Coordination of the Social Security Systems in the European Social Space

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Abstract: The free travel of workers is defined by the right to answer workplace offers, to travel for this purpose on the territory of the member states, to remain on the territory of the member states in order to perform an activity, as well as to remain of the territory of either such state, after the person performed an activity. As a corollary of this freedom, the member states are asked to eliminate any discrimination between workers, based on nationality, with respect to employment, remuneration and the other labour and employment conditions.

Keywords: freedom; directive; policy; foreign worker

1. Preliminary Ideas

The free travel of persons, one of the four fundamental freedoms that characterize the communitarian space, attempts, from the economic viewpoint, to create, first of all, a common internal market of the labour force, and from the political viewpoint, to achieve a higher cohesion of the peoples making up the European Union. Also, the free travel of the labour force should allow the countries facing a certain unemployment level to export their surplus to countries where there is a shortage of the labour force.

The free travel of workers is defined by the right to answer workplace offers, to travel for this purpose on the territory of the member states, to remain on the territory of the member states in order to perform an activity, as well as to remain of the territory of either such state, after the person performed an activity.

The free travel of workers is regulated in the Treaty of Rome, in articles 48-49, after the dispositions regarding the free travel of goods and in correlation with the

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free travel of services and capitals. Actually, *the free travel of workers is part of the wider concept of the free travel of persons and is a fundamental right of EU citizens.*

As a corollary of this freedom, the member states are asked to eliminate any discrimination between workers, based on nationality, with respect to employment, remuneration and the other labor and employment conditions. Still, an important restriction is brought by paragraph 3 of article 48, through which the member states can limit this right, for reasons of public order, public security and public health.

The requirements written in the EEC Treaty were given more consistency by means of a *complex derivative legislation.* Namely, a series of regulations and directives, among which the most important are:
a) *Regulation no. 1612/68* regarding the free travel of workers within the Community, modified by Regulation no. 2434/92 and, respectively, Directive no. 2004/38;

b) Directive no. 68/360 regarding the removal of the travel and settlement restrictions for member states workers and their families, within the Community;

c) Regulation no. 1251/70 regarding the right to remain on the territory of a member state, after having been employed in that state;

d) Directive no. 64/221 regarding the right of the member states to derogate from the provisions of the free travel, for reasons of public order, public security or public health.

The *Directive of the European Parliament and the Council no. 2004/38/E.C.* of April 29, 2004, regarding the right to free travel and stay on the territory of the member states for the European Union citizens and their family members modified Regulation no. 1612/68 and abrogated Directives no. 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC, and 93/96/EEC, starting with the date of April 30, 2006. Since this date, in all European Union member states are applied Directive no. 2004/38 and Regulation no. 1612/68.

The reason for elaborating this community instrument resided in the need to simplify, systematize and codify the community acquis in this matter. The purpose of the Directive consists in the replacement of different community normative acts that represented sectoral approaches of the right to free travel and stay in the member states (employed persons, persons exercising an independent activity,

inactive persons, persons undergoing studies), such as, starting with April 30, 2006, this Directive constitutes the basic legislative act in the matter, which modified Regulation no. 1612/68.

The objective of the directive was to regulate:

a) the conditions for exercise of the right of European Union citizens and their families to travel and settle freely on the territory of the member states;
b) the right of permanent settlement in the member states of European Union citizens and their family members;
c) the limitations of the right to free travel and the right to stay, for reasons of public order, public security and public health. (Popescu, 2008)

2. Coordination of the Social Security Systems

The freedom of travel of workers and their families would have been deprived of many of its effects if they, in exercising this right, would have risked losing their contributions regarding social security, obtained in the state of residence.

The coordination of the social security regimes does not target the elaboration of an autonomous own social security system for the migrant workers. The national systems subsist, but they become permeable in correlating with the other social security systems.

For the migrant worker it is essential to prevent a situation in which *he may be uninsured in any member state* (negative conflict of social security laws) *or in which he may be insured simultaneously in two or more states* (positive conflict of social security laws). Such a conflict of laws - positive or negative – could occur because, for instance, in the northern countries, anyone having their domicile there is insured, while in Central and Western Europe, a different criterion is applied – anyone who works in these countries is covered by insurance. The general rule is that the *applicable legislation is that of the country where the worker is performing his/her activity, regardless of his/her domicile*.

The foreign worker, resident of the European Union, must benefit of social contributions in the same conditions as the nationals, regardless of the territory on which he/she lives.

The European Union has, at present, *the most efficient and complex social protection system of migrant workers.* (Ţop, 2008)

The positive results registered were of a nature that, in 1971 and, respectively 1972, the European Economic Communities adopted two complex instruments: *Regulation no. 1408/1971/EEC regarding the coordination of the social security system and Regulation no. 574/1972 for the application of the first.* These were adapted to the successive enlargements the European Union underwent. By means of the two regulations, the *coordination covers, actually, all branches and all regimes of social security, regardless of if they are general special, contributive or non-contributive regimes*, excluding the special regimes of public servants and their assimilates. *They basically protect the entirety of workers, employed for a salary or without a salary, who have been or are subjected to the legislation of one or several European Union member states and which are the citizens of either member states, of refugees and stateless persons residing on the territory of any member state, as well as their family members and their survivors.*

Coordination is meant to ensure the protection of the rights of persons traveling in the communitarian space, in search for a job. The *objective* of the two regulations *is, however, limited, since they did not aim to harmonize the social security legislation*, but only to coordinate it, which means that the European Union member states are, in principle, free to decide *who is insured, what compensations should be granted and in what conditions, how many must be paid, how the compensations should be computed and for how long they should be. The regulations do not affect the distinctive characteristics of the different national social security systems.*

The two regulations remained *in effect until the beginning of year 2007*, when they were replaced by *Regulation (EC) no. 883/2004 of the European Parliament and of the Council, of April 29, 2004, regarding the coordination of social security systems.* This regulation contains a fundamental reform and a simplification of the coordination rules in the matter of social security, improving citizens' protection.

The following *principles* can be derived from the analysis of these community normative acts*:*

a) Non-discrimination based on citizenship. It is, probably, the most important principle. It is recorded in article 3(1) of Regulation no. 1408/71, where it is mentioned: *„ Subject to the special provisions of this Regulation, persons resident in the territory of one of the Member States to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State*".

Article 3(1) is a specific materialization of the general non-discrimination principle expressly established in art.7 of the E.E.C. Treaty and, as this provision, applies to any form of discrimination, direct or indirect.

Foreigners – citizens of other member states, are assimilated with the own citizens, in what concerns the benefit of the social security compensations. The domestic competent law must be applied, regardless of the citizenship held by a certain person. This assimilation of the communitarian alien with the own citizen, from the viewpoint of social security refers both to his/her obligations (payment of contributions), and to his/her rights (benefit of compensations). The reciprocity existing in the bilateral treaties is replaced by the *global and full right reciprocity.*

b) Payment regardless of residence. This principle derives from article 51 (b) of the E.E.C. Treaty. Developing it, article 10(1) of Regulation no. 1408/71 stipulates that social benefits (invalidity, old-age or survivors' cash benefits, pensions for accidents at work or occupational diseases and death grants) acquired under the legislation of one or more Member States shall not be subject to any reduction, modification, suspension, withdrawal or confiscation by reason of the fact that the recipient resides in the territory of a Member State other than that in which the institution responsible for payment is situated.

It must be mentioned that this principle, known as the *principle of exportability or of transferability*, does not apply to all social security compensations; for instance, illness and family compensations are the object of special regulations.

Although, still, many legislations condition the right to benefits on the maintenance of residence in the debtor country, the *communitarian regulation takes precedence over the national laws.*

c) Prevention of overlapping of benefits. Article 12 (1) of Regulation no. 1408/71 establishes that if a worker contributed to the social security systems in two or more member states, he/she will benefit of the compensations given by a single state, possibly receiving a difference from the competent institutions in other states granting higher benefits, in absolute value.

This regulation does not apply to benefits in respect of invalidity, old age, death or occupational disease, for which there is a special provisions regarding the division into equal parts between the member states.

d) Aggregation of insurance periods. This principle, derived from art. 51(a) of the E.E.C. Treaty is expressly established in the case of each type of benefit.

Thus, article 18(1) of Regulation no. 1408/71, regarding the aid for illness and maternity, establishes that „The competent institution of a Member State whose legislation makes the acquisition, retention or recovery of the right to benefits conditional upon the completion of insurance periods shall, to the extent necessary, take account of insurance periods completed under the legislation of any other Member State as if they were periods completed under its own legislation".

Other articles contain, in similar terms, dispositions regarding the other fields of social security: invalidity (art. 38), old age pensions (art. 45), death grants (art. 64), unemployment grants (art. 67), family aids (art. 72).

The migrant worker can use all periods (contribution, employment or residence), being able to request the single benefit from the competent institution. Then it follows the *pro rata temporis* assignment between the debtor institution and the institution that previously collected contributions from the respective migrant worker.

e) Preservation of the rights to complementary pension of employed workers traveling within the Community. Regulation (E.E.C.) no. 1408/71 and Regulation (E.E.C.) no. 574/72 only concern the legal pensions regimes.

In completing them, *Directive 98/49/EC of the Council, of June 29, 1998, regarding the preservation of the rights to complementary pension of employed workers traveling within the Community* was adopted, whose purpose is the safeguarding of the rights of persons affiliated to complementary pension regimes, traveling from one European Union member state to another and, thus contributing to the elimination of the barriers regarding the free travel of workers, employed for a salary or without a salary, within the European Union. This protection targets the right to pension with the title of complementary regimes, both voluntary and mandatory, except the regimes covered by Regulation (E.E.C.) no. 1408/71.

f) The principle of the single state legislation. It is established by article 13 of Regulation no. 1408/71, which established, as a general rule that „a worker to whom this Regulation applies shall be subject to the legislation of a single Member State only".

In other words, this principle protects migrant workers against the obligation to pay social security contributions in more than one European Union member state and guarantees, at the same time, that they are still insured.

*g) Preservations of rights earned (gained).*The benefits gained according to the legislation of a member state are paid to the beneficiary, even if he/she resides in a different member state („export of benefits").

h) Principle of division. In case of certain social security benefits, the *principle of dividing the payment* can be applied. This principle, which refers to the substantial or long-term benefits (invalidity, old-age, survivor's pensions), imply the *division of the financial burden, if to the benefit of the applicant,* between the competent institutions in the member states where he/she worked and contributed along his/her career, proportionally to the extent of time during which he/she worked in each state (art. 46).

In order for the worker to not be disadvantaged, in case of applying this system, there is a special provision, according to which *a worker cannot receive, in total, an amount smaller than the one he/she would have been entitled to receive, if that were to be fully computed according to the law of the state of residence* (article 50). (Voiculescu, 2007)

3. General Presentation of the Provisions of Regulation no. 883/2004

The perfecting of the communitarian policy in the matter of social security constituted a constant concern subject for the European Union. *A complete harmonization* in the sense of creating uniform legal rules in the field of social security *is, however, neither possible, nor wanted in the near future.* It is necessary to accomplish a *partial harmonization and an expansion of coordination of the social security regimes.*

Regulation no. 883/2004 maintains, basically, the general regulation framework of Regulation no. 1408/1971, including the principles of the social security coordination system, which we referred to before. Regulation no. 883/2004 applies to the following categories of persons: citizens of a member state, stateless persons, refugees, residents of another member state, in the situation when they are or were under the incidence of the legislation of one or several member states.

The Regulation dispositions also apply to their family members, as well as to their successors. According to the regulation, its dispositions apply to the successors of persons who were under the incidence of the legislation of one or several member states, regardless of the citizenship of these persons, if the successors are citizens

of a member state, or stateless persons, or refugees, residents of another member state.

The distinction between the two regulations consists of the fact that the dispositions of *Regulation no. 883/2004 regulate the situation of Union member states' citizens*, while Regulation no. 1408/71 regulated only the situation of employed and independent workers. (Ţinca, 2005)

The material application field of Regulation no. 883/2004 is indicated in its art. 3, paragraph 1, which established that it applies to all legislations regarding social security, concerning: illness benefits; assimilated maternity and paternity benefits; invalidity benefits, including those destined to maintain or improve the work capacity; old-age benefits; benefits for successors; benefits for work accidents and professional disease; death benefits; unemployment benefits; pre-retirement benefits; familial benefits.

Regulation no. 883/2004 does not apply to social and medical care, or to the regimes of benefits in favour of victims of war or its consequences. The establishing of the applicable legislation constitutes the substance of Title II of Regulation no. 883/2004, title that insists on the general rules (art. 11), on the special rules (art. 2). A series of derogatory rules are instituted through article 13-16.

The rules are, according to article 11, the following:

- persons to whom this Regulation applies shall be subject to the legislation of a single Member State only.
- 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.
- subject to art. 12-16 of the regulation (which comprise special derogatory rules):

a) a person pursuing an activity as an employed or self-employed person in a Member State shall be subject to the legislation of that Member State;
b) a civil servant shall be subject to the legislation of the Member State to which the administration employing him is subject;
c) a person 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;

d) a person called up or recalled for service in the armed forces or for civilian service in a Member State shall be subject to the legislation of that Member State;
e) any other person to whom subparagraphs (a) to (d) do not apply shall be subject to the legislation of the Member State of residence, without prejudice to other provisions of this Regulation guaranteeing him benefits under the legislation of one or more other Member States.

4. Conclusion

An activity of employee or independent worker, normally performed aboard a ship at sea, which raises the flag of a member state, is considered activity performed in the respective member state. Still, an employee performing his/her activity aboard a ship which raises the flag of a member state and who is remunerated for this activity by an enterprise or by a person whose social headquarters or work point is in a different member state, makes the object of the legislation of the second member state, if residing in the respective member state. The enterprise or person paying the remuneration is considered employer in the sense of the legislation mentioned. Article 12, called „Special rules", regulates two situations regarding the work of the employee detached to another member state and the work of a person who, usually, exercises an independent activity in a member state and travels to another member state in order to exercise a similar activity, in both cases the legislation of the first member state continuing to apply, in reality – finally – still *lex loci*. In conclusion, with the observation of the special rules of article 12 and of the circumstances established by article 13-16, Regulation no. 883/2004 preserves the principle of the law of the land where the worker performs his/her activity. (Popescu, 2008)

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