

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

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## 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 3<sup>1</sup> and 4<sup>2</sup> 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 883/2004<sup>3</sup> and 987/2009<sup>4</sup>. 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.<sup>5</sup> 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.<sup>6</sup>

(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.<sup>7</sup> 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 judgment<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup>

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.<sup>11</sup> 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 workers<sup>12</sup> or of EU citizens<sup>13</sup> or the freedom to provide services.<sup>14</sup> 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.<sup>15</sup>

## 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 works<sup>16</sup>, even if his/her residence is in another Member State. However, for some categories of workers, namely posted workers<sup>17</sup> and workers who normally are employed in two or more Member States<sup>18</sup>, special rules have been created. As the Court has emphasised<sup>19</sup> 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 effect<sup>20</sup>: 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.<sup>21</sup>

(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 expression<sup>22</sup> 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 result<sup>23</sup>. 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.<sup>24</sup> 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 States<sup>25</sup> 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.<sup>26</sup>

The waiving of residence clauses for most cash benefits<sup>27</sup> 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.<sup>28</sup> The *raison-d'être* of the Administrative Commission for the coordination of social security systems<sup>29</sup> 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 Regulations<sup>30</sup>. The electronic exchange of data between institutions (EESSI) constitutes one of the major innovations of Regulation

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(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.

987/2009<sup>31</sup>. The shift from paper to electronic data exchange has required – and continues to require – intense preparatory work<sup>32</sup> leading to several extensions of the transitional period. This transitional period expired in June 2019<sup>33</sup> 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.<sup>34</sup>

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.<sup>35</sup> As the Court has underlined in its case-law<sup>36</sup>, 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-active<sup>37</sup>, 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.<sup>38</sup>

Members of the family and survivors cannot invoke provisions of the Regulations which are applicable solely to workers, such as the unemployment chapter<sup>39</sup>. But they can invoke all other provisions such as equal treatment<sup>40</sup> 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 employment<sup>41</sup>.

### 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.<sup>42</sup> 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.<sup>43</sup>

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 nationals<sup>44</sup>. Regulation 1231/2010<sup>45</sup> 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 TFEU<sup>46</sup>, or of the direct effect of provisions laid down in Association agreements concluded with the Maghreb countries<sup>47</sup> or in Decision 3/80 of the EEC/Turkey Association Council<sup>48</sup>. 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 883/2004<sup>49</sup>, 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 UK<sup>50</sup> 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 987/2009<sup>51</sup> 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.<sup>52</sup> 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 C1 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 2004/38<sup>53</sup> 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 create<sup>54</sup> 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 judgment<sup>55</sup> and subsequent case-law<sup>56</sup>, 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.<sup>57</sup> 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.<sup>58</sup> 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 reflected<sup>59</sup> 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* judgment<sup>60</sup>, 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 conditions<sup>61</sup> 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 relationship<sup>62</sup> 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 1408/71<sup>63</sup>, 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 judiciary<sup>64</sup> of the Member State in which that person actually works, even in the case of a manifest error of assessment of the posting conditions<sup>65</sup>. 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.<sup>66</sup>

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.<sup>67</sup> 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 987/2009<sup>68</sup> 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*<sup>69</sup> 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.<sup>70</sup>

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.<sup>71</sup> 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 Guide<sup>72</sup> 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 ECJ<sup>73</sup>, 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 judgment<sup>74</sup> 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 abuse<sup>75</sup> 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).

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(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**

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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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## TABLE OF CONTENTS

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

<b>1.</b>	<b>INTRODUCTION: AIM AND LEGAL BASIS OF THE EU REGULATIONS – ROLE OF THE EUROPEAN COURT OF JUSTICE</b>	<b>19</b>
<b>2.</b>	<b>ACHIEVEMENTS</b>	<b>21</b>
2.1.	THE PILLARS OF EUROPEAN SOCIAL SECURITY COORDINATION	21
2.2.	SOME PROTECTION GOES BEYOND COORDINATION	23
2.3.	VIRTUALLY ALL EUROPEAN CITIZENS PROTECTED	24
2.4.	EXTENSION OF PROTECTION TO NON-EU NATIONALS	24
<b>3.</b>	<b>CONTROVERSIES AND CHALLENGES</b>	<b>25</b>
3.1.	EXPORT OF FAMILY BENEFITS	26
3.2.	AGGREGATION OF PERIODS FOR UNEMPLOYMENT BENEFITS	26
3.3.	ACCESS TO MINIMUM EXISTENCE BENEFITS FOR INACTIVE PEOPLE	27
3.4.	POSTING OF WORKERS	28
3.5.	PEOPLE NORMALLY WORKING IN TWO OR MORE MEMBER STATES	30
<b>4.</b>	<b>CONCLUSIONS</b>	<b>33</b>