandate, adopted the regulations which will make the new coordination framework applicable as from 2010.

Indeed, the time was ripe to modernise the instrument that is crucial for the functioning of the free movement of workers. In 1958 the free movement of workers was necessary to guarantee the development of a free economic market. When setting up the European Economic Community, no social standards were introduced, as it was believed that these would follow out of further integration and economic growth. To realise this process, the cross-border movement of workers was necessary. All barriers that could limit the development of these markets were to be removed.

The introduction of European citizenship by the Maastricht Treaty was a significant step forward in the transformation from a European Economic Community, with its economic preoccupations, to a political European Union serving the interests of all its citizens.

Free movement is perhaps one of the most important rights under Community law for individuals, an essential element of European citizenship and an important instrument for achieving an efficient labour market and high level of employment.

The European Commission is in this respect very happy that Belgium and Denmark decided very recently to no longer apply the transitional measures for workers from the Member States that joined the Union in 2004 and to give them the opportunity to fully contribute to the labour market.

But the challenges remain substantial. We have to cope with an ageing society and an increasingly flexible labour market in a globalising world. In order to achieve the goals of the Lisbon strategy, the European Council decided that one of its important guidelines was to improve the matching of labour market needs by removing obstacles for workers' mobility across Europe and by enabling a better anticipation of skill needs, labour market shortages

and bottlenecks. A large potential labour force is indeed necessary to cope with all these challenges.

Mobility was and is, therefore, still high on the political agenda of the European Commission. Already a few years have passed since the European Year of Workers' Mobility took place. In 2007, the Commission presented a communication on 'Mobility, an instrument for more and better jobs: the European job mobility action plan'. In this action plan, we pointed out that the coordination regulations are an important instrument for promoting workers' mobility and a successful instrument for achieving this objective. The coordination regulations form one of the key elements for people to exercise their right to free movement. By removing the different national barriers in the field of social security, these instruments guarantee that people moving within the European Union will not suffer any disadvantages in their social security rights. True free movement is therefore not possible without protecting the social security rights of migrant workers and members of their families.

As such, the coordination regulations contribute to a better functioning of the labour market. The growingly flexible labour markets with their new forms of mobility can make the application of these regulations problematic. Patterns of temporary employment do pose challenges to the correct application of these regulations. The European Commission will continue to create the conditions that enable increased mobility. In 2010, it is envisaged that a new communication on mobility will be adopted.

Social security is a fundamental right that should be guaranteed; it is an important safety net in this time of economic crisis. Thanks to the regulations coordinating the various social security schemes of Member States, free movement has indeed become a tangible, integral part of our European Union and identity over the last 50 years. The new regulation framework, becoming applicable in 2010, constitutes a further important step for achieving this fundamental objective of the European Union.

But the process is not finished and challenges may still be faced. We will have to work further on that. For that reason, we are very happy to have organised today's conference, where we will not only look back at 50 years of achievements, but also look at the challenges of the future. Which lessons can be learnt from the past in order to be better armed for the challenges of the future?

During the last 50 years the regulations went through many different reforms, to take stock of developments at national and European level. Several of the presentations today will shed light on the origins and positive achievements during this period. And we cannot overestimate these achievements. In fact, the coordination regulations are an instrument that work well and I am convinced that the application of the new regulation will improve under its new implementing regulation, in particular through closer and more efficient cooperation between the institutions. This will be facilitated by the new method of exchanging data via electronic means. To this end, the Commission has been collaborating very closely with the experts and institutions of the Member States.

But, of course, the new regulation does not constitute the end of the dynamic process. In fact, it is our common responsibility to continue to monitor the developments which may have an impact on the coordination regulations in the future.

Ladies and gentlemen, on 29 April 2009, the European Commission organised in Brussels a meeting of the Director-Generals of social security, as a starting -point for a series of conferences on the new regulations. Several conferences will be organised this year in order to be well prepared for the new framework. Today's conference has another, but not less important, objective. This conference does not aim at looking at the implementation of the new framework; it concerns the coordination system itself, its limits, its problems, its challenges. This conference has one thing in common with all



the other initiatives the European Commission has undertaken this year: it contributes to disseminating information on the coordination system. Correct and understandable information is perhaps our greatest challenge today. Without it, citizens will not make use of their rights. The Commission has taken several initiatives in this respect, from conferences to brochures and a website, and shall continue its efforts.

For all these reasons, I am very happy that you are all here to celebrate together this important anniversary. I am also grateful to notice that the judiciary is well represented. In fact, during the last 50 years, judges have played an enormously important role and are one of the driving forces behind European integration. I would like to congratulate you on this anniversary and I wish you all a successful conference.

# A SHORT HISTORY OF SOCIAL SECURITY COORDINATION



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Simon Roberts is Special Lecturer at the Faculty of Social Sciences, Law and Education at Nottingham University. Simon Roberts wrote his PhD on social security for migrant workers in the European Union and has kept particular interest in the subject ever since.

He is the UK expert in the EC's Observatory on the Free Movement of Workers in the European Union. He was also involved in the CONSENSUS III programme. For the past 4.5 years, Simon Roberts has been the trESS national expert for the United Kingdom. Since 2008, he is also visiting expert at trESS national seminars. Simon Roberts is member of the trESS Think Tank. He was recently an expert assisting the European Commission's European Research Area Group tasked with 'Realising a single labour market for researchers'. He is a member of the Editorial Board of the European Journal of Social Security.

Simon Roberts is the author of numerous publications on migration, free movement and social security. He is co-author of the Migration and Social Security Handbook (*"A rights guide for people entering and leaving the UK"*). Other publications include Roberts, S., (2004) *'A Strong and Legitimate Link'*. The Habitual Residence Test in the United Kingdom in Langer, R., and Sakslin, M., eds. *Coordinating Work-based and Residence-based Social Security*, Faculty of Law, University of Helsinki.

## I. THE COMPETING PRINCIPLES OF TERRITORIALITY AND FREE MOVEMENT

Community coordination of social security is 50 years old. However, the history of social coordination can be traced back beyond the European Economic Community (EEC) to the beginning of the 20th century when the first bilateral social security agreements were negotiated between what are now member countries of the European Union (EU). The need for coordination can be traced back still further — to 1648 when the Treaty of Westphalia brought the Thirty Years War to an end<sup>(1)</sup>. Under the terms of the Treaty Bodin's<sup>(2)</sup> principle of state

sovereignty — that every 'sovereign' state's jurisdiction is unchallengeable within its own frontiers but is limited to those frontiers by the fact that other states are also sovereign within their own territories — was accepted as the foundation of international law and behaviour<sup>(3)</sup>.

This principle<sup>(4)</sup> was to hold sway in Europe for 300 years until, on 9 May 1950, Robert Schuman, drawing on the ideas of Jean Monnet, proposed setting up a common market in coal and steel. The following year Belgium, France, the Federal Republic of Germany, Italy, Luxembourg and the Netherlands signed the Treaty of Paris establishing the European

<sup>(1)</sup> The Treaty or Peace of Westphalia refers to the Treaties of Munster and Osnabruck.

<sup>(2)</sup> Jean Bodin (1576), *Six books of the Commonwealth*.

<sup>(3)</sup> Hartmann, F. (1978), *The relations of nations*. New York, Macmillan; Heater, D. (1990), *Citizenship*. London, Longman.

<sup>(4)</sup> For a discussion of the ambiguities inherent in but also the fruitfulness of the concept of sovereignty, see Ferrera, M. (2005), *The boundaries of welfare*, Oxford University Press.

Coal and Steel Community (ECSC). In 1955, at a meeting in Messina, the foreign ministers of the six countries took the decision to extend European integration to the economy as a whole and, on 25 March 1957, the six signed the Treaties establishing the EEC, which came into effect on 1 January 1958<sup>(5)</sup>. The establishment of the EEC marked a new form of political organisation in Europe as the member countries pooled part of the sovereign power that had rested with the nation state since the Treaty of Westphalia.

One of the fundamental principles of the new European common market is the free movement of labour. Article 48 (now 39)<sup>(6)</sup> of the Treaty of Rome provided for freedom of movement of workers to be secured within the Community through the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. Freedom of movement entails the right, subject to limitations justified on grounds of public policy, security or health, to accept offers of employment; to move freely within the territory of Member States for this purpose; to stay in a Member State to work in accordance with the provisions governing the employment of nationals of that state; and, subject to conditions contained in the implementing regulations, to remain in the territory of a Member State after having been employed there.

Free movement is of course not a recent phenomenon. The complex distribution of ethnic and linguistic groupings across western Europe testifies to the multitude of waves of migration that has layered the European landscape since the early Iron Age<sup>(7)</sup>. More recently throughout the 19th century the industrialising countries of north-western and central Europe attracted workers from neighbouring

countries. The United Kingdom (UK) was the first industrial country to have large-scale recourse to migrant labour from another country, when hundreds of thousands of Irish peasant farmers crossed to Liverpool and Glasgow following the famine of 1845–47 to work as labourers, dockers and steelworkers<sup>(8)</sup>. Later, France drew workers from neighbouring Italy; by 1931 there were 900 000 Italians in France; and the German Empire drew in workers from central Europe<sup>(9)</sup>.

After the Second World War, and in particular during the 1950s, 1960s and early 1970s, western European states resumed their pre-war practice of drawing in labour from other parts of Europe — in particular from the European periphery and Mediterranean basin<sup>(10)</sup>. Immediately after the Second World War France resumed recruiting from the poverty-stricken south of Italy; West Germany drew workers over the border from East Germany and also from southern Italy; and the UK continued to draw workers from Ireland<sup>(11)</sup>. From 1954 the Nordic Common Labour Market provided for Finnish migration to Sweden, while Belgium and the Netherlands, suffering serious unemployment during the 1950s, did not become importers of labour until later in the decade<sup>(12)</sup>.

However, the barriers and obstacles that faced migrant workers after the Second World War were not the rivers and mountains that had confronted early Iron Age women and men but state borders and, under the concept of state sovereignty, nation states may decide who may and who may not cross

<sup>(5)</sup> [http://europa.eu/abc/history/index\\_en.htm](http://europa.eu/abc/history/index_en.htm)

<sup>(6)</sup> The Treaty of Amsterdam changed the numbering of the Treaty articles so that Article 48 became 39 and Article 51 became 42.

<sup>(7)</sup> Rokkan, S. and Urwin, D. (1983), *Economy, territory, and identity*. London, Sage.

<sup>(8)</sup> Berger, J. and Mohr, J. (1989), *A seventh man*. Cambridge, Granta.

<sup>(9)</sup> Salt, J., 'International labour migration: The geographical pattern of demand' in Salt, J. and Clout, H. (1976), *Migration in post war Europe*. Oxford, Oxford University Press; King, R., 'The social and economic geography of labour migration: From guestworkers to immigrants' in Pinder, D. (1990) (ed.), *Western Europe: Challenge and change*. London, Belhaven.

<sup>(10)</sup> Thomas, E-J. (ed.) (1982), *Immigrant workers in Europe: Their legal status*. Paris, Unesco; Castles, S. and Miller, M. (1993), *The age of migration*. London, Macmillan.

<sup>(11)</sup> Clout, H., Blacksell, M., King, R. and Pinder, D. (eds) (1989), *Western Europe: Geographical perspectives*. Harlow, Longman.

<sup>(12)</sup> Smolders, C. (1982), 'The status of immigrant workers in the Netherlands' in Thomas, E-J. (ed.), *Immigrant workers in Europe: Their legal status*. Paris, Unesco; Clout, H., Blacksell, M., King, R. and Pinder, D. (eds) (1989), *Western Europe: Geographical perspectives*. Harlow, Longman.

their territorial borders and the conditions under which they may do so.

European nation states have expanded their remit since the Treaty of Westphalia and from the late 19th century onwards have gradually included the provision of welfare to their citizens as part of their legitimate and legitimising role. However, welfare states have not all evolved in the same way but have taken on a variety of forms to address the risks associated with market economies<sup>(13)</sup>. Several well-known typologies have been constructed around the extent of the state's role in providing welfare, including Titmuss' distinction between residual and institutional welfare states<sup>(14)</sup> and Esping-Andersen's model of welfare based upon the concepts of decommodification, welfare mix and stratification<sup>(15)</sup>. The welfare states of the 27 EU Member States (EU-27) today are hybrids and contain a mix of these principles and elements in different measures.

Whatever the mix, welfare entitlements have traditionally been seen as emanating from within nation states and bounded by national frontiers, and the conditions that must now be met by cross-border migrants include the terms of access to the benefits and services of the welfare state<sup>(16)</sup>.

Justification for placing territorial limitations on entitlement to the benefits of the welfare state is

that the solidarity implicit in a common tax and public service system is necessarily bounded and those boundaries are coterminous with the boundaries of the nation state. According to Coughlan it is the 'solidarities implicit in a common tax and public service system... underpinned by the democratic solidarities of the national community' that bind the nation state together. However, 'the solidarities that exist within the nation state do not, or rarely, exist cross-nationally or between states. It is this fact above all that ties the redistributive welfare state irrevocably to the national level'<sup>(17)</sup>.

The principle of territorial restriction on access to welfare is as old as the principle of welfare itself, and has not always been aligned with the boundaries of the nation state. For example, in England the Poor Law and Vagrancy Laws of the early 17th century sought to control migration within England from the countryside to the towns. These laws empowered magistrates to deport back to from whence they came anyone coming to the parish 'to inhabit a tenement with a yearly value of less than £10 upon receiving a complaint about the presence of such a person'. Parish officers 'kept a look-out for those newly arrived in the parish who might apply to it for poor relief'<sup>(18)</sup>. These principles were transposed into early immigration laws which required aliens — who were now defined as people from another country rather than from the next village — to support themselves.

Today's welfare states use a mix of immigration rules and benefit entitlement conditions to control access to their benefits<sup>(19)</sup>. The former may allow entry to the country on condition that (certain) benefits are not claimed, while the latter typically include nationality, contribution and residence criteria.

<sup>(13)</sup> Esping-Andersen, G. (1990), *The three worlds of welfare capitalism*, Cambridge, Polity Press; Baldwin, P. (1990), *The politics of social solidarity: Class bases of the European welfare states 1875-1975*, Cambridge University Press; Ferrera, M. (1996), 'The southern model of welfare in social Europe', *Journal of European Social Policy*, 1; Arts, W. and Gellissen, J. (2002), 'Three worlds of welfare capitalism or more?', *Journal of European Social Policy*, 12(2); Hantrais, L. (2004), *Family policy matters: Responding to family change in Europe*, Bristol: Policy Press.

<sup>(14)</sup> Titmuss, R. (1974), *Social policy: An introduction*. London, Unwin Hyman.

<sup>(15)</sup> Esping-Andersen, G. (1990), *The three worlds of welfare capitalism*. Cambridge, Polity Press.

<sup>(16)</sup> Roberts, S. and Bolderson, H. (1993), 'How closed are welfare states? Migration, social security and national frontiers: Social security provisions for non-EU nationals in six EU countries'. Paper presented at the Annual Conference of the International Sociological Association, September, Oxford; Roberts, S. and Bolderson, H. (1999), 'Inside out: A cross national study of migrants' disentanglements to social security benefits' in J. Clasen (ed.), *Comparative social policy*, Blackwell; Roberts, S. (2001), 'Crossing frontiers: Migration and social security', *Ethics, poverty, inequality and reform in social security*, Ashgate Publishing.

<sup>(17)</sup> Coughlan, A. (1992), 'The limits of solidarity: Social policy, national and international'. Paper given at 'Fifty years after Beveridge'. Conference at University of York, 27–30 September, Vol. 2, York, SPRU.

<sup>(18)</sup> Gordon, P. and Newnham, A. (1985), *Passport to benefits?* London, CPAG.

<sup>(19)</sup> Roberts, S. and Bolderson, H. (1999), 'Inside out: A cross national study of migrants' disentanglements to social security benefits' in J. Clasen (ed.), *Comparative social policy*, Blackwell.

Benefit entitlement conditions differ between countries in the extent to which they build in to their benefits the need to have fulfilled contribution conditions and/or requirements about nationality, length of residence in the country or the condition that a person should be present when claiming a benefit<sup>(20)</sup>. Entitlement conditions may therefore hinder those who are new to a country or — if there are nationality conditions attached to the benefits themselves — even those with long-term residence status.

Different types of benefits are typically controlled by different types of criteria. Contributory benefits do not contain nationality or residence conditions when consumed domestically. In order to meet the contribution conditions attached to all contributory benefits it is necessary, however, to have worked and been insured in the host state — which is where immigration rules may impact on access to contributory benefits.

The main obstacles for migrant workers as far as contributory benefits are concerned lie in the requirement for a minimum number of contributions to have been paid in order to qualify for a benefit and that contributory benefits, once earned, may not be exportable or may have conditions attached to their export. Although there is no discrimination by nationality when contributory benefits are claimed domestically, there is, however, discrimination by nationality when it comes to exporting them<sup>(21)</sup>. Some countries do not allow non-nationals to claim some of their contributory benefits from abroad, while others pay higher amounts to their own nationals who are living abroad.

Many countries attach residence conditions to tax-financed benefits. It is possible to identify different types of residence conditions and several concepts

<sup>(20)</sup> Roberts, S. and Bolderson, H. (1993), 'How closed are welfare states? Migration, social security and national frontiers: Social security provisions for non-EU nationals in six EU countries'. Paper presented at the Annual Conference of the International Sociological Association, September, Oxford.

<sup>(21)</sup> Bolderson, H. and Gains, F. (1993), *Crossing national frontiers: An examination of the arrangements for exporting social security benefits in twelve OECD countries*. HMSO.

of 'residence' may operate<sup>(22)</sup>. Eligibility to non-contributory benefits may require a past period of residence or a social link between the paying state and the recipient<sup>(23)</sup>. The amount of benefit to which a person is entitled may depend on the number of years he or she has been resident in a country. Having established an entitlement a person may not be able to take a benefit abroad or claim the benefit from abroad. The requirement to demonstrate a social link is usually at its strongest with regard to assistance benefits and presence is always a condition in European assistance schemes. It should be noted that there is overlap between these categories. For instance, a prior period of residence may be a persuasive criterion in considering whether someone is socially resident. The residence conditions may also apply to nationals who return home from another country, as well as to non-nationals<sup>(24)</sup>.

## II. ORIGINS OF COORDINATION IN THE HISTORY OF BILATERAL AGREEMENTS

Disentitlement to social security consequent upon international migration has been recognised as a problem both for social security schemes and migrant workers since the introduction of the first insurance schemes in Europe in the latter part of the 19th century<sup>(25)</sup>. In response, an increasing number

<sup>(22)</sup> Roberts, S. and Bolderson, H. (1999), 'Inside out: A cross national study of migrants' disentanglements to social security benefits' in J. Clasen (ed.), *Comparative social policy*, Blackwell; Roberts, S. (2001), 'Crossing frontiers: Migration and social security', *Ethics, poverty, inequality and reform in social security*, Ashgate Publishing.

<sup>(23)</sup> Roberts, S. (2004), 'A strong and legitimate link — The habitual residence test in the United Kingdom. Co-ordinating work-based and residence-based social security', Faculty of Law, University of Helsinki; Cousins, M. (2007), 'The "right to reside" and social security entitlements', *Journal of Social Welfare and Family Law*, 29:1.

<sup>(24)</sup> Bolderson, H. and Roberts, S. (1997), 'Social security across national frontiers', *Social Security and Population Movement. Journal of International and Comparative Welfare*, special edition, 'New global development', Vol. XIII.

<sup>(25)</sup> Two excellent and seminal books on the history of social security coordination were published within a year or so of each other: Watson, P. (1980), *Social security law of the European Communities*. London, Mansell; and Holloway, J. (1981), *Social policy harmonisation in the European Community*. Farnborough, Gower. This section and the next draw on the thorough and detailed research undertaken by these authors. However, a paper can only skate across the surface of such a time span and those who wish to know the detail of the development of social security coordination (and enjoy the authors' analyses) would not regret the effort spent tracking down both of these books.

of European countries have negotiated bilateral social security agreements to ameliorate these problems<sup>(26)</sup>. While the history of international social security treaties goes back to the beginning of the 20th century, international treaties affecting the rights of foreigners have a much longer history. Most countries in the world are signatories to treaties affecting the status of foreigners in one way or another<sup>(27)</sup>. The history of these treaties can be traced back at least as far as the 16th century. Early treaties, known as ‘capitulations’, established separate legal regimes for foreign nationals. During the 17th, 18th and 19th centuries, bilateral treaties of friendship, commerce and establishment were set up and designed to protect the interests of individual traders<sup>(28)</sup>.

The earliest attempts made to coordinate social security schemes across national frontiers concern compensation for accidents at work. In 1904 France and Italy signed what is generally regarded as being the first international social security treaty, although an agreement of 1882 and a convention of 1897 between France and Belgium can perhaps be thought of as a precursor of bilateral social security agreements in that it made arrangements for migrant workers who moved between the two countries to transfer their savings with them. Savings can be viewed in this context as insurance. Taking this view, the transference of savings across national frontiers may be seen as the forerunner of the principle of aggregation of periods of insurance that forms one of the pillars of the majority of subsequent bilateral social security agreements<sup>(29)</sup>.

The 1904 Treaty between France and Italy also provided for transfer of savings between the two countries. In addition, the Treaty introduced the principle

of equal treatment for the nationals of each country in compensation schemes for accidents at work that happen while in the other country. For instance, Italians who suffered an industrial accident in France were covered by the French industrial accident compensation scheme on an equal basis with French nationals and vice versa. This represented a departure from the former principle of setting up completely separate legal regimes for aliens; and it broke through the territorial restrictions of the national social security systems of the two countries to allow people who had suffered an industrial accident to export their compensation to their home country<sup>(30)</sup>.

The Treaty had further ambitions in that it also envisaged the establishment of arrangements between the two countries for pensions and unemployment benefits<sup>(31)</sup>. These clauses were premature, however, because, although Italy had established an embryonic pension scheme through laws passed in 1898 and 1901, France had not, and neither country had by then established an unemployment insurance scheme<sup>(32)</sup>.

It is possible to see in this Treaty a wider political context that is often present in international social security agreements<sup>(33)</sup>. It was concerned to protect and further perceived national interests. Specifically, it was designed to solve a number of problems that had arisen not only with social security for migrant workers but also with the different levels of social costs in the two countries. France was concerned at the level of imports of cheaper Italian goods and had tried unsuccessfully for a number of years to encourage Italy to introduce labour conditions similar to those in France, claiming that Italy’s ability to undercut French goods was due to poor

<sup>(26)</sup> Roberts, S. (2002), ‘Migration and social security: Parochialism in the global village’ in Sigg, R. and Behrendt, C. (eds) (2002), *Social security in the global village*. International Social Security Series, Vol. 8, Transaction Publishers, New Brunswick.

<sup>(27)</sup> Goodwin-Gill, G. (1985), ‘Immigration, nationality and the standards of international law’ in Dummett, A. (ed.), *Towards a just immigration policy*. London, Cobden Trust.

<sup>(28)</sup> *Ibid.*

<sup>(29)</sup> Watson, P. (1980), *Social security law of the European Communities*. London, Mansell; Nagel, S. and Thalamy, C. (1994), *Le droit international de la sécurité sociale*. Paris, Presses Universitaires de France.

<sup>(30)</sup> Watson, P. (1980), *Social security law of the European Communities*. London, Mansell; Holloway, J. (1981), *Social policy harmonisation in the European Community*. Farnborough, Gower.

<sup>(31)</sup> Watson, P. (1980), *Social security law of the European Communities*. London, Mansell.

<sup>(32)</sup> *Ibid.*

<sup>(33)</sup> Watson, P. (1980), *Social security law of the European Communities*. London, Mansell; Holloway, J. (1981), *Social policy harmonisation in the European Community*. Farnborough, Gower.



working conditions with low investment in health and safety measures<sup>(34)</sup>. As described above, France had recruited immigrants across the border from Italy since the latter part of the 19th century. The situation, apart from causing France economic difficulties, was leading to hostility towards Italians working in France. Italy, for its part, was concerned to ensure that Italian workers were accepted in France and treated equally with French nationals<sup>(35)</sup>. These issues would reappear during the negotiations of the Treaties of Paris and Rome.

The 1904 Treaty between Italy and France became a model for subsequent bilateral social security agreements<sup>(36)</sup>. In 1912 Germany and Italy signed an agreement that provided for equality of treatment between the two countries, again in compensation for accidents at work for factory and agricultural workers<sup>(37)</sup>. The principle adopted in this Treaty was once again that of the equal treatment of each country's nationals on the territory of the other.

In 1919 another Franco-Italian Treaty went further than the earlier arrangements for transferring savings to introduce the principle of aggregation of periods of insurance proper: periods of insurance paid in one country were counted towards the satisfaction of conditions of entitlement to benefit in the other<sup>(38)</sup>. The principle of aggregating periods of insurance works by allowing a migrant to add together periods of insurance spent in each country to qualify for a benefit. A period of insurance might be a period of paid contributions, or in residence-based schemes a period of residence, or the two may be added together. The principle of aggregation has been further extended, in some cases, to

add together periods of residence in two countries in order to qualify for benefits that require the satisfaction of a prior period of residence condition.

What is significant about these early treaties is that they:

- were reciprocal;
- were confined to nationals and the territories of the two countries concerned;
- covered only workers;
- covered specific benefits.

These principles, either in total or in part, inform all later agreements<sup>(39)</sup>.

While several countries negotiated agreements relating to equality of treatment for work accident benefits after the First World War, it was at first the norm for other aspects of social security to be included in general labour conventions (Watson, 1980)<sup>(40)</sup>. However, between the wars the scope of social security agreements, in terms of both the people and the benefits covered, gradually widened towards comprehensive agreements covering all benefits<sup>(41)</sup>. In addition to equality of treatment and aggregation of periods of insurance the principle of pro-ratarisation for long-term benefits was introduced. Often the formulae and calculations involved with pro-ratarisation are complicated, but the principle is simple — that each of the countries pays a proportion of the pension determined by the period of insurance spent in each. Aggregation is concerned with adding together periods of insurance, residence and presence in order to satisfy the qualifications for benefit paid by one or the other of the countries. The principle of pro-ratarisation is applied to long-term benefits to distribute the costs in accordance with the perceived responsibility for meeting them.

<sup>(34)</sup> Ibid.

<sup>(35)</sup> Watson, P. (1980), *Social security law of the European Communities*. London, Mansell; Nagel, S. and Thalamy, C. (1994), *Le droit international de la securite sociale*. Paris, Presses Universitaires de France.

<sup>(36)</sup> Watson, P. (1980), *Social security law of the European Communities*. London, Mansell; Holloway, J. (1981), *Social policy harmonisation in the European Community*. Farnborough, Gower; Nagel, S. and Thalamy, C. (1994), *Le droit international de la securite sociale*. Paris, Presses Universitaires de France.

<sup>(37)</sup> Watson, P. (1980), *Social security law of the European Communities*. London, Mansell.

<sup>(38)</sup> Holloway, J. (1981), *Social policy harmonisation in the European Community*. Farnborough, Gower.

<sup>(39)</sup> Watson, P. (1980), *Social security law of the European Communities*. London, Mansell; Holloway, J. (1981), *Social policy harmonisation in the European Community*. Farnborough, Gower; Nagel, S. and Thalamy, C. (1994), *Le droit international de la securite sociale*. Paris, Presses Universitaires de France.

<sup>(40)</sup> Watson, P. (1980), *Social security law of the European Communities*. London, Mansell.

<sup>(41)</sup> Ibid.

After the Second World War there was an expansion in international agreements affecting migrants in general and social security in particular. Post-war treaties have promoted the movement of groups of migrant workers, and have focused on specific issues, such as recruitment, supervision of contracts of employment, facilitation of departure and reception, equal pay with nationals, family reunion, accidents at work, and social security<sup>(42)</sup>.

Most of the expansion of bilateral social security agreements that has taken place since the Second World War has happened between European countries in response to the large-scale intra-European labour migration that took place during the 1950s, 1960s and early 1970s. In the 20 years between 1946 and 1966, 401 bilateral agreements concerning social security were signed worldwide; in 94 % of these treaties both parties were European<sup>(43)</sup>. These post-war treaties were more sophisticated than their pre-war counterparts<sup>(44)</sup>, but nevertheless were founded on the principles of removing direct discrimination through the principle of equal treatment and indirect discrimination through aggregation of insurance and the export of benefits, and the apportionment of responsibility through the determination of which country should pay what proportion of the benefit.

### III. ORIGINS OF COORDINATION IN THE HISTORY OF MULTILATERAL AGREEMENTS

The growth in bilateral social security agreements and treaties to protect migrant workers was stimulated by the International Labour Organisation (ILO)<sup>(45)</sup>. The ILO was established in 1919 after the First World War with a remit to pursue 'a vision based on the premise that universal, lasting peace

can be established only if it is based upon decent treatment of working people'<sup>(46)</sup>. The ILO works by drawing up and monitoring international standards through conventions and recommendations and plays an important role in assisting member countries to design and implement social security systems and bilateral social security agreements.

In its first ever session in 1919, the ILO drew up a 'Reciprocity of treatment recommendation'<sup>(47)</sup> and six years later, at its seventh session in 1925, Convention No 19 concerning Equality of Treatment for National and Foreign Workers as regards Workmen's Compensation for Accidents, which provides for equal treatment without any conditions of residence in respect of workmen's compensation for accidents at work that occur in another ratifying member country<sup>(48)</sup>.

Ten years later, in 1935, the ILO drew up the Maintenance of Migrants' Pension Rights Convention (No 48), which provided for equal treatment and the maintenance of rights in the course of acquisition and of rights already acquired to compulsory invalidity, old-age and widows' and orphans' insurance through the aggregation of insurance periods of persons who have been affiliated to insurance institutions of two or more member countries irrespective of their nationality; and benefits which have already been acquired to be paid if they are:

- a. resident in the territory of a member, irrespective of their nationality;
- b. nationals of a member, irrespective of their place of residence.

The convention also requires the authorities and insurance institutions of each member to give assistance to those of other members,

<sup>(42)</sup> Dummett, A. (1986), 'Nationality and immigration status' in Dummett, A. (ed.), *Towards a just immigration policy*. London, Cobden Trust.

<sup>(43)</sup> Holloway, J. (1981), *Social policy harmonisation in the European Community*. Farnborough, Gower.

<sup>(44)</sup> Ibid.

<sup>(45)</sup> Ibid.

<sup>(46)</sup> <http://www.ilo.org>

<sup>(47)</sup> International Labour Organisation (1996), *International Labour Conventions and Recommendations 1919-1951*. International Labour Office, Geneva.

<sup>(48)</sup> Ibid.



*'to the same extent as if they were applying their own laws and regulations relating to social insurance, and more particularly shall, at the request of an institution of any Member, carry out the investigations and medical examinations necessary to determine whether the persons in receipt of benefits for which the latter institution is liable satisfy the conditions for entitlement to such benefits'* <sup>(49)</sup>.

Article 20 set up a commission consisting of one delegate for each member together with three persons appointed respectively by the government, employers' and workers' representatives. The commission would regulate its own procedure and, at the request of one or more members, would make recommendations on the application of the convention <sup>(50)</sup>.

Soon after the end of the Second World War, in November 1949, the five members of the Brussels Pact — Belgium, France, Luxembourg, the Netherlands and the UK — signed two multilateral social security agreements in Paris. The first was concerned with social and medical assistance, while the second aimed to link the various agreements that hitherto had existed bilaterally between the member countries. Belgium, France and Italy, and France, Italy and the Saar concluded similar agreements in 1951 and 1952 respectively <sup>(51)</sup>. However, the Council of Europe's ambitions to extend the Brussels Pact agreement to all its members was thwarted by the lack of bilateral agreements between many of the member countries <sup>(52)</sup>. Pending the establishment of such a network, the Council concluded two interim agreements in December 1953 — the first in respect of old age, disability and death, the second covering the other branches of social security. The ILO also concluded a number of treaties for specific groups of workers such as

Rhine boatmen, international transport workers, refugees and stateless persons <sup>(53)</sup>.

#### IV. THE TREATY OF ROME

The Treaty of Rome, which established the EEC, became effective on 1 January 1958. The Treaty provides for free movement of goods, services, capital and labour. Free movement of labour is intended to match supply to demand. From a political perspective, Italy, with a persistent unemployment problem, particularly in the south, was concerned during negotiations to ensure that unemployed workers within the EEC were given priority over recruits from outside <sup>(54)</sup>. Under the Treaty, migration was reconceptualised as free movement <sup>(55)</sup>. The first transitional measures were adopted in 1961 with Regulation No 15 which provided for gradually lifting immigration controls that provided obstacles to free movement and protecting the position of workers who were already present in the territory of another Member State. The second measure, Regulation No 38/64/EEC <sup>(56)</sup>, which was adopted three years later, strengthened the rights of migrant workers who were nationals of one Member State and were present in another, while at the end of the transitional period, Regulation (EEC) No 1612/68 <sup>(57)</sup> set out the rules on free movement of workers complemented by the procedural requirements in Directive 68/360/EEC <sup>(58)</sup>. Regulation (EEC) No 1612/68 has been amended and Directive 68/360/EEC repealed by Directive 2004/38/EC <sup>(59)</sup>.

<sup>(49)</sup> Ibid.

<sup>(50)</sup> The initial ratifications of the convention were: Hungary and Spain in 1937 and the Netherlands and Poland the following year in 1938. (Italy ratified, following the Second World War, in 1952.) Convention No 48 was revised by Convention No 157 and is no longer open for ratification.

<sup>(51)</sup> Holloway, J. (1981), *Social policy harmonisation in the European Community*. Farnborough, Gower.

<sup>(52)</sup> Ibid.

<sup>(53)</sup> Ibid.

<sup>(54)</sup> Hantrais, L. (2007), *Social policy in the European Union*, third edition, Basingstoke, Macmillan; and see Holloway, J. (1981), *Social policy harmonisation in the European Community*, Farnborough, Gower, for an extended discussion of the role of Italy in the negotiations of free movement of labour.

<sup>(55)</sup> Guild, E. (2006), 'More or less migrants: The legal regulation of migration and age in Europe'. Presented to 'Pensioners on the move' conference, National University Singapore, 5-7 January 2006.

<sup>(56)</sup> Regulation No 38/64/EEC (OJ L 62, 17.4.1964).

<sup>(57)</sup> Regulation (EEC) No 1612/68 (OJ L 257, 19.10.1968).

<sup>(58)</sup> Guild, E. (2006), 'More or less migrants: The legal regulation of migration and age in Europe'. Presented to 'Pensioners on the move' conference, National University Singapore, 5-7 January 2006.

<sup>(59)</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to reside and move freely within the territory of the Member States.

The drafters of the Treaty of Rome recognised that the different social security systems and the restrictions on benefit entitlement that they contained could present an obstacle and deterrent to workers moving between Member States and be a barrier to the right to free movement enshrined in the Treaty. They considered two approaches to solving the problems of social security. One was to harmonise the different social security systems of the member countries. The other was to coordinate them.

There are two types of harmonisation<sup>(60)</sup>. One, sometimes referred to as ‘approximation’, seeks to introduce a common legal system in a certain field. This type of harmonisation constrains future legal developments of the national system. The other type of harmonisation is achieved through the setting of minimum standards. Member States may develop their national system as they choose as long as they do not fall below the minimum standard<sup>(61)</sup>.

Harmonisation of the social security systems was included in the Treaty of Paris as a compromise between France and the other member countries over setting common wage and social charges throughout the ECSC<sup>(62)</sup>. France had reprised the concern first expressed at the turn of the century when negotiating the first bilateral agreement with Italy to argue, during negotiations setting up the ECSC, that its production costs were higher than other member countries’ as the result of favourable conditions regarding equal pay for men and women, holidays and generally higher wage levels. This, France argued, put it at a disadvantage in a common market. The other negotiating partners considered that harmonising wages and social charges was ‘too advanced organisationally and impractical’<sup>(63)</sup>. As a result the Treaty of Paris provided

that wages remained within the jurisdiction of the Member States, although the High Authority could intervene, under certain conditions set out in the Treaty, in the event of abnormally low wages and wage reductions<sup>(64)</sup>.

When the Treaty of Rome was being negotiated, France again argued for the inclusion in the Treaty of provisions on social harmonisation<sup>(65)</sup>. However, with respect to social security the drafters of the Treaty of Rome adopted the more cautious and politically more acceptable method of coordination.

Coordination adjusts social security systems in relation to each other to protect the entitlements of migrants while leaving the national schemes intact in other respects<sup>(66)</sup>.

Article 51 (now 42) of the Treaty provides that:

*‘The Council shall, acting in accordance with the procedure referred to in Article 251, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, it shall make arrangements to secure for migrant workers and their dependants:*

- a. aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;*
- b. payment of benefits to persons resident in the territories of Member States.’*

However, the member countries guarded their national sovereignty over social security and Article 51 also provided that the Council shall act unanimously throughout the procedure referred to in Article 251.

<sup>(60)</sup> Holloway, J. (1981), *Social policy harmonisation in the European Community*. Farnborough, Gower; Watson, P. (1980), *Social security law of the European Communities*. London, Mansell.

<sup>(61)</sup> *Ibid.*

<sup>(62)</sup> Holloway, J. (1981), *Social policy harmonisation in the European Community*. Farnborough, Gower; Watson, P. (1980), *Social security law of the European Communities*. London, Mansell.

<sup>(63)</sup> Watson, P. (1980), *Social security law of the European Communities*. London, Mansell.

<sup>(64)</sup> Watson, P. (1980), *Social security law of the European Communities*. London, Mansell; Hantrais, L. (2007), *Social policy in the European Union*, third edition, Basingstoke, Macmillan.

<sup>(65)</sup> Holloway, J. (1981), *Social policy harmonisation in the European Community*. Farnborough, Gower.

<sup>(66)</sup> Pennings, F. (2003), *Introduction to European social security law*, fourth edition, Antwerp, Intersentia.

The first measures adopted to coordinate social security were Regulation No 3 in 1958<sup>(67)</sup> and its implementing regulation, Regulation No 4<sup>(68)</sup>, which became effective on 1 January 1959. The origins of Regulations Nos 3 and 4 pre-date the Treaty of Rome and are to be found in the Treaty of Paris. One of the aims of this Treaty was to provide for the free movement of coal workers. The problems of social security were seen as an obstacle to this aim<sup>(69)</sup>. Article 69(4) of the ECSC Treaty provided:

*'They [the Member States] shall prohibit any discrimination in remuneration and working conditions between nationals and immigrant workers, without prejudice to special measures concerning frontier workers; in particular they shall endeavour to settle among themselves any matters remaining to be dealt with in order to ensure that social security arrangements do not inhibit labour mobility'*<sup>(70)</sup>.

Under this provision the High Authority with the assistance of the ILO prepared a European Convention on Social Security. The convention was signed in Rome in 1957 but was not ratified because the Treaty establishing the EEC intervened<sup>(71)</sup>.

With only slight modification the text of the convention was adopted as Regulation No 3 by the Council on 25 September 1958. The administrative arrangements prepared for the convention were adopted as Regulation No 4 on 3 December 1958. The system was completed by three regulations providing for frontier workers, seasonal workers and seamen who fell outside the provisions of Regulation No 3<sup>(72)</sup>.

<sup>(67)</sup> Regulation No 3 (OJ 30, 16.12.1958).

<sup>(68)</sup> Regulation No 4 (OJ 30, 16.12.1958).

<sup>(69)</sup> Holloway, J. (1981), *Social policy harmonisation in the European Community*. Farnborough, Gower.

<sup>(70)</sup> Holloway, J. (1981), *Social policy harmonisation in the European Community*. Farnborough, Gower; Watson, P. (1980), *Social security law of the European Communities*. London, Mansell.

<sup>(71)</sup> Watson, P. (1980), *Social security law of the European Communities*. London, Mansell; Holloway, J. (1981), *Social policy harmonisation in the European Community*. Farnborough, Gower.

<sup>(72)</sup> Holloway, J. (1981), *Social policy harmonisation in the European Community*. Farnborough, Gower.

Regulation No 3 achieved coordination through the principles developed in bilateral agreements described above: namely, equal treatment: discrimination on grounds of nationality is prohibited to guarantee that a person residing on the territory of a Member State is subject to the same obligations and benefits from the same rights as the citizens of that Member State; rules are laid down to determine which member country's legislation the person is subject to; rights in the course of acquisition are protected through aggregation of periods of insurance, residence or employment spent in each of the respective countries to establish a right in another Member State; and rights already acquired are protected by allowing certain benefits to be exported. However, Regulation No 3 took the application of these principles further than any previous international social security agreement<sup>(73)</sup>. Advances were made in the removal of residence restrictions. Regulation No 3 provided, for the first time, a general rule — rather than an exception — for the export of certain benefits<sup>(74)</sup>. Regulations 3 and No 4 also required the social security institutions of the member countries to lend each other their good offices in the administration of the regulations underpinned by the creation of an Administrative Commission comprised of a representative from each Member State with a secretariat provided by the Commission<sup>(75)</sup>.

What distinguished Regulation No 3 from all previous bilateral and multilateral agreements is that it operated within the institutional framework of the European Economic Community. In 1959, when Regulation No 3 became effective, legislative power belonged with the Council of Ministers composed of representatives of Member State governments. The Council can only make decisions on the initiative of the Commission.

<sup>(73)</sup> Ibid.

<sup>(74)</sup> Holloway, J. (1981), *Social policy harmonisation in the European Community*. Farnborough, Gower; Watson, P. (1980), *Social security law of the European Communities*. London, Mansell.

<sup>(75)</sup> Ibid.

The Court of Justice of the European Union (CJ) has the task of ensuring the uniform interpretation of EU law in all Member States<sup>(76)</sup>. The CJ does not directly rule on individual cases in the field of social security. Its judgments are limited to the interpretation of the relevant Community provisions in the light of a particular case. This interpretation is binding, however, on all parties involved<sup>(77)</sup>. The CJ has been fundamental in defining and extending the scope of social security coordination from the very beginning. Since 1959 the CJ has delivered over 600 judgments on the interpretation of the coordination regulations<sup>(78)</sup>.

## V. EARLY EVOLUTION

It soon became apparent that these complex new regulations contained a number of faults and omissions and the Commission started work to revise, extend and simplify Regulation No 3 in 1963, just five years after it was introduced<sup>(79)</sup>. Three years later the Commission submitted a proposal to the Council for a new regulation. After long negotiations — which one participant described as *'Très, très, très, très, très dures'*<sup>(80)</sup> and several redrafts, Regulation (EEC) No 1408/71<sup>(81)</sup> emerged from the Council on 14 June 1971 followed by the new implementing regulation, Regulation (EEC) No 574/72<sup>(82)</sup>, in March 1972. The new system became effective on 1 October 1972<sup>(83)</sup>.

Regulation (EEC) No 1408/71 is a more sophisticated development of Regulation No 3 that took in to account the gaps and technical problems

that had become evident in the earlier regulation, some of which had been identified and others created by the CJ<sup>(84)</sup>.

Although many of the Commission's original proposals had been watered down during negotiations in the Council, further progress was made to remove residence restrictions<sup>(85)</sup>. The material scope was extended to family benefits as well as the family allowances covered under Regulation No 3 and further restrictions were removed from sickness benefits and healthcare including the number of situations in which authorisation could be refused<sup>(86)</sup>. The new regulation also set up the Advisory Committee on Social Security for Migrant Workers while retaining the role of the Administrative Commission<sup>(87)</sup>.

Like Regulation No 3 before it, Regulation (EEC) No 1408/71 achieves coordination through the four main methods that had evolved during the establishment of bilateral agreements across Europe during the first half of the 20th century described above: discrimination on grounds of nationality is prohibited; rules are laid down to determine which member country's legislation the person is subject to; rights in the course of acquisition are protected through aggregation of periods of insurance and/or residence spent in each of the respective countries; and rights already acquired are protected by allowing certain benefits to be exported.

Export/portability of benefits is provided by Article 10(1) of Regulation (EEC) No 1408/71, which states:

*'Save as otherwise provided by this regulation, invalidity, old age or survivors cash benefits, pensions for accidents at work or occupational diseases and death grants acquired under the legislation of one or more*

<sup>(76)</sup> Pennings, F. (2003), Introduction to European social security law, fourth edition Intersentia, Antwerp.

<sup>(77)</sup> European Commission: Directorate-General for Employment, Social Affairs and Equal Opportunities (<http://ec.europa.eu/social/>).

<sup>(78)</sup> Ibid.

<sup>(79)</sup> Holloway, J. (1981), Social policy harmonisation in the European Community. Farnborough, Gower; Watson, P. (1980), Social security law of the European Communities. London, Mansell.

<sup>(80)</sup> Holloway, J. (1981), Social policy harmonisation in the European Community. Farnborough, Gower.

<sup>(81)</sup> Regulation (EEC) No 1408/71 (OJ L 149, 5.7.1971).

<sup>(82)</sup> Regulation (EEC) No 574/72 (OJ L 74, 27.3.1972).

<sup>(83)</sup> Holloway, J. (1981), Social policy harmonisation in the European Community. Farnborough, Gower.

<sup>(84)</sup> Ibid.

<sup>(85)</sup> Holloway, J. (1981), Social policy harmonisation in the European Community. Farnborough, Gower; Watson, P. (1980), Social security law of the European Communities. London, Mansell.

<sup>(86)</sup> Holloway, J. (1981), Social policy harmonisation in the European Community. Farnborough, Gower.

<sup>(87)</sup> Ibid.

*Member States shall not be subject to any reduction, modification, suspension or withdrawal or confiscation by reason of the fact that the recipient resides in the territory of a Member State other than that in which the institution responsible for payment is situated.'*

The principle of portability is variable across benefits<sup>(88)</sup>. The principle of territoriality continues to operate in whole or in part with regard to shorter-term benefits. Sickness and maternity benefits may be exported under certain limited conditions, while unemployment benefits are exportable for a maximum of three months only. Family benefits are payable where members of the family live in a different country to that which the 'worker' is in. Healthcare is, in general, provided by the country of residence, and costs are reimbursed by the competent country.

Regulation (EEC) No 1408/71 applies to 'all legislation concerning the branches of social security enumerated by ILO Convention No 102: (a) sickness and maternity benefits; (b) invalidity benefits, including those intended for the maintenance or improvement of earning capacity; (c) old-age benefits; (d) survivor's benefits; (e) benefits in respect of accidents at work and occupational diseases; (f) death grants, (g) unemployment benefits; (h) family benefits' (Article 4(1)).

Its scope did not, however, cover social assistance, benefit schemes for victims of war or its consequences, or special schemes for civil servants and persons treated as such (Article 4(4)). The material scope of the regulation and in particular the question of what is social security and what is social assistance has engaged citizens, the Commission, Council, Parliament and the Member States in an ongoing chain of case-law that will be discussed in the following section.

<sup>(88)</sup> Cornelissen, R. (1996), 'The principle of territoriality and the Community regulations on social security (Regulations 1408/71 and 574/72)', *Common Market Law Review* 33, p. 439.

## VI. THE CHALLENGE OF A DYNAMIC ENVIRONMENT

The environment in which Regulation (EEC) No 1408/71 operates has changed in several ways since the regulation was designed and negotiated during the 1960s.

In 1958 and 1971 there were the six founder members of the EEC: Belgium, France, West Germany, Italy, Luxembourg and the Netherlands. Today there are 27 members of the EU. With the (partial) exception of the Netherlands the original six members shared a similar social security system based on the male breadwinner model with derived rights for wives and children. The accession of Denmark, Finland, Ireland, Sweden and the UK introduced a different philosophy — residence-based systems financed from general taxation<sup>(89)</sup>.

At the same time the nature of migration was changing. During the 1950s, 1960s and early 1970s the focus was mainly on male, blue-collar workers who took up permanent full-time work and returned to their country of origin at the end of their working life<sup>(90)</sup>. Today there is much greater diversity with a range of different types of migrants including managers, specialists and many more women with some workers moving countries frequently<sup>(91)</sup>.

And since the Treaty of Amsterdam, it is not only workers who move. As described above, free movement was originally introduced as a fundamental economic freedom (European Economic Community) and was limited to workers and their families. Free movement is now a fundamental freedom of European citizenship<sup>(92)</sup>.

<sup>(89)</sup> Sakslin, M (2000), 'The concept of residence and social security: Reflections on Finnish and Swedish and Community legislation'. *European Journal of Migration and Law*, Kluwer Law International; Langer, R. and Sakslin, M. (eds) (2004), *Co-ordinating work-based and residence-based social security*, University of Helsinki.

<sup>(90)</sup> Jorens, Y., Lhernould, J-P., Fillon, J-C., Roberts, S. and Spiegel, B. (2008), 'Towards a new framework for applicable legislation'. *Think Tank Report, Training and reporting on European social security*. European Commission/Ghent University.

<sup>(91)</sup> *Ibid.*

<sup>(92)</sup> White, R. (2005), 'The citizen's right to free movement', *European Business Law Review*.



The changes to migration in part reflect the changing patterns of working life: female participation rates have increased, there are more part-time and temporary jobs; people make increasingly frequent transitions from one activity to another, undertake retraining and have diverse working biographies.

Changes in the patterns of working life have been taking place alongside demographic and social changes. There has been a well-documented decline in the ‘traditional’ family, accompanied by an increase in divorce rates, unmarried partners, single parents, ‘living apart together’ arrangements and same-sex relationships<sup>(93)</sup>. Today, ‘a-typical’ families are the majority in many countries. At the same time people are living longer due to increasing standards of living and advances in medical care and a growing number of people are spending their last years in a state of dependency.

These demographic, social and labour market changes have brought new challenges to social security. Member States responded to ageing populations by increasing retirement ages and reforming pension systems to relieve pressure on public pension schemes. New benefits for long-term care have been introduced to provide for the new ‘risk’ of longevity.

Changes to the gender balance in the workplace and family arrangements also bring new demands for social security. The principle of equal treatment and individual rights challenges the male breadwinner model.

These changes in turn challenge the foundations upon which coordination is built. It has been argued that the accession of countries with residence-based systems financed from general taxation and changing patterns of work and mobility weaken the theoretical justification for the ‘State of employ-

ment’ rule<sup>(94)</sup> and it is questioned whether the *lex loci laboris* rule should be replaced<sup>(95)</sup>, whether the principle of insurance under one legislation only is still appropriate<sup>(96)</sup> (it has been suggested that the *Bosmann* ruling (C-352/06) might herald the end to the principle of exclusive effect)<sup>(97)</sup> and whether there should be special rules for particular categories of people<sup>(98)</sup>.

While the fundamental principles for determining the applicable legislation remain largely unchanged — at least for the moment — the original principles that underpin the personal and material scope have come under sustained pressure with developments in the former breaking through the fundamental principle of reciprocity that had defined all previous coordinating regulations and in the latter loosening the fundamental link between coordination and work.

<sup>(93)</sup> Roberts, S., Stafford, B., Duffy, D., Ross, J. and Unell, J. (2009), ‘Literature review on the impact of family breakdown on children’: A report to the European Commission, VT/2007/118.

<sup>(94)</sup> Numhauser-Henning, A., ‘Pension rights and the EC coordination rules on applicable legislation in the light of migration and labour-market developments’, Report, Theme III, ‘Freedom of movement and transfer of social security rights’, VIth European Regional Congress of Labour Law and Social Security, Stockholm, 4–6 September 2002 (Congress Proceedings, 50 pages). Also in Blanpain (ed.), ‘Collective bargaining, discrimination, social security and European integration’, Bulletin of Comparative Labour Relations, Kluwer 2003; Jorens, Y., Lhernould, J-P., Fillon, J-C., Roberts, S. and Spiegel, B. (2008), ‘Towards a new framework for applicable legislation’. Think Tank Report, Training and reporting on European social security. European Commission/Ghent University.

<sup>(95)</sup> Christensen, A. and Malmstedt M. (2000), ‘Lex loci laboris versus lex loci domicilii — An inquiry into the normative foundations of European social security law’. European Journal of Social Security Vol. 2, Issue 1, 2000; Pennings, F. (2004), ‘Has the state-of-employment principle become outdated?’ in Langer, R. and Sakslin, M. (eds), Co-ordinating work-based and residence-based social security, University of Helsinki; Pennings, F. (2005), ‘Co-ordination of social security on the basis of the state-of-employment principle: Time for an alternative?’, Common Market Law Review, 42(1); Jorens, Y. and Hajdú, J. (2008), European Report — Training and reporting on European social security (Tress), European Commission/Ghent University; Jorens, Y., Lhernould, J-P., Fillon, J-C., Roberts, S. and Spiegel, B. (2008), ‘Towards a new framework for applicable legislation’. Think Tank Report, Training and reporting on European social security. European Commission/Ghent University; Coucheir, M., Sakslin, M., Giubboni, S., Martinsen, D. and Verschuere, H. (2008), ‘The relationship and interaction between the coordination regulations and Directive 2004/38/EC’. Think Tank Report, Training and reporting on European social security. European Commission/Ghent University.

<sup>(96)</sup> Jorens, Y., Lhernould, J-P., Fillon, J-C., Roberts, S. and Spiegel, B. (2008), ‘Towards a new framework for applicable legislation’. Think Tank Report, Training and reporting on European social security. European Commission/Ghent University.

<sup>(97)</sup> Ibid.

<sup>(98)</sup> ERA Expert Group (2008), ‘Realising a single labour market for researchers’. Report of the ERA Expert Group. Directorate-General for Research, European Commission, Brussels.

## Personal scope

Regulation (EEC) No 1408/71 redefined the personal scope of Regulation No 3 in response to the broad definitions given by the CJ from ‘wage-earners and other assimilated workers’<sup>(99)</sup> to:

*‘employed persons 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 well as to the members of their families and their survivors’.*

The personal scope has subsequently been extended to include: self-employed persons, in 1982; special schemes for civil servants, in 1998 (Regulation (EC) No 1606/98)<sup>(100)</sup>; students, in 1999 (Regulation (EC) No 307/1999)<sup>(101)</sup>; and nationals of third countries, in 2003 (Regulation (EC) No 859/2003)<sup>(102)</sup>.

The inclusion of third-country nationals within the scope of coordination breaks through the fundamental principle of reciprocity of all previous coordinating regulations.

Regulation (EC) No 859/2003 was the culmination of a lengthy and contested process (Roberts, 2000)<sup>(103)</sup>. The history can be traced back to the Green Paper of 1993 timed to coincide with

the ratification of the Maastricht Treaty<sup>(104)</sup>. The European Commission proposed in the subsequent White Paper of July 1994 to extend ‘as a first step’ healthcare benefits under Regulation (EEC) No 1408/71 to third-country nationals ‘who are legally employed and resident within the Union’ in order to begin to address the ‘multiple disadvantages they suffer when staying temporarily in another Member State, because they are not covered by the coordination provisions’<sup>(105)</sup>.

The Commission announced its intention to extend Article 22 of Regulation (EEC) No 1408/71 in Porto in November 1994. At the same time it announced its long-term intention to extend the whole of Regulation (EEC) No 1408/71 to third-country nationals who are legally resident in the EU<sup>(106)</sup>.

The proposal was based on Articles 42 (formerly 51) and 308 (formerly 235), both of which require unanimity. It was therefore possible for one Member State alone to block a proposal under either of these articles.

When the Commission made a formal submission to the Council in the Social Questions Group the UK blocked the proposal and again when it was referred up to Coreper<sup>(107)</sup> in November 1995. As a result the proposal was not accepted by the Council when it adopted Regulation (EC) No 3095/95 in November 1995<sup>(108)</sup>.

<sup>(99)</sup> Watson, P. (1980), *Social security law of the European Communities*. London, Mansell.

<sup>(100)</sup> Regulation (EC) No 1606/98 (OJ L 209, 25.7.1998, p. 1).

<sup>(101)</sup> Regulation (EC) No 307/99 (OJ L 38, 12.2.1999).

<sup>(102)</sup> Regulation (EC) No 859/2003 (OJ L 124, 20.5.2003); Pieters, D. (1997), ‘Enquiry into the legal foundations of a possible extension of Community provisions on social security to third-country nationals residing and/or working in the European Union’ in Schoukens, P. (ed.), *Prospects of social security co-ordination*, Leuven; Verschuere, H. (1997), ‘EC social security coordination excluding third-country nationals: Still in line with fundamental rights after the Gaygusuz judgment’, *Common Market Law Review* 34, p. 991; Jorens, Y and Schulte, B. (1998), *European social security law and third-country nationals*. Brugge: Die Keure la Chartre.

<sup>(103)</sup> Roberts, S. (2000), ‘Our view has not changed: The UK’s response to the proposal to extend coordination of social security to third-country nationals’, *European Journal of Social Security*, Vol. 2, Issue 2.

<sup>(104)</sup> European Commission (1993), ‘European social policy: Options for the Union’. Green Paper, COM(93) 551. DG V, Brussels.

<sup>(105)</sup> European Commission (1994), ‘European social policy — A way forward for the Union’. White Paper, COM(94) 333, 27 July, DG V, Brussels.

<sup>(106)</sup> European Commission (1995), ‘Social security in Europe: Equality between nationals and non-nationals’. Lisbon, Departamento de Relacoes Internacionais e Convencoes de Seguranca Social.

<sup>(107)</sup> The Council’s Social Questions’ Group and the Committee of Permanent Representatives (Coreper) are hierarchically arranged Council bodies. Issues that are unresolved at ‘Social Questions’ are sent up to Coreper, which has the task of preparing Council meetings and must decide what should be submitted for ministers’ consideration and in what form. If there are areas of disagreement that cannot be resolved at the level of ‘Social Questions’ the more senior officials at Coreper will try to find common ground. If common ground cannot be found, Coreper may decide either to submit the proposal to the Council of Ministers for its consideration, or refer the matter back to ‘Social Questions’ or the European Commission.

<sup>(108)</sup> Regulation (EC) No 3095/95 of 22 December 1995 (OJ L 335, 30.12.1995).

On 12 November 1997 the Commission again proposed the extension of Regulation (EEC) No 1408/71<sup>(109)</sup> and the European Councils of Tampere, Nice, Laeken and Stockholm urged that all necessary attention be given to extended social rights, including social security rights, to third-country nationals. At Laeken it was proposed to shift the legal base from Articles 42 and 308 to Article 63(4) of the EC Treaty. The UK had a special position with regard to Title IV of the Treaty and was able to opt-in selectively to (non-Schengen) measures under Protocol No 4<sup>(110)</sup>. Regulation (EC) No 859/2003 was agreed on 14 May 2003.

## Material scope

The material scope is challenged by the different systems of new member countries and new types of benefits introduced by all member countries. Because of the limitative list based on ILO Convention No 102 the classification of new benefits has sometimes proved problematic. For example, there are problems with where to place the long-term care benefits<sup>(111)</sup>. While some countries consider these benefits to be special non-contributory benefits, the CJ has found that they are sickness benefits<sup>(112)</sup>, although their characteristics require a little Procrustean encouragement to be made to fit in to the ‘Sickness’ chapter and it is likely that a new chapter will need to be introduced to accommodate this type of benefit comfortably.

Social assistance is excluded from coordination. However, in most member countries social assistance is no longer given at the discretion of the butcher, the

baker and the candlestick maker or local magistrate but is increasingly a rule-based entitlement. Furthermore, many countries have introduced non-contributory categorical benefits, for example to meet the specific needs of disabled people, which have blurred the demarcation lines between contributory social insurance and non-contributory social assistance and straddle the traditional criteria for establishing entitlement<sup>(113)</sup>. The question of what is social assistance and therefore excluded from coordination has been challenged before the courts and the CJ gave a series of judgments from *Frilli* (C-1/72)<sup>(114)</sup> to *Newton* (C-356/89)<sup>(115)</sup> that brought benefits, whether or not they were categorised as social assistance by the Member State, within the coordinating regulations if they were entitlement based (*Frilli* C-1/72) and related to one of the contingencies enumerated in Article 4(1) of Regulation (EEC) No 1408/71 (*Hoeckx*, C248/83)<sup>(116)</sup>. However, the CJ also established that benefits such as the guaranteed income for the elderly at dispute in *Frilli* (C-1/72) are only within the scope of the coordination for ‘employed persons and assimilated persons who have completed periods of employment under the legislation of a Member State and are resident in that state and receiving a pension’<sup>(117)</sup>.

In *Newton* (C-356/89) the CJ considered that a benefit, such as the UK mobility allowance in question, met the necessary criteria to be within the scope of coordination and drew on *Frilli* to distinguish between persons who had been subject to the legislation of the Member State where the benefit is

<sup>(109)</sup> Proposal for a Council Regulation (EC) amending Regulation (EEC) No 1408/71 as regards its extension to nationals of third countries (COM(97) 561 final, 12.11.1997).

<sup>(110)</sup> Ireland had the same arrangement as the UK. Denmark cannot be selective but can fully opt in to Title IV (TEU Protocol No 5). House of Lords Select Committee on European Union 16th Report, 27 March 2003.

<sup>(111)</sup> Martinsen, D. (2007), ‘The social policy clash: EU cross-border welfare, Union citizenship and national residence clauses’, presented at the European Union Studies Association (EUSA) Biennial Conference 2007 (10th), 17–19 May 2007, Montreal; Jorens, Y. and Hajdú, J. (2008), European Report — Training and reporting on European social security (Tress), European Commission/Ghent University.

<sup>(112)</sup> Jorens, Y. and Hajdú, J. (2008), European Report — Training and reporting on European social security (Tress), European Commission/Ghent University.

<sup>(113)</sup> Pieters, D. (1997), ‘Towards a radical simplification of the social Security co-ordination’ in Schoukens, P. (ed.), *Prospects of social security co-ordination*. Leuven: Uitgeverij Acco cited by Martinsen, D. (2007), ‘The social policy clash: EU cross-border welfare, Union citizenship and national residence clauses’, presented at the European Union Studies Association (EUSA) Biennial Conference 2007 (10th), 17–19 May 2007, Montreal; Pennings, F. (2003), *Introduction to European social security law*, fourth edition, Antwerp, Intersentia.

<sup>(114)</sup> Case 1/72 *Frilli* [1972] ECR I-457.

<sup>(115)</sup> Case C-356/89 *Stanton Newton* [1991] ECR I-3017.

<sup>(116)</sup> Case 249/83 *Hoeckx* [1985] ECR 982; Pennings, F. (2003), *Introduction to European social security law*, fourth edition, Antwerp, Intersentia; Martinsen, D. (2007), ‘The social policy clash: EU cross-border welfare, Union citizenship and national residence clauses’, presented at the European Union Studies Association (EUSA) Biennial Conference 2007 (10th), 17–19 May 2007, Montreal.

<sup>(117)</sup> Pennings, F. (2003), *Introduction to European social security law*, fourth edition, Antwerp, Intersentia.



being claimed and people who have been subject to the legislation of another Member State only, with the former entitled and the latter not. The CJ reprised its argument in *Frilli* (C-1/72) that this is a necessary condition to protect the stability of systems that provide benefits for disabled people on condition of residence. This meant that Mr Newton, who had not been subject to UK legislation, could not export his mobility allowance to France<sup>(118)</sup>.

Nevertheless, the reasoning of the CJ in this series of judgments had opened up an 'unintended and unwelcome development in case-law'<sup>(119)</sup> and on 30 April 1992, following *Newton*, the Council adopted Regulation (EEC) No 1247/92 to 'rein-in' this unwelcome development<sup>(120)</sup>. However, this was by no means a knee-jerk reaction, as a proposal had been presented by the Commission seven years earlier but had been embroiled in debate within the Council<sup>(121)</sup>. It has been suggested that one reason for the activity of the CJ has been 'undue slowness' on the part of the legislature compelling the CJ to rule on matters that should properly have fallen within the competence of the Council<sup>(122)</sup>. However, on this occasion the CJ's line of reasoning concentrated minds and Regulation (EEC) No 1247/92 created a new category of 'special non-contributory benefits' to coordination, defined as benefits granted to provide substitute, supplementary and ancillary protection against social contingencies covered by the branches referred to in Article 4(1)(a)–(h) or intended solely for the specific protection of disabled people<sup>(123)</sup>. The benefits considered to be special non-contributory benefits are agreed between the Member State and the legislature and are listed in Annex IIa of Regulation (EEC) No 1408/71.

<sup>(118)</sup> *Ibid.*

<sup>(119)</sup> Martinsen, D. (2007), 'The social policy clash: EU cross-border welfare, Union citizenship and national residence clauses', presented at the European Union Studies Association (EUSA) Biennial Conference 2007 (10th), 17–19 May 2007, Montreal.

<sup>(120)</sup> *Ibid.*

<sup>(121)</sup> Pennings, F. (2003), *Introduction to European social security law*, fourth edition, Antwerp, Intersentia.

<sup>(122)</sup> Sakslin, M. (2000), 'Social security co-ordination — Adapting to change', *European Journal of Social Security* Vol. 2, Issue 2.

<sup>(123)</sup> Sanchez-Rodas Navarro, C. (1997), *La aplicacion del derecho comunitario a las prestaciones especiales no contributivas*, Granada.

Special non-contributory benefits are not exportable. The CJ subsequently confirmed this position in two UK cases, *Snares* (C-20/96)<sup>(124)</sup> and *Partridge* (C-297/97)<sup>(125)</sup>. However, the non-exportability of special non-contributory benefits has been challenged and the CJ has further clarified the demarcation lines between social security, social assistance and special non-contributory benefits in a series of cases which has eroded the content of Annex IIa and expanded the content of the category of 'social security'<sup>(126)</sup>. The CJ found, in the case of *Jauch* (C-215/99)<sup>(127)</sup>, that for a benefit — in this case an Austrian care benefit (*Pflegegeld*) — to be a non-exportable special non-contributory benefit it is not sufficient simply to be listed in Annex IIa but the benefit must meet the criteria of 'special' and 'non-contributory'<sup>(128)</sup>. The point has been reiterated in subsequent cases, for example *Leclere* and *Deaconescu* (C-43/99)<sup>(129)</sup>; *Hosse* (C-286/03)<sup>(130)</sup>; and *Hendrix* (C-287/05)<sup>(131)</sup>.

Regulation (EEC) No 1408/71 was amended by Regulation (EC) No 647/2005<sup>(132)</sup> to reflect these judgments. However, in July 2005 the Commission took annulment proceedings against the Council of Ministers and the European Parliament<sup>(133)</sup>. According to the Commission, by adopting Regulation (EC) No 647/2005, the Council and Parliament accepted the criteria laid down by the CJ for the coordination of special and non-contributory benefits but failed to

<sup>(124)</sup> Case C-20/96 *Snares* [1997] ECR I-6057.

<sup>(125)</sup> Case C-297/96 *Partridge v Adjudication Officer* [1998] ECR I-3467.

<sup>(126)</sup> Martinsen, D. (2007), 'The social policy clash: EU cross-border welfare, Union citizenship and national residence clauses', presented at the European Union Studies Association (EUSA) Biennial Conference 2007 (10th), 17–19 May 2007, Montreal; Jorens, Y. and Hajdú, J. (2008), *European Report — Training and reporting on European social security* (Tress), European Commission/Ghent University.

<sup>(127)</sup> Case C-215/99 *Jauch* [2001] ECR I-1901.

<sup>(128)</sup> Fitzpatrick, P. (2007), 'The right to reside test and Regulation (EEC) No 1408/71'. Presentation to Tress seminar, London, 20 April 2007; Martinsen, D. (2007), 'The social policy clash: EU cross-border welfare, Union citizenship and national residence clauses', presented at the European Union Studies Association (EUSA) Biennial Conference 2007 (10th), 17–19 May 2007, Montreal.

<sup>(129)</sup> Case C-43/99 *Leclere* [2001] ECR I-4265.

<sup>(130)</sup> Case C-286/03 *Hosse* [2006] ECR I-1771.

<sup>(131)</sup> Case C-287/05 *Hendrix* [2007] ECR I-6909.

<sup>(132)</sup> Regulation (EC) No 647/2005 (OJ L 117, 2.5.2005).

<sup>(133)</sup> Case C-299/05 *Commission v Council and Parliament* [2007] ECR I-8695.

draw all the consequences of those criteria when it included the Finnish childcare allowance, the Swedish disability allowance and care allowance for disabled children, and the UK attendance allowance, carer's allowance and disability living allowance in the list of permitted benefits set out in Annex IIa, which, in the Commission's view, did not satisfy the criteria of 'special' benefits within the meaning of Article 4(2a) of the regulation<sup>(134)</sup>.

The judgment, which was delivered in October 2007, found that these benefits — with the exception of the mobility component of the UK disability living allowance — are sickness benefits within the meaning of Article 4(1)(a) of Regulation (EEC) No 1408/71 and therefore wrongly included in Annex IIa — and exportable<sup>(135)</sup>.

## VII. MODERNISATION AND SIMPLIFICATION

Regulation (EEC) No 1408/71 has enjoyed much greater longevity than its predecessor, Regulation No 3. In response to the continually evolving welfare systems of the member countries and the numerous judgments of the CJ, the regulation has been revised almost annually. However, ongoing revision has created complexity which has in turn given rise to both operational and substantive problems, while gaps have been exposed by the changing demographic, labour market and social arrangements in the member countries.

The modernisation and simplification of coordination was first proposed at the Edinburgh European Council in 1992 to make the regulations 'more efficient and user-friendly' and to take account of these changed circumstances. After long discussions, Regulation (EC) No 883/2004<sup>(136)</sup> was adopt-

ed by the European Parliament and the Council on 29 April 2004 and will coordinate social security for people exercising their right to free movement in the EU from early spring 2010<sup>(137)</sup>.

The route from Edinburgh to the threshold of the new Regulation (EC) No 883/2004 was difficult because, as described above, the legal base (Articles 42 and 308 EC) requires unanimity in the Council and, since the Treaty of Amsterdam in 1997, co-decision with the European Parliament. In 1998 the Commission submitted a proposal to modernise and simplify the provisions of Regulation (EEC) No 1408/71<sup>(138)</sup>. The proposal was considered during the Finnish, Portuguese, French and Swedish Presidencies, with each submitting a progress report to the Council. In general there was not much progress to report.

At the Stockholm Council in March 2001 it was decided that by the end of the year 'parameters' to set the ground rules for the modernisation of Regulation (EEC) No 1408/71 would be agreed to enable the Council and the European Parliament to proceed with its adoption. The parameters, which were introduced under the Belgian Presidency, were defined as 'the basic options adopted by the Council in the light of which the regulation is to be modernised'. The 12 parameters, which highlighted points of agreement around which to build consensus, led to considerable progress under the Presidencies of Spain, Denmark, Greece and Italy, and thereafter.

The new regulation that emerged is not radically different from Regulation (EEC) No 1408/71. The more radical changes originally proposed by the Commission, which included non-limitive material

<sup>(134)</sup> Case C-299/05 *Commission v Council and Parliament* [2007] ECR I-8695; Fitzpatrick, P. (2006), 'Exporting AA, CA and DLA to other EEA Member States', *Welfare Rights Bulletin* 191, CPAG.

<sup>(135)</sup> Roberts, S. (2007), 'UK Report', *Training and reporting on European social security* (Tress), European Commission/Ghent University.

<sup>(136)</sup> Regulation (EC) No 883/2004 (OJ L 166, 30.4.2004).

<sup>(137)</sup> At the time of writing, the working date for the entry into effect of the new coordinating regulations is 1 March 2010. This is based on the assumption that all the necessary legislative procedures will be completed by the end of June 2009, followed by a three-month time lapse for publication in the Official Journal and the six-month transitional period provided for by the regulation itself. However, it seems prudent, on this occasion, to follow Amartya Sen's advice that 'it is better to be vaguely right than precisely wrong'.

<sup>(138)</sup> 5133/99 SOC 5 (COM(98) 779 final).

scope, open personal scope, extensive equalisation of facts, pro-rata reimbursement of pensioners' healthcare costs, and unemployment benefits exportable for six months, were watered down as each of the Member States brought their own concerns, priorities and red lines to the negotiations, and the main aim became to simplify and streamline the existing concepts, rules and procedures while maintaining the guiding principles and essential elements. Nevertheless, the reform once again extends both the personal and material scope of coordination, the principle of equal treatment is strengthened, as well as cross-border recognition of facts and the principle of a single applicable legislation<sup>(139)</sup>; there are new rules regarding frontier workers, revisions to health and family benefits, and the inclusion of paternity benefits, as well as a new chapter to partially coordinate pre-retirement benefits. However, long-term care benefits remain outside the scope of coordination while the introduction of funded schemes complicates the reform of pensions and the body of case-law from *Kohll* (C-158/96)<sup>(140)</sup> and *Decker* (C-129/95)<sup>(141)</sup> to *Watts* (C-372/04)<sup>(142)</sup> has not been incorporated but will be addressed in a separate directive on the application of patients' rights in cross-border healthcare<sup>(143)</sup>. Significantly, the new regulation will extend the personal scope to all persons, including non-economically active people, who are covered by a scheme.

<sup>(139)</sup> Cornelissen, R., 'Regulation (EC) 883/2004 and its implementing regulation'. Presentation to the UK Tress seminar, 19 June 2009 (<http://www.tress-network.org/TRESSNEW/>).

<sup>(140)</sup> Case C-158/96 *Kohll* [1998] ECR I-1931.

<sup>(141)</sup> Case C-120/95 *Decker* [1998] ECR I-1831.

<sup>(142)</sup> Case C-372/04 *Watts* [2006] ECR I-4325. See Coucheir, M. and Jorens, Y. 'Patient mobility in the European Union — The European framework in relation to patient mobility', report written for the European sixth framework project 'Europe for patients', European Commission, Research DG, Brussels; Coucheir, M. and Jorens, Y. (2007), 'Options for legal change in the field of patient mobility', report made for the sixth framework project 'Europe for patients'. European Commission, Research DG, Brussels; Martinsen, D. and Vrangbæk, K. (2008), 'The Europeanisation of health care governance — Implementing the market imperatives of Europe', Public Administration. Vol. 86, No 1; Martinsen, D. (2004), European institutionalisation of social security rights: A two layered process of integration. PhD thesis, Florence, European University Institute, cited by Ferrera, M. (2005), *The boundaries of welfare*, Oxford University Press.

<sup>(143)</sup> () [http://ec.europa.eu/health/ph\\_overview/co\\_operation/healthcare/cross-border\\_healthcare\\_en.htm](http://ec.europa.eu/health/ph_overview/co_operation/healthcare/cross-border_healthcare_en.htm)

New tools and procedures for cooperation are provided in the new implementing regulation<sup>(144)</sup>, which demonstrates the intent of the Council, the European Commission and Parliament to improve service delivery of coordinated benefits. This reflects the growing emphasis on service standards across the European Union<sup>(145)</sup>. Recital 2 of the preamble to the implementing regulation states that closer and more effective cooperation between social security institutions is a key factor in allowing the persons covered by Regulation (EC) No 883/2004 to access their rights as quickly as possible and under optimum conditions; while Recital 6 states that certain procedures should be strengthened to ensure greater legal certainty and transparency: 'For example, setting common deadlines for fulfilling certain obligations or completing certain administrative tasks should assist in clarifying and structuring relations between insured persons and institutions.'

Article 89(1) of the new implementing regulation establishes Community competence to monitor quality of service. Article 89(1&3) provides for transparency tasking the Administrative Commission with ensuring that the parties concerned are aware of their rights and the administrative formalities required in order to assert them. Article 16(3) on the legislation applicable, Article 60(3) on family benefits and Article 72(2) on recovery of undue benefits contain provisions for default situations to come in to play when processing time-limits are not met.

The scope to meet the requirements introduced by Article 89(1) of the implementing regulation is greatly enhanced by the forthcoming introduction of the 'Electronic exchange of social security information' (EESSI) in response to Article 4(2). EESSI opens up several possibilities for managing case work and contains the potential to collect a wide range of management information.

<sup>(144)</sup> Michard, H. 'Modernised EU social security coordination'. Presentation to the UK Tress seminar, 19 June 2009 (<http://www.tress-network.org/TRESSNEW/>).

<sup>(145)</sup> Pollitt, C. and Bouckaert, G. (2004), *Public management reform: A comparative analysis*, second edition. Oxford University Press.

## VIII. CONCLUSIONS

The EU coordinating regulations are unique in the scale of the ambition and the sophistication of the methods to achieve that ambition. Over a period of 50 years the regulations have expanded and transformed the original principles of coordination that were developed during the course of the first half of the 20th century. The extension of coordination to nationals of third countries<sup>(146)</sup> without rights being granted in return breaks through the fundamental principle of reciprocity while the extension of the personal scope to ‘non-active’ people and the material scope to include non-contributory and special non-contributory benefits — and the ongoing redefinition of special non-contributory benefits as ‘social security’ by the CJ — loosens the links with the labour market.

Since the Treaty of Amsterdam the aim must be to provide full coordination for all citizens. At present, however, some citizens are more equal than others under the coordination regime. The struggle over the material scope, although technical, is far from abstract. The origins of coordination in work-related insurance schemes continues to create a hierarchy of coordination that is not neutral with regard to personal characteristics. Those people who are, or have been, closest to the labour market enjoy the greatest degree of coordination and consequently the greatest opportunity to enjoy the right of free movement. Those whose biographies do not fully conform to the insurance model may experience a different coordinating regime. People who do not have a full insurance

record may need to rely on social assistance or special non-contributory benefits which are either outside coordination or only partially coordinated. This is the case for disabled people who have traditionally been denied equality in free movement by declaring many of the benefits they rely upon to be non-exportable by defining them as ‘special non-contributory’ and confining them to the hinterland of Annex IIa.

Women are also discriminated against for having different biographies to those of men. Because women are far more likely than men to take on the responsibilities of unpaid care work in the home they are consequently more likely to have fragmented contribution records and need to rely on special non-contributory benefits and social assistance<sup>(147)</sup>. As a result women are more likely than men to be excluded from the benefits of full coordination and consequently less likely to be able to enjoy the right to free movement.

The regulations allow Member States to define ‘family member’ for coordination purposes. As a consequence discrimination against same-sex partners in many EU member countries translates to coordination and presents barriers to free movement<sup>(148)</sup>. Discrimination in member countries includes recognition of same-sex partners’ civil status<sup>(149)</sup>. Some countries allow same-sex partners to marry; others have same-sex civil union/partnership laws; while others do not allow registration of same-sex relationships but provide some rights for same-sex partners. Some EU member countries do not recognise same-sex relationships<sup>(150)</sup>.

<sup>(146)</sup> Article 42 of the Treaty is not the appropriate legal basis to include third-country nationals in coordination and another parallel regulation will continue to be needed — see Cornelissen, R., ‘Regulation (EC) 883/2004 and its implementing regulation’. Presentation to the UK Tress seminar, 19 June 2009 (<http://www.tress-network.org/TRESSNEW/>).

<sup>(147)</sup> Paskalia, V. (2005), ‘The (in)visibility of gender in the new regulation’, *European Journal of Social Security*, Vol. 7, No 3, September 2005.

<sup>(148)</sup> Roberts, S. and Sakslin, M. (2009), ‘Some are more equal than others: Discrimination in social security and the right of same-sex partners to free movement in the EU’, *Journal of Poverty and Social Justice*, special edition, Issue 3, October 2009.

<sup>(149)</sup> Ottosson, D. (2006), *LGBT World Legal Wrap Up Survey*. International Lesbian and Gay Association (ILGA); Roberts, S. and Sakslin, M. (2009), ‘Some are more equal than others: Discrimination in social security and the right of same-sex partners to free movement in the EU’, *Journal of Poverty and Social Justice*, special edition, Issue 3, October 2009.

<sup>(150)</sup> *Ibid.*

The most common instances of unequal treatment in relation to social security relates to same-sex partners<sup>(151)</sup>. A number of countries — none of which recognises same-sex marriage — provide specific benefits for married persons or discriminate in the benefit entitlement conditions between married and unmarried partners or between same-sex and different sex partners<sup>(152)</sup>.

The impact of the interface of the plethora of partnership statuses and benefit entitlement conditions across the member countries means that same-sex partners exercising their right of free movement may find their status changing as they move between different ‘rights regimes’ to the detriment of their entitlement to benefits, and consequently their right to free movement<sup>(153)</sup>.

Arguably the most significant characteristic that distinguishes EU coordination from all other bilateral and multilateral agreements is that it takes place within the institutional framework of the EU with the Council, Parliament, Commission and CJ all playing a central role. The CJ has been fundamental in defining and extending the scope of social security coordination from the beginning and has delivered over 600 judgments on the interpretation of the regulations. The CJ is likely to play a central role in expanding full coordination to women, disabled people and same-sex partners. However, according to an undated note in the archives of the Dutch Ministry of Foreign Affairs, things might have been different and the CJ may not have had any role at all. The Dutch note suggests that the

coordination of social security was intended by the original six member countries to take place on an intergovernmental basis rather than within the Community framework<sup>(154)</sup>.

The note observes that the conclusion of the European Convention on Social Security ‘is likely to make the adoption of further measures on the basis of Article 51 (of the Treaty) redundant’.

It appears that the expectation of the Dutch negotiators was that the conclusion of the EEC Treaty would entail that the European Convention on Social Security (of 9 December 1957) would contain the ‘necessary’ measures in the field of social security for migrant workers, and that it would not therefore be necessary to adopt further measures on the basis of Article 51.

However, the note continues:

*‘On 11 April a meeting took place in Brussels on a proposal for a regulation of the Council to implement Article 51, in which the provisions of the convention of 1957 were transformed into a proposal for a regulation of the Council. On this completely unprepared discussion — the papers were only offered at the meeting — the question whether the Council is competent to adopt a regulation on the basis of Article 51 — the content of which is the convention of 9 December 1957 — has not been discussed.’*

<sup>(151)</sup> McColgan, A., Niessen, J. and Palmer F. (2006), ‘Comparative analyses on national measures to combat discrimination outside employment and occupation: Mapping study on existing national legislative measures — and their impact in — tackling discrimination outside the field of employment and occupation on the grounds of sex, religion or belief, disability, age and sexual orientation, VT/2005/062’; Roberts, S. and Sakslin, M. (2009), ‘Some are more equal than others: Discrimination in social security and the right of same-sex partners to free movement in the EU’, *Journal of Poverty and Social Justice*, special edition, Issue 3, October 2009.

<sup>(152)</sup> *Ibid.*

<sup>(153)</sup> Jorens, Y. and Hajdú, J. (2008), *European Report — Training and reporting on European social security* (Tress), European Commission/Ghent University; Roberts, S. and Sakslin, M. (2009), ‘Some are more equal than others: Discrimination in social security and the right of same-sex partners to free movement in the EU’, *Journal of Poverty and Social Justice*, special edition, Issue 3, October 2009.

<sup>(154)</sup> I am indebted and grateful to Ivo van der Steen, Head of the Centre of Expertise on European Law at the Ministry of Foreign Affairs in the Netherlands, who commented on this paper at the ‘Fiftieth anniversary of Community social security coordination’ conference in Prague on 7–8 May 2009, for discovering, translating and interpreting this note. The note (reference 33 4ms6 15) must have been written between 11 April 1958 (the day a first meeting on social security, organised by the Commission of the EEC, took place in Brussels) and 13 May 1958 (the date of a letter from the Dutch Minister for Social Affairs to the Dutch Minister for Foreign Affairs in which the objections in this note were no longer repeated).

The note concludes:

*'As stated above, the position of the Dutch government — and this position was shared by the other parties while preparing Article 51 — is that the conclusion of the convention of 9 December 1957 would make further measures on the basis of Article 51 redundant. Now the reverse path is taken. It is intended to set aside the ratification of the convention of 9 December 1957 and to transform the content into a regulation of the Council on the basis of Article 51. Now, is this a measure which is necessary for the free movement of migrant workers? There are no doubts about the answer to this question... It is only when the ratification of the convention is set aside that the measures*

*on the basis of Article 51 are necessary. However, now the situation is reversed and, against the original intention, the ratification of the convention is set aside to draw the conclusion that the adoption of measures on the basis of Article 51 is necessary.'*

In bringing the 'necessary measures' directly within the scope of the Treaty of Rome through a Community regulation the Commission was bringing the coordinating legislation within the ambit of the Community itself and, as a regulation of the Council, within the purview of the CJ. If the views expressed in the note had materialised, the history of coordination might have been an altogether more Westphalian — and far less dynamic — affair.



# THE ROLE OF THE COURT OF JUSTICE IN THE DEVELOPMENT OF SOCIAL SECURITY LAW OF PERSONS MOVING WITHIN THE EUROPEAN UNION

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Sean Van Raepenbusch has numerous publications to his name, notably in the field of European social law. An example : RAEPENBUSCH, S. VAN, 'Tendances récentes (1998-2003) de la jurisprudence sociale de la Cour de justice des Communautés européennes', *Journal des Tribunaux du Travail*, 2003, 277-284 and 293-308 (\*).



The major contribution made by the Court of Justice (CJ) to the construction of 'social Europe' need not be demonstrated: it is evidenced by reading the numerous judgments in which the Community judge has endeavoured to interpret the texts in accordance with the idea of social justice and with the requirements of European integration at the level of the people, such that they can evolve general objectives from the EC Treaty. These judgments sometimes also provide evidence of the difficult arbitration that the judge ends up having to perform between the economic imperatives of the internal market and free competition, on the one hand, and the social objectives of the Treaty, on the other hand, while taking account of the powers of the Member States to develop their social security system and to fix the scope of the duty of national solidarity.

In this regard, Community legislation 'on the application of social security schemes to migrant

workers'<sup>(156)</sup>, to return to a formula that is traditional but reductive with regard to its genuine scope, offers an area of jurisdiction for interpretation by the judge, at the same time, due to the complexity, or even the esoterism of the applicable texts, in constant evolution, but equally because of the fundamental objective which this regulation intends to achieve, namely the free movement of people within the European Union, and the fundamental principles which encompass it, in particular the principle of equal treatment, the right of access to social security benefits and to social services, or to health protection.

Some figures permit measurement of the scope of the dialogue which has arisen over the years between the CJ and national courts with regard to the interpretation of Regulations (EEC) Nos 1408/71

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(\*) *This contribution was translated from the original French version.*

<sup>(156)</sup> Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and its implementing Regulation (EEC) No 574/72, amended numerous times, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ L 28, 30.1.1997, p. 1), itself amended several times, most recently by Regulation (EC) No 592/2008 (regarding the annexes to Regulation (EEC) No 1408/71) and Regulation (EC) No 120/2009 (regarding the annexes to Regulation (EEC) No 574/72).

and 574/72 (and formerly Regulation Nos 3 and 4): out of a total of 5 055 judgments pronounced by the CJ, on 31 March 2009, in a reference for a preliminary ruling, 509 judgments concern the social security of migrant workers, that is to say, almost 1 in 10 judgments. The proportion was even in the region of a fifth, on 1 January 1980 (122 preliminary rulings out of a total of 599), before the considerable extension of Community jurisdiction after the entry into force of the Single European Act and, above all, of the Maastricht Treaty.

It is useful, on the eve of the entry into force of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems<sup>(157)</sup> (following the imminent adoption of its implementation regulation), to try to draw the most valuable lessons from the case-law of the CJ of these recent decades, with regard to both the field of application (material and personnel) of the regulation and its links with international bilateral conventions (I) and the governing principles of Community coordination of national social security arrangements<sup>(158)</sup> (II). Our ambition is obviously not to be exhaustive, but to illustrate the influence of the interpretation of the texts, in the light of the objectives of the Treaty, on the strengthening of the social protection of persons having exercised their right to freedom of movement within the European Union.

## I. THE FIELD OF APPLICATION OF COMMUNITY LEGISLATION

### A. The notion of social security benefit

The CJ has always retained an extensive conception of the notion of social security, within the meaning of Regulation (EEC) No 1408/71, in order to bring

<sup>(157)</sup> OJ L 166, 30.4.2004, p. 1.

<sup>(158)</sup> Namely, the principles of equal treatment, the rule that the legislation of a single Member State is to apply (as a general rule, *lex loci laboris*), the preservation of immediate entitlement (by the 'export' of services), the preservation of prospective entitlement (by techniques of aggregation of periods of insurance, employment or residence and pro-rata provision of services) and, finally, of sincere cooperation.

about the most favourable conditions for the free movement of workers. Indeed, this complies with the evolutionary, even 'attractive' content of social security, according to the Advocate General M. Mayras<sup>(159)</sup>, who over and above measures curative in themselves, after the emergence of a social risk, evidently recognised the function of risk prevention and, over and above improving the standard of living, that of improving the quality of life, or even promoting a certain employment policy.

According to established case-law, a benefit must be considered as a social security benefit, on the one hand, if it is granted to beneficiaries, apart from any individual and discretionary appreciation of their personal requirements, based on a legally defined situation and, on the other hand, if it is linked to one of the social risks enumerated expressly in Article 4(1), of Regulation (EEC) No 1408/71, which correspond to the traditional branches of social security listed in International Labour Convention No 102 (see, for example, Case C-249/83 *Hoeckx* [1985] ECR I-973, paragraphs 12 to 14; Case C-78/91 *Hughes* [1992] ECR I-4839, para. 15; Case C-332/05 *Cellozzi* [2007] ECR I-563, para. 17; Case C-212/06 *Government of the French Community and Walloon Government* [2008] not yet published in the ECR, para. 17; and Case C-228/07 *Petersen* [2008] not yet published in the ECR, para. 19).

The following have thus been considered as social security benefits within the meaning of the regulation:

- benefits in kind for persons in need of long-term care ('home care'), aimed at improving the state of health and quality of life of dependent persons, considered by the CJ as sickness benefits (Case C-160/96 *Molenaar* [1998] ECR I-843, and Case C-215/99 *Jauch* [2001] ECR I-1901);
- advances on maintenance payments, intended to offset the damage resulting from non-payment of maintenance by one of the parents,

<sup>(159)</sup> Expression borrowed from French administrative case-law with regard to the concept of 'public employment'. Cf. the conclusions of Advocate General Mayras in Case 1/72 *Frilli* [1972] ECR I-457.



considered by the CJ as family benefits (Case C-85/99 *Offermanns* [2001] ECR I-2261 and Case C-302/02 *Laurin Effing* [2005] ECR I-553). Consequently, people residing in the territory of a Member State to which the provisions of this regulation are applicable shall be granted the use of such a benefit provided for by the legislation of this state under the same conditions as nationals of that country, in accordance with Article 3 of the said regulation (in this case, the children of divorced parents, of German nationality and residing in Austria, had requested, due to the father's insolvency, an advance of a maintenance payment and were refused the provision of this advance by virtue of their nationality) <sup>(160)</sup>;

- the holiday pay accorded to the beneficiary of a retirement pension (Case C-101/04 *Noteboom* [2005] ECR I-771);
- the allowance to workers exposed to asbestos, related to the branch 'benefits in respect of accidents at work and occupational disease' (Case C-205/05 *Nemec* [2006] ECR I-10745);
- the advance paid to unemployed invalidity benefit claimants in the expectation of a definitive decision on the granting of such a benefit, such an advance having been linked to the 'unemployment' branch (*Petersen* judgment, abovementioned);
- thus, in general, mixed non-contributory benefits, those 'border' benefits resulting from the progressive integration, established in national legislation, of assistance in social security <sup>(161)</sup>, and with regard to which the CJ has fixed delimitation criteria of Community legislation, without which it would have permitted a quasi unlimited expansion of social security within the meaning of Community law. This last case-law has led the Council to

introduce particular rules of coordination in Regulation (EEC) No 1408/71 concerning this category of benefits <sup>(162)</sup> which, when they are mentioned in an Annex IIa of the said regulation, are forthwith provided exclusively on the territory of the state of residence and under the legislation of this state, without the possibility of export, adding together, if necessary, the periods of employment, professional activity or residence completed in any other Member State (Article 10a) <sup>(163)</sup>.

## B. Community concept of the notion of worker

According to former case-law, inaugurated by the *Unger* judgment <sup>(164)</sup>, the concept of worker does not come within the national law of the Member States, but within Community law and likewise demands a broad interpretation taking account of the objective of Article 42 EC.

Thus, it very quickly appeared to the CJ that it would not be in accordance with the spirit of Community legislation to limit the concept of worker only to migrant workers *stricto sensu* called upon to relocate to perform their job, but that it should comprise, in a general manner, those who are staying on the territory of another Member State, whatever the reason for their relocation <sup>(165)</sup>, as well as those who are placed in one of the situations of an international nature envisaged by the regulation. The absence of

<sup>(160)</sup> It will be observed that Article 1(z) of Regulation (EC) No 883/2004 excludes advances on maintenance payments from the concept of family benefit within the meaning of the said regulation.

<sup>(161)</sup> For example, allowances for the handicapped (Case 63/76 *Inzirillo* [1976] ECR I-2057; Case 39/74 *Costa* [1974] ECR I-1251; Case C-356/89 *Stanton Newton* [1991] ECR I-3017), income for the elderly (Case 1/72 *Frilli* [1972] ECR I-457; Case 24/74 *Biason* [1974] ECR 999; Case 139/82 *Piscitello* [1983] ECR I-1427), certain benefits granted to certain unemployed persons (Case C-66/92 *Acciardi* [1993] ECR I-4567), maternity benefits (Case C-111/91 *Commission v Luxembourg* [1993] ECR I-840).

<sup>(162)</sup> Regulation (EEC) No 1247/92 of 30 April 1992 (OJ L 136, 19.5.1992, p. 28).

<sup>(163)</sup> This derogation to the principle of exportability of social security benefits having to be applied restrictively, it may not be applied to benefits conforming to the conditions laid down in Article 4, para. 2a, of Regulation (EEC) No 1408/71, that is to say those of both a special and non-contributory character, which has given rise to a new case-law on the appraisal of the genuinely special and non-contributory character of certain benefits mentioned in Annex IIa (see Case C-160/96 *Molenaar* [1998] ECR I-843, with regard to Austrian dependent allowances, and Case C-43/99 *Leclere and Deaconesco* [2001] ECR I-4265, with regard to Luxembourg maternity allowances, considered by the CJ as having been mentioned in error in Annex IIa). Article 4(2a) of Regulation (EEC) No 1408/71 was modified in 2005 (Regulation (EC) No 647/2005, OJ L 117, 4.5.2005 p. 1) in order to define 'special non-contributory cash benefits' more precisely.

<sup>(164)</sup> Case 75/63 *Mrs M. K. H. Hoekstra (née Unger) v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten* [1964] ECR I-349.

<sup>(165)</sup> *Unger* judgment, abovementioned, ECR I-366, and Case 31/64 *Bertholet* [1965] ECR I-111, 119.

any connection ‘with genuine migrations’ has had the effect of blurring the distinction between migrant workers and permanently settled workers and of provoking an overlapping of the personal sphere of the regulations of the strict framework of Articles 48 to 51 of the Treaty (now Articles 39 EC to 42 EC) relative to the freedom of movement of workers.

In reality, the personal field of application of Regulation (EEC) No 1408/71 is determined, regardless of the qualification given by national employment law or reasons for moving from one Member State to another, by a social security criterion, that dealing with the applicable legislation. This is furthermore one of the paradoxes of determining the personal field of application of the regulation: although it is based on the existence of an actual Community concept, an examination of the applicable provisions of national law is inevitable.

In *Case 75/63 Unger*, abovementioned, the CJ judged that the concept ‘wage-earners or assimilated workers’, within the meaning of Article 4 of Regulation No 3, refers to ‘all those who, as such and under whatever description, are covered by the different national systems of social security’<sup>(166)</sup>. In other words, it is the link with a social security scheme for wage-earners which ‘anchors’ the Community national to Regulation No 3.

The *Unger* case-law, which in large measure disregarded the objectives of the authors of Regulation No 3 (on account of the extension of the sphere of persons protected to practically all those insured under social security schemes for wage-earners of the Community, without a link with migration being required), was codified by Regulation (EEC) No 1408/71, of which Article 1(a) defines the worker, employed or self-employed, by sole reference to the social security scheme which covers him. In this the case-law of the CJ in the field of social security foreshadowed, almost 30 years in advance, the establishment of European citizenship and the associated rights, dealt with below.

<sup>(166)</sup> See also *Case 19/68 De Cicco* [1968] ECR I-689, p. 700, and *Case 23/73 Janssen* [1971] ECR I-859, para. 7.

## C. The implications of European citizenship

We know that, since the Maastricht Treaty entered into force, the right to move and reside freely in any Member State has been conferred on the citizens of the European Union in Article 18 EC, independently of any economic activity (‘subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect’)<sup>(167)</sup>. This important reform has not failed to reflect on the interpretation of Regulation (EEC) No 1408/71, as testified to by *Case CECR I-10409*<sup>(168)</sup>.

Therein, Ms Ursula Elsen, a German national, born in 1951, resided in France from 1981. Until in March 1985, in the capacity of frontier worker, she engaged in an occupation subject to compulsory insurance, with an interruption between July 1984 and February 1985 on grounds of maternity leave following the birth of her son. Since then, Ms Elsen has not been in employment subject to compulsory insurance, either in Germany or in France.

The claim for validation of the periods when she was bringing up her son has been rejected by the German institution having jurisdiction on the grounds that the child was brought up abroad.

It therefore appears that Ms Elsen has never worked anywhere but Germany, her country of origin, although having transferred her place of residence to France and having thus continued to work in Germany for some time in the capacity of frontier worker before ceasing all professional

<sup>(167)</sup> Reference is made to the restrictions contained in Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ L 229, 29.6.2004, p. 35), repealing those of the three former directives relating to the right of residence of pensioners, inactive persons and students (Directives 90/364/EEC and 90/365/EEC, OJ L 180, 13.7.1990, pp. 26 and 28, and Directive 93/96/EEC, OJ L 317, 18.12.1993, p. 59), which make the right of residence subject in particular to the condition of disposing of means of support of such a nature that beneficiaries of the right of residence must not become an ‘unreasonable’ burden on public finance.

<sup>(168)</sup> Cf. our study ‘Le champ d’application personnel du règlement (CEE) No 1408/71 et la citoyenneté européenne: du travailleur migrant au citoyen européen’, *Journal des Tribunaux du Travail*, 1997, p. 1.

occupation on the birth of her child in order to bring him up.

Let that be no objection! The CJ referred to former Articles 8a, 48 and 51 of the Treaty (now Articles 18, 39 and 42 EC) to consider that these articles 'require that, for the purpose of the grant of an old-age pension, the competent institution of a Member State take into account, as though they had been completed in the national territory, periods devoted to child-rearing completed in another Member State by a person who, at the time when the child was born, was a frontier worker employed in the territory of the first Member State and residing in the territory of the second Member State.'

The CJ reached this conclusion after having established that German legislation was indeed applicable to the situation of a worker who has stopped all professional activity in Germany and who is resident in the territory of another Member State, as regards taking into account periods devoted to bringing up a child born when the parent was still working in Germany in the capacity of a frontier worker. According to the CJ, due to this last circumstance 'a close link can be established between the periods of child-rearing concerned and the periods of insurance completed in Germany by virtue of her occupational activity in that state. It is precisely because she had completed the latter periods that Ms Elsen requested the German institution to take into account the subsequent periods devoted to rearing her child' (para. 26).

The applicability of German legislation having been thus established, the CJ judged that the national provisions which in this case prevented the validation of child-rearing periods completed in another Member State were of a nature to be disadvantageous to 'Community nationals who have exercised their right to move and reside freely in the Member States, as guaranteed in Article 8a of the EC Treaty' (para. 34). And 'furthermore, Regulation No 1408/71 itself, which was adopted on the basis, inter alia, of Article 51 of the EC Treaty (now, after

amendment, Article 42 EC), contains a number of provisions designed to ensure that social security benefits are payable by the competent state, even where the insured, who has worked exclusively in his state of origin, resides in or transfers his residence to another Member State. Those provisions undoubtedly help to ensure freedom of movement not only for workers, under Article 48 of the EC Treaty (now, after amendment, Article 39 EC), but also for citizens of the Union, within the Community, under Article 8a of the Treaty' (point 35).

It thus appeared clearly that, under the impulse of the CJ, Regulations (EEC) Nos 1408/71 and 574/72 have also become instruments intended to guarantee the right of European citizens to move and to reside freely within the European Union, independently of the exercise of any economic activity.

#### **D. Relationships between Community legislation and bilateral social security conventions**

##### ***Conflicts between the regulations and social security conventions concluded between Member states***

In principle, in accordance with Article 6 of Regulation (EEC) No 1408/71, this supersedes the previous social security agreements concluded exclusively between two or more Member States (letter a) and those concluded between at least two Member States and one or more third countries insofar as, in this last hypothesis, cases in the regulation are involved in which no institution of one of the third countries is called upon to intervene (letter b) <sup>(169)</sup>. However, a series of international instruments have been kept in force by virtue of Article 7 of the regulation and can thus continue to produce their effects in full with regard to all the situations to which they refer <sup>(170)</sup>.

<sup>(169)</sup> In the same sense, the enforcement regulation is substituted, in accordance with Article 5 of the same regulation, for arrangements relating to the application of agreements referring to Article 6 of Regulation (EEC) No 1408/71.

<sup>(170)</sup> Article 5 of Regulation (EEC) No 574/72 also provides that the implementing provisions of several bilateral agreements referred to in Annex 5 of the same regulation are kept in force.

Apart from these cases, the keeping in force of an agreement between Member States incompatible with Community law might be considered as constituting a failure of the obligation of loyalty laid down in Article 10 EC <sup>(171)</sup>.

It was established, until the pronouncement of the *Rönfeldt* judgment <sup>(172)</sup>, in accordance with what has just been disclosed, that the simple fact that a social security agreement is more advantageous for a migrant worker than the provisions of Regulation (EEC) No 1408/71 does not suffice to justify the exception to the rule of the same. The relevant provisions of the agreement under consideration had still be mentioned in Annex III (see Article 7).

It was thus judged in Case C-82/72 *Walder* <sup>(173)</sup>, with regard to Articles 5 and 6 of Regulation No 3, which contain provisions similar to those of Articles 6 and 7 of Regulation (EEC) No 1408/71, 'that it is clear from these provisions that the principle that the provisions of social security conventions concluded between Member States are replaced by Regulation No 3 is mandatory in nature and does not allow of exceptions save for the cases expressly stipulated by the regulation'.

In the first analysis, the *Rönfeldt* judgment seems to have rescinded this analysis, embodying the principle implied by the CJ in its *Petroni* judgment <sup>(174)</sup>: if Article 51 of the Treaty empowers and obliges the Council to confer rights on migrant workers, while different social security schemes exist, it does not permit it to make rules which deprive workers of rights to which they are entitled by national law. Recourse, in the *Rönfeldt* case, to the principle of the inviolability of the rights acquired on the basis of the single national legislation of a Member State, independently of Community law, required that the CJ treat the rights acquired by single national legislation similarly to the rights acquired under an international convention integrated into this national legislation.

<sup>(171)</sup> Case 235/87 *Matteucci* [1988] ECR I-5589, para. 19.

<sup>(172)</sup> Case C-227/89 [1991] ECR I-323.

<sup>(173)</sup> Judgment of 7 June 1973, ECR I-599.

<sup>(174)</sup> Case 24/75 *Petroni* [1975] ECR 1149.

The *Rönfeldt* judgment caused a certain amount of commotion in specialised environments. Some were disappointed that the CJ had deviated, in this case, from the simple, quasi automatic and imperative rule of *the effect of substitution* of Community law on social security conventions, in favour of reasoning judged quite perilous <sup>(175)</sup>.

Case C-475/93 *Thévenon* [1995] ECR I-3813) permitted the CJ, undoubtedly not completely blind to its arguments, to strictly limit the consequences of the *Rönfeldt* judgment by introducing a distinction according to whether the migrant worker moved between the states concerned before or after the entry into force of Regulation (EEC) No 1408/71: this case-law will only be applied in the first hypothesis.

Thus, in the *Rönfeldt* case, the CJ was led to have to settle a conflict between a Germano-Danish social security convention of 1953 and certain provisions of Regulation (EEC) No 1408/71, with regard to the payment of pension entitlements in favour of a German national, for periods of insurance completed in Germany and Denmark before the accession of this latter state to the Community. On completing these periods, the person concerned was able to cherish hopes based on the application which would be made at retirement age of the provisions of the Germano-Danish social security convention as Community law was not yet applicable in the relations between Germany and Denmark.

The CJ was also able to make the most favourable provisions of the convention, applicable at the time of completion of the insurance periods, prevail over those of Regulation (EEC) No 1408/71 on a transitional basis in favour of Mr Rönfeldt.

The circumstances underlying the *Thévenon* case — which also concerns the payment of pension entitlements with regard to a bilateral convention between Member States prior to the entry into

<sup>(175)</sup> See our study, 'Les rapports entre le règlement (CEE) No 1408/71 et les conventions internationales dans le domaine de la sécurité sociale des travailleurs circulant à l'intérieur de la Communauté', Cahiers de droit européen, 1991, p. 449.

force of Community regulations and more favourable for the person concerned — were quite different: all the periods of insurance, completed in this case in France and in Germany, by Mr Thévenon had been after the entry into force of Regulation No 3. Under these conditions, the rule to substitute Community law for the Franco-German social security convention of 1950 was applied in full even though the convention would have been more favourable for workers (solution of the *Walder* judgment).

Case C-277/99 *Kaske* [2002] ECR I-1261 offers a new case of application of the *Röndfeldt* case-law by permitting an Austrian national to invoke a more favourable convention on unemployment benefit concluded between Germany and Austria, instead of the provisions of Regulation (EEC) No 1408/71<sup>(176)</sup> which had the effect of withdrawing entitlement to Austrian unemployment benefit for which a claim had been made. Indeed, if Regulation (EEC) No 1408/71 is normally substituted for bilateral conventions, these can still be invoked if they are more favourable and concern periods prior to accession. The CJ observed that ‘the sole purpose of the principles laid down in *Röndfeldt* is to perpetuate entitlement to an established social right not enshrined in Community law at the time when the national of a Member State relying on it enjoyed that right. Accordingly, the fact that Regulation (EEC) No 1408/71 became applicable in a national’s Member State of origin on the date when that Member State acceded to the European Community does not affect his established right to benefit from a bilateral rule which was the only one applicable to him when he exercised his right to freedom of movement. Indeed, as the Commission maintains, that approach is derived from the notion that the person concerned was entitled to entertain a legitimate expectation that he would benefit from the provisions of the bilateral convention’ (para. 27)<sup>(177)</sup>.

<sup>(176)</sup> Articles 3, 6, 67 and 71 of Regulation (EEC) No 1408/71.

<sup>(177)</sup> See also, in this sense, Cases C-396/05, C-419/05 and C-450/05 *Habelt and Others* [2007] ECR I-11895, with regard to application, in view of the payment of pension entitlements, of a Germano-Austrian convention of 1966 regarding a German national who had established himself in Austria for the purpose of living and working there before the entry into force in that Member State of Regulation (EEC) No 1408/71 (within the framework of the European Economic Area).

### ***Bilateral conventions on social security and equality of treatment***

Another interesting development to point out in the context of relationships between Regulation (EEC) No 1408/71 and bilateral social security conventions is that relating to the implications of the principle of equality of treatment.

The CJ has extended to the field of social security what it had judged with regard to preventive double taxation conventions (see Case C-307/97 *Saint-Gobain ZN* [1999] ECR I-6161, paragraphs 57 to 59). Thus, it follows from the important Case C-55/00 *Gottardo* ([2002] ECR I-413), ‘when giving effect to commitments assumed under international agreements, be it an agreement between Member States or an agreement between a Member State and one or more non-member countries, Member States are required, subject to the provisions of Article 307 EC, to comply with the obligations that Community law imposes on them. The fact that non-member countries, for their part, are not obliged to comply with any Community-law obligation is of no relevance in this respect’ (para. 33).

Also, ‘when a Member State concludes a bilateral international convention with a non-member country which provides for account to be taken of periods of insurance completed in that non-member country for acquisition of entitlement to old-age benefits, the fundamental principle of equal treatment requires that that Member State grant nationals of other Member States the same advantages as those which its own nationals enjoy under that convention unless it can provide objective justification for refusing to do so’ (para. 34).

In this regard, the CJ has estimated that ‘disturbing the balance and reciprocity of a bilateral international convention concluded between a Member State and a non-member country may, it is true, constitute an objective justification for the refusal by a Member State party to that convention to extend to nationals of other Member States the advantages which its own nationals derive from



that convention (see, to that effect, *Saint-Gobain ZN*, cited above, para. 60)' (para. 36).

However, in this case, the Italian government (which had concluded a convention with Switzerland providing for account to be taken by the Italian authorities of periods of insurance completed in that non-member country for acquisition of entitlement to old-age benefits) had not established that the obligations which Community law imposes on it would compromise those resulting from commitments undertaken by Italy with regard to Switzerland, the possible increase in financial charges by Italy and the administrative difficulties linked with collaboration with the competent Swiss authorities not being able to justify lack of respect for obligations resulting from the Treaty.

Consequently, it was incumbent on the Italian authorities to take into account, for the purposes of acquisition of entitlement to old-age benefits, the periods of insurance completed in Switzerland by a French national, when in the face of the same contributions, those authorities recognised, in the application of the bilateral international convention, the taking into account of such periods completed by their own nationals.

This case-law has the effect of reducing the impact of *the principle of reciprocity* which presides over the establishment of conventional relations in order to give full force to the fundamental principle of equality of treatment in the Community legal system<sup>(178)</sup>.

<sup>(178)</sup> The Administrative Commission on Social Security for Migrant Workers has drawn the consequences of this case-law by adopting, on 18 June 2003, Recommendation No 22 concerning the Gottardo case-law according to which the advantages ensuing from a bilateral social security convention between a Member State and a third country for national workers must be accorded to workers who are nationals of other Member States (OJ L 326, 13.12.2003, p. 35). Paragraph 2 of this recommendation provides for the new bilateral social security conventions containing an express reference to the principle of non-discrimination as interpreted by the Gottardo judgment.

## II. THE GOVERNING PRINCIPLES OF COMMUNITY COORDINATION

### A. Equality of treatment

It is obviously by means of successive layers, following proceedings brought to its knowledge, that the CJ has constructed its case-law on equal treatment in favour of citizens of the Union, by way of a dynamic interpretation of the principle of non-discrimination according to nationality. Three significant traits of case-law of the CJ in this regard deserve to be underlined.

#### *Assimilation of facts and principle of equivalence*

One of the most striking expressions of equal treatment in relation to the exercise of the right of freedom of movement is the assimilation of facts or events in another Member State to those which would have been produced in the host state for the recognition of certain rights or advantages in accordance with applicable national legislation<sup>(179)</sup>.

If it is true that this consequence has rapidly been linked to the principle of equality of treatment by

<sup>(179)</sup> The reasoning is not so far removed from that followed by the CJ in its famous *Cassis de Dijon* judgment (Case 120/78, *Rewe-Zentrale* [1999] ECR 649), on the free movement of goods, even if the issue dealt with was rather that of a barrier. The CJ judged that, even in the absence of harmonisation of national legislation, any product legally produced and sold in a Member State must be able, in principle, to be sold in another Member State. Apart from the exceptions of Article 30 EC, a Member State may only oppose the marketing of products which do not satisfy its own technical or commercial regulations for reasons based on imperative requirements of public interest, such as consumer protection, fair trading, environmental protection, pluralism of the press, etc. The regulations must also be non-discriminatory in their application and adaptation to the necessities of the intended objective. It is about nothing other than the implementation of the technique of mutual recognition (or the equivalence of situations), a technique which has permitted the legislator not to invoke the action of approximation of national legislations in a number of fields, with a view to ensuring the full force and effect of the freedom of movement guaranteed by the Treaty. A topical example in this regard may be found in the approach followed by the Council in adopting Directive 89/48/EEC on general recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration: a no longer sectoral but general, horizontal approach, based on the idea of comparability of training, that university courses of study, provided by the Member States, present great similarities.

the CJ<sup>(180)</sup>, case-law has not fluctuated any less, in particular in the field of social security, in relation to the territoriality of certain benefits<sup>(181)</sup>. Today it seems well established to us in the sense of the recognition of the equivalence of situations. The CJ has thus judged that:

- where the legislation of the Member State providing family benefits 'requires, as a condition for the grant of those benefits, that a member of the worker's family must be registered as unemployed with the employment office for the territory in which that legislation applies, that condition must be considered to be fulfilled where the family member is registered as unemployed with the employment office of the Member State in which he resides'<sup>(182)</sup>;
- Community law objects to a migrant worker being precluded from invoking for the calculation of his old-age pension periods of invalidity as periods of active employment on the sole ground that, when he became incapable of work, he was employed, not in the Member State in question, but in another Member State<sup>(183)</sup>;
- when a national legislation makes entitlement to a benefit subject to a minimum period of insurance in a reference period preceding the occurrence of the risk while in certain cases permitting the extension of this period, such legislation must envisage a possibility of

extension of the reference period where the facts or circumstances corresponding to those which permit the extension occur in another Member State<sup>(184)</sup>;

- when the legislation of a Member State envisages the extension of the right to an orphan's benefit beyond the age of 25 years for persons entitled to the benefit whose education or vocational training has been suspended or delayed as a result of the completion of military service, this state must assimilate the military service completed in another Member State to military service completed under its own legislation<sup>(185)</sup>;
- by requiring, as a condition for the granting of redundancy pay, that children of Community migrant workers resident in Belgium have finished secondary school at an establishment subsidised or recognised by the Belgian State, it has failed in its obligations by virtue of former Article 48 of the EC Treaty (now Article 39 EC) and of Article 7 of Regulation (EEC) No 1612/68<sup>(186)</sup>;
- Articles 39, para. 2, EC and 42 EC preclude national legislation which does not provide for the possibility of prolongation of a reference period for the calculation of the right to benefit where the payment of accident benefits corresponding to those which enable such a prolongation occurs in another Member State<sup>(187)</sup>;

<sup>(180)</sup> See Ugliola judgment [1969] ECR I-36, where on the basis of the principle of equality of treatment implemented by former Article 48 EEC, the CJ was able to equate military obligations fulfilled in the country of origin with those fulfilled in the state of employment in order to permit the Community worker to benefit from identical protection to that of the national worker in terms of employment conditions.

<sup>(181)</sup> See Case 20/75 D'Amico [1975] ECR I-202, with regard to taking into account periods of unemployment completed in another Member State with a view to the acquisition of entitlement to an early pension, and Case 66/76 Kuyken [1977] ECR I-2711, in which for the granting of unemployment benefit, under the legislation of a Member State, the CJ did not permit former students who had never occupied a post to equate studies completed in another Member State with those completed in an establishment organised, recognised or subsidised by the competent state. See also our work, Introduction à la sécurité sociale des personnes qui se déplacent à l'intérieur de la Communauté européenne. Principes directeurs et grands arrêts de la Cour de justice, De Boeck Université, 2001, No 44.

<sup>(182)</sup> Case C-228/88 Bronzino [1990] ECR I-531, and Case C-12/89 Gatto [1990] ECR I-577.

<sup>(183)</sup> Cases C-45/92 and C-46/92 Lepore and Scamuffa [1993] ECR I-6497.

<sup>(184)</sup> Case C-349/97 Paraschi [1991] ECR I-4501.

<sup>(185)</sup> Case C-131/96 Mora Romero [1997] ECR I-3659.

<sup>(186)</sup> Regulation (EEC) No 1612/68, of 15 July 1968, on the right of workers to move and reside freely within the territory of the Member States (OJ L 257, 19.10.1968). See Case C-278/94 Commission v Belgium [1996] ECR I-4307. We would point out that following this judgment, the Belgian rule was amended, studies completed in another Member State being henceforth assimilated to studies completed in Belgium on condition that:  
— the person concerned produces documents which show that the studies or training are of the same level and equivalent to Belgian studies which provide entitlement;  
— at the time of his benefit claim, the person concerned is classified as a child of migrant workers, beneficiaries of the freedom of movement guaranteed by European law, and resident in Belgium. This new rule will initiate a new reference for a preliminary ruling raising the question of its compatibility with the requirements of European citizenship, in the event that the particular person concerned is not classified as the child of a migrant worker (see below, in para. 12, our comments on Case C-258/04 Ioannidis [2005] ECR I-8275).

<sup>(187)</sup> Case C-290/00 Duchon [2002] ECR I-3567.

- it likewise follows from a national rule which, to determine periods of insurance assimilated under old-age insurance, only takes into consideration, unconditionally, periods of child-rearing completed on national territory, but makes the benefit of maternity allowances by virtue of national legislation subject to the taking into consideration of periods of child-rearing completed in another Member State<sup>(188)</sup>;
- finally, Community law precludes a Member State refusing to take into consideration, for the purposes of granting a childcare allowance, the perception period of a comparable benefit in another Member State in the same way as if it had been completed on its own territory<sup>(189)</sup>.

It should be noted that, regardless of the rule of non-discrimination, the technique of assimilation of situations is largely used within the framework of Regulations (EEC) Nos 1408/71 and 574/72 (principle of aggregating periods of insurance, employment and residence to qualify for social security benefits or their calculation).

### **Obstacle to free movement and principle of non-discrimination**

A second dominant trait in the context of the free movement of persons is the already former trend of the CJ to include in the notion of indirect discrimination that of *obstacle to free movement*. Thus, in order to establish such discrimination, the CJ will verify whether the criterion, apparently neutral, which is used has 'the same importance' both for migrant workers or, more generally, for persons having exercised their right of free movement and for nationals or 'those permanently settled'. This analysis framework has had the effect of considerably expanding the scope of the rule on equality of treatment.

<sup>(188)</sup> Case C-28/00 Kauer [2002] ECR I-1343, paras 43 and 44; see, in the same sense, Elsen case, abovementioned, paras 25 to 28.

<sup>(189)</sup> Case C-507/06 Klöppel [2008], not yet published, paras 18 and 19. According to Austrian legislation, when only one parent receives the childcare allowance, this is due for a maximum of 30 months following the birth of the child, but if the second parent receives this allowance (or has received it) as well, the allowance is due for 36 months, the parents thus receiving the allowance alternately.

Case C-41/89 *Pinna* [1986] ECR I-1, invalidating former Article 73, para. 2, of Regulation (EEC) No 1408/71 on social security of migrant workers, quite well illustrates the reasoning followed by the CJ. This provision envisaged a specific regime, with regard to payment of family allowances, for workers employed in France: allowances for children resident on the territory of another Member State were paid by France according to the legislation of the state in which the children were living. It was therefore a question of verifying whether the criterion of place of residence of the family members of a worker employed in France, used certainly without apparent distinction of nationality, had 'the same importance' for 'migrant workers' as for 'national workers'. The CJ judged that Article 73(2) of Regulation (EEC) No 1408/71 contained discrimination disguised according to nationality contrary to former Article 48 of the Treaty<sup>(190)</sup>.

The *transposition to the criterion of the nationality of that of having or not having exercised the right of freedom of movement within the Community* is particularly striking in the *Masgio* case (Case C-10/90 *Masgio* [1991] ECR I-1134), where the CJ was led to verify whether a national provision on the calculation of an old-age pension being paid concurrently with accident insurance benefits paid in another Member State, although it is applied independently of the nationality of the workers concerned, is 'liable, even though it applies without regard to the nationality of the workers concerned, to place migrant workers *in a worse position* as regards social security than those who have worked in only one Member State' (para. 19; the italics are ours).

The CJ having established that the concurrency regulation operating differently depending on whether

<sup>(190)</sup> See also, in the same sense, Case 237/78 *Toia* [1979] ECR I-2645, on the French allowance to mothers of families reserved for those whose children are French nationals; Case 33/88 *Allue* [1989] ECR I-1591, on the application of a provision of Italian law providing for a limit to the duration of a working connection between universities and foreign-language assistants, although such a limit does not exist, in principle, for other workers; and Case C-27/91 *Le Manoir* [1991] ECR I-5538, on relief from employer social security contributions the benefit of which was subject to employment by the employer of trainee workers relevant to the national education of the Member State considered.



the benefit is paid in the same Member State or in another Member State, and such that it places a worker who has exercised his right in a worse position, has judged that the provision concerned 'is liable to constitute an obstacle to freedom of movement for workers' and is contrary to Articles 7 and 39 to 42 EC as well as to Article 3(1) of Regulation (EEC) No 1408/71.

Mention should also be made, even if it is a marginal case in the field of social security, of Case C-237/94 O'Flynn [1996] ECR I-2617. At issue was the British legislation granting a payment to persons of modest means for funeral expenses on condition that the funeral takes place in the United Kingdom. What happens when the claimant, a national of another Member State, working and resident in the United Kingdom, wishes the burial of his child to take place in the state of origin, in the family vault? After having considered that such a payment constitutes a social right within the meaning of Article 7(2) of Regulation (EEC) No 1612/68, and that, in accordance with this provision, migrant workers must be able to benefit from it under the same conditions as national workers, the CJ has established that the provision concerned, imposing the condition that funerals take place on national territory, is liable, by its nature, to affect migrant workers more than national workers as they will more often be led to arrange for burial in their state of origin with which they generally maintain links. As a consequence, according to the CJ, the condition that the burial (or the cremation) take place on national territory constitutes discrimination<sup>(191)</sup>.

<sup>(191)</sup> The CJ has adjudicated again on whether such discrimination might be objectively justified and proportionate to the objective pursued. The United Kingdom invoked two pieces of evidence in this regard: the protection of public health and the prohibitive cost and practical inconvenience which the payment of the benefit would entail if the burial or cremation takes place outside the national territory. These two pieces of evidence were rejected by the CJ. On the one hand, the protection of public health would be equally safeguarded if the remains were transported outside the territory of the UK with a view to being buried or cremated in another Member State (para. 26). On the other hand, with respect to the costs of burial or cremation in another Member State, there is nothing to prevent 'the United Kingdom from limiting the allowance to a lump sum or reasonable amount fixed by reference to the normal cost of a burial or cremation within the United Kingdom' (para. 29).

Finally, the CJ used the same framework for analysis in Case C-400/02 *Merida* [2004] ECR I-8499, with regard to the method of calculating a 'temporary allowance' granted by the German State, by virtue of a collective agreement, to civilian workers employed in foreign armed forces stationed on national territory and whose contract of employment had been terminated. This allowance was calculated on the basis of remuneration from which German income tax had been notionally deducted even if the remuneration had been subject to tax in the country of residence (in this case in France), under a double taxation agreement between the two states. The CJ, in applying Articles 39 EC and 7(4) of Regulation (EEC) No 1612/68, has confirmed that this method of calculation *disadvantaged* border workers. Indeed, although the application thereof ensured German residents, in the course of the first year following termination of the contract of employment, an income equivalent to that of an active worker, this was not the case for French residents who found their allowance subject, as was their salary, to taxation in France<sup>(192)</sup>.

### **European citizenship and non-discrimination**

Indeed, we cannot leave without comment the consequences of European citizenship from the perspective of the principle of non-discrimination based on nationality, as guaranteed by Article 12 EC, in particular in the field of social benefits. The CJ has specifically attached to the status of citizen of the Union, which 'is destined to be the fundamental status of nationals of the Member States'<sup>(193)</sup>, the

<sup>(192)</sup> Furthermore, the CJ rejected without difficulty the reasons of administrative simplification and restriction of financial costs advanced by the German government, such reasons not being able to justify failure to comply with obligations arising from the EC Treaty.

<sup>(193)</sup> Case C-184/99 *Grzelczyk* [2001] ECR I-6193, para. 31, regarding a student with French nationality studying in Belgium and who applied for the *minimex* benefit. Mention should likewise be made, in this sense, of Case C-224/02 *Pusa* [2004] ECR I-5763, concerning the Finnish law on enforcement, which, in order to determine the amount *distrainable*, did not permit any consideration to be taken of the tax paid by the party concerned in another Member State, contrary to that which was provided for in the case of deduction at source under taxation in Finland; as well as of Case C-147/03 *Commission v Austria* [2005] ECR I-5969, on conditions of access to higher and university education of a nature to restrict access to national universities by holders of diplomas obtained in other Member States.

right not to suffer discrimination ‘within the scope of application *ratione materiae* of the Treaty’<sup>(194)</sup>, which obviously supposes that the interested party is legally resident on the territory of the Member State considered<sup>(195)</sup>. But over and above the question of the right of residence of citizens of the European Union, the examination of which would distract us from the object of this study, it is worth mentioning several recent CJ cases concerning the degree of integration on national territory, of which the European citizen must provide evidence in order to claim the right to certain social benefits. In these cases, the CJ has directly applied the rules of the Treaty regarding equality of treatment.

Case C-138/02 *Collins* [2004] ECR I-2703 is an important judgment in this regard.

Mr Collins, possessing dual Irish and American nationality, returned to the United Kingdom in order to find employment in the social services sector. He asked to be able to receive job-seekers allowance, which he was refused on the ground that he was not habitually resident in this state. Was this condition discriminatory and contrary to the Treaty? This was the question.

As the party concerned was looking for first employment, he had not yet established an employment relationship in the host Member State. He therefore could not claim according to the CJ, on the basis of Article 7 of Regulation (EEC) No 1612/68<sup>(196)</sup>, the same social and tax advantages as national workers. Indeed, the term ‘worker’ in the sense of Title II of the first part of the said regulation only, according to the CJ, covers persons who have *already* entered the employment market.

<sup>(194)</sup> Case C-85/96 *Martinez Sala* [1998] ECR I-2708, para. 62, on a Spanish national residing in Germany, having ceased all professional activity and who claimed a child-rearing allowance for her child.

<sup>(195)</sup> See in this regard our comments in ‘Tendances récentes (1998-2003) de la jurisprudence sociale de la CJCE’, JTT 2003, pp. 243, 301–303.

<sup>(196)</sup> Regulation (EEC) No 1612/68, of 15 July 1968, on the right of workers to move and reside freely within the territory of the Member States (OJ L 257, 19.10.1968).

The CJ has no less verified, directly with regard to Article 39(2) EC, whether the principle of equality of treatment is at odds with a national regulation which makes a financial benefit, intended to facilitate access to employment, subject to a condition of residence on national territory. It is remarkable that the CJ has stated that it wishes to interpret Article 39 EC in the light of intervening developments regarding European citizenship, which ‘is destined to be the fundamental status of nationals of the Member States’. It is thus estimated that the national regulation in question introduced a difference of treatment to the extent that the party concerned lives habitually in the United Kingdom or not, in such a way as to disadvantage nationals of a Member State who make use of their right to move freely for the purposes of finding employment on the territory of another Member State.

However, the CJ considered that it was ‘legitimate for the national legislature to wish to ensure that there is a real link between the applicant for that allowance and the geographic employment market concerned’ (see also, in this sense, Case C-224/98 *D’Hoop* [2002] ECR I-6191, para. 38), it being possible to establish the existence of such a link ‘in particular, by establishing that the person concerned has, for a reasonable period, in fact genuinely sought work in the Member State in question’ (paras 66 to 70). In doing so, the CJ intended to prevent a certain kind of ‘social tourism’. The period of residence thus required may not, however, ‘exceed that which is necessary’, in accordance with the principle of proportionality, which, as so often in Community law, is for the national judge to assess<sup>(197)</sup>.

It is surprising that the CJ, in this case, did not quite simply follow the route of Regulation (EEC) No 1408/71, the benefit in question, specifically referred to in Annex IIa of the said regulation, having to be

<sup>(197)</sup> The solution accepted by the *Collins* judgment, based on the EC Treaty, is not in harmony with the text of Directive 2004/38/EC, abovementioned, Article 24(2) of which explicitly rejects the obligation for the Member States to grant nationals from other Member States assistance in looking for initial employment on their national territory.

granted to any person resident on national territory. However, this supposed that it was possible to establish that Mr Collins had decided to appoint the United Kingdom as the habitual centre of his interests (see, in this sense, Case C-90/97 *Swaddling* [1999] ECR I-1075).

Case C-258/04 *Ioannidis*, abovementioned, constitutes another illustration of the extensive interpretation of Article 39(2) EC by the CJ following the phasing-in of citizenship of the European Union with regard to a financial benefit (such as the tide-over allowance in Belgium) intended to facilitate access to employment in a Member State. According to the CJ, national rules, in refusing the advantage of the said benefit to nationals of another Member State seeking their first employment (and who are not in the charge of migrant workers<sup>(198)</sup>) for the sole reason that those concerned have completed their secondary education in another Member State, introduces a difference of treatment contrary to Article 39(2) EC in that this latter condition risks putting at a disadvantage principally nationals from other Member States, unless such a difference of treatment is based on independent objective considerations of the nationality of the people concerned and proportionate to the objective legitimately pursued. In this regard, as has just been recalled, it is legitimate for the national legislator to want to ensure the existence of a real link between the tideover benefit claimant and the geographical market of the work at issue (para. 30; *Hoop* case, abovementioned, para. 38).

However, as the CJ had already judged in this last case, ‘a single condition concerning the place where the diploma of completion of secondary education was obtained is nevertheless too general and exclusive.’

Case C-192/05 *Tas-Hagen and Tas* [2006] ECR I-10451 concerns the requirement for a condition of residence on national territory, imposed by a Dutch rule in view

of the granting of a benefit provided for the use of civilian victims of war. As Dutch nationals, Ms Tas-Hagen and Mr Tas were able to invoke their status of citizens of the Union, having exercised their right to move and reside freely on the territory of a Member State other than the one of which they are nationals, as they had established their place of residence in Spain. It is precisely the exercise of this right which had been of a nature to affect the possibility for them of obtaining the payment of the benefit concerned.

The CJ, resuming a well-known line of reasoning in the context of freedom of movement of workers, judged that ‘the opportunities offered by the Treaty in relation to freedom of movement cannot be fully effective if a national of a Member State can be deterred from availing himself of them by obstacles raised to his residence in the host Member State by legislation of his state of origin penalising the fact that he has used them’ (para. 30)<sup>(199)</sup>. Such is the case if a national rule makes the advantage of a social benefit subject to the condition that the people concerned have their place of residence on national territory on the date on which their claim is made as this could deter them from leaving their state of origin. Nevertheless such a restriction can be justified, with regard to Community law, ‘only if it is based on objective considerations of public interest independent of the nationality of the persons concerned and is proportionate to the legitimate objective of the national provisions’ (para. 33).

In the present case, the objective of restricting an obligation of solidarity with regard to the civilian victims of war only to persons who had a link with the Dutch people during and after the war is liable, according to the CJ, to constitute an objective of general interest, but it is still necessary that the measure taken, to know the condition of residence as well as expression of this degree of attachment to the Dutch people, be proportionate, that is to say capable of achieving the objective, without going beyond what is necessary for that purpose.

<sup>(198)</sup> With regard to the children of migrant workers, seeking their first employment, see Case 94/84 *Deak* [1985] ECR I-1873, and Case C-337/97 *Meensen* [1999] ECR I-5289.

<sup>(199)</sup> See also *Pusa* judgment, abovementioned, para. 19.

But a condition of residence cannot, according to the CJ, be considered as capable of achieving the objective pursued as, reported only on the date on which the claim is made, it does not provide sufficient indication of the degree of attachment to the society of the Member State thus testifying its solidarity with regard to victims of war. The rule was thus deemed contrary to Article 18(1) EC, guaranteeing the right to move and reside freely within the territory of the Member States.

In contrast, in Case C-406/04 *De Cuyper* [2006] ECR I-6947, the condition of residence imposed by the Belgian rule for the granting of unemployment benefit to unemployed persons over 50 years old, exempt from the obligation to register as job-seekers, was judged compatible with Article 18(1) EC. Indeed, such a condition of residence complies, according to the CJ, with the necessity for the inspection services to monitor the professional and family situation of the persons concerned, for the application of the right to unemployment benefit, which constitutes an objective consideration of general interest independent of the nationality of the persons concerned. Furthermore, with regard to the proportionality of the restriction, the efficacy of such a check rests, to a certain extent, on its random nature and the possibility of its monitoring being performed *in situ*. The CJ added that ‘the monitoring to be carried out as far as concerns unemployment allowances is of a specific nature which justifies the introduction of arrangements that are more restrictive than those imposed for monitoring in respect of other benefits’ (para. 45) <sup>(200)</sup>.

<sup>(200)</sup> Mention should again be made, even if we move away from the field of social security, of the granting of a maintenance grant to a student, a national of a Member State who has gone to another Member State to complete his studies there: Case C-158/07 Förster [2008], not yet published, paras 51 to 60, in which the CJ judged in particular that a condition of uninterrupted residence of a duration of five years was both capable of guaranteeing that the claimant of the grant was integrated into the host Member State and proportionate to the objective legitimately pursued by national law. The CJ referred in particular to Article 21(2) of Directive 2004/38/EC (although it was not applicable in the case), providing that a Member State was not obliged to grant study maintenance grants to students having not acquired the right of permanent residence, as well as to Article 16(1) of the same directive according to which such a right of residence is recognised for students having resided on the territory of the Member State concerned for an uninterrupted period of five years (para. 55). The CJ did not therefore intend to call into question the appraisal of the Community legislator himself.

It is thus ascertained that, for the purposes of Community regulations regarding the social security of migrant workers, case-law has developed based directly on the provisions of the Treaty with regard to the conditions for granting social advantages, of which certain social security benefits, for the benefit of the citizens of the Union.

## B. Determination of the applicable legislation

In this regard, we have made the choice to use a single judgment touching on particularly sensitive questions relating to the phenomenon of relocation of undertakings, encouraged by the disparities themselves between national social security schemes.

In principle, in accordance with Article 13(2) of Regulation (EEC) No 1408/71 the salaried worker is subject to the legislation of the state on the territory of which he is engaged in an occupation, regardless of the location of his place of residence or that of the headquarters or domicile of his employer. However, Article 14(1) provides that in the event of secondment of a worker, ‘employed in the territory of a Member State by an undertaking to which he is normally attached’ to another Member State ‘to perform work there for that undertaking’, he shall continue to be subject to the legislation of the first Member State. It is still a requirement that ‘the anticipated duration of that work does not exceed 12 months’ and that the person concerned is not sent ‘to replace another worker who has completed his term of posting’.

In its famous Case 35/70 *Manpower* [1970] ECR I-1251, the CJ had underlined the objective of this exception to the rule of the state of employment [at the time contained in Article 13(a), of Regulation No 3]: it is a question of promoting the free provision of services for the benefit of undertakings which make use of them by sending workers to Member States other than the one in which they are established and of favouring economic interpenetration (para. 10), by preventing an undertaking established in a Member

State from being obliged to affiliate their workers, normally subject to the social security legislation of that state, with the social security system of other Member States where they were sent to perform work of short duration (para. 11). The CJ thus considered that this exception was applicable to a temporary employment agency wishing to offer cross-border services on condition that it was engaged in a 'normal' activity in the Member State where it was established (para. 16).

In Case C-202/97 *Fitzwilliam* [2000] ECR I-883, the CJ further specified the conditions for the application of Article 14(1)(a), of Regulation (EEC) No 1408/71, to temporary workers seconded to another Member State in order to ensure that recourse to this exception is not diverted from its objective and that it does not in reality just serve a deliberate wish to avoid the application of the general rule of the state of employment.

Two conditions must be respected according to the CJ.

- On the one hand, an organic link must exist between the undertaking and the workers that it has seconded on the territory of another Member State for the duration of their secondment. It suffices, in this regard, that the worker in question is posted on the authority of the undertaking.
- On the other hand, the temporary employment agency must normally carry on its activities in the Member State in which it is established, that is to say, it 'habitually carries on significant activities' there<sup>(201)</sup>. In this regard, the CJ cites a number of criteria likely to characterise such activities: 'the place where the undertaking has its seat and administration, the number of administrative staff working in the Member State in which it is established and in the other Member State,

the place where posted workers are recruited and the place where the majority of contracts with clients are concluded, the law applicable to the employment contracts concluded by the undertaking with its workers, on the one hand, and with its clients, on the other hand, and the turnover during an appropriately typical period in each Member State concerned' (para. 43).

In contrast, the nature of the tasks assigned respectively to the workers placed at the disposal of undertakings located on the territory of the Member State where the temporary employment agency is established and to workers seconded on the territory of another Member State is irrelevant.

If that is the case, in the hypothesis of the secondment of workers, the competent institution of the Member State where the temporary employment agency is established would normally have issued a certificate (E101) confirming that its social security system remains applicable during the period of secondment. Because of the principles of uniqueness of the applicable legislation and of legal certainty, 'the certificate, in comprising this declaration, necessarily implies that the other Member State's social security system cannot apply' (para. 49). 'It establishes a presumption that posted workers are properly affiliated to the social security system of the Member State in which the undertaking providing temporary personnel is established' and is binding on the competent institution of the Member State to which those workers are posted (para. 53). Consequently, 'as long as an E101 certificate is not withdrawn or declared invalid, the competent institution of a Member State to which workers are posted must take account of the fact that those workers are already subject to the social security legislation of the state in which the undertaking employing them is established and that institution cannot therefore subject the workers in question to its own social security system' (para. 55).

<sup>(201)</sup> See also, in this sense, Case C-178/97 *Banks* [2000] ECR I-2005, para. 27. From this it emerges that a building enterprise, established in another Member State, which sends its workers to the territory of another Member State in which it carries on all its activities, with the exception of purely internal management activities, may not avail itself of Article 14(1)(a) of Regulation (EEC) No 1408/71 (see Case C-404/98 *Plum* [2000] ECR I-9379, para. 22).

However, the CJ observes that the principle of sincere cooperation, laid down in Article 5 of the Treaty (now Article 10 EC), ‘requires the competent institution to carry out a proper assessment of the facts relevant for the application of the rules relating to the determination of the legislation applicable in the matter of social security and, consequently, to guarantee the correctness of the information contained in an E101 certificate’ (para. 51). It is incumbent on it ‘to reconsider the grounds for its issue and, if necessary, withdraw the certificate if the competent institution of the Member State to which the workers are posted expresses doubts as to the correctness of the facts on which the certificate is based and, consequently, of the information contained therein’ (para. 56) (see below our developments on the principle of sincere cooperation).

Furthermore, the institutions concerned which did not manage to reach an agreement are always permitted to appeal to the Administrative Commission on Social Security for Migrant Workers, independently of the possibility for the Member State to which the workers concerned are posted of bringing infringement proceedings under Article 170 of the EC Treaty (now Article 227 EC) (para. 58) for failure to fulfil obligations.

The consequences of the issue of form E101 have been reiterated by the CJ in its *Banks and Others* judgment, abovementioned (paras 38 to 48). The CJ will add that there is nothing to prevent certificate E101 from being issued during the period under consideration, or after its expiry (even if it is preferable that issue takes place before the start of the period), and thus has retroactive effect (*Banks* judgment, paras 53 and 54)<sup>(202)</sup>.

<sup>(202)</sup> See, analogously, Case C-326/00 IKA [2003] ECR I-1703 and Case C-372/02 Adanez-Vega [2004] ECR I-10761. The CJ will add that there is nothing to prevent certificate E101 from being issued during the period under consideration, or after its expiry (even if it is preferable that issue takes place before the start of the period), and thus has retroactive effect.

## C. Preservation of acquired rights

In this regard, the breakthrough which seems the most extraordinary to us in recent years, which justifies our dwelling on it a little, undoubtedly concerns the right of those insured to travel to another Member State to receive healthcare at the expense of and in accordance with the scale of the competent state, which in turn guarantees a form of ‘export of medical care’.

It is a fact that Community law does not affect the competence of Member States to adjust their social security systems and to fix the scope of the duty of national solidarity (Case C-238/92 *Duphar and Others* [1984] ECR I-523, para. 16, and Case C-70/95 *Sodemare and Others* [1997] ECR I-3395, para. 27). Consequently, in the absence of harmonisation at Community level, it shall be for the legislation of each Member State to determine the conditions of the right or obligation to affiliate oneself to a social security system as well as the conditions for award (see in particular Case C-110/79 *Coonan* [1980] ECR I-1445, para. 12; Case C-349/87 *Paraschi* [1991] ECR I-4501, para. 15, and Cases C-4/95 and C-5/95 *Stöber and Piosa Pereira* [1997] ECR I-511, para. 36).

Nevertheless ‘the Member States must [...] comply with Community law when exercising those powers’ (Case C-120/95 *Decker* [1998] ECR I-1831, para. 23, and Case C-158/96 *Kohll* [1998] ECR I-1931, para. 19). This is a good example of the interleaving of Community and national law. Although Community law is restricted, as so very often, to imperatively setting an objective to achieve, in the event of the realisation of the freedom of movement of persons and equality of treatment according to nationality, national powers are sustained, but they are framed by the rules of the Treaty or derived law, with which they may not enter into conflict.

We know that the *Decker* and *Kohll* judgments abovementioned, which primarily concern the free provision of services (healthcare) and the free movement of goods (medical products), had



a major impact not only on the specialised environments of health insurance, but also, which is more unusual, due to the technical expertise of the material, on the public's opinion. It is not ruled out that these judgments, which have served as catalysers for new prejudicial references to the CJ<sup>(203)</sup>, may eventually require some adjustment of the principles which govern the health insurance systems of the Member States, in order to ensure the full implementation of the freedoms guaranteed by the Treaty.

This adjustment is the result of difficult arbitration which the Community judge has had to perform between, on the one hand, the imperatives of the free movement of persons — and of goods, involving medical products — and on the other hand, the necessity of maintaining the financial balance of the health insurance systems of the Member States and thus that of monitoring health expenditure as well as ensuring a balanced and accessible medical and hospital service for everyone, which is, evidently, not at odds with the maintenance of a certain level of protection of public health and national solidarity.

The case-law of the CJ relative to the provision of healthcare in a competent Member State, and to meeting its cost by the latter, may be summarised as follows<sup>(204)</sup>.

<sup>(203)</sup> See Case C-368/98 *Vanbraeckel* [2001] ECR I-5363 and Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5423; Case C-385/99 *Müller-Fauré* [2003] ECR I-4509; Case C-156/01 *van der Duin and ANOZ Zorgverzekeringen* [2003] ECR I-7045; Case C-56/01 *Inizan* [2003] ECR I-12403; Case C-372/04 *Watts* [2006] ECR I-4325; Case C-466/04 *Acereda Herrera* [2006] ECR I-5341; and Case C-444/05 *Stamatelaki* [2007] ECR I-3185. Mention should also be made of Case C-326/00 *Ioannidis* [2003] ECR I-1703, which more particularly concerns the case of pension holders with temporary residence in another Member State.

<sup>(204)</sup> In reality, two systems of meeting the cost of healthcare are found in a competent Member State: on the one hand, that laid down by Article 22(1) of Regulation (EEC) No 1408/71 which guarantees, under certain conditions, the reimbursement of medical costs payable by the competent state, but in accordance with the tariffs of the legislation of the state on the territory of which the services were provided or the products purchased and, on the other hand, that made available by the case-law of the CJ with regard to the principles of the freedom of movement of goods and the free provision of services, which is summarised here.

It is clear that the regulatory activity of a Member State which makes the reimbursement of medical costs incurred when care is provided in another Member State conditional on obtaining prior authorisation to travel to this latter state to obtain care there involves a barrier to the free provision of services, or to the free movement of goods (if it is a question of purchasing medical products in another Member State) contrary to Articles 49 and 50 EC (or 28 and 30 EC, depending on the case), taking account of the undeniable deterrent effect of such regulatory activity on recourse to providers of medical services established in a Member State other than the state of affiliation (or on the purchase of medical products in this state) (abovementioned judgments *Decker*, para. 36, and *Kohll*, para. 35)<sup>(205)</sup>.

The real problem raised by this situation is the *admissibility of the evidence* advanced with regard both to the protection of public health (in particular, the need to guarantee insured persons access to high-quality care as well as a balanced and accessible medical and hospital service) and to pressing reasons of general interest (in particular, the need to maintain the financial balance of the social security system and thus to monitor health expenditure in order to respond in particular to the requirements of national solidarity towards the most vulnerable).

Admittedly, it will be recalled that objectives of a purely economic nature cannot justify a barrier to the fundamental principle of free provision of services (see, in this sense, Cases C-398/95 *SETTG* [1997] ECR I-3091, para. 23, and *Kohll*, abovementioned, para. 41). However, in particular to the extent to which this might have global consequences on the protection of public health, a risk of serious damage to the financial balance of the social security system may constitute an imperative reason of general interest liable to justify such a barrier

<sup>(205)</sup> The *Stamatelaki* judgment, abovementioned, called into question the Greek legislation insofar as it excluded meeting the cost of hospital care in a private medical care establishment located in another Member State, with the exception of hospital care provided to children under 14 years of age, although a patient affiliated in Greece receives care in a publicly or privately funded establishment without having to pay anything.

(abovementioned judgments *Decker*, para. 39, *Kohll*, para. 41, and *Stamatelaki*, para. 30) <sup>(206)</sup>.

In this regard, the prudent approach adopted by the case-law of the CJ, in particular in the *Müller-Fauré* judgment (see paras 75 to 98), is based on a distinction between the medical services provided at the practitioner's surgery and those dispensed in a hospital establishment.

#### **(i) Regarding non-hospital services** <sup>(207)</sup>

It must be acknowledged, according to the CJ, that by their nature, these services do not represent the essential part of the costs of health insurance of the Member States. In any case, nothing seriously indicates that

<sup>(206)</sup> To tell the truth, behind all this debate can be found the difficulties encountered by the insured relevant to a benefit system in kind (or to a national health service) because of the establishment of waiting lists.

Generally speaking, it is therefore the problem of the means of control of health expenditure which is posed. A system of subsidising providers — which may, moreover, also exist in a so-called reimbursement system — is generally based on the prior negotiation of practical tariffs, of the nature of the measures and requirements (choice of therapies, medicines, medical products, duration of hospitalisation), in order to avoid exceeding that which is necessary and appropriate for recovery, the demand for healthcare being largely induced by the medical profession itself. The system of subsidies thus constitutes an efficient means for the Member States of monitoring and acting on the financial balance of their health insurance system. There are obviously other means, undoubtedly more radical, of limiting expenditure, to wit reducing reimbursement rates or decreasing the volume of measures and requirements undertaken. However, recourse to such means is based on transferring additional expenses to those insured, which results in making access to healthcare more difficult for categories of insured persons on low incomes as well as in decreasing the level of health protection.

It follows from this that the abolition of the condition of subsidisation for the provision of services abroad raises a real problem in terms of monitoring the volume of expenditure. But could it be seriously detrimental to the financial balance of the national health insurance systems considered and have consequences for the global level of protection of public health and the degree of national solidarity? That is the real question, bearing in mind that purely economic considerations cannot ever, as such, justify a barrier to the fundamental principle of free provision of services.

<sup>(207)</sup> See in this regard the abovementioned *Decker* and *Kohll* judgments, which involve a claim for reimbursement addressed to the competent fund in Luxembourg, respectively, for a pair of spectacles purchased on prescription issued by an ophthalmologist established on national territory, from an optician established in Belgium and for orthodontic treatment performed in Germany.

But above all it is the *Müller-Fauré* judgment which presents precise reasons in this regard. The facts in this last case are as follows:

- Ms Müller had asked the health insurance fund in Zwijndrecht to pay for dental treatment (the placing of six crowns and one fixed bridge prosthesis in the upper jaw) which she received during her holidays, in October/November 1994, in Germany;
- Ms van Riet, who had been suffering from pains in her right wrist since 1985, had asked the health insurance fund in Amsterdam to pay for an arthroscopy and a resection of the ulna which she had undergone, in May 1993, in Belgium. The preparation, execution and follow-up of these operations took place partly in hospital and partly outside any hospital infrastructure.

‘removal of the requirement for prior authorisation for that type of care would give rise to patients travelling to other countries in such large numbers, despite linguistic barriers, geographic distance, the cost of staying abroad and lack of information about the kind of care provided there, that the financial balance of the Netherlands social security system would be seriously upset and that, as a result, the overall level of public health protection would be jeopardised ‘which might constitute proper justification for a barrier to the fundamental principle of freedom to provide services’ (para. 95 of the *Müller-Fauré* judgment).

Furthermore, the CJ continues, ‘care is generally provided near to the place where the patient resides, in a cultural environment which is familiar to him and which allows him to build up a relationship of trust with the doctor treating him. If emergencies are disregarded, the most obvious cases of patients travelling abroad are in border areas or where specific conditions are to be treated. Furthermore, it is specifically in those areas or in respect of those conditions that the Netherlands sickness funds tend to set up a system of agreements with foreign doctors, as the observations submitted to the Court reveal’ (para. 96 of the same judgment). Those various factors seem likely, according to the CJ ‘to limit any financial impact on the Netherlands social security system of removal of the requirement for prior authorisation in respect of care provided in foreign practitioners’ surgeries’ (para. 97 of the same judgment).

#### **(ii) Regarding hospital services** <sup>(208)</sup>

The CJ accepted that because of ‘certain very distinct characteristics’ presented by the medical services provided in a hospital, the system of prior

<sup>(208)</sup> In this regard, above all, reference is made to the *Smits* and *Peerbooms* judgment, abovementioned, with regard to the refusal by a Dutch health insurance fund to reimburse hospital costs incurred in Germany and in Austria because satisfactory and adequate treatment of the illness in question was available in the Netherlands. Ms Smits suffered from Parkinson's disease and had received treatment at a clinic in Germany; Mr Peerbooms had fallen into a coma following a road traffic accident and had been transferred to a clinic in Austria in a vegetative state; put another way, the *Müller-Fauré* judgment, abovementioned; as well as the *Watts* judgment, abovementioned, in which the CJ was led more particularly to interpret Article 22 of Regulation (EEC) No 1408/71 and Article 49 EC in the context of a national health system.

authorisation is justified. Indeed, ‘the number of hospitals, their geographical distribution, the mode of their organisation and the equipment with which they are provided, and even the nature of the medical services which they are able to offer, are all matters for which planning must be possible’ (*Smits and Peerbooms* judgment, para. 76), in order to guarantee ‘sufficient and permanent access to a balanced range’ of high-quality care and to ‘control costs and to prevent, as far as possible, any wastage’ (para. 79 of the same judgment): ‘... it is clear that, if insured persons were at liberty, regardless of the circumstances, to use the services of hospitals with which their sickness insurance fund had no contractual arrangements, [...] all the planning which goes into the contractual system [...] would be jeopardised at a stroke’ (para. 81) <sup>(209)</sup>.

This is therefore a justification drawn from the protection of public health and, more particularly, from the necessity to ensure a balanced and accessible hospital medical service to all those affiliated which makes the barrier to the free provision of service constituted by the requirement for prior authorisation compatible with Article 49 EC.

However, authorisation may only be refused for *objective* reasons, known in advance, in the absence of any arbitrary behaviour on the part of the national authorities <sup>(210)</sup>.

Among these reasons, according to the CJ, there is the possibility for the patient to obtain treatment which is the same or equally effective ‘without undue delay’ on the territory of the competent state (see para. 103 of the judgment). But must it, in this regard, base itself on purely objective elements of a

medical nature, with regard to the probable development of the illness, or may other more subjective factors be taken into account, such as the degree of pain, the nature of the handicap, the personal situation of the party concerned, or the duration as such of the delay in obtaining care on the territory of the competent state?

The *Smits and Peerbooms* judgment specified in para. 104 that the national authorities are required ‘to have regard to all the circumstances of each specific case and to take due account not only of the patient’s medical condition at the time when authorisation is sought but also of his past record’. The *Müller-Fauré* judgment provides two further important particulars:

- On the one hand, among the circumstances characterising each actual case which the health insurance fund has to take into account there is the ‘degree of pain’ or ‘the nature of the patient’s disability’ which might, for example, make it impossible or extremely difficult for him to carry out a professional activity (para. 90). The CJ thus upholds a particularly broad interpretation of the notion of the patient’s ‘medical history’ <sup>(211)</sup>.
- On the other hand, ‘a refusal to grant prior authorisation which is based not on fear of wastage resulting from hospital overcapacity but solely on the ground that there are waiting lists on national territory for the hospital treatment concerned, without account being taken of the specific circumstances attaching to the

<sup>(209)</sup> Here we find again in brief the considerations developed by Advocate General Tesouro in his conclusions in the Kohll and Decker cases.

<sup>(210)</sup> The preceding considerations were reiterated in the *Watts* judgment, abovementioned, para. 100 et seq. In this judgment, the CJ denounced the fact that the regulations concerned relating to the NHS did not specify the criteria for the grant or refusal of the prior authorisation necessary for reimbursement of the cost of hospital treatment provided in another Member State, and therefore do not circumscribe the exercise of the national competent authorities’ discretionary power in that context, making it difficult to exercise any judicial review (para. 118).

<sup>(211)</sup> In this regard, it is interesting to observe that in its *Inizan* judgment (abovementioned, para. 46), the CJ transposed in the area of Article 22(2)(2) of Regulation (EEC) No 1408/71, which specifically provides that the health insurance fund of the competent state may not refuse to grant authorisation when such treatment cannot be given within the time normally necessary for obtaining the treatment in question on national territory taking account of the person concerned’s current state of health and the probable course of the disease, the analysis which the CJ adopted within the application framework of Articles 49 EC and 50 EC, in the *Smits and Peerbooms* and *Müller-Fauré* judgments (see also, in this sense, *Watts* judgment, abovementioned, paras 59 to 64). If that is the case, the CJ specified that Article 22(2) of Regulation (EEC) No 1408/71 does not intend in any way to limit the hypotheses in which authorisation can be obtained. The Member States are thus free to envisage the issue of authorisations even in the hypothesis where the conditions referred to in Article 22(2)(2) are not met.

patient's medical condition, cannot amount to a properly justified restriction on freedom to provide services'. For the rest, the CJ accepts in this regard that a waiting time which is too long or abnormal would be more likely to restrict access to balanced, high-quality hospital treatment (para. 92 *in fine*).

In the *Watts* judgment, abovementioned <sup>(212)</sup>, the CJ certainly admitted that national authorities were right to institute a system of waiting lists in order to manage the supply of treatment and to set priorities on the basis of the available resources and capacities. However, two conditions must be met in order to refuse the reimbursement of care provided in another Member State.

- The waiting time must not exceed the period which is acceptable in the light of an objective medical assessment, 'in the light of his medical condition and the history and probable course of his illness, the degree of pain he is in and/or the nature of his disability at the time when the authorisation is sought'.
- The setting of waiting times should be done flexibly and dynamically, so that 'the period initially notified to the person concerned may be reconsidered in the light of any deterioration in his state of health' (paras 68 and 69).

This possibility of refusal is, according to the CJ, because 'the resulting patient migration would be liable to put at risk the competent Member State's planning and rationalisation efforts' (para. 71), as well as to prevent any 'exodus of patients' who, having sufficient resources for that purpose, might seek to go to another Member State to obtain the hospital treatment (para. 77). If this is the case, to refuse authorisation, a Member State may not oppose the fact that the cost of the hospital treatment is more expensive in the state of stay (para. 73).

<sup>(212)</sup> Certainly, with regard to the condition stipulated in Article 22(2)(2) of Regulation (EEC) No 1408/71, but we know that this condition must be interpreted in the same way in the context of Article 49 EC (see note 55 at the bottom of the page).

### ***(iii) Regarding the relevance of the fundamental characteristics of the health insurance scheme in question***

By tracing the guidelines recalled below, the CJ has always refused to take into account the characteristics of the applicable national health insurance scheme.

This question has been at the centre of debate in the *Müller-Fauré* case. In particular, the Dutch, Spanish and Norwegian governments, as well as the Advocate General D. Ruiz Jarabo-Colomer (conclusions, para. 47 et seq.), have underlined the freedom of the Member States to establish the social security system of their choice. Now, in the event, in the absence of prior authorisation, insured persons were free to contact non-contractual care providers, such that it is the benefit scheme in kind itself, the operation of which depends essentially on the system of contracting, the existence of which would be threatened. Furthermore, national authorities who were familiar with such a scheme or a national health service would be forced to introduce mechanisms of reimbursement into the way they organised access to healthcare, to the extent to which, instead of benefiting from free health benefits on national territory, insured persons would have to advance the necessary amounts to pay for services from which they had benefited and wait a certain time before obtaining reimbursement. Thereby, the Member States concerned would undergo a forced conversion to a system of reimbursement, while waiving the principles and economy of their insurance scheme.

The CJ has not accepted this argument.

Already in the *Smits and Peerbooms* judgment it does not appear to have exactly attached crucial importance to the type of organisation of the health insurance in question.

In the *Müller-Fauré* judgment, on the contrary, it underlines that 'the achievement of the fundamental freedoms guaranteed by the Treaty inevitably requires Member States to make some adjustments to their national systems of social security. It does not follow that this would undermine their sovereign powers in this field. It is sufficient in this regard to look to the adjustments which they have had to make to their social security legislation in order to comply with Regulation No 1408/71, in particular with the conditions laid down in Article 69 thereof regarding the payment of unemployment benefit to workers residing in the territory of other Member States when no national system provided for the grant of such benefits to unemployed persons registered with an employment agency in another Member State' (para. 102).

Furthermore, it must be acknowledged that a medical service does not cease to be a provision of services because it is paid for by a national health service or by a system providing benefits in kind. Such was nevertheless the thesis defended in the *Smits and Peerbooms* case by various Member States which contested that hospital services could, in particular when they are provided free of charge, by virtue of the applicable health insurance scheme, constitute an economic activity in the sense of Article 60 of the Treaty (now Article 50 EC). The CJ judged, in this regard, 'that a medical service provided in one Member State and paid for by the patient should not cease to fall within the scope of the freedom to provide services guaranteed by the Treaty merely because reimbursement of the costs of the treatment involved is applied for under another Member State's sickness insurance legislation which is essentially of the type which provides for benefits in kind' (*Smits and Peerbooms* judgment, para. 55).

What was at issue in these last cases was the medical treatment provided in another Member State and which had given rise to the direct payment of establishments providing the treatment by the patient (or, in any case, which should have been

paid by the latter). This was precisely the requirement of a prior authorisation to benefit from payment of these treatments which constituted the obstacle to the free provision of services, that is to say the ability to have recourse to a medical provider of one's choice in a Member State other than the state of affiliation.

In any case, as the CJ also recalled, the Treaty 'does not require the service to be paid for by those for whom it is performed (Case 352/85 *Bond van Adverteerders and Others* [1988] ECR I-2085, para. 16, and Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, para. 56)' (para. 57). It is enough that the services are provided normally for remuneration, that constituting its economic counterpart. 'In the present cases, the payments made by the sickness insurance funds under the contractual arrangements provided for by the ZFW, albeit set at a flat rate, are indeed the consideration for the hospital services and unquestionably represent remuneration for the hospital which receives them and which is engaged in an activity of an economic character' (*Smits and Peerbooms* judgment, para. 58).

These considerations will be reiterated in substance in the *Müller-Fauré* judgment, which concludes, in para. 103, that there is thus no need, from the perspective of freedom to provide services, to draw a distinction by reference to whether the patient pays the costs incurred and subsequently applies for reimbursement thereof or whether the sickness fund or the national budget pays the provider directly. In the same sense, whether the service is essentially funded by the compulsory contributions of the worker, the employer or by budget contributions is irrelevant when rating the benefit.

The CJ has reconfirmed this analysis in the *Watts* case: after having ascertained that Ms Watts had paid the French hospital directly in which she had received treatment, it considers that the circumstance that the reimbursement of the hospital



treatment in question is subsequently sought from a national health service such as that in question does not mean that the rules on the freedom to provide services guaranteed by the Treaty do not apply (paras 88 and 89).

It is in the light of these prior considerations that in the *Müller-Fauré* case the CJ has examined the argument based on a change in the essential characteristics of the access system to healthcare in the Netherlands. Three reasons enabled them to reject this argument.

- Already ‘when applying Regulation (EEC) No 1408/71, those Member States which have established a system providing benefits in kind, or even a national health service, must provide mechanisms for *ex post facto* reimbursement in respect of care provided in a Member State other than the competent state’ (para. 105; see also *Watts* judgment, abovementioned, para. 74). Such shall be the case where it has not been possible to complete formalities during the person concerned’s stay in this last state (see Article 34 of Regulation (EEC) No 574/72), or if the competent state has specifically authorised access to treatment abroad in accordance with Article 22(1)(c) of Regulation (EEC) No 1408/71.
- The cover guaranteed to the insured person who goes to another Member State to receive treatment is, in any case, that of the sickness insurance scheme of the state of affiliation, according to the conditions on which benefits are granted, insofar as they are neither discriminatory nor an obstacle to freedom of movement of persons (para. 106).
- Finally, ‘nothing precludes’, the CJ observes, ‘a competent Member State with a benefits in kind system from fixing the amounts of reimbursement which patients who have received care in another Member State can claim,

provided that those amounts are based on objective, non-discriminatory and transparent criteria’ (para. 107)<sup>(213)</sup>.

To conclude, the requirements of the free movement of persons undoubtedly imply adjustments to national sickness insurance schemes which cannot as such be considered as attacks on the sovereignty of the Member States, the latter retaining complete control of the extent of guaranteed cover and of the degree of national solidarity which they wish to guarantee, in particular, in favour of the most underprivileged and most vulnerable<sup>(214)</sup>.

<sup>(213)</sup> • In this regard, the *Watts* judgment, abovementioned, provides the following particulars with regard to the specific characteristics of the NHS.

In the hypothesis where the legislation of the host Member State does not provide for reimbursement in full of the cost of hospital treatment in that state, in order to place the patient in the position he would have been in ‘had the national health service with which he was registered been able to provide him free of charge, within a medically acceptable period, with treatment equivalent to that which he received in the host Member State’ implies, for the competent institution, in addition, to reimburse the person concerned the difference between, on the one hand, ‘the cost, objectively quantified, of that equivalent treatment’ and, on the other hand, the amount reimbursed by the institution of the state of stay, where the first amount is greater than the second (para. 131).

• However, the NHS is not under an obligation ‘in all circumstances to cover the full amount of the difference between the cost of the hospital treatment provided in the host Member State and that of the reimbursement by the institution of that Member State under that state’s provisions, including where the cost of that treatment is greater than the cost of equivalent treatment in the competent Member State’ (para. 132). It is therefore incumbent on the NHS to fix a price for hospital treatments, even if national regulations are based on free issue and do not provide for any scale of reimbursement. But, to tell the truth, as has been seen, tariffs are already applied to foreign patients who come to receive treatment on British territory.

• Finally, not to miss anything, it should be added that the *Watts* judgment has quite a restrictive definition of the notion of sickness benefit in kind, in the meaning of Article 22 of Regulation (EEC) No 1408/71, concerning hospital services: these services must be ‘medical services strictly defined’ or ‘inextricably linked costs relating to the patient’s stay in the hospital for the purposes of his treatment’, which excludes the cost of travel and any accommodation other than in the hospital itself (paras 136 and 138; see also Case C-466/04 *Acereda Herrera* [2006] ECR I-5341). If that is the case, if the state of affiliation provides for the reimbursement of such costs for treatments provided on national territory, it cannot, without infringing Article 49 EC, exclude reimbursement of such costs where hospital treatment is provided in a hospital in another Member State subject to the grant of prior authorisation (para. 142).

<sup>(214)</sup> To this end, the Commission has drawn up a proposal for a directive of the European Parliament and of the Council on the application of patients’ rights in cross-border healthcare (COM(2008) 414 final, 2.7.2008), containing, among other things, the instruction of the jurisprudence of the CJ.



## D. Preservation of rights in the process of being acquired

The benefit of numerous social security services is subject to the completion of periods of employment, insurance or residence.

The result is that changing country of employment or residence may result in serious detriment for the worker or his family members if, under the legislation of the competent state, the person concerned has not completed the qualifying period necessary for the extension of the right to benefits, or, in particular, where long-term benefits are concerned, if under the various legislations of affiliation, he has not completed the required or adequate minimum periods which would permit him to benefit in full from a pension comparable to that which he would have had if he had spent his entire career in a single state.

The importance of the principle of the preservation of rights conferring prospective entitlement, borrowed from standard international law, is obvious. Its implementation requires the use of two well-known techniques: that of the aggregation of periods and that of pro-rata calculation of benefits.

Two particularly innovative judgments of the CJ have given the rule on the aggregation of periods of insurance (or, if applicable, periods of employment or of residence), completed under the legislation of two or more Member States, a scope which significantly exceeds the issues of extension of the right to benefits and of calculation of the benefits for which it was originally conceived: the cases concerned are Case C-481/93 *Moscato* [1995] ECR I-3537 and Case C-482/93 *Klaus* [1995] ECR I-3560.

It will be recalled that the rule on aggregation principally aims to guarantee a person who has worked in a Member State the taking into account of this period in the country to which he or she goes, for the extension of a right to a social security benefit subject in this second state to a trial period requirement or to determine the amount where that is a

function of completed periods of insurance. This rule was laid down by several provisions of Regulation (EEC) No 1408/71, relative to various branches of social security, in particular, regarding invalidity (Article 38(1)) and sickness (Article 18), branches to which the cases of *Moscato* and *Klaus* relate.

Mr Moscato, an Italian national, had worked in Belgium, then in the Netherlands; he then became unemployed in Belgium before working in the Netherlands again. But two months later he had to stop all professional activity due to mental illness. He received Dutch sickness benefits. However, the Dutch body, taking as its basis the national legislation on invalidity, refused to grant him disability benefits because at the start of his last professional activity in the Netherlands, his state of health clearly portended the occurrence of his incapacity to work less than six months later.

Was the body entitled to take, as the starting point of affiliation, the date on which Mr Moscato had affiliated himself with the Dutch regime, thus excluding previous periods of affiliation, completed by the person concerned under the legislation of another Member State? The response from the CJ was negative: the rule on aggregation, laid down in Article 51(a) of the Treaty and implemented by Article 38(1) of Regulation (EEC) No 1408/71 in the field of invalidity insurance, directs the competent institutions to reason as if the worker's entire career had been completed in one and the same state.

In the *Klaus* judgment, the CJ reiterates this interpretation of the rule on aggregation, but this time with regard to sickness insurance.

Ms Klaus, a Dutch national, had worked in Spain, in the Netherlands, in Spain again, then from October 1989, in the Netherlands. Scarcely 15 days after starting this new activity in the Netherlands, she found herself completely unable to work because of back problems. She was refused the sickness benefits which she had claimed from the competent Dutch fund because, on 20 October 1989, the

date on which her insurance under the Dutch sickness insurance scheme had started, she was already unfit to perform her job.

As is the case in Article 38, Article 18 of the regulation was interpreted as obliging the competent institutions to also take account of periods of affiliation completed by the insured person under the legislation of another Member State, as if periods completed under the legislation applied by them were involved, in particular, where the legislation of the competent state sets the condition for the granting of sickness benefits that unfitness for work did not already exist at the time of affiliation.

This jurisprudence has undoubtedly contributed to 'deterritorialising' still further the regulations of the national social security schemes in favour of the accomplishment of the internal market.

### **E. Obligation of cooperation in good faith<sup>(215)</sup>**

The judgment delivered by the CJ in Case C-165/91 *Van Munster* [1994] ECR I-4686 and, even more, that delivered in Case C-262/97 *Engelbrecht* [2000] ECR I-3721 shed new light on the scope of the obligations of the competent authorities of the Member States when they apply their national provisions on social security to a migrant worker. According to the CJ, the application of national legislation to the migrant worker, operated in the same manner as to the permanently settled worker, may have unforeseen repercussions incompatible with the aim of Articles 39 to 42 EC. It shall be for the competent authorities to eliminate these consequences or to attenuate them as far as possible, by implementing all the means at their disposal and, in particular, by means of an interpretation of national law which is compatible with the 'requirements of Community law', in accordance with the principle of reasonable cooperation laid down in Article 10 EC.

The circumstances of the *Van Munster* case lend themselves to such an analysis. Thus, in the Netherlands, any married person of 65 years of age is entitled to a personal pension corresponding to 50 % of the net minimum wage, increased by 50 % if she has a dependent spouse of less than 65 years of age (i.e. 100 % of the net minimum salary). In Belgium, by contrast, the retirement pension is calculated on the basis of periods of insurance up to a limit of 75 % of gross compensation for the worker whose spouse has ceased all professional activity and does not receive a pension ('family pension') and 60 % for other workers ('single rate pension').

In this case, Mr Van Munster, after having received a Belgian retirement pension at the 'family rate' found, under Belgian legislation, that the 'single rate' was applied to him when his spouse, resident in the Netherlands and unemployed, reached the age of 65 and acquired a personal pension under Dutch law (50 % of the net minimum wage), even though the award of this pension had not resulted in any increase in the couple's overall income (because it had been concomitant to a reduction on the same scale of the husband's pension). Faced with such consequences, the CJ judged that the obligation of cooperation in good faith 'implies that (the Belgian authorities) should ascertain whether their legislation can be applied literally to migrant workers, in exactly the same way as to non-migrant workers, without ultimately causing migrant workers to lose a social security advantage and, consequently, discouraging them from actually exercising their right to freedom of movement'. When applying domestic law, the national court must 'as far as is at all possible, interpret it in a way which accords with the requirements of Community law'.

But what happens when ways of interpreting domestic law do not specifically permit interpretation 'in a way which accords with the requirements of Community law'? Must the national judge set aside the national provisions in question?

<sup>(215)</sup> See our study 'Le devoir de loyauté dans l'ordre juridique communautaire', *Droit social*, 1999, p. 908.

According to the *Simmenthal* case-law<sup>(216)</sup>, national courts must apply Community law in its entirety and ‘set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule’ (para. 21). Must this principle be extended to the hypothesis where the domestic provision, without being contrary to Community law, in certain circumstances creates a barrier to the free movement of workers, in particular when it is applied to a situation containing foreign elements resulting in the simultaneous application of the legislation of that other Member State?

The CJ replied, without hesitation, in its *Engelbrecht* judgment:

‘Where application in accordance with those requirements is not possible, the national court must fully apply Community law and protect the rights conferred thereunder on individuals, if necessary disapplying any provision in the measure application of which would, *in the circumstances of the case*, lead to a result contrary to Community law (see analogously Case 249/85 *Albako* [1987] ECR I-2345, paras 13 et seq.)’ (para. 40; our italics).

Such was this case: the loss of a social advantage to the detriment of a worker merely through the award to his spouse of a benefit of the same kind, under the legislation of another Member State, although this circumstance had not given rise to any increase in overall household income (because it was concomitant with a reduction of the same amount in the personal pension received by the worker in that same state) was ‘liable to constitute an obstacle to freedom of movement within the Community’; established in Article 39 EC (paras 41 and 42)<sup>(217)</sup>.

<sup>(216)</sup> Case 106/77 *Simmenthal* [1978] ECR I-629.

<sup>(217)</sup> See also in this sense Case C-290/00 *Duchon* [2001] ECR I-3567, where the CJ judged that the loss of a social advantage for a worker through the award to his spouse of a benefit of the same kind under the legislation of another Member State, although this circumstance had not given rise to any increase in the couple’s overall income, was a barrier to the exercise of the right of freedom of movement within the Community established in Article 39 EC.

This judgment is recorded in the rules of general authority of the CJ relating to Article 10 EC. Indeed, it follows from this case-law that the principle of reasonable cooperation involves a specific obligation for the Member States who were unable to adhere to the obligation not to pursue a course of conduct or pass a bill contrary to Community law; it is incumbent on them, moreover, to ensure, including in the exercise of their sovereign powers, the effectiveness of Community law and to guarantee the achievement of the aims of the Community, as a result of their belonging to the same.

Now, Community law in its entirety sometimes requires of a national judge, under the principle of reasonable cooperation, that he *set aside* a national law, the application of which affects or forms a barrier to the achievement of the objectives of the Treaty. The CJ has made pronouncements in this sense on several occasions; thus, with regard to the procedural autonomy of the Member States, such a national rule had to be set aside by the judge because it prevented the implementation of the procedure laid down in Article 234 EC<sup>(218)</sup>, where because, taking into account the particular circumstances of the case, it had the effect of making it excessively difficult to exercise rights conferred by the Community legal system<sup>(219)</sup>; in the *Factortame* case<sup>(220)</sup>, the national judge was invited, in order to guarantee the full efficacy of the decision of a court to intervene concerning the existence of rights drawn from the Community legal order, to set aside the application of a principle of English law according to which interim measures cannot be taken against the Crown.

Certainly, in the *Van Munster* and *Engelbrecht* cases, it was the application of a national standard, linked to that of the national legislation of another Member State, which was the origin of the barrier. It involved the same type of barrier to the free movement of workers, resulting from the disparity of national

<sup>(218)</sup> See Case 166/73 *Rheinmühlen* [1974] ECR I-32, paras 2 and 3.

<sup>(219)</sup> See Case C-312/93 *Peterbroeck* [1991] ECR I-4599.

<sup>(220)</sup> See Case C-213/89 [1990] ECR I-2433.

social security schemes, which it was incumbent on the Council to eliminate by means of coordination in accordance with Article 42 EC. Nevertheless the fact remains that the duty to act in good faith which is incumbent on the Member States includes the obligation for them to do everything within their power to achieve the objectives of the Treaty, even in the absence of implementing measures from the Community institutions, in particular where the circumstances reveal that such action is necessary in the interest of the Community and that it has not undertaken this <sup>(221)</sup>.

All the more so since, taking account of the constant development of national social security legislations, it is inevitable that Community regulations are unable to guarantee, in all circumstances, the absence of any obstacle to the free movement of workers resulting from disparities between national legislations.

### III. CONCLUSIONS

This overview of the case-law of the CJ clearly reveals the decisive influence of the latter on the construction of a 'social Europe', in one of the essential elements of what is commonly called the European social model, even if, in certain aspects, the expression is slightly abusive <sup>(222)</sup>, namely social security. It is also the fruit of a permanent and constructive dialogue between the CJ and the national courts called upon to take a position, primarily on questions of interpretation and application of Community regulations on the matter which is subject, it must be recognised, to a certain esoterism. This dialogue is all the more crucial because national judges, 'faced with the final stage of application of the rule', in the felicitous expression of Louis Dubouis <sup>(223)</sup>, are the guarantors of respect for the rights which European citizens, as well as of nationals of third countries, obtain from the Community legal order.

<sup>(221)</sup> See, in this sense, Case 32/79 *Commission v United Kingdom* [1980] ECR I-2403, paras 10, 15 and 25, where the CJ considered that the United Kingdom was required, by virtue of former Article 5 (now Article 10), to take the necessary measures to guarantee the conservation of fish resources in the zone considered, which constitutes one of the objectives of the Treaty, and this before the expiry of the period of transition provided for by the Act of Accession (in particular, when the Community fails, because of persistent differences of view within the Council, to adopt a specific policy), but before the power in the matter belongs exclusively to the Community. Admittedly, the CJ has set strict limits on the adoption of national measures so as to preserve the exercise of Community powers, but the principle itself of an obligation of the Member State has been recognised by the CJ under Article 10 EC.

<sup>(222)</sup> See our study 'Les services sociaux en droit communautaire ou la recherche d'un juste équilibre entre l'économique et le social', *Les services d'intérêt économique général et l'Union européenne* (eds: J.-V. Louis et S. Rodrigues), Bruylant, 2006, pp. 99–100.

<sup>(223)</sup> 'La responsabilité de l'État pour les dommages causés aux particuliers par la violation du droit communautaire', RFDA, 1992, p. 9.

# ACHIEVEMENTS OF 50 YEARS OF EUROPEAN SOCIAL SECURITY COORDINATION

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## I. INTRODUCTION

In a limited number of pages, it is not possible to deal with all achievements of the coordination system since 1958, the year of adoption of Regulations Nos 3 and 4. Making a choice always means that a number of issues, even important ones, are not dealt with. Indeed, this presentation does not have the pretension of drawing a complete picture of all the achievements in the coordination system during the last 50 years. In my contribution I will focus on the achievements in the following fields:

- the impact of the coordination system on the principle of territoriality;
- the wide scope of persons covered by the protection offered by the coordination system;
- the adaptability of the material scope of the coordination system to developments in national legislation;

- the interaction between court and legislature having led to a separate coordination system for special non-contributory benefits;
- the great impact of the principle of equal treatment;
- the coordination system as the first and still very important instrument for cross-border healthcare.

The emphasis of my presentation will be on the positive side of what has been achieved during the last 50 years. This does not mean that I am not aware of the challenges ahead of us. I will deal with a number of these challenges in the conclusions.

### ***Achievements in spite of its limits***

Before examining the aforementioned points, it is useful to recall that we have to live with the limits resulting from the objective of Article 42 EC.

As Simon Roberts explained in his contribution, the regulations based on this article only coordinate

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the various social security schemes. They do not and cannot affect the disparities between the various schemes, for instance concerning the notion of ‘family members’ (registered partnerships, same-sex marriages, age limits for children as a condition for entitlement to family benefits, etc.), the notion of ‘invalidity’ (a person having worked in three Member States is considered as fully ‘invalid’ in Member State A, partially ‘invalid’ in Member State B and not ‘invalid’ at all in Member State C), or age conditions for entitlement to old-age pensions. As the Court of Justice (CJ) has said, these disparities could have as an effect that a person, who has moved from one Member State to another, is at a disadvantage compared with a person who has stayed his whole career in a single Member State<sup>(225)</sup>. It is sometimes very difficult to explain these limits of ‘coordination’ to the citizens of Europe.

## II. THE IMPACT OF THE COORDINATION SYSTEM ON THE PRINCIPLE OF TERRITORIALITY

The exclusive application of national law could have harmful consequences for people moving from one Member State to another. In general, national social security legislation does not take into account the specific situation of people who have worked or resided in another state<sup>(226)</sup>. National legislations organise their social security schemes according to national objectives. For example, they confine their social security schemes to people who work or reside in their territory; they guarantee benefits to those who have worked or resided for a certain period of time under their country’s social security scheme; they guarantee family benefits to insured people whose children reside within their territory, and they guarantee

<sup>(225)</sup> Judgment of 19 March 2002, Joined Cases C-393/99 and C-394/99 *Hervein and Hervillier* [2002] ECR I-2829.

<sup>(226)</sup> Of course, this situation has some exceptions, such as provisions aimed at avoiding the accumulation of benefits due under the legislation of the state concerned with benefits due under the legislation of another state!

the payment of certain benefits to those who reside on the territory of their country. Generally speaking, when the ‘principle of territoriality’ is discussed<sup>(227)</sup>, reference is made to the freedom of Member States to use these territorial elements in defining the scope of their social security schemes and in determining the qualifying conditions and the conditions of payment of benefits.

The Community regulations aim to rectify the effects of this ‘principle of territoriality’<sup>(228)</sup> on migrant workers and the members of their families.

This purpose has been achieved by numerous provisions in the regulations which have been developed and strengthened over the years, such as the exclusive<sup>(229)</sup> and mandatory effect<sup>(230)</sup> of the rules on conflicts of law, the aggregation of periods of insurance for entitlement to benefits<sup>(231)</sup>, the waiving of residence clauses<sup>(232)</sup> and cross-border recognition of facts<sup>(233)</sup>. As Simon Roberts made clear, from the very beginning the goal of the

<sup>(227)</sup> Werner Tegtmeier, ‘Erfahrungen und Vorstellungen aus deutscher Sicht’, *Wechselwirkungen zwischen dem Europäischen Sozialrecht und dem Sozialrecht der Bundesrepublik Deutschland*, Berlin, 1991.

<sup>(228)</sup> Cornelissen, R. ‘The principle of territoriality and the Community regulations on social security (Regulations 1408/71 and 574/72)’, *Common Market Law Review* 1996, Vol. 33.

<sup>(229)</sup> This means that persons to whom the coordination system applies are subject to the legislation of a single Member State only: Article 13(1) of Regulation (EEC) No 1408/71 and Article 11(1) of Regulation (EC) No 883/2004. The validity of this provision has been confirmed by the CJ: judgments of 12 June 1986, Case 302/84 *Ten Holder* [1986] ECR 1821; of 10 July 1986, Case 60/85 *Luijten* [1986] ECR 2365; and of 15 February 2000, Case C-34/98 *Commission v France* [2000] ECR I-995. However, in its recent judgment of 20 May 2008, Case C-352/06 *Bosmann* [2008] ECR I-3827, the CJ ruled that the Member State of residence, even if it is not the competent state, cannot be deprived of the right to grant child benefit to persons who are resident within its territory. Does this judgment mean the end of the exclusive effect of the rules on conflicts of law? The judgment is not entirely clear on this point. On the one hand, the CJ came to its conclusion that the state of residence cannot be deprived of its right to grant family benefits, even if it is not the competent state, because the provisions of Regulation (EEC) No 1408/71 must be interpreted in the light of the objectives of Article 42 EC. On the other hand, the CJ explicitly said that Community law (not only the regulation) does not require the German authorities to grant family benefits.

<sup>(230)</sup> This means that national affiliation conditions are overridden if their application is such as to deprive the Community rule on conflicts of law of all practical effect. A person, for instance, residing in a Member State but working in another state cannot be excluded from the scope of the social security scheme of the latter state for the sole reason of not residing there: judgments of 3 May 1990, Case C-2/89 *Kits van Heijningen* [1990] ECR 755; and of 4 October 1991, Case C-196/90 *De Paep* [1991] ECR 4815.

<sup>(231)</sup> Articles 6 and 61 of Regulation (EC) No 883/2004.

<sup>(232)</sup> Articles 7 and 67 of Regulation (EC) No 883/2004.

<sup>(233)</sup> Article 5 of Regulation (EC) No 883/2004.



regulations has been to remove all barriers in the sphere of social security which impede a genuinely free movement of workers. All the provisions of the regulations must be interpreted in the light of Article 42 EC. This means, for instance, that the aggregation provisions must be interpreted broadly, to cover also cases not directly governed by the letter of these provisions<sup>(234)</sup>. This means sometimes that a provision has to be interpreted in a way that was not foreseen by the legislature<sup>(235)</sup>.

In a European Union of 27 Member States, it has become almost impossible to deal with all the problems that could possibly arise in the field of social security for people moving within the Union. It can happen that the application of national legislation for a migrant worker, in the same way as for a non-migrant worker, gives rise to unforeseen consequences that are incompatible with the aims of Articles 39 and 42 EC. In such cases, the principle of cooperation in good faith, laid down in Article 10 EC, requires the competent authorities of the Member States to use all the means at their disposal to achieve the aim of freedom of movement established in Articles 39 to 42 EC<sup>(236)</sup>. This requirement implies that these authorities, when applying domestic law, should interpret it, as far as it is possible, in a way which accords with the requirements of Community law. Where application in accordance with those requirements is not possible, the national authorities must fully apply Community law, if necessary by not applying domestic law<sup>(237)</sup>.

<sup>(234)</sup> Judgments of 26 October 1995, Cases C-481/93 *Moscato* [1995] ECR I-3537 and C-482/93 *Klaus* [1995] ECR I-3560.

<sup>(235)</sup> Judgments of 10 June 1982, Case 92/81 *Carraciol* [1982] ECR 2213; of 23 October 1986, Case 300/84 *Van Roosmalen* [1986] ECR 3097; of 9 November 2006, Case C-205/05 *Nemec* [2006] ECR 10745; and of 20 May 2008, Case C-352/06 *Bosmann* [2008] ECR I-3827. The ultimate consequence is that a provision laid down in a regulation has to be considered as invalid if it is contrary to the aim of Articles 39–42: see judgments of 21 October 1975, Case 24/75 *Petroni* [1975] ECR 1149; of 15 January 1986, Case 41/84 *Pinna* [1986] ECR 1; of 18 April 2002, Case C-290/00 *Duchon* [2002] ECR I-3567; and of 31 May 2001, Case C-43/99 *Leclere* [2001] ECR I-4265.

<sup>(236)</sup> Judgments of 5 October 1994, Case C-165/91 *Van Munster* [1994] ECR I-4686; and of 26 September 2000, Case C-262/97 *Engelbrecht* [2000] ECR I-3721.

<sup>(237)</sup> See point 40 of the *Engelbrecht* judgment.

### III. THE WIDE SCOPE OF PERSONS COVERED BY THE COORDINATION SYSTEM

#### A. From workers to EU citizens

The original dimension of European integration was limited to a common market. The concept of the four freedoms — of capital, goods, services and persons — was economically motivated. The initial philosophy behind the regulations was to avoid workers being penalised in the field of social security for exercising, or for having exercised, their right to freedom of movement. Regulation No 3, therefore, only covered ‘wage-earners or assimilated workers’ who were nationals of a Member State, as well as the members of their families and their survivors.

The very broad definition of the term ‘employed person’ in Regulation (EEC) No 1408/71 reflects the case-law of the CJ under Regulation No 3 on the notion ‘worker’<sup>(238)</sup>. It covers all those who are covered by a social security scheme of a Member State applicable to employed persons and who move for whatever reason within the Union. In contrast to Regulation (EEC) No 1612/68 which is based on Article 39 EC, it is not necessary to have made use of the right to free movement in order to invoke Regulation (EEC) No 1408/71 based on Article 42 EC. In fact, the latter regulation contains various provisions that fall outside the framework of freedom of movement. Article 22(1)(a) of Regulation (EEC) No 1408/71, for instance, guarantees that an employed (or self-employed) person (or a student) — even when he or she has never worked in another Member State — as well as the members of his or her family, who stays temporarily in a Member State other than the state where they are insured, is entitled to all benefits in kind which become necessary there on medical grounds<sup>(239)</sup>.

<sup>(238)</sup> See also the opinion of Advocate General Mayras in Case 17/76 *Brack* [1976] ECR I-429.

<sup>(239)</sup> The costs are borne by the competent state.

In 1981 the scope of Regulation (EEC) No 1408/71 was extended to self-employed persons and in 1999 to students<sup>(240)</sup>.

In its case-law, the CJ underlined on several occasions that the purpose of Regulation (EEC) No 1408/71 is not only to promote the freedom of movement of workers, but also the freedom of establishment<sup>(241)</sup>, the freedom to provide services<sup>(242)</sup> and even the freedom of movement of persons<sup>(243)</sup>.

Article 22a of Regulation (EEC) No 1408/71 is another striking example of the fact that the regulation has gone far beyond the original framework of freedom of movement of workers. In fact, since 1 January 1996<sup>(244)</sup>, the protection offered by Article 22(1)(a) and (c) applies to all *persons*, as long as they are nationals of a Member State and they are insured under the legislation of a Member State (for instance, non-active persons insured under a residence-based scheme).

The introduction of citizenship of the Union by the Maastricht Treaty has been a significant step forward in the transformation of a European Economic Community, with its economic preoccupation, to a political European Union serving the interests and well-being of all its citizens, regardless of whether or not they are engaged in economic activities. In the recent past,

there was a piecemeal approach<sup>(245)</sup> to the right of free movement and residence in the EU. The fact that the citizenship of the Union confers the right to free movement on every citizen of the Union is reflected by the fact that there is now one single Community instrument dealing with the right to move and to reside within the Union<sup>(246)</sup>. It was, therefore, not surprising that the Commission, when it presented in 1998 its proposal<sup>(247)</sup> to simplify and modernise Regulation (EEC) No 1408/71, proposed to extend the scope of the new regulation to all EU nationals who are insured under national law<sup>(248)</sup>. The legislature agreed: Regulation (EC) No 883/2004 applies to all EU nationals who are insured under national law, whether they are employed, self-employed, students, civil servants, pensioners or, indeed, non-active, as well as to the members of their families and to their survivors.

## B. Members of the family: from *Kermaschek* to *Cabanis-Isarte*

As we have seen above, Regulation (EEC) No 1408/71 applies to the employed, the self-employed and students, who are, or have been, subject to the legislation of one or more Member States and who are a national of a Member State<sup>(249)</sup>, as well as to the members of their families and their survivors.

However, members of the family and survivors cannot rely on the regulation as a whole. According to the CJ, the Community legislature lays down two distinctive categories: workers on the one hand, and

<sup>(240)</sup> Article 1(ca) of Regulation (EEC) No 1408/71 defines the term 'student' as 'any person other than an employed or self-employed person or a member of the family or survivor within the meaning of this regulation who studies or receives vocational training leading to a qualification officially recognised by the authorities of a Member State, and is insured under a general social security scheme or a special social security scheme applicable to students'.

<sup>(241)</sup> Judgment of 19 March 2002, Joined Cases C-393/99 and C-394/99 *Hervein* [2002] ECR I-2829.

<sup>(242)</sup> Judgments of 10 February 2000, Case C-202/97 *Fitzwilliam* [2000] ECR 883, point 28; of 23 October 2003, Case C-56/01 *Inizan* [2003] ECR I-12403, points 21 and 25; of 12 April 2005, Case C-145/03 *Keller* [2005] ECR I-2529, point 46; and of 16 May 2006, Case C-372/04 *Watts* [2006] ECR I-4325, point 54.

<sup>(243)</sup> Judgments of 23 November 2000, Case C-135/99 *Elsen* [2000] ECR I-10409; of 12 July 2001, Case C-368/98 *Vanbraekel* [2001] ECR I-5363, point 32; of 23 October 2003, Case C-56/01 *Inizan* [2003] ECR I-12403, points 21 and 25; of 12 April 2005, Case C-145/03 *Keller* [2005] ECR I-2529, point 46; and of 16 May 2006, Case C-372/04 *Watts* [2006] ECR I-4325, point 54.

<sup>(244)</sup> Regulation (EC) No 3095/95 of 22 December 1995 (OJ L 335, 30.12.1995).

<sup>(245)</sup> Regulation (EEC) No 1612/68 of 15 October 1968 (OJ L 257, 19.10.1968); Council Directive 68/360/EEC of 15 October 1968 (OJ L 257, 19.10.1968); Council Directive 73/148/EEC of 21 May 1973 (OJ L 172, 28.6.1973); Council Directive 90/364/EEC of 28 June 1990 (OJ L 180, 13.7.1990); Council Directive 90/365/EEC of 28 June 1990 (OJ L 180, 13.7.1990); Council Directive 93/96/EEC of 29 October 1993 (OJ L 317, 18.12.1993).

<sup>(246)</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 (OJ L 229, 29.6.2004).

<sup>(247)</sup> OJ C 38, 12.2.1999.

<sup>(248)</sup> Provided, of course, that there is a cross-border element: the Community regulations based on Article 42 EC do not apply to situations which are confined in all respects within one Member State: judgments of 11 October 2001, Case C-95/99 *Khalil* [2001] ECR I-7413, points 69–72; and of 1 April 2008, Case C-212/06 *Walloon Government v Flemish Government*, point 33.

<sup>(249)</sup> Or who are stateless persons or refugees residing within the territory of one of the Member States.

members of their families and their survivors on the other hand. In its judgment of 23 November 1976<sup>(250)</sup> the CJ ruled that members of the family or survivors could only invoke the regulation concerning *derived rights*: rights to benefits acquired through their status as members of the family or as survivors, such as family benefits, healthcare or survivors' pensions. This was known as the 'Kermaschek principle' and meant that members of the family or their survivors *could not* invoke the regulation, *unless* it concerned benefits acquired through their status as members of the family. Twenty years later the CJ refined its case-law substantially. In its *Cabanis-Isarte* judgment<sup>(251)</sup> the CJ limited the scope of the rule in *Kermaschek* to cases in which a member of a worker's family relies on provisions of the regulation which are applicable solely to workers. In practical terms, it means that members of the family *can* now invoke the regulation, *unless* it concerns provisions that are applicable solely to workers, such as the chapter 'unemployment benefits'. Members of the family can now, for instance, invoke the principle of equal treatment, laid down in Article 3 of Regulation (EEC) No 1408/71. Another example: where an employed person is subject to the legislation of a Member State and lives with his family in another Member State, that person's *spouse* is entitled, under Article 73 of Regulation (EEC) No 1408/71, to receive a family benefit such as child-raising allowance in the state of employment. The spouse cannot be refused such benefit on the basis of the distinction between a worker's personal right and the derived rights acquired by members of his family, since that distinction is relevant only where a member of a worker's family relies on the provisions of Regulation (EEC) No 1408/71, which are applicable solely to workers and not to members of the family such as those relating to unemployment benefits<sup>(252)</sup>, and does not, in principle, apply to family benefits<sup>(253)</sup>.

<sup>(250)</sup> Judgment of 23 November 1976, Case 40/76 *Kermaschek* [1976] ECR 1669.

<sup>(251)</sup> Judgment of 30 April 1996, Case C-308/93 *Bestuur van de Sociale Verzekeringsbank v J.M. Cabanis-Isarte* [1996] ECR I-2097.

<sup>(252)</sup> Judgment of 25 October 2001, Case C-189/00 *Ruhr* [2001] ECR I-8225.

<sup>(253)</sup> Judgment of 10 October 1996, Joined Cases C-245/94 and C-312/94 *Hoever and Zachow* [1996] ECR I-4895.

### C. The inclusion of third-country nationals in the coordination system

Third-country nationals who are a member of the family or a survivor of an employed, a self-employed person or a student who is a EU national, and who is or has been subject to the legislation of a Member State, have always been covered by the coordination regulations. However, as we just have seen in para. 2, this involves only a limited protection.

The only persons who can invoke the Community regulations as a whole are employed and self-employed persons (and students) who are nationals of a Member State, or who are stateless persons or refugees residing within the territory of one of the Member States. This means that employed and self-employed persons who are third-country nationals are, in principle, not covered by Regulation (EEC) No 1408/71. Why not?

As we have seen above, the initial concept behind the coordinating regulations was to avoid penalising, in the field of social security, persons for exercising or for having exercised their right to freedom of movement enshrined in Article 39 EC. Since only workers who are nationals of a Member State enjoy freedom of movement<sup>(254)</sup>, it was logical at that time to reserve the protection offered by the regulations based on Article 51 EEC (corresponding to the current Article 42 EC) to workers who were a national of a Member State. For this reason, Regulation (EEC) No 1408/71, like its predecessor Regulation No 3, only applies to employed (and self-employed) persons who are nationals<sup>(255)</sup> of a Member State<sup>(256)</sup>.

In November 1997 the Commission presented a proposal aimed at extending the scope of Regulation

<sup>(254)</sup> Judgment of 29 October 1998, Case C-230/97 *Awoyemi* [1998] ECR I-6781, point 29.

<sup>(255)</sup> Or who are stateless persons or refugees residing within the territory of one of the Member States. To understand why stateless persons and refugees have been included in the personal scope of the Community regulations, see the judgment of 11 October 2001, Joined Cases C-95/99, C-98/99 and C-180/99 *Kahlil* [2001] ECR I-7413.

<sup>(256)</sup> As well as to the members of their families or their survivors, regardless of the nationality of these family members or their survivors (see above para. 2).

(EEC) No 1408/71 to third-country nationals<sup>(257)</sup>. However, this proposal foundered on its legal basis. Three Member States (Denmark, Ireland and the United Kingdom) considered that, in view of the close link between Articles 48 (corresponding to the current Article 39 EC) and 51 (corresponding to the current Article 42 EC), the latter article could not provide a legal basis for extending the scope of Regulation (EEC) No 1408/71 to include third-country nationals. The dispute concerning the legal basis caused the proposal to be put on hold.

In its *Khalil* judgment of 11 October 2001<sup>(258)</sup> the CJ implicitly acknowledged that Article 42 EC does not provide a legal basis for extending the regulation to third-country nationals.

Developments during the last decade in the legal basis and in the case-law of the CJ, as well as of the European Court of Human Rights, have paved the way for the extension of the scope of Regulation (EEC) No 1408/71 to third-country nationals. The Treaty of Amsterdam inserted Article 63 into the Treaty, thereby providing specific Community competence to legislate on measures concerning immigration policy, as well as on measures defining the rights and conditions under which third-country nationals legally resident in one Member State may reside in another Member State.

Another important development was the introduction of the Charter of Fundamental Rights of the European Union, solemnly declared in December 2000 at Nice by the European Parliament, the Council and the European Commission. It enshrines a certain number of rights that are recognised with respect to nationals of the Member States as well as nationals of third countries who are legally resident in the Member States<sup>(259)</sup>. The *Gaygusuz* judg-

ment<sup>(260)</sup> of the European Court of Human Rights put the discussion of the extension of the personal scope of Regulation (EEC) No 1408/71 to third-country nationals into a broader legal perspective. In fact, in this judgment, the European Court of Human Rights said that social security rights were property rights and that, accordingly, equality of treatment in social security is guaranteed by the European Convention for the Protection of Human Rights. Further to this judgment, the question was raised in literature<sup>(261)</sup> of whether the exclusion of third-country nationals from the scope of Regulation (EEC) No 1408/71 was compatible with the fundamental rights that form part of the general principles of Community law.

At its special meeting in Tampere in October 1999, the European Council created the pillars of a European immigration policy. According to one of the pillars, the European Union should ensure 'fair treatment of third-country nationals who reside legally in the territory of its Member States' and grant them rights and obligations 'comparable to those of EU citizens'.

In February 2002, all these developments caused the Commission to submit a new proposal<sup>(262)</sup> to extend Regulation (EEC) No 1408/71 to cover third-country nationals, this time based on Article 63(4) EC<sup>(263)</sup>. The proposal of 1997 was withdrawn at the same time. On 14 May 2003 Council Regulation (EC) No 859/2003<sup>(264)</sup> was adopted extending the scope of Regulation (EEC) No 1408/71 to third-country nationals. This regulation was the first piece of Community legislation ever adopted under the new Article 63(4) EC<sup>(265)</sup>.

<sup>(257)</sup> OJ C 6, 10.1.1998.

<sup>(258)</sup> Joined Cases C-95/99, C-98/99 and C-180/99 *Kahlil* [2001] ECR I-7413.

<sup>(259)</sup> The charter has now been integrated into the Lisbon Treaty and has the same value as the Treaties. Article 6(3) of the new Treaty on European Union provides: 'Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.'

<sup>(260)</sup> Judgment of 16 September 1996, Council of Europe: European Court of Human Rights, Case 39/1995/545/631 *Gaygusuz v Austria*.

<sup>(261)</sup> Herwig Verschueren, 'EC social security coordination excluding third-country nationals: still in line with fundamental rights after the *Gaygusuz* judgment?', *Common Market Law Review* 1997, pp. 991–1017.

<sup>(262)</sup> OJ C 126, 28.5.2002, p. 388.

<sup>(263)</sup> In December 2001 the European Council of Laeken had already reached an agreement about Article 63 as the appropriate legal basis for a possible extension of Regulation (EEC) No 1408/71 to third-country nationals.

<sup>(264)</sup> OJ L 124, 20.5.2003.

<sup>(265)</sup> Later more legislation was adopted on the basis of Article 63(4) EC: Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ L 16, 23.1.2004).

Thanks to Regulation (EC) No 859/2003, third-country nationals are now covered by the current European Regulation (EEC) No 1408/71. It cannot be denied that the extension of the personal scope of Regulation (EEC) No 1408/71 has substantially reinforced the legal status of third-country nationals in the EU. In fact, third-country nationals moving from one Member State to another are now treated, in the field of social security, in the same way<sup>(266)</sup> as EU nationals. However, the extension of the scope of Regulation (EEC) No 1408/71 is subject to two conditions. First of all, the person concerned must be legally resident in the territory of a Member State. This is the consequence of Article 63(4) EC constituting the legal basis of the regulation. No Community legislative act defines what is meant by 'legally resident'<sup>(267)</sup>. Nationals of third countries who are legally resident on the territory of a Member State are the persons meeting the residence conditions laid down by the legislation of the Member State in which they are resident, and those who are authorised to reside there by virtue of a right arising from an act of Community law<sup>(268)</sup> or an international obligation contracted by the Member State in question or by the European Community, in particular in the context of association agreements. The second condition is that the person concerned is not in a situation 'which is not confined in all respects within a single Member State'<sup>(269)</sup>. In other words: there must be a cross-border element between at least two Member States. A Lebanese worker, for instance, residing and working in Germany cannot invoke Regulation (EEC) No 1408/71 in order to claim the same amount of family benefits to which German nationals are entitled, if his children reside in Germany. However, if his children reside in another Member State, he can invoke Regulation (EEC) No

1408/71 because there is a cross-border element between two Member States.

The requirement that there is a cross-border element between two or more Member States means that Regulation (EC) No 859/2003 does not always guarantee that third-country nationals residing legally in a Member State are treated equally as Community nationals in that Member State. Some categories of third-country nationals do benefit from equal treatment in the field of social security, even when there is no cross-border element between Member States; for example, researchers<sup>(270)</sup>, or long-term residents in a Member State<sup>(271)</sup>, or persons who are covered by specific provisions on equal treatment laid down in international agreements concluded between the EU and some third countries. Turkish workers, for instance, can invoke Article 3 of Decision 3/80<sup>(272)</sup> of the EEC/Turkey Association Council of 19 September 1980 directly in order to obtain equal treatment in the field of social security with nationals of the host Member State, even if there is no cross-border element between two Member States. The equal treatment provisions laid down in the agreements concluded with Algeria, Morocco and Tunisia have a direct effect too, as the CJ made clear in a number of judgments<sup>(273)</sup>. A proposal<sup>(274)</sup> aimed at guaranteeing equal treatment to third-country nationals who are not yet entitled to a long-term residence status is currently pending before the legislature.

As we all know, Regulation (EEC) No 1408/71 is on its last legs. Soon Regulation (EC) No 883/2004 will be operational. Regulation (EEC) No 1408/71 will

<sup>(266)</sup> The special provisions laid down in the annex concerning family benefits in Germany and Austria only have a limited effect.

<sup>(267)</sup> Other linguistic versions of Article 63(4) EC refer to a notion of 'stay' rather than 'residence'. Some examples: the German text: '...die sich rechtmässig in einem Mitgliedstaat aufhalten'; the French text: '...en situation régulière de séjour dans un Etat membre'; the Dutch text: '...die legaal in een lidstaat verblijven'.

<sup>(268)</sup> For instance, Directive 2001/55/EC of 20 July 2001; Directive 2003/109/EC of 25 November 2003; and Directive 2004/81/EC of 29 April 2004.

<sup>(269)</sup> Exactly the same wording as used by the CJ in the Khalil judgment.

<sup>(270)</sup> Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research (OJ L 289, 3.11.2005).

<sup>(271)</sup> Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ L 16 of 23.1.2004).

<sup>(272)</sup> Judgments of 4 May 1999, Case C-262/96 Sürül [1999] ECR I-2685; and of 28 April 2004, Case C-373/02 Öztürk [2004] ECR I-3605.

<sup>(273)</sup> Judgments of 31 January 1991, Case C-18/90 Kziber [1991] ECR I-199; of 20 April 1994, Case C-58/93 Yousfi [1994] ECR I-1353; of 3 October 1996, Case C-126/95 Hallouzi; and of 15 January 1998, Case C-113/97 Babahenini [1998] ECR I-183.

<sup>(274)</sup> Commission proposal of October 2007 (COM(2007) 638 final).



be repealed as from the date on which Regulation (EC) No 883/2004 becomes applicable. This means that a new legal instrument is needed to extend the scope of the new regulation to include third-country nationals. In 2007 the Commission submitted a proposal to this effect<sup>(275)</sup>. This proposal is currently pending before the Council.

#### IV. ADAPTABILITY OF THE MATERIAL SCOPE OF THE COORDINATION SYSTEM TO DEVELOPMENTS IN NATIONAL LEGISLATION

Is Regulation (EEC) No 1408/71 suited to today's requirements as to its material scope? Does the new Regulation (EC) No 883/2004 take sufficiently into account the introduction of new forms of social security in the various Member States?

Regulation (EEC) No 1408/71 applies to social security legislation which concerns a number of branches enumerated in Article 4(1). These branches are inspired by ILO Convention No 102 dating from 1952!

Even if the benefit in question is a social security benefit, it is not covered by the regulation, if it is not to be classified under one of the branches enumerated in Article 4(1)<sup>(276)</sup>.

As we know, the social security systems of Member States are facing all kinds of challenges. They have to respond to facts like the demographic development and ageing of the population, as well as changes in family structure. The social security systems of Member States are also under pressure in the budgetary context. The starting point of coordination is to accept the national social security schemes as they are, with all their differences in benefits, procedures, organisation and funding. Therefore, changes in national

systems also have a bearing on the coordination of social security forming the bridge between the various schemes. It is true that the existing coordination system has been able to deal with the introduction of a whole set of new benefits in national legislation of the various Member States. But we should not forget that this flexibility has been mainly realised thanks to the case-law of the CJ, and not because the legislator has adapted the regulations.

As a response to demographic development and declining fertility rates, for instance, several Member States have introduced new kinds of benefits: child-raising allowances or parental benefits. They are part of family policy measures. These allowances were introduced in order to enable one of the parents to devote him/herself to the raising of a young child and to mitigate, as the case may be, the financial disadvantages entailed in giving up income from full-time employment. But since these allowances are also intended to meet family expenses, they are to be treated as family benefits in the sense of the coordination system<sup>(277)</sup>.

The employment guidelines refer to the need to reconcile work and family life in order to enable a growing participation of women in the workforce. To this end, Finland has introduced a childcare allowance. The aim of this benefit is to regulate the entitlement to financial support granted for the organisation of childcare as an alternative to a day-care place. But since the allowance is also intended to meet the expenses of the care and upbringing of children and, thus, to mitigate the financial burden, it has to be treated as a family benefit for the purpose of the coordination system<sup>(278)</sup>.

The ageing of the population leads to growing care needs of dependent older people. To this end, several Member States have introduced 'care insurance'. Sometimes this care is provided directly

<sup>(275)</sup> COM(2007) 439 final.

<sup>(276)</sup> Judgments of 5 July 1983, Case 171/82 Valentini [1983] ECR 2157; and of 11 July 1996, Case C-25/95 Otte [1996] I-3745.

<sup>(277)</sup> Judgments of 10 October 1996, Joined Cases C-245/94 and 312/94 Hoever and Zachow [1996] ECR I-4895; and of 11 June 1998, Case C-275/96 Kuusijärvi [1998] ECR 3419.

<sup>(278)</sup> Judgment of 7 November 2002, Case C-333/00 Maaheimo [2002] ECR I-10087.



by authorised bodies. However, in some Member States the care insurance gives, under certain conditions, entitlement to benefits designed to cover the costs of care provided at home by another person: the care allowance. Since the *Molenaar*<sup>(279)</sup>, *Jauch*<sup>(280)</sup> and *Hosse*<sup>(281)</sup> judgments, we know that these benefits must be seen as sickness benefits in cash.

The new Regulation (EC) No 883/2004 will bring only a very limited modernisation as to the material scope. First of all, it widens the current branch 'sickness and maternity benefits' to include also 'equivalent paternity benefits'<sup>(282)</sup>. Finally, the new regulation also will apply to pre-retirement benefits. The latter extension will have a rather limited impact, since the new regulation, like its predecessor, will only apply to statutory social security. As far as I know, statutory pre-retirement schemes only apply in Denmark and Sweden. The new chapter 'pre-retirement benefits' only has one article which stipulates that the rule on the aggregation of periods for entitlement to benefits shall not apply.

There is only very modest Community legislation protecting people moving within the Union in the field of *non-statutory* supplementary social security schemes<sup>(283)</sup>. The negotiations on the Commission proposal<sup>(284)</sup> aimed at increasing the level of such protection are very difficult.

<sup>(279)</sup> Judgment of 5 March 1998, Case C-160/96 *Molenaar* [1998] ECR I-843.

<sup>(280)</sup> Judgment of 8 March 2001, Case C-215/99 *Jauch* [2001] ECR I-1901.

<sup>(281)</sup> Judgment of 21 February 2006, Case C-286/03 *Hosse* [2006] ECR I-1771.

<sup>(282)</sup> Recital 19 of Regulation (EC) No 883/2004: 'In some cases, maternity and equivalent paternity benefits may be enjoyed by the mother or the father and since, for the latter, these benefits are different from parental benefits and can be assimilated to maternity benefits *strictu sensu* in that they are provided during the first months of a new-born child's life, it is appropriate that maternity and equivalent paternity benefits be regulated jointly'.

<sup>(283)</sup> Directive 98/49/EC of 29 June 1998 on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community (OJ L 209, 25.7.1998).

<sup>(284)</sup> Amended proposal for a directive on minimum requirements for enhancing worker mobility by improving the acquisition and preservation of supplementary pension rights (COM(2007) 603 final).

## V. THE INTERACTION BETWEEN COURT AND LEGISLATURE HAVING LED TO A SEPARATE COORDINATION SYSTEM FOR 'SPECIAL NON-CONTRIBUTORY BENEFITS'

### A. CJ case-law under Regulation (EEC) No 1408/71

Like Regulation No 3, Regulation (EEC) No 1408/71 only applies to legislation concerning social security. Article 4 made it clear, from the very beginning, that the regulation applies to all statutory general and special social security schemes, whether contributory or non-contributory. There will be no substantial change in this respect under the new Regulation (EC) No 883/2004.

By virtue of Article 4(4) of Regulation (EEC) No 1408/71, social assistance is excluded from its material scope. However, a definition of the terms 'social security' or 'social assistance' was, and is not to be found in Regulation (EEC) No 1408/71. It results from the abundant case-law of the CJ that the distinction between benefits excluded from the scope of Regulation (EEC) No 1408/71 and those which fall within its scope is based essentially on the constituent elements of the particular benefit, in particular its purposes and the conditions on which it is granted, and not whether a benefit is classified as a social security benefit by national legislation. Moreover, the CJ had consistently stated that a benefit may be regarded as a social security benefit insofar as it is granted, without any individual and discretionary assessment of personal needs, to recipients on the basis of a legally defined position provided that it

concerns one of the risks expressly listed in Article 4(1) of Regulation (EEC) No 1408/71 <sup>(285)</sup>.

In other words, if a benefit aimed at meeting family expenses was granted automatically to families meeting certain objective criteria, it had to be treated as a family benefit in the sense of Regulation (EEC) No 1408/71 with all its consequences: the residence clauses provided for by national legislation as a condition for entitlement to the benefit in question were waived by Article 73 of Regulation (EEC) No 1408/71 <sup>(286)</sup>. Likewise, insofar as the benefit in question was to be considered as a pension, being linked to the risks of invalidity, old age or survival, the benefit had to be exported, by virtue of Article 10, even if national legislation confined the benefit in question to persons residing in its national territory <sup>(287)</sup>.

## B. Reaction of legislature: Regulation (EEC) No 1247/92

By adopting Regulation (EEC) No 1247/92 <sup>(288)</sup> the legislature created a separate coordination system for the special non-contributory benefits; in other words, a coordination system which differs <sup>(289)</sup> from the normal coordination system provided by Regulation (EEC) No 1408/71, which takes into account the special characteristics of the benefits concerned.

As a first part of this separate coordination system, para. 2a was inserted in Article 4, making it clear that Regulation (EEC) No 1408/71 also applied to special non-contributory benefits. This new paragraph also contained a description of the kind of benefits which the legislator had in mind in order to be considered as 'special' in the sense of that paragraph. However, that indication was not really precise. There was no definition of what had to be understood under the term 'non-contributory'.

The second part of the separate coordination system was the insertion of Article 10a in Regulation (EEC) No 1408/71. This new article had as an objective that the special non-contributory benefits should not be covered by any of the provisions laid down in Title III of the regulation or by the general waiving of residence clauses for pensions stipulated by Article 10. However, the way this was expressed in the text was rather ambiguous <sup>(290)</sup>. The new Article 10a also contained an own aggregation provision for opening up entitlement to such benefits <sup>(291)</sup> as well as some specific assimilation of facts' provisions <sup>(292)</sup>.

## C. CJ case-law under the new regulation

In three judgments concerning UK benefits listed in Annex IIa as inserted by Regulation (EEC) No 1247/92, the CJ confirmed the validity of the special coordination system for special non-contributory benefits. These judgments had as an effect that not only the exportability of the benefits concerned was excluded <sup>(293)</sup>, but also that the habitual residence test, as laid down in UK legislation <sup>(294)</sup>,

<sup>(285)</sup> The CJ made it clear that the material scope of Regulation (EEC) No 1408/71 covered, *inter alia*: guaranteed income for old people in Belgium: judgment of 22 June 1972, Case 1/72 Frilli [1972] ECR I-457; mobility allowance in the UK: judgment of 20 June 1991, Case C-356/89 Stanton Newton [1991] ECR I-3017; allowances of the Fonds National de Solidarité in France: judgments of 9 October 1974, Case 24/74 Biason [1974] ECR 999; of 24 February 1987, Joined Cases 379, 380, 381/85 and 93/86 Giletti et al. [1987] ECR I-955; and of 11 June 1991, Case C-307/89 Commission v France [1991] ECR I-2903; benefits for elderly unemployed persons or unemployed persons with partial incapacity for work in the Netherlands: judgment of 2 August 1993, Case C-66/92 Acciardi [1993] I-4567; social pension in Italy: judgment of 10 May 1983, Case 139/82 Piscitello [1983] ECR I-1427.

<sup>(286)</sup> Judgment of 16 July 1992, Case C-78/91 Hughes [1992] ECR I-4839.

<sup>(287)</sup> Judgment of 24 February 1987, Joined Cases 379, 380, 381/85 and 93/86 Giletti et al. [1987] ECR I-955.

<sup>(288)</sup> Regulation (EEC) No 1247/92 of 30 April 1992 (OJ L 136, 19 May 1992).

<sup>(289)</sup> See the Recital 6 of Regulation (EEC) No 1247/92.

<sup>(290)</sup> The text of Article 10a (1) was: 'Notwithstanding the provisions of Article 10 and Title III, persons to whom this regulation applies shall be granted the special non-contributory cash benefits referred to in Article 4 (2a) exclusively in the territory of the Member State in which they reside, in accordance with the legislation of that state, provided that such benefits are listed in Annex IIa...'

<sup>(291)</sup> Article 10a(2) as inserted by Regulation (EEC) No 1247/92.

<sup>(292)</sup> Article 10a(3) and (4) as inserted by Regulation (EEC) No 1247/92.

<sup>(293)</sup> Judgments of 4 November 1997, Case C-20/96 Snares [1997] ECR I-6057; and of 11 June 1998, Case C-297/96 Partridge [1998] ECR I-3467.

<sup>(294)</sup> This legislation required the completion of an appreciable period of residence there as a condition for entitlement to the benefit in question.

could not be applied to the special non-contributory benefits<sup>(295)</sup>. In its later *Jauch* judgment<sup>(296)</sup>, the CJ underlined that in none of the three aforementioned judgments (*Snares*, *Partridge* and *Swaddling*) it had examined whether the benefits in question did in fact meet the conditions of being ‘special’ and ‘non-contributory’ in the sense of Article 4(2a), for the simple reason that this question had not been raised in those proceedings. The CJ stated in all three aforementioned judgments that, by reason of the fact that they were listed in Annex IIa, they had to be considered as ‘special non-contributory benefits’<sup>(297)</sup>.

The *Jauch* judgment marked a new phase in the coordination system for the special non-contributory benefits. In this judgment the CJ made it clear that the simple fact that a benefit was listed in Annex IIa was not sufficient any more to conclude that the benefit in question was a ‘special non-contributory’ one. On the contrary, for every benefit in question it had to be examined whether it was indeed a ‘special’ and a ‘non-contributory’ one. The CJ came, after careful examination of the Austrian benefit in question (the care allowance), to the conclusion that, notwithstanding its listing in Annex IIa, it was neither ‘special’ nor ‘non-contributory’.

A couple of months later the CJ examined in the *Leclere* judgment<sup>(298)</sup> whether the Luxembourg maternity allowance, listed in Annex IIa, was indeed a ‘special’ one. The CJ declared this part of the annex invalid, since the benefit in question was not a ‘special’ one.

## D. Reaction of legislature: Regulation (EC) No 647/2005

### *New criteria*

These judgments were an encouragement for the legislature to review the whole coordination system for the ‘special non-contributory’ benefits which was in place at that time, including its Annex IIa. The Commission presented in 2003<sup>(299)</sup> a proposal for criteria which must be fulfilled by benefits in order to be ‘special’ and ‘non-contributory’. By adopting Regulation (EC) No 647/2005<sup>(300)</sup>, the legislature accepted with hardly<sup>(301)</sup> any change the Commission proposal for the wording of the new criteria.

The new wording is much inspired by the *Jauch* and *Leclere* judgments<sup>(302)</sup>. Referring to the aim of Articles 39–42 of the Treaty, the CJ stated that, even when it is permissible for the Community legislature to adopt provisions which derogate from the principle of exportability of social security benefits, such derogating provisions must be interpreted strictly. The structure of Regulation (EEC) No 1408/71 shows that the concept of ‘social security benefit’ within the meaning of Article 4(1) and the concept of ‘special non-contributory benefit’ within the meaning of Article 4(2a) of the regulation are mutually exclusive. In other words, a benefit which satisfies the conditions of a ‘social security benefit’ within the meaning of Article 4(1) of Regulation (EEC) No 1408/71 cannot be analysed as a ‘special non-contributory benefit’<sup>(303)</sup>. When a benefit is a family benefit or a sickness benefit in the sense of Article 4(1) of Regulation (EEC) No 1408/71, for instance, it cannot be a ‘special non-contributory’ benefit in the sense of Article 4(2a).

<sup>(295)</sup> Judgment of 25 February 1999, Case C-90/97 *Swaddling* [1999] ECR I-1075.

<sup>(296)</sup> Point 17 of the judgment of 8 March 2001, Case C-215/99 *Jauch* [2001] ECR I-1901.

<sup>(297)</sup> Point 32 of the *Snares* judgment; point 33 of the *Partridge* judgment; and point 24 of the *Swaddling* judgment.

<sup>(298)</sup> Judgment of 31 May 2001, Case C-43/99 *Leclere* [2001] ECR I-4265.

<sup>(299)</sup> OJ C 80, 30.3.2004.

<sup>(300)</sup> Regulation (EC) No 647/2005 of 13 April 2005 (OJ L 117, 4.5.2005).

<sup>(301)</sup> There is only a slight difference in the wording of the criterion ‘non-contributory’ contained in Article 4(2a)(b).

<sup>(302)</sup> See points 20 and 21 of the *Jauch* judgment and point 35 of the *Leclere* judgment.

<sup>(303)</sup> This was also confirmed more recently by the CJ in its judgment of 21 February 2006, Case C-286/03 *Hosse* [2006] ECR I-1771.

For these reasons, the conditions to be fulfilled by a benefit in order to be considered as a ‘special non-contributory’ one were sharpened, having in mind in particular the broad interpretation of the terms ‘sickness benefit’<sup>(304)</sup> and ‘family benefit’<sup>(305)</sup>. In addition, the distinction between the two categories of ‘special non-contributory benefits’ — Article 4(2a) (i) on the one hand and Article 4(2a)(ii) on the other — has become much clearer.

The first category covers benefits whose purpose is to help people in financial need (‘guarantee a minimum subsistence income having regard to the economic and social situation of the Member State concerned’). The second category concerns benefits whose aim is to help people who are in need of assistance in order to participate in the daily life of society (‘solely protection for the disabled, closely linked to the said person’s social<sup>(306)</sup> environment in the Member State concerned’). The mere fact that a benefit is awarded to a person who is disabled is not, as such, a sufficient ground to conclude that it is, therefore, a ‘special non-contributory’ benefit<sup>(307)</sup>.

Regulation (EC) No 883/2004 contains the same criteria as Regulation (EC) No 647/2005.

<sup>(304)</sup> Judgments of 5 March 1998, Case C-160/96 Molenaar [1998] ECR I-843; and of 8 March 2001, Case C-215/99 Jauch [2001] ECR I-1901; later confirmed by judgments of 8 July 2004, Joined Cases C-502/01 and 31/02 Gaumain-Cerri [2004] ECR I-6483; and of 21 February 2006, Case C-286/03 Hosse [2006] ECR I-1771.

<sup>(305)</sup> Judgments of 10 October 1996, Joined Cases C-245/94 and C-312/94 Hoever and Zachow [1996] ECR I-4895; of 11 June 1998, Case C-275/96 Kuusijärvi [1998] ECR 3419; of 2 February 2002, Case C-255/99 Humer [2002] ECR I-1205; and of 7 November 2002, Case C-333/00 Maaheimo [2002] ECR I-10087.

<sup>(306)</sup> No reference is made to ‘economic’ environment as is the case in the first category.

<sup>(307)</sup> Regulation (EC) No 647/2005 has also clarified the wording of Article 10a. As mentioned above, the intention of the legislator in 1992 was to create a separate coordination system for special non-contributory benefits. Therefore, the provisions of the whole Title III and of Article 10 should not be applied to the special non-contributory benefits. However, the wording laid down in the previous version of Article 10a was rather ambiguous. It could be interpreted that it only overruled the waiving of residence clauses laid down in Title III and Article 10. Because of this ambiguous wording, the CJ ruled in its judgment of 22 September 1998, Case C-132/96 Stinco, that Article 46(2)(a) of Regulation (EEC) No 1408/71 requires that the competent institution, in determining the theoretical amount of the pension on which the pro-rata benefit is based, take into account a supplement intended to bring the pension to the level of the statutory minimum. Article 10a of Regulation (EEC) No 1408/71, as modified by Regulation (EC) No 647/2005, now stipulates that the provisions of Title III (including Article 46) ‘shall not apply to the special non-contributory benefits’ referred to in Article 4(2a).

### **New Annex IIa**

In order to reflect that Regulation (EC) No 647/2005 has really ‘refreshed’, and not only adapted, the coordination system of ‘special non-contributory benefits’, the content of Annex IIa has been amended as a whole rather than modifying several entries, as had been the case in all previous modifications of Annex IIa<sup>(308)</sup> of Regulation (EEC) No 1408/71.

A great number of benefits which were listed in Annex IIa prior to the coming into force of Regulation (EC) No 647/2005 have not been included in the new annex, since they had to be considered either as ‘family benefits’ or as ‘sickness benefits’ covered by Article 4(1) of Regulation (EEC) No 1408/71.

## **VI. THE GREAT IMPACT OF THE PRINCIPLE OF EQUAL TREATMENT**

One of the pillars of the EC Treaty is the principle that all discrimination on grounds of nationality is prohibited. Free movement of workers entails the right of migrant workers to be treated equally as national workers in the host state. The *lex loci laboris* principle reflects the principle of equal treatment<sup>(309)</sup>, as enshrined in Article 39 EC, in Title II of the current Regulation (EEC) No 1408/71 and of the new Regulation (EC) No 883/2004. But the importance of Article 39 EC for the social security coordination goes further than that. The judgment of the CJ in the *Gottardo* case is a nice illustration of the far-reaching importance of the principle of equal treatment laid down in Article 39 EC. In this judgment the CJ ruled that, even when the conclusion of a bilateral agreement with a third country is a matter which belongs

<sup>(308)</sup> See for instance: Regulation (EEC) No 1249/92 of 30 April 1992 (OJ L 136, 19.5.1992); Regulation (EC) No 1290/97 of 27 June 1997 (OJ L 176, 4.7.1997); Regulation (EC) No 1223/98 of 4 June 1998 (OJ L 168, 13.6.1998); Regulation (EC) No 1399/99 of 29 April 1999 (OJ L 164, 30.6.1999); and Regulation (EC) No 1386/2001 of 5 June 2001 (OJ L 187, 10.7.2001).

<sup>(309)</sup> See Prof. Herwig Verschueren, ‘Cross-border workers in the European internal market: Trojan horses for Member States’ labour and social security law?’, *The International Journal of Comparative Labour Law and Industrial Relations*, Vol. 24/2, 167–199, 2008.

to the competence of the Member States, in the application of such an agreement Member States have to comply with Community law. This means, for instance, that when Member State A has concluded an agreement with a third country, nationals of Member State B or C having completed periods of insurance in that third country, must be treated by Member State A in the same way as nationals of that Member State. According to the CJ<sup>(310)</sup>, this is an obligation resulting from the principle of equal treatment laid down in Article 39 EC.

The CJ does not hesitate to apply directly Article 39 EC in order to find a reasonable solution for workers who cannot invoke Regulation (EEC) No 1408/71<sup>(311)</sup>. The CJ will not hesitate either to declare a provision of the regulation invalid, if it violates the principle of equal treatment laid down in Article 39 EC<sup>(312)</sup>.

The introduction of European citizenship in the Treaty has made the impact of the equal treatment principle even wider. In a succession of cases<sup>(313)</sup>, starting with the famous *Martinez Sala* judgment, the CJ has given much more weight to the notion of European citizenship than initially anticipated. The experts are still debating the interrelationship between the different non-discrimination provisions based on nationality contained in Articles 12 and 18 EC, on the one hand, and those laid down in Regulation (EEC) No 1408/71, on the other.

With regard to social security, the principle of equal treatment is laid down expressly in Article

3 of Regulation (EEC) No 1408/71, which provides that persons residing in the territory of one of the Member States to whom the provisions of the regulation apply are subject to the same obligations and enjoy the same benefits under its legislation as the nationals of that state. In the case-law of the CJ, the principle of equal treatment has been given a broad interpretation, prohibiting not only overt discrimination based on nationality, but also covert forms of discrimination which, by applying other distinguishing criteria, in fact achieve the same result<sup>(314)</sup>.

Regulation (EC) No 883/2004 has strengthened the principle of equal treatment between EU nationals in two ways. First of all, the current Regulation (EEC) No 1408/71 requires that the person concerned must reside in a Member State in order to be able to invoke the principle of equal treatment. Regulation (EC) No 883/2004 does not require this condition any more<sup>(315)</sup>. This means that people covered by Regulation (EC) No 883/2004 will be able to invoke the non-discrimination provision contained in the aforementioned regulation even when they reside in a third state. For example, it will no longer be possible for a Member State to provide only to its own nationals indexation increases for pensioners residing in a third state.

The principle of equal treatment has been further strengthened by the insertion of the provision stipulating cross-border recognition of facts or events<sup>(316)</sup>. This principle means that facts or events occurring in a Member State must be taken into account by another Member State as though they

<sup>(310)</sup> Judgment of 15 January 2002, Case C-55/00 Gottardo [2002] ECR I-413. See also Recommendation 22 of 18 June 2003 of the Administrative Commission on Social Security for Migrant Workers (OJ L 326, 13.12.2003).

<sup>(311)</sup> Judgments of 22 November 1995, Case C-443/93 Vougioukas [1995] ECR 4033; of 3 October 2000, Case C-411/98 Ferlini [2000] ECR I-8081; and of 16 December 2004, Case C-293/03 My [2004] ECR I-12013.

<sup>(312)</sup> Judgments of 15 January 1984, Case 41/84 Pinna [1984] ECR I; and of 18 April 2002, Case C-290/00 Duchon [2002] ECR I-3567.

<sup>(313)</sup> Judgments of 12 May 1998, Case C-85/96 Martínez Sala [1998] ECR I-2691; of 20 September 2001, Case C-184/99 Grzelczyk [2001] ECR I-6193; of 11 July 2002, Case C-224/98 D'Hoop [2002] ECR I-6191; of 2 October 2003, Case C-148/02 Garcia Avello [2003] ECR I-11613; of 23 March 2004, Case C-138/02 Collins [2004] ECR I-2703; of 7 September 2004, Case C-456/02 Trojani [2004] ECR 7573, of 15 March 2005, Case C-209/03 Bidar [2005] ECR 2119, of 26 October 2006, Case C-192/05 Tas-Hagen, ECR 2006 I-10451; and of 22 May 2008, Case C-499/06 Nerkowska [2008] ECR I-3993.

<sup>(314)</sup> Judgments of 25 June 1997, Case C-131/96 Mora Romero [1997] ECR I-3659; of 21 September 2000, Case C-124/99 Borawitz [2000] ECR I-7293; of 9 November 2006, Case C-346/05 Chateigner [2006] ECR I-10951; and of 18 January 2007, Case C-332/05 Celozzi [2007] ECR I-563.

<sup>(315)</sup> Article 4 of Regulation (EC) No 883/2004.

<sup>(316)</sup> Article 5 of Regulation (EC) No 883/2004.



had taken place in its own territory. This provision is in line with the case-law of the CJ<sup>(317)</sup>.

However, the assimilation of facts or events occurring in a Member State can in no way render another Member State competent, or its legislation applicable<sup>(318)</sup>. Likewise, in order to clarify that the assimilation of facts or events occurring in the territory of another Member State should not interfere with the principle of aggregation of periods of insurance completed in another Member State, Recital 10 has been inserted into Regulation (EC) No 883/2004. It means that Article 5 of Regulation (EC) No 883/2004 does not create periods of insurance. Only periods that are completed under the legislation of another Member State are to be taken into account by applying the principle of aggregation of periods<sup>(319)</sup>.

<sup>(317)</sup> In fact, in a number of judgments the CJ decided in favour of a cross-border assimilation of facts or events as a requirement of the principle of equal treatment: judgments of 7 June 1988, Case 20/85 Roviello [1988] ECR 2805; of 4 October 1991, Case C-349/87 Paraschi [1991] ECR I-4501; of 9 December 1993, Joined Cases 45/92 and 46/92 Lepore and Scamuffa [1993] ECR I-6497; of 25 June 1997, Case C-131/96 Mora Romero [1997] ECR I-3659; of 7 February 2002, Case C-28/00 Kauer [2002] ECR I-1343; of 18 April 2002, Case C-290/00 Duchon [2002] ECR I-3567; and of 28 April 2004, Case C-373/02 Öztürk [2004] ECR I-3605.

<sup>(318)</sup> Recital 11 of Regulation (EC) No 883/2004.

<sup>(319)</sup> This Recital 10 is also entirely in line with the judgment of the CJ in the Adanez Vega case (Case C-372/02). The judgment (of 11 November 2004) in this case was delivered on the interpretation of Regulation (EEC) No 1408/71 which does not have, contrary to Regulation (EC) No 883/2004, a general provision concerning cross-border recognition of facts or events. Nevertheless, during the proceeding Mr Adanez Vega referred to the fact that under German legislation periods of military service completed in Germany are to be treated as periods of insurance. He had done his military service in Spain. According to Mr Adanez Vega, Article 3 of Regulation (EEC) No 1408/71, which forbids any discrimination based on nationality between EU nationals, required that his military service in Spain had to be assimilated to military service in Germany. In other words: in his eyes there was no need to examine whether the conditions for applying the aggregation provisions were fulfilled. The CJ rejected this thesis. The period of military service completed in Spain could only be taken into account if the conditions for applying the aggregation provisions were fulfilled. The CJ said that Article 3 of Regulation (EEC) No 1408/71 applies only 'subject to the special provisions of the regulation'. The CJ continued by referring to the fact that in the present case the regulations contain special provisions, namely Articles 67 and 71, which are designed to govern the entitlement to unemployment benefits of an unemployed person who has completed periods of insurance or employment under the legislation of another Member State. These special provisions displace the general principle of equality enshrined in Article 3 of Regulation (EEC) No 1408/71.

## VII. THE FIRST AND STILL VERY IMPORTANT INSTRUMENT FOR CROSS-BORDER HEALTHCARE

The European coordination of social security was the first and, for a long time, the only instrument for cross-border healthcare in the EU.

Thanks to the coordination system, all EU nationals who are insured under the legislation of a Member State are entitled to benefits in kind which become necessary on medical grounds during a stay in another Member State, taking into account the nature of the benefits and the expected length of stay<sup>(320)</sup>. The procedure for getting such non-planned treatment has been simplified<sup>(321)</sup> in view of enabling the introduction of the European health insurance card in 2004. The holder of such a card is entitled to benefits in the Member State of stay in accordance with the legislation of that state, as though he/she were insured in that Member State. The European health insurance card has become an important symbol of Europe for many of its citizens. There are now more than 172 million European health insurance cards in circulation. The holder of the card has direct access to the healthcare provider. The card also guarantees that the issuing Member State will fully refund the costs to the Member State of stay.

For travelling to another Member State with the purpose of getting healthcare there, the current Regulation (EEC) No 1408/71<sup>(322)</sup> as well as the new Regulation (EC) No 883/2004<sup>(323)</sup> always requires prior authorisation, both for hospital care and for non-hospital care. The requested authorisation cannot be refused<sup>(324)</sup> if the treatment in question is among the

<sup>(320)</sup> Article 22(1)(a) of Regulation (EEC) No 1408/71; Article 19(1) of Regulation (EC) No 883/2004.

<sup>(321)</sup> Regulation (EC) No 631/2004 of 31 March 2004 (OJ L 100, 6.4.2004).

<sup>(322)</sup> Article 22(1)(c).

<sup>(323)</sup> Article 20(1).

<sup>(324)</sup> Instead of the words 'cannot be refused if...' laid down in Article 22(2) of Regulation (EEC) No 1408/71, the new Regulation (EC) No 883/2004 uses in Article 20(2) a more positive terminology: 'the authorisation shall be accorded where...'



benefits provided for by the legislation of the competent state and where the treatment in question in that Member State cannot be given within a time-limit which is *medically* justifiable<sup>(325)</sup>, taking into account the current state of health and the probable course of the illness of the insured person.

When authorisation is granted the person is entitled to the benefits in the state of stay in accordance with the legislation of that Member State, as though he/she were insured in that Member State. This means that the cost of the treatment will be borne by the competent Member State according to the rates applicable in the Member State of stay. In addition, the insured person will be entitled, upon request, to the difference, if any, between the reimbursement rates applied in the Member State of stay and the rates applied for the same treatment in the competent Member State<sup>(326)</sup>. In many cases there will be direct payment by the institution without the patient having to pay at all.

As we all know, there is now a second way to obtain planned cross-border healthcare, namely to invoke directly the Treaty provisions on free movement of goods and freedom to provide services as interpreted by the CJ<sup>(327)</sup>. This means that no authorisation is required for non-hospital care. In that case the patient has always to pay first and can claim reimbursement by the competent institution after return according to the rates applicable in the competent state. If the rate in the Member State of treatment is higher than in the competent state, the patient will *not* be entitled to an additional reimbursement.

<sup>(325)</sup> Article 22(2) of Regulation (EEC) No 1408/71 as interpreted by the CJ in its judgments of 23 October 2003, Case C-56/01 Inizan [2003] ECR I-12403; and of 16 May 2006, Case C-372/04 Watts [2006] ECR I-4325; Article 20(2) of Regulation (EC) No 883/2004.

<sup>(326)</sup> Article 26(7) of the new implementing regulation, in line with the CJ's judgment of 12 July 2001, Case C-368/98 Vanbraekel [2001] ECR I-5363.

<sup>(327)</sup> In particular judgments of 28 April 1998, Cases C-120/95 Decker [1998] ECR I-1831, and C-158/96 Kohll [1998] ECR I-1931; of 12 July 2001 Cases C-368/98 Vanbraekel [2001] ECR I-5363, and C-157/99 Smits-Peerbooms [2001] ECR I-5473; of 13 May 2003, Case C-385/99 Müller Faúré [2003] ECR I-4509; of 23 October 2003, Case C-56/01 Inizan [2003] ECR I-12403; of 18 March 2004, Case C-8/02 Leichtle [2004] ECR I-2641; of 16 May 2006, Case C-372/04 Watts [2006] ECR I-4325; of 15 June 2006, Case C-466/04 Acereda Herrera [2006] ECR I-5341; and of 19 April 2007, Case C-444/05 Stamatelaki [2007] ECR I-3185.

A system of prior authorisation for obtaining hospital care may, under certain conditions, be justified. The conditions for obtaining such prior authorisation must be based on objective and non-discriminatory criteria which are known in advance. A person having obtained authorisation will be reimbursed at the most favourable rate<sup>(328)</sup>.

In July 2008, the Commission adopted a proposal for a directive on the application of patients' rights in cross-border healthcare<sup>(329)</sup>. This proposal is based on the assumption that regulations coordinating the social security schemes provide the general tool for patients who cannot get healthcare within a reasonable period of time. The idea is that where the conditions set by Regulation (EC) No 883/2004 are met, then this regulation shall apply. The proposal intends to complement this regulation by providing a framework for patients seeking healthcare abroad for other reasons. Obviously, one of the main points that will be discussed in the months to come is the coherence of this proposal with the rules laid down in Regulation (EC) No 883/2004 and its implementing regulation.

## VIII. CONCLUSIONS

In my presentation I have focused on a number of achievements by the Community regulations coordinating the various social security schemes of Member States. It is undeniable that these regulations provide a very high standard of protection in the field of social security for people moving within the EU. On a considerable number of points the rights of EU citizens will be further improved under the new Regulation (EC) No 883/2004. This does not mean, however, that all the problems in the field of social security have been solved. Far from it.

It is the responsibility of the legislature, and in particular the Commission who has the right of initiative,

<sup>(328)</sup> Judgment of 12 July 2001, Case C-368/98 Vanbraekel [2001] ECR I-5363, point 31.

<sup>(329)</sup> Proposal of 2 July 2008 (COM(2008) 414 final).

to check on a regular basis whether the Community regulations still meet today's requirements. This could mean that the rules need to be adapted or that choices once made by the legislature have to be revised as a result of developments in national or Community legislation, in the case-law of the CJ, or in the social or economic environment.

As to the response of the coordination rules to developments in national legislation, it is true that the existing coordination system has been able to deal with the introduction of a whole set of new benefits in national legislation of the various Member States. But we have mainly the CJ to thank for this flexibility rather than the legislature. For instance, despite efforts made during the negotiations on the Commission proposal aimed at simplifying and modernising Regulation (EEC) No 1408/71, it has not been possible, apart from one exception<sup>(330)</sup>, to include provisions specifically devoted to long-term care benefits in Regulation (EC) No 883/2004. There are now signals that the legislature, after the CJ's judgment in case C-299/05<sup>(331)</sup>, is encouraged to reopen the debate on the insertion of a chapter 'care benefits' into the new Regulation (EC) No 883/2004. The insertion of such a chapter devoted to 'care benefits' would be a very positive step, enabling a more balanced coordination system to the benefit of the citizens in cross-border situations.

Developments in Community legislation and the introduction of European citizenship also have a bearing on the coordination rules. In fact, these developments have given rise to a number of fundamental questions. To what extent could the coordination system set up by Regulation (EC) No 883/2004 be challenged under Articles 12 and 18 EC? I referred to Directive 2004/38/EC as being the single Community instrument dealing with the right to move and to reside within the Union.

<sup>(330)</sup> Article 34 of Regulation (EC) No 883/2004 aims at preventing an overlap of long-term care benefits in cases where care benefits are provided in one Member State in the form of a cash benefit and in another in the form of a benefit in kind.

<sup>(331)</sup> Judgment of 18 October 2007, Case C-299/05 *Commission v Council and Parliament* [2007] ECR I-8695.

What is the relationship between this directive and the separate coordination system set up by Regulation (EC) No 883/2004 for the 'special non-contributory benefits'? Which legal instrument should take precedence? Do persons invoking Regulation (EC) No 883/2004 (or the current Regulation (EEC) No 1408/71) in order to claim a special non-contributory benefit in the Member State in which they reside, put their right of residence at stake because they no longer fulfil the requirements for having a right to reside in the host state under Directive 2004/38/EC? Or is it just the opposite: do persons entitled to a minimum subsistence benefit of the host state thanks to Regulation (EC) No 883/2004 (or (EEC) No 1408/71) automatically fulfil the subsistence requirement for obtaining or maintaining residence rights under Directive 2004/38/EC<sup>(332)</sup>? These questions have to be clarified.

As to developments in the case-law of the CJ, it is regrettable that the case-law on cross-border healthcare, based on the Treaty provisions on the free movement of goods and on the freedom to provide services, has not been fully reflected in the text of the new Regulation (EC) No 883/2004. When the chapter 'sickness benefits' was negotiated in the Council in 2002, a number of Member States expressed their view that the case-law existing at that time did not concern their systems. This was a missed opportunity. It is now likely that we have to face the coexistence of two legal instruments dealing with cross-border healthcare.

Developments in the socioeconomic environment could also require a rethink of the coordination rules. The dominant role of the *lex loci laboris*<sup>(333)</sup> for the determination of the applicable legislation has been maintained in the new Regulation (EC) No 883/2004 and the principle of the unity of the applicable

<sup>(332)</sup> Prof. Herwig Verschueren, 'European (internal) migration law as an instrument for defining the boundaries of national solidarity systems', *European Journal of Migration and Law*, 2007, 307–346. See also the Tress Think Tank report 2008: The relationship and interaction between the coordination regulations and Directive 2004/38/EC, available on the Tress website (<http://www.tress-network.org>).

<sup>(333)</sup> This means that an economically active person is subject to the legislation of the Member State in the territory of which he is employed or self-employed, even if he resides in the territory of another state.

legislation has even been strengthened by this new regulation. This does not mean, however, that this issue is no longer on the agenda. On the contrary, the question has to be addressed of whether the rules of Regulation (EC) No 883/2004 on conflicts of law meet the requirements deriving from new forms of mobility<sup>(334)</sup>. The Commission launched a consultation procedure last year and the Think Tank of Tress has been asked to deepen the reflections on this issue<sup>(335)</sup>. It is likely that, in the framework of this process, the fundamental question will be raised of whether or not it is appropriate to modify some core concepts of the rules on conflict of law, including the dominant role of the *lex loci laboris* and the unity of the applicable legislation.

In order to guarantee that people who make use of their right to free movement are not penalised in the field of social security, it is not enough to legislate. A correct and smooth application of these rules is very important indeed. Of course, the Commission has, as guardian of the Treaty, a responsibility here. But a correct application of the rules has in the first place to be guaranteed at national level. In the Member States, public authorities, institutions, social partners, judges, lawyers, NGO representatives and other experts are confronted daily with questions of interpretation and implementation of the coordination rules. Representatives of public authorities and institutions already liaise at national level and often attend meetings at Community level in order to discuss problems of implementation. This is, however, not necessarily the case for the other partners involved — lawyers, judges, social partners, NGO representatives and other experts. In order to strengthen their expertise, as well as for networking at national level between all

the actors involved, the Commission decided six years ago to create a network on the coordination of social security. This network, composed of independent experts in every Member State, organises, on a regular basis, seminars in all Member States. A Commission representative is always present at these seminars. The network, which is known under the name Tress, also publishes an annual report on the application of the coordination rules. This report is not only presented to the Commission, but is also the subject of an annual peer review of the Administrative Commission on Social Security for Migrant Workers. Thanks to the work of Tress, the Commission has now a much better view of how the Community rules are actually applied in Member States. It also helps to identify the rules that need clarification, correction or adaptation.

A smooth application of the coordination rules is also one of the main objectives of the new implementing regulation. It aims at achieving a more efficient and closer cooperation between the institutions. Exchange of information will happen by electronic means. The implementing regulation contains other provisions aimed at a smooth application of the rules, such as a set of provisions on the provisional application of legislation, as well as on provisional granting of benefits<sup>(336)</sup>. The principle of good administration is reflected in clear provisions of Regulation (EC) No 883/2004<sup>(337)</sup>, avoiding that, in case of difficulties in the interpretation or application of the regulation, the citizen is sent from one institution to another.

In this way, the new coordination system, despite its shortcomings, will constitute an essential contribution to European integration.

<sup>(334)</sup> Commission communication: 'Mobility, an instrument for more and better jobs: the European job mobility action plan (2007–10)' (COM(2007)773 final).

<sup>(335)</sup> A first report, 'Towards a new framework for applicable legislation', is already available on the Tress website (<http://www.tress-network.org>).

<sup>(336)</sup> Article 6.

<sup>(337)</sup> Article 76(4) and (6) of Regulation (EC) No 883/2004.

# APPLICATION OF THE COORDINATION REGULATION IN THE CONTEXT OF DECENTRALISATION AND REGIONALISATION IN MATTERS OF SOCIAL SECURITY



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## I. INTRODUCTION

### A. European coordination law

The coordination regulations on social security — as elaborated by Regulation No 3<sup>(338)</sup>, Regulation (EEC) No 1408/71<sup>(339)</sup> and Regulation (EC) No 883/2004<sup>(340)</sup> — are not only the oldest, but also one of the most important, parts of European legislation. Their provisions are addressed to the Member States and have a double impact on the latter’s legal system: firstly, they are to be implemented

<sup>(338)</sup> OJ 30, 16.12.1958, p. 561.

<sup>(339)</sup> OJ L 149, 5.7.1971, p. 2; M. Fuchs, Nomos-Kommentar zum Europäischen Sozialrecht, 2005 (fourth edition); F. Pennings, Introduction to European social security law, Antwerp, 2003 (fourth edition); B. Schulte, ‘Supranationales Sozialrecht’, in U. Becker, B. von Maydell and F. Ruland (eds), Sozialrechtshandbuch, 2008, fourth edition; S. Van Raepenbusch, La Sécurité des Travailleurs Européens, Bruxelles, 2001; P. Hanau, H-D. Steinmeyer and R. Wank, Handbuch des Europäischen Arbeits- und Sozialrechts, München, 2002.

<sup>(340)</sup> OJ L 166, 30.4.2004; E. Eichenhofer (ed.), 50 Jahre nach dem Beginn — neue Regeln über die Koordination sozialer Sicherheit, Berlin, 2009; F. Marhold (ed.), Das neue Sozialrecht der EU, Wien, 2005; B. Spiegel, ‘Die neue Sozialrechtskoordinierung. Überlegungen zur Verordnung (EG) No 883/2004’, ZIAS 2006, 85.

by the social security administrations of the Member States; secondly, they give shape to the Member States’ social security legislation. This double impact ushers in two different dimensions. By its unique choice-of-law provisions, European coordination law determines the international scope of application of the Member States’ social security systems identically and, by stipulating the equal treatment of EU citizens, equalising periods of coverage or facts, giving access to benefits in kind to beneficiaries residing or staying outside the competent Member State and exporting all benefits in cash, European law makes national social security law become internationally effective<sup>(341)</sup>.

### B. A two-layer approach to law

Coordination of social security is based upon two layers of law. It is relational in character, insofar as it presupposes and links two levels of law: the

<sup>(341)</sup> E. Eichenhofer, Sozialrecht der EU, 2010 (fourth edition), Tz 75 et seq.

supranational and the national. European law, hence, implies the very existence of Member States' social security legislation<sup>(342)</sup>. The former is addressed to the latter, and without the latter the former can neither work nor even have been considered! A second characteristic of EC coordination law is the interrelation between two or more national social security legislations with respect to cross-border cases, i.e. cases with links to more than one national system of social security.

European coordination of social security law is made to bring about certain elementary achievements within each Member State's social security system: to avoid both double protection as loopholes in protection and to safeguard each social security right, whenever acquired under the legislation of one Member State, even if the entitled person has lost any link to the Member State in which the acquisition once took place. As and because European law intends to govern the laws of the Member States, both sets of legislation are deeply interrelated.

### C. Member States as nation states

In this two-layer approach, European law is addressed to the Member States' legislations in their entirety. It is therefore built upon the idea that there is a unique, homogenous and centralised legislation, thoughtfully elaborated and cultivated by each Member State. At first sight, this assumption seems to be sound — above all in social security. The modern idea of social security is deeply rooted in the nation state. Social historians conceive Bismarck's social insurance project of 1881 as a corollary to the formation of the German Empire of 1871.

So they speak, when referring to social insurance, of the decisive tool for 'the internal formation of the German Empire'<sup>(343)</sup>.

And this observation need not be restricted to a specific country, but reflects and expresses the general European experience. Anthony Giddens<sup>(344)</sup> underlines this context precisely, when looking at the formative history of the European social welfare state in the 20th century: 'Mobilising the economy and society was the prime demand in wartime; the enhanced role of the state in [the] First World War introduced forms of social and economic provisions that were solidified and extended during the Second [...]. The welfare state has always been a national state [...]. One of the main factors impelling the development of welfare systems has been the desire on the part of the governing authorities to promote national solidarity [...]. From early days to late on, welfare systems were constructed as part of a more general process of state building. Who says welfare state says nation state.'

This concept received a late and extremely prominent reconstruction in T. H. Marshall's<sup>(345)</sup> theory of social citizenship. Today this reasoning has achieved — despite its misleading and even dangerous nationalistic undertone — worldwide acceptance as the most adequate theory to legitimise the modern welfare state as the creation of individual social rights to integrate each 'citizen' into a given welfare state and society.

Many international examples, however, show that social security and the nation state do not necessarily go hand in hand. The US, Canadian and Swiss systems of social security are characterised by a

<sup>(342)</sup> S. Chardon, 'Principles of coordination', in Y. Jorens and B. Schulte, *Coordination of social security in connection with the accession of central and eastern European states, the 'Riga Conference'*, Brugge, 1999, pp. 43, 46: 'Coordination relates to regulating the relationships between national social security systems on the basis of principles and techniques aiming at the protection of entitlements to social security by people who move, without touching the substance of these systems'; F. Pennings, *Introduction to European social security law*, Antwerp 2003 (fourth edition), p. 6: 'Coordination rules are rules intended to adjust social security schemes in relation to each other' (6).

<sup>(343)</sup> M. Stolleis, 'Die Sozialversicherung Bismarcks', in H. F. Zacher (ed.), *Bedingungen für die Entstehung und Entwicklung der Sozialversicherung*, Berlin, 1979, 387 et seq.

<sup>(344)</sup> A. Giddens, *Beyond left and right*, 1994, p. 136 f.

<sup>(345)</sup> T. H. Marshall (1949), 'Citizenship and social class', in T. H. Marshall, *Sociology at the crossroads and other essays*, London, 1963, p. 67 et seq.

complex combination of federal institutions and state, provincial or canton components<sup>(346)</sup>. As all federal states are based on the distinction and division of legislative powers between two levels of government, it is not uncommon for social security programmes to not only be established by acts of national legislation, but rather by the autonomous legislation of a regional unity, vested with legislative power within the legal framework of the federal system of a nation state. And even local entities play a crucial role in social policy — not only as service providers but also as political actors<sup>(347)</sup> — and this has been true for centuries.

When — half a century ago — the process of European integration was inaugurated, five of the six founding Member States were centralist nation states. And within the only, then participating federal state, social policy was also a matter of merely national concern — due to its original determination to contribute to nation building by social legislation! Therefore, in its formative era the coordination regulation was not confronted with decentralisation and regionalisation in social security<sup>(348)</sup>.

But times are changing. As to the internal structure of nation states, one can see that devolution and regionalisation are increasing. For example, in the United Kingdom, France, Spain, Italy and Belgium a momentum towards regionalisation can be observed, according to which these former highly centralised nation states are keen to decentralise their internal legislative and administrative structures. EU examples of this trend are the regional

legislation on health- and long-term care<sup>(349)</sup> and the labour market, and its respective financing in Belgium<sup>(350)</sup>, and social assistance, healthcare and labour market measures in Spain<sup>(351)</sup>; Canada<sup>(352)</sup> and the USA<sup>(353)</sup> provide for an even broader sphere of provincial and state legislation, as workmen's compensation and social assistance, labour market (USA) and, finally, contribution-based old-age and disability insurance (Quebec and Canada) are driven by regional legislations and run by regional administrations.

#### D. Three key questions

In the context of the European coordination law, this change gives rise to profound questions, which are not easily solved. There are three key questions at stake, and they demand a clear answer.

- Has European law any impact on the social security legislation of regional autonomous legislation in the Member States (II)?
- If so, does the European coordination law apply directly to interregional relations of social security within a single Member State (III)?
- If so, what impact does the European coordination law have on the interregional coordination of social security (IV)?

The answers are provided in the following chapters, with the aim of contributing to a better understanding, or — in academic terms — to a 'theory on the interrelation of European and interregional social security law' (V).

<sup>(346)</sup> U. Becker, *Staat und autonome Träger im Sozialleistungsrecht*, Baden-Baden, 1996; *Le fédéralisme social, lien social et politiques*, 2006; S. Vansteenkiste, *Sociale Zekerheid, federalisme en de Europese Gemeenschap*, 1995; S. Vansteenkiste and M. Taeymans (eds), *Sociaal Beleid en Federalisme, Staatsrechtsconferentie*, 1998, Vlaamse Juristenvereniging.

<sup>(347)</sup> Various authors, *Le autonomie locali nei paesi della Comunità Economica Europea*, Napoli, 1981.

<sup>(348)</sup> D. Merten (ed.), *Föderalismus und Europäische Gemeinschaften*, Berlin, 1990 (second edition); H.-J. Blanke, *Föderalismus und Integrationsgewalt. Die Bundesrepublik Deutschland, Spanien, Italien und Belgien als dezentralisierte Staaten in der EG*, Berlin, 1991.

<sup>(349)</sup> Y. Jorens, 'Défédéralisation de la sécurité sociale en Belgique: l'exemple des soins de longue durée', *Lien Social* 2006, p. 129.

<sup>(350)</sup> P. Pochet and P. Reman, 'La sécurité sociale en Belgique: entre régionalisation et européanisation', *ibid.*, 89–102.

<sup>(351)</sup> M. Chapales, 'La protection sociale dans l'Etat des Autonomies. L'enjeu de fédéralisme progressive entre l'autonomie régionale et la solidarité internationale', *ibid.*, 103–117; J. L. de Castro Ruano, *La emergente participación política de las regiones en el proceso de construcción europea*, Bilbao, 1994.

<sup>(352)</sup> E. Eichenhofer, *Sozialrecht Kanadas*, Baden-Baden, 1984; G. Boismean, 'Les nouveaux visages de vieux démons', *ibid.*, 57–71; P. Graefe and M. Levesque, 'La nouvelle gouvernance fédérale et les politiques sociales au Canada', *ibid.*, 75–88.

<sup>(353)</sup> E. Eichenhofer, *Recht der sozialen Sicherheit in den USA*, Baden-Baden, 1991.



## II. EUROPEAN COORDINATION AND THE MEMBER STATES' REGIONAL PUBLIC ENTITIES IN SOCIAL SECURITY

### A. Legal structure of the EC/EU

The European Communities (EC) and the European Union (EU) were created by the Member States. They are recognised in the framework of international public law as independent and sovereign nation states. Acts of European legislation, which are based upon a specific provision in the primary legislation of the EC or EU, are paramount to the legislation of each Member State. As to its source, supranational law has priority over the legislation of each Member State. From this superiority stems its strong effect, as the law of the Member States is replaced by EC law<sup>(354)</sup>.

This effect of supranational legislation can be explained by the legal construction of the EC and EU. The legislative power of both supranational entities stems from the previous transfer of power, once held by the Member States<sup>(355)</sup>. This transfer is comprised in the primary legislation, wherein the Member States gave up rights and conferred them to the European institutions. If the legislative power of the European institutions is based on a transfer of the Member States' legislative power, one might doubt whether such a transfer comprises the legislative rights established within the Member State, but endowed by the Member State to regional public entities with their own legislative rights and privileges — as is the case in Scotland, Northern Ireland, Wales, the autonomous communities in Belgium and Spain, the regions in Italy and France, the cantons in Switzerland and, finally, the *Länder* in Austria and Germany.

<sup>(354)</sup> Case C-352/06 *Bosmann* [2008] ECR I-3827, however, gives space to a more favourable choice of law rules to be found in the autonomous legislation of each Member State.

<sup>(355)</sup> Case 26/62 *Van Gend & Loos* [1963] ECR English special edition, p. 1; Case 6/64 *Costa v ENEL* [1964] ECR 1253; R. Streinz, in Michael Sachs, *Grundgesetz*, 2007 (fourth edition), Rn. 52 f. as to the provision of the German Basic Law (Article 23) which allows the Federal Republic to transfer national rights to a supranational unit.

### B. Member States' homogenous legal entities in social welfare?

Regional public entities are autonomous, but not insular, entities. They are embedded in the legal order of a Member State, to which they belong as an integral part. The regional units of, and in, the Member States are not independent (even though some of them have foreign 'embassies'), but are incorporated in a given Member State. So, the legislation enacted by a Member State at the national level also becomes binding for the regional authorities. On the other hand, making them autonomous agencies, endowed with their own and independent legislative powers, means to leave them with their own spheres of autonomous action, in which they can decide and determine their policy without any national intrusion or intervention. So both levels of government are relatively independent from one another.

Finally, in Europe there exists a strong — i.e. old — tradition of local self-government, and this tradition is also important for social policy (as it still prevails today in many Nordic countries). This is due to the fact that, before the nation state came into being during and after the French Revolution, the public authority was carried out by the municipalities. In the formative era of social services and social benefits since the 11th century, the towns took over a crucial role, hospitals and almshouses, workhouses and houses of correction, homes for the disabled, elderly, orphans and unmarried mothers were erected and kept by local communities — not only in a few cities, but all over Europe.

There is a European social model much older than the national welfare state. For centuries the municipalities were the most important and powerful public institution to safeguard public welfare. Until the end of the 16th century they played a key role in public welfare, and from the 17th century onwards, in line with the formation of the territorial state, the latter took over an increasing role in the administration of public welfare. In the era of

‘enlightened absolutism’ during the second half of the 18th century, the territorial state assumed a pivotal and universal role in the organisation and deliverance of public welfare. At the end, it took over the mandate to control and administer the whole fabric of economic and social life, which left little room for citizens’ individual choice and discretion. When analysing the interrelation of European and interregional social security coordination, these historical traditions are of political relevance, because the decentralisation movements of today are attempting to follow in the paths set by the territorial states during the era before the nation state came into existence.

## C. Sources

In the legal framework of the EC coordination legislation on social security, there is no specific provision to answer the question raised. So, the issue of whether law has any impact on acts of regional public entities in social security is far from clear. Under those circumstances, the primary and secondary legislation and, finally, case-law need to be examined, in order to find out what the legal answer under European law could be.

### 1. Primary legislation

Seen from the perspective of primary legislation, according to Article 6(3) of the EU Treaty, the EU respects the ‘national identity of [its] Member States’. This provision will be elaborated more explicitly in Article 4(2) of the EU Treaty, as enacted in the Lisbon Treaty. Regarding this text, the commitment to respect national identity implies the acceptance of Member States’ fundamental and constitutional structures, regional and local self-administration included. Article 136 of the EC Treaty obliges European social policy to respect the traditions and peculiarities of each Member State. In addition, the Committee of the Regions (Article 263 of the EC Treaty, Article 305 of the Treaty on the Functioning of the EU (TFEU)) attests to the fact that both the EC and the EU are generally aware of regional administration,

giving it special recognition and striving to integrate it into the legal framework of the EC and EU.

### 2. Secondary legislation

A further indication regarding whether the coordination regulation on social security law can be applied to legislative acts of regional public entities can be found in Article 1(j) of Regulation (EEC) No 1408/71 (Article 1(l) of Regulation (EC) No 883/2004). Therein the term ‘legislation’ is defined as ‘in respect of each Member State, laws, regulations and all other implementing measures, relating to the social security branches covered by Article 3(1)’. It does not follow from this definition that the legislative act need be taken by the Member State itself. This follows from Article 4(2) of Regulation (EEC) No 1408/71 (Article 3(2) of Regulation (EC) No 883/2004) pursuant to which the social rights to protect individuals against certain risks embedded in collective agreements, for example those on the formation and administration of unemployment insurance in Denmark or France, which bring about systems of social security based upon sources of private (i.e. collective labour) law, can be conceived as systems of social security, if and because they do replace comparative public law institutions.

This shows clearly that, in the context of coordination, each system established in the framework of national law is to be accepted as a social security system, which creates an entitlement to a risk-related benefit on an explicit legal basis — irrespective of whether it was enacted by national or regional laws. So the qualification of social security is independent of the authority which created the entitlement.

This interpretation is also shared by the Court of Justice (CJ) <sup>(356)</sup>. According to the CJ, ‘legislation’ (Article 1(j) of Regulation (EEC) No 1408/71) is a very broad and vast concept. From this, one has to conclude that the legislative acts of decentralised

<sup>(356)</sup> Case 109/76 Blottner [1977] ECR 1141.

bodies of regional public entities are to be considered as falling under the general rules of the European coordination regulations. This can be demonstrated also by provisions in the annexes of the regulation on the coordination of social security benefits, which explicitly refer to those of regional origin and concern.

### 3. *Case-law on the relevance of Community law for the legislation and administration of regional public entities*

The CJ held in the judgment of 29 April 1999<sup>(357)</sup> that Community law is not only binding for each national court of each Member State, but also for all their administrative bodies, including regional and local ones. They not only have to set aside all the provisions contained in national law which do not concur with European legislation, but they also have to make sure that all their decisions taken at the same time respect Community law precisely and in substance. So, for example, the Austrian *Land Vorarlberg* administration has to give access, on the Austrian coastline at Lake Constance, to boat-parking facilities without any distinction between boat owners based on their (EU) nationality. As to freedom of movement, the CJ formally declared unlawful the fact that a German *Land* refused to give access to a teacher's education based on a work contract with the regional public entity<sup>(358)</sup>. Regarding public procurement of constructive work in municipalities, local governments are also obliged to respect and follow European legislation<sup>(359)</sup>. According to the case-law of the CJ, a German *Land's* public pension fund is bound by the laws on anti-discrimination on the grounds of sexual orientation. Hence, it has to integrate same-sex couples in the protection for survivors, if married couples are covered<sup>(360)</sup>. And regional social security administrations have to respect the rules of Regulation (EEC) No 1408/71

<sup>(357)</sup> Case C-224/97 *Ciola v Vorarlberg* [1999] ECR I-2517.

<sup>(358)</sup> Case 65/85 *Deborah Lawie v Land Baden-Württemberg* [1986] ECR 2121.

<sup>(359)</sup> Case 103/88 *Costanzo* [1989] ECR 1839.

<sup>(360)</sup> Case C-267/06 *Maruko* [2008], not yet published.

when levying social security contributions<sup>(361)</sup>. So, in accordance with the CJ case-law, Flemish long-term insurance is also bound by the European coordination law<sup>(362)</sup>, but the CJ held this to be self-evident, so it did not explain this issue further.

### D. Justification

This solution can be explained by the fact that Community law is addressed to the Member States; if they delegate their legislative or administrative powers to other internal independent institutions or entities, they cannot get rid of the commitments imposed on them by Community law<sup>(363)</sup>. The nation state was originally established in order to create the supremacy of the centre over the periphery<sup>(364)</sup>. It follows from this that national law is superior to regional legislation. Community law does not address the Member States just in their quality as legislatures, but as an entire legal system at large! Because of this, all regional and local elements of the Member States' legal systems are exposed to EC legislation in the same manner as national legislation<sup>(365)</sup>. Ingolf Pernice characterises the impact of EC/EU law on the legal systems of the Member States as a three-layered — or, if taking into account the local communities as a further legislative authority, even a four-layered — approach, in which EC/EU legislation stands as the first, the national legislation as the second, the regional legislation as the third and, finally, the local level as the fourth level of a comprehensive system of federal governance, embedded in a European system of law. This shows clearly that in a multi-layer structure of European governance the traditional idea of national sovereignty is no longer adequate to describe EC/EU–Member State relations.

<sup>(361)</sup> Case C-103/06 *Philippe Dervain* [2008], not yet published.

<sup>(362)</sup> Case C-212/06 *Gouvernement de la Communauté française et Gouvernement wallon v Gouvernement flamand* [2008], not yet published.

<sup>(363)</sup> R. Monaco, 'Politica regionale Comunitaria e regioni', in F. Cuocolo, R. Monaco, C. Tesaro et al., *Istituzioni Comunitarie e Regioni*, III. Convegno Nazionale di Studi regionale, Napoli, 1990, pp. 27, 29.

<sup>(364)</sup> S. Fabbrini, 'The European Union in an American perspective', in C. Asell and C. di Paolo, *Restructuring territoriality: Europe and the United States*, Cambridge, 2004, p. 163 et seq.

<sup>(365)</sup> I. Pernice, in H. Dreier (ed.), *Grundgesetz*, 1998, Bd. 2, Rn. 23, Article 23.

### III. EUROPEAN AND INTERREGIONAL SOCIAL SECURITY LAW

#### A. Interregional social security law

If within a Member State regional public entities are permitted to enact norms in the field of social security, this permission is not to be restricted to the substantive law to be created. So, on the basis of its authorisation, the regional unit is also permitted, for example in social welfare, to outline the benefits, to determine the persons entitled and to run (or define who else is to run) the public entities which have to administer the benefits in question. The legislative power comprises two further elements, i.e. to define the scope of application and to determine the effect of the regional system of social security in space and time<sup>(366)</sup>.

As no national legislation demands to establish legal rights and obligations worldwide — even though the text of substantial law is often written in such a universalistic language — no regional legislation within a Member State strives to create a worldwide web of social protection. Quite the contrary! Quite often regional social politics are driven by a more parochial approach, which is occasionally full of social romanticism<sup>(367)</sup>. They claim to increase social cohesion within a part of a Member State, and, in so doing, intend to exclude ‘the others’ from the regional benevolence. (This attitude is similar to Jean-Paul Sartre’s saying: *‘L’enfer — c’est les autres!’*) Hence, regional social security combines inclusion with exclusion — and this is done on a clear legal basis.

So, as each substantive law is made for a given space and time<sup>(368)</sup>, an ‘inter-local’ or ‘inter-state’, ‘inter-provincial’ or ‘interregional’ law is required. The term is understood in the context of the conflict of laws or the choice of laws. In this perspective it becomes clear that interregional and international law are structurally alike. Both are necessary, because law is made by a regional or national unit in the legal framework of other regions or nations. In the world of today, international law is of overall importance, due to the fact that the law is brought above all by the nation states. If a Member State opens the door for regional legislation, it has to determine how to deal with the various regional legislations — above all regarding their impact on the persons covered in case these take advantage of internal mobility within the Member State.

From a historical viewpoint, national legislation is the late outcome of the legal development of the last two centuries. Before the nation state was created, legal relations were based on laws made by territorial states — cities and dukedoms — and in the medieval era law was based on the legislation of towns. As the city had been the predecessor of the modern welfare state, the inter-local law was the predecessor of international law. Above all, the founding fathers of international law — the Italians Bartolus and Baldus — established their leading ideas on the fundamentals of the choice of law by analysing the court rules established by the cities, when executing their legislative power.

Interregional law and international law have to give proper answers to more or less identical questions. Firstly, how is the scope of application of a given law determined? In this context the space is to be defined in which the given law should become valid, i.e. applicable and socially relevant. Secondly, what are the effects of a given right? Shall it be restricted to the regional or national sphere, in which, by which and for which it had been established — or shall it become also meaningful to the beneficiary,

<sup>(366)</sup> E. Eichenhofer, *Internationales Sozialrecht*, München, 1994, Tz 11, p. 144 et seq.

<sup>(367)</sup> P. Van Parijs, ‘Rechtvaardig Sociaal Beleid in een Plurinationale Federale Staat’, in *Vansteenkiste and Taeymans*, No 9, 1998, pp. 3, 5 et seq. He uses the very strange term *volksgemeenschap* to characterise the ‘interpersoonlijke solidariteit ... binnen een zelfde ethnos (uiteraard niet raciaal maar cultureel gedefinieerd), omdat ze voldoende identificatie vereist’; against this odd interpretation: Danny Pieters, *Het Sociaal Beleid in de Federale Rechtsorde*, *ibid.*, 13, 15: ‘ons staatsbestel kent geen “volksgemeenschap” ... ook gemeenschappen zijn territoriaal gedefinieerd’.

<sup>(368)</sup> E. Eichenhofer, *Internationales Sozialrecht*, 1994, Tz. 1 et seq.

if s/he is residing or works outside the region or nation state in another region or nation state?

As a national, a regional law can also be applied to the 'citizens', the residents, the workers, the ones who opted for it, or those having an asset in the space of the legislative authority. So in both international as well as interregional law, there is a decision to be made between the *lex domicilii*, the *lex patriae*, the *lex loci laboris*, the *lex contractus* and the *lex rei sitae*. All these principles can be stipulated in order to determine the *interregional* or *international* scope of application of a given legal order.

As to the second question, both interregional as well as international law are confronted with the same type of alternative. Shall the substantive law of a region or nation state be only relevant within the space governed by it? Or shall a right earned under the legislation of one region or nation state become also effective outside the governed space in other regions or nation states?

To this question either a parochial or an open-minded answer can be given. Which type of answer is given not only depends on the state of mind of a given legislator. A parochial answer is content with verifying an acquired right in the regional or national space; an open-minded answer, however, acknowledges that social rights are human rights; in other words, the means to supply basic human needs! So, from this perspective of human rights to one of social rights, an interregional or international protection of acquired social rights is not only a political preference but also a legal necessity. But the latter requires a whole range of institutions of interregional or international cooperation, and above all the willingness to ensure a legal and administrative framework of social security coordination.

## B. Interregional and European coordination

EC coordination law is a peculiar form of international social security law<sup>(369)</sup>. The origin and purpose of this supranational law was and still is to replace, in the field of international social security coordination, all bilateral instruments — as elements of intergovernmental legislation and based on international public law — by a supranational, European and multilateral legislation, which creates a unique international social security law applicable to all Member States directly and according to identical rules and principles.

Despite the fact that regions are integral and dependent parts of the Member States and, hence, if they act as autonomous bodies they have to respect all EC/EU law restrictions and demands imposed on the Member States to which they belong, and irrespective of the overwhelming structural analogies to be drawn between the international and interregional social security law, one might doubt whether EC coordination law on social security can be applied to provisions of interregional social security law.

As interregional law is an integral part of the internal law of each Member State, one has to bear in mind that the scope of EC coordination law is not an all-embracing one, but is limited to governing the international social security relations between the Member States. This is a principle in CJ case-law which has a very profound basis in a constantly repeated practice. For the application of the rules on coordination, the CJ did not demand that the respective persons make use of their fundamental freedoms<sup>(370)</sup>. 'The Court has [...] made clear that the Treaty with governing freedom of movement for persons and measures adopted to implement them

<sup>(369)</sup> S. Devetzi, Die Kollisionsnormen des Europäischen Sozialrechts, Berlin, 2000; E. Eichenhofer, Internationales Sozialrecht, München, 1994; *ibid.*, Sozialrecht der EU, 2010 (fourth edition); R. Schuler, Das Internationale Sozialrecht der Bundesrepublik Deutschland, 1988.

<sup>(370)</sup> Case 75/63 Unger [1964] ECR 379; Case 31/64 Bertholet [1965] ECR 111.

cannot be applied to activities which have no factor linking them with any of the situations governed by Community law and which are confined in all relevant respects within a single Member State<sup>(371)</sup>. ‘Such is in particular the case where the situation of a worker has factors linking it solely with a non-member country and a single Member State’<sup>(372)</sup>.

The application of EC coordination law, hence, requires a cross-(Member States’)-border element. Interregional relations, however, can be restricted to internal situations. This leading principle is also a cornerstone of CJ case-law, which can be identified in many judgments relating to the right of establishment<sup>(373)</sup>, the freedom of movement<sup>(374)</sup>, the application of Regulation (EEC) No 1408/71<sup>(375)</sup> on social security for third-country migrants, and the concept of EU citizenship<sup>(376)</sup>. Based on the latter observation the CJ held that the legal status of an EU citizen cannot be deducted from the legal status of an individual and EU citizen, who lives and works only in one Member State and has not the slightest link to a second Member State.

The CJ held that the language rights for migrant workers, contained in Article 84(4) of Regulation (EEC) No 1408/71, do not apply to a social security case without any cross-(Member States’)-border dimension<sup>(377)</sup>. So, the dispute on the language rights of the various language communities in Belgium is not a topic dealt with by EC social security coordination law. Therefore, it was hardly surprising

that the CJ reached the conclusion, in the recent judgment on the regional legislation concerning Flemish long-term care insurance<sup>(378)</sup>, that Community law is not relevant to this piece of regional legislation, if and as far as the status of persons is involved, persons who did not make use of the fundamental freedoms of movement. Under these circumstances there is no mandate for EC coordination law, as long as interregional relations are mere matters of the internal law of one Member State.

### C. Do EC coordination rules matter for interregional social security?

It follows from the CJ judgment on the Flemish public long-term care insurance that this does not mean that EC coordination can never have any impact on interregional law, because the former is part of the supranational legislation and the latter part of the national and thus internal legislation on social security. There is a much more important part in the judgment, in which the CJ addressed the provision in regional law, according to which benefits in the case of long-term care are restricted to persons residing in the Flemish or Brussels part of Belgium, whereas persons in need of long-term care living in other parts of Belgium — due to a coverage based on previous residence on the Flemish soil — were excluded from the benefit.

The CJ found that this exclusive character of the Flemish public long-term care insurance vis-à-vis residents of other parts of Belgium might inhibit those EU citizens to actively use their right to do paid work in all Member States on the basis of the freedom of movement — guaranteed by Article 39 of the EC Treaty — as they are sanctioned by a loss of social security rights in case of residence outside the territory of the competent region. So, from the CJ judgment on the Flemish public long-term care insurance one cannot conclude that legislative acts of regional public entities in the field of social

<sup>(371)</sup> Cases C-95/99, C-98/99 and C-180/99 Kahlil [2001] ECR I-7413; Case C-59/95 Moriana [1997] ECR I-1071; Case C-153/91 Petit [1992] ECR I-4973; Cases C-64/96 and C-65/96 Uecker and Jacquet [1997] ECR I-3171; Cases C-225/95, C-226/95 and C-227/95 Kapasakalis [1998] ECR I-4239; Case C-18/95 Terhoeve [1999] ECR I-345.

<sup>(372)</sup> Cases C-95/99, C-98/99 and C-180/99 Kahlil [2001] ECR I-7413; Case C-297/92 Baglieri [1993] ECR I-5211; Case C-60/93 Aldewereld [1994] ECR I-2991.

<sup>(373)</sup> Case 20/87 Gauchard [1987] ECR 4879.

<sup>(374)</sup> Case C-18/95 Terhoeve [1999] ECR I-345.

<sup>(375)</sup> Cases C-95/99, C-98/99 and C-180/99 Kahlil [2001] ECR I-7413.

<sup>(376)</sup> Case C-403/03 Schempp [2005] ECR I-6421; with an enormous impact on social security, discovered quite early by S. van Raepenbusch, ‘Persons covered by Regulation (EEC) 1408/71 and European citizenship’, in Swedish National Social Insurance Board/European Commission, 25 years of Regulation (EEC) No 1408/71 on social security for migrant workers, Stockholm, 1997, pp. 71, 81 et seq.

<sup>(377)</sup> Case C-153/91 Petit [1992] ECR I-4973.

<sup>(378)</sup> Case C-212/06 *Gouvernement de la Communauté française et Gouvernement wallon v Gouvernement flamand* [2008], not yet published; cf. also *Cour Constitutionnelle de la Belgique arrêt no 11/2009, numéro 3194/3195*.



security are spheres that are definitely untouchable for European law<sup>(379)</sup>. Hence, EC law matters also to interregional social security law. The compatibility of these provisions with EC coordination law can be challenged, as long as a cross-border case is at issue.

It would be, therefore, a profound misconception to argue that there exists a splendid isolation between EC coordination law — as part of supranational law — and interregional social security — as part of internal or national law — and that there are two divisions and spheres of law, coexisting without getting in touch with one another! EC/EU law does not represent a cohesive and coherent legal system established as a hermetic and total legal order, built above the legal systems of the Member States. Rather, the purpose and intention of EC/EU law is to make the single market work on the basis, and by making use, of the legal systems of each Member State. Only in such a cross-border context does EC/EU law become relevant; and in that case, supranational law has to ensure that it becomes paramount to the Member States' legislation, irrespective of the level of government of the Member State by which it is enacted.

So, EC/EU law questions are not raised in order to reconstruct an abstract hierarchy of provisions of supranational or national origin, but become relevant on the basis of facts — the cross-border activities of individuals. Due to the very broad definition given by the CJ to the concept of cross-border connection and the growing importance of intra-Community activities by an increasingly mobile workforce in the single market, the likelihood of interregional social security coordination being challenged from the perspective of EC coordination law is not to be underestimated.

When examining the case-law of the CJ on what constitutes a cross-border case, it becomes clear

that it does not necessarily mean that the beneficiary him- or herself has to have a link to more than one Member State; in cases of family benefits, it suffices that a cross-border link exists through the child, entitling the parent to a family benefit<sup>(380)</sup>. The same principle applies to the taxation of parents<sup>(381)</sup>. In this context the CJ held that a cross-border element can also be based on the cross-border situation of the family member of the taxpayer, residing and working in one Member State, if the latter challenges the national tax law that inhibits the deduction of maintenance paid to a family member from the taxable income, even if the tax law of the competent state does not provide for such a deduction at all!

EC coordination social security law not only has relevance for the regional substantive law, but also for its interregional dimensions, at least regarding international law consequences — as borders of regions might concur with borders of Member States. While the latter are bound by EC coordination law, the former are bound by it also if the interregional movement turns out to be considered an international movement as well!

#### **IV. IS INTERREGIONAL LAW AFFECTED BY EUROPEAN SOCIAL SECURITY COORDINATION LAW?**

##### **A. Interregional social security and EC social coordination provisions**

In the judgment of 1 April 2008, on the Flemish public long-term care insurance, which is extremely important for any further debate, the CJ explicitly distinguished cases of strict internal relevance from those with a genuine EC dimension. Whereas the former do not fall under the provisions of EC law, the latter are directly to be examined as to their

<sup>(379)</sup> See the arguments of Advocate General Eleanor Sharpston, 28 June 2007 (Case C-212/06), Nos 115–157.

<sup>(380)</sup> Case C-194/96 Kulzer [1998] ECR I-895.

<sup>(381)</sup> Case C-403/03 Schempp [2005] ECR I-6421.

compatibility with the EC coordination regulation on social security. The CJ held <sup>(382)</sup>:

‘In this respect, it must be borne in mind that it is settled case-law that the Treaty rules governing freedom of movement for persons and the measures adopted to implement them cannot be applied to activities which have no factor linking them with any of the situations governed by Community law and which are confined in all relevant respects within a single Member State [...]. On the other hand, as the Court has also stated, any national of a Member State, irrespective of his place of residence and his nationality, who has exercised the right to freedom of movement for workers and who has been employed in another Member State, falls within the scope of those provisions’ <sup>(383)</sup>.

‘In those circumstances, two kinds of situations must be distinguished in the light of the principles recalled [...]. First, application of the legislation at issue in the main proceedings leads [...] to the exclusion from the care insurance scheme of Belgian nationals working in the territory of the Dutch-speaking region or in that of the bilingual region of Brussels-Capital but who live in the French- or German-speaking region and have never exercised their freedom to move within the European Community. Community law clearly cannot be applied to such purely internal situations’ <sup>(384)</sup>.

‘Second, the legislation at issue in the main proceedings may also exclude from the care insurance scheme employed or self-employed workers falling within the ambit of Community law, that is to say, both nationals of Member States other than the Kingdom of Belgium working in the Dutch-speaking region or in the bilingual region of Brussels-Capital but who live in another part of the national territory, and Belgian nationals in the same situation who have made use of their right to freedom

of movement. So far as that second category of worker is concerned, it falls therefore to be considered whether the provisions of Community law, interpretation of which is sought by the national court, preclude legislation such as that at issue in the main proceedings, inasmuch as it applies to nationals of Member States other than the Kingdom of Belgium or to Belgian nationals who have exercised their right of free movement within the European Community’ <sup>(385)</sup>.

‘In the light of those principles, measures which have the effect of causing workers to lose, as a consequence of the exercise of their right to freedom of movement, social security advantages guaranteed them by the legislation of a Member State have in particular been classed as obstacles. [...] Legislation such as that at issue in the main proceedings is such as to produce those restrictive effects, inasmuch as it makes affiliation to the care insurance scheme dependent on the condition of residence in either a limited part of national territory, viz. the Dutch-speaking region and the bilingual region of Brussels-Capital, or in another Member State.

Migrant workers, pursuing or contemplating the pursuit of employment or self-employment in one of those two regions might be dissuaded from making use of their freedom of movement and from leaving their Member State of origin to stay in Belgium, by reason of the fact that moving to certain parts of Belgium would cause them to lose the opportunity of eligibility for the benefits which they might otherwise have claimed. In other words, the fact that employed or self-employed workers find themselves in a situation in which they suffer either the loss of eligibility care insurance or a limitation of the place to which they transfer their residence is, at the very least, capable of impeding the exercise of the rights conferred by Articles 39 EC and 43 EC’ <sup>(386)</sup>.

<sup>(382)</sup> Case C-212/06 *Gouvernement de la Communauté française et Gouvernement wallon v Gouvernement flamand* [2008], not yet published.

<sup>(383)</sup> No 33 s.

<sup>(384)</sup> No 37 ss.

<sup>(385)</sup> No 41 s.

<sup>(386)</sup> No 46 ss.

'In addition [...] the restrictive effects of the legislation in question in the main proceedings are not to be considered too indirect and uncertain for it to be impossible to regard that legislation as constituting an obstacle contrary to Articles 39 EC and 43 EC. In particular [...], possible entitlement to the insurance care benefits at issue depends, not on a future and hypothetical event for the employed or self-employed worker concerned, but on a circumstance linked [...] to the exercise of the right to freedom of movement, namely, the choice of transfer of residence'<sup>(387)</sup>.

From this it clearly follows that all beneficiaries, covered by the regional Flemish public long-term care insurance as employees within the competent region (Flemish Community and Brussels), are jeopardised in their social security rights if they take up residence in another Member State, for example in the Netherlands or Germany — despite long-term care insurances also being established there!

The restriction of the Flemish long-term care insurance to residents of the region cannot be justified with the asserted uniqueness of the Flemish approach to ensure long-term care to dependent persons and the territorial restriction in the organising and administrative power of the Flemish legislation and government. Under EC law it is not only possible, but necessary, that a credit for long-term care earned in a Belgian, e.g. Flemish, insurance give access to care benefits supplied by German or Dutch services, whereas the costs are to be borne by the Flemish insurance. The same rule applies in European law on healthcare for pensioners<sup>(388)</sup>. So, in a coordination law, which comprises long-term care as an integral element of healthcare<sup>(389)</sup>, it is clear that the CJ could not allow any restrictions based on residence for persons covered by the Flemish public long-term care

insurance, if they are residents of a neighbouring or more remote Member State.

## **B. Is EC coordination law relevant for internal social security cases?**

EC coordination law matters for regional social security cases, if they also have an intra-Community component, i.e. a link to another Member State. But also in cases when a cross-border component is lacking, EC law can have an impact on the legal position of the individuals involved. Again a reference is to be made to the CJ's considerations in the case on the Flemish long-term care scheme. There, the CJ ruled:

'It may nevertheless be remarked that interpretation of provisions of Community law might possibly be of use to the national court, having regard too to situations classed as purely internal, in particular if the law of the Member State concerned were to require every national of that state to be allowed to enjoy the same rights as those which a national of another Member State would derive from Community law in a situation considered to be comparable by that court'<sup>(390)</sup>.

Even though EC law does apply to merely internal cases<sup>(391)</sup> directly, this does not prevent national courts from examining whether, pursuant to provisions of supranational law, a worker (employed or self-employed) of the competent state lacking a link to the legal system of another Member State may be discriminated against one having such a link. No court of any given Member State is precluded from examining whether such a differential treatment is permitted under its internal constitutional law<sup>(392)</sup>. Hence, the question as to which extent differences in treatment between internal and cross-border cases are authorised must be raised and solved in the framework of national constitutional law.

<sup>(387)</sup> No 51.

<sup>(388)</sup> Article 27 et seq. of Regulation (EEC) No 1408/71 = Article 23 et seq. of Regulation (EC) No 883/2004.

<sup>(389)</sup> Case C-160/96 Molenaar [1998] ECR I-843, Case C-215/99 Jauch [2001] ECR I-1901 and Case C-286/03 Hosse [2006] ECR I-1771; F. Pennings, No 2, 149 et seq.

<sup>(390)</sup> Case C-212/06 *Gouvernement de la Communauté française et Gouvernement wallon v Gouvernement flamand* [2008], not yet published, No 40; A. Wallrabenstein note in ZESAR 2009, 139 et seq.

<sup>(391)</sup> Case C-332/90 Steen I [1992] ECR I-341.

<sup>(392)</sup> Case C-132/93 Steen II [1994] ECR 2715.

By raising this question a general and quite fundamental problem of EC/EU law is broached, i.e. reverse discrimination or discrimination *à rebours*<sup>(393)</sup>. In Germany it is referred to as *Inländer-Diskriminierung* — the issue of whether country fellowmen of a Member State (*Inländer*) can be treated less favourably than migrants under European law. This is, of course, a rather rhetorical question, as it unveils quite easily the assertive tone underlying the question.

Therefore, this description of the question at stake is not correct. It should be reformulated as follows: is it possible, under the constitutions of the Member States, for EC law to establish more favourable conditions for an individual than those which can be found in a comparable solution in internal law? If such a difference was qualified as discrimination, it would not be understood as discrimination based on EC law, but — vice versa — on the internal law. There is a more subtle correspondence between internal and EC law. If such a non-discrimination principle can be identified in the internal law of the Member States, one might say that it can be conceived as a corollary of the non-discrimination clause to be found in and based on EC law!

### C. Can a non-discrimination principle concerning the EC and internal law treatment of comparable cases be identified in the internal law of the Member States?

So, finally the question emerges whether internal law tolerates a less favourable legal status for individuals compared with the one they could, should and would get under EC law. This question cannot be solved by interpreting EC law, as it does not apply to merely internal cases. Nevertheless, the question deals with the implicit consequences of EC law. If the said principle could be identified in the internal law of the Member States, EC law standards would

also pertain to the internal law itself; the relevance of EC legislation would, in other words, transcend its proper and genuine sphere.

The answer to this question is not to be deduced from the constitutions of the Member States, as explicit provisions are hard to find. One has to try to find a solution on the basis of an acknowledged constitutional principle, which is normally quite abstractly put and figured out. One of the key constitutional provisions involved is the rule on equality. Equality between internal and European cases — is this in today's Member States a generally accepted rule? Equality is — as Article 20 of the EU Charter of Fundamental Rights of the European Union demonstrates — a widely accepted, well-respected principle of European constitutional law. When it comes to the principle of equality, the German Constitutional Court<sup>(394)</sup> found that the requirements in the German professional legislation on the establishment of an enterprise for craftsmen had become unconstitutional from the perspective of equal treatment, since in the single market the (high) German standards are only followed by Luxembourg and Austria, whereas in other Member States the requirements regarding the education of a self-employed craftsman are significantly lower. So, it would amount to unequal and unfair treatment of craftsmen if German law were more demanding than the law of other Member States<sup>(395)</sup>.

Referring to the principle of equality — enshrined in Article 3, para. 1, of the German Basic Law — the Administrative Court of Oldenburg ruled on 26 September 2008<sup>(396)</sup> on the relevance of this constitutional provision regarding the treatment of similar cases governed by both European and internal law. The court held that the by-laws of

<sup>(393)</sup> A. Epiney, *Umgekehrte Diskriminierungen*, Köln/Berlin/Bonn/München, 1995; Anne Walter, *Reverse discrimination and family reunification*, 2008.

<sup>(394)</sup> BVerfG — 5.12.2005 — 1 BvR 1730/02 = *Gewerbearchiv* 2006, 71–73.

<sup>(395)</sup> Sachs-Osterloh, *Grundgesetz*, 2007 (fourth edition), Article 3, Rn 71: all sorts of reversed discrimination can be generally challenged by the equal treatment clause of Article 3, para. 1, of the Basic Law; compare also A. Epiney, No 55, 426 et seq.

<sup>(396)</sup> Aktenzeichen 7 A 5226/06 = *MedR* 2009, 43, also reprinted in ZESAR 2009, with a note by E. Eichenhofer.

a public pension fund on old-age and invalidity insurance for dentists of the German *Land* Lower Saxony (*Niedersachsen*), enacted on the basis of a *Land's* law by the chamber of dentists of Lower Saxony, are unconstitutional as they violate the principle of equality. They treat dentists moving to Lower Saxony from the Member States of the EU more favourably than those coming from other *Länder* in Germany. Indeed, unlike dentists establishing themselves in Lower Saxony after a previous period of self-employment in another German *Land*, European migrants, who were covered by a social security system in their previous Member State of establishment, are allowed to keep this system on a voluntary basis<sup>(397)</sup> and are thus exempted from mandatory membership in the pension fund of Lower Saxony.

For the court, no justification could be found which could ever explain and justify why dentists moving to Lower Saxony should be in a better position with regard to the organisation of their protection against the risks of old age and invalidity when they come from outside Germany (from another EU Member State) instead of within! And thus the court argued: 'Whereas Community law demands to deal with a cross-border case in a specific manner, it is a mere question of (national) constitutional law whether an internal case is to be treated alike as the international one or not'<sup>(398)</sup>. And the court asserted that the EC/EU law standard cannot be more generous than the one offered by international law — otherwise the principle of equal treatment would be hurt.

If the conclusion on the basis of the nationally accepted principle of equality is correct, each differential treatment is to be justified under the constitutional law of the Member States. If the internal law is less favourable to an individual than

the EC/EU law, this will cause unjustifiable differences between nationals and foreigners<sup>(399)</sup>. If the constitutional law interprets such a distinction as being unlawful and void, then EC/EU legislation also sets standards for the comparable internal law! On the basis of this reasoning, the Austrian Constitutional Court<sup>(400)</sup> interprets Article 14 of the Charter of Fundamental Rights of the European Union — which prohibits any discrimination when attributing human rights to individuals, as a violation of European and international human rights' guarantees — as meaning that nationals of the competent state are to be treated at least in the same manner as nationals of other Member States.

This doctrine goes far beyond CJ case-law, according to which a differential treatment of cross-border EC/EU law cases and internal cases is compatible with EC/EU law<sup>(401)</sup>. Under this assumption, EC/EU law spills over into national law and so goes beyond the sphere which is formally and officially directly governed by supranational law!. If the constitutional principle to safeguard equality is to be interpreted along the lines of the Oldenburg Administrative Court's judgment, then the guidelines established by the European legislature (or the CJ) not only set standards for international law; these standards are also to be observed and respected for deciding comparable internal cases.

One might summarise from this finding that on the basis of the principle of equality a better-law approach has to be followed: the internal law is to be respected only if it is in line with European law; if it is less favourable, it is void; however, in case the internal law is more advantageous to the individual than the European international law, then the internal law prevails — as the one that is more benevolent to the individual.

<sup>(397)</sup> Regarding Regulation (EEC) No 1408/71, the mandatory protection in a regional social security system is also applicable in European cross-border cases.

<sup>(398)</sup> Translation from the German into English by E. Eichenhofer.

<sup>(399)</sup> A. Epiney, No 56, 432 et seq.

<sup>(400)</sup> VerfG EuGRZ 1997, 362.

<sup>(401)</sup> Case 370/88 Procurator Fiscal v Marshall [1990] ECR I-4071.

One might discern in such a development the reaction of national law to the non-discrimination clause of European law (Article 12 of the EC Treaty) <sup>(402)</sup>. If a detrimental treatment of cross-border cases in relation to internal ones violates Community law and, therefore, the more favourable law is to be applied <sup>(403)</sup>, one might argue that the same principle applies conversely — if the internal case is less favourably treated by internal law than the cross-border one. From both sides of the spectrum stems a harmonising effect on the legal solutions.

This principle is not beyond any legal doubt <sup>(404)</sup>. One might ask what is left for national sovereignty (which is safeguarded by the principle of subsidiarity, guaranteeing the rights of the Member States in spheres of legislation that are left to their responsibility and discretion)? In the pending CJ cases on the tax power of the autonomous regions in Spain <sup>(405)</sup>, the question remains as to how far the regional autonomy to tax the regional economy extends and to which extent the autonomous communities are obliged to observe targets, representing the general interest of the central state. Also in the light of Article 136 of the EC Treaty, the Member States are entitled to follow their own traditions in social policy.

If regional social protection stands for the overall trend to replace the welfare state by welfare regions <sup>(406)</sup>, then it seems obvious that regions should be autonomous also in the way they establish their systems of social protection in each relevant factor. So, there is a general justification for accepting differences regarding persons covered, and risks and benefit levels between welfare regions — since facilitating such differences in forms and

levels of protection is what the regionalisation of social protection is all about. Such differences, hence, are to be respected and accepted under both national and EC/EU law. But regional autonomy is not sufficient justification for the exclusion of persons who had been covered by a social protection programme for a certain risk on the basis of residence in a region and are no longer covered due to having moved to another region of the same Member State before the risk was verified. Such an exclusion is dubious under the legislation of the Member State, which allows the regions to establish genuine systems of social protection under their autonomous legislation. Since the coordination of social security within Europe is the task of the 'superior' EC, the interregional coordination of regional social protection falls upon the Member State. The latter has to ensure that, between regions, the principles of mutual respect and equal treatment are safeguarded, and from the latter stems also the principle of non-discrimination with respect to interregional migrants as core elements of interregional law. So the argument that the regions are free to create their own systems of social protection is not very sound, if the Member State itself would not stand for a lower standard of internal law than the European one. This lack becomes obvious if an acquired social security right is internationally effective due to European law, but gets lost completely under internal law, because regional social security rights are not effective in the national context. A nation state, in which a regional social security right is effective only within the region but not beyond it, seems to be in the status of secession! It lags behind the already achieved status of European integration; this is no longer tolerable — under both internal and European law!

<sup>(402)</sup> E. Eichenhofer, No 30, Tz 112 ff; U. Becker, 'Die Bedeutung der gemeinschaftsrechtlichen Diskriminierungsverbote für die Gleichbehandlung von Sachverhalten im koordinierenden Sozialrecht', VSSR 2000, 221.

<sup>(403)</sup> B. Schulte, 'Supranationales Sozialrecht', in U. Becker, B. von Maydell and F. Ruland (eds), *Sozialrechtshandbuch*, Baden-Baden, 2008 (fourth edition), Rn. 33–38.

<sup>(404)</sup> A. Epiney, No 55, 432 et seq., 470 et seq.

<sup>(405)</sup> Cf. Advocate General Juliane Kokott of 8 May 2008 (C-428/06 KGT Risja).

<sup>(406)</sup> M. Ferrera, *The boundaries of welfare. European integration and the new spatial politics of social protection*, Oxford, 2005, p. 167 et seq.



## V. EUROPEAN SOCIAL SECURITY COORDINATION LAW AND REGIONAL SOCIAL POLICY

### A. A twofold 'divergent' solidarity?

In the debate on the interrelation of EC coordination law and regional social security systems, the argument is brought forward that both 'regional and international solidarity are profoundly different from another in both concept and character'<sup>(407)</sup>. So, should regional solidarity be conceived as being categorically distinguished and separate from international solidarity?

This observation is not wrong, yet it is extremely vague and can be quite easily misunderstood. It is vague because it does not point out how differences in 'solidarity' between these two concepts are to be noticed. And it can be quite easily misunderstood because regional and international social security deal with solidarity in different manners. So, the observation on the twofold and divergent types of solidarity, enshrined in both regional and international social security law, does not provide any clear answer. Instead, it raises two much more interesting questions. Firstly, how should the differences between regional and international social security law be characterised (B)? Secondly, how do both contribute to foster solidarity (C)?

### B. Substantive law and coordination law

As to the first question, it is important to outline and underline the profound structural differences between regional social security and international social security law. Regional social security law is part of the national law of a Member State. As it replaces the national social security legislation of this Member State, it has the same legal character as social security law based on a collective agreement of employers' and trade unions, which also

<sup>(407)</sup> Cf. the recommendation of P. Van Parijs, No 29, 1998, p. 5: 'De solidariteit tussen personen binnen een Volksgemeenschap moet strikt onderscheiden en gescheiden worden van de solidariteit binnen een internationale (of confederale) gemeenschap'.

substitutes for a missing national social security branch, for example, unemployment insurance in France<sup>(408)</sup> or Denmark<sup>(409)</sup>. So, the first peculiarity of regional social security law is the role to create substantive rules on social security, for example to define the persons covered, the contribution basis and the administration to levy them and their rate and, finally, the structure of benefits.

Seen from the EC coordination law perspective, a regional social security branch has the same legal status as other — primarily based on collective bargaining— or private branches of social security<sup>(410)</sup>. Conceived as integral parts and elements of the social security system of a Member State, the regional laws on social security are treated under the coordination law as dependent parts of the Member State's legislation on social security, to which the coordination regulation is to be applied without the smallest restriction. Without any exceptions, all provisions of EC coordination are also relevant for the regional branches of social security, as if they were the national legislation. This is evident because otherwise a Member State would be able to get rid of the pledges and commitments imposed on it by the EC coordination legislation, by fostering internal reforms and shifting national responsibilities onto regional public entities. Coordination law, hence, treats all forms of substantive law in a Member State alike, irrespective of the differences in the formation and administration of the law.

### C. Solidarity in substantive and coordination law

Each substantive branch and system of social security, irrespective of a given one, which is run by a national, regional or occupational (e.g. set up and controlled by social partners) organisation, strives

<sup>(408)</sup> F. Kessler, *Droit de la Protection Sociale*, Paris, 2005 (second edition), p. 376 et seq.

<sup>(409)</sup> D. Pieters, *The social security systems of the Member States of the European Union*, Antwerp, 2002, 47, 51.

<sup>(410)</sup> They have a growing importance: S. Vansteenkiste, S. Devetzi and F. Goyens (eds), *Private partners in social insurance*, Leuven, 2001, with reports on Belgium, the Czech Republic, Greece, Germany, Hungary, Norway, Sweden and the Netherlands.

to establish and deepen social solidarity among the persons involved. Each effort to create social security fosters solidarity. But this concept lacks an emotive or cultural component; it does not represent a vague feeling, but a very solid relationship, based — above all — on the payment of money to an institution, which has to do benevolent things, above all by distributing money to the ‘others’! In the context of the fundamental rights of EU citizens, solidarity has assumed an official and far-reaching status as the constructive basis of social human rights acknowledged EU-wide<sup>(411)</sup>.

As all social security is based upon a give-and-take mechanism (as benefits are only payable if ‘others’ have contributed to the institution in advance) the term ‘solidarity’ in the context of social security stands primarily for a financial mechanism to share and manage social risks, to be borne by the working population or the residents within a given territory.

So, within a nation state, a nation-wide social security system flattens out regional economic and social differences — which exist in each nation state — and shares the burden of social risks. ‘National solidarity’ also has quite a strong regional component, in the sense that the different economic and social developments in different parts of the country are conceived as components of the social risk, to be secured and managed jointly by social security systems established at national level. German unification showed that, in the framework of social security, immense transfers from west to east took place to establish similar living conditions within the unified country as regards social protection.

‘Regional solidarity’ — quite often described as a ‘deeper’ form of solidarity than the ‘national one’ — represents a lower degree of solidarity compared with the latter, because it is inspired by making economically strong regions stronger by getting rid of the burden of sharing the risks of those living

in economically and socially weaker regions. The concept of regional solidarity therefore departs from the idea of ‘national solidarity’. The possible increase in regional solidarity is outweighed by the lack of national solidarity.

The ‘solidarity’ enshrined in the social security system lacks any romantic flavour. As the financial means to make an enormous machinery of attribution of rights and distribution of income operate, the majority of protected and covered persons are aware of this already from the very beginning, through the collection of contributions. So it is as popular as the tax office! Therefore, the system at large, due to its enormous complexity and technicality, is much more disliked than appreciated by the ordinary citizen. Because of the financial basics of its workings — based on pre-payments towards an insecure future, which is hard to predict for individuals, and the highly technical character of its provisions — social security is not associated by those covered with any idea of ‘cosiness’ or philanthropy. Therefore, even though it organises social protection very well and very differentially, and because of this creates bonds of solidarity, it is often far from being perceived as a key element of social solidarity. One doubts whether one can rely on the assumption that coverage in social security — despite being obviously essential for the well-being of the beneficiaries — will ever be widely conceived as being a benevolent institution!

EC social security coordination law, however, is not centrally made to foster solidarity<sup>(412)</sup>. Of course, as a corollary of substantive social security, it has to fulfil some additional tasks that could not be done without coordination — the lack of which would even be very detrimental to social protection at large. From this lack would also stem a shortcoming regarding solidarity. But for the specific analysis of EC coordination law, the concept of solidarity does not have any enlightening role to play, because international social security also law has to deal

<sup>(411)</sup> Title IV, Articles 27–36 of the Charter of Fundamental Rights of the European Union.

<sup>(412)</sup> R. Schuler, No 31, S. 118 et seq., 198 et seq. and 274 et seq. on the impact of international social security to foster social justice.

with the quite elementary technical dimensions<sup>(413)</sup> of national social security systems.

- Firstly, there is the mere fact that many national social security systems exist. As long as this is done by each national state alone, each system exists in splendid isolation from all other systems. So, the most elementary and most crucial role that international law has to play is to overcome this tacit and parallel existence of numerous different national social security systems.
- Secondly, this parallel existence might bring about double protection and loopholes in protection, which are detrimental to the social security rights of individuals; coordination law has to find ways to avoid both deficits.
- Thirdly, as long as the social security systems of Member States do not take account of any other social security system, social protection is restricted to the competent nation state; migrants would not be accepted, because each social security right earned in one system would only be counted as a right within this system, and would lack any importance in another system.

So, coordination does not strive specifically to foster solidarity in a certain direction or with a certain intention. But it is the main target of coordination to interrelate the various national social security systems with one another. In this respect it *contributes* to social solidarity; but it is not the main purpose of EC law to *create* social solidarity.

In the context of Europe, EC coordination has to bring about the 'European social area' (Jacques Delors), which is not to be conceived as a homogenous space with a completely harmonised unique social security law, governed and run by the EC, but rather as a space in which the social security

legislation of all Member States is *interrelated* in such a manner that neither loopholes nor double protection occur and social security rights become internationally — i.e. Europe-wide — effective, regardless of the Member State's legislation on which they are based. Coordination is made to *overcome* a *deficit* of solidarity, insofar as *social* inclusion and *social* exclusion are to be conceived as two sides of the same coin. So, the main purpose of coordination is to overcome the exclusive effects embedded in all welfare states, which are organised in isolation from one another, and to interrelate each welfare state with the homologous system of all other Member States. This ideal indeed deepens solidarity in Europe, not by enriching or 'deepening' it but by widening social security.

#### D. EC coordination and regional social security

From these findings it follows that the regional systems of social security of the Member States are bound by the EC coordination regulation and, therefore, the regional branches of social security systems of the Member States have to respect all provisions of that regulation. This is due to the fact that regional social security systems replace the otherwise existing national ones; as mere substitutes of national social security branches they do not have another status in coordination law as those social security systems which are made by collective agreements and which are acknowledged as social security branches under EC coordination by virtue of their function to substitute an otherwise existing national social security branch. As no Member State is allowed to evade its commitments under the EC coordination regulation by the transfer of legislative power from the Member State to a region, endowed with legislative power itself, the regional legislation has imperatively to concur with EC legislation, which is paramount and binding on the Member State to which the regional entity belongs as a dependent part, with all-in-all limited legislative power. So, also under regional law the fundamental freedoms of EC law are to be

<sup>(413)</sup> Chardon, No 5, p. 47: 'The Member States play a fundamental role running the concrete coordination: respect for civil rights in everyday life is based on the productive cooperation between the social security institutions of the different Member States. Besides the roles which determine the rights of individuals, coordination also consists of a set of functions and procedures which allow productive cooperation between the institutions of Member States'; F. Pennings, No 2, p. 8 et seq.

safeguarded by adapting the regional law to the established European standards.

Also for internal cases which, for this reason, are not governed by EC law, EC coordination law has an indirect effect on the basis of the constitutional law of the Member State. This can be explained by the fact that not only the EC but also each Member State is committed to the ideals of the single market and an open society in which the freedom of movement of persons, goods, services and capital is guaranteed to everyone, without any unlawful restriction. It is clear that EC/EU law also sets standards for mobility within one Member State: what Europe allows cannot be forbidden within a Member State! So the European standard applies internally by virtue of the internal constitutional law<sup>(414)</sup>.

## VI. CONCLUSIONS

EC coordination law on social security is an important part of European legislation, because it makes Europe into a unique 'social space'. This is not the outcome of European harmonisation, but of European coordination of social security. The example examined shows precisely the growing role the EC/EU legislation to organise transnational patterns of

economic life and so also of social protection. European law become a laboratory for transnational ways of organising social protection<sup>(415)</sup>, as it sets standards to safeguard mobility and to combine this guarantee with the social purpose of safeguarding acquired rights in social security. The topic dealt with illustrates quite impressively that the social standards of European law are also relevant beyond their genuine sphere of application in the context of international law under the auspices of the guarantee of equal treatment. Thus, the legislative power of the Member States in the field of social security is respected and protected and the same is true for the regions. But national legislation is no longer the dominant instrument of social legislation; each act of national legislation can be replaced by a legislative act of the region, and both are bound by European laws. This fact is not to be deplored. One cannot help thinking of the extremely lucid and convincing observation made by the Nobel Award winner Thomas Mann in a speech to workers held in the Viennese district of Ottakring in 1932. When looking back through history, he said: 'Let's be aware that the nation is not the first, and, therefore, not the ultimate. It is a step to larger gatherings and units; it lies on the way from the tribe and the landscape to Europe'<sup>(416)</sup>.

<sup>(414)</sup> Cf. also Advocate General Eleanor Sharpston in her reflections, No 118 et seq., 28 June 2007 (Case C-212/06).

<sup>(415)</sup> E. Eichenhofer, *Geschichte des Sozialstaats in Europa*, München, 2007, p. 155 et seq.

<sup>(416)</sup> T. Mann, 'Rede vor Arbeitern in Wien' (1932), in ders., *Von Deutscher Republik*, Frankfurt/Main, 1984, 344, 360: 'zu erkennen, dass die Nation weder etwas Erstes noch darum etwas Letztes ist. Sie ist eine Stufe zu größeren Zusammenfassungen, sie liegt auf dem Wege vom Stamm und Landschaft zu Europa!'.

# THE IMPLEMENTATION OF COORDINATION REGULATIONS IN ACTIVE LABOUR MARKET POLICY PROVISIONS AT NATIONAL LEVEL

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## I. THE RISK OF UNEMPLOYMENT AS THE SUBJECT OF REGULATION UNDER EUROPEAN LAW

Obtaining an income by means of (paid, autonomous) work has an existential character in modern societies. Not having work constitutes an existential threat. This was the reason, in addition to the traditional risks constituted by similar threats such as illness, accident, disability or age, for also considering the unavailability of work as a social risk and for providing protective mechanisms against this in the area of social security. Some national systems have been created as a direct response to severe economic crises (<sup>(417)</sup>).

In view of lasting mass unemployment in Europe, the European legislator also wished to address overcoming the risk of unemployment. It has done so at various levels (<sup>(418)</sup>). Since the start of European unification and the entry into force of the Treaty of Rome, the European legislator has been concerned to set up a type of European employment market in addition to the existing national employment markets. A crucial legislative reason for this was the establishment of the freedom of movement for workers (<sup>(419)</sup>). Hence Article 39 safeguards the right to move from one Member State to another, to seek and take up employment. In Regulation (EEC) No 1612/68 on freedom of movement, the employment service has therefore become Europeanised (<sup>(420)</sup>). That the operation of such a transnational

(<sup>(1)</sup>) *This contribution was translated from the original German version.*

(<sup>(417)</sup>) The current sweeping global economic crisis is exceptional evidence of the problem. And in these times opponents of unemployment insurance may reflect on how good it is that we have protective systems in place because they represent a substantial factor of domestic demand.

(<sup>(418)</sup>) In the area of European labour law, Directive 98/59/EC in relation to mass redundancies or Directive 2001/23/EC on the guidelines for the transfer of undertakings may be mentioned.

(<sup>(419)</sup>) See article regarding this historical background: M. Fuchs and F. Marhold, *Europäisches Arbeitsrecht* [European labour law], Vienna, Springer, second edition 2006, p. 3 et seq.

(<sup>(420)</sup>) See Article 13 et seq. of Regulation (EEC) No 1612/68.

exchange of workforces was also a social security problem was indicated by the fact that, with Article 51 of the EEC Treaty, a coordinating instrument was introduced as a component of the rules on the freedom of movement. Coordinating Regulation No 3 and later Regulation (EEC) No 1408/71 enacted on this basis also covered unemployment benefits.

Active labour market policy benefits must be integrated into this coordinating system. Active labour market policy describes a strategic realignment of labour market policy. Before we can provide legal answers relating to coordination, it is therefore first necessary to investigate and introduce the status quo, as it were, of the coordination of unemployment benefits. Consequently it must be asked what is essential and new about active labour market policy and how these political schools of thought have affected the form of unemployment benefits. Against this background, the legally coordinated background can then be discussed.

## II. THE SYSTEM OF COORDINATING UNEMPLOYMENT BENEFITS

There follows a condensed description of the coordinating regulations and principles concerning unemployment benefits. These explanations should provide the basis for clarifying the challenges which, by virtue of the strategies of an active labour market policy, the modified form of unemployment benefits presents nationally to the coordinating system. This initial question raises a series of problems. Essentially it is a matter of investigating the extent to which the benefits in question fall within the material scope of Regulation (EEC) No 1408/71 or in the foreseeable future that of Regulation (EC) No 883/2004 and, if so, into which benefit category of the material scope they are to be classified. On this basis, related questions necessarily arise, which are aimed at examining the application of the coordination mechanisms to these benefits. In particular, this applies to the question of benefit exports.

### A. The material scope of unemployment benefits

The material scope<sup>(421)</sup> of unemployment benefits is laid down in Article 4(1)(g) of Regulation (EEC) No 1408/71<sup>(422)</sup>. As with all other social security benefits, the facts of Article 4(1)(g) of Regulation (EEC) No 1408/71 require that a benefit fulfils the characteristics of the concept of social security<sup>(423)</sup>. According to the jurisdiction of the Court of Justice (CJ), the distinction between benefits which are excluded from the scope of Regulation (EEC) No 1408/71 and those which fall within it depends mainly on the nature of the respective benefit, in particular on its purpose and the requirements for its being granted, but not, however, on whether a benefit is a social security benefit under national law<sup>(424)</sup>. A benefit may thus be considered a social security benefit if, firstly, it is granted to recipients without any individual means-testing assessment based on a legal statement of facts and, secondly, it relates to one of the risks explicitly listed in Article 4(1) of Regulation (EEC) No 1408/71<sup>(425)</sup>. In addition to these general criteria of affiliation with a social security system, the specific characteristics of an unemployment benefit must be worked out thereafter. This is done on the basis of the pertinent jurisdiction of the CJ, which in a series of decisions has drawn up the contours of unemployment benefits<sup>(426)</sup>.

The CJ implemented these principles in a series of judgments. Subsequently a benefit is thus associated with the risk of unemployment if it is to replace

<sup>(421)</sup> With regard to the personal scope of implementation of unemployment benefits cf. M. Fuchs in M. Fuchs (ed.), *Europäisches Sozialrecht* [European social law], Baden-Baden, Nomos, fourth edition, 2005, Guide (43).

<sup>(422)</sup> Article 3(1)(h) of Regulation (EC) No 883/2004.

<sup>(423)</sup> Elaborated by M. Fuchs in M. Fuchs (ed.), *Europäisches Sozialrecht* [European social law], Baden-Baden, Nomos, fourth edition, 2005, Article 4(7) et seq.

<sup>(424)</sup> Case 249/83 Hoeckx [1985] ECR 973 I-11; Case C-111/91 Commission v Luxembourg [1993] I-817, para. 28.

<sup>(425)</sup> Case C-66/92 Acciardi [1993] I-4567, para. 14.

<sup>(426)</sup> See also U. Rönnsberg, *Die gemeinschaftsrechtliche Koordinierung von Leistungen bei Arbeitslosigkeit. Die Verordnung (EWG) No 1408/71 und ihre Reformbedürftigkeit* [Community coordination of unemployment benefits. Regulation (EEC) No 1408/71 and the need for reform], Herbolzheim, Centaurus, 2006, p. 36 et seq.



a salary lost as a result of unemployment and is therefore intended for the upkeep of the unemployed worker<sup>(427)</sup>. These benefit characteristics, also adopted in jurisprudential literature<sup>(428)</sup>, have served to orient the CJ and legal practice in difficult borderline cases. Two significant judgments must be highlighted because on the one hand they reveal the difficulties of definition that can arise, while on the other they also point to which approach to take. At this point it should also be mentioned that these particular judgments are significant for the later part of this paper because the facts are established in areas which we find in active labour market policy benefits.

In the *Otte*<sup>(429)</sup> case the CJ had to examine a benefit under German law which was provided for older employees of the coal-mining industry laid off on the basis of a shutdown or rationalisation. The qualifying condition was that the person concerned had been employed in the German coal-mining industry for at least two years preceding his dismissal and at the time of his dismissal had built up a period of insurance of 180 months minimum as a rule, and had had to be made redundant for reasons beyond his control, within the framework of a shutdown or rationalisation plan approved by the Federal Ministry of Economic Affairs. Moreover, he would have been able to meet the conditions for payment of an old-age pension no more than five years from the day of his dismissal.

What was controversial was whether this was based on certain similarities regarding old-age benefits (Article 4(1)(c) of Regulation (EEC) No 1408/71) or regarding unemployment benefits or whether it was also a matter of early-retirement benefits. To be classified as an early-retirement benefit, the German

government had specifically made a declaration in respect of employment policy objectives<sup>(430)</sup>. Unlike the Commission, which approved classification as an old-age benefit, the CJ pronounced itself in favour of classification as an unemployment benefit. The CJ could with good reason deny affiliation with an old-age benefit with regard to the purpose of the benefit<sup>(431)</sup>. The refusal to cover unemployment benefits was provided with an illuminating justification<sup>(432)</sup>. If the argument was based solely on the wording of the formulation which the CJ had provided for the classification of benefits in earlier assessments (see above also), it could have been confirmed without a doubt that this was an unemployment benefit. For the benefit was granted in the event of unemployment and its purpose was to guarantee the recipient's upkeep. However, if we take a look at the concrete reasoning of the CJ, it can be shown that this stated objective is not enough on its own to determine the classification of the benefit. The CJ points to the circumstance that the amount of the adaptation allowance is measured in accordance with retirement pension provisions; the recipient of the adaptation allowance is neither obliged to register as a job-seeker nor to be available for work nor to refrain from taking up employed or self-employed activity, with the proceeds earned exceeding a certain upper limit. In addition, the CJ refers to the explanation of the Advocate General, who referred to the employment policy objective of the adaptation allowance, which in particular consists of keeping the dismissed employee outside the scope of unemployment insurance.

We can therefore infer from the *Otte* decision that not only the function of guaranteeing a replacement income for unemployment and upkeep is crucial for the approval of an unemployment benefit,

<sup>(427)</sup> Case C-102/91 Knoch [1992] I-4341, para. 44; Case C-57/96 Meints [1997] I-6708, para. 27.

<sup>(428)</sup> See, for example, E. Eichenhofer, *Sozialrecht der Europäischen Union* (European Union social law), Berlin, Erich Schmidt Publications, third edition, 2006, para. 259.

<sup>(429)</sup> Case C-25/95 *Otte* [1996] I-3745.

<sup>(430)</sup> To date, early-retirement pensions are not explicitly included in the objective area of agreement. In 1996, the Commission presented a proposal for the benefit of persons with an entitlement to early-retirement pensions, in order to carry the exceptional features of the benefits in the proposed legal act (OJ C 62, 1.3.1996, p. 14). Early-retirement pension regulations are now included in Article 3(1)(i) of Regulation (EC) No 883/2004.

<sup>(431)</sup> See Case C-25/95 *Otte* [1996] ECR I-3745, para. 34.

<sup>(432)</sup> Case C-25/95 *Otte* [1996] ECR I-3745, paras 36 and 37.

but the usual requirements for an unemployment benefit under national law must also be met. The CJ obviously proceeds from a definite requirement structure for unemployment benefits, which does not mean that all the features provided in the national legal system must always be met.

This appraisal of the CJ judgment in the *Otte* case is endorsed by the associated judgment in the *Meints* case<sup>(433)</sup>. In question was compensation from a fund for agricultural employees whose employment contracts had ended as a result of their former employer's set-aside schemes, if they fulfilled certain conditions. One of these conditions was that the employee was entitled to benefits under unemployment legislation. This concerned a one-off benefit, the level of which was based exclusively on the beneficiary's age. If the beneficiary enters into an employment contract with his erstwhile employer within 12 months of the ending of the previous contact, the benefit must be repaid.

Here the CJ also proceeds on the assumption of its fundamental approach, according to which unemployment benefits are those benefits intended to replace wages lost through unemployment and for the upkeep of the unemployed worker. Against this background, the CJ analyses the benefit conditions, as already in the *Otte* case. There are four points which ultimately lead to the negation of the characterisation of an unemployment benefit. For the CJ, decisive aspects are as follows<sup>(434)</sup>. The recipient must repay the benefit if he enters into a new employment contract with his former employer within 12 months. Neither the accrual nor level of benefit entitlement depend on the duration of unemployment. The disputed benefit is not paid regularly, but just once. The level depends solely on the age of the claimant and finally the benefit is granted in addition to unemployment benefit, as provided in the national regulation of social security, where entitlement to

the latter benefit is a precondition for its award. It may also be concluded here that, in assessing a benefit as an unemployment benefit, in addition to the income replacement function, it is crucial to consider whether it displays the typical features of an unemployment benefit.

Concerns regarding the endorsed appraisal of the CJ jurisdiction could arise from the decision in the *De Cuyper* case<sup>(435)</sup>. Above all, the information and description of this decision is also exceptionally important as it already contains aspects which will later play a significant role within the framework of this contribution. In question was a benefit under the Belgian Royal Decree on the regulation of unemployment. In concrete terms, a provision of this decree provided that a wholly unemployed worker who is at least 50 years of age and who has already drawn a benefit as a wholly unemployed worker with a certain frequency in the last two years before application can be exempted from the so-called stamp duty, as a result of which he is no longer obliged to be available for work and take up any reasonable job, to register at the employment agency or participate in an accompanying plan and register as seeking employment. Certainly the payment of the benefit mentioned was incompatible with the exercise of a paid activity and short-term in duration.

The CJ confirmed the existence of an employment benefit. As with previous judgments, here too the CJ examined the benefit prerequisites in detail. Both in terms of the purpose and structuring of the prerequisites, a typical unemployment benefit was studied. In question was how to deal with the feature of waiving typical requirements for the availability of the unemployed person. The CJ was of the opinion that exemption from this obligation would not change the essential requirements of an unemployment benefit. As justification, the CJ argued that the granting of this exemption did not mean

<sup>(433)</sup> Case C-57/96 *Meints* [1997] ECR I-6708.

<sup>(434)</sup> Case C-57/96 *Meints* [1997] ECR I-6708, para. 29-32.

<sup>(435)</sup> Case C-406/04 *De Cuyper* [2006] ECR I-6947.

that the unemployed person would be exempt from the obligation to make himself available to the employment service, as even if he is exempted from the obligation to register himself as a job-seeker and to accept any reasonable job, he must always be available to this agency for the purpose of monitoring his professional and domestic situation. This justification is not convincing, however. Being available to the labour market is an essential criterion for entitlement to unemployment benefit in all Member States. However, it may be possible to justify the position of the CJ by stating that the Belgian benefit in question is not an isolated case in a European context. In other countries too, there are comparable provisions in the legislation on employment benefits. For example, in German law, Section 428 para. 1 of the Code of Social Law (*SGB*) III provides for the payment of unemployment benefit to workers who have reached 58 years of age, even if they are not prepared to work and do not avail themselves and do not wish to avail themselves of all opportunities to end their unemployment. The reason for this law, according to the legislators, lies in the fact that upon reaching 58 years of age, reintegration into working life generally no longer comes into consideration<sup>(436)</sup>. Accordingly, the issue now is more that of an early-retirement benefit.

An important case, which might probably play a role in other countries in future, was the *Petersen* case<sup>(437)</sup>. Petersen, a German national, was employed in Austria. He applied to the Austrian pension insurance institution for an occupational disability pension. Austrian legislation (Section 23 of the Unemployment Insurance Act (*AVG*)) grants an advance unemployment benefit or emergency aid while the pension application is being processed, if the preconditions for drawing these benefits exist, with the exception of the precondition of employability, willingness and readiness to work. This advance payment was also made to the claimant, Mr Petersen. However, when Mr Petersen moved to

Germany, this benefit payment was stopped. Had this been an invalidity benefit within the meaning of Article 4(1)(b) of Regulation (EEC) No 1408/71, the Austrian residence clause could not have prevented the export of the benefit on account of Article 10(1) of Regulation (EEC) No 1408/71.

Regarding the definition criteria, the CJ refers to early judgments<sup>(438)</sup> according to which social security benefits are considered independently of the special characteristics of different national legislations as benefits of the same kind, if their purpose and objectives as well as their basis of calculation and the preconditions for their being granted are identical. In order to be able to establish this, the CJ once again employed the criteria which it had developed in the decisions just discussed. It bases its argument essentially on the calibre of the benefit, i.e. the eligibility criteria and the basis of their calculation. The circumstance that the benefit is for an unemployed person without an income, so that he must be provided with financial means, would have basically enabled allocation as both a disability and an unemployment benefit. Only by means of information about the eligibility criteria and the basis of calculation does the CJ create the basis for being able to effect the allocation. What is crucial is that all the eligibility criteria for entitlement to unemployment benefit must be complied with, although the requirement of availability is waived. However, by definition the purpose of the benefit is for the benefit recipient to remain in the labour market during the phase of uncertainty regarding the granting of the disability benefit in order to prevent subsequent difficulty in gaining access to the labour market, if the application for the occupational disability benefit should be refused. The advance benefit is calculated according to the same rules as unemployment benefit and is granted by the authorities responsible for the payment of unemployment benefit. Also typical for an unemployment benefit is the circumstance that the

<sup>(436)</sup> See Winkler in Gagel, *SGB III Arbeitsförderung* [Promotion of employment], Munich, C.H. Beck Publishers, 2006, Section 428, para. 2.

<sup>(437)</sup> Case C-228/07 [2008], not yet published.

<sup>(438)</sup> Case C-171/82 Valentini [1983] ECR 2157, para. 13; Case C-406/04 De Cuyper [2006] ECR I-6947, para. 25.

benefit is stopped as soon as paid employment is taken up. All this permits the conclusion that the benefit is mainly supposed to replace lost income on account of unemployment and is thus intended for the upkeep of unemployed workers.

## B. Benefits providing support

The preceding examples from the jurisdiction of the CJ have shown that the disputed cases are generally in the field of cash benefits. Historically, cash benefits have also initially played the most important role within the scope of systems to protect against the risk of unemployment. In the course of time, however, the Member States have substantially expanded the range of various kinds of funding benefits. And when we speak of measures in the active labour market policy, this area plays a special role because — as has been shown — active labour market policy specifically wishes to avoid a situation in which people remain unemployed, while financial benefits are made available to them. On the contrary, they should be involved in active measures. Hence these issues must be given particular attention.

As far as can be seen, until now only one decision has been issued by the CJ regarding this problem — the judgment in the *Campana* case<sup>(439)</sup>. This judgment certainly does not provide exhaustive information about the issues discussed here. Nevertheless, some very substantial statements were made. The case concerned an applicant of Italian nationality, working in Germany and who participated in a course to prepare for the examination for the master's certificate as a radio and television technician. He requested a defrayal of the costs for this course. According to German law, workers in employment are also entitled to these benefits, if they have been paying insurance contributions for a certain period of time before the scheme<sup>(440)</sup>. This judgment initially derives meaning insofar as no

case of unemployment existed in the individual case. Therefore the Advocate General had also begun his conclusion by considering whether benefits within the meaning of Article 4(1)(g) of Regulation (EEC) No 1408/71 could also be benefits of a preventive nature, intended to limit the onset of unemployment<sup>(441)</sup>. The Advocate General also drew attention to the fact that even then (1985!) a development in that direction was also shown to address the risk of unemployment with pre-emptive measures.

The CJ took up this train of thought in its decision. It emphasises that 'in the light of the present economic situation the Member States have established assistance for vocational training intended both to enable persons in employment to improve their qualifications to avoid the threat of unemployment and to enable unemployed persons to retrain and find new employment. Both types of benefit are intended to combat unemployment.'<sup>(442)</sup> In order to also accommodate misgivings raised by Germany, which argued particularly that the benefits for assistance for vocational training also served purposes other than the fight against unemployment, the CJ restricted its opinion. As benefits within the meaning of Article 4(1)(g) of Regulation (EEC) No 1408/71, only those benefits for assistance for vocational training should be considered which involve either unemployed workers or those workers still in employment for whom there is a tangible risk of becoming unemployed. The question of whether there is a tangible risk of the worker currently in employment becoming unemployed must be examined by the national authorities<sup>(443)</sup>.

## C. Non-contributory benefits in cash

As will be shown later, non-contributory benefits in cash play an important role within the framework of active labour market policy. It is therefore also necessary to describe the legislative and theoretical foundations of this type of benefit here. This must

<sup>(439)</sup> Case C-375/85 *Campana* [1986] ECR 2387.

<sup>(440)</sup> Section 46, para. 1, AFG a.F., now Sections 77 et seq., SGB III.

<sup>(441)</sup> See Submissions ECR 1987, 2395, 2397.

<sup>(442)</sup> Case C-375/85 *Campana* [1986] ECR 2387, para. 9.

<sup>(443)</sup> Case C-375/85 *Campana* [1986] ECR 2387, paras 12 and 13.

take place against the following background. The current structure of Article 4 of Regulation (EEC) No 1408/71<sup>(444)</sup> essentially returns to the jurisdiction of the CJ<sup>(445)</sup>. In this context it seems useful to single out the CJ decision in the *Hoeckx* case<sup>(446)</sup>. The claimant, Vera Hoeckx, a Dutch national, lived in Belgium and received unemployment benefits there. For a time she moved to France, where she was granted further unemployment benefits. When after some time she returned to Belgium, she was no longer entitled to unemployment benefit. She therefore applied for a maintenance benefit, which was refused. In order to appreciate the CJ decision, it must be realised that, under Belgian law, neediness is a prerequisite for payment of the benefit and the recipient of the benefit must demonstrate that he or she is available for work. In addition, for EU nationals it was established that they are entitled to a maintenance benefit if they have actually resided in Belgium for at least five years preceding the point in time at which this assistance is granted. It is evident that this Belgian rule is clearly contrary to Article 3 of Regulation (EEC) No 1408/71 and the ban on discrimination therein. Admittedly, this aspect would only have been relevant if the benefit in question had been dealt with in the sense of Article 4(1) of Regulation (EEC) No 1408/71.

In answer to this question, the CJ initially refers to its established case-law, whereby the difference between benefits which are excluded from the scope of the regulation, and those which fall within it, essentially depends on the basic features of each benefit, in particular its purpose and the preconditions of it being granted, and not whether a benefit is classified as a social security benefit by the national legislations. At the same time the CJ stresses that there are nationally legislated laws which are equally associated with both categories and thus elude all general classification. The

CJ therefore acknowledges that there is a type of hybrid benefit, an expression occasionally used to describe these<sup>(447)</sup>. In this sense, hybrid benefits feature strong elements of social assistance such as social security. In light of the existing legal situation of the time, in 1985 the CJ had to make a choice between affiliation to one system or another. Had it decided on social assistance, the material, factual area of application of Regulation (EEC) No 1408/71 would not have come about (Article 4(4) of Regulation (EEC) No 1408/71). In its explanation, the CJ stressed as a crucial criterion of definition that a statutory regulation only applies in the field of social security within the meaning of Regulation (EEC) No 1408/71, if *inter alia* it has a connection with one of the risks explicitly listed in Article 4(1). The CJ does not comment on this connection in its decision. The denial that a branch of social security is involved in this respect is essentially based on considerations which emphasise the social welfare character of the benefit. The CJ statements in this regard are of fundamental importance, which is why they should be quoted verbatim here<sup>(448)</sup>:

‘As is clear from documents before the Court, the “minimex” is characterised on the one hand by the fact that it confers upon recipients a legally defined position and, on the other, by the fact that it is granted to any person who does not have adequate means and is unable to obtain them either by his own efforts or in any other way’ (Article 1(1) of the Law of 7 August 1974); it thus adopts need as an essential criterion for its application and does not make any stipulations as to periods of work, contribution or affiliation to any particular social security body covering a specific risk. A claimant need only show that “he is prepared to accept work” unless prevented by his state of health or compelling social reasons; furthermore, he is required to exercise his rights to social benefits or even any rights

<sup>(444)</sup> In future this structure will be a result of Articles 3 and 70 of Regulation (EC) No 883/2004.

<sup>(445)</sup> See comprehensively M. Fuchs in: M. Fuchs (ed.), *Europäisches Sozialrecht* [European social law], Baden-Baden, Nomos, 4. 2005 edition, Article 4, para. 25 et seq.

<sup>(446)</sup> Case C-249/83 *Hoeckx* [1985] ECR 973.

<sup>(447)</sup> Cf. F. Pennings, *Introduction to European social security law*, Antwerp/Oxford/New York, Intersentia, fourth edition, 2003, p. 69 et seq.

<sup>(448)</sup> Case C-249/83 *Hoeckx* [1985] ECR 973, para. 13.

to maintenance if the public social welfare centre considers it necessary (Article 6(1) and (2) of the 1974 Law).<sup>449</sup>

Subsequently the CJ had to take numerous other decisions, which were — in short — about such hybrid benefits<sup>449</sup>.

As is generally known, the CJ jurisdiction, but also the residual uncertainties in the application of the law, resulted in the European legislator deciding to codify CJ jurisdiction. This was achieved by means of Regulation (EEC) No 1247/72<sup>450</sup>. This resulted in the insertion of subparagraph 2(a) in Article 4 of Regulation (EEC) No 1408/71. Through Regulation (EC) No 647/2005<sup>451</sup>, Article 4(2)(a) of Regulation (EEC) No 1408/71 received its current wording<sup>452</sup>. What is crucial is that these benefits are listed in Annex IIa<sup>453</sup>. This entry is of a constitutive nature.

#### D. The export of unemployment benefits

Article 4(2)(a) of Regulation (EEC) No 1408/71 is closely related to Article 10(a) of Regulation (EEC) No 1408/71<sup>454</sup>. The principle of exporting benefits, as established in Article 42 EC and implemented in Article 10 of Regulation (EEC) No 1408/71<sup>455</sup>, is significantly restricted in the case of non-contributory cash benefits. These benefits are distinguished by the fact that, from the perspective of legislative motivation, they have a strong connection with the respective national social policy of the time. Therefore the national provisions regularly make the place of residence an element of eligibility

<sup>449</sup> Of particular importance are the decisions of Case C-1/72 Frilli [1972] ECR I-475; Case C-24/74 Bionso [1974] ECR 999; Case C-78/91 Hughes [1992] ECR I-4839; Case C-6/92 Acciardi [1993] ECR I-4591; Case C-20/96 Snares [1997] ECR I-6057; Case C-297/96 Partridge [1998] ECR I-3467; Case C-90/97 Swaddling [1999] ECR I-1075.

<sup>450</sup> See Regulation (EEC) No 1247/92 of the instalment of 30 April 1992 for the amendment to Regulation (EEC) No 1408/71 of 30 April 1992 (OJ L 136, 19.5.1992).

<sup>451</sup> See AbIEG (OJ L 117, 4.5.2005).

<sup>452</sup> Article 70 of Regulation (EC) No 883/2004 assumed this definition.

<sup>453</sup> For the admission of this feature, the regulator feels compelled on the basis of the CJ in Case C-215/99 Jauch [2001] ECR I-1901, and Case C-43/99 Leclere [2001] ECR I-4265. See also No 3 of the commencement clause Regulation (EC) No 647/2005.

<sup>454</sup> Prospective Article 70(4) of Regulation (EC) No 883/2004.

<sup>455</sup> Prospective Article 7 of Regulation (EC) No 883/2004.

for benefits. The jurisdiction of the CJ, which was forced to steer a middle course in the definition of traditional social security benefits (Article 4(1) of Regulation (EEC) No 1408/71) and the systems of social assistance (Article 4(4) of Regulation (EEC) No 1408/71), ultimately brought about the incorporation of non-contributory cash benefits in the coordination of social legislation. Nevertheless, EU Member States did not wish to accept this so easily. With Regulation (EEC) No 1247/92<sup>456</sup> the European legislator decided to remove this type of cash benefit from the unrestricted coordination of Article 10(1) of Regulation (EEC) No 1408/71. The exclusive jurisdiction of the Member State of residence of the benefit in question is established in Article 10(a) of Regulation (EEC) No 1408/71, provided that the benefit is listed in Annex IIa. In any case, in terms of unemployment, the benefits do not come under the general export order of Article 10 of Regulation (EEC) No 1408/71. The repeal of the place of residence clause in Article 10 of Regulation (EEC) No 1408/71 only refers to the benefits explicitly mentioned there. The non-involvement of unemployment benefits is understood against the background of the coordination provisions in Article 67 et seq. of Regulation (EEC) No 1408/71<sup>457</sup>. Article 69 of Regulation (EEC) No 1408/71 makes it clear that the export of benefits should only be possible under the conditions stated there and on an extremely restricted scale. A further reason for transnational provision of unemployment benefits is described in Article 71 of Regulation (EEC) No 1408/71.

On account of this distinct legal position, it was therefore undisputed legal practice that unemployment benefits were only transferred to another state on this basis. Nevertheless, it was to be expected that one day the CJ would also discover a case which would occasion a confrontation between existing coordination law and the regulations on the freedom of movement (Article 18 et

<sup>456</sup> See C above.

<sup>457</sup> Prospective Article 61 et seq. of Regulation (EC) No 883/2004.



seq. EC). As is known, the CJ, beginning with the *Martinez Sala* case<sup>(458)</sup>, also instrumentalised the Freedom of Movement Act from Article 18 for the field of social security<sup>(459)</sup>.

Therefore it was not surprising that these principles would one day also influence the coordination of unemployment benefits. This first took place in the abovementioned *De Cuyper* case<sup>(460)</sup>. The claimant of Belgian nationality was refused unemployment benefit because he was living in France. Invoking previous case-law, the CJ established that such a rule only put citizens at a disadvantage because they have made use of their freedom to migrate to and stay in another Member State, and this constitutes a restriction of the freedoms bestowed upon every citizen of the Union by Article 18<sup>(461)</sup>. According to Community legislation, such a restriction may only be justified if it is based on objective considerations of the public interest, independent of the nationality of the person concerned, which reasonably adhere to objectives pursued in a lawful manner in the national legislation<sup>(462)</sup>. This set in motion the standard inspection scheme always used by the CJ where interference with basic freedoms is concerned. At the level of justification of the interference, objective considerations of the public interest must be given, which are independent of the nationality of the person involved, and the measure must be proportionate. The CJ confirms these preconditions in a concrete case. It stresses that, in the case of control measures which are intended to examine the domestic situation of the unemployed person concerned and the possible existence of sources of income not reported by the person concerned, the effectiveness by and large depends on the inspection taking place unexpectedly and it being

possible to perform it on the spot as the responsible service must be able to examine the correlation between the unemployed person's statement and the actual physical conditions. Also to be noted is that the inspection to be performed in connection with unemployment benefits points out any anomaly which might justify the establishment of more restrictive mechanisms than those for the inspection of other benefits.

While the result may be satisfactory, the reasoning certainly is not. There are doubts about whether this decision is correct both in relation to the wording of Article 18 EC and its legislative history and in relation to the system of EC legislated principles of coordinating social legislation. These doubts should be seen against the following backdrop. As a rule, national employment promotion legislation provides for the granting of unemployment benefits only if the person concerned is resident or staying in the state providing the benefit<sup>(463)</sup>. In the light of the rule in Article 42 EC, the territorial principle<sup>(464)</sup> expressed therein cannot be upheld. In principle, this EU provision requires payment of the benefit regardless of domicile. However, Article 42 EC requires no substantiation of the so-called export principle without restrictions. What are required are the measures necessary for the creation of freedom of movement. The European legislator decided on a differentiated structuring of the transnational provision of unemployment benefits<sup>(465)</sup>. It ruled out a general application of benefit export through non-take-up of unemployment benefits in Article 10. Exporting benefits should only be possible within the framework of Articles 69 and 71 of Regulation (EEC) No 1408/71. The current limitations and restrictions on free movement by Article 69 have been

<sup>(458)</sup> Case C-85/96 *Martinez Sala* [1998] ECR I-2691.

<sup>(459)</sup> See also E. Eichenhofer, *Sozialrecht der Europäischen Union* [Social law of the European Union], Berlin, Erich Schmidt Publishers, 3. 2006 edition, para. 334 et seq.

<sup>(460)</sup> See above under A.

<sup>(461)</sup> Case C-406/04 *De Cuyper* [2006] ECR I-6947, para. 39.

<sup>(462)</sup> Case C-406/04 *De Cuyper* [2006] ECR I-6947, para. 40.

<sup>(463)</sup> See also F. Warnecke, *Koordinierendes Arbeitsförderungsrecht und Freizügigkeit* [Coordinating laws promoting work and freedom of movement], Baden-Baden, Nomos, 1995, p. 25 et seq.

<sup>(464)</sup> On the importance of the territorial principle in international social law, see M. Fuchs and U. Preis, *Sozialversicherungsrecht* [Social security law], Cologne, Otto Schmidt Publishers, second edition, 2009, Section 61 II.

<sup>(465)</sup> See the differentiation between the export and integration principle, cf. R. Langer, in M. Fuchs (ed.), *Europäisches Sozialrecht* [European social law], Baden-Baden, Nomos, fourth edition, 2005, Article 42 EC para. 20 et seq.

frequently criticised<sup>(466)</sup>. In particular, the extension of the three-month deadline is favoured<sup>(467)</sup>. In the restructuring of coordination legislation by Regulation (EC) No 883/2004, an extension has also been considered. However, the proposals have received only a limited hearing with the legislative regulatory authorities<sup>(468)</sup>.

In this context, the question to be raised is whether the coordination provisions of Article 67 et seq. of Regulation (EEC) No 1408/71 satisfy the conditions of the provisions on the freedom of movement of workers (Article 39 et seq. EC). With justification it is repeatedly shown that coordinating European social legislation represents an annex institution for the freedom of movement of workers. A German author has therefore coined the phrase of freedom-of-movement specific social legislation<sup>(469)</sup>. And the fact that the basis for authorisation of the Community's legal acts in the area of social security coordination is contained in Article 42 EC shows the systematic link with the legislation of the free movement of workers. This is why the criticism of the existing coordination regulations for unemployment benefits by the authors concerned is also presented from the perspective of a lack of respect for freedom of movement. This criticism is not only directed against Article 69, but also against the provisions of Article 67(3) of Regulation (EEC) No 1408/71<sup>(470)</sup>. The CJ had already had to deal with such arguments at an early stage. An indication of the CJ's position is provided by the decision in

the *Testa* case<sup>(471)</sup>. The CJ points out<sup>(472)</sup> that Article 69 of Regulation (EEC) No 1408/71 describes a regulation promoting the freedom of movement partially overcoming the territorial arrangement of national legislation relating to the freedom of movement<sup>(473)</sup>. The basic right to live in another Member State is conceded to the worker, in order to find employment there and still retain unemployment benefits. That Article 69(2) limits this right to freedom of movement to a certain period of time and makes it dependent on the fulfilment of certain conditions is acceptable. Article 42 EC does not prohibit the Community legislator from making benefits conceded for the realisation of the freedom of movement of workers dependent on conditions and from establishing their limits. In later decisions, the CJ emphasised this legal concept<sup>(474)</sup>. Rightly, therefore, the talk has been of established case-law on the part of the CJ, with which it has judged the compatibility of the coordination rules of unemployment benefits<sup>(475)</sup>.

Against this backdrop it appears incomprehensible how, despite this established case-law, the CJ could contemplate a violation of Article 18 EC in the *De Cuyper* case. The methodical approach of the CJ is to be rejected for two different reasons. The rules concerning the freedom of movement of workers (Article 39 et seq. EC) are *lex specialis* in comparison with the specific EU freedom of movement regulations. It has been emphasised with justification that the legally protected good of Article 18 is the freedom of the person as such, and not the mobility of production factors and economic funding agencies. Therefore the right of Article 18 EC prevails if the citizen of the Union wishes to relocate and establish him/herself without economic objectives within the EU. Insofar as this freedom of movement

<sup>(466)</sup> See, for example, the contributions to the discussion from E. Eichenhofer and A. Gagel in: B. Schulte and H. Zacher (eds), *Wechselwirkungen zwischen dem Europäischen Sozialrecht und dem Sozialrecht der Bundesrepublik Deutschland* [Correlations between European social law and the social law of the Federal Republic of Germany], Berlin, Duncker and Humblot, 1991, p. 189 et seq.

<sup>(467)</sup> The proposal was also submitted by the Commission; see. B. Karl, 'Neuerungen in der Koordinierung des europäischen Arbeitslosenversicherungsrechts' [Innovations in the coordination of European unemployment insurance law], in: F. Marhold (ed.), *Das neue Sozialrecht der EU* [The new social law of the EU], Vienna, Linde, 2005, p. 47.

<sup>(468)</sup> Cf. Article 64 of Regulation (EC) No 883/2004 (extension option to six months).

<sup>(469)</sup> Cf. R. Schuler, *Das Internationale Sozialrecht der Bundesrepublik Deutschland* [International social law of the Federal Republic of Germany], Baden-Baden, Nomos, 1988, p. 277.

<sup>(470)</sup> E. Eichenhofer, 'Freizügigkeit und Europäisches Arbeitsförderungsrecht' [Freedom of movement and European laws promoting labour], ZIAS, 1991, p. 161 et seq.

<sup>(471)</sup> Case C-41/79 *Testa* [1980] ECR 1979.

<sup>(472)</sup> As previously in Case C-139/78 *Coccioli* [1979] ECR 991.

<sup>(473)</sup> Case C-41/79 *Testa* [1980] ECR 1979, para. 17 et seq.

<sup>(474)</sup> See Case C-272/90 *van Noorden* [1991] ECR I-2543; Case C-62/71 *Gray* [1992] ECR I-2737; Case C-215/00 *Rydergard* [2002] ECR I-1817.

<sup>(475)</sup> Cf. E. Eichenhofer, *Sozialrecht der Europäischen Union* [Social law in the European Union], Berlin, Erich Schmidt Publishers, third edition, 2006, p. 161.

and residence is exercised for economic reasons, the provisions concerning the worker's freedom of movement, establishment and entitlement to services are relevant as special norms<sup>(476)</sup>. Article 18 EC should therefore not have been used as a benchmark at all.

However, if one wishes to implement Article 18 EC, it is necessary to test the right of the freedom of movement established therein in a stricter application of the wording of Article 18. Article 18(1) EC puts the right to freedom of movement under the express proviso of the restrictions and conditions provided in this agreement and in the implementation rules. Indisputably, these include Article 42 EC and Regulation (EEC) No 1408/71 enacted on this basis. As Regulation (EEC) No 1408/71 — as emphasised by the CJ itself — expressly regards the coordination legislation of unemployment benefits to be in harmony with EC legislation, it is unequivocally clarified that a citizen of the Union is not entitled to a more far-reaching right arising from Article 18(1) EC.

This is not to say that the conditions that limit the freedom of movement, be they national laws or Regulation (EEC) No 1408/71, would not have been amenable to examination according to the benchmark of Article 39 et seq. EC. As has already been demonstrated several times in this paper, the law on the coordination of social security is a component of the law on the freedom of movement of workers of Article 39 et seq. EC. Accordingly it must also safeguard its inherent cohesion with this area of regulation. Therefore it is possible to ask whether Regulation (EEC) No 1408/71<sup>(477)</sup> has made appropriate use of the authorisation in Article 42 EC<sup>(478)</sup>.

<sup>(476)</sup> As applicable: A. Hatje in J. Schwarze (ed.), EU-Kommentar [Commentary], second edition, 2009, Article 18 ECG, para. 18; W. Kluth in C. Callies and M. Ruffert, EUV/EGV, Munich, C.H. Beck Publishers, third edition, 2007, Article 18 EC, para. 16; and also C. Becker, 'Freizügigkeit in der EU. Auf dem Weg vom Begleitrecht zur Bürgerfreiheit' EuR, 1999, 522, 532.

<sup>(477)</sup> Naturally the same applies to the draft Regulation (EC) No 883/2004.

<sup>(478)</sup> One of the best-known examples of such an examination describes the decision of the CJ in the case of Vougioukas: Case C-443/93 Vougioukas [1995] ECR I-4033.

In the *Petersen* case, the CJ did not test the law of coordination of unemployment benefits, as it is established in Regulation (EEC) No 1408/71, according to the benchmark of Article 39, but the domicile clause of Austrian legislation. The CJ reasoning for this was as follows<sup>(479)</sup>. It is established that Article 10(1) of Regulation (EEC) No 1408/71 does not provide for the export of unemployment benefits. The conditions for the export of benefits according to Article 69 and 71 of Regulation (EEC) No 1408/71 would not have existed. At this point the CJ abandons the reasoning for legal coordination and turns to the examination of the domicile clause according to Austrian law. Regulation (EEC) No 1408/71 is said not to have created a common social security system but to have allowed individual national systems to exist and wanted to coordinate the national systems. In the absence of harmonisation at Community level, Member States therefore continued to be responsible for the structuring of their social security systems. However, at the same time they had to consider Community legislation and in particular the EC provisions on the freedom of movement of workers. The objective pursued under Article 39 to 42 EC would not have been achieved if workers who have made use of their right to the freedom of movement were to lose social security entitlements guaranteed to them by the legal provisions of a Member State, in particular if these entitlements represent payment in return for the contributions they have paid. Such a consequence could actually deter Community workers from making use of their right to freedom of movement, and thus impair this freedom.

Thus the CJ arrives at an examination of the residency requirement according to Austrian law. In this, the CJ sees a veiled form of discrimination within the meaning of Article 39(2) EC, in which objective justification is absent, and for which in particular the Austrian government cannot provide any reasons for justification. This result can be accepted, but not the justification. Firstly, an

<sup>(479)</sup> See the CJ chain of argument in Case C-228/07 *Petersen* [2008] ECR I-6989, para. 37 et seq.

examination would have been necessary to see whether Article 69 also permitted payment of the claimant's benefit in Germany. Under the preconditions stated in Article 69(1), the applicant would also have been entitled to cash benefits in Germany for at least three months. The fact that the applicant has not only resided in Germany, but has also taken up his place of residence, does not exclude the implementation of Article 69 of Regulation (EEC) No 1408/71<sup>(480)</sup>. As the applicant was already registered as a job-seeker with the employment service four weeks after the start of unemployment and had been available for work, the only remaining issue could have been that of registration with the employment service in Germany. It can only be assumed that the applicant failed to do this. However, under Austrian law, it was not a question of availability, willingness or readiness to work at all. But compliance with Article 69(1)(b) of Regulation (EEC) No 1408/71 cannot be reasonably required either. This result could have been obtained on the basis of a simple interpretation. Such an interpretation would certainly have been called for by virtue of Article 39 EC. EC legal provisions must also be set out in the light of fundamental freedoms. In order to insist on the domicile requirement in this case would be an interpretation of Article 69 contrary to the freedom of movement, which would be justified by nothing. Consequently, for the first three months in any case, the entitlement to benefits in Germany would have had to be affirmed at the level of coordination legislation.

In relation to the time restriction of three months laid down in (c), the same reasoning must apply. As long as the benefit from the pension scheme is not paid, payment of unemployment benefit must continue.

One may argue against this solution that as a result it amounts to the same thing. The solution process favoured here relies on the consideration that it is

<sup>(480)</sup> As applicable: E. Eichenhofer in M. Fuchs (ed.), *Europäisches Sozialrecht* [European social law], Baden-Baden, Nomos, 4. Vol. 2005, Article 69, para. 2.

not acceptable to cancel the clear criteria of the exportability of unemployment benefits, as these are expressed in Article 69 et seq. of Regulation (EEC) No 1408/71, so as to impose different solutions on national legislation by applying the freedom of movement regulation.

### III. ACTIVE LABOUR MARKET POLICIES

In the second half of the 1990s, there was an initially theoretical and then practical reorientation of state intervention in the labour market. The new concepts were generally grouped together under the name active labour market policies. These new labour market policy concepts also forced a reorientation of unemployment benefits. The main ideas behind this development must therefore be outlined below and its impact on the form taken by unemployment benefits pointed out. In light of this, it will then also be possible to examine the relevance of this for European coordination law.

Particularly in this regard, the first question must be what the old labour market policies looked like and what impact they had on the form taken by unemployment benefits. The old way of thinking could be labelled 'passive labour market policies'<sup>(481)</sup>. Occasionally, the term 'passive unemployment benefits' is used<sup>(482)</sup>. The old approach and its realisation in the law in terms of the codification of the preconditions and contents of unemployment benefits are characterised by limitation to situations where there is no employment relationship and the claimant is available, which preconditions mean that benefits in kind are automatically awarded if the insurance requirements are met. This statement does not take account of the fact that, in the past, too, there were supplementary support measures in all the Member

<sup>(481)</sup> Cf. J. R. Shackleton, 'Britain's labor market under the Blair governments', *Journal of Labor Research*, 2007, 445 (469).

<sup>(482)</sup> Cf., for example, J. Münder, 'Das SGB III. Die Grundsicherung für Arbeitsuchende' [The German Social Security Code (SGB), Vol. III — basic social security for job-seekers], *Neue Juristische Wochenschrift* [periodical], 2004, 3209 (3210).

States of the EU, albeit at differing intensities, to enable those affected to reintegrate into the labour market. There were two decisive developments for this change of course, and they will be described below. They are the strategies for European employment policy and the formulation of a 'New Deal' in the labour market in the United Kingdom.

### A. European employment policy

In the mid-1990s, growing mass unemployment in Europe gave European Heads of State or Government cause to put employment policy right at the top of their list of priorities<sup>(483)</sup>. These efforts culminated in the new Title VIII on employment (Articles 125–130 EC) in the Treaty of Amsterdam<sup>(484)</sup>. The laying down of employment policy guidelines (Article 128 EC) is of particular significance when it comes to discussing this area. Even before the entry into force of the Treaty of Amsterdam, the European Council agreed the first employment policy guidelines in Luxembourg in 1997<sup>(485)</sup>. Employment policy has since been buttressed by four pillars: improving employability, developing entrepreneurship, encouraging adaptability of businesses and their employees, and strengthening the policies for equal opportunities. In 2003 there was a revision and rewriting of the guidelines<sup>(486)</sup>. Guideline 1 initially discusses active and preventive measures for the unemployed and inactive. In the title, the Member States are called upon to ensure that, at an early stage of their unemployment, all job-seekers benefit from an early identification of their needs and from services such as advice and guidance, job-search assistance and personalised action plans. Based on the above identification, they must offer job-seekers access to effective and efficient measures to enhance their employability and chances of integration, with special attention given to people

<sup>(483)</sup> In this regard, see C. Barnard, *EC employment law*, Oxford, Oxford University Press, third edition, 2006, p. 105 et seq.

<sup>(484)</sup> In this regard see E. Eichenhofer, *Geschichte des Sozialstaats in Europa* [History of the social state in Europe], Munich, C.H. Beck Publishers, 2007, p. 90 et seq.

<sup>(485)</sup> See OJ C 30, 28.1.1998, p. 1.

<sup>(486)</sup> OJ L 197, 5.8.2003, p. 13.

facing the greatest difficulties on the labour market. The Member States are to ensure that every unemployed person is offered assistance before reaching six months of unemployment in the case of young people and 12 months of unemployment in the case of adults in the form of training, retraining, work training, a job or other employability measure, combined, where appropriate, with ongoing job-search assistance. The original concept has been updated via the integrated guidelines for growth and employment (2005–08)<sup>(487)</sup> and the new guidelines for the employment policies of the Member States.

### B. The new welfare approach in the United Kingdom

Following its change of government in 1997, the UK launched a fundamentally new reform concept in social policy, which was given the title of the New Deal, reminiscent of the reform era of US President Franklin D. Roosevelt<sup>(488)</sup>. In the change-over to the new policy, the striking thing is the change from the question 'What money can we pay you?' to the question 'How can we help you become more independent?'<sup>(489)</sup>.

This journey 'from welfare to work' focuses on attaching responsibilities to rights<sup>(490)</sup>. As far as the labour market policy component of this new socio-political direction is concerned, the main focus is on the active role of those previously provided with passive benefits. This is necessarily reflected in the shaping of the conditions for receiving unemployment benefit. This can be clearly seen in unemployment benefit that is

<sup>(487)</sup> COM(2005) 141 final.

<sup>(488)</sup> See *A new deal for welfare: Empowering people to work*, 1998. For the theoretical basis of the new policy, see A. Giddens, *The Third Way*, Oxford, Blackwell Publishers, 1998, p. 99 et seq.

<sup>(489)</sup> *A new contract for welfare: Principles into practice*, DSS, Cm 4101, 1998, p. 9. Compare, in this regard, K. Puttick, '2020: A welfare odyssey. A commentary on principles into practice and the Reform Programme', *Industrial Law Journal*, 1999, p. 190 et seq.

<sup>(490)</sup> See *A new deal for welfare: Empowering people to work*, 1998, iv. 'Our approach has been based on the principle that the best welfare policy of all is work and throughout this process of reform we have sought to match rights with responsibilities.'

contribution-independent and income-based<sup>(491)</sup>. In comparison with the customary criteria for eligibility to draw unemployment benefits, there are now two new crucial elements: claimants must actively look for work and they must have signed a ‘job-seeker’s agreement’ with the competent authority setting out what specific steps are to be taken to get back into employment. At the same time, the government set up a large number of programmes to accompany this process with education and training measures and job creation<sup>(492)</sup>.

It is significant that the UK government placed particular emphasis on involving the disabled in the labour market. For that reason, it redesigned invalidity benefit. The background to this must be regarded as being, above all, that the number of people receiving this benefit had increased dramatically (from 700 000 in 1970 to 2 700 000 in 1998). The most recent stage of development marks the introduction of an ‘employment and support allowance’ (ESA) in 2008<sup>(493)</sup>. A key precondition for receiving this benefit is a health condition or disability on the part of the claimant that would make it unreasonable to expect them to work at the time of the claim. A work capability assessment is carried out in order to determine the potential of the person in question to work — even if in a limited capacity. On the basis of that health assessment, a detailed interview is held with the applicant in which his/her options are worked out. An action plan is then drawn up on the basis of the results. If an applicant refuses to participate in this process, the benefit is stopped. The plan is used to come up with different types of education, training or an occupation that are applicable. There are two types of ESA: contributory and income-related allowances, the latter of which is dependent on the claimant’s financial circumstances. All comparable existing benefits have been abolished (subject to transitional arrangements).

<sup>(491)</sup> Income-based job-seekers’ allowance, on the details: Wikeley, Ogus and Barendt’s, *The Law of social security*, London, Butterworth, fifth edition, 2002, p. 336 et seq.

<sup>(492)</sup> On these activities, see Shackleton, ‘Britain’s labor market under the Blair governments’, *Journal of Labor Research*, 2007, 445 (469).

<sup>(493)</sup> The Employment and Support Allowance Regulations 2008 (No 794).

## C. Active labour market policy benefits in Germany

The impetus generated by European employment policy, but also quite fundamentally by the New Deal policy launched in the UK, changed the landscape of labour market policy throughout Europe, albeit differently in different countries<sup>(494)</sup>. The most recent legislation in Germany is described below. Germany has operated a consistent active labour market policy and formed its unemployment benefits entirely in line with the ideas set out above. Knowledge of this range of benefits, then, will help us formulate the questions and problems that occur, and must be solved, within the framework of the coordination of European social law. We are using the German regulations here merely as illustrative examples. Where there are comparable regulations in other countries, similar problems are faced, and the answers that we need to find must be able to be generalised.

Since the late 1990s, Germany has been following a clear course in terms of active labour market policies. The traditional concept of unemployment protection through transfer benefits was not abolished in the light of a growing shortage of public funds and limited taxation capacities, but it was clearly rolled back. The ideas from the UK, referred to in Germany as the activating social state<sup>(495)</sup>, were brought up more and more in the political debate and then found their way into the legislation<sup>(496)</sup>. The first visible sign was the reform of the jobs’ promotion law in 1997. All the jobs’ promotion benefits

<sup>(494)</sup> On the different strategies and contents of active labour market policies in European countries, see J. Kluwe et al., *Active labor market policies in Europe. Performance and perspectives*, Berlin Heidelberg, Springer, 2007; W. Eichhorst and O. Kaufmann (eds), *Bringing the jobless into work? Experiences with activation schemes in Europe and the US*, Berlin Heidelberg, Springer, 2008.

<sup>(495)</sup> On the terminology, see M. Galuske and T. Rietzke, ‘Aktivierung und Ausgrenzung. Aktivierender Sozialstaat’ [Activation and exclusion. The activating social state], in: R. Anhorn, F. Bettinger and J. Stehr (eds), *Sozialer Ausschluss und Soziale Arbeit* [Social exclusion and social work], Wiesbaden, Verlag für Sozialwissenschaften, second edition, 2008, p. 399.

<sup>(496)</sup> See, on this point, W. Spellbrink, ‘Ist die Beitragspflicht in der gesetzlichen Arbeitslosenversicherung verfassungsrechtlich noch zu rechtfertigen?’ [Can the obligation to make contributions to statutory unemployment insurance still be justified?], *Juristenzeitung* [legal periodical] 2004, p. 538 et seq.



are listed in Section 3(1) of the German Social Security Code (*SGB*), Volume III<sup>(497)</sup>. The act specifically uses the term active jobs' promotion benefits. These are all jobs' promotion benefits with the exception of unemployment benefit, partial unemployment benefit and insolvency benefit (Section 3(4) of the *SGB*, Volume III). Section 5 of the *SGB*, Volume III, regulates active jobs' promotion. Benefits under active jobs' promotion should be implemented in such a way that benefits that would otherwise be necessary to replace wages or salaries in the event of unemployment are avoided on a more than temporary basis and the occurrence of long-term unemployment can be prevented. With effect from 1 January 2005, a second jobs' promotion system has been provided for under German law, known as 'basic social security for job-seekers' and incorporated in the *SGB*, Volume II<sup>(498)</sup>. The basic social security for job-seekers comprises benefits designed to end or reduce dependence on benefits, in particular through integration:

- into work, and
- to protect people's livelihoods.

Claims to these benefits are regulated under Section 7 of the *SGB*, Volume II. Claimants must be aged 15–65<sup>(499)</sup>, fit for employment, without means and ordinarily resident in Germany. This means that the benefits are non-contributory, but their award is income- and means-dependent<sup>(500)</sup>. It is also necessary to fall back on maintenance claims under certain conditions. The benefits under the *SGB*, Volume II, are of a subsidiary nature. Wherever there are legal provisions relating to other social security institutions, these take priority. This principle does not apply, however — with exceptions — in relation to those benefits under the *SGB*, Volume III. Benefits

under Volume III cannot, in principle, be granted to people as referred to in Volume II.

The new system is characterised by the principle of requirement and promotion (Sections 2 and 14, *SGB*, Volume II). Any persons who are fit for employment and without means must play an active role in all the measures intended to reintegrate them into the workforce, and must, in particular, sign an integration agreement. They must take whatever work is offered them on the labour market. Failure to do this results in sanctions that extend as far as withdrawal of the benefit. The principle of promotion means that the competent social security institution must provide comprehensive assistance to the person without means in order to integrate them into the workforce. For this purpose, the competent agency for work must nominate a personal contact for each person without means who is capable of work. The benefits aimed at integration into the workforce largely correspond to the measures provided for under the *SGB*, Volume III. A benefit known as 'Unemployment benefit II' is designed to act as a benefit in cash to protect a person's livelihood<sup>(501)</sup>. For a single person, the provision is for a monthly payment of EUR 345. This amount can be increased, however, under a range of circumstances, and claimants' reasonable accommodation costs (including heating) are also paid. If a person without means who is capable of work claims 'Unemployment benefit II' within two years of ceasing to claim unemployment benefit<sup>(502)</sup>, he/she will receive a monthly supplement to the 'Unemployment benefit II' during this period<sup>(503)</sup>.

It is evident from the description that a twin system of jobs' promotion has arisen in Germany. In basic terms, one part of the system is open to employees who have hitherto been in the labour market,

<sup>(497)</sup> Volume III of the German Social Security Code (*SGB*) is the volume of the *SGB* from which jobs' promotion takes its basis.

<sup>(498)</sup> On this point, see J. Munder, 'Die Grundsicherung fur Arbeitsuchende' [Basic social security for job-seekers], *Neue Juristische Wochenschrift* [periodical], 2004, p. 3209 et seq.

<sup>(499)</sup> The upper age limit will be raised along with the raising of the age limit for pension insurance.

<sup>(500)</sup> On the account to be taken of income and means, see Sections 11 et seq. of German Social Security Code (*SGB*), Vol. II.

<sup>(501)</sup> Section 19 of the German Social Security Code (*SGB*), Vol. II. The term 'unemployment benefit II' is to be seen in the context of the basic, contributory unemployment benefit ('unemployment benefit I') under Vol. III of the *SGB*.

<sup>(502)</sup> I.e. the benefit pursuant to German Social Security Code (*SGB*), Vol. III.

<sup>(503)</sup> For the details, see Section 24 of the German Social Security Code (*SGB*), Vol. II.

and have therefore also paid their contributions to unemployment insurance, but have now become unemployed. Those who do not meet this condition (i.e. have not paid enough social security contributions or have not been in work at all) are subject to an income- and means-dependent benefit system.

A differentiation of this nature within jobs' promotion law is also current in many other EU Member States<sup>(504)</sup>. The consequences of such differentiated active jobs' promotion systems for the law of European social law coordination will be examined below.

Section 8 of the *SGB*, Volume III, defines the term 'ability to work' by saying that an ability to work does exist, despite illness or disability, if the person in question is capable of working for at least three hours per day<sup>(505)</sup>. The parallels with developments in the United Kingdom are unmistakable. Legislators have consciously chosen such a broad definition of ability to work in order to facilitate participation in integration benefits for everyone who is not completely incapacitated, thereby also providing them with the possibility of integration into working life<sup>(506)</sup>. The notion of labour market integration and the broadest possible tapping of working potential is thus the main aim of this regulation.

#### IV. CONSEQUENCES FOR COORDINATION LAW

The revised concepts in labour market policy, the development of an active labour market policy, have, as shown above, influenced unemployment benefits law quite considerably. That certainly does not mean that we must assume a completely changed legal backdrop for benefit systems. Many structural elements in the national benefit systems

have been retained, but reinforced. For such areas, coordination operates in the established ways. There are additional unemployment benefits, however, that represent a new picture in comparison with traditional forms of protection when it comes to conditions. These, too, must be incorporated into the existing coordination system under Regulation (EEC) No 1408/71, as the old standards still exist, while Regulation (EC) No 883/2004, too, has not led to any fundamental changes to the body of EU law. In light of this, it may make sense, below, to keep the different sets of benefit separate and to carry out an evaluation in relation to coordination law.

##### A. Contributory benefits in cash and in kind

This is the classical area, if you will, for unemployment benefits. Under national law, an entitlement is usually attained by being a member of, and thus paying contributions to, an unemployment insurance scheme. The benefits in question, primarily, are income replacement benefits. This is the basis of the CJ's formula, according to which a benefit is assigned to the risk of unemployment within the meaning of Article 4(1)(g) of Regulation (EEC) No 1408/71 if it is designed to replace the pay lost as a result of unemployment and is thus meant to provide the livelihood of the unemployed worker.

The same applies to benefits in kind and services. This applies to all conceivable offers of education and training designed to give the unemployed knowledge and skills to enable them to go back into the labour market. As this benefits' area has expanded considerably in the course of the development and acceleration of active labour market policies, it is also likely to grow in significance for coordination in future. Two problem areas could result from this. One of these is delineating where unemployment benefits stop and invalidity benefits<sup>(507)</sup> start. As these types of benefit are subject to different coordination rules in relation to exportability, where

<sup>(504)</sup> In this regard, see the contributions in I. Lødemel and H. Trickey (eds), *An offer you can't refuse*, Bristol, The Policy Press, 2001.

<sup>(505)</sup> This time-limit corresponds to that used for the definition of total incapacity in pensions' insurance.

<sup>(506)</sup> Cf. the explanatory statement to the Act of BT-Druck [German Parliament Publications], 15/5235, p. 4.

<sup>(507)</sup> Taken as a general term for all forms of incapacity.

this line is drawn is significant. Since the Member States — not least having been encouraged to do so by the EU's employment policy guidelines — are seeking to better integrate the disabled or those with limited performance capability into the labour market, we can expect more benefits to be codified that exhibit elements of both invalidity and unemployment protection. In the *Petersen* case, the CJ provided methodical guidance on how to delimit these areas. The formula is as follows: social security benefits must be regarded, irrespective of the characteristics peculiar to different national legal systems, as being of the same kind when their purpose and object as well as the basis on which they are calculated and the conditions for granting them are identical. On the other hand, characteristics which are purely formal must not be considered relevant criteria for the classification of the benefits<sup>(508)</sup>. In order to be able to apply these criteria, it must be possible — as shown above<sup>(509)</sup> — to assume a type of invalidity benefits for invalidity or unemployment, as appropriate. This type is based on characteristics that are usually independent of country-specific peculiarities in the legal arrangements in the Member States. The term invalidity, which is not defined in Regulation (EEC) No 1408/71, needs to be determined in the specific context of employment. Invalidity benefits must thus have a relation to ability to work<sup>(510)</sup>. Invalidity can be seen as the risk of a permanent or at least long-term reduction in, or ending of, the ability to work as a result of an impairment of physical or mental health, which is routinely and typically associated with a reduction in income requiring compensation<sup>(511)</sup>. Accordingly, it is possible to say that an invalidity benefit obtains where the benefit in question is a benefit in cash that is supposed to compensate for a loss of income resulting from the inability of the person in question to earn income due to his/her ability to work

being lost or had restricted, while the amount of the benefit is determined according to the usual bases of calculation for invalidity benefits. The same kind of formula can be applied to unemployment benefits. The benefits in question must be ones that aim to compensate for the loss of income essentially resulting from unemployment, in other words from the lack of a suitable job for the person in question, those that seek to cover the loss of livelihood and those benefits that exhibit the typical elements of unemployment benefit in terms of conditions and calculation. The fact that the unemployment may also be influenced by the presence of a physically or mentally restricted ability to work does not in itself mean that a benefit takes on the character of an unemployment benefit. The crucial thing is that the benefit aims to overcome unemployment. From the point of view of coordination law, a benefit is regarded as an unemployment benefit if it not only seeks to compensate for a loss of income (the invalidity or incapacity benefits also do this) but also pursues the objective of more or less comprehensive integration into the labour market. In light of this, the objective of active labour market policies needs to also be implemented in coordination law. Active labour market policy benefits do not seek to ignore impairments to the ability to work but they do aim to avoid perpetuating such states of affairs through passive benefits. Rather, the aim is to fully exploit the working potential of the person in question with the goal of putting that potential to use in the labour market or as part of a similar activity. This means that typical elements of the conditions for benefits such as availability can be toned down or even done without in individual cases, as is the case in many countries for the more mature unemployed. The judgments in the *De Cuyper* and *Petersen* cases should be seen in this light. The crucial thing is that the goal of labour market integration has not been abandoned. Since active labour market policy measures emphasis self-initiative and personal responsibility, and since they lay these down legally in the form of integration agreements, the component of taking account of the labour market can certainly be easily shown.

<sup>(508)</sup> Case C-228/07 *Petersen* [2008] ECR I-6989, para. 21.

<sup>(509)</sup> IIA.

<sup>(510)</sup> Cf. Case 14/72 *Heinze* [1972] 1105; Case 818/79 *AOK Mittelfranken* [1980] 2729.

<sup>(511)</sup> As defined by R. Schuler in M. Fuchs (ed.), *Europäisches Sozialrecht* [European social law], Baden-Baden, Nomos, fourth edition, 2005, preliminary note to Article 37, point 3.

The same principles must apply when it comes to benefits in kind and services. If the primary focus of a measure is restoring the ability to work by improving the state of health (a ‘rehabilitation measure’), the measure is then regarded as an invalidity benefit<sup>(512)</sup>. If, on the other hand, despite physical disabilities, a measure focuses on acquisition or improvement of the skills to perform a particular activity, with the aim being a very specific effort relating to jobs, the measure in question is regarded as an unemployment benefit.

There are particular problems when it comes to guidelines relating to support measures<sup>(513)</sup>. Let us imagine that a provision in Member State A provides a financial allowance where an affected person allows a suitability test to be carried out and successfully completes a training course. After the benefit has been granted, the claimant decides not to take that specific training course but instead to take a similar training course in Member State B. Should benefits in cash of this nature be subject to export pursuant to Article 69 of Regulation (EEC) No 1408/71? What happens if there are no penalties in place in Member State B in the event of the person failing to complete the course? A number of questions arise here, especially of an administrative nature. Can the Member States restrict award of the benefit to people following such courses within that state? It is not possible, in this article, to conclusively clear up the many questions in this area. However, coordination law, too, must take account of the concerns and the particularities of active labour market policies. Active labour market policies aim to tie up (‘passive’) benefits in cash with the (‘active’) involvement of benefit claimants. This linkage must not be put in question by benefit claimants being involved in the support measures of another EU Member State whilst retaining the benefit in cash of the first state (by exporting the benefit). There is a need to ensure that the intentions of the country of origin

<sup>(512)</sup> In this regard, see R. Schuler in M. Fuchs (ed.), *Europäisches Sozialrecht* [European social law], Baden-Baden, Nomos, fourth edition, 2005, preliminary note to Article 37, point 7.

<sup>(513)</sup> On this problem, see also Y. Jorens and J. Hajdú, *Tress — European Report 2007*, p. 97 et seq.

and its penalty mechanisms relating to a given support measure are not rendered ineffective. Whether these problems can be solved on an administrative basis is uncertain. As long as these problems remain unsolved, however, the export of benefits in cash is not something that should be endorsed.

The second problem area results from the fact that active labour market policies — as demonstrated above — place great emphasis on preventative measures. This takes us into the problematic minefield highlighted by the CJ’s judgment in the *Campana* case. If the principles of the said judgment are applied, it is determined that preventative measures, too, fall within the scope of Article 4(1)(g) of Regulation (EEC) No 1408/71. For workers still in some form of employment, unemployment benefits can only be of issue where there is a tangible risk of becoming unemployed.

Since the *Campana* case related to a German case, German commentators have been particularly preoccupied with the issues involved here<sup>(514)</sup>. A considerable number of authors follow the line taken in the reference for a preliminary ruling from the German Federal Social Court (BSG), which does not regard preventative benefits as unemployment benefits, calling on the background to the creation of the regulation in so doing<sup>(515)</sup>. The critical objection that what is at issue is a tricky-to-administer delimitation issue, likewise, should not be dismissed out of hand<sup>(516)</sup>. Authors seeking to exclude preventative measures also predominantly bring up the fact that support measures of this nature should be regarded as an expression of national labour market and employment policy. In view of the decision of the CJ in the *Campana* case, such views have no claim to legitimacy. The CJ’s decision

<sup>(514)</sup> U. Rönnsberg, *Die gemeinschaftsrechtliche Koordinierung von Leistungen bei Arbeitslosigkeit. Die Verordnung (EWG) No 1408/71 und ihre Reformbedürftigkeit* [The coordination of unemployment benefits under Community law. Regulation (EEC) No 1408/71 and the need for reform], Herbolzheim, Centaurus, 2006, p. 106 et seq. with many references to the literature.

<sup>(515)</sup> See BSG, 15 October 1985 — 11 b/7 RAr 95/84 SGB 1986, 214.

<sup>(516)</sup> G. Haverkate and S. Huster, *Europäisches Sozialrecht* [European social law], Baden-Baden, Nomos, 1999, para. 292.

to be geared towards the tangible risk of unemployment, however, gives rise to a dramatic reduction in the number of cases of application.

## B. Non-contributory benefits

The most recent developments in active labour market policies, which have been demonstrated, for example, through the new forms of benefit and benefit systems in the United Kingdom and Germany, make clear that national labour market policies are now making greater efforts to cater for the large number of unemployed people who do not fall under the protective umbrella normally provided as a result of being a member of a contributory unemployment insurance scheme. The simple fact that a benefit is not based on a contributory payment does not, at present, remove it from the scope of Regulation (EEC) No 1408/71, as is made plain by Article 4(2) of the said regulation. Since the abovementioned examples in the UK and Germany are, however, simultaneously benefits that are income- and means-dependent, there is the problem of delimitation from social assistance, to which the regulation does not apply, pursuant to Article 4(4) of Regulation (EEC) No 1408/71. In this regard, Article 2(2a) of Regulation (EEC) No 1408/71 must also be taken into consideration, which extends the scope to cover special non-contributory cash benefits provided under legislation which, because of its personal scope, objectives and/or conditions for entitlement, has characteristics both of the social security legislation referred to in para. 1 and of social assistance. Under para. 2a's legal definition, they must meet the conditions laid down therein, which means they must be intended to provide either supplementary, substitute or ancillary cover against the risk of unemployment and guarantee the persons concerned a minimum subsistence income or only specific protection for the disabled, while the financing must be exclusively derived from compulsory taxation and the conditions for providing and for calculating the benefits cannot be dependent on any contribution in respect of the beneficiary. Furthermore, they must be listed in

Annex IIa. A glance at Annex IIa gives the impression that the Member States have tended to list their benefits in cash deriving from their active labour market policies<sup>(517)</sup>. In so doing, the Member States in question have bindingly laid down that these benefits must be included in coordination, even where, in individual cases, the benefits are strictly speaking measures of social assistance (Article 4(4) of Regulation (EEC) No 1408/71).

However, this leaves open the question of how to proceed in respect of benefits in kind and services relating to active labour market policies. An example of this, once again, would be the support measures connected with the basic social security for job-seekers under Volume II of the *SGB*. These benefits are only granted if the applicant is a person without means, in other words his/her income and means do not exceed a specific threshold and no maintenance claims can be realised against family members. These benefits can therefore only be included in coordination if they fall within the scope of Article 4(1)(g) of Regulation (EEC) No 1408/71. At this point, we have to fall back on the case-law of the CJ. The judgments in the *Hoeckx* and *Acciardi* cases referred to above are indicative. Taking account of other more recent judgments, in the *Petersen* case the CJ turned to the settled case-law once again and summed it up as follows: 'according to settled case-law, a benefit may be regarded as a social security benefit insofar as it is granted to the recipients, without any individual and discretionary assessment of personal needs, on the basis of a legally defined position and relates to one of the risks expressly listed in Article 4(1) of Regulation (EEC) No 1408/71'<sup>(518)</sup>. The rationale behind the judgment in the *Hoeckx* case was explicitly expounded above. The benefit under Belgian law in question in that case required beneficiaries to prove that they were available for work. That made it possible to affirm a relationship to the risk of unemployment. Since,

<sup>(517)</sup> On this point see the entries for the benefits in cash described above for Germany and the United Kingdom.

<sup>(518)</sup> Case C-228/07 *Petersen* [2008] ECR I-6989, para. 19, and the judgments listed there.

however, the granting of the benefit was very much determined by criteria of need, the CJ rejected the argument that this benefit had the character of a social assistance benefit. Where the granting of a benefit is dependent on an individual case assessment of the personal need of the applicant, which is characteristic of social assistance, it does not fall within the scope of Article 4(1) of Regulation (EEC) No 1408/71<sup>(519)</sup>.

### C. Coordination exclusion under residence law?

Article 24(1) of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of Member States lays down the principle of equal treatment, according to which all Union citizens residing on the basis of the directive in the territory of the host Member State must enjoy equal treatment with the nationals of that Member State. Article 24(2) of the said directive provides an exception, however. The host Member State is not obliged to confer entitlement to social assistance during the first three months of residence, or, where appropriate, the longer period provided for in Article 14(4)(b), to persons other than workers, self-employed persons, persons who retain such status and their families.

Germany made use of this option when it came to benefits under its basic social security for job-seekers (*SGB*, Volume II)<sup>(520)</sup>. Despite meeting the conditions in general, non-nationals and their family members who are in their first three months of their residence and non-nationals whose right to reside derives solely from their aim of job-seeking and their family members are excluded from the entitlement to benefits<sup>(521)</sup>. Under the wording of

the legislation, this includes citizens of other EC Member States.

There has been a wide variation in the literature in answering the question of whether this exclusion is effective<sup>(522)</sup>. One view represented is that Article 24(2), read in conjunction with Article 14(4) of Directive 2004/38/EC, is ineffective due to contravention of the prohibition on discrimination under Article 12, read in conjunction with Article 18 EC<sup>(523)</sup>. This argument is particularly based on the CJ's judgment in the *Collins* case<sup>(524)</sup>. In the said judgment the CJ stressed that, in view of the establishment of citizenship of the Union, it is no longer possible to exclude from the scope of Article 39(2) of the Treaty — which expresses the fundamental principle of equal treatment, guaranteed by Article 6 of the Treaty — a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State<sup>(525)</sup>. This question will certainly be decided by the CJ at some point. It should be noted that the *Collins* judgment was based on the old Directive 68/360/EEC. Directive 2004/38/EC strengthened the right of residence of EC citizens considerably. In particular, it severely restricts the possibilities for expelling people claiming social assistance. On the other hand, under Article 24 of Directive 2004/38/EC, the legitimate interests of the Member States are supposed to be met. On that basis, the restriction under Article 24(2) of that directive can be viewed as an objectively justified restriction of the right to the free movement of workers, as, on this basis, the Member States must be granted a legitimate right to maintain active labour market policy measures financed from taxation income in a financially

<sup>(519)</sup> Case C-78/91 Hughes [1992] ECR I-4839; Case C-66/92 Acciardi [1993] ECR 4567, para. 15.

<sup>(520)</sup> In this regard, see the Act implementing the European Union's directives on residence and asylum law of 19 August 2006 (Federal Law Gazette I, p. 1970) and the explanatory statement to the Act in BT-Druck [German Parliament Publications], 16/5065, p. 234.

<sup>(521)</sup> See Section 7(1)(2), points 1 and 2 of German Social Security Code (*SGB*), Vol. II.

<sup>(522)</sup> On the differing views see Spellbrink in Eicher and Spellbrink (eds), *SGB II. Grundsicherung für Arbeitssuchende* [German Social Security Code (*SGB*), Vol. II — basic social security for job-seekers], Munich, C.H. Beck Publishers, second edition, 2008, Section 7, para. 13 et seq.

<sup>(523)</sup> In this regard see F. Schreiber, 'Die Bedeutung des Gleichbehandlungsanspruchs aus Article 12 i.V.m. Article 18 EGV für Grundsicherungsleistungen (*SGB II* und *SGB XII*)' [The significance of the equal treatment requirement under Article 12, read in conjunction with Article 18, of the EC Treaty for basic social security benefits (German Social Security Code (*SGB*) Vols II and XII)], *ZESAR* 2006, 423, 430.

<sup>(524)</sup> Case C-138/02 Collins [2004] ECR I-2703.

<sup>(525)</sup> Paragraph 63 of the judgment.



transparent and feasible framework. Otherwise, such benefits could offer an incentive to move to countries with a relatively high level of benefits.

It should be clear, on the other hand, that national legislation based on Article 24(2) of Directive 2004/38/EC cannot override the rights under Regulation (EEC) No 1408/71. Given the principles of precedence in Community law, the latter rights must endure. Thus, insofar as the basic social security benefits are non-contributory cash benefits within the meaning of Article 4(2a) of Regulation (EEC) No 1408/71, they cannot be overridden by national legislation.

## V. SUMMARY

A change occurred in the second half of the 1990s in labour market policies from a passive benefits strategy to an approach of actively pushing

people back to work (work fare). These ideas were favoured at the European level by the European Council as well as in the wake of the change of government in the UK. The old model mirrors unemployment benefits as cash benefits, which are awarded in order to replace income lost and secure maintenance. It is small wonder that the CJ used both these elements to define the concept of benefits for unemployment within the meaning of Article 4 of Regulation (EEC) No 1408/71. Only in the *Campana* case did it deal with a specific form of active labour market measure. As more countries embarked on the road to active labour market policies, beside cash benefits benefits in kind grew in importance. And very often cash benefits and benefits in kind are linked to each other. This new situation poses manifold problems, problems of qualification of benefits, administrative problems and above all the problem of access of foreigners to these benefits and their export abroad.

# THE IMPACT OF ARTICLES 12, 18, 39 AND 43 OF THE EC TREATY ON THE COORDINATION OF SOCIAL SECURITY SYSTEMS <sup>(526)</sup>



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## I. INTRODUCTION

In this contribution we are going to analyse the way the interpretation by the Court of Justice (CJ) of the citizenship provisions, and the CJ's novel reinterpretation of the free movement rights, have affected social security systems, and in particular how they relate in a new way with the secondary legislation which coordinates national provisions concerning welfare benefits <sup>(527)</sup>.

However, before critically assessing the impact of the free movement provisions on the coordination of social security systems, and on access of welfare benefits more generally, it is first necessary to recall

the basic principles established by the case-law in relation to the free movement rights.

Since the 1970s, when the free movement provisions became directly effective, the CJ has elaborated a bi-partite test to establish the compatibility with Community law of national rules which are not directly discriminatory. First, a national rule must fall within the scope of the relevant Treaty provision; and second, it must be justified <sup>(528)</sup>. In order to be justified a rule must pursue a public interest compatible with Community law (and unless the rule is clearly protectionist this will always be the case); and it must be necessary and proportionate.

For practical purposes, the real test for assessing compatibility with Community law once a rule is found to fall within the scope of the free movement provisions is then the proportionality/necessity test. Whilst, in theory, it is for the national court to assess

<sup>(526)</sup> I am very grateful to Yves Jorens and Michael Couchier for having organised such a stimulating conference and to the participants of the conference for a lively discussion.

<sup>(527)</sup> There is an extensive body of literature on the effect of Union citizenship on welfare provision; e.g. G. de Búrca (ed.) *EU law and the welfare state* (OUP, 2005); M. Dougan and E. Spaventa (eds) *Social welfare and EU law* (Hart Publishing, 2005); A. Somek 'Solidarity decomposed: being and time in European citizenship' (2007), *European Law Review* 787.

<sup>(528)</sup> Consistent case-law, see, for example, Case 33/74 C. H. M. Van Bisbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid [1974] ECR 1299.

proportionality, the CJ often engages in such exercise. Since the assessment of proportionality is a powerful tool, in that it allows the judiciary to scrutinise the legitimacy of the way policy choices are pursued by the legislature, the CJ has been accused of pushing its own vision of the internal market at the expenses of (more legitimate) political choices exercised by the legislative institutions at national and European level. This criticism became stronger in the mid-1990s, following a considerable expansion of the definition of barrier to movement relevant to bring a factual situation within the scope of the Treaty<sup>(529)</sup>. As the scope of the Treaty expanded, so did the fields in which the CJ could scrutinise the proportionality of national rules and therefore become the final arbiter as to the legitimacy of national regulatory practices which, far from being discriminatory, sometimes reflected true political choices not only as to the level of regulation in the market, but also about the way public expenditure should be organised<sup>(530)</sup>.

The effects of the introduction of Union citizenship, which became apparent only in the late 1990s<sup>(531)</sup>, determined a further expansion of the scope of the Treaty: this time, however, the rules under scrutiny were not market rules and indeed many rules concerned access to welfare provision<sup>(532)</sup>; furthermore, some of the rules which came under scrutiny were the result of the correct implementation of secondary Community legislation, and therefore of political choices made at the highest level<sup>(533)</sup>. As a result

of this case-law, the CJ was then accused of ‘welfare engineering’, i.e. of attempting to create, single-handedly and with little political backing, a transnational welfare space where Union citizens would have to assume some responsibility for the fate of their fellow (non-national) Union citizens. This said, it is open to debate whether the case-law in the last decade is better conceptualised as a revolution or as simply an evolution which, even though it caught many by surprise, was consistent with the deeper integration necessary for encouraging, if not all together establishing, an ever closer union amongst the peoples of Europe<sup>(534)</sup>.

In this contribution I am going to look at the relevant case-law to assess the impact of the free movement and the citizenship provisions on social security coordination and access to welfare benefits. In particular, I am going to focus on the tension between the primary Treaty provisions, as interpreted by the CJ, and secondary legislation (in particular Regulation (EEC) No 1408/71 and Directive 2004/38/EC)<sup>(535)</sup>. I will address these problems thematically rather than historically or having regard to the subject matter. Two main themes emerge: the expansion of the scope of the Treaty through a ‘hermeneutic trick’; and the binary approach adopted by the CJ to expand the rights of individuals without challenging the legality of Community secondary legislation. Before addressing these issues, it is, however, worth recalling briefly the consequences of Union citizenship insofar as the application of the principle of non-discrimination on grounds of nationality is concerned.

<sup>(529)</sup> The move towards non-discriminatory barrier case-law was first visible in Case C-76/90 *M. Säger v Dennemeyer & Co. Ltd* [1991] ECR I-4221, in relation to the free movement of services; it was then extended to the freedom of establishment in Case C-55/94 *Gebhard v Consiglio dell’Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165; and to the free movement of workers in Case C-415/93 *Union Royal Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman* [1995] ECR I-4921.

<sup>(530)</sup> For example, the case-law on the possibility to claim reimbursement for healthcare received abroad, Case C-157/99 *B. S. M. Geraets-Smits v Stichting Ziekenfonds VGZ and Peerbooms v Stichting CZ Groep Zorgverzekeringen* [2001] ECR I-5473, and see more detail below.

<sup>(531)</sup> Starting from the ruling in Case C-85/96 *M. M. Martínez Sala v Freistaat Bayern* [1998] ECR I-2691.

<sup>(532)</sup> For example, Case C-85/96 *M. M. Martínez Sala v Freistaat Bayern* [1998] ECR I-2691; Case C-184/99 *R. Grzelczyk v Centre public d’aide social d’Ottignies-Louvain-la-Neuve* [2001] ECR I-6193.

<sup>(533)</sup> For example, Case C-413/99 *Baubast and R. v Secretary of State for the Home Department* [2002] ECR I-7091, in relation to the requirements to be satisfied by economically inactive citizens in order to gain a right of residence; Case C-209/03 *Bidar* [2005] ECR I-2119, in relation to access to maintenance loans; see more detail below.

<sup>(534)</sup> See preambles to the TEC and TEU.

<sup>(535)</sup> Council Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons ad to members of their families moving within the Community, as amended. Consolidated version [1997] (OJ L 28, 30.1.1997, p. 1; [http://www.europa.eu.int/eur-lex/en/consleg/pdf/1971/en\\_1971R1408\\_do\\_001.pdf](http://www.europa.eu.int/eur-lex/en/consleg/pdf/1971/en_1971R1408_do_001.pdf)); Regulation (EEC) No 1408/71 will be repealed once Regulation (EC) No 883/2004 on the coordination of social security systems [2004] (OJ L 166, 30.4.2004, p. 1), will enter into force; Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (2004) (OJ L 229, 29.6.2004, p. 35) (hereinafter Directive 2004/38/EC).

## II. UNION CITIZENSHIP AND NON-DISCRIMINATION

I have recalled above that, in assessing the compatibility of national rules with the economic free movement provisions, the CJ adopts a bi-partite approach: first, analysis of the existence of a barrier that brings the situation within the scope of the Treaty; and, second, assessment of the existence of a public interest capable of justifying the rule, which includes the proportionality assessment. Clearly, the broader the scope of the definition of barrier to movement, the broader the scope for the CJ's assessment of the proportionality of national rules. And yet, until the late 1990s, the claimant could bring herself within the scope of the free movement provisions only after having established an economic link (however weak) <sup>(536)</sup>. With the introduction of Union citizenship, however, the economic link is no longer necessary and migration alone (if even needed) <sup>(537)</sup> suffices to bring the claimant within the scope of the Treaty by virtue of Article 18 EC <sup>(538)</sup>. Furthermore, once the claimant is within the scope of the Treaty, s/he can rely on the general prohibition of discrimination on grounds of nationality contained in Article 12 EC <sup>(539)</sup>. And the prohibition of nationality discrimination is interpreted in a broad way so as to encompass not only direct discrimination but also

indirect discrimination, and in particular discrimination on grounds of residence or on grounds of length of residence <sup>(540)</sup>, as well as discrimination on grounds of migration <sup>(541)</sup>.

Clearly, since it is common for entitlement to welfare provision to be restricted to those residing and/or contributing through their economic activity, and to nationals who need not prove a link of 'belonging' to their own state, the combination of Articles 18 and 12 EC is to challenge established requirements in relation to entitlement to welfare provision in the territory of another Member State. Furthermore, since the prohibition of discrimination on grounds of nationality and/or the right to movement have been consistently interpreted so as to encompass the right not to be discriminated on grounds of movement, Article 18 EC also strained, if not altogether challenged, the rules as to the non-exportability of certain benefits, and in particular of special non-contributory benefits <sup>(542)</sup>. As we shall see in detail further below, this does not mean that Member States are now obliged to grant benefits or allow exportability to *any* Union citizen regardless of the circumstances of the case; rather, it means that national rules providing for entitlement requirements are now subject to the scrutiny of the Community or/and the national courts as to their necessity and proportionality.

## III. THE PROCESS OF DECONSTRUCTING AND RECONSTRUCTING THE SCOPE OF THE TREATY

I mentioned above that one of the effects of the introduction of Union citizenship is to sever the link between economic activity and entitlement to rights under Community law. This is particularly important

<sup>(536)</sup> In particular the CJ weakened the necessary economic link by allowing service recipients (mainly tourists) to rely on Article 12 EC in relation to anything connected to the reception of tourist services; see, for example, Case 186/87 Cowan v le Trésor Public [1989] ECR 195; Case C-45/93 Commission v Spain (museum admission) [1994] ECR I-911.

<sup>(537)</sup> See, for example, Case C-148/02 Garcia Avello [2003] ECR I-11613, where the mere desire to move in the future was enough to bring the situation within the scope of the Treaty; Case C-212/06 Government of the French Community and Walloon Government v Flemish Government [2008] ECR I-1683, where the notion of potential discouragement was used in a case which would have otherwise been purely internal; and Case C-403/03 Schempp [2005] ECR I-6421, where movement of the former wife of the claimant was enough to establish the intra-Community link. I have argued elsewhere in favour of formally departing from the need to establish an intra-Community link so as to extend the scope of the Treaty to cover also (some) purely internal situations; see E. Spaventa 'Seeing the woods despite the trees? On the scope of Union citizenship and its constitutional effects', (2008) 45, Common Market Law Review 13.

<sup>(538)</sup> For example, Case C-224/98 M. N. D'Hoop v Office national d'emploi [2002] ECR I-6191.

<sup>(539)</sup> For example, Case C-85/96 M. M. Martínez Sala v Freistaat Bayern [1998] ECR I-2691.

<sup>(540)</sup> For example, Case C-192/05 Tas-Hagen and Tas [2006] ECR I-10451; Case C-209/03 Bidar [2005] ECR I-2119.

<sup>(541)</sup> For example, Case C-224/98 M. N. D'Hoop v Office national d'emploi [2002] ECR I-6191.

<sup>(542)</sup> For example, Case C-192/05 Tas-Hagen and Tas [2006] ECR I-10451.

in relation to welfare benefits, including benefits falling within the scope of Regulation (EEC) No 1408/71, which before were reserved to economically active migrants. The effect of the introduction of Article 18 EC then is to open up new possibilities for those who were previously excluded from the scope of Community law because they did not engage in work or did not provide or receive services. However, in the early stages of interpretation of Article 18 EC, it was unclear what this actually meant. Thus, the Member States had a legitimate expectation that Union citizenship would simply codify the status quo in primary Treaty law. In this respect, it should not be forgotten that prior to the Maastricht Treaty three directives were adopted granting movement and residency rights to economically inactive people<sup>(543)</sup>. Those directives restricted the rights of residence to those who were economically independent, who would therefore not qualify for means-tested benefits, and who had health insurance in respect of all risks. Furthermore, the directives made clear that economically independent migrants should not become an unreasonable burden on the welfare provision of the host state<sup>(544)</sup>. Article 18 EC in turn referred to the limitations and conditions imposed by secondary legislation therefore, in the mind of the drafters, ring-fencing potential claims on welfare provision in the host state. Thus, the provisions and requirements contained in the residence directives would constitute the limitations referred to by Article 18 EC and therefore economically inactive citizens would not have a claim on host welfare provision.

However, in *Sala*<sup>(545)</sup> the CJ took a different interpretative path from that which could be expected and instead engaged in a process of deconstruction and

<sup>(543)</sup> Council Directive 90/364/EEC on the right of residence (OJ L 180, 13.7.1990, p. 26); Council Directive 90/365/EEC on the right of residence for employees and self-employed persons who have ceased their occupational activity (OJ L 180, 13.9.1990, p. 28); Council Directive 93/96/EEC on the right of residence for students (OJ L 317, 18.12.1993, p. 59).

<sup>(544)</sup> Article 1 of Council Directive 90/364/EEC on the right of residence (OJ L 180, 13.7.1990, p. 26); Article 1 of Council Directive 90/365/EEC on the right of residence for employees and self-employed persons who have ceased their occupational activity (OJ L 180, 13.9.1990, p. 28); Article 1 of Council Directive 93/96/EEC on the right of residence for students (OJ L 317, 18.12.1993, p. 59).

<sup>(545)</sup> Case C-85/96 M. M. Martínez Sala v Freistaat Bayern [1998] ECR I-2691.

reconstruction of Community law<sup>(546)</sup>. The case concerned the rights of a Spanish citizen lawfully living in Germany by virtue of a bilateral treaty between Germany and Spain (i.e. not by virtue of Community law). Even though Mrs Sala could not be deported, she was not entitled to a residence permit; and possession of a residence permit was a precondition to access some welfare benefits, including the child-raising allowance that Mrs Sala was denied exactly because she did not possess a residence permit. The allowance fell within the scope of both Regulations (EEC) Nos 1408/71<sup>(547)</sup> and 1612/68<sup>(548)</sup>; and the residence permit requirement was discriminatory since it did not have to be satisfied by German nationals. Since there were some doubts as to whether Mrs Sala could be considered a worker falling within the scope of either the regulations, or indeed of Article 39 EC, the question was whether the situation fell nonetheless within the scope of the Treaty by virtue of the citizenship provisions and if so whether Article 12 EC was applicable.

The CJ found that Mrs Sala fell within the scope *ratione personae* of the Treaty by virtue of being a Union citizen; it then found that the benefit in question fell within the scope *ratione materiae* of the Treaty by virtue of it falling within the scope of Regulations (EEC) Nos 1408/71 and 1612/68. Since the benefit fell within the scope of Community law and since Mrs Sala fell within the personal scope of the Treaty, Article 12 EC applied and Mrs Sala was entitled to the benefit.

The *Sala* ruling is concise and therefore difficult to understand: but what is interesting for our purposes is the CJ's reasoning in relation to what falls within the material scope of the Treaty. Such reasoning might appear rather circular, if not altogether perverse. In this respect consider that the fact that child-raising benefits fall within the scope of

<sup>(546)</sup> On the *Sala* ruling see S. O'Leary, 'Putting flesh on the bones of European Union citizenship' (1999), 24 *European Law Review* 68; J. Shaw and S. Fries, 'Citizenship of the Union: First steps in the European Court of Justice' (1998), 4 *EPL* 533.

<sup>(547)</sup> As it was a family benefit falling within Article 4(1)(h).

<sup>(548)</sup> As it was a social advantage falling within the meaning of Article 7(2).

Community law is not a novelty; however, according to Community law it is only a given category of people defined in secondary legislation that can claim equal treatment for those benefits. In other words, it seems clear that, pre-*Sala*, the two conditions (falling within the personal scope of Regulation (EEC) No 1408/71, of Regulation (EEC) No 1612/68 or of Article 39, and within their material scope) had to be fulfilled simultaneously.

However, in *Sala*, the CJ deconstructs the way material and personal scope have to be interpreted: as a result, rather than having to meet the two conditions in relation to the same piece of legislation, the two can be separated so that falling within one of the Treaty provisions, and in particular within Article 18 EC, allows to claim equal treatment in relation to any benefit ever mentioned by the Community legislature, even when the clear aim of the legislature is to limit the claimants entitled to a given benefit and therefore *exclude* all other claimants from the possibility to invoke equal treatment.

The impact of Union citizenship on social security claims is then dramatic in that it opens up the potential class of citizens entitled to rely on equal treatment in order to obtain welfare provision from the host state. And yet, reliance on Articles 18 and 12 EC rather than on Regulation (EEC) No 1408/71 is conceptually different and might lead to different outcomes: indirect discrimination can be justified, and therefore the rights granted through Articles 18 and 12 EC appear, at least theoretically, more limited than those provided for in Regulation (EEC) No 1408/71 where, once a claimant succeeds in bringing herself within both the personal and the material scope of the regulation, she might be in a much stronger position than if she fell within Article 18 EC<sup>(549)</sup>.

<sup>(549)</sup> This will depend very much on what is claimed as in certain instances indirect discrimination can be justified also in relation to Regulation (EEC) No 1408/71; however, in cases such as exportability of benefits or the possibility to seek healthcare abroad, the regulation grants 'rights' and Member States cannot depart from what is established by the regulation itself; see discussion below.

This process of deconstruction and reconstruction is evident in other fields of Community law, and most notably in the field of education. It might be recalled that the students directive excluded the migrant student's entitlement to maintenance grants awarded by the host state<sup>(550)</sup>; and that it, as the other residence directives, provides that students must have adequate resources so as not to become a burden on the social assistance of the host state. In a line of case-law that started with the ruling in *Grzelczyk*<sup>(551)</sup>, the CJ applied the *Sala* reasoning to students.

Mr Grzelczyk, a French student in Belgium, claimed the *minimex*, a minimum subsistence allowance, in order to be able to focus on his studies during the last year of his university degree. Mr Grzelczyk was denied the benefit since he was not a 'worker' pursuant to Community law and therefore could not rely on Article 7(2) of Regulation (EEC) No 1612/68. The CJ found, however, that he fell within the scope of Community law by virtue of the citizenship provisions and that, therefore, pursuant to the *Sala* ruling, he could claim equal treatment in relation to welfare benefits, including the *minimex*. In order to avoid the constraints imposed by secondary legislation, the CJ held that, whilst Directive 93/96/EEC expressly excluded foreign students from eligibility to maintenance grants, it did not exclude them explicitly from entitlement to other welfare benefits.

The ruling in *Grzelczyk* confirmed the *Sala* ruling in that it clarified that lawfully resident Union citizens might rely on Article 12 EC in order to claim welfare benefits regardless of the constraints imposed by secondary Community law. However, in *Grzelczyk*, the CJ also qualified the *Sala* ruling, since it accepted that excessive reliance on the host welfare system might transform the citizen into an

<sup>(550)</sup> Article 3 of Council Directive 93/96/EEC on the right of residence for students (OJ L 317, 18.12.1993, p. 59).

<sup>(551)</sup> Case C-184/99 R. *Grzelczyk v Centre public d'aide social d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193.



‘unreasonable burden’ and, should that be the case, the Member State would be entitled to terminate the right of the Union citizen to reside in its territory<sup>(552)</sup>. This concession to Member States’ preoccupations in relation to excessive claims on their welfare provision is, however, much more limited than it might appear at first sight: first of all, the CJ does not clarify *when* a citizen would become an ‘unreasonable burden’ and, given that the principle of proportionality always applies in those cases, it is clear that a once-off claim would not suffice to terminate the citizen’s right of residence and therefore their right to welfare provision<sup>(553)</sup>. Second, this case-law significantly complicates the national administrative framework for eligibility to welfare benefits: lawfully resident Union citizens can no longer be denied welfare benefits on the sole grounds that they are economically inactive. Rather, and as clarified by subsequent case-law<sup>(554)</sup>, the administrative authorities must investigate the claim to assess whether the burden imposed on the national welfare system is ‘reasonable’ or ‘unreasonable’, which is to say that the administrative authorities will have to conduct an assessment having regard to the particular circumstances of the claimant at issue. Finally, the CJ fails to specify whether the idea of ‘reasonableness’ in relation to the burden imposed on the public purse is to be assessed in relation to the single claim, in which case it would hardly ever be satisfied, or in relation to the potential cumulative effect of claims by several citizens.

The expansive effect of the Union citizenship provisions is confirmed in subsequent case-law. In the case of *Bidar*<sup>(555)</sup>, a French national who was

undergoing his university education in the UK claimed a maintenance loan, which was denied on the grounds that he was not ‘settled’ in the UK for the purposes of the relevant legislation<sup>(556)</sup>. It should be recalled that pursuant to Directive 93/96/EEC foreign students are not entitled to maintenance grants or maintenance loans from the host state. However, the CJ found that, since Mr Bidar had resided in the UK before becoming a university student, his right of residence derived *not* from the students directive but rather from Directive 90/364/EEC, the general residence directive. The latter did *not* explicitly exclude maintenance grants. Furthermore, the CJ found that maintenance grants fell within the scope of Community law following the adoption of Directive 2004/38/EC (even though the directive was not in force at the time of the ruling). However, it should be noted that the directive *excludes* the right to equal treatment in relation to maintenance grants for economically inactive migrants until they have acquired the right to permanent residence<sup>(557)</sup>. Nonetheless the CJ found that since such maintenance grants are available for workers and their family members, as well as for permanent residents, those grants fall within the scope of Community law and therefore, following the *Sala* ruling, Article 12 EC applies.

The *Bidar* ruling might have been recently at least partially overruled<sup>(558)</sup>. However, for our purposes what is interesting is the reasoning underlying it: the process of deconstruction and reconstruction is not dissimilar from that adopted in *Sala*: the exclusion of someone from a benefit which is granted only to ‘some’ citizens does not affect their rights under the primary Treaty provisions. Furthermore, a comparison between *Grzelczyk* and *Bidar* might be useful to

<sup>(552)</sup> Case C-184/99 R. *Grzelczyk v Centre public d’aide social d’Ottignies-Louvain-la-Neuve* [2001] ECR I-6193, para. 42.

<sup>(553)</sup> This principle has now been codified in Article 14(3) of Directive 2004/38/EC.

<sup>(554)</sup> For example, see Case C-413/99 *Baumbast and R. v Secretary of State for the Home Department* [2002] ECR I-7091, although this case concerned the right to reside rather than access to benefits; Case C-209/03 *Bidar* [2005] ECR I-2119.

<sup>(555)</sup> Case C-209/03 *Bidar* [2005] ECR I-2119; noted by C. Barnard (2005) *Common Market Law Review* 1465; see also M. Dougan ‘Fees, grants and dole cheques: who covers the cost of migrant education within the EU?’ (2005), 42 *Common Market Law Review* 943.

<sup>(556)</sup> According to the English rules at issue, in order to qualify for the maintenance loans a person needed to have resided in England for at least three years and the residence should not be wholly or in part for the purpose of receiving full-time education. Mr Bidar had resided in England for three years but he was attending school and therefore did not qualify for the loan.

<sup>(557)</sup> Article 24(2) of Directive 2004/38/EC; economically inactive migrants gain full equal treatment rights after five years of lawful residence (right to permanent residence).

<sup>(558)</sup> Case C-158/07 *Förster*, judgment of 18 November 2008, not yet published, discussed below.

fully appreciate the CJ's desire to use hermeneutic tools in a teleological way, where the *telos* is the integration of the citizen not only in the host state but also in the host welfare community. Thus, note how effectively the CJ plays with secondary legislation to achieve the desired result: Mr Grzelczyk is entitled to the *minimex* because the students directive does not explicitly exclude it; and Mr Bidar, also a student, can instead rely on the general residence directive to avoid the explicit exclusion of entitlement to maintenance grants provided for in the students directive.

The same expansive approach can be found also in the case of *Collins*<sup>(559)</sup>. Mr Collins was an Irish national who moved to the UK to seek employment; within a week of his arrival he applied for a job-seeker's allowance. The allowance was refused on the grounds that Mr Collins was not 'habitually resident' in the UK. According to pre-existent case-law, job-seekers only had a semi-status in Community law, so that they were not entitled to rely on Article 39(2) EC in relation to unemployment benefits<sup>(560)</sup>. However, the CJ held that following the introduction of Union citizenship it was no longer possible to exclude from the scope of Article 39(2) EC a benefit of a financial nature intended to facilitate access to employment in the host state. Since the habitual residence requirement was indirectly discriminatory, in that it could be more easily satisfied by own nationals, it needed to be justified. The CJ acknowledged that the residence requirement pursued the legitimate aim of ensuring that the claimant had established a genuine link with the host employment market. However, the principle of proportionality demanded that the period of residence necessary to establish such a connection did not exceed what was necessary for the authorities to satisfy themselves of the fact that the person concerned is genuinely seeking work. Once again then, the CJ then requires Member States to have due regard to the particular circumstances of the claimant. Furthermore, the CJ's ruling

<sup>(559)</sup> Case C-138/02 *Collins* [2004] ECR I-2703.

<sup>(560)</sup> Case 316/85 *Lebon* [1987] ECR 2811.

is, again, at odds with the provisions of secondary legislation. In particular, Directive 2004/38/EC, which had been adopted at the time of the ruling although was not yet in force, provides that job-seekers are excluded from the equal treatment obligation in relation to welfare provision<sup>(561)</sup>.

The Union citizenship case-law then has a considerable impact on entitlement to welfare provision beyond what is provided for in secondary legislation. And what is particularly interesting for our purposes is this process of deconstruction and reconstruction of the scope of Community law so as to give effect to the citizenship provisions. As a result, the care that the legislature might take in limiting the class of potential claimants to welfare provision is of little consequence, if not altogether counter-productive, to the rights that citizens will derive from Community law<sup>(562)</sup>.

#### IV. THE BINARY APPROACH

We have seen above that following the introduction of Union citizenship the CJ has engaged in a process of deconstruction and reconstruction of the scope of Community law which has deeply affected the obligations that Member States bear in relation to migrant Union citizens. We have seen also that this process of reconstruction takes as its starting point both Treaty provisions and secondary legislation which as a result relate in a novel way so as to stretch, if not altogether explode, the requirements to be satisfied by Union citizens before being eligible for welfare provision.

There is, however, another strand of case-law which is relevant in analysing the impact of the primary Treaty provisions on the welfare systems of the Member

<sup>(561)</sup> On the issues raised by the ruling in *Collins*, see Advocate General Ruiz-Jarabo Colomer's opinion in Joined Cases C-22/08 and 23/08 *Vatsouras*, opinion delivered 12 March 2009, case still pending at the time of writing.

<sup>(562)</sup> See also M. Dougan 'Expanding the frontiers of European Union citizenship by dismantling the territorial boundaries of the national Member States?' in C. Barnard and O. Odudu, *The outer limits of European Union law* (Hart Publishing, 2008), 119.

States: these are cases in which national rules which correctly implemented provisions of secondary legislation were nonetheless found to be incompatible with the primary Treaty provisions, at least insofar as the specific case was concerned. Those cases concerned access to healthcare provision in a state different from the one with which the claimant was insured.

It might be recalled that Article 22 of Regulation (EEC) No 1408/71 provides, inter alia, that those ensured in a Member State are entitled, prior authorisation of the competent Member State, to go to another Member State to there receive healthcare provision. According to the regulation, the authorisation might not be refused when the treatment is among the benefits provided for by the competent Member State; and where the claimant cannot be given such treatment within the time normally necessary for obtaining the treatment in question having regard to the person's current state of health and the probable course of the disease.

In a series of cases<sup>(563)</sup>, the regime provided by the regulation came under strain as the CJ found that, even though the claimants did not fulfil the conditions provided for by national rules correctly giving effect to Regulation (EEC) No 1408/71, they were still eligible for support under Article 49 EC. In *Vanbraekel*<sup>(564)</sup>, the issue related to hospital treatment

administered by an institution in a Member State other than that with which the patient was affiliated. The question did not concern the prior authorisation, which had been granted *ex post*, but rather the level of reimbursement. According to the provisions of Regulation (EEC) No 1408/71 the migrant patient has a right to receive healthcare in another Member State as if she were insured with the latter's system. In the case at issue, reimbursement according to the rules of the host state was less advantageous than reimbursement according to the rules of the Member State of provenance. The CJ held that Article 49 EC grants a right to be reimbursed according to the rules of the state of provenance: in the case in which a patient falls within both the scope of Regulation (EEC) No 1408/71 and of Article 49 EC, she can choose to be reimbursed according to the most favourable rules. In the case in which, however, the patient falls only within the scope of Article 49 EC since she does not meet the condition provided for in the regulation, reimbursement will always be limited to the tariffs established by the home Member State<sup>(565)</sup>. Further, in *Peerbooms*<sup>(566)</sup>, the CJ held that the prior authorisation required by national law to be eligible for reimbursement of expenses for medical treatment incurred abroad was a barrier falling within the scope of Article 49 EC and needed therefore to be justified, even though the prior authorisation requirement is provided for in Regulation (EEC) No 1408/71. In *Müller Fauré*<sup>(567)</sup>, the CJ went further and held that in the case of non-hospital treatment the prior authorisation requirement is incompatible with Article 49 EC, even though again the prior authorisation requirement is provided for in Regulation (EEC) No 1408/71; and in *Watts* the CJ made clear that the existence of waiting lists is not a sufficient reason to deny authorisation to seek treatment abroad<sup>(568)</sup>.

<sup>(563)</sup> The healthcare cases have given rise to a lively academic debate; see, for example, P. Cabral, 'Cross-border medical care in Europe: Bringing down a first wall' (1999) 24 *European Law Review* 387; A. P. Van der Mei, 'Cross-border access to medical care in the European Union — Some reflections on the judgments in Decker and Kohll' (1998), 5 *MJ* 277; M. Fuchs 'Free movement of services and social services: Quo vadis?' (2002), 8 *European Law Journal* 536; E. Steyger 'National health care systems under fire (but not too heavily)' (1999) 29 *LIEI* 97; A. P. Van der Mei, 'Cross-border access to medical care in the European Union — Some reflections on Garaets-Smits and Peerbooms and Vanbraekel' (2002), 9 *MJ* 189; G. Davies 'Welfare as a service' (2002), 29 *LIEI* 27; and V. Hatzopoulos 'Killing the national health systems but healing the patients? The European market for healthcare after the judgment of the ECJ in Vanbraekel and Peerbooms' (2002), 39 *Common Market Law Review* 683; E. Spaventa 'Public services and European law: Looking for boundaries' (2002-03), 5 *CYELS* 271; T. Hervey 'Mapping the contours of European Union health law and policy' (2002), 8 *EPL* 69; A. Dawes 'Bonjour Herr Doctor: National healthcare systems, the internal market and cross-border medical care within the European Union' (2006), 33 *LIEI* 167; G. Davies 'Competition, free movement and consumers of public services' (2006), 17 *EBL Rev.* 95; C. Newdick 'Citizenship, free movement and health care: Cementing individual rights by corroding social solidarity' (2006), 43 *Common Market Law Review* 1645.

<sup>(564)</sup> Case C-368/98 *Abdon Vanbraekel and Others v Alliance nationale des mutualités chrétiennes* [2001] ECR I-5363.

<sup>(565)</sup> See also Case C-385/99 *Müller Fauré v Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA, and van Riet v Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen* [2003] ECR I-4509.

<sup>(566)</sup> Case C-157/99 *B. S. M. Garaets-Smits v Stichting Ziekenfonds VGZ and Peerbooms v Stichting CZ Groep Zorgverzekeringen* [2001] ECR I-5473.

<sup>(567)</sup> Case C-385/99 *Müller Fauré v Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA, and van Riet v Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen* [2003] ECR I-4509.

<sup>(568)</sup> Case C-372/04 *Watts* [2006] ECR I-4325.

In all those cases, the CJ did not question the fact that those national rules were compatible with the regime established by Regulation (EEC) No 1408/71; nor did it question the regime established by the regulation itself; and yet, it found the national rules at issue to be incompatible with Article 49 EC. The question is then how to reconcile the compatibility of the regime introduced by the regulation, which provides for the prior authorisation requirement, with the case-law of the CJ. After all, if the prior authorisation requirement is a hindrance to movement which is caught by Article 49 EC and needs to be justified, and which is in certain cases incompatible with Community law, then Article 22(1)(c) of Regulation (EEC) No 1408/71, which provides for said prior authorisation, should also be deemed incompatible with the primary Treaty provisions<sup>(569)</sup>.

This discrepancy, which arises in a similar way in relation to the requirements to be satisfied in order to be eligible for residency rights in the citizenship context, is therefore difficult to explain. In the wake of the *Baumbast* ruling<sup>(570)</sup>, Michael Dougan and I argued that the CJ has introduced a cleavage approach to the interpretation of the relationship between primary and secondary legislation in relation to Union citizenship<sup>(571)</sup>. Thus, the black-letter rights provided by the then three residence directives, and now by Directive 2004/38/EC, constitute the floor of rights granted to Union citizens. If the citizen satisfies those requirements then she is automatically entitled to the right to reside. That is true also in relation to healthcare provision

abroad pursuant to Regulation (EEC) No 1408/71 (and probably in relation to many if not all of the rights granted by the regulation): if the patient is granted prior authorisation, or s/he satisfies the requirements for prior authorisation, then s/he has a right to travel to another Member State and receive benefits in kind as if s/he were insured in that Member State. However, if the citizen fails to satisfy the black-letter requirements imposed by Community secondary legislation, be that Directive 2004/38/EC or Regulation (EEC) No 1408/71, then s/he might have a right in primary legislation which is at the same time more limited and more extensive than that granted by secondary legislation. It is more extensive because it clearly goes beyond what is provided in secondary law; but it is also more limited since it will depend on an appraisal of the factual circumstances at stake and on whether denial of the right is a justified and proportionate response by the Member State. The fact that now we have to see secondary legislation and primary Treaty provisions as constituting, respectively, the floor and the ceiling of the rights granted in Community law was indirectly confirmed by the abovementioned ruling in *Vanbrekael*, where the CJ held that, when the patient falls within the scope of Regulation (EEC) No 1408/71, she can choose between the level of reimbursement provided by the latter (i.e. that provided by the host state) and that provided by Article 49 EC (i.e. that provided by the state of origin).

The binary approach established through the case-law, however shocking for the Member States, unwilling to see new obligations imposed on public finances, especially when those result from what could be perceived as the bypassing of carefully reached political compromises, can be considered a development of established principles in relation to the free movement of persons. Here, since the 1970s, the CJ has made clear that rights that

<sup>(569)</sup> The Commission has put forward a proposal for a directive codifying the case-law on healthcare provision; see proposal for a directive on the application of patients' rights (2008) (COM(414) final); the proposal was approved with amendments by the European Parliament on 23 April 2009.

<sup>(570)</sup> See Case C-413/99 *Baumbast* and *R. v Secretary of State for the Home Department* [2002] ECR I-7091.

<sup>(571)</sup> M. Dougan and E. Spaventa, 'Educating Rudy and the (non-)English patient: A double-bill on residency rights under Article 18 EC' (2003), 28 *European Law Review* 699; see also M. Dougan 'The constitutional dimension to the case-law on Union citizenship' (2006), 31 *European Law Review* 613; and E. Spaventa, 'Free movement of persons in the European Union — Barriers to movement in their constitutional context' (Kluwer Law International 2007), especially Chapters 6 and 7; and E. Spaventa, 'Seeing the woods despite the trees? On the scope of Union citizenship and its constitutional effects' (2008), 45 *Common Market Law Review* 13.

derive directly from the Treaty can be clarified by secondary law, but are not per se 'established' by such case-law<sup>(572)</sup>. Seen in this light, the case-law might appear less surprising: after all, the CJ has always considered that limits imposed in secondary legislation are not necessarily conclusive: they might be legitimate per se, since they would satisfy what is perceived to be a legitimate public interest by the political institutions, and yet they cannot impinge on the interpretation given by the CJ to the primary Treaty provisions (although they might well drive it). It is for the latter alone to decide the boundaries of the rights granted by the Treaty: secondary legislation simply gives effect to those rights. And naturally, the content of the Treaty provisions, like that of constitutional rights, evolve with time, whilst black-letter provisions are less dynamic in nature. The binary approach thus makes perfect constitutional sense albeit it might ruffle some political feathers.

## V. THE EXPORTABILITY OF BENEFITS BEYOND REGULATION (EEC) NO 1408/71

The binary approach adopted in relation to secondary legislation on the one hand, and Treaty rights on the other, has important repercussions in relation to the right to export benefits beyond the provisions of Regulation (EEC) No 1408/71. Here, the combination of the right to free movement granted by Article 18 EC and the interpretation technique adopted by the CJ (both the binary approach and the *Sala* approach) challenge residence requirements in relation to benefits covered by Regulation (EEC) No 1408/71 even when such residence requirements would in themselves be compatible with the regulation. Thus, once again, the fact that a restriction is consistent with the regime provided

for by secondary legislation is not conclusive as to its compatibility with Community law.

In *De Cuyper* the issue related to a residence requirement in relation to an unemployment allowance<sup>(573)</sup>. Mr De Cuyper received such a benefit from Belgium, and because he was above 50 years of age he was exempted from the obligation to submit to the local control procedures. However, the benefit was still conditional upon residence in the Belgian territory: following an inspection, the authorities found that Mr De Cuyper was living in France and therefore terminated the benefit and asked for repayment of the sums that had been granted whilst Mr De Cuyper was resident in France. Mr De Cuyper argued that the residence requirement was a restriction on his right to move and reside anywhere in the EU granted by Article 18 EC. The CJ found that the benefit in question was indeed an unemployment benefit which according to the provisions of Regulation (EEC) No 1408/71 could be made conditional upon residence in the territory of the state awarding the benefit<sup>(574)</sup>. However, the CJ also found that since a residence requirement was a restriction to the rights granted to European citizens to move and reside anywhere in the Union, it fell within the scope of Article 18 EC even though it was allowed under Regulation (EEC) No 1408/71. For this reason, the requirement needed to be justified, i.e. pursue a legitimate interest and be proportionate and necessary for its achievement. In the case at issue, the residence requirement was justified since the authorities needed to be able to monitor compliance with the legal requirements upon which the granting of the benefit was conditional<sup>(575)</sup>.

<sup>(572)</sup> For example, interpretation of the public policy derogation; or the fact that documents required by secondary legislation are mere evidence of the right at issue and are not constitutive of them; see, for example, Case C-459/99 *Mouvement contre le racisme, l'antisémitisme et la xénophobie (MRAX) ASBL v Belgium* [2002] ECR I-6591.

<sup>(573)</sup> Case C-406/04 *De Cuyper* [2006] ECR I-6947; see also M. Cousins 'Citizenship, residence and social security' (2007), *European Law Review* 386.

<sup>(574)</sup> See the conditions contained in Article 69(1) of Regulation (EEC) No 1408/71.

<sup>(575)</sup> See also Case C-228/07 *Petersen* [2008] ECR I-6989, where the CJ held that a residence requirement in relation to an unemployment benefit was a restriction to the free movement of workers (as it was applied to a migrant worker who transferred his residence back to his home state) and, in the case at issue, was not justified.

The fact that the residence requirement was justified in this case should not detract attention from the significance of the ruling. As seen already in the healthcare cases, as well as in the other citizenship cases, the fact that secondary legislation authorises a conduct on the part of the Member State no longer shelters the national rules from further scrutiny: thus, whether the residence requirement in relation to non-contributory benefits is going to be justified will depend very much on the facts of the case at issue. Furthermore, this case-law is not without its practical problems: authorities dealing with social security claims have already a considerable job in checking eligibility for the benefits at issue, as well as policing against the risk of benefit fraud. The case-law of the CJ introduces a new level of complexity since the rules now not only have to be proportionate in the abstract, they also have to be proportionate having regard to the specific facts of the case at issue. This is well illustrated by the case of *Hendrix* <sup>(576)</sup>. There the issue related to a benefit for disabled young people. The benefit supplemented the income that the disabled person would obtain from working at a reduced rate under a Dutch government scheme. Mr Hendrix received the benefit until he moved his residence from the Netherlands to Belgium when, as a result of the change of place of residence, he was denied the benefit.

For the purposes of Regulation (EEC) No 1408/71, the CJ classified the benefit as a special non-contributory benefit which could therefore be legitimately reserved to those resident in the national territory <sup>(577)</sup>. The CJ, however, also found that Mr Hendrix should be classified as a migrant worker falling within the scope of Regulation (EEC) No 1612/68 and Article 39 EC. Further, the CJ held that the benefit in question could be qualified as a ‘social advantage’; it then acknowledged that

Regulation (EEC) No 1612/68 explicitly provides that it does not affect rules adopted pursuant to Article 42, including Regulation (EEC) No 1408/71. However, the CJ also stated that Article 7(2) of Regulation (EEC) No 1612/68 is the specific expression of the principle of equality contained in Article 39(2) EC, and should therefore be given the same meaning. As a result, the residence requirement needed to be justified, and be proportionate to the attainment of the aim sought. The CJ then found that, whilst a residence requirement would be in principle justified, its proportionality in the case at issue needed to be assessed by the national court. Thus, since according to Dutch law the residence requirement could be waived if it would give rise to an ‘unacceptable degree of unfairness’, the CJ instructed the national court to interpret the legislation in the light of Community law, and in particular having regard to the fact that Mr Hendrix had exercised his Article 39 EC rights, and that he had retained a link with the Netherlands <sup>(578)</sup>.

The binary approach according to which the regime established in secondary legislation is not conclusive even when such a regime is compatible with the Treaty deeply affects the non-exportability of benefits. Thus, if a benefit can be exported according to the regime established by Regulation (EEC) No 1408/71, exportability will be a matter of right. However, in those instances where the benefit is not one for which exportability is provided for in secondary legislation, the claimant falls in any case within the scope of Community law and it is for the Member State to justify the restriction. Furthermore, and whilst in relation to those benefits which require the authorities to be able to carry out checks, the residence requirement will be more easily justified, and the authorities might have to take into consideration the factual circumstances pertinent to the claimant.

<sup>(576)</sup> Case C-287/05 *Hendrix* [2007] ECR I-6909.

<sup>(577)</sup> Cf. Article 10(a)1 of Regulation (EEC) No 1408/71, and para. 38 of the ruling.

<sup>(578)</sup> On the notion of real link see C. O’Brien, ‘Real links, abstract rights and false alarms: The relationship between the ECJ’s “real links” case-law and national solidarity’ (2008), 33 *European Law Review* 643.



## VI. IMPACT OF UNION CITIZENSHIP ON BENEFITS PREVIOUSLY EXCLUDED FROM COMMUNITY LAW

The introduction of Union citizenship has also had a pervasive effect in relation to the possibility to export benefits which previously fell altogether outside the scope of Community law, such as, for instance, pensions connected to war which according to consistent case-law fell, pre-citizenship<sup>(579)</sup>, altogether outside the scope of the Treaty.

Here, one should take care to properly understand the reasoning behind the case-law: it is not that those benefits now fall within the scope of Community law per se; rather it is that any restriction on the freedom to move and reside in another Member State falls within the scope of Article 18 EC. This distinction is of paramount importance in relation to the application of the principle of equal treatment: since such benefits do not fall within the scope of Community law per se, a non-national would not be able to claim such benefits. However, a beneficiary who is entitled, under national law, to claim, for instance, a pension for civilian victims of war, or a war pension of sorts, might have the right to transfer her residence to another Member State without for this reason losing the right to the benefit in question. Otherwise, the right to move would be severely affected: if the pension or the benefit constitutes the main source of income for the claimant, s/he would be unable to exercise her right to move in Community law for fear of losing that benefit.

Thus, for instance, in *Nerkowska*<sup>(580)</sup>, Ms Nerkowska was a Polish citizen who during the war had been deported to Russia and, as well as losing her parents, suffered from lasting health problem as

a result of her deportation. Under Polish law she was therefore entitled to a pension; however, such a benefit was conditional upon her residing in Poland, whilst Ms Nerkowska resided in Germany. The CJ found that the residence requirement was a disproportionate interference with Ms Nerkowska's right to move. On the one hand, if the residence requirement was aimed at ensuring that the claimant had sufficient connection with the territory of the state awarding the benefit, then it was disproportionate since Ms Nerkowska was a Polish national who had resided and worked in Poland for 20 years and therefore had established a sufficient connection with Polish society. On the other hand, if the national authorities needed to subject her to some health or administrative checks they could simply demand that she return to Poland on an ad hoc basis. The residence requirement was therefore disproportionate.

As mentioned above the effect of this case-law is not to broaden the scope of Community law to incorporate benefits which were previously excluded: rather it is to limit the extent to which the Member States can indirectly restrict movement by demanding that the beneficiary reside within the national territory. The distinction is important since, if the benefit were to fall within the material scope of the Treaty, then Member States would have to justify denial of benefits, which are clearly linked to nationality, to non-nationals. This was confirmed by the CJ in the case of *Baldinger*<sup>(581)</sup>, where the CJ held that a war-related benefit fell outside the scope of Community law (in that case Regulation (EEC) No 1612/68 and Article 39(2)). However, any residence requirement imposed by a Member State as a condition for eligibility for benefits now falls within the scope of Article 18 EC and needs therefore to be justified.

<sup>(579)</sup> For example, Case 207/78 *Even* [1979] ECR 2019; Case C-315/94 *de Vos* [1996] ECR I-1417.

<sup>(580)</sup> Case C-499/06 *Nerkowska* [2008] ECR I-3993; see also Case C-192/05 *Tas-Hagen and Tas* [2006] ECR I-10451; and Case C-221/07 *Krystyna Zablocka-Weyhermüller*, judgment of 12 December 2008, not yet published.

<sup>(581)</sup> Case C-386/02 *Baldinger* [2004] ECR I-8411.

## VII. THE RULING IN *FÖRSTER* AND THE IMPACT OF DIRECTIVE 2004/38/EC

A more general question, which can be answered only in a speculative way, is whether Directive 2004/38/EC will have any impact on the case-law of the CJ. On the one hand, the directive codifies most of the case-law on citizenship and the free movement of persons existing at the time of its drafting. In this respect, the directive clearly incorporates both the principle of proportionality and the incremental approach to rights in respect of welfare provisions<sup>(582)</sup>. Thus, whilst the requirements of sufficient resources and comprehensive health insurance for economically inactive citizens residing in the host state beyond three months have been confirmed<sup>(583)</sup>, the directive also makes clear that recourse to the social assistance of the host state cannot automatically determine the expulsion of the citizen<sup>(584)</sup>. Furthermore, the directive provides for a right to permanent residency which is acquired after five years of lawful residency in the host state<sup>(585)</sup>. Once a citizen has become a permanent resident, s/he is entitled to equal treatment regardless of economic activity. The directive thus somehow codifies the idea of a 'real link' by establishing that such a link will be presumed after the citizen has resided in the host country for five years.

On the other hand, the provisions of the directive appear more restrictive than the case-law analysed above. In particular, pursuant to Article 24(2) economically inactive citizens, as well as job-seekers, do not have a right to social assistance in the first three months of residence or longer if the job-seeker stays beyond three months. And economically inactive citizens are not entitled to maintenance aids for students, including maintenance loans, until when

they acquire permanent residency. As mentioned above, these provisions appear inconsistent with the CJ's approach in both *Collins* and *Bidar*. It might be recalled that in *Collins* the CJ held that, whilst a residence requirement for entitlement to a job-seeker's allowance is justified, it must be limited to a length of time sufficient for the authorities to ascertain that the job-seeker has a real connection with the host employment market<sup>(586)</sup>. Article 24(2), however, excludes any entitlement to social assistance for those who are looking for a job. Similarly, in *Bidar* the CJ held that a student might be eligible for a maintenance loan if s/he has established a genuine link with the host state<sup>(587)</sup>. In the case at issue, Mr Bidar had resided in the United Kingdom for three years, well short of the five years now required by Directive 2004/38/EC. The question is therefore whether the CJ will be willing to revisit its previous case-law; or whether it will continue to adopt a binary approach to secondary legislation so that if a citizen satisfies the conditions contained in Directive 2004/38/EC s/he will be automatically entitled to the rights therein granted; whilst if s/he does not the proportionality principle applies and entitlement will depend very much on the facts of the case at issue.

In the writer's opinion the answer is mixed and in trying to foresee how the case-law might develop we should recall not only the constitutional principles developed by the CJ, but the reason for their development. In other words, we should distinguish between the constitutional principles 'proper' elaborated by the CJ in relation to Union citizenship, which should continue to apply, and those cases in which the end result was very much driven by the particular circumstances of the case, and that are unlikely to be of more general application. Starting from the latter, a useful, if confused, indication as to

<sup>(582)</sup> See also Barnard, 'Annotation on Bidar' (2005), 42 *Common Market Law Review* 1465, who talks about a 'quantitative approach' to equal treatment (at p. 1468); and by the same author, 'EU citizenship and the principle of solidarity' in M. Dougan and E. Spaventa (eds), *Social welfare and EU law* (Hart Publishing, 2005), Chapter 8.

<sup>(583)</sup> See Article 7(1)(b) of Directive 2004/38/EC.

<sup>(584)</sup> See Article 14(3) of Directive 2004/38/EC.

<sup>(585)</sup> See Article 16 of Directive 2004/38/EC.

<sup>(586)</sup> Case C-138/02 *Collins* [2004] ECR I-2703.

<sup>(587)</sup> Case C-209/03 *Bidar* [2005] ECR I-2119.

the possible future developments of the case-law comes from the recent ruling in *Förster*<sup>(588)</sup>.

There, Ms Förster, a German citizen, went to the Netherlands in order to study and train as a teacher. During the course of her studies she was engaged in various jobs and received a maintenance grant as a worker. However, following an inspection, the awarding body found that she had not been working for a period of about six months and claimed repayment of the maintenance grant for the period in which she was not economically active. According to Dutch rules, economically inactive citizens qualified for maintenance grants only after five years of residence whilst at the time in which she was not employed Ms Förster had been residing in the Netherlands for little over three years. Ms Förster claimed that the *Bidar* ruling applied to her and that she should be entitled to equal treatment since she had demonstrated a sufficient link with the host country. It should also be noted that, after completion of her degree, Ms Förster found employment and therefore remained in the Netherlands.

The CJ found that the five-year residence requirement was justified and that it did not go beyond what is necessary to ensure that the Union citizen is integrated in the society of the host state. The CJ distinguished the case at issue from the ruling in *Bidar*, by relying on the fact that the British rules in the latter made it impossible for students to ever qualify for maintenance grants, since periods of residence for study purposes were not taken into consideration to establish length of residence. On the other hand, in *Förster* the reason why someone had resided in the Netherlands was immaterial for establishing the required length of residence.

The significance of the ruling in *Förster* might go well beyond the case of maintenance grants and raises questions as to how much of the case-law on citizenship, and possibly also on healthcare services, will survive. In this respect, in the writer's

<sup>(588)</sup> Case C-158/07 *Förster*, judgment of 18 November 2008, not yet published.

opinion, the most important shift consists in the return to an abstract analysis of the rules at issue, rather than the assessment of the proportionality of the application of the rules to the facts of a particular case. The case-law before *Förster* was heavily centred on the individual claimant, with all the problems that this might create for the administrative authorities, but with a real attention for the proportionality of the state's response to that individual case. Thus, the notion of 'real link' that justified claims on the host welfare society was assessed having regard to the individual case and seemed aimed at distinguishing 'good claimants' — those in temporary difficulties (*Grzelczyk*), those who were truly in exceptional circumstances and were not trying to unduly exploit the generosity of the host society (*Bidar*), those who were bona fide claimants (*Sala, Collins*) — from 'bad claimants', i.e. benefit tourists. On the other hand, in *Förster* the CJ wholly disregards the situation of Ms Förster, who was clearly a bona fide claimant — someone who had engaged in paid work, who was there to stay and who found paid employment in the Netherlands — to return to an abstract assessment of the rules at issue. Furthermore, the CJ also disregards the legitimate expectation that its own case-law might have created, to reach a result — the repayment of the grant received — that was as surprising as unfair on the claimant.

In the writer's opinion *Förster* is a clear sign of the CJ's willingness to accept legislative choices insofar as those are generally justified. In other words, the ruling in *Förster* might signal the CJ's acceptance of the legitimacy to restrict support for students to those who have an economic link (because they themselves were economically active<sup>(589)</sup>; or because they are the children of an economically active citizen); and to those who have established a genuine link with the host society through a very prolonged residence. Furthermore, the ruling in *Förster* should also be seen in the context of recent case-law where the CJ is exploring the potential

<sup>(589)</sup> See, for example, Case C-413/01 *Ninni-Orasche* [2003] ECR I-13187.

of the citizenship provisions for the exportability of student support awarded by the country of origin<sup>(590)</sup>. In the writer's opinion the case-law is more likely to develop in relation to own state support so that less and less will the Member State be allowed to hinder the movement of students by confining support to those who enrol in universities within their own territory. Here we could see a development similar to what has happened in the health-care services, where Member States might be under an obligation to allow the student to transfer to another Member State the support that s/he would have received at home. Furthermore, the return to a more abstract assessment of the legitimacy of the rules at issue might signal the development of a more mature case-law.

And yet, *Förster* is a very confusing case and leaves open the question as to how much of the citizenship case-law is still good law. It might be that the ruling is confined to students' support, possibly because this is an area where mobility is higher and not uniform across Member States, and where therefore the economic impact of a generous interpretation of the Treaty provisions might be felt more heavily. Thus it could be that, in other cases, the impact of the political choices made in Directive 2004/38/EC on the CJ's case-law might be more limited. It has been recalled above that the CJ in *Collins* indicated that the Member State might refuse a job-seekers' allowance to a migrant job-seeker only to the extent to which the latter has not yet established a genuine link with the employment market of the host state. On the other hand, Article 24(2) of Directive 2004/38/EC provides that Member States are not obliged to confer entitlement to social assistance to job-seekers. And Article 14 of Directive 2004/38/EC provides that recourse to social assistance shall not determine the automatic expulsion of the Union citizen (including the job-seeker); and that

the job-seeker is entitled to stay beyond the first three months without having to satisfy any further condition if s/he can demonstrate a genuine chance of finding employment. Now it is possible that, despite the explicit wording of the directive, the job-seeker who has demonstrated a genuine chance of finding employment, i.e. who is staying beyond three months, might have also established a real link with the host employment market and therefore might be entitled to claim a job-seekers' allowance<sup>(591)</sup>. More generally, and bar a legislative choice of absolute clarity, the principle of proportionality has become a constitutional principle which cannot be disregarded by the legislature.

## VIII. CONCLUSIONS

In analysing the impact of the Treaty free movement and citizenship provisions on social security coordination we have focused on the 'constitutional' effects of the case-law, which is to say on that case-law that might have future implications for eligibility to welfare provision regardless of regimes established by secondary legislation. This case-law is characterised by an expansionist approach as well as by the development of new hermeneutic techniques to enhance the rights of Union citizens whilst, at the same time, not interfering with the validity of secondary legislation adopted before the creation of Union citizenship. Whilst the implications of this case-law from a constitutional perspective are of great significance, the implications on welfare provision from a practical perspective might be more limited.

In particular, the extent to which a Union citizen might claim welfare provision in the host state beyond what allowed by secondary legislation is constrained by the possibility for the Member States to justify imposing residence criteria to

<sup>(590)</sup> See Joined Cases C-11 and 12/06 *Morgan and Bucher* [2007] ECR I-9161; and Case C-76/05 *Schwarz and Gootjes -Schwarz* [2007] ECR I-6849, noted by M. Dougan, 'Cross-border educational mobility and the exportation of students' financial assistance' (2008), 33 *European Law Review* 723.

<sup>(591)</sup> On this point see also Advocate General Ruiz-Jarabo Colomer's opinion in Joined Cases C-22 and 23/08 *Vatsouras*, opinion delivered 12 March 2009, case still pending at the time of writing.

ensure that claimants have established a real, and not merely transient, link with the host community. In this respect, from a practical perspective, the case-law has limited effects for economically inactive claimants: on the one hand, before Unions citizen can qualify for a right of residence beyond the first three months, they must meet the conditions of economic independence and comprehensive (or almost comprehensive)<sup>(592)</sup> health insurance. If those conditions are not satisfied it is open to the Member State to refuse the right to reside and therefore eliminate the risk of welfare exploitation. And it is very unlikely that an economically inactive citizen who has resided in the host state for just three months would have established a 'real link' with the host society so as to demand an exception to the resources/insurance rule. On the other hand, whilst a one-off demand on the host welfare society, a temporary difficulty, is not enough to terminate the right to reside, repeated claims might well place the citizen in the 'unreasonable burden' category. The grey area, in this respect, will emerge in relation to those citizens that have resided in the host country long enough to have established a 'real link', say four years, but who are not yet permanent residents. In this respect, it is likely that, as noted by Barnard<sup>(593)</sup>, length of residence might be relevant in assessing when the citizen turns from a 'reasonable' to an unreasonable burden. This said, it cannot be excluded that the CJ will now adhere to the provisions of Directive 2004/38/EC and shift from a constitutional to a black-letter approach to welfare entitlement, as it did in the case of *Förster*.

On the other hand, the impact of the citizenship provisions might be felt more heavily in relation to the reinterpretation of the economic free movement rules, and in relation to eligibility to welfare provision within the scope of Regulations (EEC)

Nos 1408/71 or 1612/68. Here, the CJ has used the developments which have occurred since the Maastricht Treaty as a tool to open up the potentiality inherent in both primary and secondary legislation. Thus, for instance, in *Gaumain-Cerri*<sup>(594)</sup>, the CJ made clear that there is no longer any need to closely investigate whether a claimant falls within the personal scope of Regulation (EEC) No 1408/71 since the combined effect of Union citizenship and the non-discrimination provision might lead to the same result as that which would be achieved should the regulation apply. And, as we have seen in detail above, the reinterpretation of Article 39(2) might well allow job-seekers to seek at least some support from the host state<sup>(595)</sup>.

In relation to claims against the home state, the citizenship provisions challenge the limits to the exportability of benefits, including non-contributory benefits. Here, in relation to those situations where the risk of benefit fraud is real, the CJ has been willing to accept, at least in theory, that a residence requirement might be necessary. And yet, and as demonstrated by rulings such as *Hendrix* and *Nerkowska*, the burden of demonstrating that a residence requirement is truly necessary falls upon the Member States. And, after all, the case-law on exportability seems entirely consistent with the creation of a borderless space where citizens can move freely.

Finally, the case-law examined in this contribution clearly shows the inherent limits that constrain political choices at Community level. Secondary legislation might regulate the exercise of Treaty rights, but it cannot exhaust the potential of those rights. This is demonstrated in the case-law concerning healthcare provision, in the case-law on exportability, and in the case-law that departs from the limits set by the residence directives (and

<sup>(592)</sup> See Case C-413/99 *Baumbast* and *R. v Secretary of State for the Home Department* [2002] ECR I-7091.

<sup>(593)</sup> Barnard, 'Annotation on *Bidar*' (2005), 42 *Common Market Law Review* 1465; and 'EU citizenship and the principle of solidarity' in M. Dougan and E. Spaventa (eds), *Social welfare and EU law* (Hart Publishing, 2005), Chapter 8.

<sup>(594)</sup> Joined Cases C-502/01 and C-31/02 *Gaumain Cerri and Barth* [2004] ECR I-6483.

<sup>(595)</sup> Case C-138/02 *Collins* [2004] ECR I-2703; see also Case C-228/07 *Petersen* [2008] ECR I-6989.

now by the citizenship directive) to find that citizens can claim, in primary law, rights which had not been granted in secondary legislation. From a constitutional perspective this case-law is fully defensible; from a political viewpoint this case-law might be more problematic in that it might be perceived as an undue interference of the CJ in an area which should be left to political negotiation. And yet it should not be forgotten that similar criticisms were raised against the expansionist case-law on the free movement of persons and goods in the

1970s. History tells us that without that case-law the internal market would have remained a chimera and that the political institutions accepted, and in some cases codified, the CJ's approach<sup>(596)</sup>. Similarly, the citizenship directive signals the acceptance of the main constitutional framework relating to citizenship elaborated by the CJ. Maybe then the fact that as the area of influence of Community law grows the citizen is entitled to expect a correspondent increase in her rights is far from being a heresy.

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<sup>(596)</sup> See, for example, Directive 2006/123/EC on services in the internal market (OJ L 376, 27.12.2006, p. 36).



# COORDINATION IN THE CONTEXT OF INTERNAL MARKET RULES OR HOW TO RESOLVE THE MIDLIFE CRISIS

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Fifty years on, when it comes to conducting a review of the action undertaken, the coordination rules are reflected in the magnifying mirror of Community construction: regularly lambasted for their shortcomings and weaknesses, their complexity and their inability to evolve, there is scant acknowledgement of their essential contribution to the free circulation of citizens and to the internal market within what is a highly challenging institutional context due to the weight of the unanimity requirement within the Council. In order to appreciate the added value of the coordination rules, it is sufficient to consider what would happen in their absence: imbrolios on the legislation applicable, absence of welfare cover, double contributions, loss of entitlement, etc. What is more, many of the criticisms emanating from the field are not the result of any inadequacy in the coordination rules but rather of incomplete and inadequate national social security legislation, as well as a deficit of information and communication, the responsibility for which rests primarily with the Member States.

That said, the criticisms do invite a process of questioning. After all, do the coordination rules not need to evolve, given that the areas of legal progress<sup>(597)</sup> obtained through painstaking diplomacy in relation to Regulation (EC) No 883/2004 are not fundamental but at best a modernisation, little more than a makeover or peripheral adjustments?

The fact is that, despite all its strong points, coordination is in the throes of a midlife crisis: its territory is under threat while, at the same time, its method is being disputed and its bases undermined. Legal sources which are supplementary or contradictory to the coordination regulations are becoming increasingly visible, sowing confusion among the stakeholders (the relevant top-level administrations and institutions) and seemingly drowning out the coordination message. Who can say with certainty today, in the wake of the *Bosmann* judgment inspired directly by the Treaty (Article 42), what the scope of the applicable legislation's principle of unicity is<sup>(598)</sup>, despite this being one of the pillars of the

(') This contribution was translated from the original French version.

<sup>(597)</sup> Because the added value of the new regulation appears to lie in the dematerialisation of data exchange.

<sup>(598)</sup> Case C-352/06 *Bosmann* [2008] ECR I-3827.

coordination system? Or to give another example, what the value is of the exclusion from coordination<sup>(599)</sup> of benefits for victims of war, resulting from a judgment of the Court of Justice (CJ) according to which 'Article 18(1) EC must be interpreted as precluding legislation of a Member State under which it refuses to grant to one of its nationals a benefit for civilian war victims solely on the ground that, at the time at which the application was submitted, the person concerned was resident, not in the territory of that Member State, but in the territory of another Member State'<sup>(600)</sup>? What future is there for the regionalisation of employment services, frequently disparaged and, in spite of everything, confirmed by Regulation (EC) No 883/2004, whereas the status of migrant worker laid down by Article 39 of the EC Treaty and the detailed analysis surrounding the principle of proportionality are fracturing this territorial partitioning<sup>(601)</sup>? What value has the principle of the non-export of special non-contributory benefits whereas Article 39 of the EC Treaty also makes the legality of the residence clause dependent upon an individual evaluation based around a testing of necessity and of proportionality<sup>(602)</sup>? The same goes for family benefits, recipients of which are excluded from export by Regulation (EEC) No 1408/71, but who benefit from the lifting of the residence clauses by means of Article 7(2) of Regulation (EEC) No 1612/68<sup>(603)</sup>. What value is there in the condition of advance authorisation for the delivery of cross-border healthcare in the face of the requirements for the free provision of services? And this is not all: there are crucial responses to come on the manner in which the coordination regulations will be structured, regarding inactive mobile citizens, with Directive 2004/38/EC of 29 April 2004 concerning the right of EU citizens and members of their families to circulate and stay freely on the territory of the Member States. Soon we might even witness

attempts at secession, i.e. the emergence of sectoral coordination systems outside the coordination rules, with such professional activity calling for ad hoc regulation to free itself from the 'coordination monster'. This secessionist phenomenon is not unknown, since separate 'coordination' already exists: for additional pension schemes.

Should Community judges be reproached for adapting and escaping the confines of rigid cycles and overly restrictive material limits set by the coordination regulations? Is it not too easy to accuse them of giving in to the easy option of making rulings on the basis of sources external to coordination rather than on that of the complex but ad hoc rules, if they perceive coordination to be a technical jumble, an abstract ensemble resulting from subtle institutional negotiations, whereas each situation of transnational mobility corresponds to a personal, unique and sometimes dramatic case?

Although 'the rot has set in', it could, paradoxically, help the fruit to regain shape, colour and consistency as by concentrating on the principles of the internal market, even though they are often opposed to social security, consideration can be given to whether they could help revitalise coordination, restore its meaning, give it the central role it deserves in Community construction and restore confidence among the stakeholders (Member States, social security institutions, citizens, businesses and judges).

Community construction is a unique project which relies on the creation of indivisible links between political stability and economic integration, the former needing to be the means of preserving the latter. In these days of great instability, it is apposite to recall this fact because the temptation of hostilities is never as far away as we like to believe. This is how the European Community is built: even if it is only a tool for working towards a noble aim (peace), it is pegged to text that is fundamentally economic in essence, constructed upon a liberal or neo-liberal market ideology. Article

<sup>(599)</sup> Article 3(5) of Regulation (EC) No 883/2004. See also Case C-79/76 Fossi [1977] ECR I-667.

<sup>(600)</sup> Case C-192/05 Tas-Hagen [2006] ECR I-10451. See also Case C-221/07 Krystyna Zablocka-Weyhermüller [2008], not yet published.

<sup>(601)</sup> Case C-228/07 Petersen [2008] ECR I-6989.

<sup>(602)</sup> Case C-287/05 Hendrix [2007] ECR I-6909.

<sup>(603)</sup> Case C-212/05 Gertraud Hartmann [2007] ECR I-6303.

3(c) of the EC Treaty formalises the framework of what was originally called the ‘common market’, before being transformed into the ‘internal market’: the action of the Community consists of ‘an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital’. Even more precisely, ‘The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty’ (Article 14(2), EC Treaty). The CJ ensures the transmission of this ideology: ‘The concept of a common market as defined by the Court in a consistent line of decisions involves the elimination of all obstacles to intra-Community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market’<sup>(604)</sup>.

Despite being presentable as antitheses in superficial analyses, coordination of the national social security regimes and the internal market are evolving on intersecting planes, although their relations are marked by particularities, some of which are worthy of highlighting.

The first particularity concerns the manner in which coordination contributes to the internal market. In this regard, it in fact occupies a twofold accessory role since coordination contributes to the achievement of the free movement of workers which is itself a cornerstone of the internal market. It is then easy to comprehend the ‘Russian doll’ structure of Section 1 (‘The workers’) from Title 3 of the EC Treaty (‘Free movement of persons, services and capital’). Starting from the assertion made by Article 39(1) of the EC Treaty according to which ‘Freedom of movement for workers shall be secured within the Community’, the founding text adds, in Article 42 of the EC Treaty, a *vade-mecum* for social security coordination, in the form of minimalist content: ‘The Council shall, acting in accordance with the

procedure referred to in Article 251, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, it shall make arrangements to secure for migrant workers and their dependants: (a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries; (b) payment of benefits to persons resident in the territories of Member States.’

The second particularity consists, for coordination, of envisaging the accomplishment of the internal market from the perspective of individuals, with personal considerations taking precedence over those of businesses. It is symptomatic that the preamble of Regulation (EEC) No 1408/71 makes no allusion to undertakings: ‘Whereas the provisions for coordination of national social security legislations fall within the framework of freedom of movement for workers who are nationals of Member States and should, to this end, contribute towards the improvement of their standard of living and conditions of employment’ (preamble, Section 1). The text is repeated word for word in Recital 1 from the preamble to Regulation (EC) No 883/2004. Looking at the regulatory system as a whole, it can be observed that a very marginal section concerns social security contributions, whereas they are a key element of the cost of employment and consequently of a company’s competitiveness. Apart from secondment and the provisions concerning freelance workers, the regulation is focused on private individuals. The study of social security in the context of the internal market might have prompted questioning of the role of companies in coordination and on the opportunity for a rebalancing of the interpretations between the different stakeholders. Does not Article 16 of the Charter of Fundamental Rights of the European Union stipulate that ‘The freedom to conduct a business in accordance with Community law and national laws and practices is recognised’? Whether it is a case of relations between small businesses and the coordination rules, or relations between

<sup>(604)</sup> Case 15/81 *Gaston Schul Douane Expeditie BV* [1982] ECR 1409.

large companies and the coordination rules, there is justification for carrying out in-depth work on the effectiveness of entrepreneurial freedom within the coordination rules. However, that is not the chosen theme of this study.

The third particularity lies in the fact that coordination is only one of the Community ‘inputs’ of social security. On the basis of provisions that are both explicit and implicit, the internal market is concerned with social security from a variety of angles: professional equality between men and women, wages, supplementary pensions, insurance market, etc. But above all, social security has been hit by economic freedoms and their integrative aim, which contrasts with the reserved and supervised approach of coordination: the law on agreements and dominant positions have led the CJ to fashion a *concept* of social security, while freedom of service provision and establishment have turned the system for the delivery of cross-border healthcare upside down in the sense that it can be regarded overall as favourable to national insurance scheme contributors. The analysis of social security through business law contrasts sharply with the prudent approach of coordination, which is content to touch lightly upon the notion of social security using objective indices to define the scope for the application of the rules. The CJ regularly recalls the origin of this caution, ‘the regulations on social security for migrant workers did not set up a common scheme of social security, but allowed different schemes to exist, creating different claims on different institutions’<sup>(605)</sup>, specifying that ‘Community law does not detract from the powers of the Member States to organise their social security systems’<sup>(606)</sup>.

These links between coordination and the internal market prompt the following question: can the coordination rules be reconstructed upon

an ambitious *notion* of social security, in order to renew the identity, credibility, effectiveness, influence and lustre that they have lost? In other words, the aim of this study is to see whether it is possible to rethink the aim of the coordination regulations, drawing inspiration from the internal market. In this regard, the contrast is striking between the formalist approach to social security in the coordination regulations (I) and the notional approach inspired by the tools of the internal market (II). Consequently, if a transplant was attempted, could the coordination rules be organised around the notion of solidarity (III)?

## I. A FORMALIST APPROACH TO SOCIAL SECURITY WITHIN THE COORDINATION REGULATIONS

In the coordination regulations, social security is defined by a scope of action (A). The policy of male–female equality with regard to social security also places social security within a fixed scope, even if this is not exactly identical (B).

### A. A formalist approach in the coordination regulations

The preamble to Regulation (EC) No 883/2004, which mirrors the preamble to Regulation (EEC) No 1408/71, contains no reference to the notion of social security. Is this absence linked to the prudent mandate granted to the coordination rules, a mandate recalled in the preamble and according to which: ‘... it is necessary to respect the special characteristics of national social security legislations and to draw up only a system of coordination’ (Recital 4)? Echoing this, Article 1 of Regulation (EC) No 883/2004 provides a long list of definitions and key concepts for the comprehension and implementation of the coordination rules which, despite going right through the alphabet, fails to include that of ‘social security’. Is this because it is a pointless exercise in view of the aims pursued, or

<sup>(605)</sup> Case 807/79 Gravina [1980] ECR I-2205.

<sup>(606)</sup> For example, Case C-159/91 Poucet [1980] ECR I-637.

because it is too tricky to undertake? Whichever is the case, the very objective of coordination is not defined.

The choice made was to adopt a formalist approach to social security by demarcating its scope as objectively as possible. This choice can be justified both by a concern for efficiency and by the spirit of coordination, as it is not a question of either harmonisation or convergence, but simply of coordination of national systems, a method permitting the Member States to retain their sovereignty with regard to social security. It is this approach which led to the favouring of a formal and *utilitarian* logic for social security: admittedly with Convention No 102 of the ILO for reference, it was simply a question of agreeing between Member States on the schemes and services to be coordinated, chosen less on the basis of any conceptual unity than on that of practical criteria, or even elements of a financial nature. In other words, the social security schemes and provisions have been brought together not by an *idea* but by *contingencies*.

Instead of a *notion* of social security, Regulation (EC) No 883/2004, like its predecessors, sets a physical scope for its application. It is Article 3 which marks out this area of action: '1. This regulation shall apply to all legislation concerning the following branches of social security:

(a) sickness benefits; (b) maternity and equivalent paternity benefits; (c) invalidity benefits; (d) old-age benefits; (e) survivors' benefits; (f) benefits in respect of accidents at work and occupational diseases; (g) death grants; (h) unemployment benefits; (i) pre-retirement benefits; (j) family benefits. 2. Unless otherwise provided for in Annex XI, this regulation shall apply to general and special social security schemes, whether contributory or non-contributory, and to schemes relating to the obligations of an employer or shipowner. 3. This regulation shall also apply to the special non-contributory cash benefits covered by Article 70.4. The provisions of Title III of this regulation shall

not, however, affect the legislative provisions of any Member State concerning a shipowner's obligations. 5. This regulation shall not apply to social and medical assistance or to benefit schemes for victims of war or its consequences'.

The criteria selected come down to a triple frontier within which social security evolves within the meaning of the coordination regulations.

In terms of the first frontier, social security corresponds to certain social risks. Whether general or specific, schemes come under social security provided that they cover one of the risks listed by the regulation, the list of risks having also been extended by Article 3(1) of Regulation (EC) No 883/2004, since it now includes paternity and pre-retirement benefits<sup>(607)</sup>, but not dependency benefits (which remain covered by the regulation, like sickness benefits, through interpretation of the CJ<sup>(608)</sup>). The CJ has often opted for a broad interpretation of each of the risks<sup>(609)</sup>. Nonetheless, the criterion of the risk retains an essential usefulness, not only to define the system of a particular benefit<sup>(610)</sup>, but also to determine the framework for the application of the regulation. For example, the Belgian *minimex*, 'being a general social benefit, cannot be classified under one of the branches of social security listed in Article 4(1) of Regulation (EEC) No 1408/71 and therefore does not constitute a social security benefit within the specific meaning of the regulation'<sup>(611)</sup>.

<sup>(607)</sup> Full list of the risks: sickness benefits; maternity and equivalent paternity benefits; invalidity benefits; old-age benefits; survivors' benefits; benefits in respect of accidents at work and occupational diseases; death grants; unemployment benefits; pre-retirement benefits; family benefits.

<sup>(608)</sup> See, for example, Case C-215/99 Jauch [2001] ECR I-1901.

<sup>(609)</sup> For example, advances of maintenance payments by the state, as they are intended to relieve the financial burden borne by the parent who is entrusted with the care of the children, constitute a family benefit (Case C-85/99 Offermanns [2001] ECR I-2261). It should be noted that Article 1(z) of Regulation (EC) No 883/2004 runs counter to this case-law by stating that 'the term "family benefit" means all benefits in kind or in cash intended to meet family expenses, excluding advances of maintenance payments and special childbirth and adoption allowances mentioned in Annex I'.

<sup>(610)</sup> A benefit classed as sickness benefit would not in fact come under the same system as a benefit classed as old-age benefit.

<sup>(611)</sup> Case 249/83 Hoeckx [1985] ECR I-973.

The second frontier is that social security is distinguished from social assistance<sup>(612)</sup>, as the regulation does not apply to social assistance<sup>(613)</sup>. It is known, however, that the CJ has shaped a different reality by creating the category *sui generis* of mixed benefits, which limits social assistance, within the meaning of the coordination regulations, to a reduced area, through application of the theory referred to as the ‘attraction effect of social security’. According to a well-known formula of the CJ, ‘although it may seem desirable, from the point of view of applying the regulation, to establish a clear distinction between legislative schemes which come within social security and those which come within assistance, it is possible that certain laws, because of the classes of persons to which they apply, their objectives, and the detailed rules for their application, may simultaneously contain elements belonging to both the categories mentioned and thus defy any general classification’. Nevertheless, such a benefit ‘approximates to social security because it does not prescribe consideration of each individual case, which is a characteristic of assistance, and confers on recipients a legally defined position’<sup>(614)</sup>. It matters little that the benefit or award is classified by internal law under the category of social assistance<sup>(615)</sup>. Consequently, the area of social assistance is residual, covering benefits granted under discretionary conditions and those which are not connected to any of the social security risks within the meaning of Article 3(1) of Regulation (EC) No 883/2004. As regards ‘mixed benefits’, Article 70 of this regulation incorporates Community case-law by laying down as a principle that it ‘shall apply to special non-contributory cash benefits which are provided under legislation which, because of its personal scope, objectives and/or conditions for entitlement, has characteristics both of the social security legislation referred to in Article 3(1) and of social assistance’.

<sup>(612)</sup> Benefits for victims of war are not included in the regulation, which does not prevent the CJ from coordinating them on the basis of other Community provisions. See above.

<sup>(613)</sup> See also Case C-25/95 Otte [1996] ECR I-3745.

<sup>(614)</sup> Case 1/72 Frilli [1972] ECR I-457.

<sup>(615)</sup> Cases 379 to 381/85 Giletti et al. [1987] ECR I-955.

In terms of the third frontier, social security is restricted to statutory schemes, as contractual schemes do not fall within its scope. In support of Article 3(1) of Regulation (EC) No 883/2004, Article 1(l) of the regulation clarifies the concept of ‘legislation’, which ‘means, in respect of each Member State, laws, regulations and other statutory provisions and all other implementing measures relating to the social security branches covered by Article 3(1)’. Contractual schemes are not cast aside totally, however, as coordination includes contractual schemes ‘which serve to implement an insurance obligation arising from the laws and regulations referred to in the preceding subparagraph or which have been the subject of a decision by the public authorities which makes them obligatory or extends their scope, provided that the Member State concerned makes a declaration to that effect’ (Article 1(l)). France offers two illustrations of these exceptions: the unemployment insurance scheme, of a contractual but compulsory nature, comes under the coordination regulations because it takes the place of a statutory scheme: the ARRCO-AGIRC compulsory supplementary retirement scheme came in there as a result of a unilateral declaration by the French authorities<sup>(616)</sup>. Are the contractual schemes concerned social security schemes within the meaning of the regulation? The regulation does not say so<sup>(617)</sup>. However, it is clearly apparent that insurance contracts concluded between an insurance company and a private individual do not come under the scope of the regulation and are therefore not social security, even if they do relate to a social security risk<sup>(618)</sup>.

Finally, the overview of the scope of social security within the meaning of the coordination regulations,

<sup>(616)</sup> Declaration of 29 March 1999, from which there resulted an amendment to Regulation (EEC) No 1408/71 (Regulation (EC) No 138/2001 of 5 June 2001).

<sup>(617)</sup> See also Recital 6: ‘The close link between social security legislation and those contractual provisions which complement or replace such legislation and which have been the subject of a decision by the public authorities rendering them compulsory or extending their scope may call for similar protection with regard to the application of those provisions to that afforded by this regulation. As a first step, the experience of Member States who have notified such schemes might be evaluated.’

<sup>(618)</sup> Case 313/82 NV Tiel-Utrecht [1984] ECR I-1389.



despite having evolved somewhat over the years to take account of fundamental trends in the national systems<sup>(619)</sup>, is as follows: schemes of a statutory origin, exceptionally contractual in nature, covering benefits relating to an exhaustive list of social risks, but encroaching upon social assistance.

## B. A formalist approach in the context of male–female equality

Male–female equality lies at the heart of Community social policy. Article 119 of the Treaty of Rome declares that ‘each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work’. This policy has been developed and ramified in derived legal texts, certain of which relate to social protection. Directive 79/7/EEC for statutory schemes and Directive 86/378/EEC for occupational schemes have implemented the principle of equality of treatment in the field of social security. Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation has absorbed the latter, while Directive 79/7/EEC continues on its path independently. Our focus will be primarily on the latter and on the expansionist case-law of the CJ, based on Article 141 of the EC Treaty. It will become clear that the formalist path taken leads to the definition of social security according to two frontiers: in relation to social aid (1), and in relation to occupational schemes (2).

### 1. Social security and social assistance

Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, which has the aim of ‘implementing in the

first place in the statutory schemes which provide protection against the risks of sickness, invalidity, old age, accidents at work, occupational diseases and unemployment, and in social assistance insofar as it is intended to supplement or replace the abovementioned schemes’ (preamble, Recital 1), offers an interesting view of the manner in which statutory schemes and social aid are structured.

There is a first significant difference in terms of vocabulary: whereas the expression ‘social assistance’ is used in the coordination regulations, it is the term ‘social aid’ that is opted for in relation to equality between the sexes. While this terminological variation might not appear to have any concrete implication, one might regret the lack of rigour in the terms, which results at the very least in a compartmentalised view of the concepts connected with social protection in Community law. The other difference lies in the inclusion, within the physical scope of Directive 79/7/EEC, of provisions concerning social aid, provided that ‘it is intended to supplement or replace the schemes referred to in (a)’. But contrary to what the title of the directive might suggest, social aid is not related to social security, as Article 1 of the directive indicates that its purpose is ‘the progressive implementation, in the field of social security *and other elements of social protection provided for in Article 3*, of the principle of equal treatment for men and women in matters of social security’. The directive thus makes a distinction between social security and social protection.

Points of rapprochement can also be observed. Just as for the coordination regulations and in the same spirit of useful effect, the CJ opts for a broad interpretation of the scope of the statutory schemes to the detriment of social aid, even if the legal risks covered are not exactly the same<sup>(620)</sup>. For example, a UK old-age winter fuel payment, *because its source is in the law and it relates to the*

<sup>(619)</sup> Extension of the scope of coordinated benefits, from the worker to the person covered by national health insurance and then to the EU citizen, etc.

<sup>(620)</sup> According to Article 3(1)(a), it covers the risks of sickness, invalidity, old age, accidents at work and occupational diseases, and unemployment.

*old-age risk, comes under Directive 79/7/EEC* <sup>(621)</sup>. *The statutory social security schemes even go as far as to cover benefits that, in organic terms, have nothing to do with social security: ‘a system such as that established by Regulation No 6(1) of the 1989 regulations, which exempts certain categories of persons, in particular certain old people, from prescription charges falls within the scope of the directive’ because ‘in view of the fundamental importance of the principle of equal treatment and the aim of Directive 79/7/EEC, which is the progressive implementation of that principle in matters of social security, a system of benefits cannot be excluded from the scope of the directive simply because it does not strictly form part of national social security rules’* <sup>(622)</sup>. *On the other hand, as in the coordination regulations, general social aid benefits are excluded from the scope of the directive, with the reference to ‘other elements of social protection provided for in Article 3’ of Directive 79/7/EEC effectively only interpretable as referring to the provisions concerning social aid, which generally remain outside the field of social security* <sup>(623)</sup>. Overall, however, as within the context of the coordination regulations, the scope of social aid is residual.

## 2. Social security and occupational schemes

One of the *summa divisio* of the coordination regulations relates to the distinction between statutory schemes and supplementary schemes since, without exception, only the first are covered by their prescriptions, with the second category coming under <sup>(624)</sup> Directive 98/49/EC on ‘portability’. The issue is similar for male–female equality in matters of social security, as it is appropriate to disassociate ‘statutory social security schemes’, which are subject to the stipulations of Directive 79/7/EEC, from ‘occupational social security schemes’, which come

under Directive 86/378/EEC and which correspond to supplementary pension schemes <sup>(625)</sup>. It is also worth asking why, in the title of the directive, this last expression was not preferred to ‘supplementary pension’, which is more opaque and out of step with that of Directive 98/49/EC.

What observations can be made? First of all, the complementarity between the two texts is formalised, since Article 2 of Directive 86/378/EEC specifies that ‘Occupational social security schemes means schemes not governed by Directive 79/7/EEC’. The initiative is identical for coordination, with any overlapping being avoided by Directive 98/49/EC, ‘Whereas no pension or benefit should be subject to both the provisions of this directive and those of Regulations (EEC) No 1408/71 and (EEC) No 574/72, and therefore any supplementary pension scheme which comes within the scope of those regulations, because a Member State has made a declaration to that effect under Article 1(j) of Regulation (EEC) No 1408/71, cannot be subject to the provisions of this directive’ (Recital 5). Even more clearly, the preamble to Directive 98/49/EC recalls that the coordination regulations ‘are not appropriate to supplementary pension schemes, except for schemes which are covered by the term “legislation” as defined by the first subparagraph of Article 1(j) of Regulation (EEC) No 1408/71 or in respect of which a Member State makes a declaration under that article’ (Recital 4). As the preamble to a directive is devoid of imperative legal value, it is Article 1 of Directive 98/49/EC that establishes the structuring in respect of the coordination rules: the protection offered by the directive ‘refers to pension rights under both voluntary and compulsory supplementary pension schemes, with the exception of schemes covered by Regulation (EEC) No 1408/71’.

<sup>(621)</sup> Case C-382/98 Taylor [1999] ECR I-8955.

<sup>(622)</sup> Case C-137/94 Richardson [1995] ECR I-3407.

<sup>(623)</sup> Case C-228/94 Atkins [1996] ECR I-3633 (equal treatment for men and women — concessionary fares on public passenger transport services). See also Cases C-63 and 64/91 Jackson and Cresswell [1992] ECR I-4737 (British benefit providing minimal resources).

<sup>(624)</sup> Excluding exceptions: see in particular the ARRCO-AGIRC French supplementary schemes.

<sup>(625)</sup> See Articles 1 and 2 of the directive. By ‘supplementary pension scheme’, Article 3(b) means ‘pension scheme means any occupational pension scheme established in conformity with national legislation and practice such as a group insurance contract or pay-as-you-go scheme agreed by one or more branches or sectors, funded scheme or pension promise backed by book reserves, or any collective or other comparable arrangement intended to provide a supplementary pension for employed or self-employed persons’.

But while the development of the relationship between the coordination regulations and Directive 98/49/EC goes no further, Directive 86/378/EEC provides elements that help to define what comes under the statutory and occupational schemes respectively; 'Occupational social security schemes means schemes not governed by Directive 79/7/EEC whose purpose is to provide workers, whether employees or self-employed, in an undertaking or group of undertakings, area of economic activity or occupational sector or group of such sectors with benefits intended to supplement the benefits provided by statutory social security schemes or to replace them, whether membership of such schemes is compulsory or optional' (Article 2(1)).

The breakdown between statutory schemes on the one hand and occupational schemes on the other is an important issue for the implementation of the policy of equal treatment for men and women, particularly because Article 7(1) of Directive 79/7/EEC authorises Member States not to apply equal treatment to certain key questions<sup>(626)</sup>. In practice, Directive 86/378/EEC has had a secondary effect on the breakdown of statutory/occupational schemes: it is Article 141 of the EC Treaty that has played a key role through the concept of 'pay'<sup>(627)</sup>. This provision has also displaced the lines between statutory and occupational schemes, within the meaning of a marginalisation of the former. As an indirect consequence, the concepts of 'occupational scheme' within the meaning of Directive 86/378/EEC and within the meaning of Article 141 of the EC Treaty do not match up...

<sup>(626)</sup> 'This directive shall be without prejudice to the right of Member States to exclude from its scope: (a) the determination of personable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits; (b) advantages in respect of old-age pension schemes granted to persons who have brought up children; the acquisition of benefit entitlements following periods of interruption of employment due to the bringing up of children; (c) the granting of old-age or invalidity benefit entitlements by virtue of the derived entitlements of a wife; (d) the granting of increases of long-term invalidity, old-age, accidents at work and occupational disease benefits for a dependent wife; (e) the consequences of the exercise, before the adoption of this directive, of a right of option not to acquire rights or incur obligations under a statutory scheme.'

<sup>(627)</sup> The CJ has rarely interpreted Directive 86/378/EEC, despite the prejudicial questions which have been put to it in this sense: as long as the questions are answered by Article 141 of the Treaty, it adjudges it unnecessary to respond on the basis of Directive 86/378/EEC (see, for example, Case C-19/02 Hlosek [2004] ECR I-11491).

Admittedly, it is unsurprising that an occupational pension scheme 'does not constitute a social security scheme governed directly by statute and thus outside the scope of Article 119, and that benefits paid to employees under the scheme therefore constitute consideration received by the worker from the employer in respect of his employment, as referred to in the second paragraph of Article 119'(628). Similarly, occupational pension schemes resulting either from a consultation between social partners or from a unilateral decision on the part of the employer, the funding of which is provided entirely by the employer or by both the latter and the employees, without any contribution from the public authorities, are occupational schemes resulting in remuneration (629).

The CJ has nonetheless gone far beyond the natural framework of occupational schemes by constructing, through abundant case-law, a profile of the schemes coming under Directive 79/7/EEC and of occupational schemes resulting in remuneration within the meaning of Article 141 of the EC Treaty. The statutory schemes are effectively limited to schemes 'directly governed by legislation without any element of agreement within the undertaking or the occupational branch concerned, which are obligatorily applicable to general categories of workers', as 'these schemes assure for the workers the benefit of a statutory scheme, the financing of which workers, employers and possibly the public authorities contribute in a measure determined less by the employment relationship between the employer and the worker than by considerations of social policy'(630). In contrast, all schemes that do not meet the cumulative criteria are occupational schemes or 'can be assimilated to a private occupational scheme'(631), and there are many of them too, covering millions of workers. For example, the (French) ARRCO-AGIRC supplementary retirement scheme is an occupational scheme that results in

<sup>(628)</sup> Case 170/84 Bilka-Kaufhaus [2004] ECR I-1607.

<sup>(629)</sup> Case C-262/88 Barber [1990] ECR I-1889.

<sup>(630)</sup> Case 80/70 Defrenne [1971] ECR I-445.

<sup>(631)</sup> See Case C-7/93 Beune [1994] ECR I-4471.

remuneration within the meaning of Article 141 of the Treaty because ‘the criterion relating to the arrangements for funding and managing a pension scheme does not make it possible to determine whether such a scheme falls within the scope of Article 119 of the Treaty’, so long as it ‘does not involve social security schemes designed for the whole population or all workers’ and that ‘the benefits granted are related to the last salary’<sup>(632)</sup>. However, we are in the presence here of a scheme that is quasi-statutory, compulsory, run according to the pay-as-you-go mechanism<sup>(633)</sup>, paying benefits in many cases superior to those of the basic scheme and also coming under Regulation (EEC) No 1408/71. Another example, a scheme for civil servants such as that of the ABPW (Netherlands), directly fixed by law, which is not solely supplementary since it can partially take the place of another statutory scheme that is part-financed by the government, results in ‘pay’ within the meaning of Article 141 of the Treaty because ‘the pension is paid to the worker by reason of the employment relationship between him and his former employer, that is to say the criterion of employment based on the wording of Article 119 itself’. For the CJ, ‘considerations of social policy, of state organisation, or of ethics or even budgetary preoccupations which influenced, or may have influenced, the establishment by the national legislature of a scheme such as the scheme at issue cannot prevail if the pension concerns only a particular category of workers, if it is directly related to the period of service and if its amount is calculated by reference to the civil servant’s last salary. The pension paid by the public employer is therefore entirely comparable to that paid by a private employer to his former employees’<sup>(634)</sup>. As a last example, a French public servant-based scheme organised by law and run on a pay-as-you-go basis amounts to remuneration because ‘public servants who benefit from it must be regarded as constituting a particular category of

workers’, as the pension is ‘granted in remuneration for the services which they performed until their retirement from the service and that the amount of the pension takes account of the level, duration and nature of the services’, with the CJ adding that ‘the criterion derived from the supplementary nature of a pension in relation to a basic pension provided by a statutory social security scheme nor the criterion relating to the arrangements for funding and managing a pension scheme is conclusive for the purpose of determining whether the scheme in question falls within the scope of Article 119 of the Treaty’<sup>(635)</sup>.

This rapidly presented case-law on Article 141 of the EC Treaty shows that the formal criteria which constitute the source of the scheme (statutory or contractual origin) and its position within the architecture of social protection (basic or supplementary scheme) do not constitute decisive elements. The criteria of management method (by pay-as-you-go or by capitalisation, compulsory or optional participation) and funding method (autonomous or with public authority intervention) are also irrelevant, as is any submission of the scheme to the coordination regulations. The result is that a scheme can be adjudged occupational within the meaning of male–female equality and statutory within the meaning of the coordination rules. The approach of the CJ is therefore entirely instrumental, leaving to one side any reflection on the notion of social security, which leads to the favouring of a variable geometry approach: social security is malleable; its contours fluctuate according to the questions being dealt with. It can also be observed that statutory social security schemes are defined, from the perspective of Article 141 of the EC Treaty, by default: they cover schemes that do not constitute remuneration within the meaning of the CJ’s criteria. Priority is therefore given to ‘occupational social security’, even if that means broadening its scope.

<sup>(632)</sup> Case C-50/99 Podesta [2000] ECR I-4039.

<sup>(633)</sup> In the Evrenopoulos judgment (Case C-147/95 Evrenopoulos [2000] ECR I-2057), the CJ had already ruled that a pay-as-you-go scheme could come under Article 141 of the Treaty.

<sup>(634)</sup> Case C-7/93 Beune [1994] ECR I-4471.

<sup>(635)</sup> Case C-366/99 Griesmar [2001] ECR I-9383. It should be noted that, in this judgment, the CJ does not describe the pension scheme as an ‘occupational scheme’.

Incidentally, it appears that Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer, which codifies Directive 80/987/EEC and the subsequent directives making certain amendments to it, is concerned with 'social security'. The Member States may thus make provision that Articles 3, 4 and 5 of the directive 'shall not apply to contributions due under national statutory social security schemes or under supplementary occupational or inter-occupational pension schemes outside the national statutory social security schemes'. For the CJ, referred to in respect of UK retirement schemes financed by the employer in the form of pension funds, in a case where the assets of the company in difficulty were not sufficient to cover all of the benefits owed to all of the contributors, there is 'no obligation for the Member States to guarantee entitlement to old-age benefits in full'. However, a minimum level of protection required by the directive must be respected and it must be held 'that provisions of domestic law that may, in certain cases, lead to a guarantee of benefits limited to 20 or 49 % of the benefits to which an employee was entitled, that is to say, of less than half of that entitlement, cannot be considered to fall within the definition of the word "protect" used in Article 8 of the directive'<sup>(636)</sup>.

This first part permits the assertion that social security is devoid of *identity* in Community social law, whether for coordination or equality between the sexes: it is only an area of variable geometry, merely the instrument of policies which overhang and eclipse it. Should we be surprised therefore that the judges go beyond the coordination regulations and, according to the circumstances, draw upon alternative solutions from external sources? In reaction to this negative observation, which presents a destructured vision of social security within Community social law, ideas can be drawn from the manner in which the internal market links social security and solidarity.

<sup>(636)</sup> Case C-278/05 *Robins* [2007] ECR I-1053. According to the CJ, the responsibility of the Member State concerned is contingent on a finding of manifest and grave disregard by that state for the limits set on its discretion.

## II. A NOTIONAL APPROACH TO SOCIAL SECURITY INSPIRED BY THE TOOLS OF THE INTERNAL MARKET?

Beyond the coordination regulations, social security is dealt with, in a direct or indirect manner, by multiple sources of primary law and derived law. Analysis of the texts and of the relevant case-law enables the emphasis to be placed on a very different approach to social security, where reasoning no longer takes place according to an area but according to a *notion*.

What is a notion? The notion of 'notion' comes down to the idea of classification. Identifying the notion of a given subject means finding constants, identities, behind a changing and heterogeneous social reality. Work on notion is inherent in legal activity<sup>(637)</sup>. The individualisation of a notion involves counting its constituent elements, its interactions and expressing its distinctive elements. But 'notion' does not mean 'definition': the notion is not necessarily connected to the positive law, but aids understanding of the reality and is 'the result of an intellectual procedure which consists of a passage from the sensible reality to the representation of this reality through the idea which one has of reality'<sup>(638)</sup>. The notion is the general idea proposed in the work of the mind, or 'the result of an effort of the mind, with a view to grasping, in a predominant representation, the logical essence of things.'<sup>(639)</sup> In this respect, notion is not differentiated from concept.

In methodological terms, the discovery of a notion presumes a double movement: a movement of abstraction, of generalisation of the real, followed by a process of returning to the real. Let us take an example borrowed from Charles Jarrosson (see above): if one knows iron, lead, gold and copper, the

<sup>(637)</sup> F. P. Benoit, *Notions, concepts, instruments de la connaissance juridique*, PU Grenoble, 1995.

<sup>(638)</sup> C. Jarrosson, *La notion d'arbitrage*, LGDJ, Paris, 1987.

<sup>(639)</sup> C. Jarrosson, see above

mind requires this double procedure of generalisation and abstraction to grasp the concept of metal. Once this stage is reached, it will be all the easier to recognise this or that metal which was previously unknown. In the field of law, the search for a notion is carried out through an analysis designed to bring together, among the elements of the real, those which lend themselves to classification under a common description. The notion will be the result of data as diverse as the history, the social and economic concept and the compared law. This process allows the notion to influence the legal reality, since it encourages the law to be placed in accord with the notion. There would then be two categories of notions, those which are ‘conceptual’, which would exist independently of what they are being used for<sup>(640)</sup>, and ‘functional’ notions characterised by the role that they play. In our opinion, the notion of social security should borrow simultaneously from the two approaches.

It is precisely through the instruments of the internal market that social security’s identity has been isolated in Community law: what is *inherent* in social security is solidarity. This is strikingly apparent from the case history of the CJ (A) and from the legislative works (B).

### A. Solidarity and social security in CJ case-law

The very nature of social security was discerned by the CJ over 25 years ago, within the context of a conflict involving the application of the principles of free movement of goods<sup>(641)</sup>. The dispute centred on ascertaining whether the prohibition of measures having an effect equivalent to quantitative restrictions on imports and exports applies to measures whereby a Member State (the Netherlands), with a view to achieving economies regarding compulsory healthcare insurance, prevents specifically named medicinal preparations and dressings from being

supplied to persons insured under the scheme. *It was found that 80 % of the medicinal preparations consumed in the Netherlands were imported, and that it followed that, where reimbursement by the insurance authority is excluded in respect of a medicinal preparation, purchases of that preparation fall and consequently there is a risk that the preparation in question will be totally eliminated from the national market. The CJ’s response was based on the originality of the compulsory sickness insurance sector, ‘In view of the special nature, in that respect, of the trade in pharmaceutical products, namely the fact that social security institutions are substituted for consumers as regards responsibility for the payment of medical expenses, legislation of the type in question cannot in itself be regarded as constituting a restriction on the freedom to import guaranteed by Article 30 of the Treaty if certain conditions are satisfied’<sup>(642)</sup>. And what is the nature of this ‘special nature’? The CJ did not elaborate, but the impression given was that once defined, it would serve to singularise social security and to justify separate treatment with regard to the rules of competition law.*

It was 10 years later that the CJ had the opportunity to specify its analysis. In the famous *Poucet and Pistre*<sup>(643)</sup> cases, two freelance workers challenged not the obligation to contribute to sickness and old-age risks, but not being able to choose their insurer freely, as this was imposed on them by the statutory social security schemes to which it was compulsory for them to contribute. The two insured persons took the view that the body responsible for managing the social security scheme should be regarded as constituting an undertaking in the meaning of Articles 85 and 86 of the Treaty, as the dominant position granted by the law to this body was incompatible with the common market. The CJ did not

<sup>(640)</sup> G. Vedel, JCP 1948, I, No 682.

<sup>(641)</sup> Case 238/82 Duphar [1984] ECR I-523.

<sup>(642)</sup> The CJ concluded that, for such legislation to be in conformity with the Treaty, the choice of the medicinal preparations to be excluded must be free of any discrimination to the detriment of imported medicinal preparations. To that end, the exclusionary lists must be drawn up in accordance with objective criteria, without reference to the origin of the products, and must be verifiable by any importer.

<sup>(643)</sup> Joined Cases C-159/91 and C-160/91 *Christian Poucet v Assurances Générales de France and Caisse Mutuelle Régionale du Languedoc-Roussillon* [1993] ECR I-637 and 647.



follow this line of argument, ruling that ‘Sickness funds, and the organisations involved in the management of the public social security system, fulfil an exclusively social function. That activity is based on the principle of national solidarity and is entirely non-profit-making. The benefits paid are statutory benefits bearing no relation to the amount of the contributions. Accordingly, that activity is not an economic activity and, therefore, the organisations to which it is entrusted are not undertakings within the meaning of Articles 85 and 96 of the Treaty’.

What is solidarity? For the *Poucet* and *Pistre* judgments, it means providing cover for all the persons to whom it applies, against the risks of sickness, old age, death and invalidity, regardless of their financial status and their state of health at the time of affiliation. In the sickness and maternity scheme, *continues the CJ, solidarity is embodied in the fact that the scheme is financed by contributions proportional to the income from occupation and to the retirement pensions of the persons making them; only recipients of an invalidity pension and retired insured members with very modest resources are exempted from the payment of contributions, whereas the benefits are identical for all those who receive them. Furthermore, persons no longer covered by the scheme retain their entitlement to benefits for a year, free of charge. Solidarity entails the redistribution of income between those who are better off and those who, in view of their resources and state of health, would be deprived of the necessary social cover. In the old-age insurance scheme, solidarity is embodied in the fact that the contributions paid by active workers serve to finance the pensions of retired workers. It is also reflected by the grant of pension rights where no contributions have been made and of pension rights that are not proportional to the contributions paid.*

*Solidarity is therefore both an end and a means for social security. Consequently, the approach differs radically from that followed in the coordination regulations, as the formal criteria of the latter take a back seat in relation to the functional criteria of the internal market.*

The CJ’s reasoning was transposed to a dispute concerning the refusal of a craftsman to pay social security contributions to the Italian workers’ compensation authority in respect of accidents at work, a refusal justified by the fact that this authority would be the holder of a monopoly constituting an abuse of dominant position. The CJ adopts a similar position to that of the *Poucet* and *Pistre* judgments, adapted to the context of the risk of accident at work: ‘The concept of an undertaking, within the meaning of Articles 85 and 86 of the EC Treaty (now Articles 81 EC and 82 EC), does not cover a body which is entrusted by law with the management of a scheme providing compulsory insurance against accidents at work and occupational diseases, such as the Istituto nazionale per l’assicurazione contro gli infortuni sul lavoro (INAIL)’. On the one hand, ‘the covering of risks of accidents at work and occupational diseases has for a long time been part of the social protection which Member States afford to all or part of their population’. On the other, the Italian scheme providing insurance against accidents at work and occupational diseases, ‘insofar as it provides for compulsory social protection for all non-salaried workers in the non-agricultural professions who carry out an activity classified as a risk activity by the law, pursues a social objective’. This is because ‘Such a scheme is intended to provide all the persons protected with cover against the risks of accidents at work and occupational diseases, irrespective of any fault which may have been committed by the victim, or by the employer, and therefore without any need for civil liability to be incurred by the person drawing benefits in respect of the risk activity’. Moreover, ‘Furthermore, the social aim of that insurance scheme is highlighted by the fact that benefits are paid even when the contributions due have not been paid, which obviously contributes to the protection of all insured workers against the economic consequences of accidents at work or occupational diseases’. The CJ then highlights several elements which establish that the scheme is guided by the principle of solidarity: it is ‘financed by contributions the rate of which is not systematically proportionate to the risk insured’, with the

amount of benefits paid being ‘not necessarily proportionate to the insured person’s earnings’. The absence of any direct link between the contributions paid and the benefits granted ‘thus entails solidarity between better paid workers and those who, given their low earnings, would be deprived of proper social cover if such a link existed’<sup>(644)</sup>.

How would the CJ react in relation to supplementary schemes? In the *FFSA*<sup>(645)</sup> case, it chose, on the basis of the same elements of reasoning, an opposite solution regarding a French supplementary old-age insurance scheme for non-salaried persons from the agricultural professions. *The decree establishing this scheme envisaged that it would be managed by the Caisse nationale d’assurance vieillesse mutuelle agricole, a monopoly situation contested by the federation representing private insurance companies. For the CJ, ‘A non-profit-making organisation which manages an old-age insurance scheme intended to supplement a basic compulsory scheme, established by law as an optional scheme and operating according to the principle of capitalisation in keeping with the rules laid down by the authorities in particular with regard to conditions for membership, contributions and benefits, is an undertaking for the purposes of Article 85 et seq. of the Treaty’. This resulted in an opposite response to that of the Poucet and Pistre judgments: that it is not the supplementary nature of the scheme, but the fact that it operates according to the mechanism of capitalisation, with participation also being optional, that is enough to render insufficient the elements of solidarity on the basis of which the French authorities were attempting to justify the monopolistic position.*

Then came the turn of three judgments from 21 September 1999<sup>(646)</sup> relating to Dutch supplementary pension schemes (second pillar) organised

in a sectoral manner through agreement between social partners. Was the obligation, sanctioned by the public authorities, for companies from the sector to affiliate their employees to the designated fund compatible with Community competition law? In its response, the CJ attaches great importance to the fact that the retirement fund was set up by the social partners, stating that such a scheme seeking to guarantee a certain level of pension for all workers in that sector and therefore contributing directly to improving one of their working conditions, namely their pay, *does not* fall within the scope of Article 85 of the Treaty. *That said, because the scheme operates according to the system of capitalisation, the CJ considers that the fund which manages it is an undertaking within the meaning of Articles 85 and following of the Treaty. The monopolistic situation is not, however, in dispute since ‘the supplementary pension scheme managed exclusively by the fund displays a high level of solidarity resulting, in particular, from the fact that contributions do not reflect the risk from the obligation to accept all workers without a prior medical examination, the continuing accrual of pension rights despite exemption from the payment of contributions in the event of incapacity for work, the discharge by the fund of arrears of contributions due from an employer in the event of insolvency and the indexing of the amount of pensions in order to maintain their value’. Consequently, ‘the removal of the exclusive right conferred on the fund might make it impossible for it to perform the tasks of general economic interest entrusted to it under economically acceptable conditions and threaten its financial equilibrium’. In the context of another Dutch sectoral supplementary retirement fund made compulsory by the decision of the public authorities for all specialist doctors, the CJ also ruled that such a pension fund, ‘which itself determines the amount of the contributions and benefits and operates on the basis of the principle of capitalisation, which has been made responsible for managing a supplementary pension scheme set up by a profession’s representative body and membership of which has been made compulsory by the public authorities for all members of that profession, is an undertaking*

<sup>(644)</sup> Case C-218/00 *Cisal di Battistello Venanzio & C. Sas et INAIL* [2002] ECR I-691.

<sup>(645)</sup> Case C-244/94 *Fédération Française des Sociétés d’Assurance, Société Paternelle-Vie, Union des Assurances de Paris-Vie and Caisse d’Assurance et de Prévoyance Mutuelle des Agriculteurs v Ministère de l’Agriculture et de la Pêche* [1995] ECR I-4013.

<sup>(646)</sup> Cases C-115 to 117/97 *Brentjen’s* [1999] ECR I-6025; Case C-219/97 *Bokken BV* [1999] ECR I-6121; Case C-67/96 *Albany* [1999] ECR I-5751.

within the meaning of Articles 85, 86 and 90 of the Treaty'. However, 'Articles 86 and 90 of the Treaty do not preclude the public authorities from conferring on a pension fund the exclusive right to manage a supplementary pension scheme for the members of a profession'<sup>(647)</sup>.

The identity of social security has also been reinforced by analysis of the case-law on 'insurance' directives. The question posed was, in substance, whether the monopoly of the social security bodies responsible for managing sickness and maternity insurance for freelance workers in France is compatible with Article 2(2) of Directive 92/49 of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance, which excludes from its scope of application insurance as part of a statutory social security scheme. The CJ's response was negative, stipulating that 'security schemes such as those at issue in the main proceedings, which are based on the principle of solidarity, require compulsory contributions in order to ensure that the principle of solidarity is applied and that their financial equilibrium is maintained. If Article 2 of Directive 92/49/EEC were to be interpreted in the manner contemplated by the national tribunal, the obligation to contribute would be removed and the schemes in question would thus be unable to survive'<sup>(648)</sup>.

Conversely, 'insurance undertakings covering the risk of accidents at work remain within the scope of Directive 92/49, even in the context of a statutory scheme of social security, where those undertakings operate at their own risk with a view to profit, which is true of insurance in relation to accidents at work in Belgium'<sup>(649)</sup>. The 'insurance' directive can therefore cover social security schemes which also come under the scope of Regulation (EEC) No 1408/71.

<sup>(647)</sup> Cases C-180 to 184/98 Pavlov [2000] ECR I-6451.

<sup>(648)</sup> Case C-238/94 Garcia [1996] ECR I-1673.

<sup>(649)</sup> Case C-206/98 Commission v Belgium [2000] ECR I-3509.

The reasoning of the CJ, based on the principle of solidarity, extends to the law on agreements. The question was also put to it of whether, in order to control the increase in the cost of expenditure on the statutory sickness insurance scheme, a law could require the sickness insurance fund federations of the country in question (Germany) to fix maximum amounts for their contribution towards the cost of medication and healthcare materials. In other words, does this situation amount to an agreement once the sickness insurance funds, although statutory public bodies, are in a situation of competition as regards the rate of contributions for the purpose of attracting the compulsory members as well as the voluntary members, since German law states that the members are free to choose their sickness fund? According to the CJ, 'like the bodies at issue in *Poucet and Pistre*, cited above, the sickness funds of the German statutory sickness insurance scheme are involved in the management of the social security system. In this regard they fulfil an exclusively social function, which is founded on the principle of national solidarity and is entirely non-profit-making. It is to be noted in particular that the sickness funds are compelled by law to offer to their members essentially identical obligatory benefits which do not depend on the amount of the contributions. The funds therefore have no possibility of influence over those benefits'. Consequently, 'since the activities of bodies such as the sickness funds are not economic in nature, those bodies do not constitute undertakings within the meaning of Articles 81 EC and 82 EC'. And the CJ adds that 'in determining those fixed maximum amounts, the fund associations do not pursue a specific interest separable from the exclusively social objective of the sickness funds. On the contrary, in making such a determination, the fund associations perform an obligation which is integrally connected with the activity of the sickness funds within the framework of the German statutory health insurance scheme'<sup>(650)</sup>.

<sup>(650)</sup> Cases C-264/01, C-306/01, C-354/01 and C-355/01 AOK Bundesverband and Others [2004] ECR I-2493.

The issue is similar in a case between the Spanish federation of scientific, medical, technical and dental instrument suppliers (FENIN) and the European Commission as regards the application of the competition rules to organisations managing a health offer in the form of a national health service. The Spanish business federation, made up of the suppliers of the national hospital system, complained to the Commission that the national health service management bodies regularly settled their debts with an average delay of 300 days, whereas they were settling their other debts to other service suppliers within more reasonable periods. The member companies of this federation adjudged themselves to be the victims of discrimination linked to the dominant position of the national health system administrators on the Spanish healthcare product market. In rejecting the petition, the Court of First Instance of the European Communities held that the national health service ‘operates according to the principle of solidarity in that it is funded from social security contributions and other state funding and provides services free of charge to its members on the basis of universal cover, and that the SNS [Spanish health service] management bodies do not, therefore, act as undertakings in their activity of managing the health system’<sup>(651)</sup>. Moreover, the SNS management bodies cannot be regarded as undertakings within the meaning of Community competition law, either where they participate in the management of the public health service, or in their capacity as purchasers for it. Ruling under appeal, the CJ rejected the appeal in adjudging that the Court of First Instance had rightly held that in Community competition law the definition of an ‘undertaking’ covers any entity engaged in an economic activity, regardless of the legal status of that entity and the way in which it is financed. It is the activity consisting in offering goods and services on a given market that is the characteristic feature of an economic activity. However, in the case in point, the management bodies carry out activities of a purely social nature and contribute to

national solidarity. In the CJ’s view, there is no cause to disassociate the purchasing activities of the management bodies, which according to the FENIN were economic, from the subsequent use to which they are put. Since they are not acting as undertakings when purchasing healthcare products from FENIN members, the management bodies are not covered by Community competition law<sup>(652)</sup>.

Finally, the principle of solidarity was deployed regarding the arrangement of the operating conditions of a social assistance scheme which was suspected of hindering the free provision of services and the freedom of establishment. It concerned an Italian social assistance scheme that made the granting of approval for old people’s homes conditional upon their being managed by non-profit-making operators, a condition not fulfilled by a Luxembourg company based in Italy. In the view of the CJ, the ‘system of social welfare, whose implementation is in principle entrusted to the public authorities, is based on the principle of solidarity, as reflected by the fact that it is designed as a matter of priority to assist those who are in a state of need owing to insufficient family income, total or partial lack of independence or the risk of being marginalised, and only then, within the limits imposed by the capacity of the establishments and resources available, to assist other persons who are, however, required to bear the costs thereof, to an extent commensurate with their financial means, in accordance with scales determined by reference to family income’. *It concludes from this that ‘as Community law stands at present, a Member State may, in the exercise of the powers it retains to organize its social security system, consider that a social welfare system (...) necessarily implies, with a view to attaining its objectives, that the admission of private operators to that system as providers of social welfare services is to be made subject to the condition that they are non-profit-making’. Consequently, ‘the non-profit condition cannot be regarded as contrary to Articles 52 and 58 of the Treaty’*<sup>(653)</sup>.

<sup>(651)</sup> Court of First Instance Case T-319/99 FENIN [2003] ECR II-357

<sup>(652)</sup> Case C-205/03 P FENIN v Commission [2006] ECR I-6295.

<sup>(653)</sup> Case C-70/95 Sodemare [1997] ECR I-3395.

## B. Solidarity, social security and social services of general interest

The original nature of social security was highlighted during the course of the discussions on services of general interest<sup>(654)</sup>. For example, the question was asked whether social security is a social service of general interest in itself. Directive 2006/123/EC of 12 December 2006 on the services in the internal market in this respect echoes the case-law of the CJ, even if it does not use the term ‘solidarity’ with regard to social security<sup>(655)</sup>. The directive, which aims to facilitate the free provision of services and the freedom of establishment within the EU, ‘does not affect Member States’ social security legislation’<sup>(656)</sup>. This confirms the analysis in the case-law of the concept of ‘economic activity’: to determine whether certain activities, particularly those which are funded by the public authorities or provided by public bodies, constitute a ‘service’, it is appropriate to examine them case by case and to take all of their characteristics into account, most notably the way in which they are provided, organised and funded in the Member State concerned. However, ‘the essential characteristic of remuneration lies in the fact that it constitutes consideration for the services in question and has recognised that the characteristic of remuneration is absent in the case of activities performed, for no consideration, by the state or on behalf of the state in the context of its duties in the social, cultural, educational and judicial fields, such as courses provided under the national education system, or the management of social security schemes which do not engage in economic activity. (...) These activities are, therefore, not covered by the definition of service in Article 50 of the Treaty and do not therefore fall within the scope of this directive’ (preamble, point 34). Similarly, the concept of ‘overriding reasons relating to the public interest’, to which reference is made

in certain provisions of this directive and which has been developed by the CJ, covers at least the social protection of workers and the preservation of the financial balance of the social security system (preamble, point 40, and Article 4, para. 8).

The European Commission also establishes the special role of social security within services of general interest. In a communication of 26 April 2006<sup>(657)</sup>, it classes in the concept of ‘social services’ ‘statutory and complementary social security schemes, organised in various ways (mutual or occupational organisations), covering the main risks of life, such as those linked to health, ageing, occupational accidents, unemployment, retirement and disability’. Although, under Community law, social services do not constitute a legally distinct category of service within services of general interest, they present particular characteristics such as the fact that they ‘operate on the basis of the solidarity principle, which is required, in particular, by the non-selection of risks or the absence, on an individual basis, of equivalence between contributions and benefits’ or the fact that ‘they are not for profit and in particular address the most difficult situations and are often part of a historical legacy’. They can thus be distinguished from economic services of general interest (ESGI), even if the practical distinction between economic and non-economic services is not straightforward: ‘it is not the sector or the status of an entity carrying out a service (e.g. whether the body is a public undertaking, private undertaking, association of undertakings or part of the administration of the state), nor the way in which it is funded, which determines whether its activities are deemed economic or non-economic; it is the nature of the activity itself’<sup>(658)</sup>. Admittedly, one might regret the fact that the complementary schemes are all identified as operating on the solidarity principle, which is an imprecise generalisation, but at least social security is identified on the basis of elements of solidarity.

<sup>(654)</sup> General interest services are defined as ‘market and non-market services which the public authorities class as being of general interest and subject to specific public service obligations’, White Paper on services of general interest (COM(2004) 374 final).

<sup>(655)</sup> Whereas it is used for other social services, see preamble to the directive, point 27.

<sup>(656)</sup> Preamble, point 14 and Article 1(6).

<sup>(657)</sup> ‘Implementing the Community Lisbon programme: Social services of general interest in the European Union’ (COM(2006) 177 final).

<sup>(658)</sup> In this sense, the communication of the Commission ‘Services of general interest, including social services of general interest: a new European commitment’, 20 November 2007 (COM(2007) 725 final).

So the internal market makes it possible to reveal a *notion* of social security anchored in the principle of solidarity. Could this constitute the *visible* common frame of reference for tomorrow's coordination rules?

### III. TOMORROW'S COORDINATION RULES STRUCTURED AROUND SOLIDARITY?

Although the coordination rules are sophisticated in the extreme, as befits the complexity of the objectives set for them, they suffer from a deficit of *affection*. The engineering overrides the ideal, but the technical side is not appealing, as it does not convey any transcendent project and fails to excite people. Put more plainly, it does not interest those who make the decisions.

In order to give the coordination regulations renewed meaning, would it not be necessary to marginalise the formal approach to social security and instead encourage the blossoming of a conceptual will? Within this framework, the coordination regulations would have the aim of coordinating social security schemes and benefits based on principles of solidarity. Article 42 of the EC Treaty allows full latitude in this respect, as it merely indicates that the Council shall adopt such measures 'in the field of social security' as are necessary to provide freedom of movement for workers. Since it gives no definition of social security, it does not prevent the construction of the coordination rules around the *notion* of social security.

Is this prospect unattainable? Perhaps not, as recent CJ case-law on the subject of coordination can be read as the recognition of an unbreakable link between social security and solidarity (A). The next stage would be a formal link, in the coordination regulations, between social security and solidarity (B).

#### A. Is the solidarity-based social security which is emerging from case-law applicable to the coordination rules?

The *Bosmann* judgment, which has already been referred to above, is worthy of special attention as it can be seen as the point of entry to a new paradigm; a paradigm that is not unconnected to the *notion* of social security. In the *Bosmann* case, the dispute arose from the fact that the mother of the family, a Belgian national resident in Germany with her children, had lost entitlement to German family benefits for the reason that Dutch law had become competent on the day on which she had found employment on the other side of the border, in the Netherlands. However, Dutch law did not make provision for the payment of benefits in the family situation in which she found herself<sup>(659)</sup>. For the CJ, Regulation (EEC) No 1408/71 'does not preclude a migrant worker, who is subject to the social security scheme of the Member State of employment, from receiving, pursuant to the national legislation of the Member State of residence, child benefit in the latter state'. It is Article 42 of the EC Treaty which supports this interpretation: 'the provisions of Regulation (EEC) No 1408/71 must be interpreted in the light of Article 42 EC which aims to facilitate freedom of movement for workers and entails, in particular, that migrant workers must not lose their right to social security benefits or have the amount of those benefits reduced because they have exercised the right to freedom of movement conferred on them by the Treaty'.

While the reasoning behind the judgment might be questionable, there arises from it the germination of a new method which consists of taking into account the effectiveness of the law *vis-à-vis* the benefits available in Member States and the level of benefits in order to settle conflicts between laws, or even to establish cooperation between applicable bodies of legislation. Such a system lays claim to a logic of 'social progress' promoted by the EC Treaty, a logic

<sup>(659)</sup> Her children had exceeded the age condition set by Dutch law.



also enshrined in the preamble to Regulation (EEC) No 1408/71 and Regulation (EC) No 883/2004, which should help to improve the standard of living and working conditions of mobile persons. However, the logic of social progress is a form of expression of the principle of solidarity which the CJ promotes in the *Poucet* and *Pistre* judgments. Going further still, the *Bosmann* judgment suggests that coordinating national social security schemes that share the common point of solidarity constitutes the extrapolation of solidarity in the order of international relations. This avoids the fact that these relations are characterised by a financial and human withdrawal from reality on the part of the national schemes, a compartmentalisation in contradiction with social security's purpose of solidarity.

With the *Bosmann* judgment, it is solidarity between states (only those with which a person possesses points of connection, to borrow a term from international private law) which is unveiled, with one being called upon to compensate for the shortcomings and weaknesses of another in order to guarantee the best possible social cover or, at the very least, acceptable cover. This form of interstate solidarity is also destined to call into question a brutal and unpopular piece of case-law that, apart from the coordination regulation experts, nobody understands, whereby coordination 'does not guarantee that the extension of a person's activities in more than one Member State is neutral as regards social security. Given the disparities in the social security legislation of the Member States, such an extension or transfer may be to the worker's advantage in terms of social security or not, according to circumstance'<sup>(660)</sup>.

The solidarity of the *Bosmann* judgment is the transnational image of a form of internal solidarity specific to social security, which the CJ has long since underlined in its judgments on the internal market, embodied by support for persons who are vulnerable on account of their state of health, their

financial status, their work situation, their age, their family situation, their way of living, etc. It is this internal solidarity within the national social security schemes which also needs to be reflected in the coordination regulations.

## **B. Formalised solidarity in the coordination regulations: from symbols to concrete achievements**

First of all, it should be said that it would be an error to believe that the aim of solidarity shared by the national social security schemes is alien to the current coordination regulations. In fact, it constitutes an invisible unifying theme around which, since 1958 (when the first coordination regulations were introduced), the national coordinated social security schemes have coalesced. The social security schemes protected by the CJ against the application of the rules of Community law are, in effect, more or less those which are also found in the coordination regulations, at least if one stops at the schemes with a statutory origin. The CJ also made the link between coordination and solidarity in a case where the monopolistic situation of a body in charge of Italy's statutory insurance scheme against accidents at work and occupational diseases was contested: the notion of undertaking, within the meaning of Articles 81 and 82 of the EC Treaty, does not apply to this body because, in particular, 'Regulation (EC) No 118/97 [...] contains specific provisions for coordinating national schemes on accidents at work and occupational diseases, for the application of which, in the case of the Italian Republic, INAIL is expressly designated as the competent institution'<sup>(661)</sup>. One might add that certain schemes (such as the ARRCO-AGIRC scheme in France) of a contractual nature have been integrated into the coordination regulations due to their solidarity-based nature.

The issue here is to know how to make this unifying link between social security schemes and solidarity

<sup>(660)</sup> Cases C-393/99 and C394/99 *Hervein* e.a. [2002] ECR I-2829.

<sup>(661)</sup> Court of Justice, 22 January 2002, see above.

visible; how to promote it and for what purposes. In our view, the aims should be both symbolic and functional, a duality echoed in the concept of notion presented in this study's introduction.

At the symbols' stage, it would be a question of creating a 'billboard effect' in the preamble to the regulation. By placing coordination under the auspices of social security schemes with a common aim of solidarity in the sense developed by CJ case-law, coordination would be given new impetus. Coordination would admittedly continue to play the role of an instrument for the free movement of persons, but it would have an identity, its own force, a dynamic: after all, solidarity is not only a status to be preserved, a commitment to be expressed and defended, but also an objective to be achieved. In other words, solidarity is not only a common identity uniting the national social security systems of the Member States and which is worthy of being enshrined in the most important Community text devoted to social security, but it is also what they should be striving towards. At a time when social security systems are having to 'modernise'<sup>(662)</sup>, a term rife with ambiguity, is it not necessary to recall the existence of an untouchable foundation? Establishing solidarity at the forefront of the coordination regulations amounts to declaring Europe's commitment to solidarity-based social security.

At the operational stage, there are no profound upheavals expected, but certain opportunities to be created. For example, the reference point of solidarity could help us to see coordination in a different way and to develop the coordination regulations on blocking points by opening up horizons which at the moment seem inaccessible. The four key initiatives<sup>(663)</sup> below could then be instigated.

- The scope of application of the regulation could be rethought. In particular, the failure of the proposal for a directive 'on improving the portability of supplementary pension rights'<sup>(664)</sup>, even relieved of its substance following the transformation by the Commission into the proposal for a directive on 'minimum requirements for enhancing worker mobility by improving the acquisition and preservation of supplementary pension rights'<sup>(665)</sup>, suggests making a place for supplementary pension schemes based on principles of solidarity in the coordination regulations, even when it is a case of solidarity of professional level. The preamble to Directive 98/49/EC declares that 'the system of coordination provided for in Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72, and in particular the rules of aggregation, are not appropriate to supplementary pension schemes'. Does this not underestimate the capacity for adaptation and the creativity of the coordination regulations, especially at a time when the statutory retirement schemes of several countries are adopting notional accounts based on point systems<sup>(666)</sup>? In any case, including supplementary schemes in the coordination regulations would give the latter credibility, as coordinating a one-legged social security does not do justice to the formidable European success that is social security.
- The delivery of cross-border healthcare could be redrawn, as the initiative of a special directive fed by the free provision of services<sup>(667)</sup> is not coherent. This proposal for a directive weakens the coordination rules at the same time as it serves citizens, through the complexity and

<sup>(662)</sup> Reference to the communication from the European Commission, 'Modernising social protection for greater social justice and economic cohesion: taking forward the active inclusion of people furthest from the labour market' (COM(2007) 620 final).

<sup>(663)</sup> Other questions, to respond to the CJ, merit rereading: status of the provisions for victims of war, residence clause scheme (particularly for unemployment benefits), structuring with Regulation (EEC) No 1612/68, etc.

<sup>(664)</sup> Presented by the Commission on 20 October 2005 (COM(2005) 507 final).

<sup>(665)</sup> Presented by the Commission on 9 October 2007 (COM(2007) 603 final).

<sup>(666)</sup> On the periphery, certain company schemes could remain beyond the scope of coordination, due to being irreducible to the latter's mechanisms. Even for these schemes, however, another more voluntary attitude might be envisaged, consisting of forcing their integration into coordination, which would involve the prior adaptation of the aforementioned schemes.

<sup>(667)</sup> See the current proposal for a directive on the application of patients' rights to cross-border healthcare, 2 July 2008 (COM(2008) 414 final).

opacity that it engenders. Provided that they are covered by solidarity-based social security schemes, cross-border healthcare should be fully available, as regards the conditions of its delivery, by the coordination regulations and should not be rejected towards a parallel directive.

- The rules on conflicting laws could be re-examined. In particular, it might be a question of reworking, in the light of the *Bosmann* judgment, the principle of unicity and rethinking it in the light of the aims of social progress and solidarity.
- Lastly, concerning the social security of inactive mobile citizens, the aim would be to formalise, in situations of conflict of sources, the precedence of the coordination regulations over Directive 2004/38/EC, which is anti-solidarity *par excellence*.

Beyond these areas of work, moving the coordination regulations from the stage of a technical system to that of a mouthpiece for a fundamental principle inherent in the European social model would make it possible to compete on a more level playing field against parallel sources which defend other fundamental principles — citizenship of the Union, free provision of services, free movement of persons, etc. Then, we might hope that the Community judge would once again be *inspired* by the coordination regulations and the spirit that drives them...

#### IV. CONCLUSIONS

It is paradoxical to observe that it is these conditions of operation of the internal market which promote the *notion* of social security, even though the internal market, as shown in particular in the discussions on the 'services' directive, is regarded by public opinion as the reflection of a neo-liberal or even anti-solidarity vision of Europe.

In order for the coordination rules to again exert their influence within the Community's legal order, one of the paths to be followed is to promote the principle of solidarity that is an integral part of social security. In this way, the coordination rules will rediscover the role of driving force that they originally had in the construction of the common market.

Not everyone may agree with the paths proposed, citing a potential lack of realism if resituated in the legal and political context of the European Union. But beyond the imagined solutions, it is the finding which needs to be emphasised and discussed: the coordination regulations are the victim of their own technical nature and lack of direction, due to having as their aim a form of social security destabilised by judges and Community legislators. In this respect, the dynamism of the internal market, even if the ideology is disputed, is a model to be followed in order to restore to social security and coordination the *unity* that they crave.

# NEW PATTERNS OF MIGRATION AND CHALLENGES FOR THE FUTURE



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## I. INTRODUCTION

The total population of the EU is now some 490 million persons.

As a result of various shifts in demographic features of the EU population, and of the withdrawal from the labour market of the baby boomers cohort, the working-age population will face, in the coming years, a sizeable decline. This will have adverse consequences relating to pension expenses, health spending and long-term care, dependency ratio and more broadly to the dynamism of economy. According to the latest population projections produced by Eurostat, by 2060, the working-age population of the EU is projected to fall by almost 50 million even with continued net immigration similar to historical levels. By 2060, without such immigration, the working-age population would be around 110 million lower than today, which would mean that in the EU, overall, the number of

people over 65 per person at working age would more than double by 2060. Against this backdrop, migration has thus become a major determinant of demographic evolution in the EU since, in recent years, it has outweighed the contribution from natural change. However, the most important contribution of immigration to the EU economy and competitiveness will be to help, alongside and as an essential complement of the Lisbon strategy for growth and jobs, to fill in arising and future labour and skill gaps on the EU labour markets. It is crucial in this respect to underline that the fall in the working-age population shall not automatically mean that there should be an equivalent number of immigrants to fill in the gap: such a high level of immigration would be unrealistic and impose a severe strain on EU societies and economies. Furthermore, in the EU, the determination of the volumes of labour immigrants to be admitted remains the full responsibility of the individual Member States <sup>(669)</sup>.

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<sup>(669)</sup> See 'A common immigration policy for Europe', 17 June 2008, MEMO/08/402.

The former Commissioner for Justice, Freedom and Security, Franco Frattini, emphasised in 2007 that the EU needs immigration. But he also warned that immigration alone is not the solution to ageing populations. Higher net immigration will not exempt European policymakers from implementing structural and other changes if they are to cope with the impact of ageing populations, which is a challenge not to be underestimated<sup>(670)</sup>.

### A. Some more figures

In 2006, about three million foreign immigrants settled in a country in the 27 EU Member States (EU-27). These immigrants can be divided into two groups based on their citizenship: citizens of the EU-27 (1.2 million persons) and non-EU-27 citizens (1.8 million)<sup>(671)</sup>.

EU-27 citizens migrating to another Member State accounted for 40 % of foreign immigrants. The remaining 60 % of foreign immigrants were almost equally divided between citizens of countries in Europe outside the EU-27, and Asia, the United States and Africa.

In 2006, the largest foreign immigrants' group were citizens of Poland (about 290 000 persons), Romania (about 230 000), Morocco (about 140 000), the United Kingdom, Ukraine and China (each about 100 000) and Germany (about 90 000).

The largest number of foreign immigrants in 2006 was recorded in Spain (803 000 persons), Germany (558 500) and the United Kingdom (451 700), who together received 60 % of all foreign immigrants in the EU-27.

When compared with the population in the Member State of destination, the highest rate of foreign immigration in the EU-27 was recorded in

Luxembourg (28.8 foreign immigrants per 1 000 inhabitants), Ireland (19.6), Cyprus (18.7), Spain (18.1) and Austria (10.3), compared with an EU-27 average of 6.2 foreign immigrants per 1 000 inhabitants. In Poland, Romania, Lithuania and Latvia the rates were 1 foreign immigrant per 1 000 inhabitants or less.

In 17 of the 24 Member States for which data were available, a majority of the foreign immigrants were non-EU-27 citizens. The highest share was registered in Slovenia (90 %), Romania (86 %), Portugal (84 %) and the Czech Republic (83 %). In seven Member States a majority of the foreign immigrants were EU-27 citizens. These Member States were Luxembourg (84 %), Ireland (77 %), Germany (57 %), Hungary and Slovakia (both 54 %), Austria (53 %) and Belgium (51 % in 2003).

In 2006, nationals from third countries represented around 3.8 % of the total population in the EU<sup>(672)</sup>. This is twice as much as EU citizens residing in another Member State.

### B. Three main issues

Against the background of these demographic developments and the Lisbon objective to make the EU the world's most competitive economy, three important issues will be addressed in this paper. Firstly, the next section will deal with the state of affairs and consequences of the recent enlargement rounds of 2004 and 2007.

Secondly, I will pay attention to the European migration policy as it has developed over the last 10 years. The emphasis will be in the field of labour migration, which for a long time has been considered an exclusively national issue by the Member States, but where European rules are now slowly being accepted.

<sup>(670)</sup> Speech/07/91, Frattini, 'The future of EU migration and integration policy', London School of Economics, 23 February 2007.

<sup>(671)</sup> See Eurostat, 'Recent migration trends: Citizens of EU-27 Member States become ever more mobile while EU remains attractive to non-EU citizens', Statistics in Focus 98/2008.

<sup>(672)</sup> On 1 January 2006, there were 18.5 million third-country nationals resident in the EU. Many of these third-country nationals are not themselves immigrants but descendants of immigrants who have not taken citizenship of their country of residence. See COM(2007) 539

An interesting part of the European migration policy is constituted by the so-called 'global approach', the third main issue of this paper. In the context of this global approach, increasing attention is being paid to the phenomenon of circular migration. As already mentioned I will concentrate on labour migration and I will try to give special attention to the social security aspects of some developments, given the framework of this conference.

## II. ENLARGEMENT

An important event affecting the free movement of workers in the EU and creating new patterns of migration was the enlargement of the EU from 15 to 25 Member States on 1 May 2004 and to 27 Member States on 1 January 2007. The accession of the EU-10 and EU-2 Member States led and leads to new migration flows across Europe<sup>(673)</sup>.

The fundamental right of free movement of workers was restricted by transitional arrangements. The transitional period of both Accession Treaties (2003 and 2005) has a maximum of seven years. It is divided into three phases ('2 plus 3 plus 2' formula). The initial two-year period in which the national law of the other Member States regulates the access of workers from EU-8 and EU-2 has already come to an end. For the second phase of three years Member States can extend their national measures. Restrictions should in principle end with the second phase. However, a Member State which maintained national measures at the end of the second phase may, in case of serious disturbances of its labour market or threat thereof and after notifying the Commission, continue to apply these measures until the end of the seven-year period following the date of accession. The transitional arrangements will irrevocably end for

Bulgaria and Romania on 31 December 2013 and for the EU-8 on 30 April 2011<sup>(674)</sup>.

### A. Enlargement of 2004

Thus, the transitional arrangements set out in the Accession Treaty of 2003 allow for limited derogations during a transitional period which will irrevocably come to an end on 30 April 2011. The second phase regarding the EU-8 Member States has just ended on 30 April 2009. During this phase, 11 of the EU-15 Member States opened their labour markets completely for workers of the EU-8 Member States: the United Kingdom, Ireland and Sweden had already opened their labour markets from the date of enlargement. They were followed by Spain, Finland, Greece and Portugal as of 1 May 2006 and, as of 27 July 2006, by Italy. The Netherlands lifted all restrictions as of 1 May 2007, Luxembourg as of 1 November 2007 and France as of 1 July 2008. The United Kingdom continues its mandatory registration scheme, and in Finland employment must subsequently be registered for monitoring purposes.

The four EU-15 Member States that have maintained restrictions have simplified their procedures or have reduced restrictions in some sectors/professions (Austria, Belgium, Denmark and Germany). Belgium and Denmark lifted their restrictions as of 1 May 2009.

Germany and Austria also maintain national measures in relation to the cross-border provision of services.

The three EU-8 Member States that initially applied reciprocal measures have stopped applying them (Slovenia on 25 May 2006, Poland on 17 January 2007 and Hungary on 1 January 2009).

<sup>(673)</sup> 'EU-25 Member States' means all Member States forming part of the EU before 1 January 2007. 'EU-15 Member States' means all Member States forming part of the EU before 1 May 2004. 'EU-10 Member States' means all states that joined the EU on 1 May 2004. 'EU-8 Member States' means all EU-10 Member States except for Malta and Cyprus. 'EU-2 Member States' are Bulgaria and Romania together.

<sup>(674)</sup> Communication from the Commission, 'The impact of free movement of workers in the context of EU enlargement', report on the first phase (1 January 2007–31 December 2008) of the transitional arrangements set out in the 2005 Accession Treaty and as requested according to the transitional arrangement set out in the 2003 Accession Treaty (COM(2008) 765).



## B. Enlargement of 2007 <sup>(675)</sup>

At the beginning of 2007, Bulgaria and Romania acceded to the Union. The accession agreements with these two new Member States permit the 25 other Member States to apply transitional arrangements as regards free movement of workers which are identical in content to those applicable to the 2004 Member States (excluding Cyprus and Malta whose nationals have free movement rights as workers from accession).

During the first phase, which lasted from 1 January 2007 to 31 December 2008, 10 EU-25 Member States (Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Poland, Slovenia, Slovakia, Finland and Sweden) liberalised access of Bulgarian and Romanian workers to their labour markets under national law. Some EU-8 Member States mentioned disagreement with the continued application of the transitional regime to their workers in some of the EU-15 Member States as a major reason for allowing full freedom of movement to Bulgarian and Romanian nationals <sup>(676)</sup>.

These countries were followed by Spain, Greece, Hungary and Portugal as of 1 January 2009, when the second phase started and by Denmark as of 1 May 2009 <sup>(677)</sup>.

The remaining EU-25 Member States maintained work permit systems, albeit sometimes with modifications and simplified procedures.

For instance, Malta grants work permits for positions that require qualified and/or experienced workers and for those occupations for which there is a shortage of workers. France applies a simplified procedure for 150 occupations where a work permit

is issued without considering the job situation. Luxembourg has introduced simplified procedures for work in agriculture, viticulture, the hotel and catering sector and for people with specific qualifications for which there is a need in the financial sector. Belgium has introduced an accelerated procedure of issuing work permits within five days for jobs in professions for which there is a labour shortage.

Italy does not require a work permit for employment in certain sectors (agriculture, hotel and tourism, domestic work, care services, construction, engineering, managerial and highly skilled work, seasonal work). In the United Kingdom, the employer must apply for a work permit (except for certain categories of employment) and the worker must apply for an 'Accession worker card'. Low-skilled workers are restricted to existing quota schemes in the agricultural and food processing sectors; skilled workers can work if they qualify for a work permit, or under the 'Highly skilled migrant programme'. In the Netherlands, a work permit will be issued whenever there are no workers available in the Netherlands or other EU Member States and the employer concerned can offer proper working conditions and accommodation. Temporary exemptions may be granted for sectors in which there is a labour shortage.

Ireland also requires work permits. In addition to maintaining a work permit requirement, Austria and Germany also apply restrictions on the posting of workers in certain sectors.

By 31 December 2011 those Member States which are still applying transitional arrangements as regards workers from the two countries must either lift them or justify why their continued application is necessary in accordance with the provisions of the Accession Treaty.

Bulgaria and Romania, on their part, have decided not to restrict access to their labour markets for EU nationals from those EU-25 Member States which apply restrictions for Bulgarian and Romanian workers.

<sup>(675)</sup> Based on <http://ec.europa.eu/social/main.jsp?catId=508&langId=en>

<sup>(676)</sup> See Kees Groenendijk, Elspeth Guild, Roel Fernhout, Pieter Boeles, Ryszard Cholewinski and Paul Minderhoud, *European Report on the Free Movement of Workers in 27 EU Member States in 2007*, Nijmegen, Centre for Migration Law, 2008.

<sup>(677)</sup> In Finland, Cyprus and Slovenia, employment must subsequently be registered for monitoring purposes.

### C. Patterns of migration due to enlargement

In November 2008 the Commission published a report on the impact of free movement of workers in the context of EU enlargement<sup>(678)</sup>. According to this report the exact size of post-enlargement mobility flows is difficult to determine due to shortcomings in the existing data and largely open borders between the Member States. However, available population statistics and data from the EU Labour Force Survey suggest that the number of Bulgarian and Romanian citizens resident in the EU-25 increased from around 690 000 at the end of 2003 to about 1.8 million at the end of 2007, a process which had started well before the accession of both countries to the EU in January 2007. This amounts to an average net growth of about 290 000 persons per year. Romanians accounted for around 19 % of all recent intra-EU migrants who took up residence in another EU Member State over the past four years, Bulgarian citizens for about 4 %.

Their main EU destination country has been Spain, which received well over 50 % of recent intra-EU migrants from both Bulgaria and Romania. The second country receiving the most recent migrants from Romania has been Italy (around 25 %), with flows to other Member States much smaller and nowhere exceeding 2 % of the total. For recent migrants from Bulgaria, the second main receiving country in the EU has been Germany (15 %), with Greece, Italy, France, the UK and Cyprus receiving most of the others in largely equal parts. While significant in absolute terms, the number of Bulgarian and Romanian citizens appears to be modest in relation to the overall population in the receiving countries.

<sup>(678)</sup> Communication from the Commission, 'The impact of free movement of workers in the context of EU enlargement', report on the first phase (1 January 2007–31 December 2008) of the transitional arrangements set out in the 2005 Accession Treaty and as requested according to the transitional arrangement set out in the 2003 Accession Treaty (COM(2008) 765).

The number of nationals of other EU Member States having registered their residence in Bulgaria and Romania in 2007 was still relatively small (approximately 5 000 in Bulgaria and 9 000 in Romania)<sup>(679)</sup>. But this number is rapidly increasing. The latest official data released by the Romanian Immigration Office (ORI) show that 24 000 citizens from other EU countries are currently living in Romania<sup>(680)</sup>.

At a macro-level, enlargement has had no significant impact on changes on the labour market in total. According to the Commission's report, post-enlargement mobility (and recent intra-EU mobility in general) shows that a large part of it appears to be temporary. Evidence from some Member States indicates that many mobile workers go to another Member State for a limited period of time, but do not intend to stay forever. Data from the UK suggest that around half of the EU-8 citizens who have come to work in the UK since 2004 may have already left the country again, with a similar picture emerging for Ireland<sup>(681)</sup>.

The British Home Office recently confirmed that fewer people from Poland and other east European nations are coming to work in the UK and more foreigners are departing as the economy sinks deeper into recession. The Home Office said 26 815 people from the EU-8 Member States registered to work in the fourth quarter of 2008, which is down 53 % from the peak of 57 310 in the three months ending in September 2007. 'Research suggests that many of those that came have now gone home,' according to Phil Woolas, the Labour government's Immigration Minister<sup>(682)</sup>.

<sup>(679)</sup> See Kees Groenendijk, Elspeth Guild, Roel Fernhout, Pieter Boeles, Ryszard Cholewinski and Paul Minderhoud, *European Report on the Free Movement of Workers in 27 EU Member States in 2007*, Nijmegen, Centre for Migration Law, 2008.

<sup>(680)</sup> See <http://www.financiarul.ro/2009/04/06/as-many-as-80000-foreign-citizens-live-in-romania/>

<sup>(681)</sup> See European Commission, *Employment in Europe 2008*, Chapter 3: 'Geographical labour mobility in the context of EU enlargement' (<http://ec.europa.eu/social/main.jsp?catId=119&langId=en>); and N. Pollard, M. Lattorre and D. Sriskandarajah (2008), *Floodgates or turnstiles? Post enlargement migration flows to (and from) the UK*, Institute for Public Policy Research.

<sup>(682)</sup> The Bloomberg News, 24 February 2009 (<http://www.bloomberg.com/apps/news?pid=20601102&sid=albYXsxo1zMI&refer=uk>).

The fear that the arrival of Romanians and Bulgarians would lead to extra job losses has been unfounded, according to the Commission's report. Economic migrants from the EU-8 and EU-2 Member States have not led to any serious disturbances in the labour markets of other EU countries. In fact they have contributed to economic growth without pushing out local workers or depressing wages, according to the Commission.

On the other hand, the regional allocation of migration stocks and flows across the EU-15 has changed since the EU enlargement. Sixty per cent of the EU-8 migrants resided before the enlargement in Germany and Austria. But, in 2007, 43 % of the EU-8 migrants resided in the UK and Ireland. More than 70 % of the net migration flows from the EU-8 Member States have been absorbed by the UK and Ireland since the enlargement. Seventy per cent of the migrants from Bulgaria and Romania in the EU-15 moved to Germany and Austria during the 1990s, but since the beginning of this millennium countries like Spain and Italy have received 80 % of the net migration flows from Bulgaria and Romania <sup>(683)</sup>.

#### D. Practical problems

Although the Commission's report shows a positive image of enlargement at a macro-level, a closer look at the micro-level reveals some problems which cannot be denied.

The 2007 European report on the free movement of workers in 27 EU Member States mentions several problems of (posted) EU-8 workers with substandard employment conditions, substandard housing conditions, problems with access to social benefits and integration facilities, and poor education of migrant children <sup>(684)</sup>. The legislative

measures against those practices are rather ineffective according to the report. A number of questions emerge regarding the proper application of the right of workers from the EU-8 Member States to full free movement of worker rights after 12 months' employment in any Member State still availing itself of the transitional arrangements.

Based on recent empirical research among Polish workers in the UK, Currie explains that, although there is a formal right to family reunification, this is not always accessible in practice <sup>(685)</sup>. In the UK (as well as in the Netherlands), for example, it has been shown that the practical reality for many post-accession migrants who are housed in accommodation arranged by their employers is that there is simply not adequate space, or even suitable standards of living, for their family to join them. In the UK the confusion surrounding benefit restrictions may have conspired to convince EU-8 migrant workers that, should their family join them, they would have no entitlement to any benefits or welfare services. These can be of crucial concern, particularly for those with children.

Currie wonders whether the formal equality after the expiry of the transnational periods will be sufficient to achieve a more substantive type of equality as regards the citizenship experience of EU-15 citizens, on the one hand, and EU-8 and EU-2 citizens, on the other <sup>(686)</sup>.

Another point of concern is that there is a kind of 'brain waste': migrants from all the new Member States are employed well below their educational level in the receiving countries. It is also not clear whether those EU-8 and EU-2 workers, who spend a period of a few years abroad, and worked in a de-skilled capacity during this time, will be able to integrate easily back into their profession upon return

<sup>(683)</sup> Herbert Brücker, Labour mobility within the EU: Causes, directions and constraints, ÖNB Conference: 'The integration of European labor markets', Vienna, 17–18 November 2008.

<sup>(684)</sup> Kees Groenendijk, Elspeth Guild, Roel Fernhout, Pieter Boeles, Ryszard Cholewinski and Paul Minderhoud, European Report on the Free Movement of Workers in 27 EU Member States in 2007, Nijmegen, Centre for Migration Law, 2008

<sup>(685)</sup> Samantha Currie, Migration, work and citizenship in the enlarged European Union, Ashgate, 2008, p. 144.

<sup>(686)</sup> Samantha Currie, Migration, work and citizenship in the enlarged European Union, Ashgate, 2008, p. 206.

to their state of origin. Longer periods of absence may have a damaging impact on a migrant worker's home career<sup>(687)</sup>.

## E. Future developments and enlargement

The Commission's report concludes that there are indications that mobility flows from the EU-2 and EU-8 may have peaked already and that much of recent intra-EU mobility has been of a temporary nature. Rapidly rising income levels and labour demand in the 'sending countries', coupled with falling numbers of young people most likely to emigrate, appear to be reducing labour flows and are likely to lead to a further decline in labour supply from within the EU.

Within the parameters of a stable and growing economy that is in need of new labour migrants, this could have been a solid argument to lift all remaining transitional arrangements and even to speed up the enlargement negotiations with other countries. But given the current economic crisis this is not so obvious anymore.

The current global recession will affect future migration flows. The EU-8 and EU-2 sending countries are more than proportionally affected by depreciation of the exchange rate, economic contraction and increase in unemployment rates. Higher unemployment in the destination countries involves lower immigration and a higher return migration. Higher emigration incentives in the sending countries will have a low impact if economic conditions in the receiving countries are unfavourable<sup>(688)</sup>.

Although volume and direction of mobility flows are driven by general labour supply and demand and other factors rather than by restrictions on the

labour market<sup>(689)</sup>, it is difficult for governments to lift the remaining transitional arrangements. The Dutch government, for instance, decided in November 2008 to extend the transitional regime because of the economic crisis, the expectation that neighbouring Member States would take the same position and the wish to avoid the Netherlands becoming more attractive for workers from Bulgaria and Romania<sup>(690)</sup>.

The European Council expressed in February 2009 that, although Member States have the right to maintain restrictions until the end of the third phase of the transitional period, the current serious financial and economic crisis should not be used as a sole and general justification for continued application of the transitional arrangements for the free movement of workers in the European Union<sup>(691)</sup>.

The Council therefore invites those Member States that continue to apply restrictions under the transitional arrangements, with the full involvement of the social partners in accordance with national practice, to:

- consider in the light of available evidence the further application of restrictions in the second phase with a view to moving as soon as possible to the full application of the *acquis* in the area of the free movement of workers;
- lift restrictions in the third phase if serious disturbances to the labour markets of the Member States concerned, or a threat thereof, cannot be established.

The economic crisis seems also to have a negative impact on the process of negotiations regarding future enlargement<sup>(692)</sup>. The Dutch and German

<sup>(687)</sup> Samantha Currie, *Migration, work and citizenship in the enlarged European Union*, Ashgate, 2008, p. 208.

<sup>(688)</sup> Herbert Brücker, *Labour mobility within the EU: Causes, directions and constraints*, ÖNB Conference: 'The integration of European labor markets', Vienna, 17–18 November 2008.

<sup>(689)</sup> Tesselte De Lange, *Staat, markt en migrant; De regulering van arbeidsmigratie naar Nederland 1945-2006*, Boom Juridische uitgevers, 2007.

<sup>(690)</sup> See Tweede Kamer 2008–09, 29407, No 98.

<sup>(691)</sup> Council Document 6480/09 of 23 February 2009.

<sup>(692)</sup> Candidate countries for enlargement are: Croatia, the Former Republic of Macedonia and Turkey. Potential candidate countries are: Albania, Bosnia and Herzegovina, Montenegro, Serbia and Kosovo.

governments have very recently effectively put a block on any more applications for fear of another wave of eastwards expansion which could stoke social tensions over jobs during the economic crisis. The issue came to a head last February over a European Commission assessment of a membership application request from Montenegro. Germany and the Netherlands are concerned that if Montenegro is considered then entry bids will quickly follow from Albania, Bosnia and Herzegovina, and Serbia, all countries that were promised future EU membership in 2003<sup>(693)</sup>.

### III. EUROPEAN MIGRATION POLICY

It is only 10 years ago that the European Community received far-reaching legislative authority in the field of immigration and asylum by the entering into force of the Treaty of Amsterdam. In October 1999 the European Council adopted in Tampere a common immigration and asylum policy to meet the targets set out in the Amsterdam Treaty. This policy includes four separate but closely related issues: partnership with countries of origin, a common European asylum system, fair treatment of third-country nationals, and the management of migration flows. Within five years, minimum standards, which would mean a first harmonisation of the basic principles of national legislation, were to be created. A second step will be to intensify this process of harmonisation.

In November 2004 the European Council adopted the multiannual 'Hague programme for strengthening freedom, security and justice in the European Union' on the basis of, and for the further development of, previous achievements<sup>(694)</sup>.

The Hague programme aims at improving the common capacity of the EU to ensure fundamental rights, minimum standards for procedural guarantees, access to justice with regard to the protection of vulnerable persons, migration management and the protection of the Union's external borders. There has, although, been an emphasis on rather repressive measures, addressing the problem of illegal border crossing.

The Hague programme expires in December 2009 and will be succeeded by the Stockholm programme, to be adopted in December 2009 under the Swedish Presidency. This Stockholm programme will set the strategic objectives for the further development of the Union's 'area of freedom, security and justice' from 2010 to 2014<sup>(695)</sup>.

These last 10 years great advancements have been made towards a common policy on asylum and on joint control of the EU's external borders. The restrictive elements seem to have been the easiest to reach agreement on. Regarding the management of immigration, especially labour migration, however, the Member States have been unable to agree upon a common policy. Like social security, labour migration is an area where the fear of losing national sovereignty is most pronounced. For many governments the decision on who should be allowed to enter and reside in the country as a labour migrant is still a core aspect of this national sovereignty.

It is important to stress that immigration policy is built on a different concept than the freedom of movement of persons within the Union. Freedom of movement is conceived as a set of individual rights (the right to enter, the right to reside, the right to equal treatment and so on) upon which individuals can rely against the state. Immigration

<sup>(693)</sup> See The Telegraph (UK), 27 February 2009 (<http://www.telegraph.co.uk/news/worldnews/europe/eu/4861544/EU-enlargement-blocked-over-backlash-against-foreign-workers.html>).

<sup>(694)</sup> The plan includes, besides common policies on asylum, migration, visas and checks at external borders; also police and customs cooperation, rescue services, criminal and civil law cooperation.

<sup>(695)</sup> On 25 September 2008 the European Commission launched a public consultation on the scope of future cooperation directed at the Member States, national parliaments, the general public and other stakeholders. The Commission intends to produce a communication on the future programme in May 2009. The programme will be discussed at the informal JHA Council in Stockholm in July 2009 and adopted at the summit in December 2009.

policy, on the other hand, is founded on the state's power and discretion to regulate the entry and treatment of foreigners, whose legal position is thus weaker<sup>(696)</sup>.

The result of this legislative activity of the Council is that there are now Community law rules for all major forms of migration: family members, asylum-seekers, refugees, students, long-term residents and scientists. As already mentioned the main exception to this development has been the adoption of Community law rules regarding the admission for employment. An earlier proposal of the European Commission for a general directive on economic migration met with such fierce opposition from the Member States<sup>(697)</sup> that it was withdrawn in 2005 and a time-out allowing for reconsideration was announced<sup>(698)</sup>. New discussions resulted in the presentation of two proposals for directives on 23 October 2007; one on a single permit<sup>(699)</sup> and the other establishing conditions for admission of highly skilled workers, better known as the EU Blue Card<sup>(700)</sup>. According to the EU justice and home affairs agenda for 2009, the Commission will present in May 2009 two more proposals, one covering seasonal workers and the other covering trainees and intra-corporate transferees<sup>(701)</sup>.

<sup>(696)</sup> Massimo Condinanzi, Alessandra Lang and Bruno Nascimbene, *Citizenship of the Union and freedom of movement of persons*, Martinus Nijhoff Publishers, Leiden, 2008: 236.

<sup>(697)</sup> Commission Green Paper on an EU approach to managing economic migration, 11 January 2005, COM(2004) 811 final (2004 Green Paper), p. 3. The proposal received positive reactions from the European Parliament, the European Economic and Social Committee and the Committee of the Regions.

<sup>(698)</sup> Communication from the Commission to the Council and the European Parliament, 'Outcome of the screening of legislative proposals pending before the legislator', 27 September 2005 (COM(2005) 462 final, p. 12).

<sup>(699)</sup> Proposal for a Council directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (single permit proposal), 23 October 2007 (COM(2007) 638).

<sup>(700)</sup> Proposal of the Commission for a Council directive on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment (highly qualified employment proposal), 23 October 2007 (COM(2007) 637).

<sup>(701)</sup> See [http://ec.europa.eu/atwork/programmes/docs/forward\\_programming\\_2009.pdf](http://ec.europa.eu/atwork/programmes/docs/forward_programming_2009.pdf). See also press release, 'Attractive conditions for the admission and residence of highly qualified immigrants', Brussels, 23 October 2007, MEMO/07/423, p. 2.

## A. The single permit proposal

The single permit proposal envisages a single application procedure for issuing a combined work/residence permit and sets out common rights to be granted to third-country workers legally residing in a Member State (Article 1)<sup>(702)</sup>. The proposal is still under negotiation in the Council.

The concept introduced in the single permit proposal is that permission to reside for the purpose of work in a Member State is requested and granted in one procedure. The Commission's proposal uses the words 'seeking to reside and work', but the latest Council document available to the public on this proposal reads 'who apply to reside for the purpose of work' linking residence and work more tightly<sup>(703)</sup>. The Member States shall determine whether the application is to be made by the third-country national or (added by the Council) by his/her employer. A third-country worker is defined as 'any third-country national ... admitted to the territory of a Member State and ... allowed to work legally in that Member State' (Article 2(b)). The Council added to the proposal of the Commission that this work has to be done 'in the context of an employment relationship'<sup>(704)</sup>.

The personal scope of the directive will be rather limited (Article 3). The directive will not apply to posted workers nor to workers who have been admitted to the territory of a Member State to work on a seasonal basis or as an au pair. The directive will also not apply to third-country nationals who are authorised to reside on the basis of temporary protection schemes, who are beneficiaries of international protection under Directive 2004/83/EC or who have applied for protection in accordance with national legislation, international obligations or

<sup>(702)</sup> This paragraph is largely based on Helen Oosterom-Staples, 'Regulating labour migration: The EU saga on third-country nationals seeking access to the European labour market', in: Anita Böcker a.o. (eds), *Migration law and sociology of law — Collected essays in honour of Kees Groenendijk*, Wolf Legal Publishers, Nijmegen, 2008, pp. 121–130.

<sup>(703)</sup> See Council Document 14668/08 of 29 October 2008.

<sup>(704)</sup> See Council Document 14668/08 of 29 October 2008.



practice of the Member State. Nor will the directive apply to workers who have been admitted to the territory of a Member State in order to work there for a period not exceeding six months, as regards solely the field of the single procedure.

The decision to grant, modify or renew the single permit constitutes a combined title encompassing both residence and work permit within one administrative act (Article 4). The proposal envisages that applications are processed within three months from the date when they were lodged; a period that can be extended in exceptional, complex cases (Article 5(2)). The Council added a sentence that ‘any consequence of no decision being taken by the end of this period shall be determined by national legislation’.

The single permit entitles its holder to enter, re-enter and stay in the territory of the issuing Member State (Article 11(1)(a)). The Commission’s proposal also formulated a right to travel through other Member States for this purpose (Article 11(1)(b)), but the latest public Council document leaves this paragraph blank for the moment. It also provides its holder with the right to free access to the entire territory of the issuing Member State, albeit subject to security reasons as defined by national law (Article 11(1)(c)), the right to exercise the concrete employment activity authorised under the permit and the right to be informed of the rights linked to the permit by either the directive or under national law (Article 11(1)(d)–(e)). The rights listed in Article 11 are supplemented by the principle of equal treatment with nationals for all third-country workers in Article 12.

Section 1 of this article contains a list of policy areas where equal treatment has to be ensured, subject to the exceptions found in Section 2<sup>(705)</sup>. The areas listed are: working conditions<sup>(706)</sup>, freedom of asso-

<sup>(705)</sup> In the Commission’s proposal the list was not meant to be exhaustive, as followed from the words ‘at least’ in Section 1. The Council, however, has deleted these words.

<sup>(706)</sup> Explicitly mentioned are pay, dismissal, health and safety at the workplace. This right can be restricted to third-country workers in employment (Article 12(2)(d) of the single permit proposal).

ciation and affiliation and membership of an organisation representing workers, employers or of any organisation whose members are engaged in a specific organisation, without prejudice to the national provisions on public policy and public security<sup>(707)</sup>, education and vocational training<sup>(708)</sup>, recognition of diplomas, certificates and other professional qualifications in accordance with the relevant national procedures, social security<sup>(709)</sup>, and access to goods and services and the supply of goods and services made available to the public<sup>(710)</sup>. The Commission’s proposal also included tax benefits and payment of acquired pensions when moving to a third country. The tax benefits are deleted completely in the latest (public) version of the Council and, regarding pension rights, the formulation has become much more specific: ‘without prejudice to existing bilateral agreements, payment of income related acquired statutory pensions or annuities in respect of old age at the rate applied by virtue of the law of the debtor Member States or states when moving to a third country’. The Council version adds one extra equal treatment right concerning ‘counselling services afforded by employment offices’ (Article 12(1)(h) new).

The provisions on equal treatment as regards social security in this proposal also apply directly to persons coming to a Member State directly from a third country, provided that the person concerned is legally residing and fulfils the conditions set out under national legislation for being eligible to the social security benefits concerned<sup>(711)</sup>. Nevertheless,

<sup>(707)</sup> A restriction to third-country workers in employment is permitted (Article 12(2)(d) of the single permit proposal).

<sup>(708)</sup> Restrictions are found in: Article 12(2)(a) (language proficiency) and (b) (study grants) of the single permit proposal.

<sup>(709)</sup> Here we find a reference to Council Regulation (EEC) No 1408/71, Regulation (EC) No 859/2003 and Regulation (EEC) No 574/72. With the exception of unemployment benefits, this right may be restricted to third-country workers in employment (Article 12(2)(e) of the single permit proposal).

<sup>(710)</sup> Explicitly mentioned are housing and assistance afforded by employment offices. A restriction to third-country nationals who have stayed or who have a right to stay in the Member State for a period of three years is permitted with respect to public housing (Article 12(2)(c) of the single permit proposal).

<sup>(711)</sup> This extensive scope has recently been questioned in the Council. Article 63 EC Treaty would not provide a legal basis for this. See Council Document 5082/09 of 7 January 2009.

this directive should not confer to third-country workers more rights than those already provided in existing Community legislation in the field of social security for third-country nationals who have cross-border elements between Member States<sup>(712)</sup>. Section 2 allows Member States to restrict this equal treatment to third-country workers who actually are in employment except for unemployment benefits<sup>(713)</sup>. In the Council there is still discussion on the question to what extent the (future) directive should regulate social security rights and in particular access to unemployment benefits of third-country workers who lost employment within a Member State<sup>(714)</sup>.

Notwithstanding all the limitations, Oosterom-Staples indicates that the choice for a single procedure should make life easier for all parties<sup>(715)</sup>. The vicious circle that arises when an application for a residence permit is refused until permission to work has been granted and when the latter is refused until the former has been granted should be something of the past. It should be emphasised that the proposal does not lay down any admission conditions of third-country nationals. This remains exclusively a matter for the Member States to decide.

The European Parliament, which has the right of consultation in this procedure, on 20 November 2008 adopted a legislative resolution amending the single permit proposal<sup>(716)</sup>. The main amendments reflected upon the common set of rights and the equal treatment provisions. According to the European Parliament the common set of rights must apply to all nationals admitted to the territory for employment purposes, and also to all those who were initially admitted for other reasons but who obtained the right to work on the basis of national

or Community law, irrespective of the purposes for which they were initially admitted to the territory of a Member State. The European Parliament clarified that, while the single permit procedure applies only to certain third-country workers, the common set of rights is equally applicable to all third-country workers. Otherwise, discrimination between third-country workers would be likely to arise on such a fundamental issue as the right to equal treatment. Furthermore, the European Parliament holds the opinion that apart from the rights that are listed in the proposal, third-country workers must enjoy equal treatment with nationals at least with regard to: working conditions, including pay, holidays, working time and dismissal as well as health and safety at the workplace; education in the broad sense of the term (language learning and cultural familiarisation with a view to improving integration) and vocational training; portability of pensions or annuities in respect of old age, death or invalidity; information and counselling services offered by employment offices<sup>(717)</sup>. Member States may restrict equal treatment to nationals by requiring proof of appropriate language proficiency for access to education and training. Access to university may be subject to the fulfilment of specific educational prerequisites. They may also restrict equal treatment in respect of study grants according to the Parliament. These amendments are not binding and it is very unlikely that the Council will accept them, given the current financial crisis.

## B. The highly qualified employment proposal ('EU Blue Card')

Highly qualified workers from all third countries account for 1.72 % of the EU's total workforce, which is well behind other important immigration countries such as Australia (9.9 %), Canada (7.3 %), the USA (3.2 %) and Switzerland (5.3 %). The 27 different admission regimes at present in the EU are seen as the main reason for its low level

<sup>(712)</sup> See Recital 16 of the Commission's proposal.

<sup>(713)</sup> Article 12(2)(e) of the single permit proposal.

<sup>(714)</sup> Council Document 5082/09 of 7 January 2009.

<sup>(715)</sup> Helen Oosterom-Staples, 'Regulating labour migration: The EU saga on third-country nationals seeking access to the European labour market', in: Anita Böcker a.o. (eds), *Migration law and sociology of law — Collected essays in honour of Kees Groenendijk*, Wolf Legal Publishers, Nijmegen, 2008, pp. 121–130.

<sup>(716)</sup> See A6-0431/2008.

<sup>(717)</sup> The plenary re-inserted some of the clauses in the original proposal, which the Committee on Civil Liberties, Justice and Home Affairs had deleted with regard to the right to equal treatment.

of attractiveness as an immigration destination. As a consequence it is considerably more difficult for potential migrant workers from third countries to move easily from one Member State to another. Therefore, the objective of the highly qualified employment proposal is to introduce a fast-track and flexible admission procedure and favourable residence conditions for third-country nationals in order to make the EU more attractive to highly qualified workers. The benefits for the EU Blue Card holder are, on the one hand, the right to move freely within the EU and, on the other hand, the right to immediate family reunification as well as the possibility to take up highly qualified employment in a second Member State after 18 months <sup>(718)</sup>.

‘Highly qualified employment’ means the employment of a person who, in the Member State concerned, is protected as an employee under national employment law and/or in accordance with the national practice, irrespective of the legal relationship, for the purpose of performing genuine and effective work for or under the direction of someone else for which a person is paid and for which adequate and specific competence, proved by higher professional qualifications, is required <sup>(719)</sup>. ‘Higher professional qualifications’ means qualifications attested by evidence of higher education qualifications, or, by way of derogation, when provided for by national legislation by at least five years of professional experience of a level comparable to higher education qualifications and which is relevant in the profession or sector specified in the work contract or binding job offer <sup>(720)</sup>.

The personal scope includes for a large part the same limitations as the personal scope of the single permit proposal.

Article 5 sets out the conditions for admission of a highly qualified worker as follows:

- a valid contract or job offer for at least a year;
- compliance with regulated professional rules as they apply to EU citizens and, for unregulated professions, possession of a relevant qualification;
- a valid travel document and if required (an application for) a visa;
- sickness insurance;
- no threat to public policy, public security or public health;
- a salary level which should be at least 1.5 times the average gross annual salary in the Member State concerned. This level can be lowered to 1.2 times the average gross annual salary for employment in some professions with a shortage of workers <sup>(721)</sup>.

As an extra condition a new Section 5, added by the Council, emphasises that this article shall be without prejudice to the applicable collective agreements or practices in the relevant occupational branches for highly qualified employment. The directive does not create a right of admission. Member States keep the competence to determine volumes of admission of third-country nationals for highly qualified employment <sup>(722)</sup>.

Member States shall set a standard period of validity of the EU Blue Card, which will be between one and four years. If the work contract covers a period less than this period, the EU Blue Card shall be issued or renewed for the duration of the work contract plus three months <sup>(723)</sup>.

Unemployment in itself shall not constitute a reason for withdrawing an EU Blue Card, unless the

<sup>(718)</sup> This was two years in the Commission’s proposal (see <http://www.europeanunionbluecard.com>).

<sup>(719)</sup> Article 2(b), in the latest public version of the Council (Council Document 16952/08 of 10 December 2008).

<sup>(720)</sup> Article 2(g) of Council Document 16952/08 of 10 December 2008. In the original Commission’s proposal three years of professional experience was sufficient.

<sup>(721)</sup> The original Commission’s proposal had set the level to three times the minimum gross monthly wage.

<sup>(722)</sup> Articles 7, 9(2a) and 19(6) of Council Document 16952/08 of 10 December 2008.

<sup>(723)</sup> Article 8(2) of Council Document 16952/08 of 10 December 2008.

period of unemployment exceeds three consecutive months, or it occurs more than once during the period of validity of an EU Blue Card (Article 14).

According to Guild there are good reasons for allowing a person a longer period to find work. As the current financial crisis shows, the labour market can change very rapidly. An individual who has made the decision to move with the whole family to a Member State deserves fair treatment in the event of becoming unemployed, including a reasonable period of time to find a new job. The threat of expulsion soon after unemployment gives the employer an undesirable influence on the immigration status of the employee. The latter may be coerced into accepting worse conditions or keeping quiet about breaches of labour (or company) law on the part of the employer because his or her immigration position depends too heavily on continued employment <sup>(724)</sup>.

The equal treatment provision (Article 15) includes for a large part the same rights as the provision of the single permit proposal. In the original proposal from the Commission, holders of a Blue Card could also enjoy equal treatment with nationals regarding social assistance as defined by national law, although Member States could restrict this to cases where the holder of the EU Blue Card has been granted an EC long-term resident status <sup>(725)</sup>. In the latest version from the Council this equal treatment provision has been deleted as well as the equal treatment provision regarding tax benefits.

To stimulate circular migration, holders of an EU Blue Card are allowed to return to their country of origin for a longer period (18 months, and if the EU Blue Card holder also has been granted an EC long-term residence status 24 months), without losing their right to stay in a Member State (Article 17(3) and (4)). This right may be restricted to cases in which return

has taken place to exercise economic activity, perform voluntary service or study (Article 17(5)).

Finally, two additions made by the Council which will make working in a second Member State more difficult are worth mentioning here <sup>(726)</sup>. Article 19(2) provides that the second Member State may decide, according to national law, not to allow the applicant to work until a positive decision on the application has been taken by the competent authority and Article 21(4) provides that the second Member State may require the Blue Card holder to provide evidence that: (a) he/she has accommodation regarded as normal for a comparable family in the same region and which meets the general health and safety standards in the Member State concerned; and (b) he/she has stable and regular resources which are sufficient to maintain himself/herself and the members of the family, without resources to the social assistance of the Member State concerned.

The European Parliament, which has the right of consultation in this procedure as well, adopted also on 20 November 2008 a legislative resolution, amending the highly qualified employment proposal <sup>(727)</sup>.

The Parliament proposed a clearer framework, more precise definitions and more flexibility for Member States, whilst urging them to avoid a brain drain from third countries. They also stated that Blue Card workers should not have priority over EU nationals on the labour market. A holder who loses his or her job should have six rather than three months to find another. The card should not be viewed as a 'right' for migrants, and may be refused even when they meet the criteria. EU Member States are asked not to allow Blue Cards in sectors where access to EU-10 Member States' workers is still restricted. The European Parliament also demands that EU Member States should not actively encourage the 'brain draining' of third countries through the Blue Card

<sup>(724)</sup> Elspeth Guild, 'EU policy on labour migration — A first look at the Commission's Blue Card initiative', CEPS Policy Brief, No 145, November 2007.

<sup>(725)</sup> Article 15(1)(f) and 15(3) of the highly qualified employment proposal.

<sup>(726)</sup> Council Document 16952/08 of 10 December 2008.

<sup>(727)</sup> See A6-0432/2008.

in sectors where these countries suffer from labour shortages, particularly in the areas of health and education <sup>(728)</sup>.

The highly qualified proposal was due to be adopted at the Council summit on 8 December 2008 but the Czech Republic, which took over the EU Presidency from France on 1 January 2009, seemed to hold up a deal until its own workers were given access to all EU Member States (after 30 April, see above) <sup>(729)</sup>.

The EU Blue Card can be seen as a first step towards a common, appealing policy of the EU regarding highly skilled workers. It will make the EU labour market a bit more attractive for highly qualified third-country nationals.

#### IV. NEW PATTERNS OF MIGRATION: WHAT DOES THE EU REALLY WANT?

In 2008 two important policy documents were published regarding a future EU policy on migration. One is a communication on 'A common immigration policy for Europe: Principles, actions and tools' <sup>(730)</sup> by the Commission, published in June, the other is a document adopted by the European Council on 16 October, entitled the European Pact on Immigration and Asylum <sup>(731)</sup>.

As already mentioned, under the Swedish Presidency a new five-year programme in the justice, freedom and security area will be elaborated. This so-called Stockholm programme will use the communication on a common immigration policy and the European Pact on Immigration and Asylum as bases. This will become a tremendously difficult task because both documents take a totally different approach.

The communication constitutes the Commission's contribution to the future development of the common immigration policy. This development is based on 10 common principles. These principles are based on the European commitment to uphold universal values such as protection of refugees, respect for human dignity and tolerance. They have been grouped under the three main strands of the EU policies: prosperity, solidarity and security. Each principle is accompanied by a non-exhaustive list of concrete actions to be pursued at EU and/or Member State level and designed to implement the principle in practice. The principles are listed in brief below.

- Prosperity and immigration: the following three principles aim at recognising and enhancing the contribution of legal immigration to the socioeconomic development of the EU. They deal with:
  1. clear rules and a level playing field;
  2. matching skills and needs;
  3. integration, which is the key to successful immigration; it should be strengthened by means of a 'two-way process' actively involving both host society and immigrants.

In this respect there is an explicit reference to social security. To strengthen integration, Member States have to ensure a non-discriminatory and effective access of legal immigrants to healthcare and social protection, and an effective application of EU law providing third-country nationals with the same treatment as EU nationals regarding the coordination of social security schemes across the EU <sup>(732)</sup>.

Furthermore, the EU and the Member States should promote transparency in the rules applying to

<sup>(728)</sup> See <http://www.europeanunionbluecard.com/?m=200812>

<sup>(729)</sup> Agence France Presse, 27 November 2008.

<sup>(730)</sup> COM(2008) 359.

<sup>(731)</sup> Council Document 13440/08 of 24 September 2008; also known as the French Pact because of the French Presidency under which it was established.

<sup>(732)</sup> In 2003, the European Parliament and the Council adopted Regulation (EC) No 859/2003 (OJ L 124, 20.5.2003), extending the provisions of Regulation (EEC) No 1408/71 to third-country nationals who are (1) legally residing in the EU and (2) in a cross-border situation. In July 2007, the Commission adopted a proposal extending the provisions of Regulation (EC) No 883/2004, which will replace Regulation (EEC) No 1408/71, to third-country nationals who are (1) legally residing in the EU and (2) in a cross-border situation (COM(2007) 439).

pension entitlements in case migrants wish to return to their country of origin.

- Solidarity and immigration: in this context solidarity means solidarity among the Member States, burden-sharing (financial solidarity), and solidarity and partnership with the countries of origin and transit of immigrants. In concrete terms, these three principles state the need for:

1. transparency, trust and cooperation among the Member States;
2. effective and coherent use of available means — in particular to support specific migratory and geographic challenges faced by Member States;
3. partnership with third countries to discuss and address together the whole spectrum of issues linked with the migration phenomenon.

In order to make this partnership happen there is another explicit reference to social security. The EU and its Member States need to include provisions on social security coordination in the association agreements concluded between the EU and its Member States and third countries. Apart from the principle of equal treatment, such provisions could cover portability of acquired social rights, in particular transfer of pension rights.

- Security and immigration: these four principles deal with the need to ensure that the rules laid down in the immigration area are respected, and that illegal immigration is addressed in an efficient manner:
1. a visa policy that serves the interests of Europe by facilitating the entry of bona fide visitors while at the same time enhancing security;
  2. integrated border management to preserve the integrity of the Schengen area without internal border controls;

3. stepping up the fight against illegal immigration and zero tolerance for trafficking in human beings;
4. sustainable and effective return policies.

The Commission is firmly convinced that the common immigration policy must be delivered in partnership between the Member States and the EU institutions and should be based on the economic and immigration situation of each Member State and of the EU as a whole. However, regarding labour migration the Commission underlines that neither the principles, nor the actions will impinge on Member States' competences. The determining of the volume of immigrant workers to be admitted will remain the full responsibility of each Member State. There will be neither quotas fixed by the European Union, nor a right of admission for immigrant workers set out in future directives.

#### **'The French Pact'**

The pact is intended to provide a roadmap for future European immigration policies and sets out five priorities for action:

- to organise legal immigration to take account of the priorities, needs and reception capacities determined by each Member State, and to encourage integration;
- to control illegal immigration by ensuring that illegal immigrants return to their countries of origin or to a country of transit;
- to make border controls more effective;
- to construct a Europe of asylum;
- to create a comprehensive partnership with the countries of origin and of transit in order to encourage the synergy between migration and development.

The pact has been criticised by several analysts. According to Collett it clearly heralds a more conservative approach to immigration<sup>(733)</sup>. It looks at

<sup>(733)</sup> Elizabeth Collett, 'The EU Immigration Pact — from Hague to Stockholm, via Paris', EPC Policy Brief, October 2008.



immigration policies through the prism of ‘control first’ making this more explicit than in the past. Of the five areas identified for action, just one concerns promoting access to the EU, and even this refers to preventing illegal and undesirable migration. Unlike the communication of the Commission, the pact downplays the need to harmonise immigration policies. The Council commits Member States to ‘organise’ legal immigration rather than construct common policies: ‘It recalls that it is for each Member State to decide on the conditions of admission of legal migrants to its territory, and, where necessary, to set their number’. This clearly reflects the reluctance of the Member States to relinquish their competence.

Carrera and Guild also observe that the pact is very much oriented towards the Member States and is driven by a predominantly intergovernmental logic prioritising the competences of the Member States over those of an EU at 27<sup>(734)</sup>. It will boost the ongoing tension between the establishment of a European immigration and asylum policy and the perpetuation of Member States’ competences and power of discretion over these fields.

According to Bertossi, the pact openly proposes a policy framework aimed at answering the ‘concerns of citizens’ of EU Member States rather than a policy aimed at solving economic and social issues at stake with immigration<sup>(735)</sup>. The priority put on the fight against ‘illegal migration’, on the need to regulate family migration more effectively, on the strengthening of Frontex<sup>(736)</sup>, and on the development of biometric technologies, fits this perspective. The pact being a non-binding petition of political principles can hardly be seen as providing any real implementable common policy in the field

of migration. Neither does it question whether the text is endowed with a genuine European approach. It is rather the opposite, with a move towards a strong national-orientated approach to the European agenda of migration policies.

## V. GLOBAL APPROACH AND CIRCULAR MIGRATION

An interesting component of the common migration policy is the so-called global approach. This global approach to migration can be defined as the external dimension of the European Union’s migration policy. Adopted in 2005, it illustrates the ambition of the European Union to establish an inter-sectoral framework to manage migration in a coherent way through political dialogue and close practical cooperation with third countries. It is a novel approach to improve the mobility of labour migrants from third countries to the EU.

The abovementioned communication of June 2008 on ‘A common immigration policy for Europe’ highlighted the need to strengthen the global approach to ensure a coherent, common European migration policy, reiterating the principle that effective management of migration flows requires genuine partnership and cooperation with third countries and that migration issues should be fully integrated into the EU’s development cooperation and external policies, as well as incorporate issues emerging from them. In October 2008 the Commission published a communication especially addressing the theme of global approach<sup>(737)</sup>. This global approach communication formulates as a challenge that a more highly developed common European immigration policy will need to give more thought to ways of matching job-seekers to vacancies and to allowing for more flexible access for labour migrants<sup>(738)</sup>. This means that work in

<sup>(734)</sup> S. Carrera and E. Guild, ‘The French Presidency’s European Pact on Immigration and Asylum: Intergovernmentalism vs. Europeanisation? Security vs. rights?’, CEPS Policy Brief, No 170, September 2008.

<sup>(735)</sup> Christophe Bertossi, ‘How can Europeans agree on a common migration policy?’, Report of the Ifri/Barrow Cadbury Trust ‘Anglo-French Policy Dialogue on Regularisation and Co-Development’ (draft version 26 January 2009).

<sup>(736)</sup> Frontex is the EU agency which coordinates the activity, training and operations of the EU’s border control.

<sup>(737)</sup> ‘Strengthening the global approach to migration: Increasing coordination, coherence and synergies’, communication from the Commission (COM(2008) 611, 8.10.2008).

<sup>(738)</sup> COM(2008) 611, p. 4.

areas such as recognition of foreign qualifications, exploring the portability of pension rights and other welfare entitlements, promoting labour market integration at both ends of the migration pathway, the social inclusion of migrants and development of inter-cultural skills, needs to be stepped up and given much higher priority.

An important part of this approach is the provision of incentives for circular migration by setting up or strengthening legal and operational measures such as compiling best practices and launching circular migration pilot initiatives to boost the contribution that circular migration can make to development in source countries and to ensure that such mobility responds to market needs in destination countries. These incentives should not contribute to brain drain; they should explore specific tools to facilitate circular migration and 'brain circulation' such as 'dual posts' (e.g. for health professionals, teachers and researchers) and twinning between public sector employers and institutions in EU Member States and migrant source countries, and should help migrants reintegrate in source country labour markets<sup>(739)</sup>. It is explicitly stated that in this context one has to explore ways of granting legal immigrants the right to priority access to further legal residence in the EU, and examine how the portability of acquired social rights to third countries, notably the payment of pensions, may facilitate such mobility.

So far, for instance, Germany and Switzerland have unsuccessfully pursued such a policy of circular migration in the past. Hailbronner and Koslowski<sup>(740)</sup> describe that it was expected that migrant workers recruited in the 1950s and 1960s would return to their home countries, and other migrants would take their place in a 'rotation' system. Instead, partly because of the economic self-interest of employers who did not want to lose the acquired skills of

their workers and partly because of the social and economic interests of the migrant workers, the expected temporary migration eventually became permanent migration. Additionally, migrant workers moved their families to Germany.

They stress that future circular migration projects may only be successfully managed if there is a reasonable prospect of acceptable living conditions for the migrants in the sending countries. Although there is evidence that migrants from eastern European and former Soviet Union states prefer temporary over permanent migration, this will probably not be the case for migrants from Africa<sup>(741)</sup>. The economic differences between the northern and southern shores of the Mediterranean Sea are huge. Per capita income in Spain is 13 times that of Morocco<sup>(742)</sup>.

Hailbronner and Koslowski see the granting of a special residential status, including an option to return to the host country or to another Member State after a certain time of experience, as an additional incentive to return.

In the Netherlands, the Advisory Committee on Aliens Affairs (ACVZ) will soon publish a report on temporary/circular migration<sup>(743)</sup>. The ACVZ defines temporary migration as the migration of third-country nationals who come for a period of three to four years to work and who have to return after that period to their country of origin or to another country.

The ACVZ stresses that permanent migration cannot solve the demographic challenges of the future. Experiences from the past show that one of the biggest problems of temporary migration will be to guarantee the return of the migrant. To stimulate this return, the ACVZ proposes a few strict conditions. The most remarkable are the following. The

<sup>(739)</sup> COM(2008) 611, p. 5.

<sup>(740)</sup> K. Hailbronner and R. Koslowski, Models for immigration management schemes, GMF Paper Series, 2008

<sup>(741)</sup> Ali. M. Mansoor and Bryce Quillin, Migration and remittances, eastern Europe and former Soviet Union, World Bank 2007: 110.

<sup>(742)</sup> Compared with the differences between the USA and Mexico, the per capita income is much smaller and differs six times.

<sup>(743)</sup> Briefadvies tijdelijke migratie, 9 February 2009, ACVZ/ADV/2009/02.

duration of the temporary stay should not exceed four years and the migrant workers would not have a right to family reunification during this stay<sup>(744)</sup>. As an incentive to return the migrant should get a job offer for a year in his country of origin and only those migrants who keep their promises would get another opportunity to work in the EU after a certain amount of time (for instance, 18 months). Furthermore, temporary labour migrants should have the possibility to buy off their state and company old-age pensions, the money only being paid in their country of origin.

## VI. CONCLUSIONS

Demographic factors will fuel a need for labour migration in the next few decades. The average birth rate in the EU is 1.5 at the moment, whereas the replacement rate is 2.1.

Enlargement has stimulated intra-mobility, but this source is running dry. The present boost of enlargement is over the top. Future enlargements do not seem to create a sufficient supply of labour. Moreover, the process of enlargement seems to be slackening rather than accelerating.

The Commission sees this clearly and is slowly trying to build a common policy on labour migration. The first steps have been made, but it is still an uphill struggle. The first proposals will probably reach the finish in a strongly watered-down version. Although the proposals have some important weaknesses, they provide a starting point for a common policy. For some Member States this is a first step towards a highly skilled migration policy. If it is possible to achieve one smooth, efficient and quick

procedure for businesses to fill their third-country national employment needs according to clear and precise rules, it will be a substantial benefit to the EU economy.

Besides, Directive 2003/109/EC on the status of long-term residence provides for free movement of third-country nationals who have resided lawfully in the EU for at least five years. They acquire the right to move and reside in any Member State for economic purposes, including work (though Member States can delay this by up to a year), as well as for non-economic reasons. Thus leaving the policy of first admission to the Member States becomes generally less attractive when each Member State individually controls first entry. In the interest of coherence there is an argument in favour of a common set of rules on first admission of labour migrants<sup>(745)</sup>.

A serious problem is the tension between the Council and the Commission on questions regarding the limitations of sovereignty. As in the area of social security, a great deal of Member States are still very hesitant to embrace any harmonisation on labour migration at all.

An interesting development is the growing influence of a global approach towards migration. An important part of this approach is the promotion of circular migration. However, there are a number of catches to this kind of migration.

The unpredictable factor at present is the financial crisis. Will this increase the Member States' willingness to tackle the demographic problems that exist or will it result in more protectionism and *Einzelgänger* behaviour?

<sup>(744)</sup> This will raise the question whether this is possible in the light of Directive 2003/86/EC on family reunification, Article 8 of the European Convention on Human Rights and the International Convention on the Rights of the Child.

<sup>(745)</sup> Elspeth Guild, 'EU policy on labour migration — A first look at the Commission's Blue Card initiative', CEPS Policy Brief, No 145, November 2007.

# TOWARDS NEW RULES FOR THE DETERMINATION OF THE APPLICABLE LEGISLATION?



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## I. A FUNDAMENTAL PRINCIPLE OF EUROPEAN SOCIAL SECURITY

The determination of applicable legislation is one of the fundamental principles of social security for migrant workers<sup>(746)</sup>. The objective is to avoid any doubts as to which specific law governs the social protection of the migrant worker. In the absence of this principle, taking into account that it belongs

to the national sovereignty of any Member State to determine the conditions and criteria under which persons may be insured (workplace, residence, nationality, etc.), a situation could arise where two or more conflicts in law would simultaneously apply or which appear to fall outside any relevant legislation. The objective of this principle is therefore to ensure in the interest of the migrant worker that there is complete protection, immediately available, wherever the worker is at that time<sup>(747)</sup>.

The methods to determine the applicable legislation may be diverse and are not always easy to

<sup>(746)</sup> Although this principle is not literally taken over in Article 42 of the EC Treaty. Also Guy Perrin in his book (La sécurité sociale, son histoire à travers les textes, Tome V: histoire du droit international de la sécurité sociale, Paris, Association pour l'étude de l'Histoire de la Sécurité Sociale, 1993, 361) does not mention this principle either as a fundamental principle of international coordination.

<sup>(747)</sup> ILO, Introduction to social security, Geneva, ILO, 1984, 154.

apply, ranging from place of work to the place of residence or location of the employer, the flag state, etc.

Within the European Union the option was made to choose the place of work, the *lex loci laboris*, as the criterion for defining the applicable legislation. Legal as well as practical arguments were at the origin of this decision. The idea was to clearly link the social security rights of the migrant to the legal system of the country to which s/he is most attached in her or his daily life. The *lex loci laboris* was therefore not only in line with the initial social security schemes to be coordinated, but also reflects the idea that social security is a complement to waged work, and that social security and labour are often closely interrelated, for example for the calculation of benefits or for the administrative organisation<sup>(748)</sup>. It also coincides with the rule of conflict applicable in the area of labour law (see the Convention of Rome of 1980 and Regulation (EC) No 593/2008). Choosing the residence of the worker could also encourage the employer to choose on the basis of the level of contributions as they might differ between the states. In that respect, choosing the connecting factor of the *lex loci laboris* follows the general principles of the free movement of workers, which was — at least at the adoption of the coordination regulations — the framework of reference. Social security is also an aspect of public law, relating to a question of financial division of social security costs for migrant workers<sup>(749)</sup>.

As a result, competition, as regards workers, takes place according to the terms applicable to the market where the job is performed.

It is only when the nature of some types of employment renders the strict application of the rule of the workplace law impossible that alternative

connecting factors, such as the place of residence or the location of the employer, were established.

The conflict rule not only determines where the employee is insured, but also where the employer has to pay contributions. In this respect, it is irrelevant if the employer has no other link to this state than the fact that his worker is working for him there, even if the employer is established in another Member State and pays less contributions there<sup>(750)</sup>.

*Lex loci laboris* is therefore the general rule of attachment, to be applied even when no choice has been made<sup>(751)</sup>. Regulation (EEC) No 1408/71 only derogates from the general rule of attachment to the state of employment in specific situations and on grounds of practicality and efficacy, which render attachment to the state of residence more appropriate and more in conformity with the interest of frontier workers<sup>(752)</sup>.

The fundamental option for *lex loci laboris* has, however, on many occasions been questioned, at different moments of accession when new Member States, in particular based on residence, joined the European Union. The state of employment would therefore no longer be considered the most appropriate or suitable<sup>(753)</sup>. The increasing number of Beveridge/Nordic model countries, as well as the

<sup>(750)</sup> Case C-8/75 *Le Football Club d'Andlau* [1975] ECR 739; the actual Article 91 of Regulation (EEC) No 1408/71 points out that 'an employer shall not be bound to pay increased contributions by reason of the fact that his place of business or the registered office or place of business of his undertaking is in the territory of a Member State other than the competent state'. In the new Regulation (EC) No 883/2004, this self-evident rule was abolished.

<sup>(751)</sup> The *Rebmann* case (C-58/87 [1988] ECR 3467) determines that the taking into account of a frontier worker's periods of full unemployment for the purpose of calculating pension rights falls, in the absence of a specific provision, under the general rule which causes the situation of frontier workers to be governed in principle by the law of the state of employment (para. 19).

<sup>(752)</sup> Case C-58/87 *Rebmann* [1988] ECR 3467, para. 15.

<sup>(753)</sup> A. Christensen and M. Malmstedt, 'Lex loci laboris versus lex loci domicilii — An inquiry into the normative foundations of European social security law', *European Journal of Social Security*, Issue 1, *Kluwer Law International* 2000, 69; see also D. Pieters, 'Towards a radical simplification of the social security coordination. Exploratory study on possibilities of replacement of Regulations (EEC) Nos 1408/71 and 574/72 in order to simplify the EC co-ordination of social security schemes', in P. Schoukens (ed.), *Prospects of social security coordination*, Leuven, Acco, 1997, 190.

<sup>(748)</sup> The salary of the beneficiary is often an important criterion in the calculation of the benefits.

<sup>(749)</sup> See S. Van Raepenbusch, *La sécurité sociale des personnes qui circulent à l'intérieur de la Communauté économique européenne*, Brussels, Story-Scientia, 1991, 225.

introduction of elements of residence and non-contributive benefits in the traditional Bismarkian countries, were often seen as justifications for questioning the *lex loci laboris*. Although this discussion sometimes turns too much in the direction of a country-specific approach in counting the actual numbers of resident-based systems compared with the initial schemes to be coordinated at the beginning of the European Union, the new framework of coordination (Regulation (EC) No 883/2004) confirms, and to a certain extent even strengthens, the choice for the *lex loci laboris*. In addition, in this regulation a person pursuing an activity as an employed or self-employed person in a Member State will be subject to the legislation of that Member State<sup>(754)</sup>. Only for non-active persons, the place of residence is applicable<sup>(755)</sup>. But questions remain about the appropriateness of these conflict rules.

Did the adoption of Regulation (EC) No 883/2004 create the right momentum for modifying/adapting the conflict rules almost 50 years after the adoption of the coordination regulations, and was a unique opportunity therefore missed to adopt a new ‘better’ (?) conflict rule?

In a process of simplification and rationalisation, the new Regulation (EC) No 883/2004 did bring, apart from the clear designation rule for non-active persons, some — minor — modifications to the actual system, with respect to the posting provisions<sup>(756)</sup> and the designation rules for simultaneous performance of professional activities in two or more Member States<sup>(757)</sup>, just as the only existing excep-

tion (until now, under Regulation (EEC) No 1408/71) to the general principle of the single applicable legislation has been abolished<sup>(758)</sup>.

## II. A NEED FOR A REVISION OF THE CONFLICT RULES?

But is a purely cosmetic adaptation of the conflict rules sufficient or is there a need to fundamentally change the actual rules and why should we do that?

Which reasons could justify a further reflection on new rules of applicable legislation? In our opinion, three factors could play a role<sup>(759)</sup>.

In the first place, there is the clear changing migration pattern. The migrant worker of 50 years ago is no longer the migrant worker of today. One of the most important changes has been regarding the nature of migration itself, with new patterns of work, including increasingly flexible labour markers. The regulation was set up at a time when workers had a full-time, permanent employment relationship, and the migrant worker was someone — usually a male — who moved to his country of work (with or without his family) and at the end of his career returned to his country of origin. People in general migrated for better working opportunities and conditions, including higher wages. For example, a typical migrant working in the coal mines moved for a long period to another state, often only returning to his country of origin when reaching retirement age. This type of migrant worker in particular focused on

<sup>(754)</sup> Article 11, 3(a) of Regulation (EC) No 883/2004.

<sup>(755)</sup> Article 11, 3(e) of Regulation (EC) No 883/2004.

<sup>(756)</sup> In particular the extension from the maximum period of posting from one year to two years, as well as the inclusion in the new provision of conditions that had already been made clear in the case-law of the CJ (the fact that the employer, when somebody is posted abroad, needs to normally carry out his activities in the sending state, as well as the fact that, in the case of the posting of a self-employed person, it is required that this person pursue a similar activity in the temporary state of employment); see Article 12 of Regulation (EC) No 883/2004.

<sup>(757)</sup> Here the most important modifications took place; in particular, the specific rule for international transport workers has been abolished, so that they now fall under the general rules, just as it is now required that the person concerned fulfils a substantial part of his activities in the state of residence, before this state becomes applicable; see Article 13 of Regulation (EC) No 883/2004.

<sup>(758)</sup> Article 13(3) of Regulation (EC) No 833/2004; the actual Annex VII of Regulation (EEC) No 1408/71. Compared with Regulation (EEC) No 1408/71, Regulation (EC) No 883/2004 abolishes some separate rules for special categories of people. Under Regulation (EC) No 883/2004 there is no special rule anymore for international transport workers; there is no longer a choice for persons employed by diplomatic missions or consular posts; no special rule for civil servants working in two countries; no rule for undertakings straddling a common frontier; no special rule for civil servants insured in a special scheme; and no rule for persons not belonging to the crew and working on a vessel within the territorial waters or the port.

<sup>(759)</sup> For a general overview of general trends and challenges for the actual regulations, see Y. Jorens and J. Hajdú, European Report 2008 — Training and reporting on European social security, Project DG EEMPL/E/3 — VC/2007/0188, Brussels, 125 p.



fully integrating the social security systems of the state of his new workplace. When migrating at a later age, the biggest problems these persons were confronted with were related to the possible export of retirement benefits. Today there is greater diversity, with a range of different types of migrant workers including, for example, cross-border frontier workers, temporary migrant workers and pan-European management personnel, contributing to a growing pan-European labour market. Further globalisation and the creation of a European internal market has led to a growing number of employees being sent out by their employer to perform temporary activities in another Member State. People commute weekly or daily to other states and workplaces. The career planning of a worker today often involves several consecutive international assignments (for the short or longer term), often within a network of companies, throughout different Member States. It is not so much that the permanent move has become the most important trend, but rather that the intra- and interorganisational move has.

In particular, migrant workers that are often working for short periods abroad are more in favour of further belonging to their social security system of origin and less of being integrated in their country of short employment.

It has often been argued that these new forms of mobility are challenging the principles and actual rules on applicable legislation. Might it indeed not be said that the high flexibility combined with the short assignments to different Member States, leading to a constant switch of the *lex loci laboris*, makes this general conflict rule inappropriate? Does it not only complicate to a large extent the social security situation of these migrant workers, but also prevents further migration? <sup>(760)</sup> What is to be said of the managers within a multinational group who often transfer their workplace from one business location to another and visit, throughout their career,

<sup>(760)</sup> A. Numhauser-Henning, 'Freedom of movement and transfer of social security rights', in R. Blanpain (ed.), *Collective bargaining, discrimination, social security and European integration*, The Hague, Kluwer Law International, 2003, 185–186.

several branches of this group of companies? The fact that these persons move within a network of closely related companies, where the worker sometimes even concludes a local employment contract with a daughter company, while maintaining his main, but frozen labour contract with the mother company, often complicates the 'mapping', as it becomes unclear who the worker's employer actually is. Live-performance workers can, for example, take up employment with an EU live-performance organisation in another EU country; for example, they can be posted as an employee with an EU live-performance company when this company is performing in other EU countries, or take up a service contract as a self-employed person in another EU country <sup>(761)</sup>. The specific problems of mobility that these groups of people encounter quite often result in the appeal to enact particular conflict rules that would be better adapted to the specific characteristics and situations of these categories <sup>(762)</sup>.

In the second place, freedom of movement — the fundamental background principle for the coordination regulations — has evolved and has moved from an economic perspective to a wider idea of human rights. The relationship between the free movement of workers as an instrument and the economic concern of the European Union has changed into a growing union of citizens. The migrant worker is, in the first place, not an economic person, but a human being looking to improve his living and working conditions. In the same way, the free movement of workers has evolved towards a union of 'European citizens'. The economic dimension has moved to the background, in order to establish a legal order consistent with the idea of social justice and people's expectations of European integration, as it can be understood from the general objectives

<sup>(761)</sup> See, for example, R. Pollachek, 'Study on impediments to mobility in the EU-live-performance sector and on possible solutions', study performed for Pearle, Mobile.Home Project, Helsinki, 2007, 14.

<sup>(762)</sup> R. Pollachek, 'Study on impediments to mobility in the EU-live-performance sector and on possible solutions', study performed for Pearle, Mobile.Home Project, Helsinki, 2007, and ERA Green Paper, 'Realising a single labour market for researchers', RTD DG and Council conclusions of 30 September 2008, No 13571/08.

of the Treaties<sup>(763)</sup>. 'The creation of citizenship of the Union, with the corollary of freedom of movement for citizens throughout the territory of the Member States, represents a considerable qualitative step forward in that it separates that freedom from its functional or instrumental elements (the link with an economic activity or attainment of the internal market) and raises it to the level of a genuinely independent right inherent in the political status of the citizens of the Union'<sup>(764)</sup>.

This creation of European Union citizenship, also as interpreted by the Court of Justice (CJ)<sup>(765)</sup>, has established a new set of rights for economically inactive people, until then almost ignored under European Union law<sup>(766)</sup>, and has given them the status of active claimants of social welfare provision, even when they have not been or are not exercising an economic activity<sup>(767)</sup>. As the CJ applies the provisions of European citizenship also in cases that are covered by the European regulation, it has made clear that the coordination Regulation (EEC) No 1408/71 (and in future Regulation (EC) No 883/2004) is not the only means for people to obtain social security benefits and rights. A new notion of European solidarity has been created<sup>(768)</sup>.

<sup>(763)</sup> See A. Touffait, 'La jurisprudence de la Cour de Justice des Communautés Européennes en matière de sécurité sociale des travailleurs Européens qui se déplacent', Mélanges offerts à P.H. Teitgen, Paris, 1984, 525.

<sup>(764)</sup> Advocate General Ruiz-Jarabo Colomer, para. 82 of the opinion delivered in Morgan (Joined Cases C-11/06 and C-12/06 Morgan [2007] ECR, 9161).

<sup>(765)</sup> Case C-85/96 Martínez Sala [1998] ECR 2691; Case C-184/99 Grzelczyk [2001] ECR 6193; Case C-413/99 Baumbast [2002] ECR 7091; Case C-138/02 Collins [2004] ECR 2703; Case C-456/02 Trojani [2004] ECR 7573; Case C-138/02 Collins [2004] ECR 2703; Case C-209/03 Bidar [2005] ECR 2119; Case C-192/05 Tas-Hagen [2006] ECR I- 10451; Case C-406/04 De Cuyper [2006] ECR 6947.

<sup>(766)</sup> The rights of economically non-active people were elaborated in the three residence directives (90/364/EEC on the rights of residents; 90/365/EEC on the right of residence for employees and self-employed persons who have ceased their occupational activity; and 93/96/EEC on the right of residence for students). These three directives have now been replaced by the general residence directive (2004/38/EC).

<sup>(767)</sup> E. Spaventa, Free movement of persons in the European Union. Barriers to movement in their constitutional context, The Hague, Kluwer Law International, 2007, 114–115.

<sup>(768)</sup> See also M. Ross, 'Promoting solidarity: From public services to a European model of competition?', Common Market Law Review 2007, 1065; M. Coucheir (ed.), M. Sakslin (ed.), S. Giubboni, D. Martinsen and H. Verschueren, Think Tank Report 2008: The relationship and interaction between the coordination regulations and Directive 2004/38/EC — Training and reporting on European social security, Project DG EMPL/E/3 — VC/2007/0188, Brussels, 2008, 37ff.

This brings us to the third (and very closely related to the concept of European citizenship) reason why it is necessary to take a closer look at the rules on applicable legislation. At the same time as the first cases of European citizenship appeared in the social field<sup>(769)</sup>, people, i.e. also workers, were relying directly on other EU Treaty provisions, perhaps hardly believing that they could influence their concrete social security rights. With its cases in the field of healthcare<sup>(770)</sup>, the CJ attacked the national conditions of refusal to reimburse medical treatment abroad under the internal market rules, in particular the free movement of goods and services, thereby opening to Community nationals a second way of receiving cross-border medical care in addition to Article 22 of Regulation (EEC) No 1408/71. As a result of this case-law, two different procedures, one having no primacy over the other, govern the healthcare costs incurred in another Member State<sup>(771)</sup>. These examples made clear that people could obtain social rights directly on the basis of the principles of free movement.

An important development taking place in this respect is the direct reliance on the general principles of free movement of persons (Article 39) by European workers, in order to combat possible limitations to their fundamental rights, limitations that not only are the result of national rules, but also sometimes follow from the application of the EU regulations themselves. The traditional non-exportability of certain benefits under the regulation, such as special non-contributory benefits or unemployment benefits, could be increasingly questioned under the direct applicability of the general principles of free movement of the EU Treaty. Recent CJ case-law, but also developments at the national level, have made clear that even inclusion in Annex IIa of the regulation, exempting the

<sup>(769)</sup> Case C-85/96 Martínez Sala [1998] ECR 2691.

<sup>(770)</sup> Starting with Cases C-120/95 Decker [1998] ECR I-1831, and C-158/96 Kohll [1998] ECR 1931.

<sup>(771)</sup> Y. Jorens, M. Coucheir and F. Van Overmeiren, 'Access to healthcare in an internal market: impact for statutory and complementary systems', basic report, Brussel, AIM, 2005, Bulletin Luxembourgeois des questions sociales, 18, 2005, 13.

national authorities from the obligation to export these benefits, is not necessarily the end of the story. CJ cases, such as *De Cuyper* <sup>(772)</sup>, *Petersen* <sup>(773)</sup> or *Hendrix* <sup>(774)</sup>, have shown that the non-exportability of certain benefits has to be looked at alongside the right of freedom of movement under Article 39 EC Treaty or European citizenship under Article 18 EC Treaty. Under these circumstances, conditions of residence can only be put forward if their object would be justified and proportionate to the objective pursued. This might end up with other results. In the *Hendrix* case for example, although the CJ considered a benefit for young disabled people, listed in Annex IIa of the regulation, as non-exportable, it questioned its compatibility with the principles of freedom of movement under Article 39 EC Treaty. It was up to the national court to answer and, after weighing the national legislation in the light of these principles, the national court declared the non-export clause not to be applicable. Examples such as these confirm that the regulations are no longer the only route towards the coordination of social security for migrant workers. This is also a growing tendency not only in the field of the free movement of workers but also in the field of the free movement of services. In the *Rüffert* case <sup>(775)</sup> on minimum wage, dealing with Directive 96/71/EC, the CJ directly investigated the requirement of payment of a salary — a domain clearly regulated by this directive — within the perspective of the free movement of services.

Relying directly on the EU Treaty has as a consequence that every rule will now be judged against the general test of free movement, i.e. is the application of the rule concerned an impediment, for which no objective justification can be found, and is the principle of proportionality respected? While finding an objective justification might still be easy, it becomes much more complicated to pass the proportionality test. The non-exportability of some

of the benefits is a clear example. In the *De Cuyper* case <sup>(776)</sup> the CJ confirms that the residence clause, which is imposed on an unemployed person, who is exempt from the requirement of providing that he is available for work as a condition for retaining his entitlement to unemployment benefits, is a restriction, which was, however, justified by the need to monitor the employment and family situation of an unemployed person. Looking at this justification, it is obvious that the CJ was very receptive to the arguments used by the Belgian Member State, arguments which were in actual fact hardly convincing at all. It is clear that similar restriction rules might have more difficulties in the future to pass the free movement test. This is clearly confirmed in the *Petersen* case <sup>(777)</sup>, regarding the non-exportability of an advance granted to unemployed persons who applied for the grant of invalidity benefits and which was considered by the CJ as an unemployment benefit. Here the CJ clearly states that, unless it is objectively justified and proportionate to the aim pursued, such non-exportability must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a disadvantage. Although the CJ states that the EU regulations do not preclude the legislation of a Member State from making entitlement to an unemployment benefit conditional on residence, at least in normal situations, this was not true with respect to the particular situation of Mr Petersen. The CJ argues that the Austrian government had not sought to explain the objective, which is to be achieved by the residence requirement, but even so — although it is possible that the risk of seriously undermining the financial balance of a social security system may *in particular* (author's own italics) constitute an overriding reason in the general interest. The existence of such a risk would be difficult to establish, since, by granting the benefit to applicants who reside in the

<sup>(772)</sup> Case C-406/04 *De Cuyper* [2006] ECR 6947.

<sup>(773)</sup> Case C-228/07 *Petersen* [2008] ECR I-6989.

<sup>(774)</sup> Case C-287/05 *Hendrix* [2007] ECR 6909.

<sup>(775)</sup> Case C-346/06, *Rüffert* [2008] ECR 1989.

<sup>(776)</sup> Case C-406/04 *De Cuyper* [2006] ECR 6947.

<sup>(777)</sup> Case C-228/07 *Petersen* [2008] ECR I-6989.

national territory, the competent authorities have in fact demonstrated their capacity to bear the economic burden of that benefit. As it is also intended to be paid to applicants for an invalidity pension for a limited period of time, the residence requirement also seems to be disproportionate.

The national rule, as well as the rule of Regulation (EEC) No 1408/71, is crushed under direct application of the EU Treaty provisions, where Member States are now confronted with a task they often forget, i.e. the concrete justification in the particular case assessed in the light of the proportionality test — however, not in a very abstract way, but applied to the particular situation of the case and of the person concerned. Also in the *Baumbast* case<sup>(778)</sup> the CJ applies the principle of proportionality to the facts of the case<sup>(779)</sup>; the CJ chose to scrutinise the rules *in concreto*, taking into account the facts of the particular case. Even in cases in which the legislation is in principle compatible with the demands of Community law, applied in the concrete situation, it might be contrary to it<sup>(780)</sup>. Member States will be required to pay much more attention to the concrete justification in cases and cannot limit themselves to general statements. For the individual looking for protection under Community law, it might be easier to attack the conformity of the national rules with EC law.

This *in concreto* evaluation has further led to an increased review of the conformity of secondary European legislation with the general principles of EU law<sup>(781)</sup>. The CJ does not hesitate to investigate

the conformity of national rules, even if they follow secondary European legislation, directly under the EC Treaty rules. This amounts, as Dougan points out, to ‘a judicial review of that very Community legislation, not of the privileged sort one would expect as regards questions of competence in the exercise of Community’s own legislative powers, but rather of the frontline sort one witnesses all the time as regards national provisions restricting free movement under the primary Treaty provisions’<sup>(782)</sup>. The review of proportionality performed by the CJ could be seen to pose a challenge to the European legislature’s autonomy, competencies and powers<sup>(783)</sup>. National rules in conformity with the coordination Regulation (EEC) No 1408/71 (and the future Regulation (EC) No 883/2004), as well as the social security coordination regulation itself, will increasingly be confronted with the test of conformity with the fundamental principles of EU law<sup>(784)</sup>. The ultimate framework is no longer the regulations, but the conformity with free movement.

The abovementioned reasons make it clear that, although we all may be to a lesser or larger extent satisfied with the actual rules, it could happen that the actual, but also future, coordination rules will be under further attack regarding their conformity with the general principles of EU law as elaborated by the provisions on EU citizenship, free movement of workers, free movement of services and even free movement of goods.

<sup>(778)</sup> Case C-413/99 *Baumbast* [2002] ECR 7091.

<sup>(779)</sup> See justification 92. In a recent case, the *Förster* case (Case C-158/07 *Förster*, judgment of 18 November 2008, not yet published) dealing with a maintenance grant, the CJ looks at the situation from an abstract rather than a concrete point of view. It remains unclear if the CJ herewith wants to deviate from its previously established case-law according to which the concrete individual factual situation is taken into account (see also the contribution of E. Spaventa in this publication).

<sup>(780)</sup> E. Spaventa, *Free movement of persons in the European Union. Barriers to movement in their constitutional context*, The Hague, Kluwer Law International, 2007, 155.

<sup>(781)</sup> M. Coucheir (ed.), M. Saksliin (ed.), S. Giubboni, D. Martinsen and H. Verschuereen, *Think Tank Report 2008: The relationship and interaction between the coordination regulations and Directive 2004/38/EC — Training and reporting on European social security*, Project DG EMPL/E/3 — VC/2007/0188, Brussels, 2008, 36–37.

<sup>(782)</sup> M. Dougan, ‘The constitutional dimension to the case-law on Union citizenship’, *European Law Review* 2006, 620–621.

<sup>(783)</sup> See also S. Besson and A. Utzinger, ‘Introduction: Future challenges of European citizenship — Facing a wide-open Pandora’s Box’, *European Law Journal* 2007, 575; and M. Coucheir (ed.), M. Saksliin (ed.), S. Giubboni, D. Martinsen and H. Verschuereen, *Think Tank Report 2008: The relationship and interaction between the coordination regulations and Directive 2004/38/EC — Training and reporting on European social security*, Project DG EMPL/E/3 — VC/2007/0188, Brussels, 2008, 37.

<sup>(784)</sup> See justification 57 of the conclusions of Advocate General Kokott in Case C-287/05 *Hendrix* [2007] ECR 6909 ‘Thus, a restriction on the fundamental freedoms must be justified by overriding reasons in the general interest even where that restriction derives from a Community regulation or a national measure which is in accordance with secondary law. Admittedly, Community and national legislatures enjoy a discretion when adopting measures in the general interest which affect the fundamental freedoms. The CJ retains the right, however, to examine whether legislatures have exceeded the scope of that discretion and infringed thereby the fundamental freedoms.’

### III. ARE THE ACTUAL CONFLICT RULES EC RESISTANT?

#### A. New rules for new migration patterns?

Are the regulations adapted to this new framework? Is today not the right moment, while we celebrate 50 years of regulations, to reflect on the possible revision of a system of conflict rules that has existed for 50 years?

Quite often the debate revolves around new or adapted rules that should take into account new patterns of migration.

Within the general objective of the new regulation to simplify and modernise the actual provisions, some special rules — for special groups — that were complicating the coordination system were abolished. In this respect, the adaptation and enacting of special provisions for ‘new’ forms of mobility would contradict the rationalisation process started under Regulation (EC) No 883/2004. The new inclusion of specific rules for so-called ‘new’ categories could lead to an increasing number of demands from other groups, increasing the fragmentation and uniform application of the conflict rules. Generally, it can be acknowledged that linking rules of conflict with categories of employees is not a convincing approach. It appears, in line with the Administrative Commission on Social Security for Migrant Workers (CASSTM)<sup>(785)</sup>, that very few situations seem to require specific treatment.

Artists, airplane crews, etc. already moved about in the past. Certainly not to the same extent, but advocating that special provisions should be adopted to take into account of these forms of mobility would somehow presume that the European legislator originally ignored, to a lesser or larger extent, these groups of people. Some forms of mobility are therefore not really new, but have just become more

frequent. The use of interim agencies and the application of the conflict rules in these circumstances has been recognised for decades. Already in 1970 the CJ had to deal with the application of the posting provisions with respect to interim agencies<sup>(786)</sup>. Some other forms, like air crews, were regarded as transport workers.

These examples show that some of the issues related to new forms of mobility result, not so much from the inappropriateness of the existing rules, but rather from the difficulties inherent in understanding the concepts and their implementation. One could therefore argue that Regulation (EEC) No 1408/71 and Regulation (EC) No 883/2004 are in fact reasonably well adjusted to new forms of mobility. What is required is agreement over the interpretation of the concepts and their effective implementation, rather than any wholesale change to the principles or operative concepts of the regulations<sup>(787)</sup>.

The expert group working on the free movement for researchers, for example, wants to promote the use of Article 17 agreements (Article 16 of Regulation (EC) No 883/2004) as a method for avoiding impediments to the free movement of these persons, in order to better take into account their particular situation<sup>(788)</sup>. The performance sector would also like to see the procedures to receive E101 forms made easier<sup>(789)</sup>.

Better use of the actual provisions, however, implies the need for further clarification. The lack of clarity and the different interpretation of the rules regarding the provisions on applicable legislation will not only result in the controversial use, and perhaps even incorrect application, of the actual provisions,

<sup>(786)</sup> Case C-35/70 Manpower [1970] ECR 1263.

<sup>(787)</sup> See Y. Jorens (ed.), J.-P. Lhernould (ed.), J.-C. Fillon, S. Roberts and B. Spiegel, Think Tank Report 2008 — Towards a new framework for applicable legislation. New forms of mobility, coordination principles and rules of conflict — Training and reporting on European social security, Project DG EMPL/E/3 — VC/2007/0188, Brussels, 2008, 7.

<sup>(788)</sup> See Council conclusions of 30 September 2008, DOC13571/08.

<sup>(789)</sup> See, for example, R. Pollachek, ‘Study on impediments to mobility in the EU-live-performance sector and on possible solutions’, study performed for Pearle, Mobile.Home Project, Helsinki, 2007, 34.

<sup>(785)</sup> See document of 4 October 2007, 278/07 REV.

but might also become the object of complaints before the CJ. A typical example of inconsistent use is the application of Article 17 of Regulation (EEC) No 1408/71 (Article 16 of Regulation (EC) No 883/2004) that allows Member States to conclude agreements in the interest of the migrant worker that deviate from the conflict rules. Every Member State applies its own rules which often differ from one another, not only between the states concerned, but sometimes even within the same state. One day it might even be difficult to explain to the CJ why workers in identical circumstances fall under different legislations due to different views among Member States about the application of this article. Could this be challenged on the grounds of discrimination?<sup>(790)</sup> It is of course true that one of the fundamental difficulties in this respect is that the regulation is a coordination instrument and does not harmonise social security, thereby leaving the responsibility for implementation to the Member States. It is therefore not the priority role of the European legislator to define the concept used, but a guiding role could be welcomed.

Of course, it cannot be ignored that, at least with respect to the growing flexible labour market, an increasing number of specific forms of mobility related to new forms of labour contracts are appearing: people working with fixed-term contracts; people working temporarily for employers via interim agencies; people, for a short time, at the disposal of heavily integrated companies; people working at home (teleworking); people moving constantly within a multinational group or simultaneously working at different plants in different Member States, sometimes with contracts concluded with several branches, etc. But is it always a problem of adopting new rules? Are the problems not also related to the difficult ways of understanding and implementing the basic concepts of the actual conflict rules? Working in an international, intra-organisational network of enterprises is a typical example

of that. The related problem is that the ownership of equipment and employment of personnel increasingly rests with different undertakings, staff being typically employed by 'global' employment companies. How do we define the employer? Does it make sense to look at this network of companies as a group of separate enterprises, each with their judicial personality, or should we look at it as one big entity, where the 'mother' company is the leading employer? What is the impact if a contract is concluded with a 'daughter' company? Is the employer the one with whom a labour contract is concluded, or is it rather the mother company who holds authority over the different branches or daughter companies? Let us refer to a recent case before the French Court de Cassation<sup>(791)</sup>. An employee working for the mother company Oréal ended her contract when she was mutated to the daughter company in China. She concluded a labour contract with this daughter company but was fired when she became pregnant. According to the Court de Cassation, there was an unjustified dismissal as no reclassification took place. Notwithstanding the fact that a contractual relation no longer existed between the mother company and the employee, the court considered that the mother company was still responsible as it took the initiative to put the employee at the disposal of the daughter company. Is the main company therefore the real employer? Would it not be possible in such cases for the employee, during the whole period of employment, to be subject to the place where the main employer is situated? But imagine also the case of an employee transferred to another daughter company with whom he concludes a labour contract while the initial contract with the mother company is frozen and lies dormant. It is foreseen that the person concerned will eventually be reintegrated into the mother company or will obtain a guarantee that, at the end of the period of employment at the daughter company, he will get a new job at the mother company or a similar function somewhere

<sup>(790)</sup> See Y. Jorens and J. Hajdú, European Report 2008 — Training and reporting on European social security, Project DG EMPL/E/3 — VC/2007/0188, Brussels, 8.

<sup>(791)</sup> See Lhernould, J-P, 'Obligations de la société-mère suite au licenciement du salarié mis à disposition d'une filiale étrangère', Cass. Soc. 13 novembre 2008, pourvoi No 07-41700; Dr Soc. 2009, 69.



within the group. Can the idea of reintegration be seen as an element for determining the place with the closest connection and as such for determining the most appropriate conflict rule? Would it not be better to look at such a situation from a more life-oriented global approach?

But a concrete answer to the challenges mentioned above requires more than a merely cosmetic adaptation of the conflict rules. The question is whether the actual rules would pass the test of the general principles of free movement? It should also be taken into account that, if new rules were elaborated, they should be in conformity with these principles. Would it not therefore be better if we reflected on a possible new framework, and investigated the fundamental principles and philosophy behind the actual system, i.e. the neutral character, the compulsory character and the exclusive and strong effect of the conflict rules? <sup>(792)</sup>

## B. Towards a new fundamental approach?

### 1. The objectives of the regulations

A preliminary question before possibly changing the actual conflict rules is to find out for whom these coordination regulations are written. Whom should they protect?

The coordination regulations are an instrument adopted to guarantee the free movement of workers. As the preamble to Regulation (EC) No 883/2004 clearly 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’ <sup>(793)</sup>. The objective of the new regulations was to guarantee that the right to free movement of persons can be exercised effectively <sup>(794)</sup>.

The coordination regulations therefore fit perfectly with the general objectives of the EU Treaty as enshrined in Article 2, to promote a high level of social protection and to raise the standard of living. From the beginning, the CJ declared that the regulations in the field of social security have as their basis, their framework and their limitations Articles 48 to 51 (39–42) of the Treaty, which are aimed at securing freedom of movement for workers <sup>(795)</sup>. The coordination regulations therefore have to be interpreted in the light of the free movement of workers. The interests of the workers obtain a central place in the coordination framework. The regulation, however, only installs a ‘system of coordination, not the harmonisation, of the legislation of the Member States’. As a result, Article 51 (now 42) leaves in differences between the Member States’ social security systems and, consequently, in the rights of persons working in the Member States. It follows that substantive and procedural differences between the social security systems of individual Member States, and hence in the rights of persons working in the Member States, are unaffected by Article 51 (now 42) of the Treaty <sup>(796)</sup>. As a matter of fact, it is not obvious whether one is insured at all by the appointed legislation. Indeed, it is up to the legislator of each Member State to lay down the conditions creating the right or the obligation to become affiliated to a social security scheme or to a particular branch of such a scheme or to be entitled to a benefit <sup>(797)</sup>. The person concerned will therefore only be insured if he or she fulfils the national conditions. Just as social security is only

<sup>(792)</sup> This was exactly the task that the Think Tank on new forms of mobility and applicable legislation is undertaking within the Tress project. This report is therefore also indebted to the reflections and ideas put forward by this Think Tank, to whom the author of this article belongs (see Y. Jorens (ed.), J-P. Lhernould (ed.), J-C. Fillon, S. Roberts and B. Spiegel, Think Tank Report 2008 — Towards a new framework for applicable legislation. New forms of mobility, coordination principles and rules of conflict — Training and reporting on European social security, Project DG EMPL/E/3 — VC/2007/0188, Brussels, 2008). The activities of the Think Tank will continue in the year 2009.

<sup>(793)</sup> Point 1 Preamble.

<sup>(794)</sup> Point 45 Preamble.

<sup>(795)</sup> Case C-100/63 Van der Veen [1964] ECR 565; see also Case C-242/83 Patteri [1984] ECR 3171.

<sup>(796)</sup> Case C-41/94 Pinna [1986] ECR 1.

<sup>(797)</sup> Case C-29/88 Schmitt [1989] ECR 581; Case C-2/89 Kits van Heijningen [1990] ECR 755, para. 19; Case C-275/96 Kuusijärvi [1998] ECR 3419, para. 29; and Case C-227/03 Van Pommeren-Bourgondiën [2005] ECR, para. 33.

coordinated within the EC, the EC Treaty offers no guarantee to a worker that extending his activities into more than one Member State or transferring them to another Member State will be neutral as regards social security. It follows that, in principle, any disadvantage, compared with a worker who pursues all his activities in one Member State, resulting from the extension or transfer of his activities into one or more other Member States and from his being subject to additional social security legislation, is not contrary to Articles 48 and 52 (now 39 and 43) of the EC Treaty if that legislation does not place that worker at a disadvantage compared with those who pursue all their activities in the Member State where it applies<sup>(798)</sup>.

With respect to the conflict rules, the CJ has constantly explained the objectives of these rules from the perspective of the worker: ‘the aim of the provisions of Title II of Regulations Nos 3/58 and 1408/71, which determine the legislation applicable to workers moving within the Community, is to ensure that the persons concerned shall be subject to the social security scheme of only one Member State, in order to prevent more than one national legislative system from being applicable and to avoid the complications which may result from that situation’<sup>(799)</sup>.

This predominant role of the worker in the objectives of the regulations does not, however, exclude other parties, traditionally involved in the social security field, from playing a role. This is particularly clear with respect to the conflict rules. We already mentioned, for example, that the CJ declared that it is not only the worker who is subject to that state, but also the employer, and the fact that the employer should pay less contributions in his state of establishment is of no relevance<sup>(800)</sup>.

<sup>(798)</sup> For example, Cases C-393/99 and C-399/99 *Hervillier* [2002] ECR I-2829; see also C-493/04 *Piatkowski* [2006] ECR I-2369. The same as a matter of fact also applies in the field of, for example, fiscal law (see Case C-365/02 *Lindfors* [2004] ECR 7183).

<sup>(799)</sup> See, for example, Case C-60/85 *Luijten* [1986] ECR 2365; Case C-2/89 *Kits van Heijningen* [1990] ECR 755; Case C-196/90 *De Paep* [1991] ECR 4815, para. 18; Case C-202/97 *Fitzwilliam* [2000] ECR 883, para. 20; Case C-275/96 *Kuusijärvi* [1998] ECR 3419, para. 28; Case C-101/83 *Brusse* [1984] ECR 2223, para. 14

<sup>(800)</sup> Case C-8/75 *Le Football Club d'Andlau* [1975] ECR 739.

Where an employee is insured therefore also influences the situation of the employer. In particular with respect to the posting rules, which are also related to the free movement of services and as such to the interest of the employer, the CJ declares that Article 13(1)(a) of Regulation No 3 aims at overcoming the obstacles likely to impede the freedom of movement of workers and at encouraging economic interpenetration whilst avoiding administrative complications for workers, undertakings and social security organisations<sup>(801)</sup>. So, apart from the employees, the conflict rules are also installed in the interest of the employer and the social security institutions.

## 2. The balance of interests

A possible review of the framework on applicable legislation should therefore not lose sight of the role and involvement of these three parties (employee, employer and administration) and should find the right balance between the interests of these three stakeholders. This is the idea that the Think Tank of Tress on new forms of mobility elaborated: the balance of interests should determine the applicable legalisation.

The interests of these three parties are, however, different and sometimes contradictory<sup>(802)</sup>.

For the employee what counts will be: that there is no change in the insurance career to build up long-term benefits (especially pensions); to get the highest possible benefits (e.g. no loss of benefits from the home country, especially, for example, long-term care, family benefits); to safeguard the necessary flexibility so that the employer cannot choose another employee who is easier to handle

<sup>(801)</sup> See Case C-35/70 *Manpower* [1970] ECR 1263, para. 10; later confirmed in, for example, Case C-202/97 *Fitzwilliam* [2000] ECR 883, para. 28; and Case C-404/98 *Plum* [2000] ECR 9379, para. 19.

<sup>(802)</sup> See Y. Jorens (ed.), J-P. Lhernould (ed.), J-C. Fillon, S. Roberts and B. Spiegel, *Think Tank Report 2008 — Towards a new framework for applicable legislation. New forms of mobility, coordination principles and rules of conflict — Training and reporting on European social security, Project DG EMPL/E/3 — VC/2007/0188, Brussels, 2008*, 16–17.

and cannot get rid of the non-flexible employee who insists on a social security situation which is contrary to the interests of the employer; to pay the lowest contributions (as long as they lead to benefits); to have the legislation of the same Member State applicable in the fields of social security, taxation and labour law — as this would guarantee that all his different rights would be linked to one and the same place, i.e. his central place of interest.

For the employer, however, other interests will be important: to be confronted with only the home social security scheme because only this one is well known; to have the legislation of the same Member State applicable in the fields of social security, taxation and labour law as this would facilitate administration; to make full use of the competitive advantages of the free market (to use these possibilities to have the cheapest labour force) — at least not to have to pay more contributions than local competitors and to be flexible enough so that (the high-ranking) employees are willing to move (if the negative impact on the employees is too big, this could hinder any cross-border activity of the employer).

Last but not least there are the social security institutions. For them it will be important to have only contribution-payers resident in the relevant Member State (as any cross-border execution of contribution debts is cumbersome and takes a long time). Taking into account situations in other Member States is always more complicated than taking into account only the well-known situations inside the state (e.g. income in one state could be different from the notion of 'income' in the other state) and it avoids disputes with the institutions of other Member States.

We are therefore confronted with three different, often contradictory, sets of interests.

If one wants to take these three interests into account, the question remains whether they now all play the same role, or is one to be given priority?

Should the interest of the employee not take priority, taking into account the clear free movement of workers' framework of the regulations? This may be the case, but the CJ is not always very clear on this issue. We already mentioned that the principles of free movement of services can also play a role. In recent years in particular we have noticed a growing interest in, and number of cases dealing with, the conflict between the free movement of services and the social protection of workers. In these cases, the CJ takes the economic interest of the employer as a starting point<sup>(803)</sup> and makes the social rights dependent on the exercise of the economic free movement of services. Avoiding social dumping for example, clearly at the heart of social protection, can only be combated within the framework of the posting Directive 96/71/EC, based on the free movement of services.

The role of the third stakeholder, i.e. the social security institutions, might, however, be of lesser importance. The CJ made clear that Article 48 of the Treaty (now 39) precludes a Member State from levying, on a worker who has transferred his residence from one Member State to another in the course of a year in order to take up employment there, higher social security contributions than those which would be payable, in similar circumstances, by a worker who has continued to reside throughout the year in that Member State without the first worker also being entitled to additional social benefits. The CJ clearly states that considerations of an administrative nature or difficulties of a technical nature, linked to particular methods of collection tax and social security contributions, cannot justify derogation by a Member State from the rules of Community law<sup>(804)</sup>. This case-law was also repeated under the framework of the free movement of services<sup>(805)</sup>.

According to this case-law, administrative simplification as an interest of the social security institutions

<sup>(803)</sup> See Case 341/05 Laval [2007] ECR I 11767; Case C-438/05 Viking [2007] ECR I-10779.

<sup>(804)</sup> Case C-18/95 Terhoeve [1999] ECR 345, para. 45.

<sup>(805)</sup> Case 205/84 Commission v Germany [1986] ECR 3755.

cannot be invoked. One can argue that the interests of these institutions therefore clearly are of less importance than the interests of the workers or the employers. But is it possible to find a justification with respect to the employer in case of an obstacle to the free movement of workers?

As the worker is at the heart of the regulation, might his interests not always be predominant?

But are the interests of the worker today also protected by these regulations and what is meant by these interests? This brings us back to the fundamental principles behind the regulations: the neutral character of the applicable legislation; the compulsory character; and the principle of the single applicable legislation, also translated into the concepts of exclusive and strong effect.

### 3. The fundamental principles behind the conflict rules

#### (a) The neutral character

We have already pointed out that conflict rules are generally set up in the interest of the migrant workers to ensure that they are protected. 'In the interest of the migrant worker' should, however, narrowly be understood as implying that, due to the different national criteria used for insurance, migrant workers should not have to either fall between two stools, nor have to pay twice for protection. It does not mean that the migrant worker has a right to the highest benefits. What is important is that administrative complications should be avoided, rather than that the highest benefits or perhaps the lowest contributions should be paid<sup>(806)</sup>. Article 17 of Regulation (EEC) No 1408/71 (Article 16 of Regulation (EC) No 883/2004), which allows the competent authorities of the Member States to provide for exceptions to the conflict rules in the interest of certain categories of persons or of certain persons, confirms this reasoning.

<sup>(806)</sup> Case C-60/85 Lijten [1986] ECR 2365; Case C-202/97 Fitzwilliam [2000] ECR 883; Case C-404/98 Plum [2000] ECR 9379.

The 'interest' rather relates to the determination of the applicable legislation than to the application of the legislation itself, i.e. the amount of benefits, the concrete rights and obligations, the eventual application that a particular legislation would bring about<sup>(807)</sup>. The appointed legislation on the basis of Article 17 replaces the traditional conflict rules. As such, just as the fundamental objectives behind the conflict rules have, Article 17 has as its basic intention the avoidance of administrative complications. Also the recent CJ *Bosmann* case<sup>(808)</sup> shows that, if someone wants to obtain a higher benefit or even a benefit, he depends on the national legislation of the Member State concerned. The conflict rules of Regulation (EEC) No 1408/71 therefore do not pay particular attention to the contents of the applicable law and the best possible protection for the employee.

It might therefore be perfectly possible that the employed or self-employed person would obtain higher social security benefits in case another legislation were applied. But the coordination regulations do not pay attention to this kind of interest of the employee. If administrative complications are avoided by appointing a particular legislation A, even in cases where application of another legislation B would be more beneficial for the worker, preference seems, according to this reasoning, to be given to legislation A.

The application of a principle of favouritism, known under the rules of international private law and labour law, is missing in the field of social security. The posting Directive 96/71/EC states that the application of the legislation of the country of temporary employment shall not prevent application of terms and conditions of employment which are more favourable to workers<sup>(809)</sup>. The same principle can also be found back in the Rome Convention and the

<sup>(807)</sup> Y. Jorens, *Wegwijs in het Europees sociale zekerheidsrecht*, Brugge, Die Keure, 1992, 78; see also the point of view of the European Commission in Case C-101/83 *Brusse* [1984] ECR 2223.

<sup>(808)</sup> Case C-352/06 *Bosmann* [2008] ECR I-3827.

<sup>(809)</sup> Article 3(7) of posting Directive 96/71/EC.

Rome I Regulation<sup>(810)</sup> in the field of international private law. Through this principle of favouritism the contents of the law are of importance and the best system with the biggest protection has priority.

This is certainly not the case under social security law.

But is this priority for avoiding administrative complications always in conformity with the principle of free movement of workers? Is the fact that an employee is not guaranteed the highest possible benefits as a result of a choice of conflict rules made under the regulation an impediment to free movement?

Or is the Community legislator perhaps immune to such arguments, as it is in his own power to decide which rules are in conformity with the EU Treaty? It is true that the CJ pointed out that the Council has a wide discretion regarding the choice of the most appropriate measures for obtaining the objective of Article 51 of the Treaty (now 42) and therefore had the liberty to depart in some respects at least from the mechanisms currently provided for in Regulation (EEC) No 1408/71<sup>(811)</sup>. This wide discretion should guarantee that the actual conflict rules are consistent with the principle of proportionality, and therefore judicial review of the exercise of such power must be limited to examining whether such exercise is vitiated by a manifest error or misuse of powers, or whether the institution concerned has manifestly exceeded the limits of its discretion<sup>(812)</sup>.

But taking into account the fundamental objectives of the coordination regulations to achieve the free movement of persons, is it in conformity with the principle of proportionality that more and higher benefits are sacrificed on the altar of less administrative complications? It is doubtful.

But even if one only looks at the argument of lesser administrative complications, do the actual

conflict rules pass this test? Let us take the example of frequently mobile workers who have to change legislation every time they take up a new job. By not ensuring continuity in the applicable legislation, this would lead to a further impediment<sup>(813)</sup>. We cannot ignore the fact that such a situation would increase administrative complications, which would be against the objectives of the conflict rules. In particular, if the European legislator deliberately chose a different conflict rule for another category of people, might it then not be argued by this group of frequently mobile workers that a similar application of that conflict rule would generally lead to less administrative impediments and would therefore be more in conformity with the free movement of persons?

But might it also be possible to go one step further, looking at the abovementioned case-law of the CJ, where the CJ clearly states that conformity with the free movement of persons has to be looked at, not in an abstract way, but rather from the particular situation of the worker? Could this lead to a more personal investigation of the adequacy of the conflict rule? The *lex loci laboris* has been chosen because it clearly fits into the perspective of the market integration function, allowing the worker to be connected to the country he is most attached to. It might be perfectly possible that, in a more concrete situation, the worker argues and proves that he is more attached to another country. Could it not be argued that in such situations an alternative connecting factor or conflict rule should be used as it better serves the worker's interests?

#### (b) The compulsory character of the conflict rules

Contrary to the rules on labour law and international private law, social security regulations do not foresee the possibility of free choice for determining which social security legislation would

<sup>(810)</sup> Article 6 of the Rome Convention and Article 8 of the Rome I Regulation.

<sup>(811)</sup> Case C-443/93 Vougioukas [1995] ECR 4033, para. 35.

<sup>(812)</sup> Case C-242/99 Vogler [2000] ECR 9083.

<sup>(813)</sup> See Y. Jorens (ed.), J-P. Lhernould (ed.), J-C. Fillon, S. Roberts and B. Spiegel, Think Tank Report 2008 — Towards a new framework for applicable legislation. New forms of mobility, coordination principles and rules of conflict — Training and reporting on European social security, Project DG EMPL/E/3 — VC/2007/0188, Brussels, 2008, 23.

apply<sup>(814)</sup>. Social security belongs to the public field and is of public order and therefore parties may not deviate from these general principles. This cannot, however, exclude the fact that, at least indirectly, parties can influence the choice of the applicable legislation through the factual situations of a case, such as the place of residence, the location of the employer, the workplace, etc.<sup>(815)</sup>.

The rules of conflict therefore have a compulsory character. This is also in line with the national social security schemes, according to which the principle of solidarity requires that the person concerned has to be subject to the applicable legislation. It follows from the provisions of the regulation that the application of national legislation is determined by reference to criteria drawn from the rules of Community law. Although it is for the legislature of each Member State to lay down the conditions creating the right or the obligation to become affiliated to a social security scheme or to a particular branch under such a scheme, it must be emphasised that this does not mean that the Member States are entitled to determine the extent to which their own legislation or that of another Member State is applicable<sup>(816)</sup>. The application of the provisions of the regulations therefore depend on the objective conditions and circumstances in which the migrant worker concerned is situated and the last one has

no option<sup>(817)</sup>. The provisions of Title II constitute a complete set of conflict rules, the effect of which is to divest the legislator of each Member State of the power to determine the ambit and the conditions for the application of its national legislation. The Member States are therefore not entitled to determine the extent to which their own legislation or that of another Member State is applicable, since they are obliged to comply with the provisions of the Community law in force<sup>(818)</sup>. The conflict rules are compulsorily applicable and it is only when choice has explicitly been foreseen that an option can be used<sup>(819)</sup>. In the *Miethe* case on unemployment benefits, the CJ clearly determines that Article 71(1)(a)(ii) of Regulation (EEC) No 1408/71 must be interpreted as meaning that a wholly unemployed frontier worker who comes within the scope of that provision may claim benefits only from the Member State in which he resides even though he fulfils the conditions for entitlement to benefits laid down by the legislation of the Member State in which he was last employed.

The applicable legislation is therefore derived objectively from the conflict rules of the regulation, taking into account the factors connecting the particular situation with the legislation of the Member State.

Traditionally, free choice is considered to be excluded as it is often believed that the employee, as the weaker party, would not be in a position to resist the pressure from the employer who would presumably have a preference for the country with the lowest contributions. But is this correct? Also today, the conflict rules are only concerned with avoiding administrative complications and do not exclude the possibility that perhaps the country with the lowest contributions, which — although they are not immediately interrelated — would also lead to the lowest benefits for the worker concerned, would be chosen.

<sup>(814)</sup> One exception is the free choice foreseen for diplomatic missions and consulars in Article 16 of Regulation (EEC) No 1408/71. This right of option was further kept for the auxiliary staff of the European Communities in Regulation (EC) No 883/2004 (Article 15). See also Case C-60/93 *Aldewereld* [1994] ECR 2991, concerning the situation of a person who resides in the Member State and, in the employment of an undertaking established in another Member State, works exclusively outside the European Union. The option to leave the choice to the person concerned to decide under which legislation he or she would fall, taking into account that no particular conflict rule was foreseen for this situation under the regulation, was rejected by the CJ as an option was only explicitly foreseen for diplomatic missions and the person concerned was not in a situation comparable to that

<sup>(815)</sup> Under the actual Regulation (EEC) No 1408/71 it is well-known that this choice through indirect factual elements does happen in practice, in particular in the situation where activities are performed in two Member States, one of them being the place of residence. By starting to work at home, even for a rather short period a week, people might become subject to the legislation of the state of residence, instead of the state of employment. Under the new Regulation (EC) No 883/2004, this 'intentionally arranging' to fall under the legislation of the place of residence would become less probable as it is now requested that substantial activities be performed in the state of residence.

<sup>(816)</sup> Case C-276/81 *Kuijpers* [1982] ECR 3027, para. 14; Case C-110/79 *Coonan v Insurance Officer* [1980] ECR 1445.

<sup>(817)</sup> See, for example, also Case C-12/67 *Guissart* [1967] ECR 536.

<sup>(818)</sup> Case C-302/84 *Ten Holder* [1986] ECR 1821, para. 21.

<sup>(819)</sup> See, for example, also Case C-1/85 *Miethe* [1986] ECR 1837, para. 12,



The option of free choice is known as a fundamental principle for the determination of the applicable labour law in the field of international private law<sup>(820)</sup>. However, also here this fundamental principle of free choice is to a large extent undermined by measures that should protect the employee. In the first place, the fact that parties have chosen a particular law would not, where all other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of the rules of the law of this country. Secondly, the choice of the law made by the parties cannot deprive the employee of the protection offered to him or her by the mandatory rules of the law, which would be applicable in the absence of choice, on the basis of objective criteria<sup>(821)</sup>. The application of a principle of protection and a principle of favouritism for the employee therefore implies that the general principle of free choice is very limited. In case free choice were given in the field of social security law, one could, for example, imagine establishing a conflict rule as a guarantee according to which 'free' choice could not deprive the application of the social security protection of the country to which the employee concerned is most attached. On the other hand, this would not solve the problem as the next task would be to decide the country to which the employee is most attached. Would that be the country with the highest benefits? Or in the case of, for example, a worker, who works in Member State A for an employer based in Member State B, where s/he is also living, it could be argued that it is perhaps country B to which s/he is most attached<sup>(822)</sup>.

In general, however, allowing a free choice in the field of social security is not recommendable, not

only because of the high risk of the employer choosing the country with the lowest contributions, but also because it would contradict the compulsory, objective application of social security legislation and could as such also undermine the general financial solidarity of a social security system, leading to abuse.

One way or another, the application of an Article 17 agreement (Article 16 of Regulation (EC) No 883/2004) could be seen as a greater or lesser possibility of choosing between certain systems, although the choice here is more offered to the administrations.

#### (c) The principle of exclusivity and the strong effect of the conflict rules

The other side of the single applicable legislation is the exclusive effect of the conflict rules. The fundamental question is to know whether the conflict rules are in a position to exclude, in every situation, the application of another legislation than that designated by the regulation provisions without being in conflict with, and contrary to, Articles 39 and 42 of the Treaty. This debate is not new. And it seems that the CJ 'commutes' between different points of view.

Whereas in the beginning the CJ decided that the regulations did not prohibit the application of the legislation of the Member State other than the one designated by the conflict rules, except to the extent that it requires the worker to contribute in the financing of the social security institution, which is unable to provide him with additional advantages<sup>(823)</sup>, in later cases the CJ declared that 'The provisions of Title II constitute a complete system of conflict rules the effect of which is to divest the legislature of each Member State of the power to determine the ambit and the conditions for the application of its national legislation so far as the persons who are subject thereto and the territory

<sup>(820)</sup> Article 3 of the Rome Convention and Article 3 of the Rome I Regulation

<sup>(821)</sup> See Article 6 of the Rome Convention, as well as Article 8 of Regulation (EC) No 593/2008, the Rome I Regulation.

<sup>(822)</sup> See Y. Jorens (ed.), J-P. Lhernould (ed.), J-C. Fillon, S. Roberts and B. Spiegel, Think Tank Report 2008 — Towards a new framework for applicable legislation. New forms of mobility, coordination principles and rules of conflict — Training and reporting on European social security, Project DG EMPL/E/3 — VC/2007/0188, Brussels, 2008, 25.

<sup>(823)</sup> Case C-92/63 Nonnenmacher [1964] ECR 585.

within which the provisions of national law take effect are concerned'; the Member States are (not) entitled to determine the extent to which their own legislation or that of another Member State is applicable since they are 'under an obligation to comply with the provisions of Community law in force'<sup>(824)</sup>. It is important to see that the CJ continues in this case by declaring that 'That rule is not at variance with the Court's decisions (see, in particular, the Petroni judgment) to the effect that the application of Regulation 1408/71 cannot entail the loss of rights acquired exclusively under national legislation. That principle applies not to the rules for determining the legislation applicable, but to the rules of Community law on the overlapping of benefits provided for by different national legislative systems. It cannot therefore have the effect, contrary to Article 13(1) of Regulation 1408/71, of causing a person to be insured over the same period under the legislation of more than one Member State, regardless of the obligations to contribute or of any other costs which may result therefrom for that person'<sup>(825)</sup>. The simultaneous application of two national legislations would therefore not be possible. Also the Commission had declared in that case that the principle of inviolability of national acquired rights (the famous 'Petroni principle')<sup>(826)</sup> can only apply to the substantive rules of the coordination regime and not to the conflict rules.

This seems to include that a worker could, as a result of the conflict rules, lose a higher level of benefits provided in another Member State. As such this is not really surprising as we have noticed that for the CJ the interest of the worker is determined by avoiding and limiting administrative complications, rather than by guaranteeing a high level of benefits.

The simultaneous application of, on the one hand, the national social security system on its own and

the national social security system in combination with European social security law was not possible in that respect. On the other hand, in particular with respect to family benefits, the CJ already declared that the aim of Article 51 (42) would not be achieved if workers were to lose their social security advantages, guaranteed to them by the legislation of a single Member State, as the regulations allow different schemes to exist, creating different claims on different institutions against which the claimant possesses direct rights by virtue either of national law alone, or of national law supplemented, where necessary by Community law, in particular to the lifting of conditions of residents<sup>(827)</sup>.

This discussion has gained a new momentum with, as mentioned before, the *Bosmann* case. Although the CJ firstly confirms the exclusivity character (under Article 13(2)(a) of Regulation (EEC) No 1408/71, a person employed in the territory of one Member State is to be subject to the legislation of that state even if he resides in the territory of another Member State; the effect of determining that a given Member State's legislation is the legislation applicable to a worker pursuant to that provision is that only the legislation of that Member State is applicable to him), it goes further to determine that application of this article does not preclude a migrant worker, who is subject to the social security scheme of the Member State of employment, from receiving, pursuant to the national legislation of the Member State of residence, child benefit in the latter state.

It could be said that the *Bosmann* case only extends this well-known principle of a cumulative application under family benefits, taking into account that the particularity here is that the competent state, contrary to the case-law on accumulation of benefits, did not provide for any family benefit. The fundamental question is whether the national legislator might refuse the application of its national law or that he is obliged to apply it. It seems difficult

<sup>(824)</sup> Case C-302/84 Ten Holder [1986] ECR 1821, para. 21.

<sup>(825)</sup> Case C-302/84 Ten Holder [1986] ECR 1821, para. 22.

<sup>(826)</sup> Case C-24/75 Petroni [1975] ECR 1149, paras 21–22. The regulation may not lead to the result that national acquired rights would be reduced.

<sup>(827)</sup> Case C-807/79 Gravina [1980] ECR 2205, paras 6–7, confirmed in many other cases.

to imagine that he may refuse it. The only argument which one could use is that it would be contrary to the regulation that the national law also applies. German authorities may introduce into their domestic law a provision stating that ‘family benefits are granted to all persons resident on the German territory, with the exclusion of persons who are subject to another EU legislation according to [the] coordination rules of [the] Regulation’. However, such a provision would probably be seen as a typical indirect discrimination based on nationality. The option created by the CJ would therefore turn into an obligation<sup>(828)</sup>.

Can *Bosmann* be limited to situations where, if no family benefits are to be paid under the law of the competent state, migrant workers can now hope to get these benefits from the non-competent state? The statement of the CJ — ‘the provisions of Regulation No 1408/71 must be interpreted in the light of Article 42 EC Treaty which aims to facilitate freedom of movement for workers and entails, in particular, that migrant workers must not lose their right to social security benefits or have the amount of those benefits reduced because they have exercised the right to freedom of movement conferred on them by the EC Treaty’ (para. 29) — does not seem to limit the reasoning of the CJ to family benefits<sup>(829)</sup>. The broad reasoning of the CJ justifies, in our opinion, the notion that the application of the country of residence is not only limited to family benefits, but can also be extended to all other benefits. The person working in a Member State and residing in another might therefore also be entitled, for example, to healthcare coverage in their place of residence as the legislation of the workplace does not provide healthcare insurance.

The CJ seems to apply here the Petroni principle to the conflict rules. The framework of the

<sup>(828)</sup> See Y. Jorens (ed.), J-P. Lhernould (ed.), J-C. Fillon, S. Roberts and B. Spiegel, Think Tank Report 2008 — Towards a new framework for applicable legislation. New forms of mobility, coordination principles and rules of conflict — Training and reporting on European social security, Project DG EMPL/E/3 — VC/2007/0188, Brussels, 2008, 26.

<sup>(829)</sup> Case C-205/05 *Nemec* [2006] ECR I-10745.

coordination regulations is the free movement of workers and any impediment to that principle is forbidden. The application of the regulation, leading to a situation where the person concerned would be deprived of rights and benefits foreseen under national law — national legislation which would apply to the person concerned if he had not relied on the principles of the regulation — would be in contradiction of this fundamental objective. National entitlements must therefore always be taken into account. The principle that someone cannot be deprived of national acquired rights obliges the Member State that is not appointed by these conflict rules, but to which the person concerned is subject, to pay him or her the rights and benefits to which he or she is entitled. A comparison between the benefits obtained on the basis of the legislation appointed by the conflict rules and the benefits based on national law should be undertaken, eventually leading to the obligation to pay a differential amount by the (non-competent) state. This certainly does not imply that the conflict rules will thereby become meaningless.

This idea is in line with the general case-law of the CJ in the framework of the free movement of workers and services. Also in healthcare, the CJ already mentions in the *Vanbraekel* case that the tariffs of reimbursement to be paid as a result of the free movement of services may not lead to lower tariffs than those based on national law<sup>(830)</sup>.

The consequences of cases like *Bosmann* and *Nemec* point out that the level of benefits may have to be taken into account and strengthened as such the interest of the workers. A principle of favouritism, as known under international labour law, could as such also have found its way into social security law. This applies to all branches of social security. It might shed new light on the actual philosophy of the conflict rules and encourage one to look at them again directly from the perspective of the EU Treaty.

<sup>(830)</sup> Case C-368/98 *Vanbraekel* [2001] ECR I-5363.

#### **IV. CONCLUSIONS**

Fifty years after the first EU coordination regulations appeared, new developments in migration patterns, as well as the growing direct reliance on, and applicability of, the fundamental principles of EU law, have led to a situation where a new set of conflict rules could be envisaged. These rules should not just be cosmetic and should look at

the fundamental principles behind these rules, such as the principle of neutrality, the compulsory character and the one single legislation applicable. Some of these principles could be adapted in the interest of the worker and should be in conformity with the free movement of workers. The right momentum now exists to assess the actual conflict rules against a test of the balance of interests.

# COORDINATION OF NEW BENEFITS

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- Born on 18 April 1959
- Study of Law at Vienna University
- Since 1982 civil servant in the Social Ministry
- Since 1997 Head of Division
- Responsible for Reg. 1408/71 since the beginning of the Austrian EU-Membership; negotiator for the accession of Austria, member of the Administrative Commission and Advisory Committee for migrant workers, Austrian representative in the Council Social Questions Group when social security for migrant workers is involved, experience with other Member States due to various PHARE/TAIEX-projects and bilateral negotiations
- Responsible for bilateral agreements concluded by Austria with other States or International Organisations in the field of social security
- Responsible for ECJ cases in the field of social security and the EC-conformity of the national legislation
- Chair of the Task Force (working under the supervision of the Administrative Commission to prepare the electronic data exchange between Member States in applying Reg. 883/2004)
- Chair of the SPC Group on SSGI (Social Services of General Interest)
- Member of trESS (Think Tank and Visiting Trainer)
- Speaker at international conferences related to social security, lectures on EC-rules in the field of social security for Austrian employers, writer of articles on international social security issues (\*)



## I. INTRODUCTION

### A. What is a 'new benefit'?

The advent of new social security benefits is always a challenge for all players at the European level<sup>(831)</sup>.

(\*) *This contribution was translated from the original German version.*

<sup>(831)</sup> In what follows, I will deal with the ramifications of the advent of new benefits in the context of coordinating social security systems. This phenomenon can also have consequences, of course, in other areas of European social law, such as on the directives on equal treatment for men and women; it is easy to see how these directives lag behind — compared with the development of social law in the Member States — through CJ ruling C-77/95 *Züchner* [1996] ECR I-5689, where the CJ felt obliged to declare Council Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ L 6, 10.1.1979, p. 24) inapplicable to people who devote themselves to the upbringing of their children or to caring for a sick family member, while national legal provisions have brought the situation of these particular groups of people increasingly into line with that of the gainfully employed.

First of all, it is clear that Europe has no ability to influence the emergence of new benefits<sup>(832)</sup>. The Member States develop their national legal situations independently in order to take account of the social, economic and political challenges that they face. The largely comparable basic conditions in the different Member States (such as their demographic situations) do mean that there are parallel developments in many Member States that lead to the advent of new benefits more or

<sup>(832)</sup> The shaping of national social policy, and with it decisions on how national social security systems are to be developed, remains a competence of the Member States (C-158/96 *Kohll* [1998] ECR I-1931).

less simultaneously<sup>(833)</sup>. From the European point of view, new benefits are above all of interest if they occur in multiple Member States, as a judgment by the Court of Justice (CJ) applying to one of those Member States will then automatically have consequences for the other Member States in question.

The aim now is to investigate the coordination of such new benefits more closely. Of course, it is not possible to comprehensively describe all the new categories of benefits<sup>(834)</sup>. I will therefore single out a few benefits that I see as particularly elucidating examples.

The actors at European level are in a constant race when new benefits occur. Will legislators manage to act first? Due to the complex decision-making process, the Commission must first produce a proposal, which the Council and Parliament then enact together<sup>(835)</sup>. Or will the CJ get there first? The CJ very often wins the race, as legislators are simply unable to adopt the necessary legislation unanimously. In such cases, criticism of the CJ can be relied upon. In what follows, I would therefore like to go into this

race a little bit more and to look into whether the criticism of the CJ's various judgments<sup>(836)</sup> is really justified if you analyse the role of the two 'competitors' in greater detail.

## B. Legal framework

The coordination of social security systems is currently governed by Regulation (EEC) No 1408/71. This regulation is due to be superseded in early 2010<sup>(837)</sup> by Regulation (EC) No 883/2004 which, although in principle it deals with the same fundamentals, does include a number of innovations. We will therefore cover both instruments and I will be referring to them below as the 'coordinating regulations'. It is also important to say, from the outset, that both instruments only cover statutory social security systems<sup>(838)</sup>. For that reason it is therefore natural that it is predominantly new statutory social security benefits that interest us, although we cannot completely ignore areas beyond statutory social security.

First of all, there are constant issues relating to delineating social assistance<sup>(839)</sup> as the boundary between social security and social assistance is fluid in nearly every Member State. The CJ, of course, clarified this issue long ago by deciding that all benefits that do not relate to the evaluation of an individual case and give rise to a legal entitlement are to be regarded as social security<sup>(840)</sup>. However, the national systems of the Member States often use different differentiation criteria and, furthermore, the Rubicon between social security benefits and

<sup>(833)</sup> Only time will tell whether the political cooperation amongst the Member States put in place at the political level since 2000 (the 'Lisbon process') through the 'open method of coordination' also assists, or will in future assist, parallel development of the reform processes in the Member States.

<sup>(834)</sup> We must be aware, however, that there are also differences of opinion on the issue of what actually constitute 'new benefits': K. Alaviukhola ('Coordination of "new" benefits', in *Coordinating work-based and residence-based social security*, published by R. Langer and M. Sakslin, Helsinki, Publications of the Faculty of Law, University of Helsinki, 2004, p. 173) focuses on new family benefits. On the subject of change in European social security systems, but in particular on the privatisation of risks and the consequences that may have on coordination under Regulation (EEC) No 1408/71, see 'Meeting the challenge of change', published by the Dutch Sociale Verzekeringsbank (SVB) as a summary of the contributions at the conference of 30 and 31 October 1997 at Noordwijk aan Zee. G. Igl identifies, above all, family benefits and care benefits as one of the most problematic new forms of benefit in 'Coordination and new forms of social protection' in 25 years of Regulation (EEC) No 1408/71 on social security for migrant workers, published by the Swedish National Social Insurance Board, Stockholm, 1997. The paper, however, relates to the situation before the clarifications by the CJ in Cases C-160/96 Molenaar [1998] ECR I-843, in relation to care benefits, and Cases C-245/94 and C-312/94 Hoever and Zachow [1996] ECR I-4895; in these decisions, the CJ found that child-raising benefits were clearly family benefits within the meaning of Regulation (EEC) No 1408/71. A good overview of the problems arising from the advent of new benefit systems can also be gained from the European Report 2008 by the Tress network (<http://www.tress-network.org>).

<sup>(835)</sup> For legal instruments relating to the social security of migrant workers, the Council must unanimously agree with the European Parliament in the co-decision procedure (Article 42 of the EC Treaty).

<sup>(836)</sup> The CJ's judgments are, naturally enough, always a favourite topic of study and teaching. Some judgments have been particularly heavily criticised, however. One good example is the judgment in Cases C-245/94 and C-312/94 Hoever and Zachow [1996] ECR I-4895, which was criticised, amongst others, by E. Eichenhofer in 'Deutsches Erziehungsgeld und Europäisches Sozialrecht' [German child-rearing allowances and European social law] in *Sozialgerichtsbarkeit* [periodical] 10/97, p. 449 et seq.

<sup>(837)</sup> Currently scheduled to occur on 1 March 2010.

<sup>(838)</sup> Article 1(j) pension fund of Regulation (EEC) No 1408/71 and Article 1(l) of Regulation (EC) No 883/2004.

<sup>(839)</sup> Social assistance is excluded from the functional scope of the two instruments in Article 4(4) of Regulation (EEC) No 1408/71 and Article 3(5) of Regulation (EC) No 883/2004.

<sup>(840)</sup> See, for example, C-24/74 Bionso [1974] ECR 999.



social assistance is often crossed, without the Member States in question even realising it, when social law schemes are being redesigned. Where Member States are unable to get these benefits recognised as ‘special non-contributory cash benefits’ as quickly as possible, something that can only be achieved with the unanimous agreement of the Commission and all the other Member States<sup>(841)</sup>, there is then automatically the threat of an obligation to export the said benefit to the other Member States.

That is probably the greatest risk of all the consequences of the coordinating regulations for this category of benefits.

The boundary of the statutory systems with the collective-agreement or private law-based welfare systems, too, is a fluid one. The latter systems are also outside the scope of the coordinating regulations. In such cases, too, it is striking that, depending on the particulars of each national legal situation, systems which are thoroughly comparable in socio-political terms sometimes fall within the scope of these regulations and sometimes do not. As an example, we can look at the insurance provided by health insurance bodies acting under private law. If this insurance is based on a statutory obligation, and if legislators have also imposed some minimum quality standards on that private insurance, such a system will in any case fall within the scope of the coordinating regulations (a good example of this is Switzerland’s mandatory health insurance). Where, however, national legislators just provide for certain people to be without insurance cover and allow these people the choice of how they actually intend to protect themselves from individual social security risks, insurance of this nature will not be covered by the coordinating regulations even if the insurance is negotiated with the same private insurance that is involved in the Swiss mandatory system (one example of this being the lack of insurance cover for certain

groups of people under German law)<sup>(842)</sup>. The same phenomenon can also be seen in the pension schemes under the second or third pillar.

Below we will — as I said earlier — analyse some of the new benefits more closely. I would like to focus firstly on the care benefits, as these can be seen as a prime example of all the aspects and problems associated with new categories of benefits. I will then go into detail about new systems in pension insurance, such as capital-funded systems and pension account systems, and then finally I will take a look at a few more aspects of child-rearing benefits which can also be regarded as a new category of benefits.

## II. CARE BENEFITS

### A. Background

In the 1990s, a number of Member States began to introduce national care benefit systems which were predominantly designed to meet the demands of demographic change. The aim of these systems is to assist people who are unable to live according to their own means, who, in living their day-to-day lives, are constantly or at least repeatedly reliant on external assistance, with a state-based benefit system. The people in question are usually elderly population groups, but sometimes younger people with relevant disabilities may also fall into these groups. It is worth pointing out, to begin with, that what we are talking about here is often not completely new additions to national social policy but benefits whose roots lie in older systems to care for the disabled (e.g. benefits for the blind), which nearly all the Member States have had for centuries<sup>(843)</sup>.

<sup>(842)</sup> This means that one and the same insurance for a private insurance scheme that operates across Europe can be both covered by Regulation (EEC) No 1408/71 (where Switzerland is the competent state) and not covered (where the competent state is Germany).

<sup>(843)</sup> These legacy benefits are well documented in the case-law of the CJ on the delimitation of social security benefits from social assistance benefits outside the scope of Regulation (EEC) No 1408/71, even before the introduction of Annex IIa into the said regulation in 1992 (through Regulation (EEC) No 1247/92, OJ L 136, 19.5.1992, p. 1) — see, amongst others, the judgments on Belgian benefits for the disabled such as C-187/73 Callemeyn [1974] ECR 553, or on French allowances for disabled adults such as C-63/76 Inzirillo [1976] ECR 2057.

<sup>(841)</sup> Annex IIa of Regulation (EEC) No 1408/71 and Annex X of Regulation (EC) No 883/2004.

It is also interesting that it seems to be absolutely impossible for the experts to come up with a definition for this new category of benefits. Attempts to do so by the Council, in drawing up Regulation (EC) No 883/2004<sup>(844)</sup>, as well as at the Administrative Commission level<sup>(845)</sup> have so far not met with any success. Other European social policy players, however, have not been as inhibited when it comes to finding generally accepted definitions for care benefits. The Social Protection Committee, for example, has used the following definition, which has been accepted by all the Member States unchallenged.

Originally (2003):

*'Long-term care consists of assistance to persons who are unable to live autonomously and are therefore dependent on the help of others in their everyday lives. Their needs for assistance can range from facilitating mobility, shopping, preparing meals and other household tasks to washing and feeding in most extreme cases. Providing such long-term care does not necessarily require medical skills';*

and then:

*'A cross-cutting policy issue that brings together a range of services for persons who are dependent on help with basic activities of daily living over an extended period of time'<sup>(846)</sup>.*

All these new benefit systems have something in common from the perspective of socio-political

objectives. They are planned to cover all residents, thereby aiming to provide the widest possible national coverage for the protection of the entire population against this new risk of needing long-term care. Exporting such benefits to people in other Member States is counter to the system.

It was clear that, given this background, CJ judgments on whether these systems are compatible with European law were to be expected. I would now like to trace the individual stages of this case-law.

## B. Chronology of CJ case-law

### 1. The *Molenaar* case

The first case dealt with German care insurance<sup>(847)</sup>. Under the decisive German legislation — put simply — everyone with German health insurance also has German care insurance. The insurance is administered by care insurance funds in close organisational interconnection with the German health insurance funds. The benefits offered include a care allowance and a range of benefits in kind, and it is possible for these benefits to be combined.

The subject of the case was a French citizen who commuted across the border to work in Germany. As he worked in Germany, he had to contribute to the German care insurance scheme, but under the German system he would be unable to claim any benefits as a result of the fact that he lived in France<sup>(848)</sup>. Germany did not deny that the care insurance was a branch of social security covered by Regulation (EEC) No 1408/71 but did argue that the system provided solely benefits in kind (including the care allowance as a 'surrogate benefit in kind'<sup>(849)</sup>). Under Regulation (EEC) No 1408/71,

<sup>(844)</sup> In the case of Regulation (EC) No 883/2004, first of all use is made of the term 'long-term care benefits' (Article 34), while, due to the failure of the delegations in the Council Working Group on Social Issues to agree when drawing up the regulation, the difficult task of definition was delegated to the Administrative Commission (see paragraph 2 of the said regulation).

<sup>(845)</sup> The Administrative Commission, too, was unable to fulfil the remit of coming up with a definition, and its decision, which will lay down a list of care benefits in kind and care benefits in cash, will only contain a yes/no list that makes reference to the existence of such benefits without actually setting out which specific benefits are affected precisely.

<sup>(846)</sup> This definition has been taken from the OECD, but it has never given rise to any issues in the political discussions in the Social Protection Committee. A precise analysis, however, shows that this definition, too, leaves room for improvement. One issue is that babies, too, would satisfy this definition, although benefits to all babies are, of course, not care benefits in this sense.

<sup>(847)</sup> C-160/96 *Molenaar* [1998] ECR I-843.

<sup>(848)</sup> Under the German legislation being challenged, only people resident in Germany could claim benefits under the German care insurance system (German Social Security Code (SGB), Vol. XI).

<sup>(849)</sup> Germany cited the CJ's judgment in Case C-61/65 *Vaassen-Göbbels* [1966] ECR 377, in which the CJ found that benefits that, although paid in cash, constituted a reimbursement for treatment costs paid out in cash by the insured party were to be regarded as sickness benefits in kind rather than in cash.

benefits in kind are not to be exported, but are to be provided for the residents of the Member State in question <sup>(850)</sup>.

Given this starting point, the CJ had to first decide which rules under Regulation (EEC) No 1408/71 applied to German care insurance. Given that Regulation (EEC) No 1408/71 does not itself cover 'care benefits', the CJ had to look for the benefits to which this new risk could best be assigned. Primarily due to its function in supplementing statutory health insurance, but also as a result of its organisational interweaving with the health insurance funds, the CJ categorised care insurance with the risk of 'sickness'. The next step was to decide whether care allowances were a benefit in kind or in cash. The CJ found it beyond doubt that a benefit can only be regarded as a surrogate benefit in kind where it specifically reimburses treatment costs paid by an insured party in an individual case. Where, as in the case of German care allowances, the person in question has complete autonomy over how they intend to use such a benefit (e.g. to pay for professional services, assistance by relatives or even to 'save for worse times to come'), the CJ found that such payments constituted benefits in cash. Another inevitable consequence of this decision was that sickness benefits in cash could be exported pursuant to Regulation (EEC) No 1408/71 <sup>(851)</sup>.

What this means is that, even with a place of residence in another Member State, a person (with up-to-date coverage!) <sup>(852)</sup> in the German care insurance scheme can assert his/her claim to care allowances

from this German insurance system. This also spells out clearly that care benefits in kind, such as the provision of professional help for day-to-day tasks (shopping, personal hygiene, cleaning the house, etc.), cannot be exported. Instead, such benefits, like all other sickness benefits in kind, may also be provided for those insured in another Member State who live in Germany, at the expense of the competent foreign institution. Therefore any recipients, excluding those receiving Austrian pensions, residing in Germany <sup>(853)</sup> are not only entitled to 'ordinary' benefits in kind under German health insurance (such as consultation with doctors, medicines and hospital care) but also care benefits in kind. The competent Austrian health insurance fund must then reimburse the German fund(s) for all these benefits. This is certainly not a revolutionary idea, however, but rather the entirely logical consequence of viewing care benefits as benefits within the field of health insurance. We will have to go into this in more detail below.

## 2. The *Jauch* case

The next case related to Austria <sup>(854)</sup>. As in Germany, the national provision of this new system in Austria was also very likely to involve European law. Unlike Germany, though, Austria did not plan to go down the route of benefits in kind but rather that of special non-contributory benefits. Annex IIa of Regulation (EEC) No 1408/71 was already in place, in which the Member States could list special non-contributory benefits that, inter alia, serve solely to provide specific protection for the disabled <sup>(855)</sup>. In Austria, the main aim was for the benefits to be

<sup>(850)</sup> See, for example, the reference to sickness benefits in kind in Title III, Chapter 1, of Regulation (EC) No 1408/71.

<sup>(851)</sup> Where the worker pursuant to Article 19 or the pensioner pursuant to Article 28 of Regulation (EEC) No 1408/71 resides outside the competent state.

<sup>(852)</sup> Under Regulation (EC) No 1408/71, sickness benefits require that insurance be current in the Member State in question. In other words, a person who was originally insured in Germany but who then moves to Poland, where he/she is then subject to Polish legal provisions as a result of pursuing a new occupation pursuant to Title II of Regulation (EC) No 1408/71 no longer has any claim to German sickness benefits (and thereby likewise no claim to German care allowances), even if care allowances were being drawn before moving to Poland.

<sup>(853)</sup> Under Article 29 of Regulation (EC) No 574/72 Austrian pensioners are entitled to register with a German health insurance fund using form E121 and then obtain the same benefits in kind as a German insured party.

<sup>(854)</sup> C-215/99 *Jauch* [2001] ECR I-1933.

<sup>(855)</sup> Article 4(2a) of Regulation (EEC) No 1408/71.

‘non-contributory’. The Austrian system was thus not funded by individual ‘care contributions’ but by general tax revenue<sup>(856)</sup>.

A further factor in Austria is that there is no uniform care system. Given Austria’s federal structure, there is instead provision for federal care allowances that provide for benefits for everyone for whom the federal government is responsible (those drawing pensions from general social security, federal civil servants, those utilising other federal benefits such as care systems for victims of war and their families) plus nine different provincial systems for all other groups of people (predominantly those in employment plus provincial civil servants and their families)<sup>(857)</sup>. From an organisational point of view, however, care allowances are kept entirely separate from health insurance. Federal care allowances to pensioners, for example, are paid out by the competent pension insurance body, while benefits for those in employment are paid out by the provincial government institutions.

Austria had therefore applied for care allowances under the federal care allowances scheme to be listed in Annex IIa and for care allowances pursuant to the nine provincial care allowance laws to be listed in Annex II, Part III, of Regulation (EEC) No 1408/71

<sup>(856)</sup> In its judgment on this case, the CJ also challenged the non-contributory nature of the system. This was because Austrian legislators — as always — had chosen a very complicated variant of funding for the scheme. The contribution rate for health insurance was increased, meaning that the pension insurance contribution for the health insurance of pensioners could be reduced, thus saving the state from covering the deficit in pension insurance. The money saved could then be pumped into care provision. The CJ distrusted this method of funding and found that, ultimately, it was a contributory system. In reality, however, the spheres of allocation for health insurance and care provision are kept strictly separate in Austria, meaning that not a single euro flows from health insurance to care provision. I therefore think that the CJ failed to grasp the complexity of the funding of social security in Austria. Furthermore, though, such considerations were in any case not crucial, as the CJ, at the same time, also refuted Austria’s claim that these benefits had the character of ‘special benefits’. All the ‘hard work’ was therefore in vain. This also shows that overly complicated national solutions often cause difficulties for the CJ which then come back to haunt the Member States in question.

<sup>(857)</sup> The reasons for the existence of these 10 different systems are the division of competences under the Austrian constitution and the intention of harmonising what were, prior to the introduction of the new system, completely different benefits (such as pension destitution top-ups but also provincial benefit payments to the blind and the disabled). An agreement between the federal government and the nine provinces ensured that all 10 systems would thenceforward proceed on uniform principles and, above all, that care allowance contributions would be the same across the country.

relating to regional special non-contributory benefits. These arguments were accepted by both the Commission and all the Member States with the result that these benefits were only to be awarded to residents of Austria (no export) pursuant to the wording of Regulation (EEC) No 1408/71.

The *Jauch* case related to a single Austrian pensioner (drawing a single Austrian pension) who lived in Germany. Until 1998, Mr Jauch had been receiving German care allowances<sup>(858)</sup>, but these were stopped in the light of the *Molenaar* judgment. He therefore applied for care allowances in Austria. Under the wording of Regulation (EEC) No 1408/71 it was clear that, in this case, it was not possible to export federal care allowances (which were predominantly what was at issue, given that the pensioner was drawing his pension from general social security). The question, however, was whether this ruling out of exports under Annex IIa was in line with the principles of the EC Treaty. The CJ found that Austrian care allowances under the federal legislation on care allowances were not special benefits, as the risk of ‘needing long-term care’ was an ordinary risk in sickness (as the CJ had already found in the *Molenaar* case). However, ‘ordinary’ benefits cannot be listed in Annex IIa of Regulation (EEC) No 1408/71. Such benefits have to follow the general coordination rules for sickness benefits. This means that, for pensioners, for example, an export would have to take place if it is Austria that is competent for sickness benefits (and is thereby responsible for bearing the costs of benefits in kind where someone is resident in another Member State)<sup>(859)</sup>. The judgment meant that Austria was unable to refuse the export of Austrian federal care allowances to Germany for Mr Jauch.

<sup>(858)</sup> Since prior to the *Molenaar* case Germany had worked on the basis that care allowances were a benefit in kind that should also be paid to foreign pensioners pursuant to Article 28 of Regulation (EC) No 1408/71 (and reimbursed by the competent foreign institution), if the pensioners in question had registered with a German health insurance fund using form E121.

<sup>(859)</sup> Pursuant to Article 28(1)(b) of Regulation (EEC) No 1408/71. Competence here does not mean the competence under the applicable legal provisions which, for pensioners, always rests with the state of residence, but competence to bear costs and for benefits in kind (in terms of reimbursement of costs) and for benefits in cash through the direct pay-out obligation.

With this judgment, the CJ has made one thing clear in respect of new categories of benefits, namely that differing national systems, organisational structures or funding are irrelevant. All that matters ultimately is the purpose of a benefit. Where this fits, all comparable benefits provided by the various Member States must be coordinated according to the same principles. There is another lesson to be learnt from the *Molenaar* and *Jauch* judgments, and that is that, until Community legislators provide discrete principles of coordination for these new categories of benefit, the CJ will have no choice but to find applicable to each category of benefit the principles of coordination that are most similar to the category in question<sup>(860)</sup>.

### 3. The *Hosse* case

Austria must be the most closely examined Member State in the European Union. All the benefits that had had export ruled out on the basis of listing in the annexes in question ended up being brought before the CJ<sup>(861)</sup>. Following the examination of federal care allowances in the *Jauch* case, a provincial care allowance listed under Annex II, Part III, of Regulation (EEC) No 1408/71 was also brought before the CJ<sup>(862)</sup>.

The subject of the case was a man who commuted across the border to work in Austria (in the Province of Salzburg) but lived with his family in Germany. His daughter was disabled and his wife devoted herself to looking after this daughter; she had given up a previous profession in order to do so. When it came to sickness benefits in kind, both

the wife and the daughter were covered under Austrian health insurance along with the cross-border worker, the father<sup>(863)</sup>. The question was, however, whether there was an entitlement to Austrian care allowances for the disabled daughter.

Federal care allowances (as dealt with in the *Jauch* case) were not relevant here, as there was no link to the federal competence (the father was in gainful employment and not yet a pensioner).

The CJ found that the Province of Salzburg's care allowances have the same function as the care allowances examined earlier in German care insurance and under the Austrian federal legislation of care allowances. The CJ found that the former allowances, too, essentially serve to complement the health insurance benefits in order to provide cover for a person's additional expenditure on care. The argument put forward by the Austrian government, that there was no connection at all to health insurance from an organisational point of view, was rebuffed as irrelevant<sup>(864)</sup>. The CJ also found that it is immaterial that, under the Austrian system, the entitlement to a care allowance is an individual entitlement on behalf of the person requiring care (in this case the daughter), but that the entitlement to sickness benefits under the regulation can only be derived from the legal situation of the father (the only individual in the case subject to Austrian legal provisions)<sup>(865)</sup>. Ultimately, a benefit of this nature for a family member always benefits the cross-border worker (too). The CJ therefore also denied, on

<sup>(860)</sup> This principle comes up again and again. When it came to the child-rearing benefits recently introduced in many Member States, too, the CJ had no choice but to approximate this category of benefits to family benefits, albeit that such benefits are regarded as maternity benefits in many Member States (cf., for example, Case C-275/96 *Kuusijärvi* [1998] ECR I-3419 for the classification in Sweden prior to the judgment). I will go into child-rearing benefits in greater detail later on.

<sup>(861)</sup> In addition to the *Jauch* and *Hosse* cases, readers should also be referred to Case C-160/02 *Skalka* [2004] ECR I-5613, which examined Austrian compensatory supplements to pensions, that were also based on Annex IIa to Regulation (EEC) No 1408/71. In this case, however, the CJ found that Austria was right to base this system on the annex.

<sup>(862)</sup> C-286/03 *Hosse* [2006] ECR I-1771.

<sup>(863)</sup> Under Article 19 of Regulation (EEC) No 1408/71, both of them had registered with a German health insurance fund using form E106.

<sup>(864)</sup> The CJ thereby broke this link completely for the first time. In the *Jauch* case it had still made reference, amongst other things, to the increase in health insurance contributions in order to underpin the connection with health insurance (para. 33). In the case of provincial care allowances, with their autonomous funding from the relevant provincial budget and the organisational competence of the provincial government, such a link could no longer be claimed.

<sup>(865)</sup> A view also shared with the case-law on family benefits (cf., for example, the judgment in Case C-543/03 *Dodl* and *Oberhollenzer* [2005] ECR I-5049). For family benefits, too, it is irrelevant who is entitled to make a specific benefit claim under a given national system. All that matters is ultimately the family connection. Where it is a family that is being dealt with, each family member is entitled to claim the benefit, regardless of whether it is that person or another family member who is subject to the legal provisions of the Member State in question.



the same lines, that these Austrian benefits have the quality of special benefits. These, too, were deemed to be sickness benefits, which means that the general stipulations of the ‘Sickness benefits’ chapter of Regulation (EEC) No 1408/71 apply. Mr Hosse was also entitled to care allowance from the Province of Salzburg for his daughter, even though she lived in Germany, on that basis <sup>(866)</sup>.

The CJ has been consistent again with that decision. The federal structure of a Member State is likewise not something that can exclude a benefit that only serves to cover a general and ‘ordinary’ social security risk from coordination. Therefore it is not only the national organisation of the various social security systems that is irrelevant, but also the allocation of competence within the Member States. Even benefits that, like the Province of Salzburg’s care allowances, are viewed by the national system as social assistance are not immune from the application of the general coordination rules. It would, of course, be worthwhile in this context to also take a closer look at the special role of regional benefits, an area in which the CJ has just recently made some waves <sup>(867)</sup>. To do so would exceed the scope of this text, however, and it is also of less importance when it comes to the Austrian care system as all nine provinces of Austria have an almost identical care system, meaning that there are no regional differences in such benefits.

The judgment in the *Hosse* case does give cause for further reflection, however. The CJ stated that Austria’s competence only exists where the daughter is not entitled to similar benefits in the state in which

she lives <sup>(868)</sup>. How are we to understand this? Under the system pursuant to Regulation (EEC) No 1408/71, there can only ever be one competent state for sickness benefits. For family members this means either the state of residence, if an occupation is pursued in that state by a family member, or another Member State in which a family member pursues an occupation <sup>(869)</sup>. This system does not allow for a priority entitlement in the state of residence in all cases. Would the CJ thus have thrown out Austria’s obligation to export the care allowance in a case where the daughter lived in a Member State other than Germany (where insurance is always necessary for entitlement to a care allowance, something which was not the case for the Hosse family) if, for example, all residents of the state of residence were entitled to a care allowance? As I say, that is not comprehensible from a systematic point of view as long as Regulation (EEC) No 1408/71 continues to be the applicable legal basis. Yet perhaps the CJ has already given us a route to future coordination (priority always to the state of residence) <sup>(870)</sup>? This will be an enthralling question, in any case!

#### 4. The *Gaumain-Cerri* case

This case also represents a very good example of new benefit systems that the Member States have introduced. It also highlights in a particularly clear manner the complexity with which we have to do battle.

The starting point was once again the German legal situation in relation to care benefits. This is because German legislators have introduced benefits not only for those people in need of care themselves (care allowances and care benefits in kind) but also complementary benefits of a completely different nature. German law also regulates the situation of the carer (which is to say the person who

<sup>(866)</sup> Pursuant to Article 19(2) of Regulation (EEC) No 1408/71.

<sup>(867)</sup> Judgment in Case C-212/06 *Gouvernement de la Communauté française et Gouvernement Wallon* [2008] ECR I-1683. Comprehensive coverage of this case, and in particular the impact thereof, can be found in H. Verschueren, ‘La régionalisation de la sécurité sociale en Belgique à la lumière de l’arrêt de la cour de justice européenne portant sur l’assurance-soins flamande’, *Développements de l’Europe Sociale*, 2008, 173. It would also be interesting to examine how this CJ judgment is to be seen in relation to the judgment of the EFTA Court in Case E-3/05 *EFTA Surveillance Authority v The Kingdom of Norway* of 3 May 2006, in that regional special benefits such as Norway’s Finnmark supplement very likely provide a certain guarantee of existence.

<sup>(868)</sup> Paragraph 56 of the judgment.

<sup>(869)</sup> Cf. Article 19(2) of Regulation (EEC) No 1408/71, which lays down precisely these differing priority rules.

<sup>(870)</sup> The judgment in Case C-352/06 *Bosmann* [2008] ECR I-3827 could point this way. This case can be regarded as breaking a taboo in that, despite the clear stipulation of the legal provisions to be followed under Regulation (EEC) No 1408/71, a ‘residual competence’ of the state of residence was still recognised.



looks after the person requiring care) on a statutory basis. Under certain circumstances such carers receive protection in German pension and accident insurance whereby the state pays the contributions providing the person in question with non-contributory insurance cover.

From a system point of view, that is not unique to the German legal picture. In some Member States the carers themselves receive a benefit (e.g. Ireland's carers' pensions and carers' allowances), although these are primarily a means of replacing lost income for such people. It is not only in connection with care benefits that complementary insurance provisions are in place, however. National legislators are increasingly taking the route of rewarding activities that can be viewed as being in the public interest with complementary insurance provisions of this nature for those affected (who, as a rule, are unable to pursue any gainful employment or who must limit such employment in order to attend to the activities in question). Examples include health insurance for people who are raising children (rather than being in gainful employment) and pension insurance periods for those who look after sick or dying close relatives.

The first such cases to come before the CJ concerned pension insurance for carers under German legal provisions<sup>(871)</sup>. The circumstances of the cases were as follows.

- In one case, a family lived in France and the father and mother both crossed the border to pursue an occupation in Germany; the son was insured alongside them in the German health and care insurance system and was receiving a German care allowance as a result of a disability, and both parents looked after their disabled son<sup>(872)</sup>.

- In the other case, a German citizen lived in Belgium, from where she cared for a retired civil servant living in Germany who was claiming German care benefits. She was also paid by the civil servant for her care activities, but they did not amount to gainful employment under German law<sup>(873)</sup>.

Under German national law, this pension insurance is limited to carers residing in Germany. In both sets of circumstances, there was therefore no entitlement. The CJ now had to decide how this pension insurance was to be regarded from the perspective of EC law. The interesting approach taken here was that the questions referred for a preliminary ruling were not seeking to examine these insurance systems in connection with the 'legislation applicable'<sup>(874)</sup>, but as 'benefits'. The CJ found that these pension insurance benefits, too, were to be regarded as supplemental to the care allowances and that they were therefore sickness benefits within the meaning of Regulation (EEC) No 1408/71, just like the care allowances. At first sight, this verdict is utterly incomprehensible — how can pension insurance be considered a sickness benefit?

However, after thorough examination, the judgment proves completely systematic and consistent. This is because Member States have all sorts of different ways of providing for protection of the pension entitlements of carers. They can, for example, provide a correspondingly higher care allowance for those in need of care so that the sums are sufficient either to give carers enough money to look after their own pension insurance themselves or else for those in need of care to pay for such pension insurance for 'their' carers directly. It should be clear from previous CJ case-law on care allowances that a care allowance increased in this way would be unreservedly regarded as a sickness benefit in cash and would therefore be subject to

<sup>(871)</sup> Cases C-502/01 Gaumain-Cerri and C-31/02 Barth [2004] ECR I-6483.

<sup>(872)</sup> C-502/01 Gaumain-Cerri [2004] ECR I-6483.

<sup>(873)</sup> The Barth case.

<sup>(874)</sup> Title II of Regulation (EEC) No 1408/71 — an examination pursuant to this title would certainly have pointed in a different direction as it would then have been an examination of the individual situation of the carer, which can lead to completely different competences than in the case of the person requiring care.

coordination of benefits (irrespective, of course, of the Member State of residence of the carer — the place of residence would be completely irrelevant as the care allowance would not have any specific purpose). Why, therefore, should a different result be obtained if the state steps into the breach itself and pays the pension insurance contribution (for the benefit of those requiring care)? From this point of view it is also clear that paying pension insurance contributions for carers can constitute a benefit in cash and cannot constitute a benefit in kind. There is therefore an entitlement to pension insurance on the part of the carers on the basis of this judgment.

A further interesting aspect of this judgment is, of course, not only the impact on those requiring care, but also the impact on carers. Regulation (EEC) No 1408/71 stipulates, in the chapter ‘Legislation applicable’, the legislation to which a person is subject. For example, a person in employment is subject to the legislation of the Member State in which the work is performed<sup>(875)</sup>. Thus, where the legislation of this state of employment subjects this gainful activity as a carer to insurance in a system for the working population<sup>(876)</sup>, this judgment results, where another Member State is competent for the benefits in cash, in double insurance situations in favour of those needing care — the very type of situation that the system under Regulation (EEC) No 1408/71 seeks to avoid<sup>(877)</sup>. In my opinion, this is an issue that has not yet been sufficiently clarified. In Regulation (EC) No 883/2004

it was at least clarified that such insurance as an addition to a benefit, like the pension insurance as the carer for someone who draws German care allowance, does not mean that German legal provisions will have general application to that carer<sup>(878)</sup>. This means that, for example, a carer who looks after a German pensioner in Spain and who him/herself also lives in Spain, albeit having earned time in the German pension insurance system, cannot also claim German family benefits for his/her children<sup>(879)</sup>.

The question of insurance for carers has thus been relatively clearly decided. What is the situation for insurance relating to other social security benefits, however? Let us take the example of the legal situation in Austria, according to which those claiming child-rearing allowances are also given health insurance cover. In this case, is the health insurance a family benefit and is it therefore subject to the same coordination as family benefits? If the CJ’s train of thought is followed consistently, this is the conclusion that you reach. The consequences are very complicated, however, and there is no space to go into them in detail here<sup>(880)</sup>.

As I have already said, such national legal developments that are designed to provide another insurance package as an add-on to social benefits are not unusual occurrences. As soon as such packages are subject to coordination due to the presence of cross-border elements, however, the picture immediately becomes very complicated. The solution provided by the CJ, whereby the insurance follows the triggering benefit, may be

<sup>(875)</sup> Article 13(2)(a) of Regulation (EEC) No 1408/71.

<sup>(876)</sup> This protection in a system that applies to employed persons is the precondition for the person in question to be covered by Regulation (EEC) No 1408/71 (Article 1(a) of the regulation). For a carer, it can therefore come down to, for example, whether the relationship between the person requiring care and the carer can be regarded as a working relationship and whether the payment made exceeds the national minimum values for entry into compulsory insurance systems. As a rule, there is generally supposed to be harmony between the terms ‘employed person’ and ‘pursuing an occupation’ (CJ in Case C-340/94 de Jaeck [1997] ECR I-461). It can therefore be assumed in our case that persons who are regarded as employed persons in the state in which they act as a carer on the basis of that activity are generally also subject to the legislation of that state as a person pursuing an occupation there. In so doing we are, of course, consciously not paying attention to certain groups, such as self-employed carers established in one Member State who go to another Member State in order to carry out care activities (see, for example, CJ judgment C-178/97 Banks [2000] ECR I-2005) and are therefore subject to the legislation of the state in which they are established (Article 41a(1)(a) of Regulation (EEC) No 1408/71).

<sup>(877)</sup> Article 13(1) of Regulation (EEC) No 1408/71.

<sup>(878)</sup> Recital 18a to Regulation (EC) No 883/2004, which was incorporated into the text by the first amendment thereof.

<sup>(879)</sup> Under Article 73 of Regulation (EEC) No 1408/71 and Article 67 of Regulation (EC) No 883/2004, a person subject to the legislation of one Member State can also claim family benefits under the legislation of that state for children residing in another Member State.

<sup>(880)</sup> It is thus very often the case that, when it comes to family benefits, two Member States are responsible for conferring benefits. One of them bears primary responsibility, the other a lesser competence and the latter state pays its family benefit only as a differential supplement if the benefit amount under its legislation is higher than that of the primarily competent Member State (this has now been set out clearly under Article 68 of Regulation (EC) No 883/2004). Can health insurance be regarded as a ‘differential supplement’ if the Member State with primary responsibility does not provide health insurance for the person receiving benefits?

consistent, but it also sometimes leads to almost insurmountable problems. Even the new Regulation (EC) No 883/2004 has not provided any clear solution to such problems.

## 5. Commission proceedings against Parliament and the Council

Despite the relatively clear line taken by the CJ in respect of the new category of benefits constituted by care benefits, a number of Member States found that the picture was not that clear. This is because many Member States had listed their benefits for the disabled or those in need of care in Annex IIa of Regulation (EEC) No 1408/71, as Austria had prior to the *Jauch* judgment. As not all Member States have national courts to the same extent, which could immediately refer each question to the CJ for a preliminary ruling, for such states there was little chance of such listings in Annex IIa being reviewed by a court. The Commission, in its role as guardian of the Treaties, could not just wait to see what happened and had to act instead. After a very intensive discussion process in the Administrative Commission, during which all the benefits listed in Annex IIa were analysed in detail, the Commission tabled a proposal to amend Annex IIa of Regulation (EEC) No 1408/71, as a result of which all the care benefits that correspond to German or Austrian care allowances would be removed from the annex. However, not all the Member States affected were willing to accept the Commission's proposal immediately. Further negotiation was necessary in the Council before the majority of Member States were finally willing to remove their entries from the annex. Only three Member States — Finland, Sweden and the United Kingdom — were not willing to take this step. In order to prevent the total failure of the negotiations, these benefits had to be left in Annex IIa to the regulation as a compromise<sup>(881)</sup>. Just as this agreement was being reached, however, the Commission was bringing proceedings before the CJ.

<sup>(881)</sup> Regulation (EC) No 647/2005 (OJ L 117, 4.5.2005, p. 1).

Ultimately, that action did provide the required clarity<sup>(882)</sup>. What happened was that the CJ generalised its line from the case-law thus far. It found that the affected benefits in the three Member States (Finnish childcare allowance, Swedish care allowance for disabled children and disability allowance, and the UK's disability living allowance (DLA), attendance allowance (AA) and carer's allowance (CA)<sup>(883)</sup>), too, were 'ordinary' sickness benefits that should be subject to the general coordination of such benefits. The mobility element of the DLA alone was excluded from this conclusion, as the CJ found that it was an element of social assistance. The CJ stated that these benefits assisted the parents of disabled children to provide the care, supervision and rehabilitation of those children (the CJ's view was that the primary purpose of the said benefits was nevertheless of a medical nature) and that they provided assistance for adult disabilities and were designed, by paying for assistance for the disabled by a third party, to assist in bearing the costs created by the illness and improving the quality of life of recipients and promoting the independence and social integration of the disabled. It is also important that, in the case of these benefits, we are quite clearly dealing with benefits that have absolutely no connection with the national sickness benefit system. The original requirement pursuant to the *Molenaar* and *Jauch* cases of having some connection, at least from an organisational point of view or in terms of funding, which many Member States were still assuming to apply, was thus finally deemed to be irrelevant.

From a system point of view, in any case, this judgment is to be welcomed as it ensures that all comparable benefits from a socio-political point of view will always have to be subject to the same principles

<sup>(882)</sup> Case C-299/05 *Commission of the European Communities v European Parliament and Council of the European Union* [2007] ECR I-8695. For procedural reasons, the Commission, which was taking part in the negotiation process, was unable to bring Treaty infringement proceedings against the three Member States in question under Article 226 of the Treaty, but was only able to bring a case under the annulment procedure pursuant to Article 230 of the Treaty.

<sup>(883)</sup> These benefits had previously been listed under points W, Finland (b), X, Sweden (c) and Y, United Kingdom (d), (e) and (f) of Annex IIa to Regulation (EEC) No 1408/71.

of coordination. It has also increased the degree of readiness of the Member States to consider new coordination methods<sup>(884)</sup>. It is also worth pointing out that this revision of Annex IIa to Regulation (EEC) No 1408/71 was not limited to the Member States. The review was not without consequences for the countries of the EEA; the EFTA Court thus found that a Liechtenstein benefit must be removed from Annex IIa to Regulation (EEC) No 1408/71 in the EEA Treaty version<sup>(885)</sup>.

### C. Problems arising from this case-law

It can therefore be assumed, on the basis of these judgments, that:

- there is a new category of benefits constituted by care allowances;
- these must be coordinated in a uniform way under the coordination rules of Regulation (EEC) No 1408/71 for sickness benefits, something that will result, firstly, in the granting of benefits in kind by the institution of the state of residence or stay at the expense of the competent state and, secondly, in the export of care allowances in cash.

In the light of these conclusions, which are completely logical from a systematic point of view, the follow-up question that has to be asked in this connection is whether the consequences are socio-politically acceptable<sup>(886)</sup>.

<sup>(884)</sup> In my personal experience there was no possibility before this judgment of discussing the subject of the 'coordination of care benefits' at the European level. The representatives of the three Member States affected by the proceedings, in particular, denied that there even was a general category of benefits constituted by care benefits. During its Presidency of the EU in 2006, Austria attempted to discuss the subject of 'new ways to coordinate care benefits' in the Administrative Commission, but this attempt failed in the face of opposition from these three states.

<sup>(885)</sup> Judgment of the EFTA Court in Case E-5/06 EFTA Surveillance Authority v Liechtenstein dated 14 December 2007 on the so-called 'helplessness allowance' under Liechtenstein law.

<sup>(886)</sup> This is not a test that the CJ would normally perform, however. Even in looking for reasons to justify the restriction of the basic freedoms, the financial equivalence of the social security systems is generally accepted as a justification for restricting measures (e.g. with regard to restrictions to the freedom to provide services in Case C-385/99 Müller-Fauré and van Riet [2003] ECR I-4509). Whether an interpretation of European law leads to socio-politically harmonious results, however, usually plays no role in the CJ's decision-making process.

### 1. The random nature of which case comes forward

I must first of all make clear that, in my view, when the CJ is resorted to, the case actually in question is always highly significant<sup>(887)</sup>. Although 'what if?' is a moot question, I still feel the need to ask it when it comes to care benefits. What if the CJ had first had the *Jauch* case to decide rather than the *Molenaar* case? I would like to remind you all that in Austria, due to the way the benefit was developed and also the organisational structure, the care allowances under the federal legislation on care allowances were much closer to pensions than to health insurance benefits. Would the CJ then, with a completely open mind, perhaps have categorised care benefits as invalidity benefits? The result of that would have been that Title III, Chapters 2 and 3, of Regulation (EEC) No 1408/71 would have applied, which would have meant that we would have had clear coordination for benefits in cash but not for care benefits in kind. Care allowances, however, could then be granted on a pro-rata basis in relation to periods of pension insurance. I think that would have been the worst solution. For one thing, it would have been almost impossible to administer for many Member States due to the particularities of their national legal situations and, for another, it may have led to a considerable increase in the number of inter-state cases<sup>(888)</sup>. Looked at in this way, we should be glad that *Molenaar* came before *Jauch*.

<sup>(887)</sup> Thus it always comes down to the specifics of the question actually put to the CJ. A good example of this, in my view, would be Case C-352/06 Bosmann [2008] ECR I-3827. What would have interested everyone in the circumstances of this case is, in any event, the question of whether the state of residence is obliged, despite the competence of a different Member State due to the pursuing of an occupation, to also grant the benefits envisaged for all residents and not (this being the question put in this case) whether that state is prevented from granting benefits under its legislation.

<sup>(888)</sup> Invalidity benefits would have to be granted by the state in which the person in question had earned periods of insurance cover at any point. In coordination as a sickness benefit there is, in principle, only ever one competent Member State, namely the one that is currently competent for sickness benefits.

## 2. Export is not controllable from a socio-political point of view

All care benefits have the socio-political goal of ensuring an adequate level of benefits for the residents of a Member State. There are, of course, many factors involved in this and they only relate to the Member State in question. When it comes to benefits in cash such as care allowances, for example, the cost level in the country (how high are the costs of a carer, household help, aids such as wheelchairs? How much do special dietary requirements cost? etc.), the range of other benefits (e.g. care homes provided by the Member States in question) and also other privileges (such as free travel on public transport for the disabled) are also always of particular importance. National legislators take all of these factors into account when setting the level of care benefits in cash. The socio-political goal is for it to be the very interaction of all these factors that provides adequate protection for those in need of care.

For combined benefits (combination of care benefit in cash and in kind) the picture is even clearer. With these benefits, national legislators are aiming to ensure the necessary protection through this interaction alone.

As soon as a care allowance is exported to another Member State, the same interaction no longer applies. The following factors are worthy of particular attention.

- Depending on the cost level in the state of residence, the care allowance exported from another Member State may also be too high (in the case of export into a low-wage country) or too low (in the case of export into a high-wage country), at which point it partly mutates into an additional income for the person in need of care or forms an obstacle to that person's mobility as it is insufficient to cover the costs of the care needed.
- The same applies when the range of other benefits provided in the two states is different (e.g.

where one state provides free places in state care homes or free travel on public transport and the other does not).

- Such consequences also arise for combined benefits; if the care allowance that is exported only achieves the socio-political goal in combination with care benefits in kind, it is not possible to achieve this goal if the state of residence does not have such care benefits in kind; on the flip side, a care allowance that is intended, in the system of the state in question, to cover all care costs can easily lead to an undesirable excess of provision when exported to a Member State that provides combined benefits or only provides care benefits in kind.

Admittedly, that is not necessarily specific to care benefits. Living costs (the level of costs) in the relevant country of residence do, of course, always have an impact on all exported benefits in cash<sup>(889)</sup>. For other benefits, too, there is an interaction between benefits in kind and in cash, with the result that there can always be negative consequences to their export<sup>(890)</sup>. However, whenever an obligation to export a new category of benefit is conferred, such consequences are shown up again in full clarity. Whenever cross-border careers are involved, national social policy loses its ability to influence and things that, on a national level, constitute a well-balanced combination of different elements that only achieve the goal in question when taken together fail to do so on the other side of the border. That, however, is an unavoidable consequence as long as we do not have a uniform social security system in Europe.

One important lesson that we can learn from the case-law thus far is that, even if the Member States

<sup>(889)</sup> This is also the case, for example, for pensions, although in that case there is a safety net in that, if the pensions exported from another Member State do not amount to the sum regarded as the minimum pension in the state of residence, that state has to top up the foreign pensions to that level (Article 10a(3) of Regulation (EEC) No 1408/71, which states that non-contributory minimum pension levels, which are generally listed as not exportable in Annex IIa to Regulation (EEC) No 1408/71, must also be granted to foreign pensioners).

<sup>(890)</sup> This interaction can be seen, for example, in the case of invalidity benefits, which have an interaction with back-to-work and rehabilitation benefits, or in the case of family benefits, which have an interaction with benefits in kind such as free nursery places.

take account of the impact of EC law on their planning and political preparation of a new category of benefits, this will not protect them from disagreeable surprises. Both in Germany and in Austria, the national system was designed, on the introduction of care benefits, in such a way that no export of care allowances would have to take place under EC law (in Germany by means of the plan of providing benefits in kind and in Austria by means of the plan of providing special non-contributory benefits). As we have seen, these plans did not bear fruit. This means that there is always a residual risk for national legislators, when introducing a new category of benefits, that European law may give rise to socio-politically undesirable consequences, for example by means of an obligation to export the benefits in question.

### 3. Co-occurrence of benefits in cash and in kind which pursue the same objective

Next, I would like to highlight one particularly unsatisfactory aspect of the coordination of care benefits as sickness benefits. Before the introduction of this new category of benefits, the export of sickness benefits in cash was a relatively clear matter. It was predominantly a matter, in the event of illness<sup>(891)</sup>, of sick pay for the employed population with the intention of attempting to prevent losses of income due to the inability to work as a result of an illness. The applicable coordination rules do not cause any problems for these benefits. It is simply logical for it to be the Member State in which the person in question was insured during the period of gainful employment that should pay this benefit

<sup>(891)</sup> The export regulation under Regulation (EEC) No 1408/71 in relation to benefits in cash pursuant to Title III of Chapter 1 also had a role to play when it came to maternity benefits ('weekly allowances'), which I will not be going into in further detail, but where yet more new benefit systems could also come into play in future. Many states have introduced child-rearing benefits for parents raising children (often over a much longer period than is necessary in connection with the special situation in which mothers find themselves as a result of the birth itself, during which period mothers should not work in order to protect them, and often optionally for both parents). A number of states viewed these child-rearing benefits as maternity benefits for coordination purposes, rather than as family benefits. For these new benefits, too, it was the CJ that had to provide clarity (see, in particular, Case C-275/96 Kuusijärvi [1998] ECR I-3419), by deciding against the national system in question that these were uniformly to be regarded as family benefits.

once the inability to work has occurred<sup>(892)</sup>, rather than, for example, the state of residence. It is also clear that there cannot be any benefits in kind that serve the same purposes as sick pay. This means that there can be no accumulation of benefits with the same socio-political aim.

The application of the coordination rules under Regulation (EEC) No 1408/71 to the new care benefits in cash meant that a category of benefits for which these rules had not been conceived was now being covered. The consequences of these coordination rules can be illustrated by the following example.

An Austrian pensioner lives in Germany and draws only an Austrian pension. As a result of the applicability of coordination to sickness benefits, Austria is therefore the competent Member State when it comes to health insurance<sup>(893)</sup>. Austria therefore has to pay sickness benefits in cash directly, while Germany, as the state of residence, pays benefits in kind for sickness in accordance with German legislation, but the costs of these benefits in kind have to be reimbursed by the competent Austrian health insurance fund<sup>(894)</sup>. As it is Austria that bears the costs, the competent Austrian health insurance fund may also retain the health insurance contributions from the Austrian pension<sup>(895)</sup>.

Consequently — as we have already seen a number of times — Austria has to export care allowances to Germany where this pensioner is in need of long-term care (under the Austrian system, this includes a contribution to all care-related expenses, including, for example, the costs of a home help paid for by the person in need of care). Since, however, under

<sup>(892)</sup> Pursuant to Article 19 of Regulation (EEC) No 1408/71, for example.

<sup>(893)</sup> Pursuant to Article 28(2) of Regulation (EEC) No 1408/71.

<sup>(894)</sup> Article 28(1) of Regulation (EEC) No 1408/71, according to which, however, costs are not to be calculated in accordance with the actual costs of the individual case in question but instead to be worked out on a flat rate according to the average costs of treatment of a pensioner insured in Germany (Article 95 of Regulation (EEC) No 574/72); in calculating this flat rate, Germany also includes the costs of care benefits in kind (see point 2 of Administrative Commission Decision No 175, OJ L 47, 19.2.2000, p. 32).

<sup>(895)</sup> Article 33 of Regulation (EEC) No 1408/71.



its national law, Germany also has care benefits in kind, these (such as a home help<sup>(896)</sup>, for example), too, can be claimed by the Austrian pensioner. Austria must also reimburse the costs of such benefits in kind, however. There is therefore the risk that the Austrian care allowance will no longer be necessary in order to cover the care-related additional costs of the person in need of care (in such circumstances the care allowance mutates into an additional income); on the other hand, Austria has to pay twice — once through the export of the care allowance and then a second time through the reimbursement of costs for the care benefits in kind granted by Germany<sup>(897)</sup>.

In the preparation of Regulation (EC) No 883/2004, this accumulation of benefits was a point for which European legislators sought an innovative solution, though the coordination of sickness benefits continued to apply in general<sup>(898)</sup>. It is now provided<sup>(899)</sup> that the benefit in cash will be reduced by the amount of the benefit in kind which could be claimed from the institution required to reimburse the cost. Under Regulation (EC) No 883/2004, Austria would be entitled, taking account of a home help in Germany where the reimbursement of costs to be paid by the German care insurance fund to the home help amounts to EUR 200, to deduct EUR 200 from its care allowance. However, the application of

this regulation is not always as simple in practice. This meant that a number of additional clarifications had to be included in the implementing regulation on Regulation (EC) No 883/2004<sup>(900)</sup>. Above all the issues of how the competent Member State finds out about the reimbursement amount of the care benefit in kind and how the person in need of care is informed about his/her rights and obligations (such people now have to carefully consider which benefits are to their advantage and which could have a detrimental impact) require a great deal of cooperation between all those involved. Time will tell whether this is the ideal solution. We must not overlook the fact, however, that this regulation represents a very important step from a system point of view. Through this arrangement, European legislators have recognised the special position of care benefits within the category of sickness benefits. It is possible that this regulation is thus the first step towards separate coordination of care benefits, something that I will deal with in more detail in the next section.

#### D. Possible solutions?

The problems that have been identified in the application of the coordination rules for the sickness benefits to care benefits, as well as, above all, the undesirable effects from a socio-political point of view, make new solutions — different from the coordination of sickness benefits — an attractive idea. The fundamental question is whether there are solutions that lead to fair results, that are achievable from an administrative point of view and that are also in line with the principles produced by the CJ. I will discuss a few different approaches to finding a solution below but, of course, none of them can be conclusive.

<sup>(896)</sup> For information on the relevant care benefits in kind under German legislation, see Sections 36 et seq. of German Social Security Code (SGB), Vol. XI.

<sup>(897)</sup> The reverse scenario, too, is problematic. Thus, if a German single pensioner lives in Austria he immediately loses the right under Regulation (EEC) No 1408/71 to also claim care benefits in kind as there are no care benefits in kind under Austrian legislation. Because only the German care allowance is exported to Austria, but German care benefits in kind are often 'more valuable' than German care allowances, this can be regarded as a loss of entitlement. The CJ is currently dealing with this issue in Case C-208/07 Chamier-Glisczinski. Advocate General Mengozzi has just argued in his (as yet unpublished) closing remarks of 11 September 2008 that this outright loss of entitlement to German care benefits in kind can have a negative impact on mobility and is therefore in contravention of Article 18 of the EC Treaty.

<sup>(898)</sup> Above all, because the new Regulation (EC) No 883/2004 did not succeed in producing a clear definition for care benefits it also proved impossible to produce a separate system of coordination for this new category of benefits. The status quo was therefore left intact, so that, as far as sickness benefits are concerned — with the exception of the new principle that the actual, rather than flat-rate, costs should be reimbursed for pensioners, too — exactly the same principles apply to care benefits as under Regulation (EEC) No 1408/71.

<sup>(899)</sup> Article 34 of Regulation (EC) No 883/2004.

<sup>(900)</sup> Article 31(1) of the new implementing regulation. The supplementary clarifications predominantly relate to combination benefits. If a person in need of care were entitled to EUR 500 of care allowance in the competent Member State together with another EUR 500 of care benefits in kind (thus EUR 1 000 worth of entitlements to care benefits), the EUR 500 of care allowance may not be reduced when being exported to another Member State if the person in need of care claims EUR 400 of care benefits in kind in his/her state of residence, as the sum of EUR 1 000 has not been exceeded (only EUR 900 have been consumed).

## 1. Always make the state of residence competent

Could not a new chapter be added to Regulation (EC) No 883/2004 for care benefits stating that it is always the state of residence alone that has to provide the benefits, and indeed both benefits in kind (which would be no change to the status quo) and benefits in cash (which would be new, as there would then no longer be any exports)? Of course, the first argument against a solution of this kind would be the existing case-law of the CJ on care benefits. Has not the CJ made it very plain that care allowances are to be exported? In my view the CJ has not done so; rather in the light of its first decision that care benefits are to be regarded as social security benefits that are therefore covered by Regulation (EEC) No 1408/71, it would have to undertake a categorisation of care benefits into one of the existing chapters of coordination in the said regulation (given that there is no dedicated chapter for care benefits). Since, in the CJ's view, these benefits fit best into the chapter for sickness benefits, the export of care benefits in cash would be the logical and inevitable consequence of this.

Could social security benefits be limited to the relevant residential population in a dedicated coordination chapter? There is a clear precedent for this in terms of special non-contributory benefits, which are listed in Annex IIa to Regulation (EEC) No 1408/71. As the CJ has found, certain benefits, which are primarily those that resemble social assistance and are closely connected with their social environment, can be excluded from export in compliance with the principles of the EC Treaty<sup>(901)</sup>. Care benefits, too, are certainly closely linked to their social environment. There is thus an explicit possibility of listing benefits that serve solely to provide specific protection for the disabled in Annex IIa of Regulation (EEC) No 1408/71, and care benefits are at the

<sup>(901)</sup> See, for example, Case C-43/99 *Leclere and Deaconescu* [2001] ECR I-4265, or Case C-160/02 *Skalka* [2004] ECR I-5613.

very least very close to this category of benefits<sup>(902)</sup>. They do, however, perhaps lack the character of a 'special benefit' as they are usually something that national systems allow any resident to claim<sup>(903)</sup>.

I do see another way, however, of achieving the same result. On consideration, I believe that the key could lie in the highly varied organisation of these benefits at the national level (from benefits in kind to combined benefits to pure benefits in cash)<sup>(904)</sup>. What would be needed would be to carry out an assessment and then make an attempt to find uniform coordination independent of the national organisational structure. It would be interesting to see what the CJ would have to say about uniform coordination in which all care benefits were coordinated as benefits in kind. The result of this would be that care benefits, too, would only ever be granted by the state of residence in question, although in contrast to the benefits listed in Annex IIa, the costs would be reimbursed by the competent state. This would primarily take account of the legal situation in many Member States — one example being Germany — where care benefits are paid for by contributions, as the contributions received would then always be balanced out by an obligation on the

<sup>(902)</sup> Article 4(2)(a)(ii) of Regulation (EEC) No 1408/71. The distinction between these benefits, which serve solely to provide specific protection for the disabled, and care benefits is anything but clear. Thus, the CJ itself has qualified Belgian aid to the disabled in application of the association agreement with Morocco as a benefit for the disabled within the meaning of Annex IIa to Regulation (EEC) No 1408/71 (the decision in Case C-358/02 *Haddad*, dated 27 April 2004, not yet published), although it was then removed from the annex under Regulation (EC) No 647/2005 (OJ L 117, 4.5.2005, p. 1). Was the removal of this benefit perhaps completely unnecessary?

<sup>(903)</sup> The benefits could perhaps instead share the general characteristics of Luxembourg's maternity allowance, which led to this Luxembourg benefit having to be removed from Annex IIa to Regulation (EEC) No 1408/71 in the wake of Case C-43/99 *Leclere and Deaconescu* [2001] ECR I-4265. It would, of course, be possible to argue that, for this Luxembourg benefit too, there were no other coordination methods available either as a special non-contributory benefit or as a maternity benefit, but the judgment does seem to generally assume a victory for the export obligation pursuant to Article 42 of the EC Treaty for general benefits, which is to say all benefits available on a uniform basis. Furthermore, the CJ has already found that Austria's care allowance did not have the character of a special benefit within the meaning of Annex IIa to Regulation (EEC) No 1408/71 in the *Jauch* case. It can be assumed from this that only 'genuine' special benefits pursuant to these principles can be generally excluded from export.

<sup>(904)</sup> As we have already seen, this could be unique and not found in other areas of benefits to this extent.

part of the state in question to provide benefits<sup>(905)</sup>. Thus, where an Austrian single pensioner lived in Germany, Austria would not have to export Austrian care allowances but would have to reimburse all the relevant German care benefits, regardless of whether they were benefits in kind, combination benefits or simply German care allowances.

For me, the advantages of this solution are immediately apparent. Those in need of care would always receive the full package of care benefits provided by the state of residence; this means that there would be no difference in treatment compared with the local population<sup>(906)</sup> and it would make it possible to best take account of the relevant social environment in the state of residence.

The flaws in this solution are also clear, however. For one thing, Member States that do not themselves have a system for providing care would still have to reimburse the state of residence for providing such benefits<sup>(907)</sup>. On the other hand, competent states that do themselves have a system for providing care would be freed from any obligation to provide benefits where the relevant state of residence did not provide such benefits. It must be said, however, that this would not be a new phenomenon, but rather a natural effect of the coordination of

sickness benefits<sup>(908)</sup>. Looked at in that way, there would be something to be said for such a solution.

It also needs to be pointed out that there can hardly be a Member State that has absolutely no benefits, of whatever kind, for those in need of long-term care. A number of states, however, regard such systems not as part of social security but as part of social assistance, which is excluded from the scope of Regulation (EEC) No 1408/71. Coordination can therefore only be comprehensive if all Member States also include those care benefits that they regard as social assistance. I imagine that the initially eye-catching inequalities between individual Member States would then be significantly reduced. This is certainly a point that should be given further consideration<sup>(909)</sup>.

## 2. Differential supplements

For any solution with just one competent Member State, however, there is always the uncertainty of how the CJ will deal with the issue if the said solution means that access to higher entitlements in one of the Member States is denied. If we follow the current coordination, according to which only the competent Member State has to export care benefits in cash, this could be the case if the state of residence in question provides all residents with higher benefits in cash than the competent state. Could that coordination exclude such entitlements that are available to all residents? In the case of family benefits, this situation is avoided by means of always guaranteeing at least this higher benefit amount by means of a differential supplement<sup>(910)</sup>. I believe that this arrangement could also be

<sup>(905)</sup> Under CJ case-law and the system pursuant to Annex IIa, a restriction to residents without costs being paid by the competent Member State seems to be limited to special non-contributory benefits.

<sup>(906)</sup> This would make it possible to avoid extending the application of the CJ judgment in Case C-352/06 Bosmann [2008] ECR I-3827 to the sphere of care benefits. I believe it would be no more than consistent if the principle derived from the said judgment that, where another Member State is competent pursuant to Title II of Regulation (EEC) No 1408/71 (legislation applicable), entitlements for all residents of the state of residence in question do not need to be abolished, were to be extended to also cover care benefits for all residents. However, the full scope of this principle cannot yet be conclusively sounded out. In its report on 'New forms of mobility' (<http://www.tress-network.org>), the Tress Think Tank considers, amongst others, the idea of whether this 'Bosmann principle' could be generally applied to all kinds of competence on the part of a Member State, so that a subsidiary competence could also be incumbent upon a state in which the person in question did not live but could derive entitlements through other points of contact.

<sup>(907)</sup> The same effect would also hit Member States that do have a system for providing care but that would be faced with sums to pay that, as a result of the contrast between their own very low cost of living and the very high care allowances that would result from a person in need of care residing in a Member State with a very high cost of living, would be a number of times higher than their own benefits.

<sup>(908)</sup> For these, too, the scope and the cost level of the benefits in kind to be reimbursed by the competent Member State are dependent on the situation in the state of residence or stay.

<sup>(909)</sup> The partial inclusion of social assistance in the coordination regulations is not new. Already, social assistance entitlements are covered in the recovery of benefits not due under Article 111(3) or Regulation (EEC) No 574/72.

<sup>(910)</sup> This is laid down quite clearly by Article 68 of Regulation (EC) No 883/2004. I work on the basis, however, that this is already the case today (even if, pursuant to Regulation (EEC) No 1408/71, only the legal provisions of a single Member State apply within a family, which Member State is not the state of residence), when the judgment in Case C-352/06 Bosmann [2008] ECR I-3827 is taken to its logical conclusion.

explicitly applied to care benefits in order to prevent future judgments to the contrary by the CJ.

Following this logic, it would also be possible to provide for an obligation on the part of the competent state to pay a differential supplement where there was a general fixing of the state of residence as the competent state, as proposed in the previous point, in order to prevent excessively large disadvantages for the people in question in relation to benefits in cash. Thus, where an Austrian single pensioner lived in Germany, it would initially be Germany, under the proposed new model, that would have to provide care benefits in kind, in cash and in combination, while Austria would then have to reimburse the costs. If, however, the amount due under Austrian care allowance were higher than the (total) value of the German benefits, Austria, as the competent state, would still have to pay a corresponding differential supplement. Although this would be complicated from an administrative point of view, it would certainly withstand examination by the CJ as the higher benefit amount in either Member State would always be guaranteed. This solution, too, is not new. It is already in place in the coordination of family benefits<sup>(911)</sup>.

### 3. Adjustment to purchasing power in the state of residence

Another possibility would, of course, be to leave the unrestricted export of care benefits in cash as the rule of thumb of coordination but to adjust the amount to the purchasing power in the state of residence in question. Thus, if a care allowance amounting to EUR 100 under the legal provisions of the competent Member State is exported to another Member State in which living costs only amount to 75 % of those of the competent state, it would be possible to pay out the care allowance only in

<sup>(911)</sup> These rules could also serve as a basis for laying down the supplementary details that would clearly be necessary, such as, for example, when the differential supplements are to be assessed, how frequently they are to be paid and so on. (With regard to family benefits, see Administrative Commission Decision No 147, OJ L 235, 23.8.1991, p. 21, and No 150, OJ C 229, 25.8.1993, p. 4.)

the amount of EUR 75. This solution, however, could be an expensive one for many Member States, as such an adjustment would, of course, have to take place in both directions. Thus, if the care allowance was exported to a Member State with higher living costs than the competent Member State — let us say they were 150 % of the living costs in the competent state — that state would have to increase its care allowance to EUR 150<sup>(912)</sup>.

Of course, it needs to be asked, first of all, whether a solution of this nature would in any way accord with the principles of the EC Treaty. This solution could immediately be countered by the argument that Regulation (EEC) No 1408/71 previously provided a similar situation. A special arrangement for family benefits for France was initially allowed, whereby it only had to pay the costs of benefits under the legislation of the Member States in which the children live<sup>(913)</sup>, even though all the other Member States had to export the full amount of their benefits. The CJ found this special arrangement for France to be in contravention of the principles of the EC Treaty<sup>(914)</sup>, which meant that France had to apply the coordination that applied to all other Member States, including the export of the unreduced level of family benefits. I am not entirely sure whether it was really the restriction of export that troubled the CJ most in this legal situation or whether it was not really the difference in coordination between France and all the other Member States<sup>(915)</sup>. Particular attention should be given to the closing remarks of Advocate General Kokott in the *Hosse* case<sup>(916)</sup> in which she made

<sup>(912)</sup> At first sight this certainly seems unacceptable. However, we must not forget that this is exactly what happens in relation to the reimbursement of costs for sickness benefits in kind — the costs for the competent Member State are based on the level of costs in the Member State in which the benefits are granted.

<sup>(913)</sup> Article 73(3) of Regulation (EEC) No 1408/71 in the version applicable at the time.

<sup>(914)</sup> Judgment in Case C-41/84 Pinna I [1986] ECR I.

<sup>(915)</sup> The CJ stated in a very easy-to-follow way that coordination on the basis of the differing social systems of the Member States is already very complicated, so that Community legislators must not add further differences (para. 21 of the judgment).

<sup>(916)</sup> Closing remarks in Case C-286/03 Hosse [2006] ECR I-1771, para. 109, albeit for application to Regulation (EC) No 1612/68 rather than to Regulation (EEC) No 1408/71.

reference to the possibility of indexing care allowances in the event of export in order to rule out undesirable socio-political effects.

There is certainly room for discussion about whether indexing of this nature would be possible at all under the strict principles of the EC Treaty. Personally, I think that this would be the least realistic solution for a new coordination of care benefits. Above all, it would, of course, only represent a solution for care benefits in cash. They would not be capable of remedying the problems that result from the interaction of the various benefits in cash and in kind.

### III. PENSION SYSTEMS UNDER THE SECOND AND THIRD PILLARS

Having looked into a new category of benefits in the previous point, where European legislators have not yet succeeded in providing new coordination adapted to these benefits, I would now like to turn to benefits for which it has already proved possible to put a new organisation in place.

#### A. Background

In the past, the situation relating to pensions was at least relatively clear cut. Regulation (EEC) No 1408/71 covered all statutory systems, which belonged almost exclusively to what is known as the ‘first pillar’<sup>(917)</sup>, meaning that they provided a basic provision either for all residents or only for the working population. Alongside these, systems developed at varying intensities — and depending on the socio-political situations in the individual

Member States — under the ‘second pillar’, which are mostly known as works pension schemes, and under the ‘third pillar’, in which it is left up to the private initiative of the individual to fill the gap in their pension protection, this category generally being understood to include private insurance systems in which the state, possibly through the likes of tax incentives, still takes a leading role. The systems under the second and third pillars were not generally based on ‘legislation’, meaning that Regulation (EEC) No 1408/71 did not apply<sup>(918)</sup>. It is interesting, of course, to look in more detail at which EC legal arrangements apply to systems which are located outside the scope of coordination under Regulation (EEC) No 1408/71, above all if the people in question have made use of the freedom of movement. I want to restrict myself here, however, to the impact of Regulation (EEC) No 1408/71<sup>(919)</sup>.

The provisions on assessment under Regulation (EEC) No 1408/71 for a pension covered by the regulation can be simply summarised as follows: every Member State under whose legislation periods of insurance have been completed first checks whether there is an entitlement, drawing on the periods in all Member States (whether, in other words, where necessary any qualifying periods provided under the national legislation could be fulfilled by all the periods)<sup>(920)</sup>. The pension is then calculated using a two-stage process. Firstly, the calculation is made for the amount of the theoretical pension to which there would be an entitlement if all the periods of insurance in the Member State in question had been completed. This amount is then divided in proportion to the

<sup>(917)</sup> There are no legally binding definitions of pension systems under the first, second or third pillars. It is, however, customary, to regard public systems as belonging under the first pillar, works systems as belonging under the second pillar and private systems as belonging under the third pillar (for more on this interpretation in the context of the first Austrian pensions strategy report see M. Pörtl, B. Spiegel and H. Stefanits ‘Österreichischer Rentenstrategiebericht — die europäische Dimension der österreichischen Pensionsdiskussion’ [Austrian pensions strategy report — The European dimension in Austria’s pensions debate], *Soziale Sicherheit* (Austria) 2/2003, p. 56 et seq. 72.

<sup>(918)</sup> With regard to the definition of legislation, see Article 1(j) of Regulation (EEC) No 1408/71, which lays down explicitly that industrial agreements (and often works pensions schemes) are not covered, even if they are later the subject of a decision by the authorities rendering them compulsory, unless the Member State in question opts to apply Regulation (EEC) No 1408/71 through a declaration to that effect, something that has very rarely happened thus far.

<sup>(919)</sup> On the subject of change in European social security systems, with the focus on the privatisation of risks and the consequences this may have on coordination in the light of Regulation (EEC) No 1408/71, but also on the other impacts of EC law of a privatisation of that nature see ‘Meeting the challenge of change’ published by the Dutch Sociale Verzekeringsbank (SVB) as a summary of the contributions at the conference of 30 and 31 October 1997 at Noordwijk aan Zee.

<sup>(920)</sup> Article 45 of Regulation (EEC) No 1408/71.



appropriate fractions of the sum of the periods of insurance completed in all the Member States (the pro-rata calculation method) <sup>(921)</sup>.

This method of calculation fits best where classical levy-funded <sup>(922)</sup> systems under the first pillar are being dealt with. Let us illustrate with an example <sup>(923)</sup>: under the legislation of Member State A, an entitlement to a pension exists after 15 years of insurance. The pension due is based on the average income over the preceding 10 years. A basic rate of 30 % of this average is due for the first 10 years, with 2 % per year due for subsequent years. If a migrant worker has worked for 10 years in Member State A and then continued employment for a further 30 years in Member State B, these 40 years will, first of all, of course be sufficient for a pension entitlement in Member State A. The calculation is made as follows: the theoretical sum for 40 years is 30 % + 30 x 2 % = 90 %; only the amount reduced according to the period ratio of 10/40 applies, however, namely 22.5 %.

## B. Inclusion of capital-funded systems or pension account systems in Regulation (EEC) No 1408/71

The example worked through above shows that the pro-rata calculation method leads to fair and socio-politically desirable results in the case of levy-funded systems. Assuming identical systems in all the Member States in question, this calculation leads to the total sum that would have been earned if the careers had been completed in a single Member State <sup>(924)</sup> — this test ('what would have happened if the migrant workers of the Member State in question had never left?') is the CJ's classic method of detecting the prohibited

disadvantaging of migrant workers <sup>(925)</sup>. What is more, this method also leads to a fair distribution of the burdens between the Member States according to the contributions paid. Under this method of calculation, it is usually irrelevant to the Member State in question whether the insurance career was completed early on or later in life <sup>(926)</sup>.

There has, however, also been a development in pension systems. The classical distinction between levy-funded systems under the first pillar covered by Regulation (EEC) No 1408/71 and capital-funded <sup>(927)</sup> or pension account systems <sup>(928)</sup> under the second and third pillars that fall outside the scope of Regulation (EEC) No 1408/71 has become increasingly blurred. For one thing, more and more Member States introduced systems under the second pillar on a statutory basis, which therefore inevitably found themselves within the scope of Regulation (EEC) No 1408/71. This is the case, above all, for states in which there is a statutory system, in addition to a basic provision providing flat-rate benefits, to mirror the working income level in retirement. Examples of this that might be mentioned include the systems in most Scandinavian countries and also that in Switzerland <sup>(929)</sup>. Other states converted their systems under the first pillar into pension account systems or even into capital-funded systems in order to get future developments, and in particular

<sup>(921)</sup> Article 46 of Regulation (EEC) No 1408/71.

<sup>(922)</sup> In funding by levy there is no direct link between the contributions paid by a person in the past and the future pension. Instead, current contributions' revenue is immediately allocated to those already drawing pensions and serves to pay for those pensions.

<sup>(923)</sup> I am using a fictional pension calculation system to clarify the method of calculation.

<sup>(924)</sup> Where identical calculation bases must also be assumed, which would never be the case in practice.

<sup>(925)</sup> On this philosophy see, for example, Case C-1/67 Ciecelski [1967] ECR 235, or Case C-24/75 Petroni [1975] ECR 1149.

<sup>(926)</sup> The valorisation of older contributions in levy-funded systems does not have a negative impact in such cases either as foreign periods are in any case not drawn upon in determining the basis of calculation — cf., for example, Article 47 of Regulation (EEC) No 1408/71.

<sup>(927)</sup> The term capital-funded system is usually used to refer to systems that capitalise the contributions paid in (i.e. they earn interest on them on the capital market) and then pay out the pension according to the capital available (where the remaining life expectancy of the persons in question is usually factored in according to so-called 'mortality tables'). Under these pension schemes — operated on the model of life insurance — on average, more is never paid out in terms of pensions than was actually saved as capital.

<sup>(928)</sup> Pension account schemes are a newer appearance that, while the pension scheme is still based on the levy method (in other words the contributions received are used immediately to pay current pensions), act like a capital-funded scheme in the calculation of the benefit paid out. In other words, the progress of the capital market and life expectancy both have an impact on the individual benefit entitlement.

<sup>(929)</sup> This categorisation should, of course, only be regarded as a rough approach; everyone needs to be aware that there are always very many intermediate stages and borderline cases as the systems are very diverse.



costs, better under control. Examples of such pension account systems can be found in a number of the new Member States, but also in Germany and Austria. Because these systems are based on 'legislation'<sup>(930)</sup>, they inevitably fall within the objective scope of Regulation (EEC) No 1408/71.

However, Regulation (EEC) No 1408/71 does not contain any special rules for capital-funded systems or pension account systems. We therefore need to look into the effects of the regulation in greater detail.

### C. Problems in the application of the pro-rata calculation method

The consistent application of the pro-rata method of calculation could give rise to the most problems for this type of benefit<sup>(931)</sup>. In such calculations — as referred to earlier — the person in question should always be in the position they would have been in if they had completed their entire career in the Member State in question. For capital-funded systems and pension account systems, however, the critical factor is always when the contributions were paid. Contributions paid early in life have a much higher value (due to interest and compound interest on the capital) within the subsequent pension than the same contributions paid in later on. The following specific example will demonstrate this.

This example has, once again, been chosen to be relatively simple<sup>(932)</sup>. Let us say that a person has a constant annual contribution income of EUR 1 000. If we then assume an average annual interest rate

of 6 %<sup>(933)</sup>, over a career beginning in 1970 and going on until 2009 (40 years), the result would be EUR 164 948.78<sup>(934)</sup>, due to interest and compound interest on the capital. Since the benefits (the monthly pensions) are always based on the capital saved this means that, even in the calculation pursuant to Regulation (EEC) No 1408/71, this is what it comes down to rather than the automatically generated monthly sums.

If, therefore, our test case has completed 10 years in the state in question with a capital-funded system, as well as 30 years in another Member State, the classical pro-rata calculation method requires that the monthly benefit be calculated on the basis of 10/40, i.e. EUR 41 237.20, of the capital theoretically saved for 40 years. According to the basic philosophy of any capital-funded system, however, payments can only be made on the basis of what saved capital (at least on average<sup>(935)</sup>) is actually available. What is actually available from the 10 years of membership of the system is actually critically dependent on the timing of when the contributions were paid. So, if these 10 years were at the beginning of the career, thus from 1970 to 1979, the total available is EUR 80 246.03, which is almost twice as much capital as is actually to be granted as a benefit. If, however, those 10 years came at the end of the career, thus between 2000 and 2009, then only EUR 12 655.86 is available (given the much lower amounts of interest), which is approximately only one third of the amount that would have to form the basis under the pro-rata method of benefit calculation. I hope that this relatively simple example makes clear that the pro-rata calculation method

<sup>(930)</sup> Article 1(j) of Regulation (EEC) No 1408/71.

<sup>(931)</sup> Various Member States have repeatedly argued that the pro-rata method of calculation cannot be applied to capital-funded systems or pension account systems and that there are therefore no problems resulting from this method of calculation. This is not a valid argument in my view as, in the absence of an exception under Regulation (EEC) No 1408/71, the general principles are always applicable in accordance with the existing case-law of the CJ (see my comments on care benefits).

<sup>(932)</sup> The example was taken from Austria's memorandum of 14 May 2003 to the Administrative Commission (CA.SS.TM. 156/03), which argued for an amendment of Regulation (EEC) No 1408/71 or Regulation (EC) No 883/2004 in order to take account of the particularities of capital-funded schemes or pension account schemes.

<sup>(933)</sup> This rate could be seen as unrealistic given current worldwide economic trends. However, in 2003 it was, in fact, a cautious forecast and it may turn out to be quite realistic over the longer term.

<sup>(934)</sup> This calculation is based on the formula  $Kn = Ko \times (1 + p/100)^n$ , where 'Ko' represents the starting capital, 'p' represents the interest rate and 'n' represents the period of interest in years.

<sup>(935)</sup> This, taking into account the average in capital-funded systems, is based on the consideration that, for the same contributions, one insured party will live longer, while another will not live as long; using the average makes it possible to ensure that the pay-outs made do not exceed the total capital actually available over all cases. When a parameter (most importantly the interest rate or the life expectancy at the fixed pension age) changes, the benefit must be adjusted accordingly.

cannot be used for capital-funded systems or pension account systems.

It is, of course, the case that, even under Regulation (EEC) No 1408/71, the pro-rata calculation will not always be used. Thus, when there is a single entitlement (i.e. when there is no need to add periods of insurance together to form the basis of the entitlement<sup>(936)</sup>) the solely nationally calculated benefit amount can also be paid<sup>(937)</sup>. The precondition for this, however, is that the pro-rata calculation cannot lead to a higher benefit amount — yet we proved exactly the opposite in the preceding paragraph, with the result that the option of abandoning the pro-rata calculation is unusable.

#### D. Solution in Regulation (EC) No 883/2004

Following constant pressure from a few Member States, the Community has reached the decision that new separate coordination was necessary for these special benefit systems<sup>(938)</sup>. For that reason, supplementary rules relating to capital-funded systems and pension account systems are being added to Regulation (EC) No 883/2004 in the first amendment of the regulation<sup>(939)</sup>. It is being clari-

fied, first of all, that, in systems where time periods play no role in the calculation, the national benefit amount can always be paid out (so there will no longer be a comparison with a hypothetical pro-rata benefit)<sup>(940)</sup>. This arrangement will therefore apply where there is no need to add insurance periods together for an entitlement. When it is necessary to add periods together, however, it will also be possible to derive the amount available nationally in the benefit calculation from such systems (meaning no pro-rata calculation here, either). In order for the affected Member States to be able to make use of this option, however, it is necessary to register in a special annex<sup>(941)</sup>, which a number of Member States have done. If, then, the Member State in question in our example has registered in this annex<sup>(942)</sup>, it will immediately become possible for either EUR 80 246.03 or EUR 12 655.86 (depending on the timing of when the contributions were made) to be used for the pension calculation.

Additionally, however, provision was also made for states that were not eligible for inclusion in the said annex whereby, in the pro-rata calculation in systems that take account, in their calculation, of 'other factors not connected to periods', foreign periods were always to be taken to be the average of the appropriate basis of calculation per month<sup>(943)</sup>. If we apply this arrangement to our example, the Member State in question would, when it comes to the foreign periods, use either EUR 80 246.03 divided by 120 or EUR 12 655.86 divided by 120 for each foreign month in the pro-rata calculation, which would result, for the 480 insured months (40 years)

<sup>(936)</sup> In a number of the new capital-funded schemes or pension account schemes there are no 'qualification periods' and benefit entitlements accrue after very short periods of membership of the scheme. There are also schemes, however, that still have long qualification periods (such as Austria's pension account scheme, which requires 15 years of system membership); for that reason there are also cases in such schemes where it is necessary to add periods together in order to trigger a benefit entitlement.

<sup>(937)</sup> Article 46(1)(b) of Regulation (EEC) No 1408/71.

<sup>(938)</sup> Prior to that, there had only been selective solutions for a few individual Member States in Annex VI of Regulation (EEC) No 1408/71, such as I. France point 5, S. Austria point 8 (concerning the pension systems of the liberal professions) and point 10 (concerning the pension account under the General Pensions Act (APG)) or AA. United Kingdom point 13.

<sup>(939)</sup> The necessary opinion-forming process could only be concluded after Regulation (EC) No 883/2004 had been drawn up. The first amendment of Regulation (EC) No 883/2004 is being published along with the new implementing regulation, and it will not only contain the missing annexes to Regulation (EC) No 883/2004 (in OJ L 200, 7.6.2004, p. 1, Annexes II, X and XI of the regulation and the entries for the new Member States are missing), but also clarifications in the regulation itself, which have proved themselves necessary, in particular, in working on the annexes and the new implementing regulation. This package is currently in the final phase of decision-making by the Council and Parliament, where there will now be no changes in the special arrangements under pension law that I have described as there is already agreement with the European Parliament on these issues.

<sup>(940)</sup> Article 52(5) of Regulation (EC) No 883/2004 in the version of the first amending regulation.

<sup>(941)</sup> Annex VIII, Part II, of Regulation (EC) No 883/2004 in the version of the first amending regulation.

<sup>(942)</sup> A system that functions on a purely capital-funded basis that pays interest on the capital in accordance with compound interest is certainly a system in which the periods are unimportant when calculating the amount of benefits. However, the other Member States rejected a system of this nature where, in the case of invalidity benefits, for example, apportionment periods were also to have the effect of increasing the benefit in the calculation, as these are periods, after all. For such systems the only remaining option is thus listing in Annex VIII, Part I, as the autonomous benefit is generally higher than that calculated using the pro-rata method.

<sup>(943)</sup> Article 56(1)(d) of Regulation (EC) No 883/2004 in the version of the first amending regulation.

in the two Member States, in a theoretical sum of either EUR 320 984.12 or EUR 50 623.44, which then, on reduction in proportion to the period (120/480), exactly mirrors the national starting basis again<sup>(944)</sup>. This means that, even in cases where the periods spent in multiple Member States have to be added together, the sum to be awarded corresponds exactly to the capital actually available.

Community legislators have thus responded to the new benefit systems in the field of pensions and come up with reasonable and practicable calculation rules for capital-funded systems and pension account systems. It is also worth noting that this new arrangement was effected entirely without any preceding judgments by the CJ<sup>(945)</sup>. Can this change in the law thus perhaps be cited as the best practice model at the European level?

#### IV. CHILD-REARING BENEFITS

Any discussion of new categories of benefits would be incomplete if it failed to cover child-rearing benefits, which have emerged as a separate category of benefits in many Member States for the parent who actually devote themselves to raising a child<sup>(946)</sup>. Dealing with this category of benefits comprehensively, too, would require its own paper<sup>(947)</sup>. In what

<sup>(944)</sup> Until now Article 47 of Regulation (EEC) No 1408/71 on the basis of calculation for pensions has not provided any appropriate arrangement for capital-funded systems or pension account systems.

<sup>(945)</sup> If we disregard Case C-205/05 Nemeč [2006] ECR I-10745, in which the CJ found that foreign income certainly should be included alongside domestic income in the calculation of a benefit. The new arrangement described will have no impact on this issue, however.

<sup>(946)</sup> See also the references in the introduction.

<sup>(947)</sup> On the problems of coordinating child-rearing allowances, in particular in relation to the special situation of parents who take a break from their professional activities in order to raise their child(ren), see also 'Die Koordinierung von Familienleistungen — Praktische und rechtliche Fragen der Anwendung der VO 1408/71' [The coordination of family benefits — Practical and legal issues in the application of Regulation (EEC) No 1408/71] in *Freizügigkeit und Soziale Sicherheit* [Freedom of movement and social security], published by B. Schulte and K. Barwig, Baden-Baden, Nomos, 1998, p. 210 et seq., or E. Eichenhofer, 'Deutsches Erziehungsgeld und Europäisches Sozialrecht' [German child-rearing allowance and European social law], *Sozialgerichtsbarkeit* [German periodical] 10/97, p. 449 et seq. On the problems from an Austrian viewpoint, see S. Holzmann-Windhofer, 'Kinderbetreuungsgeld für EG-Wanderarbeitnehmer' [Child-rearing allowances for EC migrant workers], *Soziale Sicherheit* [Austrian periodical] 1/2008, 26.

follows I will only pick out a few aspects so as not to completely neglect these benefits.

#### A. Background

It can be assumed that child-rearing benefits, whatever they are known as under national legislation, and wherever they are based within the national systems, are to be regarded as family benefits for the purposes of the application of Regulation (EEC) No 1408/71<sup>(948)</sup>. This means that coordination, as is envisaged for family benefits, also applies in full to these benefits<sup>(949)</sup>.

#### B. Impact of the general coordination of family benefits on child-rearing benefits

First of all, I would like to remind you of the general principles of coordination for family benefits. The place of residence of the child is immaterial, so that a Member State that is competent for a parent on the basis of the applicable legislation must also grant family benefits even if the children reside outside that state<sup>(950)</sup>. Both parents may give rise to entitlements. If, as a result of this, the two parents are subject to the legislation of different Member States, there will be competing entitlements. It is determined by means of priority rules<sup>(951)</sup> which Member State is primarily competent and therefore has to issue the full amount due according to its legislation, and which Member State has secondary competence and thus only has to pay a differential supplement if the entitlements in that state are higher than those in the state with primary

<sup>(948)</sup> The CJ has made this clear in a series of judgments on a very wide range of benefits — see, for example, the judgments for Cases C-245/94 Hoever and Zachow [1996] ECR I-4895, C-85/96 Martínez Sala [1998] ECR I-2691, C-275/96 Kuusijärvi [1998] ECR I-3419, C-153/03 Weide [2005] ECR I-6017, and C-543/03 Dodl and Oberholzer [2005] ECR I-5049.

<sup>(949)</sup> Title III, Chapter 8, of Regulation (EC) No 883/2004. For family benefits I would first like to describe the arrangements under Regulation (EC) No 883/2004, as these are considerably clearer than those under Regulation (EEC) No 1408/71, though the principles of coordination remained largely unchanged with regard to benefits for those in gainful employment.

<sup>(950)</sup> Article 67 of Regulation (EC) No 883/2004.

<sup>(951)</sup> Article 68 of Regulation (EC) No 883/2004.

competence. The state with primary competence is the one in which an occupation is pursued, but if both parents pursue an occupation, then, in principle, it is the state of residence of the children that is primarily competent.

For subsequent considerations, let us use the following example as a basis. A family lives in Member State A, where the father also works. The mother crosses the border to work in Member State B; she took parental leave under the labour law provisions of that state (Member State B) in order to attend to the raising of her 12-month-old daughter (the working relationship with the employer in Member State B remains intact)<sup>(952)</sup>. First of all, we must describe the principles of coordination for 'ordinary' family allowances in order to better understand the impact on child-rearing benefits. If the family allowance amounts to EUR 100 in Member State A and EUR 120 in Member State B, under this state of affairs, Member State A, as the state of residence, must pay its family allowance of EUR 100 in full as the state with primary competence, while Member State B has to top up this amount with a differential supplement of EUR 20.

### C. Open issues awaiting future regulation

As I have said already, the same coordination must also apply to child-rearing benefits. Let us assume then, that Member State A has a flat-rate child-rearing allowance for all residents in the amount of EUR 150, while Member State B has a child-rearing allowance in the form of an income-replacement benefit for the working population only in the amount of 80 % of the last received income (in our example, the mother earned EUR 1 000 per month before giving birth, which means that, under Member State B's legislation, her child-rearing allowance would amount to EUR 800). Under the

coordination of family benefits, first of all Member State A would have to pay its child-rearing allowance (EUR 150), while Member State B would then have to make up the difference (i.e. EUR 650). From this example alone it is clear that the coordination for such child-rearing allowances with an income-replacement function is hard to explain — those affected very rarely understand why it is not the Member State in which they pursue their occupation that pays all of the child-rearing allowance. A further complicating factor is that, according to the interpretation of a few Member States, differential supplements are only paid out in arrears at the end of the year<sup>(953)</sup>.

The problem becomes even clearer if we switch the two systems so that state of residence A provides the family with a child-rearing allowance in the form of an income replacement at 80 % of last earned income and Member State B only has a flat-rate child-rearing allowance of EUR 150. In this case, Member State A is the state with primary competence. Does this state therefore have to pay the EUR 800 worth of income-replacement child-rearing allowance despite the fact that the mother earned this income under the application of the legislation of Member State B<sup>(954)</sup>? What does Member State A pay if its national law does have a child-rearing allowance that has an income-replacement function for the working population but also has a flat-rate child-rearing allowance for those not in employment of, say, EUR 200? Since the mother is not subject to Member State A's legislation as a member of the working population (but is instead subject to Member State B's legislation), does that mean that Member State A can then only award the benefit for those not in work (meaning only the EUR 200 rather than the income-based EUR 800)?

<sup>(952)</sup> As was stated in Decision No 207 of the Administrative Commission of 26 May 2005 (OJ L 349, 31.12.2005, p. 27), for the provisions of Regulation (EEC) No 1408/71, in the case of parental leave, the continued pursuing of an occupation is to be presumed, insofar as this is viewed as equivalent under national law. It is not yet certain whether the same will apply under Regulation (EC) No 883/2004.

<sup>(953)</sup> This interpretation is based, amongst other things, on point 1(e) of Decision No 147 of the Administrative Commission of 10 October 1990 (OJ L 235, 23.8.1991, p. 21) and point 5 of Decision No 150 of the Administrative Commission of 26 June 1992 (OJ C 229, 25.8.1993, p. 5).

<sup>(954)</sup> The judgments in Cases C-137/04 Rockler [2006] ECR I-1441 and C-185/04 Öberg [2006] ECR I-1453 would indicate this, although they were not based on Regulation (EEC) No 1408/71 but rather related to retired EU officials pursuant to Article 39 of the EC Treaty.

Yet another variant can be foreseen, of course. Let us say the father earns EUR 2 000 per month in Member State A; theoretically, this income, too, could be used as a basis for the calculation of the child-rearing allowance, leading to an entitlement of EUR 1 600<sup>(955)</sup>. The question of how exactly to proceed in this set of circumstances has not been cleared up as yet.

There is another equally important problem here though, namely, if we assume that Member State A had to pay out the EUR 800 worth of child-rearing allowance in our last example, what amount would Member State B have to pay as a differential supplement? If the individual benefits are weighed against one another<sup>(956)</sup>, Member State A pays out EUR 100 in family allowance and EUR 800 in child-rearing allowance, Member State B pays EUR 20 by way of a differential supplement for the higher family allowance but no differential supplement in respect of the child-rearing allowance, as the child-rearing allowance from the Member State with primary competence is already EUR 800. If, however, the amounts of all the family benefits are compared, then Member State B would not have to pay any differential supplement at all, as the total of its family benefits (EUR 120 + EUR 150 = EUR 270) is less than the benefits due under Member State A's legislation (EUR 100 + EUR 800 = EUR 900)<sup>(957)</sup>.

These are just a few of the many questions that arise in the coordination of child-rearing benefits pursuant to the rules for the other general family benefits. Unfortunately it also proved impossible, in drawing up the new Regulation (EC) No 883/2004,

to find satisfactory answers to all these questions, although, from the overriding EC law point of view, all routes would be conceivable, in particular when it comes to the question of whether all benefits should be compared together or whether only corresponding benefits should be compared<sup>(958)</sup>. Since the Member States are not proceeding in a uniform manner on these issues, clarifications by the CJ will be the way forward, although these will lead to further dissatisfaction on the part of the Member States. Until there is agreement on these issues in the Council, the ball will be left in the CJ's court once again.

## V. SUMMARY

New categories of benefit always represent a challenge; initially for the Member States, who have to choose the right coordination mechanism for the said benefits. If the Member States are not guided in making this choice, then it must be expected that no uniform coordination will take place, which is unsatisfactory both for the people affected and for the administrations in the Member States. This guidance would be given by European legislators, making it clear and unambiguous which methods of coordination are to be applied to new categories of benefit, where it must be possible, in any case in the event of problems with the application of the principles for the existing categories of benefit, to create new principles for new categories of benefit. It is, of course, also possible for the Administrative Commission to take a leading role by declaring, at least once, that what is at issue is a new category of benefit that is not limited to a single Member State and then being able to draw up proposals for solutions. The least recommended route is leaving it up to the CJ to decide. This is because the CJ only ever has the option of applying the existing principles of coordination and always has to categorise new categories of benefit with the existing benefits that

<sup>(955)</sup> According to my information, this could be the solution that the Swedish administration found in Case C-275/96 Kuusijärvi [1998] ECR I-3419.

<sup>(956)</sup> It will doubtless always be difficult to decide with certainty here which benefits correspond to one another and which do not.

<sup>(957)</sup> This question of whether, for the differential supplements, all the benefits should be compared together (the 'one-basket theory'), or whether only the corresponding benefits should be compared (thus, in the rough division into ordinary family benefits and child-raising benefits, the 'two-basket theory'), was fiercely debated by the Council in drawing up the new implementing regulation to Regulation (EC) No 883/2004. It did not prove possible to reach a consensus solution, however. The same also applies to the question of whether the entire family should be considered together or whether the comparison calculation should be carried out for each child.

<sup>(958)</sup> Ultimately, overall the higher amount would always be guaranteed. This rules out, in any case, the possibility of financial disadvantage for people taking advantage of mobility.

they seem most closely to resemble, and that can depend on the chance particularities of the questions referred to the CJ in the individual case in question. No one can reproach the CJ for that.

It must be assumed that this problem of coordinating new categories of benefit will come up again and again <sup>(959)</sup>. How can we attempt to learn from past experience in a proactive way? I would suggest that the Member States should take more seriously their obligation to inform each other of changes to

their national legal positions that could affect the application of the regulations <sup>(960)</sup>. The other Member States, and also the Commission, would then have to analyse such reports closely in order to recognise the advent of new categories of benefit early and to seek out the most suitable principles of coordination together as quickly as possible. It is not harmonisation of the individual systems that should be aimed for but harmonisation of the coordination. Unfortunately, that has happened far too little in the past.

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<sup>(959)</sup> Previous experience shows that systems of social protection are the fastest-changing areas of law in all the Member States.

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<sup>(960)</sup> Article 76(1)(b) of Regulation (EC) No 883/2004.



# CROSS-BORDER HEALTHCARE: TOWARDS COORDINATION OF TWO PATIENT MOBILITY ROUTES

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## I. REVIEW OF EXISTING ROUTES

### A. One, then two routes for covering the costs of cross-border healthcare

#### 1. The regulatory route

##### (a) Regulation (EEC) No 1408/71

Ever since 1959 and Regulation No 3, the route commonly called the regulatory route or primary access route to cross-border healthcare has been open with its first aspect concerning access without prior authorisation to emergency care ('where his condition requires immediate medical care') during temporary residence on the territory of another Member State. The second aspect, concerning access with prior authorisation to so-called planned care ('who will be cared for on the territory of another Member

State without, for all that, transferring his residence there'), came out in 1964 with Regulation No 73/63/EEC, Regulation No 3 in its initial version only providing, again with prior authorisation, for a worker entitled to benefits in the state in which he resides to retain that benefit when he transfers residence to the territory of another Member State.

The route introduced in this way became even more important with the continual increase in the range of beneficiaries, firstly through case-law interpretation of the notion of a worker being considered as an insured worker and extending to people covered by a worker scheme, a development reflected in the description of this notion in Regulation (EEC) No 1408/71, then subsequently by the extension of the latter to non-salaried workers and to members of their families, to students and members of their families and to third-country nationals residing legally in a Member State, through Regulation (EC) No 859/2003, for those who were excluded from the application of Regulation (EEC) No 1408/71 solely on grounds of their nationality. It being most

(\*) This contribution was translated from the original French version.

(961) This contribution expresses the personal views of the author and is binding on him alone.

particularly a question of emergency care during temporary residence, the Council had, moreover, long anticipated extending these provisions of Regulation (EC) No 883/2004 to anyone (Community national) covered by the health insurance laws of a Member State.

It is worth noting that such importance is no longer alien, with the transition of the six Member States concerned to 27, and to 31 with the extension of the EEA to non-member countries of the EU and to Switzerland (which last February confirmed by a popular vote the importance it attaches to maintaining the agreement signed with the EU on the free movement of persons).

But, in terms of quality, the measures have evolved over time. With regard to the first aspect, emergency care during a stay, the categorical approach of Regulation (EEC) No 1408/71, due to personal extensions by stages, combined with the *Pierik* cases (117/77 and 182/78), led to a paradoxical situation in which active workers during a stay had fewer rights than pensioners during temporary residence. At the same time as the setting up of the European health insurance card, Regulation (EC) No 631/2004 proceeded to align entitlements in the different categories from the top. For active workers, there is thus a transition from emergency care ('whose condition immediately requires benefits during a stay in the territory of another Member State') to the new common standard of care during a stay ('whose condition requires benefits in kind which become necessary on medical grounds during a stay in the territory of another Member State, taking into account the nature of the benefits and the expected length of the stay').

With regard to the second aspect, planned care, the development concerned the conditions under which a patient may not be refused prior authorisation. In its initial version, Regulation (EEC) No 1408/71, innovative in relation to Regulation No 3, simply prescribed that such authorisation 'may not be refused where the treatment in question cannot be provided for the person concerned within the territory of the Member

State in which he resides'. The Court of Justice (CJ), in its *Pierik* judgments already referred to, stated that the decisive nature thus afforded to the medical care could lead to the obligation to grant authorisation even though the treatment in question did not fall within the healthcare basket of the competent state's scheme. But in order to return power of assessment to the institutions on behalf of which the benefits are used, Regulation (EEC) No 2793/81 tightened up the provision by establishing that from now on authorisation 'may not be refused where the treatment in question is among the benefits provided for by the legislation of the Member State on whose territory the person concerned resides and where he may not be given such treatment within the time normally necessary for obtaining the treatment in question in the Member State of residence, taking account of his current state of health and the probable course of the disease'. Healthcare baskets and waiting lists are binding. We shall see that the new Regulation (EC) No 883/2004, with CJ case-law in mind, adopts a more open wording no longer allowing the usual waiting times that may exist in the state concerned to be raised as an objection.

Conceptually, what firstly characterises this route is that the care received is covered by the health insurance scheme of the state in which that care is received on behalf of the competent scheme covering the insured person, that person enjoying the benefits in kind of the local scheme 'as if he were insured' only for the time the benefits are provided, the duration of the entitlement being governed by the laws of the other state.

The second main characteristic is the distinction made between care during so-called residence for which access, according to the regulations of the state in which it is received, is given without the prior authorisation of the competent state, regardless of the nature — hospital or otherwise — of that care, and so-called planned care, for which prior authorisation is always required, regardless of the nature — hospital or otherwise — of that care.

**(b) Regulation (EC) No 883/2004**

The new coordinating regulation does not overturn the route offered by the previous regulation, rather it develops and supplements it.

There is a development, first of all, with regard to the planned care aspect insofar as, from now on, prior authorisation will not be able to be refused 'where the treatment in question is among the benefits provided for by the legislation in the Member State where the person concerned resides and where he cannot be given such treatment within a time-limit which is medically justifiable, taking into account his current state of health and the probable course of his illness'. The healthcare basket remains binding, but the normal waiting lists no longer do, if the state of health of the person concerned requires more immediate access to the treatment requested. The influence of case-law, which will be examined in the next point, is clear and the desire is to standardise the criteria that may justify refusing authorisation by aligning them to the most restrictive ones, those relating to case-law.

Then, a supplement exists on two fronts. Firstly, the subsidiary provisions of Article 34 of Regulation (EEC) No 574/72, which will be discussed further below in point B.2(c), concerning only care during a stay, are extended to planned care and become the main means of reimbursement in both cases of costs incurred by insured persons, who thus have the opportunity from the outset to obtain reimbursement for either the tariffs charged by the state of stay or the tariffs charged by the competent state, depending on whether they approach the institution in the place of stay or the competent institution (the latter being able to do either, as the people concerned choose, if both options are possible).

Secondly, and perhaps most importantly in respect of our subject-matter, what might be described as equivalent to the *Vanbraekel* supplement (see

point B.2(b)) below) is introduced only for planned care, since the insured person, who will initially have chosen cover according to the tariffs of the state in which the care was received and will, himself, have effectively paid for all or part of the cost of treatment, will be able to ask the competent institution for supplementary reimbursement, to the extent of the costs which he will have effectively borne, if the amount of the costs assumed by the institution in the place of stay (reimbursed afterwards under the competent scheme) is lower than the amount of costs that the competent institution would have borne if the care had been received in the competent state.

It will thus be seen that, while the two main characteristics of this route remain in the new regulation, the first is transformed since, in all situations, both options are offered, and sometimes in addition to one another, that of cover according to the tariffs of the state of care and that of cover according to the tariffs of the competent state.

**2. The case-law route****(a) From Decker/Kohll to Stamatelaki**

Heralded in by the two historical judgments of 8 April 1998 *Decker* (C-120/95) and *Kohll* (C-158/96), then confirmed and examined in depth with the series of *Vanbraekel* (C-368/98), *Smits and Peerbooms* (C-157/99), *Müller-Fauré and van Riet* (C-385/99), *Inizan* (C-56/01), *Commission v France* (C-496/01), *Leichtle* (C-8/02), *Watts* (C-372/04) and *Stamatelaki* (C-444/05) judgments, provisionally in the latter case, CJ case-law introduced a second route for covering cross-border healthcare, based on the economic freedoms of the internal market.

Recalling that travel by a patient to another Member State to purchase healthcare goods and services did indeed amount to purchases of goods and services within the meaning of the EC Treaty and that the fact that it was a matter of reimbursement of medical costs by a social security

institution did not change the goods or services nature of the products and care purchased in another Member State, the CJ considered that the fact of a social security scheme, regardless of its nature, only intervening within the scope of its national territory with regard to the provision of benefits in kind or reimbursement of health costs constituted a restriction, depending on the case, on the free movement of goods or the free provision of services.

The schemes of Member States must therefore, without restriction, reimburse the care costs incurred by their insured in another Member State to the extent of the cost they would have incurred or the reimbursement amount they would have granted if the same care had been received on national territory or provided by the national health service staff and organisations. The conditions of access to healthcare or reimbursement that exist on national territory, such as the necessary referral via a GP in order to consult a specialist, are applicable to the care received in another Member State as long as they are not discriminatory by their nature or in the means by which they are applied.

The CJ did, however, agree that an obstacle, a restriction on these freedoms, may be permitted if it is justified and it has, to date, accepted three elements constituting as many pressing reasons of general interest justifying recourse to a system of prior authorisation, provided, in addition, that this system is proportionate and that it offers adequate procedural guarantees:

- the risk of seriously undermining the financial balance of the social security system of the state concerned;
- the need to maintain a balanced medical and hospital service open to all to help attain a high level of health protection;
- the need to maintain a healthcare capacity or medical competence on national territory considered as essential for public health, and

even for the survival of the population of the said state.

In order to be accepted, the undermining of the financial balance of a social security system must be effective, continuous and considerable, but, conversely, with regard to the other two justifications, the CJ considered that they were constituted by nature for hospital healthcare, concluding that 'the requirement that the assumption of costs by the national system of hospital treatment provided in another Member State be subject to prior authorisation appears to be a measure which is both necessary and reasonable' (*Watts*, op. cit., para. 110).

The obligation with regard to proportionality also led the CJ to consider that prior authorisation, required as part of an authorisation system justified in this way, may only be refused, it being a question of a treatment covered by the regime of the competent state, when a treatment which is the same or equally effective for the patient can be obtained without undue delay in that state (covered by its regime), taking into account the patient's medical condition.

This new route, also known as the Treaty route, thus has two main characteristics that are very different from those of the regulatory route. The first is that, this time, it is the insured person's usual scheme, the scheme of the competent state, that is directly applied in order to reimburse him, under the conditions and according to the tariffs of that scheme, the healthcare costs incurred in another Member State. The second is that the option of prior authorisation remains, but only for hospital care.

We shall also see that all the cases cited above referred to planned care and that the CJ has not yet, to date, come to a decision on the applicability of such case-law to healthcare during a stay. But it should soon be forced to settle this matter in the *Commission v Spain* case (C-211/08).

(b) The proposal for a directive

Following the exclusion of the health sector from the proposal for a directive on services in the internal market, the Commission published a communication on 26 September 2006 launching a consultation<sup>(962)</sup> regarding Community action on health services. The outcome of this broad consultation provided food for thought which resulted in the proposal for a directive on the application of patients' rights in cross-border healthcare<sup>(963)</sup> being forwarded to the Council and European Parliament on 2 July 2008 as part of a social package.

In spite of its title, this proposal is wider in scope than simply setting a framework for cross-border healthcare, since it is structured around three main topics, the other two of which concern common principles for all EU health systems (quality and safety of care) and European cooperation on healthcare (European reference systems, online healthcare, etc.).

We are concerned here only with the first topic, announced as a transposition and a systematisation of the case-law referred to in (a) above.

In this regard, we thus find in the proposal the principle (Article 6) of payment by the Member State of affiliation, in the form of a reimbursement, of the costs incurred by patients/insured persons in another Member State according to the laws applied by that state, this being equally valid for deciding what care is reimbursable (national healthcare basket), for setting the reimbursement amount within the limit of the costs actually incurred according to the cost that would have been incurred if the care had been received in the state of affiliation and, finally, for setting the same conditions, criteria of eligibility and regulatory and administrative formalities concerning the care as those that are imposed for the same kind of care

received on national territory, provided, of course, that they are neither discriminatory nor constitute an obstacle to freedom of movement.

The same distinction is made between non-hospital care, the reimbursement of which may not be subject to any prior authorisation (Article 7), and hospital care.

The latter (Article 8) is at first widely defined as being healthcare requiring that the patient stay in hospital for at least one night and the types of care which, spelled out in an explicit list drafted and regularly updated by the Commission with the assistance of an ad hoc committee, do not require the patient to stay in hospital for at least one night, but which do call for highly specialised and cost-intensive medical infrastructure or medical equipment or which are associated with treatments presenting a particular risk to the patient or the population.

The Member State of affiliation can subject the reimbursement of this hospital care to prior authorisation, the proposal stating that each state may set up a prior authorisation system for its social security system to cover the care received in another Member State and making national care part of its basket in order to avoid this payment actually or being likely to 'seriously undermine the financial balance of its social security system and/or the planning and rationalisation carried out in the hospital sector to avoid hospital overcapacity, imbalance in the supply of hospital care and logistical and financial wastage, the maintenance of a balanced medical and hospital service open to all, or the maintenance of treatment capacity or medical competence on its territory'. It adds that such a system shall be limited to what is necessary and proportionate to prevent such impact and shall not constitute a means of arbitrary discrimination and that the Member State must make public all relevant information on the systems introduced in this way.

Provisions also govern the procedural guarantees that must be provided by these prior authorisation

<sup>(962)</sup> SEC(2006) 1195/4.

<sup>(963)</sup> COM(2008) 414 final.

systems (Article 9) and the right of patients to information on receiving cross-border healthcare (Article 10), establish the principle of the competence of the legislation of the state in which the care is received in respect of the rules applicable to this care (Article 11) and oblige Member States to designate national contact points for cross-border healthcare. Finally, it will be noted that relationships with Regulation (EEC) No 1408/71 (formerly (EC) No 883/2004) are envisaged in terms of separate application and exclusive competence — if the regulation applies, the directive does not apply and vice versa — by Article 3, but with priority all the same given by Article 9 to open-ended entitlement in respect of the regulation if the conditions making it impossible to refuse prior authorisation are met. We shall see later on that these wordings are associated with a reading of the relevant provisions of the regulations that is open to criticism.

The Council has already carried out an initial examination of this part of the proposal under the French Presidency and there has been consensus on a number of main themes:

- firstly, recalling that health is an area which essentially comes under national competence and that the directive must neither impose new obligations on Member States nor, under the guise of CJ case-law, bestow regulatory powers on the Commission;
- next, transposing CJ case-law and nothing but that case-law, without seeking to depart from it by over-restrictive provisions, the risk therefore being to create a third route through this directive, since a case-law route would then continue to exist for those constituents or situations not covered by the directive, thus totally turning away from the objectives of clarification and simplification;
- finally, noting the full autonomy of the directive over the regulation and vice versa, the latter in the future being designed to be expanded by provisions simplifying, coordinating and harmonising the two routes.

A majority of Member States were, at this stage, and subject to the wording of the amended provisions, able to support the following major changes.

- Extension of the scope covered to all healthcare, defined as the entirety of the goods and services provided or prescribed by a health professional legally exercising his activity in the state in which the care is received, in place of a proposed definition restricted to the services provided by health professionals coming under a regulated profession within the meaning of Directive 2005/36/EC on the recognition of professional qualifications. The objective is to include the non-specialised nature of case-law and to avoid creating a third route, as stated above.
- Subject to maintaining a generic definition of hospital and specialist care, setting out the list of such care (requiring prior authorisation in order to be accepted for reimbursement) at national level, considered more legitimate and appropriate, rather than at Community level by the Commission as provided for in the proposal. The Council's objective here is to simultaneously retain control at national level of a definition proving essential for the justification and smooth running of the prior authorisation system, as well as for the preservation of national competence in terms of the organisation and supply of healthcare, and to ensure the desired flexibility and adaptability given the diversity of national systems and their respective healthcare baskets and the rapid development of medical techniques and cures.
- It being a matter of possibilities of introducing a prior authorisation system, rejection of the removal of the burden of proof effected by a proposal that would force Member States to demonstrate case by case that the lack of such a system would jeopardise the financing and/or organisation of the supply of care on their territory and seek a better balance between the individual rights of patients to mobility within the Union and the maintenance of the capacity



of Member States to regulate and plan their own healthcare system. The Council favours a strict resumption of case-law: right of Member States, without prior authorisation or justification, to introduce a prior authorisation system solely for hospital and specialist care, on the basis of the justifications accepted by the CJ, as long as that system is, in other respects, proportionate and contained by adequate procedural guarantees, accompanied by an obligation to grant the authorisation requested when the treatment appears on the list of treatments covered by the national scheme and a treatment which is the same or equally effective for the patient may not be obtained without undue delay in the competent state, taking into account the patient's medical condition.

- Finally, with regard to structuring this directive with the coordinating regulation, the Council has proved rather agreeable to improving this structuring by simplifying it, the directive being content with stating that it applies without prejudice to the regulation, and facilitating it simultaneously by extending the scope of the directive so that it is more consistent with that of the regulation and thus by reconciling the prior authorisation system with that of the regulation, for possible merger when the directive is transposed into national legislation.

At the same time, the European Parliament has also begun to examine this proposal and, whilst its final decision in full session for this first reading was not known at the time this contribution was drafted, we can already infer from the work in committee that the proposed amendments:

- approximate the Council's guidelines on the definitions of healthcare (but excluding long-term care and organ transplants) and hospital care (without, however, adopting the expression 'hospital and specialist care'), and on the relationships between directive and coordinating regulation;

- depart from them on prior authorisation by maintaining the a priori conditions laid down for its implementation by exempting patients suffering from rare diseases from this obligation, and by adding provisions on the reimbursement of transport costs, costs paid in advance and prior notification of the reimbursement amount.

Without prejudging what the final vote in full session might be, we can deduce from the overall number of amendments by the two institutions and the large number of differing amendments that the search for agreement at a second reading will require considerable effort on both sides in terms of conciliation and long explanation and negotiation sessions.

## **B. Two routes different in nature and not always with the same end in view**

### **1. A second, more problematic route**

#### (a) Variable, uncontrolled application

By its nature, case-law of this importance, being supplemented from judgment to judgment, but at the same time not systematically since, beyond matters of principle, it is responding simply to specific matters raised at the time in the individual cases under examination, does not always, in the absence of a joint Community provision or action, guarantee total, uniform application by all the Member States.

Although the general character of the said case-law, applicable to all affiliation systems regardless of their nature — health service, system of benefits in kind or insurance scheme — able to be deduced from the initial judgments, may have been indisputably confirmed in the *Watts* judgment, it has to be noted that still not all the Member States are applying it, whereas others apply it partially or with unilateral adaptations.

The practical, specific information on the options provided by this means of accessing cross-border

healthcare, its characteristics and the conditions under which it is applied is rarely available or not immediately available to users, whilst the means of information associated with the coordinating regulations (sites, brochures and so-called 'portable' forms such as the E112) are consequently incompatible and ignore this second route.

The interpretations that the Commission's departments may have of this case-law may even vary from one directorate to another and lead to apparently contradictory actions. This is the case with the action brought for non-application of case-law to cases of care during a stay even though the proposal for a directive is expressly restricted to planned care and the proposal for an implementing regulation is also restricted simply to planned care for the substitute for the *Vanbraekel* supplement, or with another action brought against extending a prior authorisation system to cost-intensive specialist, but non-hospital, care at the same time as the proposal for a directive with which we are concerned opens up the possibility of establishing a prior authorisation system for non-hospital specialist care. Or, again, the assertion drawn from a reading of the judgments concerned that authorisation granted in respect of the regulation is tantamount to authorisation granted in respect of case-law and vice versa for a situation and care that may, naturally, come under the two routes, and the parallel assertion concerning the proposal for a directive that the scope of Regulation (EC) No 883/2004 would be restricted — something we consider erroneous — simply to those cases in which authorisation may not be refused, which makes it possible to envisage for the Member States a choice beyond these cases between not granting authorisation or granting valid authorisation only in respect of the directive (payment according to the tariffs applied by the competent state).

It is true that, insofar as the main principles and guidelines of such case-law appear fixed, its limits are still unclear with regard to certain aspects, and the mechanisms by which it is implemented

(coverage tariffs, methods of breaking down the costs incurred, access to healthcare versus the state in which it is given, etc.) call for details that are not yet forthcoming.

Cases in progress will make it genuinely possible to specify or modify certain temporary limits. Thus the *Commission v Spain* case (C-211/08) will give the CJ the opportunity to state whether its case-law can also, as seems clear to us, relate to care during a stay, whether covered directly or by way of a supplement (*Vanbraekel* supplement). Similarly, the *Commission v France* case (C-512/08) should make it possible to find out whether the criteria identified by the CJ are able to justify a system of prior authorisations applying to care received from non-classic hospital bodies or, at the very least, clarify the notion of hospital treatment<sup>(964)</sup>.

A third case — *von Chamier-Glisczinski* (C-208/07) — could present very contradictory results. It in fact relates to long-term care (coverage of the costs of staying in a specialist establishment). Whilst extending the scope of healthcare to dependency care or loss of independence would not, in our opinion, pose any more of a problem to the CJ within the context of this case-law than that of the coordinating regulation, the real issue is that Article 49 EC is not applicable, as confirmed by the counsel for the prosecution, the woman concerned not having gone to Austria (stay) to buy these long-term care services, but having set up residence there with her husband.

On the other hand, however, the counsel for the prosecution is of the opinion that an identical right to the reimbursement of such benefits in kind (with the conditions appropriate to hospital care) can be

<sup>(964)</sup> In a recent judgment dated 10 March 2009 (*Hartlauer*, C-169/07), the CJ noted that 'It cannot be excluded from the outset that, as the Court has already ruled with respect to hospitals (...), establishments providing outpatient care such as doctors' surgeries and outpatient clinics may also be the subject of planning. Planning which requires prior authorisation for setting up new providers of services may prove indispensable for filling in possible gaps in access to outpatient care and for avoiding the duplication of structures, so as to ensure medical care which is adapted to the needs of the population, covers the entire territory and takes account of geographically isolated or otherwise disadvantaged regions'.

introduced on the basis of Article 18 EC (EU citizenship). Were the CJ to go in this direction, case-law would evolve in two ways, on the one hand by extending its scope *ratione materiae* to the reimbursement of long-term care and, on the other, by extending its personal scope to people residing in a state other than the competent state and requesting, on the basis of Article 18 EC, the latter to reimburse healthcare or healthcare product costs incurred in the state of residence.

#### (b) A commercial route to accessing healthcare

In undertaking this second route, as soon as the patient/insured person goes to another Member State to buy healthcare products or services there, he leaves the framework of the social security law coordination and enters the framework of the internal market. As soon as he is outside his borders and although he remains an EU citizen, he is divested of his status as an insured person (a person paying social security contributions) to become once more a simple economic subject, a purchaser of products and services on the single market (unregulated, to date, from the Community perspective as far as the healthcare sector is concerned)<sup>(965)</sup>.

As a result, he is no longer, as within the context of the coordinating regulation, temporarily considered as an insured person under the local system and in respect of practitioners, providers and establishments in the state of stay:

- he must pay costs in advance and in all cases settle his expenses;
- he may find himself billed for costs at prices or tariffs different to those locally enforceable on insured persons or social security institutions;
- he no longer, or at least statutorily, benefits from the healthcare protocols, good practices and entitlements laid down by local social security, nor from any easy access to healthcare

that may be reserved to people paying social security contributions.

Similarly, being outside national borders, he is unable to benefit from the protection offered to him by his own system, since the healthcare professionals he consults have no connection with that system and no obligations<sup>(966)</sup>, other than those laid down by the rules of their professional code of ethics and the general public health laws applicable locally. He will only again become an insured person at the time of submitting his application for reimbursement to his usual social security institution, based on case-law and the transpositions that already exist in some national laws.

In its current state and without any containment, this route may therefore be described as commercial with, as we have just pointed out, negative economic effects on patients, except in cases where the costs of cover or reimbursement of the systems of affiliation are such that they can reimburse almost all the costs incurred in a state in which the level of healthcare costs, even with unrestricted tariffs, is very low.

But in the latter case, a supplementary charge is transferred to the system of affiliation. From the latter's point of view, it should also be noted that the second route deprives it of its regulatory tools aimed directly at healthcare professionals, providers and establishments in their activity, since they fall outside its scope of cover. It is then faced with 'unauthorised' purchases which it can only challenge with its financial limits of cover (internal tariffs or costs) and the conditions of access to and consumption of healthcare directly enforceable only on insured persons, hence without going through regulation of the activity or practice of healthcare professionals, as long as these conditions are not discriminatory (obstacles to freedom of movement) in the specific situations encountered.

<sup>(965)</sup> J. C. Fillon, 'Soins transfrontaliers: les conséquences d'une approche marchande' [Cross-border healthcare: the consequences of a commercial approach], *Liaisons Sociales Europe*, 2009, No 223, 5–8.

<sup>(966)</sup> Excluding, of course, the rare case in which the healthcare professional is voluntarily associated with the said system. Similarly, a cross-border healthcare cooperation agreement can create such associations locally.

(c) Difficulties in practical application

From the technical viewpoint of the application of case-law by the competent institutions this time, the two routes clearly have different consequences.

As far as the institution to which the patient is affiliated is concerned, the first, so-called regulatory route has a big practical advantage because this institution does not need to concern itself with the conditions for accessing care, nor the conditions for covering the healthcare benefits or costs incurred, as it is the institution of the place of stay that deals with them through a sort of provision of services that it carries out on behalf of the first institution, and it does so by applying its own regulations within its own national context. Conversely, as we know, the first institution will have to reimburse the second in full and will therefore have no control over the final cost.

With the second, so-called case-law route, the competent institution does, on the other hand, have control over this cost as it operates within the limit of the cost that it would incur at home for the same care, but it has to battle significant technical difficulties to apply its regulations and norms in a foreign environment operating with regulations, norms and practices that are completely different to those in force on its own national territory, whether it is a matter of healthcare practitioners, suppliers or establishments. In addition, depending on the state in which the care is received, a competent institution is, in fact, with this route dealing with 26 diverse and differing worlds.

At the national level, there is necessarily consistency, complementarity, even similarity of definitions between the public health sphere and the social security sphere, which is obviously not the case from one EU Member State to another given the lack of harmonisation generally in these social security and health areas. Moreover, the difficulties will initially be issues of identifying drugs and

products that are described under trade names different to those current in the competent state, medical practices and procedures that may be different or grouped differently for making up a single procedure or treatment (from an administrative point of view, will that surgical treatment of an organ lesion, for example, involve the same number of technical and human procedures and interventions from one state to another?). Differences in the basket of care available, current or recommended medical practices for treating the same complaint, the same lesion, as well as administrative practices, will be added.

For example, how can the national reference amount for reimbursement easily be determined if it is expressed in the competent state by prices for hospital costs set by pathology, when the insured person submits receipted invoices issued by a hospital in another Member State where prices are set in terms of a daily price, if the pathology treated and the treatment given are not shown on the invoices? Medical confidentiality and the protection of personal data will, moreover, amount to such a case as much as obstacles to the clarification sought by the competent institution.

In other words, close cooperation between the institutions in the place of stay and the competent institutions is necessary for this second route to be effective, a need for cooperation which reaches its highest point when it involves determining a potential *Vanbraekel* supplement, which we shall look at below<sup>(967)</sup>, since, given such an assumption, the competent institution must be able to find out within a reasonable time the cost of the benefits in kind provided by the state that delivers the healthcare and which it will subsequently be asked to reimburse within the context of the regulation's financial provisions and procedures.

<sup>(967)</sup> The Administrative Commission specifically tackled these difficulties, via the procedures for applying Article 26, para. 5, of the implementing regulation of Regulation (EC) No 883/2004, during a working party meeting on 13 November 2008 (see introductory note CA.SS.TM. 420/08 of 23 October 2008).

At the current stage of development of this route, very liberal in approach in a contrasting environment unregulated at Community level, the paradox lies in the need for more cooperation, harmonisation, equivalence and standardisation for reconciling the rights of patients and the balance of national schemes, as well as their capacity to regulate their healthcare systems.

## 2. Common points or convergence

Although these two access routes to cross-border healthcare adopted are so different in design and orientation, the image of two parallel roads is hardly appropriate to them and it is possible to identify points where they meet and overlay one another.

### (a) Prior authorisation and tariffs

The first point of contact is the prior authorisation that is able to be granted in certain situations. Admittedly, the scopes are different, wider in the regulation where it concerns planned care as a whole; regardless of its level of specialisation and regardless of its cost, it is restricted only to hospital care in case-law. Similarly, the situations in which such authorisation may not be refused, when the treatment envisaged appears on the list of treatments covered by the national scheme, apparently differ in case-law, which refers to the fact that a treatment which is the same or equally effective for the patient may not be obtained without undue delay, taking into account the patient's medical condition, in the state in which he is residing, from the regulation, which refers to the fact that this treatment may not, taking into account his current state of health and the probable course of the disease, be provided to the patient within the time normally necessary to obtain this treatment in the Member State in which he resides.

But the CJ, as from the *Inizan* judgment, afforded the latter timescale an identical interpretation as that it had clarified for the words 'without undue delay' appearing in the text of the former judgment

and it will conclude in its judgment to the *Watts* case, in which it had again been questioned about the meaning to be given to these expressions, that 'there is no reason which seriously justifies different interpretations depending on whether the context is Article 22 of Regulation No 1408/71 or Article 49 EC, since in both cases the question is (...) whether the hospital treatment required by the patient's medical condition can be provided on the territory of his Member State of residence within an acceptable time which ensures its usefulness and efficacy' (para. 60). As stated above, Regulation (EC) No 883/2004 did away with any risk of duality in the matter by reprising the same terms as case-law.

With regard to authorisation as such, the CJ in the *Vanbraekel* judgment stated both that authorisation given in respect of national law (therefore also in respect of a national law having transposed the case-law directly or via the draft directive) must be considered as constituting authorisation in respect of the regulation and, albeit implicitly, that authorisation given in respect of the regulation was tantamount to authorisation in respect of case-law (for care coming within their two respective scopes, obviously), since application of the regulation did not then prevent any supplement being agreed in respect of case-law, especially in a case in which the latter accepted a system of prior authorisation.

If we add that in both cases, regulation or case-law, the prior authorisation system must offer adequate procedural guarantees, we can conclude that it will be the unity of the prior authorisation system as soon as a state decides to create one. Authorisation granted will be able to be used by the person concerned according to one or other route depending on his choice (on his interest) and the objective possibilities of using one or the other. The system only becomes a dual one again (and in fact there is then only a need for prior authorisation in respect of one of the two routes) for non-hospital care.

The second point of contact are the tariffs employed by the institutions for reimbursing the costs of

healthcare received by their insured members in another Member State.

To the remark made by some states with a system of benefits in kind or a national health service that their internal regulations did not contain any financial mechanisms for directly reimbursing insured persons for their costs, nor any tariffs for determining the amounts of such reimbursements, the CJ put forward the fact that, whilst Community law does not infringe the competency of Member States to design their own social security system, the requirements to implement the fundamental freedoms guaranteed by the Treaty inevitably obliged them to make adjustments to their system.

Thus this is, for example, the case of the provisions adopted to ensure the application of Articles 36 and 63 of Regulation (EEC) No 1408/71 or Article 34 of Regulation (EEC) No 574/72. The CJ added that there is nothing precluding the competent Member State which has no reimbursement system from setting the reimbursement amounts (tariffs) able to be claimed by patients who have received healthcare in another Member State, so long as those amounts are based on objective, non-discriminatory and transparent criteria (*Müller-Fauré and van Riet*, op. cit., para. 107), but it also noted that the tariffs and mechanisms put in place to determine the amount billed to the competent state for healthcare received by its insured in the state concerned can serve as relevant reference instruments for determining, in that state, the reimbursement amounts to be granted to its own patients who have received healthcare in another Member State.

In any event, tariffs for the application of case-law which would, like healthcare, be different according to whether it involves working out billing for another Member State or applying Article 34 of Regulation (EEC) No 574/72, or reimbursing cross-border healthcare according to case-law, would constitute discriminatory tariffs, unless it could be proved that the billing of the cost of benefits to other states

may lawfully include amounts not directly billable to private individuals.

#### (b) Vanbraekel supplement

From the outset, the CJ had to clarify that Article 22 of Regulation (EEC) No 1408/71 was not concerned with this case-law, its objective not being to regulate and in no way prevent reimbursement by the Member States according to their tariffs for costs incurred at the time of healthcare provided in another Member State, even without prior authorisation. In examining Article 22 of the regulation more deeply, the CJ will conclude in the *Inizan* judgment already referred to that its provisions even help to facilitate the free movement of patients and the provision of cross-border medical services, thus that they do not include any component such as to affect its validity.

In addition, the applicability of Article 22 to healthcare does not preclude such healthcare from also being able to fall within the scope of the provisions of the Treaty on the free movement of goods or services, and therefore the person concerned from, at the same time, with regard to these latter provisions, being entitled to access healthcare in another Member State under different reimbursement conditions than those stipulated in the said article.

That being the case, 'not intended to regulate any reimbursement at the tariffs in force in the Member State of registration, Article 22 of Regulation No 1408/71 does not have the effect of preventing or prescribing payment by that state of additional reimbursement covering the difference between the system of cover laid down by the legislation of that state and the system applied by the Member State of treatment, where the former is more advantageous than the latter and such reimbursement is provided for by the legislation of the Member State of registration.

Article 59 of the EC Treaty is to be interpreted as meaning that, if the reimbursement of costs



incurred on hospital services provided in a Member State of stay, calculated under the rules in force in that state, is less than the amount which application of the legislation in force in the Member State of registration would afford to a person receiving hospital treatment in that state, additional reimbursement covering that difference must be granted to the insured person by the competent institution' (*Vanbraekel*, op. cit., para. 53).

Applicable also to non-hospital care costs (without prior authorisation), this possibility of a supplement perfectly illustrates that the parallel application of both routes is reflected here by overlapping accompanied by an implicit, but clear, rule against the non-accumulation of potential reimbursements.

(c) Article 34 of Regulation (EEC) No 574/72

The enjoyment of benefits in kind in the event of care during a stay being subject to the submission of the request for cover/reimbursement in the state of stay before the person concerned returns to his usual state of residence, Article 34 of Regulation (EEC) No 574/72, in its initial version, creates a catch-up procedure intended to enable the person concerned, when he has not fulfilled these formalities on the spot, to contact the institution to which he is affiliated to ask it to reimburse the costs incurred according to the tariffs which would have been applied by the state of stay. The latter then needs to question the institution of the place of stay to find out what reimbursement it would have granted if it had been approached by the person concerned.

The entry of Member States with health services making this procedure inapplicable and, in addition, time-limits imposed by some institutions for forwarding the information requested on the reimbursements they would have granted, have led to this article being amended, Regulation (EEC) No 1249/92 supplementing it in order to introduce into it a simplified derogatory procedure enabling the competent institutions with

reimbursement tariffs in their regulations to reimburse their insured according to these tariffs, provided again that the person concerned agrees that this is how it is and that the amount of the costs submitted for reimbursement shall not exceed an amount set by the Administrative Commission. Furthermore, it was added that the agreement of the person concerned is not necessary when the regulations of the state of stay do not provide for reimbursement tariffs.

More recently, through Regulation (EC) No 1386/2001, this second procedure has itself, in fact, been subdivided into two sub-procedures offered to the competent institutions with reimbursement tariffs in their regulations to reimburse their insured according to these tariffs: with the agreement of the person concerned and subject to the total costs not reaching the aforementioned threshold if the state of stay has reimbursement tariffs, without the agreement of the person concerned and without the intervention of the cost threshold if the state of stay does not have reimbursement tariffs.

It is worth noting that these provisions, certainly not applicable in the case of planned care and variable application procedures depending on the states concerned, but amended several times in the direction of a wider application, in practice amount to the same for the insured person as if he were offered the provisions of the second route. This is another type of convergence, unlike the tools, but this time similar to the results in situations treated in the same way.

As stated earlier in point A.1(b), the implementing regulation of Regulation (EC) No 883/2004 not only adopts these provisions, but extends them to planned care and does away with the subsidiary or catch-up procedure nature of them by integrating them directly into the articles describing the methods for covering healthcare during a stay and planned care, like the methods of cover offered straight away to insured persons.

## II. For approximation between the two routes

### A. The reasons for such an approach

#### 1. Two already very intermingled routes

Although very different in origin and nature, it is therefore necessary to kill off the idea of two quite parallel routes, all of whose components are at odds. On the contrary, we have just pointed out some common components: the prior authorisation system, even if its scope of cover is different from one route to the other, and the reimbursement or financial coverage tariffs of the systems. Better still, both routes can sometimes be followed together in the sense of applying the regulations to start with, then by way of supplementing case-law in order for a *Vanbraekel* supplement to be obtained (moreover, there would seem to be nothing precluding a person who has received prior authorisation and contacted the institution to which he is affiliated in order to obtain reimbursement of his costs according to that institution's tariffs from then obtaining a supplement from the same institution enabling him to obtain the higher amount that would have been reimbursed by the institution of the place of stay if he had approached that institution).

Finally, Article 34 of Regulation (EEC) No 574/72 shows us that the regulatory route may also lead to a situation in which healthcare costs are paid according to the tariffs of the institution of affiliation, as in case-law, a perspective extended by the implementing regulation of Regulation (EC) No 883/2004 to all healthcare costs, whether they relate to care during a stay or planned care.

Such intermingling of the two routes in these circumstances is an initial reason for wishing to bring them closer and coordinate them, especially since they share common tools, prior authorisation and reimbursement tariffs, which could not change or be amended for one route without having consequences for the other. The concern for consistency

again leads us to coordinate the two approaches more effectively.

#### 2. Pressing needs for legal security and simplification

##### (a) The current situation as a source of legal uncertainty

From the point of view of the patient, the insured person, the current situation is rather unclear and variable from one Member State to another, even from one institution to another, depending on the extent to which case-law is applied, the mechanisms are understood and, finally, depending on agreed information initiatives.

The proposed directive, in setting the legal framework created by case-law and making sure that it is transposed into all national laws, as well as understandably insisting on the need for full, systematic information initiatives, should in part remedy this observation.

But the very existence of these two routes for covering costs is a factor that leads to uncertainty because the advantages and disadvantages of both with regard to the specific situation facing the person concerned are not immediately made known to him, are anyway difficult to translate into *ex ante* figures and depend on many factors (requirement or otherwise for prior authorisation, presence or otherwise of the product or treatment in the healthcare basket of the local system and/or in the healthcare basket of the system of affiliation, etc.). Added to this, as far as the second route is concerned, is the impossibility of predicting in advance what tariffs will be charged by the local professionals, providers and establishments.

##### (b) Remarkable complexity

Most of the components are variable from one route to the other: the scope of prior authorisation (even though the authorisation system is unique),

the scope of cover of both systems in the place of stay and affiliation (drugs covered by one and not the other, for example), the obligations in terms of range of access to healthcare (different conditions laid down by each of the two systems for access to non-emergency hospital care, for example), the administrative formalities to which the coverage or reimbursement of costs are subject.

Such complexity is not just reserved to patients, but clearly also affects the institutions, which see their management costs rise, the peak currently being reached in the event of calculating a possible *Vanbraekel* supplement, not so much due to the fact that its principle is fairly simple and able to be applied in other sectors (family allowances, for example) as due to the difficulty in gathering, identifying and costing the components by which it is calculated.

It also derives from the partial nature and often slow arrival of the information obtained by the interested parties, and from the occasional overlapping of the mechanisms, whether it is a case, of course, of the *Vanbraekel* supplement mentioned above or of the options offered by Article 34 of Regulation (EEC) No 574/72 and, before long, by Articles 25 and 26 of the new implementation regulation: how does one explain simply and clearly to insured persons that both routes may sometimes in this way lead to the same financial result? The likely extension of case-law to care during a stay through the judgment that will be given in the *Commission v Spain* case already referred to will not help, from this viewpoint, to modify this observation.

### (c) A lack of fairness

As stated earlier, the second route, currently neither standardised nor controlled, means the patient has to pay costs in advance and bear the unrestricted tariffs that may be higher or very much higher than the tariffs set or the costs borne by the social security system of the state in which the care is given. It also suffers from insufficient, not to say sometimes

a lack of, information on the procedures by which it is implemented, its consequences and the comparative advantages and disadvantages of the two routes, on the one hand, and the cross-border supply of healthcare, on the other.

There is, as a result, in this second route, a clear source of flagrant injustice between the different categories of patients/insured persons according to whether or not they have the financial capacity to bear the amount of these costs whilst waiting for them to be reimbursed, as well as the ancillary costs (for transport, accommodation, etc.), which will, of course, be even greater if long-distance travel or several journeys are involved depending on how phases of treatment are organised and staggered over a longer period.

The injustice also comes from the greater or lesser ability of the interested parties to obtain the relevant information, to be given advice, for example, on how to avoid queuing when resorting to cross-border healthcare, or even to find out the reimbursement or coverage tariffs for the two systems, that of the place where the care is received and that of the place of affiliation.

The tendency has also been noticed of a potential facility thus afforded to the most well-off and best-informed patients to exercise individual choices beyond simple medical need, leading to the risk of healthcare institutions or healthcare administration methods having to bear what one might then describe as comfort or greater comfort, in spite of the possibility offered of setting up a prior authorisation system for hospital and similar care.

### **3. A 'social security' reorientation of the second route**

Approximation of both routes also affords the opportunity of partially remedying the disadvantages already highlighted of the commercial approach to accessing healthcare in the second route. In keeping with the process of coordinating

the laws of the Member States to facilitate the free movement of persons and help improve their living standard<sup>(968)</sup>, whilst ensuring a high level of health protection<sup>(969)</sup>, it is unthinkable that one of the routes offered to patients should lead to their status as insured persons being set aside during their stay in the state in which the care is to be received, both when accessing that care and when settling the associated costs.

This access and settlement may be subject to conditions and observance of a range of healthcare as soon as it is shown to be justified and proportionate to the objective to be achieved, but not to the loss of status as an insured person. The information that the local system's insured have or should have must be made available to them, whilst the professionals, providers and establishments required to bill them for healthcare products or services must do so at the same tariff, at the same cost, as that charged to the insured of the local system or borne by that system.

Private, unrestricted tariffs are not justified simply because the coverage or reimbursement of these costs is, in short, effected directly by the system of affiliation rather than the local system acting on behalf of the former with regard to the objectives stated above and assigned to the coordination of laws. It is a case of finding, here, a balance between free movement of goods and services and free movement of persons (travel by the insured).

This reorientation must also, to a lesser extent since it is necessary to respect — save for voluntary contractual undertaking on their part — the independence of these very healthcare professionals, providers and establishments with regard to the system of a Member State other than that of their establishment, allow the systems of the states

<sup>(968)</sup> See preamble (1) to Regulation (EC) No 883/2004: '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.'

<sup>(969)</sup> See Article 152(1) EC, first sentence: 'A high level of human health protection is (...) ensured in the definition and implementation of all Community policies and actions.'

of affiliation to maintain a number of elements of control or implementation of regulatory instruments when their insured take this second route: the assurance that the latter will not submit higher invoices for reimbursement as a result of unrestricted tariffs, the guarantee of conserving for this route the cooperation of local institutions on which they can count for the first route: information, control of the services provided by the professionals and establishments, patient medical check-ups, etc.

## **B. What kind of support, what kind of mechanisms?**

### **1. The instrument of this coordination**

#### **(a) Directive or regulation**

The issue of knowing what the most appropriate legal medium ought to be — a directive or a regulation, in actual fact Regulation (EC) No 883/2004 — for transposing CJ case-law on access to cross-border healthcare now no longer arises as it has been resolved in favour of a directive, effectively more appropriate for modifying laws to make them compatible with the rules of the internal market, guaranteeing universal application in conformity with this case-law whilst enabling each state, in order to do this, to take the measures appropriate to the nature of its system's operating method.

It now remains to determine the appropriate instrument for coordinating the two routes for accessing cross-border healthcare and as much as the directive would, this time, be unsuitable for establishing the components of coordination that need to remain at Community level and must not be transposed into national laws, Regulation (EC) No 883/2004 is completely suited to its role as the instrument for coordinating national laws.

In fact, the result of the direct transposition of case-law or its indirect transposition via the directive is to give the national laws a sort of internal module

enabling them to be applied to healthcare received in another Member State (second route), without prejudice to their parallel application, without this module, but with the aid of the external module contained in the regulation (first route). The regulation will coordinate these two routes, i.e. the national laws operating sometimes without their internal *Decker-Kohll* module, sometimes with this module, by analogy with what it has long done in respect of pensions with the notions of a national or autonomous pension (sort of analogous second route) and a proportionate or pro-rated pension (pure construction by the regulation, creating a sort of analogous first route).

The grouping of the coordination rules for national laws within a single text also makes it possible to make both routes and their relationships and interactions safe, and to thus facilitate access by insured persons to a single regulation and simplifications.

It must also be pointed out that beyond the technical challenge of achieving this approximation, this new coordination, it will also represent for Regulation (EC) No 883/2004 the political challenge of adapting in order to meet the needs and achieve the objectives referred to earlier<sup>(970)</sup>.

#### (b) Legal basis

Whilst the proposal for a directive is based on Article 95 EC which makes it possible to adopt 'the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market', but excluding 'the provisions relating to the free movement of persons', Regulation (EC) No 883/2004 is, for its part, mainly based on Article 42 EC making it possible to adopt, 'such measures in the field of social security as are necessary to provide freedom of movement for workers' and

<sup>(970)</sup> J. C. Fillon, 'Trois défis pour la coordination des systèmes de sécurité sociale' [Three challenges for coordinating social security systems], *Liaisons Sociales Europe*, 2008, No 198, 5–8.

by way of supplement to Article 308 EC, which introduces the possibility of taking 'the appropriate measures' if action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers.'

It is immediately noticeable that, since the legal basis of the proposal for a directive does not allow intervention in the area of the free movement of persons, it also could not, for that reason, bring together all the components conducive to coordinating the two routes.

Conversely, the regulation is able, on the basis of Article 42 EC, to effect this wider coordination due to the objectives of the said article, the fact that such coordination only relates to the aspect covered by the cross-border healthcare social security systems and, finally, the fact that it does not have to integrate the *Decker-Kohll* module referred to above into national laws, since this action will have been implemented by the directive.

In addition, the contribution of Article 308 EC in these circumstances is twofold. It enables coordination to be extended beyond workers alone and thus to reach patients as a whole coming under a social security system, this whole constituting the personal scope of case-law and the directive, but, by making reference to any action apparently necessary to implement, within the operation of the internal market, one of the Community's objectives, it guarantees that any component of this wider coordination which may only doubtfully fall within the province of Article 42 EC would, in case of need, have its legal basis in this complementary article.

#### (c) Contribution of Regulation (EC) No 883/2004

In its proposal for a directive, the Commission rightfully emphasises the patient information initiatives that Member States must carry out and stipulates that states must set up a national contact point

network to provide and publicise the necessary information and help patients to assert and protect their rights.

It must be emphasised that in designating the regulation as a medium for the measures to coordinate the two routes, thus in introducing the second route into the scope of Regulation (EC) No 883/2004 and its implementing regulation, the latter is afforded the benefit of the full logistics of these texts:

- a network of competent institutions, in the place of stay or residence, designated institutions and liaison bodies experienced in managing people's rights and their information on those rights;
- a beefed-up set of obligations and rules on cooperation, and data and information exchange between institutions and between institutions and beneficiaries;
- a network under construction for electronic data exchange between these social security institutions, including with the healthcare professionals and establishments acting on behalf on the local health insurance system: the EESSI ('Electronic exchange of social security information') network;
- a multilingual information portal on social security rights and obligations and online access to the services of the national institutions: the EULisses ('EU links and information on social security') portal, up and running for the pensions sector, under construction for extending this to other sectors (healthcare, etc.);
- a document supporting rights of access to healthcare during a stay: the European health insurance card (EHIC), currently a paper document, but whose evolution into an electronic transaction card (eEHIC), able to be used for planned care, is under consideration;
- finally, with the Administrative Commission, a committee for the monitoring, interpretation, resolution of differences and changes in the rules for covering healthcare with regard to the regulation, for providing information

to insured persons and helping to make it easier for them to exercise their rights, an ad hoc committee whose competencies on social security will naturally be able to be extended to the scope of the second route coordinated in the regulation.

## 2. Guidelines for approximation

### (a) Proposed objectives

As mentioned above, the need for legal certainty is an argument in favour of approximating and coordinating the two routes, which supposes that the whole mechanism is present in a single text, the coordinating regulation, and is explicit. The mechanism ought also to be both readable and thus clear in the options offered to the interested parties, on the one hand, and, on the other, avoid provisions which duplicate or overlap one another.

This last comment also ties in with the requirement for simplification, which should also lead to a mechanism being adopted, one certainly presenting options, but unique in its presentation and logic. In particular, it may be based on the uniqueness of the prior authorisation system (authorisation criteria, procedural guarantees and cases in which authorisation may not be refused) and on the uniqueness of the tariffs used (*ex post* reimbursements as the competent state, notification of the tariffs as the state of stay, exploitation of the amounts due submitted to the state of affiliation as the state of stay).

Simplification also supposes that the insured person can easily, at important stages in the procedure, find out whether options are still open to him and, if so, what their practical and financial consequences might be. Similarly, preference must be given to direct systems and the use by a covering institution of its own tariffs and not those of another institution. This also leads to the search to avoid procedures that award *Vanbraekel* supplements, without, for all that, eating away at the rights of insured



persons, by endeavouring to ensure that the mechanism adopted results in the interested parties being offered the fullest cover in the maximum number of cases straight away, the supplement no longer operating except in a very small potential number of cases or for very specific situations.

'Social security' reorientation of the second route must also result in the insured being guaranteed that, regardless of his coverage option — local or in the state of affiliation — the costs he has to pay to the healthcare professionals, providers and establishments are billed to him at the social security tariff or cost and not according to unrestricted tariffs. This leads to insured persons being issued with a unique document recognising their status and rights, able to be used regardless of the coverage option exercised, in order for the social security tariffs or costs to be applied, but whose method of use by the healthcare professional, provider or establishment may vary according to the coverage option chosen.

The European health insurance card, after adaptation if necessary, clearly seems like the proper medium for enabling this wider connection between patients and healthcare providers. The electronic version of this card currently under consideration will need to take this extension in its scope of use into account.

#### (b) Constraints to be observed

It is quite clear that, since case-law on the second route is based directly on the articles in the EC Treaty concerning the internal market, it may not be set aside by a regulation. As a result, the restriction imposed on the overall coordinating mechanism to be set up is that the insured patient is able, through the procedures and options offered by this mechanism, to find the components that currently afford him case-law in the event of opting for the second route, i.e. to put it plainly, the possibility of obtaining the reimbursement of his healthcare costs in another Member State under the conditions and

according to the tariffs of the system in the state of affiliation and without prior authorisation for care other than hospital care (and specialist care within the meaning of the proposal for the directive, if that is confirmed by case-law with the expected judgment in the *Commission v France* case, C-512/08, op. cit.). Were it otherwise, the coordinating regulation could result in patients losing the rights guaranteed to them by their national law pursuant to Articles 28 and 49 EC.

Conversely, the first route, that based on recourse to the system of the state in which the care is received, is not intended to prevent direct application of the national law (second route) and also grants insured persons rights that they would not possess without the intervention of the regulation. This thus constitutes a means granted by the legislator on the basis of Article 42 EC with a view to ensuring the free movement of workers, which may be accompanied by conditions or restrictions (see *Inizan* judgment, op. cit., paras 19 to 23), or even dispensed with in favour of other means or mechanisms.

Nevertheless, both for reasons of non-regression and the guaranteeing of this means, it appears necessary to allow as a second constraint that neither should the patient lose the components, the facilities, afforded to him by this first route: application of a law more consistent in terms of quality (conditions of cover and formalities) and quantity (coverage tariffs or costs) with the provision of local healthcare and the tariffs charged by professionals and establishment, easy access to quality healthcare, restriction or removal of cases in which advance payment of costs is required, etc.

It would, moreover, be absurd not to take as a premise in this approximation exercise the retention of the components making up this first route, at the risk otherwise of encountering in the coordinating regulation nothing more in this area than a copy of the directive under consideration, therefore of carrying out a completely pointless, fruitless exercise.

### 3. Some components of the mechanism

Thus, between these objectives and constraints, we glimpse the outlines of a unique coordinating mechanism, yet one that is polymorphic, with multiple choices or with options, simultaneously allowing for the uniqueness of the mechanism, the clarity and simplicity of the routes for accessing covered healthcare and options between these routes or along these routes, making it possible to retain the essential components of both routes in favour of the patient, the insured person, and at any rate guaranteeing him a 'social security' approach.

It is not a matter here of describing a hypothetical mechanism, but of envisaging one in order to arrive at a few constituent components.

#### (a) Prior authorisation

Whilst it is accepted that the prior authorisation system must be unique, the issue remains as to alignment or non-alignment of the scopes of cover according to which one finds oneself in a situation in which the system of the competent state pays the costs directly or in a situation in which the system of the state in which the care was received pays the costs on behalf of the first state.

The readability of the mechanism and its simplicity lead us to envisage, with regard to both situations, a single range of healthcare dependent on prior authorisation. The regulation should therefore set a definition of this healthcare that would either be the one in the directive, or a more restrictive definition, thus compatible with the constraints resulting from cover under the second route.

However, such uniqueness of range is not an obligation and we may entirely envisage for the first situation a range that is equal to or less than that of the directive and the second route, and a wider range for the second situation, for example for financial reasons. Thus the overall range of healthcare would be divided up into three sub-sets, one

for which prior authorisation would be necessary in both situations, one for which authorisation would be necessary only in the second situation and, finally, one for which no authorisation is necessary for either situation. It should be noted that the latter may be reduced to nothing if, as is currently the case for planned care, authorisation in the second situation is always necessary.

Such divisions would enable institutions, in terms of the category of care under consideration, to cover their costs according to their own tariffs, but refuse to cover them (by refusing authorisation) according to the tariffs of the institutions of the place in which it was received when the latter are much higher.

Rather, for all that, we might propose envisaging a uniqueness of range simultaneously for reasons of readability and simplicity (no multiple or multi-faceted lists), but also to ensure that patients are able to choose the most appropriate cover, the one most suited to the level of costs incurred, in other words the level of the tariffs and costs billed to them by healthcare professionals and establishments.

The mechanism will, naturally, need to preserve the rules common to both routes according to which the authorisation requested may not be refused under specific circumstances in which the patient's state of health and its foreseeable course are an issue.

#### (b) Coverage tariffs

The mechanism must take into account the fact that, after transposition of the directive, all national laws must include tariffs for reimbursement, within the context of the second route, of costs for care received in the other Member States, tariffs which, as mentioned earlier, will or must be the same as those applied in the context of the first route.

The implementing regulation of Regulation (EC) No 883/2004 has already integrated this new situation and does not explicitly make the reimbursement by

the competent institution to the insured person of costs incurred in another Member State dependent on the existence of reimbursement tariffs in the regulations applied by that institution, their existence being taken as established.

In order to meet the aforementioned objectives, the mechanism should also stipulate that health-care professionals, providers and establishments required to invoice products or care to patients proving their status as insured persons in another Member State, but not applying for this health-care to be covered by the local system, must make out that billing on the basis of the tariffs or costs enforceable on the insured persons of that system or borne by that system, unless, of course, they are not registered or associated one way or another with the said local system.

#### (c) Choice competent law — local law

The constraints mentioned earlier make it compulsory to retain this major option in all situations, as already provided for by Articles 25 (care during a stay) and 26 (planned care) of the implementing regulation of Regulation (EC) No 883/2004.

Conversely, the simplification objectives — for insured persons as well as for institutions — lead to attempts to avoid routinely offering this option through a choice to be exercised by the person concerned, either before receiving healthcare or afterwards. In some situations, for example when the amount of the costs is low or when the supposed interest of the patient is clear (important difference and always in the same sense between the tariffs or costs borne or reimbursed), it is possible to envisage a predetermined option being offered by default, nevertheless allowing for the possibility of the person concerned choosing the other option.

A difference in range, as mentioned in point (a) above, could also lead to predetermination of choice for healthcare that would be covered directly by the competent institution at its tariffs without

prior authorisation and that would be covered by the institution of the place of stay at its tariffs, on behalf of the former institution, with prior authorisation. The fact for the insured person of not having requested prior authorisation could be considered as an option exercised in favour of reimbursement at the tariffs of the competent institution.

#### (d) Separation care during a temporary stay — planned care

This duality, unless any prior authorisation system is dispensed with, is worth keeping precisely to guarantee access without prior authorisation to healthcare during a stay, as is already the case in Regulation (EEC) No 1408/71 and Regulation (EC) No 883/2004.

If the CJ in the *Commission v Spain* case in progress (C-211/08) already referred to should state that the second route applies all the more to this care, it will also be possible to dispense with any prior authorisation for it in cases of reimbursement according to the tariffs of the competent state.

In fact, it is not possible to see how prior authorisation could be justified in such cases, even for major, cost-intensive treatment, even if the CJ did, in this context, have to revive the notion of emergency care, a tighter notion than that of care during a stay. In this hypothetical circumstance, which would not help to simplify the mechanism we are looking for, it would, of course, be possible to envisage setting up prior authorisation for this route in the event of hospital or specialist care to be defined that was not, for the person concerned and in the situation under study, of an emergency-type nature, despite coming under so-called care during a stay.

But in any event, simplification, legal certainty and the guarantee of access to local healthcare are arguments in favour of the lack of any prior authorisation for all care during a stay, regardless of the option for reimbursing the person concerned or covering the associated costs.

(e) A simple procedure for minor expenses?

The interest of users makes it possible to envisage a simplified procedure for minor expenses, regardless of the choices made in other respects in the mechanism as a whole, based simply on submitting the EHIC, direct settlement by the patient of these minor expenses and their — speedy and therefore almost automatic — reimbursement by the competent institution according to its own tariffs.

This type of cost can be determined either by reference to categories of healthcare or products (simple consultation of a practitioner in his surgery, standard drugs, etc.), or by reference to a maximum amount of costs incurred during the stay, or a combination of both criteria.

Such a procedure would be very helpful, beyond strict needs, for chronic diseases, for example, or long-term pathological conditions (high blood pressure and/or diabetes stabilised by medical treatment, for example) requiring frequent repeat prescriptions at a relatively low unit cost. But it supposes, for reasons of efficiency and so that the patient does not regret going through the local system (an option which ought, even in this hypothetical case, to remain open?), that the competent system ensures a high reimbursement rate for these costs or that the patient be covered by supplementary private insurance that would operate in these cases.

It should be noted, in terms of simplifying things for the institutions and restricting operating costs, that by its nature such a procedure does not necessitate subsequent recourse to an inter-system reimbursement in respect of Article 35 of Regulation (EC) No 883/2004.

(f) Containing the Vanbraekel supplement

There is no point here of returning to the difficulties of implementing such a supplement, given the differences that exist between national systems right

down to the most minor details and the lack of joint tools (such as, to start with, directories of names of professionals, establishments or products). Neither is it a question of returning to this entitlement of patients to obtain under any circumstance (the need for prior authorisation apart) the amount of reimbursement or cover that the competent state would grant if the care were received on its territory.

The route that might be explored, since this supplement is hard to manage, would be to act in such a way that the patient is encouraged to request the benefit as seldom as possible:

- whether by ensuring that the highest amount of cover can automatically be awarded to the patient (which supposes that the competent institution is capable of determining in advance the most profitable route for the insured person, and to do this systematically in a given Member-State-to-Member-State relationship or more circumstantially, and to inform the latter of it);
- or by creating channels to avoid recourse to this supplement, which would, for example, be the case if a simple procedure such as that envisaged in (e) above were set up.

We might equally wonder about the legal feasibility of setting a cost threshold below which, given the little advantage to the patient and the significant operating costs to be taken on, the request for a supplement might not be considered.

(g) Transport costs

The CJ, through a regrettable interpretation in our opinion, but one assisted by the use of a double meaning of the term 'benefits in kind' in Article 22 of Regulation (EEC) No 1408/71, considered it needed to state in the *Watts* judgment, op. cit., then in the *Acereda Herrera* judgment (C-466/04):

'As is confirmed by the second subparagraph of Article 22(2) of Regulation No 1408/71, the sole purpose

of Article 22(1)(c)(i) of that regulation is to confer on patients covered by the legislation of one Member State and granted authorisation by the competent institution the right to have access to “treatment” in another Member State on conditions for reimbursement as favourable as those enjoyed by patients covered by the legislation of that other state.

The obligation imposed on the competent institution by Articles 22 and 36 of Regulation No 1408/71 therefore relates exclusively to the expenditure connected with the healthcare received by the patient in the host Member State, namely, in the case of hospital treatment, the cost of medical services strictly defined and the inextricably linked costs relating to the patient’s stay in the hospital for the purposes of his treatment.’

As we know, it immediately added that [since its purpose] ‘is thus not to settle the question of ancillary costs, such as the cost of travel and any accommodation other than in the hospital itself, incurred by a patient authorised by the competent institution to go to another Member State to receive there treatment appropriate to his state of health, Article 22 of Regulation No 1408/71 does not make provision for, but also does not prohibit, the reimbursement of such costs’, to conclude that Article 49 EC does not oblige the competent state to cover the transport costs, amongst other ancillary costs, claimed by a patient authorised to go to another Member State to get hospital care there or who has met with a refusal to grant authorisation which is subsequently found to be unjustified, that nevertheless, the laws of the competent Member State impose on the national system a corresponding obligation to cover costs as far as the treatment provided in a local establishment falling within the province of that system is concerned.

This interpretation, with regard to benefits in kind pursuant to Article 22 of Regulation (EEC) No 1408/71 or Article 19 of Regulation (EC) No 883/2004, will be set aside with regard to the latter thanks to the addition in its first article, through

the regulation in the process of final adoption amending Regulation (EC) No 883/2004 and determining the contents of its annexes, of a definition with this objective in view of benefits in kind as being ‘benefits in kind provided for under the legislation of a Member State which are intended to supply, make available, pay directly or reimburse the cost of medical care and products and services ancillary to that care. This includes long-term care benefits in kind’.

But this addition, whilst it settles the matter of transport costs able to be covered by the institution of the place of stay on its territory, if its laws provide for this and if it intervenes, does not settle the matter of transport costs between the competent state and the state of stay.

In this regard, it may not seem adequate to refer to the content of opposing laws, as recommended by the CJ, particularly when travel is not according to the patient’s wishes, but takes place out of necessity because he is not able to receive without undue delay the care required by his state of health in the competent state. In such cases, regarding which prior authorisation, if there is prior authorisation, may not be refused, it would seem in keeping both with the principles of the free movement of persons and the fundamental right to access healthcare, and with the objective of fairness referred to above, to envisage an obligation on the competent state, regardless of the provisions of its laws, to cover the transport costs associated with the necessary travel by the patient, within the limits of the costs of transport by the cheapest route compatible with his condition.

#### (h) Procedure for direct payment by insurers

As pointed out several times above, the fact that the patient has to pay costs (settle his expenses) in advance before being able to benefit from reimbursement by the competent institution is one of the characteristic features of the second route. But it is also one of the sources of injustice that goes with

that route, since adopting it, where cost-intensive treatment is involved, is reserved to patients who have the financial means or are able to obtain the financial means to make this advance payment.

But in view of the objectives to be attained, we should consider that this state of affairs is not inevitable and that thought could be paid to remedying it.

By analogy with what the CJ has established for ancillary costs, including the transport costs considered in the previous point, it would not be inconceivable, where the laws of the competent state allow the principle on national territory of direct payment by insurers — in the sense of direct payment to the establishment, provider or professional, the creditor of the amount of the costs incurred by the insured person, the reimbursement amount which is granted to the person concerned or the amount of cover granted by the system for this healthcare — to extend this option to the territory of another Member State, where the competent state reimburses, according to its own rates, the cost of healthcare received there by one of its insured persons. Such an extension could then be

usefully restricted to hospital care or to care for an amount above a threshold to be set.

And, in the same way as for transport costs, beyond this, the possibility could be envisaged of creating an obligation on the competent state, regardless of the options offered by its laws on the matter, of directly paying the establishment, provider or professional concerned the reimbursement amount it grants to its insured when the latter goes to this other Member State out of necessity because he is unable to receive the treatment required by his condition without undue delay in the competent state. In such cases, let us remember, prior authorisation, if there is prior authorisation, may not be refused. There could be a twofold restriction on this obligation: firstly, in respect of the patient, that of finding himself in the situation described above, and, secondly, in respect of the costs, that they should relate to hospital care or be of an amount higher than a threshold to be set, in such a way that the operating costs generated by such a procedure are contained by reserving it solely to those cases in which the person concerned has no choice, on the one hand, and obliging him to make a considerable cash advance, on the other.



## OVERALL CONCLUDING REMARKS

Yves Jorens  
*Ghent University (Belgium)*

Mr. Yves Jorens (°1968, Antwerp, Belgium) is currently Professor of Social Security Law (National and International) and European Social Law, at the Faculty of Law of the Ghent University in Belgium. He was a Former Head of an Independent Junior Research Group for European and International Social Security Law at the Max-Planck-Institute for foreign and international social law, Munich, Germany. He wrote a doctoral thesis on the judicial position of non-EU-nationals in European Social security law. Since many years he is working on European social law and social policy issues with respect to accession and integration into the European Union, problems related to international employment, health policy and health care law. He has done a lot of research on and has a good knowledge and understanding of the national social security systems of the EU Member States.

He has a lot of experience of working in many Member States of the European Union, in particular the recent Accession Countries as well as connections with social security experts in many of these countries. He is also very active in Southern Africa and in China. He was expert and Team Leader in different Phare and Consensus programmes on European social law, as well as consultant for the Council of Europe. He is consultant for the European Union in different domains of European social security and European health care law and policy. Yves Jorens is Member and Scientific Mentor of the MISSOC-Secretariat (Mutual Information System on Social Protection in the EU). Currently he is also Project Director and Scientific Manager of the trESS-project (Training and Reporting on European Social Security) commissioned by the European Commission, Employment, Social Affairs and Equal Opportunities Directorate, dealing with the Social Security co-ordination regulations for migrant workers.



During the last two days, we have been celebrating 50 years of European coordination. This year, 50 years have passed since the initial instrument of coordination, Regulation No 3, entered into force.

It has already been mentioned that the free movement of persons is one of the most fundamental principles of the European Union. The principle that is closest to us all. If citizens want to make use of this freedom of movement, they must not lose rights in the field of social protection. This is still the basic objective of the regulation framework.

The importance of this objective can also be deduced from the fact that it was the third ever

adopted text in the EU and the first real, legal instrument, with due respect to Regulations Nos 1 and 2, which dealt respectively with the use of languages and the form of the *laisser passer* to be delivered to the Members of the European Parliament.

And there is another reason why we should celebrate. In this year of 50 years of regulation, a completely new, modernised, simplified framework, Regulation (EC) No 883/2004, has been adopted and will soon become reality.

But this entirely new form of coordination framework should not be considered as even a temporary culmination. That is also the reason why this

conference is in one or another way a brave task. We are celebrating 50 years, we are celebrating the adoption of a new instrument, and at a time when this new instrument is not even yet in force, we are already discussing forthcoming issues and perhaps new adaptations to this framework. But it remains essential that the coordination rules keep pace with the evolving legal and societal context in which they operate and that the process of modernisation and simplification be taken further.

But what can we learn from 50 years of history and, in addition, how can we already draw conclusions and look ahead?

I will only try to focus on some of the results of 50 years of history and point out some of the main challenges. For more details, please refer to the various written contributions.

No legislation is closer to the everyday needs of people than the regulation. The regulation is a translation and the expression of the desire to protect European citizens and to encourage their mobility. But perhaps no legislation is so complicated or in such constant need of interpretation as the regulations.

Simon Roberts has reminded us of the main reasons and principles behind EC coordination regulations, and Rob Cornelissen has looked back at the important achievements of 50 years of regulation. The exclusive application of national law could have harmful consequences for people moving from one Member State to another. In general, national social security legislation fails to take into account the specific situation of people who have worked or resided in another state. National legislations organise their social security schemes according to national objectives. The Community regulations aim to rectify the effects of this 'principle of territoriality' on migrant workers and the members of their families. This purpose has been achieved by numerous provisions in the regulations, which have been developed and

strengthened over the years, such as the exclusive and mandatory effect of the rules on conflicts of law, the aggregation of periods of insurance for entitlement to benefits, and the waiving of residence clauses and cross-border recognition of facts. Principles that are still valid although some of them are under pressure.

The social security systems of the Member States are facing all kinds of challenges. The starting point of coordination is to accept the national social security schemes as they are, with all their differences in benefits, procedures, organisation and funding. Therefore, changes in national systems also have a bearing on the coordination of social security forming the bridge between the various schemes. It is true that the existing coordination system has been able to deal with the introduction of a whole set of new benefits in the national legislation of the various Member States. But we should not forget that this flexibility has been mainly realised thanks to the case-law of the Court of Justice (CJ), and not because the legislator has adapted the regulations. Mr Cornelissen has given us some examples of this sometimes fascinating interaction between the CJ and the legislature.

Through different important cases, the CJ has indeed created progress in the field of these coordination regulations. The names of people have been recorded for eternity.

Sean Van Raepenbusch has shown us that CJ case-law on social security coordination is extremely rich and counts well over 500 preliminary rulings, making the coordination regulations arguably the most 'successful', or if you wish, the most contentious piece of Community legislation. These cases are the result of a dialogue between the national judges and the CJ.

The role of national judges cannot be overestimated. It is they who feed the CJ with references for preliminary rulings. So we are happy to have seen so many judges among the participants.

The CJ has indeed been in the driving seat when it comes to the development of the social security coordination acquired. For 40 years, it has consistently interpreted the regulations' provisions in a dynamic and constructive fashion. The CJ has clearly favoured a teleological interpretation, always taking into account the objectives of the regulations and their rationale — which ultimately is to foster the free movement of persons.

One of the difficulties with which the regulations are confronted is how to translate and to incorporate the interpretations and progress made by case-law into this regulation. This is an important but burdensome task, as it is a question of making rights accessible to European citizens. European legislation must in that respect not forget that precisely the free movement of person as interpreted by the CJ does not produce a wide variety of options; on the contrary, it produces limited room for manoeuvre to work out the coordination framework.

But we have also mentioned that the regulations should follow societal changes. One of these first challenges has been pointed out by Eberhard Eichenhofer.

The relative autonomy of decentralised entities that today play a growing role in social security does not mean that they are insular. Community law is addressed to the Member States; these states cannot evade the commitments imposed on them by Community law, by devolving their legislative or administrative powers to internal entities. Hence, regional systems of social security of the Member States are bound by the EC coordinating regulations and, therefore, the regional branches of social security systems of the Member States must respect all the provisions to be found in those regulations. The question as to the extent to which differences in treatment between internal and cross-border cases are authorised is not dealt with by EC law; it must be tackled in the framework of national law. According to this speaker, to the extent that reverse discrimination would run counter to national constitutional

law, less favourable treatment of purely internal cases in relation to intra-Community cases would be unlawful.

Another development at the heart of the regulations which requires our attention is the influence that social security is currently receiving from the much larger framework represented by competition law, the free movement of services, the free movement of goods, the free movement of persons, etc. The necessary conclusions should be drawn concerning the actual consequences that this engenders for the current coordination framework. Social security therefore suddenly finds itself once again at the centre of the political debate, the essential question of which is that of the role of social security in relation to the welfare state. The dangers are great. Is it that 'the rot has set in' as Jean-Philippe Lhernoud put it so neatly? The European legislator once again has his feet on the ground, if I may say so. The case-law of the CJ concerning free citizenship and the freedom of movement of persons, as Eleanor Spaventa shows very clearly, has a significant impact on social security benefits apart from the regulations. The European Community imposes obligations on the Member States which they had not thought of. It itself, this is a positive trend. Indeed, the fact is to be welcomed that, besides European regulations, there is a framework on the basis of which citizens of the Union can impose their rights and certainly where an addition to existing rights is involved. But the danger runs deeper. The CJ has established a new approach concerning the interpretation of the link between primary and secondary legislation. Secondary legislation constitutes the basis of the rights accorded to the citizens of the Union. If the latter do not satisfy the conditions of secondary legislation, they may have recourse to primary legislation which here constitutes a ceiling for their rights. In the latter case, the judge should proceed to an assessment of the actual circumstances and verify whether the refusal is justified and meets the requirement of proportionality. The great danger lies in the fact that new obligations arise and these obligations go beyond the difficult compromise

achieved within secondary Community law, possibly after years of negotiation. The restrictions and points of departure of the regulations are in question. Regulations may therefore well have clarified rights, but political choices may then possibly constitute a restriction rather than an advantage.

It is therefore not easy, as Jean-Claude Fillon clearly shows in the field of healthcare, to reconcile the two. For the application of two routes does not necessarily work in parallel and leads to inevitable imprecision for the citizen concerned as well as to problems of application for the administrations concerned. The adaptation of the regulations to this new trend will be an extremely difficult but nevertheless necessary task in order to obtain greater clarity and protection of citizens' rights. Furthermore, the fact that the second route is often characterised by a case method, the result of which is difficult to predict and that different bodies are concerned (such as the various DG), will undoubtedly lead to long-term, very, very hard work...

But this trend cannot be considered solely unilaterally as a danger and a negative development. This development in fact offers us the opportunity to reflect again and to consider the concrete objectives of the regulations. Perhaps this offers us the opportunity to emphasise the role of the regulations once again in their capacity as instruments of European solidarity and thus in becoming — or becoming once again — the engine of European social integration of the individuals concerned.

A recurrent problem is that of defining the scope of the regulations. Developments within national social security systems to take account of new economic or political challenges led to the birth of a completely new list of benefits. However, the discussion is always about the issue of whether these benefits were included in the objective scope and, in particular, in which chapter. The actual category is of great significance because, depending on which chapter is applicable, other coordination rules apply. The final decision is then often taken

by the CJ. Bernhard Spiegel is right when he says that a 'constant race' is taking place. Will legislators manage to act first? Or will the CJ get there first? The very fact that the final decision of the CJ has often resulted in necessary outbreaks of sweat ultimately results in consideration being given every so often to the drawing up of a separate coordination regime. This is because it is realised that the current rules are not completely attuned to the characteristics of these new benefits. As some of these benefits are unknown in other Member States, negotiations can be, as Simon has already said, *'très, très dures'*. This is not a new problem but one that has existed from the beginning. Let us consider the example of special, non-contributory benefits and the difference between social security and social assistance which — even after a political comparison has been made — has still led to a certain resistance in some Member States and even to special proceedings by the Commission against the Council. Bernhard Spiegel and Maximilian Fuchs have dealt with some of these areas in their contributions. Some of their examples also follow on from Mr Van Raepenbusch's proposition that, on the one hand, the CJ plays a role as a driving force, but, on the other, always pronounces a judgment in a particular situation, which can then have a life all of its own.

Some of the examples they cite also clearly demonstrate the need to adjust the regulatory framework to these new benefits. Let us consider care benefits which can only be coordinated with difficulty in the current framework. Or let us think of the example of pension schemes under the second and third pillars. If negotiations reach a satisfactory conclusion, this might incidentally be one of the first amendments to Regulation (EC) No 883/2004. In view of the importance of these last benefits, this is also an important step, but it is not ruled out that in future questions may also be raised about a division of the first and second pillar in the regulation. In his contributions on unemployment benefits, Maximilian Fuchs discusses some important trends including the combination of unemployment and

funding benefits. It cannot be denied that there are still some awkward points between the regulation and the ambitions of Europe to expand a European employment market. But there is also the trend towards an active welfare state in which social security no longer primarily aims to pay cash benefits but would rather avoid having to pay these. This active welfare state not only raises questions about the description of the objective scope (e.g. rehabilitation benefits, distinction between unemployment and invalidity), but also about the concrete validity of the regulation which is also problematic in this framework, for example in relation to export or applicable law.

On many occasions it has indeed been mentioned that developments in the labour market have a great impact on the coordination framework. In his contribution, Paul Minderhoud has described the migration trends and the new perspectives. It has to be admitted that traditionally, in particular compared with the USA, migration within the EU remains rather limited; 1.2 million citizens of EU Member States have migrated out of a total of almost 500 million. However, he also pointed to the new migration patterns, and in particular the idea of circular migration. Shorter terms of migration also impact the question of integration into the relevant state and the right to benefits. Migrant workers who move for shorter terms have presumably more interest in remaining insured and covered by the state of origin than in becoming insured in the state where they are going to work. As Yves Jorens mentioned, exactly these new types of migration also put under pressure the actual framework of the *lex loci laboris* and, more generally, the general principles behind applicable legislation. Important

questions need to be asked: if it is perhaps not time precisely in the light of the free movement of persons to question the exclusive effect and the neutral effect of the conflicting rules? Is avoiding administrative complications what free movement is about? What is the interest of the worker?

We started our conference by asking if we could award a golden medal to our regulation. I think the answer is yes. Of the research that has been done within the framework of the Tress network, a network looking at the implementation of the regulations throughout the different Member States, the conclusion could be drawn that the system is working rather well. This may not hide the fact that a number of gaps, shortcomings and inconsistencies can always be identified. But whether it would deserve a diamond is something we will only be able to judge in 10 years. We will indeed have to see what Regulation (EC) No 883/2004 brings us.

The regulations are an important step towards the concrete realisation of European citizenship. In this respect European citizenship contributes to the legitimacy of Europe, offering the necessary social protection to persons who have made use of their freedom of movement, protecting the diversity and the specificity of the different Member States. The evolution is important and perhaps it confirms what Umberto Eco once said, 'I wish to be a European born in Italy'. Over the last two days we may have perhaps wished to be a European born in Prague, this beautiful European capital.

We would like to thank all of you for celebrating with us these 50 years of European coordination of social security.

## ANNEXE: SOME PHOTOS OF CONFERENCE PARTICIPANTS



**Gabriela Pikorova,**

Acting President  
of CA.SS.TM,  
Czech Ministry of Labour  
and Social Affairs (Chair)



**Ivo van der Steen,**

Dutch Ministry  
of Foreign Affairs  
(Round table  
of stakeholders)



**Rolf Schuler,**

Hessisches  
Landessozialgericht  
(Round table  
of stakeholders)



**Jana Lovsin,**

Slovenian Ministry of  
Labour, Family and Social  
Affair (Round table  
of stakeholders)



**Carlos G. de Cortazar,**

Spanish Permanent  
Representation to the EU  
(Round table  
of stakeholders)



**Bernd Schulte,**

Max Planck Institute  
for Foreign and  
International Social Law  
(Round table  
of stakeholders)



**Herwig Verschueren,**

University of Antwerp  
and Brussels  
(Round table  
of stakeholders)



**Paul Palsterman,**

ACV - CSC  
(Belgian trade union)  
(Round table  
of stakeholders)





**Loes van Embden,**

BusinessEurope (Round table of stakeholders)



**Jörg Tagger,**

European Commission, DG EMPL Unit E/3 (Round table of stakeholders)



**Ivo Van Damme,**

Belgian Federation of Enterprises (Round table of stakeholders)



**Christoph Schumacher,**

German Federal Ministry of Labour and Social Affairs (Round table of stakeholders)



**Dorina Tsotsorou,**

Greek Ministry of Employment and Social Protection (Round table of stakeholders)



**Eva Lukacs,**

Hungarian Ministry of Health (Round table of stakeholders)



**Jiri Kral,**

director General for Social and Family Policy, Czech Ministry of Employment and Social Affairs (Closing speech)







European Commission

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