

TOWARDS NEW RULES FOR THE DETERMINATION OF THE APPLICABLE LEGISLATION?



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I. A FUNDAMENTAL PRINCIPLE OF EUROPEAN SOCIAL SECURITY

The determination of applicable legislation is one of the fundamental principles of social security for migrant workers⁽⁷⁴⁶⁾. The objective is to avoid any doubts as to which specific law governs the social protection of the migrant worker. In the absence of this principle, taking into account that it belongs

to the national sovereignty of any Member State to determine the conditions and criteria under which persons may be insured (workplace, residence, nationality, etc.), a situation could arise where two or more conflicts in law would simultaneously apply or which appear to fall outside any relevant legislation. The objective of this principle is therefore to ensure in the interest of the migrant worker that there is complete protection, immediately available, wherever the worker is at that time⁽⁷⁴⁷⁾.

The methods to determine the applicable legislation may be diverse and are not always easy to

⁽⁷⁴⁶⁾ Although this principle is not literally taken over in Article 42 of the EC Treaty. Also Guy Perrin in his book (*La sécurité sociale, son histoire à travers les textes, Tome V: histoire du droit international de la sécurité sociale*, Paris, Association pour l'étude de l'Histoire de la Sécurité Sociale, 1993, 361) does not mention this principle either as a fundamental principle of international coordination.

⁽⁷⁴⁷⁾ ILO, *Introduction to social security*, Geneva, ILO, 1984, 154.

apply, ranging from place of work to the place of residence or location of the employer, the flag state, etc.

Within the European Union the option was made to choose the place of work, the *lex loci laboris*, as the criterion for defining the applicable legislation. Legal as well as practical arguments were at the origin of this decision. The idea was to clearly link the social security rights of the migrant to the legal system of the country to which s/he is most attached in her or his daily life. The *lex loci laboris* was therefore not only in line with the initial social security schemes to be coordinated, but also reflects the idea that social security is a complement to waged work, and that social security and labour are often closely interrelated, for example for the calculation of benefits or for the administrative organisation⁽⁷⁴⁸⁾. It also coincides with the rule of conflict applicable in the area of labour law (see the Convention of Rome of 1980 and Regulation (EC) No 593/2008). Choosing the residence of the worker could also encourage the employer to choose on the basis of the level of contributions as they might differ between the states. In that respect, choosing the connecting factor of the *lex loci laboris* follows the general principles of the free movement of workers, which was — at least at the adoption of the coordination regulations — the framework of reference. Social security is also an aspect of public law, relating to a question of financial division of social security costs for migrant workers⁽⁷⁴⁹⁾.

As a result, competition, as regards workers, takes place according to the terms applicable to the market where the job is performed.

It is only when the nature of some types of employment renders the strict application of the rule of the workplace law impossible that alternative

connecting factors, such as the place of residence or the location of the employer, were established.

The conflict rule not only determines where the employee is insured, but also where the employer has to pay contributions. In this respect, it is irrelevant if the employer has no other link to this state than the fact that his worker is working for him there, even if the employer is established in another Member State and pays less contributions there⁽⁷⁵⁰⁾.

Lex loci laboris is therefore the general rule of attachment, to be applied even when no choice has been made⁽⁷⁵¹⁾. Regulation (EEC) No 1408/71 only derogates from the general rule of attachment to the state of employment in specific situations and on grounds of practicality and efficacy, which render attachment to the state of residence more appropriate and more in conformity with the interest of frontier workers⁽⁷⁵²⁾.

The fundamental option for *lex loci laboris* has, however, on many occasions been questioned, at different moments of accession when new Member States, in particular based on residence, joined the European Union. The state of employment would therefore no longer be considered the most appropriate or suitable⁽⁷⁵³⁾. The increasing number of Beveridge/Nordic model countries, as well as the

⁽⁷⁵⁰⁾ Case C-8/75 *Le Football Club d'Andlau* [1975] ECR 739; the actual Article 91 of Regulation (EEC) No 1408/71 points out that 'an employer shall not be bound to pay increased contributions by reason of the fact that his place of business or the registered office or place of business of his undertaking is in the territory of a Member State other than the competent state'. In the new Regulation (EC) No 883/2004, this self-evident rule was abolished.

⁽⁷⁵¹⁾ The *Rebmann* case (C-58/87 [1988] ECR 3467) determines that the taking into account of a frontier worker's periods of full unemployment for the purpose of calculating pension rights falls, in the absence of a specific provision, under the general rule which causes the situation of frontier workers to be governed in principle by the law of the state of employment (para. 19).

⁽⁷⁵²⁾ Case C-58/87 *Rebmann* [1988] ECR 3467, para. 15.

⁽⁷⁵³⁾ A. Christensen and M. Malmstedt, 'Lex loci laboris versus lex loci domicilii — An inquiry into the normative foundations of European social security law', *European Journal of Social Security*, Issue 1, *Kluwer Law International* 2000, 69; see also D. Pieters, 'Towards a radical simplification of the social security coordination. Exploratory study on possibilities of replacement of Regulations (EEC) Nos 1408/71 and 574/72 in order to simplify the EC co-ordination of social security schemes', in P. Schoukens (ed.), *Prospects of social security coordination*, Leuven, Acco, 1997, 190.

⁽⁷⁴⁸⁾ The salary of the beneficiary is often an important criterion in the calculation of the benefits.

⁽⁷⁴⁹⁾ See S. Van Raepenbusch, *La sécurité sociale des personnes qui circulent à l'intérieur de la Communauté économique européenne*, Brussels, Story-Scientia, 1991, 225.

introduction of elements of residence and non-contributive benefits in the traditional Bismarkian countries, were often seen as justifications for questioning the *lex loci laboris*. Although this discussion sometimes turns too much in the direction of a country-specific approach in counting the actual numbers of resident-based systems compared with the initial schemes to be coordinated at the beginning of the European Union, the new framework of coordination (Regulation (EC) No 883/2004) confirms, and to a certain extent even strengthens, the choice for the *lex loci laboris*. In addition, in this regulation a person pursuing an activity as an employed or self-employed person in a Member State will be subject to the legislation of that Member State⁽⁷⁵⁴⁾. Only for non-active persons, the place of residence is applicable⁽⁷⁵⁵⁾. But questions remain about the appropriateness of these conflict rules.

Did the adoption of Regulation (EC) No 883/2004 create the right momentum for modifying/adapting the conflict rules almost 50 years after the adoption of the coordination regulations, and was a unique opportunity therefore missed to adopt a new ‘better’ (?) conflict rule?

In a process of simplification and rationalisation, the new Regulation (EC) No 883/2004 did bring, apart from the clear designation rule for non-active persons, some — minor — modifications to the actual system, with respect to the posting provisions⁽⁷⁵⁶⁾ and the designation rules for simultaneous performance of professional activities in two or more Member States⁽⁷⁵⁷⁾, just as the only existing excep-

tion (until now, under Regulation (EEC) No 1408/71) to the general principle of the single applicable legislation has been abolished⁽⁷⁵⁸⁾.

II. A NEED FOR A REVISION OF THE CONFLICT RULES?

But is a purely cosmetic adaptation of the conflict rules sufficient or is there a need to fundamentally change the actual rules and why should we do that?

Which reasons could justify a further reflection on new rules of applicable legislation? In our opinion, three factors could play a role⁽⁷⁵⁹⁾.

In the first place, there is the clear changing migration pattern. The migrant worker of 50 years ago is no longer the migrant worker of today. One of the most important changes has been regarding the nature of migration itself, with new patterns of work, including increasingly flexible labour markers. The regulation was set up at a time when workers had a full-time, permanent employment relationship, and the migrant worker was someone — usually a male — who moved to his country of work (with or without his family) and at the end of his career returned to his country of origin. People in general migrated for better working opportunities and conditions, including higher wages. For example, a typical migrant working in the coal mines moved for a long period to another state, often only returning to his country of origin when reaching retirement age. This type of migrant worker in particular focused on

⁽⁷⁵⁴⁾ Article 11, 3(a) of Regulation (EC) No 883/2004.

⁽⁷⁵⁵⁾ Article 11, 3(e) of Regulation (EC) No 883/2004.

⁽⁷⁵⁶⁾ In particular the extension from the maximum period of posting from one year to two years, as well as the inclusion in the new provision of conditions that had already been made clear in the case-law of the CJ (the fact that the employer, when somebody is posted abroad, needs to normally carry out his activities in the sending state, as well as the fact that, in the case of the posting of a self-employed person, it is required that this person pursue a similar activity in the temporary state of employment); see Article 12 of Regulation (EC) No 883/2004.

⁽⁷⁵⁷⁾ Here the most important modifications took place; in particular, the specific rule for international transport workers has been abolished, so that they now fall under the general rules, just as it is now required that the person concerned fulfils a substantial part of his activities in the state of residence, before this state becomes applicable; see Article 13 of Regulation (EC) No 883/2004.

⁽⁷⁵⁸⁾ Article 13(3) of Regulation (EC) No 883/2004; the actual Annex VII of Regulation (EEC) No 1408/71. Compared with Regulation (EEC) No 1408/71, Regulation (EC) No 883/2004 abolishes some separate rules for special categories of people. Under Regulation (EC) No 883/2004 there is no special rule anymore for international transport workers; there is no longer a choice for persons employed by diplomatic missions or consular posts; no special rule for civil servants working in two countries; no rule for undertakings straddling a common frontier; no special rule for civil servants insured in a special scheme; and no rule for persons not belonging to the crew and working on a vessel within the territorial waters or the port.

⁽⁷⁵⁹⁾ For a general overview of general trends and challenges for the actual regulations, see Y. Jorens and J. Hajdú, European Report 2008 — Training and reporting on European social security, Project DG EEMPL/E/3 — VC/2007/0188, Brussels, 125 p.

fully integrating the social security systems of the state of his new workplace. When migrating at a later age, the biggest problems these persons were confronted with were related to the possible export of retirement benefits. Today there is greater diversity, with a range of different types of migrant workers including, for example, cross-border frontier workers, temporary migrant workers and pan-European management personnel, contributing to a growing pan-European labour market. Further globalisation and the creation of a European internal market has led to a growing number of employees being sent out by their employer to perform temporary activities in another Member State. People commute weekly or daily to other states and workplaces. The career planning of a worker today often involves several consecutive international assignments (for the short or longer term), often within a network of companies, throughout different Member States. It is not so much that the permanent move has become the most important trend, but rather that the intra- and interorganisational move has.

In particular, migrant workers that are often working for short periods abroad are more in favour of further belonging to their social security system of origin and less of being integrated in their country of short employment.

It has often been argued that these new forms of mobility are challenging the principles and actual rules on applicable legislation. Might it indeed not be said that the high flexibility combined with the short assignments to different Member States, leading to a constant switch of the *lex loci laboris*, makes this general conflict rule inappropriate? Does it not only complicate to a large extent the social security situation of these migrant workers, but also prevents further migration? ⁽⁷⁶⁰⁾ What is to be said of the managers within a multinational group who often transfer their workplace from one business location to another and visit, throughout their career,

⁽⁷⁶⁰⁾ A. Numhauser-Henning, 'Freedom of movement and transfer of social security rights', in R. Blanpain (ed.), *Collective bargaining, discrimination, social security and European integration*, The Hague, Kluwer Law International, 2003, 185–186.

several branches of this group of companies? The fact that these persons move within a network of closely related companies, where the worker sometimes even concludes a local employment contract with a daughter company, while maintaining his main, but frozen labour contract with the mother company, often complicates the 'mapping', as it becomes unclear who the worker's employer actually is. Live-performance workers can, for example, take up employment with an EU live-performance organisation in another EU country; for example, they can be posted as an employee with an EU live-performance company when this company is performing in other EU countries, or take up a service contract as a self-employed person in another EU country ⁽⁷⁶¹⁾. The specific problems of mobility that these groups of people encounter quite often result in the appeal to enact particular conflict rules that would be better adapted to the specific characteristics and situations of these categories ⁽⁷⁶²⁾.

In the second place, freedom of movement — the fundamental background principle for the coordination regulations — has evolved and has moved from an economic perspective to a wider idea of human rights. The relationship between the free movement of workers as an instrument and the economic concern of the European Union has changed into a growing union of citizens. The migrant worker is, in the first place, not an economic person, but a human being looking to improve his living and working conditions. In the same way, the free movement of workers has evolved towards a union of 'European citizens'. The economic dimension has moved to the background, in order to establish a legal order consistent with the idea of social justice and people's expectations of European integration, as it can be understood from the general objectives

⁽⁷⁶¹⁾ See, for example, R. Pollachek, 'Study on impediments to mobility in the EU-live-performance sector and on possible solutions', study performed for Pearle, Mobile.Home Project, Helsinki, 2007, 14.

⁽⁷⁶²⁾ R. Pollachek, 'Study on impediments to mobility in the EU-live-performance sector and on possible solutions', study performed for Pearle, Mobile.Home Project, Helsinki, 2007, and ERA Green Paper, 'Realising a single labour market for researchers', RTD DG and Council conclusions of 30 September 2008, No 13571/08.

of the Treaties⁽⁷⁶³⁾. 'The creation of citizenship of the Union, with the corollary of freedom of movement for citizens throughout the territory of the Member States, represents a considerable qualitative step forward in that it separates that freedom from its functional or instrumental elements (the link with an economic activity or attainment of the internal market) and raises it to the level of a genuinely independent right inherent in the political status of the citizens of the Union'⁽⁷⁶⁴⁾.

This creation of European Union citizenship, also as interpreted by the Court of Justice (CJ)⁽⁷⁶⁵⁾, has established a new set of rights for economically inactive people, until then almost ignored under European Union law⁽⁷⁶⁶⁾, and has given them the status of active claimants of social welfare provision, even when they have not been or are not exercising an economic activity⁽⁷⁶⁷⁾. As the CJ applies the provisions of European citizenship also in cases that are covered by the European regulation, it has made clear that the coordination Regulation (EEC) No 1408/71 (and in future Regulation (EC) No 883/2004) is not the only means for people to obtain social security benefits and rights. A new notion of European solidarity has been created⁽⁷⁶⁸⁾.

⁽⁷⁶³⁾ See A. Touffait, 'La jurisprudence de la Cour de Justice des Communautés Européennes en matière de sécurité sociale des travailleurs Européens qui se déplacent', Mélanges offerts à P.H. Teitgen, Paris, 1984, 525.

⁽⁷⁶⁴⁾ Advocate General Ruiz-Jarabo Colomer, para. 82 of the opinion delivered in Morgan (Joined Cases C-11/06 and C-12/06 Morgan [2007] ECR, 9161).

⁽⁷⁶⁵⁾ Case C-85/96 Martínez Sala [1998] ECR 2691; Case C-184/99 Grzelczyk [2001] ECR 6193; Case C-413/99 Baumbast [2002] ECR 7091; Case C-138/02 Collins [2004] ECR 2703; Case C-456/02 Trojani [2004] ECR 7573; Case C-138/02 Collins [2004] ECR 2703; Case C-209/03 Bidar [2005] ECR 2119; Case C-192/05 Tas-Hagen [2006] ECR I- 10451; Case C-406/04 De Cuyper [2006] ECR 6947.

⁽⁷⁶⁶⁾ The rights of economically non-active people were elaborated in the three residence directives (90/364/EEC on the rights of residents; 90/365/EEC on the right of residence for employees and self-employed persons who have ceased their occupational activity; and 93/96/EEC on the right of residence for students). These three directives have now been replaced by the general residence directive (2004/38/EC).

⁽⁷⁶⁷⁾ E. Spaventa, Free movement of persons in the European Union. Barriers to movement in their constitutional context, The Hague, Kluwer Law International, 2007, 114–115.

⁽⁷⁶⁸⁾ See also M. Ross, 'Promoting solidarity: From public services to a European model of competition?', Common Market Law Review 2007, 1065; M. Coucheir (ed.), M. Sakslin (ed.), S. Giubboni, D. Martinsen and H. Verschueren, Think Tank Report 2008: The relationship and interaction between the coordination regulations and Directive 2004/38/EC — Training and reporting on European social security, Project DG EMPL/E/3 — VC/2007/0188, Brussels, 2008, 37ff.

This brings us to the third (and very closely related to the concept of European citizenship) reason why it is necessary to take a closer look at the rules on applicable legislation. At the same time as the first cases of European citizenship appeared in the social field⁽⁷⁶⁹⁾, people, i.e. also workers, were relying directly on other EU Treaty provisions, perhaps hardly believing that they could influence their concrete social security rights. With its cases in the field of healthcare⁽⁷⁷⁰⁾, the CJ attacked the national conditions of refusal to reimburse medical treatment abroad under the internal market rules, in particular the free movement of goods and services, thereby opening to Community nationals a second way of receiving cross-border medical care in addition to Article 22 of Regulation (EEC) No 1408/71. As a result of this case-law, two different procedures, one having no primacy over the other, govern the healthcare costs incurred in another Member State⁽⁷⁷¹⁾. These examples made clear that people could obtain social rights directly on the basis of the principles of free movement.

An important development taking place in this respect is the direct reliance on the general principles of free movement of persons (Article 39) by European workers, in order to combat possible limitations to their fundamental rights, limitations that not only are the result of national rules, but also sometimes follow from the application of the EU regulations themselves. The traditional non-exportability of certain benefits under the regulation, such as special non-contributory benefits or unemployment benefits, could be increasingly questioned under the direct applicability of the general principles of free movement of the EU Treaty. Recent CJ case-law, but also developments at the national level, have made clear that even inclusion in Annex IIa of the regulation, exempting the

⁽⁷⁶⁹⁾ Case C-85/96 Martínez Sala [1998] ECR 2691.

⁽⁷⁷⁰⁾ Starting with Cases C-120/95 Decker [1998] ECR I-1831, and C-158/96 Kohll [1998] ECR 1931.

⁽⁷⁷¹⁾ Y. Jorens, M. Coucheir and F. Van Overmeiren, 'Access to healthcare in an internal market: impact for statutory and complementary systems', basic report, Brussel, AIM, 2005, Bulletin Luxembourgeois des questions sociales, 18, 2005, 13.

national authorities from the obligation to export these benefits, is not necessarily the end of the story. CJ cases, such as *De Cuyper* ⁽⁷⁷²⁾, *Petersen* ⁽⁷⁷³⁾ or *Hendrix* ⁽⁷⁷⁴⁾, have shown that the non-exportability of certain benefits has to be looked at alongside the right of freedom of movement under Article 39 EC Treaty or European citizenship under Article 18 EC Treaty. Under these circumstances, conditions of residence can only be put forward if their object would be justified and proportionate to the objective pursued. This might end up with other results. In the *Hendrix* case for example, although the CJ considered a benefit for young disabled people, listed in Annex IIa of the regulation, as non-exportable, it questioned its compatibility with the principles of freedom of movement under Article 39 EC Treaty. It was up to the national court to answer and, after weighing the national legislation in the light of these principles, the national court declared the non-export clause not to be applicable. Examples such as these confirm that the regulations are no longer the only route towards the coordination of social security for migrant workers. This is also a growing tendency not only in the field of the free movement of workers but also in the field of the free movement of services. In the *Rüffert* case ⁽⁷⁷⁵⁾ on minimum wage, dealing with Directive 96/71/EC, the CJ directly investigated the requirement of payment of a salary — a domain clearly regulated by this directive — within the perspective of the free movement of services.

Relying directly on the EU Treaty has as a consequence that every rule will now be judged against the general test of free movement, i.e. is the application of the rule concerned an impediment, for which no objective justification can be found, and is the principle of proportionality respected? While finding an objective justification might still be easy, it becomes much more complicated to pass the proportionality test. The non-exportability of some

of the benefits is a clear example. In the *De Cuyper* case ⁽⁷⁷⁶⁾ the CJ confirms that the residence clause, which is imposed on an unemployed person, who is exempt from the requirement of providing that he is available for work as a condition for retaining his entitlement to unemployment benefits, is a restriction, which was, however, justified by the need to monitor the employment and family situation of an unemployed person. Looking at this justification, it is obvious that the CJ was very receptive to the arguments used by the Belgian Member State, arguments which were in actual fact hardly convincing at all. It is clear that similar restriction rules might have more difficulties in the future to pass the free movement test. This is clearly confirmed in the *Petersen* case ⁽⁷⁷⁷⁾, regarding the non-exportability of an advance granted to unemployed persons who applied for the grant of invalidity benefits and which was considered by the CJ as an unemployment benefit. Here the CJ clearly states that, unless it is objectively justified and proportionate to the aim pursued, such non-exportability must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a disadvantage. Although the CJ states that the EU regulations do not preclude the legislation of a Member State from making entitlement to an unemployment benefit conditional on residence, at least in normal situations, this was not true with respect to the particular situation of Mr Petersen. The CJ argues that the Austrian government had not sought to explain the objective, which is to be achieved by the residence requirement, but even so — although it is possible that the risk of seriously undermining the financial balance of a social security system may *in particular* (author's own italics) constitute an overriding reason in the general interest. The existence of such a risk would be difficult to establish, since, by granting the benefit to applicants who reside in the

⁽⁷⁷²⁾ Case C-406/04 *De Cuyper* [2006] ECR 6947.

⁽⁷⁷³⁾ Case C-228/07 *Petersen* [2008] ECR I-6989.

⁽⁷⁷⁴⁾ Case C-287/05 *Hendrix* [2007] ECR 6909.

⁽⁷⁷⁵⁾ Case C-346/06, *Rüffert* [2008] ECR 1989.

⁽⁷⁷⁶⁾ Case C-406/04 *De Cuyper* [2006] ECR 6947.

⁽⁷⁷⁷⁾ Case C-228/07 *Petersen* [2008] ECR I-6989.

national territory, the competent authorities have in fact demonstrated their capacity to bear the economic burden of that benefit. As it is also intended to be paid to applicants for an invalidity pension for a limited period of time, the residence requirement also seems to be disproportionate.

The national rule, as well as the rule of Regulation (EEC) No 1408/71, is crushed under direct application of the EU Treaty provisions, where Member States are now confronted with a task they often forget, i.e. the concrete justification in the particular case assessed in the light of the proportionality test — however, not in a very abstract way, but applied to the particular situation of the case and of the person concerned. Also in the *Baumbast* case⁽⁷⁷⁸⁾ the CJ applies the principle of proportionality to the facts of the case⁽⁷⁷⁹⁾; the CJ chose to scrutinise the rules *in concreto*, taking into account the facts of the particular case. Even in cases in which the legislation is in principle compatible with the demands of Community law, applied in the concrete situation, it might be contrary to it⁽⁷⁸⁰⁾. Member States will be required to pay much more attention to the concrete justification in cases and cannot limit themselves to general statements. For the individual looking for protection under Community law, it might be easier to attack the conformity of the national rules with EC law.

This *in concreto* evaluation has further led to an increased review of the conformity of secondary European legislation with the general principles of EU law⁽⁷⁸¹⁾. The CJ does not hesitate to investigate

the conformity of national rules, even if they follow secondary European legislation, directly under the EC Treaty rules. This amounts, as Dougan points out, to ‘a judicial review of that very Community legislation, not of the privileged sort one would expect as regards questions of competence in the exercise of Community’s own legislative powers, but rather of the frontline sort one witnesses all the time as regards national provisions restricting free movement under the primary Treaty provisions’⁽⁷⁸²⁾. The review of proportionality performed by the CJ could be seen to pose a challenge to the European legislature’s autonomy, competencies and powers⁽⁷⁸³⁾. National rules in conformity with the coordination Regulation (EEC) No 1408/71 (and the future Regulation (EC) No 883/2004), as well as the social security coordination regulation itself, will increasingly be confronted with the test of conformity with the fundamental principles of EU law⁽⁷⁸⁴⁾. The ultimate framework is no longer the regulations, but the conformity with free movement.

The abovementioned reasons make it clear that, although we all may be to a lesser or larger extent satisfied with the actual rules, it could happen that the actual, but also future, coordination rules will be under further attack regarding their conformity with the general principles of EU law as elaborated by the provisions on EU citizenship, free movement of workers, free movement of services and even free movement of goods.

⁽⁷⁷⁸⁾ Case C-413/99 *Baumbast* [2002] ECR 7091.

⁽⁷⁷⁹⁾ See justification 92. In a recent case, the *Förster* case (Case C-158/07 *Förster*, judgment of 18 November 2008, not yet published) dealing with a maintenance grant, the CJ looks at the situation from an abstract rather than a concrete point of view. It remains unclear if the CJ herewith wants to deviate from its previously established case-law according to which the concrete individual factual situation is taken into account (see also the contribution of E. Spaventa in this publication).

⁽⁷⁸⁰⁾ E. Spaventa, *Free movement of persons in the European Union. Barriers to movement in their constitutional context*, The Hague, Kluwer Law International, 2007, 155.

⁽⁷⁸¹⁾ M. Coucheir (ed.), M. Saksliin (ed.), S. Giubboni, D. Martinsen and H. Verschuereen, *Think Tank Report 2008: The relationship and interaction between the coordination regulations and Directive 2004/38/EC — Training and reporting on European social security*, Project DG EMPL/E/3 — VC/2007/0188, Brussels, 2008, 36–37.

⁽⁷⁸²⁾ M. Dougan, ‘The constitutional dimension to the case-law on Union citizenship’, *European Law Review* 2006, 620–621.

⁽⁷⁸³⁾ See also S. Besson and A. Utzinger, ‘Introduction: Future challenges of European citizenship — Facing a wide-open Pandora’s Box’, *European Law Journal* 2007, 575; and M. Coucheir (ed.), M. Saksliin (ed.), S. Giubboni, D. Martinsen and H. Verschuereen, *Think Tank Report 2008: The relationship and interaction between the coordination regulations and Directive 2004/38/EC — Training and reporting on European social security*, Project DG EMPL/E/3 — VC/2007/0188, Brussels, 2008, 37.

⁽⁷⁸⁴⁾ See justification 57 of the conclusions of Advocate General Kokott in Case C-287/05 *Hendrix* [2007] ECR 6909 ‘Thus, a restriction on the fundamental freedoms must be justified by overriding reasons in the general interest even where that restriction derives from a Community regulation or a national measure which is in accordance with secondary law. Admittedly, Community and national legislatures enjoy a discretion when adopting measures in the general interest which affect the fundamental freedoms. The CJ retains the right, however, to examine whether legislatures have exceeded the scope of that discretion and infringed thereby the fundamental freedoms.’

III. ARE THE ACTUAL CONFLICT RULES EC RESISTANT?

A. New rules for new migration patterns?

Are the regulations adapted to this new framework? Is today not the right moment, while we celebrate 50 years of regulations, to reflect on the possible revision of a system of conflict rules that has existed for 50 years?

Quite often the debate revolves around new or adapted rules that should take into account new patterns of migration.

Within the general objective of the new regulation to simplify and modernise the actual provisions, some special rules — for special groups — that were complicating the coordination system were abolished. In this respect, the adaptation and enacting of special provisions for ‘new’ forms of mobility would contradict the rationalisation process started under Regulation (EC) No 883/2004. The new inclusion of specific rules for so-called ‘new’ categories could lead to an increasing number of demands from other groups, increasing the fragmentation and uniform application of the conflict rules. Generally, it can be acknowledged that linking rules of conflict with categories of employees is not a convincing approach. It appears, in line with the Administrative Commission on Social Security for Migrant Workers (CASSTM)⁽⁷⁸⁵⁾, that very few situations seem to require specific treatment.

Artists, airplane crews, etc. already moved about in the past. Certainly not to the same extent, but advocating that special provisions should be adopted to take into account of these forms of mobility would somehow presume that the European legislator originally ignored, to a lesser or larger extent, these groups of people. Some forms of mobility are therefore not really new, but have just become more

frequent. The use of interim agencies and the application of the conflict rules in these circumstances has been recognised for decades. Already in 1970 the CJ had to deal with the application of the posting provisions with respect to interim agencies⁽⁷⁸⁶⁾. Some other forms, like air crews, were regarded as transport workers.

These examples show that some of the issues related to new forms of mobility result, not so much from the inappropriateness of the existing rules, but rather from the difficulties inherent in understanding the concepts and their implementation. One could therefore argue that Regulation (EEC) No 1408/71 and Regulation (EC) No 883/2004 are in fact reasonably well adjusted to new forms of mobility. What is required is agreement over the interpretation of the concepts and their effective implementation, rather than any wholesale change to the principles or operative concepts of the regulations⁽⁷⁸⁷⁾.

The expert group working on the free movement for researchers, for example, wants to promote the use of Article 17 agreements (Article 16 of Regulation (EC) No 883/2004) as a method for avoiding impediments to the free movement of these persons, in order to better take into account their particular situation⁽⁷⁸⁸⁾. The performance sector would also like to see the procedures to receive E101 forms made easier⁽⁷⁸⁹⁾.

Better use of the actual provisions, however, implies the need for further clarification. The lack of clarity and the different interpretation of the rules regarding the provisions on applicable legislation will not only result in the controversial use, and perhaps even incorrect application, of the actual provisions,

⁽⁷⁸⁶⁾ Case C-35/70 Manpower [1970] ECR 1263.

⁽⁷⁸⁷⁾ See Y. Jorens (ed.), J.-P. Lhernould (ed.), J.-C. Fillon, S. Roberts and B. Spiegel, Think Tank Report 2008 — Towards a new framework for applicable legislation. New forms of mobility, coordination principles and rules of conflict — Training and reporting on European social security, Project DG EMPL/E/3 — VC/2007/0188, Brussels, 2008, 7.

⁽⁷⁸⁸⁾ See Council conclusions of 30 September 2008, DOC13571/08.

⁽⁷⁸⁹⁾ See, for example, R. Pollachek, ‘Study on impediments to mobility in the EU-live-performance sector and on possible solutions’, study performed for Pearle, Mobile.Home Project, Helsinki, 2007, 34.

⁽⁷⁸⁵⁾ See document of 4 October 2007, 278/07 REV.

but might also become the object of complaints before the CJ. A typical example of inconsistent use is the application of Article 17 of Regulation (EEC) No 1408/71 (Article 16 of Regulation (EC) No 883/2004) that allows Member States to conclude agreements in the interest of the migrant worker that deviate from the conflict rules. Every Member State applies its own rules which often differ from one another, not only between the states concerned, but sometimes even within the same state. One day it might even be difficult to explain to the CJ why workers in identical circumstances fall under different legislations due to different views among Member States about the application of this article. Could this be challenged on the grounds of discrimination?⁽⁷⁹⁰⁾ It is of course true that one of the fundamental difficulties in this respect is that the regulation is a coordination instrument and does not harmonise social security, thereby leaving the responsibility for implementation to the Member States. It is therefore not the priority role of the European legislator to define the concept used, but a guiding role could be welcomed.

Of course, it cannot be ignored that, at least with respect to the growing flexible labour market, an increasing number of specific forms of mobility related to new forms of labour contracts are appearing: people working with fixed-term contracts; people working temporarily for employers via interim agencies; people, for a short time, at the disposal of heavily integrated companies; people working at home (teleworking); people moving constantly within a multinational group or simultaneously working at different plants in different Member States, sometimes with contracts concluded with several branches, etc. But is it always a problem of adopting new rules? Are the problems not also related to the difficult ways of understanding and implementing the basic concepts of the actual conflict rules? Working in an international, intra-organisational network of enterprises is a typical example

of that. The related problem is that the ownership of equipment and employment of personnel increasingly rests with different undertakings, staff being typically employed by 'global' employment companies. How do we define the employer? Does it make sense to look at this network of companies as a group of separate enterprises, each with their judicial personality, or should we look at it as one big entity, where the 'mother' company is the leading employer? What is the impact if a contract is concluded with a 'daughter' company? Is the employer the one with whom a labour contract is concluded, or is it rather the mother company who holds authority over the different branches or daughter companies? Let us refer to a recent case before the French Court de Cassation⁽⁷⁹¹⁾. An employee working for the mother company Oréal ended her contract when she was mutated to the daughter company in China. She concluded a labour contract with this daughter company but was fired when she became pregnant. According to the Court de Cassation, there was an unjustified dismissal as no reclassification took place. Notwithstanding the fact that a contractual relation no longer existed between the mother company and the employee, the court considered that the mother company was still responsible as it took the initiative to put the employee at the disposal of the daughter company. Is the main company therefore the real employer? Would it not be possible in such cases for the employee, during the whole period of employment, to be subject to the place where the main employer is situated? But imagine also the case of an employee transferred to another daughter company with whom he concludes a labour contract while the initial contract with the mother company is frozen and lies dormant. It is foreseen that the person concerned will eventually be reintegrated into the mother company or will obtain a guarantee that, at the end of the period of employment at the daughter company, he will get a new job at the mother company or a similar function somewhere

⁽⁷⁹⁰⁾ See Y. Jorens and J. Hajdú, European Report 2008 — Training and reporting on European social security, Project DG EMPL/E/3 — VC/2007/0188, Brussels, 8.

⁽⁷⁹¹⁾ See Lhernould, J-P, 'Obligations de la société-mère suite au licenciement du salarié mis à disposition d'une filiale étrangère', Cass. Soc. 13 novembre 2008, pourvoi No 07-41700; Dr Soc. 2009, 69.

within the group. Can the idea of reintegration be seen as an element for determining the place with the closest connection and as such for determining the most appropriate conflict rule? Would it not be better to look at such a situation from a more life-oriented global approach?

But a concrete answer to the challenges mentioned above requires more than a merely cosmetic adaptation of the conflict rules. The question is whether the actual rules would pass the test of the general principles of free movement? It should also be taken into account that, if new rules were elaborated, they should be in conformity with these principles. Would it not therefore be better if we reflected on a possible new framework, and investigated the fundamental principles and philosophy behind the actual system, i.e. the neutral character, the compulsory character and the exclusive and strong effect of the conflict rules? ⁽⁷⁹²⁾

B. Towards a new fundamental approach?

1. The objectives of the regulations

A preliminary question before possibly changing the actual conflict rules is to find out for whom these coordination regulations are written. Whom should they protect?

The coordination regulations are an instrument adopted to guarantee the free movement of workers. As the preamble to Regulation (EC) No 883/2004 clearly states: ‘the rules for coordination of national social security systems fall within the framework of free movement of persons and should contribute towards improving

their standard of living and conditions of employment’ ⁽⁷⁹³⁾. The objective of the new regulations was to guarantee that the right to free movement of persons can be exercised effectively ⁽⁷⁹⁴⁾.

The coordination regulations therefore fit perfectly with the general objectives of the EU Treaty as enshrined in Article 2, to promote a high level of social protection and to raise the standard of living. From the beginning, the CJ declared that the regulations in the field of social security have as their basis, their framework and their limitations Articles 48 to 51 (39–42) of the Treaty, which are aimed at securing freedom of movement for workers ⁽⁷⁹⁵⁾. The coordination regulations therefore have to be interpreted in the light of the free movement of workers. The interests of the workers obtain a central place in the coordination framework. The regulation, however, only installs a ‘system of coordination, not the harmonisation, of the legislation of the Member States’. As a result, Article 51 (now 42) leaves in differences between the Member States’ social security systems and, consequently, in the rights of persons working in the Member States. It follows that substantive and procedural differences between the social security systems of individual Member States, and hence in the rights of persons working in the Member States, are unaffected by Article 51 (now 42) of the Treaty ⁽⁷⁹⁶⁾. As a matter of fact, it is not obvious whether one is insured at all by the appointed legislation. Indeed, it is up to the legislator of each Member State to lay down the conditions creating the right or the obligation to become affiliated to a social security scheme or to a particular branch of such a scheme or to be entitled to a benefit ⁽⁷⁹⁷⁾. The person concerned will therefore only be insured if he or she fulfils the national conditions. Just as social security is only

⁽⁷⁹²⁾ This was exactly the task that the Think Tank on new forms of mobility and applicable legislation is undertaking within the Tress project. This report is therefore also indebted to the reflections and ideas put forward by this Think Tank, to whom the author of this article belongs (see Y. Jorens (ed.), J.-P. Lhernould (ed.), J.-C. Fillon, S. Roberts and B. Spiegel, Think Tank Report 2008 — Towards a new framework for applicable legislation. New forms of mobility, coordination principles and rules of conflict — Training and reporting on European social security, Project DG EMPL/E/3 — VC/2007/0188, Brussels, 2008). The activities of the Think Tank will continue in the year 2009.

⁽⁷⁹³⁾ Point 1 Preamble.

⁽⁷⁹⁴⁾ Point 45 Preamble.

⁽⁷⁹⁵⁾ Case C-100/63 Van der Veen [1964] ECR 565; see also Case C-242/83 Patteri [1984] ECR 3171.

⁽⁷⁹⁶⁾ Case C-41/94 Pinna [1986] ECR 1.

⁽⁷⁹⁷⁾ Case C-29/88 Schmitt [1989] ECR 581; Case C-2/89 Kits van Heijningen [1990] ECR 755, para. 19; Case C-275/96 Kuusijärvi [1998] ECR 3419, para. 29; and Case C-227/03 Van Pommeren-Bourgondiën [2005] ECR, para. 33.

coordinated within the EC, the EC Treaty offers no guarantee to a worker that extending his activities into more than one Member State or transferring them to another Member State will be neutral as regards social security. It follows that, in principle, any disadvantage, compared with a worker who pursues all his activities in one Member State, resulting from the extension or transfer of his activities into one or more other Member States and from his being subject to additional social security legislation, is not contrary to Articles 48 and 52 (now 39 and 43) of the EC Treaty if that legislation does not place that worker at a disadvantage compared with those who pursue all their activities in the Member State where it applies⁽⁷⁹⁸⁾.

With respect to the conflict rules, the CJ has constantly explained the objectives of these rules from the perspective of the worker: ‘the aim of the provisions of Title II of Regulations Nos 3/58 and 1408/71, which determine the legislation applicable to workers moving within the Community, is to ensure that the persons concerned shall be subject to the social security scheme of only one Member State, in order to prevent more than one national legislative system from being applicable and to avoid the complications which may result from that situation’⁽⁷⁹⁹⁾.

This predominant role of the worker in the objectives of the regulations does not, however, exclude other parties, traditionally involved in the social security field, from playing a role. This is particularly clear with respect to the conflict rules. We already mentioned, for example, that the CJ declared that it is not only the worker who is subject to that state, but also the employer, and the fact that the employer should pay less contributions in his state of establishment is of no relevance⁽⁸⁰⁰⁾.

⁽⁷⁹⁸⁾ For example, Cases C-393/99 and C-399/99 *Hervillier* [2002] ECR I-2829; see also C-493/04 *Piatkowski* [2006] ECR I-2369. The same as a matter of fact also applies in the field of, for example, fiscal law (see Case C-365/02 *Lindfors* [2004] ECR 7183).

⁽⁷⁹⁹⁾ See, for example, Case C-60/85 *Luijten* [1986] ECR 2365; Case C-2/89 *Kits van Heijningen* [1990] ECR 755; Case C-196/90 *De Paep* [1991] ECR 4815, para. 18; Case C-202/97 *Fitzwilliam* [2000] ECR 883, para. 20; Case C-275/96 *Kuusijärvi* [1998] ECR 3419, para. 28; Case C-101/83 *Brusse* [1984] ECR 2223, para. 14

⁽⁸⁰⁰⁾ Case C-8/75 *Le Football Club d'Andlau* [1975] ECR 739.

Where an employee is insured therefore also influences the situation of the employer. In particular with respect to the posting rules, which are also related to the free movement of services and as such to the interest of the employer, the CJ declares that Article 13(1)(a) of Regulation No 3 aims at overcoming the obstacles likely to impede the freedom of movement of workers and at encouraging economic interpenetration whilst avoiding administrative complications for workers, undertakings and social security organisations⁽⁸⁰¹⁾. So, apart from the employees, the conflict rules are also installed in the interest of the employer and the social security institutions.

2. The balance of interests

A possible review of the framework on applicable legislation should therefore not lose sight of the role and involvement of these three parties (employee, employer and administration) and should find the right balance between the interests of these three stakeholders. This is the idea that the Think Tank of Tress on new forms of mobility elaborated: the balance of interests should determine the applicable legalisation.

The interests of these three parties are, however, different and sometimes contradictory⁽⁸⁰²⁾.

For the employee what counts will be: that there is no change in the insurance career to build up long-term benefits (especially pensions); to get the highest possible benefits (e.g. no loss of benefits from the home country, especially, for example, long-term care, family benefits); to safeguard the necessary flexibility so that the employer cannot choose another employee who is easier to handle

⁽⁸⁰¹⁾ See Case C-35/70 *Manpower* [1970] ECR 1263, para. 10; later confirmed in, for example, Case C-202/97 *Fitzwilliam* [2000] ECR 883, para. 28; and Case C-404/98 *Plum* [2000] ECR 9379, para. 19.

⁽⁸⁰²⁾ See Y. Jorens (ed.), J-P. Lhernould (ed.), J-C. Fillon, S. Roberts and B. Spiegel, Think Tank Report 2008 — Towards a new framework for applicable legislation. New forms of mobility, coordination principles and rules of conflict — Training and reporting on European social security, Project DG EMPL/E/3 — VC/2007/0188, Brussels, 2008), 16–17.

and cannot get rid of the non-flexible employee who insists on a social security situation which is contrary to the interests of the employer; to pay the lowest contributions (as long as they lead to benefits); to have the legislation of the same Member State applicable in the fields of social security, taxation and labour law — as this would guarantee that all his different rights would be linked to one and the same place, i.e. his central place of interest.

For the employer, however, other interests will be important: to be confronted with only the home social security scheme because only this one is well known; to have the legislation of the same Member State applicable in the fields of social security, taxation and labour law as this would facilitate administration; to make full use of the competitive advantages of the free market (to use these possibilities to have the cheapest labour force) — at least not to have to pay more contributions than local competitors and to be flexible enough so that (the high-ranking) employees are willing to move (if the negative impact on the employees is too big, this could hinder any cross-border activity of the employer).

Last but not least there are the social security institutions. For them it will be important to have only contribution-payers resident in the relevant Member State (as any cross-border execution of contribution debts is cumbersome and takes a long time). Taking into account situations in other Member States is always more complicated than taking into account only the well-known situations inside the state (e.g. income in one state could be different from the notion of 'income' in the other state) and it avoids disputes with the institutions of other Member States.

We are therefore confronted with three different, often contradictory, sets of interests.

If one wants to take these three interests into account, the question remains whether they now all play the same role, or is one to be given priority?

Should the interest of the employee not take priority, taking into account the clear free movement of workers' framework of the regulations? This may be the case, but the CJ is not always very clear on this issue. We already mentioned that the principles of free movement of services can also play a role. In recent years in particular we have noticed a growing interest in, and number of cases dealing with, the conflict between the free movement of services and the social protection of workers. In these cases, the CJ takes the economic interest of the employer as a starting point⁽⁸⁰³⁾ and makes the social rights dependent on the exercise of the economic free movement of services. Avoiding social dumping for example, clearly at the heart of social protection, can only be combated within the framework of the posting Directive 96/71/EC, based on the free movement of services.

The role of the third stakeholder, i.e. the social security institutions, might, however, be of lesser importance. The CJ made clear that Article 48 of the Treaty (now 39) precludes a Member State from levying, on a worker who has transferred his residence from one Member State to another in the course of a year in order to take up employment there, higher social security contributions than those which would be payable, in similar circumstances, by a worker who has continued to reside throughout the year in that Member State without the first worker also being entitled to additional social benefits. The CJ clearly states that considerations of an administrative nature or difficulties of a technical nature, linked to particular methods of collection tax and social security contributions, cannot justify derogation by a Member State from the rules of Community law⁽⁸⁰⁴⁾. This case-law was also repeated under the framework of the free movement of services⁽⁸⁰⁵⁾.

According to this case-law, administrative simplification as an interest of the social security institutions

⁽⁸⁰³⁾ See Case 341/05 Laval [2007] ECR I 11767; Case C-438/05 Viking [2007] ECR I-10779.

⁽⁸⁰⁴⁾ Case C-18/95 Terhoeve [1999] ECR 345, para. 45.

⁽⁸⁰⁵⁾ Case 205/84 Commission v Germany [1986] ECR 3755.

cannot be invoked. One can argue that the interests of these institutions therefore clearly are of less importance than the interests of the workers or the employers. But is it possible to find a justification with respect to the employer in case of an obstacle to the free movement of workers?

As the worker is at the heart of the regulation, might his interests not always be predominant?

But are the interests of the worker today also protected by these regulations and what is meant by these interests? This brings us back to the fundamental principles behind the regulations: the neutral character of the applicable legislation; the compulsory character; and the principle of the single applicable legislation, also translated into the concepts of exclusive and strong effect.

3. The fundamental principles behind the conflict rules

(a) The neutral character

We have already pointed out that conflict rules are generally set up in the interest of the migrant workers to ensure that they are protected. 'In the interest of the migrant worker' should, however, narrowly be understood as implying that, due to the different national criteria used for insurance, migrant workers should not have to either fall between two stools, nor have to pay twice for protection. It does not mean that the migrant worker has a right to the highest benefits. What is important is that administrative complications should be avoided, rather than that the highest benefits or perhaps the lowest contributions should be paid⁽⁸⁰⁶⁾. Article 17 of Regulation (EEC) No 1408/71 (Article 16 of Regulation (EC) No 883/2004), which allows the competent authorities of the Member States to provide for exceptions to the conflict rules in the interest of certain categories of persons or of certain persons, confirms this reasoning.

⁽⁸⁰⁶⁾ Case C-60/85 Lijiten [1986] ECR 2365; Case C-202/97 Fitzwilliam [2000] ECR 883; Case C-404/98 Plum [2000] ECR 9379.

The 'interest' rather relates to the determination of the applicable legislation than to the application of the legislation itself, i.e. the amount of benefits, the concrete rights and obligations, the eventual application that a particular legislation would bring about⁽⁸⁰⁷⁾. The appointed legislation on the basis of Article 17 replaces the traditional conflict rules. As such, just as the fundamental objectives behind the conflict rules have, Article 17 has as its basic intention the avoidance of administrative complications. Also the recent CJ *Bosmann* case⁽⁸⁰⁸⁾ shows that, if someone wants to obtain a higher benefit or even a benefit, he depends on the national legislation of the Member State concerned. The conflict rules of Regulation (EEC) No 1408/71 therefore do not pay particular attention to the contents of the applicable law and the best possible protection for the employee.

It might therefore be perfectly possible that the employed or self-employed person would obtain higher social security benefits in case another legislation were applied. But the coordination regulations do not pay attention to this kind of interest of the employee. If administrative complications are avoided by appointing a particular legislation A, even in cases where application of another legislation B would be more beneficial for the worker, preference seems, according to this reasoning, to be given to legislation A.

The application of a principle of favouritism, known under the rules of international private law and labour law, is missing in the field of social security. The posting Directive 96/71/EC states that the application of the legislation of the country of temporary employment shall not prevent application of terms and conditions of employment which are more favourable to workers⁽⁸⁰⁹⁾. The same principle can also be found back in the Rome Convention and the

⁽⁸⁰⁷⁾ Y. Jorens, *Wegwijs in het Europees sociale zekerheidsrecht*, Brugge, Die Keure, 1992, 78; see also the point of view of the European Commission in Case C-101/83 *Brusse* [1984] ECR 2223.

⁽⁸⁰⁸⁾ Case C-352/06 *Bosmann* [2008] ECR I-3827.

⁽⁸⁰⁹⁾ Article 3(7) of posting Directive 96/71/EC.

Rome I Regulation⁽⁸¹⁰⁾ in the field of international private law. Through this principle of favouritism the contents of the law are of importance and the best system with the biggest protection has priority.

This is certainly not the case under social security law.

But is this priority for avoiding administrative complications always in conformity with the principle of free movement of workers? Is the fact that an employee is not guaranteed the highest possible benefits as a result of a choice of conflict rules made under the regulation an impediment to free movement?

Or is the Community legislator perhaps immune to such arguments, as it is in his own power to decide which rules are in conformity with the EU Treaty? It is true that the CJ pointed out that the Council has a wide discretion regarding the choice of the most appropriate measures for obtaining the objective of Article 51 of the Treaty (now 42) and therefore had the liberty to depart in some respects at least from the mechanisms currently provided for in Regulation (EEC) No 1408/71⁽⁸¹¹⁾. This wide discretion should guarantee that the actual conflict rules are consistent with the principle of proportionality, and therefore judicial review of the exercise of such power must be limited to examining whether such exercise is vitiated by a manifest error or misuse of powers, or whether the institution concerned has manifestly exceeded the limits of its discretion⁽⁸¹²⁾.

But taking into account the fundamental objectives of the coordination regulations to achieve the free movement of persons, is it in conformity with the principle of proportionality that more and higher benefits are sacrificed on the altar of less administrative complications? It is doubtful.

But even if one only looks at the argument of lesser administrative complications, do the actual

conflict rules pass this test? Let us take the example of frequently mobile workers who have to change legislation every time they take up a new job. By not ensuring continuity in the applicable legislation, this would lead to a further impediment⁽⁸¹³⁾. We cannot ignore the fact that such a situation would increase administrative complications, which would be against the objectives of the conflict rules. In particular, if the European legislator deliberately chose a different conflict rule for another category of people, might it then not be argued by this group of frequently mobile workers that a similar application of that conflict rule would generally lead to less administrative impediments and would therefore be more in conformity with the free movement of persons?

But might it also be possible to go one step further, looking at the abovementioned case-law of the CJ, where the CJ clearly states that conformity with the free movement of persons has to be looked at, not in an abstract way, but rather from the particular situation of the worker? Could this lead to a more personal investigation of the adequacy of the conflict rule? The *lex loci laboris* has been chosen because it clearly fits into the perspective of the market integration function, allowing the worker to be connected to the country he is most attached to. It might be perfectly possible that, in a more concrete situation, the worker argues and proves that he is more attached to another country. Could it not be argued that in such situations an alternative connecting factor or conflict rule should be used as it better serves the worker's interests?

(b) The compulsory character of the conflict rules

Contrary to the rules on labour law and international private law, social security regulations do not foresee the possibility of free choice for determining which social security legislation would

⁽⁸¹⁰⁾ Article 6 of the Rome Convention and Article 8 of the Rome I Regulation.

⁽⁸¹¹⁾ Case C-443/93 Vougioukas [1995] ECR 4033, para. 35.

⁽⁸¹²⁾ Case C-242/99 Vogler [2000] ECR 9083.

⁽⁸¹³⁾ See Y. Jorens (ed.), J-P. Lhernould (ed.), J-C. Fillon, S. Roberts and B. Spiegel, Think Tank Report 2008 — Towards a new framework for applicable legislation. New forms of mobility, coordination principles and rules of conflict — Training and reporting on European social security, Project DG EMPL/E/3 — VC/2007/0188, Brussels, 2008, 23.

apply⁽⁸¹⁴⁾. Social security belongs to the public field and is of public order and therefore parties may not deviate from these general principles. This cannot, however, exclude the fact that, at least indirectly, parties can influence the choice of the applicable legislation through the factual situations of a case, such as the place of residence, the location of the employer, the workplace, etc.⁽⁸¹⁵⁾.

The rules of conflict therefore have a compulsory character. This is also in line with the national social security schemes, according to which the principle of solidarity requires that the person concerned has to be subject to the applicable legislation. It follows from the provisions of the regulation that the application of national legislation is determined by reference to criteria drawn from the rules of Community law. Although it is for the legislature of each Member State to lay down the conditions creating the right or the obligation to become affiliated to a social security scheme or to a particular branch under such a scheme, it must be emphasised that this does not mean that the Member States are entitled to determine the extent to which their own legislation or that of another Member State is applicable⁽⁸¹⁶⁾. The application of the provisions of the regulations therefore depend on the objective conditions and circumstances in which the migrant worker concerned is situated and the last one has

no option⁽⁸¹⁷⁾. The provisions of Title II constitute a complete set of conflict rules, the effect of which is to divest the legislator of each Member State of the power to determine the ambit and the conditions for the application of its national legislation. The Member States are therefore not entitled to determine the extent to which their own legislation or that of another Member State is applicable, since they are obliged to comply with the provisions of the Community law in force⁽⁸¹⁸⁾. The conflict rules are compulsorily applicable and it is only when choice has explicitly been foreseen that an option can be used⁽⁸¹⁹⁾. In the *Miethe* case on unemployment benefits, the CJ clearly determines that Article 71(1)(a)(ii) of Regulation (EEC) No 1408/71 must be interpreted as meaning that a wholly unemployed frontier worker who comes within the scope of that provision may claim benefits only from the Member State in which he resides even though he fulfils the conditions for entitlement to benefits laid down by the legislation of the Member State in which he was last employed.

The applicable legislation is therefore derived objectively from the conflict rules of the regulation, taking into account the factors connecting the particular situation with the legislation of the Member State.

Traditionally, free choice is considered to be excluded as it is often believed that the employee, as the weaker party, would not be in a position to resist the pressure from the employer who would presumably have a preference for the country with the lowest contributions. But is this correct? Also today, the conflict rules are only concerned with avoiding administrative complications and do not exclude the possibility that perhaps the country with the lowest contributions, which — although they are not immediately interrelated — would also lead to the lowest benefits for the worker concerned, would be chosen.

⁽⁸¹⁴⁾ One exception is the free choice foreseen for diplomatic missions and consulars in Article 16 of Regulation (EEC) No 1408/71. This right of option was further kept for the auxiliary staff of the European Communities in Regulation (EC) No 883/2004 (Article 15). See also Case C-60/93 *Aldewereld* [1994] ECR 2991, concerning the situation of a person who resides in the Member State and, in the employment of an undertaking established in another Member State, works exclusively outside the European Union. The option to leave the choice to the person concerned to decide under which legislation he or she would fall, taking into account that no particular conflict rule was foreseen for this situation under the regulation, was rejected by the CJ as an option was only explicitly foreseen for diplomatic missions and the person concerned was not in a situation comparable to that

⁽⁸¹⁵⁾ Under the actual Regulation (EEC) No 1408/71 it is well-known that this choice through indirect factual elements does happen in practice, in particular in the situation where activities are performed in two Member States, one of them being the place of residence. By starting to work at home, even for a rather short period a week, people might become subject to the legislation of the state of residence, instead of the state of employment. Under the new Regulation (EC) No 883/2004, this 'intentionally arranging' to fall under the legislation of the place of residence would become less probable as it is now requested that substantial activities be performed in the state of residence.

⁽⁸¹⁶⁾ Case C-276/81 *Kuijpers* [1982] ECR 3027, para. 14; Case C-110/79 *Coonan v Insurance Officer* [1980] ECR 1445.

⁽⁸¹⁷⁾ See, for example, also Case C-12/67 *Guissart* [1967] ECR 536.

⁽⁸¹⁸⁾ Case C-302/84 *Ten Holder* [1986] ECR 1821, para. 21.

⁽⁸¹⁹⁾ See, for example, also Case C-1/85 *Miethe* [1986] ECR 1837, para. 12,

The option of free choice is known as a fundamental principle for the determination of the applicable labour law in the field of international private law⁽⁸²⁰⁾. However, also here this fundamental principle of free choice is to a large extent undermined by measures that should protect the employee. In the first place, the fact that parties have chosen a particular law would not, where all other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of the rules of the law of this country. Secondly, the choice of the law made by the parties cannot deprive the employee of the protection offered to him or her by the mandatory rules of the law, which would be applicable in the absence of choice, on the basis of objective criteria⁽⁸²¹⁾. The application of a principle of protection and a principle of favouritism for the employee therefore implies that the general principle of free choice is very limited. In case free choice were given in the field of social security law, one could, for example, imagine establishing a conflict rule as a guarantee according to which 'free' choice could not deprive the application of the social security protection of the country to which the employee concerned is most attached. On the other hand, this would not solve the problem as the next task would be to decide the country to which the employee is most attached. Would that be the country with the highest benefits? Or in the case of, for example, a worker, who works in Member State A for an employer based in Member State B, where s/he is also living, it could be argued that it is perhaps country B to which s/he is most attached⁽⁸²²⁾.

In general, however, allowing a free choice in the field of social security is not recommendable, not

only because of the high risk of the employer choosing the country with the lowest contributions, but also because it would contradict the compulsory, objective application of social security legislation and could as such also undermine the general financial solidarity of a social security system, leading to abuse.

One way or another, the application of an Article 17 agreement (Article 16 of Regulation (EC) No 883/2004) could be seen as a greater or lesser possibility of choosing between certain systems, although the choice here is more offered to the administrations.

(c) The principle of exclusivity and the strong effect of the conflict rules

The other side of the single applicable legislation is the exclusive effect of the conflict rules. The fundamental question is to know whether the conflict rules are in a position to exclude, in every situation, the application of another legislation than that designated by the regulation provisions without being in conflict with, and contrary to, Articles 39 and 42 of the Treaty. This debate is not new. And it seems that the CJ 'commutes' between different points of view.

Whereas in the beginning the CJ decided that the regulations did not prohibit the application of the legislation of the Member State other than the one designated by the conflict rules, except to the extent that it requires the worker to contribute in the financing of the social security institution, which is unable to provide him with additional advantages⁽⁸²³⁾, in later cases the CJ declared that 'The provisions of Title II constitute a complete system of conflict rules the effect of which is to divest the legislature of each Member State of the power to determine the ambit and the conditions for the application of its national legislation so far as the persons who are subject thereto and the territory

⁽⁸²⁰⁾ Article 3 of the Rome Convention and Article 3 of the Rome I Regulation

⁽⁸²¹⁾ See Article 6 of the Rome Convention, as well as Article 8 of Regulation (EC) No 593/2008, the Rome I Regulation.

⁽⁸²²⁾ See Y. Jorens (ed.), J-P. Lhernould (ed.), J-C. Fillon, S. Roberts and B. Spiegel, Think Tank Report 2008 — Towards a new framework for applicable legislation. New forms of mobility, coordination principles and rules of conflict — Training and reporting on European social security, Project DG EMPL/E/3 — VC/2007/0188, Brussels, 2008, 25.

⁽⁸²³⁾ Case C-92/63 Nonnenmacher [1964] ECR 585.

within which the provisions of national law take effect are concerned'; the Member States are (not) entitled to determine the extent to which their own legislation or that of another Member State is applicable since they are 'under an obligation to comply with the provisions of Community law in force'⁽⁸²⁴⁾. It is important to see that the CJ continues in this case by declaring that 'That rule is not at variance with the Court's decisions (see, in particular, the Petroni judgment) to the effect that the application of Regulation 1408/71 cannot entail the loss of rights acquired exclusively under national legislation. That principle applies not to the rules for determining the legislation applicable, but to the rules of Community law on the overlapping of benefits provided for by different national legislative systems. It cannot therefore have the effect, contrary to Article 13(1) of Regulation 1408/71, of causing a person to be insured over the same period under the legislation of more than one Member State, regardless of the obligations to contribute or of any other costs which may result therefrom for that person'⁽⁸²⁵⁾. The simultaneous application of two national legislations would therefore not be possible. Also the Commission had declared in that case that the principle of inviolability of national acquired rights (the famous 'Petroni principle')⁽⁸²⁶⁾ can only apply to the substantive rules of the coordination regime and not to the conflict rules.

This seems to include that a worker could, as a result of the conflict rules, lose a higher level of benefits provided in another Member State. As such this is not really surprising as we have noticed that for the CJ the interest of the worker is determined by avoiding and limiting administrative complications, rather than by guaranteeing a high level of benefits.

The simultaneous application of, on the one hand, the national social security system on its own and

the national social security system in combination with European social security law was not possible in that respect. On the other hand, in particular with respect to family benefits, the CJ already declared that the aim of Article 51 (42) would not be achieved if workers were to lose their social security advantages, guaranteed to them by the legislation of a single Member State, as the regulations allow different schemes to exist, creating different claims on different institutions against which the claimant possesses direct rights by virtue either of national law alone, or of national law supplemented, where necessary by Community law, in particular to the lifting of conditions of residents⁽⁸²⁷⁾.

This discussion has gained a new momentum with, as mentioned before, the *Bosmann* case. Although the CJ firstly confirms the exclusivity character (under Article 13(2)(a) of Regulation (EEC) No 1408/71, a person employed in the territory of one Member State is to be subject to the legislation of that state even if he resides in the territory of another Member State; the effect of determining that a given Member State's legislation is the legislation applicable to a worker pursuant to that provision is that only the legislation of that Member State is applicable to him), it goes further to determine that application of this article does not preclude a migrant worker, who is subject to the social security scheme of the Member State of employment, from receiving, pursuant to the national legislation of the Member State of residence, child benefit in the latter state.

It could be said that the *Bosmann* case only extends this well-known principle of a cumulative application under family benefits, taking into account that the particularity here is that the competent state, contrary to the case-law on accumulation of benefits, did not provide for any family benefit. The fundamental question is whether the national legislator might refuse the application of its national law or that he is obliged to apply it. It seems difficult

⁽⁸²⁴⁾ Case C-302/84 Ten Holder [1986] ECR 1821, para. 21.

⁽⁸²⁵⁾ Case C-302/84 Ten Holder [1986] ECR 1821, para. 22.

⁽⁸²⁶⁾ Case C-24/75 Petroni [1975] ECR 1149, paras 21–22. The regulation may not lead to the result that national acquired rights would be reduced.

⁽⁸²⁷⁾ Case C-807/79 Gravina [1980] ECR 2205, paras 6–7, confirmed in many other cases.

to imagine that he may refuse it. The only argument which one could use is that it would be contrary to the regulation that the national law also applies. German authorities may introduce into their domestic law a provision stating that ‘family benefits are granted to all persons resident on the German territory, with the exclusion of persons who are subject to another EU legislation according to [the] coordination rules of [the] Regulation’. However, such a provision would probably be seen as a typical indirect discrimination based on nationality. The option created by the CJ would therefore turn into an obligation⁽⁸²⁸⁾.

Can *Bosmann* be limited to situations where, if no family benefits are to be paid under the law of the competent state, migrant workers can now hope to get these benefits from the non-competent state? The statement of the CJ — ‘the provisions of Regulation No 1408/71 must be interpreted in the light of Article 42 EC Treaty which aims to facilitate freedom of movement for workers and entails, in particular, that migrant workers must not lose their right to social security benefits or have the amount of those benefits reduced because they have exercised the right to freedom of movement conferred on them by the EC Treaty’ (para. 29) — does not seem to limit the reasoning of the CJ to family benefits⁽⁸²⁹⁾. The broad reasoning of the CJ justifies, in our opinion, the notion that the application of the country of residence is not only limited to family benefits, but can also be extended to all other benefits. The person working in a Member State and residing in another might therefore also be entitled, for example, to healthcare coverage in their place of residence as the legislation of the workplace does not provide healthcare insurance.

The CJ seems to apply here the Petroni principle to the conflict rules. The framework of the

⁽⁸²⁸⁾ See Y. Jorens (ed.), J-P. Lhernould (ed.), J-C. Fillon, S. Roberts and B. Spiegel, Think Tank Report 2008 — Towards a new framework for applicable legislation. New forms of mobility, coordination principles and rules of conflict — Training and reporting on European social security, Project DG EMPL/E/3 — VC/2007/0188, Brussels, 2008, 26.

⁽⁸²⁹⁾ Case C-205/05 *Nemec* [2006] ECR I-10745.

coordination regulations is the free movement of workers and any impediment to that principle is forbidden. The application of the regulation, leading to a situation where the person concerned would be deprived of rights and benefits foreseen under national law — national legislation which would apply to the person concerned if he had not relied on the principles of the regulation — would be in contradiction of this fundamental objective. National entitlements must therefore always be taken into account. The principle that someone cannot be deprived of national acquired rights obliges the Member State that is not appointed by these conflict rules, but to which the person concerned is subject, to pay him or her the rights and benefits to which he or she is entitled. A comparison between the benefits obtained on the basis of the legislation appointed by the conflict rules and the benefits based on national law should be undertaken, eventually leading to the obligation to pay a differential amount by the (non-competent) state. This certainly does not imply that the conflict rules will thereby become meaningless.

This idea is in line with the general case-law of the CJ in the framework of the free movement of workers and services. Also in healthcare, the CJ already mentions in the *Vanbraekel* case that the tariffs of reimbursement to be paid as a result of the free movement of services may not lead to lower tariffs than those based on national law⁽⁸³⁰⁾.

The consequences of cases like *Bosmann* and *Nemec* point out that the level of benefits may have to be taken into account and strengthened as such the interest of the workers. A principle of favouritism, as known under international labour law, could as such also have found its way into social security law. This applies to all branches of social security. It might shed new light on the actual philosophy of the conflict rules and encourage one to look at them again directly from the perspective of the EU Treaty.

⁽⁸³⁰⁾ Case C-368/98 *Vanbraekel* [2001] ECR I-5363.

IV. CONCLUSIONS

Fifty years after the first EU coordination regulations appeared, new developments in migration patterns, as well as the growing direct reliance on, and applicability of, the fundamental principles of EU law, have led to a situation where a new set of conflict rules could be envisaged. These rules should not just be cosmetic and should look at

the fundamental principles behind these rules, such as the principle of neutrality, the compulsory character and the one single legislation applicable. Some of these principles could be adapted in the interest of the worker and should be in conformity with the free movement of workers. The right momentum now exists to assess the actual conflict rules against a test of the balance of interests.