

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

BY **MARC MORSA**

Senior Researcher at the Université catholique de Louvain (Belgium) – Centre for Interdisciplinary research
Counsellor in International Strategies, Senior Legal Officer – Federal Public Service Social Security (Belgium)

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_hAhVTThUIHUUBBAsQFjAAegQIBBAB&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".

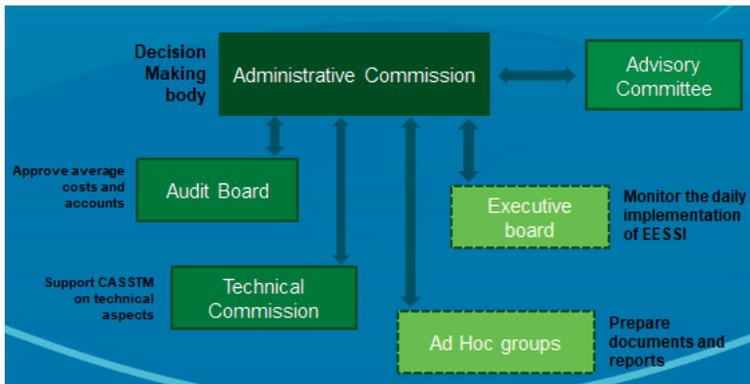
- to develop this function. This Conciliation role of the Commission results from the case-law of the Court of Justice concerning the applicable legislation, or from the legal validity of the posting forms. This conciliation mission is the subject of Decision A1 of the Administrative Commission of 12 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.

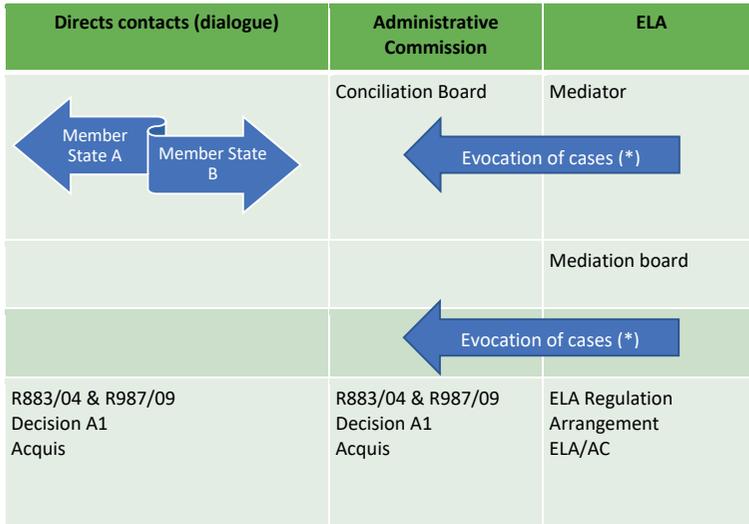
of Social Security Systems⁸⁷. During the inter-institutional dialogue under the Romanian presidency, a compromise proposal – under pressure from the European Commission⁸⁸ – concerning the resolution of disputes was presented and received the agreement of the Parliament and the Council. At the end of 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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