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Executive Summary

I Background

The trESS (Training and Reporting on European Social Security) network was set up by the European Commission to: increase the knowledge about the regulations that co-ordinate social security in the European Union (EU); build strong networks at national and European level; inform the European Commission about current problems and challenges at operational level in the Member States; and report perspectives and trends at national and Community level.

The European Report presents an overview of the implementation of the EU Co-ordination Regulations in all 27 Member States. The issues highlighted in the European Report are those identified within the 27 national reports as (potentially) problematic in their respective Member States.

The overall conclusion of the European Report is that the co-ordination of social security is effective and plays an important role in realising the aim of free movement and contributing to the development of the concept and reality of European citizenship. However, it should not be surprising, given that social security is notoriously complex and co-ordination covers 27 countries, that a number of gaps, shortcomings and inconsistencies are identified in the national reports (However, it should also be noted that some of the problems identified are those of non-compliance with the EU Regulations). These gaps and inconsistencies are highlighted in the European Report in order to support the European Commission, national administrations and other actors in their task of continually improving co-ordination of social security in the interests of European citizens.

It is perhaps not surprising that only 3 ½ years after accession the provisions of the Co-ordinating Regulations continue to present challenges to new Member States. In order to prepare their administrations many new Member States trained their staff in advance (for example Estonia, Hungary), mostly under the umbrella of EU Twinning projects (for example Latvia, Lithuania), which identified the main problems they were likely to face, and many of the new Member States have prepared detailed instructions for the application of Regulation 1408/71 and 574/72 (the Regulation (s)). However, it should be noted that prior to joining, many new Member States had little experience of international social security co-ordination either through multilateral or bilateral agreements. Thus the national reports identify an unsurprising need for further information and guidance, with particular emphasis on managing the sometimes lengthy procedures involved in gathering data from other Member States, the use of E-forms, and the extensive body of case law of the European Court of Justice (ECJ).

Some countries (Malta, Slovenia, Hungary) already had appropriate structures and experienced staff in place on accession as they had previously operated well-developed systems of bilateral agreements. Nevertheless, even in these countries, the concepts and underlying rationale of the Co-ordinating Regulations pose new challenges - not least due to the increasing number of cases their administrations will be confronted with.

This is not intended to imply that the Regulations are always fully implemented without difficulty in the old Member States. Here too Regulation 1408/71 may on occasions be wrongly applied or even completely over-looked. Thus the need for good quality information is not confined to new Member States. The Danish report, for example,

identifies particular needs for information for local municipalities about how to administer the most recent developments in EU law. Specific information needs are identified with reference to developments in social services and the administration of the European Health Insurance Card.

It is not only national administrations that need a constant supply of information; national judiciaries must also have up to date knowledge of a plethora of new issues and the high volume of case law issued by the European Court of Justice. The Bulgarian report, for example, notes that the capacity of the judiciary needs further enhancement - due in part to the fact that judicial capacity was not addressed in the three Phare Projects that preceded Bulgaria's membership.

And once again the challenges are not confined to the new Member States. While tribunals and courts play an important role in the implementation of the Regulation, the national reports show that their role differs amongst old Member States, who have many years' experience of co-ordination. For example, the highest courts in Italy and Spain are reluctant to engage in direct dialogue with the European Court of Justice in the field of social law. It is clear therefore that there is scope for awareness of the Regulations to be raised throughout Europe amongst all those tasked with the effective co-ordination of social security on behalf of European citizens.

II Some general cross-cutting issues

In this section we identify - within the overarching theme of the changing environment and context of co-ordination - three inter-related cross-cutting issues: changes to national legislation; the extent to which the Regulations have adapted to the changing environment; and their relationship to other EU instruments.

On the eve of celebrations of 50 years since the adoption of the EU regulations on social security for migrant workers, the Regulations themselves are at a watershed. Fifty years since they were conceived it is clear that these regulations are among the most important EU instruments, providing for free movement of persons and contributing to the development of European citizenship and social justice. However, they are also one of the most complicated areas of EU law, which is reflected in the high number of cases brought before the European Court of Justice.

In 1998, in order to make the Regulations "more efficient and user-friendly" and take account of changed circumstances the European Commission published its proposal for the new Regulation (COM(1998)0779) and following long discussions and negotiations, Regulation 883/2004 was adopted by The European Parliament and The Council on 29 April 2004. The new regulation will be effective from the date of entry into force of the new implementing regulation.

It is appropriate to acknowledge the challenges facing policy makers tasked with rationalising and re-designing regulations to co-ordinate social security across 27 countries in a dynamic and constantly changing environment. The environment in which Regulation 1408/71 operates has changed in several ways since it was introduced in 1971. These include: expanding membership from 6 to 27 countries; new types of migration, with increasing use of posting; new patterns of work, including increasingly flexible labour markers; demographic and social changes, with people living longer and forming more varied families and partnerships; new social security arrangements, including new arrangements for early retirement and the care of the elderly; and the growing body of ECJ case law.

The personal scope of Regulation 1408/71 has expanded over time from co-ordinating social security for workers, refugees and stateless persons, and their families to include everyone; while the concept of European citizenship has opened up new routes to entitlement in addition to the traditional link to employment.

Changes in national legislation or circumstances

The first cross-cutting issue we wish to highlight is the changing substance and context of national legislation. The material scope of the Regulation is structured around the nine traditional social security risks. Given that this is an exhaustive list, new types of benefits introduced in the Member States must be included under one of these nine categories if they are to fall within the Regulation. New types of benefits may present difficulties of definition and categorisation. One example is long-term care insurance. Introduced in some Member States during the 1990s, separate schemes for long-term care are becoming increasingly common. Although there is still a view expressed in some Member States that long-term care benefits are special non-contributory benefits, the European Court of Justice has found that they are sickness benefits, thus to be co-ordinated in accordance with the sickness chapter. However, implementation problems identified with respect to long-term care benefits suggest that the chapter on sickness may not be the appropriate framework for co-ordination. As the new Regulation, 883/2004, will provide only limited co-ordination for long-term care it is likely that further policy discussions, perhaps leading to a new separate chapter for long-term care benefits, will need to take place in the near future.

The promotion of the 'active' welfare state is leading a move away from social security schemes aimed at compensating losses consequent upon the realisation of specified risks and contingencies towards schemes concerned primarily with preventing the risk occurring in the first place. Many employment related schemes require participation in work-related activities as a condition for entitlement to benefits. This increasingly includes not only employment allowances, but also, for example, invalidity benefits. These developments are likely to raise new issues around the classification of these types of benefits, while cross border participation in work-related activities and rehabilitation measures will present policy makers and administrators with further challenges.

It is perhaps not surprising that the classification of, and distinction between, social security, social assistance and special non-contributory benefits continues to be contested. However, work undertaken within the Administrative Commission and the developing case law of the European Court of Justice has further clarified the demarcation lines between these types of benefits with the content of 'social security' continuing to expand. It is possible that a whole range of benefits and services belonging to the broad concept of social welfare will increasingly be brought within the remit of the Regulations. This may include, for example, social housing allowances, and advantages and services related to labour law. Defining the material scope of the Regulations will therefore remain an important and difficult task, not least because the concept of social security itself has a Community dimension.

However, it is not only the concept and definition of risk that will have to be examined, but also the boundaries of the legislation. As it becomes clear that a growing number of complementary and supplementary schemes, including second pillar pensions, will fall within the material scope of the Regulations questions about what falls under which Community instrument and to what extent will become more urgent.

Questions of scope are not confined to supplementary pensions, but also, for example, to health care, where an increasing number of private elements are being introduced into

national systems. This makes these systems more open (and vulnerable) to the principles of the internal market, which will in turn influence the implementation of the Regulations. The application of Article 49 of the Treaty with reference to social protection and health care will be the subject of forthcoming discussions between the Member States and the European Commission.

How social protection systems are structured in the Member States will also have an increasing impact on co-ordination. This is particularly the case with respect to the further regionalisation of social protection. While the Regulations currently co-ordinate national schemes, recent devolutionary trends in some Member States may lead to growing pressure for the application of EU law to intra-state contexts, in part through the growing influence of European citizenship. Should intra-state arrangements become subject to European co-ordination law, questions will follow about how to apply the principles and framework of co-ordination in this context.

Changes in family law in Member States, as well as definitions and arrangements, can also be expected to have an impact on the application of the Regulations. The impact of divorce and the rights of children and ex spouses raise issues for co-ordination with respect to family allowances, while questions of custody and the distribution of financial obligations can be complicated in a cross border context. Important questions concerning same sex marriage and partnerships are likely to move up the policy agenda. Some national reports (for example, Slovenia, Spain, UK) identify potential discrimination in personal and derived rights against same sex couples exercising their right to free movement arising from the different civil statuses accorded to same sex couples in the Member States. The recognition and status of transsexuals may also raise important questions for co-ordination.

Relevance of the Regulations' provisions

The second, related, cross-cutting issue concerns the question to what extent are the provisions of regulations first introduced over 50 years ago still relevant to today's context and conditions. This question is often raised with reference to the application of the rules to determine applicable legislation.

It is likely that the concept of posting will remain a contested issue in the foreseeable future. Posting, initially introduced as an exception to the general rule, is now widely used, sometimes leading to the (incorrect) perception that it is itself the general rule. Even after the adoption of the 'Practical Guide for the Posting of Workers', Member States continue to interpret the concepts and practice of posting in a variety of ways.

Different interpretations of the rules are not only encountered in the context of posting, but can be found throughout the provisions on applicable legislation such as, for example, simultaneous employment, rules concerning international transport workers and sea-farers, and the application of Article 17. Different national reports raise the need for precise interpretation and guidelines as well as clear instructions. However, as the Regulation is an instrument to co-ordinate and not harmonise social security, responsibility for implementation remains with the Member States. This is not to say that incorrect application of the rules will not continue to be challenged before the European Court of Justice. One example where challenges might be anticipated – perhaps on the grounds of discrimination - concerns the inconsistent application of Article 17. It may be difficult to explain to the Court why workers in identical circumstances fall under different legislation due to different views amongst the Member States about the application of the Article.

Some national reports question whether the Regulations are able to respond to increasingly flexible labour markets, with some workers developing highly fragmented and mobile working biographies, accentuated by the growing use of cross-border employment agencies and tele-working. Other examples that national reports suggest challenge the concepts underpinning applicable legislation include workers (for example artists) who frequently carry out successive periods of short-term work in different Member States for different employers, sometimes in different capacities. Some national reports question the rules for sea-farers (which some 'sea-faring' Member States suggest appear to have been drafted by non sea-faring countries). The general discussion extends to whether there is a fundamental conflict between the objectives of the rules determining applicable legislation – whether they are intended to support the market or to protect workers and other mobile individuals, and consequently, what should be the starting point for revision – the mobile individual or the employer?

Questions about the appropriateness of the provisions of the Regulation are not confined to determining applicable legislation. There are also questions about the privileged position of some specific categories of persons. For example, is the special position of frontier workers still justified? Here, the Regulation takes different approaches depending on the risk - whether a frontier worker is covered by the State of work or the State of residence is different for the chapters on sickness and unemployment. Other questions include whether restricting export of unemployment benefits to three months is appropriate in a pan European labour market in which people are looking for job opportunities abroad?

The growing opportunities for patients to seek cross-border medical care also raise questions about the suitability of the EU provisions. Here the mix between private and public come in to focus. Not only may patients opt for private treatment (which falls entirely within the framework of the freedom to provide services under Article 49) but they may be obliged to receive medical treatment under a 'private regime' at, for example, private rates in public hospitals or in private units within public hospitals.

Regardless of the substantive content of the Regulations, the smooth functioning of co-ordination depends on effective co-operation between national administrations. Administration - based on E-forms - is sometimes a source of complication and delays and consequent difficulties for migrants in all Member States. An incorrectly completed E-form, missing data, delays in sending documents, the use of national forms annexed to E-forms, even on occasions non use of E-forms, can all inhibit and delay effective processing of a claim. Consequently there is considerable interest in the development of electronic exchange of information. This will not only speed up administration but could also avoid the practical problems identified above. However, effective electronic exchange of information depends on well organised and effective national administrations. Administrative decentralisation that is taking place in some Member States might introduce additional problems due to lack of knowledge of the Regulations at local level combined with lack of clarity about roles and responsibilities. Again these developments point to the continuing need for wide dissemination of up to date information about the application of the Regulations.

In addition to effective co-operation between administrations there is also a perceived need for the Administrative Commission to play a more active role in resolving specific issues and conflicts in addition to its current role clarifying more general issues.

Interface with other aspects of EU law

The third, related, cross-cutting issue concerns the relationship of the Regulations to other areas of EU law. Recent developments show that that Regulation 1408/71 is no

longer the only instrument dealing with social security for migrant workers as other areas of European Law encroach. For example, the influence of internal market rules on health care and ECJ case law on European citizenship are having an increasing impact on social security and consequently an indirect influence on the Regulations. There has been a view expressed by some that Article 18 of the Treaty provisions on European citizenship would only apply in cases that are not covered by the Regulations. This is not the case. However, as long as the provisions on European citizenship provide only additional protection to migrant workers the issue is less problematic than when the application of European citizenship comes into conflict with Regulation 1408/71. Recent cases before the European Court of Justice suggest that the courts have tried to avoid giving more rights on the basis of Article 18 than derive from Regulation 1408/71. However, we can expect further developments in this area as the arguments made by the European Court of Justice are likely to be tested in respect of Art 18 and further developments with reference to Art 18 can also be anticipated over the extent of coverage of non-contributory benefits.

A further issue concerns the relationship between the Regulation and Directive 2004/38. The national reports show that the concept of residence is the cause of a range of problems. On the one hand, the concept of residence as used in the regulation and as interpreted by the European Court of Justice, differs in many respects from the concept of residence under national law as well as different understandings again under tax law. Several questions arise in relationship to the new residence directive 2004/38. For example: Do the conditions under the directive have to be fulfilled before applying the Co-ordination Regulations? Can a Member State in determining right of residence, take into account benefits paid under the Regulations? Or, conversely, can social security benefits only be obtained under the Regulation once the right of residence has been first acquired? Are the rules for social security benefits and social assistance the same? And are residence clauses indirectly discriminatory? These questions bring into play the range of case law on European citizenship.

The third interface that we want to highlight is with supplementary pensions and the proposed portability directive. This raises important questions about the boundaries between benefits that fall within the Regulation and those that will come within the purview of the portability directive. The concept of legislation is important within the Regulation and it does not follow that a second pillar scheme in which social partners play a role would necessarily fall outside. Future developments in national pension systems will raise further questions about how to determine what falls under which Community instrument. Clear definitions and boundaries between the various EU instruments will need to be mapped in order to avoid confusion between the roles of different instruments, which in turn raises fundamental questions about the objectives of the different EU instruments. It is essential, whatever the characteristics of a national system, to avoid a situation where some schemes fall outside the protection of all EU instruments.

III. The implementation and application of the Regulations 1408/71 and 574/72 in the Member States of the European Union

A. Fundamental and general principles

1. Equality of Treatment

Equality of treatment is one of the four basic principles of co-ordination. This principle rules out both direct and indirect discrimination. There is little evidence in the national reports of direct discrimination on grounds of nationality. The very few examples include Belgian unemployment benefits and some benefits for family members in Slovenia. However, the reports present evidence of indirect discrimination, including, arguably, new residence conditions attached to some benefits in some Member States (Finland, Ireland, Sweden, UK).

2. Export of Benefits

Article 10 of Regulation 1408/71 provides for portability of long term (and to a lesser extent short term) benefits. Apart from the uncertainties surrounding the application of provisions on special non-contributory benefits there were few problems reported with export of benefits.

3. Applicable legislation

3.1 introduction

a. applicable

Rules which determine which national legislation is applicable are an essential part of social security co-ordination. In principle, the law of the place of work (*lex loci laboris*) regulates all aspects. It should be noted that these rules were originally conceived for the traditional migrant worker rather than new forms of mobility that have subsequently developed. The national reports raise questions with respect to the interpretation of some of the concepts of these provisions. Examples include: which rules apply to people who have ceased all activities or to a worker who performs professional activities in at least two Member States, one of which is the State where s/he resides. As noted above, some national reports suggest that the rules for sea-farers are inappropriate, leading to loss of competitiveness in the European shipping industry.

b. Posting

Posting is an increasingly important instrument in the context of the growing need of business for international mobility. This raises the question of whether posting, as an exception to the State of employment principle, might become the rule.

The national reports suggest that many of the conditions that have to be fulfilled for the application of the posting rule are unclear and difficult to interpret. Administrative Commission Decision No 181 provides for supplementary criteria to simplify and speed up procedures. Recently, as described above, a 'Practical Guide' concerning posted workers has been adopted that has, according to some reports, introduced a greater degree of uniformity, which in turn leads to better application of the legislation. Notwithstanding the criteria in this guide however, Member States interpret these criteria in their own way and several national reports identify difficult issues.

One issue concerns the concept of 'significant business activity'. Social insurance institutions should check if an employer posting her or his employees to another Member State habitually carries out 'significant business activity' in that country. However, it is

not clearly defined what period of time and what number of employees in the posting and receiving States is considered to be sufficient to meet the criteria.

The Practical Guide defines 'significant activities' as a turnover of approximately 25 per cent of total turnover in the posting State. Some national reports suggest that this indicator is difficult both to define and meet, while some suggest that social insurance institutions issuing form E101 should be competent not only in the area of social insurance but also tax law and accounting. This may call for closer collaboration between the social insurance institutions and the tax institutions in order to check turnover and better monitor 'significant business activity'.

Another issue concerning posting raised in the national reports is the refusal to allow replacement. According to Art 14.1(a) of Regulation 1408/71 an employee can be regarded as posted if the anticipated duration of posting does not exceed twelve months and s/he is not sent to replace another person who has completed her or his term. The second requirement may create problems if the posting institution is not able to check whether or not a given posted employee is replacing another. This issue has not been addressed in either Decision No 181 or in the Practical Guide for Posting. The fact that there is no definition of 'replacement' in ECJ case law is unhelpful.

It is also not always clear whether the rules on posting or other provisions on applicable legislation apply. Questions in this respect have arisen with regard to the difference between successive postings (Article 14(1)(a) and normal employment in several Member States (Article 14(2)(b)).

Several questions are raised by the national reports with regard to the posting of self-employed persons. A particular problem has been encountered in Poland with respect to the posting of self-employed farmers to another Member State. It is believed that the concept of farming cannot be interpreted as broadly as other types of self-employment, due to its specific features.

The administrative formalities to be fulfilled for posting are sometimes considered to be complicated and are also raising a number of questions, including whether form E101 is superfluous and whether receiving Member States should look for evidence, when it is not given by the sending State. This also leads to discussion whether posting is a right and an obligation or an exception and a choice. If a worker is sent to another Member State and falls under the definition of posting, is s/he then by definition a posted worker according to the Regulation and is that the end of the matter?

Some national reports suggest that authorities appear to have become suspicious of the posting of workers, particularly when dealing with interim activities or in relation to posting under the free movement of services between the new and the old Member States. It is, however, suggested that administrations should treat this segment of the labour market with open-mindedness and flexibility.

Working in two countries

Some national reports suggest that the rules whereby if a person has their main job in one country and takes up activities in their State of residence - even if their activities are of a marginal nature - s/he is insured in the latter State (even if the State of residence gives less or no actual coverage), can be problematic. An additional problem is where marginal activities lead to a change in applicable legislation involving extra administrative work for both the employer and the worker.

3.2 Application of Article 17 of Regulation 1408/71

Article 17 can serve as an exception to the provisions of Article 14.1(a) concerning posted workers. Many of the reports show that Article 17 is mainly applied in cases when individual exceptions from posting rules are claimed. However, Article 17 can also be used in other circumstances. For example, Bulgaria had experience with similar provisions before accession in social security agreements with Germany and Austria. Bulgaria concluded special agreements containing transitional rules for converting decisions under these bilateral agreements into decisions under the Regulation. On the basis of the transitional agreements most of the posting certificates under the bilateral agreements were converted into agreements under Article 17 as they concerned periods that were often longer than prescribed in Article 14 and 14(a) of the Regulation.

The main problem identified, however, is that there is no uniform interpretation of when Article 17 should be applied. Member States appear to follow a different interpretation of what is in the employee's best interest. Some national reports raise the question of what can be done if the competent institution is not willing to sign an Art 17 agreement.

4. Aggregation of periods

Another of the fundamental principles of social security co-ordination is the aggregation of periods of insurance, residence or employment completed in one Member State to establish entitlement in another.

However, it is not clear the extent to which the assimilation expressly provided for under the Regulations enables the competent institution to 'transform' the nature and impact of another Member State's periods into the way equivalent periods are classified and interpreted under its own legislation. For example, the new Social Security Act has simplified the application of co-ordination in Sweden. The residence based part of the social security system in particular may, however, still cause problems of interpretation regarding persons who have ceased all occupational activity in Sweden.

Several reports also mention that it is unclear how the provisions concerning child rearing periods and periods of study are to be implemented with reference to the Regulation.

B. Scope of the coordination Regulations

1. Personal scope

Many reports identified the growing influence of European Citizenship and show that restrictions in secondary legislation are being challenged by this increasingly powerful concept. Future impacts of Citizenship are difficult to predict. Another question raised in some reports concerns the different new forms of living together including same sex partnerships and marriage.

2. Material scope

Several reports show how the classification of benefits plays an important role in the correct application of the Regulations and there is a lengthy list of benefits and schemes that cause problems in relation to definition. It will perhaps not be surprising that most problems occur in relation to non-contributory benefits, for example, long-term care benefits and special benefits for disabled people as well as rehabilitation measures.

The introduction of a new benefit often raises questions about definitions and how to distinguish between social security, social assistance, mixed benefits and benefits which do not fall within the scope of the Regulation. Several of the national reports highlight that the distinction between social security, special non-contributory benefits and social assistance under the Regulation is not sufficiently clear. Social assistance benefits in the Member States are no longer discretionary and other traditional criteria to distinguish between social security and social assistance – for example, whether the benefit is means-tested or whether a non-contributory benefit provides only supplementary cover to contributory benefits - are no longer valid. Inclusion in Annex IIa of Regulation 1408/71 is not decisive as comparable benefits (even within the same country) may or may not be included in the Annex.

There is also the question of whether the exhaustive list of risks enumerated in Article 4(1) will be able to cover all future developments in national legislation as Member States identify new risks and benefits all of which, as things stand, must be accommodated within Article 4(1). One complicating factor in this respect is that the concepts and terminology of national law and European law are not completely aligned.

Clearer criteria are needed to enable Member States to design and categorise their benefits with greater confidence.

The increasing privatisation of social security in a number of Member States adds further complications for co-ordination.

C. Other issues

Recent and forthcoming reforms in various Member States' pensions arrangements are identified in some national reports as a cause of concern. The greater prominence given in several Member States to the role of private insurance creates fundamental problems for co-ordination as the mechanism is designed for public first tier pension systems organised on a pay-as-you-go basis, whereas the pension accumulation system put in place in the majority of the former socialist Member States, is fully funded and privately managed. There is a great deal of uncertainty as to how to apply the Regulations' principles to these schemes. This is discussed in the Estonian and Lithuanian reports where the view is expressed that the Co-ordination Regulations are not adapted to funded schemes.

The concept of residence in the Regulations, which differs in general form the concept of residence under national law, is a cause of difficulty while the relationship between Regulation 1408/71 and the residence directive 2004/38 is giving rise to questions that will require further careful analysis.

IV. Detailed analysis of the application of benefits in title III of Regulation 1408/71

A. Sickness and maternity benefits

1. Cross-border medical care under the Regulation

The concept of 'necessary medical treatment' is interpreted differently by Member States. Several national reports identify problems of non recognition of the new European Health Insurance Card by medical service providers in other Member States. Another set of problems identified in the national reports relates to the link between benefits that are considered to be medically necessary and the anticipated duration of a patient's stay in a Member State. There is also variation between Member States in the criteria used for authorisation of treatment abroad under the Regulation. Some countries interpret the criteria narrowly, while others give it a broader interpretation.

2. The Treaty based method of cross-border medical care

There are considerable differences between Member States' sickness and maternity benefit schemes. The raft of ECJ case law has generated different responses in the Member States. While there was little reaction to the Kohll and Decker cases from Ireland, Spain, Sweden and Luxembourg, other countries such as Denmark (in a limited way) and France have changed their legislation to take the ECJ jurisprudence into account. The impact of the Watts case has so far been limited. In response to the Court's criticism that the National Health Service lacked clear criteria for managing its

prior authorisation procedures, the UK has developed detailed guidance to local healthcare commissioners on managing requests for treatment overseas.

Several outstanding issues remain. For example, do the rules established by Kohll and Decker apply to frontier workers? This concerns the reimbursement of medical care obtained by frontier workers in their country of residence, in particular those benefits which are not (fully) provided for in the country of residence; and where the distinction lies between hospital and non-hospital services?

Some national reports suggest that co-operation between competent institutions of the Member States has not yet been fully developed in the area of healthcare and concerns are expressed by several reports from the new Member States about the incorrect or non use of E-forms by the old Member States.

One problem concerns reimbursement of benefits. Several reports point out that the issue of the financial settlement of health care costs between Member States is a very slow process. This appears to be due to lack of information and trained personnel in Member States to check the real costs and respond to administrative questions. Many countries, such as Latvia, Poland and Hungary point out that the higher level of healthcare costs in the old Member States present potentially serious issues for the new Member States.

B. Long-term care benefits

Some national reports identify problems with regard to the categorisation of long-term care benefits, in particular whether they should be classified as a sickness benefit in cash or a sickness benefit in kind. Spain introduced long-term care benefits in the 39/2006 Act and the Spanish report suggests in taking this route policy makers appear to want to exclude these benefits from the Spanish Social Security Act and by extension from the material scope of Regulation 1408/71. Entitlement to long-term care benefits requires previous period of legal residence in Spain of at least five years.

There is debate in Spain about whether or not the new long-term care benefits are co-ordinated by Regulation 1408/71. As there is so far no jurisprudence it can only be argued theoretically that the Molenaar, Jauch, Hosse, and Gauman-Cerri cases should be applicable to the new Spanish long-term care benefits

C. Maternity and paternity benefits

The main issue with respect to maternity and paternity benefits concerns categorisation of benefits in some Member States.

D. Invalidity

There are two types of invalidity schemes in the Member States: one (Type A) provides benefits based on the materialisation of the risk, while the other (Type B) provides benefits based on the length of insurance.

Co-ordination implies that Member States retain responsibility for the design of their social security systems. This is the case with regard to establishing the degree of invalidity with each Member State applying its own method of evaluation.

Some national reports identify problems with the aggregation of periods. In particular, some new Member States report problems with administrative co-operation, with administrations on occasions receiving national rather than E-forms. This is further complicated by the fact that the Administrative Commission has yet to approve the request of new Member States to extend the E-forms.

E. Old-age and death

The rules on old-age and survivors' pensions are the most complex part of co-ordination. The national reports raise issues concerning aggregation, calculation of benefits, Member State co-operation and the implications of developments in Member State's pension systems.

1. Aggregation of periods

Difficulties associated with the recognition of insurance periods are identified by several national reports. A particular problem concerns the various new rules on pension rights for child raising years under the different systems.

2. Calculation of benefits

Several national reports, in particular those of the new Member States, point to the complexity of rules and procedures for calculating pensions and the consequent length of time – sometimes several months – that processing a claim can take.

3. Member States' co-operation

Some reports, for example the Netherlands and the UK, mention problems encountered gathering essential data. Gathering information about income or to confirm identity can be difficult and may be further complicated by different rules concerning data protection. Once again processing E-forms can be problematic. Several national reports complain that some institutions forward their own national forms instead of E-forms or interfere with the standard format of the E-form. Sometimes processing times are increased because the form is incomplete. Some new Member States contrasted their own competence and accuracy in completing E-forms with the lack of competence of several old Member States.

4. Modifications in pension systems

Changes to the way pension systems are organised in Member States – such as the introduction of fully funded and privately managed second pillar schemes - could raise important questions for co-ordination in the future. National reports from Hungary, Latvia, Slovak Republic and Estonia all identified problems that could arise for co-ordination concerning the calculation of second pillar pensions. Again the question is raised as to what is co-ordinated under Regulation 1408/71 and what falls under other EU instruments, for example the forthcoming directive on portability of supplementary pensions.

Changes to pension age being introduced in several Member States also raise questions for co-ordination. For example the new pension system in Sweden is flexible and does not have a fixed pension age. The time when the pension is claimed influences the amount of pension according to actuarial principles. The Swedish report suggests that this appears to be incompatible with the Regulations.

F. Accidents at work and occupational diseases

The main problems identified in the national reports concern assimilation of facts with respect to occupational diseases and the lack of a Community definition of occupational disease, as well as the non-proratisation of benefits as provided under Article 57 of Regulation 1408/71.

G. Unemployment benefits

Article 69 of the Regulation provides an exception to the principle that unemployment benefits are not exportable so that under certain conditions they may be exported for up to three months. National reports raise questions about the application of this principle. For example, can frontier workers rely upon Article 69 and if so how should the rules be applied? A particular question raised in several reports is why nationals from the new Member States cannot rely on Article 69 as the Accession Treaty does not suspend the application of the EU Regulations? The problem arises from the relationship between the transitional period and the free movement of workers on the one hand and the application of Article 69 on the other. Some national reports ask whether people from the new Member States can only rely on Article 69 if they have permission to work in an old Member State?

The Regulation contains special rules for unemployment benefits for frontier workers. A fully unemployed frontier worker receives unemployment benefits in accordance with and at the charge of the country of residence. A particular issue is the 'a-typical' frontier worker, as defined in the Miethe case, which allows such workers to receive their benefits in the State of last employment. It appears that this rule is already used in circumstances when the frontier worker does not possess the nationality of the State of residence. This is for example the case in the Netherlands where many German and Belgian frontier workers live. Some national reports question to what extent the Miethe rule is an exception to the general rule of the Regulation and in which circumstances this rule should apply?

The application of the aggregation rule with regard to unemployment benefits is dependent on having fulfilled the last period of insurance in the country where benefits are claimed. In many countries' legislations there is no minimum waiting period, so the rule is triggered by only one day of employment liable to insurance under that scheme. Some reports suggest that this could lead to serious financial impacts on unemployment schemes.

H. Family benefits

Family benefits remain a difficult issue, in particular with reference to the distinction between family benefits, parental benefits and paternity benefits. This issue is of particular concern in the Scandinavian countries, which had assumed that parental benefits would be regarded as a maternity benefit. However, the European Court of Justice ruled in the Kuusijärvi case that parental benefit should be regarded as a family benefit. The consequences of this ruling largely concern exportability.

The national reports of Sweden and Slovenia set out what they consider to be the characteristics of and distinctions between family benefits on the one hand and maternity and paternity benefits on the other. According to these reports the former are intended to meet family expenses for a longer period of time, are collective, often residence based

and reflect a normative pattern of just distribution. The latter are intended to compensate income losses for a shorter period of time, are individual, often work-based and reflect a normative pattern of protection of acquired rights. However, it appears that the European Court of Justice did not follow this approach.

The fact that a benefit is not classified as a family benefit under national law, does not prevent its classification as such for the purposes of the co-ordination rules. Some reports suggest that it can be difficult to explain how a particular benefit is classified when an identical benefit is categorized differently in another Member State according to the Regulation.

Changes of family composition and arrangements can cause difficulties, particularly where the couple has separated and are working in different Member States.

V The EU Regulation and international agreements

Most of the bilateral agreements concluded by the new Member States have been superseded by the EU Regulations.

CHAPTER I:

The implementation and application of Regulations 1408/71 and 574/72 in the Member States of the European Union

introduction

The trESS network was set up in order to ensure a constant flow of accurate information from all parties involved in the coordination of European social security law and to give a global picture of the implementation and application of Regulations 1408/71 and 574/72 in the Member States.

Although, it emerges from the National Reports that the current system of social security coordination at EU level generally works well, administrators in the Member States and especially the new ones, report that the regulations are difficult to read, interpret and implement.

While there are many complaints about the complexity and inaccessibility of the coordination Regulations, there is also a clear understanding of the difficulties inherent in the on-going process of simplification of the Regulations. However, it must be remembered that in the almost 35 years since the Regulation came into force, both the nature of the labour market and the demands made on social protection in the Member States have changed profoundly. We now see higher rates of unemployment and a much more insecure labour market. People have had to adapt to this greater insecurity through the growing flexibility of working conditions, for instance by working part-time or on fixed term contracts, by becoming self-employed or by taking early retirement. People are also becoming more willing to extend their search for employment beyond their country of origin.

Many Member States have also introduced new types of benefits which were not taken into consideration in the late 1960s when Regulation 1408/71 was designed and which today cannot easily be accommodated within the legal concepts defined by it. Over the last three decades we have witnessed a change in the nature of free movement within Europe. Whereas in the early 1970s the focus was on the free movement of employed - and mostly blue-colour - workers, the current reality in Europe is of a greater free movement of all kinds of people, not just workers. The concept of European Citizenship has opened a new route concerning access to social security benefits, away from the traditional European link between work and benefits.

Effective social security coordination relies on the correct implementation and application of the coordination rules by many social security institutions in the Member States. As far as can be gathered from the National Reports, the staff of these institutions generally carry out this work with great competence and dedication, and the competent institutions cooperate successfully with each other. This does not however mean that there are no problems. We hope that this report on the developments within the EU Member States in this area will help to provide a comprehensive overview of the way the national governments and competent institutions act, and also of the problems they face.

The National Reporters have had to rely to a significant extent on information which was forwarded to them both formally and informally by governmental and other public

institutions, especially social security institutions, employers' associations, trade unions, agencies, other administrative bodies, non-governmental associations etc. and their personnel, as well as by individuals.

The European Report gives an overview of the implementation of the EC Coordination rules in all 27 Member States. The issues mentioned in this respect are taken from the different national reports and are considered as being problematic in the Member States concerned. It seems, however, that sometimes these problems are not in conformity with the EU Regulations. It emerges from the National Reports that the current system of social security coordination at EU level generally works well. However, a number of gaps, shortcomings and inconsistencies still exist. These deficits are highlighted in this European Report in order to enable the European Commission and all the other actors involved in the implementation of the rules of European social security coordination to fill existing gaps in these rules, to remove inconsistencies and to improve coordination.

In countries (new Member States) where the coordination of social security systems is relatively new, implementation sometimes cause difficulties for the responsible national institutions. Even 3,5 year after accession most of the Central and Eastern European countries (CEECs) still have little experience in dealing with international social security coordination by bilateral or multilateral agreements.

Due to the recent accession of the New Member States to the European Union, it is clear that the provisions of the coordination Regulations constitute new material for the bodies involved with its application. The period of practical implementation is still relatively short and consequently there is still no experience with respect to some issues of co-ordination where no cases have yet emerged.

This short period of implementation in the 'new Member States' also explains the reason why hardly any disputes related to implementation of Regulation 1408/71 have yet arisen in administrative or judicial procedure. There are, as such, no national court rulings on implementation of Regulation 1408/71 notwithstanding the fact that some questions have been asked to national courts.

In order to prepare their administration for application of Regulations 1408/71 and 574/72, many of the new Member States trained their staff in advance (for example Estonia, Hungary, Cyprus) mostly under the umbrella of EU Twinning projects (for example: Latvia, Lithuania, Romania, Bulgaria), which identified the main problems in connection with the EU co-ordination of social security. These projects were considered to be of high importance and value by the new Member States in preparing their administrations for the implementation of these Regulations. Many of these projects, however, made clear that some of the new Member States had a shortage of competent staff to deal with co-ordination and were not always realistic in their view of the requirements of the EU membership in the social security field. Experts on these projects recommended not only that the new Member States should increase the number of officials dealing with EU co-ordination, but that they should also improve their skill base in order to be able to deal with these complicated issues.

In the UK it is noted that these twinning experiences were not only a one way street. For example, a twinning project with Malta (as well as other countries) delivered new insights to the UK Department of Work and Pension into how other administrations approach tasks, some new perspectives on EU Regulations and new and ongoing partnerships with other EU countries.

After 3.5 of implementation of Regulation 1408/71 and Regulation 574/72 it can be reported that the introduction of social security co-ordination has been relatively smooth.

Many of the new countries have prepared detailed instructions for the application of Regulation 1408/71 and Regulation 574/72. Nevertheless, the need for further information on the application of the Regulations, with a special emphasis on the use of E-Forms and the lengthy procedure involved in gathering data on insurance and other periods relevant for entitlement in other Member States as well as the case law of the Court of Justice have all been highlighted in the national reports. TRESS could contribute to these issues.

In the Maltese report it is emphasized that the experience of implementing a mature and well developed bilateral agreement with the UK, reflecting a tradition of movement of people between the two countries, greatly facilitated the implementation of Regulations 1408/71 and 574/72 with appropriate structures and experienced staff already in place on accession to the EU. This is also the case in Hungary, where the bilateral social security agreement with Germany, Austria and Switzerland was the forerunner of the implementation of EC Regulations. Slovenia also gained knowledge thanks to the long experiences with the implementation of bilateral agreements with the 'old' Member States.

As for cross-border cooperation in Slovakia, the development of cross-border partnership with the Republic of Hungary - within EURES – may be noted. This partnership creates opportunities for possible future conventions that would give rise to better social security for migrant workers and simpler administration of claims of migrant workers.

The representatives of the Ministry of Employment, Social Affairs and Family (MESAF) of the Slovak Republic have attended several meetings with their colleagues from other, especially neighbouring, countries (Austria, Poland, Hungary and the Czech Republic), concerning coordination of social security schemes. MESAF prepared a project to support the provision of experience during the pre-accession process called 'The cooperation of the MESAF- Slovak Republic with the Balkan states and Ukraine'. The project provides for representatives of relevant ministries in Albania, Bosnia and Herzegovina, Montenegro, Croatia, Macedonia, Serbia and the Ukraine to visit Slovakia to become acquainted with their social reforms and the process of bringing social legislation into line with the *acquis communautaire*.

Notwithstanding the fact that several of these states have had some experience with coordination of social security due to bilateral conventions, the European coordination regulations pose many additional challenges not least due to the increasing number of cases they are confronted with but also due to the different interpretations of the concepts and the different rationale behind these regulations, i.e. the promotion of the free movement of workers.

After three and a half years, it might be expected that the level of application of coordination rules in the new Member States is similar to that in the old Member States. However, even here a small percentage of complicated and non-standard situations and cases still raise doubts of even the most eminent experts although in most cases the application already standard and routine. It is therefore understandable that everybody who deals with coordination has at some time or another found themselves lost, at least for a while, within these complex regulations; more than 500 equally complicated judgements and decisions of the Administrative Commission and the interface with national legislation which often uses different terminology (Slovak Republic).

The interface is further complicated by the fact that it is not necessary to amend the text of national laws in those areas where no directives have been adopted and where regulations are implemented directly. The Slovak report suggests that the appropriate

modification of national regulations would bring about more a direct connection with the coordination rules and greater transparency (Slovak Republic).

The Danish and Swedish reports note that there is a lack of reference to EU law in their national legislation. This makes it very hard for the insurance offices to apply the national legislation in conformity with EU requirements. This "striving for conformity" is thus a future task for all those involved with co-ordination.

The twelve new Member States will now contribute to future amendments to the new coordination regulation and drawing up the implementing regulation, which it is expected will be simpler and easier to apply.

A large number of Human Resource related problems are being encountered in the new Member States. A particular problem noted in this report is that the experience in the application of the regulations is mainly concentrates on certain issues (Lithuania), while other issues are addressed much less in practice.

Administrators in Malta still do not consider that they have adequate experience of some areas of co-ordination, since, due to the country's small size, there are only a small number of claims for certain benefits. However, in other areas, particularly unemployment benefits, pensions and posting of workers their experience has increased significantly.

Some States have expressed the need to increase the number of officials dealing with the EU co-ordination issues, and also to improve their capacity to deal with these complicated issues (Cyprus, Latvia, Hungary). In Cyprus, the personnel dealing with the Coordination Regulations has been increased by 2. In Latvia, during 2005, the number of employees working with the application of Regulations 1408/71 and 574/72 has been increased and extensive training has been provided. The State Insurance Agency has drafted national guidelines for all types of benefits covered by the regulations.

The small number of experts in Slovakia understand every aspect of coordination and know how to practically apply it within the national legislation (Slovak report). There is a new initiative in the Slovak Republic. In the year 2001 an Inter-ministerial Commission responsible for the Co-ordination of Social Security Schemes of the Slovak Republic and the European Union was set up, including a proposal to give the Minister of Labour, Social Affairs and Family the responsibility for the co-ordination of social security schemes of the Slovak Republic and the European Union. It is of course not only the administration that has to cope with the regulations; the judiciary must also familiarize itself with the plethora of issues stemming from the application of the coordination regulations and the high volume of relevant case law issued by the European Court of Justice. There are around 500 judgements of the European Court of Justice in this area that must be considered when applying Regulation 1408/71, not least because they have not all been taken fully into account in the amendments to the Regulation.

This is of course not always an easy task. For example in Poland there are currently no guidelines on how to implement the Court's rulings on coordination. Polish courts do not publish appeal cases concerning Regulations 1408/71 and 574/72 or maintain separate statistics. Therefore the only source for interpretation of EC social security coordination provisions are rulings of the European Court of Justice. However access to the ECJ decisions is not easy in Poland and not all competent institutions and courts have unlimited access to ECJ rulings.

In this context it is important to note that the specific composition and *modus operandi* of the European Court of Justice also cause problems. These problems include the different national backgrounds of the judges, divergent legal cultures, different areas of juridical expertise, the absence of a common language (both literally and metaphorically), the cumbersome ways of working arising from the large number of judges in the plenary assembly, a continually increasing volume of work, and – associated with this – the risk that the increasing overruling of decisions reached in plenary assembly by decisions reached in chamber might lead to a reduction in the uniformity of the jurisdiction.

Despite these difficulties, the rulings of the European Court of Justice on social security for migrant workers have increasingly been accepted in recent years and the time when rulings by the European Court in the area of employment and social security law were ‘in dispute’ is now over a decade in the past.

The circulars produced by the administrations which help to accelerate the correct application of EU coordination rules are also important in the implementation of the Regulations. In France these circulars are considered of the greatest importance since French *caisses de sécurité sociale* refer directly to them rather than to EU legislation when determining rights and duties of insured people or companies.

This does not imply that the Regulations are smoothly applied and fully implemented in the old Member States. In some ‘old’ Member States, in particular in countries where the social security system is mainly tax-financed, like e.g. Denmark, the principles of Regulations 1408/71 and 574/72 have been one of the most publicly debated pieces of European legislation. In the public debate on the European Union, it has recurrently been argued that the general principles of Regulation 1408/71 promoting mobility contradict the residence-based Danish social security system. In general, however, the administrative application of Regulation 1408/71 seems to have worked well, although new legal interpretations from the European Court of Justice cause some difficulties in how to apply them to the Danish system. Although the Danish social security model, granting social security according to residence, is in principle contradicted by principles of mobility embedded in the Regulation, although there has only been one Danish request for a preliminary ruling to the European Court of Justice. This suggests that disagreements on the applicable scope of the Regulation are solved administratively before judicial review. Indeed, Denmark has no social courts. Decision making and channels of appeal go from the local or regional authority to the *social board in the regional authority* to the *national social appeals board*. Cases can also be referred to the *national social appeals board* from the national directorate of labour, the social security agency or the national board of industrial injuries. Civil servants from the *national social appeals board* commented that the appeals board regards itself as a court-like institution with the competence, but not the obligation, to refer preliminary questions to the European Court of Justice.

In the ‘old Member States’ Regulation 1408/71 is not always well-known and is sometimes ‘forgotten’. This is a dangerous tendency. As the Finnish reports highlights, a protectionist tendency can be identified both in the legislature and in the administration more often than the idea of promotion of freedom of movement. This tendency can be identified when a choice must be made between two or more alternative interpretations or solutions. Often the decision is based on the alternative which excludes more situations from the scope of application of the Regulation than the other available alternatives, or, limits the exportability of benefits. Often these choices are made without any real debate or without any discussion of the fundamental and general principles of European law or the national legal order.

In Spain all institutions and persons confronted with EU law agree that awareness concerning the coordination rules has to be raised, since almost 25% of Spanish citizens may be entitled to social benefits pursuant to Regulations 1408/71 and 574/72.

Tribunals and courts play an important part in the implementation of Regulation 1408/71, although the role differs to a large extent between the Member States. Increasingly, French courts -although lower courts often find it difficult to deal with trans-national social security conflicts - have to deal with conflicts involving rules of coordination, which could mean both that European coordination rules are more widely accessible and that mobility has increased.

However few Spanish cases have appeared before the European Court of Justice. This is due to several reasons: as a rule, national courts are reluctant to ask how EU Regulations should be interpreted, arguing that they have no doubts regarding the application of Community provisions.

In the new Member States only a few cases have so far been brought before the Court, although more and more cases may be expected to appear. The dissemination of the case law of the Court of Justice is however restricted. In Romania, for example, it has been proposed that judges are invited to the monthly meetings of the administrative authorities involved in social security coordination.

Judges do not have much time and prefer to settle disputes straight away, instead of waiting two or three years for a preliminary ruling (Spain).

Many migrant workers, however, cannot afford competent legal assistance and decline to claim benefits to avoid a process that they cannot understand. Moreover, migrants are reluctant to request a preliminary ruling because it will slow down the national legal process.

The same tendency can be found in Italy, where the Supreme Court of Cassation has also been reluctant to engage in *direct* 'dialogues' with the European Court of Justice when it comes to the crucial area of European social law. The mechanism of reference for a preliminary ruling under Article 234 of the Treaty establishing the European Communities seems to be an almost exclusive prerogative of lower courts in this field. While lower courts seem to be quite active, the Supreme Court of Cassation tends to maintain a firm control over the consistent application of EU coordination principles with few decisions on matters pertaining to Regulation 1408/71. In addition, EU law – and the channel of direct dialogue provided by Article 234 ECT in particular – is not applied consistently in the case law of courts of first and second instance. This results in a landscape with no clear-cut boundaries and in a tendency to apply Regulation 1408/71 in a way that is sometimes inconsistent, if not contradictory.

In Spain it was pointed out that the reception of ECJ case law, and, hence, its influence, is impeded by several factors. These include the feeling, among national judges, of having Community legislation "imposed"; their belief that Community law is useless or less protective than national law; the inertia in the application of Community law; the presence of conflicting national legislation; and lack of knowledge or indifference. Of course, legally speaking, these factors are not sustainable. For one thing, Regulation 1408/71 prevails over national law and is directly applicable. Moreover, its usefulness is beyond dispute, for lack of substitute to the coordination rules it contains.

Differences between national laws are another factor that needs to be taken into account when analysing the impact of ECJ case law, for rules applied in a specific judgement might not be appropriate for analysing a similar case in another State. "Judicial

nationalism" is yet another relevant factor; national courts will be more inclined to apply ECJ judgements in cases which originated in "their" Member State.

A crucial element in correct implementation, however, remains the correspondence between the different institutions and in particular the language issues related to this. Notwithstanding the fact that, for example, all E-forms are identical in all languages and as such transferable, misunderstandings remain.

In Slovenia, problems can be anticipated in legal procedures due to the official translations of Regulations and E forms into the Slovenian language. In some cases the correct professional or legal terminology is not used. The inadequate translations may also mislead potential claimants. The competent institutions in Slovenia provide individual advice related to the interpretation of the Regulations and E forms to persons claiming benefits. It has been reported that the official translation of the Regulation 883/04 into the Slovenian language will need a review by social security professionals; while the version of the Regulation currently in use in Estonia is not the coordinated version, but the historical version dating from 1971.

The right to use the mother tongue when dealing with claims for benefits from various social security schemes is necessary but it is not always fully applicable in practice.

Despite the effort of all institutions involved in Slovakia it is not always possible to provide for, especially oral, communication with a social security benefit applicant in his/her mother tongue, and at the regional level it is often difficult to do so even in the most frequent Community languages. In such situations, the applicant may turn to his/her employer who acts as an intermediary. Slovaks working in other Member States are in an equally difficult situation. The number of people from EEC Member States who work in the territory of the Slovak republic is far less than the number of Slovaks working in other EEC countries. As employees from EEC Member States usually work in the top management of a foreign company branch, they have a secretariat at their disposal which is able to interpret their needs. People from Slovakia usually work abroad in such areas which do not require high levels of qualification and their employer does not consider these to be the key positions, therefore their possibilities to draw on the support of their employer are lower. The only option is to quickly adjust to their new environment and language.

Another problem relates to the distribution of competencies between Polish institutions, which may lead to complications. The municipalities are competent for the payment of family benefits, whereas the decisions are taken by the regional social policy centres. A problem was reported with an Irish institution, which sent the Polish liaison body information regarding the entitlement of a given family to family benefits in Ireland. However, the Department is not in possession of the address of the family in Poland. Consequently, it is not possible for the Department to send this information to the competent regional social policy centre, which in turn cannot check with the municipality concerned. Other countries also point out that the way the administrative structure is organised in a country can cause problems. In Denmark the decentralised structure in which local authorities are responsible for e.g. the care of both elderly and disabled people, leads to problems as Regulation 1408/71 is not known within all of these local administrations. There is a clear need for more information to be given to the administration at the level of municipalities on how to administer the latest developments of EC law.

There are cases where administrative changes take place that should improve knowledge of Regulation 1408/71. In Finland in the spring of 2006 an organizational change was carried out in the Social Insurance Institution (Kela) in relation to the handling of

international affairs. Until then all international benefit matters was handled in the 265 Kela local offices. The reorganization has introduced 12 centralized units around the country which serve as back offices for the other offices. These centralized units take decisions concerning affiliation to the Finnish residence based social security schemes as well as family benefits and sickness and maternity cash benefit with international dimensions. Previously there has been an Office for International affairs taking care of insured clients abroad and pensioners residing abroad. The idea is that these 12 specialized units will make the actual decisions as well as be responsible for sending E-forms and communication with foreign institutions. This organizational change will not be noticeable to the client as the local Kela office will be the point of contact for all services. However, clients will hopefully notice the change by getting better and quicker service. As part of this organizational change all Kela offices will be given training in client service in international affairs during autumn 2006 and 2007. A special e-learning package (utilizing module) has been created for this training. The 12 specialised units will support the client service of the local offices.

“Communication barriers” is another problem that can be encountered in many countries in day to day business. This is posed by the 20 different official languages used in the European Union. The institutions in the various Member States can use any of these languages to communicate with others. However, in Malta it is mentioned that many Member States do not accept correspondences in Maltese due to unavailable Maltese translators in their country. Needless to say, in the majority of cases, an institution would elect to communicate in the official language of the Member State it is situated in, especially if documents are generated automatically through their information systems. This does not create major problems when dealing with E-forms since these are super-imposable and so no translation is required. However, the same cannot be said in situations not covered by E-forms. So when an institution in a Member State writes to another in its own language, the receiving institution has to translate the communication. It will then reply in its own language and so the first Member State will also have to translate the reply. As a result, both institutions incur translation expenses, some of which could be saved if the various institutions are able to reach bilateral agreements to communicate through the use of a mutually acceptable intermediate language. In practice, only a small fraction of the costs are refunded under Regulation 1408/71 since the translation costs of all Member States by far exceed the annual budget allocation for this purpose. However, the issue is not so much the translation costs, as the impact of having to translate documents on processing times. Therefore, on pragmatic grounds, Malta would be willing to be more flexible on this issue and to communicate in other languages to hasten the coordination process and improve customer service.

During 2007 the Nordic countries have continued their work under the Nordic Council of Ministers to overcome barriers for cross-boarder movement between countries. A Nordic brochure containing basic information for persons moving between Nordic countries has drawn up and a Nordic social security internet-portal is under preparation. The plan is that this portal will be in operation in 2008.

Germany has recently begun to reduce the importance of statutory social security schemes by replacing or supplementing them with occupational or private social security schemes which fall outside the system of EC social security coordination. Due to the absence of European Community rules in this field, existing disadvantages for migrant workers may persist or even increase.

As regards the evolution of the national systems of social security towards a ‘private-public mix’, there is some concern that this development might undermine the EC coordination system, as Regulations 1408/71 and 574/72 coordinate, in principle, only

the public schemes which are very likely to play a less dominant role in the future as they do today.

Over the past three decades Europe has also witnessed a change in the nature of labour migration and free movement. Whereas in the early 1970s the focus was on the free movement of employees, mostly blue-collar-workers, the current reality in Europe is of a greater movement of all kinds of people, not just workers, but also students and pensioners, whose rights are guaranteed by the legal provisions introduced within the framework of the European Single Market both by the Single European Act, the Treaty on the European Union, the Treaty of Amsterdam and the Treaty of Nice which amended the EC Treaty in this respect.

There is a case for examining whether there should be a single legal basis in the EC Treaty for social security coordination. Currently, on the basis of two separate legal provisions – Articles 42 and 308 EC – the coordination system applies to employed and self-employed workers and the members of their families. In order to take account of the current reality of the Member States' social security systems, it might be more appropriate to create one single legal basis for coordination covering all persons who are insured.

Furthermore, it will become increasingly difficult to negotiate and approve changes to the coordination system as long as unanimity – from 2007 on of 27 Member States – is still a precondition to the acceptance of any proposal for modification.

A. Fundamental and general principles

1. Equality of Treatment

One of the most important legal protections offered by the Regulations is the guarantee that people within its personal scope will receive equal treatment in whichever Member State they are insured. This means, in fact, that they should be treated by this State as if they were one of its own citizens. The principle of equal treatment is not only an important factor in respect of migrant workers but also in the concept of European citizenship.

Equal treatment is not only a general principle of EC law which is enshrined in Article 12 EC and with regard to freedom of movement of workers in Article 39(2) EC, but is also the pillar of EC coordination law. Article 3 of Regulation 1408/71 sets out the principle of equal treatment in social security. This principle concerns both obligations and rights, and contributions and benefits. Subject to the special provisions of Regulation 1408/71, persons residing in the territory of one of the Member States to whom the Regulation applies shall be subject to the same obligations and shall enjoy the same benefits under the legislation of any Member State as the nationals of this State (Article 3(1)) of Regulation 1408/71).

Article 3 Regulation 1408/71 is only applicable to, firstly, cross-border activities, and secondly, persons who fall under the personal scope of Regulation 1408/71. Generally, nationality is not a feature in determining eligibility for benefits under the social security legislation of the Member States. The principle of equal treatment has been broadly interpreted by the European Court of Justice and comprises not only direct discrimination on the grounds of nationality (i.e. situations where a distinction is made between persons on the basis of nationality), but also indirect discrimination, i.e. situations where a distinction is made on ('neutral') criteria other than nationality which nevertheless has a discriminatory consequence.

It is, however, particularly difficult for the competent authorities, when they issue circular letters or address ad hoc interpretative guidelines, to guarantee the smooth implementation in practice of the principle of equal treatment by all institutions involved, in particular, where there are numerous social insurance schemes administered by separate institutions, which are autonomous Public-law Entities, as it is the case for example in Greece

Most national reporters were unable to find evidence of discrimination between nationals and non-nationals from other EU countries. There are however, some examples of such a practice.

In Belgium for example with regard to unemployment benefits and the totalisation of insurance periods, employment abroad is taken into account if it would have resulted in an obligation to pay Belgian social security contributions completed in Belgium, regardless of whether the period of employment abroad is considered a valid insurance period for the application of unemployment regulations in the country where it was completed. The law does not confine the application of this rule to Belgian nationals. However, it used to be standard practice for the authorities to refuse to apply this provision to foreigners, including nationals of other Member States. It would appear that this practice is accepted, at least implicitly, by some courts which have ruled that employment periods completed in another Member State are not taken into account if they are not considered as a relevant period of employment by the other Member State itself. On the other hand, other courts have rejected this administrative practice.

The Labour Court of Appeal of Liège raised doubts about the conformity with European law of the requirement for EU citizens in Belgium to accomplish a (minimal) insurance period in order to be eligible for unemployment benefits. The Court lodged a reference for a preliminary ruling with the Court of Justice. The question pending in case C-346/05 is whether Article 39(2) of the Treaty and Article 3(1) of Regulation No 1408/71 permit Article 67(3) of Regulation 1408/71 (1) to be interpreted as imposing an obligation on a worker who is a national of a Member State to complete a period of employment giving the right to unemployment benefits in the State of residence even where the internal law of that State does not impose such an obligation in the case of a foreign worker whether s/he is from a Member State or not.

There is a special approach to equal treatment in Malta. Presently they have unequal retirement ages for men (61) and women (60). While this unequal treatment is explicitly excluded from the scope of Directive 79/7 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (Article 7.1(a)), Malta has nevertheless introduced measures to remove it. Thus, from 1st January 2007, pension ages are to be equalised at age 65 for both men and women on a scaled basis. The effect of these changes is that men and women aged 45 or less on 1st January 2007 will have a retirement age of 65.

In Slovenia, there is no direct discrimination in the social insurance schemes on the grounds of nationality against foreign nationals working legally (with a work permit where necessary). However, permanent residence in Slovenia is necessary for entitlement to some benefits, mostly benefits for family members (for instance entitlement to health care and family benefits). The condition of permanent residence can have a negative effect on benefit entitlement for non-EU nationals - mainly in the case of nationals of the new states of former Yugoslavia if there is no bilateral agreement on social security.

The Slovenian Constitutional Court ruled in favour of children who stay in Slovenia but do not have permanent residence status. The Constitutional Court decided (U-I-31/04) that permanent residence cannot be a condition for acquisition of entitlement to child benefits. Compliance with the requirements of legal stay in Slovenia is sufficient.

The Constitutional Court has also ruled (U-I-273/01) that the provision in the Pension and Invalidity Insurance Act that requires a child to be a Slovenian national in order to include the first year of the child's life in the period of insurance of one of the parents, will be repealed.

More problematic, however, are the different forms of indirect discrimination, and, in particular, the condition of residence for obtaining a benefit. In France, for example, some benefits are granted to persons who can show proof of stable residence in France (for instance, the *Couverture maladie universelle* - Health care legal scheme based on residence benefits). This may indicate that indirect discrimination remains in some areas of national social security legislation. It is also the case that French law is not familiar with the principle of indirect discrimination, as it is rarely applied by the national courts. In this respect it should be noted that as EU law supersedes national law it is not necessary to amend national legislation, although from a perspective of judicial clarity, this would be preferable. What is relevant is not that the national law is in conformity with EU law but the application of law.

Similarly in Lithuania, insurance periods acquired before June 1991 in the territory of the former Soviet Union are taken into account when entitlement to a pension is assessed. This rule is applied only to people who are permanent residents of Lithuania when the pension is granted. As a result, people who reside outside Lithuania, for example, in another Member State, are treated in a different way than Lithuanian residents. This may be seen as discrimination on the basis of residence. According to the Lithuanian report, another case of possible discrimination can be found in the decision of the Government that the cost of transferring a pension to another country is deducted from the pension itself. This rule is not applied when the person resides in the country: in this case the cost of making the payment is met by the Social Insurance Fund.

Perhaps most significant is the new '4 months clause' in Finland which requires EEA-employees to have worked in Finland for 4 months in order to be eligible for national health insurance, child care subsidies and family allowances, to accrue credits towards national pension/ survivor's pension and to be covered under the Unemployment Allowances Act.

The question of the compatibility of this 4 months clause with EU legislation has been raised, as this requirement leads in some cases to non-insurance for the first 4 months. Some people see the clause as being designed to prevent new Member State nationals coming to Finland to work for a short period of time.

A similar reaction can be found in the UK. The Habitual Residence Test was amended with effect from 1 May 2004 to coincide with the accession of the new Member States whose citizens had been given access to the UK's labour markets. Under the new arrangements, in addition to having to satisfy the Habitual Residence Test, a person must have a 'right to reside' in the Common Travel Area (CTA - UK, Republic of Ireland, Channel Islands and the Isle of Man) to receive means-tested benefits. This new test applies to all people arriving in the UK, except 'workers' from 'European Economic Area who are treated as automatically satisfying the test. EEA nationals who are 'economically inactive' are required to be 'self-sufficient and not impose an 'unreasonable burden' on the state. The Social Security Advisory Committee expressed some concerns when it reviewed the proposed legislation and subsequently some NGOs have argued that the

new test, either in substance or application, does not comply with European regulations and in addition that existing asylum seekers from the Accession States who are unable to work may be left without access to means-tested benefits.

There are an increasing number of cases concerning the Right to Reside coming before UK Tribunals/Courts. The right to reside provisions have been considered in a number of recent Commissioner's decisions that raise important issues concerning the compatibility of the test with EU law. Some typical cases are eg.

- A Portuguese man and his family had been working in the UK for approximately 18 months and had previously worked for many years in Portugal. He was diagnosed with cancer. He has claimed IS ("Income Support") but this had been refused. They have two young children who attend the local school. – Eventually awarded IB under co-ordination rules
- A Polish national was in registered work for 6 months but stopped work shortly before the birth of her baby. She had previously worked in Poland for many years. She claimed IS, CB ("Council Tax Benefit") and CTC ("Child Benefit and Child Tax Credit). All refused under the right to reside test. The woman had to return to work weeks after the birth of her child because of lack of money.
- A Lithuanian national had come to the UK with her husband. Both had been working for two years paying tax and national insurance but neither was in registered work. The wife had just stopped work following the birth of her first child. Shortly after this the husband was killed at work in an industrial accident. Receiving food parcels from the Red Cross due to lack of money.
- A French national came to the UK fleeing domestic violence. She had previously worked in France for many years. Worked for 3 weeks in the UK but became ill, claimed IS on incapacity grounds but refused under right to reside. - Eventually awarded IB under co-ordination rules.

As to the coordination rules, they do not appear to be applied. Claimants are often unaware that this is possible and so are many advisers.

However, the UK report concludes that "an adequate consideration of whether or not the right to reside provisions can be objectively justified will have to await further decision of the courts." (Cousins, 2007). The question of proportionality may be important. In one of the cases the concerning the proportionality of the right to reside test, Commissioner suggests that the test may be a proportional response under EU law in some situations but not in others

Another example of the introduction of residence tests leading to potentially discriminatory effects can be found in Denmark. In Denmark, the Act on active social policy is regarded as social assistance, which means that a) cash social assistance benefits and b) introductory benefits for persons who have resided less than 7 years in Denmark, are outside the material scope of Regulation 1408/71 (Consolidation act no. 1009 of 24/10/2005 on active social policy, lov om aktiv social politik).

In Hungary, one new issue emerged in the last year. The problem related to the principle of equal treatment is how a person who has the status of a pensioner in one Member State can certify his or her legal status as a pensioner in order to receive the benefits due as a subjective right to pensioners in another Member State (e.g. travel, museum admission fees, etc.) Similarly with regard to the European Health Insurance Card, it is suggested that an international pensioner's certificate should be introduced, which is accepted by each Member State and has a uniform data content.

Although outside the regulatory scope of Regulation 1408/71, it should be noted that the status of social assistance in relation to EU law has recently been clarified. Danish social

assistance benefit is divided into two main schemes: *cash social assistance benefit* and *introductory benefit*. Introductory benefit is paid to persons who have resided outside Denmark for more than 7 out of the last 8 years and provides a considerably lower amount than cash social assistance. The residence criteria of 7 years is, however, waived for EU citizens provided EU law entitles them to cash social assistance benefit (consolidation act 1009 of 24/10/2005 § 11 (4)). It has been unclear what are the specific circumstances under which EU law waives the national residence criteria. The case has been brought before the Social Appeals Board which has clarified that the national residence clause is overruled when the person qualifies as a worker within the meaning of Regulation 1612/68 (SM A-01-06 of 14/12/2005). This occurs when a person enters an employment relationship in Denmark even if the employment is only for a brief period (a minimum of 10 weeks). The person is regarded as a worker from the first day of employment and is then entitled to the higher cash social assistance benefit without having to comply with the domestic 7 years rule (Nyhedsbrev, no. 2. November 2005). This clarification demonstrates that residence criteria for social benefits and their relationship to international law are contested. The introductory benefit has been extensively debated in Denmark and criticised for its de facto discriminatory effects.

According to Spanish legislation, third-country students are allowed to study in Spain as long as they have a 'study visa' that authorizes them to stay in Spain. The study visa does not grant full legal residence status because as students they are not entitled to a residence permit. Under very rigid requirements, third-country students can be authorized to work in Spain but only as workers and not as self-employed or civil servants. No real cases related to migrant students have been reported yet, but it seems that these third-country students who work in Spain are not treated by the social legislation in the same way as other migrant workers. According to Spanish legislation, only workers who legally reside in Spain are eligible for contributory and non-contributory benefits. To reside legally migrants need a residence permit. As residence permits are not granted to third-country students, they are not 'legal residents' and therefore are not entitled to claim old-age and invalidity non-contributory benefits, family benefits or unemployment benefits. Moreover, if these third-country students are not legal residents under Spanish legislation, other important consequences from the point of view of EC law arise: third country students who have worked in Spain are not covered under Regulation 859/2003. The key point is that an 'authorization to stay' in Spain does not have the same legal effects as a residence permit. It could be questioned whether this is not contrary to European law and in particular Article 12 EC-Treaty?

Another problem that affected around 6.000 Spanish ex-workers in Gibraltar is related to the dissolution of the former Gibraltar Pension Fund. After several years without paying retirement pensions to people residing outside Gibraltar, there is still a difference between pensioners who are resident in Gibraltar and non-residents: only residents receive compensatory economical aid while non-residents are not eligible. This 'subsistence aid' is granted to every retired person without distinguishing between his or her state of hardship, as long as they live in Gibraltar. The key question is to establish whether this aid (financed from the public budget of Gibraltar) can be considered as a coordinated benefit or not.

In France, Circular 2005/287 of 21 June 2005 describes the new scope of the principle of equality of treatment as it derives from regulation 647/2005. The French administration recalls that coordination rules are no longer restricted to the territory of Member states. The application of the principle of equality of treatment depends on the existence of a link between an individual and a European social security scheme. It applies to any person who falls within the scope of Regulation 1408/71, whether his/her residence is located inside the EU or not. The administration has also announced another circular which will deal with the consequences of the geographical extension of the principal of

equality of treatment on the affiliation to the Caisse des Français de l'Étranger, a public structure which aims to ensure that French citizens who are expatriates outside of the EU have a suitable level of social security protection.

As long as there is no general provision in the Regulation which demands the *assimilation of facts* in the territory of another Member State to corresponding facts in the national territory, there will be uncertainties, because Member States are allowed to impose conditions on entitlement to social benefits and Article 42 EC does not abolish the differences between the social security systems of the Member States, but allows the maintenance of conditions which can lead to exclusion from this right to benefit provided that no discrimination is made on grounds of nationality. The *National Reports* demonstrate that it is quite difficult to distinguish between differences in treatment of national workers and migrant workers from Member States resulting from the differences between the social security legislations of the Member States - acceptable under EC law - on the one hand, and criteria which must be considered as discriminatory under EC law, on the other hand. This suggests that a general principle of assimilation of facts is needed.

In the light of Community law, assimilation of facts or events, implies a global understanding of the intentions and political impact at Community level of the coordination of national systems in the domain of social security.

In other words, it can function only from the moment the dynamically moving boundaries between national and Community competence are politically accepted by all national governments. Assimilation of facts and equality between migrant and non-migrant persons, can only work, however, when national administrations realize the reason why more favorable treatment under national legislation is not excluded nor prohibited for migrant persons.

2. Export of Benefits

Article 10 Regulation 1408/71 concerns the elimination of *residence requirements* for specified categories of benefits, mainly invalidity, old-age or survivors' cash benefits, pensions for accidents at work or occupational diseases, and death grants. Article 10 of Regulation 1408/71 provides for the exportability of these benefits without any modification and removes any restrictive national social security law. Such benefits 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.

The European Court of Justice has ruled that the principle laid down in this provision of the Regulation not only means that the person concerned, even after having moved to another Member State, maintains his or her right to benefit acquired, but also that he or she cannot be deprived of his or her rights to acquire a benefit on the ground that he or she does not reside in the Member State under whose legislation the benefit is payable. The principle of exportability of benefits has been narrowed by Regulation 1247/92, which has excluded the payment outside the country of residence of various non-contributory ('mixed') benefits listed in a specific Annex (II a Regulation 1408/71).

On the legal basis of Article 10 a, the special non-contributory benefits covered by Article 4 (2 a) are treated differently insofar as the Member States are no longer obliged to 'export' these benefits, provided that they are listed in Annex II a of the Regulation.

Instead, such benefits shall be granted by and at the expense of the institution of the place of residence.

Problems pertaining to export of benefits are not very frequent, at least if one excludes the uncertainties about the application of provisions on special non-contributory benefits. Some of the national benefits mentioned in Annex II may not be special and/or non-contributory, and would therefore be found to be exportable.

The Belgian Labour Court of Verviers has lodged a reference for a preliminary ruling on June 26, 2006, in order to obtain the Court of Justice's position on the following questions. Is a refusal to grant statutory Guaranteed Income to Elderly Persons on the ground that: (a) Regulation (EEC) No 1408/71 of the Council of the European Communities of 14 June 1971 does not apply to the applicant; (b) the applicant is not a recognised stateless person or a refugee; (c) the applicant is not a national of a country with which Belgium has concluded a reciprocal convention on guaranteed income or in relation to which it has recognised that *de facto* reciprocity exists; that (d) the applicant is not entitled to any retirement or survivor's pension under a Belgian scheme, the result of: (1) too restrictive an interpretation of Regulation (EC) No 883/2004 of 29 April 2004 (2) in particular in the light of Article 14 of the ECHR, Article 1 of the First Protocol thereto and Regulation (EC) No 859/2003 of 14 May 2003 (3); or, if that is not the case, (2) an interpretation of Regulation (EC) No 883/2004 that is incompatible with the Cooperation Agreement between the European Economic Community and the Kingdom of Morocco, signed at Rabat on 27 April 1976 and approved on behalf of the Community by Council Regulation (EEC) as supplemented by the EC-Morocco Agreement of 26 February 1996? (Case C-276/06).

Another example from Belgium is the recently introduced preliminary ruling to the European court of Justice on the Flemish long-term care benefits scheme. If this scheme is considered to fall under the material field of application of Regulation 1408/71, must in particular Articles 2, 3 and 13 thereof and, in so far as they are applicable, Articles 18, 19, 20, 25 and 28 be interpreted as precluding an autonomous community of a federal Member State of the European Community from adopting provisions which, in the exercise of its powers, allow only persons residing in the territory for which that autonomous community is competent and, in relation to citizens of the European Union, persons employed in the territory and who are resident in another Member State to be insured under and covered by a social security scheme within the meaning of that regulation, to the exclusion of persons, whatever their nationality, who reside in a part of the territory of the federal State for which another autonomous community is competent?

Must Articles 18 EC, 39 EC and 43 EC be interpreted as precluding an autonomous Community of a federal Member State of the European Community from adopting provisions which, in the exercise of its powers, allow only persons residing in the territory for which that autonomous Community is competent and, in relation to citizens of the European Union, persons employed in that territory and who are resident in another Member State to be insured under and covered by a social security scheme within the meaning of that regulation, to the exclusion of persons, whatever their nationality, who reside in a part of the territory of the federal State for which another autonomous Community is competent? Must Articles 18 EC, 39 EC and 43 EC be interpreted as not permitting the scope of such a system to be limited to persons who are resident in the territorial components of a federal Member State of the European Community which are covered by that system? (Case C-212/06).

In France questions could be asked with respect to the export of the *CMU* and *CMU complémentaire*, the legal health care scheme based on residence. Problems may occur

in the future for insured people who set up their residence abroad or who stay abroad for a short period.

In Estonia, social security benefits are not exportable under national legislation, i.e. are paid only to persons residing in Estonia. Before EU accession, export of benefits was possible only under bilateral agreements (Latvia, Lithuania, Finland). Therefore, export of benefits to other Member States was a new issue, which arose from application of co-ordination regulations.

In Slovakia, due to the costs related to the transfer of payments abroad it is preferred to have an account in a Slovak bank or in a branch of a foreign bank registered in Slovakia. If a migrant worker does not have such an account, payments are not transferred abroad. The cost of exporting benefits will cease to exist when Slovakia joins the EURO zone.

According to, for example, Swedish national rules, residence-related benefits are not exportable to a migrant worker or the members of his/her family who reside in another country, nor is the residence-based pension (Chapter 3 Article 1 of the Social Security Act). Compliance with EC law is achieved through direct application of EC law. Export of family benefits to family members of migrant workers residing abroad may present some difficulties, because it is both alien to the Swedish normative tradition of individual benefits and involves administrative difficulties. However, all such residence-related benefits are exportable to insured persons during a temporary stay in another EEA country (Chapter 4 Article 1 a contrario of the Social Security Act).

In the UK a new 'Employment and Support Allowance' will be introduced that will simplify the current system. From 2008, this new integrated contributory and income-related allowance will replace Incapacity Benefit and Income Support paid on the grounds of incapacity for new claimants. However, the requirement to undertake work-related interviews, agree an action plan and participate in some form of work-related activity as a condition of entitlement to the Employment and Support Allowance is likely to present new administrative challenges - and perhaps some issues around the classification of the new benefit - in cases where the recipient has or wishes to export her or his allowance to another Member State. If a similar scheme exists in the host country then one solution would be to require the person to engage with the requirements of that country's scheme. However, as this type of scheme is not widespread in the EU, this is likely to provide a solution in some cases only. Where the country of residence does not have a similar scheme, it is not yet clear how the requirement to undertake a work-focused interview will be addressed. However, more difficult would be where the claimant is then required to participate in some form of work-related activity. Requiring someone in receipt of Employment and Support Allowance to undertake that activity in the UK would restrict the exportability of the benefit.

3. Applicable legislation

3.1 *introduction*

a. applicable

Rules which designate the national legislation which is applicable to a person are an essential part of social security coordination. It is well known that, in principle, the law of the place of work (*lex loci laboris*) regulates all aspects of social security legislation. As a general rule therefore, a person will only be insured in one Member State for any one

period, will only have to pay contributions to the competent institution of one Member State, and insurance from one period will only give entitlement to benefits of the same kind in one Member State (i.e. insurance from one period cannot be used to obtain entitlement to benefits of the same kind in two or even more Member States). Thus double payment of benefits is prevented because migrant workers should not obtain additional benefits as a result of using the right to freedom of movement.

As described in the Portuguese report, the apparently logical and simple principle of only one legislation being applicable is one of the most problematic areas that claims for the Administrations and the Courts (nationals and EU). In fact the application of these rules is becoming more complex.

These rules were actually conceived for the traditional migrant worker, who is, however, increasingly a phenomenon of the past. Typically, these 'guest workers' were blue-collar workers, moving from a poorer to a more prosperous Member State in which they worked and lived for a long period of time. Upon retirement, they would often return to their country of origin, thus 'taking home' the higher pension/living standard of the State of employment. From a normative point of view, this state of employment principle seems to be the most appropriate, as the person worked and contributed to this higher level all his or her active life. This situation can moreover be considered effective in the light of the achievement of the aim of enhancing free movement of workers. This category of migrant workers could be due for revival as workers from the newly acceded countries may come to do unattractive work in the 'old' Member States.

For flexible workers in a more precarious position, however, the *lex loci laboris* principle has its weaknesses. They are more likely to become dependent on basic pension schemes and other minimum benefits, raising difficulties in terms of exportability (*cf.* the special non-contributory benefits and social assistance). But also for some other types of work, as eg. teleworking, the question is asked whether the *lex loci laboris* is the most appropriate approach (Italy).

One problem concerns the determination of the legislation applicable to artists. In Belgium, artists are presumed to be employed persons. Unlike in France, this presumption can be rebutted. In other countries (e.g. UK), artists are often self-employed. As a general remark, the rules of Title II are ill adapted to the specific situation of artists, who frequently and successively perform short-term work in various Member States, for different employers and often in different capacities. In the course of their careers, artists may have had 10, 20 or even more employers established in different countries.

A number of dance companies have their base in Belgium. For their performances, they hire dancers from different Member States. These dancers are deemed to be employed persons according to Belgian legislation. For these dancers, the ideal situation would be to remain subject to the legislation of their State of residence, and not to become subject to Belgian legislation. For the employing dance company, however, that would be a virtually unworkable situation. Its interests are generally best served by the application, according to Article 13(2)(a), of Belgian legislation. However, the application of this provision leaves the artists with extremely fragmented insurance records and, hence, a lot of complications, not least in the short run (e.g. for healthcare insurance, in case of unemployment, etc). In practice, and perhaps not surprisingly, there is a lot of unofficial, undeclared labour in this sector. A second adverse effect is that a lot of organizers only wish to work with self-employed artists.

A practical problem determining the applicable legislation was encountered with regard to the internal organisation of certain Member States. For example, in France there is a

patchwork of 'caisses primaries', all giving out E-forms with sometimes different policies and procedures and no centralised institution that can be contacted for guidance. This causes different practical problems for the Belgian administration.

In Austria for example, a question is raised concerning the principle of only one applicable legislation, referring to *Kinderbetreuungsgeld* whose recipients are covered by health insurance. The Austrian authorities regard health insurance effectively as an annex granted to the recipients of this *KBGG*. This implies that if there is an entitlement to a similar family benefit under the legislation of another Member State, this Member State is also responsible for granting sickness benefits. Austrian health insurance provisions therefore currently seem to be applied only to recipients of benefits under *KBGG* who are not covered by health insurance in the other Member State (because of their employment or status as a member of a family). This 'subsidiarity' may be considered quite reasonable from the Austrian point of view, but the situation obviously does not meet the requirements of the Regulation, if the authorities competent for sickness benefits in the other Member State also consider their provisions to be applicable only in a subsidiary manner.

The principle of a single applicable national legislation can be strictly applied by French Courts. The Cour de Cassation ruled that a frontier worker who had his residence in France and his job in another Member State where he was affiliated to the local social security scheme did not have to pay a car insurance contribution in France transferred to the French social security budget. Requiring such a payment is a violation of Article 13 of Regulation 1408/71 [*Cour de cassation, Chamber, n°05-19996*].

In Lithuania, some problems with applicable legislation arise when it is not clear if a person concerned is employed or not. This happens in the case of child care benefit. The mother (or father) of the child who takes child care leave, according to Lithuanian legislation, remains formally in a labour relationship (employed), but does not perform work (and does not receive any wage). If the father or mother of the child works in another Member State, the legislation of that state should be applicable. But that state may argue that a child stays with her mother or father in Lithuania, where she or he formally remains in a labour relationship, so Lithuanian legislation should be applicable. It could however be asked whether or not such a person would be considered as continuing to exercise a gainful activity by the European Court of Justice?

When interpreting the norms of applicable legislation, an interesting question arises as to whether or not persons must be personally engaged in business? For example a person has registered business activity in Poland and in Austria. This person resides in Poland (has a family, house etc.) but spends the majority of his or her time in Austria. His or her business in Poland is run by employees and the owner visits the company in Poland on the monthly basis. Can it be said that in this case that Polish legislation is applicable on the basis of Article 14a.2 of the Regulation 1408/71? A similar issue is raised in Greece concerning the scope of Article 14a (2): is physical mobility of the person normally carrying out activities as self-employed (social security criterion) in more than one Member State a prerequisite for the application of Article 14a(2)? The issue arises where, for example, a person exercises an activity as self-employed in UK and, at the same time, the person, as partner of an undertaking in and who never moved to Greece is deemed as self-employed under Greek social security legislation. The UK reiterated that such a person falls under Article 13(2)(b) (one activity in the UK – the latter being the sole legislation applicable). Thus, a more general question could be raised: does this situation fall under the scope of free movement of persons or free movement of capital? It would be interesting to further clarify the scope of Regulation 1408/71 from that perspective, because it would solve many questions – simplification of procedures arising

in practice with the extended parallel self-employed activity in more than one Member States of 'non mobile' persons.

An interesting example is given in the Finnish report. The Insurance Court was asked whether a person residing in Germany and employed there could be insured in Finland on the basis of employment in Finland as she did not fulfil the conditions for insurance under German legislation. The Insurance Court stated that the regulation determines which national legislation is applicable. From that point of view, the fact that the person could not be insured under the national legislation was not relevant when applying the regulation. The Finnish social security legislation could not therefore be applied to a person who resided in Germany and was employed there.

Another problem concerns Finnish tour guides who work for Swedish tour operators in different (mostly Mediterranean) Member States. Difficulties in this area are mainly caused by the fact that the employer and the employee are of different nationality and the work is carried out in a third country where the employee does not reside. While they work abroad their 'centre of interests' and their family are normally still in their country of origin. Questions arise as to which country should ensure that the employer fulfils his or her social security duties. If it is presumed that the individual should always contact the local authorities and claim social security coverage in the country of employment, this would lead to an awkward situation for the individual as the guide only works in that country for a few months. The employers have also claimed that it is impossible to pay the contributions to a country where they do not have a registered office. Even though they have tried to pay them, they argue that the authorities of the country of employment have stated that paying contributions is only possible when there is a registered office, or equivalent, located in the country of employment. Employers are not willing to contribute to the employee's home country through application of Article 17 of the Regulation. Consequently, when returning to Finland, they have what might be described as a 'vagabond' status and sometimes, although being 'people working within the EU', are still without coverage.

In Finland, there has been also a change in the national interpretation of legislation applicable after a person has stopped working in Finland and resides or moves to another Member State. This change has been a result of the changes in the Finnish employment pension law during receipt of sickness and maternity cash benefit. A person who has been covered under Finnish legislation because of employment and who falls ill or has a baby and therefore is in receipt of sickness or maternity cash benefits from Finland, and who resides or moves to another Member State, is considered to be an employed person and Finnish legislation is applicable under Article 13.2.a during the cash benefit period. This applies to all persons who have been under Finnish legislation. This situation often occurs with frontier workers, seamen and posted workers who stay in their country of residence. This means that family benefits are paid from Finland during this period according to Article 73 and Finland is responsible for the health care costs of these persons and their family members. The application of the Finnish legislation ceases when the payment of the sickness or maternity cash benefits ends. Previously the application of Finnish legislation was considered to end when the person in question actually stopped working. The sickness and maternity cash benefit was exported according to Article 22. But the person was not considered to be under Finnish legislation within the meaning of Article 73 and for health care costs.

Furthermore, the Danish report mentions that persons to whom the provisions in Title II do not apply, i.e. pensioners and students, can be covered by the legislation of two countries at the same time. Family members, students and pensioners can be entitled to benefits as residents in Denmark and at the same time be entitled to some benefits in

accordance with the special provisions of the Regulation in another EEA state. Whether this is possible, is questionable.

The Slovak Republic does not have a public document which would provide for actions taken when defining the state of domicile (the centre of interests), especially in relation to the citizens of Slovakia who have decided to live in another Member State while they retain their permanent residence in the territory of the Slovak Republic, for example, at their parents' permanent residence. As Member States in which such persons permanently live and have their centre of interests do not have a reason to contact institutions in the country of permanent residence, duplication may arise when the facts which would otherwise give rise to a change or termination of the claim are not notified to the institution.

In many other circumstances, different provisions of the Regulations may apply or the correct provision that should be applied could not be determined.

What happens, for example, if a civil servant works in two or more Member States, is insured as a civil servant in at least one of these Member States, and works as an employee or a self-employed person in one or more other Member States? Under Article 14*f* of Regulation 1408/71, the legislations of both the first Member States are applicable. It is not clear, however, which legislation is applicable with regard to the insured person's occupation as an employee or a self-employed person in the third Member State.

The correct interpretation and application of some rules may also lead to problems. International transport workers are generally subject to the legislation of the Member State in whose territory their employers have their registered offices. If they work for a subsidiary of their employers they may be subject to the legislation of the Member State in whose territory the subsidiary is established. If they exercise their main activities in the Member State where they actually live, the legislation of that Member State may apply. The latter case especially may lead to difficulty. It is not clear how to establish whether such employees exercise their main activities in the territory of a specific Member State. There is no certainty as to whether this should be determined on the basis of the number of hours worked or on the basis of any other criteria.

Another question arises if an employee is employed by two international transport companies in different Member States. Should Article 14(2)(b)(i) be applied? It is important to note that this Article does not apply to international transport activities.

It is not clear how to establish whether such employees exercise their main activities in the territory of a specific Member State. The RSZ-ONSS interprets the concept of "principally" employed as 51 per cent of the activities. Once again, interpretations vary among the Member States. The Netherlands go as far as fixing the threshold at 70 per cent.

In Belgium, with respect to international transport workers, the following practice has been reported, the effect of which is that flying personnel are not subject to Article 14(2)(a) but to the general provisions of Title II. These people are not bound by a labour contract with the airline company. Instead, they are employed by an employment agency, which is linked to the airline company and which puts personnel at its disposal. As only the airline company is engaged in international transport services, the pilots and stewards are not subject to Article 14(2)(a).

The qualification of dredgers used to be a point of discussion between Belgian and Dutch authorities. Now, the issue has been clarified. Dredgers are vessels and the provision of Article 14b applies.

Fundamental problems remain with respect to the question as to which legislation applies to persons who have ceased all activities, the post-active workers.

Whether or not the law of a Member State continues to apply to a worker who no longer has a professional activity in that Member State but who continues to receive a long-term social security allowance from that State while residing in the territory of another Member State, is to be determined by national law. The Court of Justice has ruled that Regulation 1408/71 does not itself define the conditions in which the legislation of a Member State ceases to be applicable.

According to the National Social Insurance Board in Sweden, a person residing in Sweden can be considered as normally working in Sweden as long as s/he maintains a connection to the Swedish labour market while working in another country. The rules in the Social Security Act may provide guidance in this regard. A person can thus be considered as normally working in Sweden up to three months after the work has ceased. A person who receives a work-based benefit, may also be regarded as normally working in Sweden.

In the Netherlands a lot of attention has given to this issue. The national report suggests that after 30 years of the Regulation the overall picture has become something of a patchwork. Moreover, the differences between the social security systems and the different interests of post-active persons make the concept even more difficult.

The report gives two examples: The first a Dutch pre-pensioner prefers to be insured by the AOW in the Netherlands when he lives in Belgium and worked in the Netherlands, but when he receives a high private pension, he would prefer to fall under the Belgian system to avoid the payment of high premiums in the Netherlands.

The second: For a Belgian pre-retired person it is almost impossible to live in the Netherlands, as under the Dutch residence scheme, s/he would pay 30% of her or his pre-retirement pension to the AOW.

Article 13, 2f of Regulation 1408/71 states that when a person ceases to be subject to the legislation of his Member State of employment, s/he is subject to the legislation of the Member State of residence. According to Article 10ter of Regulation 574/72, the Member State of employment determines the date of termination and is responsible for notifying the person's Member State of residence. So, strangely, the former Member State of employment can decide when the legislation of another Member State (of residence) becomes applicable.

Until 1999, post-active workers were covered by Dutch national insurance schemes after working in the Netherlands even when they resided in another Member State, provided they received a disability benefit above a certain minimum level (35 per cent of the gross statutory minimum wages). This rule was repealed in 1999. From then on, persons claiming a Dutch disability benefit, who can invoke, with the help of the Regulation's rules, benefits in kind on the basis of the Ziekenfondswet (Dutch health insurance act), are still insured for the law on general insurance against special medical expenses (AWBZ - algemene wet bijzondere ziektekosten), which is a national insurance. However, they are no longer insured under the general law on old age benefits (aow - algemene ouderdomswet) or the general law on survivors' benefits (anw - algemene nabestaandenwet).

In the Torres case of 11 July 2003 the person (a Spanish civil servant in the Netherlands who was paid by the Spanish Ministry) had an active employment relationship (as his employer was still paying him), even where he had not worked for many years and was not intending to do so again in the future. Article 13, 2d was considered to be applicable in this case and Torres could not be regarded as a post-active person. So the Dutch authorities could not levy premiums in the Torres case. This had an impact on the WAO/WIA benefit claimants abroad whose employment relation was not yet terminated (e.g. wage still paid on top of the WAO, according to a Collective Agreement) and resulted in the combination of the Dutch WAO and the foreign WW. According to the Torres case, these people are not post-active persons abroad and they remain insured in the Netherlands. This can generate the following problem: When a person receives a partial WAO and he applies for an unemployment benefit in Belgium, Belgium will say the person has no reintegration possibilities in the Netherlands, will give him unemployment benefits and will deduct social security contributions. But, according to the Torres case, the Netherlands will say that this person still has an employment relationship and will levy premiums on that basis.

One cannot however oblige post-active persons to remain so, which also poses specific problems as made clear in the Netherlands. For example, if a Belgian pre-retired person engages in some activities in the Netherlands, the Netherlands will levy premiums on it. If a Dutch pre-retired person does the same in Germany and stays below a certain percentage, s/he is not insured under the unemployment scheme anymore and has no rights when s/he falls sick. Thirdly, when an unemployed person lives in the Netherlands and works in Germany, s/he is not insured in Germany and the Dutch legislation is not applicable anymore. If s/he falls sick in Germany, s/he has no rights either. This is the reoccurring problem of people not declaring to the Dutch authorities that they work in another country and the fact that the Netherlands does not have a clear approach with regard to the question where someone is insured. Regulation 883/2004 will introduce a fairly broad solution, aiming at clarity. In conclusion, the ageing of the population, the ongoing debate on reintegration into the labour market and the need for people to work longer will highlight the need for new rules. Regulation 883/2004 is not adapted to this situation, as the design was already 10 years old, when the idea of working longer had not yet surfaced. Finally it was stated that retired people are sometimes given advice not to engage in activities abroad as this causes too many problems. This means that the regulation itself can sometimes be considered as an impediment to the free movement of workers.

In the case *Van Pommeren-Bourgondiën* (Case C-227/03, 7 July 2005) the Court ruled that the residence requirement set by a legislator as a condition for continuing to qualify for compulsory insurance in respect of social security is only compatible with Article 39 of the EC treaty if the conditions relating to voluntary insurance for non-residents are not less favourable than the conditions relating to compulsory insurance for the same branches of social security which residents can obtain. The effect of this case law is that optional insurance must become more attractive for the post-active persons who are excluded from some compulsory schemes.

A new voluntary insurance scheme was introduced which does not discriminate in comparison with insurance for residents.

However, some initial problems have already arisen within the framework of this new insurance scheme. For example, the situation of pre-retired persons who are in receipt of benefits (pre-retirement not under Regulation 1408/71, but they are also included as they are legally insured in the Netherlands according to Article 4). Whether the person should have last 'worked' lastly in the Netherlands raises the question of what to do if the

person was lastly 'insured' in the Netherlands, such as in the case of a person receiving ANW who moves to another Member State.

Concerning the application of Article 15 on voluntary insurance, the question was raised whether a person who lives in a Member State and is self-employed in another Member State has an option when the legislation of the latter Member State only provides for voluntary sickness insurance and when the person meets all the conditions in order to be insured in the former Member State.

In the Belgian report it is stated that *as a result of the Unanimity rule*, a lot of practitioners are unclear which leads to diverging interpretations. A typical example can be found concerning the application of Article 14(2), b, i of Regulation 1408/71, in cases where a worker performs professional activities in at least two Member States, one of which is the State where he or she resides. The Court of Justice has ruled that even a rather limited activity of two periods of two hours per week in the State of residence has to be taken into account for the application of Article 14 (2) b, i. In contrast, the Court has also ruled that insignificant professional activities have to be disregarded. Consequently, it is not always clear if additional, insignificant or occasional activities performed in the State of residence have to be considered when determining the applicable law.

While Belgium, for example, requests that someone who resides in Belgium and works in another State, should work at least one day a month in Belgium to be subject to its legislation, the Netherlands only requests one day every quarter. The Czech Republic, on the other hand, is much stricter and requires one day a week.

An additional problem is that the fact that such marginal activities, leading to a change in applicable legislation, involve a lot of extra administrative work for the main employer and the person concerned. This problem also arises in the case of a person who receives benefit and starts to undertake very minor activities in another Member State. He or she may lose the insurance coverage of the State in which he or she receives benefit and may not actually be insured in the new State because of the marginality of the new job.

Other problems relate to the question of defining 'main activity' and 'marginal activity' and questions of registering the cessation of employment or self-employment in another Member State of a person who is simultaneously employed or self-employed in Slovenia.

For example, the Netherlands, as a neighbouring country of Belgium, is affected by the specific rules of Article 14c, which provides that a person who is engaged in self-employed activities in Belgium and employed in other countries as an employed person, falls under two different systems. This led to the De Jaeck judgment (Case 340/94 [1997] ECR I-461), which examined the case of a person who was a majority shareholder in his own enterprise. It was unclear whether he was an employee or a self-employed person. The answer of the Court – that he is an employee - was clear and has been laid down in Annex VI to the Regulation.

The Dutch authorities agreed with the Belgian authorities to solve these problems by concluding Article 17 Agreements, in particular when persons work in certain marginal jobs, such as the voluntary fire brigade or voluntary army or are members of the municipality council, so that persons who have their main activity in Belgium continue to fall under the Belgian social security system.

Taking up of a small activity in the State of residence by a worker who already works in another country is not always without risk. As the State of residence (e.g. Belgium) becomes the competent State, the foreign employer will have to pay contributions there.

It happens that the foreign employer, in such circumstances, de facto obliges the worker to stop carrying on his activity in Belgium (on pain of dismissal), especially when the activity in the State of first employment is part-time and/or easily replaceable for the employer. In fact, what deters foreign employers is not so much the level of contributions in Belgium (and in general), but rather the administrative complications involved with employing a worker insured in another country.

The Netherlands report mentioned a trend towards the use of 'working in two Member States simultaneously' rather than posting arrangements, as it requires fewer conditions. Although the approach by the Regulation and the case law of the Court of Justice suggest that the posting rules have to be applied before a person can be considered to work in two Member States, this issue is not very strictly regulated. This issue was also described in the Belgian report. Consider the case of a person living in Belgium who is posted by his employer to another Member State several times a year for short periods. Where does the boundary lie? Does the nature of the assignments abroad bear any relevance (occasional and subject to market fluctuations versus structural; for a fixed period of time and with fixed intervals...) The policy of the Belgian RSZ-ONSS is to treat approximately 8 assignments abroad a year as falling within the scope of Article 14(2)(b). Again, practice differs from one Member State to another. For example, CZ applies a threshold of 4 times a year, other States (UK, MT, PL, LT, HU etc.) consider the whole pattern of employment; while some States have no policy at all.

It may also be noted in this regard that the situation of several postings may lead to the application of Article 14c. Under Belgian legislation, there is traditionally a strong distinction between employed and self-employed activities. The distinction is essentially a matter of fact. In other countries, however, the distinction is less marked and in some cases, notably in the 'new' Member States, a person can choose whether she pursues her activity as an employed or as a self-employed person. If, for instance, a self-employed person from one of these States posts herself to Belgium, and, accordingly, form E101 is issued by the institution of the State concerned stating the classification 'self-employed', the Belgian authorities are bound by the information provided in this form – including the classification as self-employed. When, however, that person pursues more and more activities in Belgium and crosses the boundary referred to above, her situation switches from being covered by Article 14a(1) to simultaneous employment. At that point, the Belgian authorities become competent to classify her activity (cf. *De Jaeck*, C-340/94). If her activity is classified as employed under Belgian legislation, the person may find herself subject to two legislations, according to the provisions of Annex VII.

A typical example can be found in Denmark and in particular, for example, people living in the border region between Sweden and DK. A person is covered by the Member State where he/she resides. A lot of home workers live in Sweden and work in Denmark. This way, people working for a Danish employer work ½ day at home and the rest of the week in Denmark, so the Swedish legislation is applicable as they live in Sweden and the lower Swedish contributions are paid. Danish employers are in need of labour and they often employ temporary workers from Sweden who are sometimes also working in Sweden. More and more people are working in different Nordic countries. But Danish employers are not satisfied with the outcome of the application of the rules of the Regulation. They would like to continue paying the Danish contributions and avoid the application of the coordination rules. But the Danish social security agency feels that its primary obligation is to the migrant workers and not for the employers. The agency is willing to make some flexible arrangements for people in stable employment, but not for temporary employment.

Another problem encountered in Denmark with respect to the rule of simultaneous employment relates to the exchange of information between institutions when the

legislation of another Member State is applicable. The problem is that Denmark cannot automatically identify those persons who come to Denmark, partly because they do not have a registration system for social insurance (except for unemployment benefits, but even there registration is not compulsory). It could be asked whether Denmark, in order to meet its obligations under the coordination regulations would have to set up some sort of registration mechanism, which, considering the number of persons crossing the border, would have to be very extensive. Denmark can provide this information at the request of the institution concerned, but not automatically.

The Dutch and Belgian authorities agreed to solve these problems by concluding Article 17 Agreements, in particular when persons work in certain marginal jobs, such as the voluntary fire brigade or voluntary army or are members of the Municipality council, so that persons who have their main activity in Belgium continue to fall under the Belgian social security system.

In Slovenia, the majority of problems related to the implementation of Regulation 1408/71 are related to questions concerning the determination of the legislation applicable for persons who are or could be subject to legislation of two or more Member States (Articles 14 to 14f). National legislation does not contain special rules on registration of persons employed or self-employed with insurance institutes in Slovenia, who are subject to the legislation of another Member State, or on the collection and payment of contributions for such persons. In Slovenia the employer has the legal obligation to pay contributions to the tax authority for each employed person regardless of the length of working hours or whether they are full or part time. If a person is employed in Slovenia and employed in another Member State where they reside, there is the question of who is liable to pay contributions to the competent state? The question is also not clear in such cases as to who is obliged to notify the institution that the person has stopped being employed in the competent state.

The Slovenian institution has enquired whether it is possible to limit the period of validity of form E101 to enable it to retain some control over changes in the employment situation of the insured person. One concern is how can the competent institution in Slovenia know that the insured person ceased to work in another Member State and is no longer entitled to a form E101? This information has implications for registration – all insured persons are registered in Slovenia, but there is a different code for those working simultaneously in two Member States – as well as for collecting contributions.

The Polish report notes that Member States do not want to issue E 101 forms under Article 14c (a), if paid work is performed in their territory, since according to their systems, they will not collect premiums from the business activity conducted in another country. Therefore, they make issuing this form conditional on whether the premium from the business activity conducted in the territory of another Member State will be collected.

The Greek report draws attention to the fact that there are cases where the activity pursued in one of the Member States concerned is not exercised simultaneously (within the same period of time) but on regular basis (repeatedly, e.g. for some days, weeks or months on a year or six-months basis). Such an activity should be considered as a parallel normal activity, falling under Articles 14(2), 14a(2) or 14c. However, in most cases, a number of institutions consider such activity, each time it is pursued, as a temporary and isolated (new) activity, thus falling under the scope either of Article 14(1) or Article 14a(1). Some Member States apply for an Article 17 agreement covering a more extended period in order to avoid issuing E 101 forms on a repeatedly or regular basis.

The above practice shows that, on the one hand there is a diverging interpretation of the concept of 'normal activity' ('a person normally employed' or 'a person normally self-employed') in two or more Member States and on the other there is a lack of efficient control of the corresponding contracts by the institutions involved in respect of the contracts themselves (for posting, for a second subordinate activity, works contract etc) or particular features of the independent activity.

Reference can also be made to the agreement that has recently been concluded between Poland and Germany and which has closed a dispute that had arisen between these countries upon recent enlargement. Some workers groups take vacations in May and June in order to harvest asparagus in Germany. As of May 2004, the German employers have not been transferring social contributions for these workers to the Polish institution, whose legislation, according to Article 14 § 2 (b) of Regulation 1408/71, is applicable. Apparently, the Polish seasonal workers have not been registered as employed persons in Germany. The agreement, which has entered into force in July 2005, derogates from the principle in accordance with which the legislation of a single Member State is applicable. It provides for the application of the German legislation to seasonal work and of the Polish legislation to work carried out in Poland. This implies, for instance, that the Polish institution cannot be held liable for accidents at work that happened during period of seasonal employment. Contributions are to be transferred by the German employers to a centralised office in Warsaw. However, this does not seem to be correct concerning the work carried out in Germany: in that case, Germany remains competent.

Another issue in Poland concerns the application of *Article 14c*. Some Member States are unwilling to issue a form E101 in cases where paid employment is carried out in their territory. This is the case notably for the UK and Spain. They refuse to issue a form E101, arguing that Poland should be included in Annex VII to Regulation 1408/71 and that they do not collect contributions in respect of self-employed activities in Poland. The ZUS does not agree and believes that a form E101 should be issued in those cases as is done by other Member States such as the Netherlands.

Some discussions arose concerning the payment of contributions. This was, for example, the case with regard to the calculation of the Belgian moderation contribution levied on the income of self-employed workers whose income in 1984, 1985 and 1986 was in excess of their 1983 income, more precisely when a self-employed worker worked both in Belgium and in another Member State. Consequently, a person who is simultaneously self-employed in Belgium and in France must be subject, as a result of the latter activity, to the appropriate Belgian legislation under the same conditions as if he or she was self-employed in Belgium. According to the Court of Justice it follows that a social security contribution such as the moderation contribution payable in Belgium must be calculated taking into account the income received in another Member State (Case C-249/04, Allard v. Inasti [2005]). In Case C-493/04 (Piatkowski) the Court ruled that Articles 39 and 43 EC concerning, respectively, freedom of movement for workers and freedom of establishment, and Article 14c(b) of Council Regulation (EEC) No 1408/71 must be interpreted as not precluding Netherlands legislation which includes, as the basis for calculating social security contributions, interest such as that paid by a company established in the Netherlands to a Netherlands national resident in Belgium who is subject under that regulation (Annex VII) and taking into account the nature of his/her occupational activities, to the social security legislation of both those Member States.

Dealing with the appropriateness of the provisions on applicable legislation, some new Member States made comments in particular on the rules concerning seamen. As a maritime State, Cyprus is confronted with conflicting interests concerning the application of Article 14(b)(4) of the coordination Regulation, which is based on the 'flag State's' competence.

It was stated that the Regulation has obviously been drafted in 1971 by non-maritime countries and that the Regulation is now being applied unaltered to several new Member States with a large seafaring business. This means, for example, that a Polish seafarer who works on board a Greek ship and is paid by a ship management company (considered to be his employer) established in Cyprus, will be covered by Greek social security and not by Polish or Cypriot social security. This is because the coordination Regulation is based on the 'flag state's' competence. It does not provide for the affiliation of the seafarer in Poland (considered more beneficial for the ship-owner and less beneficial for the seafarer). According to ship-owning interests in Cyprus, the above situation (the obligation of the Greek ship-owner to insure the Polish seafarer in Greece) results in a decrease of competitiveness of the EC shipping industry. It would have been preferable for the coordination Regulation to allow social security affiliation in the country of origin of the maritime labour 'of low price' as the International Labour Organization does.

The 'maladjustment' of EU social security rules for seafarers has resulted in a simple solution by the market players themselves. Indeed, as the EU did not provide a solution for the reported problems, the ship owning companies simply ended contracts with EU seafarers on European vessels and replaced them by non-EU seafarers (e.g. Filipinos) or they chose to change the flag of the ship in order to avoid the application of the EU social security rules. The latter solution resulted in the registering of the vessel under the flag of a country with lower standards of social protection than EU countries. Either way, both 'market solutions' are to the disadvantage of EU seafarers, losing their jobs or being forced to work under low-protection regimes.

The Cypriot report mentions that the relevant coordination provisions are not implemented in a uniform fashion throughout Europe. In that regard, one can distinguish three approaches. The first consists in the conclusion of Article 17 agreements, or in any case, the establishment of an understanding between two Member States; for example the agreement between Norway and Latvia. The former State also entered into similar agreements with Poland. The Netherlands tried to do so as well with Poland, but failed. The second approach, followed by several Member States, is to implement the basic provisions of the Regulation with the parallel use of the 2004 EC guidelines on State subsidies in the field of shipping. Examining the situation prevailing across other EU Member States there appears not to be a uniform policy regarding social security costs. In some countries, including Austria, Luxembourg, Norway and the United Kingdom, there are no special measures to subsidise social security costs, whereas in other countries such as Denmark, Germany, Greece and the Netherlands, the governments provide for a reduction of social security contributions. In addition, in some other countries, for example Finland, France, Ireland, Spain and Lithuania, a full refund or rebate on social security costs is made, while some countries such as Belgium, Portugal and Sweden allow a partial exemption of social security contributions. Italy permits a full exemption. All the aforementioned countries, according to the findings of a Cypriot ship-owning association at the Cypriot workshop, have introduced a mechanism in accordance with the provisions of the EU State Aid Guidelines for Maritime Transport which was approved by the Commission, either for a reduction, partial exemption, full refund or full exemption, in respect of the social security contributions of EU seafarers working on vessels that fly the flag of each of these Member States. The third and most recent approach is adopted, *inter alia*, by Malta. Under the terms of the Maltese legislation, if the company employing the crew members is not established in Malta, these crew members are not Maltese nationals or residents, nor are they resident in the State or Member State where the company is established and they are employed on a Maltese flagship, then they are exempted from any social security contributions.

In order to resolve these problems, some bodies in Cyprus are considering the potential of using Article 17 of the Regulation in order to conclude bilateral agreements with other Member States. The main aim of these agreements would be to avoid insurance in the flag state, e.g. Cyprus or Greece, of EU seafarers working on Cypriot or Greek vessels and to keep them insured in their Member State of residence (e.g. Poland). However, negotiations between Cyprus and Poland proved unsuccessful owing to political considerations. Additionally, there are doubts as to the conformity of such bilateral agreements with the *acquis communautaire*. They should however also be in the interest of the workers and in conformity with the principles, aims and the spirit of the Regulation. The main problem with the intended bilateral agreements is that they probably would not be in conformity with the idea of Article 17 Agreements, which can be concluded in the interest of the worker and to avoid administrative problems (cf. *Brusse* case, C-101/83). Article 17 agreements are not to be used 'à la carte' to change the application of given social security legislation when the application of the latter results in reduced competitiveness or the loss of jobs (e.g. because Greece has a more expensive social security system than Poland).

Similar issues could be found in Malta. A Polish shipping company (with two registered companies in Malta) asked Malta to insure the Polish crew. Malta asked for more information about the situation whether insurability actually lies in Malta. It turned out that the parent company was registered in Poland, while two subsidiaries were registered in Malta. One of these hires its vessels to the mother company. The Polish company provided copies of employment contracts. They were signed in Poland on behalf of the Maltese company. Wages were in US\$\$, calculated by the captain, paid by the Polish parent company. Malta refused to insure the crew. The ships were re-flagged to a Non-EU register as was the case with many other Polish companies.

Some problems are also identified in Malta with third country nationals. These concern third country nationals employed in international transport. Following the extension of the personal scope of the Regulation to include third country nationals from 1st July 2003, international drivers could in principle be covered provided they are lawfully resident in one Member State and, of course, in a situation involving more than one state. The Maltese institutions decided that the residence criterion was not satisfied, and that, therefore, these cases were considered to be *ultra vires* the scope of the Regulation. The administration's view was that they should be dealt with in terms of Maltese national legislation alone.

Third country nationals fall under the personal field of application of the Regulation, on condition that they reside legally within the territory of the Member State. They are not obliged to stay there. From the moment a third country national falls under the Regulation, he or she can not be forbidden to move. The question, however, is, if this third country national must live in the EU when the risk occurs, when is his or her pension paid? This problem was encountered, for example, with a Croatian national who worked for 5 years in Luxembourg and then 20 years in Germany, but now lives in Croatia. According to the Administrative Commission, actual residence in a Member State is required for the applicability of Regulation 1408/71.

Also problematic is the determination of the applicable legislation for persons working for airplane companies where a third, non EU state, is involved.

Under the German Law on Social Insurance for Artists (Künstlersozialversicherungsgesetz) any undertaking marketing the work of artists living abroad is required to pay the 'artists' social charge' (Künstlersozialabgabe) in respect of the remuneration paid to him or her, even though s/he is not subject to German social

security legislation. If that were not the case, undertakings would have an interest in marketing the work of artists who are not subject to that legislation which may lead to distortions of competition to the detriment of those artists who reside in Germany and who pursue their activities there.

The European Court of Justice held that collection of the artist's social charge (Künstlersozialabgabe) does not amount to double taxation, even indirectly, on the remuneration of artists residing in other Member States, as it is not the artists but the undertakings which market their work and which are liable to that charge, and the law prohibits those undertakings from passing on the charge to the artists. Moreover, the remuneration of artists residing and working in Germany who under national law are not covered by the artists' social security scheme is also subject to that charge. Under the relevant German legislation, the artists' social charge should not therefore have any impact on those artists who provide services in Germany and who also pursue an activity as self-employed persons in another Member State where they have their habitual residence and are affiliated to a social security scheme. The scheme is compatible with Article 13 of Regulation 1408/71 according to which persons to whom that legal instrument applies are subject, in principle, to the legislation of a single Member State only. In that regard, the German artists' social charge is to be distinguished, for example, from contributions such as the French social debt repayment contribution (CRDS) which directly affects workers covered by the social security legislation of any Member State other than France (Case 68/99, Commission vs Germany).

A very interesting question was raised by the UK concerning the scope of Article 14a(2) in Greece which can be summarized as follows: is physical mobility of someone normally carrying out activities as a self-employed person (social security criterion) in more than one Member State a prerequisite for the application of Article 14a(2)? The issue arises where e.g. a person exercises an activity in the UK as self-employed and, at the same time, as a partner in an undertaking who never moves to Greece and is deemed as self-employed under Greek social security legislation. The UK reiterated that such a person falls under Article 13(2)(b) (one activity in UK – the latter being the unique legislation applicable). Thus, a more general question could be raised: does this situation fall under the scope of free movement of persons or free movement of capital? It would be interesting to further clarify the scope of Regulation 1408/71 also from that perspective, because it would solve many questions – simplification of procedures, arising in practice with the extended parallel self-employed activity in more than one Member State of “non mobile” persons. EC-178/97 Banks etc). However, in most cases, a number of institutions deem such an activity, each time it is pursued, as a temporary and isolated (new) activity, thus falling under the scope either of Article 14(1) or Article 14a(1). In some Member States the competent authorities or designated bodies apply for an Article 17 agreement covering a more extended period in order to avoid issuing E 101 forms repeatedly or on a regular basis. This practice shows that, on the one hand, there is a diverging interpretation of the concept of “normal activity” (“a person normally employed” or “a person normally self-employed”) in two or more Member States and on the other, that there is a lack of detailed – comprehensive information, usually from the employer's or the self-employed person's side and at the same time, there is a lack of efficient control of the corresponding contracts by the institutions involved, in respect of the corresponding contracts (for posting, for a second subordinate activity, works contract etc) or features of the independent activity. From the point of view of the Greek competent authorities, the predominant criterion in all those cases should be whether the nature and purpose of the activity pursued remains the same each time or whether the latter's objectives/mandates are of a different nature each time it is exercised. Moreover, those cases should not be treated under Article 17 agreements because the latter is a derogation to Title II rules or a remedy to gaps. On the contrary, those cases should be

properly placed in their correct legal context, i.e. the above-mentioned provisions, established to eliminate obstacles for such cases.

Another problem concerns third country nationals. Article 14§1 does not apply to, for example, South-African and Brazilian artists who have been posted to France from Italy. Therefore, social contributions must be paid in France [Cour de cassation, 2nd Chamber, 17 Janvier 2007, n°05-17302]. With the entry into force of Regulation 859/2003 extending coordination rules to third country citizens, a different approach is now applicable: intra-EU posting of third country workers toward France is possible provided an E101 form is provided.

Under Belgian legislation there is traditionally a strong distinction between employed and self-employed activities. The distinction is essentially a matter of facts. In other countries, however, the distinction is less marked and in some cases, notably in the 'new' Member States, a person can choose whether s/he pursues her or his activity as an employed or as a self-employed person. If, for instance, a self-employed person from one of these States posts her or himself to Belgium, and, accordingly, the form E101 issued by the institution of the State concerned states the qualification 'self-employed', the Belgian authorities are bound by the information provided in this form – including the qualification as self-employed. However, this does not apply to the qualification for the purposes of labour law. If the activities of the person concerned qualify as employed activities for the purposes of Belgian labour law, the Belgian authorities could theoretically take legal action for non-compliance with Belgian labour legislation, and even prosecute the person concerned. Even though this does not happen in practice, the fact remains that this situation is liable to distort competition.

b. Posting

If a person is to be eligible for posting, the following conditions must be met: (i) the work must be of a temporary nature and, as a rule, not last longer than 12 months; (ii) an employee may not be posted to replace an employee whose posting has come to an end; (iii) during the period of posting, organic ties must remain between the company and the person posted; (iv) the company wishing to post its employees must carry out regular activities in the country from which it sends them; (v) the employee or self-employed person must be subject to the social security system of the country from which he or she is posted.

Posting is an important instrument in the context of the growing international need for mobility within business and industry and an exception to the country of work principle and therefore there is growing use of the posting provisions. Posting is considered (Hungary) as positive and promising for the economy, especially to work in countries where there are still restrictions on the free movement of workers.

There has been a significant increase in the number of workers posted from Estonia to Finland recently. The numbers have increased from a couple of hundred to a couple of thousand. In 2004, 440 E101s from Estonia to Finland were issued, in 2005 it rose to 3,815 certificates and by July 2006, 1 600 certificates had already been issued. There have been bilateral negotiations between Estonia and Finland concerning the issuing of E101 forms.

This leads to the question of whether posting, as an exception to the State of employment principle – posting is an exception to the general principle of the coordination Regulation – might become the rule. In any case, posting seems to be a difficult issue in nearly all Member States. The importance of posting, particularly of the

self-employed, varies considerably from Member State to Member State as does the readiness to grant permission for posting. Regulation 1408/71 does not give a legal definition of the term 'posting'.

If employees and self-employed persons are to be posted in accordance with Regulation 1408/71 a number of conditions must be satisfied.

The differences in the amount of contributions are of course at the root of the attractiveness of the posting rules. It was stated e.g. that there is a lot of posting between Slovakia and Hungary, as the contributions are lower in the former. But this is a fictitious arrangement as they work in Hungary but have their contracts in Slovakia, remaining under the legislation of the Member States of posting. Some Hungarian companies move to Slovakia to set up business there and to post workers from Slovakia to Hungary. It is a classical case of fraud to post Hungarians from Slovakia to Hungary to pay contributions in Slovakia, when actually they should pay in Hungary.

The general rule for posting allows workers who are temporarily employed in another Member State to remain insured in their home country. A person who works in Member State A and is sent by his or her company to work in Member State B remains subject to the social security legislation of State A and will neither have to pay contributions in State B nor be entitled to benefits there (with the exception of sickness at the expense of the competent state or to Annex II a, benefits at the cost of the state of residence).

The social security contributions have to be paid in the home Member State, but some problems occur with relation to the calculation of the contribution, as the basis for this is the wage received during the posting period and employers often try to minimize their wage costs. According to the Posting Directive, the posted employee should receive the minimum wage according to the legislation of the host Member State but the contributions are often calculated according to the minimum wage of the sending Member State (see also Latvia).

Posting is, as a rule, possible for a maximum period of 12 months. Obliging such short-term migrant workers to change their social security status for such a short period might deter them from migration in such circumstances and thus impede the mobility of labour. Furthermore, the administrative and financial costs of changing the social security status of a migrant for such a short period would be relatively high.

If the duration of the work which the posted worker performs extends beyond the duration originally anticipated, owing to unforeseeable circumstances, and exceeds 12 months, the legislation of the first Member State continues to apply for another period up to a maximum of 12 months if the competent authority of the Member State in whose territory the person concerned is posted gives its consent.

For the purpose of posting, the employer and the employee can apply for an E 101 form from the competent national authority. An extension must be applied by means of an E 102 form.

In accordance with the rulings of the European Court of Justice the provisions on posting also apply in the case of an employee who has not yet worked in the State where the enterprise is established, but who is recruited exclusively to be sent abroad as long as there is an organic link between the undertaking and the employee.

Many of these conditions were however very unclear and difficult to interpret. More specifically, with regard to the concept of 'posting', Administrative Commission Decision No 181 of 13.12.2000 provides for supplementary criteria – tools for accelerating and

rationalizing the procedures between all the actors involved. Recently a Practical Guide concerning posted workers has been adopted that has, according to some countries, introduced a greater degree of uniformity, which had led to better application of the legislation. Notwithstanding the criteria in this guide, many other countries, however, still mention some very difficult issues.

In the Czech Republic it is mentioned that the criteria provided in the CASSTM decision and the practical guide are difficult to assess. Persons applying for a form E101 can easily find out which questions they are going to be asked and how to answer them. In some Member States, the form is issued by one institution, operating a central registry. If that is the case, it is easy to determine whether it was issued by the proper institution. However, in other Member States, there are different branches, which do not use a single registry and which sometimes follow different procedures. In those cases, it may be difficult to find out whether the form was issued by the institution which is actually competent to do so. The E101 form contains a box which is to be completed with the relevant Article of Title II. Forms have been submitted to Czech institutions that did not contain this particular information. Moreover, there have been cases in which no information was provided in the form as to the duration of the activity. Another problem pertains to the retroactive issue of forms E101, a practice which is allowed by Decision no. 181. An example was given of a person who, having received several reminders, submits his form E101 to the Czech institution; however, upon inspection, it is established that the form is no longer valid. This raises major problems relating to the recovery of premiums and benefits.

One of the most problematic issues, is the concept of 'significant business activity'. Social insurance institutions should check if a given employer posting his or her employees to other Member States habitually carries out 'significant business activity' in the country concerned.

According to the Polish Decision, this includes:

- information regarding total turnover in a typical time period in each of the Member States,
- number of employees staying in the posting Member States compared to the number of posted employees.

This Decision does not, however, define in a precise way what period of time may be considered 'typical' and what number of employees in posting and receiving states is sufficient for 'significant business activity' to take place. Should these criteria be taken into account together?

In the Practical Guide for Posting, significant activities are generally and indicatively defined as turnover of approximately 25% of total turnover in the posting State. It is considered that this indicator is sometimes difficult to meet (notably in cases of seasonal workers). Taking into account the great divergence existing between Member States' levels of wages and labour costs as well as in general the levels of demand in the context of the national labour market, such a percentage, already difficult to define, should in fact, according to the Greek report, be adjusted by analogy. It is also perfectly possible that each Member State will have its own interpretation. This was also pointed out in Estonia. According to the competent institution, major differences occur between the countries concerned. Whereas Belgium and the Netherlands require 50% and 70% respectively of activities taking place in their territory, the United Kingdom seems to stick to the guidelines provided for by the Practical Guide (25%). In Lithuania, 20% is used and some enterprises would like to decrease this percentage or at least differentiate it by branches.

Checking this percentage is, however, a very difficult task. The Polish report suggests that the social insurance institutions issuing Form E 101 should therefore be competent not only in the area of social insurance but also in tax law and accounting in order to check the turnover in a given undertaking. Confronted with the same problems, in Estonia it is under discussion to give some competence to the Tax and Customs Board in respect of evaluating the eligibility of employers to post workers. In the view of the Social Insurance Board, the Tax and Customs Board could give an assessment on the employer, including turnover. The final decision on the award of form E101 would, however, remain with the Social Insurance Board. In Poland it is mentioned that German institutions approach the Polish institutions to get information on the turnover of Polish companies.

The Polish report raises the question of what decision should be made in the case of an undertaking which employs many employees in a Member State where its production is located but sells its products in another Member State that provides the majority of its turnover. This could lead to a violation of the principle of equal treatment, giving a stronger position to the country where the work is being carried out. A further question is: what is the basis on which the percentage should be calculated: for example, should it be turnover or numbers of contracts with clients?

According to Malta and Denmark, the presence of an administrative base will not be regarded as satisfying this criterion in itself. The main criterion, which indicates an economic activity of an enterprise, is to demonstrate valid business contracts between persons or/and enterprises. A special problem was found with the personnel of Greek ship cleaning companies working temporarily in big ports, mainly in Belgium, Germany, the Netherlands and Denmark. The personnel employed by these companies are highly-skilled and much sought after in Western-European ports. However, these companies realise only a very limited turnover in Greece, as a result of which they do not meet the criteria set out in the Court's case law and in the CASSTM documents. When these workers go to work abroad, generally for a period of one or two months, they become subject to the legislation of the State of employment. One could ask whether the posting provisions apply in such a case?

In addition to these indicators, the practical guide determines that the undertakings in question must have performed their activity in that State for a given period in order to satisfy the requirement of habitual performance of '*significant activities*' in the territory of the posting State. This requirement can be deemed to be met if the activity has been pursued for at least four months. According to Lithuanian legislation, enterprises which are just beginning their economic activities in Lithuania should be registered for not less than three months before posting an employee. These enterprises must also have registered offices and valid business contracts to demonstrate an economic activity in Lithuania.

In Latvia, the following problem occurs. Some companies act as covert recruitment agencies in Latvia. They are established as partners of large foreign companies. For instance, a Latvian meat processing company selects workers in Latvia to post them to the partner in Germany, which is also engaged in meat processing. It turns out, however, that this company is not concerned with meat processing but with recruitment. If the company does not in fact process meat, it does not fulfil the requirement regarding significant business activities.

In line with point 10 of Administration Commission for Social Security (CASSTM) decision No. 181/2000, Slovakia developed a Good Practise Code, that indicates the characteristics of a posted worker posted. These characteristics are:

- Labour relation with posting employee lasts for the whole period;
- Only posting employer has the right to cancel the labour contract and terminate employment by dismissal;
- Posting employer has the right to specify the character of work carried out by the posted employee (but not in relation to details concerning the specific type of work and terms of its execution, or decision about the final product or main service);
- Posting employer is obliged to pay the wages for work carried out;
- Employer resident in the Slovak Republic carries out an activity within the territory of the Slovak Republic, i.e. a situation when employer does not carry out any activity within the Slovak Republic and the organisation is only established formally to avoid legal regulations on social insurance, is not considered a posting employer;
- Existence of connections between posting employer established in territory of the Slovak Republic and the Slovak Republic.

The possibility of posting is therefore strictly limited to employers that usually carry out their activity within the territory of the Slovak Republic. To find out if an employer is actually exercising its main activities in their country, the following criteria are looked at:

- a) Location of employer's residence and management.
- b) Number of employees working in the Slovak Republic, of which at least 25 per cent must be in addition to employees dealing with provision of employer's internal activity; number of administrative employees in the Slovak Republic; and number of employees working in another Member State.
- c) Position where posted employees are accepted in another Member State.
- d) Location, where majority of client's contracts are concluded (major part of contracts must be concluded with Slovak clients).
- e) The right applicable to the contracts concluded between posted employer and his employees on one hand and clients on the other hand.
- f) Turnover during corresponding representative period, i.e. period of posting in each Member State concerned (the amount of 25 per cent from total turnover might be sufficient).
- g) Payment of social insurance for the whole period of employer's registration.

To be recognised, temporary employment agencies may not have the posting of employees to other Member States as their main activity.

Many authorities appear to have become suspicious of the posting of workers. This is particular the case when dealing with interim activities. This was made clear in the Luxembourg report. A lot of undertakings established in Luxembourg send their employees out of the country and remain subject to Luxembourg social legislation. Significant problems are, however, encountered with temporary agency workers, mainly from new EU-countries working in the old Member States. It is very unclear whether they are posted or they should be insured as workers in the old Member State. In Finland it was claimed that this is due to the fact that Finland has restricted the free movement of workers and not the provision of services. Coming to work in Finland under the free movement of services, the worker avoids the requirement of having a work permit. These posted workers are in many cases not covered by the social security system of their country of origin or if they are, they are covered only at the level of the minimum wage. In addition short term workers are very hard to monitor. This is a problem found in many states. Basically the question which arises here is the concept of 'posted worker' and in particular whether 'posted worker' within the meaning of the Regulation and 'posted worker' under the free movement of services have a uniform meaning.

The institutions of some Member States, notably France and Belgium, are wary of Polish workers who have been hired in order to be posted, although the case law of the Court allows for this practice. Apparently, they demand that the worker must be employed for several days before being sent abroad.

In France, the Cour de cassation ruled that a Portuguese temporary employment agency cannot post in France temporary workers who have been recruited in France if they reside there. Since no E101 form has been presented to French social security institutions, contributions must be paid in France according to French social security legislation since their place of work was located in France (*Cour de cassation, Chamber, 5 April 2007, n°05-21596*).

In line with these problems, one particular issue which has given rise to concerns in Malta (but also in other Member States) is the activities of companies (not employment agencies) who have recently been established in Malta and who recruit workers from other Member States and post them to a third Member State. It has been found that, at this point in time, such companies do not 'habitually carry out significant activities' in Malta and therefore, under the terms of Decision 181 the employment has not been considered a posting under the terms of Article 14.1 of Regulation 1408/71. For a number of reasons the transitional derogation from free movement did not include Malta and Cyprus. This has presented employers based in the EU15 countries with the opportunity of setting up 'satellite companies' in Malta for the purpose of recruiting employees from the Eastern European Countries and then posting them immediately to the country where the parent company is situated.

Another problem relates to the prohibition of rotation of personnel, contained in Article 14 § 1 (a) of the Regulation, which, once more, is not interpreted uniformly in the various Member States. The Polish report mentions that this requirement creates many problems for posting employers and for social insurance institutions granting E 101 Forms because they are not able to check whether or not a posted employee is replacing another person. In Poland, most of the problems are encountered in relation with Germany which will always contend that the form E101 is wrongly issued by the ZUS on the grounds that the person is a 'replacement'. This would be so even if a worker is posted to a construction site to 'replace' a colleague who got sick. Another example mentioned concerned deforestation. When a mechanical saw operator is posted to Germany, the latter will argue, when another mechanical saw operator takes over the job, that s/he is a replacement. According to some opinions, this contention would only hold good if the second operator continues to saw down the same tree.

The work must also be performed under the employer's supervision and direction. In order to ascertain whether the condition that there must be a link between the posted worker and the posting undertaking during the period of posting, is met, the Lithuanian administration verifies whether the Lithuanian contract of employment remains valid, whether the posting undertaking has the right to dismiss the posted worker and whether the Lithuanian employer continues to pay social security contributions on behalf of the employee.

There must be a direct relationship between the posting organisation and the posted worker. To assess whether this is the case, a number of factors are taken into account, which closely reflect those stated in CASSTM Decision No 181 and the Practical Guide. These are:

- (i) an 'active' labour contract with the posting organisation should continue to exist and no labour contract should be concluded between the posted worker and the receiving organisation. The RSZ – ONSS considers that the posting provisions cannot be applied if a labour contract is concluded between the posted worker and

- the organisation to which s/he is posted. This is deemed absolutely contrary to the posting concept. It would appear, however, that not all Member States share this opinion. This is the case for the Netherlands and Germany. The authorities of the latter country have no problem issuing a form E101 in cases where the contract between the posting organisation and the posted worker is rendered inactive by the parties to it, with the proviso that it will revive at the end of the posting period, and at the same time a labour contract is entered into between the posted worker and the receiving organisation;
- (ii) the wage and the career should be determined exclusively by the posting organisation;
 - (iii) the responsibility with regard to remuneration rests with the posting organisation, irrespective of who actually pays the salary;
 - (iv) the power to dismiss remains exclusively with the posting organisation;
 - (v) the responsibility with regard to the consequences of a possible dismissal (e.g. payment of indemnities) rest with the posting organisation.

Over and above these conditions - non-fulfilment of which precludes the application of the posting provisions - there are a number of indicative criteria. These include the existence of a 'return clause' in the labour contract (guaranteeing the worker an equivalent function upon her or his return); who has the authority to give the worker instructions; to whom the worker must report etc.

In that respect a series of problems relate to the use of the E101 form. Some examples of which are given in the Czech Report. The provision is increasingly used out of mere personal, economic convenience by persons wishing to be insured in the Member State whose legislation is the most advantageous.

The competent institution is Czech Social Security Administration and its regional offices which has developed a sophisticated centralized information system and detailed guidelines covering all situations in accordance with Articles 13 – 17 of Regulation 1408/71. Each form E101CZ has its reference number. The Czech Social Security Administration has also developed special application forms for different Articles. Data involved in these forms, after being checked by the administration, enable evaluation of fulfilment of all provisions of the Regulation as well as Decision 181 of Administrative Commission and ECJ cases. In order to allow employees, employers and self-employed persons to apply correctly for the issue of form E 101, there is extensive information on the web page of Czech Social Security Administration, including application forms.

However the Court of Justice's confirmation in Herbosch Kiere Case of the earlier case law in Banks and Fitzwilliam that E101-forms delivered by foreign institutions cannot be contested by other institutions or courts, complicates matters. In Belgium this was highly criticized as the Court appears to be saying that national judges offer less guarantees than the institutions of the sending state.

It is said that the European Court of Justice has made the E101 certificate virtually inviolable and thus rendered Belgian authorities nearly powerless to act against fraudulent postings to Belgium. Indeed, the authorities of the receiving State, whether social security institutions or the judiciary, are no longer in a position to check whether the substantive posting conditions are met.

The European Court of Justice attaches a lot of importance to good cooperation between the Member States. However, this cooperation is not enforceable, and, as will be explained below, generally leaves much to be desired. The CASSTM, to which the European Court of Justice suggests to refer the matter should the institutions not reach an agreement, does not play its role. The last instance, i.e. bringing infringement

proceedings under Article 227 EC, is hardly a viable option. This leads to a lot of frustration among national institutions and inspection services.

The following case illustrates the consequences of the ECJ Herbosch Kiere ruling. The RSZ – ONSS finds that a German worker is sent to work in Belgium by a company which manifestly does not fulfil the criteria relating to the habitual pursuit of significant activities. The RSZ – ONSS enters into correspondence with the Krankenkasse. In its answer, the latter institution confines itself to stating that it cannot verify whether the company has indeed got substantial activities in Germany. And that is the end of the matter.

Interestingly, the Belgian Court of Cassation held in 2003 that “it follows [from the ECJ ruling in Fitzwilliam] that the judge of the Member State of employment is not authorised to appreciate the validity and authenticity of a certificate issued by the competent institution of the posting Member State in accordance with Article 11(1)(a) of Regulation 574/72”.

One of the problems encountered by the authorities in their fight against fraudulent postings is that certain remedies of national law cannot be applied, as they are not binding for companies which operate from the territories of other Member States. In a judgement of 2 July 2003, the Court of Cassation held that Article 31(4) of the Law of 24 July 1987, which provides, in case of unlawful posting, for joint liability for the payment of social contributions between the user and the person who posts employed persons, cannot be applied in case of workers who are posted to Belgium in accordance with Article 14 of Regulation 1408/71, as this would amount to indirectly applying Belgian social security legislation, which is contrary to the system of the Regulation.

The issuing institution is supposed to send a copy of form E101 to the institution of the Member State to which the person concerned is posted. This is, however, not a legally enforceable obligation. The Belgian authorities systematically ask their foreign counterparts to forward such copies. The forms received are inserted into a database (GOTOT In). However, the results of GOTOT In can not be considered to present a realistic and reliable picture of the extent of cross-border labour in Belgium under the Regulation's posting provisions.

In Austria practical problems have to be dealt with in an increasing number of circumstances, for instance when a worker is hired in Austria by an employer formally situated in Liechtenstein to perform work in other Member States only, which may not be considered as ‘posting’ under the terms of Regulation 1408/71. In order to prevent the abuse of posting provisions, the Austrian, German and Liechtenstein authorities concluded a common agreement under Article 17 of the Regulation. Switzerland has not joined the agreement.

In Luxembourg, interim agencies were criticised by the Luxembourg social security authorities. They consider ‘posting of frontier workers in their State of residence’ as ‘abuse’ and argue that the notion of ‘significant activities in Luxembourg’ is a very weak barrier against such ‘abuse’.

In Belgium, specific problems are encountered in relation to postings from the Netherlands and Luxembourg. The former country has, over the last few years, witnessed the creation of a large number of posting agencies. Typical examples of abuse are cases where persons in receipt of Belgian unemployment benefit are hired by Dutch posting agencies. These agencies subsequently post them to Belgium. The Dutch authorities, unaware of the fact that the person receives unemployment benefit in

Belgium, issue a form E101. Such cases of benefit abuse are only revealed if a Belgian inspector establishes that the person concerned enjoys benefits in Belgium.

In Luxembourg, the problem stems from the fact that, on account of the Creyf's Interim ruling of the Conseil Supérieur des Assurances Sociales of 29 November 2001, Luxembourg authorities do not require a worker to be subject to Luxembourg legislation prior to being posted. Together with the comparatively low level of contributions in Luxembourg, this may explain the disproportionately high number of postings emanating from this country, as is shown in the GOTOT In statistics mentioned above. Often, the workers thus posted to Belgium are Belgian citizens who reside in Belgian territory. Luxembourg authorities are probably unaware of this fact.

Notwithstanding the fact that most Member States follow Decision No. 181 of the Administrative Commission, some important questions have been raised in the Portuguese report: Can an undertaking of a Member State that is *executing* works in the territory of another Member State engage a worker residing in this Member State and register that worker within the social security system of the first Member State (where the undertaking is established) and ignore Article 13 – 2-a), considering that worker to be “posted” under Article 14-1-a)?

In this situation the Judgement 35/70 (Manpower) seems to allow such an interpretation as it says: “*The sole fact that a worker has been engaged to work in the territory of a Member State other than that in which the undertaking which engages him is established cannot of itself rule out the application to such worker to the provisions of the abovementioned Article 13(1)(A)*” [current Article 14 – (1) (A)].

The same interpretation is given in Case 19/67 (van der Vecht): “... Article 13(A) applies equally to a worker who as been engaged exclusively to work in the territory of a Member State other than that in which the establishment to which he is normally attached is situated ...”.

These issues are causing a great deal of concern to the competent Portuguese institutions that have noticed evidence suggesting that some Member States are following this approach. This is not a minor point because the rights of the persons concerned can differ substantially when the applicable law is that of the place of work (which is also, in the cases above, the place of residence), as well as rights in case of unemployment.

In Sweden one of the decisive requirements of posting is that wages are paid by the Swedish employer. The rules on posting are applicable even if the posted worker has been employed in order to work in the other country. However, the worker must be covered by the Swedish social insurance system when the posting takes place. If wages are paid by a subsidiary company in the country where the work is performed, then this is not considered to be ‘posting’. If the wages are paid both by the holding company in Sweden and the subsidiary in the other country, the arrangement may be classified as a posting. In some cases, it may be difficult to distinguish between a business journey and a posting. In order to qualify as a posting, there must be a special agreement concerning the place of work, the wages during the work abroad, housing, etc.

It is also not always clear whether the rules on posting or other provisions on applicable legislation apply. Questions in this respect (see e.g. Belgium, Czech Republic) have arisen with regard to the difference between successive postings (Article 14(1)(a) and normal employment in the territories of several Member States (Article 14(2)(b)).

The Greek report mentions that some Member States (as a rule Germany, Denmark, the Netherlands), based on national labour law criteria, consider certain cases (3 or 6 months postings) to fall under Article 13(2)(a) instead of Article 14(1)(a). In order to maintain their legislation as applicable, due to the short duration of employment in Greece, they submit proposals for Article 17 agreements. This mainly occurs where an employed person is sent by the parent company to perform work for that organisation to the subsidiary company in Greece, and although the direct relationship criteria of Decision No 181 (Point 1) are fulfilled (especially the responsibility for recruitment, employment contract, dismissal and the obligation for the employed person's reintegration into the sending organisation as well as for the payment of social security contributions), those Member States deem that the 'organic link' is interrupted (or does not exist) if purely employment conditions (labour law) e.g. payment of the wage-salary, working hours and leaves fall under the responsibility of the subsidiary (host) organisation.

Belgian authorities refuse to issue an E 101 form if a frontier worker is seconded to his or her home state for a short period. The frontier worker is then considered to fall under the scope of the law of his or her home state. In contrast, if a colleague of the frontier worker who resides in the state where he or she is working is temporarily posted to the frontier worker's home state, the posting rule can be applied.

In the same report, it is noted that there are cases, where the activity pursued in one of the Member States concerned is not exercised simultaneously (within the same period of time) but on regular basis (repeatedly, e.g. for some days, weeks or months on a year or six-month basis). Such an activity should be considered as a parallel activity, falling under Articles 14(2), 14a(2) or 14c (following the Advocate General and the Commission in case C-178/97 Banks etc). However, in most cases, a number of institutions consider such an activity, each time it is pursued, to be a temporary and isolated (new) activity, thus falling under the scope either of Article 14(1) or Article 14a(1). In many cases, some Member States' competent authorities or designated bodies apply for an Article 17 agreement covering a more extended period, in order to avoid issuing E 101 forms repeatedly or on a regular basis. The practice followed above, shows that, on the one hand, there is a diverging interpretation of the concept of 'normal activity' ('a person normally employed' or 'a person normally self-employed') in two or more Member States and on the other, that there is a lack of detailed, comprehensive information, usually from the employer's or the self-employed person's side and at the same time, there is a lack of efficient control of the corresponding contracts by the institutions involved, in respect of the corresponding contracts (for posting, for a second subordinate activity, works contract etc.) or features of the independent activity. In the view of the Greek competent authority, the predominant criterion in all these cases should be whether the nature and purpose of the activity pursued remains the same each time or whether the latter's objectives/mandates are of a different nature each time it is exercised. Moreover, those cases should not be treated under Article 17 agreements, because the latter come as a derogation to Title II rules or as a remedy to gaps. On the contrary, those cases should be properly placed in their correct legal context, i.e. the above-mentioned provisions, expressly established to eliminate obstacles for such cases.

The Swedish report points out how difficult it can be to distinguish between a business journey and a posting. In a case from the Stockholm Administrative Court of Appeal a woman who left Sweden for an intended stay in the UK for two years and kept her employment in Sweden and performed tele-work for her Swedish employer while in England was removed from the Swedish social insurance register and, later on, denied parental benefit. The Court regarded the UK as the competent state in accordance with Article 14(2)(b) and revoked the possibility of posting due to the intended duration of the stay and the fact that she did not have a posting certificate.

In Lithuania problems occurred in respect of the double payment of contributions for workers sent abroad and not recognised as posted. When a person has an employment contract in Lithuania social security contributions are collected by the competent institution. It may happen that employees are posted to another Member State but that this institution refuses to issue form E101, for instance because the organisation does not carry out significant activities in Lithuania. However, contributions are deducted in both Lithuania and the State of employment. In addition, the latter State would sometimes fail to report its collection of contributions to the competent institution, thus depriving the Lithuanian institution of a formal reason to abandon the collection of contributions in Lithuania. Problems of this nature have occurred in particular in relation to Finland, which does not issue certificates attesting to the fact that contributions have been levied there.

A case reported in the Netherlands is surprising. The Supreme Court decided that a person, who was posted from the Netherlands to Germany, was no longer subject to Dutch social security law (liable for contributions) from the moment he or she moved to Germany. The Court considered that there was no longer a link with the Netherlands and that the posting rules were not made for this purpose (even though he or she had a posting declaration which was extended after moving to Germany). This judgment appears not to be implemented by the administration in other cases than the one concerned as it is hard to reconcile with the Regulation.

Several questions arise with regard to the posting of self-employed persons. According to some national legislation, self-employed workers are covered under a special scheme for the self-employed. In Spain it has been argued that when a self-employed person is posted to another State where he or she is going to work as an employee that it could be more convenient for the employers to contract them than national workers, due to the social contributions costs. However, in the case *Banks* (C-178/97), the European Court of Justice established that Article 14 A 1.a) Regulation 1408/71 was applicable to self-employed people even in such situations.

There is a particular problem in Poland. Posting of self-employed farmers to another Member State within the framework of farming activity carried on in Poland – as defined in Article 14 a 1a of the Regulation 1408/71 and the Decision 181 – cannot be interpreted as broadly as it is in case of other types of self-employment due to the specific features of farming, in particular its fixed connection with the land. Land cannot be transferred to another country as in the case of non-agricultural business activity. Representatives of the competent Polish institutions (such as KRUS – the Agricultural Social Insurance Fund) disagree with the position of the competent German institutions, which believe that provisions for posting should apply to Polish farmers undertaking seasonal work in Germany in the agricultural sector.

According to representatives of KRUS the type of work conducted by Polish farmers (who in Poland work on their own farm with diversified agricultural products) on farms which belong to other farmers should be classified as paid employment, i.e. work conducted for the benefit of other persons, at the risk of other persons (employer) with set remuneration. In December 2005 the Administrative Commission decided that such persons, on the grounds of Article 14a, par. 1 letter (a) of the Regulation 1408/71, are covered by the social insurance system in Poland. This implies that the German employer in relation to the seasonal work performed in Germany by such persons is obliged to accrue and pay due contributions to the Polish Social Security Institution (ZUS).

According to Polish legislation, persons engaged in paid employment are not covered by the agricultural insurance scheme, which is a supplementary scheme to the general social insurance system. This means that self-employed farmers are covered by agricultural

insurance only if they do not qualify as being covered by other social insurance stemming from employment.

A further problem is the possibility of applying posting provisions to members of farmer's household, who are considered to be self-employed for the purpose of Regulations 1408/71 and 574/72. The Polish Law on social insurance of farmers requires that members of a farmer's household should live in the same household, on his or her farm or in the near neighbourhood (particularly if that farmer works in another country than his or her household members).

Considering the differences pointed out above in the status of the farmer's and members of their household within the meaning of the EEC provisions (both groups are self-employed persons) and in the meaning of the Polish law on social insurance of farmers (additional or different conditions for farmers and for their household members) as well as superiority of application of the EEC provisions there is a need for discussion about the unification of conditions for social insurance coverage for farmers and their household members.

Regarding posting of third-country workers, in France it was noted that some international companies may set up a two-step system: the worker is first sent to a country where immigration requirements are not difficult to fulfil and where the administrative procedure is relatively simple (the UK, for example) and is then posted to France. Following Article 14 of Regulation 1408/71, the worker will be subject to UK social security legislation.

In Slovenia, the legal status of workers posted to Slovenia depends on the nationality of the worker themselves. If the posted worker is a national of non-EU Member State there are different rules for 3 modes of posting: working with a foreign undertaking in Slovenia, working in a registered office or unit of the undertaking in Slovenia, working in a managerial position or in a very specialised profession. The worker had to be employed with his or her employer for a year before posting, the duration of posting is as a rule (with exemptions) 3 month, the Slovenian labour standards have to be observed and the quotas restrict the number of postings. The workers have to be covered by health insurance.

The rules of Employment and Work of Aliens Act on posting do not apply to the nationals of the EU Member States, if an international agreement enables free access to the labour market, to employment and to free movement of services, which are carried out with posted workers. The Government decided on May , 2006 to withdraw the application of the principle of reciprocity, so employers from all EU Member States can freely post their workers to Slovenia.

b.2. Duration

In some National Reports it was pointed out that the maximum period of 12 months for posting is outdated and not compatible with assignment periods for many employees, particularly international companies. This period is, in many countries (Austria, France, Germany), is considered to be too restrictive when compared to (much) longer durations in national law or in some international agreements. One other problem with duration is the difference in maximum duration between posting in social security on the basis of Article 14 (12 months) and posting in fiscal law as defined in the bilateral tax treaties or posting under the free movement of services provisions (labour law).

For example, in Germany, the period of 12 months for posting is not only believed to be outdated, but also to be incompatible with assignment periods for many employees, particularly international companies. Under some international agreements or under national social security law, a longer period is provided (e.g. the Social Security Agreement Germany – Japan: 5 years).

In Hungarian Health insurance, a posting limited to 12 months can rarely satisfy the actual economic needs, as it is generally shorter than the period of time necessary to fulfil the contract. The 12 month period has caused problems or tension especially for the States which had bilateral agreements allowing longer periods of posting before accession to the EU.

b.3. Administrative Formalities

The administrative formalities to be fulfilled in the case of posting are sometimes considered complicated giving rise to a number of questions. For example, the Greek report states that it is indispensable for the competent institution of the Member State, whose legislation remains applicable, to issue form E 101 or, at least, a 'To whom it may concern' document for the sake of the institution of the host Member State, so that the latter becomes aware that the person concerned does not fall under the legislation it administers. Although self-evident (a clear (first) obligation by virtue of Regulation 574/72) some institutions are unwilling to respect their obligations under Community law, only complying with those rules after the intervention of 'contact persons' – liaison bodies or competent authorities. Sometimes, the institution concerned never issues such a certificate. The outcome is that the Regulation is not implemented or, in order to be implemented, other persons or authorities lose precious time.

Increasingly since the cases from the Court of Justice (Herbosch Kiere) a consensus is growing between the Member States that the E101-form is not adequate and that a new system is required.

In Belgium the question was asked whether the E101 form is superfluous and if not given out by the sending Member State, the Belgian administration should look for evidence? Should the *Banks* and *Fitzwilliam* case law be disregarded and should the competent Belgian institution accept labour contracts, proof of residence and proof of submission to the social security legislation of another Member State instead of requiring an E101-form? French companies also appear to consider that Regulation 1408/71 allows for the choice between posting and expatriation. In other words, even if a worker meets the conditions to be posted, the employer may prefer to choose the application of the '*lex loci laboris*' if the labour state legislation happens to be more favourable in terms of contributions.

This leads to a very sensitive debate on whether 'posting' is automatic and an obligation or an exception and a choice. If a worker is sent to another Member State and falls under the definition of posting, is he or she a posted worker according to the Regulation and is that the end of the story? It is, however, suggested that the competent authorities in the century should treat this segment of labour market with the necessary open-mindedness and flexibility and not lose themselves in a witch hunt for posted workers. Is it to be expected from a corporate director that s/he presents an E101 form for a meeting of one day (this statement was not welcomed by trade union representatives)? Is it to be expected from a work agency to present E101 forms for 5 days work? The reaction to this was that in some countries, and certainly in the sensitive professional sectors such as construction or cleaning services, a posted worker cannot enter the country without an E101 form. This means that in certain sectors there is over-control. However the Belgian

administration cannot introduce different treatments for different types of professions. In Belgium, Article 69 of a Law of 4 August 1978 is reevaluated by the national courts in the field of posting. This Article states that every person with whom or for whom employees of a third party are 'used' and these employees remain subject to the social security legislation of another Member State of the European Community than Belgium, must declare in writing, during the first day of presence of these employees, the names of the employees and of their employer and his address, if they cannot prove their insurance under another legislation by the posting form provided in Article 11 of Regulation 574/72. If not, the company can be criminally sanctioned. In practice this means that with Belgian firms, as long as the worker does not present an E101, he or she is not allowed work within the firm. It was, however, repeated that controls on posted workers should be reduced. Too much control of posted workers is evidently at odds with the EC Treaty provisions on the free provision of services within the Community. In the aftermath of the Court of Justice's *Fitzwilliam, Banks and Herbosch Kiere* decisions, concern is expressed by the authorities as to the difficulties of reviewing and supervising the contents of E101 forms delivered by other Member States. The fact that E101 forms are, in certain Member States, delivered by sickness institutions does not seem to inspire much trust. Investigating the accuracy of the information contained in E101 forms seems to be even more difficult when these forms are from the new Member States, with whose social security systems the Belgian authorities are not yet familiar. The main problem is probably the distinction made between employees and self-employed in Belgium. The distinction is not always as clearly made in other national legislations, which causes concern with Belgian authorities.

The suggestions of the Court to resolve disputes as to whether a posting declaration was correctly given by another Member State - i.e. by bringing the case before the Administrative Commission and if necessary to the Court - are not seen as very practical. Instead, problems are preferably solved by concluding Article 17 Agreements.

In Estonia another problem was mentioned. From 1 August 2006 amendments to the Aliens Act and a new Act on Citizens of the European Union came into force. Previously, the International Department of the Social Insurance Board when checking whether the relevant conditions for posting were satisfied prior to issuing the E101 form, had inter alia, relied on the existence of the ID-code issued by Estonia. Now requests have been made by some Estonian companies for posting of nationals of other EU Member States who do not possess the Estonian ID-code (e.g. posting Polish nationals to Sweden). The Social Insurance Board is not certain how to deal with such requests.

In Hungary, the decentralised management of the issuing E101s can lead to confusion, as on occasions the competent institutions do not know if they are authorised to issue the form, which makes it difficult for employers as they do not receive their E101's in time.

It was reported by the competent authorities in Cyprus that the form E101 issued by them is accepted without any problems by the corresponding authorities of the other Member States and that there were no points of friction in that regard. In a particular case, Cypriot Services of Social Insurance had issued form E101 under Article 14.2(a) to drivers who used to work in various Member States. The drivers in question were employed by a Cypriot company which used to employ them in view of their employment at other companies engaged in transportation in other Member States. The German competent authority (AOK Die Gesundheitskasse) submitted a query to the Cypriot authorities as to whether the company in question had been licensed in with reference to the employment of these particular employees. Cypriot legislation does not, however, contain any requirements for such a licence.

Portuguese institutions are often confronted with forms E101 that, in what concerns the period of submission to the legislation of another Member State (for instance, under Article 14-2-b), is undetermined. Institutions consider this practice to be inadequate, since there is longer control if the person in question remains insured in the other Member State. It appears that it would be convenient to adapt the form for periodical renewal. This is in case of change in the situation concerning affiliation in the other Member State, if the local legislation becomes applicable.

Moreover, institutions consider that Article 12A of Regulation 574/72 should be modified in order to establish effective methods of obtaining and changing information on income (wages or revenue) to allow calculation of contributions in the appropriate period of time. As the period of payment of contributions is not identical in all Member States the situation becomes complex when contributions cannot be collected globally, and it is necessary to evaluate earnings considered for the calculation of short-term benefits (i.e., sickness, maternity/paternity, unemployment). This perspective should be examined in the text of the new application regulation.

In France Article L762-1 of the labour code provides that performing artists are presumed to be salaried workers. This presumption can be rebutted if an individual proves that s/he pursues his or her activity on a self-employed basis. Despite justifications proposed by the French government, the European Court of Justice ruled that by imposing the presumption of salaried status on performing artists who are recognised as service providers and established in their Member State of origin, where they usually provide similar services, France has failed to fulfil its obligations under Article 49 EC [Case C-255/04 Commission v. France]. However, since the Ministerial Circular 2001/34 of 18 January 2001 was issued, it is clear that performing artists established in another Member State are no longer subject to the presumption of salaried status when they hold a Form E 101 which proves their affiliation in another Member state. The Court could not take account of this argument since the Circular had been published later than the end of the period prescribed in the reasoned opinion. In any case, it appears that a circular (also see another Circular DPM/DMI/2 2005-194 of 19 April 2005), is not sufficient to avoid violation of Article 49 EC. The legal presumption of salaried work would need to be modified. The law itself should add that the presumption is applicable "except when it is contrary to international agreements".

3.2 Application of Article 17 of Regulation 1408/71

Article 17 can serve as an exception to the provisions of Article 14.1.a concerning posted workers. Therefore, in cases when an undertaking posting its employees to another Member State does not meet the posting criteria: i.e. it does not carry on significant activity in posting state, it still can benefit from the possibility of applying legislation of the posting state on the basis of Article 17 of the Regulation 1408/71. Often agreements are concluded that extend the maximum duration of the posting provisions. In many countries, Article 17 Regulation 1408/71 is applied quite often due to the fact that, contrary to EC coordination law, there is no time limit for posting in municipal law, the latter only requiring that the person concerned is still employed in the country concerned and that the duration of his or her work abroad is temporary. Besides, it is generally not feared that an employee temporarily posted abroad will suffer any social disadvantage through the continuation of affiliation to the system of social security of the posting state.

In some countries the maximum duration of the agreement is set. The Danish practice is that in the main it only accepts agreements under Article 17 for a maximum of three years. If the planned period of posting exceeds three years, the posted person should

(from the beginning) of posting be covered by the social security legislation in the country of employment. However, there are exceptions when the employee pays tax in Denmark, for example, the Øresund Bridge Consortium, where the person, residing in Sweden but paying tax in Denmark, may have the application of Article 17 extended beyond three years.

In Finland Article 17 is used if it is known that the posting period is going to exceed one year when the application is made. The maximum period is five years. This seems to be the practice in most of the Member-States (for example, Cyprus, Netherlands, etc.). Finland often refers to Article 17 when approaching the Estonian Social Insurance Board for extension of the period of posting, whereas the Social Insurance Board from its side prefers to use form E102 for this purpose.

As the Polish and Latvian reports make clear, Article 17 is mainly applied in cases when individual exceptions from posting rules are claimed. In 85 per cent of the cases in Belgium, Article 17 is used to extend the duration of the posting up to 5 year. It is to be understood that in these cases, all conditions for posting are met and the only exception to the rule contained in Article 14(1) and 14a(1) concerns the duration of the posting.

Another application of Article 17 relates to cases where employees are sent to work abroad for a short period of time but where the conditions for posting are not fulfilled (e.g. the employer does not carry out substantial activities). Given the limited duration of the work abroad, it is possible to opt to remain subject to the legislation of the sending State. An example would be a French multinational which decides to set up a branch in Belgium. It recruits staff in Belgium and first sends them to France to follow a training course for a period of one month. In this case, the condition relating to substantial business activities is not met. By virtue of an Article 17 agreement, the workers could remain insured under Belgian legislation.

However Article 17 can also be used in other circumstances. In Estonia, this possibility has mainly been applied in respect of cases of determination of applicable legislation, where a person is working in the territory of two or more Member States.

Several agreements have been concluded between France and other EEA countries and Switzerland on the basis of Article 17. Some of these agreements concern major international companies such as Airbus. For example, France and Spain have agreed that toreadors residing in France and occasionally taking part in bullfights in Spain remain affiliated with the French social security scheme for their activities in France and with the Spanish social security scheme for those in Spain.

Another agreement deals with the applicable legislation for the employees of the Bâle-Mulhouse airport. It partially replaces the dispensatory provisions taken on the grounds of the 1949 bilateral convention between France and Switzerland. As the airport is located in France, French legislation should normally apply (*lex loci laboris*). The intention of the agreement is to provide for employees who reside in Switzerland to remain affiliated to the Swiss social security scheme only. The agreement also gives persons who fall under the scope of the Franco-Swiss agreement and who reside in France an option to be covered by the French health care scheme.

A Temporary Agreement was concluded between the Latvian Ministry of Welfare and the Norwegian Royal Ministry of Labour and Social Affairs concerning Latvian seafarers employed on Norwegian vessels under which they are subject to Latvian social insurance legislation.

Article 17 is also applied in the case of a beneficiary of a pension under the legislation of a Member State, who pursues an activity (as an employed or self-employed) in Greece, since Greek legislation does not exclude pensioners who exercise a professional activity from compulsory insurance in respect of such an activity. The Greek competent authority is reluctant to agree to the exemption of that category of persons, on the one hand because the wording of Article 17a (grammatical interpretation) has created a certain degree of confusion, as to whether pensioners of a Member State who are active in another State are exempt from the scope of Article 17, i.e. as to whether there could be no derogation from the general rule under Article 13(2)(a) or (b) in that specific case. On the other hand, the persons concerned counter-argue that exemption from Greek social security legislation is in their interest, since they are already entitled to a pension and maintain all acquired rights (full social protection), by virtue of the Regulation. Consequently, they insist that their affiliation to Greek social security legislation in their capacity as 'workers' is a disproportionate burden (taking account of their age) and claim that they should remain under the legislation of the first Member State in their capacity as pensioners.

Article 17 appears also to be used extensively in Greece by employers who, due to the short duration of employment in Greece, want to maintain Greek legislation as applicable. This occurs mainly where an employed person is usually sent by the parent company to perform work for that undertaking to the subsidiary company in Greece, and although the direct relationship criteria of Decision No 181 (Point 1) are fulfilled (especially the responsibility for recruitment, the employment contract, dismissal and the obligation for the employed person's reintegration into the sending undertaking as well as the payment of social security contributions), those Member States deem that the 'organic link' is interrupted (or does not exist) if purely employment conditions (labour law) e.g. payment of the wage-salary, working hours and holidays fall under the responsibility of the subsidiary (host) undertaking. In such cases, while the outcome, both under Article 14(1)(a) and 17, may be the same, (although an important question of principle arises, i.e. uniform interpretation/implementation of Community provisions – Administrative Commission Decisions), the procedure followed is, on the one hand, extremely burdensome and time-consuming for employers and the administration (often going beyond the posting period in question) and on the other, disturbs legal security in respect of the employed person.

The Greek competent authority has experienced great difficulties with the implementation of Article 17, as a derogation from Article 14c(b) (for the exemption of self-employed persons from Greek legislation) in its relations with Scandinavian countries. The designated bodies of those Member States do not deem the application of Article 17 in such cases to conform to the Greek entry under Annex VII, point 6. In principle, they consider that this entry, - double affiliation - as binding and always applicable. In many cases, where the Greek competent authority has intervened in writing, explaining that this proposal for such an agreement is fully acceptable, in so far as it is in the interest of the person concerned, those designated bodies responded that derogation from Article 14c(b) is a case that should be solved by Greece unilaterally. Derogation from Article 14c(b) by virtue of Article 17 is also in conformity with ECJ's case law whenever double affiliation becomes a disproportionate burden for persons either not exercising a substantial or any activity in Greece but are falling under Greek legislation in their capacity as self-employed (social security criterion). Moreover, whenever a person is not exercising any activity in Greece, the reaction of those designated bodies is that the said case is not falling under Article 14c(b), but under Article 13(2)(a), i.e. a major question of uniform interpretation of a fundamental concept.

The main problem is, however, that there is no uniform interpretation when Article 17 should be applied. In determining whether it is in an employee's best interest to grant an

extension of posting, the Belgian authorities examine whether the continued application of the legislation of his or her home Member State is in his or her best interests, rather than investigate if there is an interest in the application of that legislation itself. The Belgian authorities do not consider additional private insurance a criterion. The predominant criterion is not the economic interest of the institution or the competent State where social security contributions would have been paid if that legislation became applicable.

In the Czech Republic, the provision is increasingly used out of mere personal, economic convenience, by persons wishing to be insured in the Member State whose legislation is the most advantageous.

In France, a difference is made between two kinds of agreements: agreements for specific well-defined categories of people (in this case there is hardly any margin of discretion) and agreements in case of individual files (many elements are taken into account, e.g. the professional career), elements with respect to the sending company (substantial activities in the state) or the receiving company or the person (close to retirement?).

Portugal draws attention to the fact that Article 17 is an exceptional rule, which aims to allow the Member States to find solutions that can help workers in very specific circumstances when general or special rules are not applicable or do not allow a solution in the best interest of the worker. It's not an open door to subvert the principles that govern the determination of the applicable legislation.

From this perspective Article 17 must be used sparingly in order to resolve problems related to particular situations that justify the derogation from the other rules and where this is in the interest of workers. Portuguese institutions are faced with a large diversity of criteria in their relations with other Member States, especially when the agreement is for a period longer than five years. Recommendation 16 is often quoted to deny arrangements when derogation longer than five years is demanded. However, it seems that the intention of the Recommendation is precisely the opposite.

The Portuguese position on the subject is to find the correct solution to the situations that are submitted to the Portuguese authorities. Therefore the Portuguese institutions expect a reciprocal attitude from the authorities of the other Member States.

Many problems also arise in certain, exceptional cases, where some Member States' competent authorities assign the discretionary power for Article 17 agreements to decentralized 'designated bodies' (local administration in Scandinavian countries and recently Italy). The question is inevitably raised whether such a 'national discretionary power' could be exercised by any or every local institution designated by a Member State's competent authority. In other words the Greek report asks the question as to where such a broad national discretionary power is so decentralized, can it be exercised in conformity with the aims and the spirit of Community legislator?

It has to be stressed that according to the case law of the Court (Case 101/83 *Brusse*), Article 17 agreements should not be concluded in the interest of institutions (or the employer) but in the social security interest of the persons concerned. Is a local institution in a sound position, or has it the legal-political power to decide on such a broad question as affiliation or exemption from national legislation, and how can uniform understanding of the interest of the person concerned be guaranteed in similar situations?

The Polish report, however, mentions that competent institutions in certain countries refuse to conclude these agreements. However, employees often go abroad for short periods of not longer than a few months. Changes of social security system for a short period of time could be disadvantageous for the employee. It may even, according to the Polish report, infringe the principle of freedom of services and freedom of movement. What can be done if the competent institutions are not willing to sign such an agreement? The Dutch report mentions a case where the national Court declared a claim from an applicant disputing this refusal as non-admissible. It is, of course, not so easy to imagine a process in which a refusal to conclude an Article 17 Agreement can be brought before a national court, since the position of the partner State is often relevant. How can a national court decide on such a situation? Could the Administrative Commission play a role here in filling this gap?

Belgium has concluded a bilateral agreement with Luxembourg, pursuant to Article 17 and acting upon CASSTM Recommendation No 18, to the effect that workers who receive unemployment benefits in the State of residence and who at the same time pursue a part-time activity in the other State remain subject to the legislation of the State where they reside. It has been noted that this agreement, in practice, does not always serve the worker's interests. If a worker who resides in Belgium and who receives unemployment benefit there takes up a partial activity in Luxembourg, the employer should pay contributions in Belgium. Often, the employer will be reluctant to do so, fearing the additional administrative procedures and the higher Belgian contributions for a 'mere' part-timer. As a result, the unemployed person is *de facto* obliged to forego his or her Belgian benefit if s/he wants to get hired in Luxembourg.

The Finnish authorities have found that the Czech Republic has a strict policy when concluding agreements according to Article 17. The Finnish Centre for Pensions has been in contact with the Czech authorities and it seems that the Czech Authorities emphasises other than economic factors. Grounds for setting up an Article 17 agreement are, for example, the fact that the person is close to retirement age and circumstances where the posted worker is accompanied by family members who are in receipt of social security benefits from the posting state.

The fact that a common practice with respect to Article 17 is not being observed, could be challenged before the Court of Justice on the basis of equal treatment. It can not be ruled out that someone would challenge the refusal of an Article 17 Agreement, arguing that another person in an identical position had been granted the benefit of this exception.

4. Aggregation of periods

4.1 Introduction

One of the fundamental principles of social security coordination is the retention of rights which are in the process of being earned, i.e. the accumulation of periods of insurance, residence or employment completed in one Member State to establish a right in another Member State. The primary legal basis for this is Article 42 EC, which states explicitly that coordination guarantees the aggregation of all periods taken into consideration according to the various national legal regulations for acquiring and receiving an entitlement to benefit, as well as for calculating these benefits.

The principle of aggregation of periods of time is of importance in those cases where there are requirements in national legislation such as the requirement to have been

insured for a period of time in order to be entitled to certain social security benefits (e.g. sickness benefits, unemployment benefit, old-age pension).

Under Regulation 1408/71, the State responsible must take account of periods of insurance and employment which have occurred under the legislation of another Member State when determining legal entitlement to such benefits. In Regulation 1408/71, this is made effective through a series of individual requirements, whereas in the European Commission's proposal for a new coordination Regulation a single general clause is suggested.

In general, it can be said that this principle consists in the aggregation of the insurance periods completed in different Member States. In addition to insurance periods in respect of contributions paid, periods of employment and self-employment are aggregated, as are periods of unemployment, provided that they are regarded as relevant by national legislation. Benefits may be adjusted if a worker is entitled to both a benefit in his or her home country and benefit(s) from (an) other Member State(s) either by the determination of a unique State which will grant the benefit or by the application of overlapping benefit rules.

As a rule, a worker is only insured in one Member State for any one insurance period. Insurance from one period in Member State A cannot be used to obtain benefits of the same kind in Member State B. Although the rules on aggregation of periods seem to be clear, there are some problems in practice.

The Greek report states that how different types of period, especially assimilated ones, are functioning in the context of national legislation is only apparent when looking at the classification of all periods and the specific remarks, appearing in the context of some Member States' E 205 forms. Yet, what is not apparent, is the extent to which the assimilation expressly provided for under Article 45, enables each competent institution involved to 'transform' the nature and impact of another Member State's periods, into the way 'equivalent' periods are classified and 'used' under its own legislation. How should Article 45 be implemented if under Member State's A legislation certain periods of insurance are assimilated to actual insurance and under Member State's B legislation those types of period are not taken into consideration for entitlement to all categories of old-age pension (different qualifying conditions: varying number of periods of insurance required in combination with correspondingly different pensionable ages)?

In Belgium, one of the questions concerning unemployment which regularly arises is whether or not insurance periods have to be taken into account in a Member State if these periods would not have counted as periods of employment in the Member State itself. Belgian courts have been known to answer this question in a negative way. However, the question is whether such case law is compatible with the principle of free movement.

In Cyprus, periods of military service and child rearing are treated as insurance periods. It is not, however, clear under the scope of Article 15 of Regulation 574/72 whether this provision should be applied where an insured person is entitled to a pension on the basis of Cypriot legislation with no reference to the coordination Regulations, while being at the same time entitled to such a right in another Member State on the basis of the coordination Regulations.

In Finland, new legislation on earnings-related pensions entered into force at the beginning of 2005 and child rearing periods and periods of study are now treated as insurance periods. It is not, however, clear yet how the provisions concerning these periods of study and child rearing are implemented when Regulation 1408/71 applies.

Another issue arises where, under the legislation of a Member State, periods of employment after the age of 65 are not considered as periods of insurance (the person concerned, although employed is not subject to social security legislation – UK), where the said person has completed (after the age of 65) periods of insurance under the legislation of another Member State (applicable legislation by virtue of employment in the territory of that State). Is it compatible with the Treaty (Article 42) for the first Member State not to take into consideration those periods of insurance?

There is a problem with 'periods of residence abroad' completed in certain countries where under their national legislation those 'proved periods of residence' give entitlements to pensions. For example, Poland recognises those 'completed period of residence' accepted by other Member State as periods of insurance. For the purpose of awarding Polish old age or invalidity pensions those periods are registered as equal to contributory periods completed in Poland. This solution is criticised by some of officials who believe that those periods of residence should be treated, at most, as equal to non-contributory periods completed in Poland.

In the course of the aggregation of periods of insurance, Hungarian health insurance bodies take account of only those periods of insurance which give entitlement to cash benefits in the given Member State. However, the health insurance bodies of some States report only the periods of entitlement to health services, and it is difficult to decide whether they can be taken account of.

In the field of Hungarian unemployment benefits this principle could be realized fully if the exchange of information between two or several Member States was smoother. The failure to fill in or to fill in E forms properly, used for ensuring information flow between the Member States, is not penalised, and for this reason some Member States do not consider it important to disclose information specified in the Regulations. As these forms constitute the basis for entitlement to benefits, clients frequently suffer a disadvantage because the unemployment benefit cannot be awarded to them, or only much later when they may have already found new employment.

In Slovenia, pension and invalidity insurance conditions for entitlement and calculation of pensions and other benefits are related to periods with paid contributions and also assimilated periods. Assimilated period of child rearing in the first year of child's life and the period of entitlement to unemployment benefit are aggregated and affect entitlement and calculation of the benefit. Periods of regular studies at higher level, periods of registered unemployment and periods of army service are aggregated for entitlement but not for the calculation of pension and other benefits. If contributions are paid for these periods, than they are also aggregated for the calculation.

In the interpretation of Regulation 1408/71 the question of aggregation of the period of the first year of a child's life in pension and invalidity insurance, which were obtained while being subject of the legislation of another Member State in which these periods are not aggregated, may arise. The question of overlapping may arise as well. For entitlement to flat rate means-tested state pension, financed from the budget, for persons not entitled to any other pension, a period of 30 years of registered permanent residence in Slovenia between the 15 and 65 years of age is required. The question may arise whether residence in EU Member States should be aggregated?

- a. Totalisation with regard to the special social security schemes for civil servants

In Austria, problems pertaining to the aggregation of periods with regard to special social security schemes for civil servants, are encountered mainly in the field of old-age, invalidity and survivors' pensions. Although the extension of the personal scope of Regulation 1408/71 to civil servants has solved many problems, difficulties still remain for persons who change from a normal scheme to a special scheme because previous periods are taken into account only when they are recognised under the legislation of the competent state. Austria, however, has laid down an exemption in Annex VI.

Although the French *code des pensions civiles et militaires* (civil servant and military pensions code) was reformed in 2003, the system of aggregation of periods for the old-age pension scheme in favour of civil servants may not be compatible with Regulation 1408/71. The civil servant scheme provides no specific rules to take into account periods of residence or contributions completed in another EEA country. Article 51 of Regulation 1408/71 allows this lack of aggregation.

In the Netherlands the previous statutory scheme for civil servants for old-age supplementary benefits was privatised and consequently became a supplementary social security scheme, which is still not within the scope of the Regulation. As a result, even though the Regulation now extends to special schemes for civil servants, occupational old-age benefits for civil servants still fall outside the scope of the Regulation.

In Portugal, after the inclusion of the civil servants scheme in the material scope of Regulation 1408/71, some difficulties have been detected concerning the possibility of aggregation of periods under Regulation 1408/71.

Several people who have competed periods of insurance in Portugal, under the civil servants scheme and under a general scheme of insurance in other Member States have seen their claims to retirement (old age) pension refused by the Portuguese institution (Caixa Geral de Aposentações). People that had contributions in Portugal under the two main schemes (general scheme and civil servants scheme) under the terms of Decree-law 363/98, of 18 November, have the possibility to claim the "unified pension", i.e. one pension corresponding to the total of the periods of insurance in the two schemes, that is calculated and paid in general by the scheme where the person has been last affiliated. The amount of the pension can not be less than the amount of pension that could be paid separately. The two institutions involved will each assume the cost of the respective part of the pension that corresponds to the respective schemes. The problem emerges when the person has been last insured in another Member State, when s/he submits the pension claims. As the civil servants scheme can only recognise entitlement to the pension for people under 70 years when the person is currently insured (meaning in activity or equivalent), the Portuguese institution rejects the claim on the grounds that the person is not insured in Portugal at the date of the claim. However, if the person was insured in another Member State at the date of the claim and Article 36 of Regulation 574/72, as well as Article 45 of Regulation 1408/71, applies to the situation then the demand is binding on the Portuguese institution. It has to be stressed that Decree-law 363/98 has been amended precisely to take account of the applicability of the European Regulations and bilateral conventions, since the previous text had no references to this particular aspects. In fact, Article 4 of the Decree-law contains a provision that "periods of insurance in other countries can not be taken into account without prejudice of the provisions of Regulation 1408/71".

4.2 Additional remarks

a. Institutional problems

In many countries there is a problem of coordination of different provisions of Regulation 1408/71. Expertise and the approach of different ministries and institutions to implementing the Regulations are sometimes incompatible. Taking the Slovak example where the social insurance companies is a public–legal entity (responsible for insurance schemes), governmental institutions have a rather small direct impact on this institution. Regulation 1408/71 is cross – sectoral, some benefits (employment, family) are divided among two or more institutions in Slovakia and national legislation is yet not fully harmonized.

In Hungary no express legislative tasks are entailed by Regulation 1408/71 although the necessity of possible amendments of rules pension law is being investigated. Otherwise internal rules of procedure had to be adopted in each sub-system. A general necessity is the IT background indispensable to the proper application of legal rules of procedure, and the software for this is being developed in most of the institutions. Finally, it must be pointed out that the process within the Administrative Commission, the aim of which is the supervision of E forms used in individual sub-systems of social security, is approaching its end; thus forms with data corresponding to the Hungarian interests will soon be used in every field.

B. Scope of the coordination Regulations

1. Personal scope

1.1 Introduction

Article 18 EC guarantees the right to freedom of movement in a relatively complete sense. However, priority is still given to special freedom of movement rights of employees and self-employed persons, as the exercise of the general freedom of movement can be made dependent upon special conditions in the terms of Article 18(2) EC especially the condition of sufficient means of subsistence. In principle, the primary law guarantees also to non-working Union citizens the right to move to other Member States than the home State and take up residence there.

The question here is which rights during the period of residence are linked to freedom of movement and, more specifically, how far the anti-discrimination rule of Article 12 EC can go in this context. Articles 42 EC prohibits direct as well as indirect discrimination. Discrimination is called 'direct' when a national regulation uses the nationality criterion to distinguish its own nationals and nationals from other Member States, or subjects different cases to a formally identical procedure. 'Indirect' discrimination appears when a legal instrument does not use a nationality criterion explicitly, but produces, by use of other distinguishing criteria, the same or similar effects as the ones produced by the forbidden distinguishing criterion itself.

The French report states that the impact in France of the emerging European Court of Justice jurisprudence related to citizenship in the European Union and social security benefits remains hard to evaluate but cannot be ignored since it has an indirect impact on Regulation 1408/71. The ECJ rulings show that in particular circumstances European citizens are entitled to assistance benefits without any discrimination based on nationality. French authorities, who continue to refer to the three 'right of residence' directives (directives 90/364, 90/365 and 93/96 – repealed by directive 2004/38) to deny this type of benefit in principle will surely have to revise national legislation.

On the impact of European citizenship on the Regulation it was argued in the UK that the case law driven away from work derived rights towards those based upon the concept of European citizenship introduced some uncertainties and possible anomalies. An argument was put forward that economically active people should be the focus of coordination and consequently 'workers' should continue to have a bigger 'box of rights' than 'citizens'. However, it was pointed out that this position is being challenged by the developing case law of the European Court of Justice on European citizenship and Article 12 EC (*Martinez Sala, Grzelczyk, Bidar, ...*). These developments are of concern to the UK and the Scandinavian countries with their partially residence-based systems. It was pointed out that several restrictions in secondary legislation (residence directives, Regulation 1408/71) are now potentially compromised by the impact of European citizenship and future developments are unpredictable as citizenship rights appear to be increasingly important. The jurisprudence concerning the Habitual Residence Test in the UK was cited as an example. In the *Snares* (C-20/96) and *Swaddling* cases (C 90/97) the Habitual Residence Test was held to be compatible with Article 39 and Article 10 (a). However, in the more recent *Collins* case, where the claimant fell outside the scope of Regulation 1408/71, Collins argued that the Habitual Residence Test was discriminatory. This raises important questions as to whether people who are outside the scope of Regulation 1408/71 may, perhaps ironically, have greater rights than people who fall within the scope of the Regulation; or, conversely, whether secondary legislation is restricting Treaty rights?

The question of who is covered by the coordination regulation does not cause problems in the Hungarian pension scheme, with the exception of third country nationals, where the enforcement of the claim may entail problems. The problem is when nationals living in a third country have multiple citizenship and they choose the citizenship of the country which they think will be more beneficial to them in the administration of their cases. It can be assumed that problems arising from multiple citizenship not only affect Hungary. Unfortunately, multiple citizenship is not regulated by the Regulation. Although this question is not arranged in the Coordination Regulation, according to European Law (ECJ Micheletti, Case 369/90) a person with double nationality, one of which is the nationality of a Member State, will always be considered as an EU-national for the application of EU-Law.

There has been an increase in Finland in the number of short term working contracts and workers coming to Finland through foreign recruitment firms. These workers have contracts with the recruitment firm and in practice only work when needed by the Finnish firm. This presents problems in relation to satisfying the minimum criteria for coverage in the residence based social security system. It appears that this form of working contract is increasing in connection to several Member States.

In the Netherlands, there are still some cases in which there is discussion on whether a person is self-employed or not: for example, is a person who rents two or three houses (and does not have other activities) a self-employed person? It is of course relevant whether these activities can be considered as professional activities or merely as investments.

In Slovenia, the distinction between employed and self-employed status is unclear for persons who stipulated an employment contract with an employer in Italy or Germany, who have residence in Slovenia and who de facto work in Slovenia. They do not have self-employed status according to national legislation of Slovenia. New flexible working patterns (for instance tele-work) raise new questions on applicable legislation.

The Self-Employed Act was passed in Spain in 2007. Article 1 defines its personal scope and introduces into Spanish legislation the concept of « self-employed persons

economically dependant ». To be qualified as a self-employed economically dependant it is necessary, among other requisites, to perform an economic or professional activity in a personal and direct way for a specific client that provides at least 75 per cent of the self-employed person's total income. As far as a coordinated social security scheme (« régimen especial de autónomos ») is applicable to these persons, Regulation 1408/71 is also applicable to them.

a. Concepts of employed or self-employed persons

The Spanish report makes clear that the legal interpretation of the notion of worker for the purposes of community coordination in Social Security systems need not coincide with the meaning of free movement of workers: there can be persons protected by Regulation 1612/68 who, however, are excluded from the personal scope of application of Regulation 1408/71. And vice versa: persons excluded from the scope of Regulation 1612/68 are included in Regulation 1408/71 (self-employed workers).

An employed or self-employed person whose entitlement to Finnish social security is determined according to Regulation 1408/71 is subject to social security legislation from the date of starting employment or self-employment in Finland. However, there is an additional requirement stating that the employment must continue uninterruptedly for at least four months. This definition is applied only if the person is not considered to be permanently resident in Finland. The definition of residence is more detailed than before. 'Employed person' is a person who intends to work uninterruptedly for at least four months, and whose working time is at least 18 hours a week and has a minimum income provided by labour market agreements or alternatively 40 days of basic unemployment cash benefits.

According to the reasoning behind the legislative reform these conditions for minimum activity and minimum income are conditions for insurance and cannot be treated as qualifying periods. These legislative changes lead to many discussions. Cases have already arisen concerning Sweden and Finland where a person residing in Sweden but employed in Finland is not insured in Finland because the duration of employment is less than four months. Nevertheless, the person is not covered by Swedish social security legislation because s/he is considered to be economically active in Finland and therefore Finland is the competent state. One could ask if the Court of Justice in its *Klaus* (C-482/93) and *Moscato* (C-481/92) cases was not of the opinion that aggregation also includes the start of insurance coverage?

In different countries employed and self-employed persons are subject to different social security schemes. Due to the subtlety of the 'subordination' criterion, there is, however, currently no clear and definite frontier between employed and self-employed persons.

In Malta, the self-employed are defined as people gainfully occupied other than under a contract of service or apprenticeship. However, the legislation also provides that people who are not employed, nor otherwise gainfully occupied, shall also be considered self-employed, and liable to pay contributions. Thus the concept of self-employment in Maltese legislation includes people who in other jurisdictions would be considered as 'non-employed'. However, the legislation exempts from liability a number of categories including non-occupied married people or those in full time education or training. For the purposes of Regulation 1408/71, self-occupied persons defined in Maltese legislation are the same as defined under the Regulation (see Annex I of the Regulation).

In Slovenia, more detailed provisions on the procedures of registering for insurance are found in the Registration of Insured and Entitled Persons in Pension and Invalidity Insurance Act. In practice the problems are related to identification of persons who, at

the territory of Slovenia, are performing self-employed activities and establishing whether they are self-employed or employed as well in the Member State where they reside or in other Member State.

In Ireland, an issue is raised concerning the position of refugees. While asylum seekers are not within the scope of Regulation 1408/71, refugees are. A question arises as to whether a refugee (once recognised as such) should be entitled to be treated as within the scope of the Regulation from the date of arrival in the country, for backdating of benefits.

The Portuguese report argues, regarding citizens of third countries, that it would be convenient to establish more rigorously what is meant by «legal residency». Is this a formal juridical notion regarding the title which confirms the residency, or should we instead regard the Community's notion of residency as it has been defined by the Regulation and interpreted by the Court of Justice?

In the Czech Republic the category of 'permanent residence' is not identical with 'domicile' as employed by Regulation 1408/71. The Czech Government and its Coordination Committee for Regulation 1408/71 are aware of this inconsistency in definition. The Czech Government is considering the possible consequences of this discrepancy and is considering how to avoid possible negative impacts. Other States have a similar problem. However, in the Czech Republic this problem has been treated in a uniform manner in accordance with the findings of the Constitutional Court and of the Supreme Court of the Czech Republic, which harmonized the understanding of permanent residence under all EU agendas.

In Slovenia the main problems for employed and self-employed third country nationals are related to their family members, who are not entitled to health insurance benefits and to family benefits, if they do not have permanent residence in Slovenia. One of the conditions to obtain permanent residence is 8 years of uninterrupted residence in Slovenia.

Denmark does not apply the Regulation to third country nationals. This derogation has caused some changes to the Nordic Convention too because Denmark does not apply the Nordic Convention on third country nationals as prior to the Regulation on the application of Regulation 1408/71 on third country nationals. Even though Norway and Iceland do not yet apply Regulation 1408/71 to third country nationals, they do apply the Nordic Convention to third country nationals. This means that some of the rules and principles of Regulation 1408/71 are indirectly applied to third country nationals who move between the Nordic countries.

In Belgium, discussions took place around the status of German corporate directors with reference to Article 15. Discussion arose as to whether Article 15(1) was correctly applied, given that the Court based its decision on the assumption that Germany has a mandatory insurance system, whereas it is clear that this mandatory system does not apply to corporate directors. The Ghent Labour Court of Appeal ruled that the general mandatory social security system in Germany is not to be taken into account for the application of Article 15 (1). In the framework of the German system, there is no mandatory social security scheme for directors. As a consequence, the general rules of the Regulation for determining the applicable law remain relevant. An EC citizen holding directorships in both Germany and Belgium is therefore subject to social security legislation in his or her countries of residence, provided he or she holds a directorship in that Member State.

Even if the solution adopted by the Court seems to be logical, it is still unclear what the influence might be of Article 15 (2). It may be subject to discussion whether Article 15 (2) can be applied without rendering Article 15 (1) futile, or whether both rules have scope of their own.

b. Relationship between employed and self-employed persons and the applicable legislation

Regarding Article 14 (a) (1) and Article 14 (c) of Regulation 1408/71, a particular problem is found in Poland. Should a self-employed person running a business in Poland (carpenter workshop) and at the same time working abroad as a seasonal worker be covered by the Polish legislation (on the basis of Article 14 (a) (1)) since the period of seasonal work abroad is shorter than 12 months? Or should this person be subject to the national legislation of the country where the seasonal work is being conducted in accordance with Article 14 (c) of Regulation 1408/71?

With regard to the *Hervein* and *De Jaeck* cases, the problem of qualification as an employed or self-employed person in Belgium was again touched on. The concrete example concerned the situation of a corporate director, employed in both Belgium and The Netherlands, but also a corporate director in The Netherlands. As he is employed in both Belgium and The Netherlands, and he lives in Belgium, the Belgian legislation is applicable. But the question remains: should Belgium regard his activity as a corporate director in The Netherlands as an employed or a self-employed activity, respectively according to the Dutch or the Belgian legislation? This question was answered with case law from the Court and it was stated that first the applicable legislation must be determined and only then the worker can be classified as employed or self-employed. So the classification of employed or self-employed person is carried out under the legislation that was determined as applicable. The administration answered that it agrees with this in theory, but from a practical point of view the re-qualification is not put into practice.

c. Frontier workers

The issue of frontier workers, i.e. persons who are employed in one State while residing in another State and who return to their State of residence at least once a week (Article 1(b) of Regulation 1408/71) also deserves more attention. The term of frontier worker is not known in many new Member States. Their social security is regulated by direct application of Regulation 1408/71: for example the Czech Republic, Estonia, Hungary.

In Belgium problems are encountered with the pre-retirement scheme (*pré-pension; brugpensioen*) and unemployment benefits scheme. Belgian collective bargaining agreements do not preclude Belgian employers from paying the additional benefit if it appears that the frontier worker is entitled to Dutch statutory unemployment benefits. Employers have to pay the benefit regardless of whether an employee resides in Belgium or in another Member State. However, further to Dutch anti-cumulation rules, the Belgian additional benefit is deducted from part of the Dutch statutory unemployment benefit (i.e. the additional benefit which is granted on top of the regular benefit if the latter is below a certain amount). Sometimes, the Dutch authorities may refuse to consider the worker's unemployment to be involuntary, resulting in denial of unemployment benefits. As things stand at present, there seems to be no solution for these problems, given the fact that early retirement schemes in the Netherlands (*VUT-systems*) are also organised at company level, so that employees who formerly worked in Belgium are generally not eligible for such schemes. In contrast, Belgian frontier workers in the Netherlands who are entitled to a Dutch VUT-benefit, no longer accrue rights for

old-age benefits under the Dutch AOW-scheme, which only applies to insured persons living in Dutch territory.

Discussion has also arisen with regard to the scheme of *half-time pre-retirement*, which has similarities to the above mentioned pre-retirement scheme, and more precisely concerning the rights of frontier workers living in other Member States. In this scheme, certain older employees may enter into agreements with their employers to reduce working time by 50 per cent, whereupon they become eligible for half-time unemployment benefits and an additional allowance to be paid either by their employers or the relevant industry funds, provided their employers replace them by unemployed persons entitled to unemployment benefits. During half-time pre-retirement, the contract of employment subsists, but it is modified from a full-time to a half-time contract. In practice, it appears that the authorities refuse to grant the benefit to frontier workers living in another Member State. It has been argued that such frontier workers should qualify pursuant to Article 71(1)(a)(i) of Regulation 1408/71. The question is, however, whether Article 71(1)(a)(i), as recently clarified by the Court of Justice, requires that the worker remain available for work on a full-time basis in order to be considered partially unemployed. According to the Court, the reason the competent Member State should grant unemployment benefits in cases of partial unemployment rather than the State where the frontier worker lives, is that the institution of the latter Member State would be considerably less well placed as compared with its counterpart in the competent Member State to assist the worker in finding additional employment on terms and conditions compatible with his or her part-time job since, in all likelihood, such employment would have to be in the territory of the competent Member State. Belgian law does not expect older employees who receive half-time pre-retirement to remain available for full-time work. In the light of this, the question whether Article 71(1)(a)(i) contributes to solving the frontier workers' problem may still be subject to debate. Reference may probably also be made to Article 7(2) of Regulation 1612/68.

d. Family members

The Spanish report refers to a long standing debate whether family and offspring included in the personal scope of application of Regulation 1408/71 can invoke rights entitled to migrants as their own through Community Regulations on coordination of social security or, on the contrary, only those acknowledged as family members of a migrant, that is, the so called as 'derived rights'.

In Hungarian health insurance family members of persons working in another Member State are eligible for derived right only if they have no entitlement arising from the other parent's rights in the Member State where they reside. However, as Hungarian health insurance records family relationships only on the basis of *declaration*, it is often difficult to register family members.

The award of benefits of derived right – in respect of Hungarian legislation – raised the problem of determining, in the case of a single parent, whether the parent who claims the benefit in the Member State of his or her residence and who is not insured falls within the scope of the coordination regulation if the other parent living separately is insured in another Member State. A question arising here is whether the parent residing in another Member State does not provide for the child - or only to a limited extent. A similar question arises in the case of a foster child, who is not the 'natural' child of the spouse or the cohabiting partner.

For example: A mother living in Hungary and raising her child alone has no *insurance legal relationship*? She and her husband, who is in an employment relationship in Austria,

have been living separately for years, they do not keep contact, and the ex-husband pays a nominal sum of child alimony or pays the child alimony irregularly (the parent bringing up the child may not even receive it). Pursuant to the coordination regulations, in this case Austria is the Member State responsible for payment (according to the Austrian regulations, any form of child maintenance is sufficient for entitlement to benefits in contrast with the Hungarian rules which lay down the requirement of "raising the child in one's own household"), thus the payment of the benefit to the parent residing in Hungary has to be terminated and the parent who resides abroad and does not raise/care for the child will receive the family benefit without being obliged to spend it on the child or to forward it to the parent caring for the child.

Under the Flemish long-term care insurance scheme, the concept of "member of the family" is non-existent. For the purposes of the application of the rules determining the legislation applicable in the framework of Regulation 1408/71, account is only taken of personal and not of derived rights. As is apparent from Article 4 § 2ter, the scope of the care insurance scheme extends to persons not residing in Belgium to whom, in their own right, by virtue of employment in the Dutch speaking region of Belgium or in the bilingual region of Brussels-Capital, Belgian legislation applies on the basis of Title II of Regulation 1408/71. In practical terms, this implies that persons who live outside Belgium and who are subject to Belgian social security legislation on the basis of a derived right, do not come within the personal scope of the care insurance scheme and, thus, cannot sign up to it. It is highly unlikely whether this situation is tenable in the light of the ECJ ruling in *Hosse*. In a case which concerned the long-term care insurance scheme of one of Austria's decentralised authorities (the Province of Salzburg), the European Court of Justice, having observed that entitlement to the Salzburger care allowance was a personal and not a derived right, held that a family member of a worker employed in the Province of Salzburg who lives with his family in Germany may, where he fulfils the other conditions of grant, claim payment of a care allowance from the competent institution of the worker's place of employment, in accordance with Article 19 of Regulation No 1408/71, in so far as the family member is not entitled to a similar benefit under the legislation of the State in whose territory he resides.

It appears that, on the basis of this ruling, Flemish long-term care benefits ought to be paid to family members residing outside Belgium (or outside the Dutch speaking and the Brussels-Capital region?) with a worker subject to Belgian legislation by virtue of his employment in the Dutch speaking region of Belgium and – insofar as the worker opted to become affiliated – in the bilingual region of Brussels-Capital.

Nowadays, however, the concept of 'husband and wife' does not have this unique meaning in Europe. But it is true that from the perspective of Community Law the existence, or not, of a marriage link can affect the practice of some rights. One example is the situation of a migrant worker married under a regulation that accords same sex marriage and whose survivor spouse claims a widows pension under the protection of Regulation 1408/71 in a State whose regulations permits only heterosexual marriage.

The subject of same sex marriage was raised in the Spanish report regarding the relation between the case law of the Court of Justice and that of the European Court of Human rights. Can a partner of the same sex be regarded as a family member under the Regulation? What if a Spanish male who is married to another Spanish male working in France, dies there and the survivor spouse claims a widow's pension? In Spain same sex marriage is allowed, but in France it is not. There is no definition of 'spouse' in the Regulation and there have been different interpretations by the Court of Justice. The European Court of Human Rights is defending the right to marriage, but gives no definition of what sort of marriages are meant. While in a first phase, the ECHR held that Article 12 ECHR concerned traditional marriage between two people with different

biological sex, it changed its doctrine over recent years and stated that nowadays it is not evident that the sex of marriage partners has to be determined *only* by biological criteria. However this does not (yet) extend to same sex marriage.

In Slovenia a problem is mentioned in this respect. According to the *Same Sex Partnership Registration Act*, partners in a same sex partnership do not have the status of family member and cannot acquire the rights attached to that status by Slovenian social security legislation. The question was raised whether the same sex partner who is national of another EU Member State and residing in that state and has there a status of a family member, can be deprived of social security rights derived from the partner working in Slovenia.

2. Material scope

2.1 Introduction

Regulation 1408/71 applies to all legislation concerning the following branches of social security: (a) sickness and maternity benefits; (b) invalidity benefits, including those intended for the maintenance or improvement of earning capacity; (c) old-age benefits; (d) survivors' benefits; (e) benefits in respect of accidents at work and occupational diseases; (f) death grants; (g) unemployment benefits; (h) family benefits (Article 4 of Regulation 1408/71).

An ongoing problem remains the classification of new benefits under the Regulations. Whenever new benefits are introduced, the question is raised how to distinguish between social security, social assistance, mixed benefits and benefits which do not fall under the field of application of the Regulation. The fact that in some Member States (eg. Bulgaria) social security is generally understood as social insurance, complicates the matter.

Most problems, therefore, relate to atypical benefits such as non-contributory benefits or the introduction of specific benefits. Several of the *National Reports* highlighted that the distinction between social security, special non-contributory benefits and social assistance under the Regulation is not clear enough. Traditional elements which were seen as criteria to make a difference between social security and social assistance, as for instance the fact if these benefits are means-tested or not or that non-contributory benefits provide only supplementary cover with regard to contributory benefits, are no longer valid. In addition, social assistance benefits are today as a rule, at least in the EU Member States, no longer discretionary. It is also well known that even inclusion in *Annex II a* of Regulation 1408/71 does not solve all problems due to the fact that comparable benefits (even within a State or between States) are sometimes included and sometimes not included in this Annex. There is definitively a need for clearer criteria that allow Member States to categorise their legislations.

Many examples of all these issues can be found in the different national reports. However, since national social security systems or, better, national 'legislation' (Community definition), develop in a very dynamic and in a progressively more autonomous ('unstructured') way, it is apparent that the risks, as enumerated under Article 4(1) cannot directly cover all national regulations or practices nor can 'new social risks' be introduced as 'new' for the purposes of Community coordination. In other words, as long as the list of risks remains as it stands, nothing can be considered as a 'new risk', in spite the fact that, at national level, a separate scheme may be organized.

One of the problems in this respect is that the terminology under national law and under European law does not necessarily coincide with each other and that European social security law has its own concepts.

In the Czech Republic, for example, the distinction between social security, non-contributory benefits and social assistance is quite complicated, because in Czech theory many of the authors still employ some of the terms introduced in the times when the Czech Republic (then Czechoslovakia) implemented the Soviet model. Thus, in place of 'social assistance' in the Czech Republic, academics and the lawyers still employ the term 'social welfare' which includes both social assistance and social services for the most vulnerable in society, guaranteed and in fact provided by the State (see also Spain).

The term 'social security' in the Czech understanding includes all contributory and non-contributory systems providing social benefits to the population as of right. The 'non-contributory system' is the State social support scheme that provides family benefits to the population, in some cases subject to an income test, and financed from the State budget.

Another problem relating to the complexity of differentiating benefits concern complementary pension benefits (see for example, Spain). In a Spanish court case of 17 January 2007, a Spanish person applied for a retirement pension in France and a complementary pension before returning to Spain. Previously, in the 1987 Giletti case, the Court had decided that Article 4(4) of Regulation 1408/71 must be interpreted as not excluding from the scope of that regulation a supplementary allowance paid by a 'Fonds national de solidarité' financed from tax revenue and granted to the recipients of old-age, survivors' or invalidity pensions with a view to providing them with a minimum means of subsistence, provided that the persons concerned has a legally protected right to the grant of such an allowance.

France tried to keep this system purely national, but did not succeed before the Court of Justice. This is of course the well-known intention of all Member States to try to get certain benefits submitted to Annex IIa as special non-contributory benefits. For Spain, the minimum complements to the pension are not in Annex IIa. It is of course crucial whether the Spanish complementary pensions fulfil the conditions imposed to the qualification as an SNCB (complementary, additional or substitutive / related to Regulation 1408/71 social risks / specific protection of disabled persons / enlisted in Annex IIa). Concerning the Spanish complementary pensions, one has to look at the Perez Naranjo case, in which the Court held that a benefit such as the French supplementary allowance mentioned, under the heading 'France' in Annex IIa, constitutes a special benefit. Examination of the method of financing the supplementary allowance, on the basis of the information in the file submitted to the Court, shows that there is no sufficiently identifiable link between the general social contribution and the benefit concerned, which leads to the conclusion that the supplementary allowance is non-contributory. It is clear that the French complementary pensions have a very complex funding structure, but this case has the perverse effect that Spain had to complement the pension of France. If a person receives two pensions from two Member States, the Member State of residence should not deny the complementary benefit.

Classification of benefits plays a role for the correct application of the different rules under the Regulations. A typical example is the long-term care insurance systems. Should these be classified as benefits in kind or in cash? Another example could be found in Sweden where problems have been encountered with a sickness benefit in kind scheme, attendance allowance. Attendance allowance is a social security benefit financed by State revenue. The benefit is calculated on the number of hours of attendance needed and enables the beneficiary to engage a personal attendant of his or her own choice.

Attendance allowance is classified as a sickness benefit in kind, not as an invalidity benefit. In a national case, the Administrative Court of Appeal decided in accordance with Article 13(2)(f) assuming the attendance allowance to be a benefit in kind. The Court argued that both persons had ceased to work in Sweden. Since the husband was no longer a Swedish resident and since the national legislation of the former work state (Sweden) had ceased to be applicable (as a result of the residence requirement) the husband was now subject to the legislation of the Member State in whose territory he resided (Spain). Had the benefit been regarded as a benefit in cash, he would have been entitled under Article 19 Regulation 1408/71. Attendance allowance, which according to the Swedish view is a benefit in kind, can be exported in a practical sense since the provision of attendance is not tied to the health care organisation of the competent state. The actual physical services could be given for instance, by the wife of the beneficiary or by another person of the beneficiary's choice in the new country of residence.

In Spain, Act 3/2007 has introduced two new risks – that of paternity and breast feeding a child up to the age of nine months. The duration of paternity benefits is 13 days. There is no doubt that paternity benefits are coordinated by Regulation 1408/71 as maternity benefits are.

Long term-care benefits were introduced in Spain by the 39/2006 Act. As has been commented upon, it appears that the Spanish legislator wishes to exclude long-term care benefits from the social security field and subsequently, from the material scope of Regulation 1408/71. This conclusion arises from the fact that the long-term care risk has not been included among the social risks regulated by the Spanish Social Security Act. Moreover, long-term care benefits have been excluded from the social security system and included in a new one so called «dependant social system» to emphasise that the new benefits are not social security benefits according national legislation.

Long-term care benefits are not financed by social contributions. To be entitled to long-term care benefits it is necessary as a previous condition to have had legal residence in Spain for at least 5 years. Legally speaking, this new risk is not bound to any typical social risk. Currently, there is national controversy about whether or not the new long-term care benefits are coordinated by Regulation 1408/71. Since no jurisprudence exists up to the moment, can only be asserted theoretically that the doctrine established in the cases of Molenaar, Jauch, Hosse, Gauman-Cerri should be applicable to the Spanish long-term care cash benefits.

In Sweden, there is a proposal to consolidate all legislation concerning social security into one Social Security Code. The proposal also aims at clarifying and simplifying the contents of the national social security legislation, which may also facilitate the application of the Coordination Regulation.

Furthermore in Sweden, the benefits included in the national social security system are listed in the Social Security Act. However, from the Swedish perspective, some of these benefits do not fall under the material scope of Regulation 1408/71. Three non-contributory benefits in the Swedish system were recognised as hybrid benefits when Sweden concluded the EEA Agreement. A parent with a disabled child under 16 years is entitled to a care allowance calculated as a percentage according to the consumer price index. When the disabled child reaches the age of 16, the benefit to the parent is replaced by an invalidity benefit granted to the disabled person her or himself. If the beneficiary is also entitled to a pension, the invalidity benefit is regarded as a supplement to the pension and follows the same rules as the pension. If the disabled person is not entitled to a pension, the invalidity benefit is treated as a hybrid benefit. The classification of these benefits as hybrid benefits has been questioned by the

European Commission. The third hybrid benefit is the special means-tested housing benefit for pensioners. The benefit covers 90 per cent of the housing costs. Housing benefit is a significant part of the old-age social security package.

As the Belgium report shows, classification may also be important for the application of anti-cumulation rules. Belgian invalidity benefits are only granted if the applicant does not receive any other indemnification under to Belgian law or foreign law in respect of the same illness or injury. If such indemnification is less than the invalidity benefit due under Belgian law, the applicant is entitled only to the balance. As a result, the amount of French invalidity benefit is deducted from the Belgian benefit. Under French law, invalidity benefits are automatically replaced by an old-age pension when the beneficiary becomes 60. As there is no objection against the cumulation of an old-age pension and a Belgian invalidity benefit, the latter will not be reduced by virtue of the French old age pension.

However, it is not only the concept of the risks that causes problems, also further attention should be paid to the concept of legislation. This concept is at the heart of the determination and definition of the scope of various Community instruments, both in the field of coordination and free movement of persons (Regulation 1408/71 and the future Portability directive) as well as in the field of gender equality (Directive 79/7/EEC, the recast Directive 2006/54/EC, incorporating Directive 86/378/EEC as amended by Directive 96/97/EC, and Article 141 EC). It cannot be denied that there is confusion between these different community instruments, which are designed to serve different purposes. In Greece, for example, it can be observed that special pension schemes for civil servants are sometimes considered to be occupational schemes, which leads the latter to automatically lose its character as statutory (and mandatory) social security.

a. of the risks/new risks

The list of benefits and schemes that cause problems in relation to its qualification, remains long.

In Austria the most recent problems concerned some family benefits as well as some benefits concerning new risks. Some years ago there has been also some debate about the classification of *Notstandshilfe* (emergency unemployment assistance) which is an unemployment benefit that can be claimed (among other conditions) after primary benefit (*Arbeitslosengeld*) has expired. This specific means-test caused some classification to regard *Notstandshilfe* as a social assistance benefit. Meanwhile, its classification as an unemployment benefit within the material scope of Regulation 1408/71 is no longer denied.

Another benefit which has not been recognised as covered by the material scope of Regulation 1408/71 by national authorities for a long time, is the partly means-tested *Unterhaltsvorschuss* (advance maintenance payments). However, its classification as a family benefit was stated clearly in the *Offermans* case (C-85/99 [2001] ECR I-2261).

A particular non-contributory benefit is provided by provincial legislation and, thus, is confined to the particular *Land* (province): *Landes-Pflegegeld* can be claimed by all disabled persons and persons in need of care who are not entitled to *Bundes-Pflegegeld*. This payment has its origins in social assistance and is only granted as long as the claimant habitually resides in that province.

Thus, *Landes-Pflegegeld* was considered originally as a benefit which is not covered by Regulation 1408/71 pursuant to Article 4 (2b) and has been listed in Annex II Title III K.

Nevertheless, the European Court of Justice has denied this status in the *Hosse*-case (21.2.2006, C-286/03) and ruled that *Landes-Pflegegeld* is also a sickness benefit in cash which has to be exported according to Article 19 (1) b of Regulation 1408/71, even when the claimant is not the frontier worker himself but only one of his family members (cf. Article 19 (2) of Reg. 1408/71). By arguing in this way the Court was able to avoid all the (undesired?) consequences which would have occurred if the issue of Union citizenship or the question of export of social advantages under Art 7 (2) of Reg. 1612/68 would have been raised as the national Supreme Court has done when the case was submitted to the European Court of Justice.

With regards to the *Hosse* case it also has to be mentioned that the European Court of Justice ruled that the member of the family of the Community worker can claim a sickness benefit from the competent institution of the worker's place of employment only "in so far he is not entitled to a similar benefit" under the legislation of the state of residence. This anti-cumulation rule seems to be more rigorous than is laid down in Art 19 (2) of Reg. 1408/71 ("such benefits") and may be considered as an "anticipation" of the anti-cumulation-provisions under Art 34 of the new Reg. 883/04.

Another new benefit refers to entitlement to (reimbursements of some costs of) in-vitro-fertilisation. After several rulings of the Supreme Court, which denied entitlement under health insurance provisions, the *In-Vitro-Fertilisation-Fonds-Gesetz* was implemented providing for the establishment of a particular fund financed partly by health insurance institutions and partly by the Equalisation Funds for Family Allowances. The fund reimburses 70 per cent of the cost of insemination attempts under particular circumstances. Since such entitlement is a benefit within the material scope of Regulation 1408/71, the provision of the law, which excludes non-nationals who are not employed in Austria, obviously may not apply to EU/EEA nationals.

In France most problems occur with atypical benefits such as non-contributory benefits ('*allocation du fonds de solidarité*'- Supplementary allowance from the National Solidarity Fund), new benefits such as the '*allocation personnalisée d'autonomie*' (long-term care benefits), specific benefits ('*préretraite amiante*' – early retirement asbestos benefit) or even with the *Couverture maladie universelle*, legal health care scheme based on residence in France. Also in France, circular 2005/287 of 21 June 2005 describes the updates of Regulation 647/2005 regarding the list of special non-contributory benefits. The administration has announced that the French entries in Annex IIa will soon be modified to take into account the implementation of the *allocation de solidarité aux personnes âgées* (Solidarity Allowance for Elderly People) created by Ordonnance 2004-605 of 24 June 2004 but not yet in application, and which will replace some of the special non-contributory old age benefits currently inserted in the list of Annex IIa.

A long-term care benefit has been provided in France since the entry into application of the '*prestation spécifique dépendance*', which has been replaced by the '*allocation personnalisée d'autonomie*'. The requirement of residence in France in order to be granted the benefit may not be compatible with the right of export protected by Regulation 1408/71. The first instance *Tribunal des affaires de sécurité sociale* of Longwy submitted a question on 14 April 2005 to the European Court of Justice for a preliminary ruling. The question deals with the '*préretraite amiante*', an early retirement asbestos benefit which has been set up by a law of 23 December 1998. Asbestos workers have the option of taking early retirement. The early retirement benefit aims at aiding workers who have been employed in an asbestos environment and who are allowed to retire from age 50, depending on the total amount of working years spent in contact with the substance or that they suffer from an occupational disease. The question which arose is: by refusing to take into account the salaries received in Belgium in order to determine the amount of benefits, did the local health insurance institution (*Caisse régionale*

d'assurance maladie) infringe Article 39 of the Treaty, Regulation 883/2004 or Article 15 of Regulation 574/72? In its response, the European Court of justice may have to classify the benefit in light of Article 4 of Regulation 1408/71. The asbestos early retirement pension could be categorised as a sickness benefit in cash, an invalidity benefit, an unemployment benefit or more likely as an occupational disease benefit or an old-age benefit.

In Belgium the Arbitrage Court has now asked to the European Court of Justice if a long care insurance scheme — which (a) has been established by an autonomous Community of a federal Member State of the European Community (Flemish Community), (b) applies to persons who are resident in the part of the territory of that federal State for which that autonomous Community is competent, (c) provides for reimbursement, under that scheme, of the costs incurred for non-medical assistance and services to persons with serious, long-term reduced autonomy, affiliated to the scheme, in the form of a fixed contribution to the related costs and (d) is financed by members' annual contributions and by a grant paid out of the budget for expenditure of the autonomous Community concerned — constitute a scheme falling within the scope *ratione materiae* of Regulation 1408/71.

Many problems can be encountered today by the fact that no specific provisions are provided for long-term care insurance. For example, a person residing in Flanders, working in The Netherlands, having a disabled child. Is an accumulation of the Dutch PAB (personal assistance budget) and the FCI (“Flemish Long Term Care Insurance”) possible? The problem is that there is no provision on “similar benefits” in different Member State in the sickness chapter. One should look at the regional legislation on the FCI to find out whether it can be cumulated with benefits from another Member State or not. According to this, the FCI cannot be combined with the Dutch PAB.

Another example concerns the circumstances of a pensioner receiving a Luxembourg pension and living in Flanders who gets benefits from the Luxembourg Assurance Dépendance and an E121 has been sent for his family - can the FCI still oblige his wife to contribute to the FCI based on her residence in Flanders? She lives in Flanders, so this condition for affiliation is fulfilled, but in line with the E121 she is also under the Luxembourg system of her husband. No clear answer can be provided based on the Regulation and it can probably not be found in the Hosse case either. Some say that she has a personal right to FCI in Flanders, other say that she is only insured in Luxembourg due to the E121.

The Czech system of long-term care has characteristics of sickness benefits according to the interpretation of the European Court of Justice, however it is funded from tax and there is a strong link to residence. Different problems have already occurred with relation to this new benefit. There are, for example, no specific E-forms for long-term care, so the existing E213's have to be relied upon. Also confirming that conditions of entitlement are met is problematic. The benefits are provided by the Member State who funds the health care of the worker, which often leads to a lack of understanding, for example, Czech workers working in Germany. They do not understand why they can not get the benefit from the Czech Republic. This can be difficult to explain to workers. It is clear that in general the sickness chapter is not appropriate for the coordination of long-term care benefits.

The French *Revenu Minimum d'Insertion* (RMI), a benefit which guarantees a minimum subsistence allowance for all persons who have a stable and lawful residence in France, does not fall within the material scope of Regulation 1408/71 since it cannot be connected to any risks enumerated by Article 4. However, the RMI might be considered in specific circumstances as a social advantage under Article 7(2) of 1612/68, which could lead to its exportability. So far, French law has ignored this possibility. The French

Parliament has recently redefined the conditions of access to the RMI. A first law was voted on 26 November 2003 (law 2003-1119). This piece of legislation sets down a general principle according to which "*for the benefit of the RMI, the nationals of the Member States of the EU and other States left to agreement on EEA have to fulfill conditions demanded to benefit of a right of residence*". The 2003 law has been repealed and replaced by law 2006-339 of 23 March 2006, which sets more precise rules, even though its wording might be considered confusing. For access to the RMI, the legislator stipulates that the nationals of EU Member States have to fulfill conditions required to benefit from a right of residence and reside in France for the three months preceding the request. Nevertheless, the condition of prior residence is not applicable to European citizens who, in the framework of Directive 2004/38, are workers or who fulfill conditions to retain this status. In other words, as explained in the French report it might be concluded that the right to the RMI is not extended to inactive persons of another Member State except if, at the time of their arrival in France, they satisfy the conditions for right of residence, which is to say that they have sufficient resources. The condition of three months' prior residence, however, is applicable to them. This interpretation is apparently supported by the French administration which, in Circular DGAS 1V/2005/165 of 24 March 2005, acknowledges the right to the RMI of persons who are victims of an "accident of life" (loss of job, family break up) provided that they had sufficient resources in the past so as not to become a burden on French social assistance.

In Belgium questions have also been raised with regard to the bankruptcy insurance scheme for the self-employed. This scheme grants certain rights relating to family allowances and health care to the self-employed against whom bankruptcy proceedings have started, as well as a monthly allowance for a very limited time. Some have therefore linked the system to a system of unemployment allowances. In order to qualify for benefits under the scheme, applicants have to be domiciled in Belgium. Consequently, it seems that the benefits cannot be exported under Belgian law. Self-employed persons who have been declared bankrupt by a Belgian commercial court, but who reside in the territory of another Member State therefore seem to be excluded from the benefits.

In Germany there is a classification problem with respect to the *Act on Demand-Oriented Basic Provision for Old-Age and in the Case of Reduction of Earning Capacity (bedürfnisorientierte Grundsicherung bei Alter und Minderung der Erwerbsunfähigkeit)* which could be brought under Annex II (a) of the Regulation 1408/71 and as such would not be exportable.

In Denmark reference has to be made to the voluntary early retirement pay scheme, which is still outside Regulation 1408/71. As this scheme falls outside Regulation 1408/71, a person exporting early retirement pay has no right to health care in accordance with Regulation 1408/71. Denmark now recognises that the act on social services is covered by Regulation 1408/71. Since the decision by the Administrative Commission no. 175 in 1999 and the judgements by the European Court of Justice in *Molenaar, Jauch and Maaheimo*, Danish competent institutions have gradually started to allow for the export of certain social services. Exportability applies to the following cash benefits: benefits to parents who chose private child care or care for their children at home §§ 26, 26a; parental leave benefits §§27, 27a; extra expenses benefit § 28; compensation for the loss of income to care for a disabled child §§ 29, 29a; sickness care contribution §§ 76, 77; compensation for additional expenditures by sickness and invalidity § 84; compensation for the loss of income due to caring for a dying relative §§ 104-106.

In Estonia the scheme of social benefits for disabled persons can be regarded as addressing a new social risk, which is not explicitly listed under branches of social security in Article 4 (1) (a)-(h). It is also unclear how the care allowance in Estonia

should be classified. Can this benefit be considered as a social assistance benefit as it is provided by local government and paid directly to the insured person after an individual and discretionary assessment of the care needed?

In Finland there is a municipal cash benefit (*omaishoidon tuki*) paid to a person who takes care of a person, usually a family member, who is in need of assistance in ordinary everyday activities. Eligibility to this long term care allowance is not a legally defined individual right but based on the discretion of the municipal officials. The allowance is a cash benefit which can be linked with social services according to a personal care and service plan. The scheme is considered as social service or social assistance and not covered by the material scope of the Regulation. Nevertheless, the scheme has a lot of similarities with the benefits which were subject of the Judgments of the Court of Justice in Case C-215/99 *Jauch* and C-169/96 *Molenaar*. It should also be mentioned that the national characterisation of this long term care allowance is based on some similar elements as the Finnish home child-care allowance which was subject to the Judgment of the Court in Case C-333/00 *Maaheimo*.

Finland is in discussions with the European Commission concerning the child care allowance for a disabled child. According to the Finish Government this is a non-contributory special benefit intended to provide specific protection for the disabled under Article 4 (2a) and therefore the payment of this benefit can be limited to persons who reside in Finland.

In Finland, a legislative proposal has been given to the parliament (HE 90/2006) which includes changes to the export of some benefits. The care allowance for pensioners which at the moment is an exportable pension benefit is considered to be a disability benefit. Where the right to this benefit is based on residence in Finland and the amount of the benefit would no longer be dependent of how long the person in question has resided in Finland, a person residing in Finland would have the right to the full benefit when moving to Finland. This benefit would in the future be a non-exportable special non-contributory benefit.

Malta pays a benefit known as Additional Allowance (also known as "top-up") to survivor's - widows or widowers – who have dependent children. It is paid in addition to Children's Allowance. The *Additional Allowance* is not based on any insurance conditions but can only be paid in conjunction with a survivor's pension (which is related to insurance). *Additional Allowance* is regarded as a family benefit under Regulation 1408/71 Article 1(u) (i) and is considered a benefit for the purposes of Article 78. On this basis Malta would expect to pay the Additional Allowance in any case where Malta is the competent state under the terms of Article 78, or to pay a supplement under the terms of Administrative Commission Decision 150 in any appropriate case where Malta was not the competent state.

Article 78a addresses the difficulties which would arise in co-ordinating a flat rate scheme such as Malta's with schemes which provide for insurance based orphan's benefits by providing that such orphan's pensions shall be treated as "benefits" within the scope of Article 78 if the deceased was at any time covered by a scheme which provides only for family allowances or supplementary or special allowances for orphans. Article 78a provides that such schemes are listed in Annex VIII to the Regulation (this annex will be abolished under the new Regulation 883/2004). It would appear, in these circumstances, that Malta's Additional Allowance should have been entered into this Annex so as to ensure a practical and equitable treatment of cases which would otherwise involve the payment of an orphan's pension by another state.

In Hungary, in the case of long-term care a nursing fee may be claimed. The nursing fee is regulated by the Act on Social Assistance (1993 III). The rules pertaining to the Hungarian nursing fee generally differ from similar types of benefits found in other Member States inasmuch as in Hungary the benefit is paid to the person providing the care, while in other Member States it is provided to the person being cared for, and this difference may result in problems.

There is a difference in the treatment for disabled children under Regulation 1408/71. Disabled persons who are entitled to invalidity or old-age pension or rehabilitation subsidy in Finland are covered by pensioners' care allowance scheme. Pensioners' care allowance is considered to be a benefit for pensioners and therefore exportable. When looking closer at the pensioners' allowance it could be defined as a long term care benefit partly a benefit in cash and partly cost compensation i.e. benefit in kind.

In Slovenia, a parental insurance, paternity benefit and adoptive parents benefit were introduced in 2001. Although introduced more than five years ago, there may be discussions and questions related to the new benefits (services) provided for severely mentally or physically disabled children and adults. A parent is entitled on the grounds of the Parental Protection and Family Benefits Act to partial payment for lost income if s/he terminated employment or started to work part time to take care of the severely disabled child. The conditions for entitlement are that both the parent and the child are nationals and residents of Slovenia. Severely disabled adults are entitled on the grounds of the Social Care Act to a family assistant who provides care and help to the disabled person.

In Latvia, a new family benefit - disabled child care benefit - was introduced in November 2005. The benefit is granted to one of the parents or a guardian of a disabled child provided that the child has been recognised as disabled by Health and Work Expert Physicians Commission and the Commission has issued an opinion stating the need for special care. The benefit is granted only to the person who is not employed.

Reclassification of the benefits under Annex IIa, resulted, for example, in Ireland in some similar benefits being classified differently, for example, carer's allowance (excluded) v. carer's benefit (sickness), Infectious Diseases Maintenance Allowance (sickness) v. Disability Allowance (special). Although the recent reclassification appears to have resolved the main issues concerning the material scope, it may be that issues will arise concerning the classification of some benefits such as carer's allowance, in particular after the Hosse case of the European Court of Justice.

In the Netherlands, there are concerns about two areas of legislation: the Toeslagenwet and the Wajong benefit as to whether they are special benefits and consequently whether the export clause should also be maintained in the case of workers receiving this benefit. The Toeslagenwet was already non-exportable to countries other than EU and EEA Member State before it was proposed to be included in the Annex. The Community legislator accepted its inclusion in the Annex. However other international obligations oppose this non exportability. In a case brought by Turkish applicants who contested the termination of their Toeslagenwet benefit, the Central Appeals Court made an interesting decision, which may be relevant to export within the EU as well. The Court decided that the non-export clause contravenes ILO Convention 118 concerning equal treatment of own nationals and aliens (Article 5). It ruled that the supplements are payable in addition to a disability benefit (WAO) and therefore exportable.

The question of whether the WAJONG legislation is a 'specific protection for the disabled' (Article 4, 2bis) or should be considered to be a general income insurance has raised some doubts. Specific problems arise for Wajong-beneficiaries who work (reintegration policy). When e.g. a Wajong-beneficiary is working in The Netherlands and moves to

Belgium, he or she loses the Wajong benefit. According to the national policy guidelines on exceptional exportability, there is no genuine reintegration intention to his or her migration, as he or she already has work in The Netherlands (and is, as a worker, entitled to incapacity for work or WAO-benefits). Consequently there is no necessity to go abroad and the Wajong is not exported. It was feared that people would then come to the Netherlands with their disabled child, receive the Wajong-benefit and then return after a short period to their country of origin, with a consequent Wajong-export obligation for the Netherlands. In its Kersbergen-Lap Judgement C-154/05 the Court of Justice accepted the inclusion of the WAJONG benefit in the Annex.

In the UK it has been argued that the distinction between social security, special non-contributory benefits and social assistance can lead to discrimination against the elderly and disabled. Pensioners who live abroad may be discriminated against if they are disqualified from receiving benefits that they would be entitled to at home and the new country of residence does not provide. NGOs who are involved with the issue of pensioners and war pensioners who are living in another Member State have argued that the effect of Regulation 1247/92 on UK nationals who retire to certain other EU Member States is to restrict access to disability benefits and consequently the right of residence within the EU. Those whose disabilities prevent them from joining the workforce in the first place may be effectively excluded from the right of residence altogether.

However, the Court found in the case of Jauch Case 215/99, that for a benefit to be a non exportable special non-contributory benefit it is not sufficient simply to be listed in Annex IIa but must meet the criteria of 'special' and 'non-contributory'. The Court pointed out that in the UK cases of Snares, Partridge and Swaddling "the special non-contributory character of the benefits in question was not discussed". The point has been reiterated in the cases of Leclere and Deaconescu Case C-43/99 and Hosse Case C-286/03; while similar cases are pending (Kersbergen (now decided) Case C-154-05; Hendrix Case C-287/05; and Commission v Council and Parliament Case-299/05.) This latter case follows from the Commission's introduction of draft legislation to reflect the earlier judgements. In the UK it is suggested that "Although not entirely clear, the likely effect of the amendment would be that all three benefits - Disability Living Allowance, Attendance Allowance and Carer's Allowance - would be fully exportable". However, it requires unanimity for the amendment to take effect and the UK, along with Finland and Sweden, have blocked its introduction. In response the Commission has taken infringement proceedings against these three states (Commission v Council and Parliament Case-299/05).

There is also a new tendency to link benefits to the promotion of employment as, for example, the different New Deal programmes in the UK - policies that can be described as 'mixing' 'sticks', i.e. the threat of withdrawing benefit for those who do not participate, and 'carrots', i.e. offering a wide range of financial and other support mechanisms to assist people into work.

In Slovakia, within active measures of labour market defined in Act No. 5/2004 on employment services various allowances are provided, which are paid to job applicants to strengthen their activity leading to obtaining employment and maintaining working habits. These are provided in monetary and material form to job applicant, who is registered in the job seekers' register. This includes a job applicant from another Member State. The allowances are not exportable.

Within *material distress aid* (social assistance) contributions to allowances are provided, the objective of which is to activate persons, who are in material distress, leading to provision of own incomes and maintaining working habits. As contributions to social aid allowance they are not subject to export.

The evolution towards mixed private-public schemes undermines the Regulations which, as a rule, only coordinate public schemes. In Belgium, for example, private company pension plans have been very successful during the last few years and therefore Community coordination rules are needed if the principle of free movement of workers is to be safeguarded.

There are nevertheless problems in the construction industry. Pursuant to collective agreements in the Belgian construction industry, employees may grant complementary retirement pension rights, paid by the relevant *Fonds voor Bestaanszekerheid* (an industry fund jointly managed by employers' organisations and trade unions). In order to qualify for an additional pension, employees have to complete a ten-year insurance period. Only employment in the Belgian construction industry is taken into account.

In France, the RMI, Law 2007-290 of 5 March 2007 brought some clarification. It provides that in order to claim the RMI, EU citizens must reside lawfully in France and must have been residence in France for at least 3 months before their request. However, the residence requirement does not apply to:

- EU citizens (and their dependants) who have a job in France;
- EU citizens (and their dependants) who used to have a job in France and who are temporarily unable to work either for medical reasons or because they are currently committed in a continuing education process.

The law adds that EU citizens who arrived in France as jobseekers and who stay there as such cannot claim the RMI.

C. Other issues

a. National anti-cumulation rules

A special example can be found in Denmark dealing with the social pension where a whole development took place. In an early decision, the National Appeals Board interpreted the relationship between Danish pension rights and the anti-cumulation rules of Regulation 1408/71 in a more restrictive sense. It stated that a person who had earned pension rights both in Denmark and the United Kingdom, would have to choose between either a full Danish pension or a pro-rata pension from both Denmark and the United Kingdom. In two later decisions, the National Appeals Board, however, changed its restrictive view and ruled that a pensioner maintained acquired pension rights from both Member States, even if both together amounted to more than a full pension. However, the decisions from the National Appeals Board have now been overruled by Danish legislation. The act on social pension now states that when the time of residence is calculated, periods in which social pension rights are also earned abroad are not taken into account.

In Poland, given the constraints existing in the Polish legislation on combining incomes from work with old-age or invalidity pension a question arose concerning how the daily benefit *activation support* should be treated with respect to people living in Sweden. By the same token, should the daily benefit be treated as income in calculating entitlement to and suspension of benefit?

On the basis of information provided by the Swedish institutions to the Polish counterpart it appears that this type of benefit is an unemployment risk benefit and is an active form of support to the unemployed. Given that in the Community Regulations there are no provisions on the overlapping of the right to pension benefits with unemployment risk

benefits, it seems that exclusively Polish legislation on the suspension or reduction of benefits should apply to the persons entitled to the Polish pension benefits enjoying at the same time the Swedish activation benefit.

Pursuant to national legislation the entitlement to the old-age or invalidity benefit is suspended or such benefits are reduced if the beneficiary generates income from activity subject to the obligation to pay social security (employment, service or other gainful employment or running non-farming activities), including also income from activities carried out in foreign countries. The Swedish activation benefit fails to meet income criteria, referred to in the said Article (the source of benefit is not running an activity). Consequently the amounts of Swedish benefit do not influence the suspension of the entitlement to the Polish pension benefits or the reduction of their level.

In Portugal, as a general principle pensions of old-age or invalidity can be cumulated with other pensions of the same or different nature, without restrictions, when the amount of the pension is higher than the amount of the minimum guaranteed pension. Otherwise if the amount of pension is lower than the minimum guaranteed pension the solidarity supplement is only granted when the amount of all pensions accumulated is lower than the minimum guaranteed pension; i.e., the solidarity supplement is granted only in cases where the total amount of all pensions is, even in event of accumulation, lower than the minimum guaranteed pension.

Representatives of associations of migrant workers disagree with this interpretation of the law when applied in situations where EEC Regulations applied, taking into account the definition of pension of Article 1 of Regulation 1408/71 and the rules of Article 46A in case of overlapping of pensions.

It is argued that in the rule applied (in the case of contributory pensions) the solidarity supplement of is granted regardless of the level of income, meaning that it is not a situation of poverty that justifies the supplement. In fact, this supplement can be granted to persons with high level of income or capital, when such persons are beneficiaries of the minimum guaranteed pension. Therefore, there is no social finality in the rule and Article 1 of Law-Decree 141/91 should be modified.

In the case of survivor's pensions there is no similar rule. However there are provisions in case of accumulation of survivor pension when the beneficiary is a descendant or ascendant of the insured person and is entitled to a pension based on their own personal right.

In the special scheme of civil servants Article 67 of Decree-Law 498/72, applied by Caixa Geral de Aposentações also includes the following rule related to the accumulation of pensions:

"The pension of retirement, save in the case mentioned in Article 53 – nr 3, cannot be accumulated with another pension with a similar nature or finality granted by any entity on the basis of periods of service rendered to public entities mentioned in Article 25, when these last periods can be taken in account by the "Caixa" in view to granting a retirement pension, without prejudice to the right of the person concerned to opt for one of the pensions".

In a case submitted to the Administrative and Fiscal Court of Lisbon by a civil servant, the Portuguese institution had granted to the complainant a full pension, on the basis that she had completed in Portugal, for the special scheme of civil servants, a period of insurance corresponding to all her activity as a teacher serving in the Ministry of Education. The complainant, who was teaching in Portugal, was invited to work in

Germany to teach children of Portuguese citizens, and remained with the right of continuing to pay contributions to the Portuguese institution (this situation began before the accession of Portugal to EU). However, as the German Government of the respective Land paid wages, contributions were paid in both countries over a period of several years. As he fulfilled the conditions for the Portuguese pension, the complainant claimed and the Caixa granted a full pension.

However, subsequently the Caixa became aware of the insurance in Germany and asked the complainant to pay back a certain amount because her pension should reduce in the proportion to the time of service in Germany.

The complainant appealed against this decision without success, arguing that the Caixa didn't pay back the contributions paid and these were not taken in consideration for the calculation of the pension. Moreover the complainant argued that the rule of Article 67 of the Statute of Retirement constitutes an anti-accumulation rule and therefore the decision constitutes a violation of Community law, namely of Article , and Article 46B.

In Portugal, the Law 4/2007, on what concerns anti-accumulation rules stipulates in Article 67 that:

- Overlapping of benefits with the same nature and emerging of the same fact is not permitted as far as such benefits respect the same protected interest (save legal rule in contrary);
- Overlapping of cash benefits emerging of different contingencies shall be ruled by law which must guarantee in any case an amount of benefit not lower than the highest benefit nor exceed the total amount of all benefits;
- Benefits granted by foreign schemes can be considered in view of the application of anti-accumulation rules without prejudice of international instruments rules.

As far as pensions of invalidity or old-age are concerned we must refer to Article 54 of Decree-Law 187/2007 which allows overlapping of pensions as resulting of calculation rules. However, according to Article 55, in such situations, the complement for an eventual minimum guaranteed by law (when the calculated amount is lower than that minimum) is completed taking in account the total amount of all pensions taken in consideration in overlapping situation.

Overlapping of old-age pensions with earnings from work is allowed as follows: in case of old age pension there are no restrictions except when the pension is an old-age pension that replaces an invalidity pension or is an old-age pension granted before pensionable age; for invalidity pensions cumulation is permitted where a pension is based on relative invalidity since the total amount of pension and earnings of work does not exceed 100 per cent of the earnings taken into consideration for the calculation of the pension; on the contrary, is prohibited the cumulation of working earnings with a pension of absolute invalidity.

In the case of survivor's pensions there are provisions in case of accumulation of survivor pension when the beneficiary is a descendant or ascendant of the insured person and is entitled to pension based on their own personal right.

From the point of view of the coordination of social security in the Czech Republic, it is interesting, that according to the new Sickness insurance Act, the employer shall pay a compensation to the employee during first 14 days of his/her illness. During this period, the employer becomes a "competent institution" for the purposes of coordination. Furthermore, the new act states more explicitly, that students who study in the Czech Republic shall be insured only in the state of their origin.

b. Financing of social security benefits

The Court has in many cases established its own definition of 'charges' (of different nature in each specific case) since it was dealing with concepts specific to the Community legal order. So, the national administration is left alone to cope with what might constitute an infringement of one of the Community's basic principles or, to comply with Court's statements, such as: Member States may not adopt taxation or social security measures which conflict, impede or discourage the exercise of the fundamental freedoms of the Treaty.

In Finland the *Rundgren* case had an impact on taxation and on the liability to pay contributions in Finland. However, there is a lack of clarity in the interpretation of the *Rundgren* case, especially concerning the assessment of sickness insurance contributions. This reference for preliminary ruling from the Supreme Administrative Court will therefore have an important impact on the liability to pay contributions in Finland for a significant number of pending cases. The question concerns the interpretation of Article 33(1) of Regulation 1408/71 in a situation where a pensioner is entitled under Article 27 to claim sickness and maternity benefits only from the institution of the place of residence and at the expense of that institution. Is it incompatible with Article 33(1) that the assessment of sickness insurance contributions happens in such a way that in the pensioner's state of residence both the pensions received from that state and the pensions received from another state are taken into account as the basis for determining the amount of those contributions? The Finnish way of assessing the contributions is based on two principles. Firstly, as sickness contributions are considered as taxes under the national legislation both income abroad and income from Finland are taken into account on a similar basis for taxation. Secondly, this way of assessing the benefits it is not considered as incompatible with the Regulation unless the contributions do not exceed the amount of pensions awarded by the State of residence. However, the migrant workers are not satisfied with this interpretation and have brought both political and legal actions against it. The Commission claims that the interpretation which Finland has adopted in calculating the contributions is not in accordance with Article 33(1) of the Regulation. According to the Commission only one Member State is responsible for the benefits for pensioners and may collect contributions to cover the costs. When determining the contributions of a pensioner living in Finland, Finland takes account, in addition to the pension income paid by Finland, of pension income paid by another Member State. This is contrary to Article 33(1) according to the Commission.

The possibility to deduct national premiums from foreign pensions was recently dealt with in the Netherlands in the *Johann* case. Johann is a German worker living in The Netherlands, receiving a German invalidity pension and a Dutch pension. His complaint relates to the fact that he has to pay Dutch taxes on his German pension and because of this German pension he also has to pay additional social insurance premiums for the Dutch AOW, ANW and AWBZ. Article 33 of the Regulation holds e.g. for The Netherlands that it can deduct the premiums for sickness insurance from the pension *payable by the Dutch institutions*. This shows that the deduction of social insurance premiums from the German pension is not compatible with the Regulation. The European Commission has sent a reasoned opinion to the Dutch government to remedy this situation. The Commission clarified that premiums could be deducted for AOW and ANW, but not for AWBZ, as this is contrary to the specific rule contained in Article 33 of the Regulation (cf. *Rundgren* case). The Dutch government stated that the *Rundgren* case law could not be applied, as this concerned the question of which Member State is entitled to deduct premiums and not the question of which income or pension can be the basis for premium calculation. The Commission has brought the case before the Court (C-66/05).

After the European Court of Justice ruled that French authorities have failed to fulfil their obligations by requiring persons who reside in France and work in another EU Member State to contribute to the CSG and CRDS [Case C-34/98 *Commission des Communautés européennes v. République française* [2000] ECR 995]; Case C-169/98 *Commission des Communautés européennes v. République française* [2000] ECR 1049], the internal legislation was amended. Although the new legislation meets the requirements of the European Court of Justice and puts French law in conformity with Regulation 1408/71, a doubt has arisen regarding the opposite situation: should CSG and CRDS be levied when the workers are employed in France and reside in another Member State? In addition, in the case of someone who works in France and resides in Belgium, the fiscal bilateral convention between the two countries would make levying the contributions impossible. In conclusion, it would be no surprise if the *Code de la sécurité sociale* were modified to clarify the fact that persons who work in France and are subject to French social security legislation under Regulation 1408/71 must contribute to the CSG and to the CRDS wherever their residence is located in the EEA.

In order to clarify links between Regulation 1408/71 and bilateral tax conventions regarding CSG and CRDS, which are hybrid contributions, the *Tribunal des Affaires de Sécurité Sociale* of Paris, following the opinion of the *Cour de cassation* referred on 22 February 2006 a question for a preliminary ruling: “Is Regulation 1408/71 to be interpreted as precluding a convention, such as the United Kingdom/France Taxation Convention of 22 May 1968, from providing that income received in the UK by workers resident in France and covered by social insurance in that State is excluded from the basis on which the ‘contribution sociale généralisée’ (CSG - general social contribution) and the ‘contribution pour le remboursement de la dette sociale’ (CRDS - social debt repayment contribution) levied in France are assessed?” (Case C-103/03, *Derouin*).

For the French *Cour de cassation*, an au pair student from Iceland must pay French social contributions on her income in France since she was not able to prove that she was already affiliated to a social security scheme in Iceland (20 September 2005, case n°04-11909). The status of au pair students is unclear in both French labour and social security law. Four categories coexist and could have been applied to the person: au pair, “intern family assistant”, employed person or student. In this case, the choice of the au pair status, although open to criticism, naturally led to the solution adopted by the *Cour de cassation*.

The French report gives another example. With regard to freedom of services and freedom of establishment, some doctors, dentists and medical workers move to France in order to practice. When they emigrate from Germany, the same issue has been arising for years: due to the extraterritorial application of some German social security schemes, self-employed migrant workers refuse the affiliation to French social security because of their ongoing affiliation to the German scheme. The *Cour de cassation*, which regularly must deal with this situation, proposed a solution which may (does?) not comply with Regulation 1408/71. In its latest decision, the *Cour de cassation* stated that a German dentist who started a practice in France doesn’t have to be insured by the French social security scheme since she remained covered by the compulsory German scheme, although she was no longer living and working in Germany. This decision is considered as surprising as it gives way to the extraterritorial application of the German regulation, which goes against the provisions of Regulation 1408/71.

The Finnish Highest Administrative Court (KHO) has delivered its judgement on 27th of December 2006 (3498 KHO:2006:99) in relation to the case C-50/05 *Nikula*. The KHO considered that in the case of *Nikula* the person could not verify that she had paid sickness insurance contributions to Sweden.

There are about 25,000 pensioners at the moment who reside in Finland and receive pension both from Finland and Sweden and the number is going to increasing considerably in the coming years (see information on the prognosis on the expected rise of the number of pension applications between Finland and Sweden E Old- age and death point 1.f. Member States' cooperation) The Finnish Tax Administration has contacted the Swedish Tax Authorities in order to receive information in relation to the financing of health care of pensioners in Sweden. The administrative cooperation between the Tax Administration in the two countries was facilitated by the fact that if no general information concerning the way of financing was available, all the 25 000 cases and the coming new cases would have to be examined case by case. The Swedish Tax Administration has in its letter to the Finnish authorities stated that the intention of sickness insurance contributions in Sweden has never been to cover an individual's own health care costs after retirement. According to the letter this concerns both the years when a sickness insurance contribution was paid by the employer as well as the contribution that was paid by the employed person. The Finnish Ministry of Social Affairs and Health has given an opinion on 13th of June 2007 in which the Ministry states "that according to the information received from Sweden, it seems that there is no case of overlapping payments in relation to pensions received from Sweden and therefore Article 39 forms no obstacle to take into account the pension paid from Sweden in order to calculate the amount of the sickness insurance contribution in Finland". The Ministry also states "that the second point of the judgement will be applicable only in connection to insurance systems, where it is clear that the contributions have been collected in advance and in order to cover health care costs of a retired person". The Ministry also states that need for legislative amendments in Finnish legislation concerning sickness insurance contribution must be evaluated.

In Lithuania, it should be noticed, that the problem of contributions collection in the case when person works in Lithuania and at the same time in another EC Member State, is not properly solved. If according to Regulation (Article 14(2)(b), 14a(2), 14c(a), etc.) Lithuanian legislation is applicable, employer of another Member State is obliged to pay contributions to Lithuanian institution, but there are no formal procedures, how to do this. So it happens, that contributions are not paid, and therefore a worker loses part of benefit.

In Slovakia there are some measures under preparation, like for example the contribution to cover the costs of childcare for children up to 3 years old, the possibility to use co-financing from the European Social Fund is being considered. This raises the question of the exportability of such benefits. The current government is considering a change in the ratio splitting old-age pension insurance contributions between the pay-as-you-go financed benefit-defined pillar and the funded, contribution-defined pillar of the old-age pension insurance system. Today contributions total 18 per cent of gross income, with 9 per cent being diverted into the pay-as-you-go system and 9 per cent into the funded component. The change being considered would divert more of the finances into the pay-as-you-go system.

c. Fundamental reforms, initiatives and plans in national legislation with an implication for the Regulation

In many countries we see new measures that introduce greater importance to private pension insurance. However, this causes fundamental problems in applying the Coordination rules. The gist of the problem is that the coordination mechanism provided for in the coordination Regulations is tailored to the public first tier pension system organised on a pay-as-you-go basis, whereas the pension accumulation system put in place in the majority of the former socialist Member States, is fully funded and privately

managed. There is a great deal of uncertainty as to how to apply the Regulations' principles to the schemes.

In Austria, for example, amendments aim to stimulate private pension insurance and most of all pensions schemes at company level which provides for obligatory employer contributions into private funds. The employed person is entitled either to a certain amount when leaving the company (equivalent to the particular working period) or to leave all contributions with the fund and claim the total amount only on retirement which could be a basis for a 'second pillar' for pensions. Therefore the importance of non-statutory schemes, which are not covered by Regulation 1408/71, is also likely to increase in Austria.

Estonia has introduced a three-pillar pension system over the period of 1998-2002. The second pillar – mandatory funded pension scheme – was introduced from July 2002 by the Funded Pensions Act. This scheme is regarded by the Government as an individual saving scheme and not as a social security scheme, since it is administrated by private asset management companies, there is no collective financing of the contingency and, in principle, there is no intergenerational or intra-generational redistribution. Therefore, the Estonian second pillar pension scheme is regarded as a supplementary pension scheme for the purpose of the EU legislation, and co-ordinated under the requirements of Directive 98/49.

Similar important changes have also taken place in Lithuania. From 2004 on insured persons may voluntarily choose to opt-out from the part of PAYG system and enter into funded tier (second tier of the first pillar) and to direct a part of social insurance contributions to a personal account in a chosen privately managed pension fund. The contributions transferred into the personal account will be accumulated and will be paid when the participant reaches pensionable age. Then the participant in the funded tier must buy an annuity. Those who accumulate less than is needed to purchase an annuity that is worth at least half of the basic pension, are entitled to receive their savings as a lump sum or as a periodic benefit.

As a first pillar scheme, this system falls within the scope of the coordination Regulations. The participant of the funded tier loses a part of Lithuanian PAYG pension (but he or she earns annuity from the funded tier). From the point of view of coordination, it means that the Lithuanian part of a *pro rata* pension will be smaller. Some consequences for free movement may be observed. According to Lithuanian legislation, if a participant of the funded tier stops paying contributions because s/he leaves the country (or due to other reasons), the accumulated assets will stay in the pension fund, and annuity or lump sum will be paid when that person reaches pensionable age. It is not possible for a person to transfer the accumulated assets to a pension fund in another Member State, if this fund is not registered and supervised in Lithuania. If the worker moves to another Member State, s/he does not lose acquired rights (assets and insurance period in Lithuania), but s/he loses the possibility to increase her or his pension savings by directing part of his/her social insurance contributions into a personal account. From the point of view of coordination, there is the question how to coordinate these « first pillar bis » funded schemes. The Coordination Regulations are not adapted to schemes of this kind. For example, it is not clear how to aggregate insurance periods when a person worked in the Member State where he or she had earned only certain real (or notional) savings, but has no insurance period. It does not happen in the case of Lithuania where a person gains an insurance record despite the fact he or she had opted-out from part of social insurance. But it may create problems for a Lithuanian national who was, for several years, insured abroad and earned only notional savings there.

In Malta a new second pillar scheme is also proposed which will apply to both employees and the self-employed. It is proposed that this scheme will be voluntary initially but will become mandatory in due course. It is also proposed to introduce a new third pillar scheme on a voluntary basis. At present it would appear that neither the proposed second nor third pillar scheme will fall within the material scope of Regulation 1408/71. There are also plans in Slovenia to additionally encourage private collective and individual voluntary insurance schemes for old-age pensions and for medical care.

In the Netherlands, new problems have also arisen with the privatisation of some parts of social security. Is a worker who falls under Belgian labour law and Dutch social security law (as he or she works in the Netherlands for more than one year) sufficiently covered? He or she is not entitled to Dutch sickness benefit when he or she falls ill. There are no Dutch social security provisions in such cases (however, in the *Paletta* case, national labour law is considered as social security for the purpose of Regulation 1408/71); employers are obliged to pay wages in case of sickness pursuant to Dutch law. But the employer concerned falls under Belgian law.

In Netherlands, in 2006 the *Zorgverzekeringswet* (Care Insurance Law) came into force. Under the terms of this law, all residents of the Netherlands are insured (more precisely, those who are subject to Dutch residence insurances). This means that the coverage of the Law is much larger than of its predecessor. The Law is administered by private insurance companies. This does not prevent the Law from being subject to the Regulation. During Parliamentary debates attention was paid to the effects on trans-border situations. The problems with the law are limited, but some of the frontier workers (in particular the post active workers and members of the family of frontier workers) are slightly worse off than under the present rules. After the introduction of the law there were serious complaints of pensioners residing abroad about the level of contributions payable under the new law. Finally, the Minister gave in and introduced a new regulation with levels adjusted to the costs of each country.

Another important change is the introduction of the *Wet Werk en Inkomen naar Arbeidsvermogen* (Law Work and Income according Working Capacity), which came also in force in 2006. 10. 07. The new law limits the right to a full benefit to those who are permanently and fully incapacitated. Those who are less than 80 per cent incapacitated for will receive a supplement to their wage if they work; if they do not work they will receive a low benefit. Whether a supplement or benefit is payable is to be considered each month. This is particularly difficult in cross border situations. Because claimants will normally receive a benefit during a period of time without these conditions, there are no experiences yet with the administration of the law. Since 2007, the Law can also be administered by private companies. Since they will have to take the Regulation into account and since they will have to check the level of income will lead to considerable administrative workloads.

In Finland, the Ministry of Social Affairs and Health set up a working group to prepare the methodology for calculation of fixed-amount lump-sum payments for medical care costs according to Regulation (EEC) No. 1408/71 in regard to Finland, as well as to chart issues related to the compensation procedure under the new Regulation (EC) No. 883/2004.

The Working Group drew up a proposal for a calculation method for determining the fixed-amount payments for annual medical care costs. The Working Group examined the costs of medical care provided in Finland for persons permanently resident abroad and if the compensation system should be altered. This was explored by means of a study carried out by the Association of Finnish Local and Regional Authorities, on the basis of which the amount of total expenditure (after client fees) was estimated at about EUR 7 million. As a whole, these care costs are not very significant. It can however be judged

based on the study that the expenditure is divided unevenly between different municipalities and that the compensation the local authorities obtain through the central government transfer to local government system is not targeted in accordance with the costs incurred.

The Working Group proposes that the compensation system should be adjusted in accordance with the decision of the PARAS project so that the State will be responsible for these costs in the future. The change should be implemented in a cost-neutral way. The Working Group proposes that the service provider should be refunded through the Social Insurance Institution the costs of medical care for foreign nationals to their full amount, according to the actual costs, as from 2008. During the transition period the reform would be implemented in a cost-neutral way in regard to the state and municipal funding shares.

The Working Group also charted some other problems related to medical care provided to foreign nationals. The most important problems requiring further examination are: 1) There are provisions on the rights of persons moving to Finland in several laws, and it is difficult to co-ordinate them in regard to the eligibility for medical care; 2) It is necessary to clarify and develop provisions regarding the provision and billing of medical care in regard to cases of persons seeking care, recovery of costs and identification of the person.

In Netherlands, in 2006 the Zorgverzekeringswet (Care Insurance Law) came into force. Under the terms of this law, all residents of the Netherlands are insured (more precisely, those who are subject to Dutch residence insurance schemes are insured). This means that the coverage of the Law is much larger than of its predecessor, the Ziekenfondswet, which covered employees earning less than a particular wage only.

The Law is administered by private insurance companies. This does not prevent the Law from being subject to the Regulation. During Parliamentary debates attention was paid to the effects on trans-border situations. The problems with the law are limited, but some of the frontier workers (in particular the post active workers and members of the family of frontier workers) are slightly worse off than under the present rules.

After the introduction of the law there were serious complaints of pensioners residing abroad on the level of contributions payable under the new law. Finally, the Minister gave in and introduced a new regulation with levels adjusted to the costs of each country. Another important change was the introduction of the Wet Werk en Inkomen naar Arbeidsvermogen (Law Work and Income according Working Capacity), which came in force in 2006.

This Law limits the right to a full benefit to those who are permanently and fully incapacitated. Those who are incapacitated for less than 80 per cent will receive a supplement to their wage if they work; if they do not work they will receive a low benefit. The question whether a supplement or benefit is payable is to be considered each month. This is particularly difficult to answer in cross border situations. Because the law is still very young and very few claims have been made so far (because of the tight conditions and the deterring reputation of the Law), there are as yet no experiences reported on the administration of the law in international situations.

In Malta, credits of social security contributions will be awarded to parents (effective from the 1st of January 2007). The maximum number of credits that may be awarded in such a case is two (2) years for each and every child or in the case of a child suffering from a serious disability the period of two (2) years is extended to four (4) years. The applicable period of credits may be shared between both parents but shall in no case

exceed a total between both parents of two (2) or four (4) years as is applicable in the case. The basic conditions for entitlement are that the parent:

- has the legal care and custody of a child who is less than 6 years of age (or 10 years of age in the case of a child suffering from a serious disability); and
- has since returned to gainful activities for a minimum number of years equivalent to the period credited. The above is also applicable to adoptive parents

In Malta, during 2007, amendments to social security legislation, passed through Parliament in the latter part of 2006, have become effective from the 1st July 2007. These amendments to legislation practically result in a total reform of the invalidity pension system. The major elements of the reform include amongst others:

- a) Change the application format – to include more medical data and further responsibility on the part of the claimant to prove his case. It is important that the client be made more responsible to provide the medical information to substantiate his claim rather than the current system where the Directorate takes on the responsibility to prove or otherwise whether a client satisfies the medical criteria for Invalidity pension entitlement.
- b) Change the current medical panel system – the new medical review team will be composed of two medical practitioners engaged by the Social Security Directorate General to advise the Director General (Social Security) on the medical aspects of the case in line with the newly adopted Impairment Tables (see item c below)
- c) Establish specific medical criteria for the award of benefits – this has been achieved by establishing “Impairment Tables” that provide the basic guidelines under which that Medical Review Team would decide on work-related impairment for Invalidity pension. The Tables consist of a number of system-based tables that contain specific sets of criteria classified into levels of impairment relating to that body system. These allow ratings to be assigned in proportion to the severity of the impact of medical impairments on functional work capacity.
- d) Establish an independent systems audit – Establish a medical audit for benefit claims awarded and rejected on medical grounds, in order to establish whether such benefits have been awarded correctly. Such an audit would be carried out randomly.
- e) Also other changes to the system have been made such as a minimum period of sickness benefit introduced before the payment of an invalidity pension. The proposed waiting period is six months from the first social security medical certificate submitted by the applicant. During this waiting period the applicant will in the majority of cases still be entitled to normal sickness benefits. Such waiting period will not be applicable in sudden severe or terminally-ill cases.

Also in the UK, important changes took place or are foreseen to take place. The 2007 Pensions Act introduces several important changes to the UK pension system. These include:

Reform the contributory principle by:

- reducing the number of years to qualify for a basic State Pension from 39 for women and 44 for men to 30 for both;
- replacing Home Responsibilities Protection with a new weekly credit for people who are caring for children;
- introducing a new compulsory credit for those caring for severely disabled people for 20 hours or more a week;
- abolishing the initial contribution conditions to the basic State Pension for those who are caring for children or severely disabled people.

By 2012 the State Pension and the ‘guarantee’ element of Pension Credit will be uprated annually in line with earnings growth rather than, as at present, prices.

Introduce low-cost personal accounts for those who do not have access to occupational schemes. People will be automatically enrolled into either their employer's scheme or a new personal account, with the option to opt out. Employers will make matching contributions.

Gradually raise the State Pension age, between 2024 and 2046, to 68 for both men and women. (Pensions Act, 2007).

The reform of the contributory principle introduced by the Pensions Act 2007 has important implications for pro rate calculations which lie at the heart of EU pensions co-ordination. Under the pensions reform, the Department for Work and Pensions will no longer need to carry out pro rata calculations because what the new regulation calls the 'independent tax', which is the national tax, will very rarely be exceeded by the pro rata. Following the introduction of the changes in the Pensions Act in April 2010, the only circumstances in which a pro-rata calculation will still be needed will be where a person has worked in more than one Member State in the same tax year and has insufficient UK earnings to make that year qualify for pension purposes. A pro-rata calculation will allow aggregation of UK and foreign insurance to "qualify" the year for the EU theoretical calculation.

The reform therefore simplifies the administration of pensions very considerably. The UK has made a large investment in IT resources and specialist staff in order to gather and process the necessary information to calculate pro rata entitlements. The changes introduced by the Pensions Act 2007 will therefore have a large impact on the organisation of the Department's work.

Changes are also proposed to the incapacity benefits. The Government set out in the Green Paper 'A new deal for welfare: Empowering people to work' on 24 January 2006 its intention to introduce a new 'Employment and Support Allowance' to simplify the current system. From 2008, this new integrated contributory and income-related allowance will replace Incapacity Benefit and Income Support paid on the grounds of incapacity for new claimants.

The Green Paper sets out the range of work-related activity that might be available to claimants, with advice and support provided by Personal Advisers and the private and voluntary sector. These include:

- 'Work tasters' through work trials, voluntary work and permitted work
- 'Managing health in work' using the Condition Management Programme and NHS Expert Patients programmes
- 'Improving employability' through basic skills courses and confidence training
- 'Jobsearch assistance' through New Deal for Disabled People Job Brokers, other New Deal programmes and Disability Employment Advisers
- 'Stabilising life' through activities to stabilise health conditions, assessing childcare options, managing home finance and stabilising the housing situation.

The requirement to undertake work-related interviews, agree an action plan and participate in some form of work-related activity as a condition of entitlement to the Employment and Support Allowance is likely to present new administrative challenges - and perhaps some issues around the classification of the new benefit - in cases where the recipient has or wishes to export her or his allowance to another Member State. If a similar scheme exists in the host country then one solution would be to require the person to engage with the requirements of that country's scheme. However, as this type

of scheme is not widespread in the EU, this is likely to provide a solution in some cases only. Where the country of residence does not have a similar scheme, it is not yet clear how the requirement to undertake a work-focused interview will be addressed. However, more difficult would be where the claimant is then required to participate in some form of work-related activity. Requiring someone in receipt of Employment and Support Allowance to undertake that activity in the UK would restrict the exportability of the benefit

d. The Concept of Residence

In many countries the concept of residence as used in the regulation is identified by many national reports as a source of problems.

The fact that the concept of residence used in the regulation and which depends on criteria worked out by the Court of Justice, differs from the concept of residence under national law, is at the origin of many confusions. The problem is even greater as difference residence concepts are used and that tax law also uses a different concept of residence.

In Lithuania, for example, residence is the place of actual residence based on duration, continuity, inscription in the public register and individual statements. This includes citizens of Lithuania and permanently residing foreigners registered in Lithuania. But the residence of a person is often not clear and it is hard to identify where the application has to be submitted. Other problems occur in cases where the concerned persons are deceased. Every month the social insurance board receives data on people who died. But if someone first resides in Lithuania and moves abroad without declaring this to the Lithuanian authorities, there is no knowledge of who left and who died. This causes several overpayments. Sometimes big overpayments are made to individuals who are dead. That is why questionnaires are sent to individuals asking for different data to verify if the person concerned is still alive. If no proper information is received within 2 months, the pension benefit is suspended. After 6 months the person is considered deceased, but then the overpayment is still in the bank account of the person and it is unclear who will inherit this as the banks refuse to reveal this information.

On the notion of residence, it is clear that the Lithuanian legislation contains different criteria to establish the residence of a person in Lithuania. Of course, other Member States have different criteria, which can result in positive or negative law conflicts and that is where the problems often arise. As for the time being the Regulation does not provide guidelines or criteria on the residence issue, this causes conflicts with citizens living in other Baltic countries, the Czech Republic, Poland, etc..., as they try to prove that they have their residence in Lithuania to get benefits from Lithuania. For example, when a person receives pensions from two Member States, health care services are provided in the Member State of permanent residence and the other state does not have to compensate for the costs. However, there is no clear definition on where a person resides and thus on who should pay the bill.

In the Czech Republic the category "permanent residence" is not identical with "domicile" as employed by the EEC Regulation 1408/71. This inconsistency in definition is known to the Czech government and its Coordination Committee for EEC Regulation 1408/71. The Czech party has been considering the possible consequences of this discrepancy during the last year. In order to avoid possible negative impacts, the competent administrative bodies (Czech Social Security Administration and Centre of International Reimbursements) issued an internal guideline, which aims at defining domicile in questionable cases. This guideline and other relevant documents play a role of official explanation of the rule.

Several issues arise in Slovakia in this respect. In Slovakia, residence is “where you have your formal place of stay”. According to the European Court of Justice, residence is equal to “where you have your centre of interest”. Cases like Di Paolo pose problems of interpretation in Slovakia. There is a need to shift the centre of interest from permanent stay, as stated in European case law. When a Slovakian worker works in a foreign country and his family stays in Slovakia, the place of permanent stay is usually the same as residence. Of course there are also some cases where the migrant worker migrates permanently and takes her/his family with her or him. Therefore, there is a need for a new definition taking into account the criteria on how to evaluate the relationship between residence and the centre of interest.

How should Slovakia establish the centre of interest of a family who may have a permanent stay both in Slovakia and in the Czech Republic, when for example the children go to school in both countries? Under the national legislation of both countries the rules on residence are very easy to fulfil as the definition of permanent stay is very benevolent, for example, an EU citizen has a permanent stay after having stayed in the country for 3 months. In Slovakia, for an employed person residence is not important as s/he is entitled to social security benefits because s/he works in Slovakia. When a person is residing in Slovakia and working in the Czech Republic, s/he can get additional family benefits from Slovakia, so there residence has to be taken into account. If the father works in Slovakia and the mother works in the Czech Republic, while their family members are residing in Slovakia, there the Community concept of residence also has to be taken into account.

In Slovakia, most of the social security acts make social security benefits subject to a permanent or temporary residence. A permanent or temporary residence is a formal status which defines the place where a given person is to be found. It does not refer to domicile in the sense of the centre of interests under the European Court of Justice judgments. This report, therefore, uses permanent or temporary residence within the meaning of a formal acknowledgement given by an authority that issues residence permits.

In Denmark for social assistance, legal residence conditions entitlement. The relation between residence periods and EU law has recently been examined in relation to ‘starthjælp’ [‘beginninghelp’]. An issue was raised concerning the requirement of legal residence in the Service Act, meaning that a person should have a permanent residence in DK Denmark. The person should be physically present in Denmark at the time of application. But the ECJ judgments dealt with the issue otherwise, so the Denmark interpretation of legal residence was overthrown. However, a rather tricky fact in the act on social services is that the national criterion for eligibility is ‘legal stay’ and not ‘habitual residence’ which seems to have caused some confusion for the local authorities. In a recent case, the distinction between legal residence and permanent residence was made clear. A person had a temporary residence in Denmark and his legal residence in Spain. Denmark refused to pay for the services for this person, as he was only temporary resident in Denmark. The National Appeals Board decided that, as he received a pension from Denmark, he has the right to health care in Denmark.

In two more recent decisions, the relation between the national act on social services and Regulation 1408/71 has been clarified by the Social Appeals Board. In one case, the local authority has refused compensation for the loss of income (§ 29 of the act on social services) to a women who cared for her disabled son, because she was residing in Sweden although her place of employment was Denmark. The local authority based itself on the residence criteria in national law and found that the women was not included in the personal scope of the Danish act on social services. The social appeals board,

however, laid down that Article 73 in Regulation 1408/71 overruled the residence criteria in the act on social services (SM C-20-04 of 17/06 2004). In the other case, the local authority had declined to grant appliances for disabled persons (§ 97 of the act on social services) to a person who resided habitually in Spain, but stayed for longer periods in his summerhouse in Denmark, because he didn't have permanent residence in Denmark. The social board in the regional authority upheld the decision of the local authority. However, the national social appeals board laid down that the person was entitled to appliances for disabled persons during his temporary stay in Denmark due to Article 31 of 1408/71. Apart from substantiating the more recent consideration of benefits legislated in the Danish act on social services, the two decisions demonstrate that confusion arises when local authorities have to decide on the conditions under which a person is entitled to benefits in kind under the act of social services although not habitually residing in Denmark. Since social policies in Denmark normally entitle a person to benefits through either nationality or residence, confusion arises as to the concept of 'legal stay'. As a matter of fact, the act on social services is more liberal in its eligibility criteria than social policies in general, since its entitlement criteria is 'legal stay' and not habitual residence (§ 2 of the act on social services). In principle even a very short term stay in Denmark would entitle those staying legally to Danish social services. It is likely that there will be a future need to clarify the relationship between access to non-contributory Danish social services and the rights and criteria contained in the EU residence directive and Union citizenship.

In Estonia, a new Act on Citizens of the European Union came into force from 1 August 2006. This Act harmonized the EU directive 2004/38 and inter alia made amendments to the stipulation of the personal scope of all statutory social security schemes. Previously the national social security legislation extended to two categories of persons: permanent residents and aliens residing in Estonia on the basis of a temporary residence permit. Since according to the new Act, the residence permit is no longer required from citizens of the EU Member States, social security legislation was amended to include a new category: persons residing in Estonia temporarily on the basis of a right to residence. Citizens of the EU Member States acquire the right to reside temporarily in Estonia for a duration of 5 years when they register their place of residence in Estonia according to the procedures foreseen in the Population Registry Act. Some further concerns exist in Estonia. When cases on the determination of residence are before Estonian Courts, the only orientation used is the inscription of the person in the national registry. Estonian authorities often lose these cases because the Estonian legislation does not require the people to be physically present. Mere registration suffices. This is however essentially a national problem: it is a competence of the Member State and thus up to national legislation to establish what is taken into account for determining residence. It is believed that the Estonian authorities should take initiatives to make the national legislation stricter. At the moment no one controls the national registry and the law on registration is very loose.

There is no nationality condition to receive health benefits in kind in Denmark. In accordance with the new health law (see above), the criteria for eligibility is habitual residence. Habitual residence is established when the person is registered in the central national register (CPR) as residing in Denmark.

Regarding the act on social services, there are also no nationality conditions. Every person legally staying in Denmark has a right to benefit according to the act on social services. The act of social services is in that respect more liberal than social policies in general, since its entitlement criterion is legal stay and not habitual residence. This concept does not exclude very short stays in Denmark. The issue has received some media attention in the autumn of 2006, when the press reported on the case of German tourists on temporary stay in Denmark who were in need of long-term care services

(home help). These are not isolated cases; more generally, the municipalities are uncertain as to how to deal with claims for social services from foreign tourists. The 2007 law requires the municipalities to define the entitlements in such concrete cases. They must make a decision as to what services foreign tourists are entitled to. This implies a screening process, which is a difficult task. If a tourist is legally staying on the territory and his/her entitlement is confirmed through the screening process, s/he will receive the relevant social services.

The length of stay is not (so) important; legal stay is not permanent stay or habitual residence. As long as a person stays legally in Denmark and meets the other conditions of entitlement, s/he is entitled to social services. In principle, even a very short stay in Denmark would entitle those staying legally to Danish social services. In another case, the local authority had declined to grant appliances for disabled persons (§ 97 of the act on the previous social services) to a person who resided habitually in Spain.

This was demonstrated in autumn 2006, when the press reported incidents in which local communities questioned their obligations to grant long-term care services through providing home help to tourists on who were on short-term stay in Denmark (Jyllandsposten). It was clarified that according to national and EC law, the tourists were entitled to long-term care in terms of home help. The organisation that represents municipalities' interests - Local Government Denmark, (KL) - expects more similar cases in the future, as EU citizens needing long-term care are increasingly mobile. In relation to Danish law, it is likely that there will be a need to clarify the relationship between access to such non-contributory Danish social services and the rights and criteria contained in the EU residence directive and Union citizenship.

The definition of residence in Hungarian law does not match the definition in the new Residence Directive 2004/38. If an EU citizen lives in Hungary for more than 3 months, s/he receives a document from the competent Hungarian institution that s/he has a legal residence in Hungary. But if the same person moves to another country, e.g. her or his original home Member State and acquires legal residence there, s/he has 2 states of residence. In Hungary, the authorities have to deal with a lot of cases of people having residence in a country where they do not actually live. As residence is very important for the good functioning of the coordination system, this is well evaluated by the Hungarian authorities, looking at the family situation, the period of presence, the continuity, the payment of taxes and social security contributions, the intention to stay, etc ... All these different factors are taken into account in the residence assessment. In principle, 1 posted worker can only have 1 place of residence. If this is abroad for a Hungarian insured person, this must be registered in Hungary. He can have a Hungarian domicile, but this is not seen as his place of residence.

e. Interface with other EU provisions

Different reports point out that the European Court of Justice is increasingly concerned with interpreting the Treaty, sometimes even more than the coordination regulations (Spain).

This is particularly clear in the field of health care and family benefits.

But to what extent do other provisions of EC law intrude on the matters dealt with by Regulation 1408/71? Many questions can be asked which however can not be solved here.

Do the citizenship provisions in Articles 12, 17 and 18 EC or other movement provisions, such as Article 39 EC take effect subject to specific provisions in secondary legislation (assuming those provisions are valid)?

Where there is not a rule in Regulation 1408/71, can the Treaty create obligations to coordinate that go beyond what Regulation 1408/71 requires? In particular, as a matter of principle, should there be a difference between cases that the Community legislator specifically decided should not be covered by Regulation 1408/71 (for instance, because of an Annex entry), and cases where Regulation 1408/71 simply does not apply?

Is there a different situation when lacunae represent specific exclusions or mere gaps? Should it make any difference whether Regulation 1408/71 actively excludes something or whether it simply does not cover it?

There also seems to be tension between human rights discrimination as understood under the jurisprudence of the ECHR on the one hand and free movement discrimination under Regulations 1408/71 and 1612/68. There is alleged to be a gap between "human rights" and "community rights".

But the Charter of Fundamental Rights should not be forgotten. It is e.g. mentioned that the non-exportability of benefits for disabled persons – or restrictions to the free movement of disabled persons – might be challenged from another quarter, i.e. the Charter of Fundamental Rights, according to which "the Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community". ...

Another important issue is the link between Regulation 1408/71 and the Residence Directive 2004/38. An example of this problem can be found in Luxembourg in particular as for example the difficulties for EC citizens residing and working in Luxembourg, to take their ageing parents to Luxembourg. Luxembourg refused to give a 'residence permit to family members' (essentially ageing ascendants) of a European citizen working in Luxembourg on the ground that the family member does not fulfil the condition of "sufficient resources" of Article 7 of 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.

Luxembourg legislation, Law of 28 March 1972, in its Article 1, states that "the entry and the residence in Luxembourg can be refused to a person, who does not have *sufficient personal resources* for covering costs for travel and stay". Members of the European Union have a right to reside in Luxembourg under the condition that they have a pension higher than the Luxembourg RMG and that they have a right for sickness benefits in kind. It also states that the family member, who is a pensioner and whose pension does not exceed the Luxembourg RMG, may produce a document proving income from a descendent to complete his/her resources. This gives rise to several questions. The first is about the condition concerning the sufficiency of resources and about the source of this income. *Does Luxembourg have to take in account the income of a descendent residing and working in Luxembourg as an EC citizen?* The second question is about articulation between the right of residence (Directive 2004/38) and the application of Regulation 1408/71. *Does Luxembourg have to take in account the long-term care benefits in kind and in cash guaranteed to a migrant by Regulation 1408/71? Or, do social security rights, protected by Regulation 1408/71, benefit only to migrants, who have already got a residence permit?*

What is the relation between the condition to have sufficient resources as required by the Directive 2004/38 and the Regulation: does this condition have to be fulfilled before application of the Regulation (only means available in the country of origin may be taken into account) or a person migrate with the rights guaranteed by the Regulation (so also

resources are taking into account, including those guaranteed by the Regulation). Similar problems are also discussed in France. Problems relate also to the question to what extent people, even non-active ones, can rely on the directive to have access to social security, but also to social assistance benefits and if residence requirements/conditions are still allowed.

A final problem, although perhaps rather out of the framework of the application of the Coordination Regulation, relates to the lack of coordination between the areas of tax and social security coordination. These relate to posting, simultaneous employment in two or more Member States and special rules for certain categories of workers. Insofar as posting is concerned, there is a difference in the period of posting: one year for social security purposes (five in practice), and 183 days or immediately (due to the substantive interpretation of "employer") in the field of tax. A posted worker will thus be taxed and insured in different countries. He will have a different net wage than workers in the State of work and the State of residence. Such net wage differences are also encountered by persons working in two countries for an employer who is not established in the State of residence and by international transport workers. Differences in net wage can be significant. Especially for lower wages, considerable disadvantages arise in terms of tariffs and non-deductibility of the mortgage interest. Moreover, social security funding from taxation may lead to additional fluctuations in net wage differences. The distinction between taxation and social security contribution, incidentally, is not always easy to make (cf. C-34/98 *Commission v. France*). Problems also stem from the mismatch between statutory and supplementary schemes (e.g. for old-age pension) notably when it comes to the level of the benefits, the conditions for entitlement and the tax treatment during acquisition and payment. In terms of tax treatment, there is often a reassessment of wage components (foreign premiums, foreign pension premiums, foreign insurances, foreign labour conditions) according to the tax legislation of the country where the person is taxed. It is clear that solutions will need to be sought in the future.

f. Administrative Cooperation

Good application and implementation of the EU-Regulations of course requires good cooperation between the Member States and all institutions involved. In Malta it is emphasized that Cooperation sometimes requires face to face contact. Holding liaison meetings with major partners enhances the working relationship between institutions. Good international cooperation presupposes however also a good national administration of the coordination regulations. It is clear that in particular the application of new technology is considered crucial in all Member States. The abolition of the E-forms as foreseen in the new regulation is considered to be very important. Although these forms exist in all the 21 languages of the European Union and can be superimposed, the forms are considered (e.g. Malta) to be very cumbersome with an excessive number of footnotes. In fact, in certain forms there are up to 80 footnotes concerning individual data requirements by Member States. Many reports complain that these forms are not user-friendly and could be better designed as at present they appear cluttered, and plain language is not always used. On the other hand, this complication is inevitable given that the requirements of 29 different countries have to be incorporated and agreed by the Administrative Commission. In fact, institutions in many Member States have over the years bypassed the use of the more complicated forms by introducing simplified bilateral versions with their main partners, and the results of electronic management tools are considered to be positive. Technical improvements are therefore considered to be the future (see Belgium, France) and in many countries the electronic exchange foreseen in the new regulation is seen as very positive! However, the challenges are considerable. The IT infrastructure in the different Member States differs enormously. However more than electronic exchange of data is required. For exchange, data need

also to be available. In that respect modernisation of national administration is necessary.

Another example can be found e.g. in Belgium with GOTOT where employees can electronically request the E-101 forms. Belgium and the Netherlands have e.g. also just started with an "electronic exchange" of the E-101 forms, i.e. sending by post CD-Roms that contain the forms (in Excel). A pilot electronic data sharing project has been introduced between Estonia and Finland whereby the E125 forms are forwarded electronically. Estonia intends to extend electronic data sharing to Latvia and Lithuania as well.

Good European cooperation between institutions also depends on the organisational structure of the States. In Belgium it was mentioned that cooperation is more complicated when dealing with States that have decentralised organisation than with those which have a centralised structure where there is only one point of contact.

CHAPTER II:

Detailed analysis of the application of benefits in Title III of Regulation 1408/71

A. Sickness and maternity benefits

BENEFITS IN KIND

1. General issues.

1.1 Cross-border medical care under the Regulation

a. Medical treatment abroad

a.1 Necessary medical treatment

In the field of sickness benefits in kind, persons who reside outside the competent Member State are entitled to receive in the Member State of residence all health care benefits provided by the legislation of that State (Article 19 of Regulation 1408/71). In the case of stay outside the competent Member State, the person can only obtain "necessary" health care. In this respect, a particular problem was mentioned in the Czech Republic concerning the UK. Some Czech nationals reside in the Czech Republic but work in the UK. On the strength of Article 19, they enjoy full health care coverage in the former country. Nevertheless, the UK institution considers that persons working in the territory of the UK reside there. As a result, the persons concerned, much to their regret, can only obtain benefits in kind which become medically necessary during a stay in their home country.

Persons holding the now obsolete E-119 or E-128 forms are entitled to necessary health care services during their stay in Hungary. Necessary treatment means treatment which is necessary to receive for the safe return to his or her original member state of residence, where he or she has health insurance coverage.

Necessary treatment is not equivalent to emergency treatment. If the medical treatment is not needed immediately, the provider must consider the foreign citizen's duration of stay in Hungary. If the person does not have a temporary residence permit, only health needs which arise during the three months of stay can be met.

The precise content of necessary medical treatment in Hungary is unclear and at present, according to the national report, unascertainable, as the doctor providing the treatment has a disproportionately great role in its determination. There are great differences in interpretation even within one single Member State, especially concerning e.g. aftercare necessary following an acute intervention.

In Slovenia, *urgent* medical treatment and *necessary* medical treatment are defined in Rules on Compulsory Health Insurance. According to the Rules on compulsory health insurance, treatment abroad for insured persons can be authorised, if the available treatment in Slovenia has been concluded or treatment is not available, and it would contribute to improvement of the health condition of the patient or prevent deterioration. An insured person can be referred for treatment abroad as well if treatment is not available to an adequate extent in Slovenia (for instance due to long waiting lists) The problem in Slovenia is that there are no national waiting lists for different medical treatments (except for open heart surgery). Different hospitals have different waiting periods. The patient has the legal right to choose the hospital in which s/he wants to be treated.

In Ireland, the decision on what treatment is necessary is a clinical decision which is made by the treating doctor (general practitioner or hospital doctor as the case may be). The interpretation of the concept by Irish care providers and institutions is based on Article 22.1(a) and Decision 194, and guidelines were drawn up and issued to the necessary groups within the Irish healthcare system on the concept of 'necessary care'.

Regarding the right to free abortion during a temporary stay in Denmark, the Ministry of Health and Interior Affairs considers that in the case of a woman requesting an abortion during a temporary stay in Denmark, such treatment cannot be considered a necessary medical treatment.

A typical problem found in several countries (for example, Romania, Poland, Belgium) relates to pregnant women. For example, a woman, who is 7 months pregnant, wishes to spend her holidays in another Member State. Her doctor has authorised her departure. Is she entitled to benefits when, unexpectedly, she gives premature birth in the State of stay? According to a former decision of the CASSTM, Decision nr. 183, healthcare in conjunction with pregnancy and childbirth provided before the beginning of the 38th week of pregnancy outside the competent State had to be regarded as "immediately necessary care" for the purpose of Article 22(1)(a) (old). Following the amendments brought about by Regulation 631/2004, this Decision was repealed and replaced by Decision nr. 195.

In the UK problems with other Member States usually centre on people suffering an 'acute exacerbation' of a condition, which existed before the temporary visit. The UK Department of Health suggests that some Member States are rigid about the condition having to arise during the temporary visit. This gives rise to particular problems with, for example, people with heart conditions or psychiatric illnesses.

In Finland a time frame in which a person must be ensured access to necessary medical care in case of non-urgent treatment was recently introduced. According to this 'treatment guarantee' the need for treatment must be assessed within three working days from the day the patient contacted the care provider. In primary health care the treatment that has been assessed as necessary must be provided within three months. This time frame may be exceeded by three months if the treatment can be postponed on justifiable grounds and without jeopardizing the patient's state of health. In specialised medical care an assessment of the required treatment must be accessible within three weeks from the date that the referral has arrived from the primary care unit and the care must be provided within six months. If the municipalities are not able to arrange the examinations and treatment within these time frames at their own health care units or hospitals, they are obliged to arrange the treatment at some other provider of health care services. This must be done without a change of the client fee.

This new legislation has a link to the Regulation 1408/71 because the obligation to arrange the treatment within these time limits can be fulfilled by using either health care services in Finland or abroad. It also means that these defined time frames can be used when assessing whether the treatment is available within the time normally necessary for obtaining the treatment in question within the meaning of Article 22 (2) of the Regulation.

In some countries problems have been encountered with the European Health Insurance Card (EHIC). In practice, there have been a number of cases, in particular in Portugal and in Estonia, where medical service providers in the other EU Member States (in particular in Germany and Spain) have not recognised the European health insurance card. As was mentioned in the 2005 Report, in these cases, patients in need of medical care have contacted the Estonian Health Insurance Fund (e.g. by phone) with a request for instructions. The Fund has usually recommended those patients to contact the regional health insurance institution in the country concerned, which in some cases have helped to resolve the issue. In cases where the patient had to pay the full invoice for necessary care in another Member State him or herself (either because the service provider did not recognise the health insurance card or because the person did not have the card with him or her when travelling), the costs (with the exception of patients' fees) are reimbursed to the person by the Health Insurance Fund according to the E126 procedure upon presentation of invoices or receipts and after checking with the competent institution in the Member State concerned. These problems have now been largely resolved in Estonia. However, some practical problems have remained. In countries where the right to medical treatment is residence-based, service providers sometimes do not check the date of validity of the health insurance card, which is relevant for the Estonian Health Insurance Fund, since the right to medical treatment in Estonia is insurance-based.

In practice, however, the EHIC issued by the Greek competent institutions seems also to be accepted with difficulty in some cases by health care providers in other Member States, notably Belgian, German, French and Finnish ones. The problem seems to arise from the fact that the foreign health care professionals and the institutions of the place of stay despite the ECJ case law (C-326/2000 IKA v Ioannidis) have been over stating their fear of not being reimbursed – the former by the institutions of the place of stay and the latter by the competent institution – because the institution of the place of stay and the competent institution respectively will not consider the treatment as having become necessary on medical grounds.

The problem of the non-acceptance of the Greek EHIC is not confined to foreign health care professionals; Greek patients have on occasions experienced difficulties in having their EHIC accepted by foreign hospitals as well. As a result, patients are most often charged private rates, which they have to pay themselves. The Greek competent institutions, on the other hand, see themselves obliged to engage in time-consuming procedures, such as issuing and sending a form E 126 (certificate concerning rates for refund of benefits in kind) to the institution of the place of stay. Another difficulty relates to ex-E 128 cases (civil servants, students, posted workers). Greek competent institutions are forced – the insured persons often have been deceived by some providers or institutions of the place of stay – to issue, in addition to the EHIC, a form E 106, which then prevails over the Card. Cases of typical stay are considered – merely for sake of convenience – as residence. Yet another problem was reported with Germany, where insured foreign persons are required to choose a sickness fund (*Krankenkasse*), which then acts as the institution of the place of stay. If the patient has not chosen a sickness fund, he or she is denied benefits. This requirement may prove difficult to comply with in case of emergency care. Therefore, Greek authorities have asked German health care

providers to allow the Greek insured person to choose the sickness fund in the doctor's practice, by merely filling in an application form.

In the Greek report notwithstanding the introduction of the European health Insurance card, the major problem remains the essential 'link' between benefits medically necessary and the expected duration of the patients' stay in a Member State other than the competent state. In other words, service providers have serious reservations in using the Card in accordance with the provisions of Regulation 631/04, i.e. to justify the necessity of the care based on the duration of the stay, mainly where such a stay is for reasons other than tourism (i.e. particularly short). That practice has a negative impact on the patient who is, finally, obliged to seek and get necessary treatment as a private patient, and, consequently, to be charged private tariffs. In that way, healthcare is being provided as if the patient did not have any Community document (the Card or other) and in spite of the fact that the care has been provided under a statutory scheme. In all cases, the patient may be reimbursed *a posteriori* in accordance with the provisions of Article 34(1) of Regulation 574/72, but the costs to be reimbursed on that legal basis is much lower than the one actually paid by the insured to the provider (1/5). Article 34(4) of the implementing Regulation has never been applied by Greek institutions, because the rates of reimbursement applicable under Greek legislation are a lot lower than the rates under other Member States legislation (1/20).

In their turn, the Greek competent authority and institutions have expressed great concerns about the refusal mainly of hospitals of central and northern European countries) to recognize (practically reject) the Card, which actually penalizes the patient, due to the very high rates applying in that sector, apart from being detrimental to his or her state of health. This 'hospitals' approach is due to the above-mentioned 'fear' (reservations), that costs occurred, mainly with regard to very expensive treatment, are not going to be refunded by the institutions of the place of stay, mainly where it is not easy to verify and justify whether medical treatment in fact becomes necessary or it is a typical case of medical tourism. That problem is usually raised whenever the insured suffers from a pre-existing illness or chronic disease. Hospitals, instead of deciding on the necessity or scale of necessary care in accordance with the legislation, administered by the institution of the place of stay, as a rule ask, either via the latter or from the patient for an E 112. After an in-patient treatment has been provided, the hospital straightaway charges the institution of the place of stay. That institution is expected to reimburse promptly the hospital in question and to charge, in its turn, the amount to the competent institution. Reimbursement by the latter usually takes too long. In order to avoid possible financial deficits, due to delayed refunds, the institution of the place of stay, defers, as long as possible, reimbursing the said hospital. The Greek institution of the place of stay, for instance, does not reimburse hospitals before the competent institution refunds the latter. Consequently, in order to limit deficits, the hospital itself, instead of implementing Community provisions, prefers to charge costs directly to the patient.

In Denmark the spread of information on the European health insurance card has evidently encountered some difficulties. One main reason therefore is that health insured persons in Denmark are covered throughout the first month of staying abroad by the Danish tourist health insurance certificate. In several aspects, the tourist health insurance certificate (the Yellow Card) provides broader coverage than the European health insurance card (the Blue Card). The yellow card thus offers certain advantages compared to the blue card: it is not confined to EU/EEA Member States and Switzerland; the scope of providers is larger (also private providers); user charges are reimbursed as well. On the other hand, the yellow card, unlike the EHIC, does not cover care in conjunction with chronic diseases and is limited to stays abroad the length of which does not exceed one month (as opposed to one year for the EHIC).

The problem resides basically in the fact that people are not properly informed about the blue card and the rights attached to it. The municipalities themselves are misinformed about the EHIC. Only a small minority of municipalities appeared to be aware of the fact that the EHIC does not exclude treatment for the chronically ill. Danish citizens on temporary stay abroad have seen their yellow card refused by foreign providers, who instead asked for their EHIC – which the Danes did not have and did not know about.

The problems identified above were highlighted in a Danish television programme, broadcasted in May 2007. In the programme, the lack of awareness EHIC was unfavourably commented upon. The European card was referred to as the “secret card”. As a result of this media coverage, the situation has improved.

In Greece medical treatment abroad can be approved after the risk has materialised and the medical treatment abroad has taken place. The expenses covered by the competent institutions, after compliance with the aforementioned procedure, refer to the cost of hospital and medical treatment, doctors' fees, medical examinations, medicines, special treatment, transportation expenses, hotel expenses, embalming expenses, etc. The Conseil d'Etat held in case 1895/2000 that if the competent committee of doctors considered that “there was a sudden and acute” illness during a person's stay abroad then the cost of the appropriate treatment must be covered by IKA by an ex posterior approval granted by the competent social insurance authorities. IKA's argument that the treatment could be interrupted and that it could be carried out in Greece, was not accepted by the court, as it is considered that in the case of sudden illness during an affiliated person's stay abroad, it is irrelevant whether the appropriate treatment could be carried out in Greece as well. The case referred to surgery.

One Belgian insurance institution is reported to occasionally question the medical necessity of care obtained abroad by its insured persons. Upon receipt of the form E125 by the institution of the place of stay, it requests additional information such as medical reports. The data contained on the EHIC appears to be insufficient in some cases. Unlike its predecessor, form E111, the EHIC does not provide information on the status of its holder (e.g. pensioner). This is important, however, for Belgian pensioners staying in Spain, as pensioners are entitled to pharmaceuticals free of charge in Spain. As a result, Belgian pensioners staying in Spain experience difficulties to be treated as if they were Spanish pensioners.

Another problem relates to Latvians working in Ireland. When going on holidays in Latvia, do these workers need an EHIC issued by the Irish institution? They are already entitled to benefits under the Latvian scheme, by reason of their nationality. Can Latvia then apply the provisions of its own legislation, which supposedly offers better conditions? The answer to this question is straightforward. By virtue of Article 13(2)(a) of Regulation 1408/71, the Latvian workers are subject to Irish legislation. When they come back to Ireland, they have to apply for an EHIC in Ireland. The Regulation does not preclude the Latvian institution from providing more favourable treatment, but in that case, it loses the possibility to claim refund from the Irish institution. However, the Latvian institution cannot decide to give the workers a Latvian EHIC.

a.2 Authorisation for Treatment abroad

In Estonia the following criteria are used to determine whether the Health Insurance Fund may (but is not obliged to) give consent for medical treatment abroad:

- the health service applied for or alternatives to such health service are not provided in Estonia;

- provision of the health service applied for to the insured person is therapeutically justified;
- the medical efficacy of the health service applied for has been proved;
- the average probability of success of the health service is at least 50 per cent.

In practice authorisation for medical treatment abroad is in Austria quite easily given, especially when special treatment is not available.

In Greece, for the Application of Article 22 of Regulation 1408/1971 and the granting of authorisation for medical treatment abroad, the following conditions have to be met: for cases a) and b) the medical opinion of a doctor, chief or medical staff of a public or university clinic or hospital specialising in the illness of the person concerned certifying the kind of illness and the absence of such treatment in Greece. For case b) certificates from two Greek hospitals or clinics testifying to the inability to provide timely treatment in Greece, including organisational reasons such as long waiting lists. Furthermore, the competent institution also requires the opinion of a team of doctors, the "Special Health Committee" for granting authorisation in cases a) and b). The Committee's opinion should refer to the kind of illness, the specific reasons for the necessity of treatment abroad, the potential duration of such treatment, the particular Member State and the particular medical institution, where the person concerned will be treated.

In Spain, treatment abroad should be given when the claimant cannot obtain treatment within the time normally necessary. And this is precisely the problem in Spain, where a patient might have to wait several months for surgery. As medical practitioners and patients are not well informed about this possibility, the E 112 form is not used frequently. According to the Spanish rules, only in cases where the competent health institution of the Self-Governing Community allows the treatment abroad, the patient is required to ask for the E-112 from the competent national institution called "Instituto Nacional de Seguridad Social", which manages most social security benefits in Spain. Thus, it is to be noticed that the competence to give the E-112 form belongs to the Central Government and not to the Self-governing Communities.

In practice, the "Servicio Andaluz de Salud" (health institution competent in Andalusia) has reported a common practice used by patients (mostly EU citizens): they ask doctors to get an E-112 form and doctors send the application to the health institution but informing them that it is the patient who wants to get medical assistance abroad. The "Servicio Andaluz de Salud" (SAS) always gives the authorizations. However, in such cases patients are not entitled to be reimbursed the full amount of the cost of travelling and accommodation abroad. On the contrary, if patients are sent abroad following the recommendations of the doctors of the public health system because they cannot receive medical assistance in Spain, the "Servicio Andaluz de Salud" will reimburse them only up to a certain amount of travel and accommodation expenses. Nevertheless, the Spanish Administration seems to be reluctant to give the authorization to receive treatment abroad.

In a follow up to earlier case law, the competent Luxembourg institution UCM decided to inform, on the Internet, patients with prior authorization for treatment in Germany that the supplement for first class hospitalization, called "Wahlleistungen und Privatpatient", known by the acronym "Goä" (which is "private treatment" not covered by social security) is not covered by E 112.

In Ireland, the Health Service Executive (formerly health boards) makes a decision to authorise treatment abroad under this provision. It is understood that there are approximately 350 new referrals for treatment per annum under Article 22 (1) c, the

majority of these to the UK. This does not take into account the number of individuals previously authorised who may have had repeat or follow-up visits which are about 1,000. One issue raised is that some women seek authorisation under Article 22 to return to their home country to give birth. This is generally refused by the Irish authorities. While the Irish authorities are not obliged to grant such authorisation under EU law, some other countries do take a more flexible approach.

A further issue concerns Czech persons working in Ireland but returning regularly (once a month) to their family in the Czech Republic. It is suggested that such workers may still be resident in the Czech Republic and that they should be able to have an E106 issued by the HSE (as Ireland is the competent state). However, it is stated the HSE did not often issue an E106 in such cases. It appears that the HSE asks all applicants from other EEA countries or from Switzerland to prove to its satisfaction that they are ordinarily resident in their home country and that they visit it at least once a week. To do so it asks them to produce receipts or evidence of weekly travel over a period of six months. While people may travel back to the UK on a weekly and sometimes on a daily basis, it appears that there are very few cases further a field in which the HSE accepts that residence still exists. It is not clear that the requirement to show a weekly visit to the home country is consistent with the Regulation. However, if a person from the Czech Republic was able to prove weekly trips back home as mentioned above, the HSE would issue the E106. This is another example of the problems dealing with the interpretation of the concept of residence.

The Czech health insurance companies attempt to authorize use of health care abroad (form E112) as little as possible. In the Czech Republic to date there have been 23 requests for E112, of which only 6 were refused, which means 70 per cent of cases have been approved.

In Slovenia, authorisation from the authorised body of the HII is necessary, based on the obligatory expert opinion of a body of doctors of the University Clinic. There were 430 authorisations and referrals for treatment abroad in 2005. 13 insured persons had treatment abroad without authorisation and are claiming refunds from HII. The HII has analysed each case separately and decided that in 2 cases treatment abroad can be justified.

In Slovenia, urgent medical treatment and necessary medical treatment are defined in Rules on Compulsory Health Insurance.

According to the Rules on compulsory health insurance, treatment abroad for insured persons can be authorised, if the available treatment in Slovenia has been concluded or treatment is not available, and it would contribute to improvement of the health condition of the patient or prevent deterioration. An insured person can be referred for treatment abroad as well if adequate treatment is not available in Slovenia (for instance due to long waiting lists) The problem in Slovenia is that there are no national waiting lists for different medical treatments (except for open heart surgery). Different hospitals have different periods of waiting. The patient has the legal right to choose the hospital in which s/he wants to be treated.

In Latvia, problems may arise because Latvian legislation guarantees a very broad scope of health care services. The Basic Care Programme (the health care minimum) defines a basket of health care services to be guaranteed and covered by the state health care budget. The Basic Care Programme includes emergency care, treatment for acute and chronic diseases, prevention and treatment of sexually transmitted diseases and contagious diseases, maternity care, immunization programmes and provision of pharmaceuticals free of charge for entitled groups. However, in practice the state is not

able to ensure the provision of all formally guaranteed services due to limited resources. There are long waiting lists for some form of treatment, for instance for endoprosthesis. Under Regulation 1408/71 the authorization may not be refused where the person cannot be given a treatment within the time normally necessary for obtaining the treatment in question taking account of his current state of health and the probable course of the disease.

The Swedish system is not a reimbursement system and there is no "free movement of patients" even within national territory. As a general rule, Swedish patients cannot go to a medical institution in another Swedish county to seek better or prompter care than that provided in their own "health care area". Existing 'guaranteed care' (vårdgarantier) is offered within the 'planned system' of public services and pre-contracted private services. The Swedish authorities have interpreted Article 22.1 (c) of the Regulation in a narrow way. Permission to receive medical treatment abroad can be granted only if it is included in the Swedish medical service package, but for some reason cannot be provided within normal waiting time in Sweden. The possibility to be granted medical care outside of the package, i.e. on the grounds that the medical care is different and better in the other Member States is even more difficult.

The Greek report mentions the following problem. In some Member States doctors in public hospitals (surgeons, in particular) have, to a certain extent, the discretion also to provide services in a private capacity (applying private tariffs) in parallel with their main functioning as care providers contracted with the sickness insurance system (within a contracted establishment). When the patient is authorized by a Greek competent institution to go to one of these public hospitals of another Member State to receive there the treatment appropriate to his or her condition, very often the person receives treatment as a private patient. Usually, that situation is due to the fact that either there is an a priori agreement between the patient and the doctor involved (the 'specialist') for the specific treatment required (in the form of fixed appointments) or the patient is referred by the hospital's administration (emergency cases).

In Greece, the Ministerial Decree on 'treatment abroad' explicitly precludes authorized treatment being provided in private establishments, emphasizing priority to the Regulation mechanism, i.e. the proposed treatment must be covered by the sickness insurance scheme of the other Member State, except for cases concerning 'children'. However, given that in many cases the proposed treatment, although provided under a non or partially contracted status, is deemed appropriate for the patient, Greek competent institutions either refused to follow the authorization administrative procedure or were disposed to cover only the costs respectively born by the institution of the place of stay. In those cases, appropriate treatment abroad was no longer feasible, since the patient could not afford to bear the large part of the total costs.

Uncertainty exists as to how to deal with requests for authorisation which are dictated by the wish to avoid waiting lists in Poland.

In the Czech Republic there are three options for reimbursement of health care costs. Health services provided in other EU Member States are provided and reimbursed according to EEC Regulation 1408/71. The system of E-forms (EHIC) is applied. The non-hospital health care provided intentionally in the territory of another Member State and paid directly by the patient is also reimbursed according to prices usual within the national Czech system (according to judgments of the European Court of Justice). If the Regulation can't be applied, the third possibility of health benefits export exists according to Article 14 of the Act no. 48/1997 Coll., on public health insurance. This concerns necessary health care, which costs are covered from the health insurance to the level that is usual in the Czech Republic.

In Slovakia, the main issue in the area of benefits-in-kind of medical insurance in the past year has been the question of priority of individual rights to healthcare social security over the derived/secondary right to healthcare. The reason was that dependent family members of a migrating worker, who have residence in the Slovak Republic, or the dependent family members of a pensioner receiving a pension from another Member State, who have residence in the Slovak Republic, have the right to be state-insured in the public system of medical insurance. This individual right had precedence over their derived right as family members of employed persons. This approach has since been abandoned since it created chaos with respect to other systems of social security.

In Belgium, the question is asked whether there is any difference in treatment when it is not the patient who moves abroad, but their blood or tissue which is sent for analysis. Is prior authorisation still required?

1.2 The Treaty based method of cross-border medical care

The EC coordination rules on the provisions of health care receive much consideration in the *National Reports*. In this respect it must be borne in mind that there are considerable differences between Member States as regards schemes of sickness and maternity benefits.

The '*Decker*' and '*Kohll*' and subsequent judgments of the European Court of Justice highlighted the differences between schemes which directly foot the bill for medical services, on the one hand, and schemes under which the insured persons pay the bill themselves and then may claim reimbursement, on the other hand.

These cases of the Court of Justice on cross-border health care led to different reactions in the Member States and from many hardly any reaction at all. The Court of Justice made clear that this case law also applies to systems with a National Health Service. Thus all European Countries have to take account of this case law. However, no impact was reported in Spain and there was hardly any reaction in Sweden.

In Luxembourg also the sickness institutions did not basically change their position. They continued to reject prior authorization for ambulatory medical treatment abroad (for example, treatment from an orthodontist in Germany) or they refused to reimburse costs linked to in-patient medical treatment abroad without prior authorization. Emergency hospitalization problems also appeared. Luxembourg institutions refused to reimburse hospitalization costs, occurred abroad, covered by the legislation of the State of emergency to a lesser extent than under Luxembourg regulation or uncovered by the legislation of the State of emergency.

In a case dealing with a prior authorisation for treatment by an orthodontist established in Germany, the Court accepted the justifications presented by the sickness funds allowing restrictions of the freedom to provide medical and hospital services as free movement of patients, without any condition, represents a risk of seriously undermining the financial balance of the Luxembourg social security system. In another case dealing with the refusal of reimbursement without prior authorization, concerning in-patient treatment, the Court accepted this refusal, referring to the specifics of Luxembourg's contracting system, which has the following characteristics:

- All hospitals in Luxembourg have contractual arrangements with the sickness insurance fund.

- Hospital services are financed by annual budgets drawn up separately for each establishment.
- Costs are completely covered by the sickness insurance fund.

Furthermore, the Luxembourg financing system is linked to cost control. If the prior authorisation needed by an insured person to go to another Member State for treatment were lifted, the cost of hospital services would grow, because the establishment's costs are fixed and remain the same even if the rate of hospitalisation decreases. This risk is greater for Luxembourg, because of its small size and the great number of University hospitals in the frontier regions. Therefore, this risk must be considered as an urgent necessity (*nécessité impérieuse*) justifying prior authorisation to go to another Member State for treatment.

Denmark has taken the lead in implementing this case law, it being one of the few Member States that – perhaps not perfectly – applies it. In 2000, legislation was changed to enable the Ministry of Health to regulate the conditions for assumption of medical expenses in cases where the goods or services were bought or provided abroad. The policy reform, which came into effect on 1 July 2000, allowed dental care, psychotherapy and chiropractic treatment to be purchased abroad, as well as, for persons insured in group 2, general and medical specialist treatment. Every Danish citizen can choose once a year between two groups: group 1 entitles the patient to free medical (and dental) treatment by a general practitioner (or by a specialist to whom he or she is referred by the GP) who has joined the collective agreement with the Public Health Service. If s/he opts to belong to group 2, s/he is entitled to choose his or her general practitioner and specialist freely, but s/he has to pay part of the cost her or himself. The Treaty-based method of patient mobility is fully implemented in Denmark for persons belonging to group 2. However, this group only covers 1,5 per cent of Danish insured persons. The Cases of the Court in *Geraets-Smits and Peerbooms* have had an indirect impact, concerning exportability of Danish health care. Since 1 July 2002, Danish patients have had a right to hospital treatment outside the contracted public hospitals in the event these cannot provide the necessary treatment within two months. In that case, private hospitals in Denmark cannot be favoured over hospitals in other Member States.

The *Kohll* and *Decker* and *Smiths* and *Peerbooms* cases did not provoke much public debate in Sweden. Sweden did, however, intervene in the latter case, arguing that Article 59 (now 49) and 60 (now 50) cannot be applied to a health care system of the Swedish type. In 2004, the Supreme Administrative Court took a different view in three judgements concerning persons who had received medical services abroad and demanded reimbursement from Sweden. In one of the cases, the person had applied for permission in accordance with Article 22. 1 (c), which was rejected since the service could be provided in Sweden within reasonable time, but in the other two cases no such application had been made. The Supreme Administrative Court stated that a person in the applicants' situation had two options: to apply for permission in accordance with Article 22, which is aimed at promoting free movement, or to rely directly on Articles 49 and 50 EC. There are no demands for authorisation from the competent institution in Swedish law. The Supreme Administrative Court therefore found that the persons should be reimbursed, to the extent that the medical service would have been covered by the Swedish national health system. This case law thus makes it possible to be reimbursed for medical care received abroad, even such that could have been performed in Sweden within reasonable time, without prior authorisation. Applying for permission in accordance with Article 22.1 (c) is however still recommended, since the financial issues are then settled in advance. A proposal has been made to insert an authorisation system in Swedish legislation, which must be seen as an attempt to stop the generous application in the abovementioned judgements.

In the wake of the *Watts* case, the extent to which Denmark complies with Community law has been readdressed. The day after the *Watts* judgement was delivered, the Danish Minister of Interior and Health was asked by an MP to clarify the impact of the judgement on Danish healthcare. The government viewpoint is that due to the waiting time limit, which will be lowered to one month in 2007, the judgement will not have any practical effect. The answers to the parliamentary questions, however, again repeat the Danish restrictive definition of service - that a service, within the meaning of the Treaty, is one provided with the intention to make a profit where the insured person pays more than half of the costs (answer to S 4967, 17 May 2006).

There is no reimbursement for the costs of pharmaceuticals bought outside Denmark, unless they are bought in accordance with the rules of Regulation 1408/71 or as a part of the tourist insurance scheme.

The question whether this complies with EU law has been addressed in relation to both EU competition law and Regulation 1408/71. Recently the Danish MEP Karin Riis Jørgensen has in a written question asked the Commission whether the fact that health care insured persons in Denmark can only buy publicly subsidised pharmaceuticals at Danish pharmacies is contrary to EU law. The Danish Consumers Council (Forbrugerrådet) is preparing a case before the Danish courts and has declared that if the Danish courts do not support their case the Council will bring it to the European Court of Justice.

France has in 2005 finally taken into account the important jurisprudence of the European Court of Justice in the field of medical treatment and in that respect changed the national legislation implementing this case law. However, it is still unclear in French legislation whether cross border spa treatments should follow the procedure of hospital care or non hospital care. The requirement of prior agreement already applicable to treatments provided within France should be transposed to cross border treatments with possible adaptations ensuring that rules of free movement of services are not violated.

The procedure provided by Article L6211-1-2, 2° of the French *Code de la santé publique* concerning the administrative authorization required from bio-medical analysis laboratories established in another EU Member state to provide services in France has been implemented by Decree 2006-306 of 16 March 2006. In the meantime, the Commission has decided to send a reasoned opinion to France for failure to implement the judgment of the Court of Justice handed down on 11 March 2004 in Case C-496/01 concerning legislation on bio-medical analysis laboratories. The Commission considers that the French legislation adopted in response to this ruling does not implement it insofar as it does not provide the legal certainty required by laboratories established in other Member States which wish to offer their services on French territory.

A current proposed individual agreement to be signed by French *Caisses d'assurance maladie* and doctors established in other Member states who intend to provide services to French patients aims to integrate these doctors into the "*médecin traitant*" scheme. "*Médecins traitants*" are designed to be consulted first by their patients and are in charge of coordinating access to care. Although doctors established outside of France do not fall within the scope of French medical conventions, the agreement in preparation transposes to them rights and duties which are applicable to "*médecins traitants*". Through this agreement, French patients will be able to choose a "*médecin traitant*" among doctors in another Member state.

French law needs reform concerning care service providers established in another Member State and willing to work temporarily in France. In a case of 18 January 2006

(*Eline H. v. CPAM Sélestat, case n°03-17057*), the *Cour de cassation* has ruled that the French competent health care institution could refuse to reimburse the health care costs of an insured person residing in France because the German midwife who had delivered her baby and provided other treatments had not filled out the prior declaration form enabling her to provide services in France. Indeed, the law requires service providers established in another Member state to make a prior declaration every two days and for each patient. The Commission has decided to issue France with a reasoned opinion concerning the arrangements for the free provision of services in France by professionals whose qualifications are automatically recognised under Community Directives (20 December 2005). The Commission feels that the conditions set out under French legislation concerning the temporary provision of services by midwives established in another Member State are unduly restrictive. The conditions applied to this prior declaration under French legislation (Article R4112-12 of the Public Health Code) are problematic, since, on the one hand, migrants are required to make a declaration per medical procedure or per patient, and on the other hand, services can only be provided to the same patient for a maximum of two days in France. In the Commission's opinion, these rules go beyond the provisions of the relevant Directives, as well as the criteria set by the Court of Justice in this matter, and they hinder the free provision of services by the professionals concerned. Moreover, in this way, France is reducing the opportunities available to its own citizens to be treated by qualified midwives from other Member States.

Is the procedure set by a local *Caisse primaire d'assurance maladie* (from the region of Haute-Garonne) compatible with the principle of free movement of persons within the EU? The procedure provides that French insured persons who go abroad for more than 4 weeks must get a prior approval of the Caisse in order to receive medicines prescribed for the period of stay from a pharmacist, by the sole mention of the doctor's name on the prescription. Public health reasons may justify this restriction to free movement.

In Finland the costs of health care received abroad are reimbursed under the Health Insurance scheme. This has been possible according to the guidelines given by the Social Insurance Institution since the *Kohll and Decker* cases. The amendment of the Health Insurance Act stipulating that the insured person is also allowed a refund when the health care was received in a Member State of the European Union or in the State where Community law was applied, entered into force in January 2005. However Finland has received a reasoned opinion relating to the breach of rights to patient mobility. The Commission takes the view that the new Health Insurance Act still restricts the right of free movement by setting various registration and authorisation requirements that service providers must fulfil in order for their patients to be entitled to reimbursement from health Insurance. The Finnish government has answered that these requirements are only applied when the health care provider is established in Finland. The Social Insurance Institution does not control and have no means to control whether the service provider abroad is a legally established health care service provider. As far as it has been possible to verify these arguments it seems that these requirements are applied only to those service providers who provide services in the territory of Finland. According to the guidelines given by the Social Insurance Institution it seems that these requirements should not be applied. As the legislation seems to require that the service provider is legally established and registered in Finland, the Finnish government has informed the Commission that the legislation will be changed.

The Commission has also introduced an infringement procedure against Finland relating to the system for establishing entitlement to medical rehabilitation in other Member States. According to the Commission the procedure provides for unjustified restrictions to the free movement of services. According to the information received by the Commission rehabilitation abroad is not covered by the rehabilitation schemes administered by the

Social Insurance Institution. In addition the Commission notes that the legislation does not stipulate whether the costs of rehabilitation are covered in the cases when the insured person goes abroad in order to receive rehabilitation services.

The government of Finland answered in September 2005 that the right to receive rehabilitation under national legislation is always dependent on a rehabilitation plan which is made together with the insured person by the public health care providers. The plan includes an assessment of the insured person's need and proposed means and methods of rehabilitation. The Social Insurance Institution which administers this scheme is not bound by the plan and can accept a part of it. The person concerned can have the costs of the rehabilitation covered only if the Social Insurance Institution has made a decision on the right to rehabilitation including the approval of the plan and a decision to cover the costs. The government underlines that this condition for prior approval is applied both to rehabilitation in Finland and to rehabilitation abroad.

In practice rehabilitation is most often arranged by service providers who are permanently settled in Finland. In the rehabilitation plan the service provider is named. This is done in order to guarantee the quality of the rehabilitation services. The Social Insurance Institution arranges competitions for the service providers. However, outside of this competition, it is possible to use a service provider abroad if the services provided are in accordance with the accepted plan. From the point of view of the implementation of the Regulation 1408/71 the legal question is whether the rehabilitation plan and the procedure of accepting this plan can be considered as a prior authorisation and therefore as unjustified restriction to the free movement of services under Article 49 of the Treaty. There are no specific provisions in the new Act regulating how the rehabilitation abroad should be arranged. The reasoning of the government bill does not include any explanation on how national legislation should be implemented when Regulation 1408/71 is applied. In spite of this the opinion of the government is that there are no conditions or limitations applied to rehabilitation abroad which would not be applied to rehabilitation in Finland. As the new legislation entered into force recently, it is too early to analyse whether it will abolish the practical restrictions for rehabilitation abroad.

The rulings in *Kohll* and *Decker* did not attract as much attention in Austria. That is because Austrian health insurance before these judgments did (and still does) not distinguish between treatment abroad and treatment in Austria. In both cases, a reimbursement of 80% of the costs the competent health insurance institution would have had to pay for treatment by a *Vertragsarzt* (a physician who has a permanent contract with that institution) is foreseen.

Another problem has been raised by a recent ruling of the Supreme Court which (in accordance to the *Vanbraekel* case, C-368/98 [2001] ECR I-05363) stated clearly that a claimant whose request for authorisation was incorrectly refused, is entitled to be reimbursed directly by the competent institution by an amount equivalent to that which would have been borne if the authorisation had been properly granted. It could be argued that the *Vanbraekel*-ruling only applies to reimbursement-systems but not to a system (like the Austrian one) where the insured person is entitled to the benefit in kind directly. Otherwise the claimant himself would have to bear the major part (in the respective case: more than 80%) of the costs, even though authorisation was refused unfoundedly by the competent institution. The only solution that would meet the demands of the Regulation in that case seems to be full reimbursement of all costs.

The Court's ruling in *Vanbraekel* (C-368/98), obliges the competent institution to pay an additional reimbursement covering the difference between the level of cover under the legislation of the Member State of stay and the (higher) amount which application of the legislation of the competent Member State would afford to the patient had he or she

received the treatment concerned in its territory. The Greek report mentions however that it is wholly unclear how this additional reimbursement should be calculated: should it be based on an amount of money (in which case no account is taken of from domestic user charges) or rather on a percentage of insurance (which could imply that this is higher than the domestic amount of assumption)? A choice for the latter method might result for Greece, which has no user charges for inpatient care, in an obligation to provide full coverage.

Another important element is the question whether or not the Kohll and Decker rules apply to frontier workers? This deals with the reimbursement of medical care obtained by frontier workers in their country of residence, in particular those benefits which are not provided for or to a lesser extent in their country of residence. In principle benefits obtained in the country of residence, are taken care of by the country of residence according to its legislation but on behalf of the competent state. However if the benefits in the competent state are higher, many frontier workers believe they have the right to ask for benefits in the country of residence and to send the invoices to the competent institutions in accordance with the Kohll and Decker procedure. This would imply that one could systematically look for the most favourable tariffs. Until now the competent institutions are of the opinion that the Kohll and Decker rules which only apply in cases where frontier workers are asking for benefits in a third country, this is neither their country of residence nor the competent state. It is, however, doubtful if this position is correct.

An example of this could be found in Luxembourg. Frontier workers would like to have the right to get reimbursement in the competent State, by application of ECJ case law on *Decker-Kohll*, in the same way as people residing in Luxembourg and getting medical treatment abroad. But the competent institution, UCM always refused to apply principles of ECJ case law on *Decker-Kohll* to frontier workers for benefits delivered in the competent State (Luxembourg) or in the State of residence (France). It argued that this case law would only apply to them in case of benefits delivered in a *third Member State*, for instance Belgium or Germany.

At the same time, UCM analyzed Article 18 of Regulation 574/72 with reference to ECJ case law *Decker-Kohll*. It stated that the State of settlement of the prescriber (the ophthalmologist) could not be of any relevance in the determination of applicable legislation nor in the justification of a reimbursement refusal. As a consequence, IGSS in 2001 asked the Administrative Commission for Migrant Workers to solve this problem. Recently, Luxembourg authorities decided, in a unilateral way, no longer to take in account the State of settlement of the prescriber. France agreed to this decision and did the same in relationship with Luxembourg.

In Slovakia as well as in Bulgaria, the question is raised whether the sickness insurance funds could make the assumption of the costs of cross-border hospital care contingent upon prior authorisation. Can these institutions insist on prior authorisation? Can patients who went abroad for hospital care without authorisation be denied reimbursement? The question remains open. The healthcare cases which have come before the European Court of Justice would seem to indicate that in such a case, the institution needs to verify whether the authorisation, had it been applied for, could have been legitimately denied. If not, the institution might well be obliged to reimburse the costs.

It is also mentioned that the distinction between hospital services and non-hospital services may sometimes prove difficult to draw. In particular, certain services provided in a hospital environment but also capable of being provided by a practitioner in his surgery

or in a health centre could for that reason be placed on the same footing as non-hospital services.

It was to be expected that the Watts case attracted interest in several Member States, in particular with respect to the issue of waiting lists. Some States (Lithuania, for example) point out that the medical and legal arguments can be difficult to combine while adapting the legal and financial arguments to medical views is a complex task.

a. Frontier workers

In Hungary with regard to the provision of health care by general practitioners, a problem has occurred with relation to migrant workers from the Slovak Republic. As they worked in Hungary as frontier workers, they were entitled to Hungarian health care, which is provided by general practitioners who have to cover the people residing in their district. But as the frontier worker did not have permanent residence in the territory concerned, they were not helped by the GP's. The latter together with the dentists and all local governments were signalled by an Act of Parliament that this situation had to be remedied.

In Belgium questions have also arisen with regard to the members of the families of frontier workers (Article 20) and migrant workers who live in a Member State other than the competent Member State, but who reside on the territory of the competent Member State. It is not clear whether the competent Member State may refuse medical treatment if a family member is considered as such in the Member State where the employee lives, but does not meet the conditions to be considered insured as a family member in the competent Member State.

On the other hand, a family member may not be considered to be insured as such in the state where the employee is domiciled, but may meet the requirements to be considered as such in the competent Member State. The question then arises whether the competent Member State may then grant the benefit of Articles 22(1)(a) or (2) and 34a.

Questions have also been raised with regard to Article 22(1)(i) of Regulation 1408/71, in that it limits the right to medical treatment, to treatment granted under the law of the state where the insured person lives or resides. The question was more precisely whether it is compatible with the purpose of the Treaty that medical treatment which was administered in the Member State where the insured person lives or resides, is excluded from reimbursement, whereas the costs of such treatment would have been reimbursed if treatment was administered in the territory of the competent Member State. The specific problem is encountered by the institutions with regard to medical treatment of pensioners in another Member State.

Further to the special relationship between Belgium and the Netherlands, the hospital or the institution of the state where a frontier worker lives does not have to inform the institution of the competent Member State of any medical treatment administered, due to the settlement on the basis of fixed amounts (Regulation 574/71, Article 17(6) and 17(7)). As a result, the competent Member State is not informed of any particular treatment and may therefore decide to grant treatment, notwithstanding the fact that treatment was already granted for the same medical problem in the territory of the state where the frontier worker and his or her family live.

Recently (2005), Luxembourg concluded a bilateral Convention with France on social security. Two Articles concern sickness and maternity benefits. Article 3 recognizes the right for family members of frontier workers to get medical treatment in the competent

State. This right already existed in the Statutes of UCM for family members of a frontier worker residing in France and working in Luxembourg. But regulation by an international instrument will make it impossible, in the future, to change Statutes in a unilateral way and thus will legally reinforce this right. For family members of frontier workers residing in Luxembourg and working in France, it will create a new right. Article 4 is about sickness benefits for pensioners (including ex-frontier workers) residing in France or in Luxembourg. Regulation 1408/71 provides that they can only get sickness benefits in kind in the Member State, where they reside and that they can get medical treatment in the other Member State only if it is a "medical necessary treatment" (emergency). Article 4 includes "planned treatment" abroad, which means that pensioners will have the right to go especially for medical treatment to the other Member State. It will apply to persons, who get one pension by the French or the Luxembourg system, and to persons, who get two pensions, one from Luxembourg and one from France. It will also apply to their family members.

France has signed two bilateral agreements with Germany (22 July 2005) and Belgium (30 September 2005) which organize a cross-border cooperation on sanitary issues. These agreements allow French patients to be treated in Spanish or German hospitals without the need for an E112 form. Patients will be covered either on the basis of Article 22 of Regulation 1408/71 (as if they were insured by the state where care is provided) or directly by the French social security as though treatment had been provided in France. A similar agreement is currently under preparation with Spain.

Frontier workers living abroad and working in the Netherlands are covered by the *Zorgverzekeringswet*. In accordance with the rules of Regulation 1408/71 they are able to claim their benefits in either the country of employment or in country of residence. The members of the family are no longer co-insured under the new law, but they are entitled to benefits in kind in accordance with Regulation 1408/71. This involves that they do not have the right to chose a particular insurance company as the insured persons can, and they have to pay the contribution (persons over 18) determined by the *College voor Zorgverzekeringen*.

In the Czech Republic, as for the relations with neighbouring States (especially with Slovakia) most of the problems of the last year were still related to the interpretation of Article 13, paragraph 2, letter (f) and Article 25, paragraph 2 of the EEC Regulation 1408/71. The issue was the payment of sickness benefits for cross-boarder workers and workers with domicile in another state, especially in the case, when a person became ill after the end of his/her previous employment relationship, but during the so-called "protective period". The illness however occurred in a different Member State from the Member State, where the person had been employed.

The Administrative Commission was trying to solve this problem during 2006 and the Czech delegation issued a note in this regard, explaining its legal position. More and more Member States realize that they may face the same problem. However a final decision has not been taken yet.

In Hungary, in the case of family members of frontier workers, neighbouring Member States frequently cannot agree as to which institution should bear the costs and to what extent, and which certificates should be issued to family members. A frequently encountered problem is that the State responsible for payment is not willing to bear the costs of benefits received by the family members outside the territory of the Member State of residence.

Questions have arisen with regard to family members of migrant workers residing in Belgium and outside the competent State. According to *Article 19(2) of Regulation*

1408/71, these family members are entitled to healthcare in Belgium, at the expense of the competent institution, insofar as they are not entitled to healthcare under Belgian legislation. The position of the RIZIV-INAMI is that, if these family members cannot be considered to be family members within the meaning of Belgian legislation, they are not entitled to healthcare in the State where they reside, i.e. Belgium. Support for this position is found in Article 1 f) of the Regulation, which for the definition of family members refers to the legislation of the State under which benefits are provided. This position appears, however, to disregard the judgement in *Delavant* (C-415/93), in which the European Court of Justice ruled that when a worker resides with his family members in a Member State other than the State in which he works, under whose legislation he is insured by virtue of the regulation, the conditions for entitlement to sickness benefits in kind for members of that person's family provided by their State of residence are governed, in the same way as for the worker himself, by the legislation of the State in which that person works, insofar as the members of his family are not entitled to those benefits under the legislation of their State of residence. In the European Court of Justice's opinion, Article 1(f) does not deal with the conditions of affiliation or of entitlement to social security benefits for members of the family of a worker, but merely refers to the legislation under which benefits are provided for determining the persons considered to be family members.

It is noted that this judgement sparked some discussion within the CASSTM. Belgium is not the only country which refuses to implement the teaching of *Delavant*. However, the discussion in the CASSTM has not resulted in any interpretative decision or recommendation – which would, incidentally, lack any legal value. That being said, the approach of the Belgian authorities will be good law in the future, considering the provision of Article 1(i)(1)(ii) of Regulation 883/2004.

According to *Article 20 of Regulation 1408/71*, family members of frontier workers residing outside the competent State, unlike frontier workers themselves, can receive healthcare in the competent State under certain conditions only, namely, and except in the case of urgency, an agreement between the States/authorities concerned or upon prior authorisation. Belgium has entered into agreements with all of its neighbouring countries except Germany (see "cross-border cooperation"). The relevant Belgian implementation rules provide that family members of frontier workers working in Germany can receive a SIS-card upon request. In practice, this card, and therefore the care, is always granted.

A problem was reported with regard to *Article 21 of Regulation 574/72*. The problem concerns family members, residing in Belgium, of workers residing and working in Germany. The family members are registered with the Belgian sickness fund by means of a form E109. Pursuant to an agreement concluded between Belgium and Germany, the cost of the care provided to those family members is refunded to the Belgian institution on the basis of actual expenditure – rather than lump-sums, as provided in Article 94 of Regulation 574/72.

For this reason, the Belgian authorities argue that the responsibility for the persons concerned, notably when it comes to issuing EHCs and forms E112, continues to rest with the German institution, which thus remains competent. The German authorities, on the other hand, are of the opinion that the refund method has no bearing on the determination of the competent State. For them, responsibility is transferred to the Belgian institution, notwithstanding the fact that the latter is refunded on the basis of real costs.

In the UK the special treatment of this category of workers was questioned. It is believed that other groups such as, for example, temporary or part-time workers, would also need special provisions.

A special problem in Slovakia – although perhaps an internal rather than a coordination problem – relates to the application of Art 19(2) as well as Article 18a of Regulation 1408/71. It is indeed true that the European Court of Justice has not yet been asked to consider the second sentence of Article 19(2). The question is whether the Slovak (contribution-based) system also fell under Article 19(2) second sentence. Consider the case of a Slovak person working in Austria. His family resides in the Slovak Republic. Under Article 19(2), the family members are entitled to benefits in the State of residence provided by (cash benefits) or on behalf of (benefits in kind) the competent institution, insofar they are not entitled to such benefits in the State of residence. If the latter State operates a residence-based system, benefits in kind shall be considered as being on behalf of the competent institution, save where the spouse or the person looking after the children pursues a professional or trade activity in the territory of that State. The participant indicated that Slovakia operates a compulsory social insurance scheme providing benefits in kind to all residents. She went on to state that, before accession, long discussions were held on whether Slovakia would use the advantage of Article 19(2) or not. Finally, after consultation, it was decided to apply the coordination rules and thus to claim reimbursement from Austria of the cost associated with the healthcare provision of the family members holding a form E106 (on the basis of lump-sums, cf. Article 94 of the implementing Regulation). This procedure, however, proved to be very problematic. For this reason, the policy was changed in September 2005. As of that date, the persons concerned were insured in Slovakia and the benefits were provided at the expense of the Slovak institution. Austria, however, protested and after discussion in the CASSTM, it became clear that Slovakia had to change its policy again. Therefore, as of 1 July 2007, reimbursement claims will again be sent in respect of some family members (extended to all family members as of 1 January 2008). Similar problems can be found in other countries.

b. Member States cooperation

The co-operation with competent institutions of Member States has not been developed yet in all circumstances. In particular in the new Member States concerns are expressed dealing with the (non) use of E-forms in particular in the 'old' Member States. In the Czech Republic experience indicates that some Member States as, for example, Poland do not use E-forms and send their national incapacity-to-work certificates in place of form E116. On the basis of these national forms the doctors of the medical expert committees cannot evaluate the incapacity to work of the claimant because in the Polish certificate they do not indicate the number of the diagnosis. Negotiations are taking place with the Polish party that refuses to use forms E116, unless the cost is covered by the Czech administrator, which is not in conformity with the Regulation 574/72. The German parties do not issue forms E117 and E118.

In the Czech Republic the E116 forms are issued by the doctor that treats the patient. The cost of production of the E116 forms is covered by the Czech Social Security Administration, after verifying the material and financial correctness of the invoice the Health Assessment Service of Czech Social Security Administration. During one period of incapacity to work there may be several forms E 116 issued and thus several invoices. This event occurs more frequently in the border regions – and increases the costs. In general, the coordination rules concerning issue of E 116 seem not to be clear enough so that some EU Member States refuse to issue E 116 ex officio and require special financial recovery in cases where an E 116 was produced. These problems occurred later with

Polish side due to the fact that the Polish institution does not issue any form E 116 without request. This includes even situations when a person insured in Czech system but staying in Poland becomes sick and asks for a medical treatment in Poland. In such cases the Polish Administrator (ZUS) does not issue a form E 116 and only a Polish national incapacity of work certificate is sent to the Czech Administrator. This national certificate, however, does not contain all necessary information as form E 116 has, Czech Administrator cannot therefore provide regular evaluation and therefore has to ask the Polish Administrator to issue form E 116.

There are also problems with the forms E104. Local offices of the Czech Social Security Administration request the confirmation of period of insurance abroad on forms E104. The foreign partners send the form E104 with great delay, sometimes only after reminder letters, and sometimes not at all.

As for the relations with neighbouring states (especially with Slovakia) most of the problems relate to the interpretation of Article 13, paragraph 2, letter (f) and Article 25, paragraph 2 of the EEC Regulation 1408/71. The issue is the payment of sickness benefits for cross-boarder workers and workers with domicile in another state. The Czech Social Security Administration explained in November 2004 to the Slovak Social Insurance the procedures that are used by the Czech administration – which differs from those used by the Slovak social Insurance. If no agreement is reached, the problem will have to be approached by the ministries of labour and social affairs of both the countries.

Poland mentions one particular problem dealing with the application of the Article 18, Items 1 and 2 of the EEC Regulation 574/72, defining rules of applying for cash benefits in case of residence in a Member State other than the competent State. According to this Article an employed or self-employed person, entitled to cash benefits in respect of incapacity for work in case of residing or staying in the EU Member State other than competent State, shall, within three days of commencement of the incapacity for work, apply to the institution of the place of residence by submitting a notification of having ceased work, or, if the legislation administered by the competent institution or by the institution of the place of residence so provides, a certificate of incapacity for work issued by the doctor providing treatment for the person concerned.

The problem concerns the type of certificate the insured persons should receive and the type of certificate, which should be sent by the institution of the place of residence (stay), to the competent institution. Member States have different approaches in this respect. Some of them send a certificate of incapacity for work issued by the doctor providing treatment for the person concerned on the form defined by their national legislation and some of them send certificate of incapacity for work on the EU Form E 116.

In Poland, a new issue that occurred during the implementation of the Community law comes down to the fact that foreign institutions transfer to the Social Security Institution (ZUS) account smaller amounts for the medical examinations, commissioned by such foreign institutions, performed by ZUS certifying doctors. In practice the transfers made to ZUS account are lower than actually requested by the Polish institution. This is due to foreign exchange losses that occur as a result of the conversion of the amount to be reimbursed from PLN into EUR, and also due to the fact that foreign institutions deduct handling fees from the requested amount. However, Polish institutions believe that such cases should not exist, since pursuant to Article 105 par. 1 of the Regulation 574/72 the costs of medical examinations commissioned by an institution from one Member State and performed by an institution of another Member State shall be reimbursed to the institution that incurred such costs in accordance with the rates applied by such institution.

Consequently the costs of medical examinations, performed by ZUS following the order of foreign insurance institutions, of persons living in Poland should be refunded by the foreign institutions at the level and in the currency in which such costs were born i.e. in Polish zlotys (PLN) – in compliance with the request drawn up by ZUS. It should be also noted that despite efforts taken by Poland to address this issue on the occasion of talks between liaison institutions, to date no common position on this issue has been reached.

The procedure adopted by Poland has led to problems in contacts between Poland and other countries, like the Czech Republic and Lithuania. Czech institutions always issue E 116 in cases of determining incapacity for work of persons being sick in Czech Republic who are subject to legislation of another Member State. Therefore they expect Forms E 116 from Polish institutions in every case regarding incapacity for work of insured persons subject to their legislation. At the same time Czech institutions do not want to cover costs related to additional medical examination done by Polish evaluating doctors.

The Czech institutions are of the opinion that the institutions of residence/stay are compelled to issue form E 116 and to send this form together with form E 115 to the competent institution free of charge. The Polish party, on the other hand considers that such E forms are issued only on request and against payment. The Polish institutions are of the opinion, that the national medical report is sufficient although the Polish national medical reports do not contain the international number of diagnosis requested in form E 116 (point 5.6). That is why Czech Social Security Administration has not covered Bills under E 116 PL issued by ZUS (Polish institution of stay/residence). The Czech party is of the opinion that all E forms should be employed in accordance with EEC Regulations No 1408/71 and 574/72, in respect of all social events enumerated therein.

In the Czech Republic the E116 forms are issued by the doctor that treats the patient. The cost of production of the E116 forms is covered by the Czech Social Security Administration, after verifying the material and financial correctness of the invoice by the regional office of the Administrator. During one period of incapacity to work there may be several invoices and thus several forms E116. This event is more often in the boarder regions – and increases the costs.

A similar problem was mentioned in Lithuania concerning the administrative cooperation with Poland, in particular with regard to the provision of E-forms in the implementation of the Regulation. Specifically when Poland provides for the E 213-form concerning the assessment of the working capacity, an illegal Polish administrative practice was encountered. According to the Lithuanian competent institutions, Polish institutions request a payment for issuing the E 213-form to Lithuania. E.g. when a person lives in Poland and receives a disability pension from Lithuania, Lithuania receives E 213-forms from Poland and Poland asks for a payment to provide this form on the basis of Article 105 of Regulation 574/72, which states the following: "The costs entailed in administrative checks and in medical examinations, observations, doctor's visits and checks of all kinds necessary for the award, provision or review of benefits, shall be refunded by the institution on whose behalf they were made to the institution which has been responsible therefore, on the basis of the charges applied by the latter institution". Presently there is an on-going dispute between Polish and Czech institutions.

A special working group has been launched for cooperation for cross-border rehabilitation matters in North Finland and North Sweden. Problems have arisen in relationship to persons residing in one State and working in another and for persons who move after falling ill to another State. Rehabilitation and sickness insurance are very complicated in these cases. The structure of the systems is different. The concept in Regulation 1408/71 concerning benefits in kind and in cash is also difficult. According to Regulation 1408/71 the benefits in kind come from the State of residence and cash benefits from the state of

employment. There are difficulties in coordinating different types of benefits in kind i.e. education and training, with the other country's cash benefits. The systems are designed for that particular Member State and it is often difficult to separate which benefits are benefits in kind according to Regulation 1408/71 and which are cash benefits. An additional difficulty comes from the fact that in Finland rehabilitation is administered by several different authorities: the Social Insurance Institution (KELA), the employment pension institutions, the municipalities and the unemployment authorities.

The ongoing project is trying to agree on cooperation forms nationally and between Sweden and Finland in order to help the migrating individual to get the benefits he/she is entitled to according to national law in Regulation 1408/71-cases. The idea is to extend this pilot project in the future to other Member States as well, starting with Norway and Estonia.

c. Reimbursement of benefits

According to Articles 94 and 95 of Regulation 574/72, the reimbursement of benefits granted to family members of (self-) employed persons not residing in the state where the (self-) employed person resides or to pensioners and their members of the family residing outside the competent state, is based on lump-sum amounts. Austrian institutions argue that this is inadequate, most of all because usually it is too time consuming to determine the global amounts, thus producing a heavy burden for the institutions of the place of stay which provide interim finance for medical help, etc. A 'change of systems' is demanded, which grants reimbursement based on real costs in all cases.

In Estonia, it was mentioned that by October 2005 the Estonian Health Insurance Fund had sent invoices in respect of reimbursement of benefits to competent institutions of 24 Member States. By October 2006 there were still no contacts in matters relating to forms E125 or E126 with 8 Member States.

In relations with Spain, the problem from the Estonian side is that since there is no price list of services in Spain, the Health Insurance Fund is unable to identify which services have been provided under the E126 procedure on the basis of invoices received from Spain and accordingly it has difficulties in establishing the corresponding price of services under the Estonian price list. The Estonian Health Insurance Fund has now developed a questionnaire that the person claiming for reimbursement under E126 has to fulfil to identify the respective services in the Estonian price list of medical services and to make the reimbursement.

In Poland, the time taken by Member States to settle health care costs was criticised for being far too slow. The majority of Member States have not yet filed claims for the reimbursement of the cost of care provided to Polish insured persons and therefore it might take three years before they are able to calculate the amounts which are due to other Member States.

Another problem arises when neither the State of stay nor the competent State have clearly defined rates of reimbursement. This is the case, for instance, in Spain, which fails to comply with requests for rates for refund of benefits in kind. The solution is provided for in § 4 of Article 34 of Regulation 574/72: the competent institution, subject to certain conditions, may reimburse at its own tariffs. However, Poland does not have a clear-cut, single reimbursement rate either.

In Belgium problems are encountered dealing with the reimbursement of biological analyses. Biological analyses are increasingly being conducted in other Member States than the one where the worker resides. In such case, no travel is required from the worker. The cost of such analyses abroad is generally not reimbursed by sickness insurance. The Administrative Commission has decided that reimbursement by the competent authority is only required for analyses conducted in relation to an organ transplant. This decision is subject to some criticism as it requires insured persons to travel in order to obtain reimbursement for the cost of a biological analysis.

When it comes to reimbursement of benefits between Greece and other Member States, the insured person has to submit all receipts of payment of treatment costs. Whenever E forms have not been obtained, the cost of treatment is significantly lower than the actual cost, even when the treatment abroad was necessary. A constantly increasing number of complaints shows that there are several problems related to health benefits in kind, mainly concerning the application of the relevant provisions of Regulation 1408/71. The problems occur when benefits in kind are granted to a person affiliated to a Greek health insurance scheme, who resides temporarily in another Member State. There are difficulties related to the correct procedure that must be followed and to applicable legislation. This confusion often results in an increase of administrative costs and is detrimental to the interests of the insured people and other beneficiaries.

The main problem regarding reimbursement of benefits is the level of the costs for health care which are considerably higher in the old Member States than in the new Member States. This was mentioned in several countries as Latvia, Poland and Hungary. The estimate of Latvian authorities is that Latvia would have a negative balance and would owe a significant amount of money to other Member States. In Latvia, the main problem regarding reimbursement of benefits is the level of the costs for health care which are considerably higher in other Member States than in Latvia. In 2005, *Health Compulsory Insurance State Agency has received claims* for the reimbursement in the amount of Ls 292 205 (actual payment – Ls 94 668) for medical services provided to Latvian nationals and claimed the reimbursement in the amount of Ls 14 702 (actual payment – Ls 1 527) for medical services provided to EU nationals.

The Latvian Ministry of Welfare has started research on the impact of the provisions of the Regulation 1408/71 on the health care system and noticed a great imbalance between payments to EU Member States for medical services provided to Latvian nationals and reimbursements received for medical services provided to EU nationals. The solution to this problem would be conclusion of waiver agreements under which Member States may waive all reimbursements between institutions under their jurisdiction.

The Netherlands refer to the problem that payments are often made only two or three years after the expenses were incurred. This is due to all the administrative questions involved. In some cases States work with advances on the payments, but this is not always possible. A problem exists when States do not have central funds to which these advances can be paid. In such cases it is unclear how to pay and distribute advances. This is also the reason why the Netherlands is in favour of reimbursement on the basis of fixed sums instead of real costs. The Netherlands fears that working with real costs will lead to many complicated questions (often the real costs are not easy to determine) and a heavy administrative workload.

Millions of tourists visit Spain every year and a significant percentage requires medical assistance. The main obstacle to the reimbursement of medical costs for treatment given to non-resident EU nationals is the lack of material and personnel to check the real costs. As a result, Spain is losing large sums of money. Moreover, Spain has to bear an

important economic cost as the State of residence is the only one responsible for medical assistance when a migrant worker receives more than one pension. As a result, Spain must grant medical care to migrant workers who paid contributions or worked abroad for most of their labour career and who returned to Spain where they only paid contributions for a short period of time. Austria also refers to this problem caused by Article 28 of the Regulations, which grants entitlement to sickness benefits to pensioners living in another Member State, even when they are granted only a small pension under Austrian legislation. It is argued that application of the principle of residence (as laid down in [former] bilateral agreements) would be a lot easier to handle by the insurance authorities in these cases.

The UK has difficulty establishing accurate actual costs in order to make its claims on other Member States. It invariably seeks to apply the terms of Regulation 574/72 in accordance with Article 36 of Regulation 1408/71. The UK uses a mixture of cost waivers (Ireland and Denmark) actual costs, 'constructed' actual costs and lump sums. Agreements are concluded bilaterally and vary from country to country. Procedures vary from country to country and groups covered.

Rules that subject the reimbursement of expenditure incurred in respect of care in another Member State to conditions different from those applicable to care in Germany are capable of limiting persons from approaching providers of medical services established in Member States other than that in which they are covered, as any conditions governing reimbursement of expenditure in connection with care, such as board and lodging which form an integral part of the health care itself by a scheme such as the assistance provisions, are capable of having a direct influence on the choice of the place of the care and, therefore, on the selection of a health care centre capable of providing services of that type.

In Poland it is mentioned that the Spanish legislation does not provide for reimbursement of costs to Spanish insured persons. Therefore there are no set amounts of reimbursement which makes it impossible to inform the Polish competent institution about the reimbursable costs. It is also impossible to establish if a person is entitled to reimbursement, i.e. if medical treatment was provided within the Spanish public health system and if the treatment was necessary due to the medical condition.

In Cyprus tourists often address themselves to private clinics or hospitals, and expect expenses to be reimbursed in their home country under document E111. Since Cyprus has not yet introduced a Universal Health Care System, the public sector has contracts with only a small number of private medical institutions in Cyprus and thus, competent authorities of other Member States do not recognize the applicant's claim to reimburse such medical expenses incurred for services provided by private practitioners, hospitals and pharmacists. Consequently, tourists who visit Cyprus on several occasions, once they get to realize this, will be obliged on the second occasion to go to public hospitals in Cyprus. It is feared that this will imply several practical issues with regard to the capacity of Cypriot hospitals to deal with these additional casualties.

In Lithuania, problems arise with regard to the relationship between compulsory and private health insurance. Before accession, private health insurance covered for treatment abroad, including the costs for the treatment, transport costs, etc. Compulsory health insurance only covered necessary medical aid abroad. Now both the compulsory insurance and the private insurance are responsible for treatment abroad, so both kinds of institutions are responsible. The problem is that there are no procedures in place to share the responsibility and, maybe more important, to share the costs. In practice, cases of double insurance are dealt with as follows. The patient covers the costs for the services abroad her or himself. S/he submits the invoices to the private insurer. The

latter applies to the State Patient Fund, which checks the insurance, issues an E126 and checks what services were provided, what are the costs, what is reimbursed and then reimburses the patient. In the end, the private company does not cover the “necessary part”. But the lack of clear rules and procedures causes confusion on the division between private and compulsory health insurance and consequently both insurers end up in the national courts.

Reimbursement of benefits may also be examined in the context of the relationship between beneficiaries and institutions of the place of stay or residence.

One of the most interesting aspects of the modifications in Chapter I of Title III of Regulation is the possibility of persons moving in the Union to have a direct access to a service provider.

In Portugal it is observed that this policy aim has not yet been attempted in great part by the Member States where benefits in kind are guaranteed through indirect means on the basis of payment-reimbursement, as in France for example. Beneficiaries hardly ever (or never) have the possibility of being reimbursed before returning to their State of residence.

Portuguese officials frequently receive complaints from people who travelled and became sick and had difficulties to obtain health care. Those difficulties occurred in the Netherlands, Germany, and above all in Switzerland (where the client has to pay – like in France – and is invited to claim reimbursement exclusively in a centralised service in the city of Solothurn). The result of these difficulties is such that many people come back to Portugal and claim reimbursement under Article 34 of Reg. 574/72, which completely undermines the intentions of the legislator.

On the other hand, and to the contrary, insured people of other Member States staying in Portugal have direct access to services providers and beneficiate of treatment without payment (subject or not subject to standard moderating fees as for Portuguese nationals).

In Greece, IKA has established standard procedures for benefits in kind awarded to pensioners. Nationals of a Member State, who are affiliated to a social insurance institution of that Member State and are residing in Greece, receive from IKA, according to its legislation health care benefits in kind, on the basis of Article 28 of Regulation 1408/71. The benefits are awarded on account of the competent social insurance institution of the Member State from which the person had received his/her pension. In these cases, according to IKA, the pensioner does not have the right to a reduced amount of the cost of pharmaceuticals provided outside a hospital (10% instead of 25%). This reduced participation is provided by Article 34 of Law 2676/1999 for pensioners of a Greek social insurance institution, who receive Social Solidarity Allowance for Pensioners (Epidoma Koinonikis Allileggiis Sintaxiouxwn EKAS) In such cases, the remaining 15% of the participation of the pensioner to the cost of the medicine paid by IKA is covered on the basis of the above mentioned legislation by the state budget.

In Greece, when it comes to reimbursement of benefits between Greece and other Member States, the insured person has to submit all receipts of payment of treatment costs. Whenever E forms have not been obtained, the cost of treatment is significantly lower than the actual cost, even when the treatment abroad was necessary. A constantly increasing number of complaints shows that there are several problems related to health benefits in kind, mainly concerning the application of the relevant provisions of Regulation 1408/71. The problems occur when benefits in kind are granted to a person affiliated to a Greek health insurance scheme, who resides temporarily in another

Member State. There are difficulties related to the correct procedure that must be followed and to applicable legislation. This confusion often results in an increase in administrative costs and is detrimental to the interests of the insured people and other beneficiaries.

From 2008 the Finnish Local and Regional Authorities will be able to receive refunds for the costs of medical care for foreign nationals to the full amount, according to the actual costs. The service providers will be refunded from the State through the Social Insurance Institution (KELA). A special data system for transferring the bills from the service providers to KELA has been built.

In Latvia the main problem regarding reimbursement of benefits is the level of the costs for health care which are considerably higher in other Member States than in Latvia. In 2006, Health Compulsory Insurance State Agency has received claims for the reimbursement in the amount of Ls 973 834 for necessary medical treatment provided to Latvian nationals and Ls 1 010 472 for medical services provided to Latvian nationals. The Agency has not issued yet the claims for health care services provided in Latvia.

The Netherlands has concluded agreements with other Member States on the reimbursement of costs. These agreements seem to work well and there are no serious problems. Remaining problems in individual cases are solved in a pragmatic way. However, payments are often made two or three years after the expenses were incurred. This is due to all the administrative questions involved. In some cases States work with advances on the payments, but this is not always possible. A problem exists when States do not have central funds to which these advances can be paid. In such cases it is unclear how to pay and distribute advances. The Netherlands is in favour of reimbursement on the basis of fixed sums instead of real costs. The Netherlands fears that working with real costs will lead to many complicated questions (often the real costs are not easy to determine) and a heavy administrative workload.

The Greek report pointed out that the European Court of Justice ruled on February 25 that pensioners are entitled to reimbursement of medical expenses incurred abroad even if they result from a chronic or pre-existing medical condition. This was the judgement of the Court in Case C-326/00 (Idryma Koinonikon Asfaliseon (IKA) -v- Vasileios Ioannidis), in which the Court decided that: "A Member State may not subject payment of the medical expenses of a pensioner who has visited another Member State either to authorisation or to the condition that the illness he suffers has manifested itself suddenly.

In Greece a constantly increasing number of complaints shows that there are several problems related to health benefits in kind, mainly concerning the application of the relevant provisions of Regulation 1408/71. The problems occur when benefits in kind are granted to a person affiliated to a Greek health insurance scheme, who resides temporarily in another Member State. There are difficulties related to the correct procedure that must be followed and to applicable legislation. This confusion often results in increasing administrative costs and is detrimental to the interests of the insured people and other beneficiaries.

In Greece the cost of hospitalisation in a private clinic abroad is only met for children. Following the intervention of the Legal Council of State, it was judged that the special sanitary committee had exceeded its competence by excluding adults on the grounds of financial-actuarial crisis.

A further issue concerning hospitalisation is the situation where the condition of a patient who is already hospitalised starts to deteriorate necessitating urgent transfer to another Member State.

2. Other Issues

In Latvia, the principle that all persons who have a personal identity number and are registered in the Population Register in Latvia are entitled to health care leads to the situation that Latvia often pays for health care services for persons who are insured in another Member State. This is because people do not always inform the authorities when they move to another country. When a person who has a personal identity number and is registered in the Population Register in Latvia, but is also insured in another Member State uses public health care services in Latvia, it is not possible for the authorities to verify if Latvia is the competent country and therefore the costs often are not refunded.

Similar problems were encountered in Estonia. Until May 2005 there were problems for acquiring health insurance coverage in Estonia for persons working in the territory of Estonia, but residing in another Member State, e.g. frontier workers. The problem was related to the fact that according to Estonian legislation, the necessary data for making an entry on commencement of the insurance cover in the health insurance database, included a personal ID-code issued in Estonia. However, according to the Population Register Act, in case of foreigners, the personal ID-code could be issued only if the person was an applicant for a residence permit. In this situation, the Health Insurance Fund recommended frontier workers to apply for a residence permit in Estonia. The Population Register Act was amended from 27 May 2005, and currently the act allows the issue of a personal ID-code to other categories of persons who need it to be registered in a state database (e.g. health insurance database), but are not applying for a residence permit.

The *Couverture maladie universelle*, a recently designed health care scheme in France, raises some questions. This legal scheme aims at providing basic health-care insurance to people who have a stable and lawful residence in France but who are not eligible for a compulsory scheme such as the *régime général*. Targeting mainly jobless persons, this scheme should be included in the material scope of Regulation 1408/71. Consequently, beneficiaries should be able to benefit from the cross-border health care system put into place by Article 22 of Regulation 1408/71 and by ECJ jurisprudence. Concerning the *Couverture maladie universelle complémentaire*, a means-tested legal scheme which provides supplementary cash benefits for persons who reside in France and who have a low level of income, the situation is more complex. Some aspects, such as its status as a legal scheme granting legally protected benefits in which basic health care institutions participate, suggest that it should be included in the material scope of Regulation 1408/71, even if it is means-tested. If this vision is correct, it would mean that some private supplementary schemes – private institutions are permitted to manage the *Couverture maladie universelle complémentaire* along with *Caisses primaires* – may fall under the material scope of Regulation 1408/71.

Another problem is encountered in Ireland where nationals of EU Member States for whom Ireland is the competent State, ask the Irish institution for a form E106 so as to be entitled in their respective Member States to full health care coverage. Notably Belgians insist that they are allowed to have an E106 as this seemed to be standard practice between Belgium and other countries. The Irish institution's policy is to turn down requests for forms E106 in those situations, save where the applicant can prove that he is a frontier worker. Only once, a form E106 was given to a Belgian who was able to demonstrate that he returned to Belgium once a week.

The Irish Ombudsman's office has also been involved in an investigation of complaints from two individuals, both of whom were former public which exemplify the complex nature of health entitlement. Each was in receipt of a pension in respect of their former employment and both now lived outside Ireland but within the EU (France).

Both made application in France to register with their local health services provider there in order to avail of health care services. However, they were advised that unless they could furnish an E121 form it would not be possible for them to avail of these services.

The complainants applied to the HSE for an E121 form but were advised that under the relevant Regulation, only persons in receipt of a contributory pension from the Department of Social and Family Affairs were entitled to a Form E121. They were informed that, on the advice of the Department of Health and Children, there was no provision made in the Regulation for persons in receipt of public/civil service pensions to qualify for an E121. In their letters of complaint they claimed that this was discriminatory e.g. UK citizens who were former public servants and went to live in other EU/EEA states, qualified for an E121.

In the course of the investigation the Ombudsman discovered that, in May 1998, the then Department of Social Welfare, had sought clarification on the issue of the extension of Regulation 1408/71 to cover pension schemes of Irish public servants who entered the public service before April 1995. The advice then given to the Department, by the European Commission - indicated that the Commission's view was that Irish former Civil/Public Servants, who entered the public service before April 1995 and who were now in receipt of occupational pensions, did not fall within the scope of Regulation 1408/71. However, the Commission also noted that the Irish Government could make a 'declaration' on the public service pension schemes thereby bringing recipients of these pensions within the scope Regulation 1408/71.

The Ombudsman asked the Department of Health and Children to clarify what steps, if any, had been taken since 1998 to have a declaration of the type referred to by the Commission made. The Department undertook a review of this issue, in consequence of which it decided that the complainants, and other former civil and public servants in similar circumstances, were entitled to be issued with the Form E121 on the same basis as those in receipt of contributory social welfare pensions.

In Hungary it is unclear whether a student who is an EEA national and is studying in Hungary can be eligible for health services on account of his or her student status alone.

In the Netherlands an interesting issue can be mentioned with respect to the right to sickness benefits for family members. A Dutch case can be mentioned "Rb. Breda, 3 February 2006". It concerned the daughter of a migrant worker, the latter living and working in Belgium. His daughter studied in the Netherlands and the question was raised the case whether the girl could be insured under the Belgian sickness insurance as a family member? The Breda court referred to the Delavant case of the European Court of Justice, in which it ruled that Article 19(2) of Regulation 1408/71 is to be understood as meaning that when a worker resides with the members of his family in the territory of a Member State other than the Member State in which he works, under whose legislation he is insured by virtue of the regulation, the conditions for entitlement to sickness benefits in kind for members of that person's family are also governed by the legislation of the State in which that person works in so far as the members of his family are not entitled to those benefits under the legislation of their State of residence. The Breda court stated that the country of residence (the Netherlands) can determine the content of the benefits provided, but that it is up to the competent state to determine who is a family member, in this case Belgium. This Belgian decision can not be contested by the Dutch sickness insurance institution CVZ. But what were the implications of this judgment under the new 2006 health insurance act, the "Zorgverzekeringswet"? When the parents live and work in Belgium and the children study in the Netherlands, the same approach should be taken as in the Breda judgment. The child lives in the Netherlands, but this is only for education purposes, meaning that she cannot be considered as residing in the Netherlands and thus she is not insured there. If the parents would be

frontier workers, then the child is resident in the Netherlands and is consequently subject to the Dutch insurance obligation for residents. How is the situation in the Dutch-German cross border context? If the Dutch institutions receive an E106 from the German institutions with the family members stated, they respect this and these persons are insured in Germany. But in fact, they are resident in Germany and over 18 years, so they have a contribution obligation to the Netherlands. The question is thus who to remove from the E106 when the person becomes 18 years. As long as Germany provides an E106, sickness costs are paid by Germany. Who actually is a family member is determined by the country of residence and not by the competent Member State. It was stated that everyone, independent from their age, is insured under the Zorgverzekeringwet, but the children younger than 18 years just do not have to pay premiums. So these children are co-insured with their parents in Germany. The institution of the Member State of residence must notify that a person has to be removed from an E106. It was stated that the Netherlands never apply the Delavant Judgment and always leaves the decision to the other Member State.

The introduction of the new Dutch Zorgverzekeringwet and thus the introduction of a compulsory insurance for all, has led to increased application of Article 27 of the Regulation in the Netherlands, and also has led to the application of Article 28 of the Regulation outside the Netherlands. This has severe consequences for certain persons who lived in another state.

In most cases, for these people their contributions to the Dutch health care system are much higher than their entitlements in the country where they reside. A Dutch judge in the summary proceedings has agreed with this statement (without distinguishing between too high or too low premiums) and has decided that premiums should be adapted to the entitlements in the Member State of residence. Through this judgment, together with a parliamentary motion, the discussion on premium differentiation has started and it appears that the different premiums will have to be applied according to the different Member States of residence of Dutch insured persons. It was stated that this discussion on how much should be paid for which entitlements puts considerable pressure on the solidarity principle that should still be one of the foundations of the Dutch system. Although the adaptation of the premiums is perfectly legal and can be executed the question can be asked if this runs counter the system of the Regulation.

Concerning voluntary insurance the Czech delegation issued recently a note to the Administrative Commission regarding access to voluntary sickness insurance in another Member State, namely in Germany. Besides other facts, the Czech delegation states in its note: "Current interpretation based on the ECJ case law leads to the results, that a worker who decides to migrate and starts to be subject to the legislation of a Member State with voluntary scheme requiring, as an affiliation condition, previous periods of insurance in this state in the same scheme or for the same risk (as e.g. the German legislation does), *will never be able to fulfil this condition*. At the same time, there is no possibility to maintain the affiliation to the previous statutory scheme (mostly the state of residence scheme), as there is only one applicable legislation."

In Greece, IKA has established standard procedures for benefits in kind awarded to pensioners. Nationals of a member state, who are affiliated to a social insurance institution of that Member state and are residing in Greece, receive from IKA, according to its legislation health care benefits in kind, on the basis of Article 28 of Regulation 1408/1971. The benefits are awarded on account of the competent social insurance institution of the Member State from which the person had received his/her pension. In these cases, according to IKA, the pensioner does not have the right to a reduced amount of the cost of pharmaceuticals provided outside a hospital (10% instead of 25%). This reduced participation is provided by Article 34 of Law 2676/1999 for pensioners of a

Greek social insurance institution, who receive Social Solidarity Allowance for Pensioners (Epidoma Koinonikis Allileggiis Sintaxiouxwn EKAS) In such cases, the remaining 15% of the participation of the pensioner to the cost of the medicine paid by IKA is covered on the basis of the above mentioned legislation by the state budget.

In Finland, there have been some problems relating to application of Article 28 in Regulation 1408/71. These are cases where a pensioner receives pension from Finland and Germany and resides in Germany, but is not entitled to statutory sickness insurance benefits from Germany. The reason for not being insured in the German statutory sickness insurance are often, that the person does not satisfy the criteria of the sickness insurance because his/her income are too high. The German institutions have requested for an E121 form from Finland as the pensioner in question is not entitled to benefits under German legislation, and would be entitled to benefits under Finnish legislation if he/she would reside in Finland. This rule seems from a Finnish point of view to be somewhat in contradiction with the spirit of coordination of social security. This gives the pensioner in question the possibility to choose which system is the most cost effective for him/her.

Belgium reports that it is not always easy to make a *distinction* between *residence* (permanent stay) and (temporary) *stay*. This is true also for the purposes of implementing the sickness chapter of the Coordination Regulation. Problems have occurred in relation to Ireland, the UK, and more recently, Spain. Belgian insured persons who go to work in these countries, while maintaining their domicile in Belgium (and remain on the national register), are often refused a form E106 by the competent institution. According to the latter, these persons reside in the territory of the competent State, as a result of their working there.

A question has been raised as to the application of *Article 25 of Regulation 1408/71* to the case of unemployed persons entitled to unemployment benefit under Belgian legislation who avail themselves of the possibility provided for in Article 69 of the Regulation. These persons are considered to remain resident in Belgium. They are issued an EHIC.

However, a case has arisen of an unemployed person who wishes to establish his residence in the Member State to which he travelled with a form E303 issued by the Belgian competent institution. The Belgian authorities are uncertain as to how this person can exercise the right bestowed on him by Article 25 of the Regulation. Neither the issue of an EHIC nor of a form E106 seem appropriate in this case.

A discussion with Spain has taken place concerning the application of *Article 27 of Regulation 1408/71*. The Belgian institution was of the opinion that this Article applied, on the basis of the information available to it, but subsequently discovered that the situation was actually governed by Article 28 of the same regulation. The case concerned a pensioner who was in receipt of pensions from Spain and Belgium. He resided in Spain. The Spanish institution asked its Belgian counterpart to issue a form E121. It appeared that the pensioner drew a specific Spanish pension which, by way of exception, entails no entitlement to healthcare.

The application of *Article 33*, dealing with *contributions payable by pensioners* raises a lot of questions. Pensioners sometimes have trouble understanding that, when they are registered, for example, in Spain by means of form E121, contributions are payable in Belgium. The authorities are also uncertain about the application of Article 33, especially after the recent *Nikula* ruling of the European Court of Justice (C-50/05).

It is recalled that the European Court of Justice ruled that, in the case in which the institution of the State of residence pays a pension and is responsible for payment of healthcare, that institution may calculate the amount of social contributions of the resident pensioner on the basis of his total income, including pensions paid by another Member State. The European Court of Justice added, however, that the amount of contributions should not exceed that of the pensions paid by the institution of the State of residence. Moreover, the European Court of Justice held that it would be contrary to the fundamental freedom of movement of workers if that institution would include in the basis of calculation the amount of pension for which contributions have already been paid by the pensioner in another Member States.

The National Pensions Office (RVP-ONP) – which, since 2005, has taken over the responsibility of the RIZIV-INAMI when it comes to the collection of contributions for sickness and invalidity insurance (*ZIV-bijdrage – cotisation AMI*) payable by pensioners – takes account of foreign pensions for the purposes of establishing whether the minimum monthly amount as of which the 3,55 per cent SII-contribution is payable, is exceeded. However, deductions are made only from the Belgian pension, not from the foreign pensions. Deductions may not result in the total monthly amount of the pension to be lower than the abovementioned minimum monthly amount.

Belgian pensioners residing abroad are exempt from the SII-contribution, provided their healthcare costs are not chargeable to the Belgian State. Exemption from this contribution is, however, not automatic; the pensioner concerned should make an application to the National Pensions Office.

A longstanding implementation problem concerning *Article 34(2) of Regulation 1408/71* has recently been decided. It concerns *persons in receipt of a pension who, in addition, pursue a professional activity*. The Article provides that the Regulations' provisions on sickness benefits for pensioners do not apply to pensioners who are entitled to benefits under the legislation of a Member State as a result of pursuing a professional or trade activity. For the purposes of implementing Chapter 1 of Title III of the Regulation, these pensioners shall be considered as employed or self-employed persons. The issue is to determine when a pensioner is entitled to healthcare on account of their carrying on professional activities.

From a purely Belgian point of view, the issue is straightforward. Such persons maintain their status as pensioners for the purposes of sickness and invalidity insurance as long as the income they derive from their professional activities remains below a certain level.

However, let us consider the case of a pensioner who is residing in Belgium and is entitled to healthcare there on the basis of an E121 issued by the Dutch institution responsible for paying his pension. The pensioner concerned pursues professional activities in Belgium. Two approaches are conceivable towards the determination of the basis of her or his entitlement to healthcare benefits under Belgian legislation. One could argue, firstly, that entitlement on the basis of the exercise of a professional activity always takes priority. However, it is quite possible that the contributions payable by the person concerned do not reach the minimum level required to acquire the right to healthcare under the Belgian legislation. In that case, in order to be entitled to healthcare, the pensioner must pay a supplementary contribution. According to the second approach, which has now been approved and adopted by the Belgian authorities, the entitlement on the basis of work takes priority only when such entitlement exists without the person concerned having to pay a supplementary contribution. If not, entitlement based on the form E121 takes precedence and the pensioner is subject to Articles 27 to 33 of the Regulation.

It is noted, incidentally, that the provision of Article 14d(3) appears to imply that a pensioner in this last situation can still choose to be subject to the provisions of Article 19 to 24 of the Regulation, that is to say as employed or self-employed person, when s/he formulates the demand referred to in that provision. More in general, it is not entirely clear how this provision of Article 14d(3) of Title II of Regulation 1408/71 articulates with that of Article 34(2) of Title III of the same Regulation

The administrative implementation of the Judgement of the European Court of Justice on 18th July 2006 C-50/05 Nikula in Finland has also raised issues. The Finnish Highest Administrative Court (KHO) has delivered its Judgement on 27th of December 2006 (3498 KHO:2006:99) in relation to the case C-50/05 Nikula. The KHO considered that in the case of Nikula the person could not verify that she had paid sickness insurance contributions to Sweden.

There are about 25,000 pensioners at the moment who reside in Finland and receive pension both from Finland and Sweden and the number is going to increase considerably in the coming years (see information on the prognosis on the expected rise of the number of pension applications between Finland and Sweden E Old- age and death point 1.f. Member States' cooperation) The Finnish Tax Administration has contacted the Swedish Tax Authorities in order to receive information in relation to the financing of health care of pensioners in Sweden. The administrative cooperation between the Tax Administration in the two countries was facilitated by the fact that if no general information concerning the way of financing was available, all the 25,000 cases and the coming new cases would have to be examined case by case. The Swedish Tax Administration has in its' letter to the Finnish authorities stated that the intention of sickness insurance contributions in Sweden has never been to cover an individuals own health care costs after retirement. According to the letter this concerns both the years when a sickness insurance contribution was paid by the employer as well as the contribution that was paid by the employed person. The Finnish Ministry of Social Affairs and Health has given an opinion on 13th of June 2007 in which the Ministry states "that according the information received from Sweden, it seems that there is no case of overlapping payments in relation to pensions received from Sweden and therefore Article 39 forms no obstacle to take into account the pension paid from Sweden in order the calculate the amount of the sickness insurance contribution in Finland". The Ministry also states "that the second point of the judgement will be applicable only in connection to insurance systems, where it's clear that the contributions have been collected in advance and in order to cover health care costs of a retired person". The Ministry also states that need for legislative amendments in Finnish legislation concerning sickness insurance contribution must be evaluated.

When it comes to reimbursement of benefits between Greece and other Member States, the insured person has to submit all receipts of payment of treatment costs. Whenever E forms have not been obtained, the cost of treatment is significantly lower than the actual cost, even when the treatment abroad was necessary. A constantly increasing number of complaints shows that there are several problems related to health benefits in kind, mainly concerning the application of the relevant provisions of Regulation 1408/71. The problems occur when benefits in kind are granted to a person affiliated to a Greek health insurance scheme, who resides temporarily in another Member State. There are difficulties related to the correct procedure that must be followed and to applicable legislation. This confusion often results in an increase in administrative costs and is detrimental to the interests of the insured people and other beneficiaries.

In Finland the following issues are mentioned. The problems relating to migration between Finland and other Member states are mainly identified as problems relating to the information available for the clients as well as for the officials. Nordic projects under

the Nordic Council of Ministers concerning information to the persons moving between the Nordic states have been launched. There are also several working groups under the Nordic Liaison bodies working on different benefit sectors and trying to remove obstacles for the free movement of persons. There are Nordic working groups for legislation applicable, pensions, family benefits and rehabilitation. All these groups have meetings on average twice a year.

Liaison office meeting between Estonia and Germany has been arranged in 2006.

A special working group has been launched for cooperation for cross-border rehabilitation matters in North Finland and North Sweden. There have been identified problems in relations to persons residing in one state and working in another and for persons who move after falling ill to another state. Rehabilitation and sickness insurance are very complicated in these cases. The structure of the systems is different. The notion in Regulation 1408/71 concerning benefits in kind and in cash is also difficult. According to Regulation 1408/71 the benefits in kind come from the state of residence and cash benefits from the state of employment. There are difficulties in coordinating different types of benefits in kind i.e. education and training with the other country's cash benefits. As the systems are designed for a particular Member State and it is often difficult to separate which benefits are benefits in kind according to Regulation 1408/71 and which are cash benefits. An additional difficulty comes from the fact that in Finland rehabilitation is administered by several different authorities: the Social Insurance Institution (KELA), the employment pension institutions, the municipalities and the unemployment authorities.

The clearance time of EU pension applications is very long in pension matters between Finland and Sweden. About 90 per cent of all EU-pension matters in Finland involve Sweden. This is a question that has been under discussion for some time now and the need to re-examine the national procedures in the pension handling procedure has been acknowledged. This autumn a pilot project is going to be launched, where the application will be immediately send to the other pension institutions involved, so that they will be able to start to handle to application simultaneously. During this project an ideal handling time will be defined. The plan is to move to the handling process from the start of 2007.

In Slovenia there is a lot of scepticism regarding the free movement of health services and cross-border health care. There is a strong feeling that it could undermine the national health care system based on compulsory health insurance, considering the size of Slovenia and the fact that the whole country could be considered as a border region. Main concerns are related to the quality of health care provided abroad, the questions of continuity of treatment and the protection against medical faults.

If it were to be interpreted (in competent institutions in EU) that according to the rules on free movement of health services, a person insured in Slovenia and residing in Slovenia, may choose a personal general practitioner (and other personal doctors the insured person has to choose) in another EU Member State, this interpretation would open many questions and cause many problems. It could result in the end result in a breach of the basic principle of equal treatment of persons insured in the public health insurance in Slovenia and treated in Slovenia according to the national legislation and rules and persons treated in other EU Member State who have the same kind of health problems.

General practitioners in Slovenia in public and private health services (if they have a concession contract with HII), have to follow rules on preventive and diagnostic health services to which insured persons are entitled. It is not clear which legislation would be applicable and used by the personal doctor in another EU Member State and to what

extent the HII should cover expenses, if they are not covered for persons treated in Slovenia. The question of unequal treatment of insured persons using medical services in Slovenia and in other EU Member States would be open.

There is also the question whether the personal doctor in another EU Member State can decide upon sickness leave and sickness benefit.

A recent problem which is more and more prevalent in Slovenia is that the pregnant women go to private clinics in Austria or other EU Member States to give birth. They present the European Health Insurance Card and the HII is asked to cover the costs.

In cases when women are not staying in an EU Member State, but go to an EU Member State only to give birth, the abuse of the rights by insured persons (Article 22.1.a of R 1408/71) and abuse by the health care providers is quite evident. In Slovenia there are sufficient obstetric facilities in gynaecological and maternity hospitals in all geographical regions. All women in Slovenia give birth in hospitals specialised for childbirth. It should be also noted that in compliance with national rules the costs of childbirth in a private clinic in Slovenia that has not stipulated a contract of concession with the HII, would not be covered by the HII.

In UK the Watts case had an influence on NHS' attitude to prior authorisation. In the Watts Judgement the Court ruled that:

- a) Its case law relating to patients seeking hospital treatment in another European country applies to the UK's National Health Service.
- b) Health systems can justify the use of systems of prior authorisation before patients go abroad for treatment in hospitals but that authorisation cannot be refused - and healthcare costs must be refunded - when the home health system cannot offer the service without 'undue delay'.
- c) Criticised the NHS for not having clear criteria for managing its prior authorisation systems.

In response to the Court's criticism that the NHS lacks clear criteria for managing its prior authorisation procedures, the Department of Health announced that it was working with the NHS to develop detailed guidance to local healthcare commissioners on managing requests for treatment overseas.

The guidance for managing requests for treatment overseas (Department of Health, Patient Mobility: Advice to Local Healthcare Commissioners on Handling Requests for Hospital Care in other European Countries following the European Court of Justice's Judgment in the Watts case. www.dh.gov.uk/travellers) which was published on 16th April 2007 sets out the following key principles:

- a) Healthcare commissioners can (and should) set up systems for considering requests from patients for authorisation to go abroad for treatment which in the UK is provided in hospitals.
- b) A commissioner is entitled to refuse to pay for healthcare services that are available in other Member States but that it does not offer to patients in the UK. A commissioner is entitled to refuse to authorise a request for treatment that it does not fund, even if that treatment is funded elsewhere in the UK.
- c) If a commissioner agrees that a patient should be offered treatment on the NHS, and if that treatment is not available without 'undue delay' in the NHS, then the patient is legally entitled to go elsewhere in the EU for that service, and can request either E112 or Article 49 authorisation.
- d) Under the case law developed by the European Court in the Watts case (Article 49), commissioners are only required to refund up to the costs of treatment in the UK. If treatment costs elsewhere in the EU are higher than those in the UK, then the

patient must pay the difference (Department of Health, Patient Mobility: Advice to Local Healthcare Commissioners on Handling Requests for Hospital Care in other European Countries following the European Court of Justice's Judgment in the Watts case).

These key principles are followed by more detailed guidance (Department of Health, Patient Mobility: Advice to Local Healthcare Commissioners on Handling Requests for Hospital Care in other European Countries following the European Court of Justice's Judgment in the Watts case www.dh.gov.uk/travellers), which includes:

- a) Healthcare commissioners' decisions about what constitutes 'undue delay' must be based upon a clinical assessment of the individual circumstances of the patient, and this assessment must be kept under review while the patient is awaiting treatment.
- b) Where commissioners have 'prior authorisation' processes in place for handling requests, they can normally refuse to refund treatment costs to patients who go abroad for treatment without seeking prior approval, except where the patient faces undue delay.
- c) The guidance acknowledges that there may be exceptional circumstances where commissioners will be prepared to agree a request for a service that is not otherwise funded: this must be determined on a case-by-case basis. In these circumstances, it is unlikely that 'undue delay' will, in practice, be a consideration.

Where the patient does not face 'undue delay', there is no requirement to authorise treatment outside the UK. However, the guidance states that it is good practice for commissioners to consider the best interests of the patients and points out that they should also bear in mind that an unjustified refusal where the patient does not face 'undue delay' might nevertheless infringe EU law.

Commissioners are advised that a decision about what constitutes 'undue delay' must be based on a clinical assessment of what is a medically acceptable period for the individual clinical circumstances of the patient, and reminded that this assessment needs to be kept under review while the patient is waiting for treatment. Commissioners need transparent systems for showing that assessments are kept under review separately from current waiting lists. Commissioners are also reminded that the Court has said that offering treatment within a national waiting time target does not necessarily avoid 'undue delay'.

Commissioners are told to be aware that 'undue delay' may also be relevant to the decision of whether to refund treatment costs to patients who have gone abroad without first seeking prior authorisation. Normally, if commissioners have systems of prior authorisation in place, they can refuse to refund payment to patients who go abroad without first seeking authorisation. However, if the commissioner decides that 'undue delay' applied to the individual circumstances of the patient in this situation, they should consider whether they should refund the patient.

The specific procedures set out for treatment abroad under Article 49 include:

- a) On request, the commissioner should write to the patient, setting out the exact terms of the prior authorisation and related arrangements. This is for the benefit of both parties, and is the way in which the patient can be certain of the financial and clinical care arrangements that will apply. It is also the opportunity to ensure that the patient is aware that the responsibility for ensuring the quality of the care that the patient receives is that of the health system in the country of treatment. Commissioners are told that it is important that patients understand that the NHS cannot be responsible for the quality of providers in other Member States i.e. that authorisation will not make the NHS liable for any clinical negligence and that any liability of the provider would have to be established in accordance with the legislation of the provider country.

Commissioners are reminded that they need to ensure that patients can appeal against decisions made on requests for treatment in other European countries. Currently, the only means of challenging such a refusal is by way of judicial review. The guidance suggests that commissioners may wish to put in place an internal system for review of their decisions (whether refusals to make recommendations to the Department under the existing E112 system or refusals to authorise under Article 49). The Department of Health suggests that this can be done, for example, through the standard processes that commissioners will have in place to deal with appeals against their decisions about domestic commissioning. However, commissioners are reminded that patients are not obliged to use such a system and must be told of their rights to seek judicial review of adverse decisions (Department of Health, Patient Mobility: Advice to Local Healthcare Commissioners on Handling Requests for Hospital Care in other European Countries following the European Court of Justice's Judgment in the Watts case).

Commissioners are told to alert the Department of Health if the volume of requests for treatment in Europe increases to an extent that may damage planning of healthcare services, in which case it may be possible to reconsider the criteria for granting authorisation.

Another issue relates to the Hungarian practice of giving posted workers an EHIC before they are posted to another country. The authorities do not, however, give an E106 if they have their residence in another Member State. This could be more beneficial for the posted workers, as this entitles her or him to full health care coverage in the country where s/he is posted and there is no restriction to necessary medical care. Although this possibility exists, the authorities base their decision on Article 19 of Regulation 1408/71, according to which eligibility is tied to residence. This means that the Hungarian employer must notify the transfer of residence to the Hungarian authorities, after which notification the Hungarian residence is annulled. This possibility is not used very often.

Another issue in Poland deals with seasonal workers. These workers, whether they are employed or self-employed in Poland, remain subject to Polish legislation when performing seasonal work abroad during their leave. However, at the seminar it was wondered, how the situation of these seasonal workers would look when the seasonal work is not reported to the competent institution? What if, for instance, an accident at work occurs? Is the seasonal worker then entitled to healthcare benefits from the National Health Fund? And what happens when Polish farmers, who are obligatorily insured with the farmers' social insurance (KRUS), take up seasonal work abroad on an employed basis? If the status of these persons changes from self-employed to employed, they fail to meet the requirement to be included in the farmers' social insurance (i.e. the personal operation of a farm), and they lose the right to benefits.

BENEFITS IN CASH

In many countries problems arise due to the fact that it is the employer who has to pay the sickness cash benefits. As the Court made clear in the *Paletta* Judgement the statutorily required continued payment of wages through the employer, falls within the material scope of Regulation 1408/71, i.e. under Article 4(2): schemes concerning the liability of an employer or ship-owner in respect of the benefits referred to in paragraph 1 of Article 4. Under Austrian law sickness benefits in cash may be claimed only after entitlement under labour law has been exhausted. In the Netherlands in 2002 a Law came into force, which requires employers and employees to undertake extensive reintegration activities for sick employees (Wet Verbetering Poortwachter - Eligibility for Permanent Invalidity Benefit (Restrictions) Act). Satisfactory fulfilment of these

obligations is a condition for entitlement to WAO-benefit (incapacity benefit). It is likely that these obligations fall within the scope of the Regulation, although no cases have been reported yet.

Problems arise if a person falls under a different labour law system, than the social security legislation. This is particularly the case between Netherlands and Belgium. What happens if someone falls under Dutch social security law, but his or her contract is arranged according to Belgian labour law?

So far, there is no known case law on this problem; it is likely that Belgian employers continue to pay wages in such cases to avoid hardship for the employees. Employers and employees cannot avoid the obligations written in the Civil Code. Sometimes it is argued that *De Paepe* judgment means that Article 4(2) of Regulation 1408/71 provides that the obligation for an employer to pay wages (an obligation which falls under the scope of the Regulation) means that he or she is liable to pay wages even if he or she has chosen a different labour law system. Belgian institutions mention that in case they are confronted with the problem, they suggest that Article 17 agreements can be concluded, which means that these employees fall within the scope of Belgian social security law.

In the case of Polish beneficiaries the rule of aggregation of periods of insurance is applicable when determining entitlement to sickness allowance and sick pay. The unbroken insurance period required for entitlement to sickness allowance (sick pay) may include insurance periods completed in another Member State. When considering this issue a question does arise as to whether the required period of insurance should include employment periods or residence periods since according to national legislation of a given country these periods were sufficient for the entitlement to cash benefits in case of sickness and maternity.

In Sweden, work-related sickness benefit is awarded from the first day of employment. Thus, sickness benefit is awarded to newly arrived migrant workers without application of the aggregation rules. However, difficulties of another kind arise, namely how the benefit should be calculated when it is based on a very short employment period. According to the national rules, the calculation is not based on historical earnings, but on the earnings the claimant can be expected to gain during the year to come. A short period of temporary employment cannot form the basis for such an estimation. The employment must be expected to last for at least six months in order to serve as the basis for estimating future income. This method of calculating benefit has been regarded as unfavourable to migrant workers with only short temporary work in Sweden. For that reason, sickness benefit for a migrant worker is calculated as if their very short period of employment were intended to be permanent, a very generous principle, which favours migrant workers compared to other workers in temporary employment.

According to its national legislation, Sweden will probably continue to be the competent state for persons who have transferred their residence to another Member State as long as the claimant is entitled to sickness benefit, i.e. during the ongoing sickness period. When the sickness period ends, the responsibility for social security benefits is transferred to the new residence state even if the person concerned has not taken up any gainful occupation in that state. However, given the special features of the Swedish system, this rule may have far-reaching consequences. There is no limit to the entitlement period. Sweden's liabilities as the competent state could arguably last for an indefinite period of time. The obligation to grant sickness benefit can be transferred to a liability to grant invalidity benefits to persons, who have long since moved to another country. It will become impossible to carry out any rehabilitation measures, which are so important in the Swedish system. Sweden will also – because of the single state rule –

remain the competent state for benefits, which according to national legislation are residence-related.

In Hungary, foreign social insurance institutions often report qualifying periods only for benefits in kind as periods qualifying for cash benefits.

In Greece it is proposed that further discussion should take place on the coordination under Chapter 1 (Title III) of the Regulation of benefits for disabled persons, which have been excluded from Annex IIa (Regulation 647/04). From now on, those benefits are considered as sickness benefits in cash and are exportable. Greece is particularly concerned about the practical problems that have to be cash and are exportable. Greece is particularly concerned of the practical problems that have to be solved since "exportation" of such allowances implies internal coordination between three competent authorities (Ministry of Employment and Social Protection, Ministry of Health and Solidarity, Ministry Finance and the Ministry of Interior and Public Administration), all competent institutions, concerned at a time and the municipalities (in Greece, these allowances are paid by the local authorities of the place of residence of the insured). First steps have been taken but it is still too early to know how information, cooperation and exportability, nothing to be said about aspects of actual payments, are going to work in practice. Most probably, smooth implementation of the sickness benefits Chapter might need special regulation. At Community level other aspects are open, such as priority rules, in respect of same or different nature benefits being provided under the legislation of the Member State of stay – residence, especially in the interest (appropriate protection linked to the social environment) of the person concerned. The special Administrative Commission Working Party to be created by the Commission, with a view to examining issues of interpretation and procedures (mutual and accurate information of the institutions involved) is still pending.

Another new problem occurring in different countries relates to the issue of occupational rehabilitation. Being closely connected to the employer of the beneficiary, this form of rehabilitation is difficult to export. In Slovenia, the Pension and Invalidity Insurance Act provides for a contract to be concluded between the insurance institution, the employee and the employer. The latter is usually the provider of the rehabilitation services. Hence, occasional rehabilitation in another Member State is hardly conceivable.

In the Netherlands, sick workers employed on the basis of a contract of employment are entitled to continue to receive wages at the rate of 70% of their regular wages (below a statutorily defined maximum). This is a statutory obligation, required by the Burgerlijk Wetboek (Civil Code), Article 7:629. The obligation to continue to pay wages exists for 104 weeks. Collective agreements often require supplements to be paid to the statutory minimum. These supplements are beyond the scope of the regulation, but no problems have been reported on this. In normal situations it is quite unlikely that there are any problems, but if a person works simultaneously in two Member States, there could be complicated questions as to which benefit is to be supplemented by which employer. When the contract of employment is terminated within the 104 weeks period, workers can claim sickness benefit under the Ziektewet (Sickness Benefit Act). The Sickness Benefits Act therefore serves as a safety net for those who cannot claim benefit from their employer.

Maternity benefits were transferred to the Wet Arbeid en zorg (Work and Care Law) in 2001. This did not mean a change in the rights or obligations of the persons concerned. Pregnant women and young mothers are not dependent on their employers for the continued payment of wages during the period of pregnancy and maternity leave; they are entitled to benefit pursuant to the Wet Arbeid en Zorg.

In the Netherlands, as the statutorily required continued payment of wages resembles the German Lohnfortzahlung, which was considered to be within the scope of the Regulation (see the Paletta judgment) we can safely assume that the obligation under Dutch law also falls within the material scope of Regulation 1408/71, i.e. under Article 4(2): schemes concerning the liability of an employer or ship owner in respect of the benefits referred to in paragraph 1 of Article 4. The government supports this view.

In 2002 a Law came into force, which requires employers and employees to undertake extensive reintegration activities for sick employees (Wet Verbetering Poortwachter - Eligibility for Permanent Invalidity Benefit (Restrictions) Act). Satisfactory fulfilment of these obligations is a condition for entitlement to WAO-benefit (incapacity benefit). It is likely that these obligations fall within the scope of the Regulation, although no cases have been reported yet. This can give rise to very complicated situations: suppose a worker successively worked in the Netherlands and Germany and then falls ill. In order to satisfy the Dutch rules for disability benefit, s/he has to fulfil the reintegration efforts as required by Dutch law. Can s/he force his last, German employer to provide these reintegration provisions?

The Czech report stated that some Member States, for example, Germany, Poland, United Kingdom, do not employ E-forms and send their national incapacity-to-work certificates in place of form E116. Therefore, Czech Social Security Administration agreed with the Polish ZUS on special procedure to get the date necessary for entitlement on benefit from the Czech system.

Another problem that the Czech administration has been solving with its Polish counterpart concerns the issue of form E 116 PL. The Czech institutions are of the opinion that the institutions of residence/stay are compelled to issue form E 116 and to send this form together with form E 115 to the competent institution free of charge. The Polish party, on the other hand reckons that such E forms are issued only on request and against payment. In April 2007 Polish party took back its requests and the problem with remuneration for E116PL as such was solved. The work load connected with the European agenda differs in the different localities. The heaviest is the workload in the boarder regions and in Prague.

Latvia also mentioned that the competent authority in Finland refuses to provide form E213 free of charge.

In Finland a pilot project for cross-boarder rehabilitation matters in North Sweden and North Finland started from the 1st of September 2007.

B. Long term care benefits

An important question is whether the French '*allocation personnalisée d'autonomie (APA)*', a French benefit granted to dependant persons, is exportable? In line with the *Molenaar* and *Jauch* cases, the French APA may also be categorised as a sickness insurance cash benefit and therefore be exportable, regardless of the fact that the national legislator considers that the APA has the character of a benefit in kind. Therefore, one can wonder whether the national provision according to which the APA is provided to persons who have a stable and lawful residence in France or its territories, complies with Regulation 1408/71. The Minister of Social Security noted that a dependant person living in a care institution established in an EU Member state can be granted the state of residence benefits, which will be reimbursed by the competent French institution.

This vision could not be correct if the APA is a sickness benefit in cash and not a sickness benefit in kind in the light of Regulation 1408/71.

The *allocation compensatrice de tierce personne* (ACTP), which is similar to the APA (the ACTP is provided to persons up to age 60, the APA is provided from age 60), raises the same questions. The ACTP will soon be replaced by the *prestation de compensation*. The recently introduced *prestation de compensation*, which aims to compensate persons affected by a disability of any sort, and which will enter into force on January 2006, is also classified by the law as a benefit in cash. It will be allocated to persons who have a stable and lawful residence in France. Similar doubts arise concerning the lawfulness of the French territorial approach, although it is less obvious that this particular benefit, covering all types of disabilities, can be classified as a sickness benefit.

Spain reports problems with the German Pflegegeld. No problem exists when returning migrants receive only a German pension, because pensioners must pay compulsory contributions to the German competent institution. However, pensioners, who receive two pensions and who resided in Spain, do not have to pay any compulsory contributions for sickness in Germany. In such situations, German institutions consider that there is no obligation to pay compulsory contributions to obtain the Pflegegeld. Such an interpretation is especially disadvantageous to Spanish workers who have returned to Spain because they are not entitled to any German social security benefit if they need assistance for performing basic activities of daily living by virtue of their physical or mental state of health. However, they are not entitled to any corresponding Spanish benefit either, as the need for long-term care is not a risk covered by the Spanish social security system.

In Spain there is controversy about whether or not the new long-term care benefits are coordinated by Regulation 1408/71. In Ireland carer's allowance, formerly categorised as a non-contributory benefit is now considered to be outside the scope of the regulation (apparently on the basis that it's a minimum income payment). This is surprising given the case law of the European Court of Justice and the decisions concerning the carer's benefit payment (The UK carers allowance is still categorised as an Annex II benefit, but the Court of Justice has recently decided that it should be categorized as a social security benefit) (Case C-299/05), 18 of October 2007).

In Austria, after the *Jauch*-ruling there has been some debate with respect to recipients of pension benefits paid from other Member States who are residing in Austria. Before *Jauch* these persons were granted *Bundes-Pflegegeld* in accordance with Article 10a (3) of Regulation 1408/71. Since this provision is no longer applicable, there is no longer a legal basis for claiming *Bundes-Pflegegeld* which means – because of the responsibilities under national law - that all these pensioners are entitled to subsidiary *Landes-Pflegegeld*. Meanwhile this entitlement has been abolished by some amendments to provincial legislation. So the Supreme Court has submitted two cases to the Constitutional Court, which will have to rule whether the exclusion of recipients of pension benefits granted by other Member States from the entitlement to *Landes-Pflegegeld* under the Upper Austrian Care Allowance Act is a violation of the (national) fundamental right to equal treatment.

Slovenia does not yet have separate legislation for long-term care. The law has been discussed in 2007, but there are still some questions. Long term care benefits in cash are presently defined in the Pension and Invalidity Insurance Act for recipients of pensions and for active blind persons and active severely physically impaired persons. For disabled children special benefits in cash are provided in Parental Care and Family Benefits Act.

For severely disabled children and adults a system of family assistants is regulated in Parental Protection and Family Benefits Act and in amendments (2006) to Social Care Act. The parent of a disabled child and the family member or a third person taking care of a disabled adult, who stopped working or started to work part time or is unemployed, is entitled to a partial replacement of the lost earnings including contributions to pension and invalidity insurance, health insurance and unemployment insurance. The question may arise whether these kinds of services, replacing institutionalisation, and depending on individual decisions of family member for children and adult disabled person, fall under the scope of Regulation 1408/71.

As for long-term care, an important change occurred in Czech Republic in May 2006, when a new law on social services was adopted. The act aims to support as high a level of the client's independence as possible and at strengthening the role of services providers (especially NGOs). The act also introduces a new benefit (care allowance), which shall be coordinated according to the Regulation 1408/71.

In Finland, a legislative proposal has been given to the parliament (HE 90/2006) which comprises changes to the exportation of some benefits. The care allowance for pensioners which at the moment is an exportable pension benefit is considered to be a disability benefit. Where the right to this benefit is based on residence in Finland, the amount of the benefit would no longer be dependent on how long the person in question has resided in Finland. A person residing in Finland would have the right to the full benefit when moving to Finland. This benefit would in the future be a non-exportable special non-contributory benefit.

In Germany it follows from Molenaar that such benefits provided for by care insurance also constitute 'sickness benefits' payable to the reliant person within the meaning of Article 4. The fact that care insurance is at times provided in whole or in part by a private insurer on the basis of a private insurance contract cannot put it outside the scope of the regulation, since the conclusion of such a private law contract follows directly from the application of the social security legislation in issue. The EC Treaty, in particular Article 17 EC, and Regulation 1408/71 precludes payment of the old age insurance contributions of a national of a Member State in the position of the third party caring for the recipient of those benefits being refused by the competent institution on the ground that that third party or the afore-mentioned recipient resides in a Member State other than the competent state.

The Court of Justice held in Molenaar that German social care insurance benefits were to be regarded as sickness benefits within the meaning of Article 4 (1) (a) of Regulation 1408/71. Accordingly, such benefits must be treated as cash benefits of sickness insurance as referred to in Article 19 (1) (b) of that Regulation in accordance with the provisions of that Article and the corresponding provisions of the other sections of Chapter I of Title III of that Regulation. Care allowance (Pflegegeld) must therefore be provided irrespective of the Member State in which a person reliant on care who satisfies the other conditions for receipt of the benefit is resident. The requirement of residence in Germany in order to be granted the care allowance (Pflegegeld) is not compatible with the right of export as foreseen by Regulation 1408/71.

Long-term care benefits must be granted in line with the Molenaar and Jauch cases. They must be categorised as a sickness insurance cash benefit and therefore be "exportable", regardless of the fact that the German legislator considers that the Pflegegeld (care allowance) had the character of a benefit in kind. From a German perspective there is a case for introducing particular provisions for long-term benefits in EC coordination law. The new Regulation (EC) 883/2004. Only Article 34 of Regulation (EC) 883/2004 refers to the new social risk of dependency.

In the Czech Republic, there are special awards in hospitals providing long-term care for up to 3 months and homes for disabled people and the aged in need of long-term care. These are services to which EEC Regulation 1408/71 does not apply. The application of the new law started to bring some first difficulties, however not regarding the coordination of social security.

C. Maternity and paternity benefits

Problems in the future may be related to the categorisation of the child care benefit in Slovenia. The child care benefit for 260 days of absence of work has to be taken by the mother or the father immediately after maternity leave of 105 days. The maternity benefit and child care benefit is related to the previous earnings and cover in principle 100 % of the average salary in the last 12 months (a maximum amount is fixed). Problems may be related to the categorisation of this benefit as a maternity benefit, which was always the case in Slovenia.

In France, new fathers are entitled to take paternity leave of a minimum of 11 days for the birth or adoption of a child. They are entitled to sickness benefits in kind if they need care during a temporary stay in another EU or EEA country. Under Article 22(1) (c) (ii), beneficiaries can also be provided the paternity benefit in cash if they stay in another EU or EEA country. The reasons for the stay do not affect eligibility for the benefit: for instance, the father may go abroad to see the newborn or to introduce the child to relatives. The administration observes that the paternity benefit follows the same rules as the maternity benefit regarding the application of Regulation 1408/71. Therefore, according to the French report, a father subject to French social security legislation is entitled to the paternity benefit in cash even if he resides in another EU Member State. Rules concerning cases of overlapping entitlement to family benefits are according to an administrative circular applicable if a father is also entitled to paternity benefits in the country of residence.

D. Invalidation

1. General issues

Within the social security systems of the EU Member States there are two basic types of schemes for invalidity: one type providing benefits granted by insurance schemes which are based on the materialisation of the risk ('Type A'-scheme), and a second type providing benefits granted by insurance schemes which are based on the length of insurance ('Type B'-scheme). Coordination implies that national systems are, in principle, kept intact and that every Member State remains competent to apply its own rules. This is very clear with regard to establishing the degree of invalidity. It is up to every Member State to apply its own method of evaluation to the person concerned. As a result a person may be totally disabled in one Member State, partially disabled in another Member State, or not disabled at all in yet another Member State.

However, there are states where the mixed systems exist. For example the Czech Republic, which has a two-fold invalidity pension system. The base is flat-rate for all pensioners and the differentiated supplement is based on the period of insurance and the paid contributions (salary) – therefore this scheme has characteristics of type B. There is one small exception – invalidity pension acquired to very young people who never worked, because they are disabled as of birth, or became disabled when they were very young. In this case, the invalidity pension is of type A and it was included in the Annex IV. of Regulation 1408/71.

Article 38 of Regulation 1408/71 pertains to workers who have been subject to national schemes pursuant to which the amount of invalidity benefits is independent of the duration of insurance periods, like e.g. Belgium. Pursuant to Article 38, the worker will, in the case of invalidity, be eligible for benefits under the national scheme to which he or she was affiliated at the time he or she became an invalid. This may happen to workers who have been successively subject to Belgian and French law.

Article 38 may turn out to be rather unfavourable for the worker if he or she has been insured under the French system for less than 10 years. Benefits in France are calculated on the basis of the worker's average salary during the 10 best salary years of his or her career. If the worker has been insured for less than 10 years, the calculation is confined to these years, even if the worker can prove that he or she received a higher salary in Belgium during the remainder of his or her career. It seems that this practice is not incompatible with Article 38, which is concerned only with the conditions for the acquisition, retention or recovery of the right to benefits.

Concerning the aggregation of periods, in Spain a lot of discussion took place when dealing with the application of Article 47 of Regulation 1408/71. The Supreme Court established in different cases that when no real contributions have been paid in Spain in the years preceding their pensions, these pensions should be calculated by applying the medium basis: the arithmetic average between the maximum and the minimum basis corresponding to a worker from a similar occasional category as the migrant claimant.

Today, according to the European Court of Justice (Case 153/97, *Grajera Rodriguez*) if migrant workers have not paid contributions in Spain in the years preceding their pension claim, only contributions paid by migrant workers before leaving Spain (*remote basis principle*) should be taken into account for determining the basis of calculation. This latter solution is disadvantageous to migrant workers.

In Austria qualifying periods may be completed by months for which contributions have been paid (*Beitragszeiten*) as well as by other periods regarded as periods of insurance (*Ersatzzeiten*). These *Versicherungszeiten* have to be completed in a certain period which basically is twice as long as the required waiting time (*Wartezeit*). This period may be extended if neutral periods (*neutrale Zeiten*) can be proved. Both *Ersatzzeiten* and *neutrale Zeiten* completed in another Member State have to be taken into account when an invalidity benefit is claimed in Austria. This was confirmed in the *Kauer*-case (C-28/00 [2002]) of the Court of Justice according to which child-raising periods have to be recognised as *Ersatzzeiten* even though they have been completed in other Member States and – most of all - before Regulation 1408/71 was applicable in Austria. The ruling of the Court has caused some debate whether some explicit legislative measures should be taken in order to ensure that *Ersatzzeiten* or *neutrale Zeiten* completed in other Member States are taken into account by Austrian social insurance authorities when a benefit is claimed under Austrian legislation

Difficulties also arise with regard to the transition from (primary) incapacity for work and the start of (secondary) invalidity. E.g. when a worker has worked in Germany, Belgium and The Netherlands, the respective legislations state that the invalidity pension starts after respectively 1,5 years; 1 year and 2 years. When the worker lives in Germany and works in The Netherlands and he or she becomes incapable for work, he or she gets his or her wage paid in The Netherlands for 2 years, but also gets Deutsche Rente after 1,5 years and WAO after 2 years. This means there is a concurrence of 0,5 years. When he or she lives in The Netherlands and works in Germany, there is of course a hiatus. A similar situation occurs in the relation between Belgium and The Netherlands. It was suggested that workers would be better to apply for unemployment benefits than claim sickness benefits, in order to avoid this. The Dutch government declared that they will not cover this situation and stated that this can be remedied once the TW (Law on Extra Allowance) is on Annex IIbis and workers who live in The Netherlands will be entitled to an extra allowance when the German pro rata benefit is lower than the social minimum and the other conditions for entitlement to the TW are fulfilled.

As was the case for incapacity for work benefits, here also the issue of rehabilitation becomes more and more important. In Finland e.g. vocational rehabilitation is the most central type of rehabilitation in the earnings-related pension scheme. In 2005, a requirement for participating in rehabilitation services was that the person earned at least EUR 25.000,00 over the past five years, i.e. that s/he worked regularly. Rehabilitation as provided by authorised pension providers is still partly statutory, partly discretionary. This situation, however, is to change in the near future. A rehabilitation cash benefit is paid during periods of rehabilitation to persons whose vocational rehabilitation is supported by the pension provider. The rehabilitation cash benefit amounts to the full disability pension plus a rehabilitation increment of 33 % for periods of active rehabilitation. Discretionary rehabilitation assistance may be granted during the waiting period. A requirement for receiving rehabilitation benefits is the elaboration of a so-called rehabilitation plan and its approval by the pension provider. This rehabilitation plan can be drawn up by the applicant her or himself, or with help from the general health care, the occupational health services or the employment authorities. Important rehabilitation measures within the earnings-related pension scheme are trial work, training leading to employment or an occupation, job coaching and business subsidy. For the purposes of Regulation 1408/71, the rehabilitation cash benefit would be qualified as an invalidity benefit. Currently, there is discussion over whether it should fall under the sickness chapter.

This issue is also reported in Sweden. For rehabilitation measures, health care institutions, regions, companies, municipalities and the "insurance office" are the main actors. The Insurance office is responsible to evaluate the needs for rehabilitation to get

people back to work. In order to get this result, they purchase certain services. They are responsible for the investigations and all rehabilitation measures provided. An important part of the responsibility is also on the employers, who start the investigation if the period of sickness leave lasts for more than 4 weeks and discuss the persons situation in a meeting with the insurance office, the physician, and the worker themselves. The "Insurance office" draws up a rehabilitation plan for the person on sickness leave and establishes the rehabilitation period during which a benefit can be paid. Here also the employer plays a crucial role in paying for measures to get the worker back to work by adapting the working place to the condition and needs of the worker. The involvement of the health care system was stressed, as the decision is to be made by the Insurance office but the doctors' certificates are also very important. Where the person is unemployed, the employment office is involved to help him finding a job.

The municipalities get involved where social measures have to be put in place, such as care for drug abusers. It is clear that this system depends on the cooperation of a lot of responsible actors and bodies, which is not always very easy. As regards the international cooperation, agreements are in place between Sweden and Norway, e.g. for people living in Sweden and working in Norway. Previously no measures were taken if people in this situation were on sickness leave. Now a close collaboration is established in the regions, with administrative routines providing help for these people and rehabilitation in the form of benefits in kind received from the country of residence. Problems in this field relate to positive law conflicts where people have a right to obtain 2 subsidies and different requirements are applied. Where Sweden requires the work capacity to be reduced for 1 year, the Norwegian authorities require it to be reduced for 5 years, resulting in situations where Sweden has to pay all the compensations. Other difficulties arise where Swedish doctors do not want to fill in the long and complicated Norwegian forms without being compensated for doing so. This cooperation is also established between Sweden and Finland. Finland has a totally different system wherein different parts are medical or labour-oriented measures. An agreement was concluded on labour-rehabilitation in the form of benefits in kind.

The French law of 1959 provides that former soldiers who have become foreign citizens after serving in the French army are entitled to a "crystallized" invalidity pension (which means that the rate is determined, once and for all, the day the beneficiaries are granted the benefit) while other soldiers who remained French citizens have their pension re-evaluated every year. In an order of 13 June 2006, the European Court of Justice has ruled that French law was contrary to Article 65 (1) of the association agreement between the EC and Morocco as it denies the right to an invalidity pension to a former Moroccan soldier residing in France only because of his nationality (*Echouikh case, C-336/05*).

The European Court of Strasbourg had already ruled that such discrimination based on nationality violated the European Convention of Human Rights. The French law has been modified in the meantime, but it could still be considered as discriminatory: for soldiers who have set their residence in former French colonies, the invalidity pension is calculated on the basis of a percentage of the French rate, depending on the standard of living of the country of residence.

In 1994 the UK replaced the existing clinical examination with a functional test known as the 'All work test'. In April 2000 the 'All Work Test' was renamed the 'Personal Capability Assessment' under the slogan 'a new test that will focus on ability rather than disability'. From 2008 the Personal Capability Assessment, will be refocused onto the capacities that people have to move into work, rather than on their incapacity to work.

The Personal Capability Assessment is presently based on a functional approach which awards points for degrees of impairment in specified areas of activity, such as walking, sitting or bending. The threshold for benefit in any one area is set at 15 points; points from different areas can be aggregated to reach the threshold.

Certain well-defined groups are exempt from the test on the grounds that their level of functional impairment is such that they would clearly be found incapable of work. The exempt groups consist of those with specified severe and progressive conditions or severe disabilities. In addition, those who are terminally ill and claimants in receipt of the highest rate care component of Disability Living Allowance are exempt (DWP, 2001).

This has given rise to some difficulties. The standard form for reporting examination, the E 213 is considered by the UK to be incompatible with the 'Personal Capability Assessment' and requested in 1994 that the Commission introduce a non-standard E form for the UK. The Commission did not want to set this precedent but asked the other Member States to look favourably on the new UK format. Many country's administrations have agreed to complete the UK form instead of the E213 and in these circumstances the arrangement generally work well.

In countries where agreement has not been reached the DWP is able to commission reports from Doctors Independently, although this is more costly and time consuming.

In Spain where caseloads are relatively high, the DWP has identified specific English speaking doctors who have agreed to carry out these reports for a set fee, this limits the costs and makes administration easier. However in Countries where few examinations are needed, the fact that the National Administration does not supply a PCA report means arrangements have to be made as and when required with whichever Doctor is best placed to provide the report. In these circumstances the report can sometimes be of poor quality and there have been instances where claimants have not received a good service. A poor quality report can delay the processing of benefit and cast doubt over the correctness of any decisions based upon it. This is particularly important is benefit is disallowed and the case goes to appeal.

The requirement to undertake work-related interviews, agree an action plan and participate in some form of work-related activity as a condition of entitlement to the Employment and Support Allowance is likely to present new administrative challenges - and perhaps some issues around the classification of the new benefit - in cases where the recipient has or wishes to export her or his allowance to another Member State. If a similar scheme exists in the host country then one solution would be to require the person to engage with the requirements of that country's scheme. However, as this type of scheme is not widespread in the EU, this is likely to provide a solution in some cases only. Where the country of residence does not have a similar scheme, it is not yet clear how the requirement to undertake a work-focused interview will be addressed. However, more difficult would be where the claimant is then required to participate in some form of work-related activity. Requiring someone in receipt of Employment and Support Allowance to undertake that activity in the UK would restrict the exportability of the benefit.

In the Netherlands, since the waiting period for benefit is 2 years, problems arise with persons who are entitled to sickness benefit in another Member State if the maximum duration of benefit is less than 2 years. In that case a gap occurs in the protection, since the person concerned is no longer entitled to sickness benefit and not yet to disability benefit. The effect of this varies in the individual situation concerned (e.g. sometimes unemployment benefit can be payable), but the gap is never completely filled.

There are no attempts to solve this problem, since the Dutch government simply argues that this is simply an effect of the lack of harmonisation of national schemes. This is true, of course, but it is remarkable that governments do not take themselves action to come to more harmonisation; instead they still make new laws which lead to new problematic cases.

In Poland, principles concerning granting disability pensions are regulated by provisions of the law on old-age and invalidity pension from Social Insurance Fund. On the basis of these provisions the disability pension is granted to a person insured that is incapable of work and has completed at least 5-year insurance period (contributory and non-contributory periods) during the last decade before applying for the pension or before occurrence of incapacity for work. In the case if the incapacity for work occurred in the age lower than 30 years, these periods are respectively shorter – from 1 year to 4 years. Besides, an additional requirement must be met: the incapacity for work must have occurred during some of contributory and non-contributory periods or not later than within 18 months after the cessation of these periods. In each case the degree of the incapacity for work is being evaluated. Similar provisions determine entitlement to invalidity pension for farmers. Generally speaking if the interested persons incapable for work will prove the required insurance periods but in the period preceding the last decade before the date of the claim for benefit, the decision regarding invalidity benefits will be negative. It raises an interesting question whether in every international claim for invalidity pension in respect to incapacity for work the Polish institution evaluating the claim should attach Form E 123 to each completed application even if the available documents show that the claimant does not meet the conditions necessary for entitlement to a Polish pension; or, whether the medical examination and Form 123 should be completed only on the request of foreign institution. Presently the KRUS Social Insurance Institution for Farmers does not send the claimant to medical examination if the documents attached to application for Polish farmer's pension in respect of incapacity for work show that claimant does not meet the requirement of pension insurance period.

2. Administrative cooperation

Problems dealing with administrative cooperation are reported by the new Member States. In the Czech Republic experience shows that not all insurance carriers use the E forms and they are sometimes replaced by the national forms. So the question is here whether the form must be used and what data must be included. Sometimes the form is sent but it is hand-written and unclear or improperly filled in. The question is also whether it must be reimbursed then? These problems can make the coordination procedure very long. This relates especially to E213 from Poland. They also apply different procedural rules. The fact that the Administrative Committee has not as yet approved the requests of new members to extend the E forms makes the procedures complicated and extends the time for their issuing. In addition it is noticed that the interpretation of the provisions of the Regulations is not the same in all the Member States. E.g. the request for recalculation of pension is considered in some countries as a new claim (Hungary) while in other Member States (Czech Republic, Slovakia) this is not the case. The Czech Republic has started negotiations with its partners in other new Member States (Slovakia, Poland, Slovenia) aiming to simplify the procedures and to facilitate the clients to claim and receive pension e.g. problems with E213. Poland also identified some problems with filling in form E 205 in cases where not all insurance period completed by the claimant have been confirmed up to the date when the risk occurred. This is caused by different periods of social insurance contribution payments. In addition, due to a very long waiting period for the decision of foreign institutions, the

waiting period for a decision granting benefits is very long and claimants often send complaints to competent institutions.

In the Czech Republic, a judge mentioned the following problem. The E213 contains a detailed medical report in case of an application for an invalidity pension. The E213 should be translated with the name of the one responsible for the translation on it. A judge confirmed that she refuses to deal with translation of E213's where no name is figuring on it. As there are a lot of doubts on translation of the forms, this is a radical but necessary measure. Another problem is that the forms are sometimes very old, e.g. where the examination by a German doctor is already 2 years old when the judge has to decide on the case. If the doctor has not specified the period of incapacity, the judge cannot work with the document. In some cases people even do not know they are assessed. Therefore it was requested that the assessments should not be older than 3 months. So, all in all, translators must perform better, documents should not be too old and the people should be better informed. If these conditions for the future are not met, the situation of insured persons will aggravate, as judges will refuse to deal with the cases.

In Latvia, the State Social Insurance Agency cooperates actively with corresponding institutions of other Member States. There have been several cases when some Member States refused to provide form E 213, instead providing a pile of medical certificates and references. In 2006 the cooperation with other Member States has improved. Major problems still exist with Finland where the competent authority refuses to provide form E 213 free of charge.

The same problem is also encountered in Hungary. The examining institution of the place of residence does not issue the Form E 213 necessary for assessing the state of health, or it is issued in return for a fee, or only medical documents are attached instead of the form.

Another problem relates to a bilateral agreement concluded between Poland and Hungary. Up to May 2004 the decision concerning the determination of the level of invalidity issued by the institution of one country was binding on the institution in the other country. Under the present legal situation Poland will not recognise decisions of Hungarian doctors regarding invalidity, and as such the person concerned is in a less advantageous situation than before. The question is therefore asked if Poland should apply the provisions of the Polish-Hungarian bilateral agreement where the insured person who claims invalidity benefits completed the required insurance periods (at least partially) before accession of Poland and Hungary to the EU.

In Poland the question is raised whether in every international claim for invalidity pension due to incapacity for work, the Polish institution evaluating the claim should attach the relevant E-form to each completed application even if the available documents show that the claimant does not meet the conditions necessary for the entitlement to a Polish pension.

OLD-AGE AND DEATH

The rules on old-age and survivors' pensions are the most complex and complicated part of EC social security coordination law. In some countries however issues rarely arise in relation to Regulation 1408/71. This is perhaps, as one report highlights, because nobody has a clue how pensions are calculated. Old-age pensions schemes, as a rule, take into

account the length of the period of work or insurance completed by the insured person and relate it to the amount of benefit.

1. Aggregation of periods

The recognition of insurance periods leads often to difficult issues. The new rules on pension rights for child-raising years under the new pension scheme in Sweden are e.g. very generous when compared internationally. A parent who stays at home or reduces his or her working hours to take care of a child under four is credited with pension rights corresponding to his or her earnings before the child was born or to 75 percent of national average earnings.

However, these provisions were not designed to enable persons, who work in Sweden only for a short period of time and then move to another country, to accrue pension rights for child years under the Swedish system. For that reason there is a rule, which requires that both the parent and the child must reside in the country in order to be entitled to pension rights for 'child years'. Obviously, this provision cannot be applied to persons within the scope of Regulation 1408/71. However, there is also another condition: the beneficiary must have been accredited a pensionable income of a certain level for at least five years before the age of 70. There is a possibility of transferring pension rights for child years to a spouse, as long as the conditions above are fulfilled. The construction of the child years can thus be said to lie on the border line between old age pensions and family benefits. This poses special problems in relation to Regulation 1408/71. May a spouse of a Swedish worker, residing in another country, rely on the Regulation to obtain pension rights for child years as a derived right from her husband? It is difficult to predict today the potential legal problems which will arise in relation to Regulation 1408/71 in terms of the 'child years' under the new pension system.

Can a person who works in Sweden for a year and has a child there, and then moves abroad to take care of the child, continue to earn pension entitlement for child raising years? The question is also asked if this is an individual or a derived right? These are individual rights for one parent which are not related to a family's costs. But the connection to work is very weak as it is based on residence and it relates to a child's need for the parent to remain at home. Can a person insured in Sweden give away this right to his wife living in Denmark and thus can the spouse resident in Denmark derive pension entitlements for childraising years from her husband working in Sweden?

Under German legislation insured persons have the right to child-rearing benefits with the territorial precondition that the upbringing of children takes place in Germany or must be of equal status. The latter means that the parent bringing up the child can usually live in Germany, or he or she can live abroad but would have to have statutory insurance in Germany during the child's upbringing or prior to the birth of the child.

Provisions such as the German law on pension schemes constitute a disadvantage for those Community citizens who claimed the right to free movement in the Member States. Pursuant to German legislation a Community citizen who continued working in Germany automatically lost the advantage of aggregation of the insurance periods in the State of residence by moving to another Member State.

Poland encounters problems when aggregation of insurance periods must be applied for granting a minimum pension. Problems are encountered when applying national law if aggregation of periods must be applied for the purpose of granting minimum pension. In that case a supplement should be paid in the amount equal to the difference between the minimum pension and the total amount of minimum pension from Social Insurance Fund

(I Pillar) and pension from II pillar and foreign pension. It seems to be that according to the national provisions foreign pensions are not taking into account and an increase would be granted regardless of the fact that the entitled person resides in Poland or abroad. These provisions are more advantageous for certain groups of beneficiaries than the provisions of the Article 50 of the Regulation 1408/71. In addition they apply not only to beneficiaries residing in Poland but also to those living abroad.

From 1 January 1999 onwards the pension the insurance period in Estonia is not determined on the basis of calendar time periods, but on the basis of social tax payments. It is possible (although this would be rare) that the person worked for a full year, but the insurance period for that year is less than 1. At the same time, it is possible that the person actually worked only 1 month, but through the payment of social tax acquires an insurance period of 1 year. Therefore, in principle, any periods, irrespective of their duration, are to be taken into account for calculation of benefits. However, there have been no relevant cases yet.

Although there is no direct discrimination between Lithuanian and EU nationals, some problems arise. The first one is dealing with work in the Soviet Union. For example, a German resident has been working for several years in Lithuania and Kazakhstan. Lithuania takes responsibility for the Lithuanian period, but does not take into account the Kazakh period. In the case of a Lithuanian resident, the Kazakh period before 1991 is taken into account. Similarly, years of compulsory service in the Soviet Army are taken into account as years of pension insurance for Lithuanian residents; this rule is not applied for other EU residents who might have years of service in Soviet Army.

The application of Article 48 poses problems in Lithuania with relation to the application of bilateral agreements with Latvia and Estonia. If the insurance period is less than 1 year, this period is taken into account by the other state. The same provisions appear in the bilateral agreements. The minimum period of qualification for pension benefits in Lithuania is 15 years. If the insurance period is less than 1 year, the worker will never get benefits from Lithuania, except when it concerns disabled young people. If e.g. a person is insured for 11 months in Latvia and a very long time in Lithuania, the 11 months are not calculated in the theoretical pension and the Latvian period disappears. The fact that periods of insurance are lost, is however problematic in respect with EU-law.

In Hungary, in the case of survivors' pensions orphans' allowances falling within the scope of Chapter 8 of the EEC Regulation cause problems. It is incomprehensible for clients that not even a temporary measure can be taken on behalf of the orphan until the Member State concerned has answered, in contrast with awarding widow(er)'s pension paid to the same insured person according to the general rules.

In Austria referring to the Kauer-case (C-28/00 [2002] ECR I-1343) it was ruled most recently that periods of child-raising pursued in another Member State can only be regarded as "Ersatzzeiten" under Austrian pension provisions if the same applies to those periods under the legislation of the competent state (according to Article 13 of Regulation 1408/71) (OGH 24.1.2006, 10 ObS 55/05v -).

In 2007 in Lithuania, a supplement to the pensions for the pensioners who have insurance record of more than 30 years was introduced. The amount of the supplement is based only on the years of insurance earned in Lithuania. So if a person has more than 30 years of insurance, but less than 30 years in Lithuania, the supplement is equal to zero, and not included into pro-rata calculations. Due to this reason migrant workers are in the worse situation than Lithuanian nationals.

2. Calculation of benefits

The Regulation's provisions are considered to be extremely complicated. Many reports mention that it takes a very long time, several months is not exceptional, to calculate pension benefits in accordance with the Regulation. Furthermore, the fact that Article 46(1) of Regulation 1408/71 requires different calculation methods, even when entitlement is based only on periods completed in one country, has also been criticised.

In Spain, the method of calculating migrant workers' pensions is still a major problem. The solution provided by Regulation 1408/71 to calculate migrant workers' pension is unsatisfactory when they have not paid genuine contributions to the Spanish system during the years preceding their pension claim.

Another problem encountered in Spain deals with the situation of Spanish nationals who worked in Gibraltar prior to the closing of the border in 1969 and are now retired and living in Spain. These workers are entitled to receive an old-age pension at the expense of the Gibraltar government, the latter receiving funds allocated by the UK government. Payments to the beneficiaries are fixed at the level payable at 31 December 1993, date of the dissolution of the Gibraltar Social Insurance Fund. This, of course, impacts negatively on the beneficiaries' purchasing power. This situation, however, does not appear to be incompatible with Community law, notably because it applies in the same way to UK nationals.

Another problem is dealing with situations when persons are granted a Polish benefit calculated on the basis of Article 46 Item 1 a (i) and receive income in Poland leading to the suspension of benefits in Poland and other Member States. The question is raised if in such a case the Polish legislation should be applied or the provisions of the Article 46 c according to which the amounts of the Polish benefits which would not be paid shall be divided by the number of benefits subject to suspension.

In Poland the problems with application of the Article 87 of the law on old-age and invalidity pension concern the situation when aggregation of insurance periods must be applied for the purpose of granting minimum pension. In this case, the Polish competent institution is obliged on the basis of Article 50 of the EEC Regulation 1408/71 to award supplement to benefits in the amount equal to the difference between minimum pension and the total of the benefits: Polish pension from the Social Insurance Fund (I pillar), pension from II pillar and foreign pension.

It seems that the present provisions of the Article 87 of the law on old-age and invalidity pension would lead to a situation where person who obtain entitlement to Polish minimum pension on the basis of aggregation of insurance periods should be paid a supplement in the amount equal to the difference between minimum pension from the Social Insurance Fund (I pillar) and total amount of minimum pension from the Social Insurance Fund (I pillar) and pension from II pillar. For the purpose of determination of the amount the increase foreign benefits would not be taken into consideration and the increase would be granted regardless of the fact if the entitled person resides in Poland or abroad. These provisions are more advantageous for certain groups of beneficiaries than provisions of the Article 50 of the EEC Regulation 1408/71. In addition they apply not only to beneficiaries residing in Poland but also to those living abroad.

The present provisions of the Article 87 ensure entitlement to minimum old-age pension to all persons whose aggregated insurance periods completed in different countries are

sufficiently long for the entitlement to pension benefits even if they worked in Poland for a very short time, for example for 2 years.

The Polish report suggests that a new regulation should be considered in order to limit application of the Article 87 and at the same time to guarantee proper implementation of the Article 50 of the EEC Regulation 1408/71. For example, if for the purpose of determining entitlement to pension benefits an aggregation of insurance periods provided by EC regulations was applied and the total amount of benefit consisting of a Polish pension from the Social Insurance Fund (I pillar), pension from II pillar and foreign pensions that are lower than minimum Polish pension, the pension from the Social Insurance Fund shall be increased to the amount ensuring that the total amount of benefit consisting of a Polish pension from the Social Insurance Fund (I pillar), pension from II pillar and foreign pensions is not lower than minimum pension.

This is one of the most pressing problems for Polish competent institutions. Questions concern situations when the interested person receives the full amount of Polish benefit granted on the basis of Article 46 Item 1 a (i) and also receives income in Poland causing suspension of benefits in Poland and other Member States. In this case a question occurs if Polish legislation should be applied or provisions of the Article 46 c the amounts of Polish benefits that would not be paid shall be divided by the number of benefits subject to suspension. On the other hand in the case of Polish pro rata based benefits, should the amount of income earned in Poland also be calculated based on the pro rata temporis basis, to determine if such income results in suspension of benefit. Relevant institutions also have doubts, if Article 46a and 46c of Regulation 1408/71 should be applied to persons, whose Polish benefits were granted prior 1.05.2004 – based on bilateral agreements or internal legal regulations – and which had not been converted pursuant to Article 94 of Regulation 1408/71.

In the UK the calculation of a pension is very quick when it is not necessary to work out a pro-rata entitlement, as DWP systems will generate a figure automatically using UK insurance only. However, the reform of the contributory principle introduced by the Pensions Act 2007 has important implications for pro rate calculations which lie at the heart of EU pensions co-ordination. Under the pensions reform, the Department for Work and Pensions will no longer need to carry out pro rata calculations because what the new regulation calls the 'independent tax', which is the national tax, will very rarely be exceeded by the pro rata. For example, a person with five years insurance in the UK, or Northern Ireland, who has also worked in another Member State would currently always require a two stage calculation, to determine what they would get under the national legislation, and what would get under the pro rata calculation. Currently, a person with only five years UK contributions will receive nothing, because the contributions have to be a quarter of their working life to receive a UK pension. Under the reform the minimum contribution condition will be reduced to one year so that five years UK contribution record would give a person five years worth of pension.

Following the introduction of the changes in the Pensions Act in April 2010, the only circumstances in which a pro-rata calculation will still be needed will be where a person has worked in more than one Member State in the same tax year and has insufficient UK earnings to make that year qualify for pension purposes. A pro-rata calculation will allow aggregation of UK and foreign insurance to "qualify" the year for the EU theoretical calculation. Because the pro-rata fraction is expressed in weeks of insurance, the UK part year insurance will then be included as part of the numerator, giving a cash value in the final payable figure for weeks of UK insurance that would otherwise be "lost".

The reform therefore simplifies the administration of pensions very considerably. The UK has made a large investment in IT resources and specialist staff in order to gather and

process the necessary information to calculate pro rata entitlements. The changes introduced by the Pensions Act 2007 will therefore have a large impact on the organisation of the Department's work. It is interesting to note that the Turner Report – A New Pension Settlement for the Twenty First Century - and Pensions Act 2007 make no mention of the co-ordination of pensions.

At present, when it is necessary to work out a pro rata entitlement, delays may be caused as a result of having to liaise with other countries. In these cases clearance times vary depending on which other country is involved. Delays caused by certain countries give rise to a disproportionate number of complaints. According to the UK DWP, insurance records are not always well completed, sometimes more than one insurance record is received. Sometimes the record is illegible. However this will gradually improve with and the progressive implementation of the Administrative Commission decision 193 on electronic transfer of information between competent institutions. Sometimes countries include insurance that does not fall within Article 1 and so cannot be used in the calculation. The UK's International Pension Centre has created a desk aid which analyses EU insurance. However, many of these problems nevertheless generate the need for further enquiries, which in turn, may cause delays in turnaround time. One proposed solution is to use a computer generated form.

In Latvia the law provides the minimum amount of the old age pension. In practice, there have been several cases when the amount of pension calculated under Regulation 1408/71 is smaller than the minimum amount established by national legislation. Nevertheless the national authority always pays the higher amount, i.e., the minimum amount which is established by national legislation.

In calculating the Maltese theoretical pension under the terms of Regulation 1408/71 Article 46.2, it was initially proposed that rather than the simple ratio set out in the Article, a weighting should be given to aggregate foreign insurance in the same proportion as that used in a calculation based on Maltese contributions alone. The European Commission has questioned this procedure as it can lead to a lesser theoretical amount than that produced by a simple ratio alone. In fact whilst this is so in relation to certain values of the aggregated contributions (i.e. in relation to the number of foreign contributions included in the pro-rata fraction) in relation to other values the Maltese method of calculation gives a higher theoretical rate. Following discussions with the European Commission, the simple ratio method is now being applied.

In part depending on the outcome of these discussions, a number of scenarios have been identified where the Maltese national pension cannot apparently give a better result by the calculation required under Regulation 1408/71 Art 46(2). This matter is being researched further with a view to an entry in Regulation 1408/71 Annex IV.C, in accordance with Article 46(1) (b) of the Regulation.

After the accession to the Union the pensioner may request the recalculation of his or her pension – and the remittance of the difference if the amount of the re-calculated pension is higher – if it was determined on the basis of a bilateral agreement of social policy concluded by countries which became the members of the European Union on May 1, 2004 at the latest. Hungary concluded such an agreement with Austria, the Czech Republic, Poland, Germany, Slovenia, Slovakia and Switzerland.

As the rules of the coordination Regulation are already included in the Hungarian-German (with the exception of the Hungarian-East German), the Hungarian-Austrian and the Hungarian-Swiss agreements, in these cases the repeated calculation of pension – unless new entitlement has been obtained – will not bring new results. As for the other agreements, a more favourable pension can be expected only if new entitlement has

been acquired in the meantime, or if the benefit can be awarded on the basis of the Hungarian insurance period only. At the same time, recalculation involves no risks due to the basic principle that the pensioner may not find himself or herself in a more disadvantageous situation, so if recalculation results in a lower benefit, the old pension will be continued to be disbursed.

Recalculation is regarded as a new claim, it has to be requested by the insured person, but it is advisable to ask for the opinion of the competent pension directorate whether it is worth starting the procedure. Recalculation may be requested from May 1, 2004 until May 1, 2006 with retroactive force until May 1, 2004. After May 1, 2006 the more favourable pension may be paid retroactively only according to the national rules (In Hungary for 6 months retroactively).

With regard to the transitional provisions for employed persons, the review of pensions shared with Latvia and Estonia pose specific problems in Lithuania. The pension is revised according to the existing bilateral agreements. According to the national legislation and the bilateral agreements, a pension can be granted, but only for the periods without benefits from other countries. Article 94 of the Regulation states that the rights of a person to whom a pension was awarded prior to 1 October 1972 or to the date of its application in the territory of the Member State concerned or in a part of the territory of that State may, on the application of the person concerned, be reviewed, taking into account the provisions of this Regulation. When periods are shared between 2 countries, there are no structures in the countries for recalculation. No payments are provided for the same period, so Lithuania does not pay for periods covered by another state. There are disputes between the Baltic States on the periods from the area of the USSR. These are not calculated, which is a very specific problem for the Baltic States. The persons concerned of course want to have their pensions reallocated and recalculated as their pension would increase, but this is not the case.

Another problem encountered in Lithuania relates to the indexation of pensions. In some Member States the pension is indexed, in others it is not and no international legal instrument obliges a Member State to increase or decrease the amount of the pension. E.g. in Lithuania, pension are indexed, in Latvia they are not. Migrant workers do not understand this, as one pension changes and the other does not. It was remarked that Lithuania just pays its share. When a worker lives in Germany, Germany wants to know how much the pension has increased. It is very important that Lithuania keeps in touch with the German competent institutions on this issue.

3. Export of benefits

In Estonia the national legislation stipulates that a state pension shall be paid monthly either to the bank account of the pensioner or by post as requested by the pensioner. For pension payments in Estonia bank or post charges are paid by the Social Insurance Board. However, a person residing in Estonia may under the national legislation request that his or her pension is transferred to his or her bank account in a foreign bank, but in this case, he or she has to pay bank charges himself.

Concerning the method of payment in cases of export of pensions under Regulation 1408/71, Estonia is using, in general, direct payment to beneficiaries residing in other Member States. In cases of direct payments to beneficiaries residing in other Member States, the Social Insurance Board has exceptionally also covered the bank charges, based on a consideration of equal treatment. It should also be noted that in case of

payment of pro rata shares of pension, international transaction costs could be about the same as the amount of benefit.

However, it is debated whether this practice will be continued in the future as Article 58 of the Regulation 574/72 permits bank charges incurred in the payment of benefits to be recovered from the recipients by the paying body under the conditions provided for by the legislation administered by that body.

In the Hungarian pension scheme problems of exportability arise in connection with the transfer of the pension benefit. In several cases not all the data necessary for the transfer are given (in the case of bank transfers the name of the bank, its address, account number, SWIFT code). A further problem is that the sum of the pension benefit awarded is so small in the converted currency that it cannot be transferred every month, only quarterly or biannually.

4. Member States' cooperation

The Old Age Pension Law (AOW) in the Netherlands is a residence based scheme, under whose rules the amount of benefit depends on the number of years of residence, and therefore the information on the number of years of residence in the Netherlands is crucial. This information can be obtained from the municipality's civil registration, but it depends to a large extent on the information provided by the person himself. Secondly, this information is not decisive, as it does not show, for instance, that a frontier worker working in Germany and residing in the Netherlands is not insured in the Netherlands during this period. It often takes quite a number of months before the relevant information is obtained from other Member States.

The Dutch administration suggests that this process should be improved. An idea could be to create an interstate Ombudsman who can solve problems, for instance in the interpretation of rules. It is mentioned that considerable differences between the Member States in the views and rules on the protection of personal information, complicate the gathering of information. Some benefit administrations of the Member States e.g. do not have information on the claimant's and/or his or her partner's income and refuse to obtain this information from organisations which have this information (for instance the tax offices). If the Dutch benefit administration contacts such an organisation directly, the latter frequently refuses to cooperate, as Regulation 1408/71 is 'none of their business'.

In the UK also problems can be encountered in gathering data. Problems can arise with gathering sufficient supporting evidence to validate identity details provided by the claimant. Fifty per cent of pension claims under the Regulations involve work in the UK and Ireland and these cases may create additional difficulties in that many of the workers may have come and gone several times during the course of their working lives and as a result may have very fragmented records. In a number of cases the information provided by the customer and recorded on Form E 207 is sketchy. Even where a National Insurance number is provided, supporting evidence may be required to verify that the NI number and insurance account belong to the claimant, for example, previous addresses and employment records. The need for fuller details features in regular meetings between the UK's International Pensions Centre and its Irish counterparts. The UK considers the discussions to be very productive and co-operation from the Irish authorities is excellent.

The main subjects for discussion in Hungary include the use of form E 205 for the certification of insurance period by the Member States, giving mutual information, and if necessary explanation, about the content of personal data and insurance characteristics, and registering the range of personal data required for administration.

Some of the data indispensable to identification during the use of the personal data base of the Hungarian pension insurance system (for example the mother's maiden name) cannot be supplied by many Member States because they are not necessary for their administration, but the absence of such data may paralyse the processing of the Hungarian case. Adequate information and reasoning can help to settle the problem during bilateral talks.

In accordance with Community regulations, the E forms produced in the official language of each country are suitable for supplying basic data. However, it was found that several institutions forward their national forms for announcing claims instead of the E form. It is frequently experienced that the standard patterns of the E form are changed by the administrators, consequently the numbering of the columns is different, the data cannot be identified, so the translation of the form has to be arranged for.

In the case of languages like Hungarian, information which is not numerical but is supplied in a few words can be the source of considerable problems.

Each Member State – including Hungary – is right to insist on the use of its national language as an official EU language, but from time to time there are initiatives, especially from larger Member States, to use major languages as working languages.

The calculation of the insurance period is slowed down by the fact that forms E 207 are filled in insufficiently or not at all, and the identification data of the Hungarian employer cannot be ascertained. Form E 205 certifying insurance period recognized in the sending country and the Form 213 about invalidity are frequently sent later than the announcement of the claim.

In Hungary the administration is sometimes astonished by the laxity with which some old Member States handle these procedures and wonder why there are no deadlines in the coordination system which should be respected by all competent institutions in all Member States. A deadline for E-forms is needed and inaccurate filling-in should be sanctioned. Until today, there is unfortunately no uniform procedure in the Member States. The emphasis was put on the failure of several old Member States as opposed to the correctness and the enthusiasm with which the new procedures are welcomed in the new Member States.

This administrative delay sometimes undermines the substantive rights provided by the Regulation. This is certainly clear in the chapter on pensions. Calculation can take several years.

The UK has pointed to the importance of streamlining procedures within national administrations. This would require the Member States reviewing how they organise their work and which could include, for example, examining administrative systems in other Member States and progressively developing EU wide standards of best practice in delivering services.

The development of electronic exchanges of information between institutions enabling claims to be processed more quickly could aid this process. However, it was suggested that the slow progress in the TESS (now 'Technical Commission') programme may have

been associated with its focus on links between administrations rather than reform of national implementation.

The TC's action plan covering the 5 year implementation period to 2008 was approved by the administrative commission in December 2004. In order to meet the actions set out in the plan to use e-technology to improve information to customers and remove remaining barriers to effective service, the UK has established a number of initiatives and is an active partner in the EU Co-webs pilot programme which is establishing a new portal specifically aimed at providing information for migrant workers.

In the Netherlands one of the problems with the cooperation with other Member States which appears in particular when information is necessary for supplements for dependants (AOW supplements for younger partners of the beneficiary) and for applying the means-test is that there are considerable differences between the Member States in the views and rules on the protection of personal information.

Information on income and personal circumstances is necessary, under the Dutch rules, for instance on whether a claimant of a survivor's pension has remarried or started living together with a new partner and whether s/he has an income. Information is, of course, essential to a means test and refusing to give this information obstructs this law. Also for the supplement for a non-retired partner with a low income of a claimant of an old-age benefit, information on the income of the partner is essential.

Some benefit administrations of the Member States do not have information on the claimant's and/or his partner's income and refuse to obtain this information from organisations which have this information (for instance the tax offices). If the Dutch benefit administration contacts such an organisation directly, the latter frequently refuses to cooperate, as Regulation 1408/71 is 'none of their business'. As the cooperation Articles of the Regulation are aimed at the Member States and not at specific organisations, such a view is consistent with Community law, but it is hard to correct this attitude.

Of course, it can be argued that the law should be constructed in such a way that it is difficult to maintain it (thus means tests have to be avoided and often cause problems). The interviewee of the competent benefit administration replied that in his view (restricted) means tests will occur more and more in some areas of social security, in particular with regard to old-age benefits and survivors' pensions, which is a consequence of the greying of society and the connected need of reforming benefits. The Regulation should, therefore, take account of the need of the benefit administration for this information and impose more stringent obligations for the cooperation of the Member States.

In Estonia, acquisition of pension rights is based on social tax payments, while social tax is collected by the Tax Board. There have been cases, where social tax payments arrive at the Tax Board on behalf of persons, who are resident in another Member State, but work for an Estonian company. However, such persons are not tax residents in Estonia within the meaning of Estonian tax laws and hence do not possess the Estonian ID-code. At the same time, social security registers, including the state pension insurance register, are based on the ID-codes of persons. The Tax Board issues fictitious codes for such persons for the purpose of the tax register, but since these are not real codes, the pension rights of such persons are not registered at the pension insurance register.

Another example of the need for good cooperation between the Member States, and this between Latvia and Lithuania, is now a case pending before the supreme Administrative Court of Lithuania. The case relates to the transitional provisions for employed persons

[Article 94(5) and (6) of Regulation 1408/71]. The person concerned had worked in Latvia until 1995 and in Lithuania until her retirement in 1999. In that year, she was granted an old-age pension calculated in accordance with the provisions of the Latvian-Lithuanian bilateral agreement. In February 2006 – i.e. less than two years after May 1st 2004 – the person applied to the Lithuanian Foreign Benefits Office (FBO) for recalculation of her pension under the rules of the coordination regulations. The Latvian State Insurance Agency (SIA), which was informed about the application by the FBO, awarded a recalculated pension from April 1st 2006. The SIA divided the working record differently, decreasing the Latvian proportion and increasing the Lithuanian one. The FBO then reviewed the rights for the remaining part of the working period and also awarded a recalculated pension from 2006 onwards, relying on Articles 94 and 12 of Regulation 1408/71. The person concerned, for whom the application of the pension rules of the Regulation proved more favourable, complained to the FBO, arguing that she was entitled to a recalculated pension from the date of accession to the EU. She launched legal proceedings. The national court confirmed the FBO's decision, stating that it is not within its powers nor in those of the Lithuanian institution to force the Latvian institution to change its decision. The case leaves the Lithuanian institution in an awkward position. The insured person's rights are violated, but neither the Lithuanian courts nor institutions can influence the decision of the SIA. The Lithuanian authorities have no choice but to apply Lithuanian legislation, which precludes the award of a pension for periods worked in another State. They feel that, through the decision of the SIA, they are brought to infringe the provision of Article 94 of the Regulation. If they do not follow that decision, the periods will overlap. If the Supreme Administrative Court will decide that the FBO was right, some want to bring that case before the CASSTM, then the person concerned will have no way out. It is believed that the question could be solved if both institutions would agree on the application of Article 94.

5. Modifications in pension systems

Modifications in the way pensions are organised in the Member States could however raise some important coordination problems in the future.

It becomes more and more important, not at least through the development of other EU-instruments, to define exactly what is coordinated under the Regulation. This is particularly clear in the pension sector. Reference can be made to the other EU instruments on supplementary pensions (see for example the proposal for a directive on portability of supplementary pensions where a negative definition is followed: i.e. what does not fall under this directive? Pensions according to Regulation 1408/71).

Since the reform in 1997, Hungary has a two-pillar pension system, where the first pillar is a mandatory, state pension, which is publicly-managed and financed on a PAYG basis and a second mandatory pillar, with privately-run pension funds and fully funded. This compulsory pension scheme is administered by several independent pension funds, which are authorised and supervised by the state.

In Latvia a problem could also arise regarding the calculation of second tier pensions for the purposes of co-ordination. The pro rata principle has so far proved very useful in the case of co-ordination, but it is not considered to be designed for funded benefits. Is the current calculation mechanism adaptable to capitalisation schemes, considering that such variables as capital accumulation and pension fund's performance come into play? At this moment, Latvia is prepared to take the simplest route and award pensioners, who have completed insurance records under various national systems, with a pension according to the capital that has been accumulated in Latvia. (see comment draft)

In 2005 the Slovak Republic introduced a new pension system. It is a mixture of 3 pension system models (*EU model, World Bank model and Chilian model*) with which the legislator has chosen to shift the risk from the community to the individual. It is a two-pillar pension scheme consisting of a pay-as-you-go financed pillar that was reformed in January 2004 (gradual prolonging the retirement age and a changed pension formula are the major changes) and of a fully-funded capitalization pillar. The latter's introduction in the Slovakian mandatory pension system was approved in January 2004 and it will exist alongside the pay-as-you-go financed first pillar. It will be solely contribution-defined and financed from the contributions transferred to the individual pension accounts administered by private pension companies and it will be supervised by the Slovakian Financial Market Authority. The capitalization pillar will only be compulsory for those entering the labour market for the first time in 2005. Other workers will have the opportunity to decide about pension savings and choose a private asset management company from January 2005 till June 2006. The minimum saving period is set at 10 years. Only persons heading for retirement in ten years or more can enter the capitalization pillar.

From 2006 on, when a migrant worker goes to the Slovak Republic, he or she will have the same status as Slovakian workers and thus falls under the new pension scheme. It was stressed that when a worker moves to a Member State with a two-pillar system, he or she will be insured under the two pillars if they are both statutory. This means he or she will also take part in the pillar system, which might be quite disadvantageous for migrant workers at later age, probably having a higher wage than the rest of the people of his or her age working in the Slovak Republic and consequently paying very high contributions to the system. For older people working in Slovakia, the opportunity to choose whether or not to enter the pillar system has been provided within a certain transitional period. After this deadline, the opportunity to choose will disappear. Additionally, it should be mentioned that once a worker entered the pillar, he or she cannot get out anymore. If a migrant worker is insured under the pillar and he or she does not fulfil the requirements for benefits before he or she dies, the money will be saved and given to his or her children.

In Malta the forthcoming amendments also include new provisions which would eventually lead to the introduction of a *new second pillar pension scheme* which will apply to both employees and the self-employed. The determination of the parameters of the eventual scheme will be based on intensive actuarial studies commissioned through the Maltese Financial Services Authority. It is proposed also to introduce a new third pillar scheme on a voluntary basis. At present it would appear that neither the proposed second nor third pillar scheme will fall within the material scope of Regulation 1408/71.

From the Estonian point of view, the second pillar is a supplementary scheme. In 'euro-speak', however, it is a statutory scheme, which comes within the ambit of the coordination Regulations. It is acknowledged by the Estonian authorities that these pensions will have to be coordinated, but under the Directive 98/49. There is a concern that the coordination rules of Regulation 1408/71, in particular the pro rata calculation rules are not appropriate for coordination of the Estonian funded second pillar scheme, which is based on capitalisation, with benefits being paid by private companies.

In 2007 in Lithuanian legislation was introduced the supplement to the pensions for the pensioners who have insurance record of more than 30 years. The amount of the supplement is based only on the years of insurance earned in Lithuania. So if a person has more than 30 years of insurance, but less than 30 years in Lithuania, the supplement is equal to zero, and not included into pro-rata calculations. Due to this reason migrant workers are in the worse situation than Lithuanian nationals. The widow(er)'s pensions

were recently reformed. As before the reform, pension is granted to widow or widower if deceased spouse had earned required number years of insurance for disability or old-age pension. But the calculation of pension amount was changed into flat rate (before it was defined as a percentage of the amount of pension of deceased person). Year of insurance in EU are also taken into account to decide on the right to get pension. On the other hand, widow or widower may apply for pension in other EU state, and may get there pension granted, but Lithuanian flat pension will not be decreased due to this reason – it is still flat amount. So overlapping of benefits may arise.

6. Differences in pensionable age

Changes in pensionable age also cause many problems with the application of the Regulation. In the Czech Republic, women have different pensionable age dependent on the number of children they have educated (this does not fully apply to men, who educated his children, even though he has been a “single father”)

The new Swedish pension system is e.g. extremely flexible and knows no fixed pensionable age. An insured person can claim his or her earnings-based pension from the age of 61 and can postpone it for an indefinite period of time. The time when pension is claimed influences the amount of pension according to actuarial principles. A person who goes on working after attaining the ‘normal’ pensionable age continues to accumulate new pension rights. A claimant can choose to take out a fraction of the accrued pension rights. He or she can also choose to claim a pension from only one of the two branches of the scheme (the PAYG-branch and the prefunded branch) and postpone payments from the other branch. A claimant can also stop a pension already in payment, for instance when he or she gets a new job. How should the Regulation’s rules be applied in such situations? Will pensions from all other Member States have to be recalculated each time a pensioner changes the way he or she uses his or her Swedish ‘pension capital’? Furthermore, the amount of pension from the prefunded branch will depend on the value of the fund when the pension is drawn. If the pension has not been re-calculated into a pension with fixed annuities, the amount of pension will vary each month. For that reason the rules of the Regulation are simply not compatible with such pension schemes.

The French report mentions another interesting case that illustrates the problems resulting from the difference in pensionable age between France (age 60) and other EU countries. In this case, a labour contract had been broken by the employer on the grounds that the employee had accumulated a sufficient amount of contribution to be granted a ‘full rate’ French pension at the age of 60. The question here is: if a pension granted by the competent French institution is calculated in proportion to the amount of contribution the employee has accumulated in France, should periods completed in another Member State (in this case, the Netherlands) be taken into account for the calculation of the ‘full rate’ pension, which allows the employer to force the employee to retire? The employee argued that the French pension office should not have taken into account the periods of contribution completed in the Netherlands in order to calculate whether the employee had reached the ‘full rate’ level, as he could not ask for a retirement benefit in the Netherlands before the age of 65. Therefore, he claimed that he had been subject to an unfair dismissal. However, the *Cour de cassation* judged that Articles 3 (1), 45 and 49 of Regulation 1408/71 do not preclude French legislation from taking account of periods of contribution completed under the legislation of another Member State for the acquisition of the right to an old-age pension in France and for determining the rate of the pension. This rule applies even when the claimant is not entitled to an old-age pension before the age of 65. Therefore, even if the French pension is calculated only on the basis of periods completed in France, the employee in this case

has been lawfully required to take retirement as he was eligible for a full rate pension in France. Although this decision goes against the worker's interests, it seems to comply with the principles of Regulation 1408/71. However, another question is whether this is not contrary to Article 7 (2) of Regulation 1612/68.

Pensionable age in the UK for a man is 65, for a woman 60. However, over a ten year period from 6 April 2010 the pension age for women will increase from 60 to 65 and between 2024 and 2046 will gradually rise to 68 for both men and women. (Pensions Act, 2007).

In Lithuania the widow(er)'s pensions were recently reformed. As before the reform, pension is granted to widow or widower if deceased spouse had earned required number years of insurance for disability or old-age pension. But the calculation of pension amount was changed into flat rate (before it was defined as a percentage of the amount of pension of deceased person). Year of insurance in EU are also taken into account to decide on the right to get pension. On the other hand, widow or widower may apply for pension in other EU state, and may get there pension granted, but Lithuanian flat pension will not be decreased due to this reason – it is still flat amount. So overlapping of benefits may arise.

There are also some problematic issues arising from the fact, that Regulation 1408/71 is applicable in the new Member States only from 2004. An example is the case related to the transitional provisions for employed persons [Article 94(5) and (6) of Regulation 1408/71]. The person concerned had worked in Latvia until 1995 and in Lithuania until her retirement in 1999. In that year, she was granted an old-age pension calculated in accordance with the provisions of the Latvian-Lithuanian bilateral agreement. In February 2006 the person applied to the Lithuanian competent institution (Foreign Benefits Office, FBO) for recalculation of her pension under the rules of the coordination regulations. The Latvian competent institution (State Insurance Agency, SIA), which was informed about the application by the FBO, awarded a recalculated pension from April 1st 2006. The FBO then reviewed the rights for the remaining part of the working period and also awarded a recalculated pension from April 1st 2006, relying on Articles 94 and 12 of Regulation 1408/71. The person concerned, for whom the application of the pension rules of the Regulation proved more favourable, complained to the FBO, arguing that she was entitled to a recalculated pension from the date of accession to the EU, i.e. May 1, 2004. FBO could not agree to recalculate Lithuanian part due to Art 12 of Regulation 1408/71 and Art 54 of national pension legislation (provisions avoiding overlapping of benefits). On the other hand, Latvian SIA disagreed to change decision with reference to Latvian national law. The person concerned launched legal proceedings. Lithuanian national court confirmed the FBO's decision, stating that it is neither within its powers nor in those of the Lithuanian institution to force the Latvian institution to change its decision. The Supreme Administrative Court in May 2007 ordered the national court to reconsider the decision taking into account more relevant materials and arguments.

As Dutch old-age and survivors' pensions provide for a minimum income only, supplementary pensions play an important role in the Netherlands. As these supplementary pensions do not fall under the scope of Regulation 1408/71, rules on equal treatment, the aggregation of periods and maintenance of benefit rights, are lacking. The new directive on this issue solves coordination problems only to a very limited degree.

In Poland one of the problems concerns the principles of coordination of funeral allowances. According to the Polish regulations there are a lot of people entitled to receive such allowances, which results in doubts, if in the case of applying of the regulations under Regulations 1408/71 and 574/72 concerning death benefits, including

Article 9 Regulation 574/72, which states that in one country the source of entitlement to funeral allowance results from insurance of that person, and in another country – from insurance of another person (e.g. Spouse). Such a situation takes place as a result of application of item 1) and 2) in relation to item 4) Article 77 clause 1 of the Polish pensions act under which funeral allowance is payable in the case of death of a family member of an insured person as well as a person collecting retirement or disability pension. For instance, if the husband is insured in Spain and the wife is insured in Poland. The husband dies in Poland and his wife applies for funeral allowance due to her husband's death. In this case she can apply for this benefit in Poland (as a benefit payable for a family member), while in Spain she can apply for this benefit as a benefit payable for an employee. How are the coordination regulations to be applied in this case?

Another problem concerning funeral allowances involves doubts, if the Polish institution in charge is under any obligation to inform ex officio foreign institutions about the fact that funeral allowance payable for retirement/disability pensioner who lived and died in a Member State other than Poland, if the diseased person collected their retirement/disability pension based solely on the Polish regulations was paid out:

- to a person living abroad in an EU Member State, if the applicant requested the benefit to be transferred to the country of residence,
- to a person living abroad in an EU Member State, if the applicant did not request the benefit to be transferred to the country of residence.

F. Accidents at work and occupational diseases

The non-proratisation of benefits as provided in Article 57 of Regulation 1408/71 has the effect that legal entitlements which are conferred by the law of a Member State in which a person was previously exposed to the risk of the disease, are waived. This might constitute a violation of the 'Petroni-principle' established by the European Court of Justice which provides that the right to benefits acquired according to national law must be maintained under EC law. Furthermore, it means that those Member States which provide more generous benefits are placed at a disadvantage financially.

Assimilation of facts seems to cause some problems with regard to occupational diseases. This is caused by the lack of a Community concept of such diseases. In addition, as long as there is no obligatory list of occupational diseases, the proratisation of benefits – which is considered to be a much more adequate system for persons who have been exposed to the same risks in several Member States – cannot be realised.

Other problems resulting from this lack of such a list, for example the refusal of medical examinations required by the competent institutions of another Member State, reimbursement time or periods of insurance or assimilated periods which are not taken into account, were also highlighted.

Accidents at work suffered by Spanish workers on board foreign ships are covered by the foreign Social Security legislation. When workers are not entitled to get benefits at work according to the foreign legislation, they claim benefits in Spain for common illnesses. Spanish administration and judges deny them these benefits. Some authors consider that in such situations, Regulation 1408/71 does not protect migrant workers against accidents at work in an effective way.

In Hungary, in the case of accidents at work and occupational diseases judgement is made more difficult if the claimant has a domicile in Hungary and is a Hungarian national but is engaged in activities in another Member State as a so-called frontier worker and suffers an accident at work in this way. It is difficult to obtain the forms specified in the

EEC Regulation and the time of the termination of disbursing accident-related sickness benefit.

Another problem concerning accident related benefits is that a great number of Hungarian employers transferred their place of business to the territory of another Member State for reasons of more favourable taxation while their employees continue to work in Hungary, without representation.

G. Unemployment benefits

1. General issues

a. Discrimination between nationals and others

Although entitlement to unemployment benefits under the Austrian unemployment law is not subject to the nationality of the unemployed person, benefits are only granted (among other provisions, after a minimum period of insurance), to unemployed persons who are 'available' to the employment service authorities. This availability requires inter alia that the unemployed person must have a residence permit (in particular for occupational matters). That permit can be withdrawn when a foreigner is unemployed for a certain period, meaning that entitlement to unemployment benefits is confined to a maximum period (e.g. of twelve months for those who have been employed legally in Austria for more than one but less than five years). Since the primary benefit, i.e. *Arbeitslosengeld*, is granted usually for a maximum period of 30 weeks, the limit imposed by the law applicable to foreigners primarily restricts entitlement to *Notstandshilfe* (emergency unemployment assistance). The restrictions pursuant to the *Fremdengesetz* mentioned above, do not apply to EC nationals who exercise their right to free movement. Nevertheless, EC nationals who are unable to provide proof of sufficient earnings and health insurance covering all risks, may lose their residence permit after more than six months of unemployment. In practice, the employment service authorities seem to ignore these provisions and consider all EC nationals as 'available' and therefore entitled to *Arbeitslosengeld* as well as *Notstandshilfe* under the same conditions as nationals.

In the case of the Hungarian unemployment benefits problems may arise from the period of transition as the employment of the nationals of certain Member States is subject to a permit, thus these people have a limited access to the labour market and the principle of equal treatment can be realized only with limitations.

In Austria another provision has been stated to be discriminatory in the Kaske ruling (C-277/99 [2002] ECR I-1261). Under § 15 (5) AIVG an exception was provided to the principle that the unemployed person must have completed periods of insurance/employment in Austria before claiming unemployment benefits laid down in the AIVG (cf. Article 67(3) of Regulation 1408/71) especially for those persons who were residents in Austria for at least 15 years before moving to another Member State (cf. also most recently VwGH 24.1.2006, 2003/08/0230, stating clearly that there is no discrimination if this provision is not applied when there has been no residence period of at least 15 years before the "reunion of the family").

b. Export of benefits

Unemployment benefits are in principle not exportable. However, in order to promote the free movement, Article 69 of Regulation 1408/71 foresees that, under certain conditions, unemployment benefits may be exported during three months.

The Austrian report mentions that Article 69 has obviously not been applied to the new benefits implemented under the *AIVG* for elder unemployed persons who can no longer claim the early retirement pensions for unemployed which have been abolished in 2004: The *Übergangsgeld nach Altersteilzeit* and the *Übergangsgeld* ('transitional payment') are granted to unemployed people until they have reached regular pension age. These persons no longer have to prove they are 'available' as required for (regular) unemployment benefits, but only under the provision of particular 'directives' issued by the labour market authorities. Since these new benefits have to be considered as pension benefits in terms of Regulation 1408/71, they will have to be exported according to Article 10 and cannot be subject to any national labour market-'directives'. Article 69 is applied, however, to the *Pensionsvorschuss* (advance payment) which is granted to unemployed persons who have already applied for a pension insurance benefit.

In the Netherlands, in 2006 a new provision was inserted in the Unemployment Benefits Act. Persons entitled to unemployment benefit are allowed to participate in training, education or another reintegration project while remaining in receipt of benefit while staying in another Member State. A condition is that activities last for a maximum period of six months and give realistic prospects for getting a job of at least six months, as appearing from a letter of intent of an employer

In Luxembourg the National Court decided that the competent services or institutions have a large power to extend the time limits of the 3-months rule (Article 69 § 2), but that they have to take into account the *principle of proportionality*. Application of this principle requires that the competent services or institutions consider, in each case, the period exceeding the time limit, the reason of the late return and the seriousness of the legal consequences of the late return. It also seems impossible to deprive a citizen, who has lost his or her job and who takes the initiative to seek employment in another Member State, using his or her freedom of movement, of a social security benefit granted by the legislation of one Member State. In *exceptional cases* does not mean *in case of absolute necessity*.

In Sweden it was asked if a Member State can force someone to work in another Member State. The case concerned a man living in Sweden near Norway, who received a job vacancy from a Norwegian job agency, but he refused it because this would force him to spend a 12h working day because of the distance between his home in Sweden and his work in Norway. The Swedish Inspection was of the opinion that, as he lived in the border area, it was natural and normal that he should look for work in Norway. He argued that this could not be combined with his wife's job and the care for the children. The Administrative Court decided that it was only temporary work and 12h was not unreasonable, so he could not refuse the job.

In Portugal, officials of social security report complaints of workers and workers-unions in Switzerland concerning temporary workers in that country (not seasonal workers in the sense of the Regulations). In general those workers are occupied in Switzerland for 9 months and must return to Portugal at the end of the labour contract. Most of them can not get forms E303 as for that Swiss authorities follow strictly the rule of Article 69 and only issue the forms after the period of four weeks during which the worker must be available to Employment Swiss services. Therefore, without a regular lodging in Switzerland (that in most cases is provided by employers for the duration of the contract) those workers prefer to apply for E301 and claim unemployment benefits in Portugal under Article 71-1-b)ii).

For unemployed people coming to Portugal to look for a job, problems may arise if they do find a job (and as such are insured with Portuguese law) but lose this job immediately after again. In case the person concerned does not fulfil the waiting period, he has no right to unemployment benefits in Portugal. Relying on the totalisation of periods (Article 67) is of no help as the waiting period in Portugal requires the fulfilment of insurance periods or assimilated periods (the last ones on the basis of facts others than during which one has obtained unemployment benefits). Assimilated periods during which one received unemployment benefits in another state are therefore not take into account.

Portugal has always considered that the maximum period of 3 months as foreseen in Article 69 is only theoretical as one has to subscribe oneself again in the competent state before the end of these 3 months. The condition that one has to be present at the Portuguese territory fits difficult with this condition.

Portuguese institutions, in cases of workers who have successive contracts in Switzerland during several years, wonder whether the situation of being a Portuguese resident is fulfilled. In fact, in such situations their centre of interests seems to be situated in that country where they work regularly and almost continuously. (note: but see ECT case...)

A similar situation occurs in France where Portuguese seasonal workers have great difficulties to get the E301 form, because only one institution is competent to issue that form [Groupement des Assedic de la Region Parisienne]. Those workers who live very far (for instance in south-west, near Spain), have great difficulty to go to Paris expressly for that purpose. In the last years Portuguese institutions have been accepting E301 issued by Agricultural Social Security institutions (Mutualité Agricole) or Inspections of Work Authorities (which are not competent institutions).

A particular question is whether frontier workers can also invoke Article 69, and if the answer is in the affirmative, how the rules concerned should be applied. It follows from the *Huijbrechts* judgment, that, as a result of the application of Article 71(1)(a)(ii), frontier workers are insured on the basis of notional insurance in the State of residence. They receive their unemployment benefit in the State of residence; the right to benefit in the State of employment is suspended. If they move their residence to the State of employment, the benefit is paid by that State. In this case Article 69 is not applicable; the frontier worker cannot seek work in the State to which he or she moves while remaining in receipt of the benefit of his or her former State of residence, but the benefit is paid immediately by the State of residence/previous State of employment. Can the frontier worker invoke Article 69 in order to look for work in a third State? This question was raised before the Dutch Central Appeals Court in the case of a German frontier worker residing in the Netherlands, but seeking work in France. The Central Appeals Court inferred from the *Huijbrechts* judgment that he or she could not invoke Article 69. It is however highly questionable if this interpretation is correct.

According to the Belgian RVA – ONEM, the sanction contained in Article 69(2), i.e. loss of entitlement to benefits in case of return to Belgium after the 3-month period, is rarely applied in practice.

In a judgement of 22 February 2006, the Labour Court of Antwerp qualified as “exceptional” the case of an unemployed person who had followed her husband, a professional soldier, to Germany in December 1981 and had only returned to Belgium in August 1982. The Labour Court concurred with the reasoning of the “ministère public”, which had considered that, although many Belgian soldiers were quartered in Germany in the 1980ies, the situation of unemployed spouses of such soldiers is to be regarded as exceptional when compared to that of female unemployed persons who do not follow

their husbands abroad, and that moving abroad with the entire family, due to the military duties of one of the spouses, justifies a derogation of the period of 3 months

A particular question related to the fact as to why nationals of the new Member States may not invoke Article 69? This is particular true as the accession treaty does not suspend the application of the EU Regulations.

This problem results from the relationship between the transitional periods and free movement of workers on the one hand and the application of Article 69 on the other hand. Can those people only rely on Article 69 if they get permission for work in the "old" Member State? What is then the aim of this Article? Does seeking employment also not include taking the job? It seems that the question whether someone who is looking for a job and wants to register with the employment services and therefore can export unemployment benefits, is a national matter and will depend on each Member State. This is herewith discussed in Poland. Practice of the Member States to which Polish citizens go with formularies E-300 given them by our competent services is different:

- refusal of registration unemployed Polish citizens and payment of their exported benefits,
- registration and payment of exported benefits,
- applying of Article 69 in relation to Polish nationals independently from the transitional periods.

It means that we have different interpretation of the Community Regulations. In the Polish report the situation of Polish jobseekers going to Germany was sketched. The person would receive a form E 303 and would, once arrived in Germany and depending on the Land, go to the competent labour office. He or she then has to wait for a decision as to whether or not he or she will be registered. It is noted that the person concerned has been informed by the Polish competent institution, prior to leaving, that there might be problems in obtaining registration. Pending the decision, he or she might stay in Germany or return to Poland. However, if he or she does not return to Poland within 30 days following his or her departure, he or she might lose his or her entitlement to Polish benefits. It would seem that it sometimes takes longer than 30 days to obtain a decision from the German labour office. Refusal of registration makes a person eligible for benefits in Poland, provided he or she has worked for a period of twelve months.

The Slovenian report raises the question whether the Slovenian authorities are entitled to refuse to register an unemployed person – a Dutchman, for the sake of example – for the purposes of Article 69 of the Regulation when an unemployed Slovene in the Netherlands would meet with the same fate. This issue was dealt with in depth in the Administrative Commission.

They leave the country where they were last employed without having registered with its employment services, they register too late with the employment services of the State where they are looking for work, or they return after the expiry of the three month period. In Malta they also faced these and other problems, not to mention difficulties experienced by the unemployed persons due to language barriers. Things do not always run as smoothly as they would want them to, and the following are some common occurrences which were met when Maltese unemployed persons went to seek employment in other Member States: postponed departure; not unemployed for 4 weeks; circumstances change; late registration; not accepted as unemployed; failure to follow registration procedures; worker returns to Malta; second departures, etc. It is also worthwhile mentioning that the Department also met some difficulties when unemployed persons came to seek employment in Malta, thus transferring their unemployment benefit under Article 69. These may be summarised as: customer arriving without the forms E303; circumstances change; late registration; customer

worked in Malta before claiming; overpayment of unemployment benefits due to different payment systems (Malta pays unemployment benefits on a 6-day week basis whilst some Member States pay and quote rates on a 5/7-day week basis); and quite often, despite notifying the customers upon arrival to the offices, they leave before the unemployment benefits expires without completing the necessary formalities.

In Poland problems relate to the refund of unemployment benefits paid to unemployed persons relying on Article 69, as provided for in Article 97 of the implementing Regulation. According to CASSTM Decision nr. 100 of 23 January 1975, refund shall be made in the currency of the country to which the unemployed person went to seek employment. In spite of this decision, refunds by the Austrian competent institution to its Polish counterpart for benefits paid to Austrian unemployed persons looking for work in Poland are made in euro. The amounts refunded thus must be converted into zloty, which is disadvantageous for the Polish institution. The latter has asked the Austrian institution to clarify and justify this practice.

c. Assimilation of facts

In Austria in practice, the assimilation of other facts (e.g. military service in another Member State) seems to be granted. However, there are still problems, as the following cases may indicate. Recently it was ruled that periods of self-employment pursued in another Member State do not prolong the reference period for completing the qualifying periods as provided for unemployment benefits. A national court stated clearly that under national law only periods of self-employment pursued in Austria give rise to prolongation of the reference period; this could not be considered as discriminatory or as a violation of the principle of assimilation of facts, since even Article 9a of Regulation 1408/71 refers only to periods during which certain benefits have been drawn and periods devoted to the upbringing of children but not to periods of self-employment pursued in another Member State.

In unemployment insurance in Slovenia an employed person is entitled to unemployment benefit only if the unemployment is involuntary. The law describes in detail the cases when the unemployment is considered to be voluntary or due to the fault of the unemployed person. In practice it can prove to be difficult to ascertain whether the unemployment in another Member State is involuntary.

A particular case could be found in Finland. A person residing in one Member State and employed in another Member State as a posted worker was registered as an unemployed person in the State of residence. Later the unemployment insurance authorities noticed that as the person was not a frontier worker, he or she should be registered as an unemployed person in the competent state. The competent state did not insure him. The result is that the person has no entitlement to unemployment benefits from the State of residence and no entitlements from the competent State. The question is whether registration as an unemployed person by authorities in the State of residence should be taken into account in the competent country for the entitlement to unemployment benefits.

In Estonia it is reported that there is still no relevant practice. However, there are some cases where the assimilation of facts could become relevant. According to the Unemployment Insurance Act, there are certain exceptions, when the unemployment insurance benefit is not granted, even if the person has become unemployed and has fulfilled the qualification period. The benefit is not granted if the last employment contract of the person was terminated due to violation of the contractual obligations, lack of trust or corruptive act, or by a mutual agreement with the employer.

However, currently these conditions are not checked in practice, if the last employment contract (before registering as unemployed according to the Estonian legislation) was not made under the Estonian Employment Contract Act.

d. Unemployment benefits for frontier workers

In the Regulation, special rules are set out for the unemployment benefits of frontier workers. A fully unemployed frontier worker receives unemployment benefits in accordance with and at the charge of the country of residence.

Essentially the same applies to Austria, but it has to be mentioned that there are also some exceptions stipulated in the agreements with Germany and Liechtenstein: With respect to Germany it means that a frontier worker (even in the sense of Article 1(b) of Regulation 1408/71) who has been employed for at least five years within the last six years, among them one year as a frontier worker, may claim unemployment benefit in the state of residence (cf. Article 71(1) (a) No. ii of Regulation 1408/71) or in the state of (previous) employment. In all other cases the rules of the Regulations apply.

The French report gives an example of the application of Article 71 of the Regulation. Mr X, is a French citizen who worked in Germany for almost 20 years between 1975 and 1994 and settled in France in 1994. At the *ASSEDIC* (Unemployment Benefit Office), he claimed the unemployment benefit to which he thought he was entitled on the basis of periods of work he had completed in Germany. The *ASSEDIC* refused to grant the benefit because France was not the place of his most recent previous employment. The *Cour de cassation* confirmed the administrative decision and the ruling of the Court of Appeal: Insofar as Mr X. could not produce proof of residence in France during the time he was working in Germany, he could not benefit from the option provided by Article 71 and therefore was not entitled to French unemployment benefits.

The main problem that Latvia has faced during the first year of application of Regulation 1408/71 is that large number of Latvians who after returning from working abroad claimed unemployment benefits in Latvia according to Article 71 point 1 (b) (ii) of the Regulation. It appears that many people working abroad do not know about their rights to be covered by social insurance and to claim social insurance benefits in the country where they were working.

A Luxembourg Court decided that 'when a frontier worker, who is unemployed, after he had registered as a jobseeker in the State of residence, transfers his or her residence to the State of the last employment, the exception of Article 71 § 1 (a) (ii) stops and the State of last employment has to assume its obligations, which result from Regulation 1408/71'. As a result, the competent institution could not refuse the payment of unemployment benefits arguing only that he did not reside in Luxembourg at the moment of redundancy.

A particular issue is the so-called a-typical frontier workers as defined in the *Miethe* case, allowing 'not really frontier' workers to receive their benefits in the state of last employment. It seems that this rule is already used in many circumstances when the frontier worker does not possess the nationality of the State of residence. This is eg. the case in the Netherlands where many German and Belgian frontier workers live.

According to the Dutch report the Court may have underestimated the number of situations in which the *Miethe* rule can be said to apply which can lead to arbitrary results. The Dutch benefit administration decides that the *Miethe* rule applies in cases

where the person concerned does not have the nationality of the country of residence and if this means that they are refused Dutch benefit, they have to apply for German or Belgian benefit respectively. The Dutch Court of Appeal for social security cases has accepted this approach.

The question is asked to what extent is the *Miethe* rule an exception to the general rule of the Regulation? If it applies, workers can choose to apply for benefit in either the State of employment or residence. The rule is not intended to be advantageous for the benefit administration, but for the workers concerned.

In Denmark however, more cases (on an estimate 10 pr. year) have recently been decided with reference to case C-1/85 *Miethe*, 12 June 1986, thus making it possible for the frontier worker to receive benefits from the country of last employment although residing in a different Member State and although wholly unemployed. Article 71 (1) (B) of Regulation 1408/71 has thus increasingly been taken into account. The national decisions relate to the Sound (Øresund) region and can in part be explained by the increased frontier activity between Denmark and Sweden after the construction of the Øresund bridge.

In Spain third nationals frontier workers are excluded from unemployment benefits because although they work legally in Spain, they do not reside in Spain. According to Spanish legislation unemployment benefits are not exportable. Therefore they cannot be paid abroad to third nationals, who fall outside the EU Regulations.

In 2006 the Agency issued a leaflet on unemployment benefits in order to increase the awareness of people working abroad about their rights to social benefits.

In Poland, in relation to frequent applications for unemployment benefits on the part of persons working in different Member State for a period of time of few to even 15 years it seems doubtful whether Article 71 ,1 B ii regulation 14071 is applicable, or whether it is rather 71 b (ii). Polish competent institution believes that transporting the financial burden to the Member State of employment where for a longer period of time contributions were paid for social security is justified only in relation to certain groups of workers, and not all the migrant workers. This is why Polish linking institution invited other linking institutions for to exchange experiences with applying the rule provided for in Article 71 Regulation 1408/71. First response came from German institution saying that in such cases it applies the decision 160. If the decision is not applicable than they try to establish if the person had a place of residence in the Member State of employment, referring to criteria established in rulings of European Court of Justice. The status of returning worker applies only to persons that had kept their place of residence in Germany. German legislation does not provide provisions for refusing to grant unemployment benefits to persons working for long time abroad, there is also no maximum period for staying abroad that would be used as defining the status of 'returning worker'. These resolutions seem appropriate and understandable.

The Czech practice recognises typical and a-typical cross-border worker. Only these persons, returning back to the state of residence at least weekly, are considered to be typical cross-border workers. A-typical cross-border workers are persons who are working in the Czech Republic, but the centre of their interests is still in the state of their origin. The principle of the centre of interests is generally applied for determination of the State of residence by Czech institutions. The fact that in some other countries the residence is understood otherwise (working = residing) causes problems and misunderstandings during the application of coordination rules.

e. Concepts of full unemployment, partial unemployment, frontier worker, a-typical frontier worker and country of residence

In Estonian, Slovak, Slovenian and Hungarian law the concept of partial unemployment is not known.

Recently the Dutch Court of Roermond requested a preliminary ruling on this issue. It asked whether the interpretation given by the Centrale Raad van Beroep was correct. The Court of Justice answered this question in the *De Laat* judgment. Unfortunately the benefit administrations of the Netherlands and Belgium appear to interpret this judgment differently. Whereas Belgium seems to apply the judgment only in cases identical to the *De Laat* case (a worker continuing to work for his employer in a part-time job), the Dutch benefit administration considers that partial unemployment is also involved when a person does not have any work at all in his or her country of employment, but has a concrete prospect of finding work in that State. Which interpretation is correct?

In Slovenia a problem is encountered in relation to Germany. Slovenia does not, unlike Germany, have the concept of partial unemployment, meaning that a person whose employment contract subsists is not regarded as being unemployed. This implies that when a German partially unemployed person comes to Slovenia, he or she is not entitled to unemployment benefits. He or she would only be so if his or her employment contract had ended. In Slovenia, a case on this issue is now pending before the Slovenian Higher Labour Court. It concerns a worker receiving unemployment benefits, who was employed in Austria and who resided in Slovenia. His labour contract was terminated by agreement with his employer, as the workload had decreased. The problem in this case is that this migrant worker has no right to unemployment benefits in Slovenia, as his contract was terminated in agreement with his employer. This problem was a consequence of insufficient information for the migrant frontier worker, who was not aware that he will not receive the unemployment benefit in Slovenia, if he signed an agreement with the employer on determination of the employment contract. The concerned worker could be considered as being intermittently unemployed, as he was available to his employer. But the Slovenian system does not provide for intermittent unemployment. The employer would re-employ him if he was able to, but the concept of intermittent or partial unemployment is unknown. Intermittent unemployment in Slovenia falls under the responsibility of the employer. According to Article 71 of the Regulation, he should thus apply in Austria. In addition, according to Slovenian legislation, in the case of dismissal with agreement the employer has the obligation to inform the worker that he has no right to unemployment benefits. But how can this be done in the case of an Austrian employer?

A similar problem can be found in the relationship between Belgium and Germany. For example, the situation of a migrant worker, working in Germany and residing in Belgium. He has an employment contract and becomes incapable for work due to illness. He receives an invalidity benefit from a German social security institution. But the incapacity for work is not necessarily qualifying as invalidity in Belgium. The amount of the German invalidity benefit is very small and the question here is if he could receive an unemployment benefit in Belgium. According to Germany, his employment contract can be suspended and he is still in a labour relationship. This means he can start in a replacement job, but does this have to be qualified as full or partial unemployment? Another situation is the suspension of a labour contract while a dismissal procedure is running in Germany in the framework of a composition ("concorda(a)t" in Belgium). If the trustee in bankruptcy ("curator" in Belgium) suspends the contract, the question is whether this results in full or partial unemployment. Some consider this is a case of full unemployment and thus the Member State of residence has to provide the benefit.

f. Influence of national job promotion rules

Austria has different provisions for labour market activation and employment promotion measures. Some are particular allowances (*Beihilfen*) which can be granted to workers and employees as well as employers, e.g. to compensate partly for loss of income during periods of part-time work or to boost employment in regions or industries with specific problems. However since there is no legal entitlement to the allowances, no particular problems with regards to Community law have been encountered so far.

Another problem arises for frontier workers. Although they can only receive unemployment benefits in the state of residence, they can subscribe themselves to the job agencies in both states. In Austria there is a need for coordination where an Austrian frontier worker is taking part in some labour promotion measures offered by a German job agency and is as a result not able to accept a job in Austria. No sanctions may be given when a job in another state is not accepted. Certainly in a European labour market it seems logical that someone may be offered a job just across the border when he has to accept a job several hundreds of kilometres away, but in his residence state.

g. Totalisation of periods

The application of the aggregation rule in the field of unemployment benefits is dependent on having at least fulfilled a last period of insurance in the country where benefits are claimed. As in many countries' legislations, no minimum waiting period is provided the accomplishment of even one day of employment, liable to insurance under the legislation of that scheme, right after the person moves to that country, leads to the application of that rule. The Greek reports draws attention to the fact that that phenomenon could have a serious financial impact on the scheme as obviously, all unemployment contributions have been paid by the persons concerned to the corresponding insurance schemes of the Member States of origin or last employment, whilst for one day of contribution under the new scheme, the person has a right to benefits for a long period, without any mechanism of distribution or sharing of costs between institutions involved being provided under the Regulation. This situation is all but exceptional, Greece being a southern country attracting a lot of tourists, especially during the summer months (April to October). It is reported that a significant percentage of people travelling to Greece gets a summer job, e.g. in a club, only for several days, and are subsequently registered in the Greek records and claim unemployment benefits. Some concerns are also found in Austria where the danger of abuse is emphasized as this minimum period can easily be reached.

Implementation problems on how to take account of periods of insurance and benefits in other countries could also be found in the Slovak Republic. E.g. a Slovak person works in Hungary for 4 years, becomes unemployed and receives unemployment benefits in Hungary. Then he goes to Slovakia and works there for 1 year and becomes unemployed. Doubts were raised on whether the 4 years insurance in Hungary have to be taken into account, for instance when the Slovakian legislation requires 4 years of insurance to get unemployment benefits? It was recommended that the Hungarian insurance period should be considered as 'consumed', as the person received Hungarian unemployment benefits. This means the Slovak Republic only has to take into account the year of work in Slovakia, which will not suffice to get unemployment benefits. In other words, the Hungarian periods should be regarded as Slovak periods: if they were 'used', they don't have to be taken into account, if they were not used, they should be added up to the Slovak insurance period.

In Austria, the VwGH ruled that periods of self-employment pursued in another Member State do not prolong the reference period for completing the qualifying periods as provided for unemployment benefits under the AIVG:

According to the national court, under § 15 (5) AIVG only periods of self-employment pursued in Austria give rise to prolongation of the reference period laid down in § 14 (1) AIVG; this could not be considered as discriminatory or as a violation of the principle of assimilation of facts, since even Article 9a of Regulation 1408/71 refers only to periods during which certain benefits have been drawn and periods devoted to the upbringing of children but not to periods of self-employment pursued in another Member State.

The Labour Court of Appeal of Liège pointed out that, in order to be eligible for benefits in Belgium, a migrant worker has to accomplish at least one day's work on Belgian territory. It is up to the worker to prove that he actually worked; the circumstance that his alleged employment was officially declared to the social security and tax authorities is not sufficient in itself. In a later judgment of September 6, 2005, the same Court raised doubts about the employment requirement and its conformity with European law and lodged a reference for a preliminary ruling with the Court of Justice. The question pending in case C-346/05 is whether Article 39(2) of the Treaty and Article 3(1) of Regulation 1408/71 permit Article 67(3) of Regulation 1408/71 (1) to be interpreted as imposing an obligation on a worker who is a national of a Member State to complete a period of employment giving the right to unemployment benefits in the State of residence even where the internal law of that State does not impose such an obligation in the case of a foreign worker whether he is from a Member State or not.

The following was found in Sweden. The mere fact that the person has remained as a member in a Swedish unemployment fund during the time abroad is not sufficient to be able to qualify for Swedish income-related unemployment benefit after working abroad. A case before the Administrative Court of Appeal concerned a person who had been working in the UK and was covered by Article 71.1 b)ii in Regulation 1408/71. He/she had remained a member in the Swedish unemployment fund while working abroad. The Swedish rules demand, however, that the person apply to the fund once again after being covered by the legislation of another Member State. There is also a requirement that the person fulfil the condition of 12 months of work in Sweden or another EU-country in connection to the membership application. The person in the case ceased to be insured in the UK in May and was granted membership once again in the Swedish union as from July. Since s/he had not been insured during the period between, s/he was not entitled to income-related unemployment benefit.

h. Unemployment benefits for self-employed persons

In some Member States, an unemployment scheme for self-employed applies or will be applied. In Hungary there exists unemployment insurance protection for the self-employed, called Entrepreneurial Benefit. In Austria there are also definite plans to establish a type of voluntary unemployment insurance scheme for young self-employed persons to stimulate entrepreneurship. This could cause some problems because of the specific interpretation of 'social insurance' under constitutional law which requires that a particular *Versichertengemeinschaft* (community covered by a social insurance system) must be homogeneous. Thus, unemployed persons who have not completed a minimum period of insurance as employees will probably not be covered by unemployment insurance, at least not under the same conditions as employed persons.

At the moment in Austria, unemployment insurance does not cover self-employed persons. However, periods of self-employment may be used to extend the reference

period granted to complete qualifying periods (24 or 12 months, cf. § 15 (5) AIVG; those periods must have been completed in Austria, however, cf. VwGH 19. 2. 2003, 2002/08/0053).

2. Other issues

In Estonia the E303 forms, which the Unemployment Insurance Fund has issued so far, have been given to persons who have mainly announced that they will go to look for a job in Finland, Sweden and the UK. However, it appears that some of those persons have not actually registered themselves (or have not been eligible for registration) as unemployed/jobseekers in the country of destination as there have been no requests for reimbursement of benefits from competent institutions of other Member States so far.

Another outstanding issue in Estonia is how to tackle potential fraud, if the recipient of an unemployment insurance benefit actually works in another Member State. For the time being, the Unemployment Insurance Fund is unable to control this.

Another issue in Estonia is related to the fact that the information provided by the competent institutions of other Member States on the form E301 is insufficient. For example, forms E301 often contain no information whatsoever as to the grounds of termination of the employment relationship. This information is important, however, as under Estonian legislation no entitlement to unemployment benefits exists if the employment contract was terminated of the person's own accord, by mutual agreement, through breach of duties, abuse of trust or inappropriate act.

In Hungary it was mentioned that there are a lot of problems with E-forms, as they are often not readable, not filled in properly, containing wrong information, etc ... Moreover different Member States have different information systems and the Member States often only send the info that they need. This is a big problem in some old Member States. It takes sometimes very long to find the competent institution and the applicant is the victim of the delay.

Belgium has concluded an agreement with Luxembourg, France and Germany, pursuant to Article 17 of the Regulation, in order to keep part-time employees under the social security system of the Member State where they live. There is, somewhat surprisingly, no similar agreement with the Netherlands. Employees who live in Belgium, and work part-time in the Netherlands, have to apply for unemployment benefits in the Netherlands. It seems, however, that the Belgian competent authorities grant the benefit which is due on top of the part-time salary, if certain conditions are met.

The Belgian report also gives an example where differences in pensionable age may lead to problems related to overlapping of benefits. Workers who are entitled to a Belgian unemployment benefit may encounter problems if they are entitled to a French retirement pension, which may well happen before they reach the age of 65 which is the normal pensionable age in Belgium. Under French law, overlapping of these benefits is authorized within certain limits. The Belgian unemployment authorities refuse to allow cumulation of the Belgian unemployment benefit with a French retirement pension, be it under the general French scheme or under the ARCCO-scheme.

Another problem related to supplementary schemes for unemployment benefits can be found in the Netherlands. If an employer promises to supplement the unemployment benefit of his former worker, the idea is that the benefit is supplemented up to a certain

percentage of the former wage. In such cases the Dutch level is taken into account, even if the person concerned, being a frontier worker residing in Belgium, receives the lower Belgian benefit. Such an approach seems to infringe on Article 7(2) of Regulation 1612/68. An example of such a problem is a decision by the Kantonrechter Eindhoven (cantonal court) of 21 March 2002, which decided that the refusal to pay benefits was not contrary to Article 7(2) of Regulation 1612/68.

Pre-retirement schemes, such as the Belgian pre-pension scheme established by national collective bargaining agreement No. 17 of December 19, 1974, do not fall within the scope of Regulation 1408/71. The beneficiaries of such pre-retirement schemes do not enjoy any protection with regard to family benefits. Whereas pre-retired employees are entitled to family benefits in Belgium, the same does not apply to, for instance, Dutch VUT-beneficiaries who migrate to Belgium, as Dutch VUT (*vervroegde uittrekking* or 'early retirement') schemes are not assimilated to the Belgian pre-pension scheme.

In Portugal, problems are mentioned concerning the rules of calculation of unemployment benefits. Portugal takes into consideration the average daily wages registered in a "reference period" (twelve months before the second month prior to unemployment). In case of persons that become unemployed in Portugal after a short period of work several problems can occur when the person only fulfils the conditions through the aggregation of periods of insurance.

- 1) The person entitled to benefit was unemployed in another Member State during two or three years before coming to Portugal with the E303. Here, after receiving two weeks of unemployment benefits, s/he accepts a job that was proposed by the Employment Services and works two months. S/he becomes unemployed at the end of the 'experimental period' (period during which the employer can terminate the contract on the basis of unfitness for the job). This person cannot aggregate the periods accomplished in the previous State of occupation because Portuguese law does not allow aggregation of periods of unemployment benefits with periods of insurance due to work. The job-seeker is penalised because s/he was obliged to accept a job and afterwards loses the job and entitlement to benefits in both Member States.
- 2) When a recently employed person becomes unemployed in Portugal and doesn't complete the qualifying period for benefits and aggregation of periods is necessary it may happen that no remunerations are registered in Portugal in the reference period established for the calculation of benefits (Article 68 of Regulation 1408/71 establishes that only the remunerations registered in the competent institution must be considered). This is a serious problem for the unemployed person because aggregation of periods can be useless as benefits can't be calculated. Portugal in view to protect workers in such situation provided specific legislation on the subject (Decree-Law 46/93, of February) in two perspectives:

- when there is no Portuguese remunerations in the period of reference; or
- when in the period of reference, the unemployed person had some months with remunerations in one Member State other than Portugal and lately in Portugal,

and in both situations the legal solution provided by Decree-Law is to "use" the average of Portuguese wages to apply to the periods of work in the other Member State. Otherwise, the unemployed person would not qualify for benefits in the first case or would have a lower benefit in the second.

Another problem in the relation between Belgium and Germany relates to the calculation of the unemployment benefit and the "basic wage" to be taken into account. This is the salary in the country where the worker was working. If he is dismissed and afterwards

goes to a "société de transfer" in Germany, he has an employment contract with the latter. Should his unemployment benefit then be calculated according to the salary from the period before he was in the "société de transfer" or according to the salary in it, the "allocation minimum".

In Belgium, in order to be entitled to unemployment benefits, subject to derogations to be determined by the Minister, the unemployed person must have her or his main place of residence in Belgium and must effectively reside there. A collective agreement N° 17vicies decies of October 7, 2003 has explicitly introduced the rule that the employee's last employer has to pay the additional pre-retirement benefit even if the employee resides in another Member-State, provided s/he cannot or can no longer receive unemployment benefits in the framework of the legislation on conventional pre-retirement on the sole ground that s/he is not resident in Belgium as required by Article 66 of the Royal Decree on unemployment insurance, and insofar as s/he is entitled to unemployment benefits in her or his state of residence. In other words, the additional benefit is granted to frontier workers and migrant workers who have been employed in Belgium and who are entitled to unemployment benefits under the legislation of an EEA Member State. They are also reported to deny unemployment benefits upon consideration of the fact that the worker is exempt from the requirement of searching for a job.

By ruling of 28 April 2005, the Labour Court of Brussels held the residence requirement contained in Article 66 of the Royal Decree of 25 November 1991 on unemployment insurance to be unconstitutional insofar as it is applicable to persons in conventional pre-retirement. In particular, the Labour Court considered that there was an unjustifiable difference in treatment between pensioners and persons in conventional pre-retirement, as the latter, unlike pensioners, are subject to the obligation to reside in Belgium, even though they are exempt from all requirements which could justify their presence in Belgium. This ruling of the Labour Court was quashed by the Court of Cassation. In the view of the Belgian supreme court, the condition provided for in Article 66 is necessary to enable the inspection services to check whether the situation of the person concerned has not changed such as to impact on the entitlement to benefits. The efficacy of these checks, the Court of Cassation continued, rests in large part on the fact that they are unexpected and on the spot. It concluded that the specificity of the control in the field of unemployment benefits justifies more restrictive measures compared with those in the field of pensions.

In Germany, basic security benefits for job seekers (Grundsicherung für Arbeitsuchende) combine the former unemployment assistance (Arbeitslosenhilfe) and social assistance (Sozialhilfe). The benefits were introduced on 1 January 2005 when the benefit-related provisions of Book II of the Social Code (SGB II) came into effect. They provide a single set of benefits for all people who are capable of earning but in need of assistance, either because they have no work or do not earn enough to cover their living expenses. The benefits are provided by the Federal Employment agency and local authorities (municipal providers). They are social security benefits covered by Regulation 1408/71 insofar as they are linked to unemployment.

Individuals capable of earning who are between ages 15 and 64 and in need of assistance receive unemployment benefit II (Arbeitslosengeld II). Individuals in need of assistance who are not capable or earning but live in a joint household with someone entitled to unemployment benefit II receive social benefit (Sozialgeld), i. e. a social assistance benefit.

To reduce financial hardship on switching from unemployment benefit to basic security benefits for job-seekers, a supplement is paid for a maximum of two years. The supplement gives account to the fact that former recipients of unemployment benefit will often have accrued entitlements under unemployment insurance by virtue of many years in gainful employment. There are still legal uncertainties as regards the application of Regulation 1408/71 on these new benefits.

The main problem that Latvia has faced during the first years of application of Regulation 1408/71 was that large number of Latvians who after returning from the work abroad claimed the unemployment benefits in Latvia according to Article 71 point 1 (b) (ii) of the Regulation. It seems that many people working abroad do not know about their rights to be covered by social insurance and to claim social insurance benefits in the country where they were working.

In 2006 the Agency issued a leaflet on unemployment benefits in order to increase the awareness of people working abroad about their rights to social benefits. The two cases concerning the rights to an unemployment benefit were heard in the Administrative court. Both of them concerned application of the Article 71 point 1 (b) (ii) of the Regulation. In both cases the Court's decisions were in favour to the State Social Insurance Agency.

In Ireland the accession of Romania and Bulgaria gives rise to new issues concerning access to unemployment benefits for these nationals. Romania and Bulgaria nationals must continue to apply for work permits to participate in the Irish labour market. Bulgarian/Romanian nationals other than workers or self employed persons (i.e. those seeking work or people who are inactive or family members of workers) have the right to reside here as EU Citizens but do not have access to the labour market (without a work permit). Consequently she/he would not have the opportunity to build up an entitlement to social insurance benefits. Such persons will not become eligible for Jobseeker's Allowance as she/he would not be considered to be available for employment.

The Accession Treaties provide that any nationals of Bulgaria or Romania working legally in Ireland with a valid work permit for the 12 months prior to accession will be entitled to access the labour market without the need for a work permit. Such workers would be covered by the Irish social insurance system and may, under EU Regulations 1408/71, qualify for Jobseeker's Benefit, on the basis of the social insurance contributions paid by him/her in Ireland and in his/her country of origin.

Bulgarian and Romanian nationals engaging in self employment in Ireland will be required to pay PRSI contributions and will have limited cover for maternity benefit, old age and widow(er)'s pensions and bereavement grant (as all self-employed persons). In the event of cessation of the self employment, such persons might be entitled to the means tested Jobseeker's Allowance scheme.

In Poland in accordance with the rule included in Article 97 Regulation 574/72 the amount of benefits paid on the basis of Article 69 is paid back by the competent institution that paid the benefit. The payment should be in the currency of a Member State which paid the benefit, as it is often the case that Poland, receiving the payment in Euros, receives less money than if paid in Polish currency.

Voivodship Work Offices, being the competent institutions, often complain about the difficulties with obtaining the E303 forms from competent institutions of another Member State. The period of waiting often exceeds 6 months, and the date of issuing the form is crucial to persons applying for unemployment benefits in relation to working periods in another Member States. The person will receive a benefit only after the form is received

by the competent institution. Because of the long waiting period many persons lose their status as an unemployed person when undertaking work and can not receive his/her unemployment benefit. The Department of Community Coordination has undertaken some actions in order to speed up the procedure of issuing the form. Namely, the linking institution is asked to check the situation and speed up the process. Such procedures have some effect, but it should not be adopted as a rule.

In Slovenia the majority of problems regarding implementation of Regulation 1408/71 are related to unemployed frontier workers. The problems related to the implementation of Regulation 1408/71 and the case law, are related to the fact that the national legislation does not define 'intermittent unemployment' and 'partial unemployment'. In accordance with the national labour legislation, the employer has to cover the expenses of wages in cases of partial or intermittent unemployment.

A nice problem was found before a national Swedish court. This case concerned a Swede working in the UK, where he stopped working in May, he came back to Sweden and asked for unemployment benefits (hereinafter: UB) in July. The fault that he had made was not to ask in the UK to leave the British UB scheme. The Regulation requires in such a case that there is one competent state, so when he left Sweden, he had to join the UK scheme and when he would come back his periods in the UK would be aggregated in Sweden. But the problem here was that he forgot to get out of the UK system and so, for the Swedish scheme, there was an insurance lacuna in the month of June. But the Swedish Court here ruled that he should have notified the Swedish scheme to be entitled. The question of which UB scheme one belongs to is apparently not that rare. It should be investigated what would have happened if such a person remained in the system. But since he waited a month, he lost his entitlement. Without 12 months uninterrupted insurance, no entitlement to benefits exists. He should thus have notified the Swedish authorities that he was in Sweden. The question is if Article 71 could be applied. One should also read Annex VI to see if there are specific rules to clarify this situation.

Another problem, although rather a problem of differences in national law which remain due to the fact that the Regulation only looks for coordination, can be found back in the relation between Denmark and Sweden. A Swedish national lives and works in Denmark. He becomes unemployed and incapacitated at the same time. He then moves to Sweden, where his incapacity for work diminishes to 50%. He is only entitled to 50% coverage in Sweden, on account of the fact that he is not looking for work in Denmark. Had he found a job in Sweden, he would lose the Danish benefit completely. Or when a person has worked part-time in Denmark and part-time in Sweden, he cannot obtain full unemployment benefit, whereas he could have if he had worked full-time in Denmark. Unemployed persons residing in Sweden and wishing to look for work in Denmark have to obtain prior authorisation. Failure to comply with this requirement results in loss of entitlement to benefits.

H. Family benefits

1. General issues

a. Discrimination between nationals and others

In the Czech Republic there is some discrimination in the State Social Support scheme providing family benefits. Eligibility to these universal benefits is conditional upon permanent residence of at least 365 days. Under the present legislation foreigners are granted provisional residence and to achieve permanent residence is difficult. Foreigners

with temporary residence do not qualify for state social support benefits, unless they are subject to EU rules for coordination of social security. Thus this applies mainly to persons from third countries. As for citizens of EU employed in the Czech Republic any discrimination is excluded in line with the Directive 1612/68.

Although the rules stipulating Familienbeihilfe as well as Kinderbetreuungsgeld still contain explicit legal distinctions between nationals and non-nationals (cf. § 3 FLAG; § 2 KBGG), equality of treatment of EU/EEA nationals is guaranteed explicitly by § 53 Abs 1 FLAG.

In the Offermans case (C-85/99 [2001] ECR I-2261) the European Court of Justice ruled that the partly means-tested Unterhaltsvorschuss (advance maintenance payments) under the Unterhaltsvorschussgesetz is a family benefit, too. The fact that only nationals are entitled to that payment (cf. § 2 UVG) is therefore discriminatory. Discrimination has been denied, however, when the definition of being a dependent is subject to a different age of consent: So there is no entitlement to Unterhaltsvorschuss if a person would be qualified as a child in Austria but is regarded as an adult in terms under the legislation of the state of residence (OGH 18.10.2005, 10 Ob 43/05d; 2.3.2006, 2 Ob 48/06g).

b. Definition

The concept of family benefits remains a difficult issue in particular when referring to the notions of family benefits, parental benefits and paternity benefits. According to e.g. the Estonian legislation the aim of state family benefits is to partially compensate for families with children expenses related to the maintenance, raising and educating children. According to the Parental Benefit Act, the aim of parental benefit is to compensate for the loss of income due to raising of children, and to support reconciliation of work and family life.

According to the initial Swedish view, there are three main branches of family benefits: the general child benefit, housing benefit and maintenance support/single parent benefit. The Swedish authorities took for granted that parental benefit would be regarded as a maternity benefit. However, in the *Kuusijärvi* case, the European Court of Justice ruled that parental benefit should be regarded as a family benefit. The consequences of this ruling mainly concern exportability.

In many countries such as Slovenia and Sweden, the characteristics of family benefits on the one hand and maternity and paternity benefits on the other hand were summed up. The former are intended to meet family expenses for a longer period of time, they are collective, often residence-based and they reflect a normative pattern of just distribution. The latter are intended to compensate income losses for a shorter period of time, they are individual, often work-based and reflect a normative pattern of protection of acquired rights. It seems, however, that the Court of Justice did not want to follow this approach.

There has been a debate in Sweden that the advantageous parental insurance may cause social tourism to Sweden. Despite these concerns, the insurance was further improved the 1st of July 2006, when the maximum parental benefit was raised considerably. One reason is to encourage fathers, who normally have better wages than mothers, to stay at home.

After the Judgment C-333/00 *Maaheimo* the Finish home child-care allowance which is paid to the parent or guardian of a child who is under three years of age and is not in municipal day care, is regarded as a family benefit. The parent does not need to stop working. According to the Home Child-Care Allowance and Private Child-Care allowance

Act (1128/1996) there is also an allowance called private child-care allowance. It can be paid directly to a private child-care provider designated by the parents. The parents can choose between home child-care allowance, private child-care allowance or municipal day care. The private child-care allowance is not considered as an exportable family benefit. Some municipalities pay an addition to a home child-care benefit. These additional benefits are not exported.

Conversely, the fact that a benefit does not come under family benefits according to national law, does not prevent its classification as such for the purposes of social security coordination rules. Such was the case in Estonia, which, spurred by the Administrative Commission (CASSTM), had to categorise its 'disabled child allowance' as a family benefit. The Competent Estonian Institution mentioned that this classification is very hard to explain to people, particularly when the same benefit is not categorised as a family benefit in another Member State (see *supra*). On accession, Estonia had proposed a series of benefits, including the 'disabled child allowance', for inclusion in the list of special non-contributory benefits contained in annex 2a to Regulation 1408/71. Only two Estonian benefits made it to this list: the 'state unemployment allowance' and the 'disabled *adult* allowance'. The Estonian argument that the objectives and the criteria for granting the 'disabled child allowance' were largely similar to those of the 'disabled adult allowance', was not accepted by the CASSTM. Eventually, the 'disabled child allowance' was categorised as a family benefit, this classification appearing to be 'the closest match'.

In relation to this issue, an example was given in the Estonian report. The case involved a family residing in Estonia, of whom the father works in Finland and the mother stays at home to take care of the family's disabled child. In accordance with the *lex loci laboris* principle, Finland is the competent Member State responsible for paying the benefit. However, Finland had listed its 'disability allowance' in annex 2a to Regulation 1408/71. As mentioned above, Estonia was not allowed to do the same, purportedly because a new Court decision had intervened (Case C-215/99 *Jauch*). As a result, Finland only grants the 'disability allowance' to people residing in the Finnish territory, which was not the case for the disabled child in question. Estonia, on the other hand, had to stop payment of the benefits to the family concerned. In that regard, the competent Estonian institution was willing to continue to grant the 'disabled child benefit', but it was prevented from doing so by virtue of Article 10(1)(a) of Regulation 574/72. That provision, which supplements Article 76 of Regulation 1408/71 (Case 104/84 *Kromhout*), is intended to prevent overlapping of entitlement to family benefits based on employment (*in casu* Article 73 of Regulation 1408/71) and on the basis of national legislation making entitlement conditional on residence alone. It reflects one of the principles underlying the Community rules against overlapping benefits, i.e. that a right acquired by virtue of the pursuit of a professional activity takes precedence over a right the acquisition of which does not depend on the pursuit of such an activity. The question was raised as to whether Estonian legislation could still come into play, possibly through the so-called *Petroni* principle (Case 24/75), in which it was held that a limitation on the overlapping of benefits which would lead to a diminution of the rights which the persons concerned already enjoy in a Member State by virtue of the application of the national legislation alone is incompatible with Article 42 ECT. However, doubts were raised regarding the application of this principle to the case at hand. It is however not excluded that this is not an incorrect application of Regulation 1408/71.

In Denmark, until 2003 payment of advances on child maintenance was not regarded as a family benefit or allowance within the meaning of Regulation 1408/71. However, after the judgement by the European Court of Justice in the *Humer* and *Offermanns* cases (case C-255/99 and case C-85/99), the payment of advances of child maintenance has now also been considered a family benefit.

Latvian legislation makes no distinction between the terms family benefits and family allowances.

A recent issue in the Netherlands is whether the Child Care Benefits, payable under the Dutch *Wet Kinderopvang* are a form of family benefits.

The exclusion of benefits in connection with child birth from the regulation also leads to certain problems. In Hungary it is mentioned that there is a difficult borderline between specific benefits in connection with child birth, where certain Member States would grant these allowances and other would not. If an EU citizen is insured in Hungary when her or his child is born, s/he receives child-birth benefits, whereas other Member-State, such as the UK, are not eager to give this kind of benefits to non-UK people. Maternity allowances in some Member States do not fall under family benefit.

At present the Polish legislation on child birth benefits provides for 3 separate benefits that may be granted on the occasion of child birth:

1. a supplement to the family benefit for child birth;
2. one-off child birth aid (the aid is not linked to income criterion);
3. the municipal child birth aid with the level and eligibility criteria set on discretionary basis. Therefore, in case of this benefit there might be geographical differences.

The categorisation of these benefits was discussed in the Polish report.

One of material family benefit coordination issues is a contingent necessity to export such benefits to other Member States, since special allowances related to child birth or child adoption are not covered by co-ordination. Thus, the implementation of such benefits in the Polish legislation requires appropriate annotations in the Annex No II Part II of the Regulation 1408/71. During the accession period Poland made only one entry in the Annex No II – an entry concerned with the child birth supplement. However, it should be noted that in the period when this entry was made the supplement was a self-contained benefit, whereas at present its payment is conditional upon holding entitlement to family benefit. Since it comes across various interpreting problems Poland is considering an option of deleting this supplement in the Annex II.

In the context of applying Community standards there are also other doubts about the application of one-off child birth aid for migrating people. Theoretically speaking it is typical benefit falling into category of special benefit payable on the occasion of child birth or child adoption, so it should be excluded from the scope of co-ordination. Nevertheless Poland has not made an appropriate annotation yet in the Annex II Part II of the Regulation 1408/71. With reference to the third of the aforementioned benefits the situation should be rather clear, since being a benefit granted on discretionary basis it is not covered by co-ordination principles.

In Ireland, a new early childcare supplement was introduced in 2006. The early childcare supplement is a State payment to families with children under six years of age. The purpose of the supplement is to assist families with the cost of raising children, providing childcare, etc. This is a family benefit under EU law. It has only just gone into payment and would not appear to give rise to any major issues. Some concerns have been raised about the potential costs but this reflects the fact that those commenting were entirely unaware of the existing obligations in relation to child benefit payments under Regulation 1408.

c. Export of benefits

A former Austrian problem with regard to the export of family benefits concerned the *Kinderabsetzbetrag*, which is part of taxation legislation. As such, the amount is deducted from the gross income. Only if there is no or just a little income, the *Kindzerabsetzbetrag*, is granted as a direct payment, together with *Familienbeihilfe* it has to be considered as a family benefit in terms of Community law, which seems to be accepted in practice. Obviously, the *Kinderabsetzbetrag* is granted according to Articles 73 and 74 of Regulation 1408/71 as long as the respective child resides in another Member State.

According to the *Kuusijärvi case*, a Member State is permitted to end its responsibility as the competent state through a residence clause if the person concerned is no longer employed in the country. Swedish parental benefit was classified, not as a maternity benefit, but as a family benefit. With regard to family benefits, there is no provision on exportability in the Regulation corresponding to Article 22(1)(b), which applies to sickness benefits and maternity benefits. Consequently, when Ms Kuusijärvi transferred her residence to Finland, and was no longer employed in Sweden, Sweden was allowed to withdraw the parental benefit.

The Swedish courts have strictly followed the judgment in the *Kuusijärvi case*. If the beneficiary was no longer employed in Sweden, the benefit could be withdrawn. If she had retained her employment in Sweden, though granted a leave of absence, Sweden remained the competent state and was obliged to continue awarding parental benefit. It seems that the courts in these cases upheld a somewhat stricter view on when all occupational activity is considered to have ceased than what is generally the case as regards sickness benefits in cash.

However, the *Kuusijärvi case* itself ended in a rather unexpected way. During further proceedings in the national Court, it was revealed that Ms Kuusijärvi's husband was a migrant worker in Sweden. Ms Kuusijärvi now argued that she was entitled to the earnings-related Swedish parental benefit in her capacity as the wife of a migrant worker. The National Social Insurance Board objected and stated that the father of the child was entitled to family benefits in his own right, but that this right could not be extended to his wife, since Swedish legislation is based on the view that each of the spouses acquires social security rights independently. However, the Administrative Court of Appeal accepted the family-oriented ECJ-view on Swedish parental benefit and applied Article 73 of the Regulation. The Supreme Administrative Court confirmed this judgment. The judgment is a rather strange mix between the European Court of Justice family approach and Swedish individualised approach. Ms Kuusijärvi's right to benefit was based on her status as the wife of a migrant worker, while the calculation of the benefit was based on her own previous employment in Sweden.

According to the new Social Security Act, income related parental benefit is a work-related benefit, no longer subject to residence in the country. There is also a guaranteed level, which is residence-based. It is only exportable during a temporary stay abroad. The work-related part of the social security system continues to apply as long as a person receives a benefit based on previous work in the country, even if he or she is abroad. There is however, a residence condition with regard to the child. The child must reside in Sweden. The residence conditions concerning parental benefit cannot be applied towards a migrant worker within the scope of Regulation 1408/71 (Article 73). The individualized Swedish income related parental benefit is however difficult to apply in relation to the right of family members to invoke Article 73. According to this Article, the spouse of a Swedish worker, who lives in another Member State and who has never

worked in Sweden, may claim parental benefit from Sweden when staying at home to care for a child. The Swedish view is that only the guaranteed parental benefit may be exported to the migrant workers spouse, since the income related parental benefit is an individual benefit for the worker. The Kuusijärvi doctrine is relevant even after the new Social Security Act, in the sense that residence conditions can be upheld if the parent has ceased all occupational activity in Sweden (provided that the parent is not at the same time the family member of a migrant worker).

In Hungary it is mentioned that as to the export of the benefit, a Member State grants the benefits as long as people reside within its territory, but when people move to another Member State, they are less willing to grant family benefits (e.g. Slovakia). If a Slovak comes to Hungary, but he is not insured in Hungary, he can claim benefits in Hungary. But if a Hungarian citizen changes residence, his benefits will be exported to the new Member State of residence as his new residence does not restrict his entitlement. The only exception to this is when the concerned person moves to a third country. In that case, he receives benefits during the first 3 months in his new country of residence. If the worker resides in another Member State than his family, sometimes family benefits are not granted. The Regulation states that family members should be considered as residents of the Member-State of employment. Due to an old clause in the Family Benefits Legislation, people under the personal scope of Regulation 1408/71 were refused family benefits if they did not have a residence permit. E.g. when a worker worked in Hungary and his wife lived in Slovakia, the wife does not need residence according to the Regulation, but due to this old clause she was refused family benefits.

In France, taking account of the *Humer* case of 15 February 2002 in which the European Court of Justice ruled that legislation providing for payment of advances on maintenance payments due by a parent to his/her child constitutes a family benefit within the meaning of Article 4(1)(h) of Regulation 1408/71 and thus is exportable in other Member states, the *Caisse Nationale des Allocations Familiales* has acknowledged the full exportability of the French equivalent *allocation de soutien familial*. Until then, this benefit was exportable only for the part which could be legally recovered by the local *Caisses d'Allocations Familiales*. From now on, exportability applies in all cases (*Circular CNAF n°C2005/022, 2 November 2005*).

This is also the position of the European Commission, which has presented a proposal concerning amendments of annexes to Regulation 1408/71 (COM (2005)676 final). One amendment concerns the application of the Swedish condition of 240 days of insurance before the birth of the child and reads as follows:

For the purpose of determining a parent's income during 240 days before the birth of the child under the National Insurance Act):

...

(b) where during that period a parent had no income in Sweden but had income in another Member State, this income shall be considered to be above the minimum guaranteed level provided the parent has been economically active in that other Member State to the extent that the activity would have given rise to an income above the required minimum guaranteed level if it had been carried out in Sweden.

The proposal means that a person may fulfil the condition of 240-days of insurance without having worked in Sweden prior to the birth of the child. Persons moving to Sweden with children could then also benefit from the first 180 days of the parental insurance. The proposal has, however, not been accepted by Sweden.

According to Danish legislation, the child or the parent who has custody must live and reside in Denmark in order to receive family benefits. When Regulation 1408/71 applies,

the residence condition is waived if the parent works in Denmark or the employer is situated in Denmark. If the child lives in another EEA State, but the parent works in Denmark or the employer is situated in Denmark, the residence clause is waived. Family benefits can be exported upon application to the municipality where the applicant last resided in Denmark. If the applicant did not reside in Denmark, the application is sent to the employer's municipality.

For the family benefits regulated by the act on social services, those benefits granted to parents for taking care of their child at home or using private child care (§§ 37, 38) can be exported, parental leave benefits (§ 39, 40) can also be exported, as well as benefits compensating the loss of income when taking care of a disabled child at home (§§ 42, 43).

According to European Court of Justice in the Kuusijärvi-case, a Member State is permitted to end its responsibility as the competent state through a residence clause in case the person concerned is no longer employed in the country. Swedish parental benefit was classified, not as a maternity benefit, but as a family benefit. With regard to family benefits, there is no provision on exportability in the Regulation corresponding to Article 22(1)(b), which applies to sickness benefits and maternity benefits. Consequently, when Ms Kuusijärvi transferred her residence to Finland, and was no longer employed in Sweden, Sweden was allowed to withdraw the parental benefit.

The Swedish courts have in its case law strictly followed the judgment in the Kuusijärvi case. If the beneficiary was no longer employed in Sweden, the benefit could be withdrawn due to the residence conditions. If she had retained her employment in Sweden, though granted a leave of absence, Sweden remained the competent state and was obliged to continue awarding parental benefit. It seems that the courts in these cases upheld a somewhat stricter view on when all occupational activity is considered to have ceased than what is generally the case as regards sickness benefits in cash.

According to the new Social Security Act, income related parental benefit is a work-related benefit, no longer subject to residence in the country. The work-related part of the social security system continues to apply in a number of situations, for example as long as a person receives a benefit based on previous work in the country or as long as parental benefit can be derived from work in Sweden, even if the person is abroad. There is however, a residence condition with regard to the child. The child must reside in Sweden. The Courts could therefore uphold their case law even after the new Social Security Act entered into force. In a recent case, the Administrative Court of Appeal stated that a person, who had ceased to work in Sweden and was living in Denmark, was still insured for income-related parental benefit due to the abovementioned rules in the Swedish work-related insurance. The court stated however, that it was for the Insurance Board to decide whether the other conditions for granting income-related parental benefit were fulfilled. One such condition ought to be the residence condition with regard to the child.

The new regulation 883/2004 will however drastically change the Swedish practice. Article 11.2 means that Sweden will remain the competent state when a person receives work related parental benefit, even if the person moves from Sweden and has ceased all occupational activity here. As parental benefit can be granted until the child is 8 years old, the question arises whether Sweden will remain the competent state during the entire period or only as long as the person actually receives benefit. Article 11.2 will probably lead to problems of interpretation in this regard.

The Swedish practice to withdraw parental benefit for persons who have ceased all occupational activity in Sweden, is still relevant as regards the residence-based,

guaranteed parental benefit. Article 11.2 only applies to work-based benefits. The residence-based parental benefit can, however, not be withdrawn if the migrant worker fulfils the situation described in Article 73 of Regulation 1408/71. This situation was illustrated when the Kuusijärvi case was to be determined in the Swedish court after the European Court of Justice's judgement. During further proceedings in the national Court, it was revealed that Ms Kuusijärvi's husband was a migrant worker in Sweden. Ms Kuusijärvi now argued that she was entitled to the earnings-related Swedish parental benefit in her capacity as the wife of a migrant worker. The National Social Insurance Board objected and stated that the father of the child was entitled to family benefits in his own right, but that this right could not be extended to his wife, since Swedish legislation is based on the view that each of the spouses acquires social security rights independently. However, the Administrative Court of Appeal accepted the family-oriented ECJ-view on Swedish parental benefit and applied Article 73 of the Regulation. The Supreme Administrative Court confirmed this judgment. The judgment is a rather strange mix between the European Court of Justice family approach and Swedish individualised approach. Ms Kuusijärvi's right to benefit was based on her status as the wife of a migrant worker, while the calculation of the benefit was based on her own previous employment in Sweden.

The case shows that the individualized Swedish income related parental benefit is difficult to apply in relation to the right of family members to invoke Article 73. According to this Article, the spouse of a Swedish worker, who lives in another Member State and who has never worked in Sweden, may claim parental benefit from Sweden when staying at home to care for a child. The Swedish view is that only the guaranteed parental benefit may be exported to the migrant workers spouse, since the income related parental benefit is an individual benefit for the worker.

Swedish family benefits are quite high and there have been concerns about the exportability of such benefits, especially in relation to the new Member States, for which Sweden has no exceptions. In a report on payments of family benefits, the National Insurance Board found, however, that only small amounts had been exported to families residing in other Member States and that only a small percentage of the payments of family benefits concerned the new Member States.

d. Qualifying periods

The right to the Swedish parental benefit at the sickness benefit level during the first 180 days of the entitlement period is subject to an uninterrupted insurance period of 240 days immediately before the child is born. According to case law, the principle of aggregation applies provided that the claimant was insured in the Swedish system the last day before the child was born. Transferring residence to another country may result in an interruption of the insurance period. According to the Swedish view, an interruption period of less than one month will not lead to a situation where the claimant does not satisfy the condition of continuous insurance over the guaranteed level. There are currently two cases concerning the Swedish qualifying period for parental benefit pending before the European Court of Justice. The cases concern whether aggregation should be allowed with a period during which the worker was covered by the Joint Sickness Insurance Scheme in accordance with the rules in the Staff Regulations for officials of the European Communities. The implication of these cases has been discussed in the media. Concerns have been raised that the European Court of Justice might find the Swedish demand for at least one days insurance before the birth of the child incompatible with EC law.

In Estonia questions arose with regard to the aggregation of employment periods. The average income taken into account will be the average income in Estonia, so it will be assumed that a person has worked in Estonia. But there are doubts on how to apply the reduction formula on a person who receives parental benefits, while working in Finland.

In Sweden the judgements from the Supreme Administrative Court following the European Court of Justice's judgments meant that the persons in the cases were entitled to income-related parental benefit, based on the general principle of free movement. The question of aggregation of periods in Regulation 1408/71; whether the last day of insurance before the birth of the child must be fulfilled in Sweden, was however not solved since the cases involved persons who had been working in the European Communities and who were not covered by Regulation 1408/71.

Still, the implication of these cases were discussed in media. Concerns were raised that the judgements meant that the Swedish demand for at least one days insurance before the birth of the child was incompatible with EC law. This is also the position of the European Commission, which has presented a proposal concerning amendments of annexes to Regulation 1408/71 (COM (2005)676 final). One amendment concerns the application of the Swedish condition of 240 days of insurance before the birth of the child. The proposal means that a person may fulfil the condition of 240 days of insurance without having worked in Sweden, prior to the birth of the child. Persons moving to Sweden with children could then also benefit from the first 180 days of the parental insurance. This proposal was however not accepted by Sweden.

The Supreme Administrative Court has granted leave to appeal in two cases concerning persons who have worked in other Member States and who have been denied income-related parental benefit when moving to Sweden since the last day of insurance was not fulfilled in Sweden. The question that was left unanswered in the Rockler and Öberg-cases may thus finally be solved.

e. State of employment or State of residence

The Finnish report mentions another problem. According to an interpretation of the Regulation in Sweden the country of employment of the person obliged to pay maintenance allowance is the competent country and the maintenance allowance is paid solely according to the legislation of this country. According to the Finnish interpretation all the provisions on family benefits are applied and the activity of the parent with whom the child resides can also have an impact (See C-543/03 *Dodl* and *Oberhollenzer*). Problems arise if the child and parent are residing in Sweden and the parent obliged to maintenance is employed and resident in Finland. If the parent having the care of the child is economically active in Sweden, the Finnish interpretation is that Sweden has the primary responsibility for the payment of the allowance and the payment of family benefits by the state or employment of the other parent is suspended up to the sum of family benefits provided for by the state of primary responsibility. The Swedish interpretation is that Finland as the country of employment of the absent parent always has the primary responsibility for the payment of the allowance.

The Hungarian report mentions that forms are not returned or are filled in incorrectly by some Member States (e.g. France, Spain, Italy). The French and Italian designated liaison bodies do not forward the forms to the competent authorities, forms are returned after an extremely long time and in many cases blank. The forms in the Hungarian language are not filled in (e.g. the Hungarian form E 402 by the Slovakian universities). Certain Member States (e.g. Slovakia) request extensive, unjustified data.

In Austria the Familienlastenausgleichsgesetz basically precludes the export of benefits, especially of Familienbeihilfe, for children residing abroad (cf. § 5(4) FLAG). According to Article 3 respectively Articles 73 and 74 of Regulation 1408/71, entitlement to Familienbeihilfe is stipulated in § 53 Abs 1 FLAG for EU/EEA nationals, provided the claimant's family resides in a Member/EEA State.

A former problem with regard to the export of family benefits concerned the Kinderabsetzbetrag laid down in taxation legislation § 33(4)3 lit. a "Einkommensteuergesetz/ESTG" (Income Tax Act, BGBl. 1988/400): it is granted to persons without or with only a small amount of income as a direct payment together with Familienbeihilfe and has to be considered as a family benefit in terms of Community law, which seems to be accepted in practice. Obviously, the Kinderabsetzbetrag is granted according to Articles 73 and 74 of Regulation 1408/71 as long as the respective child resides in another Member State. As a consequence of the Offermans case (as mentioned above) the European Court of Justice ruled in Humer (C-255/99 [2002] ECR I-1205) that Unterhaltsvorschuss also has to be exported according to Articles 73 and 74 of Regulation 1408/71.

In a recent appeal the issue was whether Ireland or UK was the competent State for Child Benefit purposes. There was also a related issue concerning the delay in making a claim for Irish CB. The family live in the Republic of Ireland but both parents worked in NI until March 2005 at which point their employments transferred into RoI. UK CB had been in payment until December 2005 but then ceased as the NI authorities held that the RoI was now competent authority. An overpayment of UK CB was assessed. The departmental Deciding Officer held that there was a delay by the appellant in claiming CB and only awarded payment from 1.2.06 and not in respect of earlier period (3.05 - 1.06).

The Appeals Officer allowed the appeal (i.e. backdating of the award) on three grounds:

- (i) He accepted that Ireland was the competent State for CB payment purposes from March 2005
- (ii) The appellant had "good cause" for the delay in making the claim (S 241 (4) of the SW Consolidation Act 2005) and
- (iii) Under Art 86 of EU Regulation 1408/71 (as amended), a claim submitted in one Member State may be accepted as having been made in another.

In Lithuania a problematic issue has to do with families of which one of the parents works for the European institutions. Consider the case of a family living in Lithuania. The mother works in Lithuania for the Commission, and is as such insured in accordance with the Staff Regulations. The father does not work. Who is responsible for the payment of family benefits?

f. Assimilation of facts

In Sweden, the assimilation of facts presents great difficulties even if both parents are present in Sweden. Parents are free to choose the available benefit days until the child is eight years old, and the benefit days can be taken out in fractions of benefit days. Benefit is only granted if the insured person does not perform work (or does not work too many hours) or draws any other kind of benefit the day for which parental benefit is awarded and provided that the other parent does not draw Swedish parental benefit for the same day. These facts must be assessed each day parental benefit is claimed. It is difficult enough if the parents are present in Sweden; it becomes almost impossible if they live abroad.

g. Cumulation of family benefits

Aggregation prevents that one receives benefits from 2 different Member States. This is not always without problems. In Hungary an example was given. If both parents work in 2 different Member States, e.g. the father in Austria and the mother in Hungary, the Member State where the children live must pay the benefits (Hungary) and the difference between Hungarian and Austrian benefits should be received from Austria. This involves a lot of administration. Austria wants a huge amount of data before they give a penny. So all these data must be transferred and this takes a lot of time. In Austria, both institutions responsible for family benefits require all the data and documents, e.g. on which allowances were paid in Hungary, etc ... The Hungarian experience is that Austria is not very flexible to make it easier for Hungarian applicants, so it normally takes months before an agreement is reached.

Some of the problems which may arise are connected with the fact that the Swedish parental benefit is an individualised benefit, which is awarded to the parent, not to the family. From the Swedish point of view, there is no violation of the single state rule if one of the parents draws parental benefit based on previous work in Sweden, while the other parent draws another kind of parental benefit from another country for the same period of time and for the same child. Each parent has his or her own competent state. The only connection is that the maximum period of available days is counted as one for the two parents. This will be treated as a question of overlapping benefits and solved in accordance with the Regulation. The parental-benefit days enjoyed by the other parent in another country will be deducted from the total number of available days for both parents.

The Public Insurance Act contains a special provision on the overlapping of benefits in accordance with the Regulation. If the corresponding benefit from the other country is not earnings-related, it will be deducted from the Swedish benefit days at the guaranteed minimum level. If the foreign benefit is earnings-related, it will be deducted from the Swedish earnings-related parental benefit days.

According to Regulations 1408/71 and 574/72, there are situations when a supplement shall be paid from the country with the highest family benefits. The fact that some countries have classified their parental benefits, similar to the Swedish, as maternity benefits (it is questionable if this is still possible after the *Kuusijärvi* case) instead of family benefits may lead to an unfair outcome of these rules. In this aspect, it is also a problem that the Swedish parental benefit is income related and that family benefits in some other states are to some extent means-tested.

Belgium mentions that the practical application of this provision turns out to be difficult. The situation gets really difficult if it turns out that benefits have been paid which were not due. Cross-border recovery (both administrative and judicial) is referred to by the Belgian institutions as very cumbersome, to such extent that a cost-benefit analysis would often lead to the conclusion to forego recovery. The problem is aggravated by statutes of limitations (prescription).

The Nordic Social Security institutions have worked for some years for trying to find a common solution for the calculation of the differential amount of the family benefit supplement. Although the Nordic countries have many similarities there are also some differences between the countries as well as in their interpretations of the rules of regulation 1408/71. An additional difficulty has arisen from the fact that the Swedish parental benefit was defined as a sickness and family benefit according to Regulation 1408/71 in the ECJ case C-333/00 *Kuusijärvi*. The parental benefits in the other Nordic

countries are still sickness and maternity benefits within the meaning of Regulation 1408/71. A parental benefit in the Nordic countries is an individual benefit which purpose is to cover some of the loss of the income of the parent staying at home. The other family benefits in the Nordic countries are benefits meant for the maintenance of the child and the eligibility is based mainly on the fact that the child is residing in the country.

h. Modification of the family situation

The family situation or modifications in the family situation can cause considerable problems. The Finnish report makes clear that when the parents of the child are divorced, the parent who is not living with the child is not considered as belonging to the family when the Regulation is applied to residence based benefits. After the *Offermanns* and *Humer* case, this is still true if the divorced person is not responsible to support the child.

In Sweden, problems of interpretation have arisen concerning parents who no longer live together. According to the National Insurance Board, divorced or separated parents are not family members and parental benefit (and other family benefits) may in this situation not be granted to the parent residing abroad as a derived right from the parent in Sweden.

It is questionable whether this view is in compliance with EC-law. Regarding family benefits, the child could be regarded as the beneficiary. The child is, according to EC-law, a family member to both its parents, even if they are divorced or separated. The parent residing abroad should therefore be able to receive parental benefit, and other family benefits, due to the fact that the child, via its other parent, is entitled to Swedish benefits. The problem arises from the fact that the Swedish parental benefit in national legislation is considered as an individualized benefit for the parent, not as a family benefit.

Also the Irish report mentions that periodically issues arise as to whether Ireland or the UK is competent for the payment of family benefit and mainly relate to situations where the couple have separated and are living and/or working in different Member States. However, a liaison group with representatives from DSFA, UK Office and NI Office meet periodically to identify and resolve such issues.

In Hungary another example can be found. Another major problem is that e.g. someone is living with a child in Hungary and the ex-spouse lives in another Member State. Member States like Germany, Austria or other Member States agree on the FB and they do not supervise what is actually done with this benefit, as they do not pay it to the person who is in need of this benefits, in this case the person living in Hungary with the child. It must also be mentioned that Hungary has different procedures than the EU procedures when it comes to adopted children of natural children in non-homogenous families.

In Poland the following issue on cumulation of family benefits was mentioned. Under EU law the institution of residence of the family members entitled to family benefits in another Member State, is obliged to provide the competent institution with information about, among others, the number of family members, their age and current financial standing. Consequently any change of factual circumstances to this extent necessitates another examination of eligibility for the benefits in question.

Nevertheless some Member State institutions do not communicate to the institutions competent in Poland about granting entitlements to family benefits of the persons working in such Member State, do not reply to the inquiries of the Polish competent institutions or reply with significant delay. Such States grant family benefits on the grounds of their national legislation without checking the situation of the family residing in another state – using E 411 form, which leads frequently to the overlap of the periods of benefits in 2 countries and the accumulation of benefit payment.

No reply on the part of competent institution of another Member State with reference to the level and periods of benefits enjoyed by the Polish citizens undertaking employment there, is the reason why Poland cannot take any measures vis-à-vis the remaining family members such as revoking the decision granting benefits in Poland, or determining the level of benefit reimbursement by the institutions in another state if the benefits are paid simultaneously. The practice of Polish institutions also show that not all Member States apply benefit refund procedures despite statements in forms or a letter that Poland is not the competent state to make payments and therefore the overpaid amounts should be refunded.

Another doubt refers to the question of the correct interpretation of Article 76 par. 2 of the Regulation 1408/71. In the light of the quoted regulation the institution of the competent state may apply the suspension rule referred to in par. 1 Article 76 even if in the state of residence no application for granting family benefits has been lodged.

In practice it happens that the institutions of the Member States apply Article 76 par. 2 of the Regulation 1408/71 when the Polish institution – at the place of domicile of the family members – confirms in the E411 form that the person specified in item 2 of the form, is not involved in occupational activity at the place of domicile, nor has lodged an application for family benefits. In such cases it happened many times that the competent institution would suspend the amount of family benefit paid, and reduce it to the level of benefit due to the parties at their place of domicile.

The Polish institutions believe that acting in this way is wrong, since such person has not filed an application due to the priority in the state where job is performed – Article 73 of the Regulation 1408/71. At the same time at the place of domicile of the family no occupational activities have been performed and it is not a prerequisite to grant family benefits. Given the above the application of Article 76 is wrong according to the Polish institutions. In parallel due to the fact that in Poland no application has been lodged, it was not possible to suspend the benefit payment and reduce it to the actual amount of benefits due in Poland. Polish institutions believe that in such cases Article 10 of the Regulation 574/72 should apply.

Special problems are encountered in Poland during the implementation of Article 75 par. 2 of the Regulation 1408/71. Pursuant to the rule specified in par. 1 of the quoted regulation the family benefits are granted to the claimants pursuant to Article 73 by the competent institution of the Member State to which the hired worker or self-employed person reports to and in cases referred to in Article 74 of the Regulation, pursuant to the legislation applied by the competent institutions, regardless of the fact whether the natural or legal person stays in the territory of the competent state or in another Member State.

Nevertheless the family benefits are not earmarked for the support of family members by the person to whom the benefits should be granted and the competent institution pays benefits – pursuant to the application and via the institution of the place of domicile or another institution designated by the authorities of the Member State in the territory of

which the claimant is domiciled – to a natural or legal person that in fact extends support to family members.

Given the absence of precise definition of terms used in the Article including „earmarked for support to family members” this provision has come across major implementation problems. The institutions of other Member States refuse to transfer benefits to the person who in fact incurs the costs of support to an adolescent child when the second parent pays alimony awarded by a valid court decision. The competent institutions claim in such cases that the natural person – the hired worker - pays to extend support to a child and therefore the hired worker is entitled to family benefits for this child.

It should be noted, however, that in many cases the benefits are paid on account of awarded alimony, which the competent institution fails to consider.

In parallel in case of mother who does not perform occupational activities at the place of domicile pursuant to the „anticumulation” rules in the regulations including in particular Article 10 par. 1 letter a of the Regulation 574/72, family benefits should be suspended and reduced to the level of benefits due in the competent State pursuant to Article 73 or 74 of the Regulation 1408/71. In such cases the actual situation of the family in the country of domicile worsens since in addition to awarded alimony that as such are independent from family benefits and that was awarded by the court of law and paid by the second parent to support the child – they are deprived of family benefits at the place of domicile despite the fact that family benefits were granted in the competent state, but in fact are not earmarked for child support. Therefore it happens that Polish institutions continue to pay family benefits despite information about granting analogous benefits in another Member State.

There are also cases that the second parent applies for a family benefit despite the absence of contact with a child for a few or even several years. Information about such cases is forwarded to Poland using E411 form in order to find out if in the country of domicile benefits are paid or not. In such cases the competent institutions request forthwith feedback with confirmation that the benefit has been granted and request the release of granted benefits to the benefit of the person actually extending support to the child in Poland. However, in most cases such requests remain without any reply, and the only confirmation that benefits were granted there is the fact that the second parent commences the payment of alimony awarded after a couple of years. Under such circumstances in line with obtained information from the claimants, the family benefits granted are transferred on the account of alimony awarded, however, in most cases not in the full amount. In such cases the competent institution refuses to release benefits to the person actually extending support to the family members, on the grounds that such person extends support to family members by transferring the benefit to Poland, without verifying what is the purpose and what is the level of granted family benefits transferred.

A case that was commented in the Swedish newspapers concerned a father who is living and working in The Netherlands and his ex-wife and child live in Sweden. When the mother applied for family benefits in Sweden, she was referred to The Netherlands by the Swedish social insurance institution. The woman was angry and went to the newspapers. Also the Swedish Ministry of Social Affairs condemns this situation as unfair to the mother and her child.

According to Swedish legislation, a person is a family member as long as the persons are married or live together and not only when they have a child. But a child certainly always remains a family member, irrespective of divorce or custody. In this case the Swedish Insurance Office held that, as the parents do not live together, they do not belong to the same family, so they have to be regarded as two separate families. The child is the

beneficiary and is a family member of both families. But neither of these families has a work link with Sweden, as the father works in Holland and the mother lives but does not work in Sweden. So the Swedish insurance office referred the woman to the Dutch competent institution. It can be questioned if the Regulation was correctly applied here. Nevertheless, the problem was that the mother was left without any family support here. The Swedish office cannot force the woman to apply in The Netherlands, as it is the responsibility of the Swedish institution to contact the Dutch institution. Or is it rather a national problem?

2. Other issues

Under Article 86 of Regulation 1408/71, the application for a family benefit filed in a Member State which is not primarily competent is valid in the competent Member State provided a new application is filed by the person who is entitled to family benefits in the appropriate Member State. Such application has to be submitted within one year after the first application was refused. However, problems may arise if the right to family benefits is claimed by a person who is not considered by the competent Member State to be the person eligible for family benefits.

The question arose in the Slovak republic whether the responsibility for paying family benefits could be divided between Member States if the different benefits are directed towards different beneficiaries, e.g. a benefit of one Member State to the child and a benefit of another Member State to a parent.

In Poland the new family benefits scheme implemented in 2003 provides additionally for higher benefits for disabled children. Such benefits are also granted if a beneficiary resides in a Member State other than Poland. However this involves some difficulties with determination of the degree of disability. In principle the relevant state should use information provided by the state of residence. If the relevant state applies for such information, the institution in the country of residence should carry out medical examinations and administrative in accordance with any applicable legal regulations. In practice documents provided by other Member States are often incomplete and imprecise. This is mainly due to the fact that the degree of disability is perceived differently by the various regulations of individual Member States, and only in some exceptional situations, coordination with respect to the degree of disability takes place.

In the Netherlands another issue was mentioned relating to Regulation 1612/68. This concerns where there is an entitlement to bonuses for child care when working in or receiving benefits from another Member State. It suffices that one of the parents lives in the Netherlands to receive the bonus. This influences the payment of additional child care benefits from Germany for frontier workers. As this bonus falls under the coordination rules of Regulation 1408/71 and thus under the export regime of Article 10, this entails no advantage at all for the frontier worker NL-GER, as he sees his German additional child benefits reduced.

Although cooperation in Austria has improved enormously over the last few years, there still seems to be less exchange between institutions which grant family benefits than between social insurance institutions. Thus, the problems involved (finding out which benefits are granted in other states, most of all with respect to Article 76 of Regulation 1408/71, see below 2.a) still seem to be substantial, at least with some Member States.

In Poland different problems were mentioned. These problems pertained in the first place to the processing and filling out of forms of the E400 series (particularly the E411, i.e. a

request for information on entitlement to family benefits in the Member States of residence of the members of the family). Forms completed by institutions of other Member States sometimes lacked conformity on the formal side. Some Member States apply different (national) procedures. Some forms were empty, whereas others contained no address of the family members in Poland or no information as to where the form was to be filed. In addition, the forms are issued in a variety of national languages. Moreover, some forms were returned with an official annotation indicating that they should be translated. Occasionally, forms were lost. Dutch and Belgian institutions were reported to use no forms at all; they just send letters. As a result of these irregularities, citizens made mistakes or requests for supplementary data were needed. The procedure is lengthened and the payment delayed. The Social Security Coordination Department had adopted the policy not to accept non-conforming forms, that is to say forms that have no stamp, address or signature. The Department has also entered into contact with foreign institutions with which problems were encountered.

Another problem relates to the distribution of competencies between Polish institutions, which may lead to complications. The municipalities are competent for the payment of family benefits, whereas the decisions are taken by the regional social policy centres. A problem was reported with an Irish institution, which sends the Polish liaison body information regarding the entitlement of a given family to family benefits in Ireland. However, the Department is not in possession of the address of the family in Poland. Consequently, it is not possible for the Department to send this information to the competent regional social policy centre, which in turn cannot check with the municipality concerned.

In Slovakia it is mentioned that, with regard to the fact, that the legislation of some countries also recognises allowances for parents of children, who do not live in a common household with their children and these allowances are considered to be family allowances, in some cases a very bizarre situation may arise. In case of a divorced couple this situation can be relatively well handled, as the person taking care of children mostly knows where the place of residence of the other parent is. In case of so called single mothers often the only information of the other parent is indicated on the child's birth certificate, while such parents usually has no knowledge of the residence of the other parent and does not either know whether he is performing or not a gainful activity. The Slovak legislation regulating the area of state social support does not contain provisions on temporary award of allowances.

In Poland an important problem is caused by Member State not sending information confirming the granting of the entitlement to the payment of certain family benefits to persons working there. Their response when requested is often delayed. It is not rare that institutions do not respond at all and do not check the family situation of a person with regard to his/her family staying in Poland (using E 411 form) and just apply their legislation. This often leads to overlapping of benefits and accumulation of benefits. This may enable institutions to calculate the benefits for family members residing in Poland and may force them to try to get back the overpaid money from citizens or institutions.

An issue arises concerning access for persons living in the Republic of Ireland but working in Northern Ireland to the UK working tax credit (WTC). This is a benefit payable to persons who work at least 16 hours a week and are responsible for a child or young person or qualify for a disability element, are at a disadvantage when applying for a job due to disability and work at least 16 hours a week or are aged 25 years or over and work at least 30 hours a week or aged 50 or older and work at least 16 hours a week and qualify for 50 plus element of WTC and satisfy the means-test and are resident/present in the UK.

HM Revenue and Customs (which administers the scheme) do not consider WTC to be a family benefit and a claimant who lives in the Republic and works in Northern Ireland has only elements paid for him or her as a worker. No element is paid for a partner, children or disability element if associated with others and childcare costs are not taken into account (as the other members of the family are not present in the United Kingdom).

Further issues arise in relation to child tax credit. This is payable to a person who has responsibility for at least one child or young person, who is present/ordinarily resident in UK and satisfies a means-test. It is treated as a 'family benefit' under EU law. However, childcare is only payable if the children are cared for in the United Kingdom and the disability element is only payable for a child getting the UK DLA payment. There is no recognition of equivalent child care costs if incurred in the Republic of Ireland or entitlement to Domiciliary Care Allowance - a broadly similar benefit - as a route to qualifying for these elements.

Particular problems have been encountered in Poland during the implementation of Article 75 par. 2 of the Regulation 1408/71. Pursuant to the rule specified in par. 1 of the quoted regulation the family benefits are granted to the claimants pursuant to Article 73 by the competent institution of the Member State to which the hired worker or self-employed person reports to and in cases referred to in Article 74 of the Regulation, pursuant to the legislation applied by the competent institutions, regardless of the fact whether the natural or legal person stays in the territory of the competent state or in another Member State.

Nevertheless the family benefits are not earmarked to the support of family members by the person to whom the benefits should be granted and the competent institution pays benefits – pursuant to the application and via the institution at the place of domicile or another institution designated by the authorities of the Member State in the territory of which the claimant is domiciled – to a natural or legal person that in fact extends support to family members.

Given the absence of precise definition of statements used in the Article including „earmarked for support to family members” this provision has come across major implementation problems. The institutions of other Member States refuse to transfer benefits to the person who in fact incurs costs of support to an adolescent child when the second parent pays alimony awarded by a valid court decision. The competent institutions claim in such cases that the natural person – the hired worker pays to extend support to a child and therefore the hired worker is entitled to family benefits for this child.

It should be noted, however, that in many cases the benefits are paid on account of awarded alimony, which the competent institution fails to consider. In parallel in case of mother who does not perform occupational activities at the place of domicile pursuant to the „anticumulation” rules in the regulations including in particular Article 10 par. 1 letter a of the Regulation 574/72, the family benefits should be suspended and reduced to the level of benefits due in the competent State pursuant to Article 73 or 74 of the Regulation 1408/71. In such cases the actual situation of the family in the country of domicile worsens since in addition to awarded alimony that as such are independent from family benefits and that were awarded by the court of law and are paid by the second parent to support the child – they are deprived of family benefits at the place of domicile despite the fact that family benefits were granted in the competent state, but in fact are not earmarked for child support. Therefore it happens that Polish institutions continue to pay family benefits despite information about granting analogous benefits in another Member State.

There are also cases that the second parent applies for a family benefit despite the absence of contact with a child for a few or even several years. Information about such cases is forwarded to Poland using E411 form in order to find out if in the country of domicile benefits are paid or not. In such cases the competent institutions request forthwith feedback with confirmation that the benefit has been granted and request the release of granted benefits to the benefit of the person actually extending support to the child in Poland. However, in most cases such requests remain without any reply, and the only confirmation that benefits were granted there is the fact that the second parent commences the payment of alimony awarded after a couple of years. Under such circumstances in line with obtained information from the claimants, the granted family benefits are transferred on the account of alimony awarded, however, in most cases not in the full amount. In such cases the competent institution on the grounds of internal regulations refuses to release benefits to the person actually extending support to the family members, on the grounds that such person extends support to family members by transferring the benefit to Poland, without verifying what is the purpose and what is the level of granted family benefits transferred.

To date, probably due to the low level of application of Article 75 par. 2 by other Member States, the European Court of Justice has not made any rulings to this extent.

In Portugal the Decree-Law 308-A/2007, of September 5th 2007 establishes two new measures with a view to increasing the birth rate. These are:

Establishment of a prenatal family allowance to women after the 13th week of gestation, whose amount is equal the family allowance for children and young people with an age up to 12 months; an increase to the amount of family allowance for children and young people to families who have already one child; the birth of a second child implies the payment in double of the regular amount of family allowance for each child born after the first; the birth or integration of a third child in the family implies the payment of an increasing amount corresponding to three times the amount of the regular amount for a single child. In both situations the payment in these conditions will last for all children between 12 and 36 months. These measures will enter into force on the 1st October 2007, except prenatal allowance, which will be granted as from 1st September 2007.

I. Benefits for dependent children of pensioners and for orphans

Although this issue does not appear to lead to specific problems in the Member States as far as the National Reports are concerned, in the past it has spawned considerable case law from the European Court of Justice

CHAPTER III:

The EU Regulation and international agreements

Most of the bilateral agreements concluded by the new Member States are now replaced by the EU Regulations.

An important problem arises because of the fact that Lithuania, Latvia and Estonia, before regaining independence, were part of the Soviet Union. After the restoration of independence all three Baltic states developed new social protection legislation, according to which the periods of a person's work in the Soviet Union before restoration of independence are taken into account under certain conditions.

In order to avoid overlapping of Soviet periods of work (insurance), it was decided in the bilateral agreements that responsibility for a person's Soviet period is taken by the country where this person worked or resided at the moment the bilateral agreement came into effect.

This rule was not included Annex III of Regulation 1408/71. As a result it may occur that a person with insurance periods earned in two or all three Baltic States since 1991, will also be granted insurance periods two or three times. This problem is discussed with Latvia and Estonia in order to prevent the overlapping of periods of insurance acquired on the territory of the former Soviet Union. This problem is discussed with Latvia and Estonia in order to prepare relevant agreement to avoid possible overlapping of periods.

In 2007 the bilateral agreement with Estonia was signed to resolve the problem. According to this agreement, Soviet periods of work (insurance) are taken into account by the State in which territory a person has longer insurance record (years earned after regaining of independency are compared). If this insurance record is the same, then Soviet periods are taken by the State which legislation was most recently applied for the person.

In Cyprus a problem arose with regard to bilateral agreements on social security with Greece, Austria and the Netherlands which contain provisions on the aggregation of insurance periods considered more favourable than those provided in Article 45 of the coordination regulation. At present it is reported that the competent Cypriot authorities consider that the coordination regulation should be applied in any case, i.e. even if the provisions of a bilateral agreement may be more favourable to the insured person from the point of view of the calculation of pension rights.

Since Hungary's accession to the European Union some cases based on bilateral agreements are still in progress due the longer time it takes to arrange international cases.

There are several cases on second instance in which the pension was awarded pursuant to a bilateral agreement and periods of service abroad are disputed by the client. Unfortunately, in these cases bilateral agreement forms are requested in vain, E forms are sent in spite of the fact that different codes are used for certifying periods of insurance by the two forms.

Also in Hungary, in the case of agreements concluded with a third State it is questionable to what extent they should be applied to persons who live in the territory of the given Member State but who have eligibility based on pension paid in another Member State or on the insurance of an insured persons living in another Member State. The County Health Insurance Fund competent according to residence issues the European Health Insurance Card to an Austrian pensioner living in Hungary, which entitles him or her to emergency care in Croatia at the expense of the Hungarian health insurance. However, it is not clear whether the Austrian pensioner has the right to this pursuant to the Regulation, and whether the lump-sum payment pursuant to Article 95 of Regulation (EEC) No. 574/72 between Austria and Hungary may include the costs of the benefits provided in Croatia.

A particular issue was mentioned on the Czech-Slovak Convention on social security, which was concluded at the time the Czechoslovak Federal Republic ceased to exist. The Convention was intended to regulate the entitlements from citizens of the two countries in the field of social security. The Convention makes provision for the future relations between the two independent States on the basis of coordination. In the Convention, the parties also agreed on how to treat periods of insurance acquired prior to the separation, that is to say whether these periods are regarded as being completed in the Czech or in the Slovak Republic. In order to determine this, account is taken of the location of the registered office, either in the Czech or in the Slovak Republic, of the person's employer as of 31 December 1992, regardless of whether the person worked in a branch in the Slovak or the Czech Republic respectively. If the person worked for an employer having his registered office in Slovakia on the decisive date, all the periods already completed by that person are considered to be completed in the Slovak Republic, whose institutions are competent for the calculation and the payment of the old-age pension, even if he or she had worked for 20 years in the (Czech part of the) Federal Republic. The application of this criterion could be a bitter pill for many insured persons to swallow, notably because of the less favourable economic development of the Slovak Republic, which had a negative impact on the level of old-age pensions. Article 20 of the Convention has been challenged by insured persons receiving Slovak pensions. The Czech Constitutional Court held in their favour, evoking the principle of equality of treatment and obliged the Czech authorities to top-up these persons' pensions to the Czech pension level. The Supreme Administrative Court, on its part, has taken a different view. Faced with similar cases, it did not discern any element of discrimination. According to the Supreme Administrative Court, the Convention established a rational criterion, which was not arbitrary. The case law of the Constitutional Court was considered as very problematic, especially in the light of the fact that the Czech Republic has recently joined the EU. As the opinions of two mentioned courts are contradictory, the Grand Senate of the Constitutional Court will probably consider the issue again in near future to come to final conclusion.

It has not yet been necessary to use Annex III of the Regulation. So far, the judgements were handed down in cases where both the claim and the disputed decision were made prior to EU membership. However, in the very near future, cases will have to be handled (the bilateral agreement is mentioned in Annex III). Then, the advantage the Czech state would confer on Czech nationals – the topping-up of their Slovak pensions to the Czech level – would also have to be conferred on other Member State nationals. It is feared that in such a scenario, the Czech Republic will have to bear all the financial consequences of the division by itself. The final decision is with the Constitutional Court.

Concerning mutual agreements, a New Nordic Convention came into force in September 2004 and the Implementation agreement came into force in September 2005. The new convention aims at creating a strong link to the Regulation. The Convention includes a specific provision on the determination of the applicable legislation of family members of posted workers. The Nordic countries have considered that there is a need to adopt a

similar provision at European level. The question whether the family members can be insured in the country where they reside with the posted worker or are they entitled to benefits according to the national legislation which is applied to the posted worker is experienced as unclear. The convention is important for third country nationals. Denmark does not apply the Nordic convention to third country nationals. Norway and Iceland apply the Nordic convention to third country nationals even though they do not yet apply Regulation 1408/71 to third country nationals.

During year 2007 the Nordic countries have continued their work under the Nordic Council of Ministers to overcome barriers for cross-boarder movement between the countries. A Nordic brochure containing basic information for persons moving between Nordic countries has been made and a Nordic Social Security internet-portal is under preparation. The plan is that this portal would be in use in year 2008. A Social Security working group working under the Nordic Council of Ministers has tackled for example the special problems in relation to the mobility of students between the Nordic Countries.

A new challenge is also posed by the launch of co-ordination of social security systems between Polish and Swiss insurance institutions. This is due to the fact that by virtue of the Protocol to the Agreement on Free Movement of People concluded by the European Community, its Member States and Switzerland (hereinafter referred to as „the Agreement”), in force from 1.04.2006, the scope of application of the Agreement was widened to cover relations between Switzerland and 10 „new” Member States including Poland. Additional challenge appears in relation to the accession of two ‘new’ Member States, as it will require a big load of work on the part of institutions implementing the provisions of social security coordination.

According to the Greek point of view EC Regulation 1612/68 should be regarded as a legal instrument dealing with free movement of EU workers. On the other hand, EC Regulation 1408/71 is to be considered as the main tool promoting the coordination of national social security schemes on the basis of general principles like non-discrimination on the grounds of nationality, the exportability of acquired rights and the aggregation of entitlements to social security benefits. The basic relationship between these two instruments has to be found in the principle of equal treatment. This is seen in a number of ECJ cases. The most typical examples are cases dealing with fiscal and social advantages, covered by Article 7 par.2 as social security issues are evaluated according to the Regulation 1408/71, while broader social policy issues are examined according to EC Regulation 1612/68.

As far as Greece is concerned, the ECJ’s case law applied Regulation 1612/68 when dealing with issues of equal access to public enterprises, relating to EU nationals, who wanted to be employed by such public sector enterprises, thus applying Article 1 of the Regulation. (Cases 32/75, 237/78, dealt with provisions relating to social advantages and scholarships) in so far as the non-granting of “social advantages” would be an obstacle to free movement, as the person who has used this possibility may not be in a disadvantageous position (Cases C- 349/87, C-10/90, C-204/90) . In case C-187/96, Commission versus Greece, the European Court of Justice considered that Article 16 par.1 of the Law 1505/1984, as amended, is contrary to Article 48 of the European Treaty and 7 par.1 of the Regulation 1612/68.

According to those provisions, the time a person was employed abroad in a public service should not be taken into account to establish a right to additional wages in the form of a special allowance. Article 7 of the Regulation has spawned very little case law in the national courts. Article 2 of the Regulation 1612/68 was used to argue against the possibility of prohibiting debtors of the state or legal entities of public law from leaving the country. It has been argued that the legislation granting benefits to large families on

the grounds of law 1892/90 and 2163/93, are compatible with EU law. The decision of the Administrative Court of First Instance of Athens (466/1999) invoked Article 7 of Regulation 1612/68 in case related to the recognition of previous service of a university teacher in order to be entitled to additional wages, in the form of a special allowance. It must be clarified that such an allowance is not a social security benefit but part of the wages paid by the employer, in this case an entity of public law, to its active personnel. The court accepted that the time during which the person was employed abroad must be considered as a period of active service and taken into account for the establishment of the right to additional payment on the basis of Article 49 of the EU Treaty and Article 7 of Regulation 1612/68, on the basis of equal treatment. In this respect, the court followed the decision of the European Court of Justice in case C-187/1996.

In Ireland, Regulation 1612 may be of relevance in relation to the application of the habitual residence test (see I.C.c) based on the ECJ decision in Case C-138/02 Collins (see, for example, the recent decision by an appeals officer (Social Welfare Appeals Office Report 2006) that the habitual residence test did not apply to a Polish national who had worked in Ireland on the basis of Regulation 1612). Regulation 1612 may also be relevant in other areas.

In Germany it is asked whether the competent social security authorities are required, pursuant to their Community obligations under Articles 12 and 39 EC, to take into account, for the purpose of entitlement to social security benefits, periods of insurance completed in non-Member States by a national of another Member State in circumstances where, under identical conditions of contribution, those competent authorities will take into account such periods where they have been completed by nationals of the first Member State pursuant to a bilateral international convention concluded between that State and the non-Member State.

As in Case Grana Navoa the European Court of Justice ruled also in Case Gottardo that a convention concluded between a single Member State and one or more non-Member States does not come within the concept of legislation, as that term is used in Regulation 1408/71.

However, when giving effect to commitments assumed under such international agreements with third countries, Member States are required, subject to the provision of Article 307 EC, to comply with the obligations that Community law imposes on them. It follows from the foregoing that, when a Member State concludes a bilateral convention on social security with a non-Member-State which provides for account to be taken of periods of insurance completed in that third country for acquisition of entitlement to old-age benefits, the fundamental principle of equal treatment requires that that Member State grant nationals of other Member States the same advantages as those which its own nationals enjoy under that convention unless it can provide objective justification for refusing to do so.

In other words, if, as regards a social security advantage, a national of a Member State can benefit from a right under a convention entered into between two Member States, and if that convention is more favourable to her or him than a Community regulation which became applicable subsequently, the right derived under the convention is acquired once and for all.

Accordingly, with regard to a specific benefit, there are periods of insurance or employment which form the basis of the worker's rights were completed, at least partially, during a period when only the bilateral convention was applicable, the worker's overall situation must be assessed by reference to the provisions of that convention, if it is favourable to her or him.