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**General principles of coordination of social security:  
ruminating ad infinitum?**

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# 1 Introductory remarks

The European Union is rarely described as very active in the field of social policy. On the contrary, the last two decades the Community has been criticized for the pressure the goal of further economic integration puts on national welfare systems, while it lacks the necessary competences to compensate this by own initiatives concerning the provision of welfare<sup>1</sup>. Although its competences in social policy have modestly and strategically grown, it is still highly connected to its economic background and the realization of an internal market. Even the relatively recent judicial developments with regard to European citizenship, creating integration-dependent social rights for economically inactive persons, are not unanimously welcomed as forerunners of a more solidarity-based free movement due to fears for benefit tourism<sup>2</sup>. Whether it is appropriate or not, this perception of the EU contrasts sharply with the spirit and aims of the piece of legislation under analysis in this contribution. Even though it was also conceived solely with the purpose of removing barriers for the fundamental economic freedom of the free movement of workers, its social protection dimension can hardly be overestimated. The importance of the instrument is patently obvious when one observes that it was one of the first initiatives ever taken in the framework of the European Economic Community. Regulation 3 of 1958<sup>3</sup> had to ensure that migrant workers would not lose out on social security rights when moving throughout the territory of the European Union for professional reasons<sup>4</sup>. It is evident that if migration would do harm to, for instance, the pension rights of a worker, it would be difficult to motivate him to cross the borders. The same goes if he would lose his health care provision or cost coverage in the country where he

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<sup>1</sup> M. DOUGAN, "The Spatial Restructuring of National Welfare States within the European Union: the Contribution of Union Citizenship and the Relevance of the Treaty of Lisbon", in R. NIELSEN, U. NEERGAARD en L. ROSEBERRY (ed.), *Integrating Welfare Functions into EU Law: from Rome to Lisbon*, Copenhagen, DJOF, 2009, 189.

<sup>2</sup> K. HAILBRONNER, "Union Citizenship and Access to Social Benefits", *C.M.L. Rev.* 2005, 42, (1245) 1245-1267.

<sup>3</sup> Regulation 3/58 of 25 September 1958 concerning the social security of migrant workers, *OJL* 30/561 of 16 December 1958.

<sup>4</sup> This should not be misunderstood and the coordination system should not be regarded as an instrument only dealing with social security situations related to economic activity. A wide variety of cross-border social security situations are touched by the coordination system. It not only interferes in typical professional cross-border affairs, such as the calculation of pension benefits for persons with an international career or the right to search for work in the EU while retaining unemployment benefits. The coordination system also comes to light in daily life situations, e.g. for the guarantee of health care cover when going to a doctor or hospital during a holiday trip.

resides, due to his employment abroad. That is why the Community had to provide this instrument for “social security plumbing”, a task that was taken over from Regulation 3/58 (and its implementing Regulation 4/58<sup>5</sup>) by the current Regulation for social security coordination, Regulation 1408/71<sup>6</sup> (and its implementing Regulation 574/72<sup>7</sup>).

Plumbing in this context stands for “making the pieces fit” for the benefit of the free movement of persons. The coordination Regulation in fact guarantees that, in cross-border situations, the confluence of different national social security systems does not end up in the loss of rights or, conversely, in an abundance of rights. That is the essence of the technique of coordination, which makes it very different from harmonization. For the latter, EU competence and political will were and are still absent<sup>8</sup>. The national social security legislations, as to the conditions for affiliation and entitlement, in principle remain untouched by this supranational legislation. The not necessarily compatible national schemes are connected through a complex set of common rules focusing on the prohibition of discrimination, the determination of the applicable social security legislation, the preservation of the acquisition of rights and the guarantee of safeguarding acquired rights.

Although the current Regulation 1408/71 is still performing well as a foundation of the free movement of persons in the EU, it is considered as outdated and too complex. Where it still applies today, a process of modernization and simplification has started not later than 1992, when the Edinburgh Council already acknowledged the need for review of the coordination system. But it was only in 1998 that the European Commission came with a proposal for a new Regulation<sup>9</sup>. Discussed and blocked during the first four presidencies, it was under the 2001 Belgian Presidency of the

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<sup>5</sup> Regulation 4/58 of 3 December 1958 fixing the procedure for implementing and completing the provisions of Regulation N° 3 concerning the social security of migrant workers, *OJL* 30/579 of 16 December 1958.

<sup>6</sup> Regulation 1408/71 of 14 June 1971, *OJL* 149/2 of 5 July 1971, consolidated version 02/01/2007.

<sup>7</sup> The Implementing Regulation is the bible for the administrative side of the coordination system. It identifies the competent institutions in each Member State, the documents to be produced and the formalities to be completed in order to receive benefits. It sets out the procedures for administrative and medical checks and the reimbursement conditions for benefits provided by an institution in one Member State on behalf of an institution in another Member State.

<sup>8</sup> Certainly after the most recent enlargement this is all the more the case.

<sup>9</sup> Proposal for a Council Regulation (EC) on coordination of social security systems, Brussels, 1998, COM(1998) 779 final.

EU that a breakthrough was realized by setting several ‘parameters’ for the general and specific reforms. The legislative procedure gained momentum and in the end speeded up to make the deadline for reaching an agreement on the text. The operation succeeded, as the then 15 Member States wanted to prevent that this difficult legislative exercise would have to be performed after the 1<sup>st</sup> May 2004. After that date, also Malta, Cyprus and the new Central- and Eastern European Member States would have had their say and it was predicted that this would have aggravated the reform process too much. So in May 2004, the new Regulation 883/2004 already “entered into force”, but will only “be applicable” from the day of the entry into force of a new Implementing Regulation<sup>10</sup>.

The new Regulation 883/2004<sup>11</sup> will most likely become applicable in 2010, the year when the Implementing Regulation will most likely enter into force. What is not likely, but already certain since 29<sup>th</sup> April 2004, is that a new set of rules will govern the coordination of the social security legislations of the Member States. These rules “fall within the framework of free movement of persons and should contribute towards improving their standard of living and conditions of employment”<sup>12</sup> and will replace the rules of the current Regulation 1408/71. The structure of the rules in the new Regulation has remained the same to a large extent, containing horizontally applicable rules, specific coordination chapters for the different social security benefits covered and, at the back, administrative, financial and final provisions. But next to ‘the rules’, this Regulation, like its predecessor, is also featured by a handful of “general principles” that are crucial to social security coordination.

Although there is no such thing as a fixed and exhaustive list of principles of social security coordination, most authors<sup>13</sup> agree that a common

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<sup>10</sup> This rather unusual legal situation has been put to the test by a French Court in the Nemeč case. The French judge asked the Court of Justice whether the alleged infringement was an infringement of the new Regulation 883/2004. A very logical question, as it was unclear what the legal value was of the “already entered into force but not yet applicable Regulation”. The Court however confirmed that the instrument is to apply only from the date of entry into force of the Implementing Regulation. “Since no Regulation implementing Regulation No 883/2004 has yet been adopted, it necessarily follows that the provisions of Regulation No 1408/71 remain applicable”, was the Court’s way of saying that no legal consequences could be drawn from the new Regulation in the absence of implementing provisions. Case [ECJ] C-205/05 Nemeč [2006] ECR-10745.

<sup>11</sup> Regulation 883/2004 of 29 April 2004, OJL 166/1 of 30 April 2004.

<sup>12</sup> Recital 1 of the Preamble of Regulation 883/2004 of 29 April 2004, OJL 166/1 of 30 April 2004.

<sup>13</sup> E.g. H. Verschueren, “The relationship between Regulation (EEC) 1612/68 and Regulation (EEC) 1408/71 analysed through ECJ case law on frontier workers”, *E.J.S.S.* 2004, Vol. 6,

denominator can be found in: equal treatment (also ‘prohibition of nationality discrimination’), the aggregation of periods (or ‘tantalization of periods’), the exportability of benefits (‘waiving of residence clauses’) and the determination of the legislation applicable. In this contribution, the personal and material scope as well as the principle of good administration are added to this list of general coordination principles. If Regulation 1408/71 should be regarded as a central organ of the free movement of persons in the EU, these principles should be considered as the arteries, because they play an important role as the basis for the whole system of coordination of social security. That one cannot get around them when discussing social security coordination, is clearly shown by the fact that they always appear in whatever stage of debate with relation to coordination of social security. Firstly, they have been ingrained in the coordination system since its inception and have never been substantially altered ever since. Secondly, they were the basis for the first talks on the reform of the Regulation<sup>14</sup>. Thirdly, they reappeared in the “parameters for reform”, the new way forward presented during the 2001 Belgian Presidency<sup>15</sup>. Fourthly, already partially unveiling the conclusion of this paper, they have remained practically unchanged in the new Regulation. Finally and in the concrete, they show their central role to the system as they are in actual fact crucial for the “level of coordination” of social security benefits. Indeed, next to the fully coordinated benefits, other categories are subject to a lower level of coordination due to the exclusion of a coordination principle. Examples of this are the derogations to the export of benefits (unemployment benefits, special non-contributory benefits), to the aggregation of periods (pre-retirement benefits) and to the general rule of the determination of the applicable legislation (posting of workers). It is not a coincidence that these exceptions to the general principles are often the ‘hot potatoes’ in the field of European social security coordination.

Social security coordination law is a field that is continuously challenged by a plethora of factors. First and foremost, the coordination rules are confronted with the extremely dynamic and sometimes volatile nature of national social security legislation. The latter has to respond to different legal

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8; D. MARTINSEN, "Social Security Regulation in the EU: The De-Territorialization of Welfare", in G. DE BURCA (ed.), *EU Law and the Welfare State*, Oxford, Oxford University Press, 2005, 90 and V. Paskalia, *Free Movement, Social Security and Gender in the EU*, Oxford, Hart Publishing, 2007, 58.

<sup>14</sup> A. PERNOT, “Le remplacement du règlement 1408/71 par le règlement 883/2004 relatif à la coordination des régimes de sécurité sociale”, *R.B.S.S.* 2004, 4, 648.

<sup>15</sup> F. PENNINGNS, *Introduction to European Social Security Law*, Antwerp, Intersentia, 2003, 28.

and societal developments itself and this unavoidably has repercussions for the coordination system too. To state the most obvious examples, some demographic and societal changes such as the ageing of the population, the increase in atypical family situations and the rapidly changing technological environment all had and still have apparent effects on the way social security systems are connectable in the EU. These three examples lie at the basis of, respectively, the emergence of long-term care insurance, frictions between national systems with relation to divorced couples or same-sex marriages and the increase in new medical treatments. Next to this, the coordination system has had to deal with an ever expanding personal scope, an expanding number of Member States and types of social security systems, new types of migration and new patterns of work. The provocations to the long-standing coordination system are however not only external, as the ever ongoing need for adaptation also finds its causes within the Community legal framework. Ever since their inception, the case law of the European Court of Justice has always played a decisive role in the evolution of the coordination rules. Moreover, the pressure from this side has had a dominant role in the recent debate on social security coordination, as the application of primary Community law to standard cross-border social security situations leads to controversial solutions. The application of the free movement of services to health care is probably the most known example, but recent decisions regarding the movement and residence rights of European citizens have also been followed with Argus-eyes by European social security lawyers and practitioners.

This analysis should enable to draw some conclusions with respect to the success of the modernization and simplification exercise and to gain an insight on whether the contemporary challenges for social security coordination have actually been met in this modernization and simplification reform, specifically from the perspective of the general principles of social security coordination.

## **2 The general principles of coordination in Regulation 883/2004**

### ***2.1 A stronger principle of good administration***

Alongside the other main and well known principles of the coordination of social security, the new Regulation has brought an already existing principle to the forefront. The innovative character of this principle is however relative,

as it can be regarded as the confirmation and the first clear codification of a set of indispensable rules for the good functioning of the coordination system. Already long acknowledged by everyone dealing with the coordination of social security as of paramount importance for the smooth implementation of the rules, “good administration and cooperation” has clearly been vested with a higher status in the future coordination system. There is no disguising the fact that the cooperation and communication between the competent social security institutions is in effect the fundament and ‘conditio sine qua non’ for the other principles of coordination, the latter being impossible to operate without the former. The practical application of the principles of equal treatment, the aggregation of periods, the exportation of benefits or of the applicable legislation would be dead letter without the intervention of the national administrations of the Member States. The amount of E-forms<sup>16</sup> and the complexity of the system for their exchange are the ultimate proof of this evident truth. One could even claim that the search for the most efficient way of administrating this complex set of rules, in which the current Implementing Regulation 574/72 plays an important role, might be of greater importance than changing the legal content of the main Regulation<sup>17</sup>.

The principle of good administration and cooperation is already known under the current system of Regulation 1408/71. Two articles on “cooperation between competent authorities” and on “relations between the institutions and the persons covered by this Regulation” already comprise the rules to make sure that the administrative side of coordination is dealt with as efficiently as possible, but they are certainly not the most known or debated provisions of the current Regulation. These Articles provide for communication of relevant information between the authorities, good administrative assistance, direct communication between the authorities and with insured persons, the prohibition of refusal of claims or documents based on the language, the mutual information duty between the insured persons and the competent authorities and the obligation for the latter to provide certain information “within a reasonable period”. In practice, these

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<sup>16</sup> About 130 different E-forms are used by the competent social security institutions to exchange the information needed for the implementation of the coordination rules. E.g. an E106 is a certificate of entitlement to sickness and maternity insurance benefits in kind for persons residing in a country other than the competent country, an E303 is a certificate concerning the retention of the right to unemployment benefits.

<sup>17</sup> The increasing attention for the smooth functioning of the coordination system from an administrative point of view, is well illustrated by the “Conference on Strengthening the Cooperation between Member States in the field of Social Security Coordination”, hosted by the French Presidency of the EU in Paris on 17-18 November 2008.

rules have never worked out as the legislator had wanted it while drafting the provisions. The E-form information exchange, although of course extremely valuable in general, often malfunctions and the main reoccurring complaints in this field relate to wrongly, ambiguously or almost not filled in forms as well as to the immanent problem of delays in the receipt of information. It is obvious that these problems, highly practical and not legal-theoretical as they may be, can have a grave impact on the enforcement of the rights of the beneficiaries of social security benefits.

The new 883/2004-article on “good cooperation” is not more than a blend of the 1408/71-articles mentioned above, wherefrom certain provisions on personal data protection were extracted and placed in a separate article. All the duties with relation to good communication between the institutions and their obligation to act within a reasonable timeframe were already incorporated in the current Regulation. However, the reinforcement of the good administration of the coordination system must not be sought in the text of Regulation 883/2004. It is rather the introduction of the proposal for a new Implementing Regulation that has really lived up to the expectations on a new perspective with regard to administrative cooperation. Of course, the new Implementing Regulation in itself is an instrument for facilitating the procedures and for reducing the time needed for institutions in the various branches of social security to respond and to process cross-border cases. In addition however, this implementing instrument draws all the appropriate conclusions from the closer cooperation between the various stakeholders referred to in Regulation 883/2004 and was largely enriched by several innovations, drawn from the case law of the European Court of Justice and from other lessons from the past. It contains the scope and rules for the exchanges between the institutions (data sharing, resubmission to the designated institution, data transfer modes) on the one hand and between the beneficiaries and the institutions (information sharing, data access, remedies and procedure, ...) on the other. These general rules on the inter-institutional and customer relationships for competent institutions were supplemented by new rules on the provisional application of legislation, the provisional payment of benefits and on the obligation to provisional award. In the financial provisions, with relation to the settlements between the Member States, strict deadlines have been introduced as to the introduction of the claims, the resolution of disputes and the payments of reimbursements between institutions. Also throughout the provisions in the specific coordination regimes for the different social security benefits, an important emphasis was put on better information gathering and



distribution. Each of these rules clearly finds its basis in the principle of good administration and is obviously intended to reduce the impact of administrative complications on the enforcement of the rights of the beneficiaries.

Anyhow, those provisions somewhat turn pale in the light of what could be called the ‘magnum opus’ of the administrative simplification project resulting from the entry into force of Regulation 883/2004: the electronic exchange of data. It is built in the coordination rules by a new provision in Regulation 883/2004, stating that “Member States shall progressively use new technologies for the exchange, access and processing of the data required to apply this Regulation and the Implementing Regulation”. Electronic exchange of data between institutions has been deemed essential in facilitating the transfer of the information needed for coordinating and in particular ascertaining and calculating the rights of insured persons. To put it simple, this means that the E-forms for the exchange of information between the competent authorities will have to make space for electronic data processing. In this field, at the time of writing intensive preparatory works are ongoing. To get a clear picture of the needs, the data to be exchanged, the institutions involved, etc ..., different Ad Hoc Groups were established and a lot of effort has already been put in the preparation of the national and European architectures, which have to ensure that the information exchange becomes operational. The end result should be a quicker and more efficient exchange system, with more accurate data and fewer transposing errors. It needs not to be explained that, although this unveils more technical and practical than legal or political discussions, this will be of major importance for the functioning of the coordination system and hence for the free movement of persons in practice<sup>18</sup>.

## ***2.2 A would-be principle: the scope of the Regulation***

Although one cannot call it categorically a general principle of coordination, the scope of the Regulation has changed so fundamentally throughout its years of existence and was always food for discussion, that the consideration of it as a general principle of coordination can be justified. Especially the personal scope has undergone many changes since the system’s inception.

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<sup>18</sup> For more information on the EESSI (Electronic Exchange of Social Security Information) Project, see <http://ec.europa.eu/idabc/en/document/7189/> (last consulted on 12 April 2009).

The growing influence of European citizenship<sup>19</sup> since its introduction in the Maastricht Treaty announced a further widening. The material scope, copying the traditional social security risks from ILO Convention No. 102 of 1952, has always been static. The increasing pressure of the case law of the Court of Justice in several fields and the dynamism of the national social security legislations also made the hopes run high with regard to the modernization of the material scope of the Regulation. The “new” material scope certainly left several questions open, but also the widening of the personal scope should not be overestimated in comparison with the situation under Regulation 1408/71.

### **2.2.1 Personal scope**

The scope *ratione personae* of Regulation 1408/71 has always further evolved to comprise ever more insured persons. Started as the instrument to remove social security related barriers to the free movement of workers on the basis of Article 42 EC, it was initially – just like its predecessor Regulation 3/58 – directed at workers (but also at stateless persons and refugees) and their family members and survivors. Here, the term ‘worker’ should however not be confused with its equivalent in Regulation 1612/68, as the former concept of workers is much broader than the latter<sup>20</sup>. That taken as a starting point, the personal scope was extended to self-employed persons, civil servants and students through several modification Regulations. The scope of the Regulation does however not only cover economically active people (workers, self-employed, civil servants) but also economically inactive people such as pensioners, unemployed persons,

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<sup>19</sup> See e.g. F.G. JACOBS, “Citizenship of the European Union – A Legal Analysis”, *E.L.J.* (2007) 591-610 and S. GUIBBONI, “Free movement of Persons and European Solidarity”, *E.L.J.* (2007) 360-379.

<sup>20</sup> A worker in Regulation 1612/68 is the person that fulfils the criteria observed to be regarded as a worker according to Article 39 EC, i.e. being in an employment relationship. The essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration. Case [ECJ] C-66/85 Lawrie-Blum [1986] ECR-2121. However, the end of the employment relationship does not necessarily end the status of worker. Case [ECJ] C-85/96 Martinez Sala [1998] ECR-2691. In Regulation 1408/71 the concepts *employed person* and *self-employed person* mean respectively any person who is insured, compulsorily or on an optional continued basis, for one or more of the contingencies covered by the branches of a social security scheme for employed or self-employed persons or by a special scheme for civil servants or any person who is compulsorily insured for one or more of the contingencies covered by the branches of social security dealt with in this Regulation, under a social security dealt with in this Regulation, under a social security scheme for all residents or for the whole working population [...]”. Paraphrasing this very roughly, it can be observed that almost every person who is in some way covered by (or for a branch of) a national statutory scheme of social security is covered by the Regulation.

incapacitated persons, students and family members of covered persons. The latter category can, admittedly, also be regarded respectively as ex-workers, workers-to-be and persons deriving rights from an economic activity of a family member, which means that the economic link is always present. Other conditions for the Regulation to apply resulted in more drastic exclusions. As the Regulation, apart from the category of stateless persons, refugees and family members, could only be applied to nationals of the Member States in a situation characterized by a cross-border element, third country nationals in identical cross-border situations were nonetheless excluded. This changed with the adoption of Regulation 859/2003<sup>21</sup>, which made Regulation 1408/71 applicable to persons not having the nationality of a Member State who are not already covered by the Regulation solely on the ground of their nationality and who are “legally resident in the territory of a Member State and are in a situation which is not confined in all respects within a single Member State”.

The new Regulation 883/2004 somewhat changes the personal scope again. “Somewhat” should be stressed in this context, as the impact of this particular modification of the coordination system will not alter the coordination system dramatically. The Regulation shall apply to *“nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors”*.

It immediately strikes the reader that all references to gainful activities have disappeared in the provision concerning the personal scope. The Regulation is now oriented towards “all (have been-) insured European citizens”. Naturally, the removal of references to economic activity and the new orientation towards “nationals of the Member States who are or have been subject to the legislation of one or more Member States” is loaded with symbolism. It is the explicit expression of the coordination system’s adaptation to the developments in the field of European citizenship, promoting the unhindered free movement of any EU citizen, regardless of engagement in an economic activity. The change represents indeed an eradication of the Regulation from its historical economic grounds in favor of the inclusion of non-active persons. The actual and tangible effect of the new personal scope of the system should nonetheless be put into perspective. Regulation 1408/71 already has a broadly formulated personal scope<sup>22</sup> and, now already, a lot of EU citizens are already taken under the Regulation’s

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<sup>21</sup> Regulation 859/2003 of 14 May 2003, OJ L 38/1 of 12 February 1999.

<sup>22</sup> H. VERSCHUEREN, “European (Internal) Migration Law as an Instrument for Defining the Boundaries of National Solidarity Systems”, *E.J.M.L.* 2007, 9, (307) 313.

wings due to their status as a worker, pensioner, unemployed person, disabled person, self-employed person, civil servant, student, stateless person, refugee, survivor, family member, ...<sup>23</sup> One could even say that Member State nationals and legally resident third country nationals in a cross-border situation in the EU have to do their awful best not to fall under the Regulation. Thus, though certainly to be regarded as a step forward in terms of legal certainty and transparency, the new personal scope of the coordination system shall not have remarkable consequences quantitatively.

Anyhow, it also needs to be stressed that this change will contribute to the reform goal of simplification, as the removal of references to workers and self-employed persons immediately also reduced the definition problems complicating the coordination system. As to the application of the Regulation *ratione personae*, no definition of 'worker' or 'self-employed' is needed anymore. These concepts have proven to be difficult to interpret, as it was the national definition - sometimes scrutinized by European law<sup>24</sup> - that was taken over for the implementation of the Regulation. Complicated annexes to the Regulation with specifications with regard to these definitions will also be avoided this way<sup>25</sup>. But for the sake of completeness, one has to mention that this simplification is somehow only a Pyrrhus-victory, as a definition of employed and self-employed persons is still needed for the implementation of the coordination rules, for instance for the rules on applicable legislation that differ according to the capacity of employed, self-employed (e.g. for the special rules in case a person is simultaneously employed and self-employed) or economically non-active person (country of residence).

Where the new personal scope of the Regulation certainly strengthens the concept of European citizenship and promotes social inclusion by integrating explicitly all non-active EU citizens, the nationality requirement was maintained and consequently also the non-inclusion of legally resident third country nationals. The initial proposal for a new coordination Regulation from the European Commission did not refer to nationality at all, but the condition to be a Member State national was re-entered in the text by a European Parliament amendment<sup>26</sup> and accepted because Regulation

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<sup>23</sup> The scope was also interpreted very broadly by the European Court of Justice, as e.g. a missionary who used gifts from to provide his living, was qualified as a self-employed person by the ECJ. Case [ECJ] C-300/84 Van Roosmalen [1986] ECR-3097.

<sup>24</sup> Case [ECJ] C-300/84 Van Roosmalen [1986] ECR-3097.

<sup>25</sup> See the very detailed and mind-puzzling provisions of Annex I of Regulation 1408/71 "Persons covered by the Regulation".

<sup>26</sup> European Parliament, Report on the proposal for a European Parliament and Council Regulation on coordination of social security systems, 17 June 2003, A5-0226/2003 FINAL.

859/2003 was in the pipeline at that time. This means that, for third country nationals' entry into the new coordination system of Regulation 883/2004, the same tactics had to be applied as the one used under Regulation 1408/71. An 859/2003-equivalent had to be drafted. The European Commission has already acquitted herself of this task and has proposed a new Regulation (COM(2007)439<sup>27</sup>) to replace Regulation 859/2003. The coverage of third country nationals is thus being taken care of, but the fact remains that they are still not included in the text of the main coordination Regulation. This is deplorable, not only from the viewpoint of legal certainty and clarity, but also, for reasons of principle, in the light of the 1999 Tampere targets of the highest possible integration of third country nationals legally resident on EU territory<sup>28</sup>.

### **2.2.2 Material scope: quasi status quo**

The EU social security coordination mechanism, in comparison to the very dynamic nature of social security legislation 'an sich', has been very immobile in the area of the social security branches covered. The current Regulation is still featured by the traditional set of social security risks from the ILO Social Security (Minimum Standards) Convention No. 102: 'sickness and maternity benefits', 'invalidity benefits', 'old-age benefits', 'survivor's benefits', 'benefits in respect of accidents at work and occupational diseases', 'death grants', 'unemployment benefits' and 'family benefits'. All general and special social security schemes providing these benefits, whether they are contributory or not, are coordinated. Medical and social assistance as well as war victim benefits are excluded. Special non-contributory benefits (hereinafter SNCB), falling between the stools of social security and social assistance, form a special category of benefits. They fall under the material scope of the Regulation, but the coordination system is not applied in full to these benefits as they are not exportable. In order to be categorized as an SNCB, a benefit should be special (a supplementary, substitute or ancillary

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<sup>27</sup> Proposal for a Council Regulation extending the provisions of Regulation (EC) No 883/2004 and Regulation (EC) to nationals of third countries who are not already covered by these provisions solely on the ground of their nationality, Brussels, 23 July 2007, COM(2007) 439 final.

<sup>28</sup> "The legal status of third country nationals should be approximated to that of Member States' nationals. A person, who has resided legally in a Member State for a period of time to be determined and who holds a long-term residence permit, should be granted in that Member State a set of uniform rights which are as near as possible to those enjoyed by EU citizens". Tampere European Council conclusions of 15-16 October 1999, see [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ec/00200-r1.en9.htm](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00200-r1.en9.htm)

cover against the risks covered by the branches of social security or specific protection for disabled persons), financed from compulsory taxation (thus non-contributory) and listed in Annex IIa of Regulation 1408/71<sup>29</sup>. Their categorization is known as one of the never ending sagas in the field of coordination, in which a recent battle was won by the European Commission<sup>30</sup>. But the same can be said about the distinction between social security (“benefits targeting one of the risks mentioned in the Regulation to which a legally enforceable right exists”<sup>31</sup>) and social assistance in general, as the gap between the two has become very narrow.

As already mentioned, social security legislation is a dynamic branch of national law and is constantly in development and evolution. Social security legislation is, as already mentioned, the school example of legislation that has to be adapted to changes in society, such as technological innovation, demographic changes, financial crises, labor market developments, consumer’s interests, etc ... A variety of societal developments are reflected in adaptations to social security schemes. This has certainly been the case in the last ten years as regards demographic changes, where national governments have put a lot of efforts into guaranteeing the financial balance of the system but also in the development of new systems for new needs. Long term care insurance, cover for non-medical care in daily life, is one of the most known examples. Some Member States also created special schemes with benefits in between unemployment benefits and old-age benefits, also known as pre-retirement schemes. Another noteworthy evolution, under the influence of gender equality, is that maternity benefits were sided by equivalent benefits for fathers of newborns. On the other hand, also European law, and more specifically internal market law, has had a considerable effect on the social security schemes of the Member States in the latest decennium. Already from 1998 on, a case-by-case development started as regards the influence of the free movement of goods and services

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<sup>29</sup> Although this enlistment has proven not to be “untouchable”. In the cases *Jauch* and *Leclere*, benefits that were listed in Annex IIa as “special non-contributory benefits” were re-categorised by the ECJ as “social security benefits”, subjecting them to full coordination, including the export of the benefits. Case [ECJ] C-215/99 *Jauch* [2001] ECR-01901 and Case [ECJ] C-43/99 *Leclere* [2001] ECR-04265.

<sup>30</sup> The Commission had formally agreed to the enlistment of benefits (from Finland, Sweden and the United Kingdom) in the Annex IIa in order not to hinder progress. However the Commission had also declared that it would take further steps afterwards. It kept its promise, went to Court against Council and Parliament to fight the Regulation adopted to enlist these benefits as special non-contributory benefits and was proven right entirely. Case [ECJ] C-299/05 *Commission vs. EP and Council* [2007] ECR-8695.

<sup>31</sup> Case [ECJ] C-1/72 *Frilli* [1972] ECR-457 and Case [ECJ] C-249/83 *Hoeckx* [1985] ECR-973.

in the field of health care provision, an important branch of the national social security schemes. Unfortunately these national and European developments do not immediately soak into a quite fixed and rigid system as the European social security coordination. That is why the modernization and simplification exercise during the drafting of the new Regulation provided excellent momentum for amendment.

This momentum was, alas, not grasped with both hands, as the alteration of the material scope of the Regulation is rather minimal. The Regulation shall still apply to *“all legislation concerning the following branches of social security: sickness benefits, maternity and equivalent paternity benefits, invalidity benefits, old-age benefits, survivors' benefits, benefits in respect of accidents at work and occupational diseases, death grants, unemployment benefits, pre-retirement benefits and family benefits”*.

The matters covered under Regulation 883/2004 are a mere copy of what is in the current Regulation, albeit slightly updated with paternity benefits and pre-retirement benefits. Despite the Commission's laudable suggestion in the initial proposal to work with an open material scope (*“This Regulation shall apply to all social security legislations concerning the following in particular: [...]”*<sup>32</sup>) and the support for it in Parliament, it was rejected in Council and Regulation 883/2004 still has a closed list of benefits in its Article 3, *“for reasons of legal safety”*<sup>33</sup>.

Still, progress was made as the new Regulation now covers paternity benefits. This insertion was proposed in the European Parliament<sup>34</sup> to adapt the Regulation to the developments of gender parity within the Union and to confirm their assimilation with maternity benefits<sup>35</sup>, that were already included in the scope. The latter was also extended with statutory pre-retirement benefits, defined as *“all cash benefits, other than an unemployment benefit or an early old-age benefit, provided from a specified age to workers who have reduced, ceased or suspended their remunerative activities until the age at which they qualify for an old-age pension or an early retirement pension, the receipt of which is not conditional upon the*

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<sup>32</sup> Proposal for a Council Regulation (EC) on coordination of social security systems, Brussels, 1998, COM(1998) 779 final.

<sup>33</sup> Communication from the Commission to the European Parliament concerning the common position of the Council on the adoption of a Regulation of the European Parliament and the Council on the coordination of social security systems, Brussels, 27 January 2004, COM(2004) 44 final.

<sup>34</sup> European Parliament, Report on the proposal for a European Parliament and Council Regulation on coordination of social security systems, 17 June 2003, A5-0226/2003 FINAL.

<sup>35</sup> Recital 19 of the Preamble of Regulation 883/2004.

person concerned being available to the employment services of the competent State”. The Court had refused to link them to the coordination system<sup>36</sup>, so their inclusion provides the persons under such schemes a guarantee that they can reside in any Member State of the EU while still receiving their benefits, but also that they will be covered for health care and will receive family benefits there. However, since pre-retirement schemes only exist in a small number of Member States, Regulation 883 excludes the application of the rules on aggregation of periods for the acquisition of entitlement to pre-retirement benefits. They are not “fully coordinated”.

Next to these additions, the European legislator also put efforts in an extraction. Advances of maintenance payments were explicitly excluded from the coordination system, setting aside the legal consequences of the ECJ cases *Offermans*<sup>37</sup> and *Humer*<sup>38</sup>, in which the Court had decided unambiguously that these benefits are family benefits within the meaning of Regulation 1408/71 and thus to be coordinated. It must be remarked that the legislator thereby did not prevent all future influence from primary Community law. One may assume that the emerging social rights for European citizens, through the application of Articles 18 EC and 12 EC, could provide a solution for this exclusion from the scope of the Regulation. This may not only entail that a right to equal treatment can be enforced by a migrant European citizen, but also the non-exportability could be successfully challenged if no satisfying objective justification could be given for this restriction of the citizen’s right to move and reside throughout the EU.

### **2.2.3 Material scope: omissions**

One can of course hold on to the adage that a small progress is always better than a standstill, but it is difficult to get round the fact that major issues have been left aside when it comes to the material scope of the Regulation. Three important topics can be mentioned in this respect. Two of them relate to the field of health care, namely the impact of the free movement of services in the health care sector and the coordination of long term care benefits. The third is a less pressing but therefore not less important influential factor and arises from the developments concerning EU citizenship.

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<sup>36</sup> Case [ECJ] C-475/93 *Thévenon* [1995] ECR-3813.

<sup>37</sup> Case [ECJ] C-85/99 *Offermans* [2001] ECR-2261.

<sup>38</sup> Case [ECJ] C-255/99 *Humer* [2002] ECR-1205.



## *Patient Mobility*

As to the developments concerning the relation between the free movement of services and health care, there was no need for an extension of the material scope but rather for an adapted coordination mechanism with regard to benefits already under the scope of the current Regulation. The bulk of case law on the national authorization procedures with regard to cross-border health care<sup>39</sup> was so closely linked to the coordination of sickness benefits that an integration of it into the text of the Regulation was to be expected. Regulation 1408/71 provided for a prior authorization procedure as a condition to get the costs of planned treatment in another Member State reimbursed. In the ‘patient mobility case law’, authorization procedures for planned treatment abroad were qualified as a breach of the free movement of services according to Article 49 EC, as health care was defined as a service within the meaning of that article. A prior authorization requirement restricts the free provision of services, both for the service provider (doctor, hospital, ...) and for the service recipient (patient). But a distinction was made for the justification of such a restriction. For extramural or outpatient care, an authorization requirement can almost impossibly be justified. For intramural or hospital care, it is still possible to keep such a requirement because, for hospital services provision, an adequate planning of resources is needed.

The ECJ’s qualification of prior authorization for planned outpatient treatment abroad as a quasi-unjustifiable restriction of the free movement of health services, for instance, obviously does not sit well with the preservation of such an authorization condition in the Regulation. Although the Court explicitly held that there was no hierarchical legal problem between the Regulation and Article 49 EC on the free movement of services<sup>40</sup>, this development de facto resulted in the co-existence of two separate “coordination methods”, one based on the Regulation and one on the EC-Treaty, which were difficult to reconcile. If only for reasons of legal certainty and transparency, a one-instrument-solution in Regulation 883/2004 would have been meritorious. Unfortunately, the two procedures for cross-border health care remained separated and their disunion is about to be codified, as the Commission has presented a proposal for a Patient Mobility Directive<sup>41</sup>, containing the rules for cross-border health care as

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<sup>39</sup> See Y. JORENS, M. COUCHEIR and F. VAN OVERMEIREN, “Access to Health Care in an Internal Market: Impact for Statutory and Complementary Systems”, *B.L.Q.S.* (2005), 11-43.

<sup>40</sup> Case [ECJ] C-56/01 *Inizan* [2003] ECR-2403.

<sup>41</sup> Proposal for a Directive of the European Parliament and of the Council on the application of patients' rights in cross-border healthcare, Brussels, 2 July 2008, COM(2008) 414 final.

derived from the EC-Treaty. This gives as a result e.g. that this proposal states that “the Member State of affiliation *shall not make* the reimbursement of the costs of non-hospital care provided in another Member State *subject to prior authorization* [...]” and Regulation 883/2004 still holds that “an insured person *who is authorized by the competent institution* to go to another Member State with the purpose of receiving the treatment appropriate to his condition shall receive the benefits in kind provided, on behalf of the competent institution, by the institution of the place of stay, [...]”. Although the Court gave its fiat for the co-existence of these paradoxical rules, one cannot deny better solutions were thinkable.

However, some side aspects of the ECJ’s patient mobility case law already worked their way through the coordination rules. Firstly, the rules on planned health care abroad in Regulation 1408/71 contained a provision fixing the circumstances in which the Member States are obliged to give authorization for treatment abroad. One condition to be fulfilled was that the treatment was not available in the competent Member State “within a reasonable time”. Most Member States had always interpreted this clause from an administrative point of view. The Court emphasized at several occasions that the medical point of view, i.e. the needs of the individual patient, should prevail<sup>42</sup>. This was already incorporated in Regulation 883/2004 by replacing the words “within a reasonable time” with “within a time-limit which is medically justifiable”. De lege ferenda, the forthcoming Regulation implementing Regulation 883/2004 will contain the Court’s decision in *Vanbraekel*, in which it decided that the competent Member State should supplement the difference between the lower reimbursement in the Member State where the authorized treatment was provided and the higher reimbursement in the competent Member State<sup>43</sup>. The same Implementing Regulation will also incorporate the *Keller*<sup>44</sup> and the *Acereda Herrera*<sup>45</sup> cases. The former has inspired the European legislator to implement a derogation to the rule according to which the institutions of the Member State of residence of a patient are obliged to request authorization from the competent Member State for planned treatment in a third state. If it concerns a vitally necessary treatment, the institution of the place of residence can give this authorization on behalf of the competent institution<sup>46</sup>. The *Acereda Herrera* case is digested in a new provision

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<sup>42</sup> Case [ECJ] C-56/01 *Inizan* [2003] ECR-2403.

<sup>43</sup> Case [ECJ] C-368/98 *Vanbraekel* [2001] ECR-5363.

<sup>44</sup> Case [ECJ] C-145/03 *Keller* [2005] ECR-2529.

<sup>45</sup> Case [ECJ] C-466/04 *Acereda Herrera* [2006] ECR-5341.

<sup>46</sup> In the *Keller* case the ECJ decided that Article 22(1)(a)(i) and (c)(i) of Regulation 1408/71 must be interpreted as meaning that, where the competent institution has consented, by

holding that the costs of travel and stay inseparable from the authorized treatment shall be met in accordance with the legislation of the competent Member State<sup>47</sup>.

### *Coordination of long-term care benefits*

Whereas the omission to tackle the questions concerning cross-border health care in the framework of the new Regulation was not exactly a matter of extending the material scope, such an extension really is at stake in the area of long-term care, often labeled as “the new social security risk”. As already mentioned, a lot of EU Member States have designed specific benefits for people in need of long-term care in a very diverse way. These national schemes have different names, organization, coverage and conditions for entitlement, but in the end they are all serving the same interest. They are intended to provide (predominantly) non-medical care to persons who are in need of help to perform daily life tasks (cooking, washing, bathing, walking, ...).

The main problem as regards the coordination system of 1408/71 is that this kind of benefits is not as such incorporated in the material scope of the Regulation, but that the Court was nonetheless confronted with them around the turn of the century in the *Molenaar*<sup>48</sup> and *Jauch*<sup>49</sup> cases. As long-term care benefits were not coordinated in 1408/71, the Court found a solution by squeezing them into the existing coordination system<sup>50</sup>. Long-

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issuing a E111- or E112-form, to one of its insured persons receiving medical treatment in a Member State other than the competent Member State, it is bound by the findings as regards the need for urgent vitally necessary treatment made during the period of validity of the form by doctors authorised by the institution of the Member State of stay, and by the decision of those doctors, taken during that period on the basis of those findings and the current state of medical knowledge, to transfer the patient to a hospital establishment in another State, even if that State is a non-member country. In the concrete circumstances, Mrs. Keller was transferred from Germany to Switzerland, without the explicit consent of Spain, the competent Member State.

<sup>47</sup> The Court ruled in *Acereda Herrera* that Article 22(1)(c) and (2) and Article 36 of Regulation 1408/71 must be interpreted as meaning that authorisation by the competent institution for an insured person to go to another Member State in order there to receive hospital treatment appropriate to his medical condition does not confer on such a person the right to be reimbursed by the competent institution for the costs of travel, accommodation and subsistence which that person and any person accompanying him incurred in the territory of that latter Member State, with the exception of the costs of accommodation and meals in hospital for the insured person himself.

<sup>48</sup> Case [ECJ] C-160/96 *Molenaar* [1998] ECR-843.

<sup>49</sup> Case [ECJ] C-215/99 *Jauch* [2001] ECR-1901.

<sup>50</sup> A recent squeeze of UK long-term care took place in Case [ECJ] C-299/05 *Commission vs. EP and Council* [2007] ECR-8695.

term care benefits were, from then on, to be treated as “sickness benefits”, in cash or in kind. Regulation 1408/71 did not provide another solution and one must admit that, although long-term care could also be linked to old-age benefits, invalidity benefits or family benefits, the sickness chapter was the most fit for the job. As a result, long-term care benefits were to be coordinated in an identical way as sickness benefits. But this is where the shoe pinches.

Several problems are emerging in the sphere of the coordination of long-term care benefits<sup>51</sup>. Probably the most prevalent, as it is the only one tackled in a new provision of Regulation 883/2004<sup>52</sup>, is the overlapping of benefits in kind in the Member State of residence and exported benefits in cash by the competent Member State. This kind of overcompensation for the beneficiary and overburdening of the competent Member State, paying out cash benefits and reimbursing the benefits in kind of the Member State of residence, logically needs to be avoided. But the opposite is also possible, when the beneficiary is resident in a state that only provides benefits in cash and his competent state only included benefits in kind in its scheme. The sickness benefits coordination rules provide that the competent state should export benefits in cash and the Member State of residence should provide benefits in kind, which is obviously both impossible. In that scenario, the person will receive no benefits at all<sup>53</sup>. Of course, national schemes providing for “combined benefits”, partly in cash and partly in kind, are confronted with similar coordination problems. In addition to that, the definition of “long-term care benefits” alone is already very problematic to agree on for the Member States, not in the least because of the conviction of several Member States that their long-term care benefits can only be categorized as social assistance and thus are not to be coordinated by Regulation 1408/71.

Next to the threat of several administrative and institutional problems, this small excerpt of some coordination problems in the field of long-term care already shows clearly that there is a lot of food for discussion in this area

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<sup>51</sup> For an overview, see B. SPIEGEL, presentation on the coordination of long-term care benefits, Tress seminar Finland 2008, Helsinki.  
[http://www.tressnetwork.org/TRESSAJAX/SEMINARS/SEMINARPRESENTATIONS/2008/FI\\_2008\\_2.pdf](http://www.tressnetwork.org/TRESSAJAX/SEMINARS/SEMINARPRESENTATIONS/2008/FI_2008_2.pdf)

<sup>52</sup> The amount that has to be reimbursed by the competent Member State can be deducted from the exported benefit in cash. Benefits in cash include combi-benefits (solution in the Implementing Regulation).

<sup>53</sup> Although, after the *Bosmann* case, one should assess whether the person is not entitled to the cash benefits of his Member State of residence. Case [ECJ] C-352/06 *Bosmann* [2008] ECR-nyp. Or could Article 18 EC concerning the freedom of movement and residence of EU citizens be of any help?

that has not been taken up during the draft of the new Regulation. A thorough reflection process on, for instance, a new specific and adjusted chapter for long-term care benefits, would have been valuable.

### *Coordination of various welfare benefits*

Finally, the case law concerning the free movement and residence of EU citizens could stir up other and even further-reaching discussions with relation to the material scope of the coordination Regulation. These cases did not only deal with social security benefits and SNCB falling under the material scope of Regulation 1408/71<sup>54</sup>, but also with social assistance benefits, war victim benefits and study loans or grants. Social assistance benefits and war victim benefits are now explicitly excluded from its scope *ratione materiae*. Study loans or grants also fall outside the scope of coordination. Due to the citizenship case law, nationals of a Member State were granted these types of welfare benefits solely based on their status of legally resident citizens of the European Union.

In its decisions in *Grzelczyk*<sup>55</sup> and *Trojani*<sup>56</sup>, the Court decided that national legislation, in so far as it does not grant social assistance benefits to citizens of the European Union, non-nationals of the Member State, who reside there lawfully even though they satisfy the conditions required of nationals of that Member State, constitutes discrimination on grounds of nationality prohibited by Article 12 EC. In both cases, the economically inactive claimants were favored with equal treatment with respect to the Belgian minimum subsistence benefit, based on their lawful residence in Belgium as European citizens. A comparable equal treatment obligation for ‘integrated’ EU citizens was established in the *Bidar*<sup>57</sup> case for study loans, confirmed in the *Förster*<sup>58</sup> case. In *Tas-Hagen/Tas*<sup>59</sup>, *Nerkowska*<sup>60</sup> and *Zablocka*<sup>61</sup>, the concerned citizens of the EU all challenged residence clauses with regard to entitlement to war victim benefits. In all these cases, the Court did not accept the justification argumentations of the Member States that were

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<sup>54</sup> This was however the case for the family benefit, the jobseeker’s allowance and the unemployment benefit in, respectively, the cases *Martinez Sala*, Case C-85/96 *Martínez Sala* [1998] ECR I-2691; *Collins*, Case [ECJ] C-138/02 *Collins* [2004] ECR-2703 and *De Cuyper*, Case [ECJ] C-406/04 *De Cuyper* [2006] ECR-6947.

<sup>55</sup> Case [ECJ] C-184/99 *Grzelczyk* [2001] ECR-6193.

<sup>56</sup> Case [ECJ] C-456/02 *Trojani* [2004] ECR-7573.

<sup>57</sup> Case [ECJ] C-209/03 *Bidar* [2005] ECR-2119.

<sup>58</sup> Case [ECJ] C-185/07 *Förster* [2008] ECR-nyp.

<sup>59</sup> Case [ECJ] C-192/05 *Tas-Hagen/Tas* [2006] ECR-10451.

<sup>60</sup> Case [ECJ] C-499/06 *Nerkowska* [2008] ECR-nyp.

<sup>61</sup> Case [ECJ] C-221/07 *Zablocka* [2008] ECR-nyp.

unwilling to export these benefits, as the residence requirement was at every turn considered to be disproportionate.

As already broadly commented on in legal doctrine, this has caused a clear shift away from the former economically inspired equal treatment view on welfare rights in the European Union<sup>62</sup>. These are however not established unconditionally, as the Court has confirmed at many occasions that Member States can expect a certain degree of integration (or ‘real link’) from EU citizens holding the nationality of another Member State<sup>63</sup>. The overall tendency resulting from this case law is thus the creation of an entitlement to equal treatment in social protection matters, when the EU citizen is sufficiently integrated in the host Member State<sup>64</sup>. An awful lot more can be said about the welfare dimension of the European citizenship case law. That is however not at the centre of the attention in this contribution. More important is the overall effect these cases might have on the urgency of a legislative response in these areas. Like it has been the case with regard to the free movement of patients, that has resulted in a proposal for a Directive on the mobility of patients, the question always arises how willing the Commission and the Member States are to leave such matters in the hands of the Court.

A range of welfare benefits is currently captured as “social security benefits” by the coordination system embedded in Regulation 1408/71, guaranteeing equal treatment, export of the benefits, etc. Even more welfare benefits will also fall under the definition of ‘social advantages’<sup>65</sup> of Article 7(2) of Regulation 1612/68, also guaranteeing equal treatment and export<sup>66</sup>, but only for “workers sensu stricto” and their family members. The evolution of

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<sup>62</sup> K. LENAERTS, "Union Citizenship and the principle of non-discrimination on grounds of nationality", in X. (ed.), *Festschrift til Claus Gulmann - Liber Amicorum*, Copenhagen, Thomsen, 2006, 290.

<sup>63</sup> S. O'LEARY, "Developing an ever closer union between the peoples of Europe. The contribution of the European Court of Justice and its case-law on EU citizenship. Paper presented at the Celebration of the 50th Anniversary of the Treaty of Rome", University of Edinburgh, 2007, 11.

<sup>64</sup> R. C. WHITE, "Free movement, equal treatment, and citizenship of the Union", *I.C.L.Q.* 2005, 54, (885) 900.

<sup>65</sup> This term covers “all the advantages which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their status as workers or by virtue of the mere fact of their ordinary residence on the national territory, and the extension of which to migrant workers therefore seems likely to facilitate their mobility within the Community”. Case 249/83 *Hoeckx* [1985] ECR 973, paragraph 20 and Case C-85/96 *Martínez Sala* [1998] ECR I-2691, paragraph 25.

<sup>66</sup> Case [ECJ] C-57/96 *Meints* [1997] ECR-6689 and Case [ECJ] C-337/97 *Meeusen* [1999] ECR-3289.

EU citizenship rights has created an alternative access route to national welfare systems, also – albeit currently from case to case - guaranteeing equal treatment, export of benefits, etc. This new “Treaty-method” of access to welfare benefits, covering all EU citizens and covering a very broad range of welfare benefits, has effect above and beside the two mentioned “classic instruments”. If this development continues, it may provide momentum to reflect on a 1408/71-alike type of coordination of (certain of) these benefits, other than social security benefits<sup>67</sup>.

## **2.3 Enhanced equality of treatment**

### **2.3.1 Equal treatment**

The principle of equal treatment enclosed in Regulation 1408/71 has always been an extremely important provision in the coordination of social security. It protects persons under the scope of the Regulation who are resident in a Member State against overt but also against indirect nationality discrimination. Such discriminations may be found in national social security legislations and more specifically in the conditions for affiliation, for entitlement or for the payment of a benefit. This prohibition of discrimination has always been broadly interpreted by the ECJ and has therefore always been a highly valued guarantee in the coordination system<sup>68</sup>.

This principle has kept the same value in the new Regulation: *“Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof”*.

It has even been reinforced in two ways. Firstly, the prior condition of residence on the territory of a Member State is no longer required. The reference to residence was still in the initial Commission’s proposal, but it was taken out by the European Parliament, which based its argumentation on the Meeusen-case<sup>69</sup>, repeating and generalizing this decision to conclude that the entitlement to “certain benefits cannot be denied on grounds of

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<sup>67</sup> Cf. H. VERSCHUEREN, "European (Internal) Migration Law as an Instrument for Defining the Boundaries of National Solidarity Systems", *E.J.M.L.* 2007, 9, (307) 345-346.

<sup>68</sup> F. PENNING, *Introduction to European Social Security Law*, The Hague, Kluwer Law International, 2001, 95.

<sup>69</sup> Case [ECJ] C-337/97 *Meeusen* [1999] ECR-3289.

residence”<sup>70</sup>. The result of this change is that persons under the scope of the Regulation will be able to invoke the right to equal treatment with regard to social security legislation, even if they reside in a non-EU country, thereby extending the territorial scope of the Regulation. The second reinforcement of the equality principle was achieved through the acknowledgement of the coordination technique of assimilation of facts, already known in the ECJ case law, as a separate coordination principle.

### **2.3.2 Assimilation of facts**

For the explicit recognition of this principle, a new provision was incorporated with regard to the assimilation of facts, events, income or income replacement). It was the European Parliament that made a separate provision of this aspect of equal treatment.

The provisions on assimilation guarantee that where, under the legislation of the competent Member State, the receipt of social security benefits and other income has certain legal effects, the relevant provisions of that legislation shall also apply to the receipt of equivalent benefits acquired under the legislation of another Member State or to income acquired in another Member State. They also guarantee that where, under the legislation of the competent Member State, legal effects are attributed to the occurrence of certain facts or events, that Member State shall take account of like facts or events occurring in any Member State as though they had taken place in its own territory.

This new provision will enhance the equality of treatment in the field of social security coordination, as it will make sure that “foreign aspects” of a given social security situation will be taken into account. The given that certain benefits, income, facts or events are ‘foreign’ is to be neutralized in order to give them equal effect. So if, for instance, the Netherlands requires a youngster to reside in The Netherlands on his 18<sup>th</sup> birthday for entitlement to a benefit for disabled young persons, then it will have to give the same legal effect if a claimant resided in Malta on his 18<sup>th</sup> birthday. This will provide considerable legal simplification and a clear uniform rule for all Member States. It is not a new concept, as the current Regulation already contains assimilation provisions for specific situations. These specific

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<sup>70</sup> European Parliament, Report on the proposal for a European Parliament and Council Regulation on coordination of social security systems, 17 June 2003, A5-0226/2003 FINAL.



references have become abundant and were removed, as assimilation received the status of horizontal principle in 883/2004.

But this general provision is not just a matter of simplification, as it clearly responds to a need to provide a coordination rule for assimilation in situations that were not dealt with under the current Regulation. For certain benefits or certain circumstances, the provisions of the Regulation did not provide an adequate answer. This lack was obvious in cases like *Duchon*<sup>71</sup> and *Paraschi*<sup>72</sup>. In *Duchon*, a case concerning an occupational disability pension, the Court even decided that certain provisions of the Regulation ran counter the need for assimilation to achieve equal treatment. In *Paraschi*, the denial of assimilation was clear, where the concerned national legislation, providing for the prolongation of a reference period for an invalidity pension due to certain facts or circumstances, refused to prolong the period in case the same facts and circumstances had occurred in another Member State. A clear and general rule on assimilation should prevent such situations.

### **2.3.3 Aggregation of periods**

Unless otherwise provided for, the competent institution of a Member State whose legislation makes the acquisition, retention, duration or recovery of the right to benefits, the coverage by legislation, or the access to or the exemption from compulsory, optional continued or voluntary insurance, conditional upon the completion of periods of insurance, employment, self-employment or residence shall, to the extent necessary, take into account periods of insurance, employment, self-employment or residence completed under the legislation of any other Member State as though they were periods completed under the legislation which it applies. Or to put this long phrasing from the Regulation very shortly: social security periods of other Member States must be taken into account.

Like in Regulation 1408/71, the enumerated 'foreign periods' have to be taken into account by the competent Member State as if they were 'national periods'. This aggregation of periods of insurance, employment or residence can be found in each chapter of the current Regulation, protecting the acquisition, retention or recovery of rights. Regulation 883/2004 has brought these provisions to the forefront and transformed them into a

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<sup>71</sup> Case [ECJ] C-290/00 *Duchon* [2002] ECR-3567.

<sup>72</sup> Case [ECJ] C-349/87 *Paraschi* [1991] ECR-4501.

general provision to be applied horizontally so it does not have to be repeated for several specific situations related to the different social security risks<sup>73</sup>.

It is self-evident that there is only a thin line between this principle of aggregation of periods and the afore-mentioned principle of assimilation of facts. The danger of the incorporation of the principle of assimilation of facts was that this could be 'abused' for the creation of periods of insurance. Imagine a person is entitled to an old-age pension in Germany after 35 years of work. A person who has worked 20 years in Germany, 10 years in Belgium and 5 years in Austria, is entitled to pension and will receive pension from the German institutions for the 20 years he has worked in Germany (20/35 from Germany, 10/35 from Belgium and 5/35 from Austria). He cannot appeal to the assimilation of facts to circumvent this aggregation and proratisation by country, and to claim a full career pension (35/35) from Germany. That is why Regulation 883/2004 states in its preamble that the principle should not interfere with the principle of aggregating periods of insurance, employment, self-employment or residence completed under the legislation of another Member State with those completed under the legislation of the competent Member State. Periods completed under the legislation of another Member State should therefore be taken into account solely by applying the principle of aggregation of periods. The same was stipulated with regard to the competence of Member States according to the rules on applicable legislation. The assimilation of facts or events occurring in a Member State can in no way render another Member State competent or its legislation applicable.

## ***2.4 Export of benefits: watch out for the EU citizen***

### **2.4.1 Exportability**

For the protection of acquired social security rights, the exportability of benefits is essential. The central role to satisfy this general principle of coordination is played by an important provision of Regulation 1408/71, waiving residence rules for most of the social security benefits under the scope of the Regulation<sup>74</sup>. This rule for export of benefits has been strengthened in the new Regulation as it now unambiguously states that,

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<sup>73</sup> For technical reasons, one special aggregation provision was maintained in the unemployment benefits chapter.

<sup>74</sup> F. PENNING, *Introduction to European Social Security Law*, The Hague, Kluwer Law International, 2001, 112.

besides the specified exemptions, all cash benefits are exportable: “*Unless otherwise provided for by this Regulation, cash benefits payable under the legislation of one or more Member States or under this Regulation shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary or the members of his family reside in a Member State other than that in which the institution responsible for providing benefits is situated*”.

In practice, this cannot be regarded as a tremendous change in comparison with the current situation, because most cash benefits are indeed already exportable. Other small victories for the principle of export of benefits can be found in the details of different specific chapters. One example is the new derogation to the fundamental coordination rule of non-exportability of unemployment benefits. The new Regulation displays a somewhat more lenient approach towards the export of unemployment benefits for a job-search abroad, even if the end result is weaker than the Commission’s first proposal. The latter put forward an extension of the exportability of unemployment benefits from 3 to 6 months. The final text of the new Regulation holds a compromise solution and keeps the 3 months-rule with a possibility of extension to 6 months.

### **2.4.2 Non-exportability**

In the context of the export of benefits, the exceptions have always drawn more attention than the rule. This is the case for the aforementioned limited export of unemployment benefits, but even more for the peculiar category of SNCB. In the current Regulation it is stipulated that the waiving of residence rules does not apply to special non-contributory cash benefits, which means that they can only be granted by the Member State of residence of the beneficiary according to the legislation of that state. This rule has remained unaltered in the new Regulation, but the legislator has visibly not forgotten the lessons learnt in the various cases *Jauch*<sup>75</sup>, *Leclere*<sup>76</sup>, *Hosse*<sup>77</sup> and *Commission vs. EP and Council*<sup>78</sup>, with regard to the reserve or reticence that should be kept in mind towards the recognition of certain benefits as SNCB:

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<sup>75</sup> Case [ECJ] C-215/99 *Jauch* [2001] ECR-1901.

<sup>76</sup> Case [ECJ] C-43/99 *Leclere* [2001] ECR-4265.

<sup>77</sup> Case [ECJ] C-286/03 *Hosse* [2006] ECR-1771.

<sup>78</sup> Case [ECJ] C-299/05 *Commission vs. EP and Council* [2007] ECR-8695.

*“This Article shall apply to special non-contributory cash benefits which are provided under legislation which, because of its personal scope, objectives and/or conditions for entitlement, has characteristics both of the social security legislation referred to in Article 3(1) and of social assistance.*

*2. For the purposes of this Chapter, "special non-contributory cash benefits" means those which:*  
*(a) are intended to provide either: (i) supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in Article 3(1), and which guarantee the persons concerned a minimum subsistence income having regard to the economic and social situation in the Member State concerned or (ii) solely specific protection for the disabled, closely linked to the said person's social environment in the Member State concerned, and*  
*(b) where the financing exclusively derives from compulsory taxation intended to cover general public expenditure and the conditions for providing and for calculating the benefits are not dependent on any contribution in respect of the beneficiary. However, benefits provided to supplement a contributory benefit shall not be considered to be contributory benefits for this reason alone, and*  
*(c) are listed in Annex X”.*

The definition has become stricter with clear criteria to enhance transparency and legal certainty. The criteria will apply to all Member States so that similar benefits will be treated in the same way and this may also reduce unlawful listing of benefits in the new annex in which the SNCB of the national systems are catalogued. However, these modifications in the basic Regulation for coordination are somewhat of a theoretical nature and it remains to be seen how this will be applied in practice. What is certain, is that the new article will neither avoid all interpretation problems nor will it temper the keenness of Member States to avoid coordination of these benefits. The saga of the qualification of benefits as SNCB will thus most likely continue.

The rules on the export of benefits have remained the same to a very large extent. An important question is which role the European citizenship case law, as a direct legal base or as an indirect influential source for the interpretation of the other fundamental freedoms, can play in this context. It goes without saying that every derogation to the principle of export of benefits is under the threat of being placed on a pair of scales with the free movement rights of EU citizens. The non-exportability can be successfully challenged if no satisfying objective justification can be given for this restriction of the citizen's right to move and reside throughout the EU. This is true for both the SNCB and the unemployment benefit derogations. The fact that their non-exportability is embedded in the coordination regulation has in no way prevented the Court from requiring an objective justification and applying a proportionality test to residence clauses in the legislation of the Member States.

For SNCB, there is the clear and closed system of enjoying these benefits when residing on the territory of the state that is granting them. The system is simple: if you leave Member State A for Member State B, you lose them in

A and you receive them immediately in B<sup>79</sup>. But this system in secondary Community legislation does not mean that every SNCB is freed from the influence of the citizenship rules. It may well be that the non-exportability of a particular SNCB cannot be justified under the free movement of citizens, despite the coordination system that is worked out in Regulation 1408/71 and preserved in Regulation 883/2004. A foretaste can be found in the Hendrix case<sup>80</sup>, concerning a Dutch benefit for disabled young people, which Mr. Hendrix had lost following his removal from The Netherlands to Belgium. This benefit was a SNCB and could thus only be received within the territory of the Member State of residence, The Netherlands. The Court confirmed this rule, but added that “*implementation of that legislation [Regulation 1408/71, FVO] must not entail an infringement of the rights of a person in a situation such as that of the applicant in the main proceedings which goes beyond what is required to achieve the legitimate objective pursued by the national legislation*”<sup>81</sup>. The Court accepted the coordination rules as an objective justification, but opened the door for a proportionality test in the individual circumstances of the case<sup>82</sup>. It is exactly the acceptance of this kind of “in concreto assessment” of the proportionality of the national implementation of the coordination rules that puts them to the test and, in actual fact, questions the future accountability of certain long-standing coordination rules, such as those on non-exportability in the case at hand. The Court did not found its decision directly on the citizenship provisions in the Treaty<sup>83</sup>, but it is well-known that they also have an influence on the interpretation of the economic freedoms<sup>84</sup>. In the free movement case law, the emphasis on individual rights of citizens has triumphed at several occasions by

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<sup>79</sup> H. VERSCHUEREN, “European (Internal) Migration Law as an Instrument for Defining the Boundaries of National Solidarity Systems”, *E.J.M.L.* (2007) 316.

<sup>80</sup> Case [ECJ] C-287/05 *Hendrix* [2007] ECR-6909.

<sup>81</sup> Case [ECJ] C-287/05 *Hendrix* [2007] ECR-6909, paragraph 58.

<sup>82</sup> H. OOSTEROM-STAPLES, “Note to Case C-138/02, Brian Francis Collins v. Secretary of State for Work and Pensions, Judgment of 23 March 2004, Full Court”, *C.M.L. Rev.* 2005, 42, (205), 222-223.

<sup>83</sup> As Mr. Hendrix’ situation fell under the scope of Article 39 EC on the free movement of workers and as Article 39 is a specific expression of the citizenship provision of Article 18 EC, the Court held it was not necessary to rule on the interpretation of the latter.

<sup>84</sup> Cf. E. SPAVENTA, “From Gebhard to Carpenter: towards a (non-)Economic Constitution”, *C.M.L. Rev.* 2004, 41, 772-773; O. GOLYNKER, “Jobseekers’ rights in the European Union: challenges of changing the paradigm of social solidarity”, *E.L.Rev.* 2005, 30, (111), 115-116 and S. O’LEARY, “Developing an ever closer union between the peoples of Europe. The contribution of the European Court of Justice and its case-law on EU citizenship. Paper presented at the Celebration of the 50th Anniversary of the Treaty of Rome”, University of Edinburgh, 2007, 25.

submitting rules of secondary legislation to the fundamental Treaty provisions<sup>85</sup>.

That the citizenship rights are also breathing down the neck of the non-export rules for unemployment benefits is perfectly illustrated in the De Cuyper case<sup>86</sup>. In this case, in which the Court did find its conclusion directly on the EC Treaty's citizenship provisions, the non-export of those benefits was considered to be a restriction of the free movement and residence rights of an EU citizen. Here too, it should be kept in mind that the Court is not hesitant to qualify this long-standing non-export rule as a restriction, forcing the non-exporting Member State to give a good policy reason for its application, although the latter is merely a correct implementation of Regulation 1408/71. In De Cuyper, the ECJ was very benevolent and accepted the rather unconvincing justification of the Member State in question<sup>87</sup>. But there is no guarantee that other similar rules relating to unemployment schemes will not be caught into the snares of EU citizenship rights. This was already the case in Petersen<sup>88</sup>, a free movement of workers case also influenced by the citizenship provisions. The case concerned an Austrian advance granted to unemployed persons who have applied for the grant of an invalidity benefit. Although the Court qualified the advance as an unemployment benefit, it found no proportionate justification for the indirect discrimination resulting from the residence condition in the Austrian legislation. Again, the non-export rule for unemployment benefits in the Regulation was put on the slip.

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<sup>85</sup> Good examples are Case [ECJ] C-158/96 Kohll [1998] ECR-1931 (Article 22 of Regulation 1408/71 vs. Article 49 EC), Case [ECJ] C-184/99 *Grzelczyk* [2001] ECR-6193 (Article 1 of Directive 93/96 vs. Article 18 EC) and Case [ECJ] C-413/99 *Baumbast* [2002] ECR-7091 (Article 1 of Directive 90/364 vs. Article 18 EC). On *Baumbast* and the end of the enforcement of black letter provisions, see M. DOUGAN en E. SPAVENTA, "Educating Rudy and the (non-)English patient: a double bill on residency rights under Article 18 EC", *E.L.Rev.* 2003, (699), 699-712.

<sup>86</sup> Case [ECJ] C-406/04 *De Cuyper* [2006] ECR-6947.

<sup>87</sup> The Court accepted that a residence requirement was necessary for reasons of (unannounced) control on the family situation of the beneficiary. However, the family situation is also important for other social security benefits falling under the scope of Regulation 1408/71 and these benefits are nonetheless exported. The dominating factor that the beneficiary was not under the obligation anymore to be available for the labor market of the competent state, should have led the Court to consider the residence clause as a disproportionate restriction of the free movement of citizens. For further comments on this case, see A. JAUME, "La territorialité des droits sociaux au regard du droit communautaire", *J.T.T.* 2007, (69), 69-78 and M. COUSINS, "Citizenship, residence and social security", *E.L.Rev.* 2007 (32), 386-395.

<sup>88</sup> Case [ECJ] C-228/07 *Hosse* [2006] ECR-1771.

## **2.5 Applicable legislation under siege**

### **2.5.1 Conflict rules**

The chapter on applicable legislation, i.e. the rules for law conflicts in social security matters, is probably the most known amongst non-specialists and, certainly given the recent debate on unfair competition in the context of short-term cross-border employment, one of the more discussed in European social law<sup>89</sup>. It is contained in Title II, of which the provisions “*constitute a complete and uniform system of conflict rules the aim of which is to ensure that workers moving within the Community shall be subject to the social security scheme of only one Member State, in order to prevent more than one legislative system from being applicable and to avoid the complications which may result from that situation*”<sup>90</sup>. This chapter of the coordination Regulation not only holds the general rule for the assignment of the competent Member State in a particular cross-border social security situation, but also some special rules. The coordination system points at the legislation applicable, but it also makes sure that, in principle, one single legislation is applicable as well for benefits<sup>91</sup> as for contributions<sup>92</sup>. It is designed to prevent the simultaneous application of 2 or more social security legislations but also to avoid migrating persons to fall between stools, as the combination of requirements of different national systems can also result in the application of no system at all. This rule has an exclusive and overriding effect. Exclusive, as no other legislation can be applicable than the one indicated by the coordination system and overriding, as national affiliation conditions are waived if their application would deprive the conflict rules of their practical effect.

The general rule is that the legislation is applicable of the Member State in which the migrant worker performs his economic activities, i.e. the legislation of the workplace or the “*lex loci laboris*”. Special rules are provided for special categories of workers such as persons working in 2 or more Member States, international transportation personnel, seafarers, people working as an employee and as a self-employed person in different countries, civil servants with other occupations and persons employed by

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<sup>89</sup> Especially the posting (or secondment) of workers from the new Central- and Eastern European Member States has increased the attention of European social security law as well as European labour law practitioners in this field.

<sup>90</sup> Case [ECJ] C-71/93 *Van Poucke* [1994] ECR-1101.

<sup>91</sup> Case [ECJ] C-302/84 *Ten Holder* [1986] ECR-1821.

<sup>92</sup> Case [ECJ] C-169/98 *Commission vs. France* [2000] ECR-1049.

diplomatic missions and consular posts. A specific special rule relates to posted workers, employed and self-employed, for which the legislation of the Member State where they normally perform their activities can remain applicable during a certain period of activities abroad. This period is currently fixed at 12 months, with a possible extension of another 12 months. Different conditions have to be met to be legally posted according to the Regulation. Also the applicability of the legislation of the Member State of residence if the abovementioned SNCB are at stake, should be reported here.

Regulation 883/2004, here again, did not bring any radical change to this setting. Broadly speaking, the main general and special rules have remained but they have been cleaned up, modernized, better structured and made more coherent. The *lex locis laboris*-principle keeps ruling the waves and for economically inactive people, there is a clear reference to the Member State of residence<sup>93</sup>. This is the Member State of previous activities in case of receipt of short term benefits in cash. For persons with occupations in 2 or more Member States, the rules have not been substantially changed, but they were simplified with a dominant role for the state where a significant part of the activities is performed. The new Regulation also gave short shrift to several special rules for special groups that were unnecessarily complicating the coordination system. In this exercise of disposal of “special treatments” in the Regulation, the special rules on frontier workers throughout the Regulation remained largely untouched<sup>94</sup>. Also the posting rule is still intact as before, but the posting period was increased from 12 months to a standard period of 24 months, making extension rules (and the respective E-forms) superfluous.

### **2.5.2 New perspectives**

Although the new Regulation is not applicable yet, it is not premature to say that the rules on applicable legislation therein are under fire and there may

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<sup>93</sup> It should be highlighted that some categories of temporarily inactive people are assimilated with active persons under Regulation 883/2004: *“For the purposes of this Title, persons receiving cash benefits because or as a consequence of their activity as an employed or self-employed person shall be considered to be pursuing the said activity”*. This is not the case for people expected to remain inactive: *“This shall not apply to invalidity, old-age or survivors' pensions or to pensions in respect of accidents at work or occupational diseases or to sickness benefits in cash covering treatment for an unlimited period”* (Article 11(2) of Regulation 883/2004).

<sup>94</sup> In this case, the very strong lobby of frontier workers in the EU decision-making procedure may have prevailed over the modernisation and simplification spirit of the reform process.



be room or even need for a rethinking. The fundamentals of this chapter have not been questioned in the new Regulation, but they are challenged outside of the coordination system. Especially the influence of the recent case law of the ECJ and the pressing socio-economic reality of changed and still changing migration and work patterns are important in this context.

The coordination system could be considered a too technical system, partially outdated and therefore subject to overruling based on more fundamental Treaty principles. Several recent cases of the Court of Justice are directly based on Treaty rules, leaving aside coordination rules (see for instance *Nemec*<sup>95</sup>, *Government of the French Community and Walloon Government vs. Flemish Government*<sup>96</sup> and *Bosmann*<sup>97</sup>). This tendency demonstrates, inter alia, the lack of adaptation of Regulation 1408/71 and, although not applicable yet, of Regulation 883/2004. The recent *Bosmann* case excellently illustrates this attack on the coordination system and its most fundamental principles. Prior to the ruling in this case, the Court held on to the statement that the rules on the determination of the applicable legislation imply that no Member state's legislation other than the one designated by these rules can apply. This prohibition has been recalled in *Bosmann*. The case concerned a mother who was entitled to a German child benefit. But as she took up employment in The Netherlands, the German authorities refused any further payment of the benefit. According to the *lex loci laboris*-principle, this decision seemed correct because the employment in The Netherlands had turned the latter into the competent state. However, under the Dutch legislation, Mrs. *Bosmann*'s child was too old to receive entitlement to child benefits in The Netherlands. Also influenced by the concept of European citizenship and its emphasis on individual rights, the Court held that if Germany, which is not the competent state, is not compelled to provide family benefits to residents, Regulation 1408/71 does not preclude that German authorities provide such benefits when they are subject to a condition of residence on its territory.

Although the ECJ does not explicitly acknowledge this, this case affects earlier set out principles, for instance in *Ten Holder*<sup>98</sup>. Lacking harmonization of national schemes, the Court ruled there that the Treaty offers no guarantee to a worker that extending his activities into more than one Member State or transferring them to another Member State would be

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<sup>95</sup> Case [ECJ] C-205/05 *Nemec* [2006] ECR-745.

<sup>96</sup> Case [ECJ] C-212/06 *Government of the French Community and Walloon Government vs. Flemish Government* [2008] ECR-1683.

<sup>97</sup> Case [ECJ] C-352/06 *Bosmann* [2008] ECR-nyp.

<sup>98</sup> Case [ECJ] C-302/84 *Ten Holder* [1986] ECR-1821.

neutral as regards social security. It follows that, in principle, any disadvantage, by comparison with the situation of a worker who pursues all his activities in one Member State, resulting from the extension or transfer of his activities into or to one or more other Member States and from his being subject to additional social security legislation is not contrary to Articles 39 and 43 of the Treaty if that legislation does not place that worker at a disadvantage as compared with those who pursue all their activities in the Member State where it applies or as compared with those who were already subject to it and if it does not simply result in the payment of social security contributions on which there is no return<sup>99</sup>.

The *Bosmann* case raises lots of questions. From a theoretical point of view, it is true that neither the *lex loci laboris* rule nor the single legislation applicable principle is formally violated by the ruling of the Court. This principle is still valid and it is up to the Member State of residence whether or not to grant the benefit to citizens working in another Member State. However, this case is not easy to deal with for the German court that has referred the question to the ECJ. If the entitlement to these child benefits is solely based on residence on the German territory, then there are two possible outcomes. If the benefit is awarded, this decision is fully compatible with the dictum of the Court's case. But this would mean that German authorities should, from then on, ignore the *lex loci laboris* principle in such cases and assess all circumstances of each case in order to establish whether or not the applicant is entitled to benefits in his competent Member State. On the other hand, the ECJ decision seems to leave room for a negative decision in the national case and thus for the full implementation of the work state-principle. The absence of any entitlement in The Netherlands is in principle of no concern to the German authorities. This rule could even be implemented in the national legislation by adding that persons residing in Germany are not entitled to the benefit if they are subject to the legislation of another EU Member State according to Regulation 1408/71. However, this could be qualified as an indirect discrimination based on nationality, which could turn the option left open by the Court into an obligation. These difficulties reveal that the direct application of the fundamental Treaty freedoms to situations that are generally dealt with under the coordination rules, cause an inevitable erosion of the firm principles therein.

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<sup>99</sup> Case [ECJ] C-393/99 *Hervillier* [2002] ECR-2829.

### 3 Conclusion

When the new coordination Regulation 883/2004 is analyzed with a version of the current Regulation 1408/71 at the back of the mind, one can easily conclude that the general principles of coordination have remained the same. They are still the principles of equal treatment, aggregation of periods, exportability of benefits and the determination of the applicable legislation. This means in the first place that no new principles have been introduced in the new basic Regulation. Although this could be claimed for the principle of good administration and the principle of assimilation of facts, these are already existing sub-principles that have been brought to the forefront. This clinging to the evergreen principles of social security coordination should not come as a surprise. The coordination rules as they stand are performing well in the overwhelming majority of cross-border social security situations<sup>100</sup>. They are still of paramount importance for the realization of a genuine free movement of persons, the improvement of the standard of living and the conditions of employment in the European Union.

The existing principles are still in charge in the coordination system and they were not fundamentally changed. They were rather, in line with the modernization and simplification exercise that was the initial goal of the reform, “elaborated in a new way” according to lessons learnt from the past, to case law of the ECJ and to several developments in national social security legislation. The new elaboration is reflected in the adaptation of several specific rules in the Regulation that were restructured, brought to the forefront, simplified, updated, made more coherent, etc.

For the personal scope of the Regulation, this means that it has been brought in line with the developments regarding EU citizenship. This is however rather a gesture of symbolism than a real extension to new categories of beneficiaries. Also the equal treatment, aggregation and exportability principles have remained intact and have been reinforced and generalized. The equal treatment rule was strengthened through the generalization of the assimilation of facts. The aggregation of periods is no longer dealt with chapter-by-chapter, but was rightfully promoted to a horizontal matter. The exportability of cash benefits has received more emphasis. One could observe that each one of the old coordination principles

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<sup>100</sup> Y. JORENS and J. HAJDU, *Tress European Report 2008*, November 2008, Ghent, [http://www.tress-network.org/TRESSNEW/PUBLIC/EUROPEANREPORT/TRESS\\_EuropeanReport\\_2008.pdf](http://www.tress-network.org/TRESSNEW/PUBLIC/EUROPEANREPORT/TRESS_EuropeanReport_2008.pdf)

has been fortified, making the reform process a success story from the perspective of these principles of coordination.

However, even before Regulation 883/2004 has become applicable, the new system of coordination is already pressurized from two main angles. The first threat comes from within the field of social security coordination, as important coordination issues were left aside during the latest reform process. Where one can be neutral on the new scope *ratione personae*, the change of the material scope is a story of disillusionment. The European Commission not only lost the battle to prevent a new exhaustive list of benefits covered, the extension of the list itself was also disenchanting. Pressing issues like the impact of internal market case law on the sickness benefits chapter and the need for adjusted coordination rules for long-term care benefits were not taken up. The first omission will result in an opaque situation with respect to the coverage of medical costs for health care abroad, which will eventually be regulated in two partially contradictory instruments: Regulation 883/2004 and a forthcoming Patient Mobility Directive. The other will perpetuate a plethora of coordination problems with long-term care schemes, i.e. welfare benefits that were installed for vulnerable groups of society. The modest addition of paternity and pre-retirement benefits does not make up for these lacunae. The new coordination of pre-retirement benefits could even be considered as an ironical innovation in an era in which all governments are redoubling efforts to make people work longer.

The second menace could be considered as an external influential factor, but it is then again not so external as it is situated within the Community legal framework. Since the end of the 20<sup>th</sup> century, the coordination system has increasingly been confronted with various charges ensuing from the direct application of Treaty principles to cross-border social security situations. The Kohll and Decker cases became (in)famous as the starting blocks for a whole series of ECJ cases elaborating the impact of the free movement of services (and goods) on the different types of national healthcare systems in the European Union. This, however, only concerned the sickness benefits chapter of the Regulation. But on top of this, it is becoming increasingly clear that the application of the Treaty principles of the “free movement of persons” - sometimes as workers, sometimes as citizens - is crawling down the veins of the entire set of rules coordinating social security in the EU. And the general principles of coordination are the first to be affected. The impact on the personal scope is rather mild. In the new Regulation, the European legislator has already drawn its conclusions from the EU citizenship evolution and the coordination system has become a true citizens’

instrument, away from its historical economic roots. However, this contribution has shown that this is not the end of the story. The fixed material scope may be questioned gradually more, as a range of welfare benefits other than social security benefits (f.i. social assistance benefits and war victim benefits) are “coordinated” on a case-by-case basis before the European Court of Justice. Also the derogations to the general principle of exportability have been confronted with the free movement rights of EU citizens, qua citizens or as migrating workers, resulting in doubts about long-standing non-export rules. Mainly special non-contributory benefits, as a rule only to be granted in the Member State of residence, and unemployment benefits, as a rule only very limitedly exportable, are concerned. Finally, even the rules on the determination of the applicable legislation and more specifically the work-state principle, have recently appeared not to be secured against the influence of the Treaty provisions. The Court has opened the door for the application of the legislation of the Member State of residence, if the application of the determined legislation of the work-state would disadvantage the beneficiary’s social security situation.

In the different cases concerned, the ECJ gave priority to an individualized and principled view on coordination situations, with the rights of the beneficiary at the centre of the attention. This focus on the preservation of the individual rights of EU citizens is often hard to reconcile with the policy objectives behind the specific rules in the Regulation. This confrontation is well-known when it comes to restrictive national legislation versus the EC Treaty. The same clash between EU secondary law, like the coordination Regulation, and the EC Treaty is however still very awkward to deal with. The Court refuses to declare the rules of secondary EU law incompatible with EC Treaty provisions, but the application of a straight-forward proportionality assessment to these rules raises a lot of questions. It certainly creates a situation in which “the rule in the text is not necessarily the rule to applied”. “Special non-contributory benefits are not exportable” or “The applicable social security legislation is the legislation of the work-state” have made place for “special non-contributory benefits are not exportable, but in certain circumstances ...” and “The applicable social security legislation is the legislation of the work-state, unless ...”. Regardless of the expediency of such an eroding effect, it unmistakably points out that the European system of social security coordination is not an untouchable set of rules that can be applied blindly, independent from other parts of Community law. Two more general conclusions can be put forward. On the one hand, it is self-evident that legal certainty is not best served here. This is all the more problematic in a complex and very technical field like that of the coordination of social security. On the other hand, this case law may pave

the way for new legislative initiatives towards a coordination system that is less dogmatic, e.g. by incorporating provisions for the adaptation of formerly stringent and inflexible rules in specific circumstances.

Even before Regulation 883/2004 has become applicable, there is already a broad scope for sorting out some remaining and new issues. So why wait for the target date of 2010, the year of the actual application of the new Regulation, to start a reflection process on how these challenges can be taken up?

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