Liber Amicorum Bernhard Spiegel

Reflections on EU coordination of social security systems: bridging academia and public administration

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LIBER AMICORUM BERNHARD SPIEGEL

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1 TESTIMONY

BY | MANFRED PÖLTL

It was in the spring of 1994 when Bernhard Spiegel, at the age of 35, attended a meeting of the Administrative Commission in Brussels for the first time. 30 years and around 190 meetings later (including working groups), he retired on May 1, 2024 at the age of 65 and now with the title of Professor at the University of Salzburg. During these 30 years, he played a key role in shaping the work of the Administrative Commission.

It was the idea of the Belgian delegation, which chaired the Administrative Commission at that time, to publish this commemorative publication in his honour. Members of the Administrative Commission and representatives from the scientific community, to which Bernhard Spiegel has always felt particularly close and to which he has made a significant contribution with numerous publications, are publishing in this volume articles on the area of law that has been of particular importance in the European Union since its founding: The coordination of the social security systems of the Member States, the States of the European Economic Area and Switzerland, as the relevant legal framework to enable the free movement of workers and the self-employed under fair conditions. These rules can currently be found in Regulations (EC) No. 883/2004 and (EC) No. 987/2009.

As Bernhard Spiegel's long-standing closest colleague in the Austrian Ministry of Social Affairs, Health, Care and Consumer Protection, I had the privilege and pleasure of experiencing his passion and respect for this area of law first hand and being impressed by it. There are certainly not many experts who have such a high level of expertise and experience as he does. This also applies to related areas of law and relations with third countries, with which Bernhard Spiegel negotiated numerous social security agreements for Austria as head of delegation.

Thanks to his friendly and human nature, Bernhard Spiegel enjoyed high esteem and sympathy in the Administrative Commission, which was clearly noticeable when he was farewelled at his last meeting in March 2024. Anyone who knows Bernhard Spiegel also knows that he will probably be a little embarrassed to be given special honours in this way, knowing that he is of course not the first and only expert to have made special contributions to the Administrative Commission. If modesty really is a virtue – and who could doubt it – then he has it to a high degree.

This commemorative publication is therefore also dedicated to all those experts with whom Bernhard Spiegel has been able to discuss and argue over the years and who all share a common concern: A European legal framework in the area of social security in the interests of those people who make use of their right to freedom of movement and who thus particularly embody the spirit of a common Europe.

2 PREFACE

BY | FREDERIC DE WISPELAERE AND MARC MORSA

In this *liber amicorum*, the career of Bernhard Spiegel is celebrated by colleagues and friends who worked together with him in the Administrative Commission for the Coordination of Social Security Systems ('Administrative Commission') and in the Network of legal experts in the field of social security coordination and free movement of workers (first trESS, then FreSsco and currently MoveS). Academia and public administration unite through diverse contributions of scholars and civil servants. It is in these two worlds that Bernhard Spiegel has garnered enormous recognition for his expertise. You could say that he represents the best of both worlds, making him a master of the theoretical and practical aspects of EU coordination of social security systems.

Within the Administrative Commission, Bernhard Spiegel was esteemed as a highly amiable and respectful colleague. His extensive experience and expertise consistently became apparent whenever he contributed to discussions or took the floor. He demonstrated a remarkable ability to tackle the most complex issues, clarify rules, formulate compelling arguments, and ultimately persuade his colleagues of the validity of his analyses. An this with great determination and enthusiasm. We will always remember his very thorough analyses of the EU-UK Withdrawal Agreement and the EU-UK Trade and Cooperation Agreement. Moreover, his ability to reconcile the European interest with national interests and to safeguard the principle of loyal cooperation deserves widespread admiration.

Furthermore, Bernhard Spiegel has established an extensive academic track record through the publication of several reports from the Network of legal experts, along with multiple peer-reviewed articles. The topics he mostly covered in these publications were: international and bilateral social security agreements with third countries, the interaction between tax law and social security in cross-border situations, applicable legislation, mutual assistance and sincere cooperation, the coordination of LTC benefits etc. As a result, many of his contributions have been frequently cited by other scholars and are expected to continue receiving citations after his retirement. The contributions in this *liber amicorum* also encompass a variety of topics that are dear to Bernhard's heart, often making references to his publications. Furthermore, Bernhard was a sought-after speaker at seminars organised by both the Network of legal experts and the Academy of European Law (ERA). Indeed, he has the ability to explain complex rules regarding the coordination of social security systems in a comprehensible manner to both experts and non-experts.

Among Bernhard Spiegel's qualities is his patience in observation, listening, and analysis, perhaps stemming from a passion beyond European social security coordination: ornithology. A discipline whose etymology goes back to ancient Greek (ρνις, ὄρνιθος / órnis, órnithos[1] and λόγος / lógos[2]). This might also explain his interest

(1) Bird.

(2) Word, speech.

in free movement and migration. For instance, some old documents dealing with the passage of birds are of direct interest to ornithologists, such as Xenophon's account of ostriches in Assyria, which today live only in Africa.

This *liber amicorum* is not a farewell to Bernhard Spiegel, but rather a heartfelt and abundant thank you for his academic and professional contributions in the field of social correct coordination. We are confident that Bernhard will not leave us and that his presence will endure, possibly even with greater impact.

See you soon!

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4 THE ACADEMIC COMMUNITY AND THE COORDINATION OF NATIONAL SOCIAL SECURITY SYSTEMS – SOME BRIEF AND UNSCIENTIFIC REMARKS

BY | **JEAN-PHILIPPE LHERNOULD**
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Affirming that the coordination of national social security systems is a very complex object will not surprise the readers, whether they are familiar with the rules which govern it or are simply confronted occasionally with their application. We will not return to the structure and length of the two Union regulations which constitute its basis, which are likely to disarm the curiosity of any lawyer wishing to set out alone to conquer this abstract universe. While it is undeniable that Regulation 883/2004 of April 29, 2004 has achieved simplification compared to its predecessor, this was one of the objectives pursued, the text remains difficult to access. Unless one has a solid capacity for abstraction, practical knowledge of coordination, that is to say field knowledge, seems an essential condition for understanding and mastering its mechanisms. The field is the key to a theoretical and systematic understanding of the regulations. In an original way, the conceptualization process is part of a *bottom- up approach*.

Since becoming interested in coordination regulations, the author of this article, primarily concerned through his academic functions, has wondered about the place of the academic world in the life of coordination regulations. A very direct question arises: are academics and other researchers able to construct global thinking, conceptualize and systematize coordination regulations as they are used to doing for any other legal subject? There is no reason, *a priori*, to answer in the negative. Regardless of the legal subject, the scientific methodology is identical, the researcher's reflexes do not change. Doctoral thesis in law are written on the coordination regulations, books and articles are published, conferences are held regularly throughout Europe. Apparently, an academic life is built like that of any other disciplinary field.

The reality is perhaps not so clear. The academic function about coordination regulations deserves to be refined if we admit, the result of empirical observation, that a majority of research work concerns framework of the regulations, namely Title I (general provisions) and Title II (determination of the applicable legislation). For the latter, this situation is not a mere coincidence. Determining the applicable legislation is indeed at the epicenter of coordination regulations. Identifying the insured person's country of affiliation is a preliminary and essential step in any question relating to the right to benefits and contribution obligations. It is understandable that the attention of researchers focuses on this strategic point. The question of applicable legislation also has the advantage of escaping overly technical considerations and it uses reasoning

methods known to researchers whose origins are in private international law. Researchers easily find their bearings within the framework of classic questions: can the applicable law be chosen by the parties? can a situation be governed by several national laws? What connecting factors should prevail to locate the competent national law? This is how, among academic circles, discussions are constantly taking place around respective interests, as a connecting factor, the place of work, the place of residence, the location of the company, the discussions being renewed at the infinite depending on economic and social contexts and the evolution of work relationships and working modes. Today, it is the law applicable to teleworkers which concentrates the scientific literature; yesterday it was that of the air crew or even the scope of A1 certificates. Title 1 of Regulation 883/2004 is also explored in a comprehensive manner by researchers. This title, which includes the personal and material scope of application as well as the main principles of coordination (equal treatment, waiving of residence clauses, aggregation of periods and assimilation) has characteristics similar to Title II. It is at the heart of how coordination works and can be understood without excessively technical considerations.

Even if we have not carried out an exact quantification and if it is necessary to set aside the general studies on the regulations[3], Title III of Regulation 883/2004 on the provisions applicable to the different categories of provisions might be the subject of overall less attention in the scientific literature even if the observation deserves to be refined. Chapter 1 on sickness benefits has in fact given rise to numerous academic works for a simple reason: It was necessary to combine the provisions of the coordination regulation with those of the Treaty on the freedom to provide services and on the free movement of goods, a situation which raised theoretical questions which academic research spontaneously took up. Chapter 6 on unemployment benefits and the politically sensitive chapter 8 on family benefits are also discussed by the scientific literature. In contrast, the chapters on benefits for work accidents and occupational diseases, on death benefits, on disability benefits, on old age and survivors' pensions, on early retirement, appear as secondary centers of interest for doctrine.

The appetite of the academic community thus seems to focus more broadly on general questions and the principles and pillars of the coordination of social security systems, while academic research would maintain a greater distance from strictly technical aspects. Interesting in itself because it is not common for academic research not to fully occupy the whole field of study, this observation calls for two series of remarks, the first one relating to the nature of academic activities in the life of coordination rules (I), a second one relating to the porosity of academic and practical environments (II).

1. ACADEMIC ACTIVITIES AND COORDINATION

The academic world participates in various ways in the dynamics of coordination regulations. Prior to the adoption of the rule, functions of a prospective nature and

(3) Eg. F. Pennings, European Social Security Law, 7th ed., 2022; F. Pennings, G. Vonk, Research Handbook on European Social Security Law, 2nd ed. 2023; Mr. Morsa, Security social, free movement and citizenship European, ed. Anthemis, 2012.

technical advice coexist; downstream, classic activities of *ex post* assessment (legislation and case law) but also disseminating knowledge are carried out.

1.1. PROSPECTIVE STUDIES

The ability to project oneself is a popular exercise in scientific research. It translates into the design of models or scenarios. It does not matter if the imagined or drawn perspectives do not materialize, they contribute, through their analytical and conceptual approach to the state of science on a given subject. In this register, the so-called "13th State" model will have left its mark[4]; it is an illustration of the ability of scientific research to think about coordination, perhaps even for the academics to be its driving force at that time. The emblematic model of the 13th State" will have given rise to equally interesting extensions even if they are less known, perpetuating a forward-looking tradition[5].

Other forward-looking publications are worth highlighting, such as the report entitled "*Key challenges for the social security coordination Regulations in the perspective of 2020*". The concrete and operational conclusions drawn up in the latest research report are still worth being considered today: to make such a comprehensive coordination instrument that no longer would there be room for the direct application of the TFEU itself; to bring the reimbursement and treatment aspects of Directive 2011/24/EU on the application of patients' rights in cross-border healthcare under the roof of Regulation (EC) No. 883/2004; a concentration of all social security related fraud and error issues in one legal act or at least in one platform with the additional legal framework.

With the support of the European Commission, more than 15 years ago, academic research considered the phenomenon of new forms of mobility, including teleworking, imagining their meeting with coordination regulations[6]. Among the recommendations included in this academic work, some were innovative and revolutionary such that according to which "*Employees should be given the right to opt out when the applicable legislation designated by rules of conflict leads to unfair solutions considered objectively and subjectively, hindering freedom of movement. The right to opt out must conform to the principle of proportionality applied to employers and to administrations*".

This type of institutional research activity seems to have slowed down recently. The need for short-term practical work – technical advice – has become paramount. However, the identity of the academic world is to keep producing this type of research.

(4) Danny Pieters, Steven Vansteenkiste, The Thirteenth State: Towards a European Community Social Insurance Scheme for Intra-community Migrants, Acco, 1993.

(5) Grega Strban, Paul Schoukens, Dolores Carrascosa Bermejo, Possibilities of creating an EU social security scheme (EuS) and its influence on European Union social security coordination, MoveS , 2021. See also Schoukens, P., & Pieters, D. (2020). The thirteenth state revisited. In E. Brameshuber (Ed.), Festschrift Franz Marhold (pp. 807-827). Manzsche Publishing and university bookstore.

(6) Yves JORENS (ed.), Jean-Philippe LHERNOULD (ed.), Jean-Claude FILLON, Simon ROBERTS, Bernhard SPIEGEL, Towards a new framework for applicable legislation – New forms of mobility, coordination principles and rules of conflict, tress, 2008: http://www.tress-network.org/TRESS/EUROPEAN%20RESOURCES/EUROPEANREPORT/ThinkTank_Mobility.pdf.

Whether with the support of the Commission or independently in legal reviews, it is necessary to stimulate such prospective studies.

1.2. TECHNICAL ADVICE

Through the creation of the trESS network some 20 years ago, which was succeeded by FreSsco then MoveS , DG Employment wanted to benefit from technical expertise bringing together the academic world in the form of independent experts. This operational support proved fruitful when the process of revising Regulation 883/2004 was initiated. We cannot count the collective studies issued to help the Commission's reflection, and among many examples we can cite the reports on unemployment benefits[7], on long-term health care[8], and on the impact of the *Brey* and *Dano* judgments[9]. To avoid losing the added value of such research works, an inventory of the work carried out and a more precise assessment of its impact would not be without interest for both the European Commission and the scientific community.

If the European Parliament and certain Member States surround themselves with external advice, with academic experts sometimes being called upon, it could be worth considering for the European Commission to directly integrate academic researchers into its working teams. The recruitment of a seconded national expert, whose vocation is to provide the Union institutions with high-level professional expertise, could serve this purpose.

Recent years could have been marked, perhaps, by less academic activity in the field of social security coordination. The difficulty in having the revised regulations adopted, the process of which focuses the attention of the Commission and stakeholders, the state of inertia created by the pandemic, a certain lack of steam also around coordination, could explain the change in dynamics. However, one can regret that, on their own initiative or with the support of the Commission, the academic world has not fully planned towards the post-"revised Regulation 883/2004" because it is already necessary, even urgent, to consider new developments.

1.3. ASSESSMENT ACTIVITIES

Assessment activities are a traditional academic function. It takes various forms.

Researchers like to analyse the Court of Justice rulings, even if they are much fewer in number than before, with particular attention to those which concern

(7) Carlos Garcia DE CORTAZAR (ed.), Essi RENTOLA (ed.), Maximilian FUCHS, Saskia KLOSSE, Coordination of Unemployment Benefits, tress, 2012: http://www.tress-network.org/TRESS/EUROPEAN%20RESOURCES/EUROPEANREPORT/trESS_ThinkTankReport2012.pdf.

(8) Yves JORENS (ed.), Bernhard SPIEGEL (ed.), Carlos Garcia DE CORTAZAR, Jean-Claude FILLON, Maximilian FUCHS, Grega STRBAN, Coordination of Long-term Care Benefits – current situation and future prospects, tress, 2011: http://www.tress-network.org/TRESS/EUROPEAN%20RESOURCES/EUROPEANREPORT/trESSIII_ThinkTankReport-LTC_20111026FINAL_amendmentsEC-FINAL.pdf.

(9) Jean-Philippe Lhernould, Eberhard Eichenhofer, Nicolas Rennuy, Filip Van Overmeiren, Ferdinand Wollenschläger, Assessment of the impact of amendments to the EU social security coordination rules to clarify its relationship with Directive 2004/38/EC as regards economically inactive persons, FreSsco, 2015.

the determination of the applicable legislation. If the A1 certificates constitute an incredible common thread[10], other sensitive questions, involving situations of social fraud, have been dealt with by the Court of Justice, giving rise to numerous doctrinal commentaries[11]. Case law remains a typical playground for academics.

More original is the role entrusted to researchers by the European Commission in evaluating the conditions of application of coordination rules by Member States. As part of the MoveS network, national experts are invited to provide information, at the request of the Commission, on their internal law, so that the Community executive can ensure compliance with the coordination regulations. In this activity, the Commission, which exercises its role as guardian of Union law, delegates field work to academics. This delegation makes sense to a certain extent, even if it raises questions on two points. On the one hand, it is common for the national expert to need to obtain information held by his/her own administration to answer the Commission's questions; it is then only a transmission belt. On the other hand, this *reporting function* is located at the frontier of researcher skills.

1.4. DISSEMINATION OF KNOWLEDGE

Due to their complexity, coordination regulations give rise to misunderstandings, blockages and misinformation. The multiple stakeholders – national administrations at central and local level, social security institutions, lawyers, judges, NGOs, etc. – have the greatest difficulty mastering these instruments. In their daily activity, the role of researchers, who are also most often university professors, is also to contribute to the better understanding of the regulations.

The MoveS network, funded by the European Commission, plays a central role in this process of disseminating knowledge. For many years, several seminars have been organized each year on current topics. For 2023, for example: Social security and the labour law challenges posed by road transport in the EU; cross-border telework between Switzerland and France; social security coordination: trends and challenges… Researchers are also associated with webinars organized by the Commission on topics related to current regulations: seasonal work; the digitalization of social security coordination…

The Academy of European Law (ERA), located in Trier, also plays an important role in the dissemination of knowledge through the organization of an annual seminar on the coordination of social security systems.

2. POROSITY BETWEEN ACADEMIC AND PROFESSIONAL ENVIRONMENTS

One of the particularities of the field of coordination of social security systems is that it evolves in an uncompartmentalized manner. The functions performed by the actors

(10) See case C-410/21, DRV Intertrans BV : ECLI:EU:C:2023:138.

(11) See Case C-610/18, AFMB Ltd e.a.: ECLI:EU:C:2020:565.

are fungible. The traditional boundaries, which lead to the isolation of doctrine in a confined and in many respects sterile space, are blurred.

Whereas, through a network phenomenon largely stimulated by the European Commission, the academic community is involved in the life of coordination regulations through the close formal or informal links it maintains with the institutional actors (European Commission, European Parliament, Member States, national administrations), a remarkable opposite phenomenon is added. Among the "producers of the norm", several of them have become full-fledged operators of the academic community, sometimes crossing the threshold of the university at the same time or after having left that of the "producers of the norm" (former European Commission staff members for instance), or even to become permanent members. For some of them, holders of a doctorate in law, who occupy a central position in their national administration and play an important role in European institutions (administrative commission for the social security of migrant workers, Council, etc.), the attraction towards the academic function is natural. For others, it was built over time, stimulated by the close relationships maintained with academic circles as well as by the willingness of sharing unique skills.

This porosity of functions is not trivial. It reflects the existence of a very solid European network woven around coordination regulations, a real community that some humorously call a sect. It also reflects the impossibility of dissociating theory from practice: the specificity of coordination regulations lies in the fact that their understanding is impossible without knowledge and mastery of both. However, by their complete understanding of the most technical rules (which always go back to guiding principles in what constitutes a system that is certainly very difficult to decipher but coherent) and their ability to think systematically (a system of which they are the kingpin), they go beyond what academic actors are capable of producing. The author of this article cannot count the number of times he asked Bernhard Spiegel for pointed questions referring to theoretical considerations on coordination regulations, obtaining answers that were as quick as they were relevant. The professionals of coordination regulations, let's call them that, have become, as much by taste as by necessity, referents within the academic community.

The alliance between a perfect knowledge of the legal, diplomatic, and political terrain, an ability to systematize the rule of law, and a historical vision of coordination regulations, gives these authors strong scientific legitimacy. Bernhard Spiegel is one of those rare people whose elegance, courtesy and modesty are matched only by their immense intellectual qualities in the service of coordinating national social security systems.

Coordination regulations are complex and fragile instruments. The successive retirements of major personalities, most recently that of Bernhard Spiegel, contribute to weakening them. Added to the loss of skill is the risk of dilution of the memory effect. One can bet that the porosity between academic and professional circles continues and that the retirement of Bernhard Spiegel, like that of a few "producers of the norm" before him, will go unnoticed, not because he has retired, but because that he will have continued to be at the heart of the coordination academic life…

5 INTERACTION OF THE SOCIAL SECURITY COORDINATION IN THE EEA AGREEMENT, THE EFTA AGREEMENT AND THE SWISS-EU AGREEMENT ON THE FREE MOVEMENT OF PERSONS

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1. STARTING POINT

Regulations (EC) No. 883/2004 and No. 987/2009 coordinate the national social security systems of the EU member states.

These regulations are also used outside the EU within the framework of the Agreement on the European Economic Area (EEA Agreement), the Agreement on the Free Movement of Persons between Switzerland and the EU (FMOPA) and the EFTA Convention. However, these agreements do not apply to all EU/EFTA states or all EU/EFTA nationals. With regard to the personal scope, the agreements apply to the nationals of the respective contracting parties and, in geographical terms, are generally only applicable to situations that occur within the respective contracting states. For example, under the FMOPA, the regulations only coordinate cross-border situations between Switzerland and the EU member states and do not include Liechtenstein nationals in their personal scope. The EEA Agreement, on the other hand, does not apply to Swiss nationals and Switzerland is not a contracting state to this agreement.

The question arises as to whether and how the coordination rules in these separate agreements can interact and which legal bases are relevant, for example, for a German national who is gainfully employed in both Switzerland and Liechtenstein. This question is of particular interest to the neighboring states Germany, Liechtenstein, Austria and Switzerland, especially in the four-country-region of Lake Constance, where multilateral cases relating to the various agreements occur quite frequently.

The limitation of the personal and territorial scope of the existing agreements to the nationals or to the territory of the respective contracting parties is problematic with regard to matters that affect two or more of the aforementioned agreements. There is no interconnection between the treaties because there is no provision for cross-treaty coordination. There is no "umbrella agreement" that would enable overarching coordination of the existing agreements. These cases can therefore not be easily coordinated in accordance with the provisions of European Regulations (EC)

No. 883/2004 and 987/2009. At best, existing bilateral social security agreements are relevant, otherwise the respective national social security laws apply. This seems paradoxical, as all agreements refer to Regulations (EC) No. 883/2004 and No. 987/2009 and pursue the same objective of coordinating social insurance.

The fact that the EEA, the FMOPA and the EFTA Convention cannot, in principle, be applied to third-country nationals is an additional obstacle. Regulation (EU) No. 1231/2010 extending Regulations (EC) No. 883/2004 and No. 987/2009 to third-country nationals who are not already covered by these regulations solely on the basis of their nationality is relevant in the context of these agreements as it is not based on the provisions of EU law on the free movement of persons.

FIGURE 1: SCOPE OF THE AGREEMENTS

It must be noted that the Court of Justice of the European Union (CJEU) has considered European coordination law to be applicable in the case of certain specific circumstances relating to a non-contracting state[1]. The court also concluded that the benefits arising from a bilateral agreement between a Member State and a third country must in principle also be granted to workers of other Member States that are not party to the agreement[2]. However, this case law unilaterally grants EU nationals advantages resulting from regulations outside EU law, without regard to the interests of the third countries involved. It cannot be taken into account without further ado when applying the FMOPA and the EFTA Convention. Accordingly, Recommendation No. H1 of 19 June 2013 resulting from the aforementioned Gottardo ruling has not been incorporated into the FMOPA and the EFTA Convention.

In addition, this case law applicable to specific circumstances is unable to create an umbrella between the EEA Agreement, the FMOPA and the EFTA Convention for all coordination provisions. After all, in cases involving more than two states (see under 3. Possible solution: umbrella agreement), it cannot resolve the conflict between the coordination provisions of the existing treaties. Coordination goes far beyond the selective granting of advantages and can even be financially disadvantageous for an affected person in individual cases, particularly when determining the applicable legal provisions.

The interaction of social security coordination in the EEA Agreement, the EFTA Convention and the FMOPA has recently been addressed by both the courts and the competent authorities. The EFTA Court ruled on this in its judgement E-5/22 MAITZ on 24 January 2023 and the Austrian Administrative Court referred the matter to the Court of justice of the European Union (C-329/23, Sozialversicherungsanstalt). The responsible ministries of Germany, Austria, Liechtenstein and Switzerland have held initial exploratory talks regarding the conclusion of a quadrilateral umbrella agreement.

2. CASE LAW

On 9 May 2023, the Austrian Administrative Court referred a number of questions to the European Court of Justice (ECJ) concerning the interaction between EU law, the EEA Agreement and the FMOPA. Case C-329/23 is based on the following facts:

An Austrian-Liechtenstein dual national was simultaneously self-employed as a doctor in Austria, Liechtenstein and Switzerland. According to his own statement, he earned approx. 19% of his income in Austria, 78% in Liechtenstein and 3% in Switzerland. He started working in Switzerland on 1 January 2017. Prior to that, he had been self-employed in Liechtenstein and Austria since 1 June 2007 and was unquestionably subject to Austrian social security law in accordance with Art. 14a para. 2 of Regulation (EEC) No. 1408/71 due to his residence in Austria.

(1) See inter alia Case C-631/17, Inspecteur van de Belastingdienst, EU:C:2019:381.

(2) Case C-55/00, Elide Gottardo/Istituto nazionale della previdenza sociale (INPS), [2002] ECR, p. I-413 ff.

The Austrian institution, to which the person concerned submitted his application for a certificate A1 in accordance with Article 13 of Regulation (EC) No 883/2004, rejected the application on the grounds that there was no umbrella agreement covering the EU states, the EEA-EFTA states and Switzerland for comprehensive European coordination. Therefore, neither the EEA Agreement nor the FMOPA could apply in this case. The activities in the period from 1 January 2017 to 31 March 2018 must therefore be assessed separately based on the national legislation of Austria, Liechtenstein and Switzerland – coordination of the different social security legislation is not possible.

The person concerned lodged an appeal against this decision with the Federal Administrative Court. The court concluded that, due to the lack of coordination provisions in the relationship between the EEA Agreement and the FMOPA for the trilateral constellation at hand, the agreements should be applied separately: the EEA Agreement was decisive in the relationship between Austria and Liechtenstein, while the FMOPA was decisive in the relationship between Austria and Switzerland, in each case applying the EU coordination law declared applicable by these agreements. According to this view, two separate certificates on the applicable social security provisions are to be issued; on the one hand in the relationship between Austria and Liechtenstein, and on the other hand in the relationship between Austria and Switzerland.

The Austrian institution appealed against this decision to the Administrative Court. The Court took the view that the approach chosen by the Federal Administrative Court was not in line with the aim of coordination law to ensure that a person is solely covered by the legislation of one country at a time. This "single legislation rule"[3] also means that the determination of the applicable legal provisions under EU coordination law is in principle not activity-related, but person-related. The issuing of two different E 101 or A1 certificates for the same person and the same time period would therefore be the wrong approach. In the present case, it was only by chance that both separate considerations declared Austrian law applicable. If, for example, the person concerned had exercised a substantial part of his gainful employment in Switzerland and not in Austria, this would have led to the application of Swiss legislation under the FMOPA (also) with regard to the activity exercised in Austria. However, Austrian legislation would apply as well under the EEA Agreement applicable in relation to Liechtenstein. Even if only Regulation (EC) No. 883/2004 with regard to the respective agreements were applicable, a "separate assessment" of only the bilateral relationships pursuant to Art. 13 of the Regulation could lead to the simultaneous application of two different social security laws.

Such a result could only be avoided if in a trilateral case such as the present one coordination was carried out jointly between all states involved as if they were subject to a uniform set of rules and not separately with regard to the respective bilateral agreements. The legal justification would lie in the fact that the EEA Agreement as well as the FMOPA declare the EU coordination rules applicable. However, in the absence of an umbrella agreement, there appears to be no legal basis justifying such an

(3) See for example ECJ 6 June 2019, Inasti/Securex, C-33/18, para. 42; ECJ 3 June 2021, Team Power Europe, C-784/19, paras. 32 and 33, in each case with further references.

approach. In the opinion of the Administrative Court, the coordination rules under EU law are therefore neither directly nor indirectly applicable to the facts of the case. The inapplicability of the treaties results, on the one hand, from the fact that they do not regulate a trilateral situation such as the one at issue here and, on the other hand, from the fact that a separate consideration with the respective application of Regulation (EC) No. 883/2004 to the bilateral situations would run counter to the "single legislation rule".

The following questions were therefore referred to the ECJ for a preliminary ruling in accordance with Art. 267 TFEU:

1. Are the rules of EU law on the determination of the applicable legislation in the area of social security according to Regulation (EC) No 883/2004 in conjunction with Regulation (EC) No 987/2009 to be applied to a situation in which an EU citizen is simultaneously self-employed in an EU State, an EEA EFTA State (Liechtenstein) and Switzerland.

If the answer to the first question is in the affirmative:

2. Must the application of Regulation (EC) No 883/2004 in conjunction with Regulation (EC) No 987/2009 in such a case be such that the applicability of the social security legislation must be assessed separately in the relationship between the EU Member State and the EEA-EFTA State, on the one hand, and the relationship between the EU Member State and Switzerland, on the other hand, and must, accordingly, a separate certificate regarding the applicable legislation be issued in each case?

In principle, three possible solutions appear conceivable to answer these questions:

1. According to the first option, the EU coordination rules are not applicable at all in the trilateral relationship between Austria, Liechtenstein and Switzerland, as there is no corresponding umbrella agreement. In the present case, this would mean that the respective national regulations would have to be applied in all the countries concerned. This could mean that social security contributions would have to be paid in all three countries for the same activity and on the same income if the respective national law stipulates that the global income of the person concerned is to be used for the calculation of contributions.

The main objection to such a solution is that the EU coordination rules must be applied in the (bilateral) relationship between Austria and Liechtenstein under the EEA Agreement on the one hand and in the (bilateral) relationship between Austria and Switzerland under the FMOPA on the other. Neither agreement provides for any exceptions in the event that the person concerned is also gainfully employed in another (third) country. If the EU coordination rules were not applied, Austria would not fulfil its obligations towards Liechtenstein under the EEA Agreement and towards Switzerland under the Agreement on the Free Movement of Persons, as double insurance would then be possible for one and the same period, contrary to the principles of the coordination rules.

Furthermore, the EFTA-Court has ruled that an EEA State cannot make the rights conferred by EEA law dependent on the provisions of another international agreement[4]. This principle is applicable to an international agreement concluded between an EEA State and a third country containing provisions on social security coordination. Specific adaptations in such an agreement regarding conflict-of-law rules on social security cannot release EEA States from their obligations under EEA law. Thus, an agreement concluded in this respect between an EEA state and a third country cannot have any effect with regard to persons who fall within the scope of Regulation 883/2004. It follows that a bilateral international agreement cannot affect the obligation of an EEA State concerned to comply with EEA law.

2. The second option assumes the application of the EU coordination rules in the trilateral relationship between Austria, Liechtenstein and Switzerland. The EU coordination rules are not only applicable in the relationship between Austria and Liechtenstein – on the basis of the EEA Agreement - and in the relationship between Austria and Switzerland – on the basis of the FMOPA. They also apply in the relationship between Liechtenstein and Switzerland on the basis of the EFTA Agreement. It can be concluded from the coexistence of these agreements that the participating states visibly pursued the objective of a complete application of the EU coordination rules by committing themselves to apply these coordination rules among themselves – in particular the "single legislation rule" in regard to the determination of the applicable legislation. It could therefore be argued that the EU coordination rules should be applied not only in bilateral but also in trilateral situations. This would guarantee an optimal outcome when determining the applicable legislation insofar as the gainful employment in all three States concerned could be taken into account and – in accordance with the principle underlying the EU coordination rules – the legislation of only one State would be applicable.

However, the fact that there is no explicit legal basis for this approach – for example in the form of an umbrella agreement involving all three states concerned – speaks against it. The principle of *pacta tertiis* under international law, according to which an international agreement cannot create obligations or rights for a third country without its consent, speaks against the assumption of an implicit legal basis. Accordingly, none of the three agreements mentioned can trigger legal effects beyond the bilateral relationship for the state not covered in each case. Moreover, the fact that the EU coordination rules could, after a revision for example, be applied in different versions in the respective agreements, also speaks against the trilateral applicability of these coordination rules. The same follows from the fact that in the relationship between Liechtenstein and Switzerland, the EU coordination rules only apply with certain deviations.

3. According to the third option, the EU coordination rules apply in parallel; in the relationship between Austria and Liechtenstein on the basis of the EEA Agreement and in the relationship between Austria and Switzerland on the basis of the FMOPA: Both agreements are in force simultaneously and independently of each other. Neither

(4) E-5/22 Maitz 24 January 2023; see also Case E-1/04 Fokus Bank, EFTA Court Report 2004, p. 11, para. 31, and Case E-14/15 Holship, EFTA Court Report 2016, p. 240, para. 128.

agreement derogates from the other because neither agreement can take precedence over the other in the sense of a *lex specialis*. In the absence of identity of the contracting parties, no amendment of one agreement by the other in the sense of a *lex posterior* is possible.

Applying this interpretation, the applicable law would have to be determined separately in each bilateral relationship. It would have to be assumed that the activities carried out in the respective bilateral relationship must each amount to 100%. In the present case, Austrian law would have to be applied in both cases. In the relationship between Austria and Liechtenstein, according to Art. 14a para. 2 of Regulation 1408/71 in conjunction with Art. 87 para. 8 of the Regulation 883/2004, and in the relationship between Austria and Switzerland from Article 13(2)(a) of Regulation 883/2004. Two separate but identical certificates would therefore have to be issued.

However, the application of this third interpretation could lead to less satisfactory results in other cases: A person residing in Austria carries out 10% of their gainful employment there, while 70% of their gainful employment is in Liechtenstein and 20% in Switzerland. In this constellation, the person would be subject to Liechtenstein legislation in the Austria-Liechtenstein relationship and Austrian legislation in the Austria-Switzerland relationship. Two separate certificates would then have to be issued. This would result in two contradictory certificates for the same person for one and the same time period. This would run counter to the "single legislation rule" – as stipulated in Art. 11 para. 1 of Regulation 883/2004 and Art. 13 para. 1 of Regulation 1408/71 and as it should ultimately be applied in all constellations concerned on the basis of the agreements. In addition, the person concerned would have to pay social security contributions in both Austria and Liechtenstein. This would be in conflict with the freedom of establishment (Art. 49 TFEU) and the freedom to provide services (Art. 56 TFEU), which must also be observed in the relationship between the EU Member States and Liechtenstein (Art. 31 and 36 of the EEA Agreement) and as far as freedom of establishment is concerned, in the relationship to Switzerland (Art. 4 of the FMOPA).

In light of this background, the conclusion could be drawn that ultimately only the establishment of an umbrella agreement on the applicability of the EU coordination rules in a trilateral relationship between the states concerned would lead to a solution that takes into account all gainful activities whilst respecting the principle of the "single legislation rule".

Nevertheless, the European Commission argued in the written procedure that the fact that a Union citizen can be covered by both the EEA Agreement and the FMOPA and can exercise the right to free movement granted therein simultaneously in the European Union and vis-à-vis Switzerland suggests that both agreements can apply to a Union citizen in parallel and simultaneously. There is also no principle according to which two agreements under international law cannot be applied alongside each other and simultaneously for a certain situation. Agreements may overlap in terms of both their territorial and personal scope of application. Nothing else can apply to the EEA Agreement and the FMOPA. It would be contrary to the international law principle of honoring contractual obligations (*'pacta sunt servanda'*) if the Union could disregard

both agreements in a situation such as put before the court. In other words, if two agreements govern the same situation, it does not mean that the agreements cancel each other out. On the contrary, the agreements must be applied simultaneously. If the agreements themselves do not contain any provisions on mutual priority, they must be applied separately in a first step. In such a case, possible conflicts may arise between the provisions of the agreements and the resulting legal judgement. Such conflicts must be resolved in a second step using the methods prescribed by international law.

The EEA Agreement and the FMOPA both apply in the main proceedings because the person concerned, as a citizen of the Union, exercises a right to free movement expressly granted to him, both within the European Economic Area and vis-à-vis Switzerland. When the Union concluded both agreements, it was its intention to provide for such a territorially extended right to freedom of movement for Union citizens in gainful employment. It is precisely to promote this freedom of movement that both agreements ultimately refer to the application of Regulation (EC) No. 883/2004, which in turn also serves this objective of promoting freedom of movement. It would therefore be contrary to the express intention of the Union, when concluding the EEA Agreement and the FMOPA, to grant Union citizens a right to free movement also in relation to States outside the Union if Regulation (EC) No 883/2004, which is intended to emphasize that right to free movement in the field of social security, were not to apply in a situation such as that at issue in the main proceedings. It is expressly established in the main proceedings that the person concerned, as a citizen of the Union, may work in Liechtenstein and Switzerland on the ground that he has a right to freedom of movement.

However, no matter how the facts of the case are altered, whether in relation to the allocation of the income received or in relation to residence in one of the three States concerned, Regulation (EC) No 883/2004 would, in any event, in accordance with the EEA Agreement and the FMOPA, lead in the best case – such as that in the main proceedings – to the application of the social security legislation of only one State and, in the worst case, to the application of the legislation of at most two States. Even in this worst-case scenario, Regulation No 883/2004 offers itself the possibility of waiving the determination of the applicable legislation in individual cases and, as a result, arriving at the application of one single social security legislation. The assumption that in the triangular relationship between the EU, the other states of the European Economic Area and Switzerland, Regulation (EC) No. 883/2004 is never applied at all, on the other hand, means that three social security legislations are always applied in every conceivable scenario. With regard to the promotion of freedom of movement in accordance with both agreements, this is a result that puts the insured person in a worse position than if the two agreements were applied separately. If the two agreements were applied separately, even in the worst-case scenario, in which the "Member States" concerned do not endeavor to find a solution, the insured person could only be subject to the legislation of two states, according to the European Commission.

There are arguments in favor of applying Regulation (EC) No 883/2004 on the basis of the EEA Agreement and the FMOPA even if they are applied separately. The Regulation provides a possibility to deviate from the determination of the

applicable legislation according to title II which could be applied to conflicts which arise from the simultaneous application of the Regulation under the EEA Agreement and the FMOPA. Article 16 of the Regulation allows Member States to provide for derogations from Title II of the Regulation where this is in the interest of certain persons or categories of persons. The Commission concludes that Article 2 of Regulation (EC) No. 883/2004 within the meaning of Annex VI (Social Security) to the EEA Agreement and within the meaning of Annex II to the FMOPA must be interpreted as meaning that Title II of that Regulation also covers a Union citizen who is simultaneously gainfully employed in a Member State of the Union, another State of the European Economic Area and Switzerland. However, Titel II of the Regulation must be applied twice – separately for the EEA Agreement and for the FMOPA – in order to determine the legislation applicable.

Considerable arguments can be put forward against the Commission's reasoning. Firstly, the question arises as to whether the (competent authorities of the) States concerned are obliged to conclude an agreement pursuant to Article 16 of Regulation 883/2004 in such a case. Should this not be the case, the resolution of conflicting rules would be at the sole discretion of the (authorities of the) Member States involved. In the event that an obligation is assumed, the question also arises on how to proceed if the Member States concerned cannot agree on the legislation which should be applied.

In addition, questions comparable to those raised in the present preliminary ruling procedure – namely how to proceed if the Union concludes agreements with different third countries on the same subject matter, but these agreements do not contain any rules on the (prioritized) application of the other agreements – may also arise in other contexts. In particular, the Trade and Co-operation Agreement between the EU and the United Kingdom (TCA) should be considered: Under the TCA – unlike under the EEA Agreement and the FMOPA – there is no free movement of persons; in such a case, the arguments relating to the free movement set out by the Commission in the present proceedings could therefore not be used to justify this legal opinion. In addition, the TCA – unlike Art. 16 of Regulation 883/2004 – does not provide for the possibility of concluding agreements which deviate from the defined coordination rules. In a constellation in which a Union citizen works in a Member State of the Union and a Member State of the EEA as well as in the United Kingdom, for example, and the (parallel application of the) relevant coordination rules lead to different results, the solution outlined by the Commission could therefore not be applied.

3. POSSIBLE SOLUTION: UMBRELLA AGREEMENT

At the end of 2022, the Ministers of Social Affairs of Germany, Austria, Liechtenstein and Switzerland agreed to discuss an umbrella agreement that could be used to achieve an overall coordination. In September 2023, experts from these countries met in Vaduz for exploratory talks.

The possibility of extending the scope of the existing agreements was discussed, insofar as a cross-border situation exists between these four states. This would be achieved by means of a quadripartite agreement which would enlarge the scope of the FMOPA, the EFTA Agreement and the EEA Agreement each in such a way that they apply not

only to nationals and cross-border situations of the respective contracting parties, but also in the same way to all nationals to whom Regulations (EC) No. 883/2004 and No. 987/2009 are applicable on the basis of one of the existing agreements. If there is a cross-border relationship between two of the four contracting states, the personal scope of the agreement applicable between these states is extended by the umbrella agreement. This means that Regulation (EC) No. 883/2004 and Regulation (EC) No. 987/2009 apply to nationals of an EU or EFTA member state as well as to Swiss nationals, on the basis of the existing agreement between the two states involved.

This would ensure, for example, that a quarter invalidity pension from Liechtenstein, which is only exported on the basis of Regulation (EC) No. 883/2004, could also be paid to German or Austrian nationals residing in Switzerland on the basis of the EFTA Convention although the personal scope of the EFTA Convention does not normally include EU nationals.

The extension of the scope of the treaties also applies to persons who are no longer in a cross-border situation at the time of claiming benefits, but whose entitlement to benefits is linked to a previous cross-border situation. This means that insurance periods completed in one contracting state can be taken into account in all other contracting states for the fulfilment of the minimum contribution, period (totalization). As a result, insurance periods from Germany and Austria can also be taken into account for Liechtenstein nationals to fulfil the three-year minimum contribution period for a Swiss invalidity pension even if they are resident in Liechtenstein at the time they apply for the pension.

If there is a situation involving more than two countries, existing agreements may collide. Such cases could be prevented by prioritizing one of the agreements. The most suitable would be the FMOPA, the coordination of which is applied by three states and is familiar to the Liechtenstein authorities from the EFTA Convention. As Liechtenstein is not a contracting party to the FMOPA, Liechtenstein would have to be treated as a contracting party to the FMOPA and categorized as a "Member State" under Regulations (EC) No. 883/2004 and No. 987/2009. This would also ensure that the European coordination provisions can ultimately be applied uniformly across the territory of all contracting parties in such trilateral constellations.

For a person who is working in Switzerland as well as in Austria and Liechtenstein – like the constellation now discussed by the ECJ – the competent state would be determined on the basis of Title II of Regulation (EC) No. 883/2004 as provided for in Annex II FMOPA. The competent state for sickness and maternity benefits in kind can also be clearly be determined by applying Art. 24 of Regulation (EC) No. 883/2004 in the version foreseen in Annex II FMOPA if a Liechtenstein national residing in Germany receives pensions from both Switzerland and Liechtenstein. Finally, in the area of family benefits, in the event of overlapping entitlements in Switzerland, Germany and Liechtenstein, Article 68 of Regulation (EC) No. 883/2004, as per Annex II FMOPA, could be used to determine the state whose legislation is applicable by priority.

The advantage of such a solution is that the existing agreements do not have to be amended or replaced by a multilateral treaty. The persons concerned could nevertheless

benefit from the coordination principles of Regulation No. 883/2004 and 987/2009 (equal treatment, determination of legislation applicable according to the "single legislation rule", totalization of insurance periods, export of benefits and assistance regarding benefits in kind in the event of illness and accident).

In principle, this method is similar to the *triangulation method* applied when the United Kingdom left the EU, which extended the protection of social security rights to persons and cross-border situations within the scope of the FMOPA and the EEA (Article 33 of the Withdrawal Agreement and corresponding agreements).

The experts from the four countries have agreed to await the outcome of the ECJ judgement in Case C-329/23 before pursuing the umbrella agreement approach.

The idea of an umbrella agreement that extends and links existing agreements is not new. Germany, Liechtenstein, Austria and Switzerland concluded such an agreement back in 1977. This allowed access to the former bilateral agreements between two of the countries to nationals of the other two countries and provided for the totalization of all insurance periods completed in the four countries in the area of pension insurance, insofar as this was necessary for entitlement to and the calculation of benefits.

4. CONCLUSION

It is and remains unclear whether and how the social insurance schemes are to be coordinated in a situation that affects Switzerland, Liechtenstein, Germany or Austria. Although there are similar legal instruments that provide for the coordination of social insurance schemes, the application of these in different agreements do not lead to a clear result. Whichever way you look at it: The existing agreements do not allow a single social security law to be clearly declared applicable, as these agreements do not regulate their relationship amongst them. Uniform coordination can hardly be enforced by a court. Jurisdiction cannot create a legal basis where none exists. The court must apply the existing legal framework, even if this can lead to unsatisfactory results. It is rather up to the contracting parties to regulate such constellations through specific Art. 16 arrangements or, in order to provide more clarity, more generally by an umbrella agreement, which does not affect the existing agreements but creates a bridge between them.

6 FACTS AND FIGURES ON EU COORDINATION OF SOCIAL SECURITY SYSTEMS: A CASE STUDY FOR AUSTRIA

BY | FREDERIC DE WISPELAERE

1. INTRODUCTION

Since 2014, statistics on the impact of the application of Regulations 883/2004[1] and 987/2009[2] (hereinafter jointly referred to as the Coordination Regulations) have consistently been gathered at EU level. Based on the implementation of Article 91 of Regulation 987/2009,[3] such data are collected within the framework of the Administrative Commission.[4] Bernhard Spiegel was as member of the Austrian delegation in the Administrative Commission, a privileged eyewitness when the European Commission (EC) announced in 2013 its ambition to collect statistics on the coordination of social security systems. He will acknowledge that the reactions of the Administrative Commission to that announcement were rather reserved. Perhaps also his own first reaction. I have always perceived his approach towards the collection of statistics as pragmatic, conciliatory, and importantly, always based on strong arguments. Indeed, on the one hand, there were the ambitions and needs of the EC, but on the other hand, there was the reality of scarce financial and human resources in national public administrations. Bernhard tried to reconcile both interests. That is why he emphasised the importance of only collecting data that provide added value and are not merely 'nice to have'.[5] Meanwhile, we are more than 10 years later and I think it can be concluded that the data collected by the Administrative Commission

(1) 'Basic Regulation' (BR): Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

(2) 'Implementing Regulation' (IR): Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems.

(3) See Art. 91 of Regulation 987/2009: *"Statistics – The competent authorities shall compile statistics on the application of the basic Regulation and the implementing Regulation and forward them to the secretariat of the Administrative Commission. Those data shall be collected and organised according to the plan and method defined by the Administrative Commission. The European Commission shall be responsible for disseminating the information."*

(4) See Art. 71 and 72 of Regulation 883/2004 for information about the composition and tasks of the Administrative Commission.

(5) See for instance, following citations from a note of the Austrian delegation of 11 June 2013: *"There is a risk of 'data graveyards' for which the IT technical effort would not be justifiable." … "A decision to collect data at European level will definitely require a profound change and standardization of the data collection at national level, which will entail high costs (personnel costs, IT costs, etc.). In this context, it is important to note the austerity measures currently in place in almost all Member States."* [own translation from German to English]

have proven their usefulness.[6] In this contribution, I argue that collecting, analysing, and reporting such data is useful, not only for the EC but equally for individual Member States. I do this by means of a case study for Austria, by providing data for Austria collected over the past decade (see *Annex I* for an infographic of Austria). The case study will also show that Austria has always been a model student in providing statistics. The focus in this contribution is on the reporting of statistics related to applicable legislation and the main branches of social security, namely, pensions, healthcare, and family benefits.

Together with the provisions of the Coordination Regulations, two other variables (i.e., 'drivers') play an important role in the number of persons benefiting from the application of the Coordination Regulations as well as in the financial implications on Member States' social security systems, notably 1) the mobility flows from and to Member States, and 2) the social security legislation at national level. Afterall, it should not be forgotten that the only objective of the European rules is to *coordinate* national social security systems to promote the right of free movement of persons. Consequently, the Coordination Regulations have no impact on the composition of national social security systems (in terms of eligibility criteria, design, and level of benefits). Both variables may have a major impact on the financial consequences of the application of the Coordination Regulations.

First, mobility flows are significant drivers. For example, the larger the scale of intra-EU (labour) mobility, the larger the financial impact will be. Austria is an important receiving Member State of EU movers (of working age) and cross-border workers (i.e., frontier workers). In 2022, there were 836 474 EU/EFTA movers residing in Austria, amounting to 9% of the total population in Austria *(Table 1)*. About three out of four of this group are of working age (20-64 years old). Most of the EU/EFTA movers of working age concern German (160 305), Romanian (97 781), Hungarian (72 397), and Croatian nationals (70 007). Moreover, Austria is one of the main Member States of destination for cross-border workers in the EU/EFTA (158 000 in 2022) (Hassan et al., 2024). Most of them reside in Hungary (56 000), Germany (27 000), Slovakia (22 000), Slovenia (15 000), Czechia (10 000), and Croatia (8 000). Austria has experienced a significant increase in the number of incoming cross-border workers over the years, from 92 000 in 2010 to 158 000 in 2022. This may be associated with opening up the borders towards Eastern European countries, which is only now becoming apparent in measurable figures.

(6) For an overview of all statistical reports, the excel data sheets and the online interactive statistics see https://ec.europa.eu/social/main.jsp?catId=1154&langId=en or https://hiva.kuleuven.be/en/news/newsitems/Reports-on-social-security-coordination-and-intra-EU-labour-mobility-20171212.

TABLE 1: MAIN INDICATORS OF INTRA-EU (LABOUR) MOBILITY TO AUSTRIA IN 2022

Type of intra-EU (labour) mobility	Number
EU/EFTA movers residing in Austria – all ages	836 474 (9% of total population)
EU/EFTA movers residing in Austria – of working age (20-64)	617 027 (11% of total population of working age)
Number of incoming cross-border workers	158 000

Source: Eurostat and Hassan et al. (2024)

Second, how national social security systems are developed can influence the financial impact of the application of the Coordination Regulations. Let us take access to family benefits in cash as an example. Family benefits in cash show considerable differences in terms of eligibility criteria, design, and level of benefits. Consequently, the number of exported family benefits in cash and the related expenditure will to a large extent be determined not only by the priority rules[7] as defined by the Coordination Regulations or the size of the reference group (i.e., number of mobile persons working/residing in a Member State other than the Member State of residence of the child(ren)) but also by the differences among Member States in how access to family benefits is organised. For instance, access to child benefits as well as the amount paid are more generous in Austria than in several neighbouring countries (e.g., Hungary, Croatia, and Slovakia).[8] Consequently, this reality, together with the high number of incoming cross-border workers, will have a significant impact on the amount of family benefits transferred abroad by Austria (see *section 5*).

2. APPLICABLE LEGISLATION

In 2022, Austria issued 139 994 Portable Documents A1 (PDs A1)[9] of which more than half under Art. 12 BR (i.e., posted workers) (56%), 43% under Art. 13 BR (i.e., active in two or more Member States), and 1% under 'other categories'.[10] Over half of

(7) Rights available on the basis of (self-)employment have priority, followed by the rights available based on pension and the place of residence. In case of family benefits payable by more than one Member State on the same basis ((self-)employment, pension, or place of residence), the Member State of residence of the children becomes 'primarily' competent for the payment of the family benefits.

(8) The child benefit in Austria is not subject to a means test. In Croatia, there is no entitlement to a child benefit for those whose monthly income exceeds € 309. The child benefit for every child amounts to € 120.6 per month in Austria, € 33 per month in Hungary, € 40 per month in Croatia, and € 60 per month in Slovakia (variations in the reported amount exist in all four Member States) (based on information from the MISSOC database).

(9) The Portable Document A1 proves that the social security legislation of the issuing Member State applies and confirms that the person concerned has no obligations to pay social security contributions in another Member State.

(10) The (relative) importance of other provisions affecting the issuance of a PD A1 remains limited in Austria. However, this might have changed from July 2023 onwards due to the Framework Agreement on the application of Article 16 (1) of Regulation (EC) No. 883/2004 in cases of habitual cross-border telework. Given the high number of incoming cross-border workers, it is likely that Austria grants a high number of PDs A1 on the basis of the Framework Agreement.

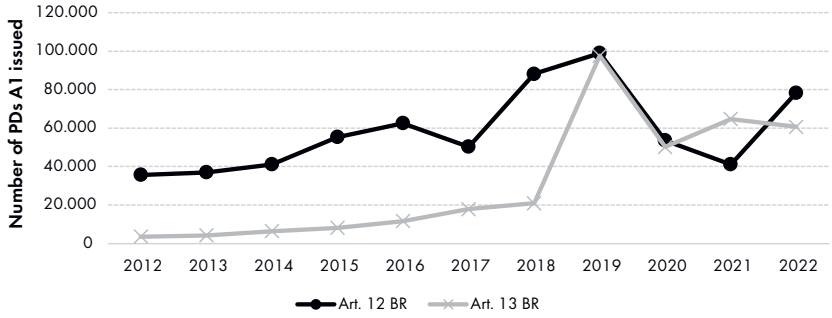
the PDs A1 issued by Austria under Art. 12 BR were received by Germany (53%). The most common sectors of activity were the industry and the construction sector. The total number of PDs A1 issued in national employment amounted to 3% for Austria as a sending Member State, which is above the EU/EFTA average of 1.8%. A number of trends can be identified over the period 2012-2022. Firstly, a strong increase in the number of PDs A1 issued can be observed (it was 3.5 times higher in 2022 compared to 2012), with a particularly high peak in 2019 *(Figure 1)*. Secondly, especially the number of PDs A1 granted under Art. 13 BR show an enormous growth (in 2022 almost 17 times higher compared to 2012).[11] In reference year 2021, the number of PDs A1 issued under Art. 13 BR was even higher than the number of PDs A1 issued under Art 12 BR.

Which factors might explain the sharp increase in the number of PDs A1 issued under Art. 13 BR over the past decade? Firstly, the increasing importance of international road freight transport (and the increased number of inspections in this sector) might be a reason for this increase. However, unlike Member States such as Lithuania and Poland, Austria does not grant most PDs A1 under Art. 13 BR for activities in international road freight transport but mainly for activities in the sectors 'industry (NACE B to F)' and 'Education, health and social work, arts and other services (NACE P to S)'. Secondly, the sharp increase of Art. 13 BR might point to risks of 'law shopping' whereby an employer considers the most interesting choice. Indeed, the existence of several conflict rules opens room for circumvention. In that respect, having a PD A1 under Art. 13 BR might be more interesting for several reasons. For instance, under Art. 13 BR there is no maximum duration of the person's coverage by the social security system of the issuing Member State, while under Art. 12 BR this is limited to a maximum period of 24 months (and several 'posting conditions'[12] must be fulfilled). Nevertheless, as an outsider, the main underlying reasons for the increasing importance of Art. 13 BR remain a matter of speculation. Austrian civil servants might be able to provide an explanation more easily. Additionally, they might be able to clarify the reasons for the huge increase in issued PDs A1 in 2019, for both Art. 12 BR and Art. 13 BR.

(11) The number of PDs A1 granted under Art. 12 BR 'only' doubled.

(12) 1) the employer must normally carry out its activities in the Member State of establishment; 2) there must be a direct relationship between the posting employer and the posted worker; 3) prior to being posted, the posted worker must be affiliated to the legislation of the Member State in which their employer is established; 4) the posting is of a temporary nature (not exceeding 24 months); and 5) the posted worker is not sent to replace another posted worker.

FIGURE 1: NUMBER OF PORTABLE DOCUMENTS A1 ISSUED BY AUSTRIA, 2012-2022

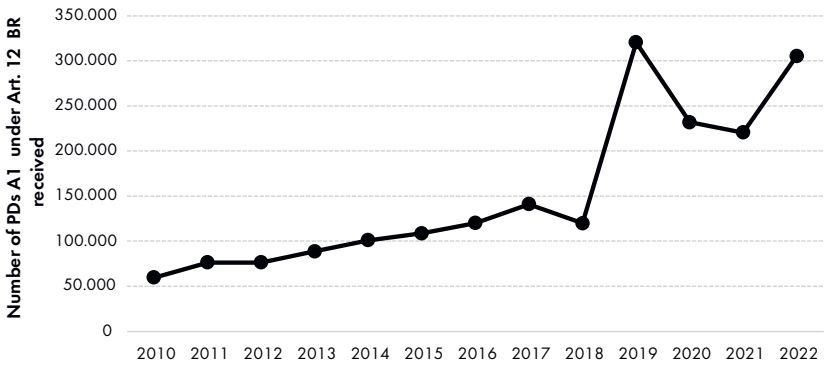


Source: De Wispelaere et al. (2024)

Austria is one of the main receiving Member States of posted workers. In 2022, it received 305 478 PDs A1 under Art. 12 BR, which was 10% of all PDs A1 under Art. 12 BR granted by all EU/EFTA countries. The great majority of the PDs A1 received by Austria under Art. 12 were issued by Germany (80%). The number of PDs A1 received under Art. 12 BR was five times higher in 2022 compared to 2012 *(Figure 2)*. The strong peak observed for 2019 can be explained by the sharp increase in the number of PDs A1 under Art. 12 BR granted by Germany in that year.[13] The decline in the number of PDs A1 received under Art. 12 BR was relatively limited during the COVID-19 pandemic. Afterall, the number for 2020 was still higher compared to the period before 2019. Finally, Austria is clearly a net receiving Member State in terms of posted workers. In 2022, the number of PDs A1 received under Art. 12 BR was almost four times higher than the number of PDs A1 issued under Art. 12 BR.

(13) It can be assumed that the evolution of the number of PDs A1 issued according to Art. 12 BR strongly depends on the evolution of cross-border trade in services. However, other factors may also have an impact on its evolution. For instance, the communication of competent authorities about the request for a PD A1 when making a 'business trip' to another Member State or about the enforcement of the PD A1 may have a direct impact on the evolution of the number of PDs A1 issued according to Art. 12 BR. This might be one of the explanations for the strong increase in PDs A1 under Art. 12 BR issued by Germany in 2019 (see also BMAS). Another reason for the increase in Germany was the introduction of a digital request for a PD A1. A digital request became mandatory for all German employers in 2019 regardless of the duration of the posting period.

FIGURE 2: NUMBER OF PORTABLE DOCUMENTS A1 UNDER ART. 12 BR RECEIVED BY AUSTRIA, 2010-2022



Source: De Wispelaere et al. (2024)

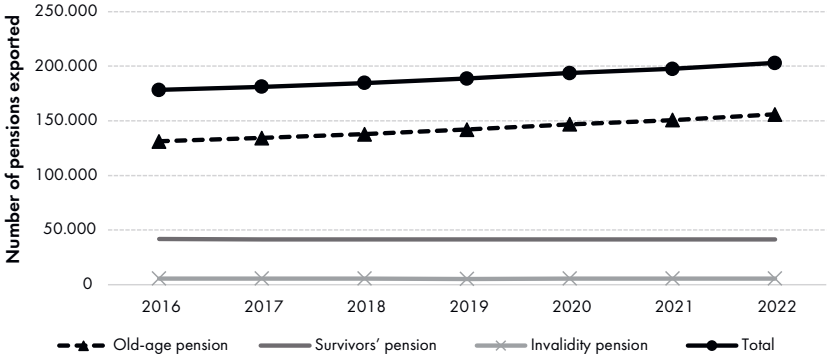
3. EXPORT OF PENSIONS

In 2022, Austria exported 202 899 pensions to beneficiaries who reside in another Member, mainly to Germany (around 50% of total). This corresponded to 7.1% of all pensions paid by Austria, a rather high share compared to the EU/EFTA average of 3.9%. Furthermore, a total amount of € 772.7 million was paid in 2022 by Austria to these beneficiaries, which amounted to 1.4 % of the total expenditure on pensions. The export of old-age pensions, both in numbers and amount, is much higher compared to the export of survivors' pensions and invalidity pensions *(Figures 3 and 4)*. About 80% of the amount exported by Austria in 2022 were old-age pensions. Between 2016 and 2022, the total number of exported pensions increased by 14% (from 178 307 pensions to 202 899 pensions). The increase of the amount exported was even much higher, notably almost 50% (from € 514.6 million to € 772.7 million). Furthermore, it is striking that the number of exported survivors' pensions and invalidity pensions remained very stable over the observed period, while the number of exported old-age pensions increased by 19%.

The export of pensions seems highly dependent on 1) the extent of intra-EU labour mobility, mainly of employed EU movers who return to their Member State of origin and of frontier workers and 2) the evolution of pensioners moving to another Member State. In that respect, the export of pensions from Austria towards Hungary, Slovakia, Slovenia, Romania, and Croatia can be expected to grow further in importance. Indeed, there has been a sharp increase in intra-EU labour mobility towards Austria since the accession of new Member States to the EU in 2004, 2007, and 2013. Many of these EU movers and cross-border workers are still of working age. Consequently, the impact of this sharp increase in intra-EU labour mobility on the export of pensions will only become visible in the coming years.[14]

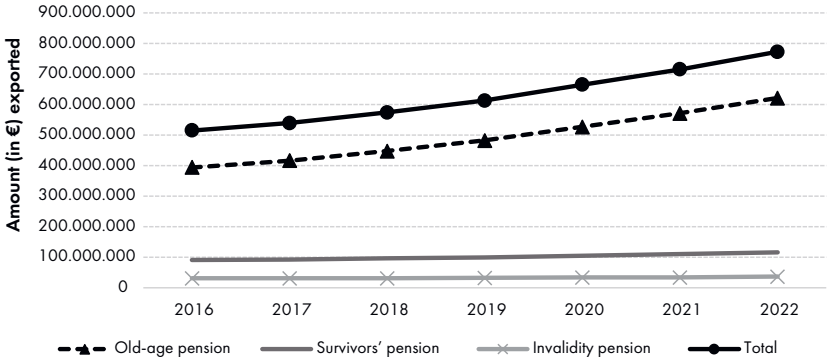
(14) Just a thought: "Will the question of indexation of pensions then also be raised, as it was recently for family benefits?" (see *section 5*).

FIGURE 3: NUMBER OF PENSIONS EXPORTED BY AUSTRIA TO ANOTHER MEMBER STATE, 2016-2022



Source: De Wispelaere et al. (2024)

FIGURE 4: AMOUNT (IN €) OF PENSIONS EXPORTED BY AUSTRIA TO ANOTHER MEMBER STATE, 2016-2022



Source: De Wispelaere et al. (2024)

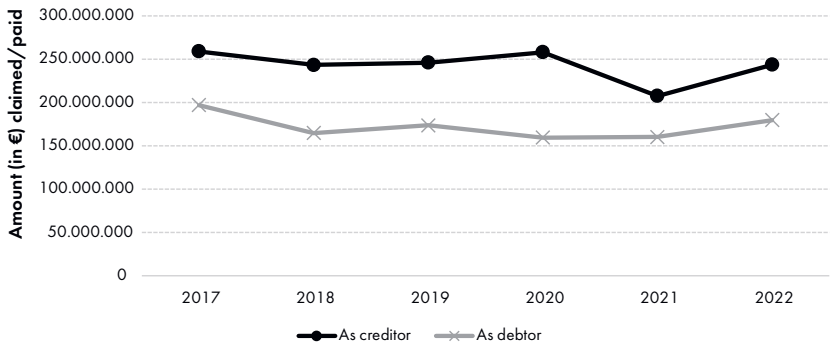
4. CROSS-BORDER HEALTHCARE

Three cross-border healthcare situations are identified and regulated under the Coordination Regulations. (1) Unplanned cross-border healthcare when necessary and unforeseen healthcare is received during a temporary stay outside of the competent Member State. (2) Planned cross-border healthcare may be received in a Member State other than the competent Member State when patients purposely seek out healthcare abroad. (3) Persons who reside in a Member State other than the competent Member State are also entitled to receive healthcare.

In terms of cross-border healthcare, Austria is a net receiving Member State. This means that Austria mainly provides cross-border healthcare to insured EU/EFTA citizens rather than insured persons in Austria receiving healthcare in another Member

State. In 2022, Austria paid an amount of € 179.7 million as debtor and claimed an amount of € 243.6 million as creditor *(Figure 5)*. Both the amount claimed as a creditor (-6%) and the amount paid (-9%) as a debtor were lower in 2022 compared to 2017. Nonetheless, in general, the amount claimed and paid show a relatively stable evolution. Only in 2021 there was a strong decrease in the amount claimed by Austria as creditor due to the COVID-19 pandemic.

FIGURE 5: AMOUNT OF CROSS-BORDER HEALTHCARE CLAIMED AS CREDITOR AND PAID AS DEBTOR BY AUSTRIA, 2017-2022



Source: De Wispelaere et al. (2024) based on Audit Board data

A more detailed breakdown can be made according to the type of cross-border healthcare. In 2022, there were 8 682 533 European Health Insurance Cards (EHICs)[15] in circulation in Austria, which indicates that 94% of the Austrian population had an EHIC. The budgetary impact for Austria of unplanned necessary cross-border healthcare depends heavily on the volume of EU travellers going on holiday to Austria (e.g., to go skiing) and Austrian travellers going on holiday to another Member State. In 2022, Austria paid € 21.7 million as competent Member State (i.e., debtor) and received € 116.8 million as a Member State of stay/treatment (i.e., creditor), the fourth highest amount of all reporting Member States.

In 2022, 3 511 insured persons in Austria received planned cross-border healthcare in another Member State on the basis of a Portable Document S2 (PD S2).[16] Consequently, roughly 38 out of 100 000 insured persons in Austria were entitled to receive planned cross-border healthcare based on a prior authorisation. Although this number is low, it is still much higher compared to the EU average (around 7 out of 100 000 insured persons). More than nine out of ten persons with a PD S2 issued by Austria received planned cross-border healthcare in Germany. Furthermore, 6%

(15) The EHIC proves the entitlement to necessary healthcare in kind during a temporary stay in a Member State other than the competent Member State.

(16) The PD S2 certifies the entitlement of the insured person to planned health treatment in a Member State other than the competent Member State.

received planned treatment in Switzerland. As a Member State of treatment, Austria received 4 359 PDs S2 in 2022 of which three quarters was issued by Germany (78%) and 12% by Switzerland. In 2022, Austria paid € 13.4 million as a competent Member State (i.e., debtor) for planned cross-border healthcare and received € 13 million as a Member State of treatment (i.e., creditor).

Concerning healthcare provided to persons residing in a Member State other than the competent one, 166 740 persons were insured in Austria and resided in another Member State, whilst 44 928 persons resided in Austria and were insured in another Member State (2022 figures).[17] Consequently, 1.8 % of the insured persons reside in a Member State other than Austria. More than nine out of ten insured persons residing outside Austria are of working age (mainly cross-border workers). Hence, only a fraction are pensioners. For the group of insured persons residing in another Member State, Austria paid € 162.9 million as a competent Member State (i.e., debtor) and received € 65.7 million as a Member State of residence/treatment (i.e., creditor).

The above figures show that Austria, as a debtor, mainly reimburses cross-border healthcare for people who are insured in Austria but reside in another Member State (82% of the amount reimbursed by Austria in 2022). Whereas as a creditor, Austria mainly receives reimbursements for the provision of unplanned necessary healthcare to people insured in another Member State (60% of the amount received by Austria in 2022) and to a lesser extent for persons living in Austria and insured in another Member State (around 34% of the amount received by Austria in 2022).

5. EXPORT OF FAMILY BENEFITS

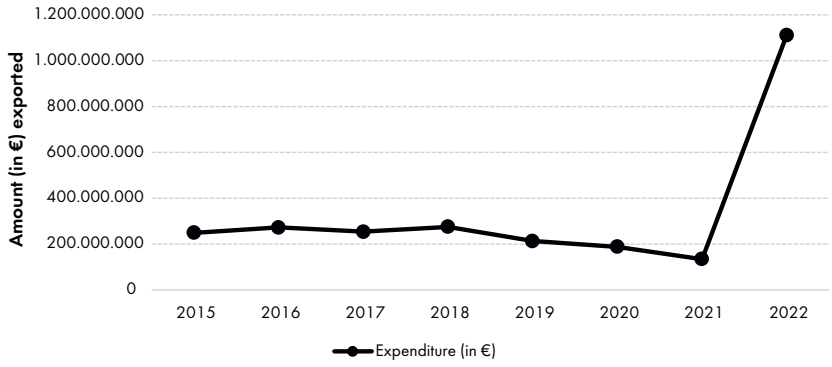
There are several variables which influence the number of exported family benefits. One of the main variables is the size of the reference group, namely the number of mobile persons working/residing in a Member State other than their family members. Consequently, it can be expected that Member States with a high number of incoming cross-border workers, such as Austria (see *Table 1*), pay a high number of family benefits to families living in another Member State (mainly to Hungary, Germany, Slovakia, and Slovenia in the case of Austria). The budgetary impact will also be influenced by differences in the amount of the child benefit among Member States. For example, Austria, as secondarily competent Member State,[18] will often top up the amount of the child benefit since the level is higher in Austria compared to most of its neighbouring countries.

(17) This group of persons will have a Portable Document S1 (PD S1). This document allows a person to register for healthcare if (s)he resides in an EU country, Iceland, Liechtenstein, Norway, or Switzerland but (s)he is insured in a different one of these countries.

(18) Indeed, the Coordination Regulations lay down priority rules to define the 'primarily competent Member State' which is obliged to provide the family benefit for the person concerned. However, another Member State might have to pay a supplement (corresponding to the difference between the amount of the two family benefits) as the 'secondarily competent Member State' if the family benefit paid by the primarily competent Member State is lower than the family benefit the person would have received from the secondarily competent Member State.

Member States show a relatively stable evolution of their export of family benefits over the observed period, even during the COVID19 pandemic. The exception to this is Austria. Starting on 1 January 2019, Austria introduced an indexation of the amount of family benefits, child tax credits, and family tax credits for EU nationals who work in Austria and have children living abroad. This implied that the amount of the family benefit depended on the cost of living of the place of residence of the children. As result of this policy, the annual amount of family benefits exported abroad decreased by around € 140 million between 2018 and 2021 (from € 275 million in 2018 to € 134 million in 2021) *(Figure 6)*. The relative importance of the exported amount of family benefits in total expenditure decreased from 5.7% in 2018 to only 2.6% in 2021. However, the Court of Justice of the European Union (CJEU) ruled on 16 June 2022 that the indexation of family benefits by Austria is not compatible with EU law.[19] With Federal Law Gazette I No. 135/2022,[20] an amendment to the Family Burdens Equalisation Act and the Income Tax Act came into force. This law repealed the indexation provisions and created a legal basis for back payments. The financial impact of the CJEU ruling is clearly reflected in the 2022 figures for Austria. An amount of € 1.1 billion was paid out to families residing in another EU/EFTA country and the UK in 2022 *(Figure 6)*. This mainly concerned (back) payments to families living in Hungary (€ 329 million), Slovakia (€ 206 million), Slovenia (€ 121 million), and Czechia (€ 113 million).

FIGURE 6: AMOUNT (IN €) OF FAMILY BENEFITS EXPORTED BY AUSTRIA TO ANOTHER MEMBER STATE, 2015-2022



Source: De Wispelaere et al. (2024)

(19) Judgment of the Court in Case C-328/20 Commission v Austria (Indexation of family benefits). See also press release No 102/22.

(20) https://www.ris.bka.gv.at/eli/bgbl/I/2022/135.

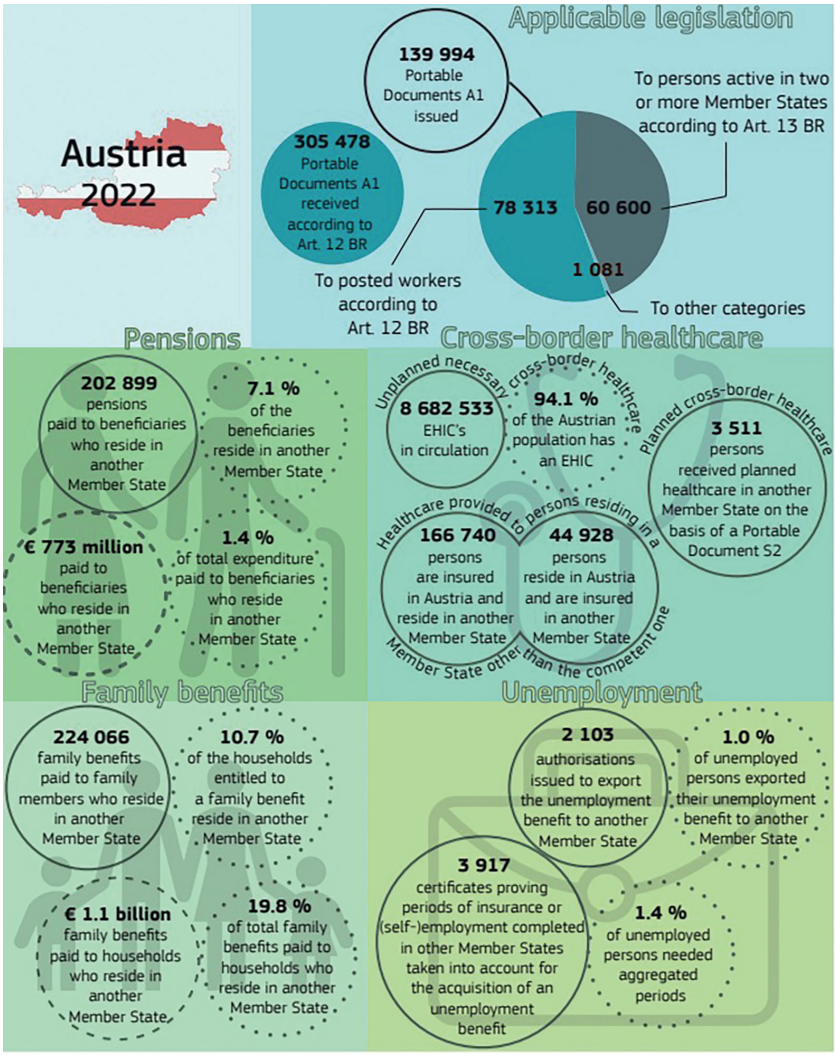
6. CONCLUSIONS AND RECOMMENDATIONS

The initiative taken in 2013 by the Commission to collect data on the application of the Coordination Regulations in a consistent manner has not led to a 'data graveyard' but rather to increased knowledge, both in terms of persons benefiting from it as well as its budgetary impact on Member states' social security systems. It allowed the EC to closely monitor the impact of the Coordination Regulations as well as to conduct evidence-based policy (for instance, in its proposal to amend the Coordination Regulations (COM(2016) 815 final)). Moreover, the statistics have been made more accessible to scholars (via Excel sheets) and non-experts (via the (interactive) infographics). This kind of information made it possible to report some key trends and evolutions for Austria.

The statistical reports on the coordination of social security systems provide a descriptive analysis of the reported data, mostly in terms of notable fluctuations of the figures compared to the previous year. The underlying reasons for certain trends and evolutions are mostly left unaddressed, mainly due to the need for further explanation from the national competent public authorities. In that regard, it would be beneficial to apply a mixed method approach in the future, where the quantitative data analysis is complemented by input from experts at the national competent public authorities. This would allow certain trends to be better explained (for instance for Austria the strong increase of the number of PDs A1 granted under Art. 13 BR or of the number of PDs A1 issued in 2019). In addition, the statistics reported often provide only a first glance at the impact of the Coordination Regulations, based on a limited number of variables for which most Member States can provide data. It may therefore be interesting to analyse and report data at country level (this is for instance the case in France).[21] This allows Member States to report more detailed and tailored data and to focus more on country-specific trends and the reasons behind them.

(21) Cleiss (Centre des Liaisons Européennes et Internationales de Sécurité Sociale) publishes an annual statistical report on the coordination of social security systems (https://www.cleiss.fr/docs/stats/index.html). It has also recently published a report on the export of family benefits covering a period between 1968 and 2021 (https://www.cleiss.fr/docs/decryptage/decryptage29/Decryptage_29.pdf).

ANNEX I INFOGRAPHIC AUSTRIA



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7 THE IMPORTANCE OF THE PRINCIPLE OF LOYAL AND MUTUAL COOPERATION IN THE IMPLEMENTATION OF EUROPEAN REGULATIONS COORDINATING SOCIAL SECURITY SYSTEMS[1]

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1. INTRODUCTION

01. - The cornerstone of the implementation of regulations coordinating social security systems is the principle of fair and mutual cooperation. This principle is so important that it should be added to the list of guiding principles for social security coordination set out in Title II of Regulation (EC) No 883/2004[2].

02. - This principle of loyal cooperation permeates, without exception, all the chapters of Regulations (EC) Nos 883/2004 and 987/2009: Title 2 of Regulation (EC) No 883/2004 on the determination of the applicable legislation, Title 3 of the same Regulation on specific coordination provisions relating to benefits[3] . As for Title 4 of the said Regulation, it enshrines the existence of a body that stands apart in the European landscape, described as an institutional curiosity by a certain doctrine[4]

(1) The contribution reflects the personal opinion of the authors and not that of the organisation (employer) to which they belong.

(2) In this regard, see R. Cornelissen, in Rob Cornelissen, Maximiliaan Fuchs, EU Social Security Law. A Commentary on EU Regulations 883/2004 and 987/2009, Nomos Verlagsgesellschaft, 2015, p. 446, citing Jorens/VAN OVERMEIR, general principles of coordination in Regulation 883/2004; see also G. GEORGES, «le citoyen européen peut-il se faire soigner dans l'Etat membre de l'U.E. de son choix», publication de l'institut européen de l'université de Genève, Euryopa vol. 41-2006, p.15.

(3) See G. GEORGES, o.c., p.20, who states that "As social security benefits may be paid in the territories of all Member States through the institution of the beneficiary's place of residence, on behalf of the institution of the State designated as competent. This requires the internationalisation of the financial systems responsible for providing benefits and deducting contributions".

(4) Mass, H., La Commission Administrative pour la Sécurité Sociale des travailleurs migrants, une curiosité institutionnelle, CDE, p. 361, 1966. This author in essence concludes that "the provisions under review consist in a delegation of powers which is not justified in law, and he suggests that the administrative Commission be changed into a consultative body of the EEC Commission, of which the advice could, in certain cases, have to be requested". See: Wenander, H., A network of Social Security Bodies. European Administrative Cooperation under Regulation (EC) No 883/2004, Review of European Administrative Law, p. 47, 2013-1.

or as a collaborative network of social security institutions[5] : the Administrative Commission for the Coordination of Social Security Systems[6] . The AC is a permanent feature of coordination[7] . Envisaged as early as the adoption of the first coordinating Regulation No 3/58 (Chapter 8, Title III, Articles 43 and 44), although with a different composition[8] and fewer tasks than those currently carried out[9] , the AC was renewed with the adoption of Regulation No 1408/71 and strengthened by Regulation (EC) No 883/2004 (Articles 71 and 74) by the creation of two subcommittees: one (the Technical Committee) is given the main task of improving the procedure for exchanging information and transmitting data between social security institutions in a secure environment, while the second (the Audit Board) is responsible for guaranteeing reimbursement to the Member State which has provided benefits in kind from another Member State within a reasonable period. This institutional cooperation must comply with one of the basic principles of Community law, that of loyal cooperation (Article 4(3) TEU)[10] . Article 76 of Regulation 883/2004 lays down the basic rules.

03. - It should be noted, however, that in 2018 the Commission, in its proposal for a regulation of 13 March 2018 for the creation of a European Labour Authority (ELA), provided for the transfer of these two subcommittees (Technical Committee and Audit Board) to ELA[11] . This clumsy attempt by the European Commission to strip the AC of its prerogatives was ultimately unsuccessful, as the co-legislators refused to transfer the two subcommittees to ELA: the compromise reached was to emphasise the need for cooperation between the CA and ELA while respecting their respective competences[12]. Article 74a(1)[er] of Regulation (EC) No 883/2004 lays the foundations for this cooperation by stating that the AC "shall conclude a cooperation agreement with ELA"[13]. In addition to this cooperation between the AC and ELA, Article 75 of the said Regulation establishes, at the request of trade union organisations at European

(5) See G. GEORGES, o.c., p.20.

(6) In this contribution, the acronym "AC" will be used.

(7) Omarjee, I, Droit européen de la protection sociale, Collection droit de l'Union européenne directed by Fabrice Picod, Bruylant, p. 92 and ff.

(8) Under Regulation No 3/58, the composition of the Administrative Commission had another configuration, since it was envisaged that the Administrative Commission would benefit from the technical assistance of the International Labour Office in the framework of the agreements concluded for this purpose between the European Economic Community and the International Labour Office.

(9) Under Regulation No 3/58, the tasks of the Administrative Commission concerned administrative questions of interpretation of the abovementioned Regulation, translations and the promotion and strengthening of social security cooperation with a view to, in particular, health and social action of common interest and, finally, on the achievement of compensation and the payment of reimbursements between the interested institutions of the Member States (tasks currently devolved to the Audit Board).

(10) We will return below to the scope of this general principle of EU law.

(11) Proposal for a Regulation of 13 March 2018 (COM (2018) 131 final) establishing a European Labour Authority (EAL), p. 10, recital 32, Article 8(2).

(12) Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019 establishing the European Labour Authority, amending Regulations (EC) No 883/2004, (EU) No 492/2011 and (EU) 2016/589, and repealing Decision (EU) 2016/344 (Text with EEA and Swiss relevance).

(13) Regulation (EU) No 2019/1149 of the European Parliament and of the Council of 20 June 2019 establishing the European Labour Authority, amending Regulations (EC) No 883/2004, (EU) No 492/2011 and (EU) 2016/589, and repealing Decision (EU) 2016/344 (OJEU No L186 of 11 July 2019) entered into force on 31 July 2019. The text of the cooperation agreement is available on the ELA website: https://www.ela.europa.eu/sites/default/files/2024-03/AC-ELA_Agreement_for_signing_17.12.2021_NB.pdf.

level, an Advisory Committee for the Coordination of Social Security Systems within the AC; this committee is supposed to embody European social dialogue within the institutional "machinery" of the AC[14].

04 - One of the most important elements in terms of cooperation under the current European regulations is the improvement of exchanges of information between competent authorities and institutions and citizens. Title V of Regulation (EC) No 883/2004 contains a number of provisions requiring excellent administrative assistance between authorities and citizens, prohibiting the refusal of requests or documents on the basis of language, the mutual duty of information between citizens and institutions, and the obligation for the latter to respond to requests within a reasonable time (Article 76). Title V also contains provisions on the protection of personal data (article 77). These provisions are supplemented and detailed in regulation 987/2009. All these provisions aim to reduce the impact of administrative complications on the implementation of beneficiaries' rights. Article 78 of Title 5 of Regulation (EC) No 883/2004 on the electronic processing of information suggests that the system for the electronic exchange of social security information (EESSI[15]) will contribute to faster and more secure exchanges of information and to better quality in the exchange of data[16] . With regard to medical examinations (Article 82), medical examinations provided for by the legislation of a Member State may be carried out, at the request of the competent institution, in another Member State, by the institution of the place of residence or stay of the claimant or recipient of benefits, under the conditions laid down in the implementing regulation or agreed between the competent authorities of the Member States concerned. Finally, Title 5 of Regulation (EC) No 883/2004 (Article 84) provides for close mutual assistance between the institutions of the Member States concerned as regards the recovery of social security contributions and the recovery of social security benefits. Unlike the previous Regulation 1408/71, which left the arrangements for implementing the provisions on the recovery of social security contributions to agreements between Member States, Regulation (EC) 987/2009 sets out a detailed legal framework modelled on the existing framework for the recovery of tax claims[17] : in the area of the recovery of social security contributions, assistance between the competent institutions of the Member States is considered necessary in order to prevent and curb abuses and to combat fraud, as well as to guarantee the long-term viability of social security schemes[18]

05. - In short, the provisions of Regulations (EC) Nos 883/2004 and 987/2009, often described as esoteric[19] , or at any rate as (overly) technical and complex, require

(14) This committee already existed under Regulation (EC) No 1408/71 (Article 82).

(15) This system is known by its acronym: EESSI.

(16) Rob Cornelissen, Maximiliaan Fuchs, EU Social Security Law, o.c., pp. 446 et seq.

(17) Council Directive 2008/55/EC of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures, succeeded by Council Directive 2010/24/EU of 16 March 2010 on mutual assistance for the recovery of claims relating to taxes, duties and other measures, O.J. L 84/1 of 31 March 2010.

(18) Regulation (EC) No 987/2009, recital 19. This recital is also the only place in coordination regulations 883/2004 and 987/2009 where the word "fraud" is mentioned explicitly.

(19) M. MORSA, Sécurité sociale, libre circulation et citoyenneté européenne, Préface S. Van Raepenbusch, Anthémis, coll. droit social, 2012.

smooth and effective cooperation and excellent cooperation between the competent authorities and institutions of the Member States in order to be implemented. Article 76 of Regulation (EC) No 883/2004 sets out the principles for establishing such cooperation and communication. In addition, this provision of the regulation also highlights the need for institutions to provide active assistance to citizens in implementing their rights under regulations 883/2004 and 097/2009. A fundamental element for citizens (insured persons, workers, companies, institutions) set out in Article 76 of the said European regulation is the information service provided to citizens concerning their rights and obligations. However, the duty of loyal and mutual cooperation also requires citizens to inform the competent institutions of any changes in their personal or family situation that may affect their entitlement to benefits under these regulations.

06. - **Outline**. After outlining the importance of the principle of loyal cooperation as a general principle of Union law (point 2), we will describe the way in which this principle manifests itself in European social law and, more specifically, in European law on the coordination of social security systems: firstly, in a number of relevant judgments handed down by the Court of Justice of the European Union, and secondly, in the development of the body constituted by the AC (point 3). We will conclude our contribution with some forward-looking conclusions (point 4).

2. THE PRINCIPLE OF LOYAL AND MUTUAL COOPERATION AS A GENERAL PRINCIPLE OF UNION LAW

2.1. ARTICLE 4(3) OF THE TEU

07. - The case law of the Court of Justice of the European Union is now constant and categorical, making the principle of "loyal cooperation" a general principle of EU law[20] . This principle derives from Article 10 of the EC Treaty (which did not expressly mention it[21]). It requires Member States to ensure that Union law is complied with, to facilitate the achievement of its tasks and to refrain from any measure which could jeopardise the attainment of its objectives. This principle therefore means that the power to enforce Union law normally lies with the national authorities. The Court of Justice has given this principle a wide scope, holding that the Member States are "under an obligation to do their utmost to ensure that 'Community law' has effective effect"[22] . Since the Treaty of Lisbon, the principle of loyal cooperation has been enshrined in Article 4(3) of the Treaty on European Union, by virtue of which the Union and the Member States respect and assist each other in the performance of their tasks under the Treaties. It thus enshrines "reciprocal duties of loyal cooperation" between the

(20) G. ISAAC, M. BLANQUET, Droit général de l'Union européenne, 10ème ed. Sirey, 2012. J. TEMPLE LANG, "Article 10 EC – The Most Important General Principle of Community Law", in U. Bernitz, J. Nergelius, C. Cardner, X. Groussot (dir), General Principles of EC Law in a Process of Development, Wolters Kluwer, 2008, p. 75 et seq.

(21) François-Xavier Priollaud, D. Siritzky, le traité de Lisbonne : texte et commentaire article par article des nouveaux traités européens (TUE-TFUE), la documentation française, p.41.

(22) ECJ, 12 October 1970, Case C-30/70.

Union and the Member States[23] . More specifically, Article 4(3) of the TEU states that *"By virtue of the principle of loyal cooperation, the Union and the Member States shall respect and assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from action taken by the institutions of the Union. Member States shall facilitate the achievement of the Union's tasks and shall refrain from any measure which could jeopardise the attainment of the Union's objectives."*.

2.2. THE DUAL OBLIGATION OF LOYAL COOPERATION ON THE PART OF THE MEMBER STATES ENSHRINED IN ARTICLE 4(3) OF THE TEU

08. - In fact, Article 4(3) TEU enshrines a "dual obligation"[24-25] . According to this provision of the TEU, the Member States are required to "take any appropriate measure, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from action taken by the institutions of the Union". This provision adds that Member States "shall refrain from any measure which could jeopardise the fulfilment of obligations under the Treaties or resulting from action taken by the institutions of the Union". The obligation of loyal cooperation has a dual dimension. It is positive in that Member States may be required to adopt measures. It is also negative in that Member States must also, where appropriate, refrain from taking measures[26].

09. - Article 4(3) TEU states that Member States are subject to a dual obligation of loyal cooperation: the obligation to act and the obligation to abstain.

2.2.1. The obligation to act

10. - The duty to act (or positive duty of loyal cooperation) on Member States requires them to take all necessary measures to fulfil their obligations and to facilitate the achievement of the Union's mission. Put another way, the positive duty of loyal cooperation obliges Member States to *"take all appropriate measures to ensure the scope and effectiveness of Community law"* [27]. As a result, Member States have an obligation to do everything possible to ensure the effectiveness of an act adopted by the Union institutions, such as a regulation[28]. They also have an obligation to transpose directives. This transposition must be complete and fair.

11. - In addition, the positive obligation of loyal cooperation entails an obligation to collaborate with the European Commission in the context of procedures aimed at

(23) ECJ, 10 February 1083, Luxembourg v EuropeanParliament, Case C-230/81, EU:C:1983:32.

(24) F. MARTUCCI, Droit de l'Union européenne, Dalloz, 2ème edition, 2019.

(25) For a more general overview of the principle, see. J.-P. Jacqué, *Droit institutionnel de l'Union européenne*, 7th ed., Paris, Dalloz, 2012, nos 986 et seq.

(26) See, for example, regarding measures manifestly contrary to the objectives of a directive adopted before the transposition deadline: CJEC, 18 December 1997, Inter-Environnement Wallonie, aff. C129/96; CJEC, 14 June 2007, Commission c/ Belgique, aff. C-422/05, EU:C:2007:342.

(27) ECJ, 26 November 2002, First and Franex; ECJ, 21 September 1989, *Commission v Greece*, case C-66/88, EU:C:1989:282.

(28) ECJ, 17 Dec. 1970, Scheer, EU:C:1970:117.

monitoring and ensuring compliance with Union law by the Member States. In this respect, the Member States are bound by a certain number of secondary obligations:

- an obligation to inform the Commission[29]
- an obligation to answer questions put by the Commission[30]
- an obligation to notify the Commission of any national measures to ensure compliance with Union law[31]
- an obligation to notify the Commission of any national measure that derogates from measures to harmonise national legislation adopted by the EU institutions.

2.2.2. The duty to abstain

12. - The duty of absention (or negative duty of loyal cooperation) requires Member States to refrain from taking measures that could jeopardise the achievement of the Union's objectives. For example, Member States must, before the end of the transposition period, refrain from taking *"measures liable seriously to compromise the result prescribed by [a] directive"* (ECJ, 18 Dec. 1997, Inter Wallonie environnement).

13. - Moreover, since the Member States must refrain from jeopardising the attainment of the Union's objectives, they must also penalise any infringement of Union law on their territory.

14. - Finally, the obligation not to jeopardise the attainment of the Union's objectives is the basis of the principle of primacy of Union law. Indeed, the Costa v Enel judgment, which recognised the principle of primacy, emphasises that *"the executive force of Community law cannot [...] vary from one State to another as a result of subsequent domestic legislation, without jeopardising the attainment of the objectives of the Treaty"*. Consequently, the negative obligation of loyal cooperation requires Member States to give precedence to EU law over their national law. National administrations and courts must therefore:

- set aside the application of a national provision that is incompatible with European Union law
- draw all the consequences of the incompatibility of a national law with the objectives of a directive by refraining from taking implementing measures or applying it when it is not possible to interpret the law in conformity with the directive.

2.2.3. Extending the principle of loyal cooperation to relations between EU institutions

15. - As we have seen, Article 4(3) TEU, the legal basis of the principle of loyal cooperation, is limited solely to relations between the Member States and between the Member States and the European Union. However, the principle of loyal cooperation also applies to relations between the institutions of the Union.

16. - This extension of the scope of the principle of loyal cooperation to relations between institutions was initiated by the Court of Justice of the European Union.

(29) ECJ, 19 Feb 1991, Commission v/ Belgium, EU:C:1991:61; ECJ, 6 March 2003, Commission v/ Luxembourg, EU:C:2003:134; ECJ, 30 May 2006, Commission v/ Ireland, EU:C:2006:345.

(30) ECJ, 13 Dec. 1991, Commission v Italy, EU:C:1991:478.

(31) For example, the national provisions adopted to transpose directives.

In various rulings, the Court of Justice has held that the EU institutions (Council of the European Union, European Parliament and European Commission) are bound by an obligation of loyal cooperation[32]. In this respect, the example of the European Parliament's advisory opinions in the context of the legislative procedure is particularly telling. The consultation procedure allows the Council to adopt acts simply by consulting the Parliament, which may approve, reject or propose amendments. Even if the opinion it delivers is not binding, consultation of Parliament is compulsory. The question therefore arose as to what the Council could do if Parliament failed to act: was the Council entitled to adopt the act without waiting for Parliament's opinion? The Court of Justice answered this question in the affirmative. Considering that the Parliament was bound by an obligation of loyal cooperation towards the Council, it authorised the Council to adopt the act when the Parliament delayed the decision-making process for no particular reason[33].

17. - Today, the obligation of loyal cooperation between the institutions of the Union is enshrined in the Treaty of Lisbon, but dissociated from classic loyal cooperation, since it appears in Article 13 § 2 TEU, according to which *"the institutions shall cooperate loyally with each other"*. By virtue of this duty of loyal cooperation, the EU institutions must demonstrate loyalty in their reciprocal relations. Thus, while it is indeed the Commission's responsibility to represent the Union before certain international bodies, the principle of loyal cooperation requires it not only to inform the Council of the positions it intends to defend, but also to consult it[34]. Similarly, the Commission, which has the legislative initiative, is entitled to withdraw its proposals without calling into question the loyal cooperation it owes to the European Parliament and the Council, as long as it has clearly indicated that beyond a certain threshold of modification of its text, it would no longer accept to ensure its authorship.[35]

3. THE PRINCIPLE OF LOYAL AND MUTUAL COOPERATION IN EUROPEAN SOCIAL LAW AND MORE SPECIFICALLY IN EUROPEAN LAW ON THE COORDINATION OF SOCIAL SECURITY SYSTEMS[36]

3.1. IN GENERAL

18. - The obligations arising from the principle of loyal cooperation normally produce their effects in the field of social security. Thus, the competent authorities of the Member States are required to take account of the objectives of the Union when applying and interpreting social security legislation. The Court of Justice has stated that "in the face of [...] divergent legislation, the principle of loyal cooperation laid down in Article 10 EC requires the competent national authorities to use all the

(32) ECJ, 10 Feb. 1983, Luxembourg v/ EP, EU:C:1983:32; ECJ, 28 Feb. 1991, Demilitis, EU:C:1991:91; ECJ, 14 July 1993, *Comm. v/ United Kingdom*, EU:C:1993:307.

(33) ECJ, 30 March 1995, *European Parliament v Cons.*, EU:C:1995:91.

(34) ECJ, 6 Oct. 2015, *Cons. v Comm.*, EU:C:2015:663.

(35) ECJ, 14 Apr 2015, *Cons. v Comm.*, EU:C:2015:217.

(36) On the application of the principle of loyal cooperation in social matters, see P. Rodière, Droit social l'Union, Paris, LGDJ, no. 48. P. Rodière, Droit social de l'Union, Paris, LGDJ, 2014, no. 48; see also F. Jault-Seseke, «*La coopération loyale au sens des règlements de coordination des régimes de sécurité sociale. Interrogations autour des certificats de détachement*», Liber amicorum in honour of P. Rodière, LGDJ, 2019 p. 115.

means at their disposal to achieve the aim of Article 39 EC", namely the principle of freedom of movement for workers[37]. This principle is thus not respected if the combined application of two national laws deprives the worker of one year's service[38].

19. - The principle of loyal cooperation is strongly expressed in relations between national social security institutions. The implementation of coordination regulations requires cooperation based on trust. The exchange of information, mutual assistance and mutual recognition of acts give concrete form to this obligation of cooperation between institutions. Many of the provisions of these regulations are guided by this concern for cooperation[39] , such as Article 76 of Regulation (EC) No 883/2004, which states that "the authorities and institutions of the Member States shall lend each other their good offices". *A fortiori*, Regulation (EC) no. 987/2009 laying down detailed rules for the application of Regulation (EC) no. 883/2004 insists on this obligation to cooperate based on the principle of loyal cooperation. It states that "the organisation of more effective and closer cooperation between social security institutions is an essential factor in enabling the persons concerned [...] to assert their rights as quickly as possible and under the best possible conditions" (recital 2).

20. - The principle of loyal cooperation takes on particular significance in the area of posting. By virtue of this principle, the Court requires the institution of the Member State in which the posting takes place not to call into question the presumption of posting resulting from the issuance by the competent institution of certificate E 101 and document A1. For the CJEU, "the principle of loyal cooperation, set out in Article 10 EC, requires the issuing institution to carry out a correct assessment of the facts relevant to the application of the rules on determining the applicable social security legislation and, consequently, to ensure the accuracy of the information contained in the E 101 certificate. As regards the competent institutions of the Member State to which the workers are posted, it follows from the obligations of cooperation arising from Article 10 EC that those obligations would not be complied with [...] if the institutions of that Member State were to consider that they were not bound by the certificate and also made those workers subject to their own social security system" [40].

(37) ECJ, 1 October 2009, Leyman, aff. C-3/08, EU:C:2009:595; CJEU, 14 March 2019, Vester, aff. C-134/18, EU:C:2019:212

(38) ECJ, 1 October 2009, Leyman, aff. C-3/08, EU:C:2009:595; CJEU, 14 March 2019, Vester, aff. C-134/18, EU:C:2019:212

(39) Regulation (EC) No 883/2004, 29 April 2004, art. 64, 65, 72.

(40) ECJ, 10 February 2000, *Fitzwilliam Executive Search,* aff. C-202/97, **EU:C:1999:33**; ECJ, 30 March 2000, *Barry Banks and others*, aff. C-178/97, **EU:C:1998:571**; ECJ, 26 January 2006, *Kiere*, aff. C-2/05, **EU:C:2006:69**; ECJ, 27 April 2017, *A-Rosa Flussschiff GmbH*, aff. C-620/15, **EU:C:2017:309**; ECJ, 6 February 2018, *Altun and others*, aff. C-359/16, **EU:C:2018:63, in** *Grands arrêts, Jurisprudence de la CJUE*, Bruylant, p. 287, obs. I. Omarjee ; *RAE*, 2018, n° 1, p. 139, obs. I. Omarjee ; *Europe*, avril 2018, comm. n° 4, p. 25, obs. L. Driguez; *JDE,* 2018, n° 248, p. 138, obs. M. Morsa. *JDE,* 2018, pp. 141 et seq. J. Y. Carlier and G. Renaudière; ECJ, 11 July 2018*, Commission v. Belgium*, aff. C-356/15, **EU:C:2018:555, in** *Sem. Jur. Soc.* 2018, No. 35, p. 43, obs. J.-P. Lhernould; *Sem. Jur.* 2018, no. 37, p. 1604*; Europe*, October 2018, comm. no. 10, p. 34, obs. L. Driguez.

3.2. IN THE CASE LAW OF THE CJEU ON THE COORDINATION OF SOCIAL SECURITY SYSTEMS: ILLUSTRATION OF THE ROLE PLAYED BY THE PRINCIPLE OF LOYAL COOPERATION

3.2.1. Combating cross-border social fraud and social dumping

3.2.1.1. Cases A-Rosa (C-620/15) and Altun (C-359/16): admission of an exception based on fraud and lack of loyal cooperation

21. - The Court of Justice of the European Union has consistently held that the binding force attached to E101 certificates (and by extension to A1 documents) is based on the principle of loyal and mutual cooperation. Since workers must be affiliated to a single social security scheme, the E 101 certificate necessarily implies that the scheme of the other Member State cannot be applied (point 36). This solution is based on the principle of loyal cooperation, according to which "*the Union and the Member States shall respect and assist each other in carrying out tasks which flow from the Treaties*" (Article 4 TEU). The Member State which issued the certificate must carry out a correct assessment of the facts relevant to the application of the rules on determining the applicable social security legislation and, consequently, guarantee the accuracy of the information contained in the E 101 certificate (point 37). For its part, the Member State to whose territory the workers are posted must consider itself bound by the information contained in such a certificate in accordance with the principle of loyal cooperation (point 38). Thus, the Member State receiving a mobile worker in general, or a posted worker in this specific case, must have confidence in the Member State that issued the certificate, which is binding on the competent institutions of the former State. At this stage of the reasoning, the Court points out that the principle of loyal cooperation also implies the principle of mutual trust (paragraph 40).

22. - In the *A-Rosa* case, the Court of Justice of the EU did not refer to the principle of mutual trust, but merely referred to the principle of loyal cooperation. However, in its observations in the *A-Rosa case,* the European Commission considered that "the *counterpart of the obligation of loyal cooperation incumbent in such a case on the institution of the Member State of origin is compliance by the institution of the host Member State with the principle of mutual trust*" (observations presented on 19 February 2016 - Point 47). At the time, the Commission stated that the Court, in its Opinion 2/13, had recalled the fundamental importance of this principle in Union law, "*given that it enables an area without internal borders to be created and maintained*" (paragraph 191 of Opinion 2/13). This principle requires Member States to consider that other Member States comply with Union law. Consequently, once an E 101 certificate has been issued by a Member State, the others must consider that it has been validly issued. The Commission concluded in its observations in the *A-Rosa* case that "*loyal cooperation, mutual trust and the requirement of legal certainty underlie the case law of the Court of Justice, which precludes the validity of E 101 certificates from being directly called into question by the institutions of a Member State other than the State which issued them*" (point 48 of the observations).

23. - However, Member States are not prisoners of these principles either, and even if they are supposed to trust the institutions that issued the E 101 certificate, they are not prohibited from raising a doubt as to its validity. Quite simply, if they believe that the workers should not be subject to the social security system of the Member State that issued the certificate, they must follow the procedures laid down by EU law. Firstly, they can inform the authority that issued the certificate of their doubts and, in

accordance with the principle of loyal cooperation, that authority must reconsider the validity of the certificate and, if necessary, withdraw it (point 43). If the institutions of the two Member States are unable to reach agreement, they may refer the matter to the Administrative Commission referred to in Article 80 of Regulation 1408/71. Finally, if no conciliation is possible, the Member State on whose territory the work is performed may bring infringement proceedings against the State which issued the E 101 certificate, in accordance with Article 259 TFEU. The Court makes it clear that this procedure must be followed, even if the error of the institutions that issued the certificate is manifest, *"and even if it is established that the conditions of the activity of the workers concerned manifestly do not fall within the material scope of the provision on the basis of which the E 101 certificate was issued"* (paragraph 46). This clarification by the Court clearly shows that the solution in A-Rosa retains its full force, as the French authorities did not in any way comply with this procedure, or even begin to comply with it, in this case. Moreover, the Court specifies that this case law also applies to cases in which Regulations 883/2004 and 987/2009, which replaced Regulations 1408/71 and 574/72, would be applicable *rationae temporis* to the dispute. The message is therefore clear: there is no need to ask the Court again on this issue...

24. - However, after clarifying its case law, which now seems to be set in stone, the CJEU nevertheless opens a way out in cases of proven fraud, coupled with a lack of loyal cooperation. At the outset of its analysis in Altun, the CJEU points out that the exception under which posted workers remain subject to the social security scheme of the Member State in which their employer is established is subject to a twofold condition: the maintenance of an organic link between the worker and the undertaking that posted him throughout the period of posting and the requirement that that undertaking habitually carries out significant activities on the territory of the Member State from which the worker was posted (point 34). The first condition makes it possible to prevent the worker from being fictitiously employed by an undertaking established in a Member State with low social protection so as to benefit from its social security system, while in reality being employed by the undertaking in which the work is carried out. Similarly, the second condition makes it possible to prevent a company from setting up in a Member State with low social protection and then carrying out all its activities in other Member States, through the freedom to provide services and the posting of workers, by means of a "letterbox" company. While European Union law does not prohibit "letter-box" companies solely in the area of the right of establishment[41], it does prohibit them in the area of the application of social security schemes to workers.

25. - Following this logic, the CJEU stated in *Altun*[42] that individuals may not rely on EU rules in a fraudulent or abusive manner (paragraph 48), the principle of the prohibition of fraud and abuse of rights constituting a general principle of EU law (paragraph 49). Continuing its pedagogical approach, the Court states that *"a*

(41) ECJ, 9 March 1999, *Centros*, C-212/97; EU:C:1999:126, ECR 1999, I, p. 1459: the judgment refers to "*pure foreign companies*".

(42) ECJ, Judgment of 6 February 2018, Case C 359/16, EU:C:2018:63: Hof van Cassatie (Court of Cassation, Belgium) v Ömer Altun, Abubekir Altun, Sedretin Maksutogullari, Yunus Altun, Abse NV and M. sedat BVBA, EU:C:2018:63).

finding of fraud is based on a corroborating body of evidence establishing a combination of an objective element and a subjective element" (paragraph 50). In the case of the E 101 certificate, the objective element consists in the fact that the conditions for obtaining and invoking an E 101 certificate are not fulfilled, whereas the subjective element consists in the intention of the persons concerned to circumvent or evade the conditions for issuing the certificate, with a view to obtaining the advantage attached to it (paragraphs 51 and 52). Where such evidence is established by the authorities of the Member State in whose territory the work is carried out, those authorities must first inform the authorities which issued the certificate. It is only if the latter, in disregard of the principle of loyal cooperation, refrain from re-examining the validity of the issue of the E 101 certificates that legal proceedings may be brought with a view to obtaining from the court of the Member State to which the workers have been posted the withdrawal of the certificates in question. In the present case, this fraud appears to have been established, since the Bulgarian companies which posted the workers did not carry out any significant activity in Bulgaria and the certificates in question had been obtained fraudulently, by means of a presentation of the facts which did not correspond to reality, in order to evade the conditions to which the posting of workers is subject under EU regulations (points 57 and 58). In addition, the Bulgarian institution that drew up the E 101 certificates appears not to have cooperated loyally, since it failed to take into account the information brought to its attention by the Belgian authorities. The Belgian court can therefore set aside the application of the E 101 certificates.

26. - The Court therefore remains very cautious and its attachment to due process is particularly emphasised in these cases. Are loyal cooperation and mutual trust the only principles behind this decision? It should be remembered that the Court of Justice is particularly committed to promoting the freedom to provide services in the area of the posting of workers, and any obstacle to this fundamental economic freedom must be strictly justified and proportionate. The Court therefore seems to be adopting the same analytical framework as it does when examining the justification for an obstacle to the freedom to provide services, this obstacle being an exception that must be interpreted strictly. Here again, if the Member States on whose territory workers are posted were able to challenge the award of E 101 certificates too easily, the obstacle to the freedom to provide services would be too great. The stakes involved in awarding these certificates are considerable, since Member States hosting posted workers are unable to recover social security contributions even though these workers occupy jobs that could be filled by workers whose contributions would accrue to them. On the other hand, if service providers established in other Member States risked having to pay back contributions if E 101 certificates were too easily contested, they would cease to post workers and therefore to exercise their freedom to provide services. However, the EU is more concerned with promoting the freedom to provide services than with protecting Member States' social security funds. Guaranteeing both the protection of workers and fair competition, on the one hand, and the freedom to provide services, on the other, is a decidedly complex exercise.

27. - In the context of an action for failure to fulfil obligations brought by the State against Belgium in relation to a programme law on the abuse of the posting of workers, the CJEU confirmed its case law in a judgment of 11 July 2018, ruling that only the

national court may disregard the A1 form in the event of fraud, after complying with the procedure applicable in the matter[43]. The Court of Justice recalls its well-established case law according to which the competent institution of the Member State in which the employer normally carries on his activity declares in the A1 certificate that its own social security scheme will remain applicable to the posted workers during the period of posting. Thus, because of the principle that workers must be affiliated to a single social security scheme, the A1 certificate necessarily implies that the social security scheme of the Member State to which the worker is posted is not likely to apply[44]. Next, the Court emphasises the scope of the principle of loyal cooperation. On the one hand, the Court states, the principle of loyal cooperation laid down in Article 4(3) TEU and the objectives pursued by Article 12(1) of Regulation No 883/2004 and by Article 5(1) of Regulation No 987/2009 would be infringed if the Member State to which the workers are posted adopted legislation authorising its own institutions to consider unilaterally that they are not bound by the particulars in the certificate and to make those workers subject to its own social security scheme[45]. On the other hand, the Court of Justice points out, the principle of loyal cooperation set out in Article 4(3) TEU requires the competent institution of the Member State which issued the A1 certificate to carry out a correct assessment of the facts relevant to the application of the rules on determining the applicable social security legislation and, consequently, to guarantee the accuracy of the information contained in that certificate[46]. In addition, it is incumbent on the said institution to reconsider the validity of such issue and, where appropriate, to withdraw the A1 certificate where the competent institution of the Member State to which the workers are posted expresses doubts as to the accuracy of the facts on which the said document is based and, consequently, the information contained therein, in particular because the latter does not correspond to the requirements of Article 12(1) of Regulation No 883/2004[47].

(43) Court of Justice of the European Union, 11 July 2018, Case No C-356/15, **EU:C:2018:555** (EUROPEAN COMMISSION and IRELAND v BELGIUM). On this judgment, see Berlin, Dominique: Il est sans doute temps de modifier le régime du détachement !, La Semaine Juridique – édition générale 2018 nº 37 p.1604 (FR) ; Lhernould, Jean-Philippe: Certificat A1 : la lutte contre la fraude au détachement ne donne pas tous les droits aux Etats, La Semaine Juridique - Social 2018 nº 35 p.43-44 ; Gardin, Alexia: Certificat A1: la fraude ne corrompt pas tout, Revue de jurisprudence sociale 2018 p.861 Carlier, Jean-Yves; Renaudière, Géraldine: Libre circulation des personnes dans l'Union européenne, Journal de droit européen 2019 p.166-175; Driguez, Laetitia: La Belgique est condamnée en manquement pour avoir permis à ses institutions de constater et de réagir unilatéralement aux cas d'abus au détachement de travailleurs, Europe 2018 Octobre Comm. nº 10 p.34 ; M. MORSA, la Cour de justice de l'Union européenne contribue à la lutte contre la fraude sociale transfrontalière et le dumping social, revue droit pénal de l'entreprise, 2018, liv. 3, 193-209.

(44) ECJ, judgments of 10 February 2000, FTS, C202/97, EU:C:2000:75, point 49, and of 26 January 2006, Herbosch Kiere, C2/05, EU:C:2006:69, point 21.

(45) See, to this effect, judgments of 10 February 2000, FTS, C202/97, EU:C:2000:75, point 52; of 26 January 2006, Herbosch Kiere, C2/05, EU:C:2006:69, point 23, and of 6 February 2018, Altun and Others, C359/16, EU:C:2018:63, point 38.

(46) See judgments of 27 April 2017, A-Rosa Flussschiff, C620/15, EU:C:2017:309, paragraph 39, and of 6 February 2018, Altun and Others, C359/16, EU:C:2018:63, paragraph 37.

(47) See, to that effect, judgment of 6 February 2018, Altun and Others, C359/16, EU:C:2018:63, paragraph 4.

3.2.2. The principle of loyal cooperation in pension matters in conjunction with the Staff Regulations of Officials of the European Commission, judgment of 13 February 2019, Case C-179/18[48-49]

28. - This judgment is in line with the case law of the Court of Justice in the My[50] and WOJCIECHOWSKI[51] cases. It was given following a question referred for a preliminary ruling by the Brussels Labour Court by judgment of 19 August 2014. It concerned the unity of career and the non-recognition of the part exceeding unity, the career taken into account for the calculation of the Belgian retirement pension being reduced by as many years as necessary to bring this total to unity.. This system, provided for in Article 17bis of Royal Decree No. 50, had been considered by the Brussels Labour Court to make it more difficult for the European Union to recruit Belgian civil servants with a certain length of service. The Court of Justice handed down its ruling on 10 September 2015, considering that, while Union law does not affect the competence of Member States to arrange their social security systems, within the scope of that competence they must nevertheless comply with the principles of Union law, including that of loyal cooperation by Member States in connection with the status of European civil servants. This principle precludes national legislation which does not allow account to be taken of the years worked by an EU national in the service of an EU institution for the purposes of entitlement to an early retirement pension under the national scheme. The same applies to the ordinary retirement pension. Such regulations can make it more difficult for EU institutions or bodies to recruit national civil servants with a certain length of service. They can also hinder – or even discourage – the taking up of a professional activity insofar as, by accepting such a job, the worker who has previously been affiliated to a national pension scheme risks losing the benefit.

(48) ECJ, judgment of 13 February 2019, EU:C:2019:111.

(49) With regard to unemployment insurance, see the judgment handed down by the CJEU on 4 February 2015 (Melchior case), aff. No C-647/13, EU:C:2015:54 where the CJEU held that "Article 10 EC [now Article 4(3) TEU enshrining the principle of cooperation in good faith], in conjunction with the Conditions of Employment of Other Servants of the European Communities laid down by Regulation [...] laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities, and introducing special measures temporarily applicable to officials of the Commission, [...], precludes legislation of a Member State, such as that at issue in the main proceedings, interpreted as meaning that, for the purposes of entitlement to unemployment benefit, the periods of service of a person who has been unemployed for more than one year shall not be taken into account, periods of work completed as a member of the contract staff of an institution of the European Union established in that Member State are not taken into account and days of unemployment which gave rise to the payment of unemployment benefit under the Conditions of Employment of Other Servants of the European Communities are not treated as days of work, whereas days of unemployment for which compensation is paid under the legislation of that Member State are treated in the same way."

(50) ECJ, 16 December 2004, Case No. C-293/03, EU:C:2004:821. In the My, aff. C293/03, of 16 December 2004, the Court ruled that the principle of loyal cooperation, in conjunction with the Staff Regulations, precludes national legislation which does not allow the years worked by a Union national in the service of a Union institution to be taken into account for the purposes of entitlement to an early retirement pension under the national scheme (§ 49). In Order C-286/09 *Ricci and Pisaneschi*, of 9 July 2010, the Court established that this scheme also applies in respect of entitlement to an ordinary retirement pension (§ 34).

(51) ECJ, 10 September 2015, Aff. n°C-408/14, EU:C:2015:591.

3.2.3. The principle of loyal cooperation also exists with regard to the institutions of other Member States involved in healthcare, CJEU aff. C-255/13

29. - In this case, an Irish national (who had worked both in Ireland and the United Kingdom) went on holiday to Germany with his partner. After feeling unwell, he was admitted to emergency at a university hospital in Germany. The doctors quickly diagnosed a severe illness and the insured lost his motor functions, forcing him to stay in Germany for several years. The medical costs were covered under Article 19 of Regulation (EC) No 883/2004, and then the competent institution was the UK's Heal Service Executive – HSE. The HSE then changed its procedure and used the provisions of Article 20 of Regulation (EC) No 883/2004, thereby authorising the insured person to travel to another Member State to receive treatment appropriate to his/her condition. This form, which is currently referred to in Article 20 of Regulation 883/2004, has been renewed around twenty times. Subsequently, the HSE refused to renew the document on the basis of the aforementioned Article 20, taking the view that there was doubt as to whether, under EU rules on medical treatment received abroad, a social insured person obliged to remain in a Member State because of an exceptionally serious state of health could "reside" in that State within the meaning of Articles 19 or 20 of Regulation No 883/2004. The Court of Justice considers that, where a competent institution wishes to limit or refuse the benefits due to a person in accordance with its legislation on the grounds that the person has established his residence in another Member State, Article 3(4), in fine, of Regulation No 987/2009, read in conjunction with Article 11(1) of that Regulation and, more generally, by virtue of Article 20[52] and the principle of loyal cooperation enshrined in Article 4(3) TEU, such a duty of cooperation also exists in respect of the institutions of other Member States concerned[53]. The latter must be given the opportunity to indicate whether they accept the fact that the person concerned has changed residence, as such a conclusion could have financial repercussions for them. To do otherwise would be to render meaningless Article 11(1) of Regulation No 987/2009, which is designed precisely to resolve differences of opinion between the institutions of two or more Member States regarding a person's residence.

3.3. THE PRINCIPLE OF LOYAL COOPERATION IN PRACTICE

3.3.1. The Administrative Commission, the heart of loyal cooperation

30. - The principle of cooperation is given concrete expression through the exchanges that are necessary between national social security administrations to ensure that the coordination regulations are properly implemented.

31. - The exchanges carried out via the EESSI system give an idea of the scale of these exchanges. Every month, more than 1,2 million electronic documents[54] are

(52) The title of this provision reads as follows: "Cooperation between institutions.

(53) See, concerning a situation similar to that in the present case, Case C-326/00, EU:C:2003:101, paragraphs 51 and 52. This case concerned a pensioner resident in Greece who suffered from chronic heart disease. During a stay in Germany, the pensioner, who had previously received an E 111 form (the validity of which was limited to a period of approximately one and a half months), was to receive medical treatment. The German institution in the place of residence asked the Greek institution to issue an E 112 form, which was refused.

(54) Sources: CSN Logs 01.04.2019 – 29.02.2024.

exchanged by around 3.400 social security institutions[55] connected to EESSI in order to process the individual cases of European citizens who make use of their right to free movement. Between the launch of EESSI in April 2019 and February 2024, more than 82 million electronic documents were shared. Given that not all the business cases designed to guarantee these exchanges are yet fully operational[56], particularly those relating to reimbursements between Member States, the volumes of exchanges are likely to increase further in the future.

32. - In addition to the processing of individual cross-border cases via EESSI, the implementation of the coordination regulations also gives rise to numerous administrative and interpretative questions which are the source of frequent and regular exchanges between national administrations via other communication channels. The dialogue and conciliation procedure, which aims to resolve disputes between Member States, is a good example of this. Even if they are more difficult to quantify, these ad hoc exchanges form, just as much as the EESSI exchanges, the backbone of loyal cooperation.

33. - As a facilitator and supervisor, the Administrative Commission (AC) is the keystone of the network of national administrations responsible for bringing the principle of loyal cooperation to life. It carries out essential tasks without which this principle would remain inapplicable in practice. For example, the AC issues guidelines for the uniform implementation of the coordination regulations, defines the processes and documents required for the exchange of information between national administrations, acts as a facilitator when national administrations are unable to agree on certain interpretative and administrative issues, designs tools and acts as a forum for the resolution of disputes between Member States in the application of the coordination regulations, and plays the role of supervisor by collecting statistics on the use of the coordination rules.

34. - The non-binding nature of the AC's decisions cannot detract from the importance of its work. Although the Court of Justice has ruled on several occasions that the decisions of the AC are not binding,[57] the members of the AC nevertheless ensure that appropriate instructions are given at national level to ensure that the AC's published and unpublished decisions are properly implemented. Indeed, as Cornelissen points out, AC's opinions are of an authoritative nature, as a result of the expertise of its members and the technical nature of work in the social security field.[58] Furthermore, as

(55) https://ec.europa.eu/social/main.jsp?catId=1544&langId=en.

(56) 97% of BUCs are in production: Switzerland has yet to launch the use of pension BUCs and the reimbursement business cases are not yet operational. Source: Sources: IR 04.03.24 and CSN Logs 01.04.2019 - 29.02.2024.

(57) See in particular ECJ, 14 May 1981, Romano, case 98/80, EU:C:1981:104; more recently, see. CJEU, Alpenrind GmbH, Case C-527/16, EU:C:2018:669. *"It follows, both from Article 211 of the Treaty and from the judicial system established by the Treaty, and in particular Articles 230 and 234 thereof, that a body such as the Administrative Commission, while capable of providing assistance to the social security institutions responsible for applying Community law in this field, is not such as to oblige those institutions to follow certain methods or adopt certain interpretations when applying Community rules".*

(58) Cornelissen, R., The Administrative Commission on Social Security for Migrant Workers, Social Europe, p. 40, 1986.

illustrated by Morsa above (point 7.3.2.1.1), the Court of Justice has also relied on the principle of loyal cooperation to enshrine the enforceability of the portable document A1 and to make recourse to the dialogue and conciliation procedure compulsory, both tools resulting from the work of the AC. In this respect, it should also be noted that a strengthening of the obligation to apply the decisions of the AC has been provided for as part of the current revision of the coordination regulations and has already been the subject of a provisional agreement between the co-legislators.[59]

R. Cornelissen also rightly points out that cooperation with the AC provides crucial support to the European Commission. Indeed, without the information provided by the AC, the European Commission "would be unable to fulfil this role which requires detailed knowledge of national legislations, of the consequences of amendments to them on the implementation of coordination regulations and the results of implementation of these regulations." This now involves coordinating 31 legislations "which are extremely complex, heterogeneous and constantly evolving". Cornelissen concludes by stressing that "its role as an organ for cooperation and deliberation is vital"[60].

3.3.2. The expression of loyal cooperation in the work of the Administrative Commission

3.3.2.1. The dialogue and conciliation procedure, an illustration of the strengths and weaknesses of the cooperation promoted by the Administrative Commission

35. - Having highlighted the importance of AC's tasks in operationalising cooperation between national administrations and with the European Commission, we will now focus on the dialogue and conciliation procedure in order to illustrate the application of cooperation through a tool designed by the AC.

36. - The opportunity provided by Decision A1 of the AC[61] to submit a report on the use of the dialogue and conciliation procedure (A1 procedure) was used only once

(59) The revised text, which, for the last time, was the subject of a provisional agreement between co-legislators (document 15068/21 ADD 1 of 17 December 2021), stresses the need for Member States to comply with the provisions of the coordination regulations, including the decisions of the AC. See Article 2.7 of the Amending Regulation which includes an amendment to Article 5 (4) of Regulation 987/2009: *"Where no agreement is reached between the institutions concerned, the matter may be brought before the Administrative Commission by the competent authorities no earlier than one month following the date on which the institution that received the document submitted its request. The Administrative Commission shall endeavour to reconcile the points of view within six months of the date on which the matter was brought before it. In doing so and in accordance with Article 72(a) of the basic Regulation, the Administrative Commission may adopt a decision on the interpretation of the relevant provisions of the basic Regulation and this Regulation. The competent authorities and institutions concerned shall take the necessary measures to apply such decision of the Administrative Commission, without prejudice to the right of the authorities, institutions and persons concerned to have recourse to the procedures and tribunals provided for by the legislation of the Member States, by this Regulation or by the Treaty."*

(60) Cornelissen, R., The Administrative Commission on Social Security for Migrant Workers, Social Europe, p. 40, 1986.

(61) Decision A1 of the Administrative Commission concerning the establishment of a dialogue and conciliation procedure concerning the validity of documents, the determination of the applicable legislation and the provision of benefits under Regulation (EC) No 883/2004 of the European Parliament and of the Council.

by the Belgian delegation in November 2020.[62] It is therefore on the basis of the observations made in this report that we will attempt to highlight, from a practical point of view, the main advantages and limitations of the cooperation framework provided by the AC.

37. - The Belgian delegation's report stresses that the A1 procedure offers the advantage of structuring the cooperation required to resolve disputes between Member States. It provides for a phased treatment of the dispute with precise deadlines. The framework provided by this tool thus gives substance to the principle of loyal cooperation by offering benchmarks against which the quality of cooperation can be assessed. The use of this procedure also increases the legitimacy of the claims made by the requesting Member State.

38. - The systematic use of this conciliation mechanism has considerably strengthened the dialogue between Belgium and several other Member States. In particular, the framework provided by the A1 procedure has made cooperation more structured and effective, notably through the identification of reciprocal commitments for the management of cases, in particular with regard to the exchange of targeted information and better notification of the issuance of A1 documents. It has also helped to raise awareness in the Member States concerned of the problems or delays arising from procedural or administrative peculiarities linked to different national legislations. This testimony shows that the Member States attach importance to and take seriously the cooperation procedures defined at the level of the AC.

39. - However, the Belgian report also highlights the shortcomings of the A1 procedure, which partly illustrate the practical limits of the principle of loyal cooperation. Although it is widely recognised that loyal cooperation is absolutely crucial to the proper implementation of the coordination regulations, its application relies to a large extent on the goodwill of the national administrations. This is mainly due to the absence of sanctions in the event of non-compliance and the limited prerogatives of the AC in monitoring the correct application of the rules. The Belgian delegation stresses that it is regularly confronted with a lack of cooperation, which is reflected in particular in non-compliance with the deadlines of Decision A1, a lack of notification of the A1 documents issued, the lack of recognition of evidence provided by Belgium, or the provision of incomplete or unusable responses and the inadequate assessment of compliance with the posting conditions.

40. **-** Unfortunately, the AC remains fairly powerless to deal with disputes arising from a lack of cooperation. This is reflected in particular in the fact that Member States faced with this problem are unable to refer matters to the Conciliation Board, which declares itself competent only when the parties agree on the materiality of the facts and the dispute is clearly identified. The Conciliation Board therefore merely interprets the provisions of the regulations, but refuses to rule on the validity of the facts or evidence put forward, confining itself to drawing up a legal opinion in abstracto.

(62) Administration Commission for the Coordination of Social Security Systems, Note from the Belgian delegation of 25 November 2020, Report on the use of the dialogue and conciliation procedure provided for in Decision A1 - AC 292/20.

Despite the affirmation of its key role by the Court of Justice, the Conciliation Board is consequently unable to fully exercise its conciliatory role in resolving disputes between parties concerning the validity of A1 documents.

41. - This practical example from the work of the AC clearly shows the ambiguity that characterises the principle of loyal cooperation. On the one hand, as the Court of Justice has pointed out on several occasions, the duty of loyal cooperation is legally binding and imposes certain obligations on the Member States (in particular the obligation to correctly assess the facts relevant to determining the applicable legislation and the obligation to recognise the enforceable nature of the A1 document).[63] On the other hand, the application of the principle of loyal cooperation is, in practice, largely based on the goodwill of the Member States and is not linked to possible sanctions.

42. - Despite this, the quality of cooperation between Member States depends to a large extent on the framework and rules of the game set by the AC. A good illustration of this is that the regular use of the A1 procedure by several Member States has led to enhanced cooperation and information exchange between Member States being provided for in the revision of the coordination regulations launched in 2016, when there is a doubt about the validity of a A1 document (or other documents concerning the applicable legislation). The proposed improvements, which have already been provisionally agreed between the co-legislators, include the following: faster exchange of information when there is a doubt about the validity of a A1 document or the accuracy of the facts on which it is based, obligation for the competent Member State to carry out a proper assessment of the relevant facts before issuing a A1 document, obligation for the Member State requesting clarification, withdrawal or rectification to substantiate its request and provide supporting documentation, obligation for the issuing Member State to make assessment (and forward evidence), withdrawal or rectify within 30 working days (rebalancing the burden of proof), etc.

3.3.2.2. The functioning of the Administrative Commission: a challenge for the future of fair cooperation

43. - We have seen that the AC is at the heart of the loyal cooperation essential to the implementation of the coordination regulations, regulations without which free movement within the European Union would not be guaranteed.

44. - In order to fully understand how this cooperation works in practice, we must therefore also look at how the AC itself operates. In this respect, we believe that fair cooperation in the field of social security coordination can only be guaranteed if the AC functions in a relevant and efficient manner. A well-functioning AC is key to maintaining a high quality dialogue within the very large and complex network of national institutions responsible for implementing the coordination regulations.

(63) See for example ECJ, C-620/15 – A-Rosa Flussschiff, EU:C:2017:309.

45. - Described as an "institutional curiosity"[64], the AC is "a constant feature of coordination"[65]. The AC was created when the first coordination Regulation No 3/58 was adopted (Chapter 8, Title III - Articles 43 and 44), albeit with a different composition and with fewer tasks than those currently carried out. It was renewed when Regulation No 1408/71 was adopted (Articles 80 and 81) and strengthened by Regulation No 883/2004 (Articles 71 and 74).

46. - The AC has no equivalent in other areas of European policy[66]. It has a *sui generis* character[67]. Although it is not mentioned among the EU institutions listed in Article 13(1) TEU, it has been given regulatory tasks by the Union legislator[68] . The AC is not an international body, despite its origins and composition (representatives of the governments of the Member States receiving instructions from their governments), but a body that obeys EU law and is "attached" to the European Commission. The rules of the AC, drawn up by mutual agreement between its members, were approved on 16 June 2010[69].

47. - The AC's operating rules have changed little since it was founded in 1958. The context in which it operates, however, has considerably changed: EU enlargement, growing mobility within the EU, changes in the labour market, digitalisation, transformation of national social security systems, the Covid-19 pandemic and its consequences for mobility, an ageing population, climate change, and so on.

48. - A number of observations lead us to believe that a review of the way it currently operates is necessary. This is particularly relevant in a context where many changes and challenges are occurring in the labour market. Examples include the increase in teleworking and other new forms of work (e.g. the collaborative economy, platform working, economically dependent self-employment, etc.), disparities between groups of people making use of their right to free movement, the mobility of third-country nationals, subcontracting chains, the digitalisation of the world of work, etc.

49. - A first observation is that the AC is no longer acting in a sufficiently structured, proactive and reactive way to carry out the tasks set out in Article 72 of the Basic Regulation. Its ability to take useful and operational decisions is being questioned. In order to ensure free movement within the EU, the AC is, however, expected to deliver tangible results, including: providing administrative and interpretative instructions to facilitate the uniform application of the coordination regulations, strengthening

(64) MASS, la Commission Administrative pour la Sécurité Sociale des travailleurs migrants, une curiosité institutionnelle, CDE, 1966.

(65) I. OMARJEE, o.c., pp.92 et seq.

(66) R. CORNELISSEN, Titre IV Administrative Commission and Advisory Committee, in FUCHS/ CORNELISSEN, EU Social security Law, a commentary on EU Regulations 883/2004 and 987/2009, C.H. BECK.Hart.Nomos, 2015, pp.423 et seq.

(67) R. CORNELISSEN, Titre IV Administrative Commission and Advisory Committee, o.c., citing Wenander, a network of Social Security Bodies - European Administrative Cooperation under Regulation (EC) N°883/2004, Review of European Administrative Law 2013-1, p.49.

(68) R. CORNELISSEN, Titre IV Administrative Commission and Advisory Committee, o.c., p.425.

(69) Statutes of the CACSSS, established at the European Commission, of 16 June 2010 (2010/C 213/11), O.J., n°C 213/20 of 6 August 2010, p. 20.

cooperation between Member States (in particular in order to take into account particular questions regarding certain categories of persons) and making proposals to the European Commission for improving the coordination rules.

50. - Among the weaknesses identified are the difficulties experienced by the AC in reaching consensus or a qualified majority when decisions need to be taken, the lack of operational follow-up to the discussions that take place during AC meetings, and the excessively long processing times. The preparation of AC agendas should also be the subject of more upstream exchanges between the delegations and the AC Secretariat to ensure that the items discussed better reflect the problems encountered on the ground by mobile workers and cross-border businesses.

51. **-** More commitment from AC members is needed in order to improve the fluidity and efficiency of AC's working method and its decision-making process. To this end, the work of the AC should extend well beyond the four annual meetings by promoting exchanges outside meetings in order to speed up the work and by reviewing the process for preparing meetings. It is also important for the AC Secretariat to play the role of driving force and coordinator, rather than confining itself to the administrative management of the AC, a trend that has been observable since the Covid crisis.

52. **-** A second aspect that deserves particular attention is the lack of transparency of the AC's activities. The tasks carried out by the AC are in the public interest and the decisions it takes have a fundamental impact on the free movement of citizens and the freedom of companies to provide services within the EU. In addition, the coordination rules are highly complex, as evidenced by the incessant discussions between practitioners about their interpretation. Progress has been made in recent years with the publication of the statistical reports[70] and the main conclusions of the AC[71] on the European Commission website[72]. However, these publications are highly confidential and only accessible to an informed public.

53. **-** Broader and more intelligible communication would undoubtedly help to increase the transparency of the AC's work and results and, consequently, promote free movement within the EU.

54. **-** The Administrative Commission would also benefit from closer cooperation with the European Labour Authority (ELA). The cooperation provided for in Article 74a of the Basic Regulation between the AC and ELA has taken shape with the conclusion of a cooperation agreement between the two bodies. The Cooperation and Conciliation Board (CCB) is responsible for implementing this agreement on behalf of the AC and three joint projects have already been launched concerning the improvement of information resources in the area of insurance enrolment and

(70) Link: https://ec.europa.eu/social/main.jsp?catId=1154&langId=en.

(71) Link: https://ec.europa.eu/social/main.jsp?catId=868.

(72) Pursuant to Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, Official Journal L 145 of 31/05/2001 p. 0043 - 0048;this regulation essentially implements the principle of public access to documents of the three institutions set out in Article 255 of the EC Treaty.

payment of contributions, the improved use of the AC statistical reports and a Mutual Learning and Understanding Programme on EESSI (PROGRESS). These projects are promising and demonstrate a genuine desire on both sides to develop synergies in the field of social security coordination, with their respective areas of expertise complementing each other (implementation support for ELA and interpretative capacity for the AC).

55. - Nevertheless, the AC should rely more on ELA's resources and network in order to better operationalise the necessary cooperation between Member States and the correct implementation of the AC's guidelines. This would increase the scope of the instructions issued by the AC and give the AC more time to address legal issues. Nevertheless, cooperation with ELA is a sensitive issue, as it touches on the question of governance in the field of social security coordination. The Member States have less influence on the ELA Management Board than on the AC.

56. - Another trend that has somewhat hampered the smooth running of the AC in recent years is the growing political focus on social security coordination. The failure of the review of the coordination regulations, which has been open since 2016, bears witness to the fact that this subject has become politically sensitive. This development is also palpable at the level of the AC, where delegations often confine themselves to defending their national interests, losing sight of the common objective that the AC must also pursue, namely ensuring the free movement of people within the EU, by removing obstacles for mobile citizens and guaranteeing their social security rights, regardless of the State in which they work, reside or stay.

57. - An overly political approach does not allow to grasp, with sufficient precision, all the subtleties of an extremely complex European regulation. The fact that political attention has focused on certain concepts, such as prior notification of posting, without sufficiently grasping their full complexity, is also partly to blame for the blocking of the revision of the coordination regulations.

58. - In this context, rather than focusing on exchanges at a political level, the AC should concentrate more on legal and technical aspects in accordance with Article 72 of the Basic Regulation, which calls on it to deal with "all administrative questions and questions of interpretation arising from the coordination regulations" and to "facilitate the uniform application of Community law". In accordance with Article 72, greater emphasis should be placed on a collaborative approach, the sharing of best practice and, in a spirit of fair cooperation, openness to the arguments put forward by other parties. However, promoting constructive, high-quality dialogue and cooperation within the AC requires a sufficient degree of involvement on the part of all its members.

8 RULES ON APPLICABLE LEGISLATION – FROM RIGHTS TO OBLIGATIONS AND COMPLIANCE

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The first coordination rules on social security, Regulations No 3/58[1] and No 4/58[2], entered into force 1 January 1959. Although based on similar concepts as the first rules on applicable legislation, an ever-increased level of cross-border movement of persons and services has led to expanded rules both in relation to degree of detail and scope. The need of a balance between rights or simplicity, to enhance the freedom of movement, and obligations or restraints, to prevent cross-border fraud and error, have become gradually more evident over the 65 years the rules have been into force. A development visible not only from amendments of the rules, but also from Decisions by the Administrative Commission for the Coordination of Social Security Systems (hereinafter the AC) as well as the case law of the European Court of Justice (hereinafter the CJEU).

1. REGULATIONS NO 3/58 AND NO 4/58

Like the regulations in force the first set of rules was based on the principle of *lex loci laboris*, combined with exceptions to avoid any simultaneous application of several legislative systems,[3] but also to overcome obstacles likely to impede freedom of movement of workers and services.[4] One of those exceptions being Article 13(a) of Regulation 3/58 which applied to wage-earners and assimilated workers whose permanent residence were in the territory of one Member State while being employed in another one by an undertaking established in the former Member State were the persons were normally attached. According to the rules, the workers were to be subject to the legislation of the former State as though they were employed in that territory. This, in so far as the probable duration of their employment in the territory of the latter State did not exceed twelve months. The legislation of the former State could continue to apply for a further period of not more than twelve months, on condition of the consent of the competent authority in the latter State, given before the end of the first twelve-month period.

(1) Règlement No 3 concernant la sécurité sociale des travailleurs migrants.

(2) Règlement No 4 fixant les modalités d'application et complétant les dispositions du règlement no 3 concernant la sécurité sociale des travailleurs migrant.

(3) Article 12 of Regulation 3/58 however only prohibited a Member State other than the one where the person was employed from applying its social security legislation when this would lead to an increase in charges without any corresponding supplementary protection by way of social security (*Nonnenmacher*, C-92/63; *Van der Vecht*, C-19/67; *Hakenberg*, C-13/73).

(4) *Manpower*, C-35/70 p. 10; FTS, C-202/97, p. 28; Walltopia, C-451/17 p. 37-38; Team Power, C-784/19 p. 59.

Hence, it was already from the outset possible to work in another Member State than the competent one and continue to be subject to the same social security legislation. This even if the rules covered only the involvement of two Member States, one where the person was normally working and residing and one where the temporary work was being performed. Whether the exclusion of persons residing in a third Member State was intentional or not, or if such situations were simply not foreseen is of course open for debate. Another reflection is the slight confusing use of the word 'employment', since it can lead to the conclusion that it refers to two different contracts of employment, one in each Member State.[5] It was also possible to work simultaneously in two or more Member States while being subject to the same social security legislation, but only if the person was involved in transport of goods or persons.[6] The coordination rules moreover included specific provisions for workers who straddled the common frontier of two Member States,[7] and for diplomats.[8]

The competent institution in the Member State subject to the worker was required to provide the worker temporarily employed in another Member State with a certificate of applicable legislation. In the event of an extension of the employment, the employer had to request the document,[9] which it might perhaps be argued emphasised the involvement of the employer and the fact that the worker was pursuing the activity on behalf of the employer. Yet, the requirement of a certificate did not involve other situations, e.g., workers involved in transport of goods or persons. Apart from special rules for Diplomats[10] and a possibility to agree upon exceptions to the rules,[11] the implementing Regulation did not include any further rules on applicable legislation.

Accordingly, as it can be understood the European Legislator at the time did not expect any need of detailed rules concerning applicable legislation. Already in September 1959 the AC however adopted its first Decision concerning the interpretation of the rules on applicable legislation. According to Decision No 12 Article 13(a) in Regulation 3/58 applied not only to workers already insured in the sending Member State, but also to those who had been insured in that Member State if they had been employed in the company that employed them to temporarily work in another Member State.[12-13] Hence, a person could in the word of the AC be employed with the sole purpose of being posted to work in another Member State.

(5) In *Van der Vecht* C-19/67 the Court furthermore held that the phrase "the probable duration of their employment" refers to the duration of the employment of the worker and not the duration of the work to which the worker is assigned.

(6) Article 13(b) of Regulation 3/58.

(7) Article 13(c) of Regulation 3/58.

(8) Article 14 of Regulation 3/58.

(9) Article 11 of Regulation 4/58.

(10) Article 12(1)-(6), Regulation 4/58.

(11) Article 12(7) of Regulation 4/58.

(12) Decision No 12 of 18 September 1959, OJ 64, 17.12.1959, p. 1245-1245.

(13) In 1959 the AC also adopted a Decision concerning the content of the certificate for periods of posting not exceeding three months. Instead of information about the receiving Member State and employer, the certificate focused on the purpose of posting, whether it concerned, e.g., reparations of an urgent nature, see Decision No 15, OJ 13, 27.2.1969 p. 494-495.

As it seems the necessity of a balance between simplicity on the one hand, and restraints on the other became nonetheless evident rather quickly. According to the wording of Article 13 (a) in Regulation 3/58 the maximum period of twelve months work in another Member State without the change of applicable legislation could be extended with another twelve months, still the AC adopted about a year after the rules had entered into force a Decision in which it was stated that to be considered as temporary work the purpose of the work should be limited in time, and not exceed fifteen months.[14]

In 1967 the CJEU confirmed the view of the AC laid down in Decision No 12 by stating that 'for the application of Article 13 (a) it is of little importance whether or not the worker was previously employed in the establishment in the State in which he resides, or whether the work in question is different from that normally carried out in this establishment. But also, that 'in order to determine the establishment to which the worker is 'normally attached' it is necessary to deduce from all the circumstances of his employment whether he is under the authority of that establishment.'[15] Hence, the necessity of a clear link between the employer and the posted worker was recognised.

In 1964, a Regulation amending the wording of Article 13(a) in Regulation 3/58[16] entered into force. In the revised Article, Article 13 (1)(a) of Regulation 3/58 the requirement of residence was deleted, opening the possibility of a worker to reside in one Member State, while normally work in another one, and being on a temporary assignment in a third Member State. Most likely due to *inter alia* the development of the case-law of the CJEU it had become clear that the scope of the rules on applicable legislation had to be extended.[17]

On the other hand, the level of complexity in the rules increased. Laid down in the Regulation were that if the employee exercised activities on the territory of several Member States, he or she should be subject to the Member State of residence. This only being the case if the person resided in one of the Member State where the activity was pursed. If not, the Member State where the employer or employers were located or where the head office of the company or companies were located would apply. If, however, the employee was the responsibility of several employers located in different Member States or several companies having their head office in different Member States, he or she would be the subject of the legislation in the Member State of residence. Furthermore, that a worker could not be sent to replace another worker who had reached the end of his term of posting, and it was no longer enough that the receiving Member State consented to the extension of twelve months, but the extension had to be due to unforeseeable circumstances. In correspondence with previous AC Decision, the period of posting should accordingly not already from the outset be intended to last for 24 months.

(14) Decision No 16, OJ 13, 27.2.1960 p. 495-496.

(15) *Van der Vecht*, C-19/67.

(16) Regulation 24/64 of 10 March 1964.

(17) See e.g., *Hakenberg*, C-13/73.

Thus, already a few years after the introduction of these new coordination rules, the need of statutory clarity regarding the possibility to use the exceptions of the principle of *lex loci laboris* was apparent. In 1970 the CJEU in addition stressed the necessity of a clear link between the employer and the employee. In its ruling the CJEU held that although an undertaking with the sole purpose of engaging workers to provide for temporary needs in another undertaking could fall within the scope of posting, and the worker being sent to the other Member State was required to comply with the working conditions and discipline laid down by internal rules of the establishment to which he was sent, Article 13(1)(a) of Regulation 3/58 was only applicable, if the worker was paid by the undertaking which had sent him or her, was answerable to it for misconduct, was able to be dismissed by it and would on behalf of that undertaking perform work temporarily in the other Member State.[18]

2. REGULATIONS NO 1408/72 AND NO 574/72

In 1972 the Regulations 1408/71 and 574/72 came into force. The new coordination rules did however not bring about any major changes to the rules on applicable legislation, even though adjustments were made. Apart from a new structure, the new set of rules included provisions for workers employed on a vessel as well as workers called up for service in the armed forces. It was also more explicitly stated that an extension of the period of posting could not exceed a period of twelve months.[19]

With the new coordination rules the AC adopted Decision No 87,[20] to replace Decision No 12. In its new Decision the AC held, in correspondence with the previous one, that Article 14(1)(a) of Regulation 1408/71 applied to an immediate posting. But also, that the worker had to be engaged in a Member State in which the undertaking had its registered office or a place of business, and, as a reflection of the resent case law of the CJEU, that there had to be a direct relationship between the undertaking and the worker during the period of posting.[21]

Whereas the only difference between AC Decision No 87 and No110[22] was the inclusion of persons being posted on a vessel flying the flag of another Member State, Decision No 113[23] provided for further clarifications and restrictions. In addition to the requirements stated already in the former Decisions, the undertaking had according to Decision No 113 to normally carry out its activities in the Member State from where the person was sent; in the case of an undertaking whose activity consisted of making staff temporarily available to other undertakings, it normally had to make staff available for employment in the territory of the first Member State, with hirers established in that territory. In addition, that the rules on posting did not apply if the undertaking to which the worker had been posted made the worker available to another undertaking, and as a final point, that the competent institution

(18) *Manpower*, C-35/70 p. 18.

(19) Article 14.1 (a)(ii) of Regulation 1408/71.

(20) Decision No 87 of 20 March 1973, OJ C 86, 20.7.1974, p.5-6.

(21) *Manpower*, C-35/70.

(22) Decision No 110 of 16 December 1977, OJ C 125, 30.5.1978, p.4.

(23) Decision No 113 of 28 February 1980, OJ C 270, 17.10.1980, p. 2-3.

had a responsibility to inform the employers and employees. Decision No 113 was later replaced by Decision No 128,[24] introduced essentially due to the entering into force of Regulation 1390/81,[25] which extended the coordination rules to cover also self-employed persons.

In 1987 new rules entered into force[26] covering the situation of a person employed simultaneously in the territory of one Member State and self-employed of the territory of another one, and in 1991 it became possible to be subject to the state of residence when the legislation of a Member State ceased to be applicable, without the legislation of another one becoming applicable.[27] Obviously, the amendments in the Basic Regulation also led to adjustments in the Implementing Regulation. Amongst those were e.g., the extension of the scope of the requirement to hold a certificate when working in another Member State.

The adoption of AC Decision No 162,[28] replacing Decision No 128, provided not only a clearer structure, but also a more comprehensive Decision covering additional situations, e.g., when a worker is posted to one or more undertakings in the same Member State, but it also laid down an obligations of the posted worker and the employer – or the competent institution of the sending State – to inform the competent institutions of any changes, as well as the requirements of the competent institutions in the sending and receiving State to cooperate.

Decision No 181,[29] the last AC Decision concerning applicable legislation before the introduction of Decision No A2 adopted due to the new coordination rules, Regulations 883/2004 and 987/2009, took it one step further. Apart from the insertion of self-employed, the resent case law of the CJEU was included concerning for example the criteria to determine whether an undertaking habitually carries out significant activities in the sending Member State, as well as the binding nature of the certificate of applicable legislation and the duty of sincere cooperation.

The increased level of complexity of the rules is visible also in the case-law of the CJEU, which reflected the ever-increased level of complexity in practice, i.e., of employers and employees taking advantage of the freedom of movement of services and workers. In 1997 the CJEU stated that a company engaged in the provision of temporary

(24) Decision No 128 of 17 October 1985, OJ C 141, 7.6. 1986, p. 6-7.

(25) Regulation 1390/81 of 12 May 1981 extending to self-employed persons and members of their families Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community.

(26) Council Regulation (EEC) No 3811/86 of 11 December 1986 amending Regulation (EEC) 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 Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71.

(27) Council Regulation (EEC) no 2195/91 of 25 June 1991 amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed person, self-employed persons and members of their families moving within the Community and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71.

(28) Decision 162 of 31 May 1996, OJ L 241/28, 21.9.1996, p.28-30.

(29) Decision 181 of 13 December 2000, OJ L 329, 14.12.2001, p. 73-77.

personnel could only benefit from the exception of Article 13(2)(a) of Regulation 3/58 laid down in Article 14 (1)(a) of Regulation 1408/71 if, *inter alia*, two conditions were met; a link between the employer and the employee as well as a relationship between the undertaking providing temporary personnel and the Member State in which it is established. Concerning the requirement of a direct link between the employer and the employee, which as held by the CJEU was also required under AC Decision No 128, its maintenance should be established by deducing from all circumstances of the worker's employment that he was under the authority of the undertaking.[30]

Concerning the relation between the undertaking and the Member State in which it is established the CJEU held that 'only an undertaking which habitually carries on significant activities in the Member State in which it is established may be allowed to benefit of the advantage afforded by the exception provided for by that provision.'[31-32] All criteria characterising the activities carried on by the undertaking had to be examined, including 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 an in 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.' Moreover, that the list could not be exhaustive, but that the choice of criteria must be adapted to each specific case.[33] That purely internal management activities have not been enough to fulfil the condition that a company must habitually carry out significant activities in the Member State from where the employees are posted to be able to rely on Article 14 (1)(a) of Regulation 1408/71 has in addition been stated by the CJEU in a later case.[34]

Regarding the assessment of applicable legislation of a person the CJEU has also held that since a certificate of applicable legislation often is issued before the start of the period of which it covers, the assessment of whether to issue it or not is based on the anticipated employment situation, and, so, that the description of the nature of the work as evidenced by the contractual documents is of particular importance to determine whether the foreseeable activities amount to employed activities covering the territory of several Member States. In addition, that not only the wording of the document could be considered, but also factors such as how previous employment contracts between the employer and the worker had been implemented in practice, the

(30) *FTS*, C-202/97, p. 24.

(31) C-202/97 *FTS*, p. 40

(32) In C-178/97 Banks and Others p. 25 the CJEU later referred by analogy to this statement about Article 14a(1)(a) of Regulation 1408/71 and self-employed persons. Regarding the maintenance of infrastructure of self-employed persons, the Court held that it involved e.g., the use of office space, payment of social security contributions, payment of taxes, possession of work permit and VAT number, or registration with the chambers of commerce and professional organizations.

(33) *FTS*, C-202/97, p. 43.

(34) *Plum*, C-404/98, p. 22.

circumstances surrounding the conclusion of those contracts, the characteristics and conditions of the work performed by the company concerned.[35]

While, on the one hand, pointing at the need of a proper assessment by the competent Member States, the CJEU has also, on the other hand, stressed the binding nature of the certificate of applicable legislation of a person.[36] A statement which can lead to difficulties for the receiving Member State if the cooperation between the involved Member States is lacking in efficiency. The binding nature of the certificate derives from the principle of sincere cooperation, which also implies the principle of mutual trust, and requires the competent institution to carry out a proper assessment of the facts relevant and consequently the correctness of the information contained in the certificate.[37] Obligations which would not be fulfilled if the receiving Member State would not be bound by the certificate. Thus, the certificate creates according to the CJEU a presumption that the posted workers are properly affiliated to the social security system of the Member State in which the undertaking which posted the workers is established, but also, that the opposite result would undermine the principle that workers are to be covered by only one social security system, which would make it difficult to know which system is applicable and would consequently impair legal certainty.[38] There is according to the CJEU nothing to prevent the certificate from producing retroactive effects, i.e., the certificate can be issued even after period concerned.[39]

The CJEU has more than once upheld the binding nature of the certificate, on not only the competent institutions in the receiving State,[40] and the national courts,[41] but also the person who has resource to a worker's services.[42] The certificate has also been considered binding even though the matter has been brought before the AC which has held that the certificate was issued incorrectly and should be withdrawn.[43]

Then again, the CJEU has also emphasised the obligation of the issuing Member State to – if the receiving Member States raises doubts as to the document's correctness – review the certificate, and if appropriate withdraw it.[44] In case concrete evidence is brought forward, suggesting that the certificates were obtained fraudulently, even a duty to review the certificates. Furthermore, that it, if the institution fails to carry out such a review within a reasonable period of time, must be possible for that evidence to be relied on in judicial proceedings, although the persons who are alleged in such

(35) *Format*, C-115/11, p. 44–45.

(36) The former E 101 certificate and the current Portable Document on Applicable legislation, PDA1.

(37) *FTS*, C-202/97, p. 51; *Banks and Others*, C-178/97, p. 38; *Format*, C-115/11, p. 42; *Altun and Others*, C-359/16 p. 38; *Format*, C-115/11, p. 42; *Vueling* C-370/17 and C-37/18, p. 62.

(38) *Herbosch Kiere*, C-2/05, p. 24-25.

(39) *Banks and Others*, C-178/97, in which the Court in this regard referred to AC Decision No 126 of 17 October 1985, OJ 1986 C 141 p. 3; *Alpenrind*, C-527/16, p. 72.

(40) *Herbosch Kiere*, C-2/05 p. 30; *A-Rosa Flussschiff*, C-620/15, p. 47.

(41) *Herbosch Kiere*, C-2/05 p. 32; *Alpenrind*, C-527/16, p. 47; *Vueling*, C 370/17 and C-37/18 p.63.

(42) *X and van Dijk*, C-72/14, p. 42; *A-Rosa Flussschiff*, C-620/15, p. 50.

(43) *Alpenrind*, C-527/16, p. 64.

(44) *A-Rosa*, C-620/15, p. 44.

proceedings must be given the opportunity to rebut the evidence on which those proceedings are based.[45] The CJEU has moreover referred to the possibility of the institutions to refer the matter to the AC if they cannot reach an agreement, and if the AC fails in reconciling the points of view, bring infringement proceedings under Article 259 TFEU to enable the CJEU to examine the question of the legislation applicable.[46]

Added to the difficulty of identifying when a situation is falling within the scope of the principle of *lex loci laboris* or the provision on posting, is the interpretation of the provision regarding persons working in two or more Member States. In 1994 the CJEU e.g., held that a person could be working in two or more Member States for the same undertaking, and that this, consequently, also applied to a person residing in one Member State and employed exclusively by an employer whose seat was in another Member State and who for a period not limited to twelve months pursued an activity in both Member States.[47] In a later judgement the CJEU stated that successive employment contracts stating the employment to be the territory of several Member States, while the work in fact was being pursued only on the territory of one of those Member States at a time, could not fall within the concept 'a person normally employed in the territory of two or More Member States'.[48] Nor has successive periods of work within one employment contract, completed in the territory of more than one Member State, when the periods of employment in in the territory of a Member State has been so long that the activity should be regarded as the normal working arrangement of that person, been considered to be covered by the concept of 'a person normally employed in the territory of two or more Member States.[49]

3. REGULATIONS 883/2004 AND 987/2009

With the introduction of the basic Regulation 883/2004 and the implementing Regulation 987/2009 on the one hand simpler rules entered into force, since the difference between different groups was to some extent taken out. On the other hand, more detailed rules were adopted, with *inter alia* the codification of the case-law of the CJEU and to some extent Decisions of the AC. Detailed rules on the application of Articles 12 and 13 in the basic Regulation, specific procedures when a person would be working in another Member States but also provisions regarding information to the person concerned, as well as cooperation between the institutions and obligations of the employers.

(45) *Altun*, C-359/16, p. 54-56.

(46) *A-Rosa*, C-620/15, p. 45; FU, DRV Intertrans, Joint cases C-410/21 and C-661/21, p. 68.

(47) *Grenzshop Andresen*, C-425/93.

(48) *Format*, C-115/11, p. 52.

(49) *Format*, C-879/19, p. 27–29. In its judgement the Court referred to the maximum period of posting of 12 months (Article 14(1)(a) in Regulation 1408/71) and held that the uninterrupted periods could not exceed this period.

A new AC Decision, Decision No A2,[50] was also adopted specifying the rules in the implementing Regulation regarding the application of Article 12 and 13 in the basic Regulation.

Since the introduction of the current coordination rules further case-law of the CJEU indicate a difficulty to in practice secure compliance with the rules, but also – as it seems – a tendency to want to deviate from the rules, as well as a need of further clarity of how the rules should be interpreted. Not only has the CJEU stressed that the derogation from the general rule of *lex loci laboris* stated in Article 12(1) of Regulation No 883/2004 must be interpreted strictly,[51] but also that the prohibition of replacing another posted person should be viewed to guarantee the equality of treatment of all persons occupied in the territory of a Member State as effectively as possible, and, furthermore, that the fact that the employers of the workers concerned have their offices in the same Member State or that they may have personal or organisational links is irrelevant in regard to when the employee must be regarded as being sent to replace another person.[52]

As mentioned earlier, the AC held already in Decision No 12 that a person could be recruited with the view of being posted. The introduction of Article 14.1 in Regulation 987/2009 narrowed this possibility down by requiring that the person had to be already subject to the legislation of the Member State in which his employer was established. In this regard, CJEU later held that a person who was not insured under the legislation of the Member State where the employer was established could still fulfill this requirement if at the time the person had its residence in that Member State.[53] As it can be understood it is accordingly not the national insurance coverage that is relevant in this regard, but the applicable legislation of the person in accordance with title II of Regulation 883/2004.

In a case involving a temporary-work agency, the CJEU has held that although the recruitment of workers is a prerequisite of the activity of such an undertaking, it is only the assignment of those workers that generates turnover. So, to perform 'substantial activity' in the Member State of establishment the undertaking must perform there, to a substantial extent, the activities of assigning workers of for the benefit of user undertakings established and performing their activities in the same Member State. Furthermore, that such undertakings would otherwise be encouraged to choose Member State in which they wish to establish themselves, and thus to allow 'forum shopping'. In addition that although the coordination rules merely establish a system for coordination, the objective of the rules, which in the case of posting is to provide services, could be undermined if Article 14(2) of Regulation 987/2009 would be interpreted to make it easier for undertakings to exploit the differences between the system, especially if such exploitation would be likely to have a 'race to the bottom

(50) Decision A2 of 12 June 2009, OJ C 106/5, 24.4.2010, p. 5-8.
(51) *Alpenrind*, C-527/16 p. 95.
(52) *Alpenrind*, C-527/16, p. 98-100.
(53) *Walltopia*, C- 415/17, p. 51.

effect', but also since such a situation could create distortion of competition between the different modes of employment.[54]

With reference to the codifications in Regulation 987/2009 of the CJEU's case-law on the scope and legal effects of the certificate of applicable legislation and the procedures to be followed to resolve any disputes between the Member States, the CJEU has lately also held that a withdrawal of a certificate must be taken into the context of the procedure laid down in the coordination rules, according to which only a decision that is in accordance with this procedure, following a reconsideration of the grounds for issuing that certificate, can remove the binding effects of the certificate.[55] Since, however, Article 5 of Regulation 987/2009 does not contain any provision relating to the procedural rules with which the issuing institution wishing to withdraw a certificate of its own motion must comply there is in such a situation no obligation to comply with the dialogue and conciliation procedure. A conclusion, which, according to the CJEU is reasonable, since such a withdrawal does not have its origin in a dispute between institutions but in its own findings following verifications which it is required to fulfil its obligations under the principles of sincere cooperation and mutual trust.[56]

4. CONCLUSION

Despite the very brief overview of the development of the coordination rules, AC Decisions, and case-law, with no ambition to be in any way comprehensive, the description may still function as an account of the rather progressive development of the situation, to meet the needs of an ever-increased level of cross-border workers and services. A development which has, in consequence, resulted in rules with a high level of complexity. But also, a discrepancy between theory and reality as well as understanding of the situation beforehand, when assessed by the institution, and afterwards, by the CJEU – when all the facts of the case are known. Hence, the complexity of the rules has caused difficulties, not only for the citizens and the employers, but also the administration.

Although the aim of the coordination rules is – and has always been – to enhance the freedom of movement, it has lately often been about the necessity to reduce the risk of fraudulent behavior; while it from the start was about rights, it is now about obligations and compliance. As it seems, however, the successively increased level of cross-border movements combined with a changed work pattern and a digital development will not reduce this risk, but rather create new challenges, for the rules and the administration. The need of good and effective cooperation between the Member States, to secure rights as well as obligations and compliance is thus evident.

To conclude, there is also in the future a need of further clarifications or development of new rules, where the possibilities and the strength of the AC should not be forgotten, but rather be made use of – as in the past and in the present.

(54) *Team Power*, C-784/19, p. 49, 50, 56, 62, 64, 65.

(55) FU, DRV Intertrans BV, Joined cases C-410/21 and C-661/21, p. 50-51.

(56) Zaklad Ubezpieczen Spolecznych Oddzial w Toruniu, C-422/22, p. 37-38, 45.

9 CROSS-BORDER TELEWORK OR DO INNOVATIVE WORK MODELS REQUIRE INNOVATIVE RULES ON APPLICABLE LEGISLATION?

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1. INTRODUCTION

During the COVID-19 pandemic and shortly thereafter, most analysts assumed that the impact on society would be drastic and irreversible. However, upon reflection with some distance, one must surprisingly acknowledge that little has actually changed. Travel activity has resumed and reached pre-COVID levels. Protective masks and distancing rules no longer play a role in everyday life. Even mass events, such as concerts, fortunately, have become commonplace again.

However, there is one aspect of life that has been in fact significantly altered by COVID-19: the world of work. Whereas prior to 2019, remote work was the absolute exception, limited to a few professions and industries, it is now considered an established and unquestioned model of employment.[1] For many, the ability to work from home has become almost as important as earning a decent income from work. Therefore, many companies actively advertise this option now. The reasons why remote work is in such high demand are diverse and often vary greatly on an individual basis. In most cases, in addition to eliminating long commutes, the better balance between work and family life is a central argument in favour of telework.

During the COVID-19 pandemic, however, telework wasn't a freely chosen work model but rather the only possibility. Many employers thus forced their employees to shift their workplace to their homes during the pandemic. Many governments also recommended[2] or even mandated[3] working from home. This means that at that time, it was less the employees themselves who wanted to work from home, but rather the employers who saw telework as the central instrument to keep their business operations running. This was particularly relevant for businesses located near borders, employing frontier workers, because many member states closed their borders during the pandemic to prevent further spread of the virus. Especially for employees who live in one member state and work in another, working from home was the only option available to fulfil their labour contract.

(1) Aceto, E., Cross-border workers – navigating the challenges of social security coordination rules in the era of telework in the European Union, *ELLJ* 2024, 1; Verschueren, H., The Application of the Conflict Rules of the European Social Security Coordination to Telework During and After the Covid-19 Pandemic, EJSS 24 (2) 2022, 80.

(2) Like Austria.

(3) Like Germany.

Therefore, in this initial phase, the primary concern was how to organize processes so that work could continue to be carried out from home. The focus was mainly on labour law aspects, such as whether the employer is obligated to provide the necessary technical infrastructure to the employee or at least must finance it. How should one handle situations where family members damage company property? How can one ensure that ergonomic requirements are met and working hours are effectively recorded, even at home? The legislator in some cases reacted and released specific (labour) rules for remote work.[4]

2. CROSS-BORDER TELEWORK AND SOCIAL SECURITY COORDINATION

Questions of social security law were initially not in the focus of interest. In fact, for the social security relationship, it is generally irrelevant whether the agreed activities are performed from home or at the employer's premises. Of course, this is only true as long as the place of residence and the (previous) place of work are in the same member state. However, problems arise when the employee resides in a different member state than where the employer's business is located. If the employee relocates their workplace to their home, the place where they carry out their work suddenly lies in a different member state. This is relevant because, according to the rules of Regulation 883/2004, the habitual place of work determines the applicable legislation.

The fundamental rule of the Coordination Regulation is that only one single state is responsible for the applicable social security law.[5] Which member state has the competence is determined by law, not by a free choice of the parties.[6] For economically active persons this is, according to Article 11 (3) (a), the state where the insured person is usually pursuing an activity as an employed or self-employed person. According to the jurisdiction of the ECJ the location of activity in this context has to be understood as referring to the place where, in practical terms, the person concerned carries out the actions connected with that activity.[7] If the person concerned simultaneously pursues activities in two member states, according to Article 13, the state where the person resides is responsible if they also carry out the substantial part of their activities there. In the case of an employee who (due to COVID) completely shifts their activity to their home, this means that for social security, the state where the company is located is no longer responsible, but rather the state where the employee resides. If the employee (after the end of the COVID pandemic) works, like in most of the cases, partly at the company´s premises and partly from home, this can also lead to the applicability of the legislation of the state where the employee resides if the substantial part of the activity is carried out there. This is the case according to Art 14 Regulation 987/2008 when the person concerned spends 25 percent or more of their working time at home. That means that an employee who works three days at the employer's premise and

(4) Cf for Austria Para 2h Arbeitsvertragsrechts-Anpassungsgesetz (AVRAG).

(5) Schoukens, P., Everaet, G., A Reflection on Telework in Social Security Coordination, *Zbornik* 73 2023, 376; Verschueren, H., The Application of the Conflict Rules of the European Social Security Coordination to Telework During and After the Covid-19 Pandemic, EJSS 24 (2) 2022, 81.

(6) Reiter, C., Thielemann, E., Homeoffice im EU-Ausland, NZA-Beilage 2023, 62.

(7) ECJ C-137/11, Partena, EU:C:2012:593.

two days at home within a five-day workweek is already subject to the social security legislation of the state of residence.

3. A PRAGMATIC APPROACH FOR CROSS-BORDER TELEWORK

Therefore, in a second phase, there was a risk that the coordination rules on applicable legislation could get employers to limit the possibility of teleworking in order to prevent a change in the applicable law.[8] On the one hand, this would have led to an undesirable spread of the virus, on the other hand, an economic collapse at least in cross border regions would have been a realistic scenario.[9] For this reason, the need for a quick and pragmatic solution at the European level soon became apparent, because changing the rules regarding the applicable legislation within the coordination regulation would have been unrealistic at that time – and probably still is today.

Indeed, the administrative commission acted swiftly and prepared a guidance on the legislation applicable to telework.[10] The commission's recommendations were intended as a transitional solution limited to the duration of the pandemic. The proposal was to qualify the pandemic as force majeure and to justify by this means that, despite the relocation of employment to the state of residence, there should be no change in the applicable legislation.[11] In other words: the member state who was competent before the pandemic should still be competent during the pandemic even though the place where the work is usually carried out has changed. However, it was clear from the outset that force majeure was not a suitable legal basis for a permanent solution to the problem of cross-border telework. Therefore, the administrative commission itself clarified that as of July 1, 2022, respectively – after another extension – July 1, 2023, force majeure should not any longer be a valid legal base for a derogation of the rules on applicable legislation according to Regulation 883/2004 and 987/2008.[12]

Therefore, the question has arisen of how to deal with cross-border telework after this point, as it was clear that remote work was not a temporary phenomenon, just used for flattening the curve, but had come to stay. While Articles 12 Regulation 883/2004 provide certain legal leeways, they can only be used effectively in very specific (ad

(8) Verschueren, H., The Application of the Conflict Rules of the European Social Security Coordination to Telework During and After the Covid-19 Pandemic, *EJSS* 24 (2) 2022, 80.

(9) Cf. the general principles of the applicable legislation (B.) of the Administration Commission for the Coordination of Social Security Systems, Guidance Note on Covid-19 pandemic, revised version as of 25/11/2021 – AC 074/20REV3.

(10) Administration Commission for the Coordination of Social Security Systems, Guidance Note on Covid-19 pandemic, revised version as of 25/11/2021 – AC 074/20REV3.

(11) Schoukens, P., Everaet, G., A Reflection on Telework in Social Security Coordination, *Zbornik* 73 2023, 379.

(12) Administration Commission for the Coordination of Social Security Systems, Guidance Note on telework, revised version as of 14/11/2022 – AC 125/22REV3; cf also Verschueren, H., The Application of the Conflict Rules of the European Social Security Coordination to Telework During and After the Covid-19 Pandemic, EJSS 24 (2) 2022, 83.

hoc) cases.[13] Therefore, a general solution for habitual cross-border telework cannot be achieved based on the rules on posting. Given the fact that a political agreement at the European level on a change of the rules on applicable legislation or a specific chapter on (cross-border) telework cannot be achieved, the administrative commission therefore proposed to make use of the possibility to agree upon exceptions in the interest of certain persons or categories of persons provided in Article 16.[14]

Indeed, some member states followed the recommendation of the Administrative Commission and began to seek special solutions for cross-border telework on a bilateral basis. Austria concluded such agreements with Germany, the Czech Republic and Slovakia.[15] Since, in most cases, telework is performed alongside regular on-site work, the mechanism proposed in these bilateral agreements to solve the issue was a change in the percentage indicating in which member state the substantial part of the work is carried out. In the above-mentioned agreements between Austria and its neighbour states a level of 40 percent was stipulated. However, it soon became clear that a common approach at the European level was needed. Therefore an expert group was established to propose ideas for a long-term solution for the issue of applicable legislation in the case of cross-border telework. Based on the results of this expert group, the Administrative Commission issued a new guidance which should pave the way for the conclusion of a multilateral framework agreement.[16]

The new multilateral framework agreement on habitual cross-border telework entered into force from July 1, 2023.[17] So far, the agreement has been ratified by twenty member states.[18] The aim of the framework agreement is to facilitate the conclusion of individual derogations of the rules on applicable legislation in the interest of a category of employed persons, i.e. cross-border teleworkers. The framework agreement formulates three central requirements: Firstly, the individuals must be employees residing in a different member state than the one where the employer's company is located. Secondly, the individuals must carry out their activities from the state of residence by using modern information and communication technology to stay connected with their employer. Thirdly, the individual must not spend more than 50 percent of their working time in the member state of residence. Furthermore this

(13) De Pauw, B., Verschueren, H., The Framework Agreement on the applicable social security law in case of habitual cross-border telework after the pandemic, *ERA Forum* 24 2023, 472; Haas, N., Homeoffice und internationale Sozialversicherung, ZAS 45 2023, 240; Schuster, S., Mobile Working: Sozialversicherungsänderungen ante portas? ASoK 2 2023, 59; Verschueren, H., The Application of the Conflict Rules of the European Social Security Coordination to Telework During and After the Covid-19 Pandemic, *EJSS* 24 (2) 2022, 82.

(14) Administration Commission for the Coordination of Social Security Systems, Guidance Note on telework, revised version as of 14/06/2023 – AC 137/23.

(15) Cf Rahmenvereinbarung über die Anwendung von Artikel 16 Absatz 1 der Verordnung (EG) Nr. 883/2004 bei gewöhnlicher grenzüberschreitender Telearbeit zwischen Österreich und Deutschland, der Tschechischen Republik und der Slowakei.

(16) De Pauw, B., Verschueren, H., The Framework Agreement on the applicable social security law in case of habitual cross-border telework after the pandemic, *ERA Forum* 24 2023, 474.

(17) Cf also Aceto, E., Cross-border workers – navigating the challenges of social security coordination rules in the era of telework in the European Union, *ELLJ* 2024, 6 ff.

(18) Cf https://socialsecurity.belgium.be/en/internationally-active/cross-border-telework-eu-eea-and-switzerland.

possibility of deviation exists, according to Art 2, only if both the state of residence and the state where the company is located have signed the framework agreement. If all these conditions are met and an appropriate request has been made, Article 3 stipulates that the state where the company is located remains competent for social security at least for the next three years. In contrast, persons who habitually pursue another activity than cross-border telework in the state of residence and/or are self-employed are explicitly excluded from the personal scope of the framework agreement according to Art 2 (3). In this case the general rules on applicable legislation of Regulation 883/2004 apply.

4. CRITICAL ANALYSIS

The primary goal of the framework agreement seems clear: The possibility to derogate from the rules of Regulation 883/2004 on applicable legislation shall ensure continuity. The opportunity for cross-border telework should not lead to a change in the applicable social security legislation. However, the question arises: whose interest does continuity serve, or to put it differently, who benefits from continuity? The answer appears quite clear when examining the solution proposed for cross-border telework. The rules of the framework agreement are intended to allow employers to continue applying the laws of the member state where their business is situated. Ultimately, it is about relieving employers of the administrative burdens that would result from applying the Articles 11 to 13 of Regulation 883/2004. The rules of Regulation 883/2004 regarding applicable legislation would often lead to a change in the competent member state, presenting employers with new administrative challenges and potentially additional costs, particularly if social security contributions in the employee's member state of residence are higher than those in the employer's member state.

However, one might question why employers should be relieved of the administrative burden arising from Regulation 883/2004. What is the legal justification? The idea that a switch to cross-border telework should not challenge the applicable legislation is understandable in traditional employment relationships if cross-border telework arises from unforeseen circumstances not anticipated in the labour contract. This was undoubtedly the case during the COVID-19 pandemic when the effects were massive and unforeseen, leading most employees in Europe and worldwide to work from home. Therefore, it was not only understandable but also prudent for the Administrative Commission to classify the pandemic as force majeure and thus avoiding a change in applicable legislation. Otherwise, in such a challenging situation, that could have led to a collapse of the entire coordination system. The reasons for deviating from coordination rules to ensure continuity therefore stemmed from the unpredictability of the situation.

In the meantime, however, circumstances have changed considerably. Presently, employees largely opt voluntarily for remote work because they choose to do so, realizing its benefits in combining employment with personal interests. Therefore, telework, including cross-border telework, is no longer an inevitable consequence of an uncontrollable situation but a conscious choice. Thus, the starting point of the framework agreement differs significantly from the guidance of the Administrative Commission.

Consequently, two questions emerge: Firstly, is it still justifiable to abandon coordination rules on applicable legislation in cases of cross-border telework? Secondly, even if continuity is deemed necessary, why should it only apply in cases covered by the framework agreement, which addresses a specific manifestation of telework? During the pandemic, remote work was involuntary, which justifies the application of the principle of continuity. Given this, one may question why the framework agreement continues to mimic a situation that prevailed during the pandemic.

Thus, it seems reasonable to ask why the framework agreement still follows the logic of the Administrative Commission's guidance. Why should employers still be relieved of administrative and financial burdens in a situation that is intentional and where the legal consequences are foreseeable for the parties? The reason is, that if we would apply the rules of Art 11 to 13 of Regulation 883/2004, employers in most of the cases would refrain from concluding telework agreements in cross-border situations considering that they would have to apply the legislation of another member state. Consequently, the objective of the framework agreement has shifted, focusing more on protecting employees than employers. Its core aim is to ensure that the coordination rules on applicable legislation do not hinder the parties of the labour contract from concluding telework agreements in cross-border situations. However, employers who differentiate when concluding a telework agreement based on whether the respective employee resides in the same state where the premise is located or not, may be violating the principle of equal treatment guaranteed by Art 45 TFEU.[19] The argument that a change in the applicable social security legislation entails disproportionate administrative burdens does not seem sufficient to justify the present indirect discrimination.[20] After all, this is precisely what the European legislator generally imposes on employers considering the solution provided by Art 11 to 13 of Regulation 883/2004.

5. CONCLUSION

Therefore, a fundamental question arises: Is it justifiable to sacrifice the rules on applicable legislation for the sake of continuity by concluding a framework agreement based on Article 16 of Regulation 883/2004? On one hand, it is undoubtedly positive that Article 16 provides an instrument enabling member states to find quick and pragmatic solutions to new problems and situations where Regulation 883/2004 does not provide appropriate answers. As rigid as the regulation is in principle, Article 16 is equally flexible. On the other hand, however, Article 16 harbours the risk that this gained flexibility will be at the expense of the idea of a unified coordination system. Or to say it differently: The use of Art 16 may open Pandora's box. The framework agreement on telework could initiate a "two-speed" or "multi-speed" Europe, even in social security coordination; a scenario which is not likely to solve our problems.

(19) Schoukens, P., Everaet, G., A Reflection on Telework in Social Security Coordination, *Zbornik* 73 2023, 381.

(20) Niksova, D., Die Arbeitswelt im digitalen Wandel: Ausländisches Homeoffice und virtuelle Entsendungen aus arbeitsrechtlicher Perspektive, ZAS 19 2023, 88; Verschueren, H., The Application of the Conflict Rules of the European Social Security Coordination to Telework During and After the Covid-19 Pandemic, EJSS 24 (2) 2022, 92; Windisch-Graetz, M., Grenzüberschreitendes mobiles Arbeiten und Sozialversicherung, *DRdA* 2022 6, 548.

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10 DIGITALISATION AS A CHALLENGE FOR THE ADMINISTRATIVE COMMISSION FOR THE COORDINATION OF SOCIAL SECURITY SYSTEMS[1]

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1. PROLOGUE: GENERAL BENEFITS AND RISKS OF DIGITALISATION

Probably no other topic has occupied the work of the Administrative Commission for the Coordination of Social Security Systems (hereinafter: Administrative Commission) as much in recent years as digitalisation. On the one hand, because the current Regulations on the Coordination of social Security Systems (EC) No. 883/2004 and 987/2009[2] have virtually prescribed this topic for themselves with the introduction of electronic data exchange[3]. Secondly, national procedures relating to the coordination of social security have been and are being increasingly digitalised[4]. Finally, various horizontal EU legal acts on digitalisation have had and continue to have a significant impact on social security coordination.[5]

The fundamental objectives of digitalisation are similar regardless of whether it is a question of sector-specific digitalisation of social security coordination, national social security systems or public administration in the EU as a whole.

Digitalisation should

- increase the efficiency of procedures by automating and optimising administrative processes, which (can) reduce bureaucracy and processing times;

(1) The views expressed in the contribution are those of the author and do not necessarily represent the position of the German Federal Ministry of Labour and Social Affairs. The author thanks her colleague Jan Kielwein for the helpful remarks when drafting the text.

(2) Regulation No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166, 30.4.2004, p.1 and Regulation (EC) No. 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No. 883/2004 on the coordination of social security systems, OJ L 284, 30.10.2009, p.1.

(3) Cf. Art. 78 Regulation (EC) No. 883/2004 and art. 4 Regulation (EC) No. 987/2009.

(4) Cf. for Germany e.g. §§ 106 et seq. German Social Code Book IV – Common provisions on social security.

(5) Cf. for example Regulation (EU) 2018/1724 of the European Parliament and of the Council of 2 October 2018 establishing a single digital gateway to provide access to information, to procedures and to assistance and problem-solving services and amending Regulation (EU) No 1024/2012, *OJ L 295, 21.11.2018, p. 1* or Regulation of the European Parliament and of the Council amending Regulation (EU) No 910/2014 as regards establishing a framework for a European Digital Identity – adopted by the Council on March 26, 2024, but not yet published in the Official Journal.

- improve the quality of service by giving citizens and businesses easier and faster access to the administration;
- reduce the bureaucratic burden for citizens and businesses by improving the exchange of information between different administrative bodies;
- reduce the risk of fraud and error by minimising transmission errors in data transfers and increasing the security against forgery of evidence,
- lead to cost savings.[6]

George Westermann, a scientist at the Massachusetts Institute of Technology, is often quoted in this context: If you do digitalisation right, a caterpillar becomes a butterfly. If you don't do it right, at best you have a faster caterpillar.[7] An important criterion for "well-done" digitalisation is therefore that it does not simply convert existing analogue processes into digital formats ("turning a paper form into a PDF document"). Instead, good digitalisation begins by scrutinising the existing processes and identifying possible synergy effects through cross-sectoral approaches. The EU Commission also pursues this idea when it comments on the prospects for the digitalisation of social security in its recent communication on digitalisation of social security coordination: "To support a seamless experience for cross-border labour mobility - both physical and 'virtual' mobility - for people, businesses and national authorities, it is important to act beyond the social security domain and foster cross-sectoral interoperability. This would require examining the various processes governing not only social security coordination but also posting of workers, cross-border healthcare and the interaction between social security coordination and labour law, taxation and company law. The aim is to bring greater clarity, simplify administrative procedures, and explore synergies between digital solutions developed in the different sectors."[8]

Given the potential advantages and benefits of digitalisation, it is hardly surprising that digitalisation issues have such a lasting impact on the work of the Administrative Commission. At the same time, some previous digitalisation initiatives (outside the Administrative Commission) have shown that the biggest risk of digitalisation is not that you only get a fast caterpillar instead of a beautiful butterfly. Instead of a fast caterpillar, badly done digitalisation can simply produce a more expensive caterpillar that is not even faster than the old one. At worst, the result is a caterpillar that no longer runs at all or at least worse than the old one.

(6) Cf. e.g. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2030 Digital Compass: the European way for the Digital Decade of March 3, 2021 available at EUR-Lex - 52021DC0118 - DE - EUR-Lex (europa.eu) or Government of the Federal Republic of Germany: Digital Strategie: Creating digital value together, available at Digitalstrategie_Aktualisierung_25.04.2023.pdf (digitalstrategie-deutschland.de).

(7) Westerman, G., Bonnet, D., McAfee, A., Leading Digital: Turning Technology into Business Transformation, p. 108.

(8) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on digitalisation in social security coordination: facilitating free movement in the Single Market of September 9, 2023, available at Digitalisation in social security coordination (europa.eu).

After all, the central challenges associated with digitalisation are:

- Lack of interoperability: Heterogeneous national data infrastructures, application programmes, processes and digitalisation strategies make cross-border, standardised applications a complex undertaking.
- Data protection and security: Appropriate security measures are needed to protect citizens' privacy and prevent data misuse.
- Technical faults and failures: Digital data exchange can be much faster than sending documents by post - but it can also come to a complete and comprehensive standstill in the event of technical faults and failures.
- Less creative leeway with automated processes: Procedures must be standardised in order to automate procedures. This makes it difficult to deal with cases that lie outside the standard and cannot be conclusively described with the existing standard format template.
- Limited resources: Digital transformation is being driven forward at many levels simultaneously. However, human and financial resources are limited, which makes it difficult to implement various national and European digitalisation projects in parallel.

In addition to such technical challenges, digitalisation is also associated with expectations that it cannot fulfil because the actual challenge is not to be found in the analogue status quo, but elsewhere - an administrative procedure that is perceived as pointless bureaucracy without real added value ultimately remains an administrative procedure without real added value even after it has been digitalised.

Nor can digitalisation overcome challenges that may be of great importance in political rhetoric but hardly play a significant role in reality: For example, increasing the security against forgery of a particular form of proof through digital elements only makes sense if forgery is actually a significant problem in practice and not just a marginal phenomenon.

However, this article will not focus on the question of which implemented or planned digitalisation initiative is/will be a real butterfly and which is just a caterpillar. Instead, the work of the Administrative Commission for the Coordination of Social Security Systems will be examined in the light of another quote from George Westerman, according to which the digital transformation requires changes in processes and thinking - changes that span internal organisational silos.[9]

What specific changes in the processes and thinking of the Administrative Commission do we need in order to make a really good contribution to the digitalisation of social security coordination?

2. THE ADMINISTRATIVE COMMISSION: CURRENT WORKING METHODS

In order to address the question of what changes would be desirable in the Administrative Commission's processes and ways of thinking with a view to (even)

(9) Westerman, G., Bonnet, D., McAfee, A., Leading Digital: Turning Technology into Business Transformation, p.163.

better handling of digitalisation issues, it is first necessary to understand how the Administrative Commission currently performs its tasks:

The Administrative Commission is a body that has existed since the first Coordination Regulation came into force[10] and which, despite its composition of representatives of the Member States, is assigned to the sphere of the EU Commission (and not the Council). The delegations from the member states and the EU Commission usually meet four times a year and discuss issues relating to the interpretation and application of the Coordination Regulations in a two-day (now: hybrid) meeting. Decisions of the Administrative Commission are not legally binding[11], but according to Article 89 para. 3 Regulation (EC) No. 987/2009, it is the task of the competent authorities in each member state to ensure that the decisions are observed in the member states. More extensive topics and issues are regularly prepared and analysed outside the regular meetings by ad hoc working groups and/or so-called leading delegations. Four times a year, a specific topic is also analysed in depth as part of a working party in a one-day, currently mostly digital meeting.

The members of the Administrative Commission and their delegations are predominantly ministry officials with legal training. As a whole, they have unique expertise on issues relating to coordination regulations. Many of them were and are also involved in previous and current legislative processes on coordination law at EU level, so that not only legal but also enormous historical knowledge is available.

Under Article 72 lit. d) Regulation (EC) No. 883/2004, the Administrative Commission also has an explicit role to play in the digitalisation of social security coordination and the development of electronic data exchange of social security information (EESSI): It promotes the widest possible use of new technologies, adopts the common structural rules for electronic data processing services and lays down the details for the operation of the common part of these services. In fact, however, the decisions of the Administrative Commission in the area of IT and digitalisation are largely prepared by the so-called Technical Commission[12], which often does not bring together ministerial representatives, but representatives of the social insurance institutions with a corresponding understanding of the specific IT architecture of the national institutions. Despite this comprehensive preparation and works by the Technical Commission, the agenda items on EESSI have taken up 30 to 50% of the Administrative Commission's meeting time for several years.

3. CHALLENGES IN DEALING WITH DIGITALISATION ISSUES IN THE ADMINISTRATIVE COMMISSION

The increasing importance of digitalisation issues for the work of the Administrative Commission poses a number of challenges for the Administrative Commission:

(10) Cf. Art. 43 Council Regulation No 3 concerning social security for migrant workers, OJ No. 30, 16.12.1958, p. 597/58.

(11) See in particular ECJ, 14 May 1981, Romano, case 98/80, ECLI:EU:C:1981:104; more recently, see CJEU, *Alpenrind GmbH*, case C-527/16, ECLI:EU:C:2017:300.

(12) Cf. Art. 73 Regulation (EC) No. 883/2004.

3.1. DIGITAL EXPERTISE

While for many years if not decades it was primarily important for the interpretation of the coordination regulations and the discussion of possible adjustments to have an eye on the special features of the social security systems of the individual Member States in addition to the legal knowledge of the regulations themselves, this view must now be extended to the existing digital infrastructure of the social administration in the Member States when it comes to questions of digitalisation. However, this knowledge of the digital infrastructure is not a typical subject of legal training, specialised literature on the coordination of social security or of "classical" ministerial work. Digital expertise is therefore not a historically developed part of the expertise of the Administrative Commission. Instead, the Administrative Commission and its individual members had and still have to acquire this knowledge.

3.2. DIGITALISATION AS AN EXTREMELY AGILE PROCESS

In addition, digitalisation is not even mostly a completed process either at European level or within national public administrations. Rather the opposite is the case: there are countless digitalisation measures being implemented or planned, both at EU level and nationally in the individual Member States. It should be noted that digitalisation measures can be specific measures within individual areas of law/individual branches of social security, but also horizontal measures that affect several subject areas equally. The legal and technical framework is therefore constantly changing due to the high level of dynamism. The changes are also much more extensive than the always-ongoing changes in the legal framework of social security systems and coordination. It is therefore not enough to read up on the latest developments in digitalisation once or to rely solely on the knowledge that ministry officials acquire in their day-to-day work with the coordination regulations. Instead, it is necessary to constantly and proactively look beyond the own core work horizon in order to be able to demonstrate a level of knowledge in the digitalisation of social security coordination that allows competent and forward-looking decisions to be made.

3.2.1. *Examples of dynamic developments at EU level*

In addition to the ongoing specific social security coordination project of the Electronic Exchange of Social Security Information (EESSI), some current horizontal digital legal acts of the EU have considerable relevance for the coordination of social security and therefore also require attention in and by the Administrative Commission. The Single Digital Gateway Regulation (SDGR)[13], which requires, among other things, the digitalisation of application procedures for certificates on applicable law (so-called A1 certificates) and for the European Health Insurance Card (EHIC), should be mentioned in particular. In addition, the Once Only Technical System[14], which is to be set up based on Art. 14 SDGR, also requires the social security institutions to connect for certain administrative procedures - and at the same time a differentiation from the data exchange that already takes place via EESSI within the framework of

(13) Regulation (EU) 2018/1724 of the European Parliament and of the Council of 2 October 2018 establishing a single digital gateway to provide access to information, to procedures and to assistance and problem-solving services and amending Regulation (EU) No 1024/2012, *OJ L 295, 21.11.2018, p. 1.*

(14) For further information cf. e.g. Once Only Technical System (europa.eu).

coordination law. A second important piece of digital legislation is the recently revised eIDAS Regulation[15], which, among other things, now obliges member states to provide a digital identity and aims to introduce a standardised EU digital wallet. Since mid-2023, social insurance institutions from various member states have been testing the future use of digital credentials within the meaning of the revised eIDAS Regulation in the context of social security coordination in two large-scale pilot projects funded by the EU Commission.[16]

In recent years, numerous of the above-mentioned working parties have subsequently dealt with the interaction of the coordination regulations with the above-mentioned and other horizontal digital legislation such as the Interoperable Europe Act[17]. One of the reasons why this debate became necessary was that the Administrative Commission was naturally not involved during the legislative processes. At the same time, it is in the nature of things that horizontal legal acts and digitalisation projects do not (and cannot) take all sector-specific features into account as comprehensively as possible from the outset. The application of horizontal legislation in complex areas such as the coordination of social security therefore poses considerable follow-up questions and challenges for the Administrative Commission. A good current example is the digitalisation of the EHIC application process and, in principle, the EHIC itself: Although the SDGR contains such a basic requirement, it sort of overlooks the fact that the format of the EHIC is currently defined (solely) as a plastic card by Decision S2 of the Administrative Commission[18] and that a change to the decision is not only a question of re-wording, but also comes with numerous downstream tasks to ensure that an EHIC can not only be issued in a digital format, but above all continues to be accepted by doctors, hospitals and other healthcare providers throughout the EU as well as the current plastic card.

Incidentally, there are also exciting questions of interaction with regard to the revised eIDAS Regulation and its application in the context of social security coordination: On the one hand, in the spirit of "digitalising the EU", digital credentials within the meaning of the revised eIDAS Regulation should also be used in the area of coordination in the future. On the other hand, the personal and geographical scope of application of the coordination regulations is broader than that of the revised eIDAS Regulation: for example, certain third-country nationals who are not resident in the EU are covered by social security coordination and coordination regulations also apply in Switzerland, but the scope of application of the revised eIDAS Regulation is narrower and does not cover situations with third country nationals with residence

(15) Regulation of the European Parliament and of the Council amending Regulation (EU) No 910/2014 as regards establishing a framework for a European Digital Identity – adopted by the Council on March 26, 2024, but not yet publisehd in the Official Journal.

(16) Further information on the projects can be found on their respective websites: www.dc4eu.eu and www.ebsi-vector.eu.

(17) Regulation (EU) 2024/903 of the European Parliament and of the Council of 13 March 2024 laying down measures for a high level of public sector interoperability across the Union (Interoperable Europe Act), *OJ L, 2024/903.*

(18) Decision No. S2 of 12 June 2009 concerning the technical specifications of the European Health Insurance Card, *OJ C 106, 24.4.2010, p. 26.*

outside the EU or the territory of Switzerland, so that it is necessary to discuss how best to deal with this discrepancy.

In the future, it would therefore also be desirable if the aforementioned specifics of social security coordination were taken into account from the outset of the development of horizontal digital legal acts, perhaps not comprehensively, but at least "more", and if the Administrative Commission were sufficiently involved at an earlier stage as far as possible.

3.2.2. Examples of dynamic developments at national level

While cross-border digitalisation is being discussed and implemented, digitalisation at national level is also evolving: previously analogue procedures are being digitalised for the first time, existing digital procedures are being revised, national application programmes are being changed or adapted. In terms of its scope, the digital transformation in the social security systems of the member states is much more comprehensive than the current transformation in the legal systems of social security, for example through national pension reforms or similar.

On the one hand, the increasing digitalisation of social insurance in the member states facilitates certain coordination tasks. For example, statistical data for coordination can be analysed much more quickly, easily and precisely.

An additional challenge compared to "analogue coordination", however, lies in the fact that Member States with fundamentally similar provisions in the area of a social security sector can take very different paths in the digital handling of these provisions in administrative practice. So finding European solutions that fit well into national requirements is double cumbersome.

In addition, some Member States use centralised digital procedures for their social security, in which the individual branches of social security are managed by one institution or at least an umbrella organisation, which favours simultaneous and uniform digitalisation in these Member States. However, this is by no means the case in all Member States. In Germany, for example, the heterogeneous institutional landscape and the responsibilities spread across the federal, state and local levels are also reflected in the digitalisation of the administration, meaning that there is no uniform structure of digital public administration, but rather a very diverse one.

3.2.3. Past experience

With these three challenges in mind, it is not surprising that the introduction of EESSI took longer than the two years originally estimated in Article 95 Regulation (EC) No. 987/2009. It is also not surprising that the path to the full rollout of EESSI has been bumpy, with setbacks – and is now only almost, but not yet fully, complete. Instead, it might not be far-fetched to assume that the legislator may not have fully grasped the complexity of the project when formulating the conceivably concise wording of a future exclusively electronic data exchange. In any case, it is certainly no exaggeration to state that no other Articles in the coordination ordinances were and are as complex to implement as those on the electronic data exchange are.

However, the Administrative Commission's experience with EESSI also shows that the members and delegations of the Administrative Commission have a steep learning curve in the area of digitalisation and are generally able to take on complex digital challenges. Digital aspects of coordination are increasingly being "automatically" taken into account: when discussing the handling of cross-border telework after the Covid pandemic, the consideration of digital implementation issues was an integral part of the discussions. In addition to discussing the legal scope of the regulations on cross-border telework, it was therefore also discussed how the telework framework agreement[19], which was developed as a solution, can be sensibly mapped within the framework of EESSI (and the national digital application procedures for applicable law).

4. WHAT NEEDS TO CHANGE?

Nevertheless, it would be naïve to claim that the challenges just outlined have already been fully mastered for the future. This is even more true as digitalisation issues relevant to the Administrative Commission are not limited to EESSI, but horizontal digital legal acts such as the SDGR and the revised eIDAS Regulation also interact considerably with social security coordination. It is precisely these interactions between coordination regulations that appear to be the next level of the Administrative Commission's digitalisation work. In the current discussion on the digitalisation of the EHIC, it is therefore no longer sufficient to focus solely on the coordination regulations in the area of health insurance and the precise handling of the EHIC from the application to the cross-border reimbursement of healthcare services between institutions, but also to interpret the provisions of the SDGR on the EHIC in a reasonable manner.

However, if it is obvious that the Administrative Commission must continue to face both familiar and new challenges in connection with digitalisation in the future, and at the same time it is clear that the Administrative Commission has already built up expertise in this area, but that this undoubtedly needs to be expanded further, the question arises as to how the Administrative Commission should approach this.

4.1. INCREASE DIGITAL COMPETENCE

First, it seems important that the Administrative Commission is aware of the tasks ahead of it in the area of digitalisation and accepts that it is no longer sufficient for the Administrative Commission to "only" bring together good lawyers and social insurance practitioners in order to continue its good work. Instead, the digital expertise of the various stakeholders in the Administrative Commission must (further) increase.

In concrete terms, this means

- that the legal and technical knowledge of the government representatives in the Administrative Commission about the respective national digital architecture and the national digitalisation status should be increased as far and as fast as possible.

(19) Further information on the framework agreement can be found on the website of the Belgian Federal Public Service Social Security Cross-border telework in the EU, the EEA and Switzerland | Federal Public Service - Social Security (belgium.be) (Belgium acts as depository state for the framework agreement).

- that the knowledge of EU Commission representatives on the reality of digitalisation in the Member States should be expanded.
- that the members of the Administrative Commission engage in (even) more intensive dialogue with the relevant IT experts in advance of the meetings on the individual agenda items in order to be able to participate more actively in decision-making not only on the legal but also the technical issues of the Administrative Board.
- that the participation of IT experts in the national delegations of the Administrative Commission should be further encouraged. This applies in particular to active participation in the form of contributions and statements from an IT perspective, as it is important that IT experts see themselves not only as "executive technicians" who implement the decisions of the Administrative Commission, but also as active co-designers of social security coordination.

4.2. TRAINING

Increasing the digital competence of ministerial lawyers in particular, as just called for, is a task that should not be underestimated and which, strictly speaking, will probably not only have to be mastered by the government representatives in the Administrative Commission, but by the ministerial bureaucracy in many Member States as a whole.

At the same time, it does not seem so easy to find the right mix of general IT law, general principles of the digitalisation of (national) public administration/social security and specific information on digitalisation aspects relating to social security coordination. This is probably due to the fact that only a few IT experts offering training have comprehensive knowledge of social security coordination and only a few coordination experts have comprehensive IT knowledge.

- It should be examined whether the transfer of knowledge on certain digital topics can be improved by changing the format of the Administrative Commission's working parties from digital frontal lectures to a more agile and interactive exchange. However, it should be noted that the working parties are not actually intended as training events but as an exchange between experts.
- It is therefore worth considering whether, for example, the ELA's range of training courses on digitalisation topics could be expanded in the aforementioned sense.
- A further possibility for further training could also be short-term "stages" of various stakeholders of the Administrative Commission at relevant "IT institutions" at national or Union level – this would also promote cross-sectoral exchange at the same time.

4.3. LEAVE SILOS

As Westerman rightly points out in his quote at the beginning, digitalisation requires changes that span internal organisational silos. It can therefore never be enough to look at digitalisation issues only from a legal or technical perspective, only from a national or European perspective, only from a general digital policy or a sector specific perspective.

Instead, it is also important to establish a more intensive communication channel with bodies such as DG Grow or DG Digit, whose core task is the creation and/or implementation of horizontal digitalisation projects such as the SDGR, in order to ensure that synergies are used and work is not carried out at cross purposes. The same principles also apply to the implementation of the revised eIDAS Regulation, as the new EU digital wallet to be introduced in the coming months is already being tested for practical application in the area of social security coordination in the two above-mentioned large-scale pilots DC4EU and Vector funded by the Commission. Although these pilots are running independently of the work of the Administrative Commission, an informed decision in due course on the question of how exactly and to what extent portable documents of the Administrative Commission such as A1 and EHIC should be fully digitalised naturally requires the relevant background knowledge.

Cross-sectoral exchange and cooperation on digitalisation issues will therefore have to become a permanent task for the Administrative Commission. This is not least because one of the Administrative Commission's tasks under Article 72 lit. f) Regulation (EC) No. 883/2004 is to make proposals for amendments to coordination law. If the cross-sectoral approach mentioned at the beginning of the Commission's communication on digitalisation is to be taken seriously, the Administrative Commission must also increasingly think outside the box and look beyond their horizon when it comes to digitalisation issues.

Therefore, for digitalisation issues relating to the coordination of social security

- the flow of information between the Administrative Commission and the Technical Commission should be improved (this is primarily an appeal to the members of the Administrative Commission).
- the exchange between the Administrative Commission and bodies involved in the implementation of the SDGR, the revised eIDAS Regulation and other horizontal digital acts (such as DG Grow, DG Digit and the implementation bodies attached to them) must be stabilised and expanded. Equally important is a functioning exchange between the members of the Administrative Commission and their colleagues in the national digitalisation ministries involved in the design and implementation of these horizontal digital acts.
- national delegations and the EU Commission in the Administrative Commission must see themselves less as counterparts with sometimes opposing, but certainly different goals, and more as parts of one and the same team with common goals.

5. CONCLUSION

The challenges that exist on all sides and everywhere in connection with the digitalisation of public administration do not stop at the Administrative Commission. When the Administrative Commission

- brings together the legal and digital expertise available there and in the technical commission even more effectively,
- further expands existing contacts with other relevant digitalisation stakeholders and

- Member States and the EU Commission work together in the Administrative Commission towards the common goal of taking into account the realities of digitalisation in the individual Member States and at the same time working towards a common European cross-border digitalisation

then the Administrative Commission can not only complete the mammoth task of implementing EESSI in the near future, but also make an important contribution to a seamless experience for cross-border labour mobility – both physical and 'virtual' mobility – for people, businesses and national authorities in the sense of the Commission's communication.

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11 POSTING OR WORKING IN DIFFERENT COUNTRIES IN THE EU COORDINATION REGULATIONS FOR SOCIAL SECURITY: BALANCING ON A THIN LINE

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1. THE CONFLICT RULES: THE SET-UP

The question which social security system applies to persons who cross the border in social security law, is one of the most well-known but also often difficult to answer question. European regulations 883/2004 and 987/2009 include a set of rules on conflict of laws in the domain of social security law, to develop a uniform solution between the Member States. The conflict rules of the coordination regulations designate the internal or foreign legislation applicable to the situation concerned. This is important as designating the applicable social security legislation, also leads to deciding which country has to pay a benefit.

Title II of Regulation 883/2004 is structured around three levels: the general rules of Article 11 (i.e. the *lex loci laboris*, adapted to civil servants, exception made for cross-border unemployed persons, particular adaptation to people in their military service, a supplementary rule for residents and adapted to people pursuing activities on board of a vessel), all with their unique connecting factor; followed by the special rules of Article 12 (in particular the situations of posting for employed as well as self-employed persons) and the particular rules of Article 13, which focus on the simultaneous performance of activities in two or more Member States. These three main divisions are followed by some complementary rules for voluntary insurance, the contract staff of the European Communities and the general possibility of Article 16 to deviate from all previous rules.

The conflict rules indicate which legislation applies, but this does not as such imply that the person concerned will actually derive social security rights from this legislation.[1] So it is quite possible that someone may not be able to enjoy social security rights because of the conflict rules . This is also the reason why the Court of Justice has in some case-law determined that the non-competent state should apply its legislation in specific cases[2].

(1) CJEU 28 April 1994, *Hoorn v Landesversicherungsanstalt Westfalen*, C-305/92, ECLI:EU:C:1994:175, para 13.

(2) See C CJEU 20 May 2008, Bosmann, C-352/06, ECLI:EU:C:2008:290; CJEU 12 June 2012, Hudzinski and Wawrzyniak, C-611/10 and C-612/10, ECLI:EU:C:2012:339.

The main conflict rule is the place of work[3], the lex loci laboris, as the criterion for defining the applicable legislation which is however set aside if the nature of the work prevents strict application of this rule[4]. The idea is that the lex loci laboris corresponds with the State to which someone is also most connected in one's daily life.

2. SPECIAL CONFLICT-RULES

Regulation 883/2004 provides for some special rules /exceptions to the general principle of the lex loci laboris, especially as a consequence of a special situation (e.g. temporary work abroad or working on the territory of various countries). However, nothing prevents different rules from applying simultaneously to certain persons, the distinction between which is difficult to make. Many situations are conceivable of persons that might fall under different provisions of the regulation. Let us take the example of someone who is in the Management Board of several subsidiaries established in different countries? Or what about a person working in Member State A at a company but regularly giving a short training in Member State B for the same company? This could be posting or simultaneous employment. Or is it simply a consecutive application of the normal principle of the country of employment?

The fact that a person could be covered both by the posting provisions and by simultaneous employment could raise the question of whether one conflict rule might take precedence over another. That question cannot be answered clearly, although the Court of Justice may seem to be inclined to give priority to posting. The Banks case, for example, concerned independent opera singers who used to perform in the UK but who also had a contract for some years with the Brussels opera house 'La Monnaie' for a number of performances (about six weeks a year). The question now arises as to whether the persons concerned were posted or whether it concerned simultaneous employment. Since it involved self-employed posted workers, an overlap is even more possible. Without going into the question of whether it could not have been simultaneous employment - which is certainly not excluded, although the facts are not entirely clear - it is notable that the Court, after considering that the posting conditions are fulfilled, does not examine the question of simultaneous employment. The Court only states the following: 'It is clear from the order for reference that the application in the case in the main proceedings of Article 14a(1)(a) of Regulation No 1408/71 (posting provision) assumes that the term work in that provision refers to any performance of work, whether in an employed or self-employed capacity, and that the second question about the application of Article 14c(a) (simultaneous employment) was raised only in the event of Article 14a(1)(a) not being applicable in this case. Having regard to the reply given to the first question, there is therefore no need to reply to the second question.'[5]

(3) To be understood as the State of employment in its entirety, irrespective of the precise location of the employment within that Member State (Art. 11(3) of Regulation 883/2004).

(4) Watson, P. Social security law of the European Communities. London: Mansell, 1980, p. 126 and Jorens, Y., Wegwijs in het Europese sociale zekerheidsrecht. Bruges: Die Keure, 1992, p. 66.

(5) CJEU of 30 March 2000, Banks and Others, C-178/97, ECLI:EU:C:2000:169, para 30.

Does the Court imply that if it is a matter of posting, it is no longer needed to check whether there is also simultaneous employment? Or is it sufficient to establish that the first question was in fact only about posting and is therefore simply the result of the questions referred for a preliminary ruling? Or can one simply say that there is a kind of waterfall approach in which one first checks whether the lex loci laboris is fulfilled, then looks at the posting conditions, and finally considers whether there is simultaneous employment if there is no posting?[6]

There does not seem to be any reason to assume that posting takes precedence over simultaneous employment. In fact, both forms constitute a special rule to the general principle of the *lex loci laboris*. Besides, posting being mentioned first would be too special a reason to give it priority. Or could it perhaps be said that the Court wanted to allude to this because the *lex loci laboris* is the main rule, posting an exception, and simultaneous employment a special rule? That may have been the case under Regulation 1408/71 , but under Regulation 883/2004, they are both considered to be special rules.[7] By the way, in order to check whether there is posting, one must first check what the normal applicable legislation – the *lex loci laboris* or a connecting factor in the case of simultaneous employment – is, and only once this has been established, one can check whether there is posting. After all, posting is also possible if, for example, a person habitually carries out work in two countries and is temporarily sent to a third country. This would seem to indicate that posting only takes place once it has been ascertained whether there is habitual employment and, therefore, in the event of a possible overlap, simultaneous employment takes precedence.

2.1. POSTING AND WORKING IN DIFFERENT COUNTRIES: THE CONDITIONS

But how do these rules relate to each other? Let us look to both rules.

Posting constitutes the most well known special rule. The Regulation states: 'A person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted by that employer to another Member State to perform work on that employer's behalf shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such work does not exceed twenty-four months and that he/she is not sent to replace another posted person.' There exists a more or less similar provision for self-employed persons. 'A person who normally pursues an activity as a self-employed person in a Member State who goes to pursue a similar activity in another Member State shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such activity does not exceed 24 months'.[8]

(6) Jorens, Y., (2022) Cross-border EU employment and its enforcement: "An analysis of the labour and social security law aspects and a quest for solutions", Springer Verlag, Cham, 333-334.

(7) Jorens, Y., (2022) Cross-border EU employment and its enforcement: "An analysis of the labour and social security law aspects and a quest for solutions", Springer Verlag, Cham, 334.

(8) Article 12(1) and (2) of Regulation 883/2004.

As such the sending state remains the applicable legislation. Out of the posting provision in the Regulation, five conditions can be deducted that all should be fulfilled for the posting provision to apply, if not the normal rule of the place of employment will apply:[9] 1) In order for a person to be posted to another Member State, he or she must, at the time of his or her posting to the territory of another EU Member State, be normally attached with that employer and, in other words, be insured as an employee under the social security legislation of the Member State in which the employer posting him is established; 2) the worker concerned is posted by the posting employer to another Member State in order to carry out work 'on his behalf' there. This is the case if it is established that a direct relationship continues to exist between the worker and the employer who posted him; 3) there should be a connection between the employer and the State in which he is established. The posting provisions may only be applied to employers who normally carry out their activities on the territory of the Member State of establishment[10]; 4) Posting is temporarily; it is a period of 24 month and; 5) the posted worker may not be posted to replace another posted worker.

But also self-employed workers can post themselves to the territory of another Member State. There exist great similarities between the system for the posting of workers and that of self-employed workers – the period is also similar – and that some conditions for workers do not apply for self-employed workers, simply because they result from the very nature of self-employment. For instance, the condition of a direct relationship with the posting undertaking does not exist for the self-employed workers. Of course, this does not imply that no further connection must exist with the posting State. The person concerned is required to have habitually carried out self-employed activities on the territory of the posting State. Nonetheless, there do exist some differences with the system applicable to workers as no condition that stipulates that a posting cannot take place to replace another posted person. [11] This way, a posted self-employed worker can be replaced by both another posted self-employed person or by a posted worker. In the case of self-employed persons who post themselves repeatedly to the same Member State, it will of course be quite clear that the distinction between posting and the simultaneous execution of self-employed activities in different countries is paper-thin.

The second special rule looks at simultaneous employment in two or more states. Surely, the general conflict rule of place of work cannot help to solve the conflict of laws in case somebody is performing activities of employment in two or more States. Logically, the person concerned would be subject, following the general rule, to both or more States. The principle of exclusive effect would be undermined. [12] For that

(9) See for an extensive description: also Jorens, Y., Cross-border EU employment and its enforcement: "An analysis of the labour and social security law aspects and a quest for solutions", Springer Verlag, Cham, 2022, 292-325.

(10) Article 14(2) of Regulation 987/2009.

(11) In the proposal for amendment of the Regulation, this inconsistency is abolished and posting to replace both an employed and a self-employed person is no longer possible (new Article 12(2) COM (2016) 815 final.).

(12) In that sense, Advocate General Colomer (in CJEU 30 January 1997, *INASTI v Claude Hervein en Hervillier SA*, C-212/95, ECLI:EU:C:1997:47, para 50.) and also Advocate General Jacobs (in CJEU 19 March 2002, *Institut national d'assurances sociales pour travailleurs indépendants (Inasti) v Claude Hervein and Hervillier SA*, C-393/99, ECLI:EU:C:2002:182, para 99.

reason, another complementary conflict rule needed to be found, which also considers the State with which the person concerned is deemed to have the closest connection, which, however, does not always seem to have really succeeded. The conflict rules differ depending on whether one performs activities as an employee, a self-employed person, or a civil servant.

A person who normally pursues his activities in salaried employment in two States, covers situations where someone either simultaneously or continuously , performs alternating activities in two States, i.e.:

- 'While working in one Member State, a person at the same time carries out another separate activity in one or more other Member States': These activities can be carried out for one employer as well as several employers.
- Or a person who continuously exercises alternating activities. This refers to someone who carries out work in different countries consecutively, so without overlap.

In the case of simultaneous employment, the posting country is not the competent country, but, on the basis of Article 13(1), the basis conflict rule will be either the place of residence or the place of establishment of the employer or the place of the centre of interests of the person involved. In order for this legislation to apply, the migrating person is deemed to carry out all his occupational activities on the territory of the Member State concerned and also to have obtained all his income there. The first question we need to answer is whether the person concerned is employed in the State of residence. [13] If this is the case, the second question is whether the work in that State of residence is also substantial. If a substantial part of activities is fulfilled in that State,[14] it will be the State of residence that will be considered as the competent State. If the employee's place of residence and place of business are in the same State, this State shall apply and no further enquiries shall be necessary. If the person concerned would not perform substantial activities in the State of residence, then different criteria could play a role: this may be the place of residence as well as, in the most cases, the place where the registered office of the employer/undertaking for whom one is working is located, depending on whether one works for one or more employers and where the latter are located.

So it is important to have a clear look to the conditions of application of both rules and to see where the differences are. In the case of posting, for example, the company must carry out significant activities in the posting State which is not required under the rules of simultaneously working in two or Member States. Neither do these last rules know any time limits as the posting rules know. The posting rules require the posted worker must be insured in the competent State (i.e. the sending State), where the employer must also be based.[15]

(13) Also Jorens, Y., Cross-border EU employment and its enforcement: "An analysis of the labour and social security law aspects and a quest for solutions", Springer Verlag, Cham, 2022, 336.

(14) Ie more than 25% of his working time in the Member State of Residence, and/or more than 25% of the person' remuneration is earned in the Member State of Residence.

(15) One remains as a matter of fact subject to the legislation of the posted state.

The fact that the conditions of application differ greatly between the two forms and are much stricter in the case of posting than in the case of simultaneous employment may explain the growing importance of these provisions. Since posting was at the centre of many discussions on social dumping, and attempts to impose stricter conditions have continued[16], inventive employers have sometimes moved on to other rules. In this respect we can notice that the provisions on simultaneous employment have gained enormous importance in recent years. For instance, it is noteworthy that the number of postings has fallen to some extent (less than before COVID), but the number of people working simultaneously in two or more Member States has increased. In 2021 eg. we counted 2,2 million postings ie 1,3 million persons.[17] Concerning people working simultaneously in two or more Member States we counted 1,35 million A1 issued or 1,2 million persons.[18]

2.2. POSTING VERSUS AND WORKING IN DIFFERENT COUNTRIES:

So how can we now make the distinction between posting and working in two or more states?

In general, to assess a situation of simultaneous employment, the work patterns over a time frame of at least 12 months will be considered. Moreover, it will be examined whether this work pattern shows a normal and regular character.[19] This should also help to make the distinction from posting which, in turn, is more indicative of an ad hoc and transient activity. After all, nowhere is it required that it should be clear in advance, at the start of the activities, what the employment pattern of the person concerned looks like and how long, for example, the duration of employment in the various Member States will be. Article 13 does not specify whether its application depends on the concrete specification, prior to the performance of the work by the employee, of two or more Member States and on the duration of the work to be carried out there, or whether the fact that the employment contract obliges the employee to carry out work in different States on behalf of his employer is sufficient to apply this provision.[20] According to Article 14(7) of implementing Regulation 987/2009, the duration of the work in one or more Member States (whether it is permanent or ad hoc or temporary in nature) will be the deciding factor in determining the distinction between simultaneous employment and cases of posting. To this end, a general assessment will be made of all the relevant facts, including in particular – with regard to a person in salaried employment – the place of work specified in the contract of employment. Posting relates to a temporary, finite period. There is however ambiguity

(16) Paolin, G. *Europe sociale et travailleurs pluriactifs*. Brussels: Larcier, 2015, 12.

(17) De Wispelaere, F., De Smedt, L. and Pacolet, J. (2023). Posting of workers – Report on A1 portable documents, issued in 2022. Brussels: European Commission, 27-47. The most popular countries for posting where: Out: Germany, Poland, Italy, Spain and In: Germany, France, Austria, B, NL, CH.

(18) Most issued from Poland (1/3), followed by Spain, Italy, Germany, Lithuania. The highest number of people ever working in two or more Member States. De Wispelaere, F., De Smedt, L. and Pacolet, J. (2023). Posting of workers – Report on A1 portable documents, issued in 2022. Brussels: European Commission, 41.

(19) Also Jorens, Y., Cross-border EU employment and its enforcement: "An analysis of the labour and social security law aspects and a quest for solutions", Springer Verlag, Cham, 2022, 334-335.

(20) See conclusion of Advocate General in CJEU 11 June 2015, *Chain*, C-189/14, ECLI:EU:C:2015:432, para 73 et seq.

over which criteria have to be used. When are we still dealing with occasional and ad-hoc work abroad or when, on the other hand, is it structured? The answer depends on whether the employment abroad has a normal structured pattern. But what when simultaneous employment and self-posting are combined? The requirement in Regulation 883/2004 that a self-employed person must undertake similar activities in the country of temporary employment further increases the difficulty of making a distinction between posting and simultaneous employment. For instance, a person normally works as a self-employed translator in Poland where he lives. In parallel, he also works one week per month as a touristic guide in Germany. He is now asked to go as guide to Belgium for a short period, so he posts himself. Which legislation is now applicable to him? The starting point is that he works in parallel in two countries and so the conflict rules on simultaneous employment apply according to which he will be subject to Polish legislation . Afterwards he posts himself to Belgium as a touristic guide. As he is now insured in Poland, the Polish legislation remains applicable. The question could be asked if the posting provisions can apply to him. Indeed, for the posting conditions to apply, one has to perform similar activities in the home State and the host State. Is it a problem that his main activity in Poland – the competent State as we have seen – is being a freelance translator and he goes to work as a self-posted touristic guide in Belgium? Both are not similar, as it is not in Poland that he normally works as touristic guide but in Germany. However, we do not believe that this would exclude the posting provisions since it is under his activity as a guide (one of the two activities he was in parallel pursuing) that he can claim to be self-posted. He is also working as a touristic guide and the rules on simultaneous employment install a fiction according to which both activities (translator and guide) are subject to the Polish legislation. We therefore imagine as if these activities as guide are also performed in Poland. The problem would be different if he pursued a temporary self-employed activity in Belgium which is not similar neither to the activity in Poland nor to the activity in Germany. For instance, when he goes to work as a cook in Belgium. As there are no similar activities, we would say that the conditions for the posting provisions do not apply, and as such he would also be subject to Belgian law through application of the lex loci laboris principle. As there is more than one applicable legislation, we should again apply the rules on simultaneous self-employment due to activities in more than one Member State.[21]

One obligatory requirement for being able to post oneself is also that the person concerned must still undertake self-employed activities in the posting State. Or what to be said of a violin player who has concluded a service agreement with a big orchestra? When this orchestra is not on tour or during the holiday period, he goes to play for other orchestras around Europe. One could argue here that the conflict rule on simultaneous employment is applicable, as the person concerned still has an agreement with his orchestra and will continue to play for that orchestra. Indeed, in case the activity in the posting State would come to an end, and one goes to work abroad for a short period of time, one might defend that the posting provisions are applicable as no two activities are performed at the same moment. This situation might however not always be very crystal clear. When can it be said that the activity

(21) Jorens, Y., Cross-border EU employment and its enforcement: "An analysis of the labour and social security law aspects and a quest for solutions", Springer Verlag, Cham, 2022, 334-336.

came to an end? A self-employed person will hardly ever completely finish his activities in his 'posting home State' when he is shortly working abroad. It might be expected that he will continue to look for new customers from his home place, which would imply that he is still active in two States. Let us also not forget that free movement of services does not preclude a service provider providing for an infrastructure in the host country (including an office or consulting rooms), if that infrastructure is necessary for providing the service in question.[22] In such cases one might defend that someone is simultaneously performing two activities and that the posting provisions do not apply.[23]

These examples show how difficult it is to make a distinction between these two conflict rules.

Even activities on an irregular basis do not exclude the application of the rules on simultaneous employment and the fact that there are intervals between periods of work does not as such exclude the possibility of working normally in two or more Member States.[24] What is important is the question whether these interruptions preclude the regular and foreseeable character of the employment. In other words, this depends very much on a factual assessment and how the contract is conceived, the work progress, and the nature of the activities.[25]

In order to maintain coherence between the conflict rules, in the same way as for posting, the duration of the uninterrupted consecutive periods of work in each of these Member States should not exceed 24 (12) months. The Court thus sought - at least as regards the period of time – a link with the general rule and the provision on posting. Persons posted by their employer to different countries for successive periods of time therefore have the option of using the scheme for employment in two or more countries, provided that the duration of a period of continuous employment in each of the Member States does not exceed 12 months.[26] Conversely, this would imply that this arrangement does not apply in cases of more than 12 months' continuous work in one Member State. Therefore, if someone works for 13 months in State A and then goes to work in State B, the rule of employment in several countries would not apply. This case still concerned the old Regulation 1408/71, in which a posting period of 12 months applied. However, there seem to be no arguments for not using a period

(22) CJEU of 30 November 1995, *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, C-55/94, ECLI:EU:C:1995:411.

(23) Jorens, Y., Cross-border EU employment and its enforcement: "An analysis of the labour and social security law aspects and a quest for solutions", Springer Verlag, Cham, 2022, 320-322.

(24) See European Commission, Practical Guide on the applicable legislation in the European Union (EU), the European Economic Area (EEA) and in Switzerland, 2013, https://ec.europa.eu/social/BlobServlet?docId=11366&langId=en, 31-34. Accessed 27 April 2022. The Practical Guide explicitly refers to crew members working for more than one airline, 26.

(25) See also Van Der Mei, A., Coördinatie van sociale zekerheid en 'forumshopping', *NtER*, 7(8), 2021, 162.

(26) See CJEU 20 May 2021, *Format II*, C-879/19, ECLI:EU:C:2021:409, para 43.

of 24 months for the application of the new regulation, although this would of course make it easier to benefit from this arrangement.[27]

For these reasons, it seems a good idea to already extend the time span to a longer period in order to better take into account changes in the personal work situation of the person concerned and thus to achieve greater stability. A period of e.g. 24 or even 36 months could be envisaged.[28] In our eyes, a period of 24 months seems to be the most appropriate choice to guarantee the best symmetry with the posting provisions. From this perspective, it seems difficult to motivate why this arrangement would be different from posting.[29] If need be, an Article 16 agreement could be concluded. Let us also not forget that the applicability of the social security scheme should be determined in advance.

However, further conditions to prevent possible abuses, by analogy with the provisions on the posting of workers, which require this undertaking to carry out, for example, substantial activities in this State, cannot, of course, be required in the absence of an explicit wording to this effect in Article 13(1)(b)(i) of Regulation 883/2004.[30] Moreover, the Commission proposed an explicit amendment to this effect at the time, in particular by amending Article 14(5a) to the effect that 'registered office or place of business' means the registered office or place of business where the main decisions concerning the undertaking are taken and where its central management functions are carried out, provided that the undertaking carries out substantial activities in that Member State'. [31] Nevertheless, the Council did not follow the Commission.

Of course, it remains a factual assessment of a legal concept oscillating between, on the one hand, a letterbox company and, on the other hand, an undertaking which normally carries out activities in the territory of that State. There is a big difference between an artificially created seat and a company carrying out its main activities there.[32] It is therefore to be feared that the workers concerned will be linked to the seat of an employer with whom they often have little connection and where the social insurance of the workers is linked to a purely administrative company, a so-called

(27) Also Jorens, Y., Cross-border EU employment and its enforcement: "An analysis of the labour and social security law aspects and a quest for solutions", Springer Verlag, Cham, 2022, 334-335.

(28) Van Ooij, E.. *Highly Mobile Workers and the Coordination of Social Security in the EU. Opening and closing Pandora's Box.* Maastricht: Maastricht University, 2022, 113-114.

(29) Also Jorens, Y., Cross-border EU employment and its enforcement: "An analysis of the labour and social security law aspects and a quest for solutions", Springer Verlag, Cham, 2022, 342.

(30) In the AFMB case (CJEU 16 July 2016, AFMB e.a., C-610/18, ECLI:EU:C:2020:56.), the national court has already asked to what extent the stricter requirements applicable in the context of posting could be applied by analogy in the context of simultaneous employment in more than one country. Because of the answer, the court did not have to answer this question. Advocate General Pikamäe did answer it in this case, but rightly considered that this question should be answered in the negative. It is in the view of the Advocate General (para 70.) problematic to introduce by way of interpretation an additional condition requiring 'significant activities in the Member State in which [the undertaking] is established', despite the unambiguous wording of those provisions..

(31) COM (2016) 815, 38.

(32) The setting up of a letterbox company in a foreign country that has no economic connection with it does not constitute establishment and is not protected by Article 54 of the TFEU. CJEU 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas*, C-196/04, ECLI:EU:C:2006:544.

letterbox company. Because of this, the European coordination regulation defines the concept of registered office or residence of the employer as the place where the essential decisions of the undertaking are adopted and where the functions of its central administration are carried out.[33] This definition tapped into the case law of the Court of Justice in fiscal matters and the administrative commission has further clarified it by putting forward certain criteria[34]: If, after considering the above criteria, institutions still cannot rule out the possibility that the registered office is a letterbox company, the person concerned should be subject to the legislation of the Member State in which the office with which he has the closest links in terms of carrying out his activity as an employed person is situated. The rules of simultaneous employment therefore promote, in certain circumstances, law shopping and result in the persons concerned being subject to legislation with which they have little connection.[35] This, of course, contradicts the idea that the applicable law is the one with which one has the closest connection in one's daily life.

3. CONCLUSION

The set of conflict rules enacted under the Coordination Regulations, were established 6 decades ago. As new forms of employment arise, we notice that the application of these rules lead to a lot of problems. It becomes also more and more complicated to determine which conflict rule applies as well as how to interpret certain conditions. Time is needed for further clarification and reflection.

(33) CJEU 2 March 2023, Intertrans, , C-410/21, ECLI:EU:C:2023:138. In this Case the Court clarified that hat the fact that a company holds a Community licence for road transport issued by the competent authorities of a Member State (on the basis of Regulation 1072/2009) does not constitute irrefutable proof that that company's registered office is in that Member State for the purpose of determining, in accordance with Article 13(1)(b)(i) of Regulation No 883/2004, which national legislation on social security is applicable (para 82).

(34) European Commission (2013). Practical Guide on the applicable legislation in the European Union (EU), the European Economic Area (EEA) and in Switzerland. https://ec.europa.eu/social/BlobServlet?docId=11366&langId=en; pp. 31-34. As there are:

- the place where the company has its registered office and its board of directors; the number of months/years the company is established in the Member State; the number of administrative staff working in the office in question; the place where the majority of the company's contracts are concluded with its customers;
- the office that determines the business policy and the operational matters; the place where the most important financial matters, including banking, are handled; the place designated under EU regulations as being responsible for the management and maintenance of records in relation to legal requirements of the relevant sector in which the undertaking operates; the place where the workers are hired.

(35) Rennuy, N. Shopping for social security law in the EU, *CMLR*, 58(1), 2021, 28.

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12 THE EQUAL TREATMENT PROVISION OF ARTICLE 4 OF REGULATION 883/2004: ITS FRIENDS AND FOES

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1. INTRODUCTION

It is with great pleasure that I contribute to this special issue dedicated to the retirement of Bernhard Spiegel. Bernhard's knowledge and experience with European social security coordination is very exceptional and unique. For decades, he was Austria's representative in the Administrative Commission, where he always used his knowledge and insight into the various aspects of this coordination constructively. Scientifically, he is also very active in this matter. For example, he is the editor of a loose-leaf commentary entitled "Kommentar zum Zwischenstaatliches Sozialversicherungsrecht" in which not only European social security coordination is discussed in depth, but also the international agreements concluded by the EU and the bilateral agreements concluded by the Member States with regard to social security.[1] In addition, he has contributed to a number of reports within the framework of the European academic networks on the free movement of workers and social security coordination (now MoveS).[2] I am particularly grateful for the many enriching conversations I had with him in which I was able to appreciate not only his knowledge, but especially his amiability.

The theme I have chosen for this contribution is that of one of the central provisions in European social security coordination, namely the right to equal treatment in Article 4 Regulation 883/2004.[3] It is well known, that it is not the intention of this coordination system to harmonize or approximate the systems of the Member States in any way. It does not affect the material and formal differences between the social security regimes of the various Member States and therefore does not affect the divergent rights of the individuals working or residing in those States.[4] The equal treatment provision of Article 4 is an exception to this: it contains a substantive law obligation for Member States to guarantee Union citizens with the nationality of another Member State the same treatment as their own citizens. This means that this provision intervenes in the national legislation of the Member States and that it sets aside all provisions in

(1) Spiegel (ed.), loose-leaf.

(2) See, for instance, Strban 2020; Spiegel 2022 and Spiegel 2024.

(3) Regulation (EC) 883/2004 of the European Parliament and the Council of 29 April 2004 on the coordination of social security systems, OJ 30 April 2004, L 166, p. 1 (hereinafter referred to as "Regulation 883/2004").

(4) See e.g. Case C-340/94, de Jaeck, EU:C:1997:43, para. 18 and Cases C-95/18 and C-96/18, *van den Berg, Giesen and Franzen*, EU:C:2019:767, para. 59.

that legislation that could be qualified as unjustified discrimination on grounds of nationality.[5]

In this contribution, I will first discuss the legal meaning of this provision (part 2). It is embedded in a broader legal framework and is also supported by this framework. I would call it the "friends". In part 3 I will explain that framework in more detail and indicate how it supports and strengthens the equal treatment provision of Article 4 Regulation 883/2004. However, the application of this provision is under pressure, more specifically by the case law of the Court of Justice on the equal treatment provision in Article 24 Directive 2004/38.[6] Here, a "foe" of Article 4 Regulation 883/2004 emerges. In part 4 I will make a critical analysis of this. Part 5 ends with some conclusions.[7]

I will base this analysis mainly on the case law of the Court of Justice (CJEU).

2. THE MEANING OF ARTICLE 4 REGULATION 883/2004

The text of Article 4 reads "Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof."

The definition of persons who fall within the scope of the Regulation is formulated very broadly in Article 3 and applies to all nationals of a Member State as well as to the members of their families and their survivors irrespective of their nationality, who are or have been subject to the legislation of one or more Member States. It also applies to stateless persons and refugees residing in a Member State. In addition, Regulation (EC) 1231/2010[8] extended this personal scope to all third-country nationals in so far as they are legally residing in a Member State and in so far as the situation of the person concerned is not in any way confined to a single Member State. As a result, almost all EU citizens and legally residing third-country nationals are nowadays covered by the EU social security regulations. However, Article 4 can only be invoked by a person who is in a cross-border situation and therefore not in situations which are confined in all respects within a single Member State.[9]

Also the material scope of Regulation 883/2004 and of its equal treatment provision is very broad (Article 3). It relates to all legislation concerning benefits in case of sickness, maternity and paternity, invalidity, old age and survivorship, accidents at

(5) See explicitly: Case C-332/05, *Celozzi*, EU:C:2007:35, para 22.

(6) 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* 29 June 2004, L 229, p. 35 (hereinafter referred to as "Directive 2004/38").

(7) For an extensive analysis of the phenomenon of 'norm overlaps' regarding the free movement of workers, see: Hancox, 2021.

(8) Regulation (EC) 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality, OJ 29 December 2010, L 344, p. 1.

(9) Case C-153/91, *Petit*, EU:C:1992:354.

work and occupational diseases, unemployment and pre-retirement, as well as benefits concerning death grants and family benefits. Social and medical assistance schemes are excluded.[10] However, benefits which have characteristics of both social security and social assistance are covered. Such benefits are called 'special non-contributory cash benefits' (SNCBs), because they provide coverage against the risks listed in Article 3 while at the same time guaranteeing the persons concerned a minimum subsistence income in accordance with the economic and social situation in a Member State. They are subject to a special coordination regime laid down in Article 70 Regulation 883/2004, based on the person's residence. The status of these benefits has been challenged by the CJEU case law on economically inactive migrating Union citizens (see part 4).

The principle of equal treatment applies in the first place to direct discrimination on grounds of nationality, which is nowadays rather rare in the field of social security.[11] Such discrimination can only be justified by means expressly provided for in the Treaty or in the Regulation.[12]

It also applies to indirect discrimination, meaning all forms of discrimination which, through the application of other distinguishing criteria, lead in fact to the same result. The CJEU has defined indirect discrimination very widely as any provision of national law intrinsically liable to affect migrant workers more than national workers.[13] A clear example of such provisions are residence clauses. The Court has repeatedly confirmed that a distinction based on residence is likely to operate mainly to the detriment of nationals of other Member States, as, in the majority of cases, non-residents are foreign nationals.[14] The same goes for the condition to have resided in a Member State for a certain period of time prior to the entitlement to a social security benefit.[15]

However, the Court accepts such indirectly discriminatory provisions, provided that they observe the principle of proportionality, which means that they are appropriate for securing the attainment of a legitimate objective and do not go beyond what is necessary to attain that objective.[16] A possible legitimate objective can be the protection of the financial viability of the system. For the Court, avoiding serious damage to the financial balance of the social security system of a Member State could be such an

(10) Nevertheless, such schemes are considered 'social advantages' within the meaning of Article 7(2) Regulation 492/2011. See part 3.

(11) For examples, see: Case C-346/05, *Chateignier*, EU:C:2006:711; Case C-399/09, *Landtová*, EU:C:2011:415 and Case C-411/20, *Familienkasse Niedersachsen-Bremen*, EU:C:2022:602.

(12) Case C-411/20, *Familienkasse Niedersachsen-Bremen*, EU:C:2022:602, para. 68. In the latter judgment the CJEU confirmed that no derogation with regard to family benefits is provided for in Regulation 883/2004.

(13) Case C-237/94, *O'Flynn*, ECLI:EU:C:1996:206, para. 18.

(14) See, inter alia, Case C-228/07, *Petersen, EU:2008:494 and Case* C-328/20, Commission v. Austria, ECLI:EU:C:2022:468.

(15) Case C-326/90, *Commission v. Belgium*, EU:C:1992:419.

(16) Case C-228/07, *Petersen, ECLI:EU:2008:494*, para. 54; Case C-308/14, Commission v. United Kingdom, ECLI:EU:C:2016:436, para. 79 and Case C-328/20, Commission v. Austria, ECLI:EU:C:2022:468, paras 103−104.

overriding reason in the public interest.[17] But it is for the competent national authorities to demonstrate, with solid and consistent data, that there are genuine risks to the balance of the social security system.[18] This is in particular the case for economically active migrant workers, since they contribute to the financing of the social policies of the host Member State through the tax and social security contributions which they pay in that State by virtue of their employment there. They must therefore be able to profit from them under the same conditions as national workers.[19] In contrast, with regard to economically inactive migrants, the Court was more willing to accept that the necessity to protect the public funds of the host Member State could justify an indirectly discriminatory provision such as the possibility of checking whether or not these persons are lawfully residing in the host State at the time of the social benefit being granted. The reason for this is that this grant could influence the overall level of the assistance to be accorded by this State.[20]

In some cases, the Court also accepted indirectly discriminatory national legislation restricting the grant of social advantages to frontier workers, where there is no sufficient connection to the society in which they are pursuing their activities without residing there. In *Geven*, the Court had to rule on the refusal of the competent German authorities to grant a child-raising allowance, which was intended to encourage the birth rate in Germany, to a Dutch national who resided in the Netherlands and worked in Germany for only 3 to 14 hours a week. The Court accepted the justification that this specific benefit could be limited to migrant workers having a sufficient link with Germany.[21]

However, the distinction between direct and indirect discrimination is not always clear. For example, in *Martinez Sala*, the Court indicated the condition in national law of having a right of residence as direct discrimination on grounds of nationality.[22] Nationals of a Member State have an automatic right of residence, so this condition only applies to non-nationals. But later, in *Commission v. UK,* the Court ruled that the condition of having a right of residence constitutes an indirect discrimination

(17) See *inter alia* Case C-158/96, *Kohll,* EU:C:1998/171, para. 41; Case C-515/14, *Commission v Cyprus*, EU:C:2016:30, para. 53; Case C- 328/20, *Commission v. Austria*, ECLI:EU:C:2022:468, para. 107.

(18) Case C-515/14, *Commission v Cyprus*, EU:C:2016:30, para. 54 and Case C-651/16, DW, ECLI:EU:C:2018:162, para. 33. See also the opinion of AG Szpunar in Case C-411/20, *Familienkasse Niedersachsen-Bremen*, ECLI:EU:C:2021:1017, para. 92 : "In my view, as regards universal social security benefits, which, like the family benefits at issue, concern children, we must base our analysis on precise and accurate data to be able to consider that unequal treatment is justified. To accept, therefore, that vague and imprecise general financial considerations may justify a difference in treatment between nationals of other Member States and one's own nationals would imply that the application and the scope of a rule of EU law as fundamental as the principle of non-discrimination on grounds of nationality might vary in time and place according to the state of the public finances of the Member States, without the Member State concerned having presented precise and rigorous evidence establishing the existence of a genuine risk to public finances."

(19) See for instance Case C-410/18, *Aubriet*, ECLI: EU:C:2019:582, para. 33 and Case C- 328/20, *Commission v. Austria*, ECLI:EU:C:2022:468, para. 109.

(20) Case C-140/12, Brey, ECLI:EU:C:2013:565, para 61; Case C-333/13, Dano, ECLI:EU:C:2014:2358, para. 63 and Case C-308/14, *Commission v. United Kingdom*, ECLI:EU:C:2016:436, para. 80. See more on this in part 4.

(21) Case C-213/05, *Geven*, ECLI:EU:C:2007:438.

(22) Case C-85/96, *Martinez Sala*, EU:C:1998:217, para. 64.

on grounds of nationality.[23] The reasoning of the Court was very disputable since it transformed the UK right to reside test into a residence condition, and concluded on the basis thereof that this is indirect discrimination on grounds of nationality. This was misleading: the condition at stake was not a condition to be resident in the UK, but to have a right to reside there. Such a condition can only be applied to non-UK citizens, since UK citizens always possess a right to reside in the United Kingdom and therefore automatically satisfy this condition.[24]

3. THE FRIENDS OF ARTICLE 4 REGULATION 883/2004

3.1. TREATY PROVISIONS

The meaning and strength of the equal treatment provision of Article 4 Regulation 883/2004 is partly due to its embedding in the Treaty itself. As regards migrant workers, the Court has consistently stated that Article 4 Regulation 883/2004 gives concrete expression to the principle of equal treatment in social security matters laid down in Article 45 TFEU and that, therefore, this provision must, in principle, be interpreted in the same way and in conformity with Article 45 TFEU.[25] Any exception or justification of unequal treatment must therefore also pass the test of these treaty provisions which aim to promote the free movement of workers. For example, the Court was of the opinion that the indexation mechanism which would adjust family benefits to the costs of living in the Member State in which the children reside permanently and which had been envisaged by the settlement for the United Kingdom within the European Union[26], would have been invalid under Article 45 TFEU if it had been adopted by the EU legislature.[27]

Moreover, it has become apparent that Article 45 TFEU can provide additional protection against discrimination for migrant workers. In *Hudzinsky*, the Court held that Articles 45 and 48 TFEU preclude the denial by a Member State of a family benefit to a worker who, as a posted worker, is subject to the legislation of another Member State, but who is subject to unlimited income tax liability in that first state. On the basis of being subject to unlimited income tax liability, the nationals of that Member State would be entitled to this family benefit. So this Member State may not exclude this posted person from the right to a family benefit, but it may reduce the family benefit by the benefit to which that worker is entitled in the competent Member State.[28] In this case, the Court reiterated that the provisions of the Regulation must be interpreted in the light of the purpose of Article 48 TFEU, which is to contribute to the establishment of the greatest possible freedom of movement for migrant workers and to contribute to the improvement of living standards and conditions of employment

(23) Case C-308/14, *Commission v. United Kingdom*, EU:C:2016:436, para 77.

(24) For a critical assessment:; O'Brien 2017; Rennuy 2023, p. 207 and Verschueren 2017.

(25) Case C- 328/20, *Commission v. Austria*, EU:C:2022:468, para. 98.

(26) OJ 23 February 2016, C-69 I, p. 1. Because of the withdrawal of the UK from the EU, this settlement agreement never came into force.

(27) Case C- 328/20, *Commission v. Austria*, EU:C:2022:468, para. 57.

(28) Cases C-611/10 and C-612/10, *Hudzinski and Wawrzyniak*, EU:2012:339.

of migrant workers (paras 53 and 57).[29] In the *Petersen* case, the Court ruled on the basis of Article 39 EC that a benefit that can be qualified as an unemployment benefit, due to the special nature of the benefit, cannot be subject to a residence requirement and non-exportability of Regulation 1408/71.[30]

These treaty provisions may also be invoked in cases that do not fall within the personal or material scope of Regulation 883/2004, as is the case with officials of the European institutions[31] or with benefits that do not constitute social security within the meaning of this Regulation.[32]

This case law means that these treaty provisions can provide a greater guarantee against discrimination with regard to social security than what is provided by the Union legislator through Regulation 883/2004.[33]

For economically inactive migrant Union citizens, Article 4 specifies the prohibition of discrimination on grounds of nationality in Article 18 TFEU.[34] However, with regard to this treaty provision the Court stated that its application is subject to the limitations and conditions on the right to free movement laid down in Directive 2004/38, Article 24 of which has given specific expression of the principle of non-discrimination of Article 18 TFEU.[35] Consequently, for economically inactive migrating Union citizens, the implementation of the principle of non-discrimination of Article 18 TFEU is subject to the conditions and limitations of Article 24 Directive 2004/38. It is remarkable that the Court limits the application of a treaty provision by provisions in a directive.[36] In part 4, we will further discuss the significance of this case law for the application of Article 4 Regulation 883/2004 to economically inactive migrant Union citizens.

3.2. REGULATION 492/2011

Article 4 Regulation 883/2004 is also supported by Article 7 Regulation 492/2011 on the free movement of workers.[37] Article 7(2) of this regulation prohibits discrimination on the ground of nationality for social advantages (as did the same article of Regulation (EEC) 1612/68 [38]). This concept must not be interpreted restrictively and the CJEU considered, inter alia, the following 'social advantages' to fall within this meaning:

(29) See also: Case C-388/09, *da Silva Martins*, EU:C:2011:439, para. 70.

(30) Case C-228/07, *Petersen, EU:2008:494*.

(31) See for instance Case C-411/98, *Ferlini*, EU:C:2000:530.

(32) See for instance Case C-192/05, *Tas-Hagen*EU:C:2006:676.

(33) Rennuy, 2023, p. 207.

(34) Case C-535/19, A., EU:C:2021:595, para. 40.

(35) Case C-333/13, Dano, EU:C:2014:2358, para. 60 and Case C-709/20 CG v. *The Department for Communities in Northern Ireland*, EU:C:2021:602, paras 65-66.

(36) For a critical assessment, see also: Haas 2022; O' Brien, 2021; Verschueren 2022.

(37) Regulation (EU) 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, *OJ* 27 May 2011, L 141, p. 1 (hereinafter referred to as "Regulation 492/2011").

(38) Regulation (EEC) 1612/68 of the Council of 25 October 1968 on freedom of movement within the Community, *OJ* 19 October 1968, L 257, p. 2 (hereinafter referred to as "Regulation 1612/68").

reduced public transport fares,[39] funeral allowances,[40] school transport costs[41] and even social assistance.[42] The social advantages in question may also be advantages granted to family members supported by the migrating worker, such as financial support for students[43] or social assistance.[44]

For the CJEU, a social advantage is any advantage that appears to be conducive to the mobility of workers within the Union or to the integration of EU workers in the host country.[45] The Court confirmed that the fact that migrant workers have participated in the employment market of a Member State establishes, in principle, a sufficient link of integration with the society of that Member State, allowing those migrant workers to benefit from the principle of equal treatment as regards social advantages. The link of integration arises from, inter alia, the fact that, through the taxes which workers pay in the host Member State by virtue of their employment, the migrant workers also contribute to the financing of the social policies of that State and therefore, they should profit from them under the same conditions as national workers.[46]

Article 7(2) Regulation 492/2011 also applies to social security benefits within the scope of the social security coordination regulations.[47] For example, the *Jobcenter Krefeld* case involved an SNCB (specifically a German Jobseekers Allowance). The person concerned could rely on Article 7 of Regulation 492/2011 because he had a right of residence under Article 10 of this regulation as primary carer of children having a right to reside in order to attend general education courses. In this judgment, the fact that this person could rely on Article 7 Regulation 492/2011 was a decisive element in granting him the right to this benefit under Article 4 of Regulation 883/2004 as well. In the *Caisse pour l'avenir des enfants* case concerning the allowance of a family benefit to frontier workers, Article 7 Regulation 492/2011 also proved to be a crucial element in deciding on the incompatibility with Union law of provisions of a Member State according to which frontier workers are entitled to receive a family allowance solely for their own children, and not for a spouse's children with whom those workers have no child-parent relationship, but whom those workers support, whereas any child residing in that Member State is entitled to receive that allowance.

The Court confirmed that Article 4 Regulation 883/2004 and Article 7(2) Regulation 492/2011 both give concrete expression to the principle of equal treatment in social security matters laid down in Article 45(2) TFEU. Therefore, those two provisions

(39) Case 32/75, *Cristini*, EU:C:1975:120.

(40) Case C-237/94, *O'Flynn*, EU:C:1996:206.

(41) Case C-830/18, *Landkreis Südliche Weinstrasse*, EU:C:2020:275.

(42) Case 249/83, *Hoeckx*, EU:C:1985:139.

(43) Case C-542/09, *Commission v. Netherlands*, EU:C:2012:346.

(44) Case C-488/21, *GV*, EU:C:2023:1013.

(45) Case C-181/19, *Jobcenter Krefeld*, EU:C:2020:794, para. 41; Case C-488/21, *GV*, EU:C:2023:1013, para. 64 and Case C- 328/20, *Commission v. Austria*, U:C:2022:468, para. 95.

(46) Case C-542/09, *Commission v. Netherlands*, EU:C:2012:346, paras 64 and 65 and Case C- 328/20, *Commission v. Austria*, EU:C:2022:468, para.109.

(47) Case C-310/91, *Schmid*, EU:C:1993:221; Case C-43/99, *Leclere*, EU:C:2001:303; Case C-181/19, *Jobcenter Krefeld*, EU:C:2020:794 and Case C-802/18, *Caisse pour l'avenir des enfants*, EU:C:2020:269.

must, in principle, be interpreted in the same way and in conformity with Article 45 TFEU.[48] In principle, the application of Article 7 Regulation 492/2011 should therefore lead to the same result as the application of Article 4 and the other provisions of Regulation 883/2004. They reinforce each other. However, it cannot be ruled out that Article 7 Regulation 492/2011 offers additional protection. This was evident, among other things, from the *Hendrix* judgment. This case concerned an SNCB, more specifically the Dutch WAJONG benefit. Since Mr Hendrix had moved to Belgium while continuing to work in the Netherlands, the latter country had stopped paying this benefit, on the basis of the provision in Regulation 1408/71 on the non-exportability of SNCBs (Article 10a and Annex IIa). So the non-payment of this benefit to a person not residing in the Netherlands was in line with the provisions of Regulation 1408/71. Nevertheless, on the basis of Article 39 EC (now Article 45 TFEU) and Article 7 Regulation 1612/68, the CJEU was of the opinion that implementation of that legislation must not entail an infringement of the rights of a person in a situation such as that of the applicant in the main proceedings that goes beyond what is required to achieve the legitimate objective pursued by the national legislation. The CJEU gave the national court the task of interpreting the national legislation, which expressly provided that the condition of residence may be waived when the condition leads to an 'unacceptable degree of unfairness', in conformity with Union law, and to take account, in particular, of the fact that the worker in question had maintained all of his economic and social links to the Member State of origin. So this judgment means that restrictions on the right to a social security benefit that falls within the scope of Regulation 883/2004 may be accommodated by Article 7 Regulation 1612/68 and Regulation 492/2011.[49]

4. THE FOES OF ARTICLE 4 REGULATION 883/2004

4.1. ARTICLE 4 REGULATION 883/2004 SUBJECT TO THE RIGHT TO RESIDE UNDER DIRECTIVE 2004/38

Unfortunately, the equal treatment provision of Article 4 Regulation 883/2004 does not only have friends. There are indeed other provisions of EU law that may trump it. This is particularly the case with Directive 2004/38 and its equal treatment provision of Article 24.[50]

Article 24(1) Directive 2004/38 guarantees Union citizens who reside, based on this directive, in the territory of a host country, the right to equal treatment within the scope of the Treaty. Paragraph 2 states that the host country is not obliged to grant the right to social assistance to Union citizens during the first three months of residence, to job-seekers who are allowed to reside in the host country for more than three months and to students as regards maintenance aid. These exceptions are

(48) Case C- 328/20, *Commission v. Austria*, ECLI:EU:C:2022:468, paras 60, 94 and 98.

(49) Case C-287/05, *Hendrix*, EU:C:2007:494. On the basis of this judgment, the national judge eventually decided that the benefit must not be refused (Pennings 2022, p. 161). For a critical assessment see Hancox 2021, p. 1080-1083.

(50) See on the interpretation of Directive 2004/38: *Commission notice. Guidance on the right of free movement of EU citizens and their families*, OJ C 22 December 2023.

not applicable, though, to employed or self-employed persons or persons who have maintained this status.

Article 24(1) has a broad material scope and the CJEU has also applied it to the benefits within the scope of Regulation 883/2004. The Court has even given preference to this equal treatment provision over Article 4 Regulation 883/2004 by stating that the granting of benefits falling within the scope of Regulation 883/2004 may be made subject to the requirement that the citizens involved fulfil the conditions for possessing a right to reside lawfully in the host Member State under Directive 2004/38.[51] It follows that for the application of Article 4, it must first be checked whether the person concerned has a right to reside in the host country on the basis of the directive.

As regards the first three months of residence in the host Member State, Article 6(1) of that directive provides that Union citizens have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport. Article 14(1) of that directive maintains that right as long as Union citizens and their family members do not become an unreasonable burden on the social assistance system of the host Member State. Recently, the CJEU acknowledged that a Union citizen who fulfils this condition to have a right to reside in the first three months, benefits from the principle of equal treatment with the nationals of that Member State laid down in Article 4 of Regulation 883/2004.[52]

After the initial period of six months, the right to reside is guaranteed for workers and persons who retain that status, as well as for their family members (Article 7(1) (a) and Article 7(3)).[53] However, for economically inactive Union citizens, after a first period of three months up until the acquisition of a permanent right of residence (after five years), the right of residence is dependent on whether or not they have sufficient means of subsistence not to become a burden on the social assistance system of the host country during their stay. [54] They are also required to have comprehensive sickness insurance cover in the host country (Article 7(1)(b)) Directive 2004/38). During this period, these persons' right to reside depends on the question whether or not they are an unreasonable burden on the host country's social assistance system.[55] The CJEU did

(51) Case C-140/12, Brey, EU:C:2013:565, para. 44; Case C-333/13, Dano, EU:C:2014:2358, para. 83; Case C-308/14, *Commission v. United Kingdom*, EU:C:2016:436, para. 68 and Case C-411/20, *Familienkasse Niedersachsen-Bremen*, EU:C:2022:602, para. 62

(52) Case C-411/20, *Familienkasse Niedersachsen-Bremen*, EU:C:2022:602. This case concerned the refusal of a family benefit to an economically inactive migrant Union citizen while this benefit was granted to a national of that Member State, including during the first three months following his or her return to the same Member State after having made use, under EU law, of his or her right to move and reside in another Member State.

(53) On the concept of worker: see Houwerzijl and Verschueren 2024, pp. 183-186 and Verschueren 2016.

(54) The origin of the means is not relevant: Case C-93/18, *Bajratari*, EU:C:2019:809.

(55) Art. 14(3) Directive 2004/38 and recital 10 which states that these conditions were intended to prevent these persons from becoming 'an unreasonable burden on the social assistance system of the host Member State'. See also recital 16 and Case C-424/10 *Ziolkowski and Szeja*, EU:C:2011:866, para. 40; Case C-333/13, Dano, EU:C:2014:2358, para.71 and Case C-709/20 *CG v. The Department for Communities in Northern Ireland*, EU:C:2021:602, para. 76.

specify that if the right to equal treatment for social assistance would not be dependent on having sufficient resources for economically inactive migrant Union citizens, they would be able to rely on these benefits to fund their means of subsistence and thus to acquire a right of residence.[56]

Regarding the restrictions of article 24(2) on the right to social assistance, the Court has applied these restrictions in a number of cases on benefits which also fall within the scope of Regulation 883/2004. For the CJEU, Article 24(2) Directive 2004/38 must be seen as an explicit exception to the equal treatment provision of Article 4 Regulation 883/2004 even if the latter provision only accepts such an exception "provided for by this Regulation" and does not refer to exceptions in Directive 2004/38 or in other EU legal instruments. Still, it is important to point out that the CJEU recently confirmed that the exceptions of Article 24(2) Directive 2004/38 only apply to social assistance benefits and not to social security benefits such as family benefits.[57] It recalled that "as a derogation from the principle of equal treatment laid down in the first paragraph of Article 18 TFEU, of which Article 24(1) of Directive 2004/38 is merely a specific expression, Article 24(2) must be interpreted strictly, and in accordance with the provisions of the Treaty, including those relating to Union citizenship".[58] However, on the basis of its wide interpretation of the concept of "social assistance" in Article 24(2) Directive 2004/38, the Court applied this exception also to the SNCBs falling under the scope of Regulation 883/2004 (see part 4.2).

As a consequence of this case law, the application of the equal treatment provision of Article 4 Regulation 883/2004 is therefore subject to the conditions of having a right of residence under Directive 2004/38 and to the exceptions of its Article 24(2). That is highly remarkable. As a result, a provision in a regulation is overridden by a provision in a directive, although both instruments were adopted by the Union legislator on the same day (namely on 29 April 2004) and Regulation 883/2004 could be seen as a *lex specialis* vis-à-vis the directive. [59] In 2016, the European Commission proposed to adapt Article 4 of the Regulation to this case law by introducing a new paragraph that would read: "A Member State may require that the access of an economically inactive person residing in that Member State to its social benefits be subject to the conditions of having a right to legal residence as set out in Directive 2004/38."[60] However, the Council and the European Parliament rejected this proposal during the negotiations.[61] It is therefore all the more remarkable that the CJEU subsequently further confirmed its case law, more specifically in the *CG* judgment.

(56) Case C-333/13, Dano, EU:C:2014:2358, paras 74, 76 and 77 and Case C-709/20 *CG v. The Department for Communities in Northern Ireland*, EU:C:2021:602, para. 77.

(57) Case C-411/20, *Familienkasse Niedersachsen-Bremen*, EU:C:2022:602.

(58) Case C-181/19, Jobcenter Krefeld, EU:C:2020:794, para. 60 and Case C-411/20, *Familienkasse Niedersachsen-Bremen*, ECLI:EU:C:2022:602, para. 50.

(59) See Hancox, 201, p. 1059 who states that, in Union law, there is no hierarchy between directive or regulation.

(60) COM 2016 (815) final.

(61) EP Report of 23 November 2018, A8-0386/2018, amendment 71 and Council Document 7698/19 ADD 1 REV 1 of 25 March 2019, p. 16.

4.2. A BROAD DEFINITION OF THE CONCEPT OF 'SOCIAL ASSISTANCE'

In addition, for the implementation of the provisions of Directive 2004/38 the CJEU has given a wide interpretation to the concept of "social assistance", including the "special non-contributory cash benefits" (SNCBs) listed in Annex X to Regulation 883/2004.[62] This is remarkable because it means that the Court uses a different definition of the concept of "social assistance" in Regulation 883/2004 and in Directive 2004/38. Indeed, Regulation 883/2004 does not apply to social assistance and the inclusion of SNCBs within the scope of this regulation means that they are not considered as social assistance for the purposes of its application. [63] For the purposes of Directive 2004/38, however, they would constitute social assistance.[64] This also means that if an economically inactive Union citizen wants to rely on an SNCB, he risks being considered a burden on the social assistance system of the host country and therefore risks not having the right to reside and consequently risks not being able to rely on the right to equal treatment for this benefit. Because the SNCBs, pursuant to Article 70 Regulation 883/2004, only have to be granted by the country of residence and do not have to be exported by the previous country of residence, this may imply that the person concerned is not entitled to an SNCB in any Member State. That would cause a negative conflict of law, which is precisely the sort of thing social security coordination wants to avoid.

4.3. WHAT KIND OF BURDEN?

Determining whether an economically inactive migrant Union citizen has a right to reside depends on the question whether the claim to this benefit can be considered an unreasonable burden. With regard to the concept of "unreasonable burden", the Court stated in *Brey* that national authorities cannot conclude that a person has become an unreasonable burden without first carrying out an overall assessment of the specific burden which granting that benefit would place on the national social assistance system as a whole, by reference to the personal circumstances characterizing the individual situation of the person concerned. The Court indicated that the national authorities may take into account, *inter alia,* the amount and regularity of the income which the economically inactive migrant person receives.[65]

However, later in *Dano* and in *CG,* the Court made no reference to the unreasonability and proportionality test, despite the fact that the Court has clarified elsewhere that the conditions laid down in Article 7(1)(b) Directive 2004/38 must be interpreted narrowly[66] in compliance with the proportionality principle.[67] In *CG,* the Court stated

(62) Case C-140/12, *Brey*, EU:C:2013:565; Case C-333/13, *Dano*, EU:C:2014:2359; Case C-67/14, *Alimanovic*, EU:C:2015:597 and Case C-299/14, *Garcia-Nieto*, EU:C:2016:114.

(63) The CJEU explicitly confirmed that Article 4 Regulation 883/2004 also applies to these benefits: Case C-333/13, *Dano*, EU:C:2014:2358, para. 55 and Case C-181/19, *Jobcenter Krefeld*, EU:C:2020:794, para. 83.

(64) For a critical assessment see: Vonk 2020.

(65) Case C-140/12, *Brey*, EU:C:2013:565, para. 78. This judgment seems to reflect recital 16 of the preamble to Directive 2004/38. For a more detailed analysis of this judgment, including its relevance for the meaning of Regulation 883/2004 on the social security coordination, see Verschueren 2014.

(66) Case C-140/12, *Brey*, EU:C:2013:565, para. 70.

(67) Case C-93/18, *Bajratari*, EU:C:2019:809, para 35.

that since the person involved did not have sufficient resources, it is likely that she will become an unreasonable burden on the social assistance system of the host state and therefore, she cannot invoke the principle of non-discrimination of Article 24(1) Directive 2004/38.[68] Still, refusing social assistance without a proportionality test having been applied goes against what the Union legislator has determined and also intended about this in Directive 2004/38, including the provisions in Article 8(4) and Article 14(3) of Directive 2004/ 38/EC and in recital 16 of this Directive.

4.4. WHAT ABOUT THE PAYMENT OF CONTRIBUTIONS?

If an economically inactive migrant Union citizen fulfils the condition for a right of residence of more than three months, he/she can rely on the right to equal treatment with regard to the social security of the host country. This was recently expressly confirmed by the Court in the judgment in A.[69] In this case, the Court recognized that, based on Article 11(3)(e) of Regulation 883/2004, an economically inactive migrant Union citizen is subject to the legislation of the country of residence, including for health insurance. The Court then decided that the host Member State concerned must guarantee the migrant Union citizen access to its health insurance under the same conditions as those applicable to its own nationals. What was remarkable in this judgment, however, was that the Court was of the opinion that this Member State can request the payment of a contribution, even if it does not do so for its own nationals. The Court argued this by stating that it follows from Article 7(1)(b) of Directive 2004/38, read in conjunction with Article 14(2) thereof, that, throughout the period of residence in the host Member State of more than three months and less than five years, economically inactive Union citizens must, inter alia, have comprehensive sickness insurance cover for themselves and their family members so as not to become an unreasonable burden on the public finances of that Member State. For the CJEU, that condition for residence in accordance with Directive 2004/38 would be rendered redundant if the host Member State would be required to grant an economically inactive Union citizen residing in its territory on the basis of Article 7(1)(b) Directive 2004/38 affiliation, free of charge, to its public sickness insurance system, even if affiliation is free of charge for the nationals of that Member State.[70] This shows that the Court subordinates the application of the right to equal treatment as regards the payment of contributions to the objectives of Directive 2004/38, in particular the protection of the public finances of the host country.[71] It clearly stated in this judgment that: "It is also important to add that no different conclusion can validly be drawn from Article 24 of Directive 2004/38 and Article 4 of Regulation 883/2004" (para. 60) and that "any unequal treatment which might result, to the detriment of such a Union citizen, from access which is not free of charge to that system would be

(68) Case C-709/20 *CG v. The Department for Communities in Northern Ireland*, EU:C:2021:602, para 80. For a critical commentary: O'Brien 2021; Pennings 2022, pp. 199-218; Verschueren 2022 and Wollenschläger 2022.

(69) Case C-535/19, A., EU:C:2021:595.

(70) Case C-535/19, A., EU:C:2021:595, paras 55-59. However, this Member State must comply with the principle of proportionality when determining the amount of the contributions: para. 59.

(71) Case C-535/19, A., EU:C:2021:595, para. 55. For a critical commentary, see: Gillian 2023 and Paju 2022.

the inevitable consequence of the requirement, laid down in Article 7(1)(b) of that directive, that that citizen must have comprehensive sickness insurance cover" (para. 62). However, in a more recent judgment, the Court held that a Union citizen or his family members meet the conditions for having health insurance if they are affiliated free of charge to the public sickness insurance system of that State and that it cannot be considered that that affiliation free of charge constitutes, in such circumstances, an unreasonable burden on the public finances of that State.[72]

4.5. RIGHT TO RESIDE UNDER A DIFFERENT LEGAL BASIS

However, these limitations are accommodated by the case law of the Court that if the Union citizen concerned has a right of residence on the basis of another legal basis in Union law, in particular on the basis of Regulation 492/2011, this Union citizen and his family members can rely on the equal treatment provision of Article 7 of this regulation (see above).[73] This may also concern someone who is not (or no longer) economically active, but does have a right of residence, for example as a parent who cares for school-age children, or economically inactive family members of a migrant worker.

In addition, the Court indicated in the *CG* judgment that if the Union citizen concerned does not have a right of residence under Directive 2004/38 or another provision of Union law, but does have a right of residence under national law of the host country, this citizen may be able to rely on the EU Charter of Fundamental Rights. The Court primarily referred to Article 1 of the Charter, which states that the human dignity should be protected and respected. In the Court's view, this means that the host Member State has to ensure that Union citizens who are in a vulnerable position can live in dignified circumstances. The Court also refers to Article 7 on the right to respect for private and family life and combines this with Article 24(2), which requires that the best interests of the child are taken into account. From these provisions, the Court deducts the obligation of the host Member States to ensure that children can live in dignified circumstances with the parent (or parents) responsible for them. Consequently, the Court decides that a request for social assistance can only be dismissed once the national authorities have ascertained that this refusal will not expose the persons in question to an actual and current risk of violation of these fundamental rights. To this end, the authorities need to take into consideration all means of assistance provided for by national law.[74] It is not clear, however, how far this obligation goes and when the circumstances are such that they are no longer in accordance with human dignity or the best interests of children as vulnerable persons.[75] The Court did not provide any further explanation on the matter.

(72) Case C-247/20, *VI*, EU:C:2022:177, para 70.

(73) Case C-181/19, *Jobcenter Krefeld*, EU:C:2020:794 and Case C-488/21, *GV v. Chief Appeals Officer*, EU:C:2023:1013.

(74) Case C-709/20 *CG v. The Department for Communities in Northern Ireland*, EU:C:2021:602, para. 92.

(75) See also Kramer 2023; O'Brien, 2021; Verschueren 2022.

5. TO CONCLUDE

The equal treatment provision of Article 4 Regulation 883/2004 is a cornerstone of social security coordination and can be seen as a substantive law provision that intervenes directly in the legislation of the Member States that would conflict with this provision. Its primary objective is to promote the free movement of people within the EU. As far as migrant Union citizens who are covered by the principle of free movement of workers are concerned, the Court has settled case law that this provision contributes to the establishment of the greatest possible freedom of movement for migrant workers and to the integration of EU workers in the host country as well as the improvement of living standards and conditions of employment of migrant workers. The treaty provisions regarding the free movement of workers and the equal treatment provision of Article 7(2) Regulation 492/2011 therefore reinforce the meaning of Article 4. In certain circumstances they may even offer greater protection on top of this last provision.

On the other hand, the Court of Justice has made the application of the equal treatment provision of Article 4 Regulation 883/2004 subject to the condition that the person concerned must have a right of residence under Directive 2004/38. This despite the fact that the Union legislator did not include this restriction in Article 4 and rejected the Commission's proposal on this. This is particularly problematic for economically inactive migrant Union citizens as their right to reside for more than three months is subject to the condition of having sufficient means of subsistence so as not to place an unreasonable burden on the social assistance system of the host country. The broad interpretation of what constitutes "social assistance" within the meaning of this directive, which also includes certain benefits that are not social assistance within the meaning of the regulation, challenges the relationship between the regulation and the directive. The failure to apply the proportionality test further reinforces this.

Clearly, the EU has difficulty in reconciling the right to free movement of persons and to equal treatment as a fundamental right including for economically inactive EU citizens with the Member States' concerns regarding their public financing. Still, the Court has also confirmed that the prohibition of discrimination is in itself a fundamental principle of Union law and in particular of Union social law, which must therefore not be interpreted restrictively.[76]

(76) Case C-660/20, Lufthansa CityLine, EU:C:2023:789, para 37.

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13 BINDING EFFECT OF THE A1 CERTIFICATE IN THE CASE-LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

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EU social security coordination is based on the principle of insurance in a single Member State, that is to say, the payment of social security contributions only under the legislation of the competent State. This so-called "applicable legislation" is determined in accordance with the conflict-of-law rules contained in Title II of Regulation No 883/2004. The Portable document A1, issued by the institution of the competent State, is the certificate used to attest in which Member State the person concerned is insured. The A1 certificate thus declares that its holder is insured by the State which issued it, but at the same time it prevents the institutions of any other EU country from making that person subject to their local social security contributions. This is the "binding effect" of the A1 certificate.

In the field of social security affiliation, the rules of the game are clear: firstly, the State of insurance must be determined in accordance with the criteria laid down in Title II of Regulations No 883/2004 and No 987/2009 ("the Coordination Regulations") and, in that State, social security contributions must be paid for the person concerned, in accordance with local legislation, on all his or her income, even if it derives from activities carried out in other countries.[1] All other States must respect this determination of the State of insurance and refrain from imposing their own contributions on the same person. Both migrant workers and their employers have the guarantee that social security contributions will always be paid in a single Member State only.[2]

This principle has been confirmed on numerous occasions by the settled case-law of the Court of Justice of the EU and is linked to the principle of legal certainty and free movement of workers within the EU internal market. It is essential for migrant self-employed persons, workers and their employers to be guaranteed that they will not be obliged to pay double or multiple social security contributions when carrying out their activities in different Member States, nor will they have to deal with social security obligations and administration in several countries at the same time. By doing so, the EU law provides a stable and predictable system of social security insurance. If the situation were reversed, it would constitute an obstacle to the free movement of

(1) Article 13(5) of Regulation No 883/2004 provides that persons active in the territory of more than one State are to be treated as though they were pursuing all their activities as employed or self-employed persons and were receiving all their income in the competent Member State.

(2) Under Article 11(1) of Regulation No 883/2004, persons to whom that regulation applies are to be subject to the legislation of a single Member State only.

workers and services, undermine the functioning of the EU single market and would therefore be incompatible with the principles of the Treaty on the Functioning of the European Union.[3]

1. DISPUTES CONCERNING THE DETERMINATION OF THE STATE OF INSURANCE

Although the objectives of social security coordination described above make perfect sense, they are not so easy to apply in practice. This is because the rules and criteria for resolving conflicts of law in Title II of Regulation No 883/2004 can be complex and unclear. The most common disputes concern the interpretation and application of the rules on posting[4] and determination of the State of insurance for persons who normally work in more than one EU country[5]. Sometimes, the authorities of the States involved have different interpretations of the conflict rule in question or they even disagree on which particular rule or provision should apply to the case in question. This leads to uncertainty as to where the person concerned should be insured - either no State considers itself competent to cover the person (negative conflict of jurisdiction) or, more commonly, two different States consider that the person should be covered by their legislation (positive conflict of jurisdiction).

While the Coordination Regulations contain a rule providing for the provisional application of the legislation in the event of disagreement between institutions[6] (i.e. in the case of a conflict of jurisdiction), this provision often cannot be applied in practice because one of the institutions concerned has already issued an A1 certificate to the person in question, thereby 'declaring' its country as the State of insurance.

Example:
Mr X, who is employed in the Czech Republic, is posted by his employer to work for him in Austria for a period of 12 months. Article 12 of Regulation 883/2004 provides that, if the conditions for posting are met, the posted worker remains insured in the State where he normally works – in this example, the Czech Republic. However, if the conditions for posting are not met, the worker concerned would have to be insured in the State where he actually carries out his temporary activity – in this case Austria. There may be a dispute between the Czech and Austrian institutions as to whether the conditions for posting were met in the case of Mr X.

In the absence of an A1 certificate in that situation, Article 6(1)(a) of Regulation No 987/2009 would apply, which provides that, pending the outcome of the dispute, the worker concerned is to be provisionally insured in the State in which he actually carries out his activity – that is to say, Austria.

However, if the worker has a PD A1 issued by a Czech institution confirming that he continues to be insured in the Czech Republic in accordance with Article 12, this

(3) In particular Articles 45, 48 and 56 TFEU.

(4) Article 12 of Regulation No 883/2004, Article 14 of Regulation No 987/2009, Decision No A2 of the Administrative Commission published in the Official Journal of the EU – OJ C 106, 24. 4. 2010, pp. 5-8.

(5) Article 13 of Regulation No 883/2004, Article 14 of Regulation No 987/2009.

(6) Article 6 of Regulation No 987/2009.

certificate is binding on the Austrian authorities and prevents them from making that person subject to the Austrian law and contributions.

Although the Austrian institution may have serious doubts as to whether Mr X or his employer fulfil the conditions for posting, or may even be convinced that the conditions for posting are not fulfilled, in this situation, it gets the short end of the stick, since the holder will remain exclusively insured in the Czech Republic unless the A1 certificate is withdrawn by the issuing (Czech) institution.

2. WHY IS THE A1 CERTIFICATE BINDING?

The Court first examined the character of the attestation on the applicable legislation in the case *Fitzwilliam* (also known by the acronym FTS)[7]. This was a landmark case-law followed by a number of other judgments[8], establishing settled case-law in which the Court has developed a doctrine of the binding effect. Although some of this case-law refers to the previous Coordination Regulations No 1408/71 and No 574/72 and the E-101 form that was used at the time (the current portable document A1 replaced it), the principle of binding effect applies and is relevant also to the Coordination Regulations that are in force today.[9]

The binding effect of the A1 certificate is based on the following reasoning in the case law of the Court of Justice[10]:

- The A1 certificate issued under Title II of the Coordination Regulations is intended to facilitate the free movement of workers and services.
- In the A1 certificate, the issuing institution declares that its own social security system will remain applicable to the worker concerned for the period of validity of that certificate. By virtue of the principle that workers must be covered by only one social security system, the certificate, in comprising this declaration, necessarily implies that the other Member State's social security system cannot apply.
- The principle of sincere cooperation laid down in primary EU law[11] 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 that certificate.
- As regards the institutions of the other Member States, it follows from the obligations of sincere cooperation that those obligations would not be fulfilled and that the objectives of Title II of the Coordination Regulations would be thwarted, if those institutions were to consider that they were not bound by the certificate and made its holder subject also to their own social security system.
- Consequently, in so far as the certificate establishes a presumption that its holder is properly affiliated to the social security system of the Member State whose

(7) CJEU ruling in case C-202/97 Fitzwilliam, EU:C:2000:75.

(8) E.g. CJEU ruling in Cases C-178/97 Banks, EU:C:2000:169, C-2/05 Herbosch Kiere, EU:C:2006:69, C-620/15 A-Rosa Flussschiff, EU:C:2017:309 and others.

(9) CJEU ruling in case C-527/16 Alpenrind, EU:C:2018:669.

(10) See in general terms paragraphs 48-55 of Fitzwilliam and paragraphs 20-26 of Herbosch Kiere.

(11) Now Article 4(3) TEU.

institution issued it, such a certificate is binding on the competent institutions of other Member States.

- The opposite result would undermine the principle that employees are to be covered by only one social security system, would make it difficult to know which system is applicable and would consequently impair legal certainty. In cases in which it was difficult to determine the system applicable, each of the competent institutions of the two Member States concerned would be inclined to take the view, to the detriment of the workers concerned, that their own social security system was applicable to them.
- As long as the A1 certificate is not withdrawn or declared invalid by the issuing institution, the institutions of the other Member States must take account of the fact that the holder of the A1 certificate is already subject to the social security legislation of the Member State whose institution issued the certificate and, consequently, cannot make the worker concerned subject to their own social security scheme.

2.1. BINDING A1 VIS-À-VIS THE COURTS

Subsequently, the Court expressly extended the doctrine of binding effect to the courts of the Member States. In case C-2/05 *Herbosch Kiere* the Court ruled that:

- If it were accepted that a competent national institution could, by bringing proceedings before a court of the posted worker's host Member State to which that institution belongs, have a PD A1 certificate declared invalid, there would be a risk that the system based on the duty of cooperation in good faith between the competent institutions of the Member States would be undermined.
- As long as it has not been withdrawn or declared invalid, a PD A1 certificate takes effect in the internal legal order of the Member State to which the workers concerned are posted and, therefore, binds its institutions.
- It follows that a court of the host Member State is not entitled to scrutinise the validity of a PD A1 certificate as regards the certification of the matters on the basis of which such a certificate was issued.[12]

Therefore, the A1 certificate cannot be invalidated by a judicial decision, even if the court of the host State were to be convinced that the certificate was issued incorrectly. The A1 certificate is thus binding not only on the social security institutions, but also on the courts of the Member States.

2.2. A1 CERTIFICATE ISSUED RETROSPECTIVELY

As the *Banks*[13] ruling makes clear, the attestation on the applicable legislation may also be issued retrospectively, i.e. with retroactive effect. While it is preferable for such a certificate to be issued before the beginning of the period which it is intended to cover, before the worker is posted or begins to work in the territory of two or more States, it

(12) CJEU ruling in Case C-2/05 Herbosch Kiere, EU:C:2006:69, paragraphs 30-32.

(13) CJEU ruling in Case C-178/97 Banks, EU:C:2000:169, paragraphs 49-57.

may also be issued during or even after that period. The Coordination Regulations do not contain any deadline or time limit within which the attestation must be requested.

Moreover, as the Court held in the case *Alpenrind* [14], a retrospectively issued A1 certificate is binding even if, in the meantime, the rule providing for the provisional application of the legislation of the State of activity has already been applied. The case concerned Hungarian butchers posted to Austria who initially did not have A1 certificates. Although the Austrian institution provisionally made them subject to Austrian insurance, this decision was "superseded" by the Hungarian authorities, which retroactively issued the workers concerned with A1 posting certificates. The Court held that a certificate issued retrospectively is binding, notwithstanding the fact that the host State has in the meantime made the posted worker subject to its own social security system.

3. CAN THE HOST STATE OPPOSE THE BINDING PD A1?

As can be seen from the previous paragraphs, the Court, through the doctrine of binding effect, has considerably strengthened the position of the State issuing the A1 certificate. In the case of posting of workers, the A1 certificate is issued by the sending State and, in the case of persons who normally work in the territory of several Member States, it is normally issued by the State of residence. As long as the institution of that State has not withdrawn or declared the certificate invalid, none of the other States can change the situation in any way or make the person concerned subject to its own insurance. However, the risk that the A1 certificate has been incorrectly issued can never be completely ruled out.

The Court was aware of the need to strike at least an elementary balance between the States concerned and that it must be possible to question the accuracy of the A1 certificate. It therefore laid down the following principles[15]:

- It is incumbent on the competent institution of the Member State which issued that certificate to reconsider the grounds for its issue and, if necessary, withdraw the certificate if the competent institution of another Member State expresses doubts as to the correctness of the facts on which the certificate is based and, consequently, of the information contained therein, in particular because the information does not correspond to the requirements of Title II of Coordination Regulations.
- Should the institutions concerned not reach agreement on, in particular, the question how the particular facts of a specific case are to be assessed, and consequently on the question whether it is covered by the provisions of Title II of the Coordination Regulations on the basis of which the certificate was issued, it is open to them to refer the matter to the Administrative Commission.[16]

(14) CJEU ruling in Case C-527/16 Alpenrind, EU:C:2018:669, paragraphs 70-77.

(15) See in general terms paragraphs 56-58 of Fitzwilliam and paragraphs 27-29 of Herbosch Kiere.

(16) The Administrative Commission is the body of representatives of the Member States, whose secretariat is provided by the European Commission, and whose tasks include, inter alia, administrative and interpretative questions relating to Coordination Regulations and the approximation of divergent positions in the event of disputes – see Articles 71 and 72 of Regulation No 883/2004.

- If the Administrative Commission does not succeed in reconciling the points of view of the competent institutions on the question of the legislation applicable, the Member State to which the workers concerned are posted may, without prejudice to any legal remedies existing in the Member State to which the issuing institution belongs, at least bring infringement proceedings under Article 259 TFEU in order to enable the Court to examine in those proceedings the question of the legislation applicable to those workers and, consequently, the correctness of the information contained in the A1 certificate.

Therefore, the binding effect of the A1 certificate is not absolute and the Court's case law provides for the means of reviewing the determination of the country of insurance. In practice, however, these means may prove to be futile.

3.1. CORRECT ASSESSMENT OF THE FACTS BY THE ISSUING INSTITUTION

In an ideal world, of course, each institution should approach the determination of the country of insurance in an objective and consistent manner, carefully assessing all the relevant circumstances and issuing the A1 certificate on the basis of the established facts that have been examined in detail. In the real world, however, this is not always the case, either because of the limited operational capacity and overall administrative workload of the issuing institution, or because of the lack of objective resources to verify the facts relevant to the determination of the applicable law. Often, the issuing institution has no choice but to rely on the self-declarations and documents provided by the applicants, which may not always be complete or truthful.

3.2. CONTESTATION BY THE INSTITUTIONS OF THE HOST STATE

Even if another (host) State were to inform the issuing institution of its doubts as to the correctness of the A1 certificate, the question remains as to the motivation of the latter institution to revise its original decision. Withdrawing the original certificate and changing the country of insurance is generally not in the interest of the person concerned or the employer, who often oppose such a measure. Moreover, the institutions concerned would have to settle the premiums paid, i.e. reimburse them in the original competent State and collect them retroactively in the new competent State, recover the benefits paid and the healthcare provided during the period in question, which is a difficult process. As a result, the issuing institution is often reluctant to withdraw the certificates it has issued because of the administrative and legal problems this would entail, such as the risk of being sanctioned for maladministration.

3.3. CONVERGENCE OF POSITIONS BEFORE THE ADMINISTRATIVE COMMISSION

As regards the possibility of bringing a dispute before the Administrative Commission, it is true that in recent years this committee has dealt with several cases concerning the correctness of the A1 certificate. However, this is a lengthy and administratively cumbersome process,[17] with an uncertain outcome, as Member States have to agree on

(17) Decision of the Administrative Commission No A1 published in the Official Journal of the EU – OJ C 106, 24. 4. 2010, pp. 1-4.

a qualified majority, which is not always achieved. Moreover, even if the Administrative Commission decides that the A1 certificates should be invalidated, this verdict lacks formal legal force and therefore there is no guarantee that the issuing institution will actually comply with it.[18]

3.4. PROCEDURE UNDER ARTICLE 259 TFEU

Taking another Member State to the Court of Justice under Article 259 TFEU is really only a hypothetical option – from a political point of view, it is an extreme measure that no Member State would resort to just to have the A1 certificate withdrawn.

Therefore, the binding effect of the A1 certificate is strong and the possibilities for Member States to unilaterally suspend its validity are minimal. This is the case even if the institution of the other State is convinced that the certificate is manifestly incorrect because it has been issued to a person who does not fall within the material scope of the provisions for which the certificate has been issued.

Such a situation arose in the *A-Rosa Flussschiff* case[19], which concerned workers on French cruise ships. Although these workers worked exclusively in French national waters and, as such, should have been insured in France in accordance with the basic rule of the lex loci labouris[20], they were issued with an A1 certificate by a Swiss institution, stating that they were subject to Swiss legislation on the basis of the conflict rule applicable to workers normally employed in the territory of more than one Member State. However, even in this situation, the Court did not accept that the A1 certificate could be unilaterally disregarded by the French authorities and insisted that it was binding. The Court pointed out that, in its previous case-law, it had established the procedure to be followed in order to resolve any dispute between the institutions of the Member States concerned as to the validity or accuracy of the A1 certificate. That procedure must apply even where it appears that the circumstances of activity of the workers concerned do not manifestly fall within the material scope of the provision based on which that certificate was issued. The Court rejected the French Government's arguments concerning the ineffectiveness of that procedure and the need to prevent unfair competition and social dumping which could result from the excessively binding effect of the A1 certificate.

The only case in which the Court accepted that the certificate on applicable legislation did not have binding effect was the judgment in *X*[21]. It concerned boatmen who, as a result of an administrative error on the part of the Luxembourg institution, obtained an A1 certificate although they were covered by the provisions of the Rhine boatmen's convention. In this situation, the Court accepted that a certificate issued in error to a person who does not fall within the scope of the Coordination Regulation is not binding on the institutions of other Member States.

(18) CJEU ruling in Case C-527/16 Alpenrind, EU:C:2018:669, paragraphs 58-64.

(19) CJEU ruling in Case C-620/15 A-Rosa Flussschiff, EU:C:2017:309.

(20) Article 11(3)(a) of Regulation No 883/2004.

(21) CJEU rulings in Joined Cases C-72/14 and C-197/14 X, EU:C:2015:564.

4. BREAKTHROUGH TO BINDING EFFECT IN CASE OF FRAUD

The *Altun*[22] decision is a turning point in the doctrine of binding effect. In this case, the Belgian Inspectorate found that Bulgarian workers posted to Belgium had obtained A1 certificates from a Bulgarian institution fraudulently – by providing false information on the scope of the workers' employer's activity in Bulgarian territory. Although the Belgian authorities drew attention to the suspicion that A1 certificates had been obtained fraudulently from the Bulgarian issuing institution, the latter did not take those findings into account for the purposes of examining whether the issuance of those certificates was justified.

The Court has held that the binding nature of such certificates cannot result in individuals being able to rely on EU law for abusive or fraudulent ends and cannot therefore be extended to cover transactions carried out for the purpose of fraudulently or wrongfully obtaining advantages provided for by EU law.[23]

Such fraudulent conduct is to be based on a consistent body of evidence that satisfies both an objective and a subjective factor[24]:

The objective factor consists of non-compliance with the conditions required for obtaining and relying on the A1 certificate as laid down in Title II of the Coordination Regulations.

The subjective factor corresponds to the intention of the parties concerned to evade or circumvent the conditions for the issue of that certificate, with a view to obtaining the advantage attached to it. The fraudulent procurement of an A1 certificate may therefore result from a deliberate action, such as the misrepresentation of the real situation of the posted worker or of the undertaking posting that worker, or from a deliberate omission, such as the concealment of relevant information, with the intention of evading the conditions of posting.

Even if these two factors are satisfied, the procedure for contesting A1 certificates laid down by the case-law must still be followed, i.e. the issuing institution must be provided with concrete evidence suggesting that these certificates have been obtained fraudulently. In the light of that evidence, it is for that institution to reconsider the grounds on which those certificates were issued and, where appropriate, to withdraw them. If the issuing institution fails to carry out such a review within a reasonable time, it must be possible to rely on that evidence in court proceedings in order to convince the court of the Member State to which the workers have been posted that the certificates should be disregarded.

At the same time, however, the safeguards associated with the right to a fair trial must be respected, in particular persons suspected of fraudulently obtaining A1 certificates must be able to rebut the evidence on which the contestation of those certificates is

(22) CJEU ruling in case C 359/16 Altun, EU:C:2018:63.

(23) CJEU ruling in Case C 359/16 Altun, EU:C:2018:63, paragraphs 48-49.

(24) CJEU ruling in Case C 359/16 Altun, EU:C:2018:63, paragraphs 50-53.

based. If all those conditions are met, the national court may disregard the contested A1 certificates even without being revoked by the issuing institution.[25]

The Court's conclusion that the binding effect of A1 certificates obtained through fraudulent conduct may be broken under certain circumstances was particularly welcomed by the inspectorate authorities of countries that traditionally carry out thorough checks on migrant workers entering their territory. However, the conditions laid down in the Altun judgment were not always consistently observed in practice, prompting the Court to address the excessively repressive procedures in a subsequent judgment.

4.1. THE NEED TO FOLLOW THE PROCEDURAL REQUIREMENTS FOR CONTESTING THE A1 CERTIFICATE

In the *Vueling* joined cases[26], the French inspection authorities found that Vueling Airlines had improperly obtained A1 certificates from a Spanish institution for its staff operating at Roissy-Charles de Gaulle airport in France. On the one hand, the Court confirmed that there was evidence of fraudulent acquisition of the A1 certificates, in the sense that the Vueling airlines had deliberately concealed or misrepresented the facts relevant to the determination of the State of insurance, thereby obtaining certificates stating that their workers were subject to Spanish legislation, but, on the other hand, the Court also concluded that the French authorities had failed to comply with the procedural requirements deriving from its previous case-law.

As a preliminary point, the Court reiterated that it follows from the principle of sincere cooperation that, where the competent institution of the host Member State expresses doubts as to the accuracy of the facts on which the issue of the A1 certificate is based and, consequently, of the information contained therein, it is incumbent on the competent institution of the Member State which issued that certificate to reconsider the grounds for that issue and, if appropriate, to withdraw it. If the institutions concerned disagree on the assessment of the relevant facts and the determination of the State of insurance, it is open to them to refer the matter to the Administrative Commission in order to reconcile their positions.

It also pointed out that, particularly in the context of suspected fraud, the implementation of the procedure for referral to the Administrative Commission before a final finding of fraud is made by the competent authorities of the host Member State is of particular importance, since that procedure enables the competent institution of the issuing Member State and that of the host Member State to engage in dialogue and to cooperate closely in order to check and ingather, using the investigatory powers available to them under national law, all relevant matters of fact or law that may dispel or, on the contrary, confirm the accuracy of, the doubts expressed by the competent institution of the host Member State concerning the circumstances surrounding the issue.[27]

(25) CJEU ruling in Case C 359/16 Altun, EU:C:2018:63, paragraphs 54-56.

(26) CJEU rulings in Joined Cases C-370/17 and C-37/18 Vueling, EU:C:2020:260.

(27) CJEU ruling in Joined Cases C-370/17 and C-37/18 Vueling, EU:C:2020:260, para. 66.

This allows the issuing institution to take part in the dialogue concerning the contestation of the A1 certificate already at an early stage, giving it the opportunity to respond to any concrete evidence of the existence of fraud submitted to it by the competent institution of the host Member State, or the opportunity, where appropriate, to cancel or withdraw the certificates in question if it concludes that such evidence proves that they have indeed been obtained or relied upon fraudulently.

Where there is concrete evidence that A1 certificates have been obtained or relied upon by fraudulent means, the institution of the host Member State must immediately initiate the procedure laid down for contesting such certificates and consult the issuing institution on the evidence of fraudulent conduct. This is a prerequisite for determining whether the conditions for the existence of fraud have been met and, consequently, for any conclusions to be drawn as to the validity of the certificates in question. Compliance with this condition must also be taken into account by the court of the host Member State in the context of criminal proceedings brought against a person who is alleged to have committed fraud.

Consequently, a court of the host Member State may disregard A1 certificates in the course of judicial proceedings only if two cumulative conditions are met. First, the institution which issued those certificates, to which the competent institution of that Member State has promptly submitted a request for a review of the grounds on which those certificates were issued, has failed to carry out such a review in the light of the evidence submitted to it by the latter institution and has failed to take a decision, within a reasonable time, cancelling or withdrawing those certificates. Secondly, the submitted evidence enables that court to find, with due regard to the safeguards inherent in the right to a fair trial, that the certificates in question were fraudulently obtained or relied on.[28]

However, in the cases in question, the first condition was not met, since the French authorities did not send the evidence of fraud to the Spanish issuing institution until almost four years after the labour inspectorate had collected it. Moreover, the French criminal court ruled on the case without seeking to ascertain the state of the dialogue between the competent French institution and the Spanish issuing institution and without awaiting the outcome of that procedure. The A1 certificates in question therefore remained binding on the French authorities.

4.2. WITHDRAWAL OF A1 CERTIFICATE BY THE ISSUING INSTITUTION OF ITS OWN MOTION

Recently, the Court also dealt with the question of the extent to which an A1 certificate is binding on the institution which issued it, when that institution alone becomes aware that the certificate is incorrect.[29] The ruling emphasised that an A1 certificate can be withdrawn by the issuing institution of its own motion, i.e. even without having received a contestation from the competent institution of another Member State.

(28) CJEU rulings in Joined Cases C-370/17 and C-37/18 Vueling, EU:C:2020:260, para. 78.

(29) CJEU ruling in Case C-422/22 Zakład Ubezpieczeń Społecznych Oddział w Toruniu, EU:C:2023:869.

In so far as the way in which the activities of the worker concerned are carried out may change in relation to the situation taken into account when an A1 certificate was issued and the evidence on the basis of which that situation was initially established may subsequently prove to be incorrect, the principles of sincere cooperation and mutual trust imply that the issuing institution is obliged to verify the accuracy of the information contained in such a certificate throughout the period during which the activity on the basis of which the certificate was issued is being carried out and to withdraw it if it finds, in the light of the actual situation of the worker concerned, that the certificate does not comply with the provisions of Title II of Regulation No 883/2004.

The Court also concluded that, in the absence of any specific provision laying down a procedural obligation where the issuing institution wishes to withdraw an A1 certificate of its own motion, the contestation procedure laid down in Article 5(2) to (4) of Regulation No 987/2009 is not a prerequisite for the issuing institution – which has established that the information on which the issue of that certificate was based is incorrect – to withdraw an A1 certificate of its own motion.

Although the issuing institution wishing to withdraw an A1 certificate of its own motion on the grounds of inaccuracy of the information contained therein is not required to initiate the dialogue and conciliation procedure with the Member States concerned beforehand, that institution should, as soon as possible after that withdrawal, inform the Member States and the person concerned of that withdrawal and communicate to them all the information and data necessary for the purpose of establishing and determining the rights of that person.[30]

5. TO HAVE OR NOT TO HAVE PD A1

Recent case law of the Court of Justice shows that the binding nature of the A1 certificate is subject to certain limits. In the event of fraudulent conduct, the host Member State may, if it follows the prescribed procedure, disregard the certificate and make the person concerned subject to its own social security system. Likewise, if the issuing institution establishes that the certificate is incorrect, it must withdraw it of its own motion.

Despite these limitations, the A1 certificate still offers a solid guarantee that its holder will not be made subject to the social security system of a Member State other than the one that issued it. Although the case law allows for the ex-post request for and issue of such certificate, particularly in the cases of long-term assignments abroad or short-term postings in exposed sectors (such as construction and international transport), it is advisable for migrant workers to apply for this document in advance and to keep it throughout the period of work abroad. This is particularly true for those going to Member States that impose heavy fines on migrant workers without an A1 certificate.[31]

(30) CJEU ruling in Case C-422/22 Zakład Ubezpieczeń Społecznych Oddział w Toruniu, EU:C:2023:869, para 55.

(31) For example: Austria, France.

At the same time, however, it must be borne in mind that the A1 certificate applies exclusively to social security, i.e. it allows the holder to avoid the obligation to register with and pay contributions to the social security system of the host country. As the Court held in judgment *Bouygues travaux publics and Others*[32], this certificate cannot be used as an argument for not complying with other formalities and obligations relating to the posting of workers, in particular employment and working conditions imposed under labour law.

(32) CJEU ruling in Case C-17/19 Bouygues travaux publics and Others, EU:C:2020:379.

14 PITFALLS OF COORDINATING FAMILY BENEFITS IN THE EU

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1. INTRODUCTION

Esteemed and dear Colleague, Prof Bernhard Spiegel enjoys a long-standing career in social security coordination matters. As Head of the international social insurance department at the Austrian Federal Ministry of Social Affairs, Health, Care and Consumer Protection,[1] he solves most challenging social security coordination issues on a daily basis. Moreover, he has authored numerous publications[2] and presented at a large number of conferences and scientific meetings. Hence rightfully so, he also holds a position of an Honorary professor at the Law Faculty of the Paris Lodron University in Salzburg.

Among others, his work evolved around coordinating of family benefits, one of the most complex areas of social security coordination,[3] where all the principles of coordination, such as equality of treatment, unity of applicable legislation protection of the rights in course of acquisition, protection of acquired rights and good administrative cooperation, were challenged before the national and EU courts and (more or less founded) deviations were developed. This topic intrigued colleague Spiegel and with findings he has inspired many, among them also the author of the present paper. Therefore, it seems only logical that not only a simple congratulation to dear Colleague Spiegel for his personal jubilee is in order, but an article shall be dedicated to the pitfalls of coordinating family benefits in the European Union (EU).

First, the diversity of family benefits is presented, followed by the analysis of basic principles of social security coordination in the field of family benefits, before summarising the findings with some concluding thoughts.

(1) Leiter, Abteilung II /A / 4 (Internationale Angelegenheiten der Sozialversicherung), Sektion II (Sozialversicherung), Organigramm des Sozialministeriums, Stand 1. April 2024.

(2) One of the most cited in the scientific community is the Fuchs commentary, which Colleague Spiegel has co-authored. See Maximilian Fuchs, Constanze Janda, Europäisches Sozialrecht, Nomos, 8. Auflage 2022.

(3) For instance, B. Spiegel, Kindererziehung in einem anderen Mitgliedstaat, in: Kuras/Neumayr/Spendling (Hrsg), Beiträge zum Arbeits- und Sozialrecht – Festschrift für Peter Bauer, Gustav Maier, Karl Heinz Petrag, Manz 2004; B. Spiegel, Familienleistungen aus der Sicht des europäischen Gemeinschaftsrechts, in: Mazal (Hrsg), Die Familie im Sozialrecht, Braumüller 2009; B. Spiegel (ed.), FreSsco Analytical Report 2015, Assessment of the impact of amendments to the EU social security coordination rules on export of family benefits, EU 2015; G. Strban (coord.), B. Spiegel, P. Schoukens, The application of the social security coordination rules on modern forms of family, MoveS Analytical legal report 2019, EU 2020.

2. DIVERSITY OF FAMILY FORMS AND FAMILY BENEFITS

Since the EU coordination mechanism is concerned with linking national social security systems and not harmonizing them, definitions in national law are of the utmost importance. Not only family benefits, but also families might be considered distinctively among the Member States. Some recognise co-motherships and father plus, living together-apart arrangements, and various recomposed families. Some apply definitions of family law and some social security specific definitions.[4]

However, the notion of family members is to a certain extent harmonized, but only if national legislation does not make a distinction between the members of the family and other persons to whom it is applicable. In this case the spouse, minor children, and dependent children who have reached the age of majority are considered to be members of the family.[5] Moreover, national legislation may consider members of the family or household only as a person living in the same household as the insured person. However, in order to remove the residence requirements, which might prove to be an obstacle to free movement, this condition is considered to be satisfied if the person in question is mainly dependent on the insured person.[6] It should be mentioned that being married or divorced is irrelevant for the receipt of family benefits, since the link to children is not discontinued by the divorce. As the CJEU held in the case of *Slanina*,[7] although the Regulation (EC) 883/2004 on the coordination of social security systems[8] (hereafter the Social Security Coordination Regulation) does not expressly cover family situations following a divorce, there is nothing to justify the exclusion of such situations from its scope.

Concerning family benefits, the question is, whether all benefits to a member of a family could be considered as family benefits or only those intended to meet family expenses. According to the social security minimum standards, only additional costs that derive from the responsibility for the maintenance of children present a social risk.[9] Benefits could take the form of periodical payments to persons who have completed a certain qualifying period (if required) or payments meant for the provision of food, clothing, housing, holidays or domestic help to or in respect of children.[10] Family benefits in national law may be provided in kind or as cash benefits, by social insurance or as non-contributory benefits, be of more universal legal nature or targeted towards specific types of families, like single-parent or large families, related to social assistance or provided in a separate social security scheme. They may also take a form of child benefits (which may also vary according to the number and age of children, as well as family income); child-raising allowances (in some Member States considered as

(4) More in G. Strban (coord.), B. Spiegel, P. Schoukens, The application of the social security coordination rules on modern forms of family, MoveS Analytical legal report 2019, EU 2020.

(5) Regulation (EC) 883/2004 is actually reinforcing the (outdated) single breadwinner model.

(6) Article 1(i) of Regulation (EC) 883/2004.

(7) Case C-363/08 *Slanina*, EU:C:2009:732.

(8) Regulation (EC) 883/2004, OJ L 166, 29.4.2004, as amended.

(9) Article 40 of ILO Convention No. 102 and Article 40 European Code of Social Security (1964).

(10) Article 42 of ILO Convention No. 102.

maternity and paternity benefits) and child care allowance (right to day care, subsides for day-care, or the reduction of kindergarten fees).[11]

In many Member States, birth and adoption grants, supplements for single parents and other benefits (such as accommodation and housing allowances) are provided. Special family benefits are available to disabled children or parents caring for them, linking such benefits to invalidity or reliance on long-term care. Many Member States provide advances on maintenance payments, in case of no timely payments by a parent or other responsible person, and for tax credits or tax relieves when carrying for children.

The Social Security Coordination Regulation strives to do away with the mixture of general coordination rules and benefits related provisions, as was the case in the previous Regulation (EEC) 1408/71,[12] by providing a uniform regulation on family benefits.[13] Moreover, there is no distinction between family benefits and (cash) family allowances. The Court of Justice of the European Union (hereafter the CJEU) in the case of *Hoever and Zachow*[14] explained the notion of family benefits. The case concerned payment of the German non-contributory child-raising allowance. The German government argued that the child-raising allowance did not have the same purpose as a 'family benefit' within the meaning of Regulation (EEC) 1408/71 since it intended, by conferring a personal right, to remunerate the parent who both took on the task of raising a child and personally fulfilled the conditions for the granting of the allowance.

The CJEU did not accept this argument. It concluded that the child-raising allowance is paid only because of the children; its amount varies according to both the age and number of the children as well as on the parents' income. It is intended to enable one of the parents to devote himself/herself to the raising of a young child. Such allowance is aimed at remunerating the service of bringing up a child, meeting other costs of caring for and bringing up a child and mitigating the financial disadvantages entailed in giving up income from full-time employment. Therefore, such a benefit had to be treated as a family benefit.

Similar arguments were also applied to the Swedish parental benefit in the case of *Kuusijärvi*.[15] The CJEU concluded that this benefit was intended to enable the parents to devote themselves, in alternation, to the care of the young child until that child started to attend school and the benefit was intended to offset – to some extent – the loss of income of parents temporarily giving up occupational activity. Consequently,

(11) G Strban, Family benefits in the EU – is it still possible to coordinate them?, Maastricht Journal of European and Comparative Law (MJ), 23(5), 2016, p. 775.

(12) Regulation (EEC) No. 1408/71 on the application of social security schemes to employed persons and their families moving within the Community, OJ L 149, 1971, as amended.

(13) Chapter 8 of Regulation (EC) 883/2004.

(14) Case C-245/94 *Hoever and Zachow*, EU:C:1996:379.

(15) Case C- 275/96 *Kuusijärvi*, EU:C:1998:279.

all benefits that are intended to meet family expenses or offset the loss of income of parents caring for children qualify as family benefits.[16]

The CJEU held that the expression 'to meet family expenses' is to be construed as referring in particular to a public contribution to a family's budget to alleviate the financial burdens of the maintenance.[17] Hence, maintenance payments also constituted a family benefit according to the previous Regulation (EEC) 1408/71. The EU legislator reacted to these judgments. Today applicable Social Security Coordination Regulation on the one hand uses only the notion of family benefits, and no longer applies the notion of family allowances. Though, the notion of family benefits has remained rather broad.[18] On the other hand Social Security Coordination Regulation clearly excludes maintenance payments.

Hence, the notion of 'family benefits' encompasses all benefits in kind and in cash intended to meet family expenses, excluding advances of maintenance payments and special childbirth and adoption allowances (mentioned in Annex I to the Social Security Coordination Regulation).[19]

This new definition demonstrates the comprehensive approach to family benefits. According to the goal of simplification, the distinction between family benefits and family allowances was abolished. The subject of social security coordination are not only child benefits, but also child-raising benefits (which are in some Member States linked to maternity) and child-care benefits.[20] Not only are cash benefits covered, but also benefits in kind.[21] Also, tax benefits for dependent children may fall under coordination rules,[22] although at the same time they could be subject to double taxation avoidance treaties.[23]

Conversely, 'advances of maintenance allowances' are recoverable advances intended to compensate for a parent's failure to fulfil his/her legal obligation of maintenance to his/her own child, which is an obligation under family law. These advances should not

(16) S. Devetzi, The coordination of family benefits by Regulation 883/2004, European Journal of Social Security (EJSS), 11(1-2) 2009, p. 207.

(17) Case C-85/99 *Offermanns*, EU:C:2001:166; and Case C-255/99 *Humer*, EU:C:2002:73.

(18) See also Recital 34 of the Preamble to Regulation (EC) 883/2004.

(19) Article 1(z) of Regulation (EC) 883/2004.

(20) In Case C-333/00 *Maaheimo*, EU:C:2002:641, the CJEU argued that home child-care allowance, provided by the Finish local community, is intended to meet family expenses and has to be considered as a family benefit.

(21) Case C-75/11 *Commission v. Austria*, EU:C:2012:605. Here, the granting of reduced fares on public transport only to students whose parents are in receipt of Austrian family allowances was contrary to EU law.

(22) In Case C-177/12 *Lachheb*, EU:C:2013:689, the CJEU established that the fact that a benefit is governed by national tax law is not conclusive for the purpose of evaluating its constituent elements, which determine whether a benefit is subject to coordination or not. Hence, tax reduction (child bonus in Luxembourg) is a family benefit in social security coordination law.

(23) Case C-303/12 *Imfeld and Garcet*, EU:C:2013:822 (on tax exemption for dependent children under the German tax law and the supplementary tax-free income allowance for dependent children under the Belgian tax law).

be considered as a direct benefit from collective support in favour of families and the coordination rules should not apply to them anymore.[24]

Childbirth and adoption allowances are still exempted from social security coordination rules, if they are mentioned in Annex 1 to the Social Security Coordination Regulation. An insertion in the annex is a constitutive element and in the case that childbirth allowances are not mentioned in this annex, they would be fully subject to coordination rules (and thus exportable to other Member States).

However, it seems, that the CJEU made a distinction within the category of family benefits. In the case of *Wiering*,[25] the CJEU argued that family allowances in Luxembourg are allowances of the same kind as German child benefit (*Kindergeld*). However, German child-raising benefit (*Elterngeld*) should be distinguished from them, since its object is to maintain the standard of living of parents who temporarily (fully or partially) give up work in order to look after their young children.[26] This benefit is salary related and linked to a person (a parent) rather than the family as such. Hence, the CJEU added another criterion for establishing whether family benefits are of the same kind, being the persons entitled to such benefits.

It seems that we now have (at least) two categories of family benefits, one related to a family as such and the other to parents, who might take time off economic activity in order to care for children. Therefore, it was (still is) proposed that Recital 35a is inserted to explain that family benefits intended to replace income during child-raising periods are a special category of family benefit and are to be treated as an individual and personal right provided the benefit in question is listed in Part 1 of Annex XIII of the basic Regulation. This means a competent Member State is not obliged to grant derived rights in respect of such a benefit to members of the insured person's family. Member States with secondary competence may still choose not to apply the anti-overlapping rules at Article 68(2) of the Security Coordination Regulation and award such benefits in full to an entitled person. Where a Member State chooses to derogate it should be listed in Part 2 of Annex XIII and the derogation must be applied consistently to all entitled persons concerned. In the same vein it is proposed that Article 68b is introduced.[27]

The discussion on anti-overlapping rules is essential mainly for determining which family benefits have to be paid for family members residing in another Member State. The more categories, which cannot overlap, the more family benefits have to be provided.[28]

(24) Recital 36 of the Preamble to Regulation (EC) 883/2004.

(25) Case C-347/12 *Wiering*, EU:C:2014:300.

(26) More on the German Federal Ministry of Family, Seniors, Women and Youth at http://www.bmfsfj.de.

(27) Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 883/2004 on the coordination of social security systems and regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004, COM/2016/0815 final – 2016/0397 (COD).

(28) G Strban, Family benefits in the EU – is it still possible to coordinate them?, Maastricht Journal of European and Comparative Law (MJ), 23(5), 2016, p. 791.

3. EQUALITY OF TREATMENT

The principle of equal treatment of EU citizens is one of the pillars of EU law. It is also enshrined in the Social Security Coordination Regulation. Persons covered by this Regulation have to enjoy the same benefits and be subject to the same obligations under the legislation of any Member State, on the same conditions as the nationals of that state.[29]

Any direct (overt) and indirect (covert) forms of discrimination are prohibited. Not only nationality, but also residence conditions, which in national legislation are quite often applied to family benefits, may cause discriminatory effects and restrict free movement. Therefore, the general provisions of Social Security Coordination Regulation waive residence clauses for cash (family) benefits. Cash benefits must not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary or the members of his/her family reside in another Member State.[30]

More specific rules can be found in the chapter on family benefits.[31] A person is entitled to family benefits in accordance with the legislation of the competent Member State, including for his/her family members residing in another Member State, as if they were residing with him/her. Although, it might be argued that this provision is superfluous, since the general rules of the Social Security Coordination Regulation would lead to the same result, it might be good that the legal fiction of family members residing with an entitled person (for example a worker) is maintained.[32] However, it might be questioned where a person or a family (habitually) resides, since residence is one of the core issues of social security coordination.[33]

Residence conditions were also waived by the CJEU, which either based this decision on Treaty provisions or on the Social Security Coordination Regulation. The CJEU decided in the first *Pinna* judgment[34] that the provision of the Regulation (EEC) 1408/71 requiring the benefit level of the state of residence to be used in case of French benefits was contrary to the Treaties (now Article 45 TFEU). In the *Maaheimo*[35] case, the CJEU argued that if the grant of a family benefit (in this case a home child-care allowance) depends on the child's actual residence in the territory of the competent Member State, that condition must be held to be satisfied where the child resides in the territory of another Member State.

(29) Article 4 of Regulation (EC) 883/2004.

(30) Article 7 of Regulation (EC) 883/2004.

(31) Article 67 of Regulation (EC) 883/2004.

(32) Former Regulation (EEC) 1408/71 had no general rules on waiving residence clauses, and this has to be regulated in the chapter on family benefits (Article 72).

(33) For example, Case C-394/13 *B.*, EU:C:2014:2199 (registered permanent residence without habitually residing in the state cannot suffice); C-589/10 Wencel, EU:C:2013:303 (habitual residence only in one Member State); C255/13 I, EU:C:2014:1291 (long-term residence not necessarily means habitual residence); C-308/14 *Commission v. United Kingdom*, EU:C:2016:436 (admissibility of the right to reside test for child benefit and child tax credit).

(34) Case C-41/84 *Pinna*, EU:C:1986:1.

(35) Case C-333/00 *Maaheimo*, EU:C:2002:641.

Although it is in the exclusive competence of the Member States to legislate family benefits, they are not completely free when doing do. EU law has to be respected as well. The way of living is not so static anymore. Although perceptions of family and family members change in time and in place, another element has to be added, i.e. the promotion of mobility within the EU, especially the freedom of movement of workers. Many people live in one Member State and work in another.[36] And, workers shall be treated equally.

It might be noted that many receiving Member States, i.e. Member States where workers perform economic activity, try to limit family benefits for children of such workers, who are living in another Member State. The most far-reaching limitation seems to be legislated by Austria. Since the beginning of 2019, family benefits (and tax relief for children) were adjusted to the standard of living in the Member State where children reside, arguing that children should be treated equally in the Member State of their residence and that Staff Regulations also provide for adjustment of pay and benefits. Hence, prices among Member State should be compared according to Eurostat findings. Only monetary amount but not the value of family benefits might be distinct. However, Austrian Federal Financial Court asked the CJEU for a preliminary ruling whether such national law is in line with the EU law, in particular with prohibition of discrimination (of workers), providing equal social advantages to them and coordination of social security (in this case family) benefits. Moreover, the European Commission started an infringement procedure[37] and in May 2020 lodged a claim against Austria before the CJEU,[38] which issued the judgment on the merits in 2022.[39] The main argument was discrimination on the grounds of nationality.

Already in the case of *Trapkowski*,[40] the CJEU argued that Article 67 of the Social Security Coordination Regulation establishes the principle that a person may claim family benefits for members of his or her family who reside in a Member State other than that responsible for paying those benefits, as if they resided in that latter Member State. This was reiterated in the above mentioned judgment in the case Commission against Austria. The CJEU argued that a person may claim family benefits for his or her family members residing in a Member State other than the Member State competent for paying those benefits, as if they were residing in the latter Member State. Migrant workers must be able to benefit from the social policies of the host Member State under the same conditions as national workers, since they contribute to the financing of those policies through the taxes and social contributions which they pay in that State by virtue of their employment there. Member States cannot, without infringing that regulation, carry out an adjustment of family benefits according to the

(36) There were approximately 1.8 million cross-border workers reported in the EU and EFTA at the end of 2022. This represents an 8% increase in comparison to 2021. European Commission, Annual Report on Intra-EU Labour Mobility 2023, EU 2024.

(37) See https://ec.europa.eu/commission/presscorner/detail/EN/IP_19_4253.

(38) EC Press release: Indexation of family benefits, child tax credit and family tax credits: Commission takes Austria to Court for discrimination, Brussels, 14 May 2020, https://ec.europa.eu/commission/presscorner/detail/en/IP_20_849.

(39) C-328/20 – *Commission v Austria* (Indexation des prestations familiales), EU:C:2022:468.

(40) Case C378/14 – *Trapkowski*, EU:C:2015:720.

State of residence of the beneficiary's children. Moreover so, if Only the recipients of family benefits whose children reside outside Austria are subject to the mechanism for adjusting the amount of those benefits on the basis of the price levels and purchasing power in their children's place of residence. Such a mechanism does not apply to family benefits granted for children residing in different regions of Austria, even though there are differences in price levels of a scale comparable to those which may exist between the Republic of Austria and other Member States.

Article 4 of the Social Security Coordination Regulation and Article 7(2) of the Regulation 492/2011 (hereafter Free Movement of Workers Regulation) give concrete expression, in their respective fields, to the principle of equal treatment laid down in Article 45(2) TFEU, which protects the workers concerned against any discrimination, direct or indirect, based on nationality resulting from the national laws of the Member States. In particular, all the social and tax advantages which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory are covered. Hence the CJEU found that social security based family benefits and fiscal and social advantages (such as tax credits or relieves for children) have to be provided to EU workers and could not find a justification for treating migrant workers whose family members reside outside of Austria distinctively.

Moreover, some courageous Austrian authors[41] argued even before the CJEU decision was taken that such unsuitable cost-saving budget measure contradicts Union law. Consequently, The Austrian administrative authorities would be therefore obligated to leave (parts of) the provisions of Austrian law incompatible with Union law unapplied. Furthermore, the Judiciary would be obliged to do so, too. After all, since the Austrian legislation is obviously incompatible with primary Union law, authorities or courts are not even required to refer the matter to the CJEU. Yet, from a practical point of view, the Austrian regulation concerned has already been referred to the CJEU. But the CJEU ruled against such Austrian provisions without any limitation *ratione temporis*. Migrant workers could claim the full amount of family and tax benefits for the entire period, also retroactively (which never will all do and Austria did make some saving after all).

The questions and arguments seem very similar to the ones in the case C-802/18 *Caisse pour l'avenir des enfants*, where both regulations were applicable (the Social Security Coordination Regulation and the Free movement of Workers Regulation).[42] Also Luxemburg amended its legislation, with the effect as of August 2016 with the aim to focus more on children by granting them individual rights, rather than perceiving them as family members of a (frontier) worker. Already before, i.e. in 2008, Luxembourg adopted a new approach concerning welfare of children. Through reforms in fiscal

(41) F. Marhold, C. P. Ludvik, Thoughts about Indexing Family Benefits: Are authorities permitted to apply the Austrian indexation of family benefits? The primacy of EU law and the right/obligation to request a ruling from the Court of Justice of the European Union, European Journal of Social Security (EJSS), 22(3) 2020, p. 273.

(42) G. Strban, Case C-802/18 Caisse pour l'avenir des enfants v FV, GW: Equal treatment of workers or of children?, Maastricht Journal of European and Comparative Law (MJ), 2020, Vol. 27(4), p. 522.

matters and family benefits,[43] the government recognised the child as an individual. In 2010, it abolished the right to family benefits (including child bonus) for young people, who reached their majority, unless they were still in secondary education. The government introduced financial aid for young people in higher education residing in Luxemburg, as an individualised and universal right, instead.[44] In 2016 the next step was taken by abolishing all references to the '*family group*'. Since 2016, a new universal benefit, named benefit for the future of the children, replaces the traditional family benefit and the *child bonus*.[45]

The Luxembourg case is interesting also due to the composition of a family. Families are no longer composed only of (biological) parents and minor children (as the definition of a standard beneficiary according to the ILO Convention 102 would indicate). Less traditional types of family have to be considered as well. Among them are e.g. adoptive families, families with same-sex parents, single-parent or lone-parent families, and reconstituted families.[46]

Luxembourg authorities rather straightforwardly argued that the goal of national law was to endow a personal right of a child and to protect national administration, since broadening of personal scope of application would present a disproportionate burden for the family benefits system of Luxemburg, which 'exports' approximately 48 percent of its family benefits.

The Court however rejected both arguments. It established that even if for national residents it might be a right of a child, there is no personal right of a child involved when granting it to biological children of non-resident workers. Moreover, even if granting a personal right to a child might be legitimate objective, indirect discrimination merely for budgetary and administrative reasons in neither suitable nor necessary to achieve such objective. Requirements for granting such family benefit might be linked to the common household or predominant maintenance of a child, without distinguishing between resident and frontier workers.

(43) See case C-177/12 Lachheb, EU:C:2013:689, classifying child bonus as a family benefit, subject to anti-overlapping rules. See also case C-347/12 Wiering, EU:C:2014:300, specifying which family benefits are of the same kind, which led to proposed amendment of the Regulation (EC) 883/2004 in December 2016.

(44) However, residence condition has been perceived as disproportionate and indirectly discriminatory (also towards children of frontier workers, residing in another Member State). Case C-20/12 Giersch, EU:C:2013:411. Compare with case C- C-352/06 Bosmann, EU:C:2008:290, where falling back to the Member State of residence is allowed only, if benefits are not provided in the Member State of work.

(45) The new rule applies to children born after 1 August 2016, to children of a person who started working in Luxembourg after that date, and to persons with children who settle down in Luxembourg after that date. N. Kerschen, Changes in Luxembourg's Welfare System (1998–2018): Coalition Governments and Europeanisation as Major Driving Forces, in: S. Blum, J. Kuhlmann, K. Schubert (eds.), Routledge Handbook of European Welfare Systems, 2nd Edition, Routlidge 2020.

(46) Single parenthood typically results from separation, divorce or the death of a parent. Other factors include the absence of a parent for prolonged periods (e.g. due to migration or illness or imprisonment, so-called de facto single parenthood), unintended pregnancy or the choice to raise a child alone. Reconstituted families are families with step-parents and step-children, also known as 'blended families', 'step-families', 'patchwork families' and 'recomposed families'. These consist of a couple with children from previous relationships, as well as any children that the couple may have together. V. Jordan, K. Stewart, B. Janta, Mechanisms supporting single parents across the European Union, European Platform for Investing in Children (EPIC), European Union 2019, p. 2.

It seems that by doing so, the CJEU gave priority to workers and their freedom of movement rather than family policy considerations of a Member State. As a consequence of previous CJEU judgments, Luxemburg had to put an end to a universal right of young people and went back to a family model.[47]

It will be interesting to observe the future cases on family (and tax) benefits, from the perspective of equal treatment. Since migrant workers have to be treated equally and not non-moving children, the question was raised concerning a moving child of a non-moving worker.[48] Hence, the situation is reversed comparing to the mentioned Austrian case. The dependent child exercised the right to move and reside freely in another Member State, while the worker has not made use of her right of free movement, but was nevertheless disadvantaged. The tax relief for such dependent child was abolished since the child also received an Erasmus+ grant. The question remains whether there is sufficient link between such movement and cross-border provision of family (and tax) benefits.

4. UNITY OF APPLICABLE LEGISLATION

Family benefits are of a specific character. They are granted on behalf of dependent persons (children as entitling persons). Therefore, the equality principle does not only apply but also the principle of unity of applicable legislation is of the utmost importance. It determines which Member State is competent for providing family benefits, if they are provided in both Member States, the Member State of employment (for example of a parent)[49] and the Member State of residence of children.

A complete and uniform system of conflict rules has to ensure that persons moving within the EU should be subject to the social security system of only one Member State.[50] This rule has a so-called exclusive and overriding effect. The first term ('exclusive') expresses that, in principle, the legislation of a single Member State is only applicable for collecting social security contributions and for granting the benefits. The possibility of the other Member States' social security schemes being simultaneously applicable for the same person in the same time period is excluded. The 'overriding' or 'binding' effect means that the designated social security system has to be applied,

(47) In case C-401/15 *Depesme and Kerrou* EU:C:2016:955, students, who have reached their majority, are once again considered as financially dependent family members entitled to derived rights. This approach is in line with CJEU case law, but it is not in line with the 'revolution' initiated by Luxembourg, in 2007, on the welfare of children, the recognition of children as individuals, and European citizenship. N. Kerschen, Changes in Luxembourg's Welfare System (1998–2018): Coalition Governments and Europeanisation as Major Driving Forces, in: S. Blum, J. Kuhlmann, K. Schubert (eds.), Routledge Handbook of European Welfare Systems, 2nd Edition, Routlidge 2020.

(48) Pending CJEU case C-277/23, lodged 28.4.2023.

(49) There is a separate rule for pensioners. They are entitled to family benefits under the legislation of the Member State competent for their pension. This provision (Article 67 of Regulation (EC) 883/2004) is not limited to pensions linked to previous economic activity. Pensions paid in the event of death, like the German pension for bringing up children are also covered. Case C- 32/13 *Würker*, EU:C:2014:107.

(50) Article 11 of Regulation (EC) 883/2004.

despite any other conditions of that legislation, that is, even if national legislation as such would not include EU migrants in its social security system.[51]

It has to be noted that according to the general rule, economically active migrants are subject to the legislation of the Member State where they work (*lex loci laboris*). Non-active migrants are as a rule subject to the legislation where they reside (*lex loci domicilii*).[52]

In its endeavour to provide the best possible protection to EU citizen, the CJEU at times might set aside specific rules of the Social Security Coordination Regulation and directly apply the more general provisions of the Treaties, such as the freedom of movement, the free movement of goods and services, and the concept of EU citizenship. A good example concerning family benefits is the decision in the case of *Bosmann*.[53] Until this case, the CJEU upheld the principle of exclusive application of the designated Member State.

In the *Bosmann* case, the CJEU departed from the strong and overriding effect of the principle of unity of the applicable legislation. It argued that while Germany (a non-competent state) was not compelled to provide child benefits, the Social Security Coordination Regulation did not preclude German authorities providing such benefits when they are subject to the condition of residence on its territory. More specifically, the Member State of residence cannot be deprived of the right to grant child benefits to those residing within its territory. Some argue that the decision in the *Bosmann* case contravenes the binding effect of the Social Security Coordination Regulation, and that basic principles of social security coordination could be questioned. Others argue that the principle of unity of the applicable legislation has to ensure that complexities arising out of simultaneous application of several social security systems do not have adverse impact on the fundamental right of the free movement of EU citizens.[54]

It could be argued that it becomes increasingly obvious that the CJEU, in certain cases, perceives the Social Security Coordination Regulation as too technical and inflexible, and rather relies on the more general principles of EU law. Of course, this is only the case when general principles lead to a more favourable situation for the person moving within the Union,[55] according to the so-called *favourability* principle

(51) Y. Jorens and F. Van Overmeiren, General Principles of Coordination in Regulation 883/2004, European Journal of Social Security (EJSS), 11(1-2) 2009, p. 72.

(52) H.-D. Steinmeyer, Title II Determination of the legislation applicable, in M. Fuchs and R. Cornelissen (eds.), EU Social Security Law, C.H. Beck, Hart, Nomos 2015, p. 144.

(53) Case C-352/06 Bosmann, EU:C:2008:290. Mrs Bosmann, a Belgian national residing in Germany, took up employment in the Netherlands and the latter became competent. As a consequence, Germany ceased paying family benefits for her two children studying in Germany. Mrs Bosmann was disadvantaged by the coordination regulations, since she was not entitled to the child benefits in the Netherlands, where they are granted up to the age of 18. Students who are studying in the Netherlands may be entitled to study grants.

(54) More on the discourse in P. Schoukens and L. Monserez, Introduction to Social Security Co-ordination in the EU, in Ruess, Leuven, 2010, p. 40.

(55) G. Strban, Social security of EU migrants – an interplay between the Union and national laws, in M. Király and R. Somssich (eds.), Central and Eastern European Countries after and before the accession, ELTE 2011, p. 88.

or *Petroni* principle.[56] It emphasizes that the application of social security coordination law cannot result in a worse situation for the moving person than the application of purely national law.

In the *Bosmann* case, there was a deviation from previous case law, which is not well recognized in the *Bosmann* judgment itself. Nevertheless, the CJEU confirmed its position in the case of *Hudziński and Wawrzyniak*.[57] The CJEU went even further. In the *Bosmann* case, there was no entitlement to family benefits in the competent Member State (the Netherlands), therefore, Germany could still provide family benefits on the basis of national law. However, in the *Hudziński and Wawrzyniak* case, there was an entitlement to family benefits in Poland. Polish seasonal and posted workers were not disadvantaged by exercising the right to free movement and working in Germany. They neither lost nor suffered any reduction of family benefits.

The argument that a non-competent Member State is not deprived or is allowed to pay family benefits might be misleading. Family benefits were indeed refused; otherwise, there would not have be a case before the CJEU. The exclusion from family benefit provisions is actually prohibited, since it could constitute a disadvantage for migrant workers. National courts followed the arguments of the CJEU in the mentioned cases and granted the family benefit.[58]

However, the CJEU argued that in order to prevent overlapping of benefits, the German court was allowed to deduct the Polish family benefit from the German one and pay only the difference. This rule of deducing the amount of family benefits from another Member State applies (and there is no discretion), even if the entitlement to family benefits exist but family benefits would actually not be claimed in that Member State.[59]

The case of *Franzen*[60] also involved family benefits, but the Member States were reversed comparing to the *Bosmann* case. The CJEU argued that the Dutch and the German legislations do not subject the right to child benefits to conditions of employment or insurance. Consequently, the mere fact of residence in the Netherlands is sufficient for entitlement to child benefits, regardless that Germany was a competent Member State due to (albeit very limited) employment on its territory.[61] Although the CJEU is trying to uphold the rules on single legislation applicable, it seems to have developed an exception when non-contributory benefits are granted in the Member State of residence (that are not provided in the competent Member State).

(56) Case C-24/75 Petroni, EU:C:1975:129.

(57) Case C-611/10 *Hudziński and Wawrzyniak*, EU:C:2012:339.

(58) Following the Case C-352/06 Bosmann, the fiscal court of Köln granted the family benefit for the disputed period, since the right to German *Kindergeld* is not excluded by EU law. Finanzgericht Köln, 10 K 4830/05, 25.09.2008. Follow up on the *Hudziński and Wawrzyniak* judgment, see Bundesfinanzhof, III R 8/11, 16.5.2013.

(59) Case C-4/13 *Fassbender-Firman*, EU:C:2014:2344.

(60) Case C-382/13 – *Franzen and Others*, EU:C:2015:261Case

(61) See also case C-95/18 – *van den Berg and Giessen*, EU:C:2019:767.

5. PROTECTION OF THE RIGHTS IN COURSE OF ACQUISITION AND OF ACQUIRED RIGHTS

The principle of protection the rights in the course of acquisition might play a role only when certain insurance, employment or residence period would be required. Especially insurance period might be required case with parental benefits (in the part extended over pure maternity and paternity benefits, which are coordinated together with sickness benefits).[62] However, such benefits are unlikely (rightfully so or not) to be coordinated as family benefits.

Moreover, it should be noted that the principle of protecting the acquired (vested) rights is guaranteed by the exportation of benefits. However, the notion of the 'export' of family benefits might be misleading from a legal point of view. The Social Security Coordination Regulation obliges Member States to pay family benefits, for example, to workers whose children reside in another Member State. In this case, there is no actual payment (export) to another country. However, benefits might be provided to a person actually caring for a child[63] and – in this sense – exported to another country. Nevertheless, the export of family benefits is usually understood in a broader way, that is, when family benefits have to be paid for children residing in another country.

Such exporting was contested by some Member States, arguing that paying for children in another country might not follow the policy aims behind these benefits. These concerns found their way in to the Conclusions of the European Council meeting on 18 and 19 February 2016 (the so-called 'Brexit' agreement, but special arrangements, due to the vote on the UK referendum to leave the EU, ceased to exist).[64] Annex V to these conclusions contained the declaration of the European Commission that a proposal for amending the Social Security Coordination Regulation should be made. It would give the Member States, with regard to the exportation of child benefits to a Member State other than that where the worker resides, an option to index such benefits under the conditions of the Member State where the child resides. The Commission considered that these conditions included the standard of living and the level of child benefits applicable in that Member State.

There are certain problems related to this declaration. It is not clear exactly which benefits are 'child benefits', since the notions used in the Social Security Coordination Regulation are 'family benefits' and 'family allowances'.[65] Alternatively, could this maybe only refer to classic child benefits? Moreover, if a worker's residence is decisive, this might exclude frontier and seasonal workers. It might place pressure on family reunification, since family members could come to reside with the worker. Additionally, which rules should be applied for indexation, what data are used to determine the standard of living and the level of benefits, and will the national legislation have to foresee such option for indexation?[66]

(62) Title III, Chapter 1 Regulation (EC) 883/2004.

(63) Article 68a of Regulation (EC) 883/2004.

(64) Brussels, 19 February 2016, EUCO 1/16. The UK referendum was held on 23 June 2016.

(65) Family allowances are still mentioned in Article 15 of Regulation (EC) 883/2004.

(66) Probably yes (C-4/13 *Fassbender-Firman*). Extensively B. Spiegel, *Export of family benefits* (ERA, 2016).

However, there are other problems with adjusting family benefits, which are of a more general nature. The CJEU already argued that the old rule under which France could restrict the export of family benefits to the national level in the Member State of children's residence is contrary to the provisions of the TFEU.[67] The heads of state have now decided that the arrangements for the UK (including indexation of child benefits), if it decided to remain in the EU, are 'fully compatible with the Treaties'.[68]

However, the CJEU argued to the contrary. In the case of adjustment of Austrian family (and tax) benefits mentioned above, it established that the conformity with EU law of the indexation mechanism which had been envisaged by the new settlement for the United Kingdom within the European Union, two factors should be noted. First, that settlement never entered into force and the Commission did not therefore submit a proposal to amend Regulation (EC) No 883/2004 allowing Member States to index social benefits for children residing in a Member State other than that in which the worker resides. Secondly, and in any event, if such an amendment had been adopted by the EU legislature, it would have been invalid under Article 45 TFEU.[69]

Exporting or not of family benefits is closely related to the principle of equal treatment (and adjusting cross-border family benefits) already discussed in the text above.

6. GOOD ADMINISTRATIVE COOPERATION

The need for good administration, following the principle of mutual trust and sincere cooperation, is emphasized when benefits for specific social risks are coordinated. Effective exchange of information is essential also when providing family benefits to migrating workers and children themselves. Family benefits require special attention, since parents might be working in different Member States than the one they are living in. Moreover, the CJEU observed that family benefits, by their nature, could not be regarded as payable to an individual in isolation from his/her family circumstances. Moreover, it is not always easy to determine the place of residence (of entitling children or entitled adults, or adults claiming the benefit).

All these examples show the need for a structured exchange of social security information. Forms are unified to enable a claimant lodging only one claim in one of the EU official languages, and strict rules apply to the substance and format of exchanged information. However, in practice some Member States are more and some are less eager to share social security information, also the one related to family benefits. Moreover, families (however composed) have to disclose the cross-border element to the competent institutions.

(67) Case C-41/84 *Pinna*.

(68) Point I.(2) of the European Council Conclusions (18 and 19 February 2016).

(69) Para. 57 of the Judgment in case C-328/20 – *Commission v Austria (Indexation des prestations familiales)*, EU:C:2022:669.

7. CONCLUDING THOUGHTS

Family benefits are one of the delicate issues for the families (however they are composed) whose member(s) move across borders in the EU. Free movement is one of the main pillars of the Union integration, providing for acknowledging the differences among the EU peoples and contributing to a lasting peace in the Union. The CJEU does not have an easy task in promoting such free movement, even if it means going against the fundamental principles of social security coordination or, better, providing for exemptions to such principles. It can be only hoped that also Colleague Spiegel will actively contribute to this specific topic of social security coordination in the EU for many more years to come.

15 THE ADMINISTRATIVE COMMISSION: AN INDISPENSABLE BODY OF COOPERATION

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Since 1 January 1995, date of accession of Austria to the European Union, Bernhard Spiegel has played an active role in the Administrative Commission for the coordination of social security systems. But even before that date he showed a fascination for the functioning of the European social security coordination system during the negotiations with the European Commission leading to the Treaty establishing the European Economic Area which entered into force on 1 January 1994. He was, at that time, a member of the Austrian delegation of the EFTA team. The negotiations with the EFTA countries started just after my nomination as head of unit responsible for social security coordination. The Commission negotiation team consisted of two persons: Peter Altmaier, the first person I had recruited, and myself. I keep excellent memories about these negotiations with the EFTA team characterised by a very open, constructive and transparent atmosphere.

The Administrative Commission plays an extremely important role in the practical implementation of the social security regulations. The often complex and technical provisions contained in these regulations are to be implemented by the authorities and institutions of the Member States. This is possible only if there is a good and close cooperation between the institutions and the competent authorities of the Member States. The raison d'être of the Administrative Commission is to facilitate and strengthen such cooperation.

The Administrative Commission takes a rather curious position in Union law. Even when it is not one of the institutions of the Union within the meaning of Art. 13 TEU, various tasks, enumerated or referred to in Article 72 of Regulation 883/2004, have been delegated to this body by the Union legislature. One of these tasks is to clarify administrative questions and questions of interpretation arising from the provisions of the social security regulations. To this end the Administrative Commission adopts decisions which are published in the Official Journal. For constitutional reasons decisions of the Administrative Commission do not have a binding character (98/90, Romano; C-202/97, Fitzwilliam). Therefore, a national court is not bound by a decision of the Administrative Commission. However, the lack of legally binding effect does not prevent the decisions of the Administrative Commission from having authoritative character. The members of the Administrative Commission are experts in a field which is characterised by its complexity. They often have contributed to the wording of provisions of the social security regulations, not only in their capacity as members of the Administrative Commission (Article 72 (f) of Regulation 883/2004), but also as experts in the framework of negotiations in the Social Questions Group of the

Council. They are very well placed in interpreting provisions to which they themselves have contributed. The authoritative character of decisions of the Administrative Commission is also illustrated by the fact that the Court sometimes refers to these decisions to underpin its interpretation of provisions of the social security regulations[1]. In its judgment in case C-236/88 (Commission versus France), the Court pointed out that practical problems in the application of the regulations may always be referred to the Administrative Commission. In its case-law[2] the Court underlined the important conciliatory role of the Administrative Commission in cases where no agreement is reached between the institutions involved concerning the validity and/or content of a document certifying the applicable social security legislation. In addition, in its case-law the Court has attached great importance to the principle of sincere cooperation within the meaning of Art. 4(3) TEU. This means that Member States are not free to simply ignore or deviate from decisions of the Administrative Commission. It is also for this reason that the competent authorities of Member States are obliged to ensure[3] that their institutions are aware of, and apply all the Union provisions, legislative or otherwise, "including the decisions of the Administrative Commission".

In spite of its genesis (European Convention converted into Regulation) and its composition (government representatives), the Administrative Commission is not an international body, but a body subject to Union law, which is "attached to the European Commission"[4]. In accordance with Article 1 of its rules[5], it is a specialized body of the European Commission. This expresses the idea that the members of the Administrative Commission not only represent the interests of their respective Member States but also have to serve the interests of the Union, to the benefit of the persons making use of their right to free movement with the Union.

As said before, the Administrative Commission functions as a body to deal at Union level, with all problems concerning the application of the social security regulations and to improve those regulations. Obviously, the Commission has the right of initiative with regard to legislative proposals[6], but in order to fulfill this role correctly it depends on information delivered by the Administrative Commission. In fact, the Commission needs detailed information about the content of national legislation as well as on the impact developments of case-law of the Court or changes in national legislation might have on the application of the regulations and on the results of such application. On this point the Administrative Commission has done, on several occasions, very efficient work. To illustrate this, I refer to a source of long-lasting and vivid controversy, namely the so-called "*special non-contributory benefits*". The criteria that have to be fulfilled by benefits to be considered as "*special*" and as "*non-contributory*", currently laid down in Article 70 (1) and (2) of Regulation 883/2004, are actually the result of such fruitful cooperation between all actors of the Administrative Commission in the beginning of this century. {In fact, these criteria have not changed in comparison with

(1) 238/81, Van der Bunt; C-620/15, Rosa Flussschiff.

(2) C-202/97, Fitzwilliam; C-178/97, Banks; C-2/05, Herbosch Kiere; C-620/15, Rosa Flussschiff.

(3) Article 89(3) of Regulation 987/2009.

(4) Article 71(1) of Regulation 883/2004.

(5) Official Journal C 213 of 6 August 2010, page 20).

(6) Article 17(2) TEU.

those contained in the Commission proposal to Article 4(2a) of the old Regulation 1408/71, as amended by Regulation 647/2005}[7].

As Guy Perrin indicated in 1961[8], there are a number of non-contributory benefits (financed not by contributions but by taxes) which can be considered borderline benefits arising from the progressive integration, in various legislations, of social assistance into social security. These benefits were initially called " *non-contributory benefits of a mixed type",* since they have the characteristics of social security and social assistance. As with the current Regulation 883/2004, the old Regulations 3 and 1408/71 applied only to legislation concerning social security. Also, in the same way as Regulation 883/2004, Regulations 3 and 1408/71 excluded explicitly social (and medical) assistance from their material scope. However, a definition of the term "social security" or "social assistance" was, and is, not to be found in any of these Regulations. The abundant case-law of the Court in the 1970's and 1980's concerning such mixed-type benefits clarified that a number of benefits which were considered "social assistance" under the definition of the national legislation of the Member State concerned actually fell under the material scope of Regulation 1408/71[9], with all its consequences, including the waiving of residence clauses for entitlement to benefits.

As a reaction to this case-law the European legislature created in 1992 a separate coordination system for these mixed type benefits by adopting Regulation 1247/92[10]. The objective of this Regulation was two-fold. First, it "translated" the case-law of the Court into the wording of the Regulation, by stipulating in Article 4(2a) that Regulation 1408/71 also applied to "special non-contributory benefits". The second objective was to counter the Court's case-law by preventing mixed-type benefits from being exported. The new Article 10a(1) of Regulation 1408/71 stipulated that persons "to whom this regulation applies" should be granted the "special non-contributory benefits" listed in Annex IIa "*exclusively in the territory of the Member State in which they reside*".

In three judgements concerning UK benefits listed in Annex IIa as inserted by Regulation 1247/92, the Court confirmed[11] the validity of the separate coordination system for "special non-contributory benefits". It meant that benefits listed in Annex IIa were no longer exportable. In all three judgements the Court concluded that the benefits in question had to be considered as "special non-contributory benefits" by reason of the fact that they were listed in Annex IIa[12]. Not surprisingly, the list of benefits listed in Annex IIa became longer and longer.

(7) Official Journal 117 of 4 May 2005.

(8) Guy Perrin (1961): "Les prestations non contributives et la sécurité sociale", Droit social, page 179.

(9) Examples: guaranteed income for old people in Belgium (1/72, Frilli), mobility allowance in the UK (C-356/89, Stanton Newton), allowances of the Fonds National de Solidarité in France (24/74, Biason; 93/86, Giletti), social pension in Italy (139/82, Piscitello).

(10) Regulation 1247/92 of 30April 1992, Official Journal L 136of 19 May 1992.

(11) C-20/96 (Snares), C-297/96 (Partridge) and C-90/97 (Swaddling).

(12) C-20/96, para 32; C-297/96, para 33; C-90/97, para 24.

However, in subsequent case-law the Court changed its position. It ruled that the simple fact that a benefit was listed in Annex IIa was not in itself sufficient to mean that the benefit in question was indeed a "*special non-contributory benefit*". On the contrary, for every benefit in question it had to be examined whether it was indeed a "*special*" and "*non-contributory*" one. The Jauch judgment[13] concerning the Austrian care allowance, listed in Annex IIa, marked this new phase of case-law. Referring to the objective of Articles 39-42 EC (corresponding to Articles 45-48 TFEU), the Court stated that, even when it is permissible for the Union legislature to adopt provisions which derogate from the principle of exportability of social security benefits, such derogations must be interpreted strictly. After examination of the Austrian benefit in question, the Court came to the conclusion that, notwithstanding its listing in Annex IIa, the benefit was neither "special" nor "non-contributory". According to the Court, the Austrian benefit was a sickness benefit within the meaning of Article 4(1) of Regulation 1408/71 and could therefore not be a "special non-contributory" one within the meaning of Article 4 (2a). A couple of months later the Court examined in the Leclere judgment[14] whether the Luxembourg maternity allowance, listed in Annex IIa, was "special". The Court replied in the negative and declared this part of Annex IIa invalid.

After these two judgments delivered in Spring 2001 it was crystal clear for the Commission that the whole coordination system for "special non-contributory benefits" had to be reviewed. In fact, several benefits concerning other Member States listed in Annex IIa were similar to the ones of Austria or Luxembourg. Therefore, the Secretariat of the Administrative Commission asked all Member States to send in notes giving details about every single benefit listed in Annex IIa, in particular the objective pursued by the relevant national legislation, the conditions for entitlement and the methods to calculate the benefits. In addition, the secretariat sent in a note explaining that it was unavoidable, having in mind the broad interpretation of the terms "sickness benefit"[15] and "family benefit"[16] as given by the Court in its recent case-law, to tighten the conditions for a benefit in order to be considered as "special non-contributory". To this end it provided new criteria for "special non-contributory benefits".

These notes were carefully examined by all delegations and the secretariat in a working group, in which in particular Herwig Verschueren, Jean-Claude Fillon, Carlos de Cortazar, Sebastiao Pizarro and Bernhard Spiegel played a very active role. After a year or so, all delegations in the Administrative Commission agreed about tightening the conditions for a benefit to be considered as "special non-contributory". In addition, all delegations agreed about the need to make the distinction between the two categories of "special non-contributory benefits" much clearer. The first category covers benefits aimed at helping people in financial need[17]. The second category concerns benefits

(13) C-215/99 (Jauch).

(14) C-43/99, leclere and Deaconescu.

(15) C-160/96, Molenaar and C-215/99, Jauch; later confirmed by C-286/03, Hosse.

(16) Joined cases C-245/94, and C-312/94, Hoever and Zachow; C-275/96, Kuusijärvi, C-255/99, Humer; C-333/00, Maaheimo.

(17) *"Guarantee a minimum subsistence income having regard to the economic and social situation of the Member State concerned".*

aimed at helping people who are in need of assistance in order to participate in daily life of society[18].

In July 2003 the Commission presented a proposal[19] to modify the provisions laid down in Regulation 1408/71 concerning "special non-contributory benefits". It contained the new criteria previously discussed and agreed upon by the Administrative Commission. Meanwhile the discussions in Council and Parliament about the 1998 Commission proposal to simplify and modernise Regulation 1408/71 as a whole were in its final stage. When adopting Regulation 883/2004 on 29 April 2004[20], the legislature decided to include in chapter 9 ("*Special non-contributory cash benefits*") the entire text as proposed by the Commission in the aforementioned 2003 proposal without any modification. Indeed, Article 70(1) and (2) of Regulation 883/2004 is a copy of the 2003 Commission proposal concerning the proposed wording of Article 4 (2a) of Regulation 1408/71 and Article 70 (3) and (4) of Regulation 883/2004 copies the 2003 Commission proposal's text concerning the proposed Article 10(1)[21] of Regulation 1408/71. However, the content of several annexes, including Annex X listing the "special non-contributory benefits" had not yet been decided by the legislature when it adopted Regulation 883/2004 on 29 April 2004. This was done only in 2009 when the legislature adopted Regulation 988/2009[22].

The developments starting with the Jauch and Leclere judgments also had consequences for the negotiations with the 10 candidate countries. In fact, the Commission refused the inclusion in the annex listing the "special non-contributory benefits" of benefits which did not correspond to the new strict criteria. The Commission explained the candidate countries that there would be no difference in treatment between Member States, "old" or "new", since it had launched a process leading to a complete revision of the annex for all Member states.

Indeed, in order to reflect that the coordination system for "special non-contributory benefits" had really been revised and not only adapted, the 2003 Commission proposal aimed to amend the content of Annex IIa of Regulation 1408/71 as a whole. A large number of benefits which had previously been listed in Annex IIa were not included in the 2003 Commission proposal, since they had to be considered either as "sickness benefits" or as "family benefits" covered by Article 4(1) of Regulation 1408/71.

During the negotiations on the 2003 Commission proposal, three Member States insisted on including five entries in the new Annex IIa that did not, in the opinion of the Commission, correspond to the concept of "*special*" benefits because they concerned "sickness benefits" or "family benefits" within the meaning of Article 4(1)

(18) *"Solely protection for the disabled, closely linked to the said person's social environment in the Member State concerned".*

(19) COM (2003), 468.

(20) Regulation 883/2004 of 29 April 2004, Official Journal L 200 of 7 June 2004.

(21) By stipulating that *"the provisions of Article 10 and Title III of Regulation 1408/71 shall not apply to the special non-contributory benefits"* the Commission proposal countered the consequences of the Court's judgment in the Stinco case (C-132/96).

(22) Regulation 988/2009 of 16 September 2009, Official Journal L 284 of 30 October 2009.

of Regulation 1408/71, as interpreted by the Court. In fact, the UK made it clear that it would never accept the Commission's proposal unless its three entries concerning disability living allowance[23], attendance allowance and carer's allowance were included in Anex IIa. Sweden took the same position regarding its disability allowance and Finland concerning its childcare allowance.

It is important to mention here that these negotiations took place according to the procedures of Article 42 EC[24], which required unanimity within the Council. To avoid blocking the progress made in the other parts of the proposal, the other Member States felt that they had to accept, at least for the time being, the inclusion of these five entries in the Annex, knowing that the Commission would challenge the continuous inclusion of these five entries in the Annex before the Court. Indeed, following the adoption of Regulation 647/2005[25], the Commission brought an action against the legislature before the Court under former Article 230 EC[26]. The purpose of the action, which was without precedent in the field of social security, was to annul Regulation 647/2005 in so far as it retained the five entries in Annex IIa. With its judgement of 18 October 2007[27] the Court indeed annulled the five entries concerned. According to the Court, the benefits in question were "sickness benefits" within the meaning of Article 4(1) and, therefore, could not be "special" benefits within the meaning of Article 4 (2a) of Regulation 1408/71.

Not only did this judgement confirm implicitly the sound work of the Administrative Commission on the new criteria, but it also made clear that these criteria were to be applied without distinction between Member States.

(23) Only the care component of the disability living allowance was disputed by the Commission. The mobility component clearly fulfilled the conditions of being "special" within the meaning of Article 4(2a) of Regulation 1408/71.

(24) Since the entry into force of The Lisbon Treaty on 1 December 2009, Article 42 EC has become Article 48 TFEU. In comparison with the old Article 42 EC, Article 48 TFEU has brought two major changes. First, it provides a legal basis for the coordination of social security not only on behalf of employed mobile workers, but also on behalf of self-employed mobile workers and their dependents. In the second place Council and Parliament together make up the legislature, but unanimity within Council is replaced by qualified majority, accompanied by a brake procedure. See: Rob Cornelissen: *"How difficult is it to change EU social security coordination legislation? A story of changing legal basis"* in PRAVNIK, Ljubljana 2012, 129, pages 57-78.

(25) Regulation 647/2005 of 13 April 2005, Official Journal L 117 of 4 May 2005.

(26) Corresponding to the current Article 263 TFEU.

(27) Case C-299/05, Commission versus Council and Parliament.

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