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Coordination of Social Security Systems in Europe

Study for the EMPL Committee

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Coordination of Social Security Systems in Europe

STUDY

Abstract

This study, prepared by Policy Department A at the request of the Committee on Employment and Social Affairs, provides a picture on current developments in the area of social security coordination in the EU.

It assesses the functioning of coordination rules in areas targeted by the amendment proposal from the European Commission, and evaluates the proposal's possible effects. The study highlights how some of the proposed changes could potentially impact fundamental principles of social security coordination and free movement law, such as the equal treatment principle.

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CONTENTS

LIST OF ABBREVIATIONS **5**

LIST OF BOXES **6**

LIST OF TABLES **7**

EXECUTIVE SUMMARY **8**

1. THE FUNCTIONING OF SOCIAL SECURITY COORDINATION IN EUROPE – KEY PRINCIPLES AND AIMS **12**

1.1 Introduction 12

1.2 The material scope and general principles of the coordination of social security 13

1.3 The territorial and personal scope of the coordination of social security 16

1.4 The applicable legislation 17

1.5 The proposal of the European Commission for a revision of social security coordination rules, and scope of the assessment 18

1.6. Social security coordination ahead of forthcoming policy challenges 19

2. SOCIAL SECURITY COORDINATION FOR ECONOMICALLY INACTIVE CITIZENS **24**

2.1. Current situation 24

2.2. Assessment of the European Commission's proposal 29

3. COORDINATION OF UNEMPLOYMENT BENEFITS **35**

3.1. General access to unemployment benefits 35

3.1.1. Current situation 35

3.1.2. Assessment of the European Commission's proposal 37

3.2. Access to unemployment benefits by frontier workers and other cross-border workers 39

3.2.1. Current situation 39

3.2.2. Assessment of the European Commission's proposal 41

3.3. Summary and recommendations 43

4. COORDINATION OF LONG-TERM CARE BENEFITS **45**

4.1. Current situation 45

4.2. Assessment of the European Commission's proposal 46

5. COORDINATION OF FAMILY BENEFITS **50**

5.1. Current situation 50

5.2. Assessment of the European Commission's proposal 51

6. SOCIAL SECURITY COORDINATION FOR POSTED WORKERS 55

6.1. Current situation 55

6.2. Assessment of the European Commission's proposal 61

7. ADMINISTRATIVE COOPERATION AND MEASURES FOR COMBATTING FRAUD AND ERROR 66

7.1. Current situation 66

7.2. Assessment of the European Commission's proposal 67

REFERENCES 71

ANNEX 1 - LIST OF INTERVIEWEES (ANONYMISED) 75

ANNEX 2 - CATEGORIES OF CITIZENS AT RISK OF EXCLUSION FROM SOCIAL ASSISTANCE PURSUANT TO DIRECTIVE 2004/38/EC AS INTERPRETED BY THE CJEU 76

ANNEX 3 – LIST OF PROPOSED CHANGES TO REGULATION (EC) 883/2004 AND ITS IMPLEMENTING REGULATION (EC) 987/2009 PROPOSED BY THE EUROPEAN COMMISSION IN EACH RELEVANT FIELD 79

LIST OF ABBREVIATIONS

CJEU Court of Justice of the European Union

EEC European Economic Community

EC European Community

EESC European Economic and Social Committee

ETUC European Trade Union Confederation

EU European Union

GDP Gross Domestic Product

PES Public Employment Services

TCNs Third Country Nationals

UK United Kingdom

LIST OF BOXES

Box 1: Economically inactive citizens and access to social assistance – The case of Germany and possible conflicts with national primary law and EU law 28

Box 2: Economically inactive citizens and access to social assistance – The case of Belgium 31

Box 3: Long-term care benefits – Examples for loss of entitlements (Belgium – the Netherlands) 47

Box 4: Long-term care benefits – Examples for loss of affiliation choice (Germany – Portugal) 47

Box 5: Indexation of child benefits in a cross-border situation – Illustrative example 52

Box 6: Requirement of being insured in the sending Member State – Illustrative example 58

Box 7: Dialogue and conciliation procedure in case doubts over the validity of the A1 form arise 59

Box 8: Errors and administrative problems in the management of sickness benefits in the Germany-Czech Republic cross-border region 66

LIST OF TABLES

Table 1: Access to unemployment benefits by workers and cross-border workers – Comparison between current and proposed rules 42

Table 2: Categories of citizens at risk of exclusion from social assistance pursuant to Directive 2004/38/EC as interpreted by the CJEU 76

EXECUTIVE SUMMARY

Background

The coordination of social security systems within the EU aims at ensuring that each EU citizen and third country national residing in the EU has fair access to social security regardless, of the country where he or she stays.

Social security coordination law has been a fundamental pillar of the free movement of persons since the inception of the European integration process. Envisaged by the 1951 Paris ECSC Treaty, a comprehensive regime of the coordination of national social security systems was established as early as 1958 by the foundational EEC regulations 3 and 4. Since then, EU social security coordination law has co-evolved in tune with the deepening of the integration process as well as with its expansion and the gradual accession of new Member States up to the enlargement in 2004-2007. Currently, coordination rules are provided for by the Regulation (EC) 883/2004 and its Implementing Regulation (EC) 987/2009.

Coordination rules do not remove substantive differences between national systems, including the possible negative effects of crossing borders due to different levels and standards of social protection in each country, nor do they compensate for such effects.

Irrespective of such inherent limits, these rules provide for a fundamental pre-condition for exercising free movement rights within the EU, preventing national social security rules from impeding this freedom by: a) prohibiting any form of (direct or covert) discrimination on grounds of nationality; b) mandatorily and exclusively determining the applicable legislation; c) allowing the aggregation of periods of insurance, work or residence fulfilled in another Member State in order to satisfy the qualification periods for benefits and to calculate their level; d) removing any territorial requirement for the payment of such benefits; f) promoting good administrative cooperation among Member States' social security institutions with the aim of smoothing the effective exercise of rights (and duties) conferred upon individuals by the regulations.

The material scope of the coordination rules includes: (a) sickness benefits; (b) maternity and equivalent paternity benefits; (c) invalidity benefits; (d) old-age benefits; (e) survivors' benefits; (f) benefits in respect of accidents at work and occupational diseases; (g) death grants; (h) unemployment benefits; (i) pre-retirement benefits; and (j) family benefits.

As for the applicable legislation, in general EU citizens are covered by the State of employment or of last employment if they are economically active, while they shall receive benefits by the State of residence if economically inactive.

Yet, the actual classification of benefit schemes or of citizens' statuses under the different and evolving national social security systems may create uncertainties on which legislation applies depending to the case at hand. These problems add up to shortcomings in information sharing between the relevant administrations, leading to increased risk of unfair outcomes concerning access to benefits.

In a view to modernise and simplify existing rules, as well as guarantee a fair burden sharing of social security costs between Member States, the European Commission presented a proposal of revision to the coordination rules in December 2016 (COM (2016) 815 final).

The main changes proposed by the Commission cover: 1) the limits of application of the equal treatment principle for non-economically-active EU citizens; 2) the rules on exporting unemployment benefits and on unemployment protection for cross-border workers; 3) the introduction of a new chapter on long-term-care benefits; 4) the partial revision of the rules on family benefits with a new provision on child raising allowances; 5) the definition of posted workers for the purpose of social security coordination and the strengthening of related administrative tools; 6) the fine-tuning of existing (and mostly technical) rules on administrative cooperation between Member States.

Aim

The purpose of this study is to provide Members of the EMPL Committee with an up-to-date overview of the social security coordination system in connection with the discussion on the Commission's Proposal.

The study provides a thorough analysis of the limits and challenges of the current coordination system and of the proposed changes by the Commission by means of desk research, and interviews with experts and stakeholders.

The evidence is presented in different chapters, each covering one of the areas addressed by the European Commission's proposal. In each chapter, conclusions and recommendations for the reform at stake are included.

The introduction provides background information on the functioning of the coordination rules, and addresses possible forthcoming challenges arising from the enlargement of social security rights pursued by the Social Pillar, and from the exit of the United Kingdom from the EU.

Conclusions

The Commission's proposal for amending and adjusting existing coordination has a different level of prospective impact depending on the area at hand. Some proposals potentially impact fundamental principles of social security coordination and free movement law, such as the equal treatment principle. Other provisions are of a more limited relevance, as they essentially aim at adjusting the existing rules of specific technical nature. The overall impact of the proposed changes would in any case be significant, since the Commission's proposal is intended to be, in terms of extension and coverage, one of the most ambitious reforms within the evolution of social security coordination law, at least since the entry into force of Regulation (EC) 883/2004.

In detail, the Commission aims to **codify the recent case law of the European Court of Justice** by expressly derogating from the principle of equal treatment **for economically inactive citizens** moving from one Member State to another. Access to social benefits for this category of citizens would, in fact, be conditional upon meeting requisites for legal residence, as defined in Directive 2004/38/EC. Yet, under that Directive, economically inactive persons shall prove they have sufficient means of subsistence and comprehensive health insurance in order to obtain residence right. This means that they could end up in limbo, whereby they cannot export social benefits from the country of provenance, pursuant to rules waiving the export principle for special non-contributory cash benefits, nor can they ask for social benefits in the country where they reside as this could prove the lack of sufficient resources to lawfully reside there.

Concerning **unemployment benefits**, the Commission's proposal contains a mix of measures which have in part an expansive effect on access to benefits, as well as a slightly restrictive impact.

On one side, the period for exporting unemployment benefits to the Member State where the person is looking for a job should be extended from a minimum period of 3 to 6 months.

On the other side, for the purpose of aggregating insurance or employment periods in other Member States, a qualifying period of 3 months is to be introduced. If the person concerned does not qualify, it will be the Member State where he or she was formerly employed that is responsible for paying those benefits.

The Commission also proposes to **change the rules concerning access to unemployment benefits by cross-border workers**. As of now, these workers are covered by the State of residence if 'wholly unemployed' or by the State of employment if 'partially unemployed'. Under the proposed new rules, the State of last employment would pay unemployment benefits to cross-border workers provided they have worked at least 12 months there, and regardless of whether they are 'wholly' or 'partially' unemployed. For shorter periods, cross-border workers would have either to apply for unemployment benefits in the State of residence, or to claim them in the State of last employment, albeit without relying on the aggregation principle.

Long-term care benefits, which are currently covered by coordination rules within the chapter on 'sickness benefits', would be clearly defined and included in an autonomous new chapter under the proposed changes. Yet, the same coordination rules devoted to sickness benefits would continue to be applied. Such a change may trigger significant drawbacks. The separation between sickness benefits and long-term care benefits would in fact paradoxically exclude certain situations which are covered by current rules on sickness benefits, producing a loss of rights and entitlement and creating unwarranted obstacles to the free movement of persons within the EU.

In the area of **family benefits**, the Commission's proposal aims at updating the rules on allowances compensating a parent for loss of income or salary during time spent raising a child (child-raising allowances). Under the proposed changes, which expand existing entitlements, these benefits should be considered as 'personal' benefits, and paid by the State of insurance to the insured person, and not also to his or her dependent family members.

The definition of **posted workers** is proposed to be amended and aligned with that of the Directive 96/71/EC, covering terms and conditions of employment of posted workers. Nevertheless, in light of the different purposes of the two pieces of legislation, the desirability of such alignment is questionable. The proposal would also strengthen administrative cooperation processes which are necessary to ascertain the legislation applicable to posted workers, also by introducing deadlines covering the process of information sharing between the relevant authorities.

Concerning **administrative cooperation**, the European Commission intends to introduce a legal definition of fraud, and to modernise existing processes of information sharing, especially by easing data exchange between Member States through digitalisation and use of standard forms.

Recommendations

The opportunity of introducing an express exception to the fundamental principle of equal treatment targeting (and indeed potentially stigmatising) **economically inactive EU citizens** should be very carefully evaluated. In case such exception is introduced, it should be duly qualified and circumscribed by ensuring that nothing in the proposed new rules should restrict the fundamental rights recognised in the Charter of Fundamental Rights of the European Union.

The proposed **changes to unemployment benefits** aim essentially at realising a more equitable and efficient allocation of the burden for the provision of unemployment benefits among Member States. Changes proposed to the new rules are generally agreeable. However, some criticism has been directed towards the very long qualifying period of 12 months for allocating the payment of the unemployment benefit for frontier workers to the Member State of last employment. Due to the growing casualisation and precariousness of employment relations, many cross-border workers would still continue to be paid unemployment benefits by the State of residence. A somewhat analogous criticism has been directed towards the proposal of introducing a qualifying period of 3 months for allowing the aggregation of insurance or employment periods fulfilled in other Member States. This would in fact introduce a restriction of the current special rules on aggregation of periods of insurance.

The introduction of a new chapter on **long-term care benefits**, separate from sickness benefits, may pose problems of coordination, possibly leading to a loss of entitlement. Introducing the proposed definition of these benefits within the Chapter on sickness benefits would probably be a better and easier solution for improving legal clarity.

The proposed changes to **child-raising allowances** do not raise any significant issues: their adoption would thus be recommended in line with other current Commission initiatives to support work-life balance for working parents and carers under the European pillar of social rights.

In regards to the **posting of workers**, the proposed new rules essentially aim to strengthen the administrative tools related to social security coordination, to ensure that national authorities have the adequate means to verify the social security status of such workers and to address any potential unfair practices or abuses. Such aims have received an overall positive evaluation from different sides of the socio-political spectrum of the stakeholders concerned. The main perplexities concern the effective congruence between ends (or aims) and means (or administrative or regulative tools) provided for in this regard by the Commission's proposal. A more specific criticism has been directed at the proposal of making reference to Directive 96/71 for the purpose of defining posted workers within the context of social security coordination. Such criticism rightly points out how the reference to the significantly different notions of posted worker within the meaning of the Directive would imperil legal clarity without enhancing in any significant way the fight against potential abuse of posting.

Finally, in reference to **administrative cooperation**, apart from concerns about possible excess in rigidities in the newly envisaged procedures, the proposed changes seem capable of strengthening mutual assistance and good governance of the complex system for the exchange of information between social security institutions. Their adoption is thus recommended with the obvious awareness that no regulative or technical measure, however carefully drafted on paper, could per se ensure effective outcomes in practice.

1. THE FUNCTIONING OF SOCIAL SECURITY COORDINATION IN EUROPE – KEY PRINCIPLES AND AIMS

KEY FINDINGS

- Social security coordination in Europe has been in place since 1958 as an essential complement of the freedom of movement of workers. Its personal scope has gradually been enlarged by case law and by EU law developments, and nowadays it covers 'all nationals of the Member States', representing a complement of EU citizenship. The coordination, currently ruled by Regulation (EC) 883/2004 and Implementing Regulation (EC) 987/2009 also applies to stateless persons, refugees, and third-country nationals. The territorial scope of the regulations goes beyond EU Member States, embracing Iceland, Liechtenstein, Norway, and Switzerland. The material scope of coordination includes a wide array of social security schemes, although the actual boundaries are not always clear, especially as far as social assistance is concerned.
- The coordination builds upon five main principles with a view to: ensuring the equal treatment of citizens regardless of their nationality; ensuring the legislation of only one Member State is applicable at a time; entitling citizens to have the periods of insurance they have completed in a Member State taken into consideration for the entitlement to benefits abroad; entitling citizens to export their benefits; and fostering good cooperation between Member States.
- Nevertheless, in the light of interpretation problems and ongoing development of social security schemes across Europe, the application of coordination rules may still lead to contradictory outcomes, such as double access to benefits or denial of access thereto.
- In December 2016, the European Commission proposed a revision of the current rules on the coordination of social security. The proposal is to strengthen the link between benefits and the State of insurance. Albeit many changes have been welcomed by stakeholders, criticism addressed the risk that the new rules will hamper access to social security for some categories of citizens. Over the years to come, coordination of social security will also face remarkable challenges, among which the exit of the United Kingdom from the EU, and possible significant changes in national social security systems to guarantee wider coverage to people in need or in atypical work patterns.

1.1 Introduction

The **coordination of social security** systems within the EU aims to **ensure equal treatment of workers and persons** moving throughout Europe under the different national social security systems. In essence, it aims to de-territorialise the application of national social security systems so as to provide an essential pre-requisite for free movement of persons within the EU. In this way, EU social security coordination law has been aptly described as 'the sum of all primary and secondary legal provisions, rules and

principles that aim to remove social security barriers, which could prevent an individual from exercising his/her right to freedom of movement'.[1]

EU coordination law has been an essential complement of the principle of 'free movement of workers', one of the 'four freedoms' of the European Single Market, along with the free movement of goods, capital, and services, since the inception of the EU integration process. Since the entry into force of Regulation (EC) 883/2004 (hereinafter 'Regulation 883'), EU coordination law also encompasses economically inactive persons and can be considered an essential complement of European citizenship.

Firstly addressed in the Treaty of Rome, the freedom of movement of workers is currently enshrined in the Treaty on the Functioning of the European Union (TFEU), and in the EU Charter of Fundamental Rights (CFR). The progressive extension of free movement rights to economically inactive persons finds expression in Article 45 CFR, which summarises the new comprehensive approach enshrined in Article 2 of Regulation 883 in the definition of the personal scope of social security coordination. In fact, in the same way as 'Every citizen of the Union has the right to move and reside freely within the territory of Member States' (Article 45 CFR), Article 2 of Regulation 883 also applies to nationals of a Member State who are or have been subject to the social security legislation of one or more Member States, as well as to the members of their families and their survivors (irrespective of their nationality).

In particular, the TFEU sets forth the **abolition of discrimination on the ground of nationality** in relation to employment, remuneration and other conditions of work and employment (Article 45), and the adoption of measures in the field of social security as necessary to ensure it (Article 48). This article has provided the legal basis for adopting rules coordinating social security between European Member States from as early as 1958, with Regulation 3/1958. After having been reformulated in Regulation (EEC) 1408/71,[2] these rules are currently laid out in Regulation 883, and in its Implementing Regulation (EC) 987/2009 (hereinafter 'Implementing Regulation 987'), which has been in force since 1 May 2010.

In line with its predecessors, Regulation 883 promotes the 'coordination' rather than the 'harmonisation' of the different national social security systems.[3] This means that it is not targeted at changing or setting common standards for national social security systems, some of which are selectively addressed by European directives, but rather at ensuring that they do not penalise migrant workers/persons or nationals of other Member States (and of third-country nationals (TCNs) legally residing in the EU).

1.2 The material scope and general principles of the coordination of social security

The material scope of Regulation 883 (Article 3) covers a wide array of social security benefits, namely: (a) sickness benefits; (b) maternity and equivalent paternity benefits; (c) invalidity benefits; (d) old-age benefits; (e) survivors' benefits; (f) benefits in respect

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[1] Fuchs, M., Cornelissen, R. (2015), *Introduction*, in Idd. (eds.), *EU Social Security Law. A Commentary on EU Regulations 883/2004 and 987/2009*, Baden Baden/Oxford, p. 11. For a similar definition, cf. also Pennings, F. (2015), *European Social Security Law*, Cambridge/Antwerp/Portland, sixth edition, p. 6.

[2] Regulation (EEC) 1408/71 and its Implementing Regulation (EEC) 574/72 replaced Regulation 3/1958 on the coordination of social security, as well as Regulation 4/1958 laying down implementing rules and supplementary provisions, and Regulation 36/63/EEC concerning social security for frontier workers. The new rules brought together different sets of provision implementing Article 51 of the Treaty of Rome (now Article 48 TFEU), while broadening the personal and material scope of the coordination of social security.

[3] Cf. e.g. Pennings, F. (2015), *Principles of EU Coordination of Social Security*, in Pennings, F., Vonk, G. (eds.), *Research Handbook on European Social Security*, Cheltenham, UK/Northampton, USA, p. 321 ff.

of accidents at work and occupational diseases; (g) death grants; (h) unemployment benefits; (i) pre-retirement benefits; and (j) family benefits.

The branches of social security listed in Article 3 of Regulation 883 clearly draw inspiration from ILO Convention No. 102 of 1952, concerning minimum social security standards. This list is exhaustive, since any branch of social security not mentioned in Article 3, according to the settled case law of the Court of Justice of the European Union (CJEU),[4] cannot qualify as such, although it grants the beneficiary a legal right to the benefit and thus complies with the general notion of social security elaborated by the CJEU.[5] Whilst Regulation 883 does not define the meaning of 'social security', according to the CJEU a benefit may be regarded as a social security scheme if it is granted without any individual and discretionary assessment of personal needs of the claimant, on the basis of a legally defined position (and indeed if it is based on one of the social risks expressly listed in Article 3).

Whether such benefits are funded through social security contributions or general taxation is irrelevant, in terms of qualifying within the scope of Regulation 883. This is expressly clarified by Article 3(2), according to which, unless otherwise provided for in Annex XI, Regulation 883 applies to general and special social security schemes, whether contributory or non-contributory (and to the schemes relating to the obligation of an employer and a ship-owner). Instead, as remarked by CJEU case law, the purposes and conditions upon which the benefit is granted are crucial for determining its actual classification, while characteristics that are purely formal must not be considered as relevant for that purpose, since the notion of social security has to be given a EU wide meaning.

Generally, in order to avoid conflicts between different national provisions on social security and to avoid discrimination on the basis of nationality, Regulation 883 builds upon six principles, namely:

- **only one legislation applicable (Article 11)**: citizens are covered, as a general rule, by the legislation of one Member State per scheme. Regulation 883 defines rules for determining the applicable legislation in order to avoid citizens are covered by two legislations at a time (positive conflict of laws) or remain uncovered by any national provision (negative conflict of laws);
- **equality of treatment (Article 4)**: citizens, and more generally all persons to whom Regulation 883 applies, cannot be discriminated against on the ground of their nationality, but have the same rights and obligations as the citizens of the competent Member State;
- **equality of benefits, income, facts, or events (Article 5)**: the receipt of social security benefits and other income, and relevant facts or events occurring in a Member State have legal effects and must therefore be taken into account by other Member States as if they happened in their territory;

[4] See, for instance, CJEU, Case C-25/95, *Otte*, EU:C:1996:295, and CJEU, Case C-160/96, *Molenaar*, EU:C:198:84. To avoid confusion, this report refers to the European Court of Justice (ECJ) as the 'Court of Justice of the European Union (CJEU)' for decisions made prior to 1 December 2009.

[5] The notion of 'social security' is not defined by the regulation and has been elaborated by the CJEU in a very broad and comprehensive way since the 1970s. See, for instance, CJEU, Case 1/72, *Frilli*, EU:C:1972:56, and more recently CJEU, Case 249/83, *Hoeckx*, EU:C:1985:139. See also: CJEU, Case C-66/92, *Acciardi*, EU:C:1993:341; CJEU, Case C-286/03, *Hosse*, EU:C:2006:139; and CJEU, Case C-396/05, *Habelt*, EU:C:2007:810.

- **aggregation (Article 6)**: if necessary, periods of insurance, residence, or work carried out in other countries can be counted for the purposes of claiming benefits;
- **export of benefits (Article 7)**: citizens can generally receive a cash benefit they are entitled to even if they live in another country;
- **good administration (Article 76)**: Member States must cooperate and mutually assist each other for the benefit of citizens.

On closer inspection, one could rightly assume that the overarching and unifying principle of EU social security coordination law is the meta-principle of non-discrimination and equal treatment. According to the purposive and teleological interpretation given to Article 4 of Regulation 883 in the light of Article 45 TFEU, the equal treatment principle goes beyond the prohibition of (direct and indirect) discrimination on grounds of nationality, as it extends its normative grip to also encompass non-discriminatory obstacles to the free movement of persons, and cross-border access to the social security systems of the Member States. An example of this is the *Terhoeve* case,[6] in which the CJEU ruled that, through applying social security coordination, not only discrimination on grounds of nationality, but even the mere disadvantages affecting persons who have exercised their right to freedom of movement are to be prohibited.

The classic coordination techniques based on the assimilation of facts and events (Article 5 of Regulation 883), the aggregation of periods (Article 6), and the export of benefits (Article 7) could to an extent be configured as specific expressions of the fundamental principle of equal treatment, which is enshrined in Article 4 of Regulation 883. And indeed, whilst the rules on aggregation and the export of benefits find their formulation and legal basis directly in Article 48 TFEU, the provision of the equal treatment of benefits, income, facts, and events (newly inserted in Article 5 of Regulation 883) codifies the CJEU's longstanding case law that is directly based on the fundamental principle of non-discrimination/equal treatment.[7]

Due to its overarching constitutional relevance,[8] the principle of equal treatment has a comprehensive and encompassing coverage: it applies to all persons Regulation 883 makes reference to, without any distinction, and it refers to every branch of social security listed in Article 3. Although Article 4 suggests the possibility of derogations from, and exceptions to the principle,[9] Regulation 883 does not provide for any such exception. EU institutions are not permitted to adopt regulations that impede the achievement of the aims set out by the treaties, especially Articles 45 and 48 TFEU.[10] The famous *Pinna I* ruling of the CJEU[11] is a striking example of the unconditional nature of the fundamental principle of equal treatment on grounds of nationality in the realm of social security coordination. In this example, which concerned a French family allowance, the CJEU boldly stated that EU institutions are not permitted to adopt rules, such as the one adopted by the European Council in 1983, that allow unequal treatment among EU

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[6] CJEU, Case C-18/95, *Terhoeve*, EU:C:1999:22.

[7] See *ex plurimis*: CJEU, Case C-20/85, *Roviello*, EU:C:1995:394; CJEU, Case C-228/88, *Bronzino*, EU:C:1990:85; and CJEU, Case C-507/06, *Klöppel*, EU:C:2008:110. Further references can be found in Schuler, R. (2015), *Article 5*, in Fuchs, M., Cornelissen, R. (eds.), *EU Social Security Law. A Commentary on EU Regulations 883/2004 and 987/2009*, Baden Baden/Oxford, p. 119 ff.

[8] See e.g. Watson, Ph. (2009), *EU Social and Employment Law*, Oxford, p. 419 ff.

[9] '*Unless otherwise provided for by this Regulation*, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member Stats as the nationals thereof.' (emphasis added)

[10] Kahil-Wolf, B. (2015), *Article 4*, in Fuchs, M., Cornelissen, R. (eds.), *EU Social Security Law. A Commentary on EU Regulations 883/2004 and 987/2009*, Baden Baden/Oxford, p. 105.

[11] CJEU, Case C-41/84, *Pinna I*, EU:C:1986:1.

citizens, such rules being void as they are contrary to the treaties (*in casu*, Article 45 TFEU).

The actual classification of benefits and the application of these principles are often contentious, and it seems difficult to tackle such issues once and for all. The regulation itself does not provide definitions for all the addressed benefits. Instead, its annexes list national benefit schemes in an attempt to make the rules more transparent and clear.

In attempting to ease the homogeneous application of rules across Member States, Regulation 883 sets out that an '**Administrative Commission**', where all Member States are represented, is in charge of resolving any interpretation doubts and of supporting cooperation. Nevertheless, in the light of the differences amongst national systems, the complexity of specific schemes and their constant development, the straightforward definition of benefits, and the proper aggregation of periods remain arduous tasks.

The decisions of the Administrative Commission themselves cannot be binding upon national institutions, however, the CJEU uses them to interpret EU law.[12]

This adds up to problems of cooperation between the involved Member States, a factor that is crucial in determining entitlement to a benefit or for sharing the related financial burden between the involved institutions when Regulation 883 so entails.

1.3 The territorial and personal scope of the coordination of social security

Regulation 883 applies to EU Member States, Iceland, Liechtenstein, Norway, and Switzerland. The rules laid out in the regulation can be invoked by nationals of these countries (provided they are, or have been, covered by the legislation of one or more Member States), by their family members or survivors and, vice versa, by EU nationals having been covered in these countries.

The current **personal scope** results from a gradual extension of the initial coverage of Regulation 3/1958 (wage earners and assimilated workers), implemented by CJEU case law and by subsequent law revisions. With a view to radically simplify the very complex provisions in the scope of application *ratione personae* of the social security coordination law in former Regulation (EEC) 1408/71, Article 2 of Regulation 883 refers generally and comprehensively to all nationals of Member States (irrespective of whether they are economically active in the labour market as employees or self-employed), stateless persons, and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors.

This means that Regulation 883 applies regardless of whether a person has been insured as employed or self-employed, or under other conditions, e.g. residence or citizenship.

Instead, pursuant to Regulation (EU) 1231/2010 (Article 1), **TCNs** only fall within the scope of the coordination rules if they are legal residents and have been subject to the legislation of more than one Member State.[13]

Yet, exceptions are made, since the extension to TCNs does not apply to Iceland, Liechtenstein, Norway, and Switzerland, or to Denmark. The United Kingdom (UK) is in a peculiar situation as it is not bound by Regulation (EU) 1231/2010, but has accepted Regulation (EC) 859/2003, extending to TCNs the earlier Regulation (EEC) 1408/71 and

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[12] CJEU, Case C-98/80, *Romano*, EU:C:1981:104.

[13] See Giubboni, S., Orlandini, G. (2007), *La libera circolazione dei lavoratori nell'Unione europea*, Bologna, p. 139 ff.

its Implementing Regulation (EEC) 574/72. Therefore, the UK continues to apply to TCNs coordination rules that preceded the enforcement of Regulation 883, which entailed, amongst other things, a narrower personal scope (limited to employees, self-employed, and their family members) and complex rules concerning the aggregation principle.

1.4 The applicable legislation

Generally, the ***lex loci laboris*** (State of employment legislation) applies to economically active citizens (Article 11(2)(a) of Regulation 883).

Therefore, these citizens can apply for benefits according to the law of the Member State where they work. In the application of the 'assimilation' criterion, relevant events, which occurred in other Member States, shall be taken into account to access the benefit, as if they occurred in the country where the benefit is claimed.

Workers might also be covered by the country of residence, if working in two or more Member States[14] or if they qualify as frontier workers.[15] **Posted workers** – that is, persons who pursue an activity as employed persons in a Member State on behalf of an employer that normally carries out its activities there and who are posted by that employer to another Member State on that employer's behalf – continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such work does not exceed 24 months, and that they are not sent to replace another person (Article 12(1) of Regulation 883).[16] **Civil servants**, instead, are covered by the Member State to which the relevant administration is subject (Article 11(3)(b)).

Post-active persons, i.e. those receiving cash benefits linked with their former employment activity, are generally assimilated to workers for the coverage of social security benefits (Article 11(2)). Yet, where long-term benefits are concerned, including old-age or survivors' pensions, disability benefits, and sickness benefits in cash covering treatment for an unlimited period, the costs are shared between Member States according to the periods of insurance. In the light of the considerable impact on public resources these benefits might entail, this rule is aimed at ensuring fair burden-sharing between the involved Member States.

For **economically inactive citizens**, instead, the ***lex loci domicilii*** (State of residence legislation) applies (Article 11(3)(e) of Regulation 883).

The correct application of these rules requires a high degree of cooperation between the involved States, and raises a number of problems in terms of coordination, especially in the light of the interpretation given to these rules by national authorities and courts. Indeed, questions concerning social security coordination have been often referred to the

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[14] When the person pursues his/her activities in more than one Member State, the general attachment criterion to the place of employment or work performance cannot be of use. This is why, according to Article 13(1)(a) of the regulation, that person shall be subject to the legislation of the Member State of residence if he/she pursues a substantial part of his/her activity in that Member State. If he/she does not pursue a substantial part of his/her activities in that Member State, the legislation of the Member State of establishment will apply (Article 13(1)(b)).

[15] Indeed, frontier workers are covered by the State of employment as far as they do not lose their job, while they must apply for unemployment benefits in the State of residence if they lose their job. In fact, according to Article 11(3)(c) of the regulation, a wholly unemployed frontier worker, receiving unemployment benefits in accordance with Article 65 under the legislation of the Member State of residence, shall be subject to the legislation of that Member State.

[16] The same applies *mutatis mutandis* to self-employed persons (Article 12(2) of the regulation). We shall return to posted workers below when commenting on the European Commission's proposal.

CJEU, whose ruling played a significant role in shaping the meaning of law provisions or in triggering law changes themselves.

1.5 The proposal of the European Commission for a revision of social security coordination rules, and scope of the assessment

Interpretation questions arising from rulings of the CJEU, as well as debate at national and European level over the perceived 'fairness' of the system, brought the European Commission to propose in December 2016, as part of the wider 'Labour Mobility Package', a **targeted revision** of rules concerning the coordination of social security.[17]

The proposal pursues the following targets, namely: (a) make coordination rules fairer, clearer, and easier to enforce; (b) promote free movement of workers; (c) prevent fraud; and (d) strengthen administrative cooperation between Member States.

In general, the proposal steers towards the principle that benefits are due in the place where contributions are paid, thus answering concerns of uneven financial burden between Member States.

In the following chapters, the report provides an assessment of Regulation 883 and its current gaps, as well as of the European Commission's proposal. Coherently, only the aspects of the proposed revisions are examined in depth, namely: social security coordination for economically inactive citizens (chapter 2), coordination of unemployment benefits, including rules applying to cross-border workers (chapter 3), coordination of long-term care benefits (chapter 4), coordination of family benefits (chapter 5), social security coordination for posted workers (chapter 6), administrative cooperation and measures for combatting fraud and error (chapter 7).

The report builds upon desk research, including: (a) scientific literature and research papers; (b) CJEU case law; and (c) policy documents issued by relevant stakeholders.

Findings have been complemented by 10 interviews with selected experts at European and national levels, including academics, firm consultants with expertise in the field, unionists, and officials of the European Employment Services (EURES) network.

The main principle leading the assessment is the goal of guaranteeing fairness, especially concerning: (a) the absence of unjustified restrictions to the freedom of movement of workers; (b) the absence of abuse of social security rights by beneficiaries and their families; and (c) fair burden-sharing of social security costs between involved Member States.

Gaps may be related to different interpretations at national level of the definitions themselves or in the actual application of coordination rules. For this reason, these issues are presented and dealt with separately in the following sections.

The proposal has partially been criticised by social partners and Member States, especially the measures intended to fight abuses and to strengthen the geographical link between entitlement to benefits and payment of contributions, as they might hamper workers' mobility.

The proposal is currently being examined by the European Parliament Committee on Employment and Social Affairs (EMPL), before it is submitted to the plenary assembly.

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[17] The full text of the proposal (COM(2016) 815 final) is available at the following link: http://ec.europa.eu/social/main.jsp?catId=849&langId=en&newsId=2699&moreDocuments=yes&tableName=news.

1.6. Social security coordination ahead of forthcoming policy challenges

Before detailing the assessment of the regulations at hand and the European Commission's proposal, some general remarks have to be made on possible challenges concerning social security in Europe in the near future.

To this aim, two specific aspects have been selected: the changing borders of the EU, and the possible extension of social protection to those in non-standard work or in self-employment across all Member States, which is backed by the European Commission.

The scope of Regulation 883 and Brexit

The first aspect has primarily to do with **Brexit**, the first case of a Member State leaving the EU, which is to be finalised by the end of March 2019 as per Article 50 of the Treaty on European Union.

Without taking into consideration future migration flows, as of now, approximately 4.5 million EU citizens are potentially affected by Brexit.

According to the UK Office for National Statistics in 2016, EU citizens currently residing in the UK are about 3,572,000, mainly Poles (1,002,000 million), Irish (335,000), Romanian (328,000) and Italian (233,000). [18]

On the other side, UK citizens living in EU are about 900,000. A review of currently available statistics from the UK Office for National Statistics suggests Spain, Ireland, France and Germany are the main destinations.[19]

Concerning social security coordination, in the absence of an agreement on that date, pursuant to Regulation (EU) 1231/2010, the EU would consider UK citizens as TCNs, applying therefore the same coordination rules currently granted to EU citizens, upon condition they are legally residing in the EU and have been subject to the legislation of more than one Member State (see section 1.3).

Instead, the UK would be no longer bound by Regulation 883. As observed by Verschueren, the bilateral social security coordination treaties entered by the UK and other EU Member States, currently waived by Regulation 883, would become applicable again. Nevertheless, these treaties cover only some EU Member States, excluding most Central and European countries, and the provisions there contained may be outdated compared to the current cross-border situations.[20]

Yet, it could decide to continue to apply it, for instance by incorporating EU rules into the UK legal order through an *ad-hoc* bill.[21]

Under a more optimistic scenario, and in line with the currently available official declarations, the parties in the withdrawal agreement would mutually agree that

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[18] See: https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/datasets/populationoftheunitedkingdombycountryofbirthandnationality

[19] UK Office for National Statistics (2017), *What information is there on British migrants living in Europe?: Jan 2017*, available at: https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/articles/whatinformationisthereonbritishmigrantslivingineurope/jan2017 .

[20] Verschueren, H. (2017), Scenarios for Brexit and social security, *Maastricht Journal of European and Comparative Law*, Vol. 24, Issue 3, p. 379.

[21] This option was suggested as a temporary way out under this scenario in United Kingdom, Her Majesty's Government (2017), *Legislating for the United Kingdom's withdrawal from the European Union*, available at: https://www.gov.uk/government/publications/the-repeal-bill-white-paper/legislating-for-the-united-kingdoms-withdrawal-from-the-european-union .

principles and rules of Regulation 883 shall continue to be applied, at least to those EU citizens living in the UK before the exit and to UK citizens living in the EU as of the same date.[22] In theory, these citizens should not be affected by Brexit as far as social security coordination and freedom of movement are concerned.

As to the **future flow of citizens** across the border, distinctions have to be made between the effects of possible restrictions on workers' freedom of movement, and restrictions to the right to equal treatment when it comes to social security.

As of now, the UK and the EU are committed to defining rules concerning the residence right in the withdrawal agreement, with no further discretion.

Whether the UK or the EU introduces stronger requisites than the ones currently enshrined in Directive 2004/38/EC for migration, restrictions can be introduced without prejudice to the rules set forth by Regulation 883 for persons legally moving across the borders. From a formal point of view, under this scenario, the UK would be covered by Regulation 883 as a result of a bilateral agreement with the EU, as is currently the case for Switzerland, or as a third country, pursuant to Regulation (EU) 1231/2010. This would not imply any relevant change to the applicable rules, unless *ad-hoc* derogations are made.

Yet, indirect effects shall be considered. Categories such as job-seekers might find it harder than in the past to enter the UK or to enter the EU from the UK, and stricter conditions on the movement of persons may target those that are not in employment, although – once they meet the conditions for migration – the existing rules on the coordination of social security would continue to apply.

Persons receiving unemployment benefits in the UK or in the EU may also be discouraged from exporting their benefits across the border since they may face obstacles or additional costs to get or maintain their residence right for as long as they do not find a job abroad.

In addition, rules on the export of benefits may change compared to the current provisions.. In fact, while the EU suggests sticking to Regulation 883, the UK proposes applying a different criterion, i.e. guaranteeing EU citizens the right to export UK benefits on the same footing as its nationals, as well as adopting similar rules for UK citizens wishing to export their benefits from the EU.

Brexit and the future of coordination rules

Even if assuming the EU and the UK confirm the application of Regulation 883, additional problems may arise concerning **possible bias in coordination rules** or in the interpretation, application, and enforcement thereof, arising when Brexit takes place.

Whether the UK and the EU make a dynamic or static reference to Regulation 883 in the withdrawal agreement or in a separate agreement will be key to determining whether future amendments to Regulation 883 will be applicable or not to the UK.

Should a **dynamic reference** be applied, the coordination rules will remain the same across the border, despite the UK no longer being able to influence them through the legislative process of the EU. Moreover, pursuant to Article 71 of Regulation 883, the UK

[22] European Commission (2017), *Joint technical note on EU-UK position on citizens' rights after fourth round of negotiations*, pp. 13-16, available at: https://ec.europa.eu/commission/sites/beta-political/files/table_-_citizens_rights.pdf; and United Kingdom, Home Department (2017), *The United Kingdom's Exit from the European Union. Safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU*, p. 13, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/621848/60093_Cm9464_NSS_SDR_Web.pdf.

would no longer have the possibility to influence the Administrative Commission's decisions, as only Member States are represented therein. It may instead receive observer status.

In case a **static reference** applies, *ad-hoc* agreements should possibly adapt to later changes, also by means of a joint committee.[23]

As is currently the case for Switzerland, a joint committee may also agree on relevant changes to the Annexes, including aspects like derogations from coordination rules, the list of special non-contributory cash benefits, and other agreements on the coordination of social security between Member States, which remain applicable pursuant to Article 8 of Regulation 883.

Case law and administrative practices may also follow a dual path. In fact, the past and future case law of the CJEU shall no longer apply to the UK, unless this is explicitly agreed by the UK and the EU.

Alternatively, the agreement may entail: (a) the setup of an arbitration body to rule over cases addressing cross-border EU-UK cases; (b) the coverage by different jurisdictions for UK citizens in the EU (to be heard by EU national courts and, ultimately, by the CJEU) and for EU citizens in the UK (to be heard by UK courts and, ultimately, by the UK Supreme Court); and (c) the setup of a dispute resolution mechanism.

Unlike the arbitration body and, especially, the different jurisdiction options, the setup of a dispute resolution mechanism would make it possible to avoid the overlapping of different interpretations of coordination rules. Such a mechanism would in fact entitle the UK and the EU to refer to a bilateral body disputes concerning the way coordination rules are applied in order to maintain a shared understanding.[24] At the same time, despite being a third country, the UK would gain in this way the possibility to influence – on an equal footing with the EU as a whole – the interpretation of EU law.

Social security coordination rules ahead of possible extension of social rights to non-standard workers, self-employed, and people in need

The European Commission, in its recent communication entitled 'Establishing a European Pillar of Social Rights' (COM(2017) 250 final), officially proclaimed by the European Parliament, the Council and the Commission during the Gothenburg Social Summit in November 2017, acknowledged the need for 'addressing emerging social challenges and the changing world of work in light of, notably, emerging types of employment deriving from new technologies and the digital revolution'. As of now, the communication is merely an expression of the support of all institutions for the principles and rights under the Pillar, which is not legally binding in any way. Nevertheless, it tables a number of notable proposals, to be implemented through specific legislation, addressing **social protection of non-standard workers, self-employed, and people in need**.

In particular, under Chapter III, 'Social protection and inclusion', the communication entails that, 'regardless of the type and duration of their employment relationship,

[23] See Verschueren, H. (2017), Scenarios for Brexit and social security, *Maastricht Journal of European and Comparative Law*, Vol. 24, Issue 3, p. 367 ff.

[24] See United Kingdom, Her Majesty's Government (2017), *Enforcement and dispute resolution: a future partnership paper*, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/639609/Enforcement_and_dispute_resolution.pdf.

workers, and, under comparable conditions, the self-employed, have the right to social protection'. In more detail, as far as the benefits under scrutiny in this study are concerned, the pillar should introduce:

- a right to a 'replacement income' that should protect employees and self-employed, and provide self-employed people access to social protection, including the branches covered by Regulation 883;
- the extension of the right to adequate unemployment benefits of a reasonable duration to all unemployed, including those with short employment records and former unemployed persons, yet in line with the contributions and national eligibility rules;
- a right to a minimum income for everyone who lacks sufficient resources. The communication specifies minimum income benefits are 'non-contributory, universal and means-tested', and requires people to be available to work or participate in community activities;
- a right to long-term care services for persons who are reliant on care, privileging home-care and community-based services.

The proposal might enhance access to social protection for self-employed and non-standard workers across Europe on a similar footing with employees, and provide a common minimum degree of social protection to all those who are unemployed.[25]

Pursuant to the European Treaties, the next necessary steps for the implementation of the Social Pillar shall be the draft and approval of EU legislation in all the covered fields and the implementation thereof at the national level.

The actual degree of extension of social security coverage in regards to both its personal and material scope will also depend on the presence of coherent employment, fiscal, and macroeconomic policies, agreed by Member States and the European Commission in the framework of the European semester.

In fact, financial resources for guaranteeing the proposed social rights may be seriously limited in the light of the goal, included in the social pillar as well, of 'guarantee[ing] employers the necessary flexibility to adapt swiftly to economic changes', which, combined with constraints on public budgets[26] may end up underpinning flexibility without granting adequate security.[27]

That said, if legislative initiatives under the social pillar are passed and the right to extended social protection is properly implemented at national level, there would be notable effects also on the coordination of social security.

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[25] At the time of writing, as part of the Social Pillar Initiative, the European Commission is holding consultations with social partners and stakeholders concerning a possible EU initiative aimed at ensuring access to a package of social security benefits and employment services for non-standard workers and self-employed.

[26] Currently, France, Spain, and the United Kingdom are under the excessive deficit procedure, whilst this procedure has been recently closed for Greece, Croatia, and Portugal. As far as the public debt to GDP ratio is concerned, Austria, Belgium, Croatia, Cyprus, France, Germany, Greece, Hungary, Ireland, Italy, the Netherlands, Portugal, Slovenia, Spain, and the United Kingdom are above the 60% reference value set by the Growth and Stability Pact.

[27] On the social costs of the European employment policies, see: Giubboni, S. (2015), 'Europe's Crisis Law and the Welfare State: A Critique', *European Labour Law Journal*, Vol. 6, Issue 1, p. 4 ff.; Deakin, S., Koukiadaki, A. (2013), *The Sovereign Debt Crisis and the Evolution of Labour Law in Europe*, in N. Countouris, M. Freedland (eds.), *Resocialising Europe in a Time of Crisis*, Cambridge, p. 163 ff.; and Myant, M., Theodoropoulou, S., Piasna, A. (2016), *Unemployment, internal devaluation and labour market deregulation in Europe*, European Trade Union Institute (ETUI), Brussels.

Particular attention should be paid to the **classification**, adopted for the purposes of Regulation 883, of the 'replacement income' and of the 'minimum income'. While the former seems to resemble the features of an unemployment benefit, the latter may be classified as a 'special non-contributory cash benefit'.

As explained in the following chapter, this means that both benefits would be accessible to EU mobile citizens, albeit with some restrictions.

The scenario would be rather different if Member States classified such benefits as 'social assistance'. Since this category of benefits is in principle excluded from coordination rules, EU mobile citizens could be subject to strict conditions in order to access the benefit and retain it when moving abroad. However, the notion of social assistance under Regulation 883 is very restrictive, since it applies only to social benefits which are granted by Member States according to a discretionary assessment of the personal needs of the claimants (see section 2.1 below).

Another difficulty may arise in the application of the aggregation principle for self-employed wishing to aggregate their insurance periods for accessing unemployment benefits abroad.

In fact, relevant information from self-employed workers might be difficult to convert as they are not bound to a number of worked hours, and current and future rules for determining the entitlement to, and duration of the benefit may adopt a different basis from country to country.

Finally, the introduction of a 'right to long-term care', and the specific reference made to benefits in kind, such as home care, may promote wider and more homogenous take-up of these schemes across Europe. In turn, this could ease their coordination if, as proposed by the European Commission, a specific chapter targeting 'long-term care benefits' were eventually introduced.

2. SOCIAL SECURITY COORDINATION FOR ECONOMICALLY INACTIVE CITIZENS

2.1. Current situation

Definition

Regulation 883 does not provide a definition of 'economically inactive citizens'. Yet, as further detailed below, this group can be identified when opposed to citizens classified as being 'economically active' from Article 11 of Regulation 883, and from the overlap with Directive 2004/38/EC (Article 7).

Apart from people in employment, obviously considered as 'economically active', further categories of pre- or post-active persons are assimilated to "workers". Article 11(2) of Regulation 883 assimilates persons receiving cash benefits because, or as a consequence of having lost their job (i.e. 'post-active persons') in a State, to workers for all benefits except: (a) old-age or survivors' pensions; (b) pensions in respect of accidents at work or occupational disease; and (c) sickness benefits in cash covering treatment for an unlimited period.

Regarding 'pre-active' persons, job-seekers are also considered as active persons under specific circumstances, as further specified in the following section.

Coordination

As a general rule, 'economically inactive persons' are covered by the **State of residence** (Article 11(3)(e)).[28] Pursuant to Article 1(j), 'residence means the place where a person habitually resides'.[29]

Relevant exceptions are pensioners, whose pension benefits are paid by the State(s) of insurance (Articles 23-30), and dependent family members, who are subject to the legislation of the worker or pensioner they are dependent on (Article 2).[30]

As far as access to social security is concerned, economically inactive citizens shall be granted all the benefits covered by the material scope of Regulation 883 on the same footing as nationals of the competent Member State. This does not include social and medical assistance, which is expressly excluded from the material scope of Regulation 883 (Article 3(5)(a)).

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[28] A specific mention has to be made for pensioners, whose pension benefits are paid by the Member State(s) of insurance.

[29] As set out by Article 11 of the implementing regulation, the elements for determining the residence rest mainly with factual rather than legal indicators, namely: (a) the duration and continuity of presence on the territory of a Member State; and (b) the person's situation as arising from: the nature and the specific characteristics of any activity pursued; his/her family status and family ties; the exercise of any non-remunerated activity; the source of his/her income (if he/she is a student); his/her housing situation; and the place where the person is deemed to reside for taxation purposes. In addition, in case of persistent disagreement between Member States, the person's intention, especially the reasons that led him/her to move, shall be considered decisive for the definition of the place of residence for the purposes of Regulation 883.

[30] Yet, the extent of this right is still contentious as per CJEU case law development. In more detail, in CJEU, Case C-40/76, *Kermaschek*, EU:C:1976:157, the CJEU appeared to limit this right to sole benefits specifically addressing dependent family members, whilst in CJEU, Case C-308/93, *Cabanis*, EU:C:1996:169, it adopted a more extensive orientation, deeming exclusions to apply only for benefits meant especially for employees and self-employed persons (say unemployment benefits).

What constitutes 'social assistance'?

Since inactive citizens may need to rely more than active citizens on schemes intended to ensure subsistence, possibly unlinked to social security or employment records, the actual meaning of 'social assistance' under Article 3(5) is particularly relevant to them.

In the absence of a definition by Regulation 883, the CJEU developed in the 1970s and the 1980s a **narrow interpretation of the exclusion of social assistance** from the field of application of Regulation 883.

As highlighted in the *Frilli* and *Hoeckx* cases,[31] the CJEU identified as aspects qualifying a benefit as 'social assistance', the absence of social security contribution or employment requirements for the access, which shall, instead, be granted by reason of a need and by taking individual cases into consideration. Instead, a benefit shall be deemed to be a 'social security benefit' covered by Regulation 883 whenever (a) the benefit is conditional upon a legally defined position rather than a discretional assessment, and (b) it concerns one of the cases covered by the material scope of Regulation 883 (Article 3 (1) Regulation 883).

The CJEU also clarified that the classification of the benefits rests with their purposes and conditions as defined by EU law, while the actual classification adopted by the national legislation is irrelevant in this regard.

In order to clarify interpretation problems arisen from CJEU case law, rules on social security coordination have been amended several times and, since 1992, have included a chapter dealing with '**special non-contributory cash benefits**' (Article 70).[32] These benefits are defined by Regulation 883 as those complying with three requirements, namely: (a) being fully funded by general taxation; (b) providing supplementary coverage for risks covered by Regulation 883 with a view to guaranteeing a minimum subsistence income or specific protection for people with disabilities, closely linked to the person's social environment in the State concerned; and (c) being listed in Annex X.[33]

The mediation found was intended, on the one hand, to make sure mobile citizens could access schemes providing long-term support, like the minimum subsistence income, in the country of residence, and, on the other hand, to deny the export of these benefits, perceived as a threat to a fair distribution of social costs between Member States.

In spite of this attempt, disputes brought to the attention of the CJEU highlighted: (a) possible misclassification of these benefits, which might be ascertained to be sickness or unemployment benefits by the CJEU; as well as (b) overlaps between special non-contributory benefits and benefits intended as social assistance under Directive 2004/38/EC (Article 7).

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[31] CJEU, Case C-1/72, *Frilli*, EU:C:1972:56, and CJEU, Case C-249/83, *Hoeckx*, EU:C:1985:139

[32] See Verschueren, H. (2009), Special non-contributory Benefits in Regulation 1408/71, Regulation 883/2004 and the Case Law of the ECJ, *European Journal of Social Security*, Vol. 11, Issues 1-2, p. 217 ff.

[33] Benefits intended to provide specific protection for people with disabilities are also considered as a 'special non-contributory cash benefit'.

Directive 2004/38/EC and limits on the access to 'social assistance'

The thorny issue of the right of access to social assistance became even more complex after the *Brey* and *Dano*[34] judgments, addressing the possible interference between Regulation 883 and Directive 2004/38/EC, concerning the right of free movement of EU citizens.

According to this case law, a special non-contributory benefit under Regulation 883 might still qualify as social assistance within the meaning of **Directive 2004/38/EC**. This possibility lies indeed at the heart of the CJEU's ruling in the *Brey* case.

Advocate General Wahl, when examining the objectives of the two instruments (the first of which essentially relates to social security, and the second, to freedoms of movement, non-discrimination, and EU citizenship), reached the conclusion that **the concept of 'social assistance' is not the same in the two legislative texts**. The CJEU followed this approach, holding that 'the concept of a "social assistance system" as used in Article 7(1)(b) of Directive 2004/38 cannot […] be confined to those social assistance benefits which, pursuant to Article3(5)(a) of Regulation No 883/2004, do not fall within the scope of that regulation'. On the contrary, in its view, the concept of 'social assistance systems' within the meaning of Article 7(1)(b) of Directive 2004/38/EC must be defined according to the objective of that provision, and not on the basis of formal criteria. Accordingly, it must be interpreted 'as covering all assistance introduced by the public authorities, whether at the national, regional or local level, that can be claimed by an individual who does not have resources sufficient to meet his own basic needs and the needs of his family and who, by reason of that fact, may become a burden on the public finances of the host Member State during his period of residence which could have consequences for the overall level of assistance which may be granted by that State'. On these grounds, in *Dano* the CJEU ruled that a person who is not economically active and claims a special non-contributory cash benefit within the meaning of Article 70 of Regulation 883 can be made subject to the requirement that he/she fulfils the conditions for obtaining a right to residence under Article 7 of Directive 2004/38/EC. Accordingly, as stated in *Dano*, Article 24(1) of Directive 2004/38/EC, read in conjunction with Article 7(1)(b) thereof, does not preclude national legislation, such as the German one at issue in the main proceedings, insofar as it excludes nationals of other Member States who do not have a residence right under Directive 2004/38/EC in the host Member State from entitlement to certain 'special non-contributory cash benefits' within the meaning of Article 70(2) of Regulation 883.[35]

The same conclusion must be reached, according to the CJEU, in respect of the interpretation of Article 4 of Regulation 883, precluding discrimination on grounds of nationality. The benefits at issue in the main proceedings, which constitute 'special non-contributory cash benefits' within the meaning of Article 70(2) of Regulation 883, are, under Article 70(4), to be provided exclusively in the Member State in which the persons concerned reside, in accordance with its legislation.

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[34] See, respectively, CJEU, Case C-140/12, *Brey*, EU:C:2013:565, and CJEU, Case-333/13, *Dano*, EU:C:2014:2358. This case law has been the object of extensive (and mostly critical) commentaries; see among many: Verschueren, H. (2014), Free Movement or Benefit Tourism: The Unreasonable Burden of *Brey*, *European Journal of Migration Law*, Vol. 16, Issue 2, p. 147 ff.; Verschueren, H. (2015), *EU Migrants and Destitution: The Ambiguous EU Objectives*, in Pennings, F., Vonk, G. (eds.), *Research Handbook on European Social Security*, Cheltenham, UK/Northampton, USA, p. 413 ff.; and Giubboni, S. (2016), *Free Movement of Persons and European Solidarity: A Melancholic Eulogy*, in Verschueren, H. (ed.), *Residence, Employment and Social Rights of Mobile Persons. On How EU Law Defines Where They Belong*, Cambridge/Antwerp/Portland, p. 73 ff.

[35] CJEU, Case C-333/13, *Dano*, EU:C:2014:2358, para. 82.

It follows that there is nothing to prevent the grant of such benefits to EU citizens who are not economically active from being made subject to the requirement that those citizens fulfil the conditions for obtaining a residence right under Directive 2004/38/EC in the host Member State.[36]

A similar approach was taken in the *Alimanovic* case[37] concerning a Swedish job-seeker that, after having worked for 11 months in Germany and having been unemployed for a year, was discontinued social benefits. In this case, the CJEU stated that, although Ms Alimanovic may qualify as a '**job-seeker**' and retain her residence right as long as she could provide evidence that she was continuing to seek employment and that she had a genuine chance of being engaged, 'it must nevertheless be observed that, in such a case, the host Member State may rely on the derogation in Article 24(2) of that directive [Directive 2004/38/EC] in order not to grant that citizen the social assistance sought' (paras. 56-57).

As a result, the possibility for mobile EU citizens not in employment to access social benefits may be restricted by rules concerning the residence right, transposing Directive 2004/38/EC at national level.

Whereas workers and their family members do not suffer from particular restrictions, Directive 2004/38/EC grants Member States the possibility to exclude some categories of citizens from access to social assistance.

As detailed in the table below, citizens having lost their job without having completed at least one year of employment in a Member State (as in the case at hand in *Alimanovic*), as well as inactive family members residing in the country for less than five years who lose their affiliation with the worker, are those who run the greatest **risk of exclusion from access to 'social assistance'** in the Member State where they reside pursuant to Directive 2004/38/EC, while not being entitled to analogous 'social benefits' in the country of provenance, as far as they are not 'resident' there according to Regulation 883.[38]

Citizens having worked or resided legally on a continuous basis in a country for at least five years cannot, instead, be denied social assistance since they are entitled to a 'permanent residence right' pursuant to Article 16. This status shall be lost only through absence from the host Member State for a period exceeding two consecutive years.

A peculiar situation is the one of 'job-seekers'. According to Article 14(4), Member States shall not be obliged to grant social assistance to people entering the country with the purpose of finding a job. Yet, they have a right to reside in a host country for at least three months or longer periods if there is evidence they are looking for a job and have a 'genuine chance of being engaged', a provision whose interpretation remains relatively open to national provisions and practices.

EU citizens who do not enjoy a permanent residence right might be further discouraged from claiming a social assistance benefit since, beyond being denied the benefit, they could risk being expelled from the country. As per Article 14(3) of Directive 2004/38/EC, expulsion cannot be an automatic consequence of recourse to social assistance, since a careful individual assessment of the personal situation of the claimant is to be carried out for that purpose by the competent authority of the Member State. Although such an assessment has to take into account the overall situation of the individual concerned

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[36] CJEU, Case C-333/13, *Dano*, EU:C:2014:2358, para. 83.

[37] CJEU, Case C-67/14, *Alimanovic*, EU:C:2015:597.

[38] Interestingly, the Swedish expert interviewed reported administrative practices deeming one year of employment to be completed if the person concerned has had an employment contract lasting for one year, a condition that might not be easily met by those under short fixed-term contracts.

beyond any automatic application of the black letter of the law,[39] including whether access to social assistance is due to temporary difficulties, and the amount of the aid granted, it cannot be denied that the condition of economically inactive citizens has been significantly weakened *vis-à-vis* Member States' objective interest of protecting the financial integrity and stability of their social assistance systems.[40] Furthermore, a Member State is legitimated not to grant the residence right upon assessment of personal circumstances, if the claimant is found to prove a lack of self-sufficiency (Article 8(4) of Directive 2004/38/EC).[41]

An overview on the categories of citizens at risk of exclusion from social assistance pursuant to Directive 2004/38/EC as interpreted by the CJEU can be found in Annex 2.

The most notable case arising from our field research into the denial of social assistance is the one of Germany, explained in Box 1. Indeed, recent law changes seem to go beyond CJEU case law, curbing access to social assistance for all economically inactive citizens residing in the country for less than five years.

Box 1: Economically inactive citizens and access to social assistance – The case of Germany and possible conflicts with national primary law and EU law

On 1 January 2017, amendments to the German Social Code entered into force.

Pursuant to the new provisions, economically inactive persons are banned from access to social assistance if they have not been residing in the country for at least five years. This includes the *Arbeitslosengeld II*, which is intended to provide a minimum income to unemployed people in need.

The new rules seem to clash not only with Regulation 883, but also with national case law as well, with which they might be confronted.

In fact, these law provisions came after the German Federal Social Court stated EU citizens shall have access to social assistance after a period of residence of six months, as well as after the German Constitutional Court's case law dating back to 2010 and 2012. In particular, the Constitutional Court assimilates the right to social assistance to a human right, holding it shall be granted to all those who reside in the country.

[39] Recital 16 of Directive 2004/38/EC further specifies: 'As long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State they should not be expelled. Therefore, an expulsion measure should not be the automatic consequence of recourse to the social assistance system. The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system and to proceed to his/her expulsion. In no case should an expulsion measure be adopted against workers, self-employed persons or job-seekers as defined by the Court of Justice save on grounds of public policy or public security.'

[40] See: Spaventa, E. (2016), *Once a Foreigner, Always a Foreigner. Who Does Not Belong Here Anymore? Expulsion Measures*, and Verschueren, H., *Being Economically Active. How It Still Matters*, both in Verschueren, H. (ed.), *Residence, employment and social rights of mobile persons. On how EU law defines where they belong*, Cambridge, pp. 89 and 187, respectively; and Verschueren, H. (2009), Special non-contributory Benefits in Regulation 1408/71, Regulation 883/2004 and the Case Law of the ECJ, *European Journal of Social Security*, Vol. 11, Issues 1-2, p. 217 ff.

[41] See also: European Parliament (2015), *Free Movement of Workers,* Fact Sheets on the European Union, available at: http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_3.1.3.html; Verschueren, H. (2009), Special non-contributory Benefits in Regulation 1408/71, Regulation 883/2004 and the Case Law of the ECJ, *European Journal of Social Security*, Vol. 11, Issues 1-2, p. 217 ff.; and CJEU, Case C-140/12, *Brey,* EU:C:2013:565, paras. 66-67.

2.2. Assessment of the European Commission's proposal

The European Commission's proposal

The proposal stems from the recent CJEU case law codifying in Article 4 the possibility for Member States to make access to social security benefits by economically inactive mobile citizens conditional upon having a right to legal residence under Directive 2004/38/EC. It also makes clear that such restriction cannot apply to a mobile job-seeker according to Article 45 TFEU, and calls upon Member States to make it possible for inactive EU mobile citizens to fulfil the requirement of having a comprehensive sickness insurance.

Reasons for the proposed changes

The European Commission aims to align legislation with the recent case law of the CJEU. This way, circumstances allowing Member States to refuse access to social security benefits by economically inactive citizens should be clearer, transparent, and more certain to both claimants and social security institutions.

The proposal does not provide a specification of the meaning of 'social assistance' or of 'economically inactive citizens', but merely aligns Regulation 883 with Directive 2004/38/EC.

As specified in the impact assessment, the option to make a **general reference** to limitations on social benefits rather than to specific categories of benefits, like 'special non-contributory cash benefits', was preferred. Although the link with Directive 2004/38/EC should justify only limits on the access to 'social assistance' by economically inactive citizens, the wider reference to 'social security benefits' leaves room for the dynamic shaping of such concept by the CJEU's future rulings. By referring to social security benefits, i.e. to all benefits covered by Regulation 883, the European Commission's proposal would potentially go beyond the current reach of CJEU case law.

This was preferred over the options entailing a further specification of the benefits that could be denied, which, instead, would have channelled the CJEU's interpretation on the conflict between the provisions at hand.

Discussion

The proposal appears to respond to the fears of welfare tourism raised by States with more generous welfare systems.

Yet, it fails to address the needs of persons who have lost their job and are seeking employment in the host State, if they fail to complete 12 months of employment in the host country. These people might be *de facto* obliged to **leave the host State** if they do not have sufficient resources (see Article 7(3)(b-c) of Directive 2004/38/EC).

This led relevant stakeholders, such as the European Economic and Social Committee (EECS), to question whether this provision is in line with the right to EU citizenship as well as with the CFR, notably with regard to the right to human dignity (Article 1), the right to social security and social assistance (Article 34), and the right to healthcare (Article 35). Indeed, the European Commission's proposed amendment to Article 4 would introduce an unprecedented derogation from the fundamental principle of equal treatment as specifically enshrined in the sphere of EU social security coordination law.[42]

[42] The proposal triggered debate also in the Committee of Permanent Representatives, that eventually suggested not codifying case law, but, rather, to include a new Recital 5a in Regulation 883, remarking the CJEU case law on the principle of equal treatment needs to be respected. See: Council of the European Union (2017), *Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 883/2004 on the coordination of social security systems and regulation (EC) No 987/2009 laying down the*

Such a proposal would also give rise to a specific **coordination problem** affecting economically inactive persons, since the combination of the proposed text of Article 4 with Article 70 of Regulation 883 would potentially create for this category of EU citizens a situation akin to a typical negative conflict of laws, whose prevention allegedly constitutes a fundamental purpose of EU coordination law.[43] Since economically inactive persons are prevented from exporting special non-contributory cash benefits according to Article 70, and at the same time are excluded from the right to equal treatment in the Member State of residence, they would potentially find themselves in a state of limbo quite akin to a negative conflict of laws, because they no longer meet the conditions of coverage from their home Member State, while at the same time not being able to satisfy the requirements for being integrated into the social security system of the host Member State. In this regard, it should be recalled that the introduction, by Regulation (EEC) 1247/92, of a special system of coordination for non-contributory cash benefits, characterised by the express and exceptional derogation from the general principle of exportability, was specifically offset by the attribution of the responsibility for the payment of such benefits to the Member State of actual residence of the beneficiary according to the *lex loci domicilii*. Yet, the notion of residence to this end was based on parameters that are inherently and essentially factual, as opposed to Directive 2004/38/EC, which gives a stricter legal definition anchored to requirements of a legal and substantial nature (such as sufficient resources and comprehensive health insurance coverage). The original idea was precisely that, whenever the merely factual situation of habitual residence in the host country occurred, the economically inactive EU citizens covered by the social security regulation would certainly be entitled to non-contributory benefits provided for by the legislation of the host Member State, in which those citizens placed their centre of interest. The overall coherence of that special coordination framework would be undermined by the proposed new Article 4(2) of Regulation 883.

This connects to a different question raised by some stakeholders (and the European Citizen Action Service, ECAS), which relates to the social security coverage of economically inactive EU citizens. For similar reasons of negative interaction between Directive 2004/38/EC and Regulation 883, citizens who move to a country with a residence-based healthcare system can in fact face the analogous problem of being prevented from affiliating to the host Member State's system, whilst also losing their healthcare coverage in their home country due to their change of residence.

In addition, as highlighted by some interviewees, **whether a person classifies as an 'economically active'**, such as a job-seeker, **or as an 'economically inactive' citizen is not straightforward**, and the proposed changes do not clarify this aspect. As per the CJEU's reading of Directive 2004/38/EC (Articles 7, 14(4)(b), and 24(2)), the border line

procedure for implementing Regulation (EC) No 883/2004 (Text with relevance for the EEA and Switzerland) - Partial general approach, 1319/17, Brussels, 16 October 2017.

The Rapporteur on the EC proposal of the Committee on Employment and Social Affairs of the European Parliament, instead, rejected the proposal on economically inactive citizens, remarking in the explanatory statement that 'it is not the task of EU legislators to codify decisions taken by the Court proposed not to codify the case law', and wishing the revision of coordination rules ensures continuity of social rights. See: European Parliament (2017), *I DRAFT REPORT on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004*, Committee on Employment and Social Affairs, 2016/0397(COD).

[43] See e.g. CJEU, Case C-2/89, *Kits van Heijningen*, EU:C:1990:183, para. 12: 'Those provisions are intended not only to prevent the simultaneous application of a number of national legislative systems and the complication which might ensue, but also to ensure that the persons covered by Regulation No 1408/71 are not left without social security cover because there is no legislation which is applicable to them'. See also Pennings, F. (2015), *European Social Security Law*, Cambridge/Antwerp/Portland, sixth edition, p. 8-9.

would be on the ground of (a) 'continuing to seek employment' and (b) 'having a genuine chance of being engaged'.

Yet, what constitutes a 'genuine chance' may vary depending on the country at hand and only incidentally on whether national provisions undergo a test of coherence with EU rules before the CJEU. As described in Box 2, there is already some evidence that suggests that the six-month clause is disregarded, even when it comes to the residence right.

Box 2: Economically inactive citizens and access to social assistance – The case of Belgium

The dossier prepared by the unions INCA CGIL and FGTB/ABVV and by the NGOs EU Rights Clinic and Bruxelles laïque[44] duly reported evidence of illegitimate practices implemented by the Belgian Immigration Office, which is tasked with assessing foreign citizens' residence right.

Among the reported cases, which stem from by-laws of the Immigration Office and from the expulsion orders received by citizens asking for legal support from the unions, the most significant are the following:

- Belgian authorities labelled the 'CPAS contract' as social assistance, i.e. an employment contract entered into by the public social services centres (CPSA) to guarantee employment to job-seekers with a view to supporting integration into the social security system, as well as the acquisition of work experience. Consequently, 'inactive' foreign citizens have been denied such measures. Although, according to the report, law amendments have been implemented to overcome this practice, foreign citizens are still denied access to the measure since relevant administrative guidance has not been provided to the Immigration Office;
- expulsion orders were issued, after less than six months of unemployment, against people who had worked in Belgium;
- expulsion orders motivated the lack of a 'genuine chance of being engaged' on the basis of initiatives made by unemployed people to improve their skills or to find a job, such as the attendance of training or language courses;
- expulsion orders failed to specify the administrative court with which the person concerned could lodge an appeal, in breach of Article 30(3) of Directive 2004/38/EC.

In the authors' opinion, the 'stereotyped' motivations adopted in the orders, as well as the number of expulsions, suggest the adoption of automatic procedures rather than the assessment of personal circumstances, as entailed by the Directive.

Although the reports deal mainly with the 'right of residence', for the purposes of Regulation 883 once an expulsion order is issued, the person concerned may no longer claim any social benefits in the country (Article 64).

Indeed, according to the dossier, the categories that are most likely to receive an expulsion order include:

- citizens asking for social assistance or that might be entitled thereto;
- people who have been unemployed for more than six months (sometimes even less) and who have worked for less than one year in Belgium;
- citizens who worked on a full-time basis under the CPAS contract.

[44] INCA CGIL, FGTB/ABVV, EU Rights Clinic, Bruxelles laïque (2016), *Plainte concernant la violation de la Directive 2004/38 et du Règlement 882/2004 par l'État belge*, Brussels.

The strict interpretation of Article 7 of Directive 2004/38/EC may be very problematic and even lead to paradoxical situations. In fact, under Article 7(3)(c) of the Directive, **a worker who has become unemployed during the first 12 months of employment** in the host State may lose his/her status after six months of unemployment. Yet, such a person may continue to be entitled to an unemployment benefit of the host State (pursuant to national law in combination with the unemployment chapter of Regulation 883). However, as the box above shows, some Member States, such as Belgium, have endorsed the policy of taking expulsion measures against this category of persons. In such a situation, they should continue to enjoy the right to reside in the host Member State since they have sufficient resources not to become a burden on the social assistance system of the host State. Indeed, unemployment benefits are not social assistance benefits within the meaning of Directive 2004/38/EC. Moreover, job-seekers may not be expelled as long as they provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged (Article 14(4)(b)) of Directive 2004/38/EC). In addition, expulsion would also lead to the loss of unemployment benefits, since Regulation 883 makes the retention of such a benefit conditional upon the residence in the competent Member State (Article 64). An expulsion measure would therefore have disproportional consequences for the persons involved, and would also undermine the *effet utile* of Regulation 883.[45]

The concept of 'social assistance', too, has not been clarified, and indeed the proposed text refers to 'social security benefits', a concept that might even enlarge the scope of the exclusion as currently defined by the CJEU, which hardly introduces more clarity in the absence of further definition or guidance.

These restrictions seem to be partially counterbalanced by the new recitals introduced in the Preamble, which make explicit reference to the CFR and, in particular, to: the right to human dignity (Article 1), the right to life (Article 2), the right to social security (Article 34), and the right to healthcare (Article 35), as well as to the call upon Member States to simplify the possibility to have a health insurance in the country.

Though these principles could set limits on the possibility of denying social benefits, their potential remains untapped as the proposal lacks a concrete declination of those rights.

Summary and recommendations

The European Commission's proposal aims to codify, through the amendment of Article 4 of the basic regulation, the recent case law of the CJEU, according to which economically inactive citizens moving from one Member State to another can only access social security benefits on a par with the nationals of the host State if they satisfy the condition of legal residence, as defined in Directive 2004/38/EC. Under this directive, legal residence of economically inactive persons requires that they prove that they have sufficient means of subsistence and a comprehensive health insurance (so-called 'reverse means test').[46] This condition does not apply to economically active persons, including job-seekers; their right of residence in another Member State is conferred directly by Articles 45 ff. TFEU, and it cannot be made conditional upon the test of satisfying the double requirement of sufficient resources and comprehensive health insurance coverage.

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[45] Verschueren, H. (2016), *Being Economically Active. How It Still Matters*, in Id. (ed.), *Residence, employment and social rights of mobile persons. On how EU law defines where they belong*, Cambridge, p. 187 ff., and Verschueren, H. (2009), Special non-contributory Benefits in Regulation 1408/71, Regulation 883/2004 and the Case Law of the ECJ, *European Journal of Social Security*, Vol. 11, Issues 1-2, p. 217 ff.

[46] Cf. Ferrera, M. (2005), *The Boundaries of Welfare. European Integration and the New Spatial Politics of Social Protection*, Oxford, p. 131 ff.

The European Commission's proposal expressly aims to codify, for the sake of clarity and legal certainty, the recent case law of the CJEU. This means that economically inactive persons will not have access in the host Member State to any social assistance benefits, in the broad meaning adopted by Directive 2004/38/EC so as to include social security benefits under Regulation 883, unless they have the right to reside there (which, for inactive EU citizens, is conditional upon having the means of subsistence, as well as comprehensive health insurance coverage).

The European Commissions' proposed change to Article 4 of Regulation 883 has triggered many **objections** from important stakeholders, from the position of the European Trade Union Confederation (ETUC)[47] to the opinion of the European Economic and Social Committee (EESC),[48] and indeed raises a number of constitutional and legal questions. The main objection on a constitutional and principled level is that it would disproportionately derogate from the fundamental principle of equal treatment irrespective of nationality, by severely restricting economically inactive EU citizens' right to freedom of movement. A codification of a rigidly and generally drafted derogation from Article 4 of the basic regulation would ossify CJEU case law by unduly restricting the possibility of an individual assessment of the conditions of economically inactive EU citizens claiming access to social rights in the host Member State under the proportionality principle. Such a derogation would in fact authorise Member States to establish rigid conditions for residence (and for gaining access to social assistance/security benefits), making it difficult for economically inactive EU citizens to exercise their free movement rights, in consideration of their link and attachment to the host society with due deference to the proportionality principle.[49] This is why, in its opinion on the proposal, the EESC has, for instance, asked for an express reference to equal respect for human dignity and to equal access to social security and healthcare, as provided for by the CFR in accordance with the treaty provisions on free movement of persons.[50]

The objections raised against the European Commission's proposal on a regulative and implementation level are equally important. According to criticism, the combination of the newly proposed Article 4 of the basic regulation (limiting equal access to social security benefits in the host State of actual residence) with Article 70 (preventing the export of special non-contributory benefits in cash from the former home State of residence) would be potentially able to entrap economically inactive persons in a state of limbo, creating a lacuna in the cross-border social protection of those persons that is quite akin, *de facto*,

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[47] ETUC (2017), *ETUC Position on the EC proposal for the revision of Regulation 883/2004 on the coordination of social security systems*, available at: https://www.etuc.org/documents/etuc-position-ec-proposal-revision-regulation-8832004-coordination-social-security-systems#.WdNnKcZx0dU.

[48] [48] EESC (2017), *EESC opinion: Coordination of social security systems*, SOC/557-EESC-2017-01461-00-00-ac-tra, available at: http://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/coordination-social-security-systems.

[49] For a discussion on this point, see: Dougan, M. (2006), 'The Constitutional Dimension to the Case law on Union Citizenship', *European Law Review*, Vol. 31, Issue 5, p. 613 ff.; Giubboni, S. (2012), *Diritti e solidarietà in Europa*, Bologna, p. 182 ff.; and Schiek, D. (2017), *Perspectives on Social Citizenship in the EU: From* Status Positivus *to* Status Socialis Activus *via Two Forms of Transnational Solidarity*, in D. Kochenov (ed.), *European Citizenship and Federalism. The Role or Rights*, Cambridge, p. 341 ff.

[50] 'The EESC is of the view that nothing in the proposed new rules should restrict the fundamental rights recognised in the Charter of Fundamental Rights of the European Union, notably the right to human dignity (Article 1), the right to social security and social assistance (Article 34), and the right to health care (Article 35)' (point 5.11 of the opinion adopted on 5 July 2017). For the same reason, the EESC's opinion stresses the importance of Recital 5b of the European Commission's proposal, whereby Member States should ensure that economically inactive EU mobile citizens are not prevented from having comprehensive health insurance coverage in the host Member State. This means that such citizens should be allowed, contrary to what currently happens in some Member States (such as, e.g., in the United Kingdom and Sweden), to contribute in a proportionate manner to a scheme for health coverage in the host Member State.

to a negative conflict of laws. Indeed, such EU citizens would easily find themselves in a paradoxical situation whereby applying for a social assistance benefit (in the broad meaning of Directive 2004/38/EC) would imply that, in the host State, they do not have sufficient resources and thus no residence right (while being prevented from exporting non-contributory benefits from the home State). As effectively observed, the paradoxical consequence is that 'such a Union citizen would only be entitled to any social assistance if he has sufficient resources and therefore is not in need of any social assistance. This seems to be a real Catch-22 situation'.[51]

At the same time, it should be recalled that, because of the growing fragmentation and casualisation of work relationships, a sharp distinction between the condition (and the status) of worker (and job-seeker), protected as such to a different extent by Article 45 TFUE, and the condition of being economically inactive is very often not easy. Moreover, for the purpose of applying Regulation 883 *ratione personae*, the meaning of 'activity' in relation to an employed person, and consequently the **worker status** depend on the social security legislation of the Member State concerned (Article 1(a) of the regulation). This is a potential obstacle to the inclusion of marginal workers as economically active employed persons within the sphere of application of the regulation.[52]

In the light of the above discussion on the impact assessment of the European Commission's proposal at issue, we would recommend evaluating carefully the opportunity of introducing such an express exception to the fundamental principle of equal treatment, which targets (and indeed potentially stigmatises) economically inactive EU citizens. Due to the prevailing negative evaluation of the current proposal of the European Commission, we would suggest that, in case the modification of / derogation from Article 4 of Regulation 883 were to be accepted, it should be duly qualified and circumscribed by ensuring that nothing in the proposed new rules restricts the fundamental rights recognised in the CFR – notably the right to human dignity (Article 1), the right to social security and social assistance (Article 34), and the right to healthcare (Article 35) – as well as the fundamental right of free movement, granted by the TFUE and the CFR to EU citizens.

[51] Minderhoud, P. (2016), *Sufficient Resources and Residence Rights under Directive 2004/38*, in Verschueren, H. (ed.), *Residence, Employment and Social Rights of Mobile Persons. On How EU Law Defines Where They Belong, Cambridge/Antwerp/Portland,* p. 60-61.

[52] See Caldarini, C., Giubboni, S., McKay, S. (2014), *The 'Place' of Atypical Work in the European Social Security Coordination: A Transnational Comparative Analysis*, WP C.S.D.L.E. "Massimo D'Antona", Collective Volumes, 2/2014, especially p. 45 ff.

3. COORDINATION OF UNEMPLOYMENT BENEFITS

3.1. General access to unemployment benefits

3.1.1. Current situation

Definition

Unemployment benefits are not defined under Regulation 883, nor has a definition been agreed upon by the Administration Commission. Consequently, a tentative description can stem only from CJEU case law.

In this regard, the *Acciardi* case[53] can be mentioned, concerning the access to a Dutch benefit, eventually classified by the CJEU as an unemployment benefit. In its argumentation, the CJEU mentioned the following aspects as relevant for its decision: (a) the entitlement was restricted to unemployed persons; (b) the right ceased as soon as the retirement age was reached; (c) the entitlement started immediately after the expiration of the unemployment benefit under the national legislation; and (d) the law imposed several conditions to ensure the beneficiaries' availability to work.

However, these criteria cannot be considered as sufficient or necessary as a whole to determine the identification of an unemployment benefit.

Indeed, in the *De Cuyper* case,[54] the CJEU ruled that a benefit was to be intended as an unemployment benefit insofar as it covered the risk of the loss of income of a person still able to work who involuntarily lost his/her job, although he/she was not subject to monitoring by the competent institution due to his/her older age.

The CJEU also held that 'measures intended to combat unemployment' should be considered as within the scope of Regulation 883, including benefits in cash intended to support training in case of imminent unemployment.

These **uncertainties** tally with an increasing diversification of these benefits in relation to both their contents and coverage. It is not clear, for instance, whether the emerging minimum income schemes declared by Member States as outside the scope of Regulation 883 would pass the test of the CJEU, or would fall under unemployment benefits by reason of measures entailing the beneficiary's active job-seeking.

Problems also might arise from the misclassification of benefits covering self-employed workers, as, due to the nature of self-employment, they might be based on a consistent loss of income rather than on a formal 'unemployment status'. Though, their actual 'purposes and conditions' might well be deemed to resemble unemployment benefits upon assessment by the CJEU.

Coordination

Special rules apply to the coordination of unemployment benefits.

An unemployed person can ask for the **aggregation** of previous periods of employment completed abroad only once a period of employment or insurance has been completed in a Member State ('qualifying period'). The former periods can be claimed for the purposes of acquisition, retention, recovery, or duration of the right to the benefits. Regulation 883 does not specify a minimum length of qualifying period, enabling aggregation following the completion of 'either periods of insurance, employment or self-employment' (Article

[53] CJEU, Case C-66/92, *Acciardi*, EU:C:1993:341.

[54] CJEU, Case C-406/04, *De Cuyper*, EU:C:2006:491.

61). Reading this provision in line with the aggregation principle enshrined in Article 48 TFEU (and, therefore, as a way to enhance workers' mobility), **any qualifying period of employment is deemed sufficient** to provide access to unemployment benefits in the State where periods of insurance or employment have been lastly completed.[55] This led to the assumption that even one day of registered employment in the country is sufficient to claim an unemployment benefit in the State of employment, by relying on the aggregation rule (so-called 'one-day rule'). The competent State is not reimbursed any sum by the Member State of previous insurance for periods completed there.

The calculation of the benefits stays, instead, with the sole income received in the competent Member State (Article 62) as far as the benefit is computed on the basis of a wage or a professional income.

The **export rule** is also subject to limitation. In fact, in accordance with article 64 (1) (a) Regulation 883, export is possible for a three-month period and the Member State paying the benefit can also require that the beneficiary remain at disposal of its PES for a period of four weeks before the export is allowed.

At the same time, Member States are also free to grant more generous conditions, by extending the period of export to up to six months (Article 64).

Exceptions are made for frontier workers and other cross-border workers, covered by the State of residence principle as explained under section 3.2.

Concerning the aggregation principle, some Member States called for **stricter rules**. They deemed that the current provisions might lead to abuse of right, insofar as workers could claim unemployment benefits in a Member State even upon completion of one day of work there.

Indeed, as highlighted by the FreSsco network,[56] the 'one-day rule' is often not abided by, as some Member States compute periods of insurance in 'weeks' and, therefore, require at least one week of employment to be completed before the aggregation principle can apply (one-week rule), or address cases of claims for access to unemployment benefits after one day of work in the country as potential frauds.

Although the absence of qualifying periods of work might be seen as a potential trigger of 'welfare tourism', this position seems to overlook the role of other obstacles to free movement, like the need to find a job and accommodation in the host country.[57] In addition, as unemployment benefits are often linked with the condition that the person shows up at public employment services (PES) and pursues a job activation path, fraud can be limited if effective activation policies are in place.

This way, so-called cases of 'welfare tourism' linked to unemployment benefits might be discouraged, safeguarding the proper functioning of the 'aggregation principle' as a tool

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[55] CJEU, Case C-272/90, *Van Noorden*, EU:C:1991:219.

[56] Fuchs, M. (ed.) (2015), *Analytical Report 2015 – Assessment of the impact of amendments to the EU social security coordination rules on aggregation of periods or salaries for unemployment benefits*, FresSco, European Commission, Luxembourg.

[57] The average share of unemployed people asking for the aggregation of periods in the State covered by Regulation 883 is 0.1% (2013) and reaches its highest values in Bulgaria (0.9%, 4,118), Belgium (0.5%, 2,196), and Norway (0.5%, 500). Aggregations in case of last period of employment shorter than 30 days are 11.7% of the total number of aggregations. Unfortunately, data is missing for a number of large countries, including Germany. See Pacolet, J., De Wispelaere, F. (2015), *Aggregation of periods or salaries for unemployment benefits, Report on U1 portable documents for migrant workers*, European Commission, Brussels.

to ease workers' mobility rather than an allegedly indiscriminate access to the social benefits by migrants.

As to the export of benefits, problems arise in regards to the **coordination of PES** in the involved States. Their coordination might fail to ensure adequate assistance to the job-seeker or to monitor his/her actual effort to re-enter the labour market. In addition, if Member States apply the four-week rule, the period of export might end up being even shorter and possibly insufficient to find a job in the chosen State.[58]

This may be the case for Member States with less generous unemployment benefits. In Hungary, for instance, unemployment benefits are granted for 90 days at most. This means that, if export is allowed from the fifth week onwards, workers might have the possibility to export the benefit for about one month.[59]

3.1.2. Assessment of the European Commission's proposal

The European Commission's proposal

The proposed amendments entitle Member States not to apply the general '**aggregation rule**' of Article 6 for periods of employment in the country shorter than three months (Article 61(1)). In this case, claimants can receive the unemployment benefit from the Member State of previous insurance and, according to its legislation, for a maximum period of six months, possibly extended for the full period of entitlement. Nevertheless, the application can be filed in the State of last employment (Article 64a).

At the same time, the proposal **extends the period of exportability** of unemployment benefits to six months, and leaves Member States free to further extend it for the full period of entitlement (Article 64).

A minor adjustment is also introduced to codify Recommendation U1 of the Administrative Commission to ensure that persons receiving unemployment benefits from one Member State while simultaneously working in another Member State are covered by the legislation of the Member State paying out the unemployment benefits.

Reason for the proposed changes

The proposal intends to ensure access to unemployment benefits, whilst also providing for more clarity and fair burden-sharing between the involved Member States.

The introduction of a three-month rule concerning the aggregation of periods, in particular, would ensure consistency across different Member States in defining a qualifying period.

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[58] See also: Fondazione Giacomo Brodolini (FGB) (2015), *Task 2: Administrative costs of handling aggregation of periods or salaries for unemployment benefits*, European Commission, Luxembourg; and Pacolet, J., De Wispelaere, F. (2014), *Export of unemployment benefits. PD U2 Questionnaire*, European Commission, Luxembourg.

[59] As per the administrative data available from Pacolet, J., De Wispelaere, F. (2014), Export of unemployment benefits. PD U2 Questionnaire, European Commission, Luxembourg. The average length of the export period is 47.4 days for Hungary. The country ranks among those with the highest success rate for job-seekers exporting their benefit (22.2% of whom found a job abroad), but it remains among those with the lowest number of unemployed people exporting their benefits (27 over a six-month period, 0.1% of the average number of unemployed persons in 2013). Other countries featuring average periods of export below three months are: Austria, Croatia, Denmark, Finland, Germany, Malta, and Portugal, whilst Bulgaria, Luxembourg, and Poland feature the highest length of export (107, 104, and 102 days respectively). Data refers to the second semester of 2013 and covers 18 Member States.

On the other hand, the extension of the period of export of benefits is intended to ease workers' mobility, smoothing the functioning of the European labour market.

At the same time, the three-month rule appears to respond to two fears clearly referred to in the impact assessment, namely:

- access to unemployment benefits after short periods of unemployment thanks to the possibility of using the aggregation rule;
- access to unemployment benefits in the Member State of last activity thanks to the possibility of using the aggregation rule and on the basis of the (higher) income received there.

As explicated in the proposal, the latter two aspects have to do with 'perceived unfair gains' as far as the workers can access benefits in a State without a real link being established.

Discussion

As for the impact assessment documents, changes in the aggregation rule should bring about overall savings of €41 million, albeit differently shared among Member States.

Whereas individuals might be discouraged from exercising their **freedom of movement** by the new rules concerning aggregation, savings deriving from the avoidance of the risks of 'abuse of right' seem to be mild. To give an idea, the estimated savings of €41 million account for barely 0.4% of the poorest EU country in terms of Gross Domestic Product (GDP) (Malta). In this regard, the proposed changes appear to address mainly the target of pursuing fair burden-sharing between Member States.

As far as fairness in the **access to benefits** is concerned, the proposal is weaker and leaves wide discretion to national provisions.

Those losing their job before the third month of employment in a Member State do not lose their right to unemployment benefits, but have to address their claim to the Member State of previous employment through the PES of the State of last employment (proposed Article 64a).

Nevertheless, as an interviewee pointed out, the proposal seems to overlook the case of highly mobile workers. Taking the example of a worker employed in sequence for very short assignments across Europe, he/she is likely to be excluded *de facto* from the access to unemployment benefits insofar as no country is eligible since he/she does not achieve a qualifying period consisting of three-month employment there. Such an effect would run against the 'principle of aggregation' set out in Article 6 Regulation 883 and, most notably, directly in Article 48 TFEU.

In addition, it increases the need for **administrative cooperation** with possible failures or delays in the information sharing necessary to ascertain whether the State of previous employment is competent. In addition, there is a risk of poor support to the claimant by the PES of the last country of employment, as well as of weak monitoring of his/her active job-seeking insofar as the PES in the host country are not responsible for the payment of the benefit.

Then, the amount of the benefit itself might incur significant drops, which makes living in a host country financially unsustainable.

The new Article 64a, read in the light of Article 62, triggers a change in the wage to be taken as a reference for the calculation of the benefit in the State of previous employment.

In the presence of migration flows from countries with lower wages and lower benefits to those with higher wages and more generous benefits, this can have a substantial impact on the amount of the allowance, insofar as the wage received in the 'low-wage country' – instead of the wage received in the 'high-wage country' – becomes the basis for the computation.

This is not only the case for flows from eastern and southern Europe towards central and northern Europe, but might also affect the flows within border regions, for instance EU citizens from France, Austria, Germany, or Italy who work in Switzerland.

A possible compromise, suggested by some experts and envisaged as well among the options under scrutiny in the impact assessment, would be to require one month of employment to be completed in a Member State before the aggregation principle applies, provided such a length would be sufficient to discourage fraud.

In the light of the stark differences in Europe in terms of generosity and coverage of social safety nets addressing unemployment and, more generally, poverty risks, it should be considered whether an upward harmonisation goal should be prioritised among EU policies. Of course, such a policy option would go beyond the limits of coordination law.

3.2. Access to unemployment benefits by frontier workers and other cross-border workers

3.2.1. Current situation

Definition

This specific category of workers resides in a State different from the one in which they work. In order to qualify as such, a **frontier worker** must 'come back as a rule at least once a week in his/her residence country' (Article 1(f) of Regulation 883).

Although most frontier workers work in a neighbouring region, [60] Article 1(f) is formulated in such a way as not to exclude workers who are active in a country far away from their place of living.

This approach prevents differentiations among workers in comparable situations from being made based on 'distance' between the place of stay and the place of work.

At the same time, in accordance with Article 65(2) of Regulation 883, and in light of the interpretation provided by Decision U2 of the Administrative Commission, workers residing in a Member State and working in another Member State shall also be subject to *ad-hoc* rules when unemployed. This may be the case of workers who, although not returning to the Member State of residence at least once a week, shall be deemed to reside there even if they carried out their last activity in a different Member State, including persons who normally exercise their activity in two or more Member States (e.g. workers active abroad on a seasonal basis who also perform a substantial activity in the country of residence), and workers on board of a vessel.

Regulation 883 does not define this broader category, often referred in literature, and indeed also by the Commission's proposal, as '**cross-border workers**'.

[60] Yet, available statistics on frontier workers are not recent. See: Nerb, G., Hitzelsberger, F., Woidich, A., Pommer, S., Hemmer, S., Heczko, P. (2009), *Scientific Report on the Mobility of Cross-Border Workers within the EU-27/EEA/EFTA Countries*, MKW Wirtschftsforschung GmbH and Empirica Kft, cited in: Jorens, Y., Minderhoud, P., De Coninck, J. (2015), *Comparative Report: Frontier workers in the EU*, FreSsco, European Commission, Luxembourg.

In addition, Member States may also identify specific categories of workers as falling under Article 65(2) by means of a common agreement pursuant to Article 16 of Regulation 883.[61]

In any case, as the coverage of a worker by Article 65(2) rests mainly with factual parameters, like the identification of the 'State of residence', this may be difficult to ascertain on a case-by-case basis.

Coordination

Frontier workers and other cross-border workers (hereinafter 'cross-border workers') are covered by the State of insurance as long as they are in employment. Yet, most problems arise once they lose employment, as special rules apply for unemployment benefits (Article 65).

In this case, the same aggregation rules explained in the previous section apply concerning acquisition, retention, recovery, or the duration of the right to the benefits, while facts having occurred in the State of previous employment must be taken into consideration also when computing the amount of the benefit, to be based exclusively on the wage received in that country (Article 62(3)).

The main differences concern the rules for determining the applicable legislation.

The **State of residence principle** applies to 'wholly unemployed cross-border workers'.[62]

In order to seek employment, they must contact the PES of the State of residence.

'Partially unemployed cross-border workers' are covered, instead, by the State of employment.

The rationale of the rule was explained by the CJEU as an implementation of the goal of providing unemployment benefits in the most favourable conditions for the search for new employment (Recital 9 of the Preamble of Regulation 883) (see also the *Mouthaan* case).[63]

Yet, this might represent indirect discrimination insofar as the assumption that cross-border workers are better off in the State of residence might be unrealistic whenever, for instance, unemployment benefits are more generous in the State of insurance, or the person intends to carry on working in the most recent State of employment.

As per the changes introduced by Regulation 883 in 2004, the State of residence is partially reimbursed the costs of the unemployment benefits by the State of last employment, whilst cross-border workers, beyond having to make themselves available at the PES of the State of residence, gained the right to access employment services also in the State of employment. Yet, other provisions remain untouched, and cross-border workers might still receive lower benefits than those payable to the unemployed of the State where they have been insured.

The definition of 'partially unemployed cross-border workers' has also been contentious, especially when it comes to frontier workers keeping marginal or part-time jobs in the country where they had a standard employment relationship.

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[61] See also CJEU, Case C-454/93, *Van Gestel*, EU:C:1955:205.

[62] A safeguard clause for 'wholly unemployed self-employed frontier workers' establishes that they can access unemployment benefits in the State of last employment if there is no unemployment benefit targeting self-employed workers in the State of residence (Article 65a).

[63] CJEU, Case C-39/76, *Mouthaan*, EU:C:1976:181.

Yet, this issue was thoroughly addressed by Decision U3 of the Administrative Commission, which opted for an extensive interpretation. The decision established that a cross-border worker is to be considered partially unemployed if 'any contractual or employment link exists or is maintained between the parties'.

3.2.2. Assessment of the European Commission's proposal

The European Commission's proposal

The proposal confirms that unemployment benefits are due by the State of employment for partially unemployed cross-border workers, whilst the wholly unemployed would also fall within the competence of the State of employment provided they have been employed for periods longer than 12 months.

If shorter periods of employment have been completed in the country, wholly unemployed cross-border workers may choose to claim unemployment benefits in the State of residence or in the State of employment. Yet, in the latter case, they cannot rely on the aggregation principle, i.e. claiming periods of employment completed abroad to be taken into account for the purposes of eligibility to the benefit, or for the computation of its duration and amount.

Indeed, according to the newly proposed Article 65 (2), a wholly unemployed person who would be entitled to an unemployment benefit solely under the national legislation of the competent Member State if he or she resided there, may alternatively opt to make himself or herself available to the employment services in that Member State and to receive benefits in accordance with the legislation of that Member State as if he or she were residing there.

Pursuant to the new rules, reimbursements between Member States would no longer be entailed (Article 65(6-8) of Regulation 883 and Article 70 of the Implementing Regulation).

Reason for the proposed changes

The European Commission addresses the current 'inconsistency' concerning cross-border workers, who are currently paid, as for unemployment benefits, by a State different from the one they have been insured in, and where they might wish to look for a job.

In doing so, it partially aligns rules with those applicable to other unemployed persons, and supports the reintegration of frontier workers in the State of last employment.

The 12-month rule aims to guarantee fair burden-sharing between the involved countries, in case a cross-border worker has been employed for a short period in a Member State.

Discussion

The proposed changes provide for a closer link between the State of insurance and the one in charge of paying the benefit.

They therefore appear more balanced than the current rules in achieving fair burden-sharing between contributions and benefits.

The administrative burden might also be reduced, at least in cases of periods of employment longer than 12 months.

Yet, the question arises as to whether the 12 months are to be considered as a consecutive period of employment or not, especially in cases where workers complete 12 months of employment through two or more fixed-term contracts interrupted by brief unemployment periods.

As far as claimants are concerned, different views are held. Whereas, on the one side, it can be argued that there are weak reasons not to apply the aggregation rule to cross-border workers in a way similar to unemployed workers,[64] on the other hand, some stakeholders noted that the new proposed rule might 'ossify' the relation of the worker with the labour market of the hosting Member State, while discouraging improvements in the PES of the sending State.[65]

Yet, most interviewed experts converged on a positive evaluation, deeming the proposed option as a reasonable compromise between the State of employment principle and the need to ensure a '**genuine link**' with that State of employment. Indeed, some interviewees also wished for the application to cross-border workers, of the general aggregation rules entailed in case of unemployment.

Other observations raised by the interviewees addressed current practices in breach of the regulation, leading to negative conflict of laws.

This is the case of cross-border workers being unable to access unemployment benefits in the State of employment in the light of the correct application of Regulation 883, whilst being refused the same benefits in the State of residence, which wrongly applies the State of employment principle entailed for other claimants. This was reported especially by Portuguese, Italian, French, and Belgian workers.

There is a reasonable fear that similar failures might be encouraged by the 12-month rule. Nevertheless, as far as the rule has a clear wording, the problem might be properly addressed by means of strengthening cross-border cooperation between public administrations, as well as fostering access to information by claimants.

Additional problems may arise from the proposed wording of Articles 64 and 65 as workers may end up in different situations by reason of their State of residence (see the table below).

Table 1: Access to unemployment benefits by workers and cross-border workers – Comparison between current and proposed rules

Categories of citizens	Regulation 883	European Commission's proposal
A person living in Germany normally moves to Austria on a temporary basis to work as a ski instructor in January and February. She also normally lives and works in the summer season	In the light of Article 65, Germany (i.e. the State of residence) is the competent State. Unemployment benefits shall be granted by Germany, considering the working activity carried out in Austria as if it took place in Germany.	In the light of the proposed Article 65(2), Germany (i.e. the State of residence) is the competent State. Unemployment benefits shall be granted by Germany, considering the working activity carried out in Austria as if it took place in Germany.

[64] See also ETUC (2017), *ETUC Position on the EC proposal for the revision of Regulation 883/2004 on the coordination of social security systems*, available at: https://www.etuc.org/documents/etuc-position-ec-proposal-revision-regulation-8832004-coordination-social-security-systems#.WdNnKcZx0dU .

[65] See Austrian Federal Chamber of Labour (*Österreichische Bundesarbeitskammer*, AK) (2009), *Proposal for a regulation of the European Parliament and of the Council to amend Regulation (EC) 883/2004*, Position paper, available at: http://www.akeuropa.eu/_includes/mods/akeu/docs/main_report_en_452.pdf.

Categories of citizens	Regulation 883	European Commission's proposal
in Germany as a cook. She qualifies as a cross-border worker.		Alternatively, the person can apply for unemployment benefits in Austria without the previous period of employment in Germany being taken into account.
A person living in Germany loses his main job and decides to leave the country. She rents a house in Austria, where she firstly finds a job as a ski teacher for two months only. She does not qualify as a cross-border worker.	In the light of Article 61, Austria (i.e. the State of last employment) is the competent Member State. Unemployment benefits shall be granted by Austria, taking into account the working activity carried out in Austria and the previous working activity carried out in Germany as if it took place in Austria.	In the light of Article 61, Germany is the competent Member State if the person has previously completed a period of employment of at least three months there. In this case, unemployment benefits shall be granted by Germany, taking into account the working activity carried out in Austria as if it took place in Germany, and the previous working activity carried out in Germany. If the previous period of employment in Germany was shorter than three months, neither Austria nor Germany would be regarded as the competent State.

Source: Authors' analysis based on Regulation 883 and the revision proposal of the European Commission.

3.3. Summary and recommendations

Concerning unemployment benefits, the European Commission's proposal contains a mix of measures that have in part an expansive effect on access to benefits (whereby they aim to expand the current entitlements of unemployed persons mainly in terms of the export of benefits) and in part a slightly restrictive impact (especially on the issue of the aggregation of periods of insurance).

On the one side, the period for **exporting unemployment benefits** to the Member State where the person is looking for a job should be extended from a minimum period of three to six months, with the possibility of a further extension for the remaining period of entitlement according to national law. One the other side, when assessing whether a job-seeker qualifies for unemployment benefits, a Member State will be required to consider any similar periods of insurance, employment, or self-employment in other Member States (as is the case under Article 61 of Regulation 883). However, this would only be possible, contrary to the current state of affairs, if the person concerned has worked in that Member State for at least three months. This means that, for the purpose of aggregating insurance or employment periods in other Member States, a qualifying period of three months is to be introduced. If the person concerned does not qualify, it will be

the Member State where he/she was formerly employed that will be responsible for paying those benefits.

As for unemployment benefits for **cross-border workers**, under the proposed rules it is the Member State of former employment that will be responsible for paying any unemployment benefits if these workers have worked there for a minimum period of 12 months. At the same time, according to the European Commission's proposal, for employment periods below 12 months it will be the responsibility of the Member State of residence to pay the unemployment benefits, applying its own legislation and at its own expense. Cross-border workers may request, instead, access to unemployment benefits in the State of last employment without the possibility to aggregate previous periods of employment completed abroad.

Under the current rules (Article 65 of Regulation 883), a cross-border worker pays contributions (and taxes) in the Member State where he/she works; however, in case he/she becomes wholly unemployed, it is for the State of residence to provide for unemployment benefits according to its legislation and at its own expense (save for the partial reimbursement of benefits in accordance with Article 65(6-8)).[66]

The main rationale behind such a proposed reform is based on the assumption that the current rules do not implement an equitable and efficient allocation of the burden for the provision of unemployment benefits among Member States. This is essentially the case for wholly unemployed cross-border workers. At the same time, the European Commission's proposal would simplify the still complex legal framework concerning this category of persons. Such an aim of the European Commission's proposal has been welcomed by the majority of stakeholders, as well as within the expert debate. The same can be said for the proposal for extending the minimum period of export of unemployment benefits up to six months (with the possibility of a further extension by the competent Member State).

However, some **criticism** has been directed towards the very long qualifying period of 12 months provided for the purpose of charging the Member State of former employment with paying unemployment benefits to cross-border workers. Such a long period would indeed significantly weaken the impact of the proposed reform in terms of fair financial burden-sharing among Member States, since – due to the growing casualisation and precariousness of fixed-term employment contracts – many frontier workers would still continue to be paid unemployment benefits by the State of residence. Somehow similar criticism has been directed towards the proposal of introducing a qualifying period of three months for allowing the aggregation of insurance or employment periods fulfilled in other Member States. This is in fact a restriction of the current special rules on aggregation of periods of insurance, employment, and self-employment, as provided for by Article 61 of Regulation 883.[67]

In light of the above evaluation, we would recommend endorsing the European Commission's proposal while at the same time lifting the 12-month period as provided for in the new version of Article 65, and possibly eliminating the three-month period under the proposed new text of Article 61.

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[66] See Fuchs, M. (2015), *Article 65*, in Fuchs, M., Cornelissen, R. (eds.), *EU Social Security Law. A Commentary on EU Regulations 883/2004 and 987/2009*, Baden Baden/Oxford, especially p. 399.

[67] Cf. Fuchs, M. (2015), *Article 61*, in Fuchs, M., Cornelissen, R. (eds.), *EU Social Security Law. A Commentary on EU Regulations 883/2004 and 987/2009*, Baden Baden/Oxford, p. 374 ff.

4. COORDINATION OF LONG-TERM CARE BENEFITS

4.1. Current situation

Definition

Long-term care benefits are not currently defined by Regulation 883 or by the Administrative Commission.

A tentative description can be derived from the vast case law of the CJEU on the topic.

As stated in the *Molenaar* case[68] (paras. 22-24) and reiterated in following judgments, long-term care benefits can include those implying coverage of expenditures entailed by the insured person's reliance on care, and they are essentially intended to supplement sickness insurance benefits in order to improve the state of health and the quality of life of persons reliant on care. In *Molenaar*, the CJEU also provided a list of the benefits that might fall within this category, like: 'care provided in the home, in specialised centres or hospitals, the purchase of equipment required by insured persons, the carrying out of work in the home and the payment of monthly financial aid allowing the insured to choose the method of assistance they prefer and, for example, to remunerate in one form or another the third party assisting them […], cover, furthermore, against the risks of accident, old age and invalidity for some of those third parties.'

The CJEU also ruled that benefits with these features supplement sickness insurance benefits and are to be treated as such.

Yet, the actual classification adopted by the Member States can be misleading, as most of them do not have a specific category for long-term benefits in their national legislations and might qualify 'long-term care benefits' in the meaning of the CJEU as healthcare benefits or old-age benefits.

Coordination

Currently, Article 34(1) of Regulation 883 states that long-term care benefits have to be regarded as sickness benefits.

As a consequence, in line with Articles 21 and 29, cash benefits are provided by the State where the person is insured or that is responsible for his/her pension unless differently established by bilateral agreements.

Benefits in kind, instead, are to be provided by the Member State of residence. Unlike sickness benefits in cash, benefits in kind are not exportable. If a person is insured in another State, the State of residence is entitled to reimbursement by the Member State where the person is insured (Articles 17 and 35).

The amount to be reimbursed is determined according to national average monthly costs differentiated according to age groups, namely: 'under 20', '20-64', and '65 or over' (Article 64 of the Implementing Regulation).

With a view to prevent overlapping, in this case the Member State of insurance shall also reduce the amount of the benefit in cash it may provide to the insured person.

Further anti-overlapping rules apply to determine the legislation applicable to the insured person's family members (Articles 18, 26, 28(3), 29(2)).

[68] CJEU, Case C-160/96, *Molenaar*, EU:C:1998:84.

Nevertheless, apart from the risk of failure to cover the entitled person, differences in the schemes include difficulties in the computation of reimbursement amounts, as these depend largely on the actual behaviour and degree of cooperation of the involved authorities. Whereas a fair condition would entail entitlement to receive long-term care in a single Member State, possibly to be reimbursed by the Member State of insurance, the reality might actually entail one of the following options: (a) double taxation of the benefit, which hampers free movement of workers; (b) the impossibility to access the benefit in the event the State of insurance provides only benefits in kind (therefore not exportable) and the State of residence provides only benefits in cash; or (c) abuse of right, whenever a person receives a benefit in cash (exportable) from the competent State and a benefit in kind in the State where he/she moved.[69]

4.2. Assessment of the European Commission's proposal

The European Commission's proposal

Departing from CJEU case law, the proposal is to define long-term care benefits as 'any benefit in kind, cash or a combination of both for persons who, over an extended period of time, on account of old-age, disability, illness or impairment, require considerable assistance from another person or persons to carry out essential daily activities, including to support their personal autonomy; this includes benefits granted to or for the person providing such assistance' (Article 1(va)).

In addition, the Administrative Commission would provide a list of benefits classified as such in each Member State (Article 35a(2)). This would replace the list drafted according to Article 34(2), which currently affects only specific reimbursement rules between Member States. The same coordination rules concerning the applicable legislation would continue to apply (Article 35a(1)). Derogations by Member States from coordination rules concerning a specific long-term care benefit in cash would be allowed only if specified in an *ad-hoc* annex, and provided the outcome of such coordination is more favourable for the beneficiary (Article 35a(3)).

The proposal also amends the age groups to be taken into account for the reimbursement rules (Article 64 of the Implementing Regulation). A single age group would be introduced for those aged under 65, while costs incurred for long-term care of older persons would be split into the '65-74', '75-84', and '85 or over' groups.

Reason for the proposed changes

The European Commission's proposal attempts to clarify which benefits are considered as long-term care, and to introduce a stable regime of coordination covering them, avoiding double taxation or denial of access.

Citizens and institutions would know which benefits are to be intended as long-term care ones and which rules apply.

Discussion

In principle, the new provisions bring clarity and this is why the majority of stakeholders welcome the definition proposed by the European Commission. Yet, by separating long-term care from sickness benefits, problems in terms of coordination, administrative cooperation, and denial of entitlement could arise.

In fact, Member States could claim that a person has not been insured for the purposes of such benefits, inasmuch as, currently, only few Member States have separate long-

[69] See also SWD(2015) 460 final, Part 1/6, in particular the section entitled 'Long-term care benefits'.

term care insurance schemes from which periods completed could be computed. Indeed, as observed by the German National Association of Statutory Health Insurance Funds,[70] a very relevant stakeholder in this field, treating sickness benefits and long-term care benefits as separated branches would imply that only insurance periods specifically related to the risk of long-term care would be taken into account for the purpose of coordination. Moreover, instead of one joint document proving their entitlement to sickness benefits and long-term care benefits, insured persons would need two different documents with a heavier administrative burden.

Some, under the new proposal, might completely **fall outside the rules**. This could be the case for pensioners when no long-term care benefits in kind exist in the Member State concerned. According to the current legal framework as interpreted by the CJEU, since long-term care benefits are to be regarded as sickness benefits, it is possible today to rely on the entitlement to sickness benefits in kind as a starting and encompassing point of reference. With a separate chapter on long-term care benefits, this starting point of reference would be ruled out; and since many Member States have no long-term care benefits in kind, there would be a loss of entitlement in those cases in which pensions are received from one of those Member States. Problems of negative conflicts of laws are further explained in the boxes below, providing two examples taken from the statement of the German National Association of Statutory Health Insurance Funds.

Box 3: Long-term care benefits – Examples for loss of entitlements (Belgium – the Netherlands)

A pensioner residing in Belgium receives a pension from Belgium and the Netherlands. As per Article 23 of Regulation 883, Belgium, i.e. the State of residence, is the competent State for sickness benefits in kind and in cash, including long-term care benefits.

Under the new proposal, should the current list of long-term care benefits entailed under Article 34(2) be confirmed, this person may lose the entitlement to long-term care benefits in cash.

Since Belgium does not have long-term care benefits in kind according to the list, the Netherlands would become competent for long-term care benefits in kind and in cash (Article 24 of Regulation 883). Currently, this clause is applicable to pensioners only if there is no entitlement to 'sickness benefits in kind' under the legislation of the State of residence. Under the proposal, as a result of the separation between 'sickness benefits' and 'long-term care benefits', it would apply also to the much broader case in which there is no entitlement to 'long-term care benefits in kind'.

Although the Netherlands has long-term care benefits in kind and in cash, the latter are not exportable. Consequently, the pensioner, albeit paying contributions in the Netherlands, would lose entitlement to long-term care benefits in cash. The entitlement to benefits in kind might also be negatively affected, as those would no longer be provided by the State of residence (Belgium) but by the Netherlands.

Box 4: Long-term care benefits – Examples for loss of affiliation choice (Germany – Portugal)

[70] German National Association of Statutory Health Insurance Funds (*GKV-Spitzenverband*) (2017), *Statement by the German National Association of Statutory Health Insurance Funds of 2 May 2017 on the Proposal for a Regulation amending Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 of 13 December 2016*, Berlin.

A pensioner residing in Portugal receives a pension from Germany and Portugal. As per Article 23 of Regulation 883, Portugal, i.e. the State of residence, is competent for sickness benefits in kind.

Since Portugal does not have any schemes providing long-term care benefits in kind, according to the European Commission's proposal and in the light of Article 24 of Regulation 883, Germany would become competent for long-term care benefits in kind and in cash.

The pensioner would lose entitlement to long-term care benefits in cash in Portugal, having, instead, the right to long-term care benefits in cash exported from Germany to Portugal.

According to CJEU case law, a person:

- who receives pensions both from his/her Member State of origin and from the Member State in which he/she spent most of his/her working life, and
- who has moved from that Member State to his/her Member State of origin

can, by reason of optional continued affiliation to a separate care insurance scheme, receive a cash benefit corresponding to that affiliation, in particular if cash benefits relating to the specific risk of reliance on care do not exist in the Member State of residence.

According to the European Commission's proposal, instead, this voluntary option would become a compulsory rule, with no possibility for the pensioner to remain affiliated to the scheme of the State of residence.

Summary and recommendations

The European Commission's proposal aims to introduce a specific chapter on long-term care benefits defined as 'any benefit in kind, cash or a combination of both for persons who, over an extended period of time, on account of old-age, disability, illness or impairment, require considerable assistance from another person or persons to carry out essential daily activities, including to support their personal autonomy; this includes benefits granted to or for the person providing such assistance'. A list of benefits classified as such in each Member State is annexed.

The proposal does not modify the coordination rules that are currently applied to long-term care benefits according to CJEU case law, which includes such benefits within the perimeter of the rules set out by Regulation 883 on sickness benefits. As such, the proposal would codify the existing settled case law by enhancing legal clarity.

However, according to some stakeholders active in this field, the proposal has significant drawbacks. An autonomous new chapter on long-term care benefits would in fact somehow paradoxically exclude some situations that are covered by current rules on sickness benefits, leading to a loss of rights and entitlements, and creating unwarranted obstacles to the free movement of persons within the EU.[71]

This is why we recommend a careful assessment of the advisability of introducing a new chapter to Regulation 883: adding the abovementioned definition of long-term care

[71] See the examples provided above in Boxes 3 and 4.

benefits to the chapter on sickness benefits would probably be a better and easier solution to improve legal clarity by codifying CJEU case law.

5. COORDINATION OF FAMILY BENEFITS

5.1. Current situation

Definition

Article 1(z) of Regulation 883 defines family benefits as 'all benefits in kind or in cash intended to meet family expenses, excluding advances of maintenance payments and special childbirth and adoption allowances'.

In light of the interpretation of the CJEU, 'family benefits' can encompass a variety of schemes targeting family expenses, starting from family allowances, i.e. periodical cash transfers granted exclusively by reference to the number and, where appropriate, the age of the members of the family,[72] and including child-raising benefits, which are benefits intended to replace income during child-raising periods, tax bonuses or aids for child care at home if the public kindergartens are not used.[73]

Apart from the selective exclusion of some benefits, recent controversies arising from the definition concern the attachment of the definition of family members to the legislation under which benefits are provided.

This means that, for instance, legally recognised same-sex couples under one legislation might not qualify for a benefit under the rules of the State where the benefit is required.

Coordination

General rules addressing coordination are applied to family benefits. As for the main categories, this means workers are covered by the State of employment. Pensioners are covered by a special rule, being subject to the Member State responsible for the payment of the pension.

Yet, since both parents may be entitled to such benefits, Article 68 of Regulation 883 and Articles 58-61 of Implementing Regulation 987 also set forth specific anti-overlapping rules, called '**priority rules**', identifying a 'primary' State, which is responsible for the payment thereof, and a 'secondary' Member State, which shall top up the payment up to the amount of the benefit that would be paid according to its legislation, if it entails a higher amount than the one provided in the State having priority.

Whenever family benefit schemes have eligibility criteria based on different grounds, depending on the country, those granted based on employment take precedence over those paid on the basis of pensions, and the latter take precedence over benefits paid by reason of residence.

Further provisions determine the competent Member State in the case schemes are accessible on the same ground, for instance, where in the involved countries benefits can be claimed by employed persons. In this case, the priority rules address the circumstances of the family. Whenever benefits are payable to employed persons, the benefits are paid by the State where the children live. Yet, if neither parent is active there, the State with the more generous benefit prevails. If the benefit is payable based on pensions, the benefits are paid as well by the State where the children live. If a pension is not paid under that legislation, the primary State is the one with the longer period of pension insurance.

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[72] This category was distinguished from family benefits in Regulation (EEC) 1408/71

[73] See Spiegel, B. (ed.) (2015), *Assessment of the impact of amendments to the EU social security coordinationrules on export of family benefits*, Analytical Report 2015, FreSsco, European Commission.

Finally, in case of benefits payable on the basis of residence, the discriminating criterion is the country of residence of the children.

The proper functioning of these rules requires Member States to cooperate with each other. Indeed, Article 68(3) of Regulation 883 and Articles 58-61 of Implementing Regulation 987 entail that a Member State where the family benefit is claimed shall inform the relevant institution of the other Member State whether it is the latter to have priority. Yet, cooperation might not always be quick or efficient, leading to unfair outcomes, like double payments or denial of access. This has been remarked as well by the Romanian country expert interviewed, stating that, on the one side, there is an attitude to 'reap' the benefits, with individuals accessing the same benefit both in the country and abroad; on the other side, there is a problem of weak access to information, with workers being unaware of their rights when abroad and, therefore, lacking access to welfare.

In the expert's view, the digitalisation of data exchange could smooth the information exchange process and ease the fight against fraud. Yet, each individual situation may have its specificities, and the assessment of the regularity of an individual position in relation to the social security institutions of two or more countries remains a difficult task.

Indeed, many Member States proposed revising current rules so as to avoid parents being paid family benefits according to living standards of the country responsible for the benefit, although children might live in a country with lower living standards or family benefits. Under this view point, family benefits shall be adjusted to meet the expected family expenses rather than a loss of income for the time spent raising a child.

A recent report by the FreSsco network also explored the relevance of the issue in the national debate across the EU, highlighting that debate reached the general public only in the UK and Poland. This followed a statement by the (at that time) UK Prime Minister David Cameron, on his intention to negotiate with EU the possibility to deny child benefits for children living outside UK.[74]

The main option proposed in this regard is the so-called '**indexation of child benefits**', under which the competent Member State would be allowed to reduce the amount of child benefits by reason of the actual number of dependent family members living in other countries and of the related cost of living.

Yet, as specified in the following section, this option was eventually omitted from the proposal of the European Commission.

5.2. Assessment of the European Commission's proposal

The European Commission's proposal

The proposal does not modify the existing rules on the export of child benefits. Nor is an indexation of child benefits envisaged.

Yet, the proposal is to introduce 'family benefits intended to replace income during child-raising periods', listed in the newly proposed Annex XIII to Regulation 883. These benefits are distinguished by other family benefits insofar as they compensate either parent for the time spent raising a child, rather than for general family expenses (Article 68b).[75]

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[74] See: SWD(2016) 461 final, p. 2; FGB (2015), *Task 3: Secondary effects following a change of regulations on the exportation of family benefits*, European Commission, Luxembourg; and HIVA (2015), *Export of family benefits. Analysis of the economic impact of the options*, European Commission, Brussels.

[75] See generally Strban, G. (2016), 'Family Benefits in the EU. Is It Still Possible to Coordinate Them?', *Maastricht Journal of European and Comparative Law*, Vol. 23, Issue 5, p. 775 ff.

Therefore, they are to be considered as a 'personal' benefit and shall be paid only to the insured person by the Member State of insurance, whilst a derived right could not be claimed by his/her family members.

At the same time, a Member State might choose to derogate from anti-overlapping rules whenever it should be considered as the 'secondary Member State', and might award this benefit in full in line with the legislation of the primary Member State (i.e. the one being competent for the benefit according to the priority rules). Member States opting to do so will be listed in an annex to Regulation 883.

Reason for the proposed changes

Stemming from the purpose of child-raising allowances, which, unlike other family benefits, are intended to replace income loss rather than meeting general family expenses, the proposal is to strengthen the link of the benefit with the State of insurance.

The proposal also aims to expand entitlements to such benefits, allowing Member States to grant family benefits intended to replace income during child-raising periods beyond the existing rules on priority in the event of overlapping.

The spirit of this proposal is somehow connected to the *Bosmann* case law,[76] in which the CJEU stated that Article 13(2)(a) of former Regulation (EEC) 1408/71 did not prevent a migrant worker subjected to the social security system of the Member State of employment from receiving family benefits under the national legislation of the Member State of residence in the latter State.[77]

By classifying such benefits as 'individual rights', the proposal appears to encourage the sharing of parental responsibilities.

Discussion

Indexation of child benefits

As highlighted in the impact assessment, the indexation of child benefits according to the place of residence of the children would imply major administrative hurdles whilst entailing marginal expenditure savings for the richest countries. As shown in the example below, this might be particularly challenging under cross-border situations.

Box 5: Indexation of child benefits in a cross-border situation – Illustrative example

A and B are a couple living in country X with their child. A works in country X, whilst B works in border country, Y.

Child benefits are payable in relation to an employment relationship in both countries. Therefore, X (the place of residence of the workers) is the competent Member State. This would remain unchanged under the indexation proposal.

Yet, following divorce, A stays in X, while B decides to move across the border to reside in Y.

The court rules that the child should change his/her place of living on a weekly basis, spending one week with A and the following one with B.

[76] CJEU, Case C-352/06, *Bosmann*, EU:C:2008:290. See also CJEU, Joined Cases C-611/10 and C-612/10, *Hudzinski*, EU:C:2012:339.

[77] Cf. Marhold, F. (2015), *Article 68*, in Fuchs, M., Cornelissen, R. (2015), *Introduction*, in Idd. (eds.), *EU Social Security Law. A Commentary on EU Regulations 883/2004 and 987/2009*, Baden Baden/Oxford, p. 410.

Under the current rules, with it being impossible to determine the place of residence of the child, Article 58 of the Implementing Regulation would apply. This would qualify the Member State with the higher payable amount as the competent one, provided it would be entitled to the reimbursement of half of the sum by the competent institution of the other Member State up to the limit of the amount provided for in the legislation of the latter.

Yet, should the indexation be phased in, the competent State might have to compute the amount of the payable benefit in the light of the amount of the benefit payable in the secondary Member State according to the weeks spent by the child in latter country. This implies a situation similar to the development of *ad-hoc* (higher or lower) allowances for each case that is analogous to this example, provided accurate and up-to-date information is made available to the relevant institutions by the court.

At the same time, the indexation might also determine an increase in costs for the competent State if children live in countries where benefits are higher, despite having no influence over their amount.

In addition, such an approach might end up being unfair towards claimants.

Albeit they are intended to meet family expenses rather than to replace income, child benefits are generally granted to workers and funded by income taxes or social security contributions; therefore, migrant workers still contribute to financing them in the host Member State on an equal basis with nationals of this Member State.

In addition, costs for raising a child in a country with lower living standards than the one where one is working are not necessarily lower, both by reason of the possible lack of public services, e.g. public kindergartens, scholarships, or allowances for paying school books, and because of costs incurred due to distance from the family (e.g. travelling home or hiring a carer).

Changes to child-raising benefits

Regarding the proposed changes concerning child-raising benefits, the amount parents will receive will change in line with the level of the newly competent country. The possibility that the proposal supports a balanced sharing of care responsibilities between parents is also likely. Yet, this will particularly depend on the extent to which Member States with schemes that support an even sharing of leaves will accept to grant them in full to both parents.

Nevertheless, new coordination problems may arise. In fact, under the proposed rules, a Member State that is competent pursuant to Annex XIII shall apply the legislation of another Member State to compute the amount and length of the benefit.

Summary and recommendations

The proposal aims to update the rules on parental leave allowances, which compensate a parent for loss of income or salary during the time spent raising a child. The European Commission' proposal does not modify the existing rules on the export of child benefits, nor does it introduce any indexation of those benefits as has been suggested by some Member States. Upon a careful assessment of the potential impact of such a possible change, the European Commission's dismissal of changing the existing rules on exporting family and especially child benefits is in line with the fundamental principle of equal

treatment as constantly interpreted by the CJEU ever since the path-breaking *Pinna* case.[78]

The proposed new Article 68b of Regulation 883 does not raise any significant issues: its adoption would thus be recommended also in line with other current initiatives by the European Commission to support work-life balance for working parents and carers under the European pillar of social rights.[79]

[78] CJEU, Case C-41/84, *Pinna I*, EU:C:1986:1.

[79] See in particular the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, COM(2017) 252 final.

6. SOCIAL SECURITY COORDINATION FOR POSTED WORKERS

6.1. Current situation

Definition

For the purposes of Regulation 883 (Article 12 (1)), a **posted worker** is a person who pursues an activity **as an employed person** in a Member State (sending Member State) on behalf of an employer that normally carries out its activities there, and who is posted by that employer to another Member State (host Member State) to perform work on that employer's behalf.[80]

While normally, a mobile worker would be subject to the social security system in the State of employment (Article 11(3)a), exceptions are made in the case of posting, but only under the following conditions:

(a) the expected duration of work in the host Member State shall not exceed 24 months; and (b) the person shall not be sent to replace another one.

These two conditions are intended to prevent posting from negatively impacting the labour market of the host Member State and damaging the social security of the posted workers themselves.

In fact, differences in social security contribution rates across Europe, as well as in wage levels and taxation rules, make it possible, through posting, to have different labour costs by reason of the legislation of the State where the worker is posted from.

As to workers' social security, the rules aim to find a balance between the goal of avoiding unnecessary fragmentation of social security records, and ensuring fairness of treatment in case of long-term periods of employment 'abroad'.

Not only workers, but also **self-employed** people **can be considered as posted** pursuant to Article 12(2) of Regulation 883, when they normally pursue their activity in a Member State and go to pursue a similar activity in another Member State, provided the anticipated duration of such activity does not exceed 24 months.

The Administration Commission also provided clarifications on the correct interpretation of the definition of posting (Decision A2), specifying a **set of criteria** to identify whether an employer normally pursues an activity in a Member State and whether a worker pursues an activity in the sending Member State. Yet, these criteria left intact the

[80] This is a more strict definition than the one adopted for labour law purposes by Directive 96/71/EC, defining the 'posted worker' as a worker who, for a limited period, carries out his/her work in the territory of a Member State other than the State in which he/she normally works. In particular, the following conditions do not currently feature in the directive, thus making the social security coordination notion of posting of workers stricter: (a) immediately (at least one month) before the start of the employment relationship, the worker must have already been subject to the social security legislation of the sending Member State (Article 14(2) of Implementing Regulation 987 and point 1, para. 4 of Decision A2 of the Administrative Commission); (b) the posting undertaking must normally carry out its activities in the sending Member State (that is, the employer must be effectively established there and must ordinarily perform substantial activities there other than purely internal management tasks); (c) the posting is to be limited in time since the outset to a maximum period of 24 months; and (d) the posted worker must not be sent to replace another posted worker. Regulation 883 differs significantly from the labour law definition of posting in the Directive also under another important aspect: it applies to self-employed workers, whereas Directive 96/71/EC refers exclusively to employees as defined by national legislations. Under Article 12(2) of Regulation 883, a person who normally pursues an activity as a self-employed worker in a Member State, and who goes to another Member State to pursue a similar activity there shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such activity does not exceed 24 months.

discretion upon national authorities to determine, on a case-by-case basis, situations where the employer or the employee has started the activity shortly before the beginning of the posting period.

This might pose problems in the determination of the applicable legislation, leaving room for fraud occurring in breach of Article 12 or, on the other hand, leading to unjustified restrictions of free movement, which can clash with the freedom to provide services enshrined in Article 56 TFEU.

Similar issues arise in regard to the distinction between posting and 'persons normally pursuing an activity in two or more Member States' (Article 13). In the absence of specifications in Article 13 of Regulation 883, the CJEU held that, as far as conditions for posting are complied with, a person shall be deemed a posted worker.[81] Yet, whether a Member State shall be deemed as one of those where the person 'normally' works or where the concerned person goes to pursue an activity for a limited period of time may not be easy to ascertain.

These aspects are further explored in the next section.

Coordination

As an exception to the rule of social security coverage in the Member State of (self-)employment (Article 11(3)a), posted workers remain insured in the sending State for up to 24 months (Article 12).

As specified in Decision A2 of the Administrative Commission (Article 3), following the expiry of a period of posting, a worker may be sent to another Member State for a new period of posting.

Nevertheless, a fresh period of posting involving the same worker, the same undertakings, and the same Member State shall not be authorised unless a period of at least two months has elapsed from the conclusion of the previous posting.

Problems in determining the applicable legislation may also arise when a worker is sent by an employer to two or more Member States for periods not exceeding 24 months in each of the States involved.

This situation may actually fall under rules covering 'persons pursuing an activity in two or more Member States' rather than under posting. The legislation of the State of residence is then applicable if the worker performs substantial activities there.[82] If this is not the case, the person shall be covered by the legislation of the Member State where the office or place of business of the undertaking or employer is situated (Article 13 of Regulation 883), meaning the place where the functions of its central administrations are carried out (Article 14(5)(a) of the Implementing Regulation).[83]

This means that, under said conditions, if workers are sent from a country to perform activities in more than one Member State, they can remain endlessly attached to the social security contribution regime of the employer's Member State.

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[81] CJEU, Case C-390/98, *Banks*, EU:C:2001:456.

[82] Pursuant to Article 14(8) of the implementing regulation, a share of at least 25% of income or working time shall be sufficient to determine the presence of a substantial working activity in a country.

[83] An exception to this rule is made when the person that does not perform substantial activities in the Member State of residence is employed by two or more employers, at least two whereof have their registered office or place of business in different Member States other than the Member State of residence. Under this condition, again, the State of residence of the worker is the competent one.

Derogations from rules on posting, for instance to allow posting to take place also if a worker has not been insured in the sending State for at least one month or to extend the period of posting beyond 24 months, can be agreed by social security institutions of the involved countries under Article 16 of Regulation 883. Conditions for applying this provision, as well as minimum periods of insurance in a sending country between two consecutive periods of posting, are left to Member States' discretion. Article 16 only commits Member States to taking decisions 'in the interest of certain persons or categories of persons'.

Coordination of social security and the A1 form

Posted workers or their employers should also inform 'whenever possible in advance' social security institutions of the sending country when they pursue an activity in another Member State (Article 15 of Implementing Regulation 987).

To this aim, the A1 form/portable document (PD) has been devised as a uniform document certifying the **applicable legislation** and replacing the former E101 form.

Posted workers or their employers can request the relevant national authority in the worker's residence country to provide the form.

The authority shall check that the conditions stated by Article 12 of Regulation 883 are complied with and issue the A1 form 'preferably in advance' to confirm that the legislation of its country remains applicable for social security purposes. It shall also make the form available to the relevant authorities of the host Member State. The formulation adopted at EU level (specifically in Decision 181 of the Administrative Commission) leaves wide discretion as to the moment when the A1 form is to be issued.

Indeed, based on CJEU **case law**, specifically the *Banks* case[84] (paras. 49-57), Decision 181 specified that the A1 form shall be released even after the expiry of the posting period and that it has retroactive effect.

Yet, this flexibility may also pose problems. The national authorities might provide the document with some delay, also considering the need to check information with local branches or authorities, as highlighted by the Swedish expert interviewed. At the same time, the company might need to send the worker abroad in due time following an urgent request, resulting in an unfavourable situation.

If, for instance, the A1 form is eventually refused but the posting period has already started, the sending company has to register the posted worker in the hosting country from the beginning of the posting period, thus incurring unexpected costs. On the other hand, even when the A1 form is approved but delayed, the temporary lack of the form leaves companies in a grey zone. In this case, they are to choose whether to postpone the beginning of the service abroad, or to send the worker and risk claims from social security institutions of the host country. According to the interviewed experts, the latter option seems to be in most cases the preferred way forward.

As highlighted in the interviews, these circumstances are particularly problematic when companies require the authorisation to post a worker abroad for more than 24 months or to extend the period of posting beyond this deadline, pursuant to Article 16. This procedure may take up to six months, during which the worker might remain in the host country without the A1 form. Procedures do not follow standard paths, but entail an assessment on a case-by-case basis by the involved authorities, some of which adopt a restrictive approach.

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[84] CJEU, Case C-390/98, *Banks*, EU:C:2001:456.

Box 6: Requirement of being insured in the sending Member State – Illustrative example

Whilst there has been evidence of misuse of the loose criteria adopted by Regulation 883 (in order to apply the social security regimes of countries with lower costs, without any real link existing with these countries), interviews with business consultants also highlighted some noteworthy different cases, calling for some exceptions.

In particular, problems have been experienced by transnational companies promoting mobility programmes, often entailing a preliminary period of employment/training abroad before employing the worker in the country.

These programmes might target 'young talents' such as post-graduates looking for their first job, or very young applicants gaining their first work experience.

As anticipated, the Administrative Commission ruled that a one-month insurance period in the country is generally necessary to be considered as insured in a country, leaving discretion for shorter periods.

This results in the adoption of different practices, with some authorities denying the A1 form to young graduates that have not yet been affiliated with the social security institution in the sending country.

A similar circumstance has been highlighted for workers close to their retirement age, who might have a specific interest in remaining attached to the social security system of the sending country beyond the 24 months. Once again, in the absence of clear guidelines at EU level, this possibility strongly depends on the willingness and practices of national authorities.

This situation creates uncertainty also for social security institutions of the host country, which are aware that their decisions against cases of suspected fraud might be overturned if an A1 form is eventually released by the relevant authorities in the sending country.

As part of the information provided, the A1 form also includes details on the employment status, i.e. employee or self-employed, which is key for the core of employment rights of posted workers. In fact, posted employees are subject, for labour law purposes, to a core set of labour rights defined in Article 3 of Directive 96/71/EC[85] in accordance with the legislation of the host State.

Although the release of the A1 form does not imply a thorough check of whether the nature of the employment relationship is in line with the one declared for administrative purposes, all the information it contains, including the employment status, is binding upon social security institutions of the host country whenever a fraudulent behaviour is alleged. Should this be the case, social security institutions in the host Member State cannot withdraw the A1 form, declaring, for instance, the posted workers concerned as 'bogus self-employed'.

Instead, such a decision must follow a request made to the social security institutions of the sending country, as they are the ones entitled to withdraw the A1 form.

[85] These include: maximum work periods and minimum rest periods; minimum paid annual holidays; the minimum rates of pay, including overtime rates (this point does not apply to supplementary occupational retirement pension schemes); the conditions of hiring-out workers, in particular the supply of workers by temporary employment undertakings; health, safety, and hygiene at work; protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children, and of young people; and equality of treatment between men and women, and other provisions ofnon-discrimination.

Actually, according to Article 5 of Implementing Regulation 987 and to Decision A1 of the Administrative Commission, in case Member States do not reach an agreement over the validity of a document, including the A1 form, the matter might be brought before the Administrative Commission, which has to reconcile the views.

Box 7: Dialogue and conciliation procedure in case doubts over the validity of the A1 form arise

First stage of the dialogue procedure

Whenever the institution of the host Member State has doubts on the validity of an A1 form, it shall send a request for clarification, complemented with supporting evidence, to the relevant institution in the sending Member State, as well as appointing a contact person.

The institution of the sending Member State shall confirm receipt of the request within 10 working days and, in its turn, appoint a contact person. Information about the outcome of its investigation – confirming, amending, or withdrawing the A1 form – shall be sent to the institution of the host Member State within a period of three months.

By reason of the complexity of the case, this deadline can be extended to six months unilaterally by the institution of the sending Member State. Upon common agreement, these deadlines can also be derogated from to a limited extent by the involved institutions.

In the absence of an agreement, the involved institutions shall notify their competent authorities, which, in turn, can either go through the second stage of the dialogue procedure or refer the matter to the Administrative Commission.

Second stage of the dialogue procedure

If the authorities initiate the second stage of the dialogue procedure, they shall appoint a contact person within two weeks.

The contact persons have six weeks to reach an agreement on the matter.

In the absence of an agreement, the authorities may refer the matter to the Administrative Commission.

Conciliation procedure

The Administrative Commission is tasked with reconciling the views within six months. To this aim, each competent authority shall submit a memorandum with the main points of contention.

The Administrative Commission may also refer the matter to the Conciliation Board. In this case, the Administrative Commission shall define in a mandate the term, tasks, working methods, and the system of chairmanship of the Conciliation Board.

The inescapability of this procedure has been recently remarked by the CJEU in *A-Rosa Flussschiff GmbH*.[86] In particular, the CJEU ruled: 'an E 101 certificate issued by the institution designated by the competent authority of a Member State […] is binding on both the social security institutions of the Member State in which the work is carried out and the courts of that Member State, even where it is found by those courts that the

[86] CJEU, Case C-620/15, *A-Rosa Flussschiff GmbH*, EU:C:2017:309.

conditions under which the worker concerned carries out his activities clearly do not fall within the material scope of that provision of Regulation No 1408/71.'

Yet, the current low level of information sharing between the different Member States seems to hamper this process, making it possible to post workers as self-employed with the sole purposes of benefitting from lower social security contribution rates and of escaping the host State's terms and conditions applicable to employees. Research has also highlighted the release of inaccurate or incomplete A1 forms.[87]

Although the validity of the form concerns social security aspects, labour inspectors and courts might find it difficult to classify a bogus self-employed person as an employee for labour law purposes if the A1 form states he/she is self-employed. As explained in a study by the University of Amsterdam,[88] the A1 form can be used as an indicator or the main indicator of the nature of an employment relationship in case a dispute arises, as it seems to be the case especially for Slovenia and Ireland.

Problems also arise when it comes to initiating lawsuits, as it could be difficult to get in touch with the employer in the sending country.

In addition, national provisions and practices intended to ensure stronger protection of workers than the one descending from Directive 96/71/EC have been successfully challenged before the CJEU as capable of introducing unjustified restrictions on the freedom to provide services. This seems to discourage the enforcement of labour rights in the absence of proof that the posting is not genuine according to the authorities issuing the A1 form.

Problems of social security coordination may therefore add up to, or even trigger those concerning the actual paid wage and working conditions of posted workers.[89]

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[87] On the issue of fraud concerning posting of workers and related problems of administrative cooperation, see, amongst others: Eurofound (2016), *Exploring the fraudulent contracting of work in the European Union*, Luxembourg; van Hoek, A., Houwerzijl, M. (2011), *Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union*, University of Amsterdam, Amsterdam; and FGB, COWI (2016), *Study on wage setting systems and minimum rates of pay applicable to posted workers in accordance with Directive 96/71/EC in a selected number of Member States and sectors*, European Commission, Luxembourg.

[88] van Hoek, A., Houwerzijl, M. (2011), *Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union*, University of Amsterdam, Amsterdam; see also van Hoek, A., Houwerzijl, M. (2011), *Comparative study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union*, University of Amsterdam, Amsterdam. It might be useful to recall that Article 2(2) of Directive 96/71/EC stipulates that the definition of a worker is that which applies in the legislation of the Member State to whose territory the worker is posted. Hence, the nature of the work in question should be determined in accordance with the law of the host State. For labour law purposes, a comprehensive judgmental view on an individual basis is necessary in each country. In the previous report, it was observed that the burden of proof is sometimes very heavy. Hence, for labour law purposes, Dutch law provides a rebuttable legal presumption of an employment relationship. It was assessed that this good practice may inspire other Member States to implement similar provisions, however with the caveat that a similar (albeit more stringent) legal presumption in French law was considered to constitute a disproportionate restriction of the free movement of services, thus becoming incompatible with EU law. Nevertheless, it was concluded that, although this judgment made Member States hesitant to adopt a legal presumption of an employment relationship in certain situations of posting, the EU legislator could still consider this option. This again highlights the problems Member States experience in effectively monitoring the proper application of the Directive without violating EU law.

[89] See Voss, E. (ed.) (2016), *Posting of Workers Directive – Current Situation and Challenges*, European Parliament, Luxembourg.

6.2. Assessment of the European Commission's proposal

The European Commission's proposal

The proposed rules aim to strengthen the administrative tools related to the social security coordination of posted workers, in order to ensure that national authorities have the adequate means to verify the social security status of such workers and to address potential unfair practices or abuses.

More in detail, the **main changes** would be:

- the relevant institution in the sending country has the responsibility to properly assess the facts before issuing the A1 form (the elements to be verified will be defined through an implementing act by the European Commission, with the support of the Administrative Commission) (Article 19(3) of the Implementing Regulation);
- the A1 form is valid only if all the compulsory sections have been filled in (Article 5(1) of the Implementing Regulation);
- an implementing act by the European Commission would introduce a deadline for issuing the A1 form (Article 20a of the Implementing Regulation);
- social security institutions, labour inspectorates, and tax and immigration authorities are entitled to directly exchange relevant information (as of now, designated national liaison offices are in charge of sharing information at transnational level) (Article 19(4) of the Implementing Regulation);
- the issuing country has 25 days to reply to a request sent by institutions of the host country, to verify the A1 form, as would be the case also for other portable documents covered by Regulation 883 (Article 5(2) of the Implementing Regulation);
- if a request is classified as urgent and the reason for the urgency is clearly explained, the issuing country shall send a reply within two days (Article 5(1) of the Implementing Regulation);
- in case of fraud, the withdrawal of the A1 form will have retroactive effect (Article 5(1) of the Implementing Regulation).

As per the proposal of the Commission, Article 12 should cover workers that are posted within the meaning of the Directive 96/71/EC, while keeping the current restrictions in terms of links with the sending state, expected duration of work and (non) replacement of previous workers.

In addition, rules intended to cover workers 'posted' abroad apply also to those that are 'sent' abroad.

Yet, it remains unsolved whether 'sent' has to be understood as a synonym of 'posted' or whether it has a different meaning, possibly unbound from criteria concerning posting.[90]

[90] See: Austrian Federal Chamber of Labour (Österreichische Bundesarbeitskammer, AK) (2009), Proposal for a regulation of the European Parliament and of the Council to amend Regulation (EC) 883/2004, Position paper, available at: http://www.akeuropa.eu/_includes/mods/akeu/docs/main_report_en_452.pdf, p. 4; and German National Association of Statutory Health Insurance Funds (*GKV-Spitzenverband*) (2017), *Statement by the German National Association of Statutory Health Insurance Funds of 2 May 2017 on the Proposal for a Regulation amending Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 of 13 December 2016*, Berlin, p. 18.

The proposed Article 12 also makes it clear that the condition of not replacing a previously posted worker applies not only to the replacement of employees, but also to self-employed persons.

Finally, in order to avoid the improper use of Article 13, the proposal better clarifies indicators concerning the '**place of business**'. According to the proposed Article 14(5a) of the Implementing Regulation, the place of business shall be considered as the one where the functions of an undertaking's central administrations are carried out, provided it performs a substantial activity there. Otherwise, the place of business shall be deemed to be in the Member State where the centre of interest is located in the light of the location of the fixed and permanent place of business, the habitual nature, or the duration of the activities pursued, the number of services provided, and the intention of the undertaking as revealed by all the circumstances. To the aim of this assessment, the concerned institutions shall take into account the situation projected for the following 12 calendar months.[91]

Reason for the proposed changes

The proposal aims to clarify the meaning of posting, by aligning it with the one of Directive 96/71/EC. In addition, it aims to make information certified by the A1 form more reliable.

Extensive changes are introduced to prevent and tackle fraud by enlarging the scope of information sharing and the range of institutions involved.

Discussion

The proposal addresses one of the main concerns behind posting, mostly its limits upon monitoring and enforcement bodies due to **procedures concerning the A1 form**. In theory, the new rules are appreciable insofar as they are aimed at preventing the misclassification of workers.

Coherently with the binding nature it has on the authorities of the host country, a step forward to prevent fraud would indeed be to issue the A1 form upon proper verification of actual compliance with the conditions set out in the regulation, and not upon mere administrative compliance. This approach would be backed also by declaring the A1 forms that have not been duly completed as invalid.

The idea behind this provision is to ensure closer cooperation between Member States, which is highly recommendable in the light of the growing interconnection of national economies.

Proper preliminary control measures should act as a 'filter', preventing dishonest companies from making use of posting of workers for fraudulent purposes, and thus reducing possible cross-border disputes or, merely, cross-border information requests during the period of posting.

On these grounds, this strategy has been deemed as the correct way forward by most of the interviewed experts.

[91] For the sake of completeness, paragraph 12 would be added to Article 14 of the implementing regulation to clarify the rules applicable to workers active in two or more Member States, residing outside the territory of the EU who are subject to the legislation of a Member State in line with its national provisions. For these workers, the same coordination rules concerning workers in two or more Member States apply. Yet, in order to avoid conflicts of laws, the proposal specifies that the residence of the worker shall be deemed to be the Member State where the place of business of the employer is located, rather than the third country.

Yet, concerns have been expressed on the **feasibility** of such an option, as preventive assessments might not be implemented or might imply serious delays without any remedy being envisaged.

If this provision is taken seriously,[92] field inspections might be necessary before posting can take place, possibly causing delays in the release of the A1 form, as well as considerable efforts in terms of human resources in sending countries. In fact, administrative information alone can hardly certify, in a proper way, all the information contained in the A1 form.

If the suggested controls are properly implemented, authorities in the sending State may be in the best position to identify letter-box companies, as the elements to be verified have mostly to do with their country. The same may hold true for the existence of a real link with the State of insurance. Yet, the host country may hardly detect cases of bogus self-employment, especially because the misclassification of workers has much to do with the actual employment conditions that can be verified in the host country, and there is no shared view of what constitutes 'self-employment' under the different EU national provisions.

In addition, interviews with consultancy firms conducted as part of the field research highlighted that companies often need to send their workers abroad in due course, and there might be a risk that they are unable to perform the required service if small delays in the release of the A1 form occur.

A thorough preliminary control action will not end up being more timely than the current procedures for the release of the A1 form.

In this regard, the creation of a digital European social security card, where social security records are traced, could help making relevant information easily available in the host country without posing significant administrative burden on sending companies nor on the competent institutions.

This option was backed by the Rapporteur of the Committee on Employment and Social Affairs of the European Parliament, together with the request to allow the host Member State to withdraw or rectify the A1 form in the absence of an answer concerning the portable document by the issuing institution within 15 working days from the receipt of the request.[93]

Secondly, it is not to be overlooked that Member States have different interests at stake.

On the one side, sending countries are interested in promoting the 'export' of their workforce, as far as this contributes to the development of their economies. On the other side, hosting countries might see posting as a form of undesired competition inasmuch as posted workers can replace domestic workers or outperform domestic companies on the mere ground of differentials in the labour cost.

As per the current rules and under the proposal, the institutions of the sending countries would keep an unbalanced power *vis-à-vis* those of the hosting countries, having the last word over the validity of the A1 form. These differences could be possibly reconciled by

[92] Actually, as explained above, the proposal remains vague on the reach of this preventive assessment, which is to be specified in an implementing act.

[93] See European Parliament (2017), *I DRAFT REPORT on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004*, Committee on Employment and Social Affairs, 2016/0397(COD).

the Administrative Commission. Yet, the procedure for reconciliation may be too lengthy to address fraud in a timely manner and, in any case, its outcomes are not mandatory.[94]

Different positions may also be held when it comes to workers' interests. As highlighted in the interviews, managers and qualified personnel might prefer to remain attached to the social security institutions of the sending country, possibly bargaining with their company wage supplements or private pension benefits. Yet, the reality might be quite different for low-skilled workers, who lack such a bargaining power and might also end up being deprived of social security contributions and other employment rights due to the misuse of the posting rules.

One way to address conflicting interests would be to provide better guidance to Member States on when and how to apply exceptions under Article 16, including the introduction of deadlines for the related procedures, while restricting conditions concerning minimum insurance in the sending State, as well as the maximum duration of posting.

The latter aspects have been the object of attention by the Committee of Permanent Representatives, which proposes to introduce a 'three-month' period of affiliation in a country's social security system before the A1 form be released, and to codify the Decision A2 of the Administrative Commission for what concerns the minimum period between two consecutive postings (two months).[95]

The Rapporteur of the Committee on Employment and Social Affairs of the European Parliament also suggested introducing in the Regulation 883 a minimum period of affiliation in a country's social security system before posting can take place, set at six months.[96]

Another option would be to clearly outline the scope of the A1 form, for instance by clarifying that it does not affect the entitlement of authorities of the host State to classify the employment relationship of posted workers in line with their national provisions as far as labour law is concerned, or that it does not modify applicable sanctions, which are proportionate to the need to guarantee equal treatment of posted workers and to prevent unfair competition. This way, the possibility to refuse the A1 form would not be affected, but host States would be granted increased discretion to tackle social dumping by using their national legislation.

As concerns the application of the **special rules to workers 'sent abroad'**, there is the risk that, as far as this might be intended as a category different from posted workers, the proposed change could create further uncertainty. This might lead to controversial case law.

Moreover, as observed in the opinion delivered by the EESC, the proposed new reference to Directive 96/71/EC in Regulation 883 would risk creating confusion and lead to less

[94] See Jorens, Y., Lhernhould, J.-P. (2014), *Procedures related to the granting of Portable Document A1: An overview of country practices*, FreSsco, European Commission, Luxembourg.

[95] Council of the European Union (2017), *Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 883/2004 on the coordination of social security systems and regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 (Text with relevance for the EEA and Switzerland) - Partial general approach, 1319/17*, Brussels, 16 October 2017.

[96] European Parliament (2017), *I DRAFT REPORT on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004*, Committee on Employment and Social Affairs, 2016/0397(COD).

legal clarity in practice, since the definitions in the two pieces of legislation differ considerably,[97].

As to changes concerning **indicators** for determining the place of business, the proposal reduces room for fraud. Yet, it is to be noted that the Committee of Permanent Representatives of the Council of the European Union proposed a more detailed list, requiring an overall assessment of: (a) the place of residence of the main directors; (b) the places where general meetings are held; (c) the place where administrative and accounting documents are kept; (d) the place where financial and, particularly, banking transactions mainly take place; (e) the turnover, working time, number of services rendered, and/or income; and (f) the habitual nature of the activity pursued.[98]

In addition, the committee proposed tasking the Administrative Commission with laying down detailed arrangements for the determination of the place of business.

Summary and recommendations

The proposed new rules essentially aim to strengthen the administrative tools related to the social security coordination of posted workers, to ensure that national authorities have the adequate means to verify the social security status of such workers and to address potential unfair practices or abuses. Such aims have received an overall positive evaluation from the different sides of the socio-political spectrum of the stakeholders concerned. The main perplexities concern the actual consistency between ends (or aims) and means (or administrative or regulative tools) provided for in this regard by the European Commission's proposal. In particular, in its opinion, the EESC has expressed concerns about the cumulative effect of the new rules on posting (Article 12) and the new technical amendments in the social security regulations regarding the A1 form. According to the EESC, the growing complexity through the combination of these different measures is likely to restrain transnational mobility.

With regards to the proposal of making reference to Directive 96/71/EC for the purpose of defining posted workers within the context of social security coordination, the EESC rightly points out how the reference to the significantly different notion of posted workers within the meaning of the Directive would compromise legal clarity without enhancing in any significant way the fight against potential abuse of posting. This is why we would recommend removing the reference to Directive 96/71/EC in both texts of the newly proposed Article 12 of Regulation 883 and of Article 14 of Implementing Regulation 987.

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[97] EESC (2017), *EESC opinion: Coordination of social security systems*, SOC/557-EESC-2017-01461-00-00-ac-tra, available at:

http://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/coordination-social-security-systems.

[98] Council of the European Union (2017), *Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 883/2004 on the coordination of social security systems and regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 (Text with relevance for the EEA and Switzerland) - Partial general approach, 1319/17*, Brussels, 16 October 2017.

7. ADMINISTRATIVE COOPERATION AND MEASURES FOR COMBATTING FRAUD AND ERROR

7.1. Current situation

Although national authorities are bound to mutual legal or administrative assistance (Article 76(4) of Regulation 883), entailing direct communication between relevant social security institutions, and specific procedures to be followed whenever the need to cooperate arises (for instance, as far as reimbursement rules are concerned), this cooperation may at times be ineffective or slow.[99] As a consequence, even when rules are clear, the behaviour of administrations may lead to: (a) people missing the chance to access their rights; or (b) people acting as 'free riders', by accessing the same benefit twice, both in their country of residence and in the host country.

Errors and problems might arise also in the light of the national interpretation of notions entitling workers to access a benefit, as is the case of the notion of residence; aspects that are often tackled on a case-by-case basis upon referral to the CJEU.[100]

For the time being, Regulation 883 and Implementing Regulation 987 do not offer serious legal remedies in the event that information-sharing obligations are not properly fulfilled.

Article 71 of Regulation 883 also sets out that an 'Administrative Commission', where all Member States are represented, is in charge of answering interpretation questions and of supporting cooperation between Member States. It can also request the European Commission to update the annexes by means of regulations and is supported in this regard by an obligation upon Member States to notify, on a yearly basis, changes concerning their social security systems and benefits covered by Regulation 883. Nevertheless, it is not unusual that the formal classification of benefits is successfully challenged before the CJEU.

Box 8: Errors and administrative problems in the management of sickness benefits in the Germany-Czech Republic cross-border region

The interview carried out with the expert covering the cross-border region between Germany and the Czech Republic highlighted situations akin to a negative conflict of laws, which concern Czech non-standard workers, most of whom are temporary agency workers that are employed in low-skilled occupations in Germany as frontier workers.

As a premise, it is to be noted that employment contracts are subject to a six-month probation period under German law, which is free from restrictions on dismissals. At the same time, fixed-term contracts are allowed for a maximum overall duration of two years.

As a consequence, the interview reported the presence of an alarming trend of subsequent fixed-term contracts having a duration of six months and lasting up to two

[99] See: Jorens, Y., Lhernhould, J.-P. (2014), *Procedures related to the granting of Portable Document A1: An overview of country practices*, FreSsco, European Commission, Luxembourg, especially pp. 22-42, Spiegel, B. (ed.) (2015), *Analytical report 2014: The relationship between social security coordination and taxation law*, FreSsco, European Commission ,Luxembourg; Spiegel, B. (ed.) (2015), *Assessment of the impact of amendments to the EU social security coordination rules on export of family benefits*, Analytical Report 2015, FreSsco, European Commission, Luxembourg, pp. 16-18; Jorens, Y., Minderhoud, P., De Coninck, J. (2015), *Comparative Report: Frontier Workers in the EU*, FreSsco, European Commission, Luxembourg.

[100] See also Spiegel, B. (ed.) (2015), *Analytical Report 2014 – The relationship between social security coordination and taxation law*, FreSsco, European Commission, Luxembourg.

years. This way, employers remain free to dismiss workers when they get sick or pregnant.

When they do so, they are required by the German legislation to pay a sickness allowance for two weeks, instead of the six-week coverage due if the employment relationship remains in place.

Once the two weeks have elapsed, the dismissed frontier workers would have to be covered by the State of insurance from the moment of sickness (i.e. Germany).

Yet, this right can be denied: if they present themselves at the Health Insurance Office after the deadline for claiming the benefit has elapsed, they are refused the benefit.

This might occur for a number of reasons, such as:

- the worker shows up only once he/she stops receiving the benefit from the employer;
- the worker has to get the certificate from his/her general practitioner (in the Czech Republic), who nevertheless is obliged by the Czech legislation to send the document over to the Czech authority, and to submit it in paper form to the relevant local Health Insurance Office in Germany.

In addition, the German Health Insurance Office might fail to provide a translation service, and ask the worker, who may not speak German, to submit a certificate in German on his/her own. According to the expert, some workers had problems in having their disease recognised as a sickness as they used online automatic translation tools, which translated the name of the disease in a wrong way.

Further problems may arise if the employer fraudulently anticipates the official date of termination of the employment relationship in order to make it fall before the date of the certificate and the consequent dismissal of the worker.

In this circumstance, the worker loses the sickness benefit from both the employer and the Health Insurance Authority.

At the same time, workers might be denied unemployment benefits in the Czech Republic as they are not in the position to work, since they are sick.

This burdensome process can discourage potential claimants, who might be seriously sick or in urgent need of money. As the expert put it, they may prefer to give up claiming their social rights and look, instead, for a new job as soon as possible.

7.2. Assessment of the European Commission's proposal

The European Commission's proposal

The proposal introduces a legal definition of fraud. The fraud would correspond to 'any intentional act or omission to act, in order to obtain or receive social security benefits or to avoid paying social security contributions, contrary to the provisions of the basic and implementing Regulations or the law of a Member State' (Article 1(2)(ea)) of the Implementing Regulation).

Data exchange between Member States is to be made easier, both by loosening restrictions on data sharing and by envisaging the use of the Electronic Exchange of Social Security Information (EESSI) platform, whose full implementation should be effective by mid-2019.

Data sharing would also be allowed on a periodical basis with a view to facilitating the identification of fraud and errors, subject to provisions safeguarding data protection. The Administrative Commission would be tasked with enlisting data allowed to be shared as well as with compiling the list of possible responses (Article 2(5) of Implementing Regulation 987).

As a further tool of cooperation, the proposal promotes bilateral agreements intended to support mutual assistance. In particular, it suggests that officials of a Member State be present in the offices where the administrative authorities of the other Member State carry out their duties, or that they assist the competent officials of the other Member State during court proceedings (Article 85a of Implementing Regulation 987).

As explained in the section concerning the posting of workers, when a request is made, an answer should be filed within 25 days, also whenever the relevant institution does not find any error. In case of urgency, the requesting institution may ask for supporting evidence to be sent within two days even if a final decision on the validity of the documents has not been taken (Article 5(2) of the Implementing Regulation). An implementing act by the European Commission, drafted with the support of the Administrative Commission, should set forth rules concerning the withdrawal of the document when its validity is disputed over by the concerned institutions (Article 20a of the Implementing Regulation).

In addition, standard procedures are envisaged for the enforcement of the recovery of unduly paid social security benefits. These include standard forms, conditions upon which claims can be filed, as well as communication duties upon the involved parties (Articles 77-82 and 84-85 of the Implementing Regulation).

Reason for the proposed changes

The European Commission identifies the proposed changes as technical amendments. They shall be read with a view to easing cooperation mechanisms and recovery procedures in order to better implement the provisions of Regulation 883.

Discussion

The adoption of **standard procedures** and **digital tools** should ease administrative cooperation procedures and improve the ability of Member States to recover unduly paid sums.

Interestingly, as far as posting is concerned, a recent EU-funded project involving research centres, unions, social security authorities, and labour inspectorates covering Belgium, Germany, Italy, and Romania – 'Enforcement Stakeholders Cooperation' (ENFOSTER) project – substantially promoted the use of the IMI digital platform as a facilitator for information exchange. Similarly to the proposal made by the European Commission concerning data exchange, IMI works as a platform providing a set of predefined questions and answers. At the same time, the final report of the project provides some suggestions for improvement, which might also inform the development of similar digital tools; among these suggestions:

- the possibility to have field text options to explain some aspects in more detail;
- the implementation of training actions for the involved officials on the platform;
- the setup of a forum available to users to address the most frequent issues or problems concerning the platform.[101]

[101] Giannini, G. (ed.) (2015), *Il distacco transnazionale di lavoratori nell'Unione Europea: pratiche e riflessioni sul dialogo sociale e la cooperazione amministrativa*, ENFOSTER Brief No. 1.

The introduction of **deadlines** concerning information sharing between institutions could also speed up administrative procedures.

Yet, in the absence of sanctions or enforcement procedures, this target may not be reached.

A small step forward in this regard might be the "upgrading" of the obligation on competent authorities to ensure that their institutions are aware of, and apply the relevant EU rules in the field through the newly proposed Article 75a Regulation 883, by replacing the similar provision currently enshrined in the Implementing Regulation (Article 89(3)).

Nevertheless, according to the Swedish expert interviewed, this provision could be problematic for Sweden, as this obligation on competent authorities could contravene the Swedish Constitution, granting authorities autonomy from the government in ruling individual cases and in the interpretation of the law. This would be the case if the proposed Article 75a Regulation 883 forced the government to intervene in an individual case concerning the exercise of public authority or to determine how EU law should be applied.[102]

In addition, the actual knowledge and understanding of EU rules on the coordination of social security by officials in charge of applying them should not be taken for granted. As emerged during the interviews, when it comes to granting special non-contributory cash benefits to economically inactive citizens, or unemployed benefits to frontier workers coming back to the country of residence, problems can be experienced as officials might ignore that these people are entitled to the benefit.

In this regard, the role of the **EURES network** could be strengthened: the network could become the main and qualified interlocutor in case cross-border problems arise. Yet, this depends on the willingness of Member States and responsible bodies to seek support when it comes to deciding whether and how to grant a benefit to a migrant worker. A further step forward to renew commitment to administrative cooperation and address disputes more smoothly could lie in the recently disclosed proposal of the European Commission to establish a Labour Authority.[103]

Summary and recommendations

As mentioned above, the proposal introduces a legal definition of fraud as 'any intentional act or omission to act, in order to obtain or receive social security benefits or to avoid paying social security contributions, contrary to the provisions of the basic and implementing Regulations or the law of a Member State'. In addition, data exchange between Member States is to be made easier, both by loosening restrictions on data sharing and by envisaging the use of the EESSI platform, whose full implementation should be effective by mid-2019.

Data sharing would be allowed on a periodical basis with a view of facilitating the identification of fraud and errors, subject to provisions safeguarding data protection. Moreover, the Administrative Commission would be tasked with enlisting data allowed to be shared, as well as with compiling the list of possible responses (Article 2(5) of the Implementing Regulation).

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[102] See also Swedish Confederation of Professional Employees (*Tjänstemännens Centralorganisation*, TCO), Swedish Confederation of Professional Associations (*Sveriges Akademikers Centralorganisation*, SACO) (2017), *TCO's and Saco's position on the revision of regulation 883/2004 and 987/2009.*

[103] See Juncker, J.-C. (2017), *State of the Union Address 2017*, speech delivered in Brussels on 1 September 2017, available at: http://europa.eu/rapid/press-release_SPEECH-17-3165_en.htm.

Moreover, deadlines would be introduced for relevant institutions as for the review of portable documents certifying the applicable legislation upon request of institutions of other Member States. An implementing act by the European Commission, drafted with the support of the Administrative Commission, should set forth rules concerning the withdrawal of the document when its validity is disputed over by the concerned institutions.

Standard procedures are also envisaged for the enforcement of recovery of unduly paid social security benefits, which would include standard forms, conditions upon which claims can be filed, as well as communication duties upon the involved parties.

Apart from some worries about possibly too much rigidity in the newly envisaged procedures, the proposals at issue have been mainly considered by social partners and stakeholders as capable of strengthening administrative cooperation and good governance of the complex system aimed at information exchange between social security institutions. Their adoption is thus recommended, obviously with the awareness that no regulative or technical measure, albeit carefully drafted on paper, could *per se* ensure effective outcomes in practice.

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ANNEX 1 - LIST OF INTERVIEWEES (ANONYMISED)

Interviewee	Country	Type of respondent
Academic	EU	Expert
Academic	EU and Germany	Expert
Union representative	Europe	Employee representative
Union representative	Spain	Employee representative
Tax and social security advisor	EU and Italy	Business consultant
Tax and social security advisor	EU and Italy	Business consultant
Union representative	Sweden	Employee representative
Academic	Romania	Expert
Tax and social security advisor	UK	Expert
Public Employment Service Official	Czech Republic and Germany	Expert

ANNEX 2

Table 2. Categories of citizens at risk of exclusion from social assistance pursuant to Directive 2004/38/EC as interpreted by the CJEU

Categories of citizens	Access to social assistance	Residence right in view of request for social assistance	Safeguard clauses
Neither employed in the country nor looking for a job (including students, pensioners, and people with disabilities) **(Article 6)**	Access to social assistance can be denied if this poses a burden on the social assistance system. **(Article 24(2))**	As having sufficient resources not to become a burden on the social assistance system, together with having a comprehensive sickness coverage in the country, is a requisite for keeping the residence right for more than three months, this right may be withdrawn upon assessment of individual circumstances following the request for social assistance. **(Article 14)**	No restrictions on the residence right apply for the first three months of residence. **(Article 6)**
Entering the country as job-seekers **(Article 14(4)(b))**	Member States are explicitly allowed not to grant social assistance. **(Article 24(2))**		Job-seekers shall keep the residence right for at least three months or longer periods if: (a) there is evidence that they continue to seek employment; and (b) they have a genuine chance of being engaged. **(Articles 6 and 14(4)(b))**
Unemployed having worked in the country for one year or less **(Article 7(3)(c))**	Access to social assistance can be denied if this poses a	As having sufficient resources not to become a burden on the social assistance system is a requisite for keeping the residence right, this right may be withdrawn upon assessment	These persons retain their 'worker' status and the right to access social assistance for at least six months after the end of the working activity,

Categories of citizens	Access to social assistance	Residence right in view of request for social assistance	Safeguard clauses
	burden on the social assistance system. **(Article 24(2))**	of individual circumstances following the request for social assistance. **(Article 14)**	provided they register as 'job-seekers'. **(Article 7(3)(c))**
Inactive family members legally residing in the country for less than five years, in case of death or departure of the worker they are dependent on. **(Article 12)**	Access to social assistance can be denied if this poses a burden on the social assistance system. **(Article 24(2))**	As having sufficient resources not to become a burden on the social assistance system is a requisite for keeping the residence right, this right may be withdrawn upon assessment of individual circumstances following the request for social assistance. **(Article 14)** The acquisition of a permanent residence right for these inactive citizens after five years of residence is also subject to the condition of having sufficient resources not to become a burden on the social assistance system of the host Member State, together with the requirement of having a comprehensive sickness insurance coverage in the country. **(Article 12(2))**	These persons shall retain the residence right if they have been residing in the country for at least one year before the death of the partner, or until the completion of the studies, if they are children enrolled in schools, their parents, or persons who have custody of them. **(Article 12(2-3))**
Inactive family members legally residing in the country for less than five	Access to social benefits can be denied if this poses a burden	As having sufficient resources not to become a burden on the social assistance system is a requisite for	These persons shall retain the residence right under at least one of the following conditions: (a) the

Categories of citizens	Access to social assistance	Residence right in view of request for social assistance	Safeguard clauses
years, in case of divorce or annulment of marriage, or of termination of registered partnership **(Article 13)**	on the social assistance system. **(Article 24(2))**	keeping the residence right, this right may be withdrawn upon assessment of individual circumstances following the request for social assistance. **(Article 14)** The acquisition of a permanent residence right for these inactive citizens after five years of residence is also subject to the condition of having sufficient resources not to become a burden on the social assistance system of the host Member State, together with the requirement of having a comprehensive sickness insurance coverage in the country. **(Article 13(2))**	partnership has lasted for at least three years, including one year spent in the country; (b) they have custody of children; (c) they have the right to visit children; or (d) in case of difficult circumstances, such as those affecting victims of domestic violence. **(Article 13(2))**

Source: Authors' assessment based on Directive 2004/38/EC and CJEU case law.

ANNEX 3 – LIST OF PROPOSED CHANGES TO REGULATION (EC) 883/2004 AND ITS IMPLEMENTING REGULATION (EC) 987/2009 PROPOSED BY THE EUROPEAN COMMISSION IN EACH RELEVANT FIELD[104]

ECONOMICALLY INACTIVE CITIZENS

Regulation 883/2004

TITLE I

GENERAL PROVISIONS

Article 4

Equality of treatment

1. Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof.
2. A Member State may require that the access of an economically inactive person residing in that Member State to its social security benefits to be subject to the conditions of having a right to legal residence as set out in Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

Related provisions:

Recital 2

The Treaty does not provide powers other than those of Article 308 to take appropriate measures within the field of social security for persons other than employed persons.

Article 21 Treaty of the Functioning of the European Union guarantees every Union citizen the right to free movement subject to the limitations and conditions laid down in the Treaties and by measures adopted to give them effect.

Recital 5

It is necessary, within the framework of such coordination, to guarantee within the Community equality of treatment under the different national legislation for the persons concerned~~.~~ ,subject to the conditions as regards the access to certain social security benefits by economically inactive mobile EU citizens in the host Member State set out in Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

Recital 5(a)

[104] COM(2016) 815 final, available at: http://ec.europa.eu/social/BlobServlet?docId=16784&langId=en

The Court of Justice has held that Member States are entitled to make the access of economically inactive citizens in the host Member State to social security benefits, which do not constitute social assistance within the meaning of Directive 2004/38/EC subject to a legal right of residence within the meaning of that Directive. The verification of the legal right of residence should be carried out in accordance with the requirement of Directive 2004/38/EC. For these purposes, an economically inactive citizen should be clearly distinguished from a jobseeker whose right of residence is conferred directly by Article 45 of the Treaty on the Functioning of the European Union. In order to improve legal clarity for citizens and institutions, a codification of this case law is necessary.

Recital 5(b)

Member States should ensure that economically inactive EU mobile citizens are not prevented from satisfying the condition of having comprehensive sickness insurance cover in the host Member State, as laid down in Directive 2004/38/EC. This may entail allowing such citizens to contribute in a proportionate manner to a scheme for sickness coverage in the Member State in which they habitually reside.

Recital 5(c)

Notwithstanding the limitations of the right of equal treatment for economically inactive persons, that arise from the Directive 2004/38/EC or otherwise by virtue of Union law, nothing within this Regulation should restrict the fundamental rights recognised in the Charter of Fundamental Rights of the European Union, notably the right to human dignity (Article 1), the right to life (Article 2) and the right to healthcare (Article 45).

UNEMPLOYMENT BENEFITS

Regulation 883/2004

TITLE II

DETERMINATION OF THE LEGISLATION APPLICABLE

Article 13

Pursuit of activities in two or more Member States

(…)

4a. A person who is receiving unemployment benefits in cash from one Member State and who is simultaneously pursuing an activity as an employed or self-employed person in another Member State shall be subject to the legislation of the Member State paying the unemployment benefits.

TITLE III

SPECIAL PROVISIONS CONCERNING THE VARIOUS CATEGORIES OF BENEFITS

CHAPTER 6

Unemployment benefits

Article 61

Special rules on aggregation of periods of insurance, employment or self-employment

1~~. The competent institution of a Member State whose legislation makes the acquisition, retention, recovery or duration of the right to benefits conditional upon the completion of either periods of insurance, employment or self-employment shall, to the extent necessary, take into account periods of insurance, employment or self-employment completed under the legislation of any other Member State as though they were completed under the legislation it applies.~~

~~However, when the applicable legislation makes the right to benefits conditional on the completion of periods of insurance, the periods of employment or self-employment completed under the legislation of another Member State shall not be taken into account unless such periods would have been considered to be periods of insurance had they been completed in accordance with the applicable legislation.~~

~~2~~1. Except in the cases referred to in Article 65(2)~~(5)(a)~~[wholly unemployed frontier workers], the application of ~~paragraph 1 of this Article~~ Article 6 [exportability principle] shall be conditional on the person concerned having ~~the~~ most recently completed a period of at least three months, in accordance with the legislation under which the benefits are claimed.~~:~~

~~— periods of insurance, if that legislation requires periods of insurance,~~

~~— periods of employment, if that legislation requires periods of employment,~~

~~— or~~

~~— periods of self-employment, if that legislation requires periods of self-employment.~~

2. Where an unemployed person does not satisfy the conditions for the aggregation of periods in accordance with paragraph 1 because the total duration of his or her most recently completed periods of insurance, employment or self-employment in that Member State is less than three months that person shall be entitled to unemployment benefits in accordance with the legislation of the Member State where he or she had previously completed such periods under the conditions and subject to the limitations laid down in Article 64a.”.

Article 64

Unemployed persons going to another Member State

1. A wholly unemployed person who satisfies the conditions of the legislation of the competent Member State for entitlement to benefits, and who goes to another Member State in order to seek work there, shall retain his/her entitlement to unemployment benefits in cash under the following conditions and within the following limits:

(…)

(c)

entitlement to benefits shall be retained for a period of ~~three~~ six months from the date when the unemployed person ceased to be available to the employment services of the Member State which he/she left, provided that the total duration for which the benefits are provided does not exceed the total duration of the period of his/her entitlement to benefits under the legislation of that Member State; the competent services or institutions may extend the period of ~~three months up to a maximum of six months~~ of six months up to the end of the period of that person’s entitlement to benefits;

(…)

3. Unless the legislation of the competent Member State is more favourable, between two periods of employment the maximum total period for which entitlement to benefits shall be retained under paragraph 1 shall be ~~three~~ six months; the competent services or institutions may extend that period up to ~~a maximum of six months~~ the end of the period of entitlement to benefits.

Article 64a

Special rules for unemployed persons who moved to another Member State without fulfilling the conditions of Article 61(1) and Article 64

In the situations referred to in Article 61(2), the Member State to whose legislation the unemployed person was previously subject shall become competent to provide unemployment benefits. They shall be provided at the expense of the competent institution for the period laid down in Article 64(1)(c), if the unemployed person makes himself/herself available to the employment services in the Member State of most recent insurance and adheres to the conditions laid down under the legislation of that Member State. Article 64 (2) to (4) shall apply mutatis mutandis."

Regulation 987/2009

Article 55

Conditions and restrictions on the retention of the entitlement to benefits for unemployed persons going to another Member State

(…)

~~4. At the request of the competent institution,~~ the institution in the Member State to which the unemployed person has gone shall provide relevant information on a monthly basis concerning the follow-up of the unemployed person's situation, in particular whether the latter is still registered with the employment services and is complying with organised checking procedures.

7. Paragraphs 2 to 6 [concerning export of unemployment benefits] shall apply mutatis mutandis to the situation covered by Article 64a and Article 65a(3) of the basic Regulation.

Article 55a

Obligation of employment service of the Member State of most recent insurance

In the situation referred to in Article 61(2) of the basic Regulation, the institution of the Member State of most recent insurance shall immediately send a document to the competent institution of the Member State of previous insurance containing: the date on which the person concerned had become unemployed, the period of insurance, employment or self-employment completed under its legislation, the relevant circumstances of the unemployment likely to affect entitlement to benefits, the date of registration as unemployed person and their address."

ACCESS TO UNEMPLOYMENT BENEFITS BY FRONTIER WORKERS AND OTHER CROSS-BORDER WORKERS

Regulation 883/2004

Article 65

Unemployed persons who resided in a Member State other than the competent State

1. An unemployed person who~~, is partially or intermittently unemployed and who~~, during his~~/~~ or her last activity as an employed or self-employed person~~,~~ resided in a Member State other than the competent Member State shall make himself~~/~~ or herself available to ~~his/her~~ the former employer or to the employment services in the competent Member State. ~~He/she~~ Such a person shall receive benefits in accordance with the legislation of the competent Member State as if he~~/~~ or she were residing in that Member State. These benefits shall be provided by the institution of the competent Member State.

2. By way of derogation to paragraph 1, a wholly unemployed person who, during ~~his/her~~ the last activity as an employed or self-employed person, resided in a Member State other than the competent Member State, and who had not completed at least 12 months of unemployment insurance exclusively under the legislation of the competent Member State ~~continues to reside in that Member State or returns to that Member State~~ shall make himself ~~/~~or herself available to the employment services in the Member State of residence. Such a person shall receive benefits in accordance with the legislation of the Member State of residence as if he or she had completed all periods of insurance under the legislation of that Member State. Those benefits shall be provided by the institution of the Member State of residence. Alternatively, a wholly unemployed person referred to in this paragraph, who would be entitled to an unemployment benefit solely under the national legislation of the competent Member State if he or she resided there, may instead opt to make themselves available to the employment services in that Member State and to receive benefits in accordance with the legislation of that Member State as if he or she were residing there.

~~Without prejudice to Article 64, a wholly unemployed person may, as a supplementary step, make himself/herself available to the employment services of the Member State in which he/she pursued his/her last activity as an employed or self-employed person.~~

~~An unemployed person, other than a frontier worker, who does not return to his/her Member State of residence, shall make himself/herself available to the employment services in the Member State to whose legislation he/she was last subject.~~

3. ~~The unemployed person referred to in the first sentence of paragraph 2 shall register as a person seeking work with the competent employment services of the Member State in which he/she resides, shall be subject to the control procedure organised there and shall adhere to the conditions laid down under the legislation of that Member State. If he/she chooses also to register as a person seeking work in the Member State in which he/she pursued his/her last activity as an employed or self-employed person, he/she shall comply with the obligations applicable in that State.~~

If a wholly unemployed person referred to in paragraphs 1 or 2 does not wish to become or remain available to the employment services of the competent Member State after having been registered there, and wishes to seek work in the Member State of residence or the Member State of last activity Article 64 shall apply mutatis mutandis, except Article 64(1)(a)[obligation to have been registered as a person seeking work and to have remained available to the employment services of the competent Member State for at least four weeks after becoming unemployed]. The competent institution may extend the period referred to in the first sentence of Article 64(1)(c) [export of unemployment benefits for six months] up to the end of the period of entitlement to benefits.

4. A wholly unemployed person referred to in this Article may in addition to making themselves available to the employment services of the competent Member State also make themselves available to the employment services of the other Member State.

~~The implementation of the second sentence of paragraph 2 and of the second sentence of paragraph 3, as well as the arrangements for exchanges of information, cooperation and mutual assistance between the institutions and services of the Member State of residence and the Member State in which he/she pursued his/her last occupation, shall be laid down in the Implementing Regulation.~~

5. Paragraphs 2 to 4 of this Article shall not apply to a person who is partially or intermittently unemployed.

~~(a) The unemployed person referred to in the first and second sentences of paragraph 2 shall receive benefits in accordance with the legislation of the Member State of residence as if he/she had been subject to that legislation during his/her last activity as an employed or self-employed person. Those benefits shall be provided by the institution of the place of residence.~~

~~(b) However, a worker other than a frontier worker who has been provided benefits at the expense of the competent institution of the Member State to whose legislation he/she was last subject shall firstly receive, on his/her return to the Member State of residence, benefits in accordance with Article 64, receipt of the benefits in accordance with (a) being suspended for the period during which he/she receives benefits under the legislation to which he/she was last subject.~~

~~6. The benefits provided by the institution of the place of residence under paragraph 5 shall continue to be at its own expense. However, subject to paragraph 7, the competent institution of the Member State to whose legislation he/she was last subject shall reimburse to the institution of the place of residence the full amount of the benefits provided by the latter institution during the first three months. The amount of the reimbursement during this period may not be higher than the amount payable, in the case of unemployment, under the legislation of the competent Member State. In the case referred to in paragraph 5(b), the period during which benefits are provided under Article 64 shall be deducted from the period referred to in the second sentence of this paragraph. The arrangements for reimbursement shall be laid down in the Implementing Regulation.~~

~~7. However, the period of reimbursement referred to in paragraph 6 shall be extended to five months when the person concerned has, during the preceding 24 months, completed periods~~

~~of employment or self-employment of at least 12 months in the Member State to whose legislation he/she was last subject, where such periods would qualify for the purposes of establishing entitlement to unemployment benefits.~~

~~8. For the purposes of paragraphs 6 and 7, two or more Member States, or their competent authorities, may provide for other methods of reimbursement or waive all reimbursement between the institutions falling under their jurisdiction.~~

Related provisions

Regulation 987/2009

Article 56

Unemployed persons who resided in a Member State other than the competent Member State

1. Where the unemployed person decides, in accordance with Article 65(~~2~~4) or Article 65a(1) of the basic Regulation, to make himself/herself also available to the employment services in the Member State not providing the benefits, by registering there as a person seeking work, he/she shall inform the institution and the employment services of the Member State providing the benefits.

(…)

~~*3. For the purposes of applying Article 65(5)(b) of the basic Regulation, the institution of the Member State to whose legislation the worker was last subject shall inform the institution of the place of residence, when requested to do so by the latter, whether the worker is entitled to benefits under Article 64 of the basic Regulation.*~~

CHAPTER II

Reimbursement of unemployment benefits pursuant to Article 65 of the basic Regulation

~~Article 70~~

~~Reimbursement of unemployment benefits~~

~~If there is no agreement in accordance with Article 65(8) of the basic Regulation, the institution of the place of residence shall request reimbursement of unemployment benefits pursuant to Article 65(6) and (7) of the basic Regulation from the institution of the Member State to whose legislation the beneficiary was last subject. The request shall be made within six months of the end of the calendar half-year during which the last payment of unemployment benefit, for which reimbursement is requested, was made. The request shall indicate the amount of benefit paid during the three or five month-period referred to in Article 65(6) and (7) of the basic Regulation, the period for which the benefits were paid and the identification data of the unemployed person. The claims shall be introduced and paid via the liaison bodies of the Member States concerned.~~

~~There is no requirement to consider requests introduced after the time-limit referred to in the first paragraph.~~

~~Articles 66(1) and 67(5) to (7) of the implementing Regulation shall apply mutatis mutandis.~~

~~From the end of the 18-month period referred to in Article 67(5) of the implementing Regulation, interest may be charged by the creditor institution on outstanding claims. The interest shall be calculated in accordance with Article 68(2) of the implementing Regulation.~~

~~The maximum amount of the reimbursement referred to in the third sentence of Article 65(6) of the basic Regulation is in each individual case the amount of the benefit to which a person concerned would be entitled according to the legislation of the Member State to which he was last subject if registered with the employment services of that Member State. However, in relations between the Member States listed in Annex 5 to the implementing Regulation, the competent institutions of one of those Member States to whose legislation the person concerned was last subject shall determine the maximum amount in each individual case on the basis of the average amount of unemployment benefits provided under the legislation of that Member State in the preceding calendar year.~~

LONG-TERM CARE BENEFITS

Regulation 883/2004

TITLE II

DETERMINATION OF THE LEGISLATION APPLICABLE

Article 11

1. (…)

2. For the purposes of this Title, persons receiving cash benefits because or as a consequence of their activity as an employed or self-employed person shall be considered to be pursuing the said activity. This shall not apply to invalidity, old-age or survivors' pensions or to pensions in respect of accidents at work or occupational diseases or to ~~sickness benefits in cash covering treatment for an unlimited period~~ long-term care benefits in cash.

TITLE III

SPECIAL PROVISIONS CONCERNING THE VARIOUS CATEGORIES OF BENEFITS

CHAPTER 1a

Long-term care benefits

Article 35a

General provisions

1. Without prejudice to the specific provisions of this Chapter, Articles 17 to 32 shall apply mutatis mutandis to long-term care benefits.

2. The Administrative Commission shall draw up a detailed list of long-term care benefits which meet the criteria contained in Article 1 (vb) of this Regulation, specifying which are benefits in kind and which are benefits in cash.

3. By way of derogation from paragraph 1, Member States may grant long-term care benefits in cash in accordance with the other Chapters of Title III, if the benefit and the specific conditions to which the benefit is subject are listed in Annex XII and provided that the outcome of such coordination is at least as favourable for the beneficiaries as if the benefit was coordinated under this Chapter.

Article 35b

Overlapping of long-term care benefits

1. If a recipient of long-term care benefits in cash granted under the legislation of the competent Member State receives, at the same time and under this Chapter, long-term care benefits in kind from the institution of the place of residence or stay in another Member State, and an institution in the first Member State is also required to reimburse the cost of these benefits in kind under Article 35c, the general provision on prevention of overlapping of benefits laid down in Article 10 shall be applicable, with the following restriction only: the amount of the benefit in cash shall be reduced by the reimbursable amount for the benefit in kind which is claimable under Article 35c from the institution of the first Member State.

2. Two or more Member States, or their competent authorities, may agree on other or supplementary measures which shall not be less favourable for the persons concerned than the principles laid down in paragraph 1.

Article 35c

Reimbursement between institutions

1. Article 35 shall apply mutatis mutandis to long-term care benefits.

2. If the legislation of a Member State where the competent institution under this Chapter is situated does not provide for long-term care benefits in kind, the institution which is or would be competent in that Member State under Chapter 1 for the reimbursement of sickness benefits in kind granted in another Member State shall be deemed to be the competent one also under Chapter 1a.

Related provisions:

Recital 24

~~It is necessary to establish specific provisions regulating the non-overlapping of sickness benefits in kind and sickness benefits in cash which are of the same nature as those which were the subject of the judgments of the Court of Justice in Case C-215/99 Jauch and C-160/96 Molenaar, provided that those benefits cover the same risk.~~

Long-term care benefits for insured persons and members of their families need to be coordinated according to specific rules which, in principle, follow the rules applicable to sickness benefits, in line with the case law of the Court of Justice. It is also necessary to provide for specific provisions in case of overlapping of long-term care benefits in kind and in cash.

Article 1

Definitions

For the purposes of this Regulation:

(…)

(va) "long-term care benefit" means any benefit in kind, cash or a combination of both for persons who, over an extended period of time, on account of old-age, disability, illness or impairment, require considerable assistance from another person or persons to carry out essential daily activities, including to support their personal autonomy; this includes benefits granted to or for the person providing such assistance;

Article 3

Matters covered

1. This Regulation shall apply to all legislation concerning the following branches of social security:

(ba) long-term care benefits.

~~*Article 34*~~

~~*Overlapping of long-term care benefits*~~

~~1. If a recipient of long-term care benefits in cash, which have to be treated as sickness benefits and are therefore provided by the Member State competent for cash benefits under Articles 21 or 29, is, at the same time and under this Chapter, entitled to claim benefits in kind intended for the same purpose from the institution of the place of residence or stay in another Member State, and an institution in the first Member State is also required to reimburse the cost of these benefits in kind under Article 35, the general provision on prevention of overlapping of benefits laid down in Article 10 shall be applicable, with the following restriction only: if the person concerned claims and receives the benefit in kind, the amount of the benefit in cash shall be reduced by the amount of the benefit in kind which is or could be claimed from the institution of the first Member State required to reimburse the cost.~~

~~2. The Administrative Commission shall draw up the list of the cash benefits and benefits in kind covered by paragraph 1.~~

~~3. Two or more Member States, or their competent authorities, may agree on other or supplementary measures which shall not be less advantageous for the persons concerned than the principles laid down in paragraph 1.~~

Regulation 987/2009

TITLE III

SPECIAL PROVISIONS CONCERNING THE VARIOUS CATEGORIES OF BENEFITS

CHAPTER 1

Sickness, maternity and equivalent paternity benefits, and long-term care benefits

Article 23

Regime applicable in the event of the existence of more than one regime in the Member State of residence or stay

If the legislation of the Member State of residence or stay comprises more than one scheme of sickness, maternity and paternity insurance for more than one category of insured persons,

the provisions applicable under Articles 17, 19(1), 20, 22, 24 and 26 of the basic Regulation shall be those of the legislation on the general scheme for employed persons. This provision applies mutatis mutandis to long-term care benefits.

Article 24

Residence in a Member State other than the competent Member State

1. For the purposes of the application of Article 17 of the basic Regulation, the insured person and/or members of his family shall be obliged to register with the institution of the place of residence. Their right to benefits in kind in the Member State of residence shall be certified by a document issued by the competent institution upon request of the insured person or upon request of the institution of the place of residence.

(…)

3. This Article shall apply mutatis mutandis to the persons referred to in Articles 22, 24, 25 ~~and,~~ 26 and 35a of the basic Regulation.

Article 28

Long-term care benefits in cash in the event of stay or residence in a Member State other than the competent Member State

1. In order to be entitled to long-term care benefits in cash pursuant to Article 21(1) of the basic Regulation in accordance with Article 35a thereof the insured person shall apply to the competent institution. The competent institution shall, where necessary, inform the institution of the place of residence thereof.

Article 32

Special implementing measures

1. When a person or a group of persons are exempted upon request from compulsory sickness insurance and such persons are thus not covered by a sickness insurance scheme to which the basic Regulation applies, the institution of another Member State shall not, solely because of this exemption, become responsible for bearing the costs of benefits in kind or in cash provided to such persons or to a member of their family under Title III, Chapter I, of the basic Regulation.

2. For the Member States referred to in Annex 2, the provisions of Title III, Chapter I, of the basic Regulation relating to benefits in kind shall apply to persons entitled to benefits in kind solely on the basis of a special scheme for civil servants only to the extent specified therein.

The institution of another Member State shall not, on those grounds alone, become responsible for bearing the costs of benefits in kind or in cash provided to those persons or to members of their family.

3. When the persons referred to in paragraphs 1 and 2 and the members of their families reside in a Member State where the right to receive benefits in kind is not subject to conditions of insurance, or of activity as an employed or self-employed person, they shall be liable to pay the full costs of benefits in kind provided in their country of residence.

4. This Article applies mutatis mutandis to long-term care benefits.

TITLE IV

FINANCIAL PROVISIONS

CHAPTER I

Reimbursement of the cost of benefits in application of Article 35 and Article 41 of the basic Regulation

Article 64

1. For each creditor Member State, the monthly fixed amount per person (Fi) for a calendar year shall be determined by dividing the annual average cost per person (Yi), broken down by age group (i), by 12 and by applying a reduction (X) to the result in accordance with the following formula:

Fi = Yi*1/12*(1-X)

Where:

~~— the index (i = 1, 2 and 3) represents the three age groups used for calculating the fixed amounts:~~

~~— i = 1: persons aged under 20,~~

~~— i = 2: persons aged from 20 to 64,~~

~~— i = 3: persons aged 65 and over,~~

<u>- the index (i = 1, 2, 3 and 4) represents the four age groups used for calculating the fixed amounts:</u>

<u>i = 1: persons aged under 65,</u>

<u>i = 2: persons aged from 65 to 74,</u>

<u>i = 3: persons aged from 75 to 84,</u>

<u>i = 4: persons aged 85 and over,”</u>

— Yi represents the annual average cost per person in age group i, as defined in paragraph 2,

— the coefficient X (0,20 or 0,15) represents the reduction as defined in paragraph 3,

(…)

TITLE V

MISCELLANEOUS, TRANSITIONAL AND FINAL PROVISIONS

Article 87

Medical examination and administrative checks

(…)

2. The institution of the place of stay or residence shall forward a report to the debtor institution that requested the medical examination. This institution shall be bound by the findings of the institution of the place of stay or residence.

The debtor institution shall reserve the right to have the beneficiary examined by a doctor of its choice. However, the beneficiary may be asked to return to the Member State of the

debtor institution only if he or she is able to make the journey without prejudice to his health and the cost of travel and accommodation is paid for by the debtor institution.

3. Where a recipient or a claimant of benefits, or a member of his family, is staying or residing in the territory of a Member State other than that in which the debtor institution is located, the administrative check shall, at the request of the debtor institution, be performed by the institution of the beneficiary's place of stay or residence.

Paragraph 2 shall also apply in this case.

4. Paragraphs 2 and 3 shall also apply in determining or checking the state of dependence of a recipient or a claimant of the long-term care benefits mentioned in Article ~~34~~1(vb) of the basic Regulation

6. As an exception to the principle of free-of-charge mutual administrative cooperation in Article 76(2) of the basic Regulation, the effective amount of the expenses of the checks referred to in paragraphs 1 to 5 shall be refunded to the institution which was requested to carry them out by the debtor institution which requested them. <u>However, if the institution which was requested to carry out the check also uses the findings for the granting of benefits to the person concerned under the legislation it applies, it shall not claim the expenses referred to in the previous sentence.</u>

FAMILY BENEFITS

Regulation 883/2004

Article 68b

Special provisions for family benefits in cash intended to replace income during periods of child-raising

1. Family benefits in cash which are intended to replace income during periods of child-raising and which are listed in Part 1 of Annex XIII shall be awarded solely to the person subject to the legislation of the competent Member State and there shall be no derived right for his or her family members to such benefits. Article 68a of this Regulation shall not apply to such benefits nor shall the competent institution be required to take into account a claim submitted by the other parent, a person treated as a parent or institution acting as guardian of the child or children pursuant to Article 60(1) of the Implementing Regulation.

2. By way of derogation from Article 68(2), in cases of overlapping entitlements under conflicting legislation or legislations, a Member State may award a family benefit referred to in paragraph 1 in full to a beneficiary regardless of the amount provided for by the first legislation. Member States that elect to apply such a derogation shall be listed in Part 2 of Annex XIII by reference to the family benefit to which the derogation applies.

Related provisions:

Recital 35a

Family benefits in cash intended to replace income during a periods of child-raising are individual rights which are personal to the parent subject to the legislation of the competent Member State. Given the specific nature of these family benefits, such benefits should be listed in Part I of Annex XIII to this Regulation and should be exclusively reserved to the parent concerned. The Member State with secondary competence may elect that the rules of priority in case of overlapping of rights to family benefits under the legislation of the competent Member State and under the legislation of the Member State of residence of members of the family should not apply to such benefits. Where a Member State chooses to dis-apply the priority rules it must do so consistently in respect of all entitled persons in an analogous situation and be listed in Part II of Annex XIII.

POSTING OF WORKERS

Regulation 883/2004

Article 12

Special rules

1. A person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted within the meaning of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services or sent by that employer to another Member State to perform work on that employer's behalf shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such work does not exceed twenty-four months and that the person ~~he~~ is not posted or sent to replace another employed or self-employed person previously posted or sent within the meaning of this Article.

2. A person who normally pursues an activity as a self-employed person in a Member State who goes to pursue a similar activity in another Member State shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such activity does not exceed twenty-four months and that the person is not replacing another posted employed or self-employed person.

Related provisions

Regulation 987/2009

Article 14

Details relating to Articles 12 and 13 of the basic Regulation

1. For the purposes of the application of Article 12(1) of the basic Regulation, a 'person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted within the meaning of the Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services or sent by that employer to another Member State' shall include a person who is recruited with a view to being posted or sent to another Member State, provided that~~,~~ immediately before the start of his employment, the person concerned is already subject to the legislation of the Member State in accordance with Title II of the basic Regulation [Rules concerning the determination of the legislation applicable] ~~which his employer is established~~.

(…)

5a. For the purposes of the application of Title II of the basic Regulation, "registered office or place of business" shall refer to the registered office or place of business where the essential decisions of the undertaking are adopted and where the functions of its central

administration are carried out~~.~~, provided the undertaking performs a substantial activity in that Member State. Otherwise, it shall be deemed to be situated in the Member State where the centre of interest of activities of the undertaking determined in accordance with the criteria laid down in paragraphs 9 and 10 is located.

~~For the purposes of Article 13(1) of the basic Regulation, an employed flight crew or cabin crew member normally pursuing air passenger or freight services in two or more Member States shall be subject to the legislation of the Member State where the home base, as defined in Annex III to Council Regulation (EEC) No 3922/91 of 16 December 1991 on the harmonization of technical requirements and administrative procedures in the field of civil aviation is located.~~

Article 19

Provision of information to persons concerned and employers

(…)

3. Whenever an institution is asked to issue the attestation referred to above [the A1 form], it shall carry out a proper assessment of the relevant facts and guarantee that the information on the basis of which the attestation is provided is correct.

4. Where necessary for the exercise of legislative powers at national or Union level, relevant information regarding the social security rights and obligations of the persons concerned shall be exchanged directly between the competent institutions and the labour inspectorates, immigration or tax authorities of the States concerned this may include the processing of personal data for purposes other than the exercise or enforcement of rights and obligations under the basic Regulation and this Regulation in particular to ensure compliance with relevant legal obligations in the fields of labour, health and safety, immigration and taxation law. Further details shall be laid down by decision of the Administrative Commission.

5. Competent authorities shall be obliged to provide specific and adequate information to concerned persons concerning the processing of their personal data pursuant to the Regulation of the European Parliament and of the Council on the protection of individuals with regard the processing of personal data and on the free movement of such data (General Data Protection Regulation),53 as also provided for by Article 77 of the basic Regulation and shall adhere to the requirements of Article3(3) of this Regulation.”.

ADMINISTRATIVE COOPERATION

Regulation 883/2004

Article 75a

Obligation of competent authorities

1. The competent authorities shall ensure that their institutions are aware of and apply all provisions, legislative or otherwise, including the decisions of the Administrative Commission, in the areas covered by and within the terms of this Regulation and the implementing Regulation.

2. In order to ensure the correct determination of the applicable legislation, the competent authorities shall promote the cooperation between institutions and labour inspectorates in their Member States."

Article 76a

Power to adopt implementing acts

1. The Commission shall be empowered to adopt implementing acts specifying the procedure to be followed in order to ensure uniform conditions for the application of Articles 12 and 13 of this Regulation. Those acts shall establish a standard procedure including time limits for

– the issuance, the format and the contents of a portable document certifying the social security legislation which applies to the holder,

– the determination of situations in which the document shall be issued,

– the elements to verified before the document can be issued,

– the withdrawal of the document when its accuracy and validity is contested by the competent institution of the Member State of employment.

2. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 5 of Regulation (EU) No 182/201147.

3. The Commission shall be assisted by the Administrative Commission, which shall be a committee within the meaning of Regulation (EU) No 182/2011.

88

Delegating the power to update the Annexes

~~1. The Annexes of this Regulation shall be revised periodically.~~ The European Commission is empowered to adopt delegated acts in accordance with Article 88a to periodically amend the Annexes to this Regulation and the implementing Regulation following a request from the Administrative Commission.

Article 88a

Exercise of the delegation

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article

2. The delegation of power referred to in Article 88 shall be conferred on the European Commission for an indeterminate period of time from the [the date of entry into force of the Regulation (EU) xxxx].

3. The delegation of the power referred to in Article 88 may be revoked at any time by the European Parliament or by the Council. A decision of revocation shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force

4. Before adopting a delegated act, the Commission shall consult experts designated by each Member State in accordance with the principles laid down in the Interinstitutional Agreement on Better Law-Making of 13 April 2016

5. As soon as it adopts a delegated act, the European Commission shall notify it to the European Parliament and to the Council simultaneously.

6. A delegated act adopted pursuant to Article 88 shall enter into force only if no objection has been expressed either by the European Parliament or by the Council within a period of two months of notification of that act to the European Parliament and the Council or if, before the expiring of that period, the European Parliament and the Council have both informed the European Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or the Council."

Regulation 987/2009

Article 1

Definitions

(…)

2. (…)

ea) 'fraud' means any intentional act or omission to act, in order to obtain or receive social security benefits or to avoid to pay social security contributions, contrary to the law of a Member State;"

(…)

CHAPTER II

Provisions concerning cooperation and exchanges of data

Article 2

Scope and rules for exchanges between institutions

(…)

5. When a person's rights or obligations to which the basic and implementing Regulations apply have been established or determined, the competent institution may request the institution in the Member State of residence or stay to provide personal data about that person. The request and any response shall concern information which enables the competent Member State to identify any inaccuracy in the facts on which a document or a decision determining the rights and obligations of a person under the basic or implementing Regulation is based. The request can also be made where there is no existing doubt about

the validity or accuracy of the information contained in the document or on which the decision is based in a particular case. The request for information and any response must be necessary and proportionate.

6. The Administrative Commission shall draw up a detailed list of the types of data requests and responses which can be made under paragraph 5 and the European Commission shall give such list the necessary publicity. Only data requests and responses which are listed shall be permitted.

7. The request and any response shall comply with the requirements of the Regulation of the European Parliament and of the Council on the protection of individuals with regard the processing of personal data and on the free movement of 5. When a person's rights or obligations to which the basic and implementing Regulations apply have been established or determined, the competent institution may request the institution in the Member State of residence or stay to provide personal data about that person. The request and any response shall concern information which enables the competent Member State to identify any inaccuracy in the facts on which a document or a decision determining the rights and obligations of a person under the basic or implementing Regulation is based. The request can also be made where there is no existing doubt about the validity or accuracy of the information contained in the document or on which the decision is based in a particular case. The request for information and any response must be necessary and proportionate.

6. The Administrative Commission shall draw up a detailed list of the types of data requests and responses which can be made under paragraph 5 and the European Commission shall give such list the necessary publicity. Only data requests and responses which are listed shall be permitted.

7. The request and any response shall comply with the requirements of the Regulation of the European Parliament and of the Council on the protection of individuals with regard the processing of personal data and on the free movement of such data (General Data Protection Regulation), as also provided for by Article 77 of the basic Regulation."

Article 3

Scope and rules for exchanges between the persons concerned and institutions

(…)

3. When collecting, transmitting or processing personal data pursuant to their legislation for the purposes of implementing the basic Regulation, Member States shall ensure that the persons concerned are able to exercise fully their rights regarding personal data protection~~,~~ in accordance with ~~Community~~ Union provisions on the protection of individuals with regard to the processing of personal data and the free movement of such data~~.~~ in particular concerning the rights to have access, to rectify, to object to the processing of such personal data and are fully informed of the safeguards concerning automated individual decisions. A data subject shall be able to exercise the right to access his or her personal data processed under this Regulation not only by addressing the authority that controls the data but also through the competent institution where he or she is resident.

Article 5

Legal value of documents and supporting evidence issued in another Member State

1. Documents issued by the institution of a Member State and showing the position of a person for the purposes of the application of the basic Regulation and of the implementing Regulation, and supporting evidence on the basis of which the documents have been issued,

shall be accepted by the institutions of the other Member States for as long as they have not been withdrawn or declared to be invalid by the Member State in which they were issued. Such documents shall only be valid if all sections indicated as compulsory are filled in.

2. Where there is doubt about the validity of a document or the accuracy of the facts on which ~~the particulars contained therein~~ they are based, the institution of the Member State that receives the document shall ask the issuing institution for the necessary clarification and, where appropriate, the withdrawal of that document. ~~The issuing institution shall reconsider the grounds for issuing the document and, if necessary, withdraw it.~~

a) When receiving such a request, the issuing institution shall reconsider the grounds for issuing the document and, if necessary, withdraw it or rectify it, within 25 working days from the receipt of the request. Upon detection of an irrefutable case of fraud committed by the applicant of the document, the issuing institution shall withdraw or rectify the document immediately and with retroactive effect.

b) If the issuing institution, having reconsidered the grounds for issuing the document is unable to detect any error it shall forward to the requesting institution all supporting evidence within 25 working days from the receipt of the request. In urgent cases, where the reasons for urgency have been clearly indicated in the request, this shall be done within two working days from the receipt of the request, notwithstanding that the issuing institution may not have completed its deliberations pursuant to subparagraph (a) above.

c) Where the requesting institution having received the supporting evidence continues to have doubts about the validity of a document or the accuracy of the facts on which the particulars contained therein are based that the information upon which the document was issued is not correct, it may submit evidence to that effect and make a further request for clarification and where appropriate the withdrawal of that document by the issuing institution in accordance within the procedure and timeframes set out above.

(…)

Related provisions

Recital 39a

The relevant EU data protection acquis, in particular Regulation (EU) 679/2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)42 shall apply to the processing of personal data pursuant to this Regulation."

Recital 46

In order to enable a timely update of this Regulation to the developments at the national level, the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union should be delegated to the European Commission in respect of amending the Annexes to this Regulation and Regulation (EC) No 987/2009. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level and that those consultations be conducted in accordance with the principles laid down in the Interinstitutional Agreement on Better Law-Making of 13 April 2016.43In particular, to ensure equal participation in the preparation of delegated acts, the European Parliament and Council receive all documents at the same time as Member States' experts, and their experts systematically have access to meetings of Commission expert groups dealing with the preparation of delegated acts.

Regulation 987/2009

Recital 18a

Certain specific rules and procedures are required for the reimbursement of the cost of benefits incurred by a Member state of residence, where the persons concerned are insured in a different Member State. Member States that need to be reimbursed on the basis of fixed expenditure should notify the annual average costs per persons within a given deadline to allow the reimbursement as promptly as possible. If a Member State is unable to notify within the deadline the annual average cost per person in each age group for a reference year, it is necessary to provide an alternative that the Member State may submit claims for that year based on the annual average costs previously published in the Official Journal. The reimbursement of the expenditure on benefits in kind on the basis of fixed amounts should be as close as possible to the actual expenditure; therefore a derogation from the notification obligation should be subject to the approval by the Administrative Commission and should not be granted in a consecutive year.

Recital 19

Procedures between institutions for mutual assistance in recovery of social security claims should be strengthened in order to ensure more effective recovery and smooth functioning of ~~the coordination rules~~ social security schemes. Effective recovery is also a means of preventing and tackling abuses and fraud and a way of ensuring the sustainability of social security schemes. This involves the adoption of new procedures, taking as a basis a number of existing provisions in ~~Council Directive 2008/55/EC of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures. Such new recovery procedures should be reviewed in the light of the experience after five years of implementation and adjusted if necessary, in particular to ensure they are fully operable.~~ Council Directive 2010/24/EU concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, in particular through the adoption of a uniform instrument for enforcement and standard procedures for requesting mutual assistance and notification of instruments and measures relating to the recovery of a social security claim."

Recital 25

The Administrative Commission adopted Decision No. H5 of 18 March 2010 concerning cooperation on combating fraud and error within the framework of Council Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 of the European Parliament and of the Council on the coordination of social security systems50, which underlines that action to combat fraud and error is part of the proper implementation of Regulation (EC) No 883/2004 and this Regulation. It is, therefore, in the interest of legal certainty that this Regulation contains a clear legal ground permitting competent institutions to exchange personal data with relevant authorities in the Member State of stay or residence relating to persons whose rights and obligations under Regulation (EC) No 883/2004 and this Regulation have already been established, in order to identify fraud and error as part of the ongoing proper implementation of these Regulations. It is also necessary to specify the circumstances in which personal data may be processed for a purpose other than social security including to monitor compliance with legal obligations at Union or national level in the fields of labour, health and safety, immigration and taxation law.

Recital 26

In order to protect the rights of the persons concerned Member States should ensure that any data requests and responses are necessary and proportionate for the proper implementation of Regulation (EC) No 883/2004 and this Regulation, in accordance with

European Data Protection legislation. There should be no automatic removal of benefit entitlement resulting from the data exchange, and any decision taken on the basis of the data exchange should respect the fundamental rights and freedoms of the individual concerned in that it is based on sufficient evidence and is subject to a fair appeal procedure.

Article 20a

Power to adopt implementing acts

1. The Commission shall be empowered to adopt implementing acts specifying the procedure to be followed in order to ensure uniform conditions for the application of Articles 12 and 13 of the basic Regulation. Those acts shall establish a standard procedure including time limits for:

– the issuance, the format and the contents of a portable document certifying the social security legislation which applies to the holder,

– the determination of situations in which the document shall be issued,

– the elements to verified before the document can be issued,

– the withdrawal of the document when its accuracy and validity is contested by the competent institution of the Member State of employment.

2. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 5 of Regulation (EU) No 182/201154.

3. The Commission shall be assisted by the Administrative Commission, which shall be a committee within the meaning of Regulation (EU) No 182/2011."

TITLE IV

FINANCIAL PROVISIONS

CHAPTER I

Reimbursement of the cost of benefits in application of Article 35, 35c and Article 41 of the basic Regulation

Article 64

Article 64

Calculation method of the monthly fixed amounts and the total fixed amount

1. For each creditor Member State, the monthly fixed amount per person (Fi) for a calendar year shall be determined by dividing the annual average cost per person (Yi), broken down by age group (i), by 12 and by applying a reduction (X) to the result in accordance with the following formula:

Fi = Yi*1/12*(1-X)

Where:

~~— the index (i = 1, 2 and 3) represents the three age groups used for calculating the fixed amounts:~~

~~— i = 1: persons aged under 20,~~

~~— i = 2: persons aged from 20 to 64,~~

~~— i = 3: persons aged 65 and over,~~

— the index (i = 1, 2, 3 and 4) represents the four age groups used for calculating the fixed amounts:

— i = 1: persons aged under 65,

— i = 2: persons aged from 65 to 74,

— i = 3: persons aged from 75 to 84,

— i = 3: persons aged 85 and over,

(…)

Article 65

Notification of annual average costs

1. The annual average cost per person in each age group for a specific year shall be notified to the Audit Board at the latest by the end of the second year following the year in question. ~~If the notification is not made by this deadline, the annual average cost per person which the Administrative Commission has last determined for a previous year will be taken.~~

2. The annual average costs ~~determined~~ notified in accordance with paragraph 1 shall be published each year in the Official Journal of the European Union after approval by the Administrative Commission.

3. Where a Member State is unable to notify the average costs for a specific year by the deadline referred to in paragraph 1, it shall by the same deadline ask permission from the Administrative Commission and the Audit Board to use the annual average costs for that Member State as published in the Official Journal for the year preceding the specific year in which notification is outstanding. When seeking such permission, the Member State is required to explain the reasons why it is unable to notify the annual average costs for the year in question. If the Administrative Commission, having considered the opinion of the Audit Board, approves the request of the Member State, the aforementioned annual average costs shall be republished in the Official Journal of the European Union.

4. The derogation in paragraph 3 shall not be granted for consecutive years.

CHAPTER III

Recovery of benefits provided but not due, recovery of provisional payments and contributions, offsetting and assistance with recovery

Article 73

~~*Provisionally paid benefits in cash or contributions*~~

Settlement of benefits and contributions unduly provided or paid in case of provisional award of benefits or retroactive change of the applicable legislation

~~1. For the purposes of applying Article 6 of the implementing Regulation, at the latest three months after the applicable legislation has been determined or the institution responsible for paying the benefits has been identified, the institution which provisionally paid the cash benefits shall draw up a statement of the amount provisionally paid and shall send it to the institution identified as being competent.~~

~~The institution identified as being competent for paying the benefits shall deduct the amount due in respect of the provisional payment from the arrears of the corresponding benefits it owes to the person concerned and shall without delay transfer the amount deducted to the institution which provisionally paid the cash benefits.~~

~~If the amount of provisionally paid benefits exceeds the amount of arrears, or if arrears do not exist, the institution identified as being competent shall deduct this amount from ongoing payments subject to the conditions and limits applying to this kind of offsetting procedure under the legislation it applies, and without delay transfer the amount deducted to the institution which provisionally paid the cash benefits.~~

~~2. The institution which has provisionally received contributions from a legal and/or natural person shall not reimburse the amounts in question to the person who paid them until it has ascertained from the institution identified as being competent the sums due to it under Article 6(4) of the implementing Regulation.~~

~~Upon request of the institution identified as being competent, which shall be made at the latest three months after the applicable legislation has been determined, the institution that has provisionally received contributions shall transfer them to the institution identified as being competent for that period for the purpose of settling the situation concerning the contributions owed by the legal and/or natural person to it. The contributions transferred shall be retroactively deemed as having been paid to the institution identified as being competent.~~

~~If the amount of provisionally paid contributions exceeds the amount the legal and/or natural person owes to the institution identified as being competent, the institution which provisionally received contributions shall reimburse the amount in excess to the legal and/or natural person concerned.~~

1. In case of a retroactive change of the applicable legislation including situations referred to in Article 6(4) and (5) of the implementing Regulation, at the latest three months after the applicable legislation has been determined or the institution responsible for paying the benefits has been identified, the institution which unduly paid cash benefits shall draw up a statement of the amount paid and shall send it to the institution identified as being competent for the purpose of their reimbursement.

The same applies with respect to benefits in kind, which shall be reimbursed by the institution identified as being competent in accordance with Title IV of the implementing Regulation.

2. The institution identified as being competent for paying the cash benefits shall deduct the amount it has to reimburse to the institution which was not competent or only provisionally competent from the arrears of the corresponding benefits it owes to the person concerned and shall without delay transfer the amount deducted to the latter institution.

If the amount of unduly paid benefits exceeds the amount of arrears payable by the institution identified as being competent, or if arrears do not exist, the institution identified as being competent shall deduct this amount from ongoing payments subject to the conditions and limits applying to this kind of offsetting procedure under the legislation it applies, and without delay transfer the amount deducted to the institution which had unduly paid the cash benefits for the purpose of their reimbursement.

3. The institution which has unduly received contributions from a legal and/or natural person shall not reimburse the amounts in question to the person who paid them until it has ascertained from the institution identified as being competent the sums due to it by the person concerned.

Upon request of the institution identified as being competent, which shall be made at the latest three months after the applicable legislation has been determined, the institution that has unduly received contributions shall transfer them to the institution identified as being competent for that period for the purpose of settling the situation concerning the contributions owed by the legal and/or natural person to it. The contributions transferred shall be retroactively deemed as having been paid to the institution identified as being competent.

If the amount of unduly paid contributions exceeds the amount the legal and/or natural person owes to the institution identified as being competent, the institution which unduly received contributions shall reimburse the amount in excess to the legal and/or natural person concerned.

4. The existence of time limits under national legislation shall not be a valid ground for the refusal of the settlement of claims between institutions under this Article.

5. This Article shall not apply to claims related to periods which are older than 60 months at the date when a procedure in accordance with Articles 5(2) or 6(3) of this Regulation commenced.

Section 3

Recovery

Article 75

Definitions and common provisions

(…)

4. Information exchanged in conformity with this Section may be used for the purpose of assessment and enforcement including the application of precautionary measures with regard to a claim, and in addition may be used for the purpose of assessment and enforcement of taxes and duties covered by Article 2 of Directive 2010/24/EU concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures. Where a refund of social security contributions relates to a person who resides or stays in another Member State, the Member State from which the refund is to be made may inform the Member State of residence or stay of the upcoming refund, without prior request.

Article 75a

Obligation of competent authorities

1. The competent authorities shall ensure that their institutions are aware of and apply all provisions, legislative or otherwise, including the decisions of the Administrative Commission, in the areas covered by and within the terms of this Regulation and the implementing Regulation.

2. In order to ensure the correct determination of the applicable legislation, the competent authorities shall promote the cooperation between institutions and labour inspectorates in their Member States.”.

Article 76

Requests for information

(…)

3. The requested party shall not be obliged to supply information:

(a) which it would not be able to obtain for the purpose of recovering similar claims arising in its own Member State;

(b) which would disclose any commercial, industrial or professional secrets; or

(c) the disclosure of which would be liable to prejudice the security of or be contrary to the public policy of the Member State.

"3a. Paragraph 3 shall in no case be construed as permitting a requested party of a Member State to decline to supply information solely because this information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

(…)

Article 77

Notification

2. ~~The request for notification shall indicate the name, address and any other relevant information relating to the identification of the addressee concerned to which the applicant party normally has access, the nature and the subject of the instrument or decision to be notified and, if necessary the name, address and any other relevant information relating to the identification of the debtor and the claim to which the instrument or decision relates, and any other useful information.~~

The request for notification shall be accompanied by a standard form containing at least the following information:

(a) name, address and other data relevant to the identification of the addressee;

(b) the purpose of the notification and the period within which notification should be effected;

(c) a description of the attached document and the nature and amount of the claim concerned;

(d) name, address and other contact details regarding:

(i) the office responsible with regard to the attached document, and, if different;

(ii) the office where further information can be obtained concerning the notified document or concerning the possibilities to contest the payment obligation.

(…)

4. The applicant party shall make a request for notification pursuant to this Article only when it is unable to notify in accordance with the rules governing the notification of the document concerned in its Member State, or when such notification would give rise to disproportionate difficulties.

5. The requested party shall ensure that notification in the Member State of the requested party is effected in accordance with the national laws, regulations and administrative practices in force in the Member State of the requested party.

6. Paragraph 5 shall be without prejudice to any other form of notification made by an authority of the Member State of the applicant party in accordance with the rules in force in that Member State.

An authority in the Member State of the applicant party may notify any document directly by registered mail or electronically to a person within the territory of another Member State.

Article 78

Request for recovery

1. ~~The request for recovery of a claim, addressed by the applicant party to the requested party, shall be accompanied by an official or certified copy of the instrument permitting its enforcement, issued in the Member State of the applicant party and, if appropriate, by the original or a certified copy of other documents necessary for recovery.~~

At the request of the applicant party, the requested party shall recover claims which are the subject of an instrument permitting enforcement in the Member State of the applicant party. Any request for recovery shall be accompanied by a uniform instrument permitting enforcement by the Member State of the requested party.

2. The applicant party may only make a request for recovery if:

(a) the claim and/or the instrument permitting its enforcement are not contested in its own Member State, except in cases where the second subparagraph of Article 81(2) of the implementing Regulation is applied;

~~(b) it has, in its own Member State, applied appropriate recovery procedures available to it on the basis of the instrument referred to in paragraph 1, and the measures taken will not result in the payment in full of the claim;~~

(c) the period of limitation according to its own legislation has not expired.

3. ~~The request for recovery shall indicate:~~

~~(a) the name, address and any other relevant information relating to the identification of the natural or legal person concerned and/or to the third party holding his or her assets;~~

~~(b) the name, address and any other relevant information relating to the identification of the applicant party;~~

~~(c) a reference to the instrument permitting its enforcement, issued in the Member State of the applicant party;~~

~~(d) the nature and amount of the claim, including the principal, the interest, fines, administrative penalties and all other charges and costs due indicated in the currencies of the Member States of the applicant and requested parties;~~

~~(e) the date of notification of the instrument to the addressee by the applicant party and/or by the requested party;~~

~~(f) the date from which and the period during which enforcement is possible under the laws in force in the Member State of the applicant party;~~

~~(g) any other relevant information.~~

Before the applicant party makes a request for recovery, appropriate recovery procedures available in the Member State of the applicant party shall be applied, except in the following situations

a) where it is obvious that there are no assets for recovery in the Member State of the applicant party or that such procedures will not result in the payment in full of the claim, and the applicant party has specific information indicating that the person concerned has assets in the Member State of the requested party

b) where recourse to such procedures in the Member State of the applicant party would give rise to disproportionate difficulty.".

(…)

6. The request for recovery of a claim may be accompanied by other documents relating to the claim issued in the Member State of the applicant party.

Article 79

Instrument permitting enforcement of the recovery

~~1. In accordance with Article 84(2) of the basic Regulation, the instrument permitting enforcement of the claim shall be directly recognised and treated automatically as an instrument permitting the enforcement of a claim of the Member State of the requested party.~~

~~2. Notwithstanding paragraph 1, the instrument permitting enforcement of the claim may, where appropriate and in accordance with the provisions in force in the Member State of the requested party, be accepted as, recognised as, supplemented with, or replaced by an instrument authorising enforcement in the territory of that Member State.~~

~~Within three months of the date of receipt of the request for recovery, Member States shall endeavour to complete the acceptance, recognition, supplementing or replacement, except in cases where the third subparagraph of this paragraph applies. Member States may not refuse to complete these actions where the instrument permitting enforcement is properly drawn up. The requested party shall inform the applicant party of the grounds for exceeding the three-month period.~~

~~If any of these actions should give rise to a dispute in connection with the claim and/or the instrument permitting enforcement issued by the applicant party, Article 81 of the implementing Regulation shall apply.~~

1. The uniform instrument permitting enforcement in the Member State of the requested party shall reflect the substantial contents of the initial instrument permitting enforcement, and constitute the sole basis for the recovery and precautionary measures taken in the Member State of the requested party. It shall not be subject to any act of recognition, supplementing or replacement in that Member State.

2. The uniform instrument permitting enforcement shall include:

(a) the name, address and any other relevant information relating to the identification of the natural or legal person concerned and/or to the third party holding his or her assets;

(b) the name, address and any other relevant information regarding the office responsible for the assessment of the claim, and, if different, the office where further information can be obtained concerning the claim or the possibilities for contesting the payment obligations;

(c) information relevant to the identification of the instrument permitting its enforcement, issued in the Member State of the applicant party;

(d) a description of the claim, including its nature the period covered by the claim, any dates of relevance to the enforcement process and the amount of the claim, including the principal, the interest, fines, administrative penalties and all other charges and costs due indicated in the currencies of the Member States of the applicant and requested parties;

(e) the date of notification of the instrument to the addressee by the applicant party and/or by the requested party;

(f) the date from which and the period during which enforcement is possible under the laws in force in the Member State of the applicant party;

(g) any other relevant information."

Article 80

Payment arrangements and deadlines

1. Claims shall be recovered in the currency of the Member State of the requested party. Subject to Article 85(1a), the entire amount of the claim that is recovered by the requested party shall be remitted by the requested party to the applicant party.

2. The requested party may, where the laws, regulations or administrative provisions in force in its own Member State so permit, and after consulting the applicant party, allow the debtor time to pay or authorise payment by instalment. Any interest charged by the requested party in respect of such extra time to pay shall also be remitted to the applicant party.

~~From the date on which the instrument permitting enforcement of the recovery of the claim has been directly recognised in accordance with Article 79(1) of the implementing Regulation, or accepted, recognised, supplemented or replaced in accordance with Article 79(2) of the implementing Regulation, interest shall be charged for late payment under the laws, regulations and administrative provisions in force in the Member State of the requested party and shall also be remitted to the applicant party.~~

From the date on which the recovery request is received, the requested party shall charge interest for late payment in accordance with the laws, regulations and administrative provisions in force in the Member State of the requested party.

Article 81

Contestation concerning the claim or the instrument permitting enforcement of its recovery and contestation concerning enforcement measures

1. ~~If, in the course of the recovery procedure, the claim, and/or the instrument permitting its enforcement issued in the Member State of the applicant party are contested by an interested party, the action shall be brought by this party before the appropriate authorities of the Member State of the applicant party, in accordance with the laws in force in that~~

~~Member State. The applicant party shall without delay notify the requested party of this action. The interested party may also inform the requested party of the action.~~

If, in the course of the recovery procedure, the claim, the initial instrument permitting enforcement in the Member State of the applicant party or the uniform instrument permitting enforcement in the Member State of the requested party, the validity of a notification made by an authority in the Member States of the applicant party are contested by an interested party, the action shall be brought by this party before the appropriate authorities of the Member State of the applicant party, in accordance with the laws in force in that Member State. The applicant party shall without delay notify the requested party of this action. The interested party may also inform the requested party of the action.

(…)

3. Where the contestation concerns enforcement measures taken in the Member State of the requested party, or the validity of the notification made by an authority of the requested party, the action shall be brought before the appropriate authority of that Member State in accordance with its laws and regulations.

4. ~~Where the appropriate authority before which the action is brought in accordance with paragraph 1 is a judicial or administrative tribunal, the decision of that tribunal, insofar as it is favourable to the applicant party and permits recovery of the claim in the Member State of the applicant party, shall constitute the 'instrument permitting enforcement' within the meaning of Articles 78 and 79 of the implementing Regulation and the recovery of the claim shall proceed on the basis of that decision.~~

The applicant party shall inform the requested party immediately of any subsequent amendment to its request for recovery or of the withdrawal of its request, indicating the reasons for amendment or withdrawal.

5. If the amendment of the request is caused by a decision of the appropriate authority referred to in Article 81 (1), the applicant party shall communicate this decision together with a revised uniform instrument permitting enforcement in the Member State of the requested party. The requested party shall then proceed with further recovery measures on the basis of the revised instrument.

Recovery or precautionary measures already taken on the basis of the original uniform instrument permitting enforcement in the Member State of the requested party may be continued on the basis of the revised instrument, unless the amendment of the request is due to invalidity of the initial instrument permitting enforcement in the Member State of the applicant party or the original uniform instrument permitting enforcement in the Member State of the requested party.

Articles 79 and 81 shall apply in relation to the revised instrument."

Article 82

Limits applying to assistance

1. The requested party shall not be obliged:

(a) to grant the assistance provided for in Articles 78 to 81 of the implementing Regulation if recovery of the claim would, because of the situation of the debtor, create serious economic or social difficulties in the Member State of the requested party, insofar as the laws, regulations or administrative practices in force in the Member State of the requested party allow such action for similar national claims;

(b) to grant the assistance provided for in Articles 76 to 81 of the implementing Regulation, if the initial request under Articles 76 to 78 of the implementing Regulation applies to claims more than five years old, dating from ~~the moment the instrument permitting the recovery was established in accordance with the laws, regulations or administrative practices in force in the Member State of the applicant party at the date of the request. However, if the claim or instrument is contested, the time limit begins from the moment that the Member State of the applicant party establishes that the claim or the enforcement order permitting recovery may no longer be contested.~~ the initial request for assistance. However, if the claim or the initial instrument permitting enforcement in the Member State of the applicant party is contested, the five year period shall be deemed to begin from the moment that it is established that the claim or the instrument permitting recovery may no longer be contested.

Moreover, in cases where a postponement of the payment or instalment plan is granted by the authorities of the Member State of the applicant party, the five-year period shall be deemed to begin from the moment when the entire payment period has come to its end.

However, in those cases the requested party shall not be obliged to grant the assistance in respect of claims which are more than 10 years old, dating from the due date of the claim in the Member State of the applicant party.

Article 84

Precautionary measures

~~1. Upon reasoned request by the applicant party, the requested party shall take precautionary measures to ensure recovery of a claim in so far as the laws and regulations in force in the Member State of the requested party so permit.~~

~~For the purposes of implementing the first paragraph, the provisions and procedures laid down in Articles 78, 79, 81 and 82 of the implementing Regulation shall apply mutatis mutandis.~~

1. Upon reasoned request by the applicant party, the requested party shall take precautionary measures, if allowed by its national law and in accordance with its administrative practice, to ensure recovery where a claim or the instrument permitting enforcement in the Member State of the applicant party is contested at the time when the request is made, or where the claim is not yet the subject of an instrument permitting enforcement in the Member State of the applicant party, in so far as precautionary measures are also possible, in a similar situation, under the national law and administrative practices of the Member State of the applicant party.

The document drawn up for permitting precautionary measures in the Member State of the applicant party and relating to the claim for which mutual assistance is requested, if any, shall be attached to the request for precautionary measures in the Member State of the requested party. This document shall not be subject to any act of recognition, supplementing or replacement in the Member State of the requested party.

2. The request for precautionary measures may be accompanied by other documents relating to the claim, issued in the Member State of applicant party.

3. For the purposes of implementing the first paragraph, the provisions and procedures laid down in Articles 78, 79, 81 and 82 of the implementing Regulation shall apply mutatis mutandis.”.

Article 85

Costs related to recovery

1. The requested party shall recover from the natural or legal person concerned and retain any costs linked to recovery which it incurs, in accordance with the laws and regulations of the Member State of the requested party that apply to similar claims.

1a. Where the costs linked to recovery cannot be recovered from the debtor in addition to the amount of the claim, they shall either be deducted from any amount which could be recovered or, where this is not possible, be reimbursed by the applicant party. The applicant and requested parties may agree on a reimbursement arrangement specific to the case, or a waiver of reimbursement of such costs."

Article 85a

Presence in administrative offices and participation in administrative enquiries

1. By agreement between the applicant party and the requested party and in accordance with the arrangements laid down by the requested party, officials authorised by the applicant party may, with a view to promoting mutual assistance provided for in this Section:

(a) be present in the offices where the administrative authorities of the Member State of the requested party carry out their duties;

(b) be present during administrative enquiries carried out in the territory of the Member State of the requested party;

(c) assist the competent officials of the Member State of the requested party during court proceedings in that Member State.

2. In so far as it is permitted under the legislation in force in the Member State of the requested party, the agreement referred to in paragraph 1(b) may provide that officials of the Member State of applicant party may interview individuals and examine records.

3. Officials authorised by the applicant party who make use of the possibilities offered by paragraphs 1 and 2 shall at all times be able to produce written authority stating their identity and their official capacity.

TITLE V

MISCELLANEOUS, TRANSITIONAL AND FINAL PROVISIONS

Article 89

Information

(…)

~~3. The competent authorities shall ensure that their institutions are aware of and apply all the Community provisions, legislative or otherwise, including the decisions of the Administrative Commission, in the areas covered by and within the terms of the basic Regulation and the implementing Regulation.~~

~~Article 92~~

~~Amendment of the Annexes~~

~~Annexes 1, 2, 3, 4 and 5 to the implementing Regulation and Annexes VI, VII, VIII and IX to the basic Regulation may be amended by Commission Regulation at the request of the Administrative Commission.~~

NOTES

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