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PREFACE

BY | **FREDERIC DE WISPELAERE**

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Under the Juncker Commission, renewed attention was directed to Europe's social dimension.¹ Nevertheless, 'social Europe' has always been a reality, not least for people who are mobile within Europe. From 1958 onwards, the Treaty included a strong legal basis for legislation in the field of social security coordination. This legal basis is now contained in Article 48 of the Treaty on the Functioning of the European Union (TFEU). It obliges the legislature – the Council and the European Parliament – to take measures in order to provide, in the field of social security, protection to people who make use of their right to free movement. Social security was one of the first domains in which the European Union (EU) was active: Regulations 3 and 4 both coordinated national social security systems at European Union level. The Regulations currently in place are 'Basic' Regulation 883/2004 and 'Implementing' Regulation 987/2009 (hereinafter jointly referred to as the "Coordination Regulations").

In May 2019, a conference on *60 years of social security coordination from a workers' perspective* was organised by HIVA – Research Institute for Work and Society.² This conference offered the opportunity to discuss the historical context, the current social and political context as well as the challenges ahead. This volume of *Belgisch Tijdschrift voor Sociale Zekerheid/Revue belge de sécurité sociale* includes a number of papers prepared for this conference.³ These contributions give an insight into the importance and development of the coordination rules. They show that Europe has been trying to fulfil its duty to protect the social rights of movers within the European Union/European Free Trade Association (EU/EFTA) to the best of its ability for the past 60 years. Of course, there is always room for improvement. From that point of view, in 2016 the Commission proposed a revision of the Coordination Regulations (COM (2016) 815 final).⁴ Despite the fact that on 19 March 2019 a provisional agreement was reached in the trilogue meeting,⁵ the agreement was rejected at the Coreper meeting

(1) For a comprehensive overview of initiatives, see: *Putting social matters at the heart of Europe. How the European Commission supported employment, social affairs, skills and labour mobility (2014-2019)*, European Commission, 2019.

(2) See <https://hiva.kuleuven.be/en/news/newsitems/HIVA-EZA-Conference-60years-european-social-security-coordination-presentations>.

(3) My sincere thanks go to the Federal Public Service Social Security and more specifically to Mr Roland Van Laere. In the past, the FPS Social Security has regularly brought this issue to the attention of the public via *Belgisch Tijdschrift voor Sociale Zekerheid/Revue belge de sécurité sociale*. In the last volume of 2004, for example, the revision of the Coordination Regulations was discussed in various articles.

(4) 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.

(5) <https://data.consilium.europa.eu/doc/document/ST-7698-2019-ADD-1-REV-1/en/pdf>.

on 29 March 2019. This is a disappointment for several reasons, not least because this was actually a balanced proposal. Nonetheless, this also creates new opportunities. In that respect, the conference came at a good time. The momentum was there to discuss a number of challenges and possible solutions. After all, scholars remained relatively absent from the discussions, both during the preparation of the proposal and during the negotiations. Although it is true that the European Commission had issued a well-elaborated Impact Assessment in preparation for the proposal,⁶ scholars could certainly have played their part as well. In the 1990s, during the negotiations on the revision of Regulation 1408/71, this was in my view much more the case.⁷ Therefore, the ambition of the conference was partly to make up for this absence in the debate. After all, scholars, preferably from an interdisciplinary perspective, may/must, on the basis of their academic freedom, think about how things could be improved. Of course, they are only one voice in the debate.

In her opening speech, European Commissioner for Employment and Social Affairs Marianne Thyssen stressed the importance of the coordination rules to protect the social rights of millions of people who are mobile in Europe. She also pointed to the fact that both labour mobility and the EU rules on the coordination of social security systems are under pressure. In this context, the Commission has in recent years taken several initiatives to strengthen the fairness of the rules on labour mobility. Examples are, in particular, the Commission's proposals to revise the Posting of Workers Directive and the Regulations for the Coordination of Social Security Systems, as well as the proposal to set up a so-called 'European Labour Authority' (ELA).⁸ Two of the three initiatives have been brought to a successful conclusion. Directive (EU) 2018/957 amending Directive 96/71/EC concerning the posting of workers must be transposed into national legislation by 30 July 2020 and steps are currently being taken to make the ELA operational as soon as possible.⁹ The future will show how successful both initiatives will be. Unfortunately, no agreement was reached on the revision of the Regulations on the coordination of social security systems. However, at the time of writing (September 2019) there is hope that the discussion will be resumed. At the same time, the Commission has also taken steps to support the development of social protection at national level, mainly through the introduction of the European Pillar of Social Rights. Above initiatives show that the Commission has certainly put the social dimension back on the European agenda, also for the benefit of intra-EU/EFTA movers.

(6) SWD(2016) 52 final. Largely based on preparatory studies from the FreScco network (network of legal experts) and the Network Statistics FMSSFE.

(7) See for instance, Schoukens, P. (ed.), *Prospects of Social Security Co-ordination*, Acco, Leuven/Amersfoort.

(8) Moreover, some provisions of the new Directive 2019/1152 on Transparent and Predictable Working Conditions are also very important for mobile workers (see Article 7 'Additional information for workers sent to another Member State or to a third country').

(9) 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. See also: <https://ela.europa.eu/>.

Rob Cornelissen states that in spite of the modest objective of the Regulation, as it only coordinates the various social security systems instead of opting for harmonisation, there have been many achievements over a period of 60 years. Consequently, EU rules have improved the protection of social rights when EU/EFTA citizens are mobile in the EU/EFTA. This is largely due to the four pillars of the coordination of social security systems: (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) the exportability of benefits and (4) the determination of a single applicable law.¹⁰ In addition, the gradual expansion of the personal and material scope had a significant positive impact on the protection of mobile EU/EFTA citizens. Furthermore, Prof Cornelissen is certainly not blind to the current controversies and challenges.

Elena Fries-Tersch points out that the group of people protected by the European coordination system is not small and cannot be narrowed down to intra-EU migrants. In fact, the Coordination Regulations nowadays protect, in the field of social security, all EU/EFTA citizens moving between Member States, be it for reasons linked to work or for other reasons (holiday, planned healthcare, moving abroad as a retired person, etc.). Some figures serve to illustrate the numerical importance of the scope of the European coordination system. According to Eurostat population statistics, in 2017 there were 19 million EU/EFTA movers in the EU/EFTA, including 14 million persons of working age (20-64 years). They made up 3.6% of the total population in the EU/EFTA and 4.5% of the total working age population in the EU/EFTA. These figures give us an idea on the 'stock' of EU/EFTA movers, but do not say anything about the annual flow of this group of people. For instance, some 2.1 million persons who migrated to the EU/EFTA in 2017 were previously living in another EU/EFTA country. In addition, there were some 1.9 million cross-border workers in the EU/EFTA in 2017, around 1.8 million postings, and finally some 1 million persons who normally worked in two or more Member States. Furthermore, roughly 1.8 million EU/EFTA citizens aged 65 or over were living in an EU/EFTA country other than their country of citizenship, making up 1.8% of the population aged 65 or over in the EU/EFTA. Finally, EU/EFTA residents also made around 229 million trips with overnight stays in another EU/EFTA country – some 204 million tourism trips and around 25 million trips for professional purposes (e.g. business trips).

Article 91 of Regulation 987/2009 is one of the 'hidden' improvements of the current Implementing Regulation in comparison with the past. It requires the competent authorities to compile statistics on the application of the Coordination Regulations and to forward them to the Administrative Commission. The reports on the various statistical data certainly help to assess the functioning of the current Regulations and

(10) Cooperation between public authorities is actually another important pillar (see also: Morsa, this volume).

to underpin proposals for possible improvements.¹¹¹² That many mobile persons benefit from the Coordination Regulations is illustrated by Frederic De Wispelaere, Jozef Pacolet and Lynn De Smedt. The reported figures visualise the well-developed European social protection system that people enjoy when they are mobile in Europe, based on high-quality level coordination techniques. The figures also provide answers to some key political questions/discussions on ‘welfare tourism’ and ‘social dumping’. After all, it is important to ensure that such concerns are based on facts and figures and not on myths.

The fact that EU legislation has been coordinating national social security legislation for 60 years is an achievement in itself. However, we cannot turn a blind eye to some deficiencies in social protection coordination. Several papers in this volume elaborate on this. These challenges arise, for example, in the field of cross-border healthcare, atypical employment, posting of workers etc. Moreover, there are also various administrative challenges.

The overall effect of cross-border patient mobility in the EU, in terms of persons involved or budgetary cost, is rather marginal. Nonetheless, the use of cross-border patient mobility is very important for certain pathologies, geographical areas and groups. Gabriella Berki argues that after 60 years of healthcare coordination, European patients are still left with restricted cross-border mobility rights and impediments of free movement both from legal and non-legal points of view. She defines a number of solutions, often by thinking out of the box.

Paul Schoukens elaborates on the question to what extent the Coordination Regulations are still able to accommodate the growing complexity of work forms present in the current labour market. In this respect, the traditional characteristics of work are probably mostly challenged by (online) platform work, which raises questions about the application of the Coordination Regulations. In this chapter, possible pathways are defined to modernise coordination which could facilitate a better integration of non-standard work forms in the Coordination Regulations.

The most sensitive issue when talking about the application of the Coordination Regulations is probably the posting of workers. In this context, suggestions are regularly made/requested by the stakeholders to amend the applicable legislation, by some stakeholders for the sake of the fight against ‘social dumping’, by other stakeholders to take further steps in the liberalisation of the internal market, and more specifically of the free movement of services. The question is, however, whether it is really necessary to constantly pursue adjustments to the European rules applicable to posting. In that respect, Yves Jorens and Frederic De Wispelaere discuss further steps that could be taken by Member States but also at EU level in the area of information,

(11) See: <https://ec.europa.eu/social/main.jsp?catId=1154&langId=en> or <https://hiva.kuleuven.be/en/news/newssitem/HIVA-EZA-Conferentie-60years-of-social-security-coordination-from-a-workers-perspective>.

(12) Data collection will also be an important task for the ELA. See: Article 10(4) of Regulation (EU) 2019/1149 “The Authority shall, where appropriate, collect statistical data compiled and provided by Member States in the areas of Union law within the Authority’s competence.”

registration, enforcement and monitoring based on a better implementation of the existing EU legislation on posting. They argue that by focusing on these four areas, improving the functioning of posting in the internal market may become a Herculean task instead of a Sisyphean one. Their analysis shows that Member States can and must do better in all these areas.

Marc Morsa argues that the objectives of the Coordination Regulations have been achieved for 60 years through loyal and intense cooperation between Member States. He highlights the crucial role of the Administrative Commission in this respect. Finally, he also discusses the possible role of the European Labour Authority in this area.

Finally, in his concluding remarks, Frederic De Wispelaere briefly evaluates the Coordination Regulations on the basis of a number of objectives that could be achieved. These objectives are (1) individual fairness, (2) financial fairness, (3) administrative ease, and finally (4) competitive fairness. He argues that the European provisions seem to be under pressure, mainly due to fears about 'welfare tourism' and 'social dumping'. A solution lies in having better awareness of the financial consequences of the Coordination Regulations. At the same time, the analysis shows that the 2016 Commission proposal to revise the coordination rules is only an episode of a never-ending story of adaptations to the Coordination Regulations in order to keep up with the times.

OPENING SPEECH

BY | **MARIANNE THYSSEN**

European Commissioner for Employment and Social Affairs

1. INTRODUCTION

Ladies and gentlemen,
Dear colleagues,

It's a great pleasure to be here at Leuven University, my alma mater. As the guest of the HIVA Research Institute for Work and Society – I can assure you, your studies have been highly appreciated and relied upon at the European Commission.

And as the guest of the European Centre for Workers' Questions. I really appreciate your work. Through training and education, you are building the social dialogue of the future.

This is a very important conference. For two reasons.

1.1. IMPORTANCE OF FREEDOM OF MOVEMENT

First of all, because of the great importance of social protection and the coordination rules for the lives of the 17 million citizens that live or work in another Member State. Labour mobility can simply not be organised in an orderly way without coordination of national social security systems.

That was already clear to the Founding Fathers of the European Union when they agreed on the Treaty of Rome in 1957.

Many people are often surprised when I tell them that the very first pieces of substantive legislation adopted by the European Economic Community concerned social security coordination. Two regulations that show that you cannot have free movement of workers without guaranteeing mobile workers that they will not lose social protection.

I believe it is not necessary for this audience that I recall the benefits that freedom of movement brings to society.

It brings jobs for workers and better trained staff for businesses. It boosts growth, and boosts the efficiency of European labour markets, by better matching vacancies with skills.

Labour mobility cannot work without social security coordination. That is also why social security coordination has been a key point of attention in the Brexit negotiations and the Withdrawal agreement.

And why our efforts to prepare for a no deal Brexit include a regulation on social security coordination.

And why the Political Declaration on the Future relationship between the European Union and the United Kingdom contains both Parties' agreement to "consider addressing social security coordination in the light of future movement of persons". Even though the UK wishes no longer to apply free movement of persons, coordination of social security systems will still be necessary to accompany labour mobility that will inevitably continue to exist.

1.2. LABOUR MOBILITY UNDER PRESSURE

There is a second reason why a conference on social security coordination is topical and highly relevant.

That is because labour mobility and social security coordination are under increasing pressure. I am not referring to the attack on free movement and labour migration that comes from the usual suspects. Those who play on the fears of uncontrolled immigration, crime and terrorism.

What I refer to is the pressure stemming from fears of abuse of social security systems. Fears of labour under decent working conditions being replaced by so-called social dumping. Fears of uncontrolled or uncontrollable exploitation of mobile workers. But also from fears of labour mobility leading to brain drain and negative effects for long-term growth in certain sending countries.

We should not deny these fears. We have to understand these fears. Reassure citizens, and build bridges. So that efforts to protect social systems against abuse do not lead to protectionism. So that free movement and the internal market – the instruments on which Europe's welfare is based – are not undermined. So that everyone can enjoy the benefits of labour mobility.

2. IN DEFENCE OF FAIR LABOUR MOBILITY

This is the challenge that we took on ourselves five years ago when we started with the Juncker Commission. Strengthening the fairness of the Internal Market became one of the priorities of the Commission.

2.1. FAIRNESS IN THE INTERNAL MARKET

To secure continued support for free movement the internal market must be governed by rules that are clear, fair and enforceable.

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 the 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 abuse 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.

For this audience, I do not need to recall all our initiatives to promote fair labour mobility.

To the wider audience, some of these initiatives, like the Regulation on EURES (European network of employment services) and the set-up of a European Platform to tackle undeclared work receive less attention than, for example, the revision of the Posting of Workers Directive and the proposed revision of the Regulations on the Coordination of Social Security Systems.

2.2. POSTING OF WORKERS

The relatively quick adoption of the revised Posting of Workers Directive is a significant achievement for the Commission – and for the European Union as a whole.

In the end, only two Member States voted against my proposal to lay down the principle of the same pay for the same work at the same place. Showing that it is possible to bridge the divides.

In future, a Belgian worker and his posted Polish, or French or Portuguese colleague working on the same building site will receive the same remuneration.

2.3. ELA

I will come in a minute to the proposed revision of the social security coordination rules. But let me first emphasise the issue of enforcement.

It is not enough to have fair rules. Fairness only exists if the rules are effectively enforced across the Union. Concerns about uneven compliance with the rules jeopardise trust and fairness in the Internal Market. That is why I believe our European Labour Authority will be so important. The Authority will be the Union's operational arm on the European Labour Market. It will bring the Member States' enforcement authorities together to step up their cooperation.

I can tell you that when President Juncker announced the idea of a European Labour Authority, many believed we did not have sufficient time to realise it. But we managed to have the Founding Regulation finalised, agreed by a wide majority of Member States and widely supported from left to right in the European Parliament. We only need its formal adoption in the upcoming EPSCO Council in June for the Regulation to enter into force in July.

Meanwhile, the Member States are set to decide on the location of the Authority. In any event, we will not wait for the future premises to be ready. The Authority will work from Brussels until it is ready to move to one of the four candidate cities (Bratislava, Nicosia, Riga, Sofia).

I intend to invite President Juncker to open the first meeting of the Management Board in October.

The fact that we succeeded in setting up the European Labour Authority was again based on our aim to build bridges. To take into account all stakeholders' legitimate interests, and to design the type of agency most urgently needed on the European labour market.

The Authority will have clear operational tasks. In the first instance to support the Member States' enforcement authorities in information exchange, inspections and mediation. Bringing national liaison officers together will foster a common enforcement culture.

I emphasise this today because social security coordination will be a major area of activity for the Authority. It will also deal with other labour mobility rules, including posting of workers. But we have fought hard to make the Authority active across labour mobility areas.

Setting up the Authority was not only an exercise in linking labour law experts with social security experts. I have insisted that the Authority should satisfy the most pressing needs of all actors on the European labour market, including the Member States at the origin of labour mobility. Therefore, the Authority will also support the Member States in providing the information that mobile workers and their employers need on rights and obligations abroad. And support the European network of employment services in matching skills and vacancies.

3. SOCIAL SECURITY COORDINATION

Let me now say a few words on the proposed revision of the rules on social security coordination, which could not be finalised under this legislature but will be one of the key files for the new Parliament together with the future Council Presidency. In March 2019 we concluded the inter-institutional negotiations with a balanced agreement.

As you are aware, the Council did not reach a qualified majority as only a few votes were missing. This was certainly not due to a split between sending and receiving countries. Our agreement was supported by many in Western and Eastern Europe, the North and the South.

I remain hopeful that a final agreement will be reached soon with the new Parliament. Because the problems that our proposal aimed to fix, are still there. And will only be resolved by a solution based on clear, fair and enforceable rules.

Fairness means that we need to reassure Member States and citizens that we can tackle abuse and fraud. That is why our proposal, and also the compromise agreement, improved procedures. By ensuring that Portable A1 Documents are beyond dispute. By requiring institutions that issue A1 documents to fact check them and guarantee that they are correct.

We want any document based on an intentional fraudulent claim to be withdrawn immediately and with retroactive effect.

And we proposed explicit deadlines for exchange of information between national authorities. Deadlines that can be monitored by the European Labour Authority.

For the same reason we also proposed to codify the case-law of the Court on non-active mobile citizens. The Court clarified that Member States may regulate access to social benefits for economically inactive citizens. I believe that citizens should be able to read in legislation rather than in case-law what their rights and obligations are.

Fairness means also solidarity and a fair distribution of financial burden amongst the Member States. That is why we want workers and jobseekers to build up a relationship with the country where they claim benefits. It is fair to ask an individual to work a certain period in a State before that State becomes competent to pay unemployment benefits on the basis of previous work experience abroad.

But without abandoning the principle of aggregation, which let us not forget has existed since 1958. It would be wholly unfair to mobile workers to refuse recognising previous work experience. Protection of social security systems does not mean adopting protectionist measures that discriminate against mobile workers.

Fairness therefore also means: saying no to the indexation of child benefits. In particular when these benefits go to children living in a region where living expenses may be lower. If workers pay the same contributions or taxes into a system, they should receive the same benefits from that system.

We cannot say that workers have the right to the same pay for the same job at the same place, and meanwhile allow workers to receive different benefits for the same contributions to the same system.

4. CONVERGENCE

Ladies and gentlemen, many of the sensitivities regarding labour mobility stem from large inequalities between our Member States. That means we also need to look at the broader social and economic context.

4.1. CONVERGENCE GOING BACK 60 YEARS

Growth has returned to all our Member States. 240 million Europeans are now at work. More than ever before. Unemployment is at 6.4 per cent. The lowest number ever.

At the same time, there are still large differences in Europe. In 2016 real wages in Bulgaria, the country with the lowest wage level, were about 3 times lower than real wages in Luxembourg, although 10 years earlier they were 6 times lower.

Last week I was in Sibiu, Romania. You know that Romania has lost a significant part of its population, partly because of labour mobility. If you ask anyone in the street there about Europe, one of the first things they ask is: “when will we start earning as much as in the West?”

And it's not just about wages, but convergence of living standards in the widest sense. People want a good quality of life and opportunities for their children.

The differences between Member States may be larger now than in 1957. But the Founding Fathers realised that labour mobility should be paralleled with social convergence.

In the Treaty of Rome they also established the European Social Fund, which still is one of our main tools for promoting social cohesion across the European Union.

Historically, the EU is a convergence machine. You can take Ireland as an example, which is no longer the poor country that it was at the time of its accession.

And central and Eastern European countries are catching up. Ever since accession, we've seen real wage convergence between East and West. In Bulgaria, Romania and the Baltics, real wages are growing between 70 and 110 per cent faster than in the rest of the EU.

With economic growth, the pace of labour mobility is slowing down already in some countries. With increasing wages and better opportunities for people, more and more people are returning to their home countries. Bringing capital, experience and skills with them.

We now need to get the European convergence machine – that slowed down during the crisis – up to full speed.

4.2. **FOSTERING CONVERGENCE: EU FUNDS AND THE EUROPEAN PILLAR OF SOCIAL RIGHTS**

As tools for convergence we have at our disposal, as you know, our European structural and investment funds.

The aim of our regional funds is explicitly to foster social cohesion by convergence. And with our European Social Fund we invest in people, promoting employment and social inclusion and fighting poverty.

But we also developed a more comprehensive tool for fostering convergence. The European Pillar of Social Rights. The rights and principles set out in our Pillar will be the compass guiding the Union and the Member States in the years to come. To steer Europe towards upwards convergence. And to help us navigate economic and social change in the new world of work.

The Union institutions and the Member States must now all turn rights into realities and principles into practice. Each on our own level. Supported by social partners and civil society.

The Pillar was accompanied from the beginning by a social scoreboard, which was integrated into the European Semester – our annual cycle of economic policy coordination.

Those who follow our country reports and country specific recommendations know that the Semester is far more social than ever before.

The message from the Social Summit in Gothenburg has passed across Europe. Recently I was in Lithuania. There the minister of Social Affairs told me he was setting up a working group to help implement the Pillar in their own country.

5. **CONCLUSION**

Ladies and gentlemen, the freedom of movement is one of our greatest achievements.

But nothing is set in stone. Everything can change. There are politicians who want to build new walls and new barriers. We can take nothing for granted.

We must defend free movement. That means telling our politicians: “don’t beat the same drum as the populists. Because the drumming will only sound louder.”

In order to defend and preserve free movement, we must act. We must do everything to make sure labour mobility is fair for everyone.

I believe I have done my bit. I am proud of what we have achieved. I hope that all of you continue to support and develop the European project with your expertise on labour mobility and social protection.

I wish you a very successful conference.

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THE PROTECTION OF SOCIAL RIGHTS IN A CROSS-BORDER SITUATION WITHIN THE EU: A HISTORICAL OVERVIEW

BY **ROB CORNELISSEN**

Vrije Universiteit Brussel

1. INTRODUCTION: AIM AND LEGAL BASIS OF THE EU REGULATIONS – ROLE OF THE EUROPEAN COURT OF JUSTICE

This year we celebrate the 60th anniversary of European coordination of social security. It was one of the first domains in which the EU was active. Regulations 3¹ and 4² provided for the coordination of Member States' social security systems. They protected migrant workers and the members of their families. These regulations entered into force on 1 January 1959. They were replaced in 1972 by Regulations 1408/71 and 574/72. In 2010 Regulations 1408/71 and 574/72 were replaced by the current Regulations 883/2004³ and 987/2009⁴. These Regulations provide, in the field of social security, a high standard of protection to European citizens who move between Member States, be it for professional or for private reasons.

The objective of the social security Regulations is by nature both modest and ambitious. The Regulations have a modest objective since they only coordinate the various social security systems, they do not harmonise them. They do not affect the freedom of Member States to determine their own systems. Member States are, in principle, free to decide who is to be insured, what benefits should be granted, how they should be calculated and for how long they should be granted.⁵ The EU Regulations on the coordination of social security systems do not and cannot affect the disparities between the various systems. As the Court has underlined in its case-law, the Treaties offer no guarantee to a worker that extending his activities into more than one Member State or transferring them to another Member State will be neutral as regards social security. Given the disparities in the social security legislation of the Member States, such an extension or transfer may be to the worker's advantage in terms of social security or not, according to the circumstances.⁶

(1) Council Regulation (EEC) 3 of 25 September 1958, OJ 30 of 16 December 1958.

(2) Council Regulation (EEC) 4 of 3 December 1958, OJ 30 of 16 December 1958.

(3) Regulation (EC) No 883/2004, OJ L 200 of 7 June 2004, lastly modified by Regulation (EU) No. 465/2012, OJ L 149 of 8 June 2012.

(4) Regulation (EC) No. 987/2009, OJ L 284 of 30 October 2009, lastly modified by Regulation (EU) No. 465/2012.

(5) C-347/10, *Salemink*, EU:C:2012:17, para 38.

(6) C-208/07, *Von Chamier*, EU:C:2009:455, para 85

But the EU Regulations are ambitious at the same time. In fact, they have as their objective to make 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. Social security coordination is indeed an indispensable element of free movement.

Depending on the different social and political history of each state, Member States limit the boundaries of their solidarity systems, sometimes on the basis of nationality, but mostly on the basis of territoriality.⁷ In a general way this means that each state confines the scope of its national scheme by using territorial elements like working or residing in that State. The objective of the EU Regulations is to overrule, at least partially, the application of these criteria based on nationality and territoriality. Without such an ambition, the goal of the EU Regulations to remove all barriers in the sphere of social security which impede a genuinely free movement would not be met.

From day one, the Treaty included a strong legal basis for legislation in the field of coordination of social security. This legal basis is now contained in Article 48 TFEU.

The abundant case-law of the Court of Justice played an essential role in the development of the early coordination system set up under Regulation 3 into the system under Council Regulation 1408/71 and then into today's Regulation 883/2004. In fact, these Regulations have often been modified in order to take into account, if not to "translate", the case-law of the Court in the wording of the Regulations.

Already in its very first judgment⁸ concerning the old Regulation 3 the Court of Justice clarified that all provisions laid down in the Regulations on social security should be interpreted in the light of the objective pursued by their legal basis, namely to promote and secure free movement of workers by protecting those concerned from the harmful consequences which might result from the exclusive application of national law. This has as a result that sometimes a provision laid down in the Regulation has to be interpreted in a way not foreseen by the legislature.⁹ The ultimate consequence is that a provision laid down in the Regulation has to be considered as invalid if it is contrary to the aim of Articles 45-48 TFEU.¹⁰

But the Court's influence goes beyond the power to pronounce on the interpretation and validity of Union legislation, including provisions contained in Association agreements with third countries.¹¹ In the absence of harmonisation at Union level

(7) Cornelissen, R., The principle of territoriality and the Community Regulations on social security (Regulations 1408/71 and 574/72), *Common Market Law Review*, Vol. 33, No. 3, pp. 439-471, 1996.

(8) 75/63 *Unger*, EU:C:1964:19.

(9) C-205/05, *Nemec*, EU:C:2006:705 and C-352/06, *Bosmann*, EU:C:2008:290.

(10) 24/75, *Petroni*, EU:C:1975:129, 41/84, *Pinna*, EU:C:1986:1, C-290/00, *Duchon*, EU:C:2002:234 and C-43/99, *Leclere*, EU:C:2001:303.

(11) C-18/90, *Kziber*, EU:C:1991:36, C-58/93, *Yousfi*, EU:C:1994:160, C-126/95, *Hallouzi*, EU:C:1996:368, C-113/97, *Bababenini*, EU:C:1998:13, C-262/96, *Sürül*, EU:C:1999:228, C-485/07, *Akdas*, EU:C:2011:346 and C-677/17, *Coban*, EU:C:2019:408.

Member States are free to determine their social security schemes. However, when exercising this power they must nevertheless comply with Union law as a whole. The result is that the Court does not hesitate to examine whether in a specific case the application of national law is compatible with the Treaty, such as the provisions on freedom of movement of workers¹² or of EU citizens¹³ or the freedom to provide services.¹⁴ Bilateral agreements concluded between a Member State and a third country are also subject to the supremacy of Union law. Member States may not limit the application of social security agreements concluded with third countries to their own nationals and must treat other EU nationals equally under the terms of the agreement.¹⁵

2. ACHIEVEMENTS

2.1. THE PILLARS OF EUROPEAN SOCIAL SECURITY COORDINATION

In order to prevent different national criteria leading to conflicts of law in cross-border situations (negative conflict: a person would not be insured in any Member State; positive conflict: the person would be insured simultaneously in two or more Member States) Regulation 883/2004 contains uniform criteria to determine the applicable social security legislation. The main rule is that a person is subject to the legislation where he/she works¹⁶, even if his/her residence is in another Member State. However, for some categories of workers, namely posted workers¹⁷ and workers who normally are employed in two or more Member States¹⁸, special rules have been created. As the Court has emphasised¹⁹ the EU rules determining the applicable social security legislation have a binding effect. It means that national affiliation conditions (such as a residence condition) are set aside if their application is such as to deprive the conflict of law rule laid down in the Regulation of all practical effect. On the other hand the EU rules determining the applicable social security legislation have an exclusive effect²⁰: a person cannot be simultaneously subject to the legislation of two or more Member States. However, it follows from the case-law of the Court that in some cases it is possible that a worker is also covered by the social security legislation of a Member State other than the one designated as the competent one by the Regulation.²¹

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

(13) C-406/04, *De Cuyper*, EU:C:2006:491.

(14) C-158/96, *Kohll*, EU:C:1998:171 and C-157/99, *Smits-Peerbooms*, EU:C:2001:404.

(15) C-55/00, *Gottardo*, EU:C:2002:16.

(16) Article 11(3)(a) Regulation 883/2004.

(17) Article 12 Regulation 883/2004.

(18) Article 13 Regulation 883/2004.

(19) C-2/89, *Kits van Heyningen*, EU:C:1990:183, C-196/90, *De Paep*, EU:C:1991:381, C-347/10, *Salemink*, EU:C:2012:17 and C-106/11, *Bakker*, EU:C:2012:328.

(20) Article 11(1) Regulation 883/2004.

(21) C-352/06, *Bosmann*, EU:C:2008:290, C-208/07, *Von Chamier*, EU:C:2009:455, C-611/10 and 612/10, *Hudzinski*, EU:C:2012:339 and C-382/13, *Franzen*, EU:C:2015:261.

The principle of equality of treatment is one of the cornerstones of the Union. With regard to social security the right to equal treatment has found specific expression²² in Article 4 of Regulation 883/2004. The Court has given a broad interpretation to this principle, prohibiting not only direct discrimination based on nationality but also covert forms of discrimination which, by applying other distinguishing criteria, in fact achieve the same result²³. It also follows from the Court's case-law under the old Regulation 1408/71 that the principle of equal treatment may require the social security institution of a Member State, when examining whether all the qualifying conditions for a benefit are fulfilled, to treat facts and events which occur in another Member State as if they were facts or events occurring in its own State.²⁴ This case-law is now reflected in general terms in Article 5 of Regulation 883/2004.

The aggregation of the periods of insurance completed in all Member States²⁵ for entitlement to benefits is a technique to put together the career of a migrant worker. In this way the Regulation guarantees that social security rights in the process of being acquired are retained. Given this purpose the aggregation provisions must be interpreted widely and also cover cases not directly governed by the letter of these provisions.²⁶

The waiving of residence clauses for most cash benefits²⁷ reflects the principle of maintenance of acquired rights.

The rather technical and often complex coordination provisions are to be implemented by the authorities and institutions of Member States. This is possible only if there is a smooth and effective cooperation and communication between the authorities and competent institutions of the various Member States. Several provisions of the EU Regulations lay down the principles for such cooperation and communication.²⁸ The *raison-d'être* of the Administrative Commission for the coordination of social security systems²⁹ is to facilitate and strengthen such cooperation. The principle of good administration is reflected by the obligation for institutions to provide information to citizens in enforcing their rights and obligations and to offer them active assistance in enforcing their rights under these Regulations³⁰. The electronic exchange of data between institutions (EESSI) constitutes one of the major innovations of Regulation

(22) C-346/05, *Chateignier*, EU:C:2006:711.

(23) 41/84, *Pinna*, EU:C:1986:1 and C-349/87, *Paraschi*, EU:C:1991:372.

(24) C-228/88, *Bronzino*, EU:C:1990:85, C-12/89, *Gatto*, EU:C:1990:89 and C-349/87, *Paraschi*, EU:C:1991:372.

(25) Article 6 applies to all benefits covered by Regulation 883/2004. However, the unemployment chapter has its own specific aggregation provisions (Article 61), taking into account the specific features of the various unemployment schemes.

(26) C-481/93, *Moscatò*, EU:C:1995:348 and C-482/93, *Klaus*, EU:C:1995:349.

(27) Article 7 Regulation 883/2004. This article does not apply to "*special non-contributory benefits*"; it applies to unemployment benefits only in some specific cases.

(28) Articles 76-79 Regulation 883/2004 and Articles 2-9 Regulation 987/2009.

(29) Articles 71-74 Regulation 883/2004.

(30) Article 76(4) Regulation 883/2004 and Article 2(1) Regulation 987/2009.

987/2009³¹. The shift from paper to electronic data exchange has required – and continues to require – intense preparatory work³² leading to several extensions of the transitional period. This transitional period expired in June 2019³³ which means that the transmission of data between the social security institutions should now be carried out exclusively by electronic means.

2.2. SOME PROTECTION GOES BEYOND COORDINATION

In some aspects Regulation 883/2004 provides protection which goes beyond simple coordination, since rights are created which citizens would not otherwise have.

Article 64 facilitates geographical mobility of unemployed persons. It enables, under strict conditions and for a limited period of time, an unemployed person who receives an unemployment benefit in the competent Member State to go to another Member State in order to seek work there without losing entitlement to an unemployment benefit.

Article 19 provides another example. A person who is insured for health care in one Member State and who stays temporarily in another Member State (e.g. during a city trip, family visit, holiday) is entitled to health care which becomes necessary in that other Member State as if he/she is insured in that other Member State. In order to benefit from this arrangement the person only has to show his/her European Health Insurance Card to the care provider. It is estimated that there are currently more than 236 million European Health Insurance Cards in circulation.³⁴

Article 20 enables a person who is insured for health care in one Member State to go to another Member State in order to get medical treatment there, at the expense of the competent institution, provided he/she receives authorisation from that institution. If that authorisation is accorded he/she will benefit from reimbursement conditions which are far more favourable than those contained in the Patients Mobility Directive.³⁵ As the Court has underlined in its case-law³⁶, in this way Article 20 Regulation 883/2004 helps to facilitate the free movement of persons covered by social insurance and, to the same extent, the provision of cross-frontier medical services between Member States.

(31) Article 4(2) Regulation 987/2009.

(32) Fuchs/Cornelissen, *EU Social Security Law, a Commentary on EU Regulations 883/2004 and 987/2009*, C.H. Beck-Hart-Nomos, pp. 432-439, 2015.

(33) However, it seems that some Member States are not yet ready to implement and integrate the necessary national infrastructure, necessitating a further extension of practical arrangements.

(34) F. De Wispelaere and J. Pacolet, *Social Security coordination at a glance-reference year 2017*, Network Statistics FMSSFE, European Commission, 2018.

(35) Directive 2011/24, OJ L 88 of 4 April 2011.

(36) C-56/01, *Inizan*, EU:C:2003:578, para 21 and C-145/03, *Keller*, EU:C:2005:211, para 46.

2.3. VIRTUALLY ALL EUROPEAN CITIZENS PROTECTED

Regulation 883/2004 applies to all EU nationals who are insured under national law, whether they are employed, self-employed, students, civil servants, pensioners or indeed, non-active³⁷, as well as to the members of their families and survivors, regardless of the nationality of their family members or survivors. This constitutes progress in comparison with the old Regulations which only covered economically active people and the members of their families. Regulation 883/2004 contributes to social inclusion. In fact, all EU citizens who are insured under national law are protected in the field of social security when they move from one Member State to another.

Stateless persons and refugees residing in a Member State have always been included in the personal scope of the EU social security Regulations.³⁸

Members of the family and survivors cannot invoke provisions of the Regulations which are applicable solely to workers, such as the unemployment chapter³⁹. But they can invoke all other provisions such as equal treatment⁴⁰ or the provisions laid down in the chapter “family benefits”. Where an employed person is subject to the legislation of a Member State and lives with his family in another Member State, then that person’s spouse is entitled, under Article 67 Regulation 883/2004, to receive a family benefit such as a parental benefit in the state of employment⁴¹.

2.4. EXTENSION OF PROTECTION TO NON-EU NATIONALS

The rules of the EU Regulations not only apply in the EU and to EU nationals but also in Norway, Iceland and Liechtenstein and to nationals of these countries, by virtue of the Agreement on the European Economic Area.⁴² This agreement is a special one, since it comes close to membership, as the four fundamental freedoms are guaranteed without any notable exceptions. One of the EFTA countries, i.e. Switzerland, rejected the Agreement following a referendum. The EU and Switzerland have then concluded an agreement on free movement of persons, including full applicability of the EU social security Regulations.⁴³

For a long time third-country national workers have been excluded from the protection offered by the EU social security Regulations. The explanation for this exclusion is to be found in the legal basis of the EU social security Regulations. Developments in primary law in the last two decades have paved the way for the extension of the EU

(37) Article 2 Regulation 883/2004.

(38) C-95/99 to C-98/99 and C-180/99, *Khalil*, EU:C:2001:532.

(39) C-198/00, *Ruhr*, EU:C:2001:583.

(40) C-308/93, *Cabanis-Isarte*, EU:C:1996:169.

(41) C-245/94, *Hoever* and C-312/94, *Zachow*, EU:C:1996:379.

(42) OJ L 1 of 3 January 1994.

(43) OJ L 114 of 30 April 2002. Annex II concerns the coordination of social security schemes. It contains some special provisions for Switzerland.

Regulations to third-country nationals⁴⁴. Regulation 1231/2010⁴⁵ now offers third-country nationals, in the field of social security, the same protection as EU citizens moving within the EU. However, this extension is subject to two conditions. In particular the condition that there should be a cross-border element between at least two Member States means that Regulation 1231/2010 does not always guarantee that third-country nationals legally residing in a Member State are treated equally as Union nationals in that Member State. Several categories of third-country nationals do have such an EU level guarantee, with some exceptions, although there is no cross-border element between Member States. This is the result either of a series of legal instruments based on (the predecessor of) Article 79 TFEU⁴⁶, or of the direct effect of provisions laid down in Association agreements concluded with the Maghreb countries⁴⁷ or in Decision 3/80 of the EEC/Turkey Association Council⁴⁸. In addition, Decisions of several Association Councils are in the pipeline, guaranteeing, inter alia, equal treatment in the field of social security for workers who are nationals of the third countries concerned and who are legally employed in a Member State.

3. CONTROVERSIES AND CHALLENGES

Over the years, the EU Regulations on the coordination of social security systems have been well received both by the persons covered and by the Member States. True, the Regulations are complicated, but hardly anybody would contest that they provide a high standard of protection in the field of social security for people moving across borders within the EU.

On the contrary, there have always been voices claiming that the protection offered by these Regulations, as interpreted by the ECJ, goes too far and that Member States with the highest level of social protection have to pay disproportionately favourable benefits to people covered by these Regulations. The impression is sometimes given that the EU Regulations, as interpreted by the Court of Justice, could jeopardise the high level of protection given by the social security schemes of the “old” Member States. Some of the issues which have been the subject of controversy over the last few years are the following.

(44) Rob Cornelissen, *Regulation 1231/2010 on the inclusion of third-country nationals in EU social security coordination: reach, limits and challenges*, EJSS, Vol. 20(2), pp. 86-99, 2018.

(45) OJ L 344 of 29 December 2010.

(46) Directives 2003/109, OJ L 16 of 23 January 2004, 2005/71, OJ L 289 of 3 November 2005, 2009/50, OJ L 155 of 18 June 2009, 2011/98, OJ L 343 of 23 December 2011, 2014/36, OJ L 94 of 28 March 2014 and 2014/66, OJ L 157 of 27 May 2014.

(47) C-18/90, *Kziber*, EU:C:1991:36, C-58/93, *Yousfi*, EU:C:1994:160, -126/95, *Hallouzi*, EU:C:1996:368 and C-113/97, *Bababenini*, EU:C:1998:13.

(48) C-262/96, *Sürül*, EU:C:1999:228, C-373/02, *Öztürk*, EU:C:2004:95 and C-485/07, *Akdas*, EU:C:2011:346.

3.1. EXPORT OF FAMILY BENEFITS

According to Regulation 883/2004⁴⁹, a person who works in one Member State and whose children reside in another Member State, is entitled to family benefits from the State of work, as if the children were residing in that State. Recently a number of “old” Member States have requested a modification of the EU Regulations, so that the Member State of work will be allowed to index such benefits to the standard of living of the Member State where the children reside. The Member States concerned refer to the controversial deal that EU leaders offered to the UK⁵⁰ before the 2016 British referendum, as proof that such indexation is legally viable. The discussions on this issue are not silenced by the fact that the 2016 Commission proposal to modify Regulations 883/2004 and 987/2009⁵¹ does not modify the existing rules on export of family benefits. This is illustrated by the fact that since 1 January 2019 Austria implements such indexation on the basis of national law.

3.2. AGGREGATION OF PERIODS FOR UNEMPLOYMENT BENEFITS

According to Article 61 Regulation 883/2004, the application of the aggregation is subject to the condition that the person becoming unemployed has “*most recently*” completed periods of insurance or employment in the Member State where the claim for unemployment benefit is made. The philosophy behind this provision is clear: the state in which the unemployed person last worked or paid contributions should bear the burden of providing the unemployment benefit. Therefore, this condition is in line with Article 48 TFEU.⁵² However, Article 61 does not specify how long the person must have “*most recently*” completed periods of insurance in the Member State where he/she became unemployed before being able to invoke the aggregation provisions. The result is a divergent implementation of Article 61 in the EU. Some Member States permit aggregation after only one day of insurance in the Member State concerned. Other 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. According to the 2016 Commission proposal to modify Regulations 883/2004 and 987/2009, Member States may require that someone has worked for at least three months on its territory before a person who becomes unemployed can rely on previous experience in another Member State to claim unemployment benefits. According to the March 2019 tripartite (Council, Parliament and Commission) compromise on this Commission proposal the required minimum period has been reduced to one month. Some Member States have expressed the view that this period is not long enough to ensure that the financial burden for paying unemployment benefits does not arise in situations where mobile EU workers have not yet made a significant contribution to the scheme of the host Member State.

(49) Article 67 Regulation 883/2004.

(50) Conclusions of the European Council of 18-19 February 2016, *A New Settlement for the United Kingdom within the European Union*, OJ CI 69 of 23 February 2016.

(51) COM(2016) 815 final.

(52) C-62/91, *Gray*, EU:C:1992:177 and C-284/15, “M”, EU:C: 2016:220.

3.3. ACCESS TO MINIMUM EXISTENCE BENEFITS FOR INACTIVE PEOPLE

One of the parts of the EU Regulations that sparked most controversy over the last decade was the access to minimum subsistence benefits in the host state by economically non-active people coming from other Member States. In this context it is useful to recall that the current Regulation 883/2004 applies to all EU citizens who are insured under national law, whether they are economically active or not. For many people fears of benefit tourism are inextricably linked to the free movement of economically non-active persons. The right of EU citizens to move and reside freely within the territory of the Member States is enshrined in Article 21 TFEU. Directive 2004/38⁵³ specifies the residence rights of EU citizens (and members of their family) who move within the EU and defines certain conditions and limitations. By virtue of Article 7(1) of this Directive the right of residence for more than three months for economically inactive persons is subject to the condition that they have sufficient resources for themselves and their family members so as not to become a burden on the social assistance system of the host Member State, as well as to the condition that they have comprehensive sickness insurance. These conditions regarding sufficient resources and comprehensive sickness insurance do not apply to workers and self-employed people.

The EU Regulations based on Article 48 TFEU apply only to legislation concerning social security (whether contributory or non-contributory). Social assistance has always been explicitly excluded from the material scope of the EU Regulations. However, a definition of the term “social security” or “social assistance” was (and is) not to be found in these Regulations. There are a number of non-contributory benefits – financed not by contributions but by taxes – which have the characteristics of social security and social assistance. It followed from the abundant case-law of the ECJ that a high number of benefits which were considered “social assistance” by the Member State concerned actually fell within the material scope of the EU social security Regulations, with all its consequences, such as the waiving of residence clauses for entitlement to cash benefits. The reaction of the legislature to this case-law was to create⁵⁴ a separate coordination system for “special non-contributory benefits” in order to avoid their exportability. Under Article 70(4) Regulation 883/2004, 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.

A number of Member States have imposed on the entitlement to “special non-contributory benefits” listed in Annex X of Regulation 883/2004 for non-active people coming from another Member State the condition that they have a residence right there in accordance with Directive 2004/38. Since Directive 2004/38 and Regulation 883/2004, adopted on the same day, do not refer to each other, it became unavoidable that the ECJ had to rule on the relationship between the two legal instruments. In its famous Brey judgment⁵⁵ and subsequent case-law⁵⁶, the ECJ clarified that the notion

(53) Directive 2004/38, OJ L 158 of 30 April 2004.

(54) Regulation 1247/92, OJ L 136 of 19 May 1992.

(55) C-140/12, EU:C:2013:565.

(56) C-333/12, *Dano*, EU:C:2014:2358, C-67/14, *Alimanovic*, EU:C:2015:597, C-299/14, *Garcia-Neto*, EU:C:2016:114 and C-308/14, *Commission versus UK*, EU:C:2016:436.

“social assistance” within the meaning of the Directive could comprise “special non-contributory” social security benefits within the meaning of Regulation 883/2004. There is nothing to prevent the entitlement to such benefits for Union citizens who are not economically active from being made subject to the requirement that those citizens fulfil the conditions for obtaining a right of residence under Directive 2004/38 of the host Member State.

3.4. POSTING OF WORKERS

As mentioned above, the EU Regulations contain uniform criteria to determine the applicable social security legislation. The main rule is the *lex loci laboris*: a person is subject to the legislation of the Member State in which he/she works. This rule is based on the idea that a migrant worker should have the same rights as a national of the host State.⁵⁷ This rule seeks to prevent unfair competition between employers who use migrant workers in a Member State and those who only use non-migrant workers. The difference in social protection level between Member States, following the 2004, 2007 and 2013 enlargements has strengthened this objective even further.

From 1959, date of entry of Regulation 3, the law of the workplace did not apply in the event that a worker is sent by his employer for a short period to another Member State to work there on the employer’s behalf. It would be a severe burden on workers, employers and social security institutions if the worker was required to be insured under the social security system of every Member State to which he was posted in the course of his employment, even if such posting was of very short duration.⁵⁸ Such workers continue to be subject to the legislation of the sending State. However, in the *Manpower* and *Van der Vecht* judgments the Court has given a rather extensive interpretation of the term posting by deciding that the posting provisions also apply to a worker who is recruited with a view to being posted to another Member State. This case-law is now reflected⁵⁹ in the current Regulations.

The Court has, from the very beginning, mentioned not only the interests of the worker but also those of the employer and of the social security institutions. Initially, the ECJ underlined simplification as objective of the posting provision. However, in its 2000 *Fitzwilliam* judgment⁶⁰, the Court ruled that the purpose of the posting provisions is ‘in particular, to promote freedom to provide services for the benefit of undertakings which avail themselves of it by sending workers to Member States other than that in which they are established’. The objective of simplification is mentioned only in second place.

(57) Recital 17 Regulation 883/2004. Cases C-68/99, *Commission versus Germany*, EU:C:2001:137, para 23, C-249/04, *Allard*, EU:C:2005:329, C-493/04, *Piatowski*, EU:C:2006:167.

(58) 19/67, *Van der Vecht*, EU:C:1967:49 and 35/70, *Manpower*, EU:C:1970:120.

(59) Article 14(1) Regulation 987/2009.

(60) C-202/97, EU:C:2000:75, repeated in C-404/98, *Plum*, EU:C:2000:607.

The application of the posting provisions is subject to a number of strict conditions⁶¹ to prevent the posting provisions from being used in cases for which they are not intended. Firstly, posting has to be temporary: Article 12 Regulation 883/2004 mentions a strict maximum time limit of 24 months. Secondly, in order to avoid rotation of personnel performing the same activities, the worker may not be sent to replace a person who has completed an earlier period of posting. Thirdly, in order to reflect the goal of achieving continuity in the affiliation of the worker to the social security system of the sending Member State, the worker must have been subject to the legislation of the sending State prior to the posting. Fourthly, the worker should continue to be under the authority of the employer which posted him: there must be a direct relationship⁶² between worker and employer for the whole duration of the posting. And last, but not least, the employer should habitually carry out significant activities in the sending State. This last condition aims to prevent “letter-box” firms from using the posting provisions.

Posting is a very sensitive issue. For some Member States and interest groups, the conditions are too strict and lead to protection of the market of the host State. For other Member States and interest groups, the application of the posting provisions could lead to unfair competition and constitutes a risk for the level of social protection in the host State.

Proof that the legislation of the sending State is applicable is delivered by a certificate (Portable Document A1) provided by the competent institution of the Member State whose legislation is applicable. It follows from the case-law of the Court under the old Regulation 1408/71⁶³, now codified in Article 5 of Regulation 987/2009, that such document is binding for all other institutions of the Member States concerned. This means that whenever the decision of the issuing institution is contested by the institution of the place where the work is actually carried out, a (retroactive) change of the applicable legislation is not possible without the consent of the issuing institution to withdraw or to invalidate the A1 Document in question.

The Court based its case-law on the principle of cooperation in good faith laid down in Article 4(3) TEU. On the one hand, this principle requires the issuing institution to carry out a proper assessment of the facts and to (re-)examine whether all conditions for posting are fulfilled. On the other hand, the Document A1 establishes a presumption that the worker is properly affiliated to the social security system of the sending Member State. It is, therefore, binding on the competent institution as well as on the judiciary⁶⁴ of the Member State in which that person actually works, even in the case of a manifest error of assessment of the posting conditions⁶⁵. If the institution of the Member State in which the work is carried out has doubts about the validity of

(61) Articles 12 Regulation 883/2004 and 14 Regulation 987/2009, further elaborated in Decision A2 of the Administrative Commission, OJ C 106 of 24 April 2010.

(62) This notion is clarified in Decision A2 of the Administrative Commission, OJ C 106 of 24 April 2010.

(63) C-148/97, *Banks*, EU:C:2000:169 en C-2/05, *Herbosch Kiere*, EU:C:2006:69.

(64) C-2/05, *Herbosch Kiere*, EU:C:2006:69.

(65) C-620/15, *Rosa Flussschiff*, EU:C:2017:309.

the document or about the accuracy of the facts on which that document is based, it may start the dialogue and reconciliation procedure within the meaning of Article 5 Regulation 987/2009. However, that institution cannot unilaterally make the workers concerned subject to its own social security legislation.⁶⁶

The dialogue procedure must be followed, even if the institution of the Member State in which the work is carried out produces evidence collected in the course of a judicial investigation, that supports the conclusion that Document A1 was fraudulently obtained or relied on. It is only when the issuing institution fails to take such evidence into consideration for the purpose of reviewing the grounds for the issue of that document, that a court of the Member State where the work is carried out may disregard that document. This was decided by the Court in its famous *Altun* judgment.⁶⁷ In this judgment the ECJ underlined that the principle of prohibition of fraud and abuse of rights is a general principle of EU law which individuals must comply with. However, the ECJ clarified that only a national court, not a social security institution, may disregard the document concerned. In such cases, obviously the right to a fair trial must be guaranteed. A national court is only allowed to disregard such document in cases of fraud or abuse of rights. Findings of fraud are to be based on evidence that satisfies both an objective and a subjective factor. The objective factor consists in the fact that the posting conditions are not met. The subjective factor corresponds to the intention of the parties concerned to evade or circumvent the posting conditions with a view to obtaining the advantage attached to it (e.g. paying less social security contributions). The fraudulent procurement of Document A1 may thus result from a deliberate action (e.g. misrepresentation of the real situation of the worker or of the employer) or from a deliberate omission (e.g. concealment of relevant information) with the intention of evading the posting conditions. In practice it will not always be easy to produce evidence supporting the subjective factor, indispensable to conclude the findings of fraud.

The December 2016 Commission proposal to modify Regulations 883/2004 and 987/2009⁶⁸ contained a series of provisions aimed at fighting fraud and abuse as well as at strengthening the verification of the social security status of posted workers.

3.5. PEOPLE NORMALLY WORKING IN TWO OR MORE MEMBER STATES

For obvious reasons, the application of the law of the workplace is not suitable in cases where a person normally pursues activities in two or more Member States. For workers with such a working pattern, other connecting factors have been incorporated in special rules. These factors are laid down in Article 13 Regulation 883/2004.

The first connecting factor for determining the applicable social security law for workers normally working in two or more Member States is the notion “*substantial*

(66) C-356/15, *Commission versus Belgium*, EU:C:2018:555.

(67) C-359/16, EU:C:2018:63.

(68) COM(2016) 815 final.

*part*⁶⁹ of the worker's activities. Workers who normally work in two or more Member States and who pursue a "substantial part" of their work in their Member State of residence are subject to the social security legislation of that State. If a substantial part is not performed in the Member State of residence, then the decisive criterion is the "registered office or place of business" of the employer or of one of the employers.⁷⁰

The number of A1 documents issued for persons covered by Article 13 increased from 168,279 in 2010 to more than 1 million in 2017.⁷¹ This is a remarkable growth within a short period of time. The share of A1 documents issued on the basis of Article 13 in the total number of A1 documents strongly increased over the last few years up to 36% in 2017. To a large extent the increase in the number of A1 documents is linked to the fact that recently some Member States have decided to impose fines on people working on their territory without being affiliated to their social security scheme, if they do not carry a document A1 with them. Moreover, these Member States have tightened up their control measures. Nevertheless, these figures could be seen as an indication that in their search for the most advantageous social security legislation, businesses not only look at the possibilities offered by the posting provision of Article 12 Regulation 883/2004 but also at those offered by Article 13.

In fact, "posting" within the meaning of Article 12 is subject to the conditions and limitations explained above. This means in particular that there must be a direct relationship between the worker and employer and that the employer ordinarily performs significant activities in the Member State in which he is established. In order to be covered by Article 13, however, those conditions and limitations do not apply. In addition, there are some uncertainties as to how to interpret the notion "registered office or place of business of the undertaking or employer", within the meaning of Article 13. In order to eliminate "brass-plate" companies, a definition of this term is provided by Article 14(5a) Regulation 987/2009. Unfortunately, this definition is rather vague. True, the Practical Guide⁷² contains a number of criteria, but this does not exclude situations where some of these criteria are fulfilled, while others are not. Interpretation problems may arise in particular when corporate businesses with mother/daughter companies are involved. The following case, which is now pending before the ECJ⁷³, may illustrate such dilemmas.

A number of European truck drivers reside in the Netherlands. They are employed by a transport enterprise established in the Netherlands. They normally work in two or more Member States and, therefore, fall under Article 13 Regulation 883/2004. They do not perform a substantial part of their activities in the Netherlands. By virtue of Article 13(1)(b) Regulation 883/2004 they are subject to the social security legislation

(69) Article 14(8) Regulation 987/2009: 25% of working time or remuneration.

(70) Article 13(1)(b) Regulation 883/2004.

(71) Frederic De Wispelaere and Jozef Pacolet (KU Leuven), *Posting of workers - Report on A1 Portable Documents issued in 2017*, available on the website of the European Commission.

(72) *Practical Guide on the applicable legislation in the European Union, the European Economic Area and in Switzerland*, available on the website of the European Commission.

(73) C-610/18, *AFMB Ltd*.

of the Netherlands since their employer is established there. However, after a while the enterprise has engaged in outsourcing part of its operations to Cyprus. Since then it is a company established in Cyprus that recruits and pays the truck drivers concerned. The Cypriot company hires the truck drivers concerned out to the same transport enterprise established in the Netherlands. The transport enterprise claims that the truck drivers are now subject to the social security legislation of Cyprus, since their employer has its registered office in that Member State. The Dutch social security institution, however, is of the opinion that the truck drivers remain subject to the social security legislation of the Netherlands, since their real employer is the transport enterprise whose registered office is in the Netherlands. The dispute is brought before the Dutch court.

According to the findings of the Netherlands judiciary the truck drivers concerned remain *de facto* fully available to the transport enterprise in the Netherlands and it is the enterprise in the Netherlands which actually bears the wage costs. The Dutch court decides to refer the case to the ECJ by asking a number of preliminary questions. The first question is which of the two companies involved has to be considered as the employer of the truck drivers within the meaning of Article 13. As stated before, “posting” within the meaning of Article 12 is subject to the condition that for the whole duration of the posting there is a direct relationship between the worker and employer and that the employer ordinarily performs significant activities in the Member State in which he is established. In his second question the Dutch court asks the ECJ whether these conditions should apply by analogy to the employer within the meaning of Article 13. In the event that the ECJ comes to the conclusion that the company established in Cyprus is the employer within the meaning of Article 13 and that the conditions under which employers can invoke Article 12 do not apply to Article 13 by analogy, then the final question is whether the objective pursued by Regulation 883/2004 is attained. In this context the Dutch court refers to recital 1 of Regulation 883/2004 and to the famous Bosmann judgment⁷⁴ in which the ECJ underlined that the EU Regulations based on Article 48 TFEU aim at contributing towards improving the standard of living and conditions of employment for people exercising their right to free movement. In its referring judgment the Dutch court expresses fears for the abuse⁷⁵ of Article 13, since the objective of the EU Regulations is not to facilitate competitive advantages for employers. It fears circumvention of the social security legislation of the Netherlands by the companies involved by creating artificially the conditions for obtaining an advantage (level of contributions more favourable for the employer).

(74) C-352/06, EU:C:2008:290.

(75) Conclusions of Advocate-General Saugmandsgaard in C-359/16, *Altun*, EU:C:2017:850, footnote 45.

4. CONCLUSIONS

It is contested by nobody that the EU Regulations, notwithstanding their complexity, their gaps and deficiencies, provide a very high standard of protection in the field of social security and, therefore, guarantee that the right of free movement can be effectively exercised. These Regulations need to be adapted and modernised on a regular basis not only to be able to respond better to the need to protect mobile persons, but also to be able to address all kinds of developments in the socio-economic environment. The coordination of Member States' diverse social security systems is, just as it has been for the last 60 years, bound to face a growing number of challenges, some of which have been referred to in this contribution. A continuous update and reform of the EU Regulations is a never ending story.

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INTRA-EU MOBILITY AND EMPLOYMENT. OPPORTUNITIES AND RISKS

BY **ELENA-FRIES TERSCH**

Milieu Ltd

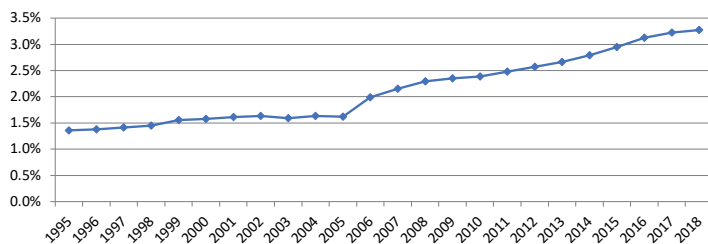
This article presents an overview of intra-European Union (EU) mobility over the past decade, with a focus on the role of employment in the mobility process. The article shows that intra-EU mobility of EU citizens has constantly increased during the past decade. Better employment opportunities in the destination than in the origin country have been a key driver for most movers, and economic divergence as well as legal access to labour markets in other Member States seem to have greatly impacted mobility flows.

While one can assume that moving does have important economic benefits for mobile citizens, it also comes with a certain cost for many, most importantly carrying out jobs below one's skill levels and precarious employment conditions, such as non-standard types of work.

1. **EMPLOYMENT AS A KEY DRIVER OF MOBILITY**

Intra-EU mobility (or, mobility of EU citizens within the European Union) has constantly increased for a long time. However, in the past decade it has increased much stronger than in the decade before. The share of EU-15 movers from the total EU-15 population increased between 1.4% and 1.6% in the years 1995 to 2005, whereas the share of EU-28 movers from the total EU-28 population increased from 2% to 3.1% in the following decade (2006 to 2016). Different factors may have influenced this exceptional growth of intra-EU mobility, among others the accession of the new Member States resulting in greater regional disparity within the EU; the financial crisis of 2008 and subsequent economic downturn in several Member States; faster and cheaper transport; an ageing society and resulting labour shortages in the care sector; etc. Furthermore, it must be noted that migration from some of the new Member States to some EU-15 countries (e.g. from Poland to Germany) was already large in size in the 1990s, but would have not been defined as 'intra-EU mobility', but as immigration of third country nationals.

FIGURE 1: SHARE OF INTRA-EU MOVERS AGED 15 YEARS AND ABOVE FROM THE TOTAL EU POPULATION*, 1995-2018



* Data refers to stocks of EU citizens living in a Member State other than their country of citizenship, as a share of the total EU population; figures refer to the EU-15 until 2005 and to the EU-28 as of 2006.

Source: Eurostat, LFS series – detailed annual survey results, ‘Population by gender, age, citizenship and labour status’, available at: <https://ec.europa.eu/eurostat/web/lfs/data/database>.

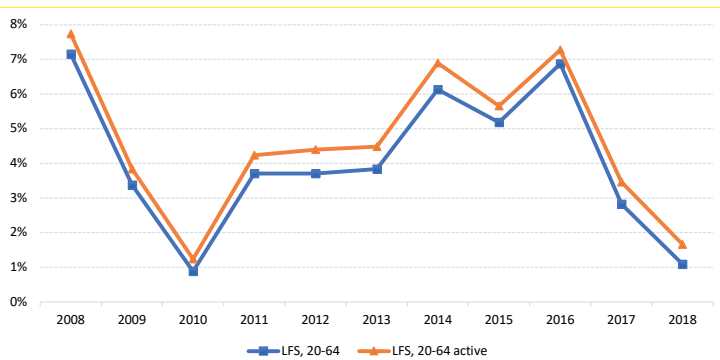
The graph below shows a more precise picture of the development of the stocks of EU citizens living in a Member State other than their nationality since the second Eastern enlargement in 2007 – over the past decade, these stocks grew annually between 1% and 8%. After a very strong growth in 2008 following the accession of Romania and Bulgaria in 2007, growth declined in 2009 and 2010 (which was also related to the economic crisis, see below). Subsequently, growth increased again, particularly in 2011 and 2014. These were the years when the transitional arrangements for citizens of the new Member States ended. Pursuant to the transitional arrangements, free movement of workers may be deferred for a period of maximum 7 years. Such a transitional period is divided into three distinct phases, according to the ‘2 + 3 + 2’ formula. Transitional arrangements were/are mainly implemented to avoid a labour market disruption in the destination country. Thus, EU-8 citizens were granted full access to the labour markets in all Member States in 2011 and EU-2 citizens in 2014.

The strong increase in growth in 2011 and 2014 indicates that the free access to the labour market has had some effect on labour mobility (see also figure 5 below). Nevertheless, mobility already grew strongly directly after the accession of the new Member States. This is, among others, because the implementation of the transitional arrangements has led to the use of several loopholes. A report published by the European Commission in 2006 stated that it was “acknowledged that the restrictions may have encouraged EU-8 nationals to look for other ways to perform economic activity in EU-15 Member States, reflected in an exceptionally high influx of posted workers or workers claiming to be self-employed.”¹ This phenomenon can be conceptualised as

(1) European Commission, *Report on the Functioning of the Transitional Arrangements set out in the 2003 Accession Treaty (period 1 May 2004–30 April 2006)*, COM(2006)48, Brussels, 2006.

the ‘front door/back door’ problem. In the same report, social partners also pointed out that restrictions lead to a proliferation of undeclared work and bogus employment.

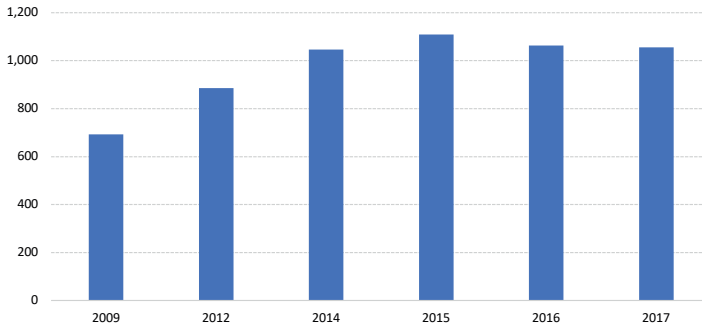
FIGURE 2: ANNUAL GROWTH IN STOCKS OF EU MOVERS (ACTIVE AND TOTAL) OF WORKING AGE, 2008-2018



Source: EU Labour Force Survey, 2018, <https://ec.europa.eu/eurostat/web/lfs/data/database>.

Whereas the stock data above includes all citizens who ever moved to another Member State and who still reside there and a small part of its variation might be explained by other reasons than actual cross-border mobility², annual inflow figures show the actual movement per year. As can be seen, inflows of citizens from other EU Member States have increased constantly between 2009 and 2015, and only decreased slightly in 2016 and 2017.

(2) Especially, changes in the age structure and thus in the number of persons captured in the 20-64 years age bracket.

FIGURE 3: ANNUAL INFLOWS OF EU-28 MOVERS TO ANOTHER MEMBER STATE (IN THOUSANDS), EU-28 AGGREGATE, 2009-2017

Source: Eurostat, Immigration by age group, gender and citizenship, http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_imm1ctz&lang=en.

In 2017, there were in total 17 million EU movers (here defined as EU citizens living in a Member State other than their citizenship), of which 12.4 million were of working age, making up 4% of the working-age population in the European Union.

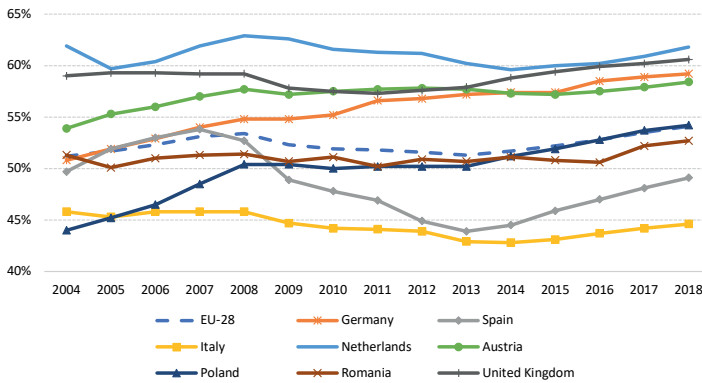
Germany and the United Kingdom (UK) are by far the most important countries of destination, with around 50% of all EU movers in 2017 departing to either of these countries. Germany, in particular, has seen a very large increase in inflows since 2009, with annual inflows doubling already until 2012, and in 2017 being three times as high as eight years ago. The UK saw a slightly flatter increase in inflows during that time span, given that inflows were already very high since 2004. Furthermore, the UK is experiencing a strong decrease in inflows of EU citizens since the second half of 2016, when the referendum on Brexit signalled upcoming changes to immigration policy.³ Outflows of their own nationals being much lower than inflows of other EU nationals, net mobility to both countries was outstandingly high in both countries in 2016: just below +100,000 in Germany and around 50,000 in the UK. Other countries, in particular, the Netherlands and Austria, also saw important increases in inflows since 2009, and emerged as two of the six most important countries of destination in 2017, also with a positive net mobility of EU citizens. The strong increase in mobility to these countries was, firstly, a result of the accession of the new Member States and secondly, of the impact of the economic crisis, in particular on Spain and Italy. Both Spain and Italy were, and still are, prominent destinations for EU movers, but the economic downturn and following decline in employment opportunities led to a decrease in inflows to both countries between 2009 and 2014, with a subsequent deviation of flows towards the countries mentioned above, in particular, Germany. The appeal to EU movers was weakened especially in Italy, which in 2009 still attracted the second

(3) UK Office for National Statistics, Migration Statistics Quarterly Report: May 2019, <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/bulletins/migrationstatisticsquarterlyreport/may2019>.

largest number of movers from other countries. Inflows dropped more than half until 2014 and have stagnated since. This means that Italy receives inflows in the same range as Austria and the Netherlands. In Spain, on the other hand, inflows started picking up again in 2015, and have been increasing since. In parallel to a decrease of inflows from other EU countries, Spain and Italy both saw a strong increase in emigration of its own nationals in the first years after the onset of the economic crisis.

These developments are just one example of the importance of the economic context and employment opportunities of the destination country as a pull factor for mobility.

FIGURE 4: TREND IN EMPLOYMENT RATES (OF POPULATION AGED 15 YRS. AND ABOVE) IN IMPORTANT COUNTRIES OF ORIGIN AND DESTINATION OF EU MOVERS, 2004-2018



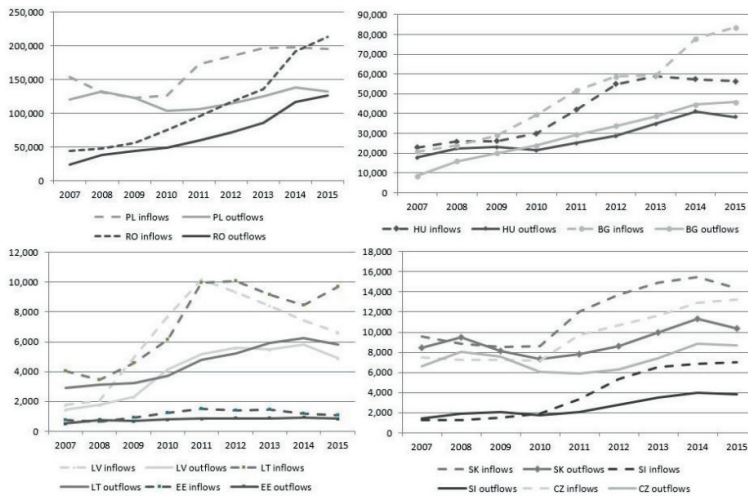
Source: EU Labour Force Survey, 2018, <https://ec.europa.eu/eurostat/web/lfs/data/database>.

The relevance of access to the labour market as a pull factor can also be seen when looking at flow trends between Germany and several Eastern European countries.

The graph below shows two things quite clearly:

- First, that the economic crisis had a trimming effect on mobility towards Germany, which was felt at the very beginning of the crisis and was only short-term. During the first years of crisis (2008-2010), inflows from several Eastern European countries (such as Poland, Lithuania and Slovakia) declined slightly, while inflows from others stagnated (Czech Republic, Slovenia, Estonia). During this time, employment in Germany stagnated, marking a break in the strong upwards trend from the years before.
- Second, and more importantly, the flows quite clearly show the pull effect of the complete opening of the German labour market to EU-10 citizens in 2011 and to EU-2 citizens in 2014. Inflows from several countries show exceptionally strong increases in inflows in these two years.

FIGURE 5: INFLOWS AND OUTFLOWS TO AND FROM GERMANY, BY PARTNERING COUNTRY, ALL AGES, 2007-2015⁴



Figures show inflows and outflows to and from Germany with the partnering countries indicated. Partnering countries are countries of previous residence (inflows to Germany) and countries of next residence (outflows from Germany).

Figures include persons of all nationalities and all ages. They include any registrations and deregistrations of residence in Germany and therefore also include temporary flows (less than 12 months). Therefore, absolute figures are not comparable with Eurostat migration statistics.

Source: German national statistical institute DESTATIS, statistics on temporary migration flows between Germany and foreign countries: ‘Wanderungen zwischen Deutschland und dem Ausland: Jahre, Staaten der Europäischen Union’.

But not only the development in trends show the importance of labour market dynamics to steer mobility flows – the value of employment can also be seen when asking movers for their reasons for migration. Reasons for migration are various and can be roughly categorised into economic and professional reasons, social and family related reasons, cultural reasons and education and other.⁵ Results from several surveys show that when asking all movers, social and family-related reasons feature as much if not more than professional reasons as the main reasons for migration, and these

(4) Figures include persons of all citizenship, however 90% or more are non-Germans. Therefore, it seems safe to assume that in most cases they constitute mobility of citizens from the respective partner country indicated.

(5) Classification used in several surveys, according to Verwiebe, R., Wiesböck, L. and Teitzer, R. (2014), New forms of intra-European migration, labour market dynamics and social inequality in Europe, *Migration Letters*, 11(2).

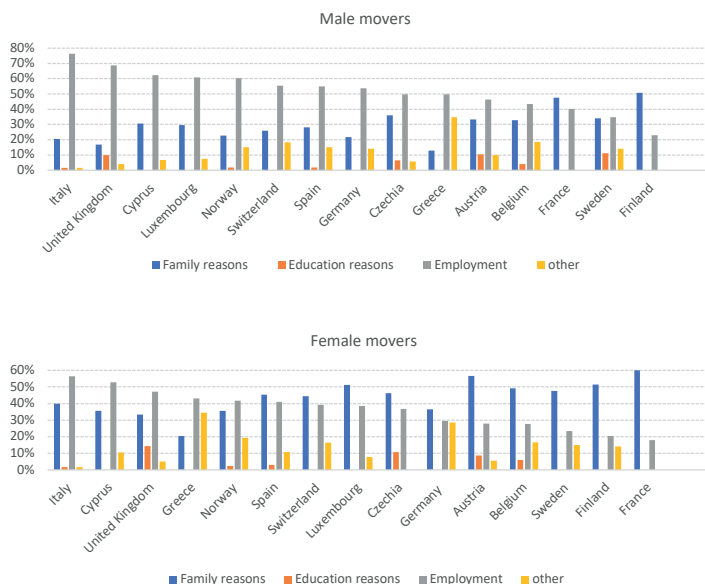
two categories are much more important than cultural reasons and education.⁶ These general results, however, cover important gender differences. Looking at the two gender groups separately reveals that employment is by far more important as a reason to move for men than for women. Accordingly, employment is the reason mentioned most often by male movers in 12 out of 15 European countries⁷, while it is mentioned most frequently by female movers only in 5 out of 15 countries, namely Italy, the UK, Cyprus, Greece and Norway. In the other countries, family is the main reason for migration mentioned most often by female movers. Furthermore, the shares of female movers mentioning employment as the main reason for migration are much smaller than those of men mentioning employment as the main reason in all 15 countries. Thus, in a very general way, one may say that women are most likely to move for family reasons and men for employment reasons (this was also found in a recent Organisation for Economic Co-operation and Development (OECD) study⁸).

(6) Verwiebe et al., p. 129, 2014.

(7) Italy, Cyprus, UK, Greece, Norway, Spain, Switzerland, Luxembourg, Czechia, Germany, Austria, Belgium, Sweden, Finland, France.

(8) OECD, *International Migration Outlook 2017*, OECD Publishing, Paris, pp. 148-149, 2017, available at: https://www.oecd-ilibrary.org/social-issues-migration-health/international-migration-outlook2017_migr_outlook-2017-en.

FIGURE 6: MAIN REASON FOR MIGRATION BY FIRST GENERATION MOVERS OF ANOTHER EU NATIONALITY, BY GENDER, 2014



Source: EU-LFS AHM 2014.

Furthermore, we may consider that a fair amount of movers move as a couple, and that women are more often the ‘accompanying spouse’ who remains inactive or unemployed in the country of destination. An analysis of EU-European labour force survey (LFS) microdata on movers’ household showed that a) most movers (65%) who are in a couple have a partner who is also a mover and b) that women in a mover couple are very likely to be unemployed (9%) or inactive (25%). Thus, it seems logical to assume that accompanying spouses, who are more likely to be female, may mention ‘family’ as the main reason, but that the key reason for the movement of the couple or the family is still the employment opportunities of one of the partners.

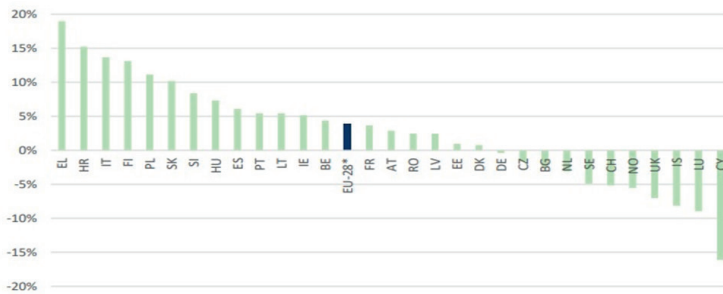
This being said, mobility may of course, in many cases, be purely motivated by social reasons, for example in the case of family reunions. Furthermore, social networks play a crucial role in facilitating mobility and in the decision where exactly to move to. Social connections and labour market characteristics of the destination country (vacancies, wages, job conditions) are likely to both play important roles in a movers’ success on the labour market and his or her integration.

2. POSITIVE EMPLOYMENT EFFECTS OF MOBILITY

The initial aspiration to move to find a job or a better paid job seems to often realise itself. An indication for this is the employment situation of movers compared to the

nationals in their country of origin. Overall, EU-28 movers of working age have a higher employment rate than those citizens in their country of origin. While at EU level movers have an employment rate of 77%, nationals who are still in their country of origin have an employment rate of 73%. This positive advantage can be seen for most national groups, and is particularly high for Italian, Polish, Greek and Croatian movers (more than 10 p.p. difference).

FIGURE 7: DIFFERENCE IN EMPLOYMENT RATES BETWEEN EU-28 MOVERS AND NON-MOBILE NATIONALS OF COUNTRY OF ORIGIN, BY COUNTRY OF ORIGIN, 2017



* EU-28 aggregate also includes EU-28 movers who live in an EFTA country.

Figures of low reliability: CY, IS.

Countries not displayed have figures below reliability.

Source: EU-LFS, Milieu calculations, 2017.

When comparing unemployment rates however, the picture is less clear. At EU level, the movers' unemployment rate is slightly higher (+1p.p.) than that of the citizens in their country of origin. However, when looking at country level, for most national groups of movers the unemployment rates are lower than that of nationals in the country of origin. The EU aggregate is due to the fact that unemployment is larger for several large national groups of movers, namely Bulgarian, Romanian, British and German which have a heavy weight in the EU aggregate.

This, at first sight, contradiction between employment and unemployment rates is due to the fact that unemployment rates refer to only the active population and employment rates to the total population. Thus, because movers are more likely to be active, employment rates are higher. However, unemployment also seems to be higher than in the countries of origin for several national groups, which may be due to several factors: many movers move without having secured a job before the move (see below); also, movers are more likely to have limited or short-term contracts.

Despite this, for many national groups, mobility also results in lower chances of unemployment than if they stayed at home.

In addition to higher chances of employment for most movers, movers are also likely to earn more than if they stayed at home, even if living costs are higher (earning differences below are shown in Purchasing Power Standard and therefore factor in already the higher living costs compared to the wage). This is likely to be the case even if they carry out a job requiring a lower skill level. For example, monthly earnings for professionals in important countries of origin such as Bulgaria and Romania are lower than monthly earnings in elementary occupations in important destination countries such as Germany, France, Spain, Italy and the UK. Furthermore, monthly wages for the same level of occupations are the highest in Germany and the UK, explaining their attraction of movers also from other countries of origin, such as Spain and Italy.

TABLE 1: MEAN MONTHLY EARNINGS IN PURCHASING POWER STANDARD (PPS), ALL AGES, BY OCCUPATION, 2014

	Professionals	Craft and related trades workers	Elementary occupations
Bulgaria	1,312	790	520
Germany	4,547	2,739	1,729
Spain	2,958	1,998	1,438
France	3,367	1,995	1,641
Italy	3,090	1,966	1,669
Poland	2,158	1,420	1,023
Romania	1,456	806	542
United Kingdom	3,499	2,409	1,549

Source: Eurostat, Mean monthly earnings by gender, age and occupation, <https://ec.europa.eu/eurostat/web/labour-market/earnings/database>.

3. CHALLENGES FACED BY MOBILE WORKERS

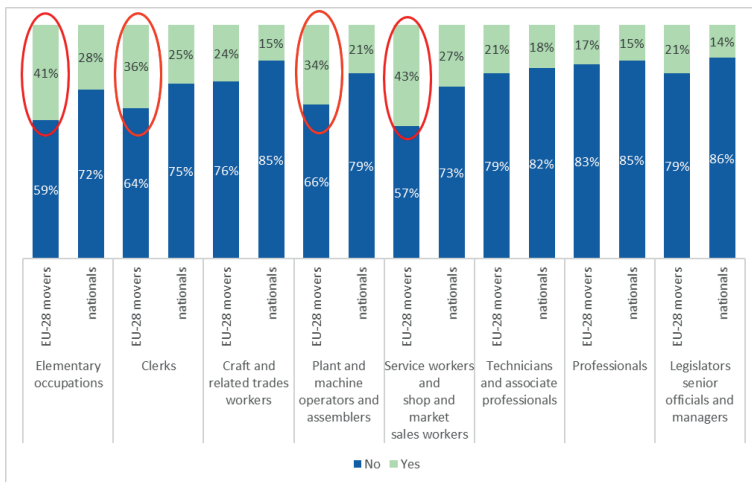
Despite the benefits in employment described above that many movers are likely to gain, mobility also has its downside on movers' working life.

First, EU movers are often overqualified for their jobs, which is a result of labour shortages in certain sectors and occupations (for example, agricultural and construction workers) in destination countries, combined with the higher average wages.

While overqualification (carrying out a job below one's skill level) is also apparent among nationals in the destination countries, movers are disproportionately affected.

As shown in the graph below, subjectively perceived overqualification⁹ is particularly frequent in low-skilled or elementary occupations (such which require only a lower secondary school degree or below), among clerks, service and sales workers, and plant and machine operators and assemblers. While overqualification is highest in these occupations also among nationals (between 21% and 28%), among EU movers it is much larger (between 34% and 43%).¹⁰ This is confirmed by looking more objectively at overqualification, namely by comparing peoples' occupation, the education level required to carry out that occupation and their achieved highest level of education. Although the categories (highest achieved level of education, educational requirements by occupation) are rather broad, one can see that overqualification is particularly pronounced in elementary occupations and among clerks. Among movers working in elementary occupations, 13% have a tertiary (university or higher education) degree and 50% have a secondary degree (higher secondary education), whereas these types of occupations normally only require lower secondary degrees. Among clerks (requiring an upper secondary degree), 50% of movers have a tertiary degree and are therefore overqualified – this share is 30% among nationals of the country of destination.

FIGURE 8: SUBJECTIVE OVERQUALIFICATION OF EU-28 MOVERS AND NATIONALS IN DIFFERENT OCCUPATIONS, 2014



Source: EU-LFS ad-hoc module 2014.

Data also shows that overqualification becomes more unlikely the longer a mover has been in the destination country. One reason for this is the acquisition of the host

(9) The EU-LFS asks respondents whether they feel they are overqualified for their job.

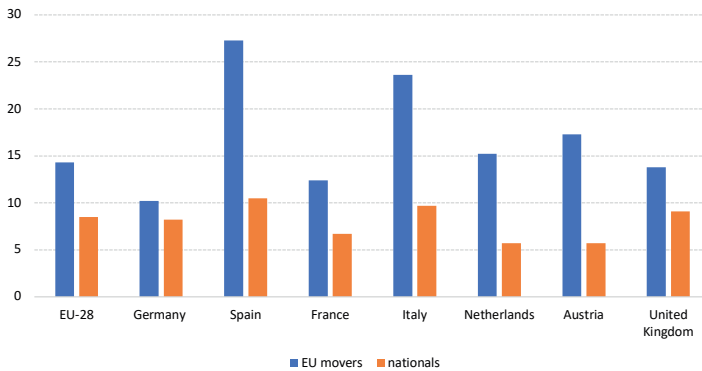
(10) Fries-Tersch, E., Tugran, T., Markowska, A. and Jones, M., *2018 Annual Report on intra-EU Labour Mobility. Final Report December 2018*, Fig. 44, p. 91, 2018, based on EU-LFS ad-hoc module 2014.

country's language skills, the lack of which is mentioned as the most frequent obstacle for movers to obtaining a suitable job.¹¹

Overqualification is more likely encountered by movers from the new Member States than from the EU-15, which is most likely due to the salary differences which constitute an incentive to carry out jobs below one's skill level. Furthermore, female movers are more likely to experience overqualification than male movers.

Secondly, although salary differences between countries of origin and destination countries are often beneficial for movers, they are at a higher risk of in-work poverty than nationals in the destination countries (Figure 9). At EU level, around 15% of EU movers are at such a risk (compared to 9% among nationals), but in Spain and Italy, the share is above 20%. This is related to the fact that such a high share (20%)¹² work in low-skilled jobs (elementary occupations), compared to 8% among nationals.

FIGURE 9: IN-WORK AT-RISK-OF-POVERTY RATE IN KEY DESTINATION COUNTRIES, 18 YEARS AND ABOVE, 2017



Source: Eurostat, *In-work at-risk-of-poverty rate by broad group of citizenship (population aged 18 and over)*, available at: http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=ilc_iw15&lang=en.

4. CONCLUSIONS

The sections above highlight some key trends of intra-EU mobility, in particular over the past decade. They show the importance of access to employment and better salaries as a driver of EU mobility. This is underlined by movers' statements that a key reason to move is employment. Although movers encounter better opportunities and chances, they also run risks related to their employment situation and/or career. In particular,

(11) Source: EU-LFS ad-hoc module 2014.

(12) EU-LFS, Milieu calculations, 2017.

they are likely not to find employment that corresponds to their education level, if they have achieved a medium or higher degree education. This is because movers are more likely to fill shortages in low-skilled occupations, such as the service or the agricultural sector. A lack of language skills is by far the most important reason for movers not accessing jobs that match their skill level; but also shortages in such occupations and difficult, unstable working conditions, open the field for employment of workers from other countries. Thus, whereas salary levels might be higher and movers might earn more even in a more low-skilled occupation in the country of destination, they are still more likely to experience poverty than citizens of the destination country themselves.

In light of these challenges, access to social security is crucial for mobile EU citizens. Precarious employment situations make it indispensable, for example, to access unemployment benefits, even after returning back to the country of origin. Free movement can offer great opportunities to EU citizens, among others, to improve their socio-economic situation – but only if the risk of moving is accompanied by a safety net of social security that can be transferred as smoothly across borders as the movers themselves.

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SOCIAL SECURITY COORDINATION AT A GLANCE: THE HIDDEN EUROPEAN WELFARE STATE

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1. INTRODUCTION

The ‘invisible’ or the ‘hidden’ social security or welfare state is a well-known concept in scientific literature. It covers ‘hidden terrains’ (referring to a broader spectrum of institutions and approaches of social security – ‘invisibility in width’) as well as ‘hidden aspects’ (referring to the functions of social security – ‘invisibility in depth’) (Berghman, 2014).¹ This concept may also apply to the Coordination Regulations. In that respect, one could consider the European Union coordination of social security systems as proof of the ‘hidden European welfare state’ for two main reasons.

Firstly, it would be wrong to assert that the European Union (EU) has no social dimension today. Instruments such as the Open Method of Coordination, common European (minimum) standards and directives but especially the European Semester have a real impact on national social policy (Schoukens, 2016). Moreover, the newly implemented ‘European pillar of social rights’, which sets out a number of key principles and rights to support fair and well-functioning labour markets and welfare systems, even seems to reinforce the social dimension of Europe (Pacolet et al., 2018). The importance of the coordination of social security systems as a European social instrument is less known, perhaps even forgotten. Moreover, it is certainly also a tool for coordinating a well-functioning European labour market. The Regulations should therefore be considered as an important element of the European social acquis, which is the result of a long and gradual development over a period of 60 years. The importance of the coordination rules has been pointed out by Eichenhofer (2009, p. 90) by stating that these provisions are *“an important part of European legislation, because it makes Europe a unique ‘social space’.”* Moreover, he concludes that *“The coordination of social security between Member States has been the most significant development so far in social policy at the European level. Its success has been remarkable, yet its implementation has been scarcely noticeable. For decades, pensions have been ‘exported’, medical treatment has been available for tourists travelling between Member States, and pro-rata pensions have been payable to those who have spent their working lives in more than one Member State. Such benefits of EU social security coordination are today taken for granted”* (Eichenhofer, 2000, p. 231). The slogan ‘unknown, unloved’ seems to apply here.

(1) The concept of the ‘hidden welfare state’ has frequently been used to refer to tax expenditures with social welfare objectives (see Howard, 1997).

Secondly, for a long time the content and the impact of the coordination rules were an unexplored area in terms of available statistics, even despite concerns about ‘social dumping’² and ‘welfare tourism’³ which have become so heavily politicised. It certainly proves the necessity of more and better statistics as this should allow Member States and the European Commission to be more aware of the real impact of the coordination of social security systems in terms of number of persons involved and the related budgetary impact for Member States. These data may also go against the perception of ‘welfare tourism’ and ‘social dumping’.⁴ Something that may not have happened enough in the discussions before the ‘Brexit referendum’.

Although the coordination of social security systems has been in force for 60 years, this is not the case for the data collection. A historical overview of the use of the Regulation is therefore not available. However, it is, of course, possible to look at the statistics that are available on migration. These are available for a long period of time. Moreover, recent figures on the size and impact of the Coordination Regulations are fortunately available. Over the past five years, important steps have been taken to collect statistical data on the application of the coordination rules, mainly based on the application of Article 91 of Implementing Regulation (EC) No 987/2009.⁵ For several years now, the Network Statistics FMSSFE,⁶ on behalf of the European Commission – DG EMPL, has been collecting administrative data on the application of the Coordination Regulations. Thematic questionnaires are sent to the members of the Administrative Commission.⁷ In this body, the reports containing the analysis of the collected data are also presented and approved. The value added of collecting such data has recently been proven when there were several ad hoc needs for more detailed information on the current situation within the context of the announced ‘Labour Mobility Package’. This package included both a proposal of a targeted review of the Posting of Workers

(2) Defined 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/standards that are not (fully) remedied by European legislation” (De Wispelaere and Pacolet, 2017). This definition cites the reason why welfare states in host Member States come under pressure from intra-EU posting, particularly as a result of the applicable European legislation. What this definition mainly describes is often referred to as ‘regulatory competition’ and therefore does not include fraudulent activities.

(3) Or the so-called ‘welfare magnet’ hypothesis, whereby migrants are attracted to more generous welfare states (Borjas, 1999).

(4) In its Impact Assessment of the Regulation, the Commission states that “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, 2016).

(5) This article states that “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.”

(6) Composed of expert teams from HIVA (KU Leuven), Milieu Ltd, IRIS (UGent), ICON-INSTITUT Public Sector GmbH, Szeged University and Eftheia bvba.

(7) The Administrative Commission for the coordination of social security systems comprises a representative of each EU Member State and representatives of the European Commission – DG Employment. It is responsible for dealing with administrative matters, questions of interpretation arising from the provisions of regulations on social security coordination, and for promoting and developing collaboration between EU countries. The composition, operation and tasks of the Administrative Commission are laid down by Articles 71 and 72 of the Basic Regulation.

Directive⁸ and of the Regulation on the coordination of social security systems⁹. In the sections below, we report the most striking data. It should allow the reader to become more aware of the importance and added value of the Coordination Regulations in terms of protecting social rights in case of intra-EU mobility as a worker, unemployed person, pensioner, tourist, etc. We will deal with the main branches of social security, namely healthcare, pensions, unemployment and family benefits. First, one of the most politically sensitive chapters of the Coordination Regulations will be discussed, namely ‘applicable legislation’.

It should be noted that the figures reported below 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. This raises a question about the size of the non-take up of social rights by mobile persons. Research has shown that there can be significant barriers to claiming these rights (Zabransky and Amelina, 2017; Fingarova, 2017; Bruzelius et al., 2017). In addition, we have regularly observed that there is certainly room for improvement when it comes to providing information about the social rights of mobile persons (De Wispelaere and Pacolet, 2018d). In the section on the export of unemployment benefits, we try to make a first tentative estimate of the non-take up.

2. APPLICABLE LEGISLATION, WITH A FOCUS ON INTRA-EU POSTING

The determination of the applicable legislation if persons are or have been mobile in the EU/EFTA (European Free Trade Association) has a far-reaching impact on the amount of social security contributions received as well as on public social spending by Member States. The main rule is that a person is subject to the legislation where he/she works, even if his/her residence is in another Member State. In some very specific situations, criteria other than the actual place of employment are applied. For instance, the law of the workplace does not apply in the event that a worker is sent to another Member State by his employer for a short period of time to work there on the employer’s behalf. This is the so-called ‘posted worker’. It would be a severe burden on workers, employers and social security institutions if the worker was required to be insured under the social security system of every Member State to which he was posted in the course of his employment. Such workers continue to be subject to the legislation of the sending State. In this section, we give a brief overview of some key figures on the profile, size and impact of intra-EU posting.

(8) In March 2016 there was the proposal for amending the Posting of Workers Directive (Directive 96/71/EC) (COM (2016) 128). On 21 June 2018, after a long period of negotiations, the Council of the European Union approved the revised Posting of Workers Directive (see Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services). Member States should adopt and publish the laws, regulations and administrative provisions necessary to comply with this Directive by 31 July 2020.

(9) On 13 December 2016, the European Commission launched its proposal to revise the current rules on the coordination of social security systems. The proposal focused on four areas: economically inactive citizens’ access to social benefits, long-term care benefits, unemployment benefits and family benefits. However, no agreement was reached on this proposal.

The main source of information on intra-EU posting is the so-called Portable Document A1 (PD A1). The form is provided by the competent Member State at the request of the employer or the person concerned and establishes the presumption that the holder is properly affiliated to the social security system of the Member State that issued the certificate. Consequently, it confirms that the person concerned has no obligations to pay contributions in another Member State. It should be noted that a PD A1 is not only issued to posted workers covered by Article 12 of Basic Regulation (EC) No 883/2004 but also to several other mobile workers, such as persons who are active in two or more Member States, mariners, and flight or cabin crew members. We will only discuss those issued on the basis of Article 12 of the Basic Regulation. Moreover, it should be acknowledged that the A1 data only provide an indicative picture of the phenomenon. An undertaking which posts a worker to another Member State, or in the case of a self-employed person the person himself/herself, must contact the competent institution in the posting State and wherever possible this should be done in advance of the posting. However, in practice, the competent services are certainly not always informed when people are posted. Consequently, the number of PDs A1 issued and its evolution may depend on the number of inspections performed by the enforcement bodies in the host Member State as well as to what extent host Member States have implemented sanctions for failure to present a PD A1. As a result, the share of tightly controlled sectors, such as the construction sector, in total postings might be overestimated when relying on the PD A1 data while the size and share of postings in qualified occupations might be underestimated (i.e. ‘the forgotten sectors in the posting debate’: the financial sector, the scientific sector, the IT sector, the performing arts sector etc.). Moreover, there is little chance that persons going abroad for a business meeting will apply for a PD A1. Nevertheless, by looking at the A1 data, we obtain an instructive, yet tentative, view on the profile, size and impact of the phenomenon.

In 2017, approximately 1.7 million PDs A1 were issued according to Article 12 of the Basic Regulation (De Wispelaere and Pacolet, 2018a). Some 7% of the forms were issued to self-employed persons. A more detailed analysis shows that some 1 million PDs A1 were granted by the EU-15 Member States and some 700,000 forms by the EU-13 Member States. The main sending Member States pursuant to Article 12 were Germany (332,091 postings), Poland (235,836 postings) and Slovenia (163,876 postings). From the perspective of the receiving Member State, most persons covered by Article 12 provided services in Germany (427,175 postings), France (241,363 postings) and Belgium (167,335 postings). There were two significant flows: from Poland to Germany (114,979 postings) and from Slovenia to Germany (71,219 postings). Compared to 2016, the overall number of postings increased by some 6.5%. This is mainly the result of an increasing number of postings from Germany (+ 100,000 postings). An important finding is that the number of postings from the EU-13 Member States decreased by some 1% compared to 2016, mainly due to a strong decline in postings from Poland (- 24,163 postings). Approximately 6 out of 10 postings take place from an EU-15 Member State. At the same time, 85% of postings take place in the EU-15. Furthermore, some 40% of the postings occur from one high-wage Member State to another. The flow from low-wage to high-wage Member States represents some 30% of total postings.

Based on the reported figures it can be concluded that on average, one posted worker was sent abroad two times in 2017. Under the current rules on social security coordination the period that persons can pursue an activity covered by Article 12 of the Basic Regulation is set at a maximum of 24 months. In practice, however, the average duration amounts to some 98 days. The fact that the average duration is 98 days and that the person is sent almost two times per year means that a posted worker is abroad 191 days on average. However, this is an EU average, as we can see strong differences between countries.

In 2017, an equivalent of 0.4% of EU employment could be related to the employment of posted workers. The most striking figure is obtained for Slovenia, as some 5% of the Slovenian population of working age were posted abroad. Furthermore, almost 47% of the persons who were sent abroad provided temporary activities in the construction sector. The share of posting in the total employment of the construction industry is therefore high in a number of sending and receiving Member States. For instance, some 6 out of 10 employed persons in the Slovenian construction sector were sent abroad to provide services. From the perspective of the receiving Member State, mainly in the construction sector of Luxembourg, Austria and Belgium intra-EU posting is an important type of employment. In all three of these Member States, intra-EU posting accounts for more than 20% of the employment in the construction sector.

3. CROSS-BORDER HEALTHCARE

Cross-border healthcare within the EU can be defined as a situation in which an insured person receives healthcare in a Member State other than the Member State of his/her insurance (i.e. competent Member State). Persons have different routes at their disposal to receive cross-border healthcare. They can be treated under the Coordination Regulations, under Directive 2011/24/EU (the so-called 'Patient Mobility Directive'), or under their own national legislation. The figures reported below relate only to cross-border healthcare provided under the Coordination Regulations. Three cross-border healthcare situations are identified and regulated in the Coordination Regulations. (1) There is unplanned cross-border healthcare when necessary and unforeseen healthcare is received during a temporary stay outside the competent Member State. (2) Planned cross-border healthcare may be received in a Member State other than the competent Member State. Finally, (3) persons who reside in a Member State other than the competent Member State are also entitled to receive healthcare.

The budgetary impact of cross-border healthcare on total healthcare spending related to benefits in kind is rather limited as it amounts to some 0.4% of total healthcare spending related to benefits in kind (De Wispelaere et al., 2018b). Nonetheless, this amounts to an annual expenditure of more than EUR 4 billion. The budgetary impact also varies greatly among Member States. For 17 competent Member States, the share of cross-border healthcare expenditure is less than 0.5% of total healthcare spending

related to benefits in kind.¹⁰ The budgetary impact is between 0.5% and 1% for nine competent Member States.¹¹ Finally, Luxembourg, Bulgaria, Cyprus, Romania and Latvia show a cross-border healthcare expenditure of more than 1% of their total healthcare spending related to benefits in kind. Especially EU-13 Member States show a higher relative cross-border expenditure compared to EU-15 Member States. One of the basic principles of the Coordination Regulations is that the costs of healthcare provided by the Member State of treatment are fully reimbursed by the competent Member States in accordance with the tariffs of the Member State of treatment and not of the competent Member State. This reimbursement principle avoids a high financial burden for the patient receiving healthcare abroad but shifts the higher cost to the competent Member State. Member States where the cost of healthcare is (much) lower than in the Member States of treatment, experience the greatest financial impact. This, of course, explains the higher budgetary impact on EU-13 Member States.

The budgetary impact also varies among the different types of cross-border healthcare. Healthcare provided to persons residing in a Member State other than the competent Member State (i.e. cross-border workers or pensioners) amounts to approximately 0.3% of total healthcare spending related to benefits in kind. Unplanned healthcare amounts to 0.1% and finally planned healthcare to some 0.03% of total healthcare spending related to benefits in kind. At the same time, more than 5 million claims for reimbursement of cross-border care were exchanged between Member States in 2017. About 60% of these claims relate to healthcare provided to persons residing in a Member State other than the competent Member State. This form of cross-border healthcare accounts for about 75% of total cross-border healthcare expenditure. Thus, the amount per claim for unplanned care is on average lower than the amount per claim of reimbursement for healthcare provided to persons residing in a Member State other than the competent Member State. This makes sense since the latter group also includes pensioners.

The data collected on the number of claims for unplanned necessary healthcare can also be compared to the annual flow of tourists. This makes it possible to estimate the probability that a tourist will need care under the Coordination Regulations. It is estimated that 0.9% of the tourists had unplanned care in 2017 under the Coordination Regulations.¹² The same exercise can be done for persons living in a country other than their competent Member State. Yearly, some two claims of reimbursement are made per person that resides in a Member State other than the competent Member State. This high figure can be explained by the fact that a high number of persons who reside in a Member State other than the competent Member State are retired. Moreover, the chance that this group of persons will need healthcare is much higher, mainly because a tourist only stays abroad for a short period, while the other group resides abroad permanently.

(10) Spain, Finland, Norway, Sweden, Iceland, the United Kingdom, France, Italy, Malta, Ireland, Germany, Denmark, Switzerland, Greece, the Czech Republic, Portugal and Hungary.

(11) Estonia, the Netherlands, Croatia, Austria, Lithuania, Slovenia, Poland, Belgium and Slovakia.

(12) Please note that under the Coordination Regulations costs of healthcare are reimbursed only if healthcare is provided by a public healthcare provider and that one claim doesn't necessarily stand for one person.

4. OLD-AGE PENSIONS

Persons 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. These pensions correspond to the insurance periods completed in each of the Member States concerned. Figures on the total number of cross-border entitlements to pensions are reported in this section. Please note that due to missing data of some (large) Member States some caution is required when drawing general conclusions. Nonetheless, these fragmented data give an interesting view of the main flows of pensions. At the same time, the amounts reported by Member States show that this is the most important branch of social security in terms of social expenditure. An amount of more than EUR 11 billion was exported abroad in 2017. This is already a high amount, while a number of countries, such as Germany and Switzerland, have not yet reported figures.

On average 3.2% of the total number of pensioners reside abroad (De Wispelaere and Pacolet, 2018c). The total spending for this group of pensioners amounts, however, to 'only' 0.9% of the total amount of paid pensions. This shows that the amount paid for pensioners residing abroad only represents a partial pension. On average, only 25% of the average amount of a pension is paid to a pensioner residing in another Member State. In relative terms, mainly Luxembourg, Austria, Slovenia and Belgium exported a pension to a relatively high share of persons who reside abroad. Luxembourg is certainly an 'outlier' with regard to the export of pensions, which is mainly the result of the high number of incoming frontier workers. Some 57% of the old-age pensions paid by Luxembourg are exported abroad, although they only represent 29% of total expenditure on old-age pensions. Furthermore, Sweden, the Netherlands, Poland, the United Kingdom, Finland and Norway are above the total average of 3.2%. Denmark, Iceland, France, the Czech Republic, Cyprus, Croatia, Estonia, Ireland, Portugal, Malta and Hungary are below this total average but above 1%. Finally, Spain, Romania, Lithuania, Bulgaria and Slovakia exported a pension to less than 1% of total pensioners.

Furthermore, on average 2.5% of the pensioners residing in one of the reporting Member States are entitled to two or more pensions, one of which from the Member State of residence. The amount paid to this group of pensioners amounts to 1.6% of total pension expenditure. Mainly in Luxembourg there is a high number of pensioners who receive a pension from two or more Member States one of which from the Member State of residence. About 1 out of 10 pensioners residing in Luxembourg find themselves in such a situation. The collected figures also indicate that the average amount per pensioner is higher when paid by Member States of residence than when paid by exporting Member States. It suggests that pensioners entitled to a pension from two or more Member States worked the longest period of time in the Member State that pays a pension as Member State of residence.

5. UNEMPLOYMENT

5.1. EXPORT OF UNEMPLOYMENT BENEFITS

An unemployed person who wants to look for employment in a different Member State than the one that pays the unemployment benefit may export this benefit for a limited period of three months. This period can be extended by another three months. However, the export rules are not applied uniformly across the EU (De Wispelaere and Pacolet, 2018d). It appears that almost half of the Member States do not provide an extension:

- three months, no extension: Cyprus, Denmark, Finland, France, Croatia, Greece, Sweden, Hungary, Italy, Ireland, the Netherlands, the United Kingdom, Iceland and Norway;
- three months, possibility to extend: Austria, Belgium, Bulgaria, Spain, Germany, Luxembourg, Romania, Estonia, Latvia, Lithuania, Slovenia, Slovakia, Poland and Portugal;
- six months by default: the Czech Republic and Malta.

Figures show that more than 30,000 authorisations to export the unemployment benefit were granted in 2017. Germany (6,482), the Netherlands (4,793), Switzerland (3,108), France (2,700) and Denmark (2,169) issued most authorisations. Furthermore, Poland (8,756), France (2,220) and Spain (2,025) registered the highest number of jobseekers. Almost 8 out of 10 authorisations were issued by EU-15 Member States and almost half of the authorisations were received by EU-13 Member States. The mobility of jobseekers looking for work abroad is rather limited, observing that an authorisation was issued for approximately 2 out of 1,000 unemployed persons. Only Switzerland, Norway, Luxembourg, Denmark and the Netherlands show a relatively higher mobility of jobseekers (more than 1 in 100 insured persons).

Several factors may influence the decision to export the unemployment benefit. Figures show a negative relationship between the share of unemployed persons exporting their benefit and the national unemployment rate, which is in contradiction to what one might assume. Reasons to export the unemployment benefit other than the height of the unemployment rate are thus probably more decisive. For instance, mobile workers who return to their country of origin after they became unemployed. This raises the question whether the unemployed person is really looking for work in the country of origin. Roughly 1 in 10 of the unemployed persons with a PD U2 found work abroad. Moreover, we see that many unemployment benefits are exported from the Netherlands to Poland, but only a fraction of them find work.

Finally, we would also like to estimate the non-take up of the right to export unemployment benefits. The main emigration countries are Germany, the UK, Poland and Romania.¹³ Despite the large outflow of people from Poland and Romania, we observe that these countries only granted a limited number of authorisations to export the unemployment benefit (Poland: 128 and Romania: 9). Based on the EU

(13) We do not know exactly whether these persons migrated to a country outside or within the EU/EFTA.

Labour Force Survey, we estimate that more than 90,000 people were unemployed when they moved to another Member State (2013 figures). This while the number of authorisations granted to export the unemployment benefit is always around 30,000 authorisations, which means that there is a formal non-take up of this social right by 2 out of 3 unemployed people who have moved to another Member State. However, in reality, a (large) group of unemployed people may still have exported their unemployment benefit abroad without reporting it (i.e. the informal take-up).

5.2. AGGREGATION OF PERIODS FOR UNEMPLOYMENT BENEFITS

In principle, unemployed mobile workers will claim the unemployment benefit in the Member State of last activity. In some cases, a mobile worker's period of insurance, employment or self-employment is insufficient to be entitled to an unemployment benefit. In that case, additional periods completed by the person in a Member State other than the competent Member State (i.e. the Member State of last activity) are required. It should be noted that a migrant worker becomes subject to the legislation of a Member State as soon as he or she starts to work there (leaving aside the special case of posting). Hence, the aggregation rules become fully applicable as from that moment. However, this principle is not uniformly applied by all Member States. Some Member States (for example, Belgium, Finland and Denmark) have specifically defined periods for the application of the aggregation principle in their national law, which, of course, cannot be the purpose of European legislation. Not only the number of new intra-EU movers, their risk of becoming unemployed, and the period of insurance, employment or self-employment completed by these mobile persons in the Member State of last activity will determine the number of aggregations but also the qualifying period, which varies significantly across Member States. Nonetheless, many Member States apply a qualifying period of some 12 months.

In total 43,901 cases reported by 28 Member States for reference year 2017 concerned unemployed mobile workers whose period of insurance, employment or self-employment completed in the Member State of last activity was insufficient to be entitled to an unemployment benefit (De Wispelaere and Pacolet, 2018e). This amounts to an estimated share of 0.3% of the total unemployment figure in those Member States and to 2.7% of the annual flow of intra-EU/EFTA mobile workers of working age to these Member States.

In roughly seven out of ten cases of aggregation, a period of insurance, employment or self-employment of more than three months was already completed by the unemployed mobile worker in the Member State of last activity. This is an indication that only for a minority of cases, new mobile workers who became unemployed worked for a very short period in the last Member State of activity.

The above figures go against the perception that (some) EU-13 citizens are moving to the EU-15 to claim unemployment benefits as soon as possible. However, this is without prejudice to the question of how long a person should contribute to the social security system in order to be able to claim rights there as well. The same applies to the question of whether the country of origin should also bear part of the cost if the recent migrant has only worked for a very short period in the new Member State.

6. FAMILY BENEFITS

When family members live in a Member State other than the one where the mobile person works and/or resides, family benefits can in some cases be exported to these family members. As the entitlement to family benefits might 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'. In this respect, rights available on the basis of (self) employment have priority. When there is employment in two different Member States, it is the Member State of residence of the children that will become primarily competent for the payment of the family benefits. However, a Member State might 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.

The export and import of family benefits is strongly concentrated among a limited number of (neighbouring) Member States (De Wispelaere and Pacolet, 2018f).¹⁴ Switzerland, Luxembourg, Germany and Austria are the main exporting Member States of family benefits. This is mainly the result of the high number of cross-border workers in these Member States. Most of the households that received a family benefit from abroad live in France and Poland.

The impact of the export of family benefits in terms of persons involved and expenditure is quite limited for most of the Member States. Luxembourg is certainly an 'outlier' with regard to the export of family benefits, as some 48% of its public spending on family benefits was exported abroad in 2017. Austria paid 6.2% of its family benefits to households living in another Member State, amounting to 5.4% of its public spending on family benefits. Belgium, Slovakia, Poland, Norway and the Netherlands exported between 1% and 2% of their family benefits, while Estonia, Ireland, Latvia, Portugal, Romania, Finland and the Czech Republic exported between 0.1% and 1% of their family benefits. Finally, Croatia, Greece, Lithuania, Malta and Spain paid less than 0.1% of their family benefits to households residing in another Member State.

The total number of family benefits being exported and the amount it represents is the result of the Member State being primarily or secondarily competent. The number of mobile persons working/residing in a Member State other than their family members (i.e. 'reference group'), the priority rules as well as differences in eligibility criteria, and the amount of family benefits will determine the number of exports and the related expenditure as primarily or secondarily competent Member State to a high extent. It follows that the context will vary between Member States. Belgium, the Czech Republic, Spain, Croatia, Latvia, Luxembourg, the Netherlands and Iceland mainly

(14) Mainly from Luxembourg to France, from Germany to Poland, from Luxembourg to Belgium, from Luxembourg to Germany, from Belgium to France, from the Netherlands to Poland, from the UK to Poland, from Germany to France and from Austria to Hungary.

paid family benefits as primarily competent Member State, while Estonia, Austria and Slovakia mainly paid family benefits as secondarily competent Member State.

A number of countries would like to see the provisions changed because they believe that the current regulations lead to welfare tourism. In this respect, the controversial deal that EU leaders offered to the UK before the 2016 Brexit Referendum opened Pandora's box. After all, the possibility of indexing a child benefit based on the cost of living in the country of residence of the children was proposed. It remains remarkable that this was even proposed by the EU as the UK exports only 0.2% of its family allowances to another Member State. Nonetheless, this EU proposal may have inspired Member States. For instance, since 1 January 2019 Austria implements such indexation on the basis of national law.¹⁵ It is estimated that this could lead to public savings of around EUR 100 million. This is mainly due to the fact that Austria exports a large amount of family allowances to Hungary and Slovakia (as secondarily competent Member State). Finally, the discussion about the indexation of the child benefit could possibly lead to a broader debate about the level of benefits when persons are mobile in Europe. After all, the amount of the benefit can be an important barrier to the free movement of persons. People with an unemployment benefit from an EU-13 Member State will find it very difficult to make ends meet if they are looking for work in an EU-15 Member State. The same applies to pensioners who want to move from an EU-13 Member State to an EU-15 Member State.

7. CONCLUSIONS

In this contribution we have visualised the well-developed social protection that people enjoy when they are mobile in Europe. As is the case at national level, pensions and healthcare are by far the most important branches of social security in a cross-border context. The export of pensions to persons residing in other EU/EFTA countries therefore accounts for a significant share of the pensions paid by countries in most Member States.

The figures available also provide answers to some key political questions/discussions. The statistics show that, with regard to the presence of risks of 'welfare tourism' and 'social dumping', there is a large difference between public/political perception and facts. For instance, intra-EU posting is increasingly seen as a Trojan horse by several host Member States. Nonetheless, evidence reveals that the number of posted workers and their share in total EU employment is still rather marginal. However, it is striking how strongly this phenomenon manifests itself in the construction sector. The Belgian construction sector is an extreme example of this, since about one in three people employed is a posted worker. In relative terms, a large part of the Slovenian labour force is posted to another Member State. Figures also counter the common perception that intra-EU posting can be narrowed to low-skilled posted workers moving from low-wage to high-wage Member States. After all, most of the posted workers come from an EU-15 country and 4 out of 10 postings take place between high-wage countries.

(15) However, the Commission has opened infringement proceedings against Austria.

In addition, figures on the export of family benefits and the aggregation of periods for unemployment benefits prove that the risk of 'welfare tourism' is (very) low. Moreover, risks of non-take up of social rights are probably much higher. However, this is something that we are still unable to identify sufficiently with the figures currently available.

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PATIENT MOBILITY IN THE EU – A PLAYGROUND FOR ALL OF US?

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1. INTRODUCTION¹

In November 2010, the European Commission launched an extensive media campaign the slogan of which was “*Europe is your playground*”. One of the main messages of the Commission was that people can preserve their right to social security benefits when moving to a different Member State. This is clearly among the biggest achievements of the social security coordination legislation. However, when looking more closely at certain groups and certain situations, it becomes visible that the above-mentioned playground is more like an obstacle course – with booby traps, hidden or less hidden barriers to tackle. Mobile patients belong to one of these groups as well as receiving healthcare abroad constitutes one of these situations.

Remarkably, during the recent Brexit negotiations, the questions of accessing healthcare both for citizens of the United Kingdom (UK) in the European Union (EU) and for EU citizens in the UK have received prominent attention. The media² as well as scientific circles³ engaged in a lively discussion on the topic and sought feasible answers. This debate provided a vivid example for those who stigmatised cross-border healthcare and patient mobility to be marginal. It is true that the overall effect of cross-border patient movements on the healthcare budgets is not striking,⁴ but patient mobility is very important for certain pathologies (e.g. rare and complex diseases), for certain geographical areas (e.g. small countries, touristic areas) and for certain groups (e.g. highly mobile workers, mobile pensioners).⁵

(1) More details on the topic can be found in Berki, G., *Free movement of patients in the EU – A patient's perspective*, Cambridge, Antwerp, Portland, Intersentia, 2018.

(2) See for example <https://www.theguardian.com/politics/2019/jan/29/british-pensioners-in-eu-will-lose-nhs-covered-health-care-under-no-deal-brexite> (date of access: 30 May 2019), <https://www.bbc.com/news/business-47214093> (date of access: 30 May 2019), and <https://www.thelocal.fr/20190321/anger-among-britons-in-europe-over-uk-governments-brexite-healthcare-offer> (date of access: 30 May 2019).

(3) See for example Cayon-De Las Cuevas, J. and Hervey, T., A place in the sun? Healthcare rights of retired UK citizens in Spain post-Brexit, *Health Economics, Policy and Law*, Volume 12, Issue 3, July, pp. 297-307, 2017; Strban, G., Brexit and social security of mobile persons, *ERA Forum*, Volume 18, Issue 2, June, pp 165-185, 2017 and Hervey, T., Reciprocal healthcare arrangements after Brexit, *BMJ*, p. 363, 2018.

(4) Recent statistical data show that “*the budgetary impact of cross-border healthcare on total healthcare spending in kind is rather marginal as it amounts to only 0.4% of total healthcare spending in kind. Nonetheless, in absolute terms annual cross-border healthcare spending amounts to more than EUR 4 billion.*” De Wispelaere, F. and Pacolet, J., *Coordination of social security systems at a glance: 2016 Statistical Report*, Network Statistics FMSSFE, Leuven, p. 23, 2016.

(5) France, G., Cross-border flows of Italian patients within the European Union – An international trade approach, *European Journal of Public Health*, Volume 7, Supplement 3, p. 18, 1997.

Upon the celebration of the 60th anniversary of the coordination of social security schemes in the European Union, it seems both necessary and desirable to account for what we have gained and what we are still lacking in this domain, which – without any doubts – went through an enormous development throughout the decades. In this paper, I approach this progress from the perspective of European (mobile) patients.

2. CHALLENGES

According to the Eurobarometer survey on patients' rights in cross-border healthcare in the European Union, 49 per cent of EU citizens would be willing to travel to another EU country to receive medical treatment.⁶ Nevertheless, practice shows that only as much as five per cent did actually receive medical treatment in another EU country.⁷ Might this huge gap be – at least partly – explained by the difficulties insured people face when receiving healthcare abroad?

In my view, free movement of patients in the EU would mean a borderless Europe where insured persons can travel and receive healthcare in any Member State without any difficulties, by simply proving their healthcare entitlement with a universalised EU document, just like we can travel across borders simply by carrying our ID cards. In practice, this requires – first of all – a clear and consistent legal framework which ensures that patients can benefit from the rights conferred on them by the European legislation.

I find that one of the main reasons why it is difficult to tackle the problems of cross-border patient mobility is that the field of healthcare is a multi-player arena where many different interests (of the patients, healthcare providers, healthcare funds, national governments, Union institutions etc.), different competences (basically of the Member States and various EU institutions, but also within the Member States competences are often allocated among different levels, e.g. federal, regional, local) and different ideologies collide. This creates a tense political atmosphere in which the patients' well-being, which is supposed to be the starting point and the main aim of any health-related arguments, runs the risk of evaporating in the process. Thus, after sixty years of healthcare coordination and two decades since the ground-breaking judgements⁸ of the Court of Justice of the European Union (CJEU), European patients are still left with restricted cross-border mobility rights and impediments of free movement both from legal and non-legal points of view.

(6) Special Eurobarometer 425, Patients' rights in cross-border healthcare in the European Union, http://ec.europa.eu/commfrontoffice/publicopinion/archives/ebs/ebs_425_sum_en.pdf (date of access: 29 May 2019), p. 6.

(7) Special Eurobarometer 425, Patients' rights in cross-border healthcare in the European Union, http://ec.europa.eu/commfrontoffice/publicopinion/archives/ebs/ebs_425_sum_en.pdf (date of access: 29 May 2019), p. 4.

(8) The (in)famous Kohll and Decker judgements opened a new path of patient mobility directly based on the Treaty provisions on free movement of services. C-158/96 Raymond Kohll v Union des caisses de maladie [ECR 1998 Page I-01931]; C-120/95 Nicolas Decker v Caisse de maladie des employés privés [ECR 1998 Page I-01831].

2.1. LEGAL OBSTACLES

2.1.1. Legal complexity

The European legislation governing intra-EU patient movements across the Member States is in itself very complex. At least two dimensions of legal complexity can be identified. On the one hand, access to healthcare abroad includes three different situations to which different rules apply: access to healthcare in the competent Member State (where the person is insured) when residing outside this State; access to necessary healthcare during a temporary stay outside the Member State of residence; and access to planned healthcare outside the Member State of residence. On the other hand, these situations are currently regulated by two (if counting the case-law of the CJEU as well, three) separate sets of rules: the social security coordination mechanism⁹ and the case-law based Patient Mobility Directive,¹⁰ which partly overlap and partly conflict with each other, creating doubts and legal uncertainty.

So how do these pieces of the legislative puzzle fit together? The Directive unambiguously states in its Preamble that for patients the two systems should be coherent.¹¹ Article 2 (m) of the Directive indicates that the Directive should apply without prejudice to the Coordination Regulations, which implies that they are applicable in parallel and that there is no priority between them.

2.1.2. Administrative burden

The administration related to patient movements is not less complex than the legislation. Patients might easily find it discouraging to learn that both the Regulations and the Directive have their separate procedures, with their own set of administrative requirements, documents to fill in and attach, and administrative steps to follow. It is very crucial for patients to be aware of all the relevant information on the procedures, their entitlements under the two legal tools and the implications of the outcomes of these procedures. For instance, it is of utmost importance to inform the patient what the difference is between being granted prior authorisation under the Regulations or under the Directive.

Moreover, in the different scenarios, different administrative paths are to be followed. For instance, under the coordination regime, insured persons residing outside the competent Member State have to register themselves at the institution of the place of residence and have to provide proof of insurance under the sickness scheme of the competent Member State¹² by using portable document (PD) S1. In order to obtain

(9) Regulation (EC) 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 of 30 April 2004 (hereinafter also referred to as Basic Regulation or BR) 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 of 30 October 2009 (hereinafter also referred to as Implementing Regulation or IR).

(10) Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare, OJ L 88 of 4 April 2011 (hereinafter also referred to as Patient Mobility Directive or PMD).

(11) Recital 30 of the Preamble of PMD.

(12) Article 24 (1) IR.

necessary healthcare abroad during a temporary stay on the account of the patient's health insurance in the competent Member State, the healthcare entitlement is to be proved by a valid European Health Insurance Card.¹³ Lastly, when travelling to another Member State with the purpose of receiving benefits in kind during the stay, the insured person shall seek authorisation from the competent institution.¹⁴ For this purpose, PD S2 is used.

Furthermore, as a result of the transposition of the Directive, in terms of administrative procedure and requirements attached to the right to reimbursement, numerous patterns can be identified among the Member States. On the one hand, most of the Member States which apply a prior authorisation requirement created a uniform procedure where the authorisation process under the Regulation and under the Directive are merged and go through the same steps. On the other hand, some Member States decided to keep the procedures under the two different legal tools entirely separated. In some of these states, the separate authorisation procedures belong to the competence of different divisions of the same institution, or even to different institutions.¹⁵ Finding the competent institution might prove to be challenging for some patients, especially if the lack of information is added to the picture.

2.1.3. Discretionary power

It is evident that the Member States transpose directives as best fits their aims, tools and circumstances within the given legal framework, thus there are differences between the entitlements and practical opportunities of patients insured in different Member States. However, the Regulations, which are to be applied in a universal manner, also leave considerable space for Member States' discretion. For instance, the outcome of the evaluation related to a request for prior authorisation highly depends – despite the efforts of the CJEU to define procedural minimum requirements and limit the discretionary power of the competent institutions – on the national administrative guidelines and practices.

The minimum requirements intend to guarantee an impartial and objective evaluation of the requests and to ensure transparency of the procedures in order to strengthen the patients' feeling that they are not exposed to an uncontrollable, untraceable bureaucratic mechanism. Nevertheless, some of the requirements are rather vaguely phrased and may thus not have the desired effect. For instance, the criterion which says that the factors assessed in the authorisation procedure are to be known in advance does not concretise how or by means of what platform and where this information must be published or how much in advance this has to be communicated towards the insured persons.

(13) Article 25 (A) (1) IR.

(14) Article 20 (1) BR.

(15) Strban, G. (ed.), Berki, G., Carrascosa, D. and Van Overmeiren, F., *Access to healthcare in cross-border situations*, FreSso Network, Ghent, 2017.

2.2. NON-LEGAL OBSTACLES

2.2.1. Language gap

Communication is a key element of healthcare provision, in the course of which it is of essential importance that each party involved expresses him/herself clearly and exactly. If the mutual communication works properly, it “ultimately leads to an enhanced doctor-patient relationship resulting in satisfaction with the encounter by both parties and thus improved health care outcomes”,¹⁶ whereas the lack of or inappropriate information exchange might result in incomplete medical assessment, distrust between the parties and inadequate medical treatment. The language gap constitutes a serious obstacle in cross-border healthcare situations: if the patient and the healthcare professional do not speak the same language, the risk of misunderstanding and – as a consequence – of misdiagnosis increases significantly, and “extensive physical examinations and diagnostic tests [are] sometimes required to compensate for the inability to communicate verbally.”¹⁷ Interestingly enough, this problem has not been addressed at the EU level so far.

2.2.2. Lack of information

The European citizens’ awareness of their cross-border healthcare rights is rather low: the above-mentioned EU-wide survey demonstrated in 2014,¹⁸ and a cross-border healthcare simulation also confirmed,¹⁹ that a large share of the European population has no or very little information about the possibility to receive medical treatment in another EU country and to be reimbursed for that treatment by their national health authority or healthcare insurer.

The Patient Mobility Directive clearly articulates the patients’ need for information on cross-border healthcare.²⁰ It acknowledges that appropriate information on all essential aspects of cross-border healthcare is necessary in order to enable patients to exercise their rights on cross-border healthcare in practice.²¹ Both the Directive²² and the Coordination Regulations²³ provide rules on the Member States’ information duties.

Although the codification of information duties in the current set of Regulations is an applauded improvement in the coordination mechanism, it suffers from several

(16) Fowler, J.D., *Cultural and Structural Barriers that Affect the Doctor-Patient Relationship: A Bolivian perspective*, <http://ir.library.oregonstate.edu/xmlui/bitstream/handle/1957/9896/Fowler.pdf?sequence=1> (date of access: 9 June 2019), p. 5.

(17) Priebe, S., Sandhu, S. et al., Good practice in health care for migrants: views and experiences of care professionals in 16 European countries, *BMC Public Health*, vol 11, issue 187, p. 4, 2011.

(18) Special Eurobarometer 425, Patients’ rights in cross-border healthcare in the European Union, http://ec.europa.eu/comfrontoffice/publicopinion/archives/ebs/ebs_425_sum_en.pdf (date of access: 29 May 2019), p. 6.

(19) Jelfs, E. and Baeten, R., *Simulation on the EU Cross-Border Care Directive. Final Report*, http://www.ose.be/files/publication/2012/CrossBorderHealthcareSimulation_FinalRep_09052012.pdf (date of access: 9 June 2019), p. 20.

(20) Recital 19 of the Preamble of the PMD.

(21) Recital 48 of the Preamble of the PMD.

(22) Article 4 and 5 PMD.

(23) Article 76 (4) BR, Article 3 (1) IR.

weaknesses. It should therefore be made more exact and patient-friendly in order to ensure quick, reliable and understandable cross-border healthcare information for free. Compared to the rules of the Regulations, the rules of the Directive are more specific and detailed and guarantee access to a broader scale of information. However, they do not offer a solution to the problem that if a patient wants to collect all relevant information concerning a certain treatment abroad, this involves at least three sources he/she needs to contact in (at least) two different Member States. So even if a patient possesses the necessary language skills to acquire the essential information, the multi-source investigation puts a considerable burden on him/her.

2.2.3. Financial affordability

One of the most outstanding differences between the Coordination Regulations and the Patient Mobility Directive is the financing of cross-border medical treatments: the most relevant discrepancies between the two routes of patient mobility concern the level of reimbursement and the mechanism of reimbursement.

The level of reimbursement is basically dependent on which tariffs are applied when calculating the reimbursement. According to the coordination rules – on the ground of the full integration principle, namely that foreign patients must be treated as if they were insured in the Member State of treatment – the rules of the Member State of treatment apply, including the rules on the calculation of medical fees. Hence, in principle, the healthcare costs incurred abroad are fully covered.²⁴ However, the Directive's financing mechanism is based on the idea that the reimbursement of cross-border healthcare costs may not affect the financial balance of the Member State of affiliation. Patients can thus claim reimbursement up to the level of domestic tariffs in that country. If the actual costs exceed this amount, the Member States cannot be obliged to bear the difference, which therefore remains at the expense of the patient.²⁵

Concerning the mechanism of reimbursement, whereas the Regulations primarily require the institutions involved to settle the claim for reimbursement between each other without the patient needing to advance the costs of the treatment, under the Directive, the patient is invited by the healthcare provider to pay the invoice upfront, after which he/she can claim posterior reimbursement from the Member State of affiliation.

From the patients' point of view, both characteristics are more beneficial under the Regulations, and the less favourable financial scheme of the Directive has the potential to prevent patients from using their rights conferred on them by the Directive. The risk indeed exists that the Patient Mobility Directive exacerbates pro-rich inequality, because it is "*likely to disproportionately benefit wealthy and well-informed patients.*"²⁶

(24) Article 35 (1) BR.

(25) Article 7 (4) PMD.

(26) Legido-Quigley, H., Passarani, I. et al.; Cross-border healthcare in Europe: clarifying patients' rights, *British Medical Journal* 2011, vol 342, p. 366.

3. TOOLS

There are numerous weak points in the current European legislation on cross-border patient mobility. The legislative body is complex, the relation between the different legal tools is unclear, the administrative procedures are often lengthy and burdensome, the monitoring and enforcing mechanism is poor, the information is scattered, the discretion of the national healthcare authorities and the financing schemes of healthcare abroad restricts cross-border patient movements.

The European patient mobility legislation has two basic tasks, namely providing patients with clear provisions on their entitlements and serving European patients. Thus, it seems necessary to create a legal framework which takes the interests of the (border-crossing) patients into due account.

These challenges give a brief glimpse of the difficulties European border-crossing patients face when (intending to) obtain(ing) healthcare in a Member State other than their Member State of residence. Einstein warns that we cannot solve our problems with the same level of thinking that created them. Thus, we should – at least slightly – change our mindset and question what we hold solid and unchangeable in the current patient mobility legislation. I suggest considering two groups of ideas, namely rewriting the existing playbook of patient movements and bringing new tools into play.

3.1. REWRITING THE PLAYBOOK

I found that the above-mentioned defects could be overcome by a consistent, integrated legal system which builds on the legacy of sixty years of healthcare coordination and which is complemented by the innovations of case law and the Patient Mobility Directive. Such a scheme could synthesise the high level of protection provided by the Regulations and the more liberal approach of the Directive. The establishment of the integrated system in the framework of the Regulations would solve the problem of diverse transposition in the various Member States and enable the European institutions to monitor the application of the rules more easily. Last, but not least, a mono-track system – especially if combined with an accessible and patient-friendly network of national contact points (NCPs) – would significantly decrease the legal uncertainty and administrative burden on the patients' side.

As I see it, the complexity of the issues related to cross-border patient mobility excludes the possibility to unite all the relevant rules in one single legal tool and requires a fine-tuned, contradiction-free multi-level legislation instead. To design the integrated legislation of free movement of patients, the structure of the free movement legislation could be used by analogy. In the field of free movement of workers, the

basic entitlements are incorporated into a Regulation,²⁷ and a Directive was adopted in order to facilitate the exercise of rights conferred on the workers.²⁸

The proposed integrated legal scheme is based on equal cross-border healthcare entitlements for each insured person without a distinction between planned and unplanned care, with as little administrative burden as possible and with access to any legally functioning healthcare provider who meets the universalised European standards.

3.1.1. Prior authorisation

As to prior authorisation required for planned treatment abroad, the baseline of the patient mobility case-law was that the Treaty precludes national rules which have the effect of making the provision of services (and the consumption of services) between Member States more difficult than the provision of services purely within one Member State.²⁹ Nevertheless, after refusing a series of possible grounds for justification of restrictions, the Court acknowledged that planning objectives can justify the maintenance of prior authorisation schemes.³⁰ Opening up the possibility for the Member States to make reimbursement of medical costs incurred abroad subject to prior authorisation substantially eroded the patients' rights to cross-border treatments. Moreover, the Patient Mobility Directive took it a step further and introduced grounds for justification – based on the protection of public health – which were not even verified by the Court.³¹ As a consequence, the cross-border mobility of European patients is more restricted today than it was at the end of the 1990s.

It is clear that the great majority of European patients prefer to use healthcare facilities which are close to their home and which they are familiar with. Hence, no indicators suggest that cross-border patient movements can be expected to grow into a mass phenomenon in Europe: as it seems now, patient mobility will remain limited, although very important in certain areas and certain cases. Thus, the Member States' vehemence with which they guard their national healthcare (authorisation) schemes against border-crossing patients hardly correlates with the figures on the current

(27) Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union.

(28) Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers, OJ L 128 of 30 April 2014.

(29) C-381/93 *Commission v France*, 17; C-158/96 *Kohll*, 33; C-368/98 *Vanbraekel*, 44; C-157/99 *Geraets-Smits and Peerbooms*, 61; C-8/02 *Leichtle*, 37; C-372/04 *Watts*, 94; C-444/05 *Stamatelaki*, 25; C-211/08 *Commission v Spain*, 55; C-490/09 *Commission v Luxembourg*, 16, 33.

(30) This argument first occurred in the *Geraets-Smits and Peerbooms* judgement and was then confirmed on several occasions. C-157/99 *Geraets-Smits and Peerbooms*, 76, 78-80; C-385/99 *Müller-Fauré and Van Riet*, 77-81; C-56/01 *Inizan*, 56; C-145/03 *Keller*, 62; C-372/04 *Watts*, 108-110; C-173/09 *Elchinov*, 43; C-512/08 *Commission v France*, 33-42.

(31) Article 8 (2) (b)-(c) PMD.

volume of cross-border patient movements.³² It is high time to raise the question: is the authorisation mechanism still necessary and proportionate? What would the implications be of the removal of the prior authorisation requirement?

Since factual evidence does not support the Member States' argument that the current volume of patient movements would constitute a major risk to their healthcare systems, the justification that prior authorisation should be maintained in meeting the desire to control costs and to prevent as far as possible, any wastage of financial, technical and human resources³³ is hardly valid in today's circumstances. It can thus be argued that the prior authorisation requirement should be erased from the Regulations. Nevertheless, upon the occasion of abolition of prior authorisation schemes, a practical counterbalance could be introduced into the protection of national healthcare systems against any possible extreme change in patient mobility trends. An 'in case of emergency' (ICE) clause could be inserted into the Regulations – similar to the one which has been applied to the free movement of workers in the newly accessed Member States – indicating that when a Member State undergoes or foresees disturbances in its national healthcare system which could seriously threaten the standard of healthcare provision or the national healthcare scheme in the given Member State, that Member State shall inform the Commission and other Member States thereof and shall supply them with all relevant particulars. On the basis of this information, the Member State may request the Commission to permit certain restrictions in order to restore to normal the situation in the healthcare system concerned.³⁴

This way, the burden of proof would be shifted: instead of the patient being required to request an authorisation from the competent institution in advance and meet the conditions laid down in the legislation in order to receive an authorisation, the Member State has to provide evidence that patient movements put its system at a considerable risk. If such evidence cannot be given, patients are free to access healthcare in any other Member State.

3.1.2. Distinction between planned and unplanned healthcare

The distinction between planned and unplanned care has occupied a place on the list of difficulties of healthcare coordination. From a conceptual point of view, the

(32) The Commission's report on the operation of the Directive underlines that "[t]he data returns made by the Member States, in general, do not suggest that extensive systems of prior authorisation are justified", because "some Member States with prior authorisation systems have received no requests for authorisation at all (and many others have received very few)", European Commission, Report from the Commission to the European Parliament and the Council, Commission report on the operation of Directive 2011/24/EU on the application of patients' rights in cross-border healthcare, COM (2015) 421 final, 04.09.2015., p. 4 and 16.

(33) C-157/99 *Geraets-Smits and Peerbooms*, 76, 78-80. On this issue see also C-385/99 *Müller-Fauré and Van Riet*, 77-81; C-56/01 *Inizan*, 56; C-145/03 *Keller*, 62; C-372/04 *Watts*, 108-110; C-173/09 *Elchinov*, 43; C-512/08 *Commission v France*, 33-42.

(34) See by analogy for instance the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded – Annexes to the Act of Accession – 1. Freedom of movement for persons, Article 7.

difference lies in the (prior) intention of the person concerned, namely whether or not he/she willingly travelled abroad in search of medical treatment. However, a genuine problem is how the intention of the person – when not obvious from the circumstances – can be unfolded.

From an administrative point of view, the different nature of the health risks explains the different administrative procedures. Whereas necessary care, which may occasionally occur during a temporary stay abroad, can be obtained simply by presenting a valid European Health Insurance Card to the healthcare provider, in case of planned care, where the aim of the travel is to receive healthcare in another Member State, a prior authorisation from the competent institution must be requested. However, in a system in which no prior authorisation is required, as proposed above, the legal distinction between occasional and planned care becomes outdated. The removal of the distinction is in line with the Patient Mobility Directive. With such a change, instead of investigating the person's intention, which is problematic, only the patient's entitlement should be examined.

3.1.3. Exclusion of private providers

Another long-lasting teething problem of European social security coordination is that only national statutory systems are coordinated. This limitation of the Regulations might have been appropriate at the end of the 1950s, but in today's social security systems the exclusion of the voluntary and supplementary elements of social security coverage is no longer acceptable. The consequence of this characteristic in the field of healthcare is that under the scope of the Regulations, patients can – in principle – obtain treatments only from providers affiliated to the statutory healthcare system of the Member States. This not only causes uncertainty and misunderstandings concerning the recognition of which providers do belong to the system and which do not, but more importantly, it considerably limits the patients' freedom to choose which provider they wish to turn to.

It is a great merit of the Patient Mobility Directive that it covers both public and private providers, thus offering the patients significantly more options. This development should be built into the proposed integrated legislation of European patient mobility, which requires the Regulations to open up for private providers.

3.2. NEW TOOLS

3.2.1. Financing mechanism

It is equally true for healthcare systems that money makes the world go round: healthcare budgets constitute a fundamental unit of national budgets, so anything which has the potential to genuinely affect healthcare expenditures, is a politically sensitive area. The currently existing reimbursement regimes of medical treatments abroad greatly differ, and their interaction is not always clear. It is beyond dispute that the Regulation rules on financing are more favourable for the patients, since – in principle – they do not need to advance the medical costs and the full cost of medical intervention abroad is covered except for the co-payments. The single asset of the Directive in this regard is that it offers reimbursement if the treatment was

provided by non-contracted healthcare providers, who are excluded from the scope of the Regulations.

In my opinion, once again the starting point of the integrated system must be the financing mechanism of the Regulations, since it ensures higher protection for the patients. However, if the applicability of the tariff of the Member State of treatment is maintained while no prior authorisation is in place, unpredictable patient movements might produce high medical invoices and feed the Member States' budgetary fears. This might impact especially those Member States in which tariffs are considerably lower than in others. Thus, this scenario has the potential to deepen the division between western and northern Europe as patient exporters, where patients can easily access healthcare systems with lower tariffs, and eastern and southern Europe as patient importers, where patients have less chance of heading towards countries with higher tariffs. A compensation mechanism is needed to tackle this defect.

As an ambitious solution, a European Healthcare Fund could be set up, which compensates the Member States for the difference between their domestic tariffs and the foreign tariffs invoiced for them. Hence, cross-border patient movements would leave national healthcare spending basically intact. This European healthcare budget would ensure that patients of worse off Member States have the same opportunities in terms of cross-border healthcare as those with better financial conditions. It would thus be a manifestation of European supranational social solidarity.³⁵ However, an unavoidable question is where the revenues of this solidaristic fund should come from. In this respect also multiple options can be suggested: I hereby outline three of them.

A possible alternative, which implies higher Union involvement, is that transfers are made from other European funds, such as the European Social Fund, for this special purpose. The advantage of this option is that it is based on a long-existing European fund. Transfers could thus be made rather promptly. Still, a huge disadvantage is that it takes away money from other (similarly important) social purposes.

Another solution – by analogy to what was proposed by Commissioner Andor in relation to the supranational unemployment scheme – is that the Fund functions as a supranational healthcare insurance scheme; hence, all Member States pay a part of their revenues to the Fund. To this end, a universal contribution could be introduced to each insured person in Europe. I find this option fair and promising, because it embraces solidarity and unity, values which I think are supposed to be the leading stars of an enhanced social Union. However, it puts the financial burden directly on the citizens. Nevertheless, I think this burden – since shared by all insured persons in all the Member States – is far less per capita than the burden a patient might face in a cross-border situation without an appropriate financing mechanism.

(35) The idea of creating a common European fund for specific social purposes received a new stimulus in recent years. In Berlin on 13 June 2014, Commissioner László Andor outlined a scheme where the eurozone states would share the costs of a European short-term unemployment insurance, http://europa.eu/rapid/press-release_SPEECH-14-455_en.htm (date of access: 10 June 2019).

Whereas countries with lower tariffs need to rely on the Fund to be able to pay medical invoices from other Member States, Member States with higher tariffs save money if their insured persons receive healthcare in a country with lower costs. Another element of cross-national solidarity would be, if a part of these savings would also be paid into the European healthcare fund. This is all the more reasonable, since otherwise Member States might be motivated to ‘outsource’ their patients to countries with good quality care but much cheaper treatments to save money. The aim of the patient mobility legislation is certainly not to push patients – against their will – to receive healthcare services far from where they live, but to guarantee that in case they need or prefer to undergo a medical treatment in another Member State, they have both the right and the real possibility to do so on an equal basis without facing significant hurdles. Therefore, this option seems to deserve more attention in the future.

With a well-functioning compensation mechanism in place the financing of cross-border patient movements would not significantly affect the financial balance of the national social security budgets. Hence, the Member States cannot use this argument to restrict the free movement of patients.

3.2.2. Supranational central unit for NCPs

In order to ensure the smooth functioning of European cross-border healthcare legislation in practice, a solid institutional background needs to be created. The Patient Mobility Directive already took the first, important step forward by imposing the obligation on the Member States to designate one or more national contact points for cross-border healthcare.³⁶ However, I find the provisions on the network of national contact points rather vague and I hold the firm opinion that for now, the Union is far from using the full potential of such a network.

According to my ideas, a network of national contact points coordinated by a supranational central unit could be the right advocate for European (border-crossing) patients. This system could ensure that patients engaged in cross-border healthcare provision can exercise their rights simply by turning to a single institution on national level. Seeking to guarantee that these institutions work in the best interests of the patients and towards the enforcement of Union legislation without external influence, it is desirable that they function independently, separately from national healthcare funds and ministries.

There are a number of tasks in relation to cross-border patient mobility which could be delegated to these institutions. The national contact points could provide interpretation and translation services for patients in order to bridge potential language gaps. Modern information and communication technologies can significantly simplify this exercise. They could also serve as a knowledge base and information centre for cross-border healthcare. They should both provide information on request and carry out information campaigns aimed at patients and providers. If the request for information concerns another Member State, they should contact the national contact point in

(36) Article 6 PMD.

that state at the shortest notice.³⁷ They could easily do so by means of a common online platform. In this sense, I think they could function similarly to the SOLVIT network but specialised in cross-border healthcare issues. Yet, differences are that whereas SOLVIT is a service provided by the national administration of each Member State, NCPs must be independent institutions functioning on a national level; whereas SOLVIT mostly deals with cases when public authorities breach Union law, NCPs must have a broader competence and deal with any issues related to cross-border healthcare and also; whereas SOLVIT is mainly approached online, NCPs should offer various means by which they can be contacted by patients. Nevertheless, the rules on the establishment and functioning of the SOLVIT network can provide some ideas.³⁸

The national contact points should establish a one-stop shop system for patients by connecting each party involved in cross-border healthcare, and cooperate and frequently consult with patient organisations, healthcare providers and healthcare insurers. The point of a “*one-stop shop for cross-border problems*” is very well summarised by the Commission: “[d]ifferent mechanisms to assist citizens [...] must also be better co-ordinated. The world looks different through the eyes of a citizen [...] than through the eyes of the public sector. When citizens have a problem in the Internal Market, whether it relates to a bad experience when buying goods across borders or when trying to exercise their civil liberties, they do not wish to wander around looking for a helping hand. They want one door to knock on: A one-stop access to clear information about their rights, advice and a remedy.”³⁹

As to the central unit at the EU level, its main mission is to enhance the cooperation between national contact points, monitor their functioning and deal with the tasks which go beyond borders, such as training and research on European cross-border healthcare, organising multilateral seminars and consultations where experts can share their experience, working on methods to develop cross-border mechanisms and operating the proposed European Healthcare Fund.

3.2.3. European Reference Networks

In 2017, 24 European Reference Networks (ERNs) were set up based on the Patient Mobility Directive.⁴⁰ Each ERN is a virtual expert network involving healthcare specialists all over Europe and focusing on a rare or complex disease or group of

(37) Article 6 (2) PMD.

(38) See European Commission, Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions - Effective Problem Solving in the Internal Market (“SOLVIT”), COM (2001) 0702 final, 27.11.2001; European Commission, Commission Recommendation of 7 December 2001 on principles for using ‘SOLVIT’ – the Internal Market Problem Solving Network, C (2001) 3901, OJ L 331 of 15 December 2001 and European Commission, Commission Recommendation of 17 September 2013 on the principles governing SOLVIT, C (2013) 5869 final, 17.9.2013.

(39) European Commission, *Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions – Effective Problem Solving in the Internal Market (“SOLVIT”)*, COM (2001) 0702 final, 27.11.2001.

(40) Article 12 PMD.

diseases.⁴¹ ERNs offer the potential to give patients and doctors across the EU access to the best expertise and timely exchange of life-saving knowledge, without having to travel to another country.⁴²

This innovation can be a viable alternative of patient mobility, eliminating some of the difficulties described above. However, ERNs are yet in an early phase of functioning and much has to be done in relation to both their clinical and research practices. Nevertheless, they hold a great potential for European patients, mobile or otherwise.

4. CLOSING THOUGHTS

Although the achievements of the social security coordination mechanism have benefitted the citizens of the EU immensely in the last 60 years, we cannot sit still, but must constantly review the current legislation to meet the requirements of today.

The controversial issues of cross-border healthcare are just a few of the many examples of the dilemma that are rooted in the Member States' fear to give up (more pieces of) their national sovereignty as opposed to the Union's steady intention to develop the internal market and deepen integration. It seems clear that without further measures, the questions surrounding cross-border healthcare entitlements will remain unanswered for a long time. I firmly believe that the European institutions and the Member States must join forces and work towards a more integrated, solidarity-based, socially sensitive European Union, providing equal rights and opportunities for all. Hopefully, we do not need to wait another 60 years to see this happen.

(41) The list of ERNs can be found here: https://ec.europa.eu/health/ern/networks_en (date of access: 12 June 2019).

(42) https://ec.europa.eu/health/sites/health/files/ern/docs/2017_brochure_en.pdf (date of access: 12 June 2019).

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SOCIAL SECURITY COORDINATION AND NON-STANDARD FORMS OF (SELF)EMPLOYMENT

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INTRODUCTION¹

According to Eurostat data, approximately 40% of the active workforce works in one or another atypical (or non-standard)² form of work.³ The majority of the active workforce may be still contracted in a standard labour relation, non-standard work relations however have been growing over the last couple of decades.⁴ Standard work is in accordance with the European Labour Force Survey defined as full-time subordinated work for an indefinite period. Traditionally part-time work, work for a definite time period and self-employment were labelled as the main atypical work types.⁵ Yet recently the work organisation grew in complexity and labour markets increasingly face the emanation of a multitude of ‘new’ atypical forms of work (such as platform work, crowd work, portfolio work, etc.) that combine often simultaneously the main types of non-standard employment (part-time, defined work and/or self-employment) in a given work situation.⁶

Regardless of their status – standard or not – workers have in principle the right to move and migrate within the territory of the European Union (Article 45 of the Treaty on the Functioning of the European Union (TFEU)). In order to accommodate this movement, specific regulations that coordinate the various social security systems have been developed.⁷ Today we are celebrating the 60th anniversary of social security coordination in the European Union (EU) and one of the major questions is to what extent these regulations are still able to accommodate the growing complexity of forms of work present in the current labour market. Originally the coordination regulations

(1) This contribution reflects in chapter 3 a selected part of the analytical report the *Social security coordination and non-standard forms of employment and self-employment* which has been prepared within the MoveS network. The full analytical report can be consulted: Sturban, G., Carrasosa Bermejo, D., Schoukens P. and Vukorepa, I., *Social security coordination and non-standard forms of employment and self-employment. Interrelation, challenges and prospects*, Brussels, MoveS-European Commission, 69 p., 2018.

(2) For this contribution non-standard work and atypical work will be used as two synonymous concepts.

(3) See *European Labour Force Survey*, Eurostat.

(4) See on this e.g.: Barrio, A. and Schoukens, P., The changing concept of work: When does typical work become atypical?, *European Labour Law Journal*, 306-332, 2017.

(5) *Ibidem*.

(6) For a systematic overview of these atypical forms of work and their characteristics, see Barrio, A. and Schoukens, P., The changing concept of work: When does typical work become atypical?, *European Labour Law Journal*, (306), pp. 312-314, 2017.

(7) EU Coordination Regulation 883/2004 and its application Regulation 987/2009. For the purpose of this contribution these regulations will be abbreviated as Reg. 883/2004 and Reg. 987/2009 respectively.

were designed to support (only) the free movement of workers, which in turn had a rather standard work situation (of the full time – moving – worker) in mind as the default situation. Slowly different types of work found their way in to the personal and material scope of the Coordination Regulations.⁸ As such this may not come as a surprise; at the end of the day these EU regulations do nothing more than to coordinate national social security systems. If atypical forms of work are integrated into the national scope of the social security systems they consequently will have to be accommodated by the coordination corpus. However, the growth of atypical forms of work and the different ways of having them integrated into the national social security systems create some application issues for Reg. 883/2004 and 987/2009. This is mainly due to the fact that the coordination rules only make a distinction between two types of forms of work⁹: i.e. wage-earnership (working as an employed person) and self-employment (working as a self-employed person) whereas national systems have shown to be more creative in allowing ‘third types’ or “in-between” work categories going beyond the traditional ‘summa divisio’ of wage-earnership and self-employment. Moreover, new application problems occurred in cases where the atypical work is of a ‘marginal’ kind, leading to exclusion or a very reduced (work related) social insurance of the concerned work categories. Apart from the traditional demarcation between the major work categories (employment–self-employment) a new delineation issue started to emerge in social security legislation, i.e. between ‘non-work and ‘work’. When work is of a marginal nature (in numbers of hours and/or remuneration) can it then still be considered to be genuine work? And if not, to what extent are these persons then to be considered as non-working persons for the application of the coordination rules? This question is not without any consequences as the rules of coordination do differ considerably between workers and non-workers (e.g. to indicate the competent social security state). Another example showing that as the 60 years of EU coordination rules are approaching ‘pensionable’ age, is its approach towards work organisation: the coordination rules still rely upon a rather physical work organisation: ‘where are people standing (literally!) to work’, is still a key indicator to find out which social security system is in the end to be applied (see Articles 11ff Reg. 883/2004, indicating the competent state) whereas all kinds of new forms of work are organised over distance (telework) and/or (in the case of online platform work) virtually.

The rise in non-standard work creates problems for the application of Reg. 883/2004 and 987/2009. With this contribution we would like to highlight some of these application problems. In order to do so, we will first define what we understand by standard and non-standard work; secondly, as coordination is mainly starting from the definitions and the scope of application of the national social security systems, we

(8) With Regulation 1390/81 (self-employed persons) and Regulation 1606/98 (civil servants) as major legal initiatives to extend the scope of application; however the European Court of Justice played a similar crucial role to accommodate atypical forms of work within the regulatory framework of the Coordination Regulations (such as e.g. for telework Case C-137/11, Partena vzw v Les Tartes de Chaumont-Gistoux SA, EU:C:2012:593 or for home-based work Case C-570/15, X v Staatssecretaris van Financiën, EU:C:2017:674).

(9) If we make an abstraction of the specific situation of civil servant.

will sketch¹⁰ under which status non-standard forms of work are covered in national social protection systems: are they to be considered employees, self-employed persons or not professionally active for the sake of national social security legislation? This information should help us in answering the third part of the contribution: what kind of legal problems arise from applying the coordination rules (Reg. 883/2004 and Reg. 987/2009) to these new categories of non-standard work? For this contribution we will restrict ourselves to the title dealing with the coordination rules indicating the competent social security state in case of cross-border activities. The central question will be to what extent the traditional rules of indicating the competent state are still refined enough to deal with atypical forms of work. In the last part of this contribution we shed some light on the future and indicate possible pathways for modernising the coordination that could facilitate a better integration of non-standard forms of work into the current Reg. 883/2004 and 987/2009.

1. WHAT IS (NON)STANDARD WORK?

In order to be able to define the atypical (or non-standard) form of work, we first need to know who the typical employee is and what is so typical about the employment relationship between the employee and the employer. Looking at the definitions¹¹ used by Eurostat¹² and the International Labour Organisation¹³ the concept of standard work(ers) refers to the regulatory model¹⁴ that formed the basis for the regulation of social law; moreover, the concept refers as well to the labour market model that is regarded as ‘standard’ in the existing employment relationships. Employment relationships that differ from this are consequently regarded as ‘atypical’.

From this point of view perhaps Walton¹⁵ provides the most complete description of the typical standard employment relationship. He defined it as the “stable, open-ended and direct arrangement between a dependent, full-time employee and their

(10) This general comparison is based upon the answers which have been received by the national experts of the MoveS network at the occasion of the preparation of the study on non-standard work and EU Regulation 883/2004: Strban, G., Carrascosa Bermejo, D., Vukorepa, I. and Schoukens, P., *Analytical report. Social security coordination and non-standard forms of employment and self-employment: Interrelation, challenges and prospects*, EU Commission – MoveS, Brussels, 68 p., 2018.

(11) See Barrio, A. and Schoukens, P., The changing concept of work: when does typical work become atypical, *l.c.*

(12) Cf. *European Union Labour Force Survey – Annual Results*.

(13) International Labour Organisation, *Recommendation 198: Employment Relationship Recommendation* in 95th Session International Labour Conference, Genève, ILO, 2006.

(14) In contrast to the deregulating model that is now gradually being used as a standard, for instance, flexicurity. See Deakin, S., *Addressing labour market segmentation: the role of labour law*, Genève, International Labour Office, p. 4., 2013.

(15) Walton, M.J., The shifting nature of work and its implications, *Industrial Law Journal*, 45/2, pp. 111-121, 2016 with reference to Stone, K.V.W. and Arthurs, H., The Transformation of Employment Regimes: A Worldwide Challenge, in Stone, K.V.W. and Arthurs, H. (eds.), *Rethinking Workplace Regulation: Beyond the Standard Contract of Employment*, New York, Russell Sage Foundation, pp. 1-20, 2013; Freedland, M., Burying Caesar: What Was the Standard Employment Contract?, in Stone, K.V.W. and Arthurs, H. (eds.), *Rethinking workplace regulation: Beyond the standard contract of employment*, New York, Russell Sage Foundation, p. 82, 2013.

unitary employer.” The definition not only contains the traditional elements of the employment relationship (the personal subordination, the bilateral nature of the relationship, the wage as a source of income, the economic dependency, the reciprocity of the commitments and the place where work is carried out; together the first characteristic), but also implies qualitatively the job security (second characteristic) and income security (third characteristic) that are the objective of the permanent employment relationship.

Below is a brief explanation of the three characteristics.

1.1. THE ELEMENTS OF THE STANDARD EMPLOYMENT RELATIONSHIP (FIRST CHARACTERISTIC)

a. Personal subordination

The first, and perhaps most important, element is the personal subordination of the employee to the employer. Legally, subordination is traditionally interpreted as the control and supervision that the employer has over the employee.¹⁶ As the work becomes more intellectual in nature (for example with highly educated employees), the nature of the instructions and control also changes. For example, the functional coordination of the work and the degree of integration of the work gradually dominates in the labour organisation of the employer. Control over the duration, the formal organisation and the scope of the work prevail over the substantive control by the employer.¹⁷

b. Bilateral employment relationship

The unequal bargaining position lies at the (normative) basis of labour law aimed at protecting employees. According to Freedland and Controuris, this is intrinsically linked to the bilateral contractual nature of the standard employment relationship whereby one of the parties, the employee, is in an economically weaker position and therefore needs more protection.¹⁸

c. Reciprocity of the commitments

The contractual relationship between employee and employer in turn leads to a reciprocal relationship. Employers pay wages in exchange for the work delivered by employees and are therefore obliged to provide (sufficient) work so that employees can obtain sufficient income security and can further develop their skills (to strengthen their position in the labour market and to earn more). On the employee’s side this implies being available to perform the work on offer.

(16) Veneziani, B., The employment relationship, in Hepple, B. and Veneziani, B. (eds.), *The transformation of labour law in Europe: A comparative study of 15 countries 1945-2004*, London, Hart Publishing, 109, 2009.

(17) Eurofound, *Time Constraints and Autonomy at Work in the European Union*, Luxembourg, Publications Office of the European Union, 1998. Applied to the increasing autonomy of translators see Fraser, J. and Gold, M., “Portfolio workers”: Autonomy and Control amongst Freelance Translators, *Work, Employment and Society*, 15/4, pp. 676–697, 2001.

(18) Freedland, M. and Contouris, M., *The Legal Construction of Personal Work Relations*, Oxford, Oxford University Press, p. 370, 2011.

d. Salary (remuneration)

An essential component in the (regulation of the) employment relationship is the salary that is paid to the employee in exchange for the work done. In view of the intended (income) security, the salary is extensively protected.¹⁹ After all, it must enable employees to generate an income that leads to sufficient social security for them and their family. In turn that income offers companies (employers) and the economy in a broader sense, consumption assurance. Thus there is a reciprocal interest in income.

e. Economic subordination

Salary dependency leads to the economic subordination of employees towards their employer. The employment relationship is the most important, sometimes even the only source of income for employees. This means they are not in a position to sufficiently spread the economic risks of earning income.²⁰

f. At the employer's workplace

Finally work is generally undertaken at the employer's workplace. This is an element that follows from a traditional Fordism,²¹ but that became relatively less important in light of the increasing possibilities to spread the work geographically.²² Some argue that the workplace is not an essential part of the traditional standard employment relationship (see below).

1.2. WORK STABILITY (SECOND CHARACTERISTIC)

The traditional employment relationship leads to work and income security (the social function of the employment relationship). Work stability covers two elements. The employment relationship is permanent. It can only be terminated under certain conditions or for certain reasons such as incompetence, bad behaviour or economic reasons. This long-term solidarity between employees and employers can manifest further into permanent training facilities that might create an increasing autonomy on the part of employees within the company.²³ Mutual trust and loyalty in this sense therefore become important elements in the employment relationship between both

(19) Knegt, R., The Employment Contract as an Exclusionary Device, in Knegt, R. (ed.) *The Employment Contract as an Exclusionary Device: An Analysis on the Basis of 25 Years of Developments in the Netherlands*, Antwerp, Intersentia, p. 3, 2008.

(20) Davidov, G., Freelancers: An Intermediate Group in Labour Law?, in Fudge, J., McCrystal, S. and Sankaran, K. (eds.), *Challenging the Legal Boundaries of Work Regulation*, London, Hart Publishing, pp. 171-185, 2012.

(21) Reflecting the work organisation introduced by Ford and referring to stable employment based upon an open ended, full time and direct arrangement with a unitary employer leading to the necessary job-security allowing in its turn to the necessary amount of consumerism and economic activities affording the (further) development of our welfare states.

(22) Vleminckx, J.E. and Rojot, J., The Fissured Workplace in France, *Comparative Labor Law & Policy Journal*, 37/1, p. 165, 2015.

(23) Zekic, N., Job Security or Employment Security: What's in a Name?, *European Labour Law Journal*, 7/4, p. 568, 2016.

parties. In addition, work stability refers to the full-time nature of work that translates into a working week established in advance (standardised working hours).

1.3. INCOME SECURITY (THIRD CHARACTERISTIC)

In turn work stability creates the intended income security for employees. Income security relates to earning a salary that is sufficient to provide for livelihood security, but also to the expectation of sufficient social protection when there is a risk of loss of income due to unemployment or incapacity for work (role of social security as income replacement). Income security allows people to consume and plan in the long(er) term, making long-term investments once again possible.²⁴ The government also assumes (macro) income security since it guarantees stable income through taxation. It enabled Europe to develop the welfare state after World War II.²⁵

1.4. ATYPICAL FORMS OF WORK

Generally speaking, typical for atypical forms of work is that they lack one or more of these typical work relation characteristics, such as legal subordination, economic dependency, working at the employer's workplace or the lack of security in the provision of income or work. We refer to this evolution as external challenges to the work organisation. Nevertheless, it may be that all the typical work characteristics are present, but that the characteristics themselves are subject to developments; these are then called internal challenges. Below we first discuss the internal changes followed by a discussion of the external changes.

a. Internal developments

The traditional characteristics of the standard employment relationship can themselves be subject to evolution. The employment relationship retains its traditional characteristics, but the content-specific interpretation of the element evolves. For example, work is no longer necessarily undertaken at the employer's workplace, but it can be spread out geographically or undertaken at the employee's home (home-based work or more recently teleworking). The working conditions that relate to the workplace will have to be adapted to this situation (consider, for example, the establishment of working hours, rest times, but also the suspension of the employment contract in the event of a technical defect at the workplace).

Similarly, the interpretation of the element legal (personal) subordination has also evolved. For example, the service economy is increasingly characterised by more complex forms of work that require a high level of education on the part of employees. The employer depends more than ever before on the intellectual autonomy of the employee. Consequently, the assessment of legal subordination will focus more on

(24) Bosch, G., Towards a New Standard Employment Relationship in Western Europe, *British Journal of Industrial Relations*, 42/4, pp. 619-620, 2004.

(25) Gottfried, H., Insecure Employment: Diversity and Change, in Wilkinson, A., Wood, G. and Deeg, R. (eds.), *The Oxford Handbook of Employment Relations: Comparative Employment Systems*, Oxford, Oxford University Press, pp. 541-570, 2014.

the functional context within which the employee is active (and the possible freedom that the employee has within the organisational framework: working hours, use of equipment, use of rooms made available by the employer, etc.). The characteristics of standard work therefore also come under pressure 'from within' and must, where necessary, be given a new interpretation, adapted to social and/or technological evolutions.

b. External developments

More important for this contribution is the evolution in which the traditional elements of the standard employment relationship come under external pressure. Atypical work can also be regarded as an external development of typical work caused by the absence of one or more characteristics.

Atypical work is not a recent phenomenon. In a certain sense it is of all times and it is precisely in the standard employment relationship that it finds its rationale. After all, as soon as work is done in which one or more elements typical to the standard relationship are absent, we are dealing with atypical work.

Originally, these atypical forms found their origin in the absence of a legal subordination (independent work) and/or because of the absence of a stable employment relationship (fixed-term work) or income security (part-time work). It is also these forms of atypical work that are still the most prevalent in Europe. For example, roughly speaking, 60% of the working population in the European Union is still employed on the basis of a permanent contract²⁶ and employment in the form of temporary and/or part-time work is 'limited' to 14% and 19% respectively of the workforce (combined or not), while self-employed work occupies a share²⁷ of 15%²⁸. However behind these figures there are some interesting trends to be observed. For example, these three main forms of atypical work account for one third of all employment relationships in the Organisation for Economic Co-operation and Development (OECD) countries and account for half of the net employment growth since the 1990s.²⁹ In Italy, France and Germany the percentage of professional activity in the age group between 15 and 24 years on the basis of a standard employment relationship has dropped by 30 to 40 per cent in the period 1985-2015.³⁰ In the Netherlands, half of the workforce is employed in some form of atypical work situation (self-employed, part-time or in a defined work

(26) Eurostat (2015c), European Union Labour Force Survey – Annual Results 2014, retrieved August 2016, [http://ec.europa.eu/eurostat/statisticsexplained/index.php/Labour_market_and_Labour_force_survey_\(LFS\)_statistics](http://ec.europa.eu/eurostat/statisticsexplained/index.php/Labour_market_and_Labour_force_survey_(LFS)_statistics).

(27) Some of the workers combine one or more of these atypical forms of work, meaning that e.g. they can work part-time and at the same time are self-employed.

(28) Largely this figure can be further broken down into 10% solo self-employed and 5% self-employed persons working with employees. This last group seems to be in decline over the last couple of years, whereas solo self-employment grew strongly in countries such as the Netherlands and the UK.

(29) OESO, *In It Together: Why Less Inequality Benefits All*, Paris, OECD Publishing, pp. 137-139, 2015.

(30) Stone, K.V.W., The Decline in the Standard Employment Contract: A Review of the Evidence, in Stone, K.V.W. and Arthurs, H. (eds.), *Rethinking Workplace Regulation: Beyond the Standard Contract of Employment*, New York, Russell Sage Foundation, p. 374, 2013.

contract).³¹ These figures indicate that atypical forms of employment are (again) in the ascendant. But perhaps more important than the bare figures is the increasing variety under which atypical work manifests itself.

New forms of atypical work come to the fore, deviating from the other elements of standard work, including for example (the lack of) salary, reciprocity or economic subordination. For example, non-paid forms of work such as internships, apprenticeships or doctoral fellowships are increasingly being used, whereby the doctoral student is qualified as a student for the application of employment and social security law. Also in the ascendant are forms of employment in which the employee is increasingly paid on the basis of the return of the operating capital and less in proportion (or 'reciprocity') to the work done.³² Similarly, the remuneration by companies of 'popular' participants in social networking sites is increasing; people with many followers or friends are regarded by companies as (potential) trend-setters and paid in proportion to success - and not to the work done.

Furthermore, it is striking that new forms of work increasingly contain more different atypical work elements at the same time. Atypical work has generally developed into a combination of temporary, part-time and self-employed work, possibly even further supplemented by other atypical elements, including for example the lack of reciprocity, bilateral legal relationship or economic subordination. Crowd work is a good illustration of this, being a type of work that is often seen in relation to the growing platform economy. In the situation of crowd work, a commissioner or client posts an offer to undertake remunerated activities ('work') on an online platform; the offer is done in an undefined manner, meaning that for the commissioner it is not so important who in the end will carry out the activity. Typical to crowd work is the low level of skills required to do the activity. Rather than who is doing, it is more important that someone will do the activity in the end. The work can be performed offline (Uber, Deliveroo, TaskRabbit, etc.) or (immediately) online (Amazon Mechnic Task). Depending on the platform, there are different levels of control carried out on the established legal relationship and/or the delivered result. For example, the high level of control and pricing exercised by Uber is increasingly becoming an element that is taken into account in the case-law to nevertheless qualify the 'atypical' employment relationship as paid employment.³³ Crowd work is often undertaken on a self-employed basis; the person doing the activity, is only contracted for minor defined tasks (defined work) and is seldom doing the job on a full-time basis (part-time work).

(31) Eurostat, *Part-time Employment as Percentage of the Total Employment, by Sex and Age*, retrieved August 2016, http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=lfsa_eppga&lang=en.

(32) In 2013, the Employee Shareholder Status was introduced in the UK, where the employee opts for a share in working capital in exchange for a loss of employment protection against dismissal and severance pay. Likewise, the large numbers of self-employed workers in Belgium that are organised in company form and that pay themselves an income that is set at a fixed rate independently of the work done.

(33) In this sense, for example Federal District Court San Francisco 11 March 2015 and London Central Employment Tribunal, *Aslam and Farrar v Uber*, 28 October 2016.

2. NON-STANDARD WORK AND SOCIAL SECURITY

2.1. OVERALL CHALLENGES FOR SOCIAL SECURITY SYSTEMS

Due to the increase in atypical forms of work and the simultaneous application of several atypical work characteristics in each of these types, more and more challenges arise for the organisation of social security. Given the limited structure of this contribution, we cannot here examine each atypical group individually. Without being exhaustive, we list a number of atypical elements that require a review of social security, at least if we want to keep the atypical workforce in the system.

Many atypical forms of work do not (any longer) entail (full time) work activities that are performed in exchange for wages (reciprocal commitments). The relationship between work activity and income is called into question (see above examples of the employee shareholder, the non-work-related activities on social networking sites that generate income, etc.). It will become increasingly difficult to determine when the 'activity' can be considered as a work activity to be taken into account for the application of work-related social security schemes. Conditions that are determined in terms of the number of hours worked or other work volumes in social security law (access conditions, contribution provisions in respect of which the amount is related to the number of hours worked) are harder to apply to atypical forms of work. It can be expected that as work becomes more flexible, the income factor will play a greater role in determining the (scope of) social security rights and obligations and that this will be at the expense of the work (volume) element.³⁴

What is more, many atypical forms of work appear to be based on work that is not paid or is paid only marginally (reduction of the income security and salary elements). It becomes more difficult to determine whether the activity performed has the underlying objective of generating income (livelihood security), or focuses rather on a different (non-mercantile) objective, such as learning more during an internship. To what extent can these forms of work (still) be included in work-related social security?³⁵ What minimum thresholds will we apply for taking work into account for accruing entitlements to social security?³⁶ How far can we go in financially supporting this type of (non-economic) activity (role subsidies, in-work benefits)? Thresholds are exclusive and therefore less desirable as work flexibility increases. It might be necessary to switch to more transparency, with every euro earned from an activity creating entitlement to social security. There is also the observation that the Nordic two-pillar system has fewer problems protecting atypical forms of work (in particular non-economic activities) due to the general protective function of the first universal pillar. Yet, here attention should be given to the financing side, as atypical forms of work such as platform work

(34) In turn this can affect the rules of Reg. 883/2004 and Reg. 987/2009 when they take into account quantitative elements such as work time in their coordination rules (e.g. Article 13 regulating the competent state in the situation of the performance of simultaneous activities; see further below).

(35) And what does this mean for the application of Reg. 883/2004 and Reg. 987/2009, as the Coordination Regulations mainly refer to the national social security definitions? See further below.

(36) An initial comparative study shows us that Member States deal very differently with the definition of 'marginal' work and that the minimum thresholds for accessing social security schemes in Europe vary widely.

may for the moment not be well enough incited to pay in proper taxes/contributions for social security purposes.

Atypical forms of employment deviate more from the bilateral relationship with one employer. For example, multiple clients can be considered to be the employer (see platform work, temporary work, agency work, etc.). In traditional social security, the employer still has an important (administrative) position, for example with regard to collecting the contributions or with regard to the final conditions for the granting of benefits during illness and unemployment. Who will take on this role or duty with regard to the non-traditional forms of work? The client, the customer, the platform at the centre of the sharing economy, the state? When there are multiple clients (see crowd work) the question arises as to how this client responsibility can be spread. Alternative forms will have to be thought up to accommodate the declining role of the employer. With regard to this, inspiration can be drawn from the solutions implemented in numerous systems for agency workers in Europe.³⁷

Atypical forms of work are at risk of presenting an increasing qualification problem (absence of traditional legal subordination). In a derived form, this qualification conflict threatens to culminate in a growing number of sham employees who can be deployed for the client more 'cheaply' (because they are less protected). To prevent this, efforts must be made to guarantee full social protection for all forms of work, taking into account the uniqueness of the form of work in each of the work groups. For this purpose, a link can be sought with the distinction between work status neutrality (neutral basic principles in designing social security protection) and specificity as refined and applied for self-employed workers (labour form adapted social security).³⁸

2.2. HOW ARE NON-STANDARD WORKERS INTEGRATED IN (WORK RELATED) SOCIAL SECURITY: AS EMPLOYEE, SELF-EMPLOYED PERSON OR AS 'IN-BETWEEN' CATEGORY?

From previous research³⁹ we learned that most non-standard workers are for the application of national social security law considered to be employee or self-employed

(37) Likewise for the application of Reg. 883/2004 and Reg. 987/2009 one could ask who in the end is to be considered as employer. See further below.

(38) See on this distinction: Schoukens, P., A comparative presentation of the national social security systems for the self-employed: outstanding issues of coordination, in Ministry of Labour and Social Security and European Commission (eds.), *The free movement of the self-employed within the European Union and the co-ordination of national social security systems*, Athens, Greek Ministry of Labour and Social Security, (195), 210-212, 2000. At that occasion it was defended that the EU regulations should also be 'labour form neutral' as to the design of their main rules; yet at the same time make sure that in the application of these neutral rules, they are adapted to the specific labour form situation of the (atypical) self-employed worker.

(39) Schoukens, P., A comparative presentation of the national social security systems for the self-employed: outstanding issues of coordination, in Ministry of Labour and Social Security and European Commission (eds.), *The free movement of the self-employed within the European Union and the co-ordination of national social security systems*, Athens, Greek Ministry of Labour and Social Security, 195 ff, 2000; Barrio, A., Montebovi, S. and Schoukens, P., The EU social pillar: An answer to the challenge of the social protection of platform workers?, *European Journal of Social Security*, 219-239, 2018 and G. Strban, D. Carrascosa Bermejo, P. Schoukens and I. Vukorepa, *Social security coordination and non-standard forms of employment and self-employment. Interrelation, challenges and prospects*, Brussels, MoveS-European Commission, 69 p., 2018.

(and hence are consequently socially insured in that manner). Their classification follows largely the criteria in use to distinguish between wage-earnership (legal and/or economic dependency) and self-employment (absence of a dependent work relationship). Much will be dependent upon whether the person concerned performs his or her work in a status of personal or economic dependency. If this is the case the person concerned must be considered as an employee, if not, as a self-employed person. This delineation applies mainly for labour law, but is largely present too in social security law.

In many Member States there is no overall definition present of flexible forms of work such as casual work, on-demand work and intermittent contracts. Some forms might even be considered as illegal or are not allowed by the Labour Inspectorates.

For non-standard work specific adaptations will have to be made in the legislation in order to clarify the eventual status of the worker. These adaptations reflect the specific working circumstances of the non-standard worker. In temporary agency work e.g., the agency might be considered as the employer and hence the agency workers might have social security coverage as employees. In some Member States domestic workers are defined as employees providing domestic work for an employer, irrespective of whether they belong to his or her household. In this case they are covered by the general social security system.

In some systems a presumption is made that for non-standard forms of work, such as on-demand work, telework and domestic work a contract of dependent labour is concluded; consequently they are considered to be employees for the application of the social security provisions. Teleworkers providing services in personal dependency are in many Member States subject to social security law for employees. An exception may be that the rules regarding the employer's workplace, like accident-at-work insurance, are not applicable.

Although in recent times, platform work has been growing strongly in most European countries, not many specific regulations are to be found governing their specific working environment. Platform work as such is not specifically regulated in social security law. However many of the persons active on a platform are not considered to be a genuine 'worker' and hence are not covered in the (work related) social security schemes. The activities underlying platform work, at least when reported, are often too marginal of a kind, to be considered as regular professional activities. Hence they will not be taken into account for the application of (work related) social security schemes. The qualification of the (platform) activity is here of another kind (than the traditional question whether the activity is of an employee or of a self-employed kind); the issue boils down to the mere essential question: can the activity be considered as a professional activity or not? Is the person providing platform activities a worker?

In general in relation to non-standard work (such as part-time work and defined forms of work), elements such as the level of income or working time, may indeed affect the eventual access to social protection schemes. For instance in relation to part-time and fixed-term work the pay and/or working hour thresholds (minimum threshold of earnings to become insured) might be too demanding for some of these workers

and consequently may exclude them from social security coverage. Part-time workers and fixed-term workers may thus be protected for labour law, but may not be socially insured in the end.

Similarly as with wage-earnings, the self-employed activity has been growing in diversity. Traditional self-employed groups are tradesmen, craftsmen, liberal professions and farmers. Yet at the same time the self-employed system is constructed as a 'residual' system accommodating all forms of work that are not active in (legal) subordination. Especially the group of freelancers – as it is defined in a flexible manner (professionally active persons working not in subordination of their principal) – has been absorbing some new independent labour forms (e.g. emerged in the platform economy). Overall the traditional standard self-employed professions diminished in number; conversely more solo self-employed emerged, some of them dependent upon only one principal (and hence economically dependent) and some others formally registered as self-employed yet factually (still) active in legal subordination (employee); in the last situation we are strictly speaking not dealing anymore with self-employed (bogus self-employment). Moreover, also self-employed persons might perform work on a part-time basis.

Countries sometimes use the concept of 'economically dependent self-employed person', being self-employed who is mainly dependent on one client but is for social security purposes to be treated as an employed person (labelled as a 'small scaled self-employed' or 'dependent self-employed', providing services to one or two employers. In this case the rules on social security contributions being shared between the self-employed person and his or her 'commissioner', and the social security system for employees might become applicable (in full or sometimes only for some risks).

Bogus self-employed persons conclude a contract for self-employed persons (i.e. a freelance contract or contract of services), although they provide their services in personal dependency. Some Member States consider this hidden employment. And if all the elements of the (factual) employment relationship are established by a court of law, they are treated as employees under an indefinite contract. This also means that the employer has to pay social security contributions and potentially administrative fines for not registering a worker. It is usually for less economic burden and to avoid labour law rules that a self-employment activity is preferred over employment. If a Member State would still consider such person as self-employed, the same problems of social security coordination might be raised as for dependent self-employed persons, mentioned above.

3. NON-STANDARD WORK AND COORDINATION REGULATIONS 883/2004 AND 987/2009

3.1. SCOPE OF APPLICATION

Since the introduction of Reg. 883/2004 and Reg. 987/2009, the nature of work is not so relevant anymore. Before the application of these latest Coordination Regulations it was important to know the professional status of the covered persons. Until 1981, the Coordination Regulations were only applicable to the employees; from that year

onwards⁴⁰ the scope extended to employees and self-employed but was still limited to the group of professionally active persons⁴¹.

The personal scope of the coordination Regulations has thus constantly evolved to cover ever more insured persons. Regulation 883/2004 now encompasses all nationals of EU Member States who move or have moved within the EU and are or have been subject to the social security legislation of an EU Member State (Article 2). This is an explicit expression of the coordination system's concurrence with developments in the field of European citizenship, promoting the unhindered free movement of any EU citizen, regardless of engagement in an economic capacity.

3.1.1. Socially insured EU nationals moving between Member States

First of all, Regulation 883/2004 applies to nationals of an EU Member State who are or have been subject to the social security legislation of one or more EU Member States and who are moving or have moved between EU Member States. The movement implies thus a movement between at least two Member States of the EU. A movement within a single Member State (e.g. between two regions of that state) is thus not enough to fall under the scope of Regulation 803/2004.

Regulation 883/2004 refers explicitly to EU nationals. Third country nationals are thus not directly covered by Regulation 883/2004.⁴²

3.1.2. Primary insured, and dependent family members and survivors

Although the coordination Regulation covers all socially insured EU citizens one still has to make a distinction between the primary insured persons and the family members dependent upon the primary insured. The coordination rules differ across those two groups. Dependent family members cannot e.g. only rely upon some coordination provisions which are aimed at workers only. This means, e.g. that they

(40) With the coming into force of Reg. 1390/81 extending the scope of application to self-employed as well; as the legal basis (Article 48; back then Art. 51 TEEC) was only referring to workers (in the sense of wage earners, recourse had to be made to Article 352 TFEU. In a first time it was thus required to know for the delineation of the personal scope who could be considered as employee; later on with the extension to self-employed people, who was working (as employee or self-employed) and who was not working or who did not have a link with an employee or self-employed person (as depending person).

(41) Understood in a broad sense; persons on income replacement benefits, who were previously professionally active were assimilated to workers; so were persons who were dependent (as spouse, family member, etc.) upon the worker.

(42) As to third-country nationals, i.e. people who do not have the nationality of one of the EU Member States, a distinction between three different categories has to be made. The first category consists of stateless persons and refugees who are or have been subject to the social security legislation of an EU Member State, who move or have moved in the EU and who reside in an EU Member State (thus they have to meet a residence criterion). Regulation 883/2004 is applicable to them, as well as to their family members and their surviving family members. Secondly, family members of an EU national, a stateless person or a refugee who together with him move or have moved to another Member State are covered by the coordination Regulations as well, irrespective of their own nationality. In other words, the coordination Regulations treat non-EU dependent family members in the same way as EU dependent family members. Thirdly, other third-country nationals: with the exception of the relations with Denmark and the UK, third country national can invoke the coordination rules on the basis of Council Regulation (EEC) No 1231/2010, at least if they stay legally in the territory and (have) move(d) between at least two Member States.

cannot rely upon the chapter “unemployment benefits”. in relation to health care and family benefits. Family members⁴³ and survivors of EU nationals who are moving or have moved together with the EU national to another Member State are thus covered by Regulation 883/2004; yet they fall under specific coordination rules.

The primary insured persons refer to the professionally active persons or persons who have been professionally active and who are on benefit now. Here as well a distinction has to be made between the professional categories activities of the persons concerned, being mainly wage-earners, self-employed persons and civil servants. Different coordination rules are in place according to these activity groups as will become clearer below. Analogously as to the family members, these concepts refer as to their concrete contents, to the national law of the state on the territory of which the activities are (have been) pursued (see Article 1(a) and (d) Reg. 883/2004).

3.2. APPLICABLE LEGISLATION

3.2.1. Different qualification of professional activities

Whether a person works or not (or is considered as an employee or self-employed person) is still important for the application of the coordination rules. This is true in particular for Title II of Regulation (EC) No 883/2004. The applicable legislation rules differ across working and non-working groups and across employees, self-employed persons and civil servants. Consequently, Title II is not neutral regarding the eventual qualification.

One of the major challenges in an ever-diverging landscape of national qualifications is to know in the end which of the authorities involved is competent to make the eventual qualification of the professional activity. The Zinnecker case⁴⁴ provided us with some key elements to answer this question. Each of the Member States (involved) on whose territory professional activities are performed is competent to determine the nature of these activities. Taking into account the outcome of the legal qualification of each of these activities, the competent Member State will eventually be assigned by the rules of Title II. An artist performing activities both in Member State A and Member State B may be qualified differently across the countries (self-employed in A; wage earner in B). The outcome will be that Member State B will become competent as a result of the application of Article 13(3) of Regulation (EC) No 883/2004. Only in the case of posting under Article 12 of Regulation (EC) No 883/2004, the country from where the worker is posted retains the qualification competency over the activities.⁴⁵

(43) For the definition of family member, reference is made to the concerned national legislation (Article 1(i) Regulation 883/2004). Here we can read that family member means any person defined or recognised as a member of family or designated as a member of the household by the legislation under which benefits are provided. If the legislation of a Member State does not make a distinction between the members of the family and other persons to whom it is applicable (e.g. a social security benefit that is provided to all people who reside in that country, regardless whether they work or are depending upon a worker), the spouse, minor children, and dependent children who have reached the age of majority shall be considered members of the family.

(44) Case C-121/92, *Staatssecretaris van Financiën v A. Zinnecker*, EU:C:1993:840.

(45) Case C-390/98, *Banks*, EU:C:2001:456.

As such the Zinnecker case follows a healthy logic: each of the Member States remains competent to determine the legal qualification of the professional activities. Yet the question still remains as to what extent the competent Member State will have to respect the legal qualification made by the other relevant Member State? More specifically, if an artist is self-employed for his or her activities performed in the territory of Member State A, will Member State B as a competent country have to give due respect to this legal qualification when applying its own legislation? Can it requalify the legal qualification made by Member State A? In the Administrative Commission, the consensus drew on the more practical approach – to have the eventual competent Member State deciding on the qualification of all activities involved.⁴⁶ So it may be that our artist, considered to be self-employed in Member State A, may be requalified for that activity (performed in the territory of Member State A) as a wage earner activity, when the legislation of Member State B considers such activities for the application of social security as wage earner activities. However, notwithstanding this common position, it was interesting to notice that in some country reports another interpretation was followed, that which forces the competent Member State to respect the qualification given by the authorities on whose territory activities were performed. It appears that there is still no final consensus on how far the legal effect of national qualifications should reach, which makes it problematic when applied to atypical forms of work that are qualified differently for the application of national social security legislation.

The eventual qualification given by a Member State to a professional activity can impact the outcome of the applicable law rules. Whether one is considered to be an employee or a self-employed person, can lead to a different applicable legislation in the end. This may be problematic when similar professional activities turn out to be qualified differently across national social security systems. It is important to remember that employee activities prevail over self-employed activities (Article 13(3) of Regulation (EC) No 883/2004) and civil servant activities in turn prevail over employee and self-employed activities (Article 13(4) of Regulation (EC) No 883/2004). It is therefore important to determine which Member State is competent and what the exact legal effect of the eventual qualification of the professional activity is or will be.

Due to the increased flexibilisation of work, the qualification of work activities may face some new challenges. An increasing number of people are combining different work activities. It is likely that the rise in combined work will result in a higher number of combined cross-border activities (small jobs in different countries). Apart from the qualification issues discussed above (employee or self-employed), flexibilisation of labour may generate another problem: from which moment an activity turns to become a professional and which Member State decides upon this? Because of its minor or irregular nature, countries may decide that the activity is not to be considered as work, yet at the same time others may have it considered as a genuine work activity. Which of the involved countries is then to decide whether the person is working or

(46) Conclusion discussion Administrative Commission, 21 December 2017. See for a comment Nerinckx, S., Social security status and simultaneous activities: some clarifications, *Expatriate News*, No 2 (February), 1-3, 2018.

not? The answer to this question is important for the purposes of determining the application of Title II of the Coordination Regulation, as the competency rules differ between working and non-working persons. Later on we will take up this issue in a more extensive way.

In a similar manner, the discussion on the geographical aspect of work will increase. New forms of work applied in e.g. telework and platform work are becoming more virtual. Title II of Regulation (EC) No 883/2004 on the other hand starts from a very physical concept of work: the *lex loci laboris* principle is based upon the underlying default situation that the physical place where the person is working ultimately determines the Member State competent for social security. As the CJEU stated in the Partena-case⁴⁷, it is clear from the broad logic of the Coordination Regulation that “the criterion of the ‘location’ of the employed or self-employed activity of the person concerned is the main criterion for designating a single legislation which is applicable” and that the criterion should be derogated from only in exceptional circumstances (obs. 49). After having considered that unlike the concepts of employed and self-employed activity, “the concept of ‘location’ of an activity must be considered to be a matter, [...] for EU law and, consequently for interpretation by the Court” (obs. 53), it defined the concept, “in accordance with the primary meaning of the word used, as referring to the place where, in practical terms, the person concerned carries out the actions connected with that activity” (obs. 57).

Can this still be upheld now as a basic assumption in a world where people organise their work in an increasingly virtual manner? Virtual work as often applied in telework or platform work activities makes long-distance work relations possible, where employers and employees are well-connected online but remain geographically very distant from each other. Moreover due to IT tools it is now much easier to carry out (parts of work) at home. In line with the above mentioned Partena case, is this kind of home-based work to be taken into account as well for the indication of the location where physically someone is carrying out his/her work? Taking into account the growing facilities granted to workers to carry out the work (partially) at distance/ from home, it is very likely that Regulation (EC) No 883/2004 will face a growing number of cases where the geographical relation between employees, self-employed persons and employers on the one hand, and the Member States on the other hand will become more virtual and hence will further complicate the applicable law rules in their application.⁴⁸ A first indication of how the applicable law rules may have to deal with home-based work is to be found in the recent case X v Staatssecretaris van Financiën.⁴⁹ The person concerned worked for an employer located in the Netherlands; as he occasionally worked from home, the question was whether these occasional activities (performed at distance; from home) were to be taken into account for designating the applicable law (see also below 3.2. occasional and marginal work).

(47) Case C-137/11, Partena vzw v Les Tartes de Chaumont-Gistoux SA, EU:C:2012:593.

(48) For some examples, see the conference Employment, Social Policy, Health and Consumer Affairs Council (EPSCO), *The future of work, making it E-easy*, Tallinn, Estonian Presidency, 13-14 September 2017.

(49) Case C-570/15, X v Staatssecretaris van Financiën, EU:C:2017:674.

Interesting were the considerations of Advocate-General Szpunar when he stated that “it is one of the advantages – or, for some people, a curse – of the digital economy, that an employee may be asked or allowed to accomplish a part of his office tasks while away from the office, by working from home. The particularity of such working arrangement lies in the fact that it potentially undermines the concept of a particular place of employment, as a relevant factor for determining the Member State which has the closest link to the employment relationship (obs. 36-37)”⁵⁰. In line with the opinion of the Advocate-General the CJEU decided that the activities (i.e. the ones performed at home) were too marginal of nature to be taken into account for the concerned applicable law rules of Reg. 883/2004. In a situation such as that at issue, “where working from home is not explicitly reflected in contractual documents, does not constitute a structural pattern and amounts to a relatively small percentage of the overall working time, it is inappropriate to rely on that circumstance for the purposes of applying the designation rules”⁵¹. Conversely, if the activities at home are not marginal (in time/or gain), are followed in a structured manner and are agreed upon with the employer they may have to be considered for the application of Title II. It is evident that in absence of concrete rules in the current coordination rules, the CJEU will have the task of deciding how this circumstance of working partially at home (or at distance from the regular working place) though IT facilities, will have to be taken into account for indicating the competent social security state (Adv-Gen Szpunar, obs. 38). More on the effect of marginal activities for the application of Title II Reg. 883/2004, will be addressed below under 3.2.3.

3.2.2. The growing in-between categories of workers: employees or self-employed for the application of Title II?

A considerable amount of Member States have introduced in their social security law a new ‘in-between’ category of workers, i.e. in-between the traditional groups of employees and self-employed persons. Traditionally, at least when we disregard the group of civil servants, in social security law workers are split between employees – who are in a subordinated relation with their principal – and self-employed persons, those who are professionally active but not subordinated to their principal. Due to a growing flexibilisation of work, new groups of (non-standard) workers emerged taking on characteristics of both: while some workers may not be in a subordinated relation vis-à-vis their principal, their economic dependency on their sole co-contractor calls for a more extensive protection than the one provided for traditional self-employed persons. The best known example of these in-between groups is economically dependent self-employed persons, as introduced in quite a number of countries.⁵²

(50) Opinion Adv-Gen Szpunar, case C-570/15, X v Staatssecretaris van Financiën, EU:C:2017:182.

(51) Ibidem.

(52) For instance, in Norway the category of freelancer is considered to have a status “in-between” employee and self-employed person. Similarly in Italy and Spain the economic dependent self-employed person is a third category in-between the employee and traditional self-employed person. In Spain these are called “TRADE” (*trabajador autonomo economicamente dependiente*) workers, who receive 75% of their total income from one client. From the point of view of social security law, they are considered self-employed workers with some peculiarities (as mentioned above). In Italy reference is made to “co.co.co.” or “coordinated and continuing collaboration”, applying to activities carried out on an exclusively personal basis and under the organisational guidance of the contractor. See also the discussion under chapter 2, above.

For the application of the coordination rules these in-between categories create some challenges when it comes to the qualification of their labour status. For workers, Regulation (EC) No 883/2004 only makes a distinction between activities as an employed person and self-employment activities (again disregarding the group of civil servants): How should their activity be qualified and who is to assess the nature of their work? Article 1 of Regulation (EC) No 883/2004 refers for the definition to the national legislation of the Member States where the activities are being performed and follow in that respect the Zinnecker principle: it is up to the national system where the activities are performed to assess the nature of the activities. Yet this brings us no further when this system apart from employees and self-employed persons works with a third – in-between – category of professionally active persons. How should this ‘third’ group be considered for the application of Title II Regulation (EC) 883/2004, as the applicable law rule only works with two categories of professional activities: employees or self-employed persons?

Some guidance in answering the above question can be found in the case *Van Roosmalen*,⁵³ which dealt with non-standard work *avant la lettre*. One of the questions before the Court was whether a priest could be considered as a worker for the application of Regulation (EEC) No 1408/71, and if so, whether he was self-employed or an employee. It is interesting to note that the national law in question, was not clear in answering these questions either. As Mr Van Roosmalen was covered under the (Dutch) system first and foremost as a resident, it did not matter so much for the application whether he was a worker or not.

The CJEU reminded that for the application of the coordination Regulations, the concepts “employee” and “self-employed persons” for the application of the Coordination Regulations, are first and foremost to be determined by the national legislation (involved). However, as the national legislation involved was not itself clear on the matter, the CJEU ruled that in such a situation, one could fall back upon the European definitions as made available by the Coordination Regulations themselves (in particular the national definitions at that time provided by the Member State in Annex 1 of Regulation (EEC) No 1408/71) or, in absence of these, as applied by the articles shaping the free movement of workers (Article 45 TFEU or the Implementing Regulation). The Court held that the priest could be considered as a self-employed person within the meaning of Article 1(a), Annex I of Regulation (EEC) No 1408/71, as the concept of self-employment defined by the Netherlands under this annex applied to “persons who are pursuing and have pursued otherwise than under a contract of employment in a trade or profession, an occupation in respect of which they receive income permitting them to meet all or some of their needs, even if that income is supplied by third parties benefiting from the services of a missionary priest” (i.e. the members of the parish). Two crucial elements were present: the fact that the performed activities were of a “professional nature” (intention to earn livelihood) and that there was “no subordinated relationship” (no employee).

(53) Case C-300/84, *Van Roosmalen*, EU:C:1986:402.

Of similar relevance are the (even older) cases Unger,⁵⁴ De Cicco,⁵⁵ Janssen,⁵⁶ Brack⁵⁷ and Walsh,⁵⁸ as they date from a period where the Coordination Regulations applied to employees. Most of the cases dealt with self-employed persons who for the application of the European coordination rules could be considered as “atypical employees” and hence could be covered by the personal scope. Although they were self-employed under national law, the CJEU considered them to be “atypical employees” for the application of the Coordination Regulations as they were formally covered by the national system for employees. Interesting in this respect was the opinion of the CJEU when it defined the concept of employee: essential in its view was not so much the nature of the work (in subordination or not) but more the formal belonging to the social security system of the employee. The fact that the self-employed persons concerned were all formally covered by the social security system of employees was enough to have them considered as employees for the application of social security coordination rules, even though for some of them specific rules were in place in the national systems concerned.

By analogy, one could apply a similar reasoning to the new non-standard workers who are neither employees, nor self-employed in their country. In case the national system is not clear on the definition of their status, the concept should be defined by European standards. This means that we first and foremost look to which of the professional systems they formally belong (employees or self-employed); if the formal categorisation does not give a proper answer either, it is upon the more general European definitions as made available in the free movement rules to find out whether they can be considered as an employee or as a self-employed person.

Probably the most problematic tendency discerned is the growing group of persons who are considered to be marginal workers. Marginal or occasional work refers to the small and/or irregular character of work in relation to hours and/or income

(54) Case C-75/63, Unger, EU:C:1964:19.

(55) Case C-19/68, De Cicco, EU:C:1968:56.

(56) Case C-23/71, Janssen, EU:C:1971:101.

(57) Case C-17/76, Brack, EU:C:1976:130.

(58) Case C-143/79, Walsh, EU:C:1980:134.

gained. This group often struggles to reach the income⁵⁹ and/or working hour⁶⁰ thresholds introduced by many Member States. They have introduced thresholds which exempt/exclude the group from social insurance protection, limit the social insurance protection from certain key risks (sometimes guaranteed through universal schemes), and/or grant only a voluntary insurance to them. In some other Member States, marginal work receives a special treatment with regard to financing: it exempts the workers from paying contributions and/or gives them a preferential treatment in paying (lower) contributions.⁶¹ In some countries both are applied together: special treatment contributions and reduction in social coverage. Marginal workers are largely to be found in the rapidly growing platform economy, being characterised by its 'gigs' or small-sized tasks made available through the intermediary platforms to an indefinite group of persons potentially interested in undertaking the micro task.⁶²

Interestingly in some countries the minimum income threshold is determining the definition of a worker.⁶³ If the person does not earn the minimum amount required, s/he is not to be considered as professionally active. Instead of the regular pattern of

(59) In the Czech Republic e.g. the minimum income threshold (monthly) to be affiliated to the social security system is CZK 10,000 (EUR 400), in Germany it is EUR 450, in Austria EUR 438.05. In Latvia the monthly amount is EUR 70 for seasonal workers (in the agricultural sector) and EUR 50 for self-employed persons. In Malta there is a minimum annual threshold set for self-employed people, which amounts to EUR 910; in the UK in the case of self-employed, persons with earnings from self-employment of less than GBP 6,205 per year are exempted from compulsory joining social insurance schemes (however, they may opt to join on a voluntary basis). Some countries introduced a minimum weekly amount. In Ireland it is EUR 38 a week, in Cyprus EUR 174.38 a week and in the UK this amount is equal to GBP 116 a week for employees (while those between GBP 116 and GBP 162 are insured but exempted from payment of contribution); a person will not be eligible for national insurance credits if earnings are below). Some countries however apply a reduced coverage in case the income falls below the set level; for wage-earners often coverage is still foreseen for the scheme of accidents at work although the threshold is not reached. In Spain, according to the Supreme Court, self-employed persons are obliged to be insured if they earn more than the minimum wage. This threshold is considered a relevant element when determining the regular (habitual) character of the self-employment activity (Supreme Court Judgments 29-10-97, Rec 406/1997, ES:TS:1997:6441, 29-4-02, 30-4-02 and 20-3-07, Rec 5006/2007, ES:TS:2007:2483). However, it is possible to be voluntarily insured when the income is below this threshold. For two years, self-employed persons could pay a flat-rate contribution of only EUR 50 per month.

(60) Without being exhaustive, some examples: in Switzerland, Liechtenstein and Malta, in order to fall under the social security schemes, the threshold of a minimum of 8 hours of work activities a week is applied; in Norway there is a *de facto* threshold of 1 hour per week, whereas in Luxembourg the period of work should not be less than 3 months of continued (employed and self-employed) work in the last year.

(61) In Latvia e.g. self-employed persons with a low income (less than EUR 50 a month) enjoy a reduced contribution rate for the pension insurance scheme: 5% instead of 24.5% (general rate). In France the scheme of micro-entrepreneurs allows the self-employed person to pay his or her contribution in a proportional manner from the declared income (and not starting from the minimum income threshold, i.e. for traders and craftsmen EUR 15,893 for sick pay and EUR 4,569 for the pension scheme).

(62) Schoukens, P. and Barrio, A., The changing concept of work. When does typical work become atypical?, *European Labour Law Journal*, Vol. 8, issue 4, 2017.

(63) See e.g. the recently introduced category of non-registered workers in Poland for self-employed persons having a reported income below the minimum wage, but also the specific rules on platform work in Belgium, exempting self-employed persons earning income from a registered platform below EUR 5,100 to become registered for social security purposes. Likewise, some countries use minimum income thresholds, often expressed in relation to (a percentage of) the minimum wage which self-employed persons have to earn on a yearly basis in order to become registered for social security purposes.

the performed activities or the size of the working time, the level of income becomes the determining factor for deciding whether a person works or not. The underlying idea is that at the end of the day the person has to generate enough financial means to earn his or her livelihood. Whether this is done on the basis of activities over a regular time span or on a flexible ad hoc basis is not so crucial, especially when the activities are performed as a self-employed person.

Whether a person is professionally active or not is important for the application of the Coordination Regulation, especially in relation to the rules determining the applicable law. Persons who have their professional activities performed in a cross-border manner are ruled by the *lex loci laboris* principle; those who are not professionally active by the *lex loci domicilli* principle. When activities are simultaneously performed across several Member States, a series of specific applicable law rules start to become applicable in which residence and/or the size of the professional activity determine where the person is to be socially insured. Yet who is to determine whether or not the activity is of a professional nature?

3.2.3. Performance of 'marginal' activities and applicable law rules

The EU has its own definition of the concept of work indicating from which moment onwards activities have the characteristics to be considered as professional activities. For the application of the free movement rules (Article 45 TFEU, Implementing Regulation, Free Movement Directive 2004/38/EC) the CJEU developed a series of criteria indicating from which moment a person can be considered a worker; here as well activities of a mere occasional and/or marginal nature are excluded from the definition of work. The reference case (Lawrie-Blum) provided us with a classic definition of a worker, based on the generally accepted principle of a person performing services for and under the direction of another person for which s/he receives the remuneration.⁶⁴

However, the EU Coordination Regulations use a specific approach in defining this concept; they essentially refer to the social security legislation of the Member State concerned (Article 1 of Regulation (EC) No 883/2004). For the application of the applicable law rules, we first and foremost have to follow the national definition. If this qualifies the activity as too marginal to have it considered as a professional activity for the application of its own social security legislation, the person will not be considered to have a professional activity for the application of the Coordination Regulation. This may be due to the fact that the person is earning an income below the threshold set by the national law. Consequently, the activity which is not of a professional nature can thus not be invoked to indicate the competent Member State by application of the *lex loci laboris* rule. In a residual way, the person's residence will eventually determine the competent State. Apart from the consequences for the Coordination Regulation, the marginal 'non-professional' activity may also have an impact on the application of the Free Movement Directive.

(64) Case C-66/85, Lawrie-Blum, EU:C:1986:284. The CJEU stated that the concept of 'worker' in Article 45 should be interpreted broadly as (i) a person (ii) performing services (iii) under the direction of another (iv) for remuneration, and that this included a trainee teacher. Article 45(4) is to be construed narrowly, and only to safeguard state interests.

a. Marginal activities and substantial activities: the 5% rule

Furthermore, for the application of the applicable law rules the Coordination Regulation itself applies a concept of marginal activities which refers to the limited amount of working time and/or remuneration (Article 14(5)(b), (7) and (8) of Regulation (EC) No 987/2009; CJEU case X⁶⁵). So even though under national law the activity is considered to be of a professional nature, the Coordination Regulations may not give legal effect to the activity as it is too marginal. For cross-border activities performed simultaneously in different countries, work of a marginal nature is not to be taken into account to determine the competent State (Article 14(5)(b) of Regulation (EC) No 987/2009).

Article 14 of Regulation (EC) No 987/2009 however omits to quantify the marginal character of the activities. Nevertheless, the Administrative Commission determined in its Practical Guide on Applicable Legislation that “marginal activities are activities that are permanent but insignificant in terms of time and economic return. It is further on suggested in the guide that, as an indicator, activities accounting for less than 5% of the worker’s regular working time and/or less than 5% of his/her overall remuneration should be regarded as marginal”.⁶⁶ Also the nature of the activities, such as activities that are of a supporting nature, that lack independence, that are performed from home or in the service of the main activity, can be an indicator that they concern marginal activities.

Article 14 of Regulation (EC) No 987/2009 is, however, restricted in application, i.e. to be applied when indicating a competent Member State when simultaneous activities are performed on the territory of the different Member States (Article 13 of Regulation (EC) No 883/2004).⁶⁷ Whether we can give an analogous application of the ‘marginal activity rule’ for the other provisions of Title II is far from clear. In this respect the recent case X⁶⁸ is of interest. This case defines marginal activities for the application of Title II (applicable law rules) of the (former) Regulation (EEC) No 1408/71, which at the time did not have an article on marginal work, like Article 14 of Regulation (EC) No 883/2004. X performed a minor part of his activities at home (6.5% of the total working time). Knowing that the country of residence was different from the country where he normally performed his job for his employer, the question was whether the designation rule for the performance of simultaneous activities in different countries (at that time Article 14(2)(b)(i) of Regulation (EEC) No 1408/71) was to be applied, or whether the work activities at home should be disregarded and hence the basic rule of the country of work (Article 13 of Regulation (EEC) No 1408/71) prevailed. Starting from the facts of the case the CJEU decided that an employment activity amounting to 6.5% of the total work hours of the employee, was of a marginal nature and hence to be disregarded for the application of Article 14(2)(b).

(65) Case C-570/15, X, EU:C:2017:674.

(66) Administrative Commission, *Practical guide on the applicable legislation*, Brussels, Commission EU, 27, 2013.

(67) See case C-89/16, Szoja, EU:C:2017:538 for an application of the rule in case of simultaneous activities of a different nature (self-employment and employment).

(68) Case C-570/15, X, EU:C:2017:674.

Can we now deduce from this case a general rule, i.e. that professional activities of a marginal nature are not to be taken into account for applicable law rules of the Coordination Regulation? Or do we restrict this omission of marginal activities to the rules developed in relation to simultaneous activities? Arguments may be found for both interpretations; yet it should be indicated from the outset that contrary to the main designation rule (*lex loci laboris*) and the posting provisions, the article dealing with simultaneous performance of professional activities clearly refers to the situation of a person who 'normally' pursues an activity as an employed or self-employed person (in two or more Member States). Both the CJEU and the Advocate General induced from this that marginal activities are not of such a nature that they can be considered as pursuing 'normal' activities, and hence could be disregarded for the application of this rule. Working 'normally' in the territory of a Member State refers to a pattern of regularity that is absent in the case of marginal activities. However, this regularity pattern is neither (yet?) required for the application of the main *lex loci laboris* rule, nor in the posting provision. For the latter rule of posting there are other conditions required of the professional activity (minimum activity before posting, bond with employer, same nature of self-employment activity, etc.) yet they do not refer to the minimum amount of remuneration or working time.

With the exception of Article 13 of Regulation (EC) No 883/2004, we can conclude that for the other applicable law rules the professional activities do not need to reach a defined minimum size in order to be taken into account for the indication of the competent Member State. However, these activities should from the outset be considered as professional (employee/self-employed) activity by the legislation of the Member State (by application of Article 1 of Regulation (EC) No 883/2004). Here, as before, it may be that by national law already the activity has to reach some set minimum amount of gain, income or working time in order to be considered as a professional activity.

b. Marginal activities and simultaneous activities: the 25% rule

Marginal activities play a (second) role as well in relation to the applicable law rule specifically designed for simultaneous activities (i.e. Article 13 of Regulation (EC) No 883/2004 and Articles 14-16 of Regulation (EC) No 987/2009). Activities which are too marginal (5% or less of the working time/remuneration) are not to be taken into account to prevent a manipulation of the rule.

In a second layer the size of the activity is taken into account to determine the eventual competent Member State: in principle the Member State of residence will be competent when activities are performed simultaneously, yet it is required that at least 25% of the activities are performed in that country. Otherwise it will be the Member State of the registered office of the employer employing the person working in different countries (see Article 13(1)(b) of Regulation (EC) No 883/2004 to see the sequence, in the event that there is more than one). To determine the 25% share, account has to be taken of the working hours and/or remuneration (for employees) and of turnover, working time, number of services and/or income for the self-employed (Article 14(8) of Regulation (EC) No 987/2009). Here some interpretation issues may arise.

Non-standard forms of work (platform work in particular) are characterised by irregular working time periods and a multitude of micro-activities performed through the means of a platform. How should we have to deal with the listed parameters taking into account these irregular forms of work? Moreover, by leaving the eventual criterion open for the parties involved to decide (Article 14 refers to an option – “or”), we may end up in quite some discussion between administrations and/or involved parties, especially when part of the activities are performed in a virtual manner. The number of hours worked based on cloud platform work is not easy to track down, let alone determining the physical location where these activities are performed online (see the case of digital nomads, continuously travelling to new locations from where they can access the internet and their cloud activities).

3.2.4. Limited social insurance protection and applicable law rules – Effects of case-law Bosmann and Franzen

The landscape of social insurance protection for non-standard workers differs strongly. Many States exempt non-standard workers from mandatory protection, reduce the protection to some basic insurance and/or provide (only) voluntary access to the main social insurances.⁶⁹

The social security coverage of the non-standard workers may thus differ largely depending on where the work is being carried out. In a cross-border situation one consequently has to take into consideration the possible effects of the case-law of the CJEU which reduced the ‘exclusive’ and ‘overriding’ effect of the applicable law rules. From the Bosmann case⁷⁰ onwards, the CJEU started to apply the Petroni principle (also known as the principle of favourability) on Title II, allowing the insured person to fall back upon the social security system of the place of residence, in case the applicable system of the Member State of work was (too) limited in its eventual protection. The CJEU is inclined to do so, if under national law the residence scheme can be made applicable, e.g. because of the applied universal scope covering all residents. Contrary to its previous case-law,⁷¹ the CJEU was not in disfavour (anymore) to apply both systems involved when at least no overlap occurred with regard to the specific social insurance schemes. Consequently, the person could, e.g. be covered for family benefits

(69) Thus, persons performing so-called mini-jobs in Germany and in Austria are excluded from the scope of the social security system. In Poland non-registered activity is not defined by social security law. In the UK, if a person is employed, but earns less than GBP 116 a week, the latter will not be eligible to be entitled to social security schemes. In Denmark some trade unions forced platforms to provide crowd-workers with collective agreements, so they could receive minimum social security rights. In France and in Latvia the category of micro-entrepreneurs falls under the special tax system, according to which all taxes and social security contributions are replaced by a single payment. In most countries non-standard forms of employment are not covered against accidents at work: in the Netherlands self-employed persons are not entitled to employee insurance, as there is no separate scheme for accidents at work and occupational diseases; the same situation can be found in Norway (however, freelancers are covered), Portugal, Iceland, Malta, Sweden and Austria. In Spain, insurance of self-employed persons entitles them to sickness benefits in cash (lack of income compensation in case of temporary incapacity - *incapacidad temporal*). Insurance against accidents at work and occupational diseases is compulsory for TRADEs and voluntary for other self-employed persons.

(70) Case C-352/06, Bosmann, EU:C:2008:290.

(71) Cases C-41/79, Testa, Maggio, Vitale, joined cases C-41/79, C-121/79 and C-796/79, EU:C:1980:163; C-302/84, Ten Holder, EU:C:1986:242; C- 60/85, Luijten, EU:C:1986:307.

by the residence scheme when the system that was made competent by application of the designation rules (Title II of Regulation (EC) No 883/2004) only provided coverage for the occupational accident scheme.

The Bosmann case provoked quite some controversy amid scholars claiming that it would lead to a situation where social security coordination becomes unworkable. Yet the CJEU followed a similar line of reasoning in a series of follow-up cases.⁷² Especially in cases where the eventual competent Member State provides only for restricted social protection, the CJEU is tempted to accept additional access to the social security system of the other Member State involved when under national law this is made possible.

In the quoted Bosmann case, and also in the Franzen case,⁷³ non-standard forms of work were brought into the ambit of the Coordination Regulation. The persons concerned worked in 'mini-jobs' in Germany and hence were socially covered in a very restricted manner. In both cases the persons were still residing in the Netherlands and the involved non-standard workers tried to safeguard their access to Dutch universal social insurance on the basis of their residence. The CJEU followed this approach and hence neutralised to some extent the exclusive effect of the applicable law rules, until then a rock solid principle in the case-law of the CJEU. In Franzen the CJEU recalled that the general applicable law principle *lex loci laboris* means that a resident of a given Member State who works for several days per month on the basis of an on-call contract in the territory of another Member State, is subject to the legislation of the State of employment both on the days on which he performs the employment activities and on the days on which he does not. However, due to the irregular and low income earned from her activities, Ms Franzen⁷⁴ was only covered for one scheme (accidents at work) in the competent Member State, excluding the person from other protection, such as child care benefits. Due to the exclusive effect of the applicable law rules, access to child care was lost in the country of residence as well. The CJEU stated that in circumstances such as these the migrant worker who is subject to the legislation of the State of employment is not to be precluded from receiving, by virtue of national legislation of the Member State of residence, family benefits from the latter State. In the joint cases Giesen and van den Berg the CJEU came to a similar conclusion for access to the Dutch old-age pension.

Often the 'other' Member State involved turns out to be the State of residence, which by its universal character can be made applicable upon the person concerned (having

(72) C-11/10, Hudzinski & Wawrzyniak, EU:C:2011:91; C-212/06, Government of the French Community and Walloon Government v Flemish Government, EU:C:2008:178; C-382/13, *Franzen*, EU:C:2015:261; recently re-introduced in C-95/18, van den Berg, EU:C:2004:665.

(73) Case C-382/13, *Franzen*, EU:C:2015:261. See also Cornelissen, R., The self-employed and the coordination of social security in Europe, in Schoukens, P. (ed.), *Social protection of the self-employed in the EU*, Deventer-Boston, Kluwer, 43, pp. 56-57, 1994.

(74) Apart from the concrete case of *Ms Franzen*, the case integrated two other similar (national) cases, i.e. *Giesen* and *van den Berg*, in which the access to the Dutch universal pension scheme (AOW) was under consideration.

its residence in the country concerned). Refusing the person to have the benefits granted by its own national law could be considered as an infringement of the free movement principle (Article 45 TFEU), especially as there is no positive conflict of laws at stake, the CJEU seems to reason.

However, the case-law generates uncertainty as to how far this acceptance of a double designation across work and residence systems should reach.⁷⁵ Taking into account the very broad spectrum of coverage of non-standard workers in the EU countries it is likely that the number of these cases will increase especially when the non-standard worker is assigned to a system of limited (or no) protection whereas s/he may still be entitled to social security benefits on the basis of national legislation of other Member States involved (e.g. of residence and/or even of a country where simultaneously the remainder of the professional activities are performed). What if the protection guaranteed in the competent Member State turns out to be rather marginal compared to the one in the Member State of residence (and hence there is a positive conflict of law, yet one with different levels of protection or financing levels)? What if the competent Member State to a large extent provides only voluntary insurance whereas the state of residence grants a decent protection on the basis of reduced social security contributions. Coordination works fine as long as the standards/levels of the systems to be coordinated are not too different, but provokes controversy as soon as systems are intrinsically very different as to level of protection and/or financing. In a landscape where there is too much variety in protection, the decision where one is insured is no longer purely legal; it becomes political.

3.2.5. Voluntary insurance

Reportedly, Member States increasingly give non-standard workers (only) voluntary access to the social insurance schemes. Especially for the workers/self-employed persons with low remuneration we notice the practice of exempting them from mandatory social insurance and at the same time giving them the possibility to be covered by social insurance on a voluntary basis.⁷⁶

Leaving aside the question of how many non-standard workers in reality take up social insurance in the end, the growing reliance on voluntary insurance has consequences for the application of the Coordination Regulations. Although voluntary schemes related to the contingencies covered by the Coordination Regulations⁷⁷ do fall under the material scope, specific rules for such schemes nevertheless exist in Title II. Article 14 of Regulation (EC) No 883/2004 regulates the status of voluntary insurances in case they need to be coordinated with other (mandatory) schemes. The general rule

(75) See the new request for a preliminary ruling in the same cases *Franzen, van den Berg* and *Giesen*, launched by the Dutch High Council (Hoge Raad) on 9 February 2018, OJ C 7 April 2018, 161/21-22.

(76) Most of the EU Member States provide the possibility to apply for voluntary based social security schemes. Some legislation allows an entitlement to social security contingencies in general: Ireland, Hungary, Denmark, others allow limited entitlement, thus for pension insurance: Czech Republic, Germany, Latvia, Slovenia, Portugal, Liechtenstein and Switzerland. In some countries the voluntary scheme is extended to insurance against accidents at work and occupational diseases: Finland, France.

(77) CJEU, joint cases C-82 and 103/86 *Laborero and Sabato*, EU:C:1987:356.

is clear in stating that the applicable law rules (Article 11-13 of Regulation (EC) No 883/2004) are not applicable to voluntary insurance (or optional continued insurance), unless only a voluntary insurance exists in a Member State. Already here the first application raises questions. If non-standard workers are given voluntary access to a mandatory insurance (in place for regular workers) is this rule to be understood as if only voluntary insurance exists for this type of workers?

Furthermore, Article 14 excludes persons made subject to the compulsory insurance of the competent Member State to take up voluntary insurance in another Member State (e.g. the Member State of residence). Taking into account the case-law of *Bosmann/Franzen* (see above) this prohibition is likely to be interpreted in a restricted manner and will not apply in case the voluntary insurance refers to a contingency for which the competent State does not have a mandatory insurance in place. Already in the third paragraph of Article 14 it becomes clear that this Article is not aiming at an overall exclusion of voluntary schemes in the non-competent system, making an exception for invalidity, old-age and survivor's schemes.

If for a given branch the person may choose between several voluntary schemes (put in place by the different countries involved), s/he can opt for the scheme of his or her choice. Here as well the question is whether this rule is to be read contingency by contingency or system by system; the fact that the article refers to 'branch' presupposes the first interpretation.

4. ALTERNATIVES FOR THE FUTURE?

The study of non-standard work quickly questions the major fabrics of the Coordination Regulation. Are they still up to the new challenges, the greater flexibilisation of work organisation, the virtual character of a growing number of atypical forms of work, etc. Consequently some of the older proposals to have a radical reform on social security coordination have been put again under discussion.⁷⁸ Could they be an alternative for the future as sketched before? Here we restrict ourselves to the 'old' idea of the 13th state which possibly could be an alternative coordination rule for very mobile (virtual) workers. With regard to virtual (platform) work, reference should be made as well to the proposal made by E. Weber to introduce a digital (collection of) social security (contributions) to be distributed in a consecutive manner to the involved national system(s); the collection of the contribution is to be done by a supranational (international or European) body, such as e.g. the EU; the contributions are to be paid by the platforms mediating work from providers to users.⁷⁹ Here we restrict ourselves to the idea of the European social insurance (the 13th state) which in version 2.0

(78) The 'older' proposals refer to the idea of introducing a proper social insurance for migrant workers, the so-called 13th state (see below) and the idea to have installed a clicking system for mobile researchers: see more on this idea: *The social security of moving researchers*, Berghman, J. and Schoukens, P. (eds.), Leuven, Acco, 142 p., 2011.

(79) See for a summary Weber, E., *Setting out for digital social security*, Geneva, ILO, 14 p., 2018, <https://www.iab-forum.de/en/setting-out-for-digital-social-security/>.

could address some of the issues related to the social security coordination of mobile workers.

4.1. THE 13TH STATE

The ‘thirteenth state’ scenario referred to the European Community⁸⁰ and can best be summarised as the establishment of a European social security system for intra-community migrants, existing alongside the national social security systems. Since, at the time the idea was developed, there were 12 Member States, this European system was referred to as the system of the thirteenth state, which would function alongside those of the twelve Member States. For today’s European Union, we should refer to it as the 29th state, or, in the near future, as the 28th state; but since the idea is more important than the name, we prefer to continue calling it the ‘thirteenth state’.

The European ‘thirteenth state’ system would, in principle, be open exclusively to intra-community migrants. The European system would offer a complete system of social insurance covering all social risks in the field of social insurance. The method applied here should lie somewhere between harmonisation and coordination. The creation of a European social insurance system clearly goes beyond coordination alone. On the other hand, the ‘thirteenth state’ method falls outside the definition of harmonisation, since it does not, in principle, change national law.⁸¹

In principle, the thirteenth state system will only be open to persons who change their competent state in accordance with the rules of the Coordination Regulation. The system of the thirteenth state could, however, also address other categories of the population with regard to its scope of application *ratione personae*. In addition to intra-Community migrants, for example, employees of companies operating in more than one Member State would fit well into the social security system of the thirteenth state⁸².

4.2. THE 13TH STATE, EDITION 2.0

The Coordination Regulations attach great importance to the place of work, the *lex loci laboris*, as the standard for establishing the competent state. However, by realising the free movement of goods and services in an integrated market, simultaneously with the inclusion in the Union of countries from Central and Eastern Europe, many companies have shifted the base of their operations to these new Member States. This

(80) Although the scenario of the ‘thirteenth state’ was designed with an eye to the European Community, while the name refers to the situation in the European Community, the method of the ‘thirteenth state’ could also be applied in another multinational context.

(81) The method applied in the scenario of the ‘thirteenth state’ was and is not entirely new in the law of the European Community/European Union. After all a ‘European social security system’ has been set up especially for European Community civil servants; see Regulation (EEC, Euratom, ECSC) 259/68 of 29 February 1968, JO L56 of 4 March 1968; cfr. also DG IX, La protection sociale des agents des Communautés européennes, in Association des Rencontres européennes des fonctions publiques, La protection social des agents publics en Europe, La Documentation française, Paris, p. 409 ff., 1993.

(82) Cfr. on this possibility Pieters, D. and Vansteenkiste, S., *The Thirteenth State...*, o.c., p. 106.

evolution is particularly noticeable in certain sectors; let us only mention here the international transport of goods. But even in what are at first glance less mobile sectors such as construction, social protection is often arranged from within a new Member State, with lower wages and modest benefits. As such, a supporter of free movement cannot argue with this, were it not for the fact that it results in more and more people effectively working in the territory of a state, without being socially insured there. In other words employees can be working on the same site all having a different social security status: one might be insured in the country of employment, while another, as a result of posting is insured under a foreign social security system. All kinds of attempts to counteract undesirable competition or 'social dumping', are confronted with the difficulty of distinguishing abuse of the use of free movement and with the sometimes very conflicting interests of Member States in this.

But there is more, the place of work is also becoming increasingly difficult to identify in a highly computerised world: where does, for instance, the person, residing in Kortrijk (southwest Flanders/Belgium) who works in an office of his British employer just across the border in Lille (France), but who works from home two days a week, actually work in the sense of the Coordination regulations? Where does the controller responsible for the planning of slots at Edinburgh Airport (UK) operating from Lund (Sweden) and going to Edinburgh twice a month, work? We could give many more examples that are neither imaginary nor far-fetched.

The network or shared economy has added a dimension to this: it is becoming less and less clear when we do work or otherwise earn income in a way that is socially insurable. What about the person who, in the border region, passes on the prices of specific products in supermarkets on both sides of the border to a parent company of one of the large department store chains established in a third country, doing so for a small amount per transferred price and without being bound through agreement or (labour) contract?

Does the thirteenth state offer a solution to all these problems? Certainly not, but it would be a way of offering a good solution for specific sectors or activities that are by nature cross-border or that are difficult to locate. It is therefore worth investigating whether we could not introduce the 13th state system for specific groups of professional activists. Here we consider, for instance, the workers and self-employed workers in the international transport sector, scientists, researchers and university professors (from the Union or from outside the Union), intra-corporate transferees etc.

OUTLOOK

The nature of work is changing. A stronger diversity in atypical forms of work is proof of this development. Platform work by incorporating various elements of atypical work challenges probably the most traditional characteristics of work (personal subordination, indefinite time, full time, and its outcome in security work). Especially online platform work is the most difficult work type to capture in social security schemes that have been around traditional forms of work. Due to its virtual nature it can be performed wherever in time and at whatever place. Moreover it is hard to find out who are the different parties involved (intermediary platform,

several commissioners as clients or employer). As the tasks are of tiny 'gig' nature some utter that platform activities are not even to be considered as work activities and hence disqualify them from the traditional professional social security schemes. A new qualification indicating the nature of activities emerges: from which moment an activity becomes a professional activity.

It is exactly this question which challenges to a large extent the actual design of the coordination rules in Title II 883/2004 (indicating the competent state), which largely differentiates between workers and non-workers. Platform workers apparently sit largely in between the two categories. This and the fact that many of the online platform activities are of a virtual kind, potentially reaching out to the global world, ask (again) for a rethinking of the coordination rules. Probably we have to start to accept that some types of work of an intrinsically mobile nature cannot be assigned to the territory of a given state but are simply 'European' in their kind asking for truly European answers. It is maybe time after 60 years of social security coordination in the EU, to accept the existence of a genuine 'European worker' enjoying his/her social protection in a truly European scheme.

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INTRA-EU POSTING: LOOKING FOR SOLUTIONS: A HERCULEAN OR A SISYPHEAN TASK?

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It is an understatement to say that the topic of ‘posting’ stirs up strong emotions. The phenomenon has been under discussion for more than 20 years, and even after the recent revision of the Posting of Workers Directive (Directive (EU) 2018/957 of 28 June 2018 amending Directive 96/71/EC), emotions still do not seem to have calmed down. For some stakeholders, the amended Posting of Workers Directive goes much too far, while other stakeholders argue that the new provisions will have little or no impact in practice. The future will tell. Not only the Posting of Workers Directive but also the Regulations on the coordination of social security systems (‘Basic’ Regulation (EC) No 883/2004 and ‘Implementing’ Regulation (EC) No 987/2009, hereinafter the “Coordination Regulations”) have important implications for the use of posting. Despite the European Commission’s proposal to amend these Regulations as well (*COM(2016) 815 final*), no agreement was ultimately reached on this. The Commission will probably get back to this ‘*dossier*’ meaning that posting will continue to be a topic of discussion in coming years. All the proposed changes to the Posting of Workers Directive and the Coordination Regulations have been made without waiting for the outcome of the review of Directive 2014/67/EU (i.e. the ‘Enforcement Directive’). After all, the Commission had to review the application and implementation of the Enforcement Directive by mid-June 2019 (EC, 2019).¹

The question is, however, whether it is really necessary to constantly pursue adjustments to the European rules applicable to posting. After all, it seems like several provisions on access to information, the registration of posted workers, enforcement, the exchange of information, data collection, and finally monitoring which are laid down by the Posting of Workers Directive, the Coordination Regulations and the Enforcement Directive, are still underutilised. That is why we are in favour of a pragmatic approach which first fully endorses and implements the current legislative framework applicable on intra-European Union (EU) posting as well as the (upcoming) legislative changes. In this chapter, we discuss further steps that can be taken by Member States, but also at EU level in the area of information, registration, enforcement and monitoring on the basis of a better implementation of the existing EU legislation on posting. These areas can also be regarded as communicating vessels which, by means of even better elaboration, can provide a solution to the problems that currently go hand in hand with posting. However, in order to make progress in these areas, it must first be clear

(1) The review was published by the Commission on 25 September 2019 (2019a, 2019b, 2019c).

what can be understood by the notion of ‘posting’.² Currently, it seems that everyone talks about posting, but nobody knows exactly what it means.

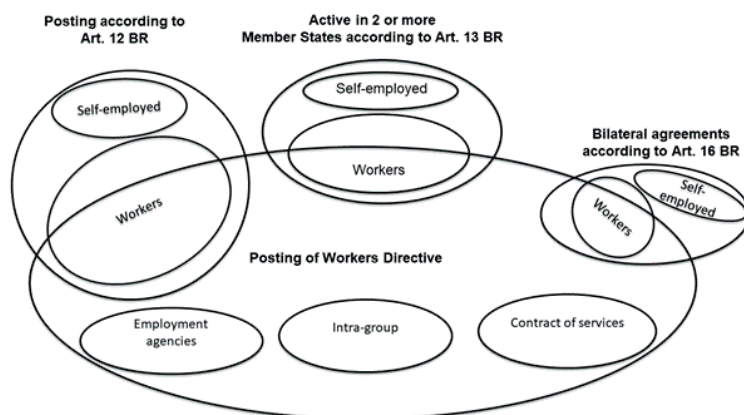
1. INTRA-EU POSTING: A CONFUSED CONCEPT

The notion of a ‘posted’ worker/person is used both in the Basic Regulation and the Posting of Workers Directive. However, because of the differences in scope, persons might be ‘posted’ under Article 12 of the Basic Regulation, but not in the meaning of the Posting of Workers Directive (Figure 1). For example, a self-employed person temporarily working in another Member State according to Article 12(2) of the Basic Regulation is posted, but is not covered by the Posting of Workers Directive. In contrast, workers who pursue an activity in two or more Member States (Article 13 and not 12(1) of the Basic Regulation) may fall under the Posting of Workers Directive. This creates confusion for all stakeholders involved. Therefore, it should be clear which posting situations are covered by the Basic Regulation and the Posting of Workers Directive. Whereas for the Posting of Workers Directive this is rather clear, for the Basic Regulation this is less the case. Based on the reading of Article 12 of the Basic Regulation, we tend to conclude that almost every person who is sent to another Member State to perform work and complies with the defined conditions of anticipated duration and replacement should be considered a posted worker. Consequently, this also includes workers going abroad for a conference or a business meeting. However, such workers are not covered by the Posting of Workers Directive.³

(2) See also: Van Hoek and Houwerzijl, 2012.

(3) See also the Practical Guide on Posting (EC, 2019c) (section 2.4. “What about ‘business trips’ to another Member State? Are the rules on posting applicable to any mission abroad of workers?”): “Workers who are sent temporarily to work in another Member State, but do not provide services there, are not posted workers. This is the case, for example, of workers on business trips (when no service is provided), attending conferences, meetings, fairs, following training etc. Such workers are not covered by the Posting of Workers Directives and the administrative requirements and control measures set out in Article 9 of Directive 2014/67/EU are therefore not applicable to them. Please note that, as far as the coordination of social security is concerned, Regulations (EC) No 883/2004 and 987/2009 provide that, for every cross-border work-related activity (including ‘business trips’) the employer, or any self-employed person concerned, is under the obligation to notify the competent (home) Member State, whenever possible in advance, and obtain a Portable Document A1 (PD A1). That obligation covers any economic activity, even if only of short duration. These Regulations do not provide for any exceptions for business trips either.”

FIGURE 1: DIFFERENCES IN SCOPE BETWEEN REGULATION (EC) NO 883/2004 AND DIRECTIVE 96/71/EC



The proposal of the Commission to revise the Regulations on the coordination of social security systems (*COM(2016) 815 final*) aimed to, among others, clarify the relationship between the Coordination Regulations and the Posting of Workers Directive. Notably, Article 12 of the Basic Regulation was amended to clarify that the term ‘posted worker’ should be given the same meaning it is given within the Posting of Workers Directive.^{4 5} It aligned the notions, which is an important step, but did not change the differences in personal scope of both legislations. The proposal even acknowledged the differences in scope by keeping situations where a person is sent to another Member State by an employer in the definition. Neither the European Council nor the European Parliament followed this approach. In Article 12(1) of the provisional agreement between Council and Parliament (2019), the terms ‘posted’ and ‘posted person’ were even replaced by the terms ‘sent’ and ‘sent employed person’. The term ‘posting’ therefore seems to be entirely reserved for the Posting of Workers Directive, which is remarkable. Furthermore, the provisional agreement explicitly defined that the competent Member State should be informed in advance

(4) The proposal for amending Article 12 of the Basic Regulation: “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 within the meaning of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services or sent 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 24 months and that the person is not posted or sent to replace another employed or self-employed person previously posted or sent within the meaning of this Article.” (*COM(2016) 815 final*).

(5) At the same time, there is a remarkable difference between the definition in Article 12(1) of the Basic Regulation and Article 1(3) of the Posting of Workers Directive when it comes to the country in which one ‘normally works or carries out activities’. In the Basic Regulation, this applies to the employer, whereas in the Directive it applies to the ‘posted worker’. This was not reflected in the Commission’s proposal.

of the sending of the worker to another Member State, but that ‘business trips’⁶ were exempted from this requirement. This also confirms that business trips are covered by the term ‘posting’ under the Coordination Regulations.

2. ACCESS TO INFORMATION

It cannot be denied that providing services in another Member State is not as simple as it may seem. For this reason, it is both necessary and important to inform workers as well as their employers on their rights as well as their obligations. Insufficient information is an impediment to exercising one’s rights, which endangers the effectiveness of the system and leads to incorrect application of EU instruments. It is as such not surprising that many EU instruments emphasise this obligation to provide correct information. The European Pillar of Social Rights mentions that workers, at the start of their employment, have the right to be informed in writing about their rights and obligations resulting from the employment relationship, including the probation period.⁷ According to the new Directive on transparent and predictable working conditions (revision of the Written Statement Directive 91/533/EEC) posted workers should receive additional information specific to their situation: labour conditions (by referring to the single official national website developed by the host Member State), remuneration and allowances (Article 7 (2)). Unless Member States provide otherwise, those obligations apply if the duration of the work period abroad is longer than four consecutive weeks. Moreover, the information on the remuneration may, where appropriate, be given in the form of a reference to specific provisions of laws, regulations and administrative or statutory acts or collective agreements governing that information. A lack of a complete overview of the terms and conditions of work for posted workers can be an important barrier for posting undertakings and their workers. Therefore, the bottom line requirement is that Member States should ensure that information is made generally available, in a clear and unambiguous manner, free of charge, and that effective access to it is provided. However, reality has demonstrated that posted workers are far from acquainted with their rights. As a result, there is a broad need for easily accessible information, at European and national level, on the notion ‘posting’ and on which situations it covers, as well as on the applicable EU and national provisions of labour law, social security law and tax law.

To achieve this, a helpful tool could be the single official national website, an obligation introduced by Article 5 of the Enforcement Directive. This Article states that “Member States shall take the appropriate measures to ensure that the information on the terms and conditions of employment referred to in Article 3 of the Posting of Workers Directive which are to be applied and complied with by service providers is made generally available free of charge in a clear, transparent, comprehensive and easily

(6) A ‘business trip’ means “a temporary working activity of short duration organised at short notice, or another temporary activity related to the business interests of the employer and not including the provision of services or the delivery of goods, such as attending internal and external business meetings, attending conferences and seminars, negotiating business deals, exploring business opportunities, or attending and receiving training” (Council and Parliament, 2019).

(7) See: Principle 7 Information about employment conditions and protection in case of dismissals.

accessible way at a distance and by electronic means, in formats and in accordance with web accessibility standards that ensure access to persons with disabilities and to ensure that the liaison offices or other competent national bodies referred to in Article 4 of the Posting of Workers Directive are in a position to carry out their tasks effectively.” The importance of these websites will increase even further from August 2020, as Recital 21 of Directive (EU) 2018/957 points out that “Each Member State should ensure that the information provided on the single official national website is accurate and is updated on a regular basis. Any penalty imposed on an undertaking for non-compliance with the terms and conditions of employment to be ensured to posted workers should be proportionate, and the determination of the penalty should take into account, in particular, whether the information on the single official national website on the terms and conditions of employment was provided in accordance with Article 5 of the Enforcement Directive.”

The Commission makes a rather positive assessment of the implementation of the single official national websites in its recent review of the Enforcement Directive. For instance, the Commission states that “all Member States have set up the websites and these largely fulfil the conditions provided in the Directive, including the language requirements” and that “many websites go further as regards the scope of information presented” (EC, 2019a). However, a number of critical remarks can and should be made. After all, the ways in which Member States are approaching this task varies greatly (Table 1). In this respect, good practices are observed in, among others, Austria, Slovenia, Italy and Sweden. In contrast, a number of websites are still not up to scratch. This is certainly the case for the Netherlands, Bulgaria, Romania and Malta. Furthermore, several websites only contain part of the information that the posting undertaking actually needs, as no information is available on social security law and tax law, or even on the applicable collective agreements. Furthermore, websites do not always refer to the application/declaration process of posted workers in both the Member State of origin (related to the application of the Coordination Regulations) and the host Member State (related to the application of the Posting of Workers Directive and the Enforcement Directive). Given the above limitations of many websites, we certainly agree with the remark/proposal of the employers’ organisations included in the review of the Enforcement Directive: “a template for a uniform website would be a significant improvement when it comes to the clarity and accessibility of information” (EC, 2019a).

However, the responsibility for informing posting undertakings and posted workers cannot be placed solely on the Member States. The European Commission also has a major responsibility in this respect. That is why it is a good thing that one of the tasks of the newly established European Labour Authority (ELA) is to improve the access for employees and employers to information on their rights and obligations in cases of cross-border mobility, free movement of services, and social security coordination.⁸ The question is, of course, how this task will be carried out. At present, the European

(8) 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.

website only provides a link to the national websites.⁹ ELA's ambitions with regard to the provision of information should be greater than that.

TABLE 1: OVERVIEW OF THE SINGLE OFFICIAL NATIONAL WEBSITES ON POSTING

	Link to the websites
Belgium	http://www.employment.belgium.be/defaultTab.aspx?id=6540
Bulgaria	http://www.gli.government.bg/en/page.php?c=57
Czech Republic	http://www.suip.cz/english-documents/
Denmark	https://workplacedenmark.dk/en/
Germany	https://www.zoll.de/EN/Private-individuals/Work/Minimum-conditions-of-employment/minimum-conditions-of-employment_node.html
Estonia	https://www.ti.ee/en/organisation-contacts/the-labour-inspectorate/posted-workers/
Ireland	https://www.workplacereactions.ie/en/
Greece	http://www.ypakp.gr/index.php
Spain	http://www.mitramiss.gob.es/es/sec_trabajo/debes_saber/desplazamiento-trabajadores-eng/index.htm
France	https://travail-emploi.gouv.fr/droit-du-travail/detachement-des-salaries/posting-of-employees
Croatia	http://www.mrms.hr/posting/posted-workers/
Italy	http://www.distaccoue.lavoro.gov.it/Pages/Home.aspx?lang=eng
Cyprus	http://www.mlsi.gov.cy/mlsi/dl/dl.nsf/page1k_en/page1k_en?OpenDocument
Latvia	http://www.lm.gov.lv/eng/index.php?option=com_content&view=article&id=83473
Lithuania	https://www.vdi.lt/Forms/Tema.aspx?Tema_ID=50
Luxembourg	https://guichet.public.lu/en/entreprises/ressources-humaines/mobilite/detachement.html
Hungary	http://ommf.gov.hu/index.php?akt_menu=547
Malta	https://dier.gov.mt/en/Employment-Conditions/Sectoral%20Minimum%20Conditions%20of%20Employment/Pages/Sectoral-Minimum-Conditions-of-Employment.aspx
Netherlands	https://www.government.nl/documents/publications/2016/10/20/factsheet-terms-of-employment-posted-workers-in-the-eu-act
Austria	https://www.postingofworkers.at/cms/Z04/Z04_10/home

(9) https://europa.eu/youreurope/citizens/work/work-abroad/posted-workers/index_en.htm#national-websites.

	Link to the websites
Poland	https://www.government.nl/documents/publications/2016/10/20/factsheet-terms-of-employment-posted-workers-in-the-eu-act
Portugal	http://www.act.gov.pt/(pt-PT)/CentroInformacao/DestacamentoTrabalhadores/Postingofworkers/Paginas/default.aspx
Romania	https://www.inspectiamuncii.ro/informatii-detasare-transnationala
Slovenia	http://www.napotenidelavci.si/en/
Slovak Republic	https://www.ip.gov.sk/posting-of-workers/
Finland	https://www.tyosuojelu.fi/web/en/employment-relationship/posted-worker
Sweden	https://www.av.se/en/work-environment-work-and-inspections/foreign-labour-in-sweden/Posting-foreign-labour-in-sweden/this-is-posting/
United Kingdom	https://www.gov.uk/working-abroad/posted-workers

Source: https://europa.eu/youreurope/citizens/work/work-abroad/posted-workers/index_en.htm#national-websites.

3. REGISTRATION OF POSTING UNDERTAKINGS AND POSTED WORKERS

3.1. IN THE 'SENDING' MEMBER STATE: REQUEST OF A PORTABLE DOCUMENT A1

A key principle of the social security coordination rules is that persons are subject to the legislation of a single Member State only. In the event of employment, the legislation of the Member State where the activity is carried out usually applies (*lex loci laboris*¹⁰). However, in some very specific situations, criteria other than the actual place of employment are applied. Intra-EU posting is such a specific situation, as the posted person remains subject to the social security system of the Member State of origin. In order to prove that a posted person is subject to the social security system of the Member State of origin a so-called 'Portable Document A1 (PD A1)' can be requested by the posting undertaking or the person concerned. This form establishes the presumption that the holder is properly affiliated to the social security system of the Member State which has issued the certificate and consequently confirms that the posted person has no obligations to pay contributions in another Member State.

Whereas the Administrative Commission lays down the structure, content, format and detailed arrangements for the exchange of documents,¹⁰ and whereas the Implementing Regulation sets out the information policy affecting the granting of PD A1,¹¹ the Coordination Regulations provide no detailed rule about the process that leads to the issuing of a certificate (Jorens and Lhernould, 2014). This flexibility reflects the fact that Member States retain the power to organise their internal procedures in the field of social security. Overall, Member States have an important margin of discretion for designing the PD A1 granting procedure. Perhaps this margin of discretion is

(10) Commission Decision No A1 of 12 June 2009.

(11) See e.g.: Articles 15 and 19 of the Implementing Regulation.

currently too great. After all, we should not forget that the quality of the internal procedure is very important, since documents issued by the competent institution of a Member State showing the position of a person for the purposes of the application of the Coordination Regulations, and supporting evidence on the basis of which the documents have been issued must be accepted by the institutions of the other Member States.¹² Currently there is a great variety of practices among Member States with regard to the application procedure for a PD A1. The central approach seems to prevail. Moreover, in many Member States, an electronic procedure to apply for a PD A1 is implemented.

Before issuing a PD A1, the competent institutions will or at least should check whether the posting conditions are fulfilled. The principle of sincere cooperation is supposed to oblige the competent institution to carry out a proper assessment of the facts relevant to the application of the rules for determining the applicable social security legislation and, consequently, to guarantee the correctness of the information contained in the PD A1. There are several conditions, to be fulfilled cumulatively, for the proper use of posting under the Coordination Regulations: (1) the employer must normally carry out its activities in the Member State of origin; (2) there is a direct relationship between the posting employer and the posted worker; (3) the posting is of a temporary nature; (4) the posted worker is not being replaced.¹³

To what extent these conditions are verified, however, strongly differs among Member States. It is clear that the issuing institution's access to relevant information is crucial in order to know whether the PD A1 requested should be delivered. In general, four methods are used by the competent public authorities to verify whether the conditions are fulfilled: (1) it is asked on the PD A1 application form (declaration from the employer and/or questions); (2) the competent institution asks for relevant documents (to be attached to the application); (3) it is verified by consulting other electronic databases/registers by the competent institution; (4) random checks on the submitted declarations.

Despite the importance of the internal assessment procedure, as the PD A1 has to be accepted by the host Member State, several Member States rely solely on the answer of the posting undertakings to the questions included in the application forms. Moreover, several Member States do not or cannot verify these conditions (Eurofound, 2019). For instance, it is clear that it is almost impossible to verify the 'non-replacement condition', as both the Member State of origin and the host Member State should cooperate and exchange information. From the point of view of host Member State

(12) Article 5(1) of the Implementing Regulation. In *Alperind GmbH and Others* (C-527/16), the CJEU confirms the binding and retroactive effect of the PD A1. However, an exception is possible in cases of fraud or abuse of rights (see: *Altun and Others* (C-359/16)).

(13) Article 12 of the Basic Regulation states that 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 24 months and that he/she is not sent to replace another posted person."

A, the posted worker cannot be immediately replaced by (1) a posted worker from the same undertaking of posting Member State B, or (2) a posted worker from a different undertaking located in Member State B, or (3) a posted worker from an undertaking located in Member State C. The competent institution of posting Member State B should normally be able to verify situation 1 before issuing the PD A1. Situation 2 is already much more difficult to verify for posting Member State B and may require the assistance of host Member State A. Finally, situation 3 is the most difficult situation, as posting Member State C can never know this reality without input from host Member State A.

Finally, the question arises as to whether it is always compulsory to have a PD A1 at the time of posting. Expert opinions differ in this respect. In the ‘Practical guide on the applicable legislation’ (EC, 2012) we read that “an undertaking which posts a worker to another Member State, or in the case of a self-employed person the person himself/herself, must contact the competent institution in the posting State and wherever possible this should be done in advance of the posting.” This obligation is defined by Article 15(1) of the Implementing Regulation and based on case-law (see *inter alia*: *Banks and Others C-178/97*). Consequently, in some cases, a posting may take place without the institutions being informed of it, or the PD A1 will be awarded with retroactive effect. However, some Member States (France¹⁴, Austria and Germany) recently seem to be much stricter in their judgment of having a PD A1 as a condition for being legally posted. They implemented sanctions in case of failure to show a PD A1 and/or are currently carrying out far more inspections on having a PD A1. Moreover, it now even seems advisable to have a PD A1 for a business trip.¹⁵ Since there are often high administrative sanctions in the event that no proof can be delivered, this might be an incentive for people to ask for a PD A1. Of course, the conditions and sanctions for installing such an obligation should be proportional. The provisional agreement to revise the Coordination Regulations (Council and Parliament, 2019) also addresses the above discussion. It states that the employer should inform the competent institution of the Member State whose legislation is applicable in advance. Consequently, if in the (near) future an agreement can be reached on the revision of the Coordination Regulations, the number of PDs A1 issued would increase significantly (even if ‘business trips’ are excluded from this obligation). Nonetheless, it will still be possible that there is no PD A1 at the moment of posting. Not least because the issuance procedure can take a long time in certain Member States.

3.1.1. IN THE ‘RECEIVING’ MEMBER STATE: NOTIFICATION BY MEANS OF NATIONAL DECLARATION TOOLS

Based on Article 9(1)(a) of the Enforcement Directive, host Member States may impose an obligation on the posting undertaking to make a simple declaration to the responsible national competent authorities. In the meantime, most Member States have introduced such a declaration tool for incoming posting undertakings (Table 2)

(14) Article L 114-15-1 of the ‘Code de la sécurité sociale’.

(15) See also the Practical Guide on Posting: EC 2019c (Section 3.3. In case of inspection, which documents must be available?).

and have defined sanctions for cases in which the provision of services by incoming posted workers is not registered in their declaration tool.¹⁶ The United Kingdom is an exception, while the declaration system in the Netherlands should be operational by 2019. The national declaration tool may assist the competent authorities in identifying posted employed as well as self-employed persons. The obligation to notify applies, however, in most Member States to posted workers and not to the self-employed, except in Belgium, Denmark and Slovenia, where also the latter should notify (De Wispelaere and Pacolet, 2019). This should be seen as a missed opportunity since monitoring the number of posted self-employed persons is very important, not least because the wages and working conditions defined in the Posting of Workers Directive do not apply to them. Additionally, Member States have varying policies to require the registration of posting undertakings from countries outside of the EU-28/European Free Trade Association (EFTA). In the following countries the declaration tools cover persons posted from countries outside of the EU-28/EFTA: Belgium, Bulgaria, the Czech Republic, Denmark, Germany, Spain, France, Croatia, Italy, Lithuania, Luxembourg, Austria, Poland, Romania, Finland and Sweden. This is not the case in Estonia, Ireland, Greece, Cyprus, Latvia, Hungary, Malta and Slovakia.

Furthermore, the legislature has given a lot of freedom to Member States in implementing this ‘simple declaration’. Article 9(4) of the Enforcement Directive only states that “Member States should ensure that the procedures and formalities relating to the posting of workers can be completed in a user-friendly way by undertakings, at a distance and by electronic means as far as possible.” This has led to differing registration procedures among the Member States. Most Member States have implemented an online/electronic declaration system (Belgium, Denmark, Germany, France, Italy, Luxembourg, Hungary¹⁷, Malta, Austria, Poland, Slovenia, Slovakia, Finland and Sweden). Nonetheless, in Bulgaria, Ireland, Cyprus, Latvia and Romania, the notification of posting is done by post, and/or in the Czech Republic, Estonia, Ireland, Cyprus, Greece, Croatia, Lithuania and Portugal by e-mail. It would have been better if all Member States had been obliged to implement an electronic declaration tool. Not only would it have been more user-friendly, but it would also have advantages in terms of enforcement and monitoring.

(16) This is in contrast to the policy applied when posted workers do not have a PD A1 as described above.

(17) A new declaration tool will be introduced by the Hungarian authorities in 2019.

TABLE 2: DESCRIPTION OF THE NATIONAL DECLARATION SYSTEMS, 2018

	Implemented a declaration tool?	Self-employed covered?	Persons posted from countries outside of the EU-28/EFTA covered?	Type of procedure	Link to the webpage of the national declaration procedure
BE	YES	YES	YES	Electronic	www.limos.a.be
BG	YES	NO	YES	Post	http://www.gli.government.bg/page.php?c=211&d=2767
CZ	YES	NO	YES	Mail/post	https://portal.mpsv.cz/sz/zahr_zam/riskopisy/informace_o_nastupu.pdf
DK	YES	YES	YES	Electronic	https://indberet.virk.dk/myndigheder/stat/ERST/Registrar_of_Foreign_Service_Providers_RUT
DE	YES	NO	YES	Electronic	https://www.meldeportal-mindestlohn.de/Meldeportal/form/display.do?%24context=2C5C9D68A44D7F3371BA
EE	YES	NO	NO	Mail	http://ti.ee/en/organisation-contacts/the-labour-inspectorate/posted-workers/registration
IE	YES	NO	NO	Mail/post	http://www.workplacerelations.ie/en/Publications_Forms/Form-of-Declaration.pdf
EL	YES	NO	NO	Mail/post/fax	http://www.ypakp.gr/uploads/docs/10805.pdf
ES	YES	NO	YES		http://www.empleo.gob.es/es/sec_trabajo/debes_saber/desplazamiento-trabajadores-eng/desplazamiento/index.htm#section6
FR	YES	NO	YES	Electronic	www.sipsi.travail.gouv.fr
HR	YES	NO	YES	Mail	http://www.mrms.hr/posting/instructions-for-foreign-companies
IT	YES	NO	YES	Electronic	http://www.distaccoue.lavoro.gov.it/Pages/Documentazione.aspx?lang=eng
CY	YES	NO	NO	Mail/post	www.mlsi.gov/dl
LV	YES	NO	NO	Mail	http://vdi.gov.lv/en/contacts
LT	YES	NO	YES	Mail/post/fax	https://www.vdi.lt/Forms/Tema.aspx?Tema_ID=50
LU	YES	NO	YES	Electronic	https://guicher.itm.lu/edetach/

	Implemented a declaration tool?	Self-employed covered?	Persons posted from countries outside of the EU-28/EFTA covered?	Type of procedure	Link to the webpage of the national declaration procedure
HU	YES	NO	NO	Electronic	http://www.ommf.gov.hu/index.php?akt_menu=552
MT	YES	NO	NO	Electronic	https://eforms.gov.mt/pdfforms.aspx?fid=wes072e
NL	NO				
AT	YES	NO	YES	Electronic	https://www4.formularservice.gov.at/formularserver/user/formular.aspx?pid=fe66cedb506e495e94b3e826701443e5&pn=B461f73088ab946fe9bd1d1ccc573d81a
PL	YES	NO	YES	Post/ Electronic	Electronically: https://www.biznes.gov.pl/en/firma/cudzoziemcy/chce-delegowac-pracownikow-do-polski/proc_1328-oswiadczenie-o-delegowanui-pracownika ; Post: https://www.pip.gov.pl/pl/f/v/155136/Oswiadczenie%20pracodawcy%20delegujacego%20pracownika%20na%20terytorium%20RP.pdf
PT	YES	NO		Mail	http://www.act.gov.pt/(pt-PT)/CentroInformacao/DestacamentoTrabalhadores/Destacamentodetrabalhadores/Paginas/default.aspx
RO	YES	NO	YES (other system)	Post	https://www.inspectiamuncii.ro/documents/66402/1518590/ModelDeclaratie-en.pdf/976f2580-2efd-4553-8382-df76328dca5b
SI	YES	YES		Electronic	https://www.ess.gov.si/delodajalci/zaposlovanje_in_delo_tujcev/spletna-prijava-dela-tujcev-spletna-prijava-dela-tujcev-prijava-izvajanje-storitev-delodajalca-s-sedezem-v-drzavi-clanici-eu-egp-ali-svicarski-konfederaciji?cl=35&cl=35
SK	YES	NO	NO	Electronic/ mail	https://www.ip.gov.sk/posting-of-workers/
FI	YES	NO	YES	Electronic	https://anon.ahtp.fi/_layouts/15/FormServer.aspx?OpenIn=Browser&XsnLocation=/Lomakkeer/Ilmoitus_ty%oc3%b6ntekij%oc3%b6iden_l%oc3%oc4%hert%oc3%oc4%tmisest%oc3%oc4_en.xsn&Source=https://anon.ahtp.fi/sivut/submitred.aspx
SE	YES	NO	YES	Electronic	posting.av.se
UK	NO				

Source: De Wispelhere and Pacolet, 2019.

3.2. A DOUBLE BURDEN IN TERMS OF REGISTRATION?

The fact that the posting undertaking has to fulfil several notification requirements, both in the Member State of origin (i.e. ‘application for a PD A1’) and in the host Member State (i.e. ‘declaration of its services’) creates a substantial administrative burden, perhaps even a double burden. Moreover, the implementation and the impact of some specific provisions of Directive (EU) 2018/957 amending Directive 96/71/EC on the administrative burden of posting undertakings is still highly unclear, and might even differ by Member State. For instance, how Member States should monitor the compliance with the duration of the posting period (12 months + 6 months for a ‘motivated notification’) is not specified in the new Directive. Normally, this supposes a monitoring of the posting period ‘in real time’ via PD A1 or the national declaration tool, but the reported ‘anticipated duration’ mentioned on the PD A1 or reported in the national declaration tool are inaccurate indicators.¹⁸

4. ENFORCEMENT

In the area of enforcement, the Coordination Regulations contain some important provisions that the Commission wanted to further strengthen through its revision (EC, 2016).¹⁹ And when talking about enforcement in the case of posting, we should certainly also discuss the Enforcement Directive. The Enforcement Directive’s overall objective is to ensure that posted workers actually enjoy the minimum protection offered by the Posting of Workers Directive, whilst also facilitating the free provision of services. To reach that aim, the Enforcement Directive establishes a common framework of competent authorities and liaison offices, clarifies the concept of ‘genuine posting’ while giving Member States tools to fight abuse and evasion, and obliges Member States to improve access to information on the relevant terms and conditions of employment. In addition, the Enforcement Directive lays down rules to enhance administrative cooperation between competent national authorities. In order to effectively monitor compliance, the Enforcement Directive provides a framework for the recourse to administrative requirements and control measures as well as for inspections. Furthermore, the Enforcement Directive promotes the enforcement of rights, and the handling of complaints, by requiring Member States to ensure that posted workers, with the support of trade unions and other interested third parties, can lodge complaints and take legal and/or administrative action against their employers if their rights are not respected. The Enforcement Directive also ensures that administrative penalties and fines imposed on service providers by one Member State’s enforcement authorities for failure to respect the requirements of the Posting of Workers Directive can be enforced and recovered in another Member State. The latter is, and will probably remain, a challenge in which ELA may also play a role in the future.

However, in this section we will not discuss whether all these provisions have or have not been successful in practice. After all, this was the subject of discussion in the

(18) Consequently, the ‘monitoring’ will probably only take place on the basis of checks by inspection services.

(19) See also: Jorens et al., 2018.

recently published review of the Enforcement Directive (EC, 2019a; 2019b). In this section, we want to focus on the importance of risk assessment, particularly in the fight against ‘letterbox companies’. It is a subject that has already been discussed by both authors in several research projects (see e.g.: Jorens et al., 2015; De Wispelaere et al., 2018). However, risk analysis still seems to be in its infancy in many Member States. Risk assessment should help inspection services to detect, prevent or tackle fraudulent posting more efficiently. It should help them to verify whether the posting conditions are met. This does not mean, however, that fewer inspectors are needed. After all, proper enforcement is only possible if there are sufficient financial and human resources. This remains a problem in many Member States, along with the willingness to cooperate transnationally.

Defining relevant indicators and ‘red flags’²⁰ as well as the availability of data are key conditions for risk analysis to be carried out. The effectiveness of the risk assessment tool could be assessed by looking at the result of the audit. Four possible outcomes are thinkable: (1) True Positive (TP): when data correctly predict that someone has committed fraud; (2) True Negative (TN): when data correctly predict that there is no fraud; (3) False Positive (FP): when data falsely predict that someone committed fraud, whilst in fact s/he has not; (4) False Negative (FN): when data do not alert that fraud is taking place. Consequently, if the indicators and red flags are not accurate enough, fraud cases might escape the eye of the inspection services. If the ‘red flags’ are too strict this will result in too many false positives and create a dangerous atmosphere of profiling innocent companies. However, it is certainly not so obvious to define accurate indicators and the associated red flags. And it is even harder to have data that can substantiate these indicators and red flags.

The added value of risk analysis in the field of posting may certainly lie in the fact that it helps to distinguish ‘normal’ posting activities from posting activities involving fraud, criminal activities or human trafficking. This brings us to the potential link between posting and the existence of letterbox companies.²¹ Both concepts have a common denominator, notably ‘the presence or absence of substantial activities’. Letterbox companies can be defined as follows:

- companies that are registered in one Member State but, while not carrying any substantive economic activity in the Member State of registration/incorporation, operate in another Member State of the EU or outside the EU (i.e. ‘narrow approach’ of the definition);
- companies that are registered in one Member State but have no economic activity either in that Member State, or within or outside the EU (i.e. ‘broad approach’ of the definition).

(20) Red flags are criteria that are met in the defined indicators, which may possibly indicate fraudulent posting.

(21) There is no unique and unanimous definition of letterbox companies. Different organisations at European and international level use a range of definitions. The drivers are differences in company law and in taxation, employment, social security and other areas of law.

When discussing letterbox companies in the context of posting, the ‘narrow definition’ seems to prevail. However, the ‘broad definition’ cannot and should not be overlooked, especially if companies, such as international transport companies, solely focus on the foreign market. In the following paragraphs, we will focus primarily on indicators and ‘red flags’ that may indicate a lack of substantial activities. A number of relevant indicators and ‘red flags’ can be found in the existing European legislation (on posting).²²

According to Article 14(2) of the Implementing Regulation the words ‘which normally carries out its activities there’ refer to “an employer that ordinarily performs substantial activities, other than purely internal management activities, in the territory of the Member State in which it is established, taking account of all criteria characterising the activities carried out by the undertaking in question. The relevant criteria must be suited to the specific characteristics of each employer and the real nature of the activities carried out.” What criteria apply to determine whether an employer normally carries out its activities in the posting Member State? The practical guide of the Commission defines a series of objective factors (EC, 2012)²³ (the place where the posting undertaking has its registered office and its administration; the number of administrative staff of the posting undertaking present in the Member State of origin and in the host Member State; the place of recruitment of the posted worker; the place where the majority of contracts with clients are concluded; the law applicable to the

(22) See also the Commission’s proposal for amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions (COM(2018) 241 final). In this proposal the term ‘artificial arrangement’ was defined. A provisional agreement after trilogue negotiations was achieved on 13 March 2019, but the text still needed to be formally confirmed by the Parliament and the Council. The EP adopted the text at the plenary session on 18 April 2019. The term ‘artificial arrangement’ is no longer used here. However, the following can be read in recital 33: “Where the competent authority has serious doubts that the cross-border operation is set up for abusive or fraudulent purposes, the assessment should consider all relevant facts and circumstances, and should take into account, where relevant, at a minimum, indicative factors relating to the characteristics of the establishment in the Member State in which the company or companies are to be registered after the cross-border operation, including the intent of the operation, the sector, the investment, the net turnover and profit or loss, number of employees, the composition of the balance sheet, the tax residence, the assets and their location, equipment, beneficial owners of the company, the habitual place of work of the employees and of specific groups of employees, the place where social contributions are due, the number of employees posted in the year prior to the conversion within the meanings of Regulation (EC) No 883/2004 of the European Parliament and of the Council and Directive 96/71/EC of the European Parliament and of the Council, and the number of employees working simultaneously in more than one Member State within the meaning of Regulation (EC) No 883/2004 and the commercial risks assumed by the company or companies before and after the cross-border operation. The assessment should also take into account the relevant facts and circumstances related to employee participation rights, in particular as regards negotiations on such rights where those were triggered by the four fifths of the applicable national threshold. All these elements should only be considered as indicative factors in the overall assessment and therefore should not be regarded in isolation. The competent authority may consider it as an indication of absence of circumstances leading to abuse or fraud if the cross-border operation results in having the place of the effective management and/or the economic activity of the company in the Member State, where the company or companies are to be registered after the cross-border operation.”

(23) Based on Decision No A2 of 12 June 2009 concerning the interpretation of Article 12 of Regulation (EC) No 883/2004 of the European Parliament and of the Council on the legislation applicable to posted workers and self-employed workers temporarily working outside the competent State (Text of relevance to the EEA and to the EC/Switzerland Agreement).

contracts signed by the posting undertaking with its clients and with its workers; the number of contracts executed in the Member State of origin and the host Member State; the turnover achieved by the posting undertaking in the Member State of origin and in the host Member State during an appropriate typical period (e.g. turnover of approximately 25% of total turnover in the Member State of origin could be a sufficient indicator, but cases where turnover is under 25% would warrant greater scrutiny); the length of time an undertaking is established in the Member State of origin). However, as stated in the practical guide “it should be noted that this is not an exhaustive list, as the criteria should be adapted to each specific case and take account of the nature of the activities carried out by the undertaking in the State in which it is established.”

In addition, Article 4(2) of the Enforcement Directive provides for a non-exhaustive list of elements which Member States may in particular use when making the overall assessment to determine whether an undertaking genuinely performs substantial activities in the Member State of establishment.^{24 25}

What about companies that focus exclusively on international activities? Their activities will mostly fall under Article 13 of the Basic Regulation,²⁶ where it is perfectly possible that no substantial activities are carried out by the person concerned in the country of residence. In that case, for instance, Article 13(1)(b)(i) determines that a person normally working in two or more Member States is subject to the legislation of the Member State in which the registered office or place of business²⁷ of the undertaking employing her/him is situated if s/he is employed by one undertaking or employer. The practical guide of the Commission defines several criteria in order to determine

(24) A ‘substantial part of the activity’ pursued in a Member State means that a quantitatively substantial part of all the activities of the worker is pursued there, without this necessarily being the major part of those activities. For the purposes of determining whether a substantial part of the activity of an employed person is pursued in a Member State, the following indicative criteria shall be taken into consideration: * the working time; and/or * the remuneration. If in the context of carrying out an overall assessment it emerges that at least 25% of the person’s working time is carried out in the Member State of residence and/or at least 25% of the person’s remuneration is earned in the Member State of residence this shall be an indicator that a substantial part of all the activities of the worker is pursued in that Member State.

(25) See also the review of the Enforcement Directive: “Most of the Member States have provided for a list of elements identical to those in the Directive. Austria, Germany, Ireland, the Netherlands, Sweden and the UK have not explicitly transposed this part of the Article. Eight Member States (Bulgaria, Croatia, Italy, Romania, Slovenia, Austria, Spain and Greece) have introduced or maintained other existing elements”.

(26) See also: De Wispelaere and Pacolet, 2018a.

(27) See Article 14(5a) of the Implementing Regulation: “For the purposes of the application of Title II of the basic Regulation, ‘registered office or place of business’ shall refer to the registered office or place of business where the essential decisions of the undertaking are adopted and where the functions of its central administration are carried out.”

the ‘registered office or place of business’.^{28 29 30}The delimitation of this term was also an important point of discussion during the negotiations on the revision of the Regulation.³¹

What can we conclude from the above overview? (1) It makes sense that, in case of posting, the narrow definition of a letterbox company is used as a frame of reference, but this is not necessarily the case when providing activities in two or more Member States. (2) It is of the utmost importance that these criteria are aligned with each other, certainly knowing that a group of persons falling under Article 13 of the Basic Regulation may be considered as a posted person under the Posting of Workers Directive. (3) In determining the Member State responsible for social security, it might be advisable to look at the place of activity of the person concerned and not of his/her employer.³² (4) The above criteria should be complemented by sector-specific criteria. For instance, Regulation (EC) No 1071/2009 has introduced some important requirements for all transport undertakings authorised by a Member State, helping to clamp down on the phenomenon of letterbox companies. The core requirements for engagement in the occupation of road transport operator are summarised in Article 3(1) of Regulation (EC) No 1071/2009 as follows: to have an effective and stable establishment; to be of good repute; to have appropriate financial standing; and to have the requisite professional competence.³³

Defining relevant indicators and ‘red flags’ is only one step. In a next phase, databases should help to convert these indicators/‘red flags’ into real cases. Administrative data can help in this respect. For example, data that become available because companies

(28) “The place where the undertaking has its registered office and its administration; the length of time that the undertaking has been established in the Member State; the number of administrative staff working in the office in question; the place where the majority of contracts with clients are concluded; the office which dictates company policy and operational matters; the place where the principal financial functions, including banking, are located; the place designated under EU regulations as the place responsible for managing and maintaining records in relation to regulatory requirements of the particular industry in which the undertaking is engaged; the place where the workers are recruited.”

(29) Case C-73/06 Planzer Luxembourg.

(30) See also Cornleissen (this volume): “In order to eliminate “brass-plate” companies, a definition of this term is provided by Article 14(5a) Regulation 987/2009. Unfortunately, this definition is rather vague. True, the Practical Guide contains a number of criteria, but this does not exclude situations where some of these criteria are fulfilled, while others are not. Interpretation problems may arise in particular when corporate businesses with mother/daughter companies are involved.”

(31) Article 14(5a) of the Implementing Regulation of the provisional agreement between Council and Parliament (2019) states: “For the purpose of the application of Title II of the Basic Regulation, ‘registered office or place of business’ shall refer to the registered office or place of business where the essential decisions of the undertaking are adopted and where the functions of its central administration are carried out. In determining the location of the registered office or place of business, a series of factors shall be taken into account, such as the turnover, the number of services rendered by its employees and/or income, the working time performed in each Member State where the activity is pursued, the places where general meetings are held, and the habitual nature of the activity pursued.”

(32) See also the proposal of the European Parliament: “the legislation of the Member State in which he/she performs the largest share of his/her work activities, if he/she does not reside in one of the Member States in which he/she pursues a substantial part of his/her activity as an employed person.”

(33) For a ‘risk assessment’ on the basis of these indicators see: De Wispeleere and Pacolet, 2018b.

have a number of notification obligations in both the sending and receiving Member States may be very useful. At the same time, this presupposes that data are exchanged transnationally in order to make optimal use of the available information. This brings us to the fourth and last area.

5. MONITORING BY (THE EXCHANGE OF) DATA ON INTRA-EU POSTING

The lack of accurate and detailed data on posting might hamper the possibility to get a proper picture of the phenomenon, and to assess the legal, economic and social impact of this type of intra-EU labour mobility. The importance of collecting data on posted workers is also emphasised by Directive (EU) 2018/957 by stating in Recital 5: “Sufficient and accurate statistical data in the area of posted workers is of utmost importance, in particular with regard to the number of posted workers in specific employment sectors and per Member State.” In this respect, data currently collected at EU level on the number of PDs A1, via a thematic questionnaire launched in the framework of the Administrative Commission, is vitally important (data are published in De Wispelaere and Pacolet, 2018a). In recent years, several new questions were included in the thematic PD A1 questionnaire, which resulted in a step-by-step improvement of the information available on PDs A1 issued under the Basic Regulation. Nonetheless, it should be acknowledged that the PD A1 data only provide an indicative picture of the actual number of postings (Table 3). Notably, the number of PDs A1 issued and its evolution may depend on the number of inspections performed by the enforcement bodies in the host Member State as well as to what extent host Member States have implemented sanctions for failure to present a PD A1. As a result, the share of tightly controlled sectors, such as the construction sector, in total postings might be overestimated when relying on the PD A1 data, while the scale and share of postings in qualified occupations might be underestimated (i.e. ‘the forgotten sectors in the posting debate’: the financial sector, the scientific sector, the IT sector, the performing arts sector etc.).³⁴ In addition, there is little chance that persons going abroad for a business meeting will apply for a PD A1.

In this regard, data on incoming posting undertakings and posted workers registered by national declaration tools may complement the data on posting provided by PD A1. In 2018, such data were for the first time collected via a questionnaire launched within the framework of the Expert Committee on Posting of Workers (ECPW) (data are published in De Wispelaere and Pacolet, 2019). However, these data also have their limitations, as many host Member States exempt several categories of posted workers, particularly self-employed persons, from the obligation to make a declaration. Consequently, in order to get a better view of the scale of posting, data from the PD A1 and the national declaration tools should be complemented with the number of posted workers without a PD A1 or the number of unregistered/exempted posted workers in the national declarations. Of course, this is easier said than done.

(34) The incentive to apply for a PD A1 by employers active in these sectors is probably much lower than in the strictly controlled sectors.

TABLE 3: DIFFERENCES BETWEEN THE A1 APPLICATION PROCESS AND REGISTRATION IN THE NATIONAL DECLARATION TOOLS

	Data from the A1 form	Data from the national declaration tools
Legal base	Basic Regulation (EC) No 883/2004 and Implementing Regulation (EC) No 987/2009	Directive 2014/67/EU
Area	Social security	Terms and conditions of employment
Scope	Determined by Article 12 of the Basic Regulation	Determined by Article 3(1) of the Posting of Workers Directive + (for some MSs: + self-employed and/or + posting undertakings established outside the EU-28/EFTA)
Exempted	Persons active in two or more Member States (Article 13 of the Basic Regulation); postings longer than two years; repetitive postings	Several categories in some/most host MSs (for instance, persons attending business meetings or participation in seminars and lectures are not always required to register) + (by several MSs: + self-employed and/or + posting undertakings established outside the EU-28/EFTA)
Enforcement	In some cases, a posting may take place without the institutions being informed of it. Moreover, a PD A1 can also be awarded with retroactive effect.	Implementation of a 'simple declaration' system is a faculty given to Member States, not an obligation. Most Member States implemented sanctions in the event of non-registration.

Source: De Wispelaere and Pacolet, 2019.

Data on posting are certainly not only necessary for scholars and policy makers. Also competent institutions in both the Member State of origin and the host Member State need data before, during and after the posting of workers. Before posting, the competent institutions in the Member State of origin should be able to verify whether the posting conditions are fulfilled before issuing a PD A1. During posting, host Member States need data to ensure effective monitoring of compliance with the terms and conditions of employment as well as to verify whether the posted worker falls under the social security system of another Member State. Finally, information on the 'real' posting duration and the wage level is needed to calculate the amount of social security contributions to be paid in the Member State of origin as well as to determine in which Member States personal income taxes should be paid. Ideally, the competent public authorities should have real-time access to the necessary national and transnational databases, of course taking into account national and European privacy and data protection rules. In addition, in the case of transnational data exchange, one might be confronted with possible problems regarding delays in data exchange and the identification of the 'unit' for which information is requested.

A smooth exchange of data and information is of paramount importance. However, administrative problems often arise. These might be related to long delays in other

countries' responses,³⁵ or to unjustified administrative obstacles and excessive delays with regard to claims or problems in obtaining reliable data. Slowness, a lack of accuracy, the federal organisation, or the amount of domestic institutions are considered additional challenges. So, not only is there often a slow exchange of information between countries, but also slow internal procedures make it impossible to provide the requested information within a short period of time. Another challenge is that often some information is simply not exchanged, for example when it concerns personal data and an exchange would constitute a breach of data privacy protection rules.

Furthermore, with no European identification in place and some Member States lacking official identification cards, the accurate identification of a natural person during inspections and on site is often difficult and sometimes even impossible. Even when a person was identified during an inspection, it is often difficult to get additional information from foreign administrations, since some Member States do not use a unique identifier for natural persons. In some countries, different administrations often use different numbers to identify the same natural person. In consequence, it is much harder for foreign inspection services to find accurate information about a natural person when requesting such information abroad. In extreme cases, information about a natural person cannot be obtained simply because the natural person cannot be identified by lack of the right number identifying this person with the administration concerned. In this respect, the implementation of EESSI (Electronic Exchange of Social Security Information) might have a positive impact on the exchange of information about posting. EESSI is an IT system which aims to help social security institutions with the exchange of electronic cross-border documents. The EESSI system was made available by the European Commission in July 2017. Since then, Member States had two years to finalise their national implementation of EESSI and connect their social security institutions to the cross-border electronic exchanges. By the end of 2019/beginning of 2020 it will become clear what the added value of EESSI is for the exchange of information on posting. Finally, to be able to respond more quickly to a request to verify an insurance status across borders, the idea has been launched by the European Commission to introduce a European Social Security Number. Having such a European Social Security Number might be useful when workers are posted abroad.

6. CONCLUSION

The objective of this contribution was to demonstrate that several provisions on access to information, the registration of posted workers, enforcement and finally monitoring laid down by the Posting of Workers Directive, the Coordination Regulations and finally the Enforcement Directive are still underutilised by Member States. These four areas are communicating vessels in which the importance of data, and their exchange, is the common denominator. We argue that by focusing on these four areas, improving the functioning of posting in the internal market may become a Herculean task instead

(35) Perhaps this is why the proposal of the EC to revise the Coordination Regulations sets a time limit for certain provisions. For instance, "the issuing institution shall reconsider the grounds for issuing the A1 document and, if necessary, withdraw it or rectify it, within 25 working days from the receipt of the request."

of a Sisyphian task. Member States can and must do better in all of these areas. Let us briefly reiterate some possible steps for improvement in the field of information, registration, enforcement and monitoring (Table 4).

TABLE 4: POSSIBLE STEPS FOR IMPROVEMENT IN TERMS OF INFORMATION, REGISTRATION, ENFORCEMENT AND MONITORING

Information	Registration	Enforcement	Monitoring
Information should be offered from a helicopter view. Inform posting undertakings and employers and posted workers about: * the use of posting (situations covered) and the differences of the notion in labour law, social security law and tax law; * the application/ registration procedures in both the sending and receiving Member State.	The introduction of user-friendly application/ registration procedures. An administrative burden should be avoided by a better exchange of (transnational) data.	The consultation of several (transnational) databases together with more uniform questionnaires to apply for a PD A1 should improve the assessment by all Member States of the posting conditions before issuing a PD A1. Risk analysis should ensure that the focus is on fraudulent posting and that the posting conditions are fulfilled.	Improve access 'in real time' to national and foreign data and information. Extracting data on posting and fraudulent posting from national sources should result in a better view of the scale, characteristics and impact of (fraudulent) posting.

6.1. ACCESS TO INFORMATION

Difficulties in accessing information on registration requirements and terms and conditions of employment might often be a reason why existing rules are not applied by foreign service providers. Directive (EU) 2018/957, which amends the Posting of Workers Directive, refers on several occasions to the importance of access to information for both the posting undertaking and the posted worker. Article 5 of the Enforcement Directive translated these concerns by stating that each Member State should provide for a single official national website with the ambition to improve accessibility of information. However, all websites implemented on the basis of Article 5 of the Enforcement Directive mostly cover only a part of the information that posting undertakings actually need, as the formalities that need to be fulfilled are dispersed over several administrations, i.e. labour, tax and social security administrations. Therefore, the information should be offered from a helicopter view. In addition, more uniform national websites would be a significant improvement. A single European website (managed by the European Labour Authority?) that gives a complete overview of necessary information would certainly be an added value (What is posting? Which situations are covered by posting? Which rules apply? Are they rules of labour law, social security law, tax law, company law? What are the administrative requirements?

(link to the application procedures for a PD A1 in the competent Member State, link to the declaration tools in the host Member States), What are the applicable wages based on the collective agreements?, etc.).

6.2. REGISTRATION OF POSTING UNDERTAKINGS AND POSTED WORKERS

It cannot be denied that the posting undertaking has to fulfil several notification requirements, both in the Member State of origin (i.e. ‘application for a PD A1’) and in the host Member State (i.e. ‘simple declaration’). This constitutes a substantial administrative burden, perhaps even a double burden. The introduction of user-friendly application/registration procedures, together with an increased exchange of transnational data, could significantly reduce this burden.³⁶ Furthermore, it is unclear how the administrative burden for posting undertakings but also for national authorities will evolve. Both the implementation of certain specific provisions of Directive (EU) 2018/957 amending Directive 96/71/EC as well as the Directive on transparent and predictable working conditions in the EU might have important consequences. Finally, for enforcement and monitoring purposes, it seems important that the obligation to make a declaration in the host Member State is extended to posted self-employed persons and posting undertakings established outside the EU-28/EFTA.

6.3. ENFORCEMENT

The principle of sincere cooperation obliges the competent institutions to carry out a proper assessment of the facts relevant to the application of the rules for determining the applicable social security legislation and, consequently, to guarantee the correctness of the information contained in the PD A1.³⁷ Despite the importance of the internal assessment procedure, several Member States rely solely on the answer of the posting undertakings to the questions included in the application forms. Moreover, several Member States do not or cannot verify the posting conditions. The consultation of several (transnational) databases together with more uniform questionnaires³⁸ to apply for a PD A1 should therefore improve the assessment by all Member States of the

(36) Or perhaps even a single European declarations system. See also the recent review of the Enforcement Directive (2019a): “There are some areas that have been brought to the attention of the Commission by different stakeholders and where improvements could be necessary. These include the simplification of the administrative control systems by, for example, introducing a single EU-wide declaration system.” This idea certainly requires a feasibility study first.

(37) See also Verschuere and Bednarowicz (2019, p. 144): “The body issuing the document is obliged to assess the relevant facts correctly and must guarantee the accuracy of the data that have been entered. This was expressively confirmed by the Court of Justice.”

(38) This is also promoted by the Administrative Commission in Recommendation No A1 of 18 October 2017 concerning the issuance of the attestation referred to in Article 19(2) of Regulation (EC) No 987/2009.

posting conditions before issuing a PD A1. In addition, the host Member State could/should also play a role here.³⁹

6.4. MONITORING BY (THE EXCHANGE OF) DATA ON INTRA-EU POSTING

“The more we know about posting, the better we can discuss it.” With this in mind, we would like to further promote the debate on posting. The availability of the data on intra-EU posting highly depends on the extent to which posting undertakings are obliged to make a notification in both the Member State of origin and/or the host Member State when providing services in another Member State. There are several options to obtain a more accurate view on intra-EU posting. However, the objective to obtain an accurate and detailed view of the phenomenon can never be the main reason to propose changes in the applicable notification requirements of posting undertakings. Therefore, the number of ‘undeclared’ posting undertakings/posted workers should, in the first instance, be reduced by an increased awareness of the applicable rules and the application/declaration process together with a user-friendly electronic procedure to apply for a PD A1 or to declare posting activities in the host Member State.

The richness of the data on posting could be further reflected in national reports. Extracting data from both the information available in the Member States’ PD A1 databases and from Member States’ databases of the national declaration tools should result in a better view on the scale, characteristics and impact of intra-EU posting. In addition, it is remarkable that so little data are available on fraudulent posting (Jorens et al., 2018). Especially since posting is often associated with cross-border social fraud. Consequently, the objective should be to gain a better insight into the profile and scale of fraudulent posting.⁴⁰

Moreover, competent institutions in both the Member State of origin and the host Member State need data before, during and after the posting of workers. In this respect, a next step in the exchange of data would be to improve access to national and foreign data and information ‘in real time’. When taking these steps, the relevant EU legislation on data protection when collecting and exchanging personal data should always be kept in mind.

(39) See also Verschuere and Bednarowicz (2019, p. 144): “The PD A1 could be an important instrument in combatting fraud and abuse. However, it remains a unilateral document, the issuance of which only depends on the decision of the competent institution of the issuing Member State. But the implementation of the rules on posting not only depends on factors and criteria that are to be verified in the issuing Member State, but also in other Member States such as the receiving Member States.”

(40) Currently, several questions on fraudulent posting cannot be answered sufficiently (for instance: what is the scale of fraud committed in posting? What are the types of cross-border social fraud in posting? Are some sectors more than others confronted with such fraud? Do posting undertakings commit more violations in percentage terms than domestic companies? etc.).

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THE EUROPEAN REGULATIONS ON SOCIAL SECURITY COORDINATION FROM THE PERSPECTIVE OF THE BELGIAN AUTHORITY

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1. SIXTY YEARS OF INTENSE ADMINISTRATIVE COOPERATION TO ENSURE THE FUNCTIONING OF THE COORDINATION REGULATIONS: LOYAL COOPERATION AND THE PRINCIPLE OF GOOD ADMINISTRATION

1.1. NO APPROXIMATION OR HARMONISATION OF NATIONAL SOCIAL SECURITY SYSTEMS, BUT RATHER COORDINATION BETWEEN MEMBER STATES' SOCIAL SECURITY SYSTEMS

The need to coordinate social security schemes has been a factor since the creation of the European Economic Community (EEC) and has been associated, since the beginning, with the creation of the internal market and, more specifically, with the free movement of workers.¹ This explains why Regulations No 3 and 4 concerning the social security of migrant workers are among the most crucial elements of the EEC regulations.²

The first measures adopted to coordinate social security systems are Regulation No 3 of 1958³ and Regulation No 4⁴; the latter fixes the application terms of the former and comes into force on 1 January 1959. The origin of Regulations No 3 and No 4 predates the Treaty of Rome and dates back to the Treaty of Paris. One of the objectives of this treaty is to ensure the free movement of coal miners. Problems with social security are seen as an obstacle in this regard.⁵ Article 69 (4) of the European Coal and Steel Community (ECSC) Treaty provides that: “They [the

(1) Omarjee, I., *Droit européen de la protection sociale*, Collection droit de l'Union européenne dirigée par Fabrice Picod, Bruylant, p. 105, 2018.

(2) Watillon, L., Le règlement n° 3 de la Communauté Economique Européenne concernant la sécurité sociale des travailleurs migrants, *Revue belge de sécurité sociale*, pp. 221-239. Regulation No 1 established the language regime of the European Economic Community (OJ 17, 6.10.1958, p. 385), while Regulation No 2 fixes the form of laissez-passer issued to members of the European Economic Community (OJ 17, 6.10.1958), the European Parliamentary Assembly (OJ 17, 6.10.1958, pp. 387-389).

(3) Regulation No 3, 1958, OJ 561.

(4) Regulation No 4, 1958, OJ 597.

(5) Roberts, S., A short history of social security coordination, in *50 years of social security coordination - Past, present, future*, Prague, 7 and 8 May 2009, responsible editor Pr. Dr. Y. Jorens, Ghent University, Belgium, European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities - Unit E.3, quoting Holloway, J., *Social Policy Harmonisation in the European Community*, Farnborough, Gower, 1981.

Member States] shall prohibit any discrimination in the remuneration and working conditions of national and migrant workers, without prejudice to special measures of frontier workers; in particular, they shall seek, among themselves, any arrangements which may be necessary to ensure that the provisions relating to social security do not impede the movement of labour". Based on the provisions of the ECSC Treaty, the High Authority prepares, with the help of the International Labour Organisation (ILO), a European Convention on Social Security. The Convention is signed in Rome in 1957, but is not ratified due to the advent of the EEC Treaty.⁶ After minor amendments, the text of the Convention is adopted by the Council on 25 September 1958 (Regulation 3). The administrative arrangements prepared for the Convention are adopted on 3 December 1958 (Regulation No 4). Three other regulations bolster the system for frontier workers, seasonal workers and seafarers, who are not covered by the provisions of Regulation No 3. Despite the insistence of the French delegation during the negotiations to include provisions regarding social harmonisation in the Treaty, those responsible for drawing up the Treaty of Rome decide – with regard to social security – to adopt the coordination method which was acceptable from a political point of view. In a coordination system, the Member States retain their national sovereignty as it pertains to social security. It should be noted that neither the Treaty nor the Coordinating Regulation (1408/71 – currently Regulation 883/2004) provides a definition for the concept of coordination, nor does the Court of Justice in any of its decisions.⁷ The Court of Justice often views the concept of coordination in a negative manner, in the sense that “any discrepancies existing for the benefit of migrant workers are not the result of the interpretation of Community law, but of the lack of a common safety regime or the absence of harmonisation in existing national regimes, which cannot be remedied by the simple coordination currently in effect.”⁸

Thus, the coordination mechanism, which comprises the two Coordination Regulations, has two main features⁹; on the one hand, a coordination mechanism for national social security rules, i.e. providing an articulation mechanism between systems with a limited territorial scope of application to the national territory, with a view to resolving legal conflicts (in particular, conflicts regarding participation in a social security scheme and the payment system for social contributions) and, beyond that, to preserve the rights of those who have been subjected to more than one of these¹⁰. According to the Court of Justice, in establishing the rules for coordinating

(6) Roberts, S., *o.c.*, quoted Watson, P., *Social Security Law of the European Communities*, London, Mansell, 1980; Holloway, J., *Social Policy Harmonisation in the European Community*, Farnborough, Gower, 1981.

(7) Pennings, F., *Eur. S.S.L., op. cit.*, pp. 6-7; Cornelissen, R., The European co-ordination of social security and third country nationals, in Pieters, D. and Schoukens, P. (eds), *The social security co-ordination between the EU and Non-EU countries*, p. 443.

(8) ECJ, 13 October 1977, *Fonds national de retraite des ouvriers mineurs v. Giovanni Mura*, case. 22-77, ECLI:EU:C:1977:154.

(9) Prétot, X., *La protection sociale des travailleurs qui se déplacent à l'intérieur de la Communauté, Droit social*, No 7/8 July-Augustus., p. 566, 1989.

(10) ECJ, 9 July 1980, *Giacomo Gravina*, case 807/79. ECLI:EU:C:1980:184, para. 7. See: Pennings, Fr., *European Social Security Law*, 5th ed., Antwerp, Intersentia. By “coordination”, it is a question of matching social security systems so that the rights of migrants leaving their national systems are protected and kept intact in all their aspects.

national legislation, Regulation No 1408/71 is based on the fundamental principle that the above rules must ensure benefits accrued in the various Member States, up to the highest of these amounts, to workers moving within the Community. On the other hand, the coordination of national social security systems is not part of a classical international instrument (bilateral or multilateral), but of a specific legal order, one that is pre-eminent to national orders.¹¹ Finally, it should be emphasised that the concept of coordination is interpreted by the Court of Justice in light of the objective assigned to it by Article 48 of the Treaty on the Functioning of the European Union (TFEU), i.e. to ensure the free movement of people, which gives the concept of coordination a special meaning.¹²

Barely five years after its introduction, the European Commission begins work on the revision, extension and simplification of Regulation No 3. After lengthy negotiations, (EEC) Regulation No 1408/71¹³ is adopted by the Council on 14 June 1971, followed by the new Implementing Regulation, (EEC) Regulation No 574/72¹⁴, in March 1972. The new system comes into force in October 1972. In effect, it can be said that (EEC) Regulation No 1408/71 is a more elaborate version of Regulation No 3, which takes into account the shortcomings and technical problems which have become evident with previous regulations and been identified or created by the European Court of Justice (ECJ).¹⁵ Several years have passed and the Community provisions concerning the coordination of social security provisions dating from 1971 (with the adoption of Council Regulation 1408/71¹⁶) have since been amended and updated on a number of occasions. The Coordination Regulation has to adapt not only to take developments at the Community level into account, including the interpretations provided by the European Court of Justice, but also to incorporate the evolution of legislation at the national level. These different factors have contributed to the complexity and length of Community coordination rules. The need for a general revision of the legislation has been recognised as early as 1992, when the Edinburgh Council launched a call for the simplification of coordination rules.¹⁷ In its 1997 communication, entitled “Action Plan for the free movement of workers”¹⁸, the Commission acknowledges that the modernisation and simplification of the rules for coordinating social security schemes is essential in order to make them “more efficient and user-friendly”. If a vote had been taken on the basic Regulation (Regulation 883/2004) as early as April 2004, it was not

(11) Morsa, M., *Sécurité sociale, libre circulation et citoyenneté européennes*, Anthémis, 480 p., 2012.

(12) Pennings, Fr., *ibid.*

(13) (EC) Regulation No 1408/71, of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, OJ L49 of 5.7.1971.

(14) (EC) Regulation No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community, OJ L 74 of 27.3.1972.

(15) For a thorough analysis of these Regulations, see: Van Raepenbusch, S., *La sécurité sociale des personnes qui circulent à l'intérieur de la Communauté économique européenne*, Story Scientia, 546 p., 1991; Mavridis, P., *La sécurité sociale à l'épreuve de l'intégration européenne. Etude d'une confrontation entre libertés du marché et droits fondamentaux*, Brussels/Athens, Bruylant/Ant. N. Sakkoulas Publishers, 2003.

(16) (EC) Regulation No 1408/71 of the Council of 14 June 1971, o.c.

(17) European Council in Edinburgh 11-12 December, 1992. Conclusions of the Presidency (SN 456/92).

(18) COM(97) 586 final.

until the adoption of Implementing Regulation No 987/2009 on 16 September 2009 that the new Regulations Nos. 883/04 and 987/09 come into force on 1 May 2010.

For sixty years, the Coordination Regulations have functioned correctly and achieved the goals that the TFEU (Art. 48) assigned to them, even though some abusive and fraudulent behaviour designed to circumvent European regulations has emerged in recent years. This has been made possible by the sustained mutual cooperation that has developed between the Member States (their competent authorities and institutions) and the European Commission. It must be recognised that the principle of loyal cooperation is strongly expressed in relations between social security institutions. The implementation of Coordination Regulations requires cooperation that is based on trust.¹⁹ The exchange of information, mutual assistance and mutual recognition of acts demonstrate this obligation for close cooperation between institutions in a clear manner. Many of the provisions of the Coordination Regulations are thus guided by this duty of cooperation.²⁰ Article 76 of Regulation No 883/2004 provides that “for the purposes of this Regulation, the authorities and institutions of the Member States shall assist one another and behave as if they were applying their own legislation. The mutual assistance of said authorities and institutions is, in principle, free”. So-called “good administration”, which is well known to lawyers specialised in public and administrative law, refers to the way in which (social security) institutions respond to all requests within a reasonable time and communicate any information necessary to assert the rights conferred upon them by the Coordination Regulation to those concerned and is added to the principle of loyal cooperation.²¹

But which body could have ensured the function of a permanent collaborative forum between the Member States and the European Commission, in order to adapt all the legal, administrative and relevant techniques for the correct application of the European coordination rules on a day-to-day basis, better than the Administrative Commission for the Coordination of Social Security Systems? R. Cornelissen stresses, in this regard, that this is the “raison d’être” of the Administrative Commission.²² The coordination of social security benefits under Union law calls for administrative cooperation between social security bodies in different Member States.²³ In social security law, good administrative cooperation has sometimes been labelled “the fifth principle of European Social Security law”.²⁴ Since the legal regime in the field of

(19) Omarjee, I., *o.c.*, p. 24 and ff.

(20) Omarjee, I., *o.c.*, p. 24 and ff.

(21) Morsa, M., *Sécurité sociale, libre circulation et citoyenneté européennes*, *o.c.*

(22) Cornelissen, R., Title IV Administrative Commission and Advisory Committee, in Fuchs, M. and Cornelissen, R. (eds), *EU Social Security Law. A commentary on EU Regulations 883/2004 and 987/2009*, München/Oxford, C.H. Beck/Hart/Nomos, p. 425, 2015.

(23) Wenander, H., A network of Social Security Bodies. European Administrative Cooperation under Regulation (EC) No 883/2004, *Review of European Administrative Law*, p. 39, 2013-1.

(24) Wenander, H., A network of Social Security Bodies. European Administrative Cooperation under Regulation (EC) No 883/2004, *Review of European Administrative Law*, p. 40, 2013-1.

social security is based on coordination, the national administrative bodies have a central role.²⁵

1.2. NECESSITY FOR CLOSE AND EFFECTIVE COOPERATION BETWEEN NATIONAL INSTITUTIONS AND AUTHORITIES IN ORDER TO MAKE COORDINATION REGULATIONS WORK

Qualified as “institutional curiosity” by a certain doctrine²⁶, the Administrative Commission is “a constant of coordination²⁷”. Envisaged since the adoption of the first Coordination Regulation No 3/58 (Chapter 8, Title III Art. 43 and 44), although with a different composition²⁸ and with fewer tasks than those that are currently exercised²⁹, the Administrative Commission is renewed with the adoption of Regulation No 1408/71 (Articles 80 and 81) and reinforced by Regulation No 883/2004 (Articles 71 and 74). Within it, two subcommittees, which are essential for the application of the coordination rules, have been created: on the one hand, the Technical Commission whose main task is to improve procedures for the exchange of information and to ensure the transmission of data between social security institutions in a secure environment, and, secondly, the Audit Board, which aims to guarantee a refund to a Member State which has provided benefits in kind from another Member State within a reasonable time³⁰.

(25) Wenander, H., A network of Social Security Bodies. European Administrative Cooperation under Regulation (EC) No 883/2004, *Review of European Administrative Law*, p. 46, 2013-1.

(26) 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.

(27) Omarjee, I., *o.c.*, p. 92 and ff.

(28) 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.

(29) 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).

(30) These two sub-committees are not further analysed in this contribution. Note, however, that the Commission, in its proposal for a Regulation of 13 March 2018 (COM (2018) 131 final, with a view to establishing a European Labour Authority (ELA), p. 10, recital 32, Article 8, by .2 provided for the transfer of these two sub-committees to the ELA. Finally, the co-legislators refused this transfer of both subcommittees to ELA.

2. ADMINISTRATIVE COMMISSION FOR THE COORDINATION OF SOCIAL SECURITY SYSTEMS³¹

2.1. NATURE AND GENESIS OF THE ADMINISTRATIVE COMMISSION

The Administrative Commission is unique, has no equivalent in other areas of European policy³² and is considered by the doctrine to be *sui generis*.³³ Although it is not mentioned among the institutions of the European Union listed in Article 13 (1) of the Treaty on European Union (TEU), it has been entrusted with regulative tasks³⁴ by the legislature of the European Union. In case 98/80, the Court of Justice examined whether the Council's conferring legislative powers to the administrative Commission was compatible with the EEC Treaty. According to the Court, the Community's institutional structure does not allow the Administrative Commission to act as an authority endowed with rule-making powers. The Administrative Commission's decisions provide assistance to the social security institutions responsible for implementing Community law, but they cannot have the effect of obliging these institutions to follow certain methods or adopt certain interpretations. The Administrative Commission's decisions are therefore only opinions.³⁵ The Administrative Commission is not an international body, despite its genesis³⁶ and composition (representatives of the governments of the Member States receiving instructions from their governments), but a body subject to the European Union law³⁷ and which is "attached" to the European Commission. Nevertheless, the Administrative Commission is independent from the Commission.³⁸ Finally, the Administrative Commission must not be confused with the Comitology Committee, which is responsible for monitoring the exercise of implementing powers conferred on the Commission by the legislature of the Union, in accordance with Regulation No

(31) Cornelissen, R., *The Administrative Commission on Social Security for Migrant Workers*, Social Europe, p. 40, 1986; Mass, H., *La Commission Administrative pour la Sécurité Sociale des travailleurs migrants, une curiosité institutionnelle*, CDE, No 4, 1966; Wenander, A., A network of Social Security Bodies- European Administrative Cooperation under Regulation (EC) No 883/2004, *Review of European Administrative Law*, p. 39, 2013-1.

(32) Cornelissen, R., Title IV Administrative Commission and Advisory Committee, *o.c.*, p. 423 and ff.

(33) Cornelissen, R., Title IV Administrative Commission and Advisory Committee, *o.c.*, quoted H. Wenander, A Network of Social Security Bodies. European Administrative Cooperation under Regulation (EC) No 883/2004, *Review of European Administrative Law*, p. 49, 2013-1.

(34) R. Cornelissen, Title IV Administrative Commission and Advisory Committee, *o.c.*, p. 425.

(35) ECJ, Judgment of 14 Marc 1981, case 98/80, ECLI:EU:C:1981:104, par. 20. See: Cornelissen, R., *The Administrative Commission on social security for migrant workers*, Social Europe, p. 40 and ff.

(36) R. Cornelissen, Title IV Administrative Commission and Advisory Committee, *o.c.*, p. 426.

(37) Rules of the Administrative Commission for the Coordination of Social Security Systems attached to the European Commission of 16 June 2010, (2010/C 213/11), Article 16 stipulates that "Where the provisions of these rules require interpretation, such interpretation shall be given by the Court of Justice of the European Union in accordance with Article 267 of the Treaty on the Functioning of the European Union".

(38) Wenander, H., A Network of Social Security Bodies. European Administrative Cooperation under Regulation (EC) No 883/2004, *Review of European Administrative Law*, p. 48, 2013-1.

182/2011 as it pertains to the rules and principles of control for the Member States of the Commission's exercise of implementing powers.³⁹

2.2. THE COMPOSITION OF THE ADMINISTRATIVE COMMISSION

The statutes of the Administrative Commission are established by mutual agreement of its members. These statutes adopted on 16 June 2010⁴⁰. Articles 5 (4)⁴² and 6 (3)⁴³ of Implementing Regulation No 987/2009 are a clear illustration of the role of conciliation bestowed upon the Administrative Commission. The Administrative Commission for the Coordination of Social Security Systems⁴⁴ is a specialised body of the European Commission, which has the same seat as the Commission and was established at the Commission of the European Communities⁴⁵. It shall consist of a government representative from each of the Member States⁴⁶, assisted, where appropriate, by expert advisers, if the matters to be dealt with or the measures to be taken at the national level require it. Each delegation may, as a general rule, consist of no more than four individuals.⁴⁷ A representative of the Commission of the European Communities shall participate, in an advisory capacity, in the meetings of the Administrative Commission.⁴⁸ The representative of the European Commission

(39) Van Raepenbusch, S., *Droit institutionnel de l'Union européenne. 2ème édition*, Collection Europe(s), Larcier, p. 205, 2016; Jacqué, J.-P., *Droit institutionnel de l'Union européenne*, Dalloz, 2018; Isaac, G. and Blanquet, M., *Droit général de l'Union européenne*, Sirey, 12ème édition. See: also Wenander, H., A network of Social Security Bodies. European Administrative Cooperation under Regulation (EC) No 883/2004, *Review of European Administrative Law*, p. 48, 2013-1.

(40) Rules of the Administrative Commission for the Coordination of Social Security Systems attached to the European Commission of 16 June 2010, (2010/C 213/11).

(41) OJ, No C 213/20 6.8.2010, p. 20.

(42) On the legal value of documents and supporting evidence issued in another Member State which stipulates that: "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".

(43) Provisional application of legislation and provisional granting of benefits which stipulates that: "Where no agreement is reached between the institutions or authorities concerned, the matter may be brought before the Administrative Commission by the competent authorities no earlier than one month after the date on which the difference of views, as referred to in paragraph 1 or 2 arose. The Administrative Commission shall seek to reconcile the points of view within six months of the date on which the matter was brought before it".

(44) Fillon, J.-Cl., La machinerie des nouveaux règlements: pilotage et gestion administrative et financière, *R.D.S.S.*, No 1, p. 64, 2010, who states that it is "a *sui generis* committee, not falling under the usual comitology, but a specialised body of the European Commission [...]".

(45) This expresses the idea that the Administrative Commission not only represents the interests of the Member States but also serves the interests of the Union; see: R. Cornelissen, Title IV Administrative Commission and Advisory Committee, *o.c.*, p. 427.

(46) Rules of the Administrative Commission for the Coordination of Social Security Systems, article 2 (1-2), which stipulates that "When a member of the Administrative Commission is prevented from attending, he/she shall be replaced by the alternate designated for this purpose by his/her government". Alternate members may accompany members at the meetings of the Administrative Commission.

(47) *Idem*.

(48) Regulation No 883/2004, article 71 (1). As a rule, it is the Head of Unit who will participate in the meetings of the Administrative Commission in an advisory capacity.

may be accompanied by his deputy. In addition, a representative of the Legal Service may attend the sessions and, should a matter to be dealt with require their presence, a representative of another service of the European Commission.⁴⁹ The secretariat is provided by the Secretary General and his collaborators.

This Commission succeeds the Administrative Commission for the Social Security of Migrant Workers. The latter title was no longer in line with the new Regulation No 883/2004, which is understood to have considerably expanded the personal scope of application by allowing the categorical approach focused on the economic activity of recipients to be “dropped” from Regulation No 1408/71.

2.3. THE FUNCTIONING OF THE ADMINISTRATIVE COMMISSION

Pursuant to Article 3 of the Statutes of the Administrative Commission the office of Chair of the Administrative Commission shall be held by the member belonging to the State whose representative to the Council of the European Union holds, for the same period, the office of President of the Council of the European Union in accordance with Article 16(9) of the Treaty on European Union and Article 236(b) of the Treaty on the Functioning of the European Union.⁵⁰ The Chair represents the Administrative Commission within the Advisory Committee for the Coordination of Social Security Systems⁵² and on any other occasion. If the Chair in office is prevented from attending, the alternate shall act as Chair and, in this case, the alternate may vote in the Chair’s place. The Secretary General of the Administrative Commission shall attend all meetings of the Administrative Commission and its working groups, accompanied by the members of the secretariat designated by him. In case of impediment, he is replaced by the Deputy Secretary General or the members of the secretariat designated by him/her.⁵³ Decisions regarding the issues of interpretation referred to in Article 72 (a) of Regulation No 883/2004 shall be adopted in accordance with the voting rules established by the Treaty, and shall be the subject of the necessary publicity in the Official Journal of the European Union by the General Secretariat. It should also be noted that the decisions of the Administrative Commission, as the Court of Justice has pointed out on a number of occasions, are not binding. Indeed, it follows from both Article 211 of the Treaty and from the jurisdictional 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 social security institutions responsible for applying Community law in this field, is

(49) Rules of the Administrative Commission for the Coordination of Social Security Systems attached to the European Commission, Article 2, § 5.

(50) Pursuant to TFEU, Articles 16(9) and (236), b).

(51) J.-Cl. Fillon, “La machinerie des nouveaux règlements...”, *op. cit.*, p. 65 who indicates that “the originality and strength of the Administrative Commission come from the fact that it is not chaired by the representative of the Commission, who has only a consultative voice, but by the representative of the Member State holding the rotating Presidency.”

(52) Regulation No. 883/2004, Article 75.

(53) Regulation No. 883/2004, Article 71, § 3 and Rules of the Administrative Commission for the Coordination of Social Security Systems attached to the European Commission, Article 2, § 6.

not in a position to require those institutions to follow certain methods or to adopt certain interpretations when applying the Community rules.⁵⁴ The members of the Administrative Commission shall ensure that appropriate instructions are given at the national level, in order to ensure the proper application of the published and unpublished decisions of the Administrative Commission. Decisions shall apply from the date they are adopted or, failing that, from the first day of the second month following their publication in the Official Journal of the European Union.

The Administrative Commission shall meet upon convocation, sent at least ten days before the meeting, by the Secretary General to the members and representatives of the European Commission⁵⁵, after consultation with the Chair. The Administrative Commission meets at least four times per year. In addition, each year, one of the sessions is devoted to the examination of the situation of the debt referred to in Article 69 of Regulation No 987/2009, in the presence of the Chair-in-Office of the Audit Board; this is also reported to the Administrative Commission, in accordance with Article 74 of Regulation No 883/2004. In addition, the Administrative Commission may also meet for an extraordinary session, if at least five members or the representative of the European Commission request this. The request specifies the purpose of the meeting. In exceptional cases, the Administrative Commission may hold its sessions outside its seat, in one of the Member States of the European Union or at the premises of an international body. The provisional agenda for each session shall be drawn up by the Secretary General, after consultation with the Chair of the Administrative Commission and the representative of the European Commission. Where necessary, the Secretary-General may, before proposing the inclusion of an item on the agenda, request that the delegations concerned make their views on this issue known in writing. The provisional agenda is sent to the members and representatives of the European Commission at least ten days before the beginning of the session. This agenda is then approved at the beginning of the session of the Administrative Commission. The members of the Administrative Commission and the representative of the European Commission have the right to submit specific questions on the interpretation of Regulations No 883/2004 and 987/2009 to the Administrative Commission when different interpretations between Member States are required. Member States, or one or more of the Member States, and the European Commission could be detrimental to the rights of individuals. The Administrative Commission may decide to transfer these matters to the Conciliation Board. The Chair signs the documents emanating from the Administrative Commission. Finally, on the basis of the mandate that it

(54) See: ECJ, 14 may 1981, Romano, case 98/80, *Rec.*, 1981 p. 1241; more recently, see: ECJ, Alpenrind GmbH, case. C-527/16, paragraph 64: “an A1 certificate issued by the competent institution of a Member State under Article 12(1) of Regulation No 883/2004 is binding on both the social security institutions of the Member State in which the activity is carried out and the courts of that Member State, so long as the certificate has not been withdrawn or declared invalid by the Member State in which it was issued, even though the competent authorities of the latter Member State and the Member State in which the activity is carried out have brought the matter before the Administrative Commission which held that that certificate was incorrectly issued and should be withdrawn”.

(55) The President may instruct the Secretary-General of the Administrative Commission to hold meetings and to carry out the work falling within the remit of the Administrative Commission.

adopts⁵⁶, the Administrative Commission can set up an Operational Board to assist it in its work and facilitate its task⁵⁷. The “Fraud and Error” ad hoc group has been set up on this basis for the purpose of, among other things, analysing the risks of fraud and errors arising from the application of the Coordination Regulations and to make proposals to the Administrative Commission. Similarly, the Administrative Commission may establish, on the basis of the mandate, a Conciliation Board to assist it in its work, when members have a divergent interpretation of the provisions of Regulations No 883/2004 and 987/2009. It may also set up working groups and studies for particular issues⁵⁸ that may be expected by representatives of the European Commission. The statutes of the Administrative Commission leave the latter with real room to manoeuvre within the configuration of the working groups.⁵⁹ The main task of the Administrative Commission is to facilitate and strengthen cooperation between national authorities and institutions.⁶⁰

2.4. THE TASKS OF THE ADMINISTRATIVE COMMISSION

Pursuant to Article 72 of Regulation No 883/2004, the Administrative Commission is responsible:

- for dealing with any administrative or interpretative issues arising from the provisions of this Regulation, or from the Implementing Regulation or any agreement or arrangement made in connection therewith, without prejudice to the right of the authorities, institutions and individuals regarding the procedures and jurisdictions provided for by the laws of the Member States, by this Regulation and by the Treaty.⁶¹ On this basis, the Administrative Commission has adopted a large number of decisions and recommendations covering all aspects of the coordination rules (applicable legislation, family benefits, pensions, etc.).⁶² This is the natural core business of the Administrative Commission;
- for facilitating the uniform application of Community law, in particular by promoting the exchange of experience and good administrative practices. This

(56) In a mandate that it adopts, the Administrative Commission details the composition, the duration, the tasks, the working methods and the system of chairmanship of the management.

(57) Rules of the Administrative Commission for the Coordination of Social Security Systems attached to the European Commission, Article 4.

(58) Rules of the Administrative Commission for the Coordination of Social Security Systems attached to the European Commission, Article 6.

(59) Rules of the Administrative Commission for the Coordination of Social Security Systems attached to the European Commission, Article 7, § 4.

(60) Cornelissen, R., Title IV Administrative Commission and Advisory Committee, *o.c.*, pp. 423 and ff.

(61) Whilst a decision of the Administrative Commission of the European Communities on Social Security for Migrant Workers may provide an aid to social security institutions responsible for applying Community law in this field, it is not of such a nature as to require those institutions to use certain methods or adopt certain interpretations when they come to apply Community law. Decision No 101 of the Administrative Commission does not therefore bind national courts. See: ECJ, Romano, case C-98/80, EI:C:1980:267.

(62) The decisions and recommendations of the Administrative Commission in force can be consulted via the following hyperlink: http://www.google.be/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEWjHurKn0v_hAhVTThUIHUUBBAsQFjAAegQIBB&url=http%3A%2F%2Fec.europa.eu%2Fsoci al%2FBlobServlet%3FdocId%3D4987%26langId%3Den&usq=AOvVaw1DpRL3FzLDgR5O8ErK7Ucf.

particular task was not mentioned in Regulation No 1408/7, but the added value of all of the actors resulting from the exchange of good practices was included in Article 137 (2) of the Treaty Establishing the European Community (EC Treaty) (now Article 153 § 2 of the TFEU).⁶³ This task can be illustrated by the annual discussion within the Administrative Commission, which is carried out on the basis of reports submitted voluntarily by the Member States on the frauds and errors resulting from the H5 decision. Belgium has been particularly involved in this task since, starting from a project funded by the European Commission, it has made it possible – in partnership with an institution in the Netherlands (Sociale Verzekeringsbank) – to develop an e-platform of national contact points, which is hosted on the servers of the European Commission; it is a unique pan-European platform for combating cross-border social fraud at the European level⁶⁴. An annual platform conference allows national contact points to share best practices and find inspiration for their internal policies against cross-border social security fraud and error;

- for promoting and developing social security cooperation between Member States and their institutions, with a view, inter alia, to addressing the particular questions of certain categories of persons⁶⁵; to facilitate, in the field of social security coordination, the implementation of cross-border cooperation;
- for promoting the widest possible use of new technologies, in order to facilitate the free movement of people, in particular by modernising the procedures necessary for the exchange of information and by adapting the flow of information between institutions to electronic exchanges; developments in the treatment of information in each Member State. The Administrative Commission adopts the common structural rules for electronic data-processing services, in particular, as they pertain to security and the use of standards, and lays down the operating procedures for the shared part of these services. This particular task refers to the implementation of the Electronic Exchange of Social Security Information (EESSI) electronic exchange;
- for carrying out any other function within its jurisdiction under the basic provisions of Regulations No 883/2004 and No 987/2009, or any agreement or procedure made within the framework thereof. This is a very broad mission attributed to the Administrative Commission;
- for making any proposal to the Commission of the European Communities regarding the coordination of social security schemes, with a view to improving and modernising the Community knowledge by drawing up subsequent regulations or by means of other instruments provided for in the Treaty. In order to carry out this task, the Administrative Commission has decided to organise discussion forums on topics directly related to the improvement and/or modernisation of the regulations, or a forum on the international dimension of social security

(63) Cornelissen, R., Title IV Administrative Commission and Advisory Committee, *o.c.*, p. 431.

(64) The “Cross-border social security fraud and error” platform is hosted by the European Commission: <https://webgate.ec.europa.eu/fpfis/forums/h5ncp/index.php>.

(65) Cornelissen, R., Title IV Administrative Commission and Advisory Committee, *o.c.*, pp. 431-432, who explains that the wording “(...) certain categories of persons” is a compromise. By this wording allusion is made to frontier workers without saying it explicitly.

coordination. Each presidency decides to tackle a particular topic, on the basis of an analytical report prepared by the commission's network of legal experts. During these forums, national representatives interact not as government representatives, but as experts in the field of social security coordination. The underlying purpose of these forums is to conduct a long-term, informal discussion, with a view to identifying "recommendations", areas for improvement and so on. These could later lead to a decision or recommendation adopted by the Administrative Commission, or become a component of a future legislative initiative of the Committee to revise the coordination rules;

- for organising and supporting the annual forum on the international dimension of social security coordination.⁶⁶ This forum is the privileged place for national experts to discuss the ongoing bilateral treaty negotiations they have developed with third countries and to share the difficulties encountered with said third countries, but also to allow the Commission to provide an inventory of the negotiations it is conducting to conclude such association agreement⁶⁷;
- for establishing the factors to be taken into account, for the purposes of defining the accounts of the Member States institutions' liability under this Regulation and for adopting the annual accounts between the institutions of the Member States, on the basis of the report of the Commission referred to in Article 74. An annual report of the Audit Board is thus presented to the Administrative Commission for adoption.

It is therefore a "very broad programme".⁶⁸ Compared with the previous regulation, it should be noted⁶⁹:

- Regulation No 883/2004 removes two of its functions: firstly, the function of having translations carried out, in particular with regard to the files of the beneficiaries of the Regulation (allocation to be borne by the Commission itself) and, on the other hand, the attribution (never exercised in the past) of promoting and developing collaboration between Member States, with a view to shared health and social actions;
- Regulation No 883/2004, on the other hand, strengthens two functions devolved to the Administrative Commission:
 - on the one hand, as an ex-gratia appeal body, Implementing Regulation No 987/2009 (Article 6 (3)⁷⁰) makes a number of references to the Administrative Commission, in addition to those organised by Regulation No 883/2004,

(66) The creation of this forum on the external dimension of social security coordination follows the communication of the European Commission of 2012, (COM(2012) 153 Fin).

(67) The creation of this forum on the external dimension of social security coordination follows the communication of the European Commission of 2012, (COM(2012) 153 Fin).

(68) Fillon, J.-Cl., *La machinerie des nouveaux règlements...*, *o.c.*, p. 65.

(69) Fillon, J.-Cl., *ibid.*, pp. 66 and ff.

(70) Regulation No 987/09, provisional application of legislation and provisional granting of benefits which stipulates that: "Where no agreement is reached between the institutions or authorities concerned, the matter may be brought before the Administrative Commission by the competent authorities no earlier than one month after the date on which the difference of views, as referred to in paragraph 1 or 2 arose. The Administrative Commission shall seek to reconcile the points of view within six months of the date on which the matter was brought before it".

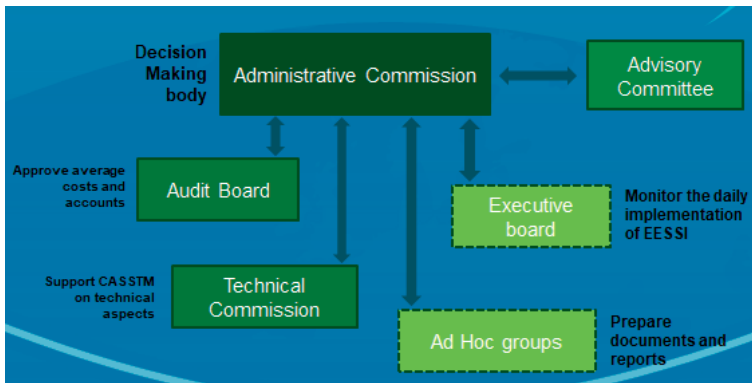
- to develop this function. This Conciliation role of the Commission results from the case-law of the Court of Justice concerning the applicable legislation, or from the legal validity of the posting forms. This conciliation mission is the subject of Decision A1 of the Administrative Commission of 12 June 2009, which defines the modalities of an applicable dialogue and conciliation procedure and is exercised by a conciliation committee set up therein⁷¹;
- on the other hand, the recourse function with respect to new technologies has grown considerably (the regulation now imposes the obligation to dematerialise all exchanges of documents and data). The Technical Committee for Information Processing is responsible for proposing the common architecture rules for the management of electronic data processing services to the Administrative Commission, in particular as regards security and the use of standards. Given the number, and the technical nature, of the decisions to be taken during the current phase of setting up the EESSI network, the Administrative Commission has temporarily appointed an Executive Board to assist it in this work, by supervising the project on a day-to-day level.

The Coordination Regulations also create two permanent sub-committees within the Administrative Commission for the Coordination of Social Security Systems (CACSS): the Audit Board⁷² (a kind of settlement/compensation chamber for cross-border claims, mainly in the field of health care) and a Technical Commission (responsible for proposing a structure for the electronic exchange of information – EESSI).⁷³ The Advisory Committee is a sub-committee comprising representatives of the European Commission, governments and social partners at the European level and meets once a year (on average). CACSS: The Audit Board of the CACSS: the Audit Board and the Technical Commission (responsible for proposing a structure for the electronic exchange) of information – EESSI). The Advisory Committee is a sub-committee of representatives of the European Commission and is a member of the European Commission.

(71) The dialogue and conciliation procedure shall be followed before the matter may be referred to the Administrative Commission. This Decision applies without prejudice to the administrative procedures to be followed under the national law of a Member State concerned. In the event the matter has become the subject of a judicial or administrative appeal procedure under national law in the Member State of the institution that issued the document in question, the dialogue and conciliation procedure must be suspended.

(72) Regulation No 883/2004, Article 74.

(73) Regulation No 883/2004, Article 73.

FIGURE 1: SCHEMATIC REPRESENTATION OF THE ADMINISTRATIVE COMMISSION

3. THE DIALOGUE AND CONCILIATION PROCEDURE

3.1. TWO STAGES OF DIALOGUE AND A CONCILIATION STAGE

In line with the provisions of Articles 5 and 6 of Regulation No 987/2009⁷⁴, the Administrative Commission for the Coordination of Social Security Systems adopted Decision A1⁷⁵ on 12 June 2009, thus establishing 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 883/2004⁷⁶. This procedure shall be applied before any referral is made to the Administrative Commission, and without prejudice to the administrative procedures to be followed in accordance with the national legislation of the Member States concerned. In addition, if the matter referred to the Conciliation Board is the subject of a judicial or administrative appeal procedure, under the national law of the Member State in which the institution which issued the document in question is located, the dialogue and conciliation procedure is suspended.⁷⁷

(74) These provisions confirm and extend the case-law of the Court of Justice of the European Communities in the light of Council Regulation (EEC) No 1408/71, which led to the introduction of a standard procedure for the settlement of disputes between Member States concerning the validity of the posting certificates and was consolidated in the former Decision No 181 of the Administrative Commission of the European Communities on social security for migrant workers. See: Wenander, H., *A network of Social Security Bodies. European Administrative Cooperation under Regulation (EC) No 883/2004*, *Review of European Administrative Law*, p. 66 and ff, 2013-1.

(75) OJ No C106 of 24.04.2010, p. 1.

(76) Both Articles 5 and 6 of Regulation (EC) No 987/2009 provide for the possibility of referring the matter to the Administrative Commission in the absence of an agreement between the institutions or authorities concerned, but the Member States have indicated that they consider it necessary to establish a standard procedure to be followed before the Administrative Commission can be seized and to define more precisely the conciliation role of the said commission in case of divergence of points of view between the institutions concerning the applicable legislation. But the Member States have expressed a need to establish a standard procedure to be followed before a matter may be referred to the Administrative Commission and to define more precisely the role of the Administrative Commission in reconciling opposing views held by the institutions concerning the applicable legislation, see: recital 11 of decision A1.

(77) Decision A1, Article 4.

In the first stage, in the event of doubts concerning the validity of a document issued by an institution or authority of another Member State, or in the event of a dispute relating to the (provisional) determination of the applicable law, the inspection services send a reasoned request to the competent institutions in the Member States concerned, asking them to provide the necessary clarifications concerning its decision and, as the case may be, to withdraw or invalidate the document concerned, or to review or annul its decision. The institution of the other Member State must acknowledge receipt of this request within a maximum of 10 days and, in principle, makes its decision within three months of receiving the request; indeed, this period may be extended by a maximum of three months, depending on the complexity of the file or because the verification of certain data requires the intervention of another institution. Finally, the Member States concerned may, under very exceptional circumstances, agree to derogate from the aforementioned deadlines; in this case, the extension must be justified and proportionate, in light of the circumstances of the case and must be limited in time. If the parties concerned do not reach an agreement at the end of the first phase of the procedure, or if no decision is made within the prescribed period, then they may enter the second stage of the dialogue procedure.⁷⁸ In this case, the parties shall appoint a central contact point within 14 days, and the latter shall endeavour to reach an agreement within six weeks of their appointment. If no agreement is reached at the end of the second phase of the dialogue, the parties concerned may submit to the Administrative Commission and prepare, for this purpose, an explanatory note on the disputed points for the attention of the Administrative Commission, with the possibility of a referral to a Conciliation Board if both parties to the dispute and the Administrative Commission agree; the latter committee operates as an ad-hoc working group set up within the Administrative Commission, and is composed of experts appointed by the Member States who are particularly competent in the fields of coordination (applicable legislation, etc.). The Conciliation Board is responsible for rendering, within six months of its referral, a legal opinion on the question(s) of law between the two parties. These “arbitration” rules developed by the Administrative Commission cannot replace or change the rules outlined by the ECJ, but must be understood as making them more concrete (e.g. by fixing a deadline) and helping Member States to have procedures that are clear to everyone.⁷⁹

This procedure remains unrecognised and is therefore not applied.⁸⁰ In addition, although it may be implemented in the event of a dispute concerning the documents issued in the various sectors covered by the material scope of Regulation No 883/2004, it is not used in case of doubt as to the validity of A1 documents.⁸¹ The competent Belgian institutions and authorities have been using this procedure extensively for several years and systematically since mid-2015; to this end, the Belgian authorities

(78) This second stage of the procedure is optional and the parties can bring the dispute directly before the Administrative Commission.

(79) Pörtl, M. and Spiegel, B., Arbitration under international Social Security instruments, *Inertax*, Volume 42, Issue 3, Wolters Kluwer, p. 199, March 2014.

(80) Jorens, Y., in analytical report *on procedures related to the granting of portable documents A1*, 2014.

(81) Regarding the Austrian experience, see: Pörtl, M. and Spiegel, B., Arbitration under international Social Security instruments, *Inertax*, Volume 42, Issue 3, Wolters Kluwer, pp. 198-201, March 2014.

have developed a collaborative platform between the competent Belgian institutions and authorities, in order to follow up on all the cases dealt with under the dialogue and conciliation procedure (“A1 procedure”).⁸² Although this A1 procedure (which can be improved) leads to encouraging results in terms of exchanging information and/or withdrawal of portable A1 documents by foreign authorities, this procedure tends to reinforce the processes of cooperation between the inspectorates, institutions and competent authorities of the Member States. Some authors consider “Therefore, in ‘hard cases’, only the ECJ can decide about the interpretation of Union Law in a way which would bind all stakeholders (...)”⁸³. We do not entirely share this view, as the well-known opposition between hard law and soft law comes into play here.⁸⁴ If the A1 procedure described above is characterised by its voluntary nature and the absence of sanctions, the “moral condemnation by peers” within the Administrative Commission implies that the legal opinions issued by the Conciliation Board, although not binding, are respected and followed up on by the Member States in question in practice. The notion of the legality of all these rules is then expressed not so much in the constraints, but by the level of “persuasiveness”, of effectiveness, which is expressed in their capacity to express the consensus of the categories concerned.⁸⁵

3.2. INTERACTION WITH THE FUTURE EUROPEAN LABOUR AUTHORITY IN MATTERS OF CONFLICT RESOLUTION

Following intensive work by the co-legislators, an agreement was reached on 14 February 2019 to establish a European agency (known as the “European Labour Authority”).⁸⁶ The Authority will cooperate closely with European Union bodies, which will continue to operate in their current configuration, such as the Administrative Commission, the Advisory Committee for the Coordination of Social Security Systems and the Advisory Committee on Free Movement of Workers, in order to ensure the complementary nature of their work. This rationalisation of the institutional landscape will create valuable synergies and eliminate redundancies, thereby improving the quality of the discussions and results of the action.

The European Commission’s proposal for a regulation provides for the settlement of disputes for all policy areas covered by the European Labour Authority (ELA) through a mediation committee set up within the ELA. In its general approach, the Council noted that “(...) the Conciliation Board and its missions should continue to fall within the competence of the Administrative Commission. In particular, it has been argued that the authority may not have the competence to deal with cases in the field of social security coordination, and may interfere with the interpretation of Regulation (EC) No 883/2004 which belongs to the Administrative Commission for the Coordination

(82) The Electronic Platform called by the Belgian Authorities “Osiris”.

(83) Pörtl, M. and Spiegel, B., Arbitration under international Social Security instruments, *Inertax*, Volume 42, Issue 3, Wolters Kluwer, pp. 200-201, March 2014.

(84) Senigaglia, R., Soft law et hard law dans le “réseau” des sources, *Ricerche giuridiche*, vol. 3, n° 1, Giugno, 2014.

(85) Senigaglia, R., *ibid.*

(86) See: COM(2018) 131 final of 31 March 2018.

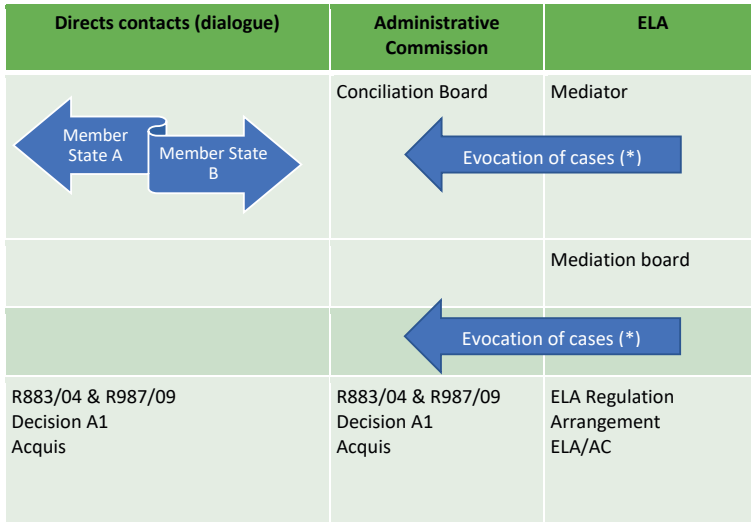
of Social Security Systems⁸⁷. During the inter-institutional dialogue under the Romanian presidency, a compromise proposal – under pressure from the European Commission⁸⁸ – concerning the resolution of disputes was presented and received the agreement of the Parliament and the Council. At the end of the dialogue phase, and insofar as no agreement between the parties has been reached, cases dealing wholly or partly with social security coordination elements are forwarded to the mediation committee established within the ELA. The latter must inform the Administrative Commission of the cases it receives which pertain to social security coordination, either fully or in part. The mediation process takes place in two stages: first, via a mediator (first stage) and then via the possibility of entering the mediation committee within the ELA, in the event that no agreement has been reached at the end of the first stage. A right of evocation allows the case (which pertains, in whole or in part, to social security coordination aspects) to be processed by the Administrative Commission (and its Conciliation Board) for the benefit of the Administrative Commission, with the agreement of the Member States that are party to the dispute or any Member State that is party to the dispute is foreseen. Therefore, the two procedures (conciliation via Administrative Commission and mediation via ELA) can operate in parallel, with the “last word” given to the Administrative Commission. This hybrid procedure will be evaluated by the European Commission, with a view to considering a modification to this one in the future.

The procedure conceived in this way is likely to affect the processing time of the files, whereas the latter, by its very nature, requires speed in processing.

(87) COREPER, 28 November 2018, doc. No 14583/18.

(88) Who wanted to entrust ELA with operational tasks related to social security coordination.

FIGURE 2: THE DIALOGUE AND CONCILIATION PROCEDURE



(*) Right of evocation of cases (at all levels of the mediation procedure) either by the Administrative Commission with the agreement of the two parties in dispute, or by a Member State in dispute with the agreement of the other Member State.

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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 Wispeleere, 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.”

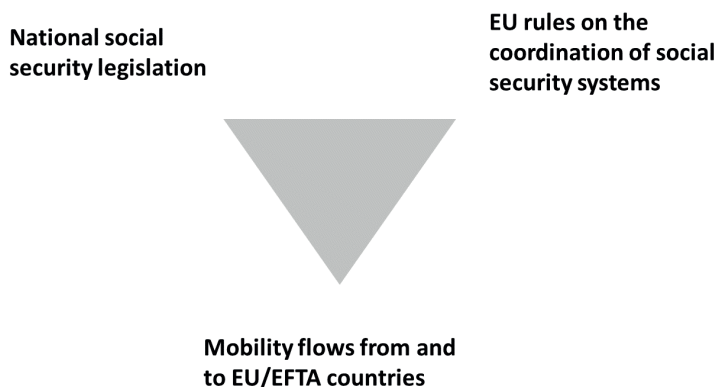
(26) See: Dano, C-333/13; Brey, C-140/12; Alimanovic, C-67/14.

(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 Rennuy (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

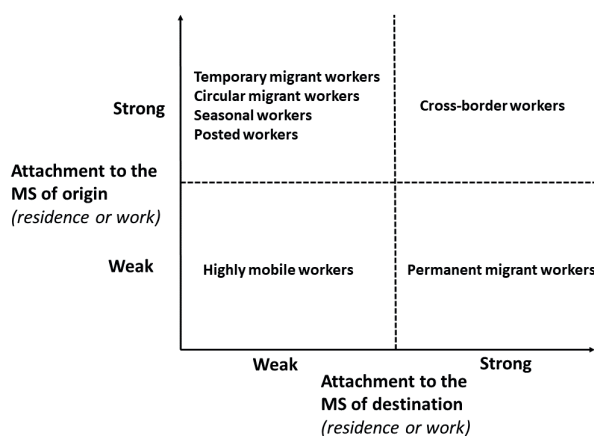
(55) However, this scenario put forward in the Commission's 1998 proposal, namely that the criterion for the distribution of healthcare costs for pensioners should be the ratio of insurance periods spent in the different Member States, was rejected, as it would result in a greater administrative burden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

The "Forum" section publishes texts that are concise and notable for their critical content and reflective dimension.

Submitted texts must detail a position that is based on clearly-stated normative principles, they must formulate an opinion (or a reaction) and they must contain arguments and references.

Personal considerations may be developed and it is not necessary to provide documentation and detailed bibliographical references.

The editorial board is not responsible for the content of the texts, but reserves the right to select the texts among the submissions.

FORUM TEXT – BASIC INCOME AND SOCIAL SECURITY: A STRUCTURAL PROBLEM?

BY | YVES STEVENS AND JAKOB WERBROUCK

Basic income is seen by some as an answer to the flaws of modern systems of social protection. Ensuring the social protection of all citizens by providing for an unconditional and universal income, it is said to provide a solution to the disincentivising effects of current protection schemes, as well as an alternative to inefficient administration and complex structures of benefits, institutions and regulations. However, implementing a basic income in reality has so far been a difficult process. While several small-scale experiments have been carried out, they have focused mainly on modifying existing benefits within a framework of social security protection. As a consequence, their relevance can be questioned from a regulatory standpoint, as deregulated social security benefits do not necessarily represent a true basic income. We argue that the adoption of a social security perspective, paired with a lack of understanding of the structural qualities that define modern social security systems, lies at the heart of the problems associated with implementing basic income.

1. INTRODUCTION

In the aftermath of World War II, a significant number of Western states enacted a series of social reforms that lead to the establishment of the so-called welfare state. Through the introduction and institutionalisation of several social benefits, welfare states have been able to provide a level of material security that is unprecedented in human history. The provision of this security comes at a considerable budgetary cost. Major economic events, such as the oil crises of the seventies, as well as major political evolutions, such as the rise of neo-liberalism in the eighties, have sent shockwaves through the Western world that have affected the character of welfare states. Especially since the 1990s, national social security systems have been dominated by the activation paradigm, according to which the provision of social benefits to claimants entails a reciprocal relationship in which the claimant must fulfil an active role in seeking support.¹

Not coincidentally, from the 1980s onwards, research into the concept of basic income has increasingly attracted attention. The past few decades have seen a significant number of studies on the concept of basic income. Sociologists, economists and philosophers alike have tried to make a case for the feasibility or improbability of

(1) For a more detailed account on the subject, see: Vandenbroucke, F., *The active welfare state revisited*, Bruges, Die Keure, 2013.

such an income, each from their own distinct viewpoint.² Although definitions may vary, basic income in essence represents a government scheme that indiscriminately offers a certain periodic amount of resources to all citizens, on the sole condition of their citizenship.³ This marks a notable departure from the currently prevailing social security schemes, which are inherently conditional upon the behaviour, past or present, of the claimant. Proponents of the idea of a basic income claim that it is situated at the crossroads of the dilemma which modern welfare states face: it provides both a radically new way to provide social protection that would eliminate excess budgetary and administrative spending, as well as promises to uphold or even improve the currently existing levels of protection.⁴

There have been numerous studies on the concept of basic income in the past few decades. Sociologists, economists and philosophers alike have tried to make a case for the feasibility or improbability of such an income, each from their own distinct viewpoint.⁵ While these efforts have been instrumental in popularising the concept and bringing it to the forefront of debates on social security, the problem of how to effectively implement basic income in any existing legal order remains opaque. Several initiatives testing basic income-like benefits have been launched around Europe, but these experiments have been decidedly small-scale and limited in scope and time. With the absence of any large-scale success stories that testify to its feasibility, the debate surrounding basic income can still be considered somewhat theoretical. Indeed, agreeing on the idea of a basic income is one thing, but making it work within a given

(2) Notable examples include Van Parijs, P., *Arguing for Basic Income: Ethical Foundations for a Radical Reform*, New York, Verso Books, 1992; Van Parijs, P., *Real Freedom for All: What (if anything) can justify capitalism?*, New York/Oxford, Clarendon Press/Oxford University Press, 1995; Ferry, J., *L'Allocation Universelle. Pour un revenu de citoyenneté*, Paris, Cerf, 1996; Groot, L. and Van Der Veen, R., *Basic Income on the Agenda: Policy Objectives and Political Chances*, Amsterdam, Amsterdam University Press, 2003; Atkinson, A.B., *Public economics in action: the basic income/flat tax proposal*, Oxford, Clarendon Press, 2004; Widerquist, K., *Independence, Propertylessness, and Basic Income: A Theory of Freedom as the Power to Say No*, New York, Palgrave Macmillan, 2013; Terry, M., *The Feasibility of Citizen's Income*, London, Palgrave Macmillan, 2016; Van Parijs, P. and Vanderborght, Y., *Basic Income: A Radical Proposal for a Free Society and a Sane Economy*, Cambridge, Harvard University Press, 2017.

(3) As definitions vary, the selection of essential characteristics associated with the basic income varies as well. Some of these essential characteristics include: the noncontributive nature, the all-inclusiveness of the personal scope of application, the undefined duration and the lack of any behavioural conditions related to the enjoyment of the benefit.

(4) Specifically the provision of a basic income would combat the stigma associated with receiving social benefits, as well as related problems such as non take-up of benefits or incentivising low-skilled workers to participate in the labour market.

(5) Notable examples include Van Parijs, P., *Arguing for Basic Income: Ethical Foundations for a Radical Reform*, New York, Verso Books, 1992; Van Parijs, P., *Real Freedom for All: What (if anything) can justify capitalism?*, New York/Oxford, Clarendon Press/Oxford University Press, 1995; Ferry, J., *L'Allocation Universelle. Pour un revenu de citoyenneté*, Paris, Cerf, 1996; Groot, L. and Van Der Veen, R., *Basic Income on the Agenda: Policy Objectives and Political Chances*, Amsterdam, Amsterdam University Press, 2003; Atkinson, A.B., *Public economics in action: the basic income/flat tax proposal*, Oxford, Clarendon Press, 2004; Widerquist, K., *Independence, Propertylessness, and Basic Income: A Theory of Freedom as the Power to Say No*, New York, Palgrave Macmillan, 2013; Terry, M., *The Feasibility of Citizen's Income*, London, Palgrave Macmillan, 2016; Van Parijs, P. and Vanderborght, Y., *Basic Income: A Radical Proposal for a Free Society and a Sane Economy*, Cambridge, Harvard University Press, 2017.

legal order is something else entirely. In what follows, we will give our analysis on how basic income experiments are being conceived and why this is problematic from a legal point of view.

2. BASIC INCOME EXPERIMENTS IN EUROPE

2.1. OVERVIEW

As mentioned above, basic income probably most visibly differentiates itself from modern-day social security benefits by indiscriminately offering means of living to all citizens. As basic income is thought to be both *universal* as well as *unconditional* in character: *everyone* should be able to enjoy the material security it provides, without having to comply with certain demands. Unlike for example pensions or unemployment benefits, one need not provide an extended history of employment or social security contributions, nor does one need to belong to a specific at-risk demographic, such as the unemployed or the elderly. The selectivity and conditionality that characterise modern social security benefits is replaced by the idea of a universal and unconditional benefit for all citizens. In the past couple of years, several initiatives have been launched, trying out benefits that try to implement this universal and unconditional way of providing material security. Building on the premise that modern-day social security benefits may need to be complemented or replaced by something different in order to better achieve certain anti-poverty and social participation objectives, they test benefits with a decidedly more unconditional and universal character.

Several examples can be noted in this regard:

- Finland: the *Perustulokeilun*

In August 2016 the Finnish Ministry of Social Affairs announced a legislative bill that proposed to carry out a two-year basic income experiment in Finland. The experiment was officially launched on 1 January 2017, and is operated under the auspices of *Kela*, the Finnish Social Insurance Institution, running for two years. The trial came into existence as a way of finding out whether or not reshaping the Finnish social security system, by providing a basic income-like benefit, will enable it to respond more aptly to the challenges of a 21st century labour market. It wishes to assess if basic income promotes inclusion in the labour market and provides a positive incentive for the test participants to find employment. One cannot freely apply to be part of the experiment. The Finnish government has selected a test group of 2,000 persons living in Finland who in November 2016 received a basic daily allowance or labour market support under the Unemployment Security Act. The experiment entails providing these individuals with an unconditional income of EUR 560 per month. This corresponds with the lowest level of labour market subsidy and basic unemployment allowance under the Unemployment Security Act. Participation, if selected, is obligatory, as to ensure that the results obtained with the test group are not biased and the government can accurately measure the labour market effects of the removal of conditions on its unemployment benefits. The selected individuals' age ranges from 25 to 58 years old, which excludes

students and persons receiving an old-age pension, as they do not fit with the objective of promoting employment.⁶

- Barcelona: the *B-MINCOME* project

The City Council of Barcelona, with financial help from the European Union, launched its B-MINCOME pilot project in September 2017, with the project's end set in December 2019. As a reaction to the complexity and insufficiency of current aid systems, its goal is to try a new approach in combatting poverty and inequality in Barcelona's poorest neighbourhoods in the north of the city. To do this, the project offers "comprehensive" support to participating households, by combining both "passive" support (the provision of a benefit) and "active" support (four activation policies amongst which job training and a housing renovation programme). The benefit provided by the project is Barcelona's municipal inclusion support, which is designed to complement income depending on household structure and financial status, and can range anywhere between EUR 100 and EUR 1,676. The participating households are selected from Barcelona residents who have an open Social Services file or are taking part otherwise in other social programmes (such as the Social Insertion Service). Amongst the nearly 5,000 households eligible to take part in the project, a draw was held through a randomised stratified system to choose the 1,000 participants. A similar number of homes were selected to act as a control group. At least one member of the household must be aged 25 to 60 years old. If selected, participation is not obligatory. The 1,000 households who consent to participating in the project will be divided into groups that receive the aid following two criteria: whether or not their aid is limited, and whether or not receiving aid is made conditional. The first criterion means that the benefit will be reduced if the household obtains additional income; the second criterion refers to the obligation to participate in the "active" policies. Out of 1,000 participating households, 450 will receive the benefit without having to take part in the active policies.⁷
- Livorno: the *reddito di cittadinanza locale*

Medium-sized Italian city Livorno launched a six-month basic income pilot programme that began in June 2016, and was extended in January 2017. It ran from April to December 2017. Officially dubbed "*reddito di cittadinanza locale*" or 'local citizenship income', it aimed to provide "economic and social support" to those who are "temporarily in conditions that prevent them from providing in their livelihood and that of their family". The benefit was a monthly allowance of EUR 80 for one person, EUR 150 for two and EUR 220 for three or more. In order to be eligible for the benefit, one had to meet both a number of admissibility

(6) Kela/Fpa, *From idea to experiment. Report on universal basic income experiment in Finland*, Helsinki, Kela, 2016, <https://helda.helsinki.fi/bitstream/handle/10138/167728/WorkingPapers106.pdf?sequence=4> [accessed 12.06.2017].

(7) Ajuntament de Barcelona, *Barcelona launches a pilot project in the Besòs with the EU to create a municipal income for inclusion*, Barcelona, Ajuntament de Barcelona, 2017, <http://ajuntament.barcelona.cat/premsa/2017/05/31/barcelona-posa-en-marxa-un-projecte-pilot-al-besos-amb-la-ue-per-crear-una-renda-municipal-dinclusio/> [accessed 9.11.2017].

criteria as well as behavioural conditions. To be admitted into the programme, the applicant had to first hold Italian or EU citizenship, or non-EU with a residence permit, and reside in the municipality of Livorno. Second, the age of the person applying had to lie between 29 years and 66 years and 7 months. Third, one had to be unemployed at the time of application. Fourth, the applicant had to satisfy a number of conditions that measures both income and means. This meant that one may not already receive support through a similar government programme called *SLA*⁸, nor may the applicant's family have an *ISEE* attestation exceeding EUR 3,000.⁹ The applicant was also not allowed to own a car with horse power equal to or higher than 80 KW purchased in the last 12 months, as well as not own real estate, with the exclusion of only properties belonging to certain cadastral categories.

To effectively enjoy the benefit, the applicant had to furthermore commit to meeting with three behavioural conditions. One had to first provide immediate job availability at the local employment centre. Second, the applicant was obliged to offer his or her availability for participation in projects “useful to the community” managed by the municipality. This was broadly defined as projects in the fields of “cultural, social, artistic, environmental, educational and protection of common goods”. Third, one was under the obligation to communicate promptly to the municipality should there occur any change in income, wealth, work and family situation that may result in the loss of the right. Once the applicant had fulfilled all the required admissibility criteria, he or she was attributed a score on the basis of which a ranking is made. The 100 best ranked families out of 997 applications received the benefit.¹⁰

- The Netherlands: a framework for municipal experiments

As a reaction to the experiments proposed by several Dutch cities, the Dutch government adopted a resolution in February 2017 that establishes a framework for municipalities to experiment with the social assistance benefits provided under the Participation Act. By doing so, the government enables municipalities to research what the optimal way is for social assistance beneficiaries to obtain durable employment. Central to the Participation Act is the job-seeking condition in article 9, incumbent upon every benefit recipient: unless “urgent reasons” demand that a “temporary suspension” be given, every person must actively seek employment. The legal framework created by this resolution however enables cities to conduct experiments whereby this condition is suspended. More precisely, it allows for

(8) Acronym for “*Sostegno per l’Inclusione Attiva*”. This is a similar poverty alleviation programme for families in vulnerable socio-economic situations, applied nationwide.

(9) Acronym for “*Indicatore della Situazione Economica Equivalente*”. This is a tool used by the Italian government to measure the economic situation of a family by taking into account income, assets (securities and real estate) and the characteristics of a family (type of family and size).

(10) Comune di Livorno, *Reddito di Cittadinanza Locale/Contributo economico mensile 2017*, Livorno, Comune di Livorno, 2017, <http://moduli.comune.livorno.it/modulistica/schede/reddito-di-cittadinanza-localecontributo-economico-mensile-2017> [accessed 11.06.2017]; Comune di Livorno, *Bando per reddito di cittadinanza locale contributo economico mensile anno 2017*, Livorno, Comune di Livorno, 2017, <http://moduli.comune.livorno.it/modulistica/sites/default/upload/ServiziSociali/bando%20redditodi%20cittadinanza%202017.pdf> [accessed 11.06.2017].

conducting experiments with three experimental groups: a “suspension” group (*ontheffingsgroep*), an “intensification” group (*intensiveringsgroep*) and a “release” group (*vrijlatingsgroep*). The suspension group is relieved of all formal activation conditions. The intensification group is subjected to a doubling of activation efforts by the re-integration services. The release group is entitled to circumvent the existing cumulation rules and enjoy both the benefit and an income from labour up to a maximum of EUR 200 monthly. Participation in the experiment is not obligatory, and only a maximum of 4% of municipal welfare recipients may participate in the experiment at all times. The maximum duration of the experiment is limited to two years for every cycle of three years.¹¹

2.2. ANALYSIS: THE LIMITED RELEVANCE OF BASIC INCOME AS A MODIFIED SOCIAL SECURITY BENEFIT

The initiatives discussed above differ in the way that they are planned and executed. First, the Dutch, Barcelonan and Livornese experiments are decidedly local in scope, whereas the Finnish approach exhibits a nation-wide focus, even though it is highly selective. Second, the Dutch, Barcelonan and Finnish initiatives intend to introduce a basic income by deregulating existing benefits, while the Livornese scheme establishes an entirely new benefit. Third, the Livornese benefit scheme is more of a top-up than a real income replacement, whereas the other three initiatives can provide a full income replacement. However, different as these schemes may seem in their design, all of them are similar in their approach to implementing basic income into the legal order. All four experiments are typified by the will to provide a basic income through *modifying the currently existing social security structures in order to transform one or more benefits into basic income*. Either the regulatory frameworks of actual benefits are adjusted, or a new benefit is introduced that is clearly modelled after the framework of a current benefit, all the while navigating within existing social protection structures. Innovation is achieved through remodelling and reorientation. In this way, basic income is merely *one type of benefit* with specific, albeit unconventional, characteristics, such as universal application and the absence of behavioural conditions, while other benefits, related to exceptional costs or exceptional status, would continue to be awarded. This minimalist approach steers clear of the laborious task of developing an entirely new system of social protection, a goal which is often stated or implied when talking about basic income. As a result, it is uncertain to which extent the results produced by these experiments can be used to promote the idea of a practically feasible basic income.

The Finnish, Dutch and Barcelonan initiatives take an existing social security benefit and modify its conditions to make it more inclusive, mimicking the unconditional nature of basic income. In Finland, the benefits provided under the unemployment act are taken as a starting point, whereas both the Barcelona and Dutch initiatives propose using the benefits granted under social welfare legislation. The benefits are then deregulated, which in essence boils down to stripping them from the job-seeking

(11) Dutch government, Nota van Toelichting bij Besluit van 22 februari 2017, houdende vaststelling van het Tijdelijk Besluit experimenten Participatiewet, *Staatsblad van het Koninkrijk der Nederlanden*, 1 March 2017.

requirement that makes up the essence of their behavioural conditions. In this way, much like true basic income, they become unconditional. This lack of conditionality is, however, immediately put into perspective by the specific personal scope of the initiatives. Non-conditionality is offset by selectivity. Only welfare or unemployment assistance recipients are targeted, and as a consequence, a rather specific demographic segment. Furthermore, only a relatively small sub-group of that target group is actually selected for the experiment. In Barcelona, only 1,000 out of 5,000 eligible families participate in the experiment, while the selectivity is much greater in the Netherlands (max. 4% of welfare recipients) and Finland (only 2,000 participants in the entire country). In Finland, this selectivity is compounded by an age limit that only allows for persons between 25 and 58.

As a result, the relevance of these initiatives is limited by the specific personal traits that define the participant group. It can only provide an answer to the question of how a selected group of *unemployed persons* or *persons on welfare*, within a certain age limit, would respond to receiving a deregulated form of unemployment or welfare benefits. Insofar as one considers basic income as a means of social protection for the weaker, negating the poverty trap associated with unemployment insurance and welfare policies, this is not a problem. However, if one views basic income as a more *general* tool for self-realisation for *all citizens*, as for example the 2016 Swiss referendum on basic income did, this selective target audience limits the relevance of the experiments to one aspect of basic income. As such, these experiments steer clear of one of the fundamental questions surrounding basic income: does receiving a basic income cause people *in general*, including non-vulnerable groups, to put down their work? These initiatives essentially boil down to granting a welfare or unemployment benefit, whilst simultaneously disabling the control mechanisms in place. Creating a more *inclusive* benefit is not the same as creating a *universal* one: while the specific scope of application can provide useful answers in the fight against social exclusion for the weaker, it simultaneously prevents any questions being resolved regarding the effect of basic income on the general population.

Likewise, the basic income experiment conducted in Livorno falls into the same trap. Whilst depicted by authorities as a new benefit, operating outside of the existing structures of social security benefits, it is another form of social welfare benefit in all but name. Unlike basic income, which is universal, the *reddito di cittadinanza locale* is designed to help only those families who are in poverty or at least close to such a state of need. To qualify as such a family, one must meet four different criteria that directly or indirectly test the means of the person seeking the benefit, including not owning real estate or having an *ISEE* attestation not exceeding EUR 3,000. Depending on how these conditions are fulfilled, a ranking is made, and only the best ranked families are eligible to receive the benefit. As such, the Livornese basic income clearly showcases a targeted anti-poverty objective that is hard to reconcile with the – theoretically at least – universal nature of basic income. Furthermore, the inclusion of three behavioural conditions, necessary for the enjoyment of the benefit, adds to the character of the local citizenship income as a form of welfare benefit. Not only must participants communicate on their material status to the authorities and prove that they are actively looking for employment, they must even participate in community projects. Again, with such an obviously limited scope of application, the question

must be asked what the relevance of this experiment can be for the goal of promoting the practical feasibility of a true basic income scheme.

3. THE ROOT OF THE PROBLEM: A SOCIAL SECURITY PERSPECTIVE

By limiting their ambition to modifying existing benefits, the experiments prove above all what the effects of deregulated benefits are on certain demographic segments. Never leaving the logic of the current structures of social security, they fail to achieve what makes the basic income a *universal* tool for the benefit of *all society*. As we will argue below, this limited scope is emblematic of the use of a social security perspective when conceiving basic income experiments. By viewing basic income through the prism of social security, one unavoidably juxtaposes the monolithic structure inherent to the idea of basic income with the polyolithic structure that has long characterised modern systems of social security. This clash of contrasting structural characteristics results in the questionable relevance of these experiments. The only way out is to accept the structural limitations that come with a social security perspective and therefore to abandon it.

3.1. POLYLITHIC AND MONOLITHIC STRUCTURES OF SOCIAL SECURITY PROVISION

It is often argued that the introduction of a basic income within a given society can lead to significant efficiency and budgetary gains, by rendering obsolete the complicated and sometimes bloated structures that typifies social security nowadays. By condensing the existing forms of social protection into one benefit, there would no longer be any need for a multitude of different laws, institutions and benefits. Citizens can rely on one benefit for all their primary social protection needs, resulting in both a more transparent as well as cost-efficient solution, cutting away excess administrative costs.

Whether or not these statements are true is food for thought for economists and financial experts alike. From a legal perspective however, this argument marks a notable departure from the existing conceptions of social security. In the absence of a widely accepted definition, social security in a given society is often defined by the benefit schemes it intends to provide.¹² Following the minimum standards imposed by ILO Convention 102, a considerable part of the world views social security as a collection of benefits related to medical care, sickness, unemployment, old age, employment injuries, family, maternity, invalidity and survivorship. What benefits to include in the social protection states offer depends on what risks individuals are confronted with are regarded as *social* risks, and thus part of the responsibility a society must bear towards its members. This has led to both the inclusion of new benefits, such as those that support care for those unable to cope, as well as the gradual disappearance of old benefits, such as those that are based on survivorship. It is this institutionalisation of protection against certain risks that ultimately shapes the appearance of social security systems. In this way, what we consider to be social security is in fact determined by how we organise social security, making *essence follow form*.

(12) Pieters, D., *Introduction into the Basic Principles of Social Security*, Deventer, Kluwer, pp. 30-31, 1993.

What makes basic income relevant in this regard, is how they intend to deviate from this logic. Instead of breaking down social security systems into a multitude of different benefit schemes, basic income holds the promise of organising social security around one single benefit scheme, namely the basic income itself. Citizens can turn to social security for an unconditional and universal form of income that shields them against all risks they may encounter. In this fashion, what we consider to be social security is determined by the level of protection that the government wishes to provide, and not by a collection of different levels of protection offered in varying circumstances, making *form follow essence*.

As a result, the provision of a basic income leads to adopting a *monolithic structure* of social security: one benefit to deal with all primary social protection needs. This contrasts with the currently dominant view on the organisation of social security, which promotes adopting a *polylithic structure* of social security: each aspect of an individual's need for social protection is handled by a different benefit. Moreover, within the regulations of these different benefits, a differentiation is often made between employees, self-employed persons, civil servants and other special categories, further adding to the complexity. Especially in Europe, polylithic structures have become the norm. A part of the reason why is how social security systems have organically evolved throughout the past few centuries, gradually including protection against an increasing number of social risks. Another part of the reason is political, as integrative politics under the European Union have made countries' converge into the same polylithic model of organising social security.

3.2. BASIC INCOME: A STRUCTURAL PROBLEM

As a consequence, basic income represents more than just a new type of benefit provided by the state to its citizens. Basic income has come to symbolise a *radical overhaul of the way social security is organised*. It means departing from the dominant polylithic model of social security organisation, and moving towards a monolithic model instead. This shift in the underlying logic of structuring social security systems is of profound importance. It is precisely because of these structural implications that the introduction of a basic income within a given system of social security leads to experiments with limited scientific relevance.

Polylithic structures split up an individual's need for social protection into a multitude of different benefits, each governed by its own laws and institutions. This does however not mean that this need can always be reduced to providing protection against one social risk. Overlap between social risks form a common occurrence. For example, a person who has been sick for an extended period of time may find it hard getting out of unemployment. Conversely, the need for protection against the negative effects of sickness does not end when receiving job-seeking support through social welfare programmes. As a result, polylithic structures are characterised by the presence of cumulation rules. These rules signify which legislation is to be applied in case of overlap. They can prohibit cumulation between two or more benefits in an absolute way; they can also allow the combination of certain benefits until a fixed level of income has been reached, or even stand for a total freedom of cumulation. In this way, cumulation rules lie at the heart of how polylithic structures work. They provide

a compass that shows the way to reconcile the complex nature of an individual's need for protection with the legislator's desire to reduce a person's reality to one social need. They are not only a practical consequence of how these structures are organised, but even a logical necessity: citizens are best helped when the right legislation, tailored to their specific needs, is applied.

Monolithic structures on the other hand have no need for these cumulation rules. An individual's need for social protection is met through the provision of one single income that encapsulates the protection against all social risks the individual may be confronted with. There is no overlap between different benefits, as there is only one. Benefits with a supplementary function, such as those relating to exceptional costs or costs related to an exceptional status of need, do not evoke the need for cumulation rules either, precisely because of their nature as a top-up for specific circumstances. This structural difference between basic income and the currently prevailing conceptions of social security explains why basic income experiments are likely to be limited in such a profound way in scope and objective. In order to materialise the concept of a basic income into a concrete set of rules, and with it the promise of a monolithic structure of social security provision, one must disentangle the whole cumulation rules that are inherent to polyolithic structures. Faced with the complexity of such an undertaking, basic income experiments will try and avoid confronting cumulation rules by situating the basic income fully within the currently existing structures of social security. This means either slightly modifying current benefits, as the Finland, Barcelona and Dutch initiatives show, or adopting a new benefit anchored firmly within the logic of the old ones, such as the case of Livorno illustrates. As these forms of basic income never leave the existing legal framework, there is no need to devise a work-around concerning the question of cumulation. Even though the Finnish experiment means a notable alteration of unemployment benefits, as job-seeking conditions are removed, the applicable cumulation rules still stand; the same can be said for the Dutch or Barcelona initiatives. The Livornese local citizenship income likewise features a set of explicit and implicit, through means testing, cumulation rules that prevent the benefit from clashing with currently existing ones. As a result, these results obtained by these experiments are of limited scientific relevance. At the most, they prove that existing benefits can be deregulated further to the advantage and emancipation of those in need of the benefit. They do not give clues to what the effect of the benefits may be on the general population.

3.3. DEPARTING FROM A SOCIAL SECURITY PERSPECTIVE

The question thus arises: is introducing a basic income at all feasible from a structural standpoint? Can basic income experiments be modelled so that they fit seamlessly into a modern legal order? As we have argued so far, introducing a basic income inside the current frameworks of social protection is problematic due to the difference in intrinsic structural qualities between basic income and modern conceptions of social security. Attempting to install monolithic elements within a predominantly polyolithic structure is trying to reconcile opposing views; attempting to replace a polyolithic structure by a monolithic one implies the strenuous task of having to disprove the merits of a risk-based system of social security. This condemns the basic income initiatives to being

forever stuck meddling with the specifics of existing benefits for specific demographic segments.

As a result, basic income will not likely form the solution to the problems modern social security systems are faced with, because introducing them either brings about a series of new – and possibly even more complex – problems by having to rethink an entire system of social protection, or does not fundamentally solve anything at all, by modifying existing benefits in the margin. However, a specification is needed: our assessment is only true *in so far as we view basic income from a social security perspective*. Experiments are only destined to fall into the same trap if we regard basic income as a form of social security, by either letting them play the role of a new type of social security benefit or constituting a new type of social security system as a whole. Crucially, if we want basic income experiments to succeed, and truly obtain a universal character, we should depart from the social security-oriented perspective that, due to its polythetic nature, will always be specific in scope. We need to stop regarding basic income as a social security benefit, but more generally, as an income provided for by the state. As basic income is universal and unconditional, it need not necessarily adhere to the logic of social protection. Even though granting every citizen an unconditional sum will likely better shield them against the negative financial externalities of certain risks, to require that the income be used exclusively for this protection would negate the unconditional and universal character of the basic income itself. Basic income is an indiscriminate form of government subsidy to all its citizens, with no specified purpose other than the belief that it will bring citizens better social protection and allow them to develop themselves as persons more freely.

Modelling basic income after social security benefits means accepting the inherent limitations such a perspective brings; precisely those limitations are what keeps basic income from becoming feasible. As a result, we could look at basic income from a different perspective; one that, like basic income itself, is not bound by a specific logic that targets only certain needs or a defined group of persons. Basic income is not by definition a form of social security, even though it may bring about similar effects as to the social protection of individuals. The question now remains what mechanism can make basic income achievable. In the history of research into basic income, the tax system has been the most prominent alternative to the social security paradigm; specifically, establishing a basic income through negative taxation.¹³ Closely studying this mechanism should be the object of further research into basic income; potentially mastering it to escape the theoretical deadlock put forth in this paper should be an objective.

4. CONCLUSION

In this paper, we have tried to make a case for developing a new theoretical perspective on basic income. Basic income is often viewed exclusively through the prism of

(13) Friedman, F., *Capitalism and Freedom*, Chicago, University of Chicago Press, pp. 190-195, 1962; Friedman, F., *Free to Choose: A Personal Statement*, New York, Harcourt Trade Publishers, pp. 120-126, 1980.

economics or ethics, implying that if questions surrounding financial feasibility or moral choice are answered, implementing the basic income itself constitutes but a practical matter. In reaction to this, we have argued that the technical specifics of establishing basic income schemes, by way of laws and regulations, are crucial to the success of basic income experiments. At the heart of our argument is the observation that modern conceptions of social security employ a specific structure that splits out social protection into a multitude of different spheres, each with their own institutions, regulations and benefits. Basic income however is seen as the very negation of this way of structuring social protection, as it promises one single income to meet all primary needs. Experiments with basic income performed in the past year have all, in their own way, tried to either ignore or circumvent this structural difference. Yet their limited success and targeted relevance have shown that these structural characteristics cannot simply be put to the side. We therefore argue in favour of departing from the social security paradigm that is prevalent amongst those pleading the case of basic income. While it is true that basic income can lead to better social protection, this cannot be a logical necessity; arguing otherwise would contradict the very nature of basic income, as they are meant to be unconditional and universal. Instead of adopting the specific logic of social protection through which to view basic income, and accepting its limitations, the search must be on for other perspectives, and other mechanisms, that can materialise the idea of an unconditional and universal protection in a modern-day society.

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**ACCESS TO HEALTHCARE IN THE EU: AN OVERALL POSITIVE TREND BUT
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ACCESS TO HEALTHCARE IN THE EU: AN OVERALL POSITIVE TREND BUT IMPORTANT INEQUALITIES PERSIST¹

BY | RITA BAETEN, SLAVINA SPASOVA AND BART VANHERCKE²

| European Social Observatory

INTRODUCTION

Most European health systems provide nearly universal population coverage for a wide range of benefits. Notwithstanding this, people on a low income and vulnerable groups, in nearly all countries, have more difficulties obtaining access to care. At the same time, vulnerable and marginalised groups in societies tend to have more health problems and thus have more healthcare needs (Mackenbach et al., 2007).

Access to care can be hindered by various hurdles, which can be financial, organisational or personal. Financial hurdles relate to the extent to which the needed health services are financially covered; organisational hurdles can relate to waiting times, availability of quality care, the level of provider choice, or available information; individual patient characteristics which can hinder access to care include poor literacy, language or culture, and low levels of trust between the provider and the patient (Busse et al., 2006).

The 2008-2009 economic and financial crisis, and in particular the ensuing austerity measures, exacerbated problems relating to access to care in many countries. Since 2015, a gradual recovery has taken place, both in terms of self-reported unmet needs for medical care and with regard to investments in the health system. However, for some countries, levels of unmet needs have continued to increase.

This article explores the main factors which may be associated with inequalities in access to healthcare in the 28 Member States of the European Union (EU). To do so, we analyse health system characteristics with regard to healthcare financing, organisation and delivery. We furthermore assess health system reforms since the financial and economic crisis, addressing (in)equalities in access to healthcare.

Our approach is mainly qualitative, drawing on a Synthesis Report (Baeten et al., 2018) written by the authors in the context of the European Commission-funded European Social Policy Network (ESPN). The article analyses evidence from country reports (ESPN Thematic Reports 2018) on inequalities in access to healthcare, written

(1) This article was first published, in Dutch, in the 28th edition of the Yearbook on Poverty and Social Exclusion (Coene et al., 2019). It was made possible in the framework of a project (2018-2019) financed by the Belgian National Institute for Health and Disability Insurance (NIHDI/RIZIV/INAMI). The extensive research done for this article was also supported through the RE-InVEST project that received funding from the European Union's Horizon 2020 research and innovation programme (grant agreement no 649447).

(2) The authors wish to thank Chiara Belletti for her graphical support.

by ESPN country experts.³ In producing their reports, national ESPN experts cite many different sources in support of their analysis. References to these are not included in the present article. Our analysis is accompanied by a quantitative assessment of Eurostat and OECD data.

We first describe which groups in society face the most important hurdles in accessing healthcare (Section 1). Next, we analyse the main factors which may impact inequalities in access to healthcare (Section 2). In section 3 we present trends in health system reforms addressing access to healthcare. Section 4 summarises the key findings and concludes.

1. WHO FACES THE MOST SERIOUS DIFFICULTIES IN ACCESSING HEALTHCARE IN EUROPE?

Different population groups may have different access to healthcare. Income, gender, age and activity status may determine to an important extent inequality in access to healthcare. Some specific groups may be particularly vulnerable as they are exposed to a multitude of risk factors: for example, single mothers on a low income, the unemployed and Roma people.

Based on the EU indicator on self-reported unmet needs for medical examination and care, this section examines which groups in society face the most serious difficulties in accessing healthcare and what the main reported reasons are.⁴

1.1. UNMET NEEDS FOR MEDICAL EXAMINATION AND CARE: THE OVERALL PICTURE FOR THE PERIOD 2008-2017

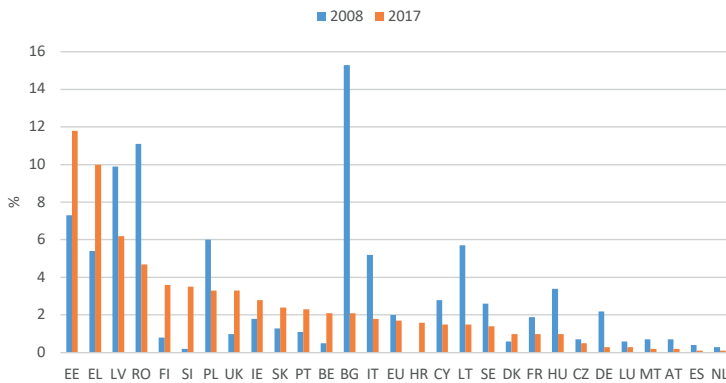
Costs and waiting times are the main reported barriers for access to healthcare. Here, we present the overall picture, before describing, in Section 1.2, which groups are mostly impacted by these factors.

(3) The study illustrates the main challenges and trends in national policies through examples. Countries which have developed along similar lines are listed in brackets (e.g. AT, BE, BG) so that the reader interested in knowing more about these can examine the EU ESPN national experts' country reports. For the used country codes, see Annex.

(4) Different approaches and indicators are available to measure the accessibility of healthcare and to assess the extent of inequality in access to services. The most common approach to monitoring inequalities in access to healthcare is through a proxy indicator on the self-reported unmet needs for medical care. Indicators on self-reported unmet needs measure people's subjective perception of their health needs, and thus do not objectively capture health needs. Despite this, it is commonly agreed that they are the best available proxy to measure unmet medical needs (EXPH 2016). While various surveys include questions on self-reported unmet need for medical care, the main source in Europe is the EU Statistics on Income and Living Conditions (EU-SILC). The questions recommended to the Member States to use for this indicator are: "Was there any time during the past 12 months when you really needed medical examination or treatment (excluding dental) for yourself?"; and if the answer is positive "What was the main reason for not having a medical examination or treatment?" This dataset has the undeniable advantage of facilitating cross-country comparisons and providing a first indication of inequalities and problems regarding affordability and accessibility. Nevertheless, many ESPN experts have pointed to its limitations and emphasised the need for caution in interpreting the results (See also EXPH 2016; European Commission 2017).

In 2017, on average only 1.7% of the EU population had unmet needs for healthcare due to cost, travel distance and waiting times taken together (see Figure 1). However, this relatively low value hides significant differences between countries: from more than 5 times the average in Estonia (11.8%) and Greece (10%) to only around 0.1% of the population in Spain and the Netherlands.

FIGURE 1: SELF-REPORTED UNMET NEEDS FOR MEDICAL EXAMINATION AND CARE DUE TO COST, DISTANCE AND WAITING TIME



Source: Eurostat [hlth_silc_08].

The 2008-2009 economic crisis exacerbated problems relating to access to care in many countries. While, for the EU as a whole, 3.0% of the EU population reported that they had been unable to obtain the healthcare they needed in 2009, this percentage rose to 3.6% in 2014. As we will see in section 2.1, public expenditure on health dropped substantially in this period. Austerity measures in many countries included increasing user charges, reducing service provision and the salaries of health staff. In some countries, increasing numbers of people in a precarious employment situation lost their entitlement to healthcare. Furthermore, household budgets available for healthcare decreased as a result of reduced income levels (due to rising unemployment and reduced wages) and increased costs for other basic services (Eurofound, 2014).

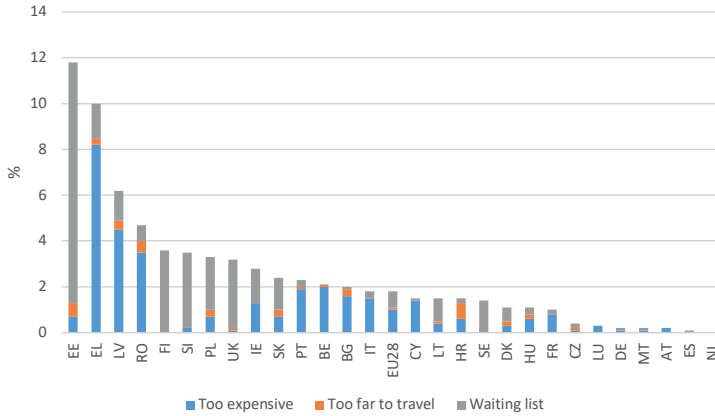
From 2015 onwards, the share of the population reporting unmet needs for healthcare gradually decreased to reach a relatively low level (1.7%) in 2017 (Eurostat, 2018).

There were however significant variations in trends between Member States and between social groups within Member States. While in most countries there has been an increase in unmet needs for medical care during the crisis years, there has been a steady decrease since then in many countries (e.g. BG, CY, HR, HU, LT, LU, LV, RO). However, in some countries, the upward trend continued until 2017, in particular in Greece and Estonia. But also in Belgium the numbers continued to increase from

1.5% in 2011 to 2.1% in 2017. The most significant fall in unmet needs was observed in Bulgaria in the period 2008-2015: from 15.3% to 4.7%.⁵

When looking into the three factors separately, cost is the most important factor impeding effective access to healthcare (Figure 2).

FIGURE 2: SELF-REPORTED UNMET NEEDS FOR MEDICAL EXAMINATION AND CARE: MAIN REASONS (2017)



Source: Eurostat [hlth_silc_08].

The most extreme case is Greece, with 8.2% of self-reported unmet needs due to cost alone. Belgium takes, with 2% of the population reporting unmet needs due to cost, a not so glamorous fourth place, after Latvia and Romania (with respectively 4.5% and 3.5% of self-reported cost-related unmet needs). At the opposite end of the spectrum, Denmark, the Netherlands, Spain and Sweden have zero values for unmet needs driven by cost. The second most significant factor impeding effective access to medical care is the issue of waiting lists — with the highest score being 10.5% in Estonia, followed, at a considerable distance, by Finland (3.6%). Finally, there is the factor of travelling time, which is far less important in all countries: Croatia has the highest score here: 0.7%.

The following section analyses how personal characteristics relate to these systemic factors.

(5) There have been breaks in time series for the indicator on unmet needs for medical examination or care in the Eurostat data set for the following countries and years: Belgium (2011), Bulgaria (2016), Finland (2015), Poland (2017) and the United Kingdom (2017). We therefore use different time periods for these countries, to ensure comparability over time.

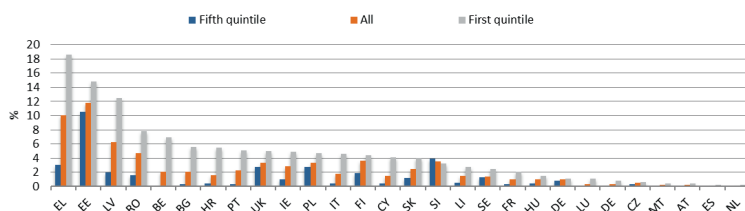
1.2. WHICH POPULATION GROUPS ARE IMPACTED THE MOST?

1.2.1. Low income as the key factor associated with unmet needs for medical care

Those on a low income have the highest unmet needs for medical examination and care (Figure 3). However, there are important variations between countries. The EU average of unmet needs for the lowest incomes is 3.3%; for the highest incomes the proportion is 0.8%. Some of the countries display differences of more than 5 percentage points between the lowest and highest income quintiles in self-reported unmet needs for medical examination and care (BE, BG, EL, LV, RO). The most striking example is Greece, where those in the lowest income quintile report 18.6% of unmet needs due to cost, with only 3% in the highest. Only a few countries – those with the lowest scores on unmet needs due to cost – report barely any difference between income groups (AT, CZ, DE, ES, MT, NL).

It should be noted that Belgium performs rather poorly on this indicator. In spite of the fact that public expenditure on healthcare is relatively high in Belgium (see Section 2), there are strong inequalities in access to healthcare between socio-economic groups. Even more importantly, while the number of people reporting unmet needs in the lowest income quintile decreased from 6.1% in 2011 to 3.3% in 2017 for the EU as a whole, it increased in Belgium from 4.8% to 6.9%. Most Belgian respondents reported that they were unable to have access to necessary medical care because it was too expensive for them.

FIGURE 3: SELF-REPORTED UNMET NEEDS FOR MEDICAL EXAMINATION AND CARE DUE TO COST, WAITING TIME AND TRAVELLING DISTANCE BY INCOME QUINTILE (2017)



Source: Eurostat [hlth_silc_08].

The crisis and the ensuing austerity measures played a significant role in aggravating unmet needs among low income populations in countries such as Greece and Portugal. Health system characteristics may aggravate or offset the impact of low income on unmet needs for medical care (see Section 2).

Activity status also impacts access to medical care in some countries (Eurostat, 2019b). In general, the unemployed have serious difficulties accessing healthcare. In Greece (11.2%), Latvia (14.2%) and Estonia (15.2%) the unemployed face substantial problems in having access to care in 2017. But even in countries where the percentage of unmet needs for medical examination and care among the entire population is below the EU average, the unemployed may have a significant level of unmet needs for medical care (e.g. BE, BG, FR, FI). Several factors may explain problematic access

for the unemployed, such as low incomes, absence of legal coverage or lack of occupational health insurance (see Section 2).

In some countries pensioners' access to healthcare is even significantly more impeded than that of employed people. This is mostly the case in Central and Eastern European countries (BG, EE, HU, HR, LT, LV, RO, SI, SK), but also in Greece and Finland. Estonia and Greece top the charts, with, respectively, 16.4% and 15.8% of pensioners declaring unmet needs for medical examination and care in 2017 (Eurostat, 2019b).

1.2.2. Composition of household and gender matter

Gender is also a factor having an impact on unmet needs for medical care: women are clearly (far) more disadvantaged than men in most EU countries, with some exceptions, such as Ireland, Denmark, the Netherlands. In some countries the gender gap in unmet needs is particularly striking: 4.6 percentage points in Estonia and around 2.5 percentage points in Romania, Greece and Finland (Eurostat, 2019a).

Single person households are another vulnerable group with regard to access to healthcare (e.g. BE, FR). Single persons with children, and in particular single women, are among the categories reporting most difficulties in paying the costs of health services (Eurostat, 2016).

1.2.3. Particularly vulnerable groups: homeless people, migrants and ethnic minorities

Homeless persons (and other marginalised groups such as alcoholics and drug addicts) are a particularly vulnerable category with regard to effective access to healthcare in most countries. Many factors may explain their lack of effective access, including their lack of a registered address, lack of information regarding their rights and the services available to them as well as poor health literacy. These people also have a significantly worse health status.

Roma populations are also among the most vulnerable with regard to access to healthcare, especially in Central and Eastern Europe, due to the lack of health insurance, incomes which are too low to afford healthcare, as well as poor health literacy. Asylum seekers, refugees and undocumented migrants have been reported to be in a particularly vulnerable situation in several countries regarding access to healthcare. Asylum seekers and undocumented migrants have restricted formal access to healthcare in most countries under scrutiny.

2. HEALTH SYSTEM FEATURES ASSOCIATED WITH INEQUALITIES IN ACCESS TO HEALTHCARE

In this section we explore the main features of the healthcare systems with a view to understanding the differences in access to healthcare between countries, within countries and over time, as discussed in Section 1. We explore three main characteristics of health systems: first, we look at differences in health system financing between countries and over time (Section 2.1), second, we look at the various dimensions of health coverage: who is covered for healthcare (population coverage), what are the health services and products

covered (benefit package) and how much is covered (user charges policies) (Section 2.2). Third, we discuss availability of health services and health professionals.

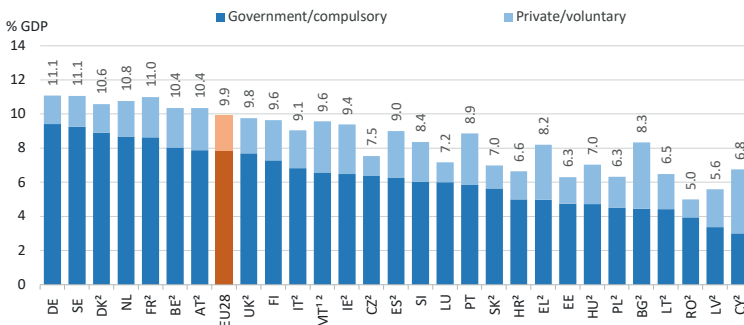
2.1. HEALTH SYSTEM FINANCING

Adequate health system funding is important for ensuring equal access to quality healthcare. Inadequate public funding creates and exacerbates access barriers (SPC 2016, Or et al., 2009).

2.1.1. Public resources spent on healthcare

There is a huge variety in the public resources made available to the health systems in EU countries, ranging from 3% of GDP in Cyprus to 9.4% of GDP in Germany. In Belgium, public resources spent on healthcare amount to 8% and private spending to 2.6% of GDP (see Figure 4). Public resources include both general taxation and compulsory health insurance contributions. Countries with relatively high public spending include most of the continental European and Nordic countries, while Southern and Eastern European countries are middle and lower-level spenders.

FIGURE 4: HEALTH EXPENDITURE AS A SHARE OF GDP, 2015 (OR NEAREST YEAR)



Source: OECD/EU (2016), Health at a Glance: Europe 2016; Includes investments; OECD estimate.

ESPN experts in many countries underline that the statutory health system in their country is underfunded (e.g. BG, CY, EE, EL, HR, HU, IE, IT, LT, LV, PL, RO) (see also Figure 4), and this low level of funding is reported to be one of the main reasons for the underdevelopment of the health system. This typically results in a limited number of contracts with health providers, underfunding of hospitals, limited supply of medical services and in some cases high out-of-pocket payments. Inadequate supply of health services is referred to in these countries as an implicit form of rationing. It should therefore not come as a surprise that these countries perform worse than the EU average with regard to both access to healthcare and inequalities in access to healthcare between income groups, as measured using the EU-SILC data on self-reported unmet needs for healthcare (see Figure 2 and 3). This corresponds with findings of earlier research that inequalities in access to care are stronger in countries where the level of public health expenditure is relatively low (Or et al., 2009).

After years of continuous growth, health spending slowed significantly across Europe in the wake of the 2008-2009 economic and financial crisis (Spasova et al., forthcoming). In many EU countries, expenditure cuts resulted in drastic reductions in public healthcare funding (e.g. CY, EL, ES, HR, IE, IT, PT). In most of these countries, this was the result of the implementation of the Economic Adjustment Programmes (EAP) agreed with the EU lenders. In Greece, *per capita* health spending dropped by as much as 8.7% on average annually during the period 2009 to 2013. In several countries, public revenue for the health sector also fell as a result of unemployment and falling wages (Jowett et al., 2015).

While for the EU as a whole, health spending *per capita* increased by about 3.1% per year between 2005 and 2009 (OECD/EU, 2016), it increased by only 0.6% between 2009 and 2013 and by around 1.9% each year in real terms between 2013 and 2017 (OECD/EU, 2018). Thus, while the negative trend has been reversed in most countries since 2013, the increase in health spending has slowed down compared to the pre-crisis period (see Spasova et al., 2019 for further analyses). Nevertheless, *per capita* health spending in countries such as Greece and Portugal was still at a lower level in 2017 than in 2009 (OECD/EU, 2018).

2.1.2. Out-of-pocket payments

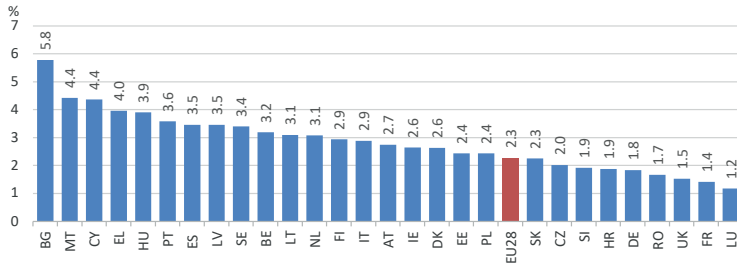
Out-of-pocket payments are an important hurdle for access to healthcare, especially for low income groups. Earlier research found a positive link between the share of households' out-of-pocket payments in total health expenditure and the probability of unmet needs (Chaupain-Guillot, S. and Guillot, O., 2015; Or et al., 2009).

For the EU as a whole, 18% of health spending is borne by households through out-of-pocket payments (OOP)⁶. This share is mirrored in Belgium, where OOP also are at 18% of health spending.

The rate of OOP spending is higher than 25% in eight EU countries (BG, CY, EL, HU, LT, LV, MT, PT) and is as high as 45% in Cyprus.

OOP medical spending levels as a share of overall household consumption are quite significant in most European countries. Bulgaria (5.8%), Malta (4.4%), Cyprus (4.4%) and Greece (4%) have OOP figures (almost) double the EU average of 2.3% while Luxembourg (1.2%), France (1.4%), the UK (1.5%), Germany (1.8%) and Romania (1.7%) have the lowest scores in this respect (see Figure 5).

(6) Out-of-pocket payments (OOPs) are direct payments made by individuals to healthcare providers at the time of service use (https://www.who.int/health_financing/topics/financial-protection/out-of-pocket-payments/en/, last accessed 29/04/2019). Different forms of OOP exist. They include: 1) payments for goods or services that are not covered by any form of third-party payment; 2) cost-sharing (user charges): a provision of health insurance or third-party payment that requires the individual who is covered to pay part of the cost of the healthcare received; 3) excess fees: payments due on top of the regulatory defined user charges, for healthcare provided by health providers who are free to set their tariffs; and 4) informal payments: unofficial (under-the-table) payments for health goods or services (own elaboration based on Rechel, Thomson and van Ginneken (2010)).

FIGURE 5 : OUT-OF-POCKET MEDICAL SPENDING AS A SHARE OF FINAL HOUSEHOLD CONSUMPTION, 2014 (OR NEAREST YEAR)

Source: OECD/EU (2016), Health at a Glance: Europe 2016.

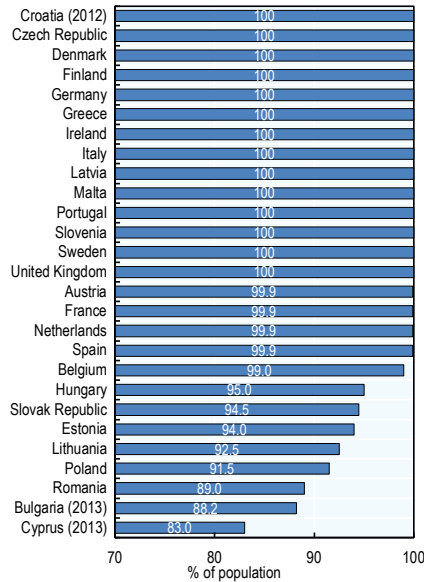
In several countries, a significant share of the population, in particular low-income earners, face “catastrophic” health expenditure (e.g. CY, EL, HU, LV, PT) (ESPN Thematic Reports, 2018). Health spending is considered catastrophic for households when falling ill induces sizeable and unpredictable shocks to a household’s living standards, pushing many of them into poverty. It is defined in relation to a household’s capacity to pay for healthcare.⁷ In countries where the incidence of catastrophic health spending is very low, unmet need also tends to be low and without significant income inequality (Thomson et al., 2019).

2.2. HEALTH COVERAGE

In this section we will discuss 1) who is compulsorily covered for healthcare (population coverage); 2) what is covered (benefit package) and how much is covered (user charges policies) and 3) voluntary health insurance coverage.

While a large majority of European health systems cover nearly the whole population for a comprehensive basket of healthcare benefits, in eight EU countries a significant percentage of the population is not covered by the statutory health system, ranging from 5% in Hungary to 17% in Cyprus (See Figure 6). But even in countries providing nearly universal population coverage, some specific population groups may fall through the safety net. Groups not mandatorily covered include, in some countries: non-active people of working age without entitlement to cash social protection benefits, some specific categories of people in non-standard employment and precarious jobs, some categories of self-employed, people who have not (yet) contributed a sufficient number of years to the system, people performing undeclared work, homeless people, some categories of migrants, asylum seekers and undocumented people.

(7) The threshold has been defined at 40% of total household spending net of subsistence needs (i.e. food, housing and utilities), See K. Xu et al., 2003.

FIGURE 6: POPULATION COVERAGE FOR A CORE SET OF SERVICES, 2016 (OR NEAREST YEAR)

Note: This includes public coverage and primary private health coverage. Data for Luxembourg is not available.

Source: OECD/EU (2018), Health at a Glance: Europe 2018.

In Greece, millions of people lost coverage during the crisis years, mainly those who became unemployed or could no longer afford to pay contributions (such as the self-employed). Since 2016, a reform has provided comprehensive coverage for the whole population, including irregular migrants and refugees (OECD/EOHSP, 2017). As a result, while in 2015, 14% of the Greek population was not covered for healthcare (OECD/EU, 2016), as of 2016 the whole population is covered. This seems to have had an immediate and extraordinary effect on access to healthcare. Unmet needs for medical care for the lowest income quintile increased dramatically in Greece between 2010 and 2016: from 9% to 35.2%. In 2017 this figure fell again to 18.6%, which is nearly half the level of 2016. This evolution illustrates the enormous importance of universal population coverage to ensure equal access to healthcare.

The range of benefits fully or partially covered by the health system is comprehensive in nearly all Member States, including prevention, outpatient primary and specialist care as well as hospital care. In Ireland, however, over half of the population covered, in particular those on higher incomes, are only covered for hospital care; and in Latvia the range of benefits covered is relatively limited.

Several Member States reduced the benefit package in response to the financial and economic crisis. Requirements for cuts in the benefit package, usually for drugs,

were included in the Economic Adjustment Programmes concluded between the EU institutions and Greece, Cyprus and Romania.

In most countries, user charges apply to some health services and products. However, there are substantial differences in the general approach to user charges. In many countries, health services covered by the statutory health system are predominantly available free at the point of use, while in others, cost-sharing applies for most inpatient and/or outpatient care services (see Table 1).

TABLE 1: GENERAL POLICIES ON USER CHARGES IN EUROPE

Health services predominantly free at the point of use	Cost-sharing for most inpatient and/or outpatient health services
AT, CZ, CY, DK, EL, ES, HU, LI, LT, MT, PL, RO, SK, UK	BE, BG, DE, EE, FI, FR, HR, IE, IT, LU, LV, NL, PT, SE, SI

Source: authors' own elaboration drawing on ESPN country reports (2018).

An annual cap on user charges, set per household or insured person, applies in many EU countries (e.g. AT, BE, DE, FI, HR, IE, LU, LV, SI). Above this threshold, the patient does not pay any further user charges. The level of the cap can vary according to income, the health status or age of the person insured. There is a huge variation between countries in the maximum annual amount to be paid by the patient between countries. For instance, in Latvia, the co-payments are capped at EUR 569 per person per year. This cap does not apply to co-payments for pharmaceuticals and medical devices (ESPN Thematic Reports 2018). In Belgium, the annual cap has been set per household and includes nearly all care that is included in the benefit package. It ranges, depending on the income of the household and health situation of the family members, from EUR 371 to EUR 1,910.

Coverage for medicines, dental care, (outpatient) mental health services, physiotherapy, rehabilitation and medical devices is often limited and in many countries some of these services and products are excluded from the benefit package. In general, the share of OOP spent on pharmaceuticals is among the most significant. This is especially true in Central and Eastern European countries (e.g. CZ, EE, HR, HU, PL, RO, LV, SK) and Greece (OECD, 2017).

Most countries apply some mechanisms to protect specific vulnerable groups from prohibitive healthcare expenditure. They may be exempted from cost-sharing, pay lower user charges or qualify for a broader benefit package. These measures may apply, for instance, to patients on a low income, patients with chronic conditions or infectious diseases, recipients of certain social benefits, pregnant women, children and old age pensioners. In Austria, about a quarter of the population and in Portugal more than half of the population are exempted from cost-sharing. In Belgium, insured

persons with a low income, about 20% of the population, pay substantially lower user charges.

Some vulnerable groups may also be exempted from user charges for specific benefits such as pharmaceuticals or dental care. In Belgium for instance, where user charges apply for dental care, dental care is free for children. However, in many countries vulnerable groups are not protected from high user charges for pharmaceuticals, and pharmaceuticals are often exempted from annual caps on user charges.

In some countries, patients who are entitled to public or contracted outpatient and inpatient care also have access, on a cost-sharing basis, to health services delivered by private or non-contracted providers (e.g. AT, BE, EL, FI, FR), in which case the providers can in principle freely set their tariffs. In France, a strong increase in practices charging excess fees led to a reform in 2016, prohibiting private providers from claiming excess fees from vulnerable groups. In Belgium excess fees have been prohibited for hospital care in common rooms (but continue to be allowed in single rooms).

In the wake of the crisis, most EU countries increased user charges (Thomson, 2015). In the countries most heavily hit by the crisis, increasing user charges was one of the conditions set in the Economic Adjustment Programme agreed between the Eurozone countries in difficulty and their EU lenders (e.g. CY, EL, ES, IE, IT, PT). Strikingly, this requirement was not accompanied by conditions to protect vulnerable groups from user charges (Thomson, 2015).

In many of the healthcare systems that perform well with regard to access to care and preventing inequalities in access to healthcare among income groups (see Figure 2 and 3), healthcare is in general free at the point of use (see Table 1) or user charges are relatively low and measures are in place to protect vulnerable groups from user charges. Strikingly, this also applies to some of the countries with below EU average public spending on healthcare as a proportion of GDP (e.g. CZ, ES, UK) (see Figure 4). This suggests that user charges policies are key to ensuring equal access to care. This corresponds with the findings of the WHO that exemptions for poor people are the single most effective co-payment design feature in terms of access (Thomson et al., 2019).

In some countries the role of voluntary health insurance (VHI) is relatively important in ensuring access to healthcare. Both in France and Slovenia, complementary health insurance covering relatively high co-payments is taken out by nearly the whole population and is financially supported by public policies. In Ireland, where the statutory benefit package is very limited for a large share of the population, 45% of the population is mainly covered for healthcare through VHI. In Belgium, an estimated 83% of the population is covered for VHI (2016) and it represents 5% of total health expenditure (OECD, 2018).

Several countries have well-developed VHI schemes paid for by the employer (occupational VHI schemes), providing access to private and non-contracted providers free of charge (e.g. BE, CY, FI, HU, IT, MT, RO) or on a cost-sharing basis (e.g. PT).

These schemes provide faster access and an increased choice of healthcare providers. Such schemes may be supported by public money in different ways. Also in Belgium, there is a growing occupational and individual insurance segment for the risk of large out-of-pocket expenditures for hospitalisation and dental care. Many ESPN experts warn that (the growth in) voluntary and occupational health insurance may exacerbate inequalities in access to healthcare, particularly when the schemes are used to ‘jump the queue’ – for example, by those in better employment situations (ESPN Thematic Reports 2018). These practices indeed lead to access to healthcare based on ability to pay. They may also lead to worse availability of public healthcare if doctors leave the publicly funded sector to work in the private sector. As an example, in Finland, the main reason for unmet needs for medical care are the long waiting times in the municipal system. The hardest-hit groups are the low-income earners, since for most employees, rapid and free access to outpatient care is guaranteed through occupational health insurance coverage.

2.3. AVAILABILITY OF HEALTH SERVICES

While the healthcare benefits package is, in principle, quite broad in most countries, enough services need to be available in sufficient numbers and quality throughout the territory to ensure effective access to healthcare.

In many countries the provision of healthcare facilities is generally considered sufficient, although often with some regional shortcomings. In others, however, underfunding of the health system has resulted in underdevelopment of health services as an implicit form of rationing. Limited budgets for health services and quotas as to the number of services to be performed, have led to accumulated deficits of healthcare institutions, cuts in service provision and underinvestment in infrastructure and health technologies (e.g. BG, CY, EE, ES, HR, IE, LV, PL, RO).

Many European countries experience shortages of health professionals and, in particular, reduced numbers of professionals working in the publicly funded system. Medical professionals are leaving the health system to work in more attractive settings. Factors which make working in the public system less attractive include poor wages and working conditions (e.g. BG, CY, EE, IE, LV, PL, RO). Most Eastern European countries are confronted with a large outmigration of health professionals (e.g. BG, EE, HR, IE, LV, PL, RO). Health professionals also leave to work in the private or non-contracted sector and move from rural areas to set up practice in urban centres. Nearly all EU countries face shortages of health services in rural areas, in particular for primary care.

In several countries, health services have been reduced due to cost constraints in the wake of the financial and economic crisis. In most of the countries heavily hit by the crisis, austerity measures included closure of health services, staff reductions, freezes on hiring, limits placed on the number of contracts with health professionals in the publicly funded institutions and/or reduced wages (e.g. CY, EL, ES, IE, IT). For instance, in Greece, over the period 2010-2015, a decrease of 33.3% has been observed in the number of medical personnel employed in the health centres.

Waiting times are an issue of considerable concern in a large majority of EU countries and are a focus of public debate. Underfunding of the health system and staff shortages in the publicly funded sector often result in problematically long waiting lists. In some countries there are official waiting lists for specific treatments, while in many others there is a lack of transparency on priority-setting, or no monitoring of waiting times. In many countries, patients can bypass waiting times in the public sector if they (first) consult the specialist privately and therefore pay additional fees (e.g. AT, ES, FI, LT, MT, PL, SI). Informal (under-the-table) payments by the patient to physicians, which are common practice in several countries, are also made in order to bypass waiting lists or to have access to healthcare of better quality (e.g. BG, EL, HU, LT, LV, RO, SI). In Bulgaria, informal payments are estimated to make up half of the total out-of-pocket payments.

In some countries, additional funding has resulted in a reduction in the average waiting times in general, or for specific treatments (e.g. HU, LV, MT, NL, PT) while in others they are steadily increasing (e.g. ES, PL, SI, UK). In Cyprus, for instance, during the crisis years, even more people turned to the public sector and, as a result, waiting lists grew even more. Knee and hip replacements are being delayed by 30 months; cataract surgeries by 15 months.

Policies to improve waiting list management through the introduction of official waiting lists and maximum waiting time guarantees for specific treatments have been introduced in many countries (e.g. DE, DK, EE, FI, NL, SE, SI, UK). Patients waiting longer than the maximum waiting time obtain, in principle, more freedom to choose a healthcare provider, for instance a private/non-contracted provider or a provider outside their health region.

3. TRENDS IN REFORMS IN THE POST-CRISIS PERIOD ADDRESSING ACCESS TO HEALTHCARE

In this section we discuss some health system reforms addressing access to healthcare in European countries in the post-crisis period, that is since 2015.

Five countries — Cyprus, Greece, Finland, Ireland and Latvia — have implemented or are planning a comprehensive reform, involving an important overhaul of their health system. These are the EU countries with the most heavily fragmented health systems, with important differences in insurance coverage between different population groups, serious gaps in health coverage and important inequalities in access to healthcare. They are taking steps to move towards more uniform health coverage, by providing the whole population with coverage for the same benefit package. In Cyprus and Latvia, the reform will be funded by transforming the health system into a contribution-based compulsory social health insurance system. Yet reforms in most of these countries are slow, opposition from vested interests is substantial and financial means are often insufficient to ensure proper implementation. In Cyprus, for instance, despite the fact that the reform was unanimously voted through by the Parliament, implementation and operation of the new NHS system is being challenged, just three months before its launch, due to fierce opposition from both the Cyprus Medical Association and the Cyprus Association of Private Hospitals (Mamas, 2019). In Finland, after two years of debate in the parliament, three major aspects of the reform (increased role of private

providers; cost containment measures; and regionalisation of service provision) remain unresolved. In March 2019 the Finnish Parliament stopped the proceedings related to the reform, which triggered the Government's resignation (Keskimäki, 2019).

The countries most heavily hit by the 2008/2009 economic and financial crisis (Greece, Ireland, Spain, Portugal, Cyprus, Italy and Romania) implemented major reforms during the crisis years with the aim of reducing health spending, usually under strict surveillance from the European institutions. Austerity measures included: increasing user charges, reduction of salaries and of the health workforce, reduced prices for health services and products and closure of services. Since 2015, a cautious recovery has taken place in most of these countries, and in some countries austerity measures enacted during the crisis years, have been reversed.

Some of the countries with structurally underfunded health systems have made efforts to increase funding (e.g. CY, EE, LV, PL, RO). Additional funding has in particular been invested in policies aimed at retaining the health workforce and reducing outmigration, including by increasing wages (e.g. LT, LV, PL, RO).

Many European countries took measures to reduce user charges for specific services and products. This usually happened on an *ad hoc* basis. In some countries, such measures reversed increases in user charges enacted during the crisis years. However, some countries also took measures to further increase user charges or reduce protection from high user charges. In Slovakia for instance, the maximum limit for co-payments has been increased, while the groups of patients subject to these maximum limits have been extended.

Measures to improve access to primary care (e.g. EL, FI, IE, IT, PL, RO, UK), including initiatives to shift care from inpatient to outpatient settings and better integration of health and social services have also been a focus of policy measures.

4. SUMMARY AND CONCLUSIONS: AN OVERALL POSITIVE TREND BUT IMPORTANT INEQUALITIES IN ACCESS TO HEALTHCARE PERSIST

This article explored inequalities in access to healthcare in the 28 EU Member States, based on in-depth national ESPN Thematic Reports (2018) and statistical data.

While a substantial increase in unmet needs for medical care was noticed during the crisis years, since 2015, a gradual recovery has taken place. However, in some countries the situation is deteriorating further. Several population groups continue to have significant difficulties in accessing healthcare.

Our analysis found a link between the following health system features and inequalities in access to healthcare:

- First, underfunded systems perform worse than the EU average with regard to both access to healthcare and inequalities in access to healthcare between income groups. Indeed, underfunding leads to substantial shortages in healthcare provision, and in large shares of the healthcare cost having to be paid by the patient.

- Second, population coverage is crucial to ensure equal access to care.
- Third, user charges exacerbate inequalities in access to healthcare. In many of the healthcare systems that perform rather well with regard to access to healthcare, user charges are relatively low or healthcare is free at the point of use. In particular, the protection of vulnerable groups from user charges is crucial to ensuring equal access to healthcare. The low coverage for medicines, but also dental care and mental healthcare, are a cause of concern in many countries.
- Fourth, many countries experience shortages of health professionals, in particular of professionals working in the publicly funded system, which leads to waiting lists. Factors which make working in the public system less attractive include poor wages and working conditions. Serious shortages of healthcare providers, particularly in primary care, have frequently been reported in rural areas, thus leading to inequalities in access to care between regions.
- Fifth, patients can bypass waiting times in the public sector if they (first) consult the specialist privately and therefore pay additional fees. Informal (under-the-table) payments by the patient to physicians, which are common practice in several countries, in particular in Central and Eastern Europe, are also made in order to bypass waiting lists or to have access to healthcare of better quality. This leads to substantial inequalities in access to care. Voluntary and occupational health insurance may exacerbate these inequalities, particularly when the schemes are used to 'jump the queue'.

This article concludes that, while the general direction of travel is towards improved access to healthcare, important inequalities in access to healthcare persist, both between and within countries. Large shares of the EU population, in particular vulnerable groups, face multiple hurdles to access healthcare and therefore face multiple unmet needs. While access to healthcare is considered as a human right,⁸ most EU countries still have a way to go to ensure this right for each and every of their citizens. Some countries will have to invest more financial resources in their health system while others should reorganise their system to better protect vulnerable groups. In both cases, political courage will be needed to face opposition of vested interests.

(8) Article 25(1) of the United Nations *Universal Declaration of Human Rights* (1948) and Article 35 of the Charter of Fundamental Rights of the EU.

ANNEX: COUNTRY CODES

AT	Austria	IE	Ireland
BE	Belgium	IT	Italy
BG	Bulgaria	LT	Lithuania
CY	Cyprus	LU	Luxembourg
CZ	Czech Republic	LV	Latvia
DE	Germany	MT	Malta
DK	Denmark	NL	The Netherlands
EE	Estonia	PL	Poland
EL	Greece	PT	Portugal
ES	Spain	RO	Romania
FI	Finland	SE	Sweden
FR	France	SI	Slovenia
HR	Croatia	SK	Slovakia
HU	Hungary	UK	United Kingdom

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