

60 YEARS OF COORDINATION OF SOCIAL SECURITY SYSTEMS: STILL ROOM FOR IMPROVEMENT

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This concluding chapter aims to make a non-exhaustive evaluation of the EU rules on the coordination of social security systems.^{1 2} Various criteria can be used for this evaluation, primarily by focusing on the social, legal, administrative and financial impact of the provisions on the stakeholders involved (mobile persons, employers, public authorities, etc.). These are also the criteria that have been used in the preparatory studies of the Commission's 2016 proposal for the partial revision of the Coordination Regulations in order to calculate the impact of the current provisions and of possible changes to these provisions (European Commission, 2016a; 2016b).³ The hundreds of pages in the Impact Assessment show how thoroughly the proposal was prepared. For this reason alone it is regrettable that no final agreement was reached in March 2019.

This contribution will not adopt the criteria used in the Impact Assessment, as this would lead us too far. What will be used are the objectives defined in that document. It reads as follows: "It is important that rules are fair (in particular in relation to the relative balance of responsibility between Member States who receive or have received social security contributions and the obligation to pay benefits) and that perceptions of unfairness are properly investigated and addressed when they arise. Further, the rules should be efficient in terms of costs, administrative burden and risk of fraud or administrative error. Finally the rules should be effective in relation to meeting the overall goals of coordination in particular safeguarding the continuity of social security protection as citizens move from one Member State to another" (European Commission, 2016b). This shows that the focus of the Impact Assessment and of the

(1) The author would like to thank Jozef Pacolet and Rob Cornelissen for their useful comments on a previous version of this chapter. The usual disclaimer applies.

(2) For similar evaluations see also: Cornelissen and De Wispelaere, 2019; Swedish National Insurance Board, 1997; Pieters, 1997; Jorens, 2010; Pennings, 2015; Fuchs and Cornelissen, 2015.

(3) The proposal mainly focused on four areas of coordination where, according to the European Commission, improvements were required: economically inactive citizens' access to social benefits, long-term care benefits, unemployment benefits and family benefits. I refer to Spiegel (2019) for an overview of the Commission's proposal as well as the positions of the Council and the European Parliament on this proposal.

proposal itself was clearly on guaranteeing ‘fairness’.^{4 5} To a large extent, these objectives summarise, consciously or not, the three objectives defined by Holzmann et al. (2005) that serve as a benchmark to evaluate the EU policy regarding the protection of social rights of mobile persons (i.e. the portability of social rights)⁶ currently in place:⁷

- *Objective 1 (individual fairness):* no benefit disadvantage for mobile persons. Movements between Member States should not lead to lower benefits or gaps in coverage.
- *Objective 2 (financial fairness):* financial fairness for host and source Member States. No financial burden should arise for the social security institution of one Member State while the social security institutions of the other Member State benefit from any provisions on portability or the lack thereof.
- *Objective 3 (administrative ease):* the administrative provisions on portability or the lack thereof should not cause a bureaucratic burden for the institutions involved and should be easy for mobile persons to navigate.

The extent to which these objectives are achieved under the current legislation will be described briefly, partly based on the contributions published in this volume of *Belgisch Tijdschrift voor Sociale Zekerheid/Revue belge de sécurité sociale* as well as on the presentations of the speakers at the conference on 60 years of coordination of social security systems from a workers’ perspective.

1. INDIVIDUAL FAIRNESS

The Coordination Regulations guarantee the portability of social security rights in the European Union/European Free Trade Association (EU/EFTA). The concept of ‘portability’ has been very well developed by Holzmann et al. (2005) in economic literature. It is understood as the mobile person’s ability to preserve, maintain and transfer acquired social security rights, independently of nationality and country of residence. According to Holzmann, the social protection status of migrants can be

(4) The question is, of course, what can be understood by this term. In the opening speech of the conference on 60 years of coordination of social security systems from a workers’ perspective, Commissioner Marianne Thyssen (2019, this volume) said the following about this: “Fairness means that the rules are equitable to all and not designed to benefit one category of stakeholders to the detriment of others. It means taking into account interests of both sending Member States and receiving Member States. Fairness means rules that support mobile citizens but also take account of the interests of taxpayers and the interest in maintaining adequate social security systems. Fairness also means preserving and improving tools to fight abuses and fraud. Fairness means for me also preserving the business opportunities of the companies and self-employed that make use of free movement in good faith to serve clients across Europe.” Fairness can also be linked to the concept of ‘reciprocity’, which Vandenbroucke (2017) regularly considers to be a possible solution to the challenges of cross-border mobility.

(5) See also the Commission’s communication: “Fairness at the heart of Commission’s proposal to update EU rules on social security coordination”.

(6) See further for the explanation of this concept.

(7) Considerations of fairness can be raised at the individual and country levels. If an individual has contributed to a national social security system, then acquired rights should be portable across time and space as a matter of fairness. Similar considerations apply at the country level. If an individual moves between Member States, denying him or her the financial portability of acquired rights provides a profit for the Member State of origin and imposes a financial burden on the new Member State.

classified into four regimes (Regime I: portability, Regime II: exportability, Regime III: no access, Regime IV: informal). Regime I is the most favourable in terms of formal social protection for migrants. Research by Avato et al. (2009) shows that only a quarter of the total number of migrants in the world are covered by such a regime. It applies, however, to all EU/EFTA citizens moving within the EU/EFTA. This is a good example of the well-developed social protection that the EU offers to mobile persons, which is far from guaranteed in the rest of the world.

A high-quality level of coordination techniques has been developed by the EU legislature to coordinate the variety of social security systems, based on four key principles: (1) prohibition of discrimination, reinforced by the equal treatment of cross-border facts and events (i.e. principle of assimilation), (2) aggregation of periods, (3) exportability of benefits, and (4) determination of a single applicable legislation.⁸ As a result, the Regulation ‘weaves a seamless web of social protection: wherever they find themselves, migrants have uninterrupted access to many social benefits’, as argued by Rennuy (2017). Not least because the personal and material scope has constantly been broadened since 1959. Moreover, as pointed out by Cornelissen (2019, this volume), for some aspects the Coordination Regulations provide social protection which even goes beyond mere coordination, since rights are created which citizens would otherwise not have. It could even be argued that thanks to certain provisions or case-law, the mobile person or the mobile person’s family is guaranteed a level of social protection which is sometimes better than that of ‘non-mobile’ persons. This is because (1) the mobile person’s family as a whole is covered by social security schemes of more than one Member State,⁹ or (2) the mobile person has a right to choose in which Member State s/he claims a specific benefit,¹⁰ or (3) the result of the application of the EU rules has to be compared with the result of the application of the relevant national rules¹¹. The above observations give the impression that the overwhelming

(8) For an analysis of these principles, see: Pennings, 2015; Fuchs and Cornelissen, 2015.

(9) When family members live in a Member State other than the one where the insured person works and/or resides, entitlement to family benefits may arise in more than one Member State (based on employment, receipt of a pension or residence). The Coordination Regulations lay down priority rules in order to define the ‘primarily competent Member State’. However, a Member State may have to pay a supplement (corresponding to the difference between 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 entitled would have received from the secondarily competent Member State. This means that households in Member State A where one of the breadwinners works abroad will, in certain cases, receive higher family benefits than households where the breadwinners work exclusively in Member State A.

(10) Frontier workers can choose where to receive healthcare (in the Member State of residence or in the Member State of employment). Likewise, some persons who reside in a Member State other than the Member State of employment can choose where to claim unemployment benefits when they become wholly unemployed.

(11) When a person has worked in two or more Member States, s/he will be entitled to pensions from each of these Member States at the age of retirement. Each Member State must make two calculations. First, it has to calculate the pension rights based exclusively on its national law. Then it has to calculate the amount of the pension which would result from the application of the relevant EU rules. The pensioner will be entitled to the higher of the two amounts.

ambition of Recital 1 of the Basic Regulation to improve the standard of living and conditions of employment of mobile persons is (gradually) being achieved.¹²

However, we cannot turn a blind eye to some deficiencies in social protection coordination. Firstly, there is a risk of gaps in social protection when people move.^{13 14} This is more and more the case because the current EU rules do not sufficiently take into account new forms of employment (Schoukens, 2019, this volume; Cornelissen and De Wispelaere, 2019; Essers, 2019). The Coordination Regulations have been set up at a time when it was the norm that workers had a full time and a permanent job. However, over the last decades we have seen a significant rise in new types of employment, such as short-time, part-time, on-call or framework contracts. Platform work and telework have become common phenomena. Secondly, the Coordination Regulations have not kept pace with the introduction of all kinds of new forms of social security in Member States. It is true that several new kinds of benefits, such as parental benefits and long-term care allowances, have been brought into the material scope of the Coordination Regulations.¹⁵ Nonetheless, social assistance has always been explicitly excluded from the material scope of the Coordination Regulations.¹⁶ There are, however, a number of non-contributory benefits – financed not by contributions but by taxes – which have the characteristics of social security and social assistance.¹⁷ The question therefore arises as to whether the distinction drawn between social security and social assistance will be tenable in the future, particularly since the difference between these concepts has become blurred (Verschueren, 2019). The recurring discussion about ‘welfare tourism’¹⁸ when talking about access to social assistance for recent incoming EU/EFTA movers definitely raises this question as well. This issue is further elaborated in the ‘financial fairness’ section. Finally, not only the link between social security and social assistance should be strengthened in the future, but certainly also the link between social security and taxation (Weerepas, 2019).

(12) Recital 1 of the Basic Regulation: “The rules for coordination of national social security systems fall within the framework of free movement of persons and should contribute towards improving their standard of living and conditions of employment.”

(13) Of course, the Coordination Regulations cannot guarantee a worker that moving to a Member State other than his/her Member State of origin will be neutral in terms of social security. Given the disparities between the Member States’ social security schemes and legislation, such a move could be advantageous or disadvantageous for the person concerned in that regard (see also: von Chamier-Glisczinski (C-208/07)).

(14) For some examples, see: Essers, 2019.

(15) This is not due to a dynamic legislature but to a dynamic Court of Justice of the European Union.

(16) See Article 3(5)(a) of the Basic Regulation. However, no specific definition of the term ‘social assistance’ (differentiating it from ‘social security’) is to be found in the Coordination Regulations.

(17) It follows from CJEU case-law concerning Regulation 1408/71 that a high number of benefits which were considered ‘social assistance’ by the Member State concerned actually fell within the material scope of the Coordination Regulations, with all its consequences, such as the waiving of residence clauses for entitlement to benefits. The reaction of the legislature to this case law was to create a separate coordination system for “special non-contributory benefits” in order to avoid their exportability. Under Article 70(4) of the Basic Regulation, the “special non-contributory benefits” listed in Annex X are provided exclusively in the Member State in which the persons concerned reside, in accordance with the legislation of that Member State.

(18) Or the so-called ‘welfare magnet’ hypothesis, whereby migrants are attracted to countries that provide more generous welfare (Borjas, 1999).

The same type of ‘mobile persons’ are sometimes treated differently by Member States. This flexibility is allowed by the Coordination Regulations. For example, several Member States limit the export period of unemployment benefits for people looking for a job in another Member State to three months, while in other Member States it can be extended by another three months.¹⁹ As a result, mobile unemployed persons are treated differently depending on the competent Member State. Likewise, some States apply different policies for the aggregation of periods for entitlement to unemployment benefits,²⁰ as well as for the export of family benefits.²¹ In this way the uniform application of the EU rules is at risk and mobile persons’ social rights may be restricted. Such national rules show that one of the main aims of the Coordination Regulations, i.e. making the right to free movement a reality by ensuring that a person is not penalised in the field of social security for having moved from one Member State to another, is under increasing pressure. These national rules are being implemented under the pretext of countering the risks of welfare tourism. However, figures show that these are myths rather than facts (De Wispelaere and Pacolet, 2018b). Nonetheless, this does not mean that the Coordination Regulations should not seek to achieve a more balanced relationship between social contributions and social expenditure (see next section).

Finally, despite a proper social protection guaranteed by the Coordination Regulations, it is a reality that in practice mobile persons do not always take up their social rights. Figures on the extent of this phenomenon are, however, hardly available. The figures reported by De Wispelaere et al. (2019, this volume) only give an overview of the persons who have actually made use of the EU rules. This number is not necessarily equal to the group of eligible persons. Research shows that there can be significant barriers to claiming rights (Fingarova, 2019; Seeleib-Kaiser, 2019). In this context, there is still room for improvement in the provision of information about mobile persons’ social rights. The lack of knowledge of their social rights can be an important informal barrier for mobile persons (Berki, 2019, this volume).

2. FINANCIAL FAIRNESS

The financial implications for individuals and Member States are another important part of the evaluation of the Coordination Regulations. The observation of Schoukens and Pieters (2009) that “the present Regulations pay little attention to the financial side of coordination” still applies today. This is a missed opportunity, since part of the solution to the challenges and controversies faced by the Coordination Regulations

(19) It appears that almost half of the Member States do not provide an extension (Cyprus, Denmark, Finland, France, Croatia, Greece, Sweden, Hungary, Italy, Ireland, the Netherlands, the United Kingdom, Iceland and Norway) (De Wispelaere et al., 2018).

(20) Some Member States require a minimum period of 4 weeks (Finland) or even three months (Denmark and Belgium) before a right to aggregate past periods of insurance completed in another Member State arises.

(21) Since 1 January 2019, Austria has implemented an indexation of the family benefits to the standard of living of the Member State where the children reside.

today lies in the financial aspect.^{22 23} Coordination should attempt to ensure a balanced relationship between contributions and benefits/social rights. After all, we should not forget that Article 48 of the Treaty on the Functioning of the European Union (TFEU) itself, as worded after the Lisbon Treaty, attaches importance to the issue of potential financial implications of the Coordination Regulations.²⁴ Moreover, this attention to the financial impact is present, both with the legislature²⁵ and the judiciary,²⁶ with regard to access to social assistance for recent EU movers (Verschueren, 2019; Devetzi, 2019). The interpretation of the notion ‘unreasonable burden’ is a frequent point of discussion here (Verschueren, 2014; Rennuy, 2017).

To be able to analyse the financial impact of the mobility of persons through the application of the Coordination Regulations, it is important to have a good understanding of the relevant variables. There are three important variables: (1) the extent of mobility in the EU/EFTA; (2) national social security legislation; and (3) the provisions defined in the Coordination Regulations (Figure 1). Let us take an example to explain this. Member States apply different types of family benefits in cash and in kind.²⁷ At European, but even at national level as well, these benefits show considerable differences in terms of eligibility criteria, design and level of benefits.²⁸ Consequently, the number of exported family benefits and the related expenditure will to a great extent be determined not only by the size of the reference group (i.e. number of mobile persons working/residing in a Member State other than the State of the family members) and the priority rules defined by the EU rules on social security coordination, but also by (differences in) eligibility criteria and rates with regard to family benefits. This contribution will only address the impact of the EU provisions themselves. Nonetheless, it is certainly also useful to examine in detail the impact of the other two variables.²⁹

(22) Although the figures reported by De Wispelaere et al., (this volume) show that the financial impact on social security systems is marginal in most Member States.

(23) See also the importance of Case C-515/14 (Commission v. Cyprus) (discussed by Verschueren and Bednarowicz, 2019, p. 124).

(24) “Where a member of the Council declares that a draft legislative act referred to in the first subparagraph would affect important aspects of its social security system, including its scope, cost or financial structure, or would affect the financial balance of that system, it may request that the matter be referred to the European Council.”

(25) See Recital 10 of Directive 2004/38/EC: “Persons exercising their right of residence should not, however, become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence. Therefore, the right of residence for Union citizens and their family members for periods in excess of three months should be subject to conditions.”

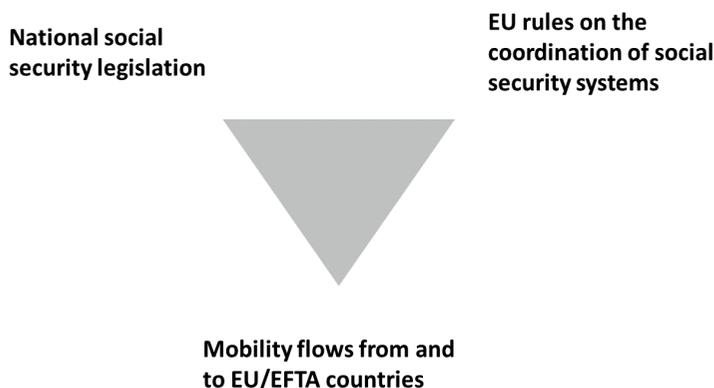
(26) See: Dano, C-333/13; Brey, C-140/12; Alimanovic, C-67/14.

(27) For instance, policy in the Nordic countries is more focused on the development of family benefits in kind.

(28) The MISSOC tables provide more detailed information on the different types of family benefits applicable in Member States as well as their characteristics.

(29) For example, what is the impact of the ‘transitional arrangements’ when countries join the EU or what is the impact of a Member State’s policy to opt for benefits in kind rather than benefits in cash.

FIGURE 1: VARIABLES DETERMINING THE BUDGETARY IMPACT OF THE MOBILITY OF PERSONS THROUGH THE APPLICATION OF THE COORDINATION REGULATIONS



When talking about financial fairness, we must first and foremost talk about fair burden-sharing between Member States.³⁰ Jorens et al. (2013) point out that “whatever type of benefits is concerned, the Coordination Regulations do not properly deal with burden-sharing between the Member States concerned in a given situation.” This is mainly due to the fact that the determination of a single competent Member State is one of the key principles of the Regulation. The determination of the applicable legislation is an important issue both for the mobile person, since it has an impact on what social protection can be enjoyed, and for the employers and Member States concerned, since it determines where social security contributions have to be paid. In determining the competent Member State, one would assume that the legislature seeks a link between the payment of contributions and the entitlement to social security contributions. Apparently this is not always the case.³¹ Moreover, the legislator has provided little or no financial compensation from other Member States.³² Nonetheless, the need for better financial burden-sharing does not necessarily apply to all social benefits to the same extent. This largely depends on the type of benefit and how long

(30) Conceptualised by Renuy (2019) as the ‘integration-protection nexus’.

(31) Verschueren (2001) argues that there is not always a direct link between payment of contributions and entitlement to social security benefits.

(32) This is the case, for example, for frontier workers who become unemployed. Article 6(6) of the Basic Regulation stipulates that the competent institution of the State to whose legislation the person was last subject has to reimburse the State of residence the full amount of benefits paid for the first three months. This period is extended for five months if the person concerned, during the preceding 24 months, completed periods of employment or self-employment of at least 12 months in the State of last employment (Article 65(7) of the Basic Regulation). Sometimes the debits and credits offset each other and the procedure is rather an additional administrative burden.

it will have to be paid by the competent Member State.³³ This automatically draws attention to healthcare and pensions. However, in view of the discussion on ‘welfare tourism’, it may be better to take other benefits into account as well.

Pensioners are entitled to a partial pension from every Member State where they were insured for at least one year, provided that the conditions under national law are fulfilled. The amounts of these pensions correspond to the insurance periods completed in each of the Member States concerned. They are not subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the pensioner resides in a Member State other than that in which the institution responsible for providing pensions is situated. The objectives of ‘individual fairness’ and ‘financial fairness’ for the pension branch therefore seem to be achieved by the Coordination Regulations.

In contrast, the objective is not achieved in the area of healthcare since there is no arrangement to share the health costs of a migrant who contributed to the public health institutions of various Member States.³⁴ Workers moving between Member States have immediate access to the healthcare system of their new Member State without having contributed to the social security system. For instance, a person who worked in Slovenia for 30 years and moved to Italy in order to work there is immediately entitled to healthcare in the latter State at its expense, although the person never contributed to the healthcare system in Italy.

Furthermore certainly relevant is the payment of healthcare and long-term care to pensioners, particularly given its increasing importance in an ageing society. Special conflict of law rules have been created for pensioners with regard to access to healthcare.³⁵ These special rules not only have an impact on which healthcare can be enjoyed by the pensioner, but they also determine which Member State has to bear the costs for the pensioner’s healthcare. For instance, a pensioner who receives a pension under the legislation of two or more Member States, of which one is the Member State of residence, will receive healthcare from and at the expense of the institution of the place of residence. A pensioner who has worked successively for 1 year in Slovakia and then 39 years in Austria and who returns to Slovakia after his retirement will receive two pensions, one from Slovakia and one from Austria. He is entitled to healthcare provided in accordance with Slovakian legislation, the costs of which will be borne entirely by Slovakia. Especially those Member States with a high number of outgoing frontier workers, but also Member States receiving a high number of return migrants, may be negatively affected by this EU provision, as it is likely that the main share

(33) For instance, Pieters (1997) makes a distinction between schemes dealing with income replacement and schemes dealing with cost compensation. He proposes that the schemes dealing with income replacement should be coordinated on the basis of the ‘*lex loci laboris*’ principle, whereas the schemes dealing with cost compensation should be coordinated by the ‘*lex loci domicilii*’ principle.

(34) There is always one public health system that has to bear all the costs.

(35) Articles 23 to 30 of the Basic Regulation.

of both groups will also have a partial professional career in their Member State of residence.^{36 37}

Furthermore, when the principle of aggregation for entitlement to unemployment benefits is applied, the objective of fair burden-sharing may not be achieved when a person only worked in his or her new Member State of residence for a very short period of time before becoming unemployed. Frontier workers who become wholly unemployed are another example. Their Member State of residence is competent to pay the unemployment benefit while social security contributions were paid in the Member State of employment. Although it is true that the EU rules provide for a system of reimbursement, this system is not always seen as a satisfactory compensation. Finally, the provisions on the coordination of family benefits also give rise to financial concerns in some Member States. However, there does not seem to be an immediate imbalance between contributions and benefits in this branch of social security.³⁸

The above examples illustrate the weight that is attached to the determination of the competent Member State. It has important financial consequences, both for the receipt of social security contributions and for the payment of social benefits. In some cases there is a need to strike a better balance between what Member States receive in terms of contributions and what they have to pay in terms of benefits. Possible solutions are diverse and can differ according to the type of benefit or situation.

3. ADMINISTRATIVE EASE

Administration should be dealt with as efficiently as possible between the competent public authorities as well as between the mobile person and the competent public authorities. In addition, administrative obligations, as well as administrative cooperation, should ensure that errors and fraud are kept to a minimum. This should improve the perception of the fairness of the rules.

Today, most documents are still exchanged on paper, by post or by email among the competent public authorities in the EU. This will change when the Electronic Exchange of Social Security Information (EESSI) system is implemented (Rentola,

(36) Already in 2007, critical remarks about these EU provisions were made with regard to their budgetary consequences. In its note to the Administrative Commission of 8 June 2007 on the coordination of social security systems, France argued that this “does not guarantee a sufficiently fair distribution of the burden of benefits between the States liable to pay pensions, as it is sufficient for the State of residence to be liable to pay a small pension for the entire burden to fall upon it, even though the person concerned may have been active almost entirely in another State and be entitled to a commensurate pension from that State” (cited in Roberts et al., 2009).

(37) In contrast, this is financially advantageous for Member States with a high number of incoming cross-border workers. For instance, cross-border workers represent some 45% of the workforce in Luxembourg, while only 2% of the Luxembourg long-term care spending went to persons living abroad.

(38) Therefore, the Commission’s proposal made no changes to these provisions (EC, 2016a). EU commissioner Marianne Thyssen defended this with the principle ‘equal benefits for equal contributions at the same place’. However, there was the controversial deal to index family benefits offered by the EU to the UK before the 2016 British referendum.

2019). This IT system helps social security institutions with the exchange of cross-border electronic documents. EESSI will connect social security institutions across Europe and support international data exchanges between these institutions in a secure and reliable manner. The data will be exchanged using predefined messages and in accordance with the business rules agreed by Member States. EESSI was made available by the European Commission in July 2017, after which Member States had two years to finalise their national implementation of EESSI and connect their social security institutions to the cross-border electronic exchanges. The system will replace paper-based exchanges of social security files with electronic exchanges by using so-called Structured Electronic Documents. By the end of 2019 / beginning of 2020, it will become clear which impact EESSI has on the administrative cost and burden in the Member States.

Furthermore, formal barriers to the access and portability of social rights still exist (too long waiting periods, application forms only available in the official language of the Member State of application, outdated application procedures, ...) (Fingarova, 2019; Matyska, 2019; Kasarova, 2019). Many public authorities still do not offer the possibility to apply for documents and/or register electronically. Today, this should be the standard way to facilitate contact between citizens and competent authorities. This should not exclude personal contact at a desk, especially in view of the complexity of certain cases. In view of this complexity, it is also extremely important to step up efforts in the field of communication between the competent authorities and mobile persons, for instance to avoid social rights not being asserted. It is hoped that the newly established European Labour Authority (ELA) will also play a prominent role in the area of better information.³⁹

Cooperation can certainly be seen as one of the key principles of the coordination of social security systems (Morsa, 2019, this volume). The technical and complex provisions that allow coordination can only be successful in practice if there is sincere and intense cooperation. Not only the competent Member States have a responsibility in this respect, but certainly also the citizens themselves.⁴⁰ In addition to cooperation, it is of course important that simple but clear provisions are defined. Here, too, there is room for progress.

Finally, to facilitate the identification of persons across borders for the purposes of social security coordination, the idea has been launched by the European Commission to introduce a European Social Security Number (Dion, 2019). This was, however, not elaborated further. Hopefully this idea is not buried, as there is definitely a need for a unique identification of persons. This should benefit both mobile persons and

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

(40) For instance, Article 76 of the Basic Regulation stipulates explicitly that citizens have the obligation to inform the competent institutions about any change in their personal or family situation that might affect their right to benefits under the Regulations.

the competent authorities, while of course taking into account European and national privacy legislation.

4. **COMPETITIVE FAIRNESS: A FOURTH OBJECTIVE?**

The highly politicised topic of ‘social dumping’ has not yet been addressed in this chapter.⁴¹ Although it could be classified under ‘financial fairness’, it might be more useful to include it in a separate objective of ‘competitive fairness’. It is the pursuit of a level playing field for all actors involved. Under the main rule of the Coordination Regulations, a person is subject to the legislation of the Member State where s/he works (*lex loci laboris*). This rule entails that all persons employed in a Member State are subject to the applicable employers’ and employees’ social security contribution rates in that State.⁴² Consequently, this principle prevents employers from employing foreign employees under lower social security contribution rates than national employees. However, the *lex loci laboris* principle does not apply when a worker is sent by his employer to another Member State for a short period to work there on the employer’s behalf. The posted worker and his/her employer are exempt from paying social security contributions in the host Member State during a posting period of a maximum of 24 months and thus remain subject to the social security system of the Member State of origin. This legal framework gives posting undertakings a competitive advantage or disadvantage in terms of social security contributions when they temporarily provide services in another Member State.⁴³ Moreover, social security contributions levied on the higher wages of posted workers earned in the host Member State might be capped at a maximum level when an income ceiling is exceeded.⁴⁴

Contrary to popular belief, social security contribution rates do not differ that much between the ‘old’ and ‘new’ Member States.⁴⁵ The lowest contribution rates even apply in Denmark. Nevertheless, the question arises as to whether the exception to the *lex*

(41) Vaughan-Whitehead (2003) defines social dumping as “any practice pursued by an enterprise that deliberately violates or circumvents legislation in the social field or takes advantage of differentials in practice and/or legislation in the social field in order to gain an economic advantage, notably in terms of competitiveness, the state also plays a determinant role in this process”. De Wispelaere and Pacolet (2017) define social dumping as “one country reducing labour costs and labour conditions because of the pressure created by the competitive advantage that other countries have resulting from differences in national legislation that are not remedied by European legislation.”

(42) However, these are not necessarily the same, as different social security contributions often exist depending on the type of employment.

(43) Social security contributions constitute just one aspect that will determine domestic and foreign companies’ competitive advantage or disadvantage. Other aspects are differences in wages, corporate income taxes as well as differences in productivity, knowledge, skills, infrastructure and flexibility of companies and their workers.

(44) The European Federation of Building and Woodworkers (EFBWW) recently submitted a complaint to the European Commission against Slovenia for granting illegal state aid to their companies when they post workers abroad.

(45) See: EC - DG ECFIN - Tax and benefits indicators database.

loci laboris' principle is also tenable in the future,⁴⁶ although it seems unlikely that this will be revised in the short term. After all, this point of discussion has not really been raised during the discussion of the Commission's proposal to revise the Coordination Regulations.

It can be argued that the objective of 'competitive fairness' should be achieved in the first place by focusing much more on the fight against fraudulent posting. This presupposes better information, registration, enforcement and monitoring, as argued by Jorens and De Wispelaere (2019, this volume). A first step in the enforcement process is to ensure that all conditions for being posted are respected and thus checked in detail before a Portable Document A1 is issued by the competent public authorities. All posting conditions can individually disrupt the labour market of the host Member State if they are not respected. This disruption will occur in the first place in labour-intensive/price-sensitive sectors. Strict monitoring of compliance with the conditions of posting is certainly necessary in these sectors, while in others it is less necessary. The question therefore arises as to whether the posting conditions should not be defined from a sectoral approach. Otherwise, in the event of a general revision, sectors where no problems occur risk being affected as well, as the adjustments might not be sufficiently tailored to the sectors in which an adjustment is desirable.⁴⁷ In this respect, the expression "one size fits all" may not apply here. Posting conditions could be defined more strictly in labour-intensive/price-sensitive sectors such as the construction sector,⁴⁸ but more flexibly in other sectors. Bluntly speaking, the phenomenon will probably continue to be a divisive issue in the EU as long as no such sectoral approach is adopted.⁴⁹

5. CONCLUSION: THE COORDINATION REGULATIONS CANNOT SOLVE EVERYTHING

Figures on the number of people who benefit from the Coordination Regulations reveal a 'hidden European Welfare State' (Pacolet et al., 2019; De Wispelaere et al., 2019, this volume; Fries-Tersch, 2019, this volume). This well-developed European social protection system for mobile persons, based on high-quality coordination techniques, has been developed over a period of 60 years. The importance has been pointed out by Eichenhofer (2009), who stated that the provisions are "an important part of European legislation, because it makes Europe a unique 'social space'". Nevertheless, the European provisions seem to be under pressure, mainly due to fears

(46) The '*lex loci laboris*' principle is not necessarily the only alternative. For instance, "a possibility is that the State-of-employment principle is enforced to the extent that after three months of posting the contributions have to be paid at the level of the country of employment if these are higher than in the country where the person is insured (but still in the country of origin)" (Pennings, 2015) (see also: De Wispelaere and Pacolet, 2015).

(47) However, general rules are a guarantee for simplicity and transparency. In addition, sectors are sometimes difficult to delimit or obligations are circumvented in this way. 'Sectors at risk' can also change over time.

(48) Moreover, the possible loophole by Article 13 of the Basic Regulation must also be closed.

(49) In addition, the receiving Member State could also play a role in the verification of the posting conditions before issuing the PD A1 (see Jorens and De Wispelaere, this volume).

about ‘welfare tourism’ and ‘social dumping’. However, these fears cannot always be justified on the basis of facts.⁵⁰

Amendments to the Coordination Regulations should only be made if they are really necessary. This can be assessed by carrying out in advance a legal and socio-economic impact assessment of the current rules and possible amendments. Nonetheless, public and political pressure will also have to be taken into account.^{51,52} Or this must be refuted on the basis of figures. A solution certainly lies in raised awareness of a better balance of financial responsibility between Member States who receive or have received social security contributions / personal income taxes and the obligation to pay social benefits.⁵³ In this respect, the question ‘Where and for how long have social security contributions been paid?’ is of great importance. The 2016 proposal of the Commission to revise the Coordination Regulations already takes this conclusion into account to some extent and tried to facilitate an equitable distribution of the financial burden among Member States for a number of branches. However, no changes were made to the coordination of healthcare in this proposal. It is precisely in this area, however, that the greatest challenges lie.

A number of solutions are conceivable to monitor the financial burden-sharing in the area of healthcare. For example, the Member State of origin could continue to be responsible for the cost of healthcare provided by the host country of recent movers of working age for a certain period of time (e.g. a number of months).⁵⁴ The question is, of course, whether such a change is desirable. After all, it will have a financial impact on Member States with a strong outflow of people (Romania, Bulgaria, Lithuania, Latvia, etc.). In most cases, these are Member States where the costs of healthcare are much lower than in the host Member States. As a result, such a provision would put additional financial pressure on these Member States. For pensioners who have

(50) For example, we read the following statement in the Commission’s impact assessment “a general challenge is the fact that popular concerns are difficult to substantiate with hard facts and data, and often appear to be based on negative perceptions and anecdotal accounts rather than well founded on evidence.” (EC, 2016b).

(51) The Commission’s impact assessment also acknowledges this by stating, for example, that “not undertaking action in the field of aggregation could lead to increased public disenchantment and exacerbate criticism of, and anxiety about the consequences of free movement. It could lead to the situation that (more) Member States apply their own interpretation of the current rules in a restrictive way thus reducing legal certainty and risking that mobile EU workers will lose out on rights.”

(52) In that respect, bilateral agreements with non-EU countries may show what Member States really want (see also: Melin, 2019). For instance, Montenegro has 19 bilateral agreements with EU-28/EFTA countries. In many bilateral agreements between Montenegro and EU Member States, the posting period differs from the period defined by the Coordination Regulations, mostly limited to 12 months. Furthermore, in several bilateral agreements there are no provisions about aggregation periods for unemployment benefits. Finally, in most bilateral agreements it is defined that in case a person is entitled to a family benefit in both contracting countries, the competent country is the one in which the child resides.

(53) In her conclusions on cases C-95/18 and C-96/18, Advocate General Sharpston raises an interesting point, namely that the rules of the Coordination Regulations are not only intended to protect mobile workers, but also to share the financial burden between the Member States fairly (see also: Cornelissen and De Wispelaere, 2019).

(54) For instance, on the basis of the EU provisions for unplanned necessary cross-border healthcare.

worked in several countries, including their country of residence, the reimbursement of healthcare could be based on a 'pro-rata approach'⁵⁵ or by authorising the Member State where the person has been insured for the longest period of time.⁵⁶

The fact that EU legislation has been coordinating national social security legislation for 60 years is an achievement in itself. Nonetheless, for some of the challenges which we face today, simply coordinating national social security systems may no longer be the best solution. What if the Coordination Regulations run up against the limits of what they can do? In some cases of (labour) mobility, complexity and legal uncertainty prevail. Moreover, differences in social security systems might be amplified through coordination and even lead to a race to the bottom.⁵⁷ In this respect, it can be hoped that either social security systems will converge more closely towards each other or that the legislature facilitates this by defining provisions at EU level. A number of alternatives are listed below, but without elaborating on them.

People who are highly mobile in Europe, and whose place of employment is not a particular Member State but Europe, could benefit from a more harmonised approach (Figure 2). This is of course a very diverse group of people. In particular, people who are employed in the transport sector seem to fall into this group (truck drivers, pilots, aircrew members and seafarers). Nonetheless, it is not only in the transport sectors that workers are highly mobile or have a transnational job. After all, there are business people and sales representatives who travel around Europe all the time. The live performance sector is also a highly mobile sector with artists and cultural professionals touring and working abroad. For example, imagine a dancer on tour for several weeks in different Member States. Due to the high mobility of artists and musicians, identifying which social security legislation is applicable can be challenging. Mobile artists may, therefore, be uncertain about their rights and obligations. In addition, an orchestra, theatre or dance company that goes on tour for a short period (from a few hours to a few days) to another country might be confronted with difficulties when dealing with all the administrative requirements. From a legal, administrative and social point of view, some kind of 'harmonised social security status' could therefore be aspired to for the group of highly mobile persons. This brings us to the 'thirteenth state', an idea that was launched by Pieters and Vansteenkiste (1993) in the early

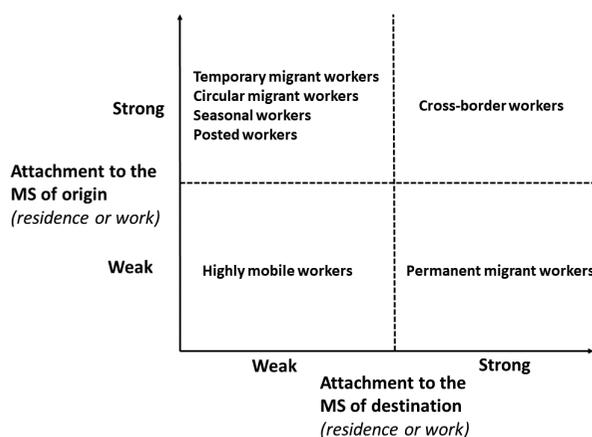
(55) However, this scenario put forward in the Commission's 1998 proposal, namely that the criterion for the distribution of healthcare costs for pensioners should be the ratio of insurance periods spent in the different Member States, was rejected, as it would result in a greater administrative burden (Roberts et al., 2009).

(56) Based on Article 24(2)(b) of the Basic Regulation. This Article defines the rules to be applied if the pensioner receives his/her pension from more than one Member State, but the Member State of residence is not one of these. In this case, the healthcare cost will be borne by the Member State to whose legislation the person has been subject for the longest period of time.

(57) For instance, this may be a risk in the case of posting due to the exception to the '*lex loci laboris*' principle. Moreover, family benefits schemes of the primarily competent Member State have an impact on the amount to be paid as secondarily competent Member State (means-tested schemes exist in Croatia, Cyprus, the Czech Republic, Italy, Portugal, Slovenia and Spain).

1990s that seems to be reviving today.⁵⁸ Yet the idea seems even more utopian than at the time it was launched. After all, differences in the social field have become greater between Member States.⁵⁹ This does not mean that this idea cannot be elaborated further for certain cross-border professions. International drivers are the first to be targeted in this respect. However, the differences in social security contributions undoubtedly result in competitive differences between Member States. Therefore, it will be difficult, if not impossible to convince the transport sector (or governments) of this idea. That is why it should first be applied to highly mobile professions in which there is little or no competition between them in terms of labour costs, for example artists and musicians working in the live performance sector.

FIGURE 2: DIFFERENT PATTERNS OF LABOUR MOBILITY



In addition, the Coordination Regulations give the impression that they offer little to no flexibility to Member States. This in itself is positive for creating legal certainty among individuals, employers and public authorities. It also avoids the Coordination Regulations being applied differently depending on the Member State to which one moves. Nevertheless, the introduction of greater freedom for Member States could be a possible solution to the challenges/discussions which we face today. Indeed, during the recent negotiations on the revision of the Coordination Regulations, it became clear that several Member States often dropped out of one specific proposal, despite

(58) See, for instance, ITEM discussion meeting organised by Prof. M. Weerepas (Maastricht, 29 October 2018): “Revival van het zogenaamde dertiende-landstelsel?”

(59) Price levels: Denmark: 42% above EU average vs Bulgaria: 52% below EU average; Method of financing social security: Denmark: 18% via social security contributions vs Estonia: 79% via social security contributions (source: Eurostat).

the fact that the overall package was beneficial to them.⁶⁰ This may slow down social progress for mobile people. It could be argued that, in exceptional cases, Member States should be allowed to derogate from European rules. Therefore, it might be worth investigating to which extent Member States could make use of Article 8(2) of the Basic Regulation, which states that “*Two or more Member States may, as the need arises, conclude conventions with each other based on the principles of this Regulation and in keeping with the spirit thereof.*”⁶¹ This rule allows Member States to derogate from the provisions of the Coordination Regulations. However, it should not be forgotten that “Article 8(2) only enables the Member States to create further-reaching rights” (Fuchs and Cornelissen, 2015, p. 134). In addition, the question is of course what the interpretation can be of the notion “as the need arises”, defined in Article 8(2). There seems to be no clear answer to this question. For instance, it could be argued that based on the available data, and the extent to which figures deviate from the average (i.e. to be regarded as ‘outliers’), a number of cases fall under this concept.⁶² Depending on the subject and the solution proposed, it may or may not be possible to use Article 8(2). In some cases, even better solutions may be provided by the Regulation.⁶³ Moreover, an adjustment by a bilateral convention is sometimes more likely to lead to a reduction in social protection.⁶⁴ Finally, as argued by Essers (2019), Article 8(2) of the Basic Regulation can or even should also be used to improve the social protection of certain groups of mobile persons between two Member States.⁶⁵

The two ideas above are (too) controversial. They have to be further elaborated and discussed from a multidisciplinary perspective. Only then can it be decided whether they can be implemented in practice or whether they are rather utopian. However, one cannot expect that the Coordination Regulations will solve all problems and challenges. In order to counteract the phenomena of ‘social dumping’ and ‘welfare tourism’, Member States should further develop their social security systems so that they converge towards each other upwards. The question is whether Europe should take the lead here by laying down minimum criteria (Debroey, 2019; Van den Brande,

(60) Reasons why certain countries did not agree to the provisional agreement of March 2019: Belgium: aggregation of periods for unemployment benefits; the Netherlands: export of unemployment benefits; Luxembourg: unemployed frontier workers; Austria: export of family benefits; Poland: applicable legislation, etc.
(61) According to Article 9(1) of the Basic Regulation, the provisions of these conventions must also be notified.

(62) For instance, intra-EU posting to the Belgian construction sector; export of family benefits by Austria as ‘secondarily competent Member State’; frontier workers in Luxembourg (and Switzerland); export of unemployment benefits from the Netherlands to Poland; inflows of EU-28 movers in Germany and the United Kingdom: access to healthcare without reimbursement by the Member State of origin; reimbursement of cross-border healthcare by some ‘new’ EU Member States.

(63) For instance with regard to the export of unemployment benefits, Article 55(6) of the Implementing Regulation offers Member States the possibility to enhance the bilateral procedures concerning the follow-up of jobseekers. Moreover, the relationship and impact of the provisions defined in the Coordination Regulations concerning ‘unemployed persons who resided in a Member State other than the competent State’ on the volume of exports of unemployment benefits requires further research.

(64) For instance, if an indexation of the child benefit is proposed between two countries. In some cases this will lead to an improvement in social protection and in others to a reduction.

(65) Or to solve gaps in their social protection.

2019; Meesters, 2019). After all, there are still major differences in the development of social security systems between Member States.^{66 67}

(66) For example, Bulgaria spends only 14% of its GDP on social spending, while France spends 34% of its GDP on social spending.

(67) In addition, there are strong differences in social security contributions. This can be solved by legislation but also by the Member States themselves if they evolve towards similar social contributions (see also: Pieters, 2018).

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TABLE OF CONTENTS

60 YEARS OF COORDINATION OF SOCIAL SECURITY SYSTEMS: STILL ROOM FOR IMPROVEMENT

| | |
|--|-----|
| 1. INDIVIDUAL FAIRNESS | 160 |
| 2. FINANCIAL FAIRNESS | 163 |
| 3. ADMINISTRATIVE EASE | 167 |
| 4. COMPETITIVE FAIRNESS: A FOURTH OBJECTIVE? | 169 |
| 5. CONCLUSION: THE COORDINATION REGULATIONS CANNOT SOLVE EVERYTHING | 170 |
| REFERENCES | 176 |