

## UNEMPLOYMENT INSURANCE – COMPARATIVE, CROSS-BORDER AND EU PERSPECTIVES

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*The article is centred upon the research question whether unemployed persons enjoy proper protection in national, international (cross-border) and EU law. In an attempt to reply to such question, the authors firstly compare national unemployment insurance schemes and secondly, research on how unemployment benefits are coordinated in cross-border cases. Moreover, non-coordination of social assistance schemes is addressed. With respect to coordination of unemployment benefits and social assistance schemes, the authors advocate for ways of improving the legal position of mobile unemployed persons. Lastly, some EU-wide unemployment related initiatives are highlighted, namely the European unemployment benefit scheme (EUBS) and the European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the Covid-19 outbreak.*

*Keywords: unemployment insurance; unemployment benefits; social security coordination; social assistance; EUBS; SURE*

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## 1. INTRODUCTION

Dear and esteemed Colleague, Prof Željko Potočnjak enjoys an over four decades long research career, with numerous publications, highest judicial and managerial functions.<sup>1</sup> Despite focusing more on individual and especially collective labour law, his research interest reached also the law of social security, not only from substantive but also from procedural aspects. Publications on pension insurance and constitutional protection of social security entitlements are well known to the international research community.<sup>2</sup>

Therefore, it seems only logical that we not simply congratulate dear Colleague Potočnjak for his personal jubilee, but dedicate the present paper to the various aspects of unemployment insurance, a topic closely related to employment and social security law. Research question of the present paper is how does social risk of unemployment differ from other social risks and if unemployed persons enjoy proper protection in national, international (cross-border) and EU law. Moreover, possible ways of improving their legal position are advocated. The present paper is rounded up with concluding thoughts and possible outlook.

## 2. SOCIAL RISK OF UNEMPLOYMENT

Unemployment is not only an individual status, but an important societal factor that each country strives to reduce, as this means a bigger gross domestic product and budgetary income, improves the economic position or “standard” of society, while also lowers the expenses in the form of social security or social assistance expenditure.<sup>3</sup> Nevertheless, States cannot entirely prevent unemployment as it is a phenomenon inherently present in a capitalistic society. They seek to minimize it by encouraging the unemployed through “active” labour market policy measures, while also having “passive” measures to compensate for the income loss for the unemployed.

Unemployment is one of the traditional social risks, anchored in the Conventions of the International Labour Organisation (ILO) as a risk of income

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<sup>1</sup> Among others, he was a judge at the Croatian Constitutional Court and Dean of the Faculty of Law, University of Zagreb.

<sup>2</sup> More in the library catalogue of the Zagreb Faculty of Law, URL: [https://www.pravo.unizg.hr/knjiznica/online\\_katalog](https://www.pravo.unizg.hr/knjiznica/online_katalog). For a full list of prof. Potočnjak’s published works in the last two decades see his CROSBİ profile, URL: <https://www.bib.irb.hr/pregled/profil/11514>.

<sup>3</sup> Rataj, P., *Pravni položaj brezposelnih oseb, ki se gibljejo v Evropski uniji*, PhD thesis, Pravna fakulteta, Ljubljana, 2022, pp. 180-186.

loss due to inability to obtain suitable employment, despite being able to work and actively seeking for it.<sup>4</sup> The risk can in principle be present not only in cases of whole unemployment, but also in cases of partial or temporary unemployment. However, unemployment is intertwined with many other consequences, for instance, loss of motivation to work, loss of competences, mental struggles, deterioration of family relations, etc. Moreover, unemployment can hurt a human being economically and especially morally, creating poverty, inequality, felt the most by those with other family members that they have to support. Many unemployed persons miss the working environment, their work and co-workers, leading them to feel neglected, worthless, useless and even socially excluded.<sup>5</sup>

### 3. UNEMPLOYMENT INSURANCE

#### 3.1. Distinctive personal scope across Member States

In the field of social security, the typical scheme to protect against unemployment in European Union (EU) Member States is a mandatory<sup>6</sup> unemployment insurance scheme.<sup>7</sup> One of the fundamental questions in the design of insurance schemes is who should be solidary with whom, i.e. who are the persons covered. All Member States with a social insurance design cover employed

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<sup>4</sup> Bubnov-Škoberne, A., *Pravni vidiki socialne varnosti za brezposelne*, Časopisni zavod Uradni list Republike Slovenije, Ljubljana, 1997, p. 38. When assessing social risks and comparing them, it cannot be overlooked that a form of compensation for income loss is typical also in relation to some other social risks, such as sickness, old age, disability, etc. The difference is that an unemployed person is, on the one hand, able to work and, on the other, has not yet achieved the age, from which economic activity is no longer expected. Even though an unemployed person is able to work, he/she cannot find employment, despite seeking it actively.

<sup>5</sup> See Bubnov-Škoberne, A., *Pravica do socialne varnosti v primeru brezposelnosti*, Zbornik znanstvenih razprav, vol. 56, 1996, p. 6 and onwards about unemployment as a societal and individual state.

<sup>6</sup> It is a voluntary scheme only exceptionally, for instance in Denmark, or partially also in Sweden and Finland. Moreover, voluntary insurance may be possible in some EU Member States for specific groups that are not mandatorily covered. For more information on comparative aspects see comparative tables of the Mutual information system on social protection (MISSOC), URL: <https://www.missoc.org/missoc-database/comparative-tables/> (January 2023).

<sup>7</sup> Luxembourg is an exception where an unemployment benefit is financed from taxes. This is also one of the reasons why there are special rules for aggregation of periods of insurance, employment or self-employment in Art. 61. of Regulation (EC) No. 883/2004 on the coordination of social security systems, OJ L 166, 30. 4. 2004.

persons, most often with no distinction towards hours of work or income earned out of employment.<sup>8</sup> On the other hand, insurance schemes take different approaches towards the self-employed persons.<sup>9</sup> In some Member States, they are *a simile* mandatory included, in some they can be insured voluntarily and in some they cannot be socially insured for the risk of unemployment at all. The situation reflects the theoretical underpinnings<sup>10</sup>, where (especially) in the past, the self-employed were not included in unemployment insurance schemes. It was understood that they themselves took on the economic business risk, and it was difficult to assess whether unemployment was the result of a self-employed person's will or fault, the lack of it being the condition to claim unemployment benefits in some Member States.

These are not merely ideas of the past, but can be present even today. Furthermore, it is questionable whether the unemployed (previously self-employed) are obliged to accept a suitable employment or also pursue self-employment (again). The question is also, how to compensate for their income, an issue evident in the wake of Covid-19 measures.<sup>11</sup> Nevertheless, the situation has been changing in recent decades, as self-employed persons have been included in the personal scope in some Member States<sup>12</sup> and their inclusion is recommended (even if on a voluntary basis).<sup>13</sup>

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<sup>8</sup> An exception to this are “mini-jobs” in Germany and Austria.

<sup>9</sup> Along with the employed and self-employed persons, some Member States mandatorily cover also civil servants, apprentices, vocational trainees, persons receiving social security benefits, and some other categories of persons in a smaller number of EU Member States. It is not rare that some economically active persons, especially non-standard workers, are either not covered in an unemployment insurance scheme or face difficulties in accessing unemployment benefits. For a glimpse comparatively see Spasova, S. *et al*, *Access to social protection for people working on non-standard contracts and as self-employed in Europe: A study of national policies*, European Commission, 2017, pp. 51-55.

<sup>10</sup> Schoukens, P.; Weber, E., *Unemployment insurance for the self-employed: A way forward post-corona*, EISS Research paper, 2020, write more extensively about this phenomenon.

<sup>11</sup> Due to the various restrictions imposed in public life at the outset of Covid-19 pandemic in Slovenia, the self-employed were for a period of time entitled to a benefit of an equal amount for all as compensation for the loss of income they (supposedly) endured. Mišič, L., *Sistematična analiza PKP ukrepov s področja socialne varnosti: med pravom in (socialno) politiko*, *Delavci in delodajalci*, vol. 22, no. 2-3, 2022, pp. 200-201, discussed the nature of such a benefit, perhaps best described as some sort of a social compensation.

<sup>12</sup> Also the rules on coordination of unemployment benefits have been fully extended to self-employed persons with Regulation (EC) 883/2004.

<sup>13</sup> See the Council Recommendation on access to social protection for workers and the

### 3.2. Distinctive conditions for acquiring unemployment benefits and their material scope

If one looks at unemployment insurance schemes and their design, mention must be made of conditions to claim unemployment benefit(s) and their defining elements (level and duration). Firstly, a person is required to qualify as an “unemployed person”. Besides being (wholly and/or partially<sup>14</sup> unemployed), an unemployed person has to register with the employment services, be able to work<sup>15</sup>, actively seek employment and be prepared to take up a suitable employment (if offered).

Moreover, despite the fact that *prima facie* unemployment insurance schemes’ design in Member States seem comparatively similar, the differences become obvious when studying unemployment insurance schemes in depth.<sup>16</sup> The main condition to claim unemployment benefits in national legislations is the qualified (i.e. minimum required insurance) period.<sup>17</sup> On top of that, in majority of Member States, in order to claim unemployment benefits, persons ought to be involuntarily unemployed. On the contrary, some Member States in such cases<sup>18</sup> only provide for a waiting period before an unemployment

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self-employed, OJ C 387, 15. 11. 2019. It is recommended in line with points 2 and 8 that formal coverage, effective coverage, adequacy and transparency should be ensured for all workers (mandatory and regardless of the type of employment relationship) and the self-employed in social protection systems of EU Member States. It is stated in point 18 of the preamble that voluntary coverage may be a suitable solution in the case of unemployment insurance for the self-employed.

<sup>14</sup> All EU Member States do not grant an unemployment benefit in the case of partial unemployment. For instance, to claim an unemployment benefit in Slovenia, whole unemployment is required and partial unemployment benefit may be granted only in cases when a wholly unemployed person subsequently finds part-time employment (i.e. benefit reduction).

<sup>15</sup> Member States commonly also foresee age limits, for instance to be aged between 15-65 years (e. g. in Slovenia and Croatia). This reflects the minimum age to be employed (through seeking employment) and the age at which old-age benefits are foreseen, meaning that it is no longer expected from an individual to be economically active.

<sup>16</sup> See MISSOC comparative tables, *op. cit.* (fn. 6).

<sup>17</sup> The minimum period ranges from 3 months (in Italy) to 24 months (in Slovakia). Most common solution is a period of 12 months, but in various periods where this needs to be achieved (for instance, in 16 months in Latvia and up to 72 months in Spain).

<sup>18</sup> In some EU Member States, short waiting periods are foreseen even in cases of involuntary unemployment.

benefit can be claimed.<sup>19</sup>

When the conditions to claim an unemployment benefit are fulfilled, Member States grant the benefit in varying durations and levels. Majority of them follows the logic of the principle of equivalence, meaning that longer (uninterrupted) insurance period(s) result(s) in a longer duration<sup>20</sup> of an unemployment benefit.<sup>21</sup> These Member States most commonly provide the benefit for the duration between three and twelve months, whereas in exceptional cases this can last even for a period of 36 months.<sup>22</sup>

Some Member States approach the question of the duration of an unemployment benefit differently.<sup>23</sup> In Belgium, for instance, there is no temporal limit for an unemployment benefit (although the conditions get stricter during time). In other Member States, however, unemployed persons can claim the benefit only for a limited period, it being equal for all, with no regard to previous insurance periods.<sup>24</sup> This period can last up to 3, 5, 6, 8, 10 or even 11 months, depending on the Member State.

The obvious comparative differences are seen in the levels of unemployment benefits. It can be determined as a flat-rate benefit<sup>25</sup> or as a benefit that is dependent on previous earnings but with a ceiling (i.e. maximum amount). The latter reflects a certain percentage (usually 60 to 80 percent) of the insurance basis (i.e. previous earnings in a reference period, most commonly a period of 12 months).<sup>26</sup> The level of unemployment benefit (i.e. usually the

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<sup>19</sup> For instance, four weeks in Austria and six months in Malta. In some cases, the result of voluntary unemployment is a lower benefit (Czech Republic and Bulgaria).

<sup>20</sup> Some Member States attempt to do this in a linear manner (e. g. Germany, Netherlands, Italy), while in (some) others the increase of the duration of an unemployment benefit is very gradual and much longer insurance periods are required (e. g. Austria, Slovenia, Croatia, Portugal). Specific rules may also exist for older unemployed persons, the unemployment benefit in such cases usually being of a longer duration, since they have a much more difficult task in finding employment.

<sup>21</sup> The most common comparative solutions follow the idea of providing unemployment benefits for a half of the previous insurance period, although in some Member States this ratio is almost equivalent or exceptionally even in favour of a longer unemployment benefit duration.

<sup>22</sup> Rataj, *op. cit.* (fn. 3), p. 243.

<sup>23</sup> A specific example is Poland, where the duration depends on the level of unemployment in a particular part of Poland, age, insurance period and the (presence of a) duty to support children.

<sup>24</sup> For instance, in Hungary, Latvia, Denmark, Finland.

<sup>25</sup> For instance, in Ireland and Malta.

<sup>26</sup> There are exceptions to the percentage of the basis and to the reference period, but due to spatial constrictions, a simplified sentence suffices. For more in depth information see Rataj, *op. cit.* (fn. 3), pp. 205-210.

percentage of the insurance basis) is lowered with the passage of time in majority of Member States, since lower income compensation should theoretically stimulate unemployed persons to find employment. There are vast differences to the (highest) level of an unemployment benefit. Some Member States also take into account the situation of family members when determining the level of unemployment benefit.<sup>27</sup>

The material scope of unemployment benefits largely depends on the philosophical underpinnings of a particular scheme.<sup>28</sup> Some Member States strive towards a (high) income replacement benefit that the person had before becoming unemployed, while others focus on the mere minimum (equally for all), which corresponds to liberal philosophy that emphasizes the responsibility of an individual. A similar logic applies to the duration of an unemployment benefit, where some Member States provide for a high-income replacement benefit with the intent that the person has more freedom in finding a suitable (well-paid) job, where the level gradually decreases over time. In Member States of a more liberal philosophy, any job is better than no job, and it is up to the individual to find it after a short period of unemployed benefit entitlement. This is supplemented with social assistance that can in some cases be claimed by unemployed persons when their unemployment benefit ends.

#### 4. CROSS-BORDER EMPLOYMENT AND UNEMPLOYMENT

National unemployment insurance schemes in practice predominantly include nationals of a specific State that are conducting economic activity (as employed or self-employed persons) in that State and reside there. Nevertheless, if people move from one State to another and become economically active there, cross-border cases are formed. In order to achieve the goal of freedom of movement (in the EU), social security systems of (Member) States have to be coordinated. This applies also to schemes which provide social security if the

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<sup>27</sup> For instance, through a higher level of unemployment benefit in Belgium, Luxembourg, Germany, Portugal, or through a specific supplement in Austria, Finland, Ireland, Malta. In Poland and Sweden, this results in a longer duration of an unemployment benefit. Approximately half of EU Member States do not take into account the situation of family members within the scope of an insurance scheme, but approach this question systemically (mainly) through family benefits.

<sup>28</sup> See Esping-Andersen, G., *The three worlds of welfare capitalism*, Polity Press, Cambridge, 1990, where the author describes three philosophical models of welfare States, where they differentiate in the manner in which they provide for a socially acceptable standard of living independently of labour market participation. More specifically, it concerns a conservative (corporative, continental) model, social-democratic model and a liberal model of a welfare State.

risk of unemployment materialises. It has now been more than a century since the first social security agreements were concluded between States with the intent of providing social security in cross-border cases.<sup>29</sup>

The relevant instruments to achieve that goal are multi-fold<sup>30</sup>, for instance, bilateral and multilateral agreements, EU coordination regulations<sup>31</sup> for cross-border cases between two or more EU Member States, in some cases even EU Directives<sup>32</sup> or unilateral State measures.<sup>33</sup>

#### 4.1. Bilateral and multilateral social security agreements

More specifically, as regards multilateral social security coordination agreements, the risk of unemployment is rarely included. Unemployment benefits fall under the material scope of ILO social security Conventions No. 118 and 157<sup>34</sup>, but further provisions are scarce. For instance, in Convention No. 118 on equality of treatment in social security, it is stipulated that residence of up to six months can be required before unemployment benefits can be claimed (even though the general rule requires equal treatment without a residence condition).<sup>35</sup> Additionally, ILO Unemployment provision Convention No. 44

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<sup>29</sup> For an overview see Roberts, S., *A short history of social security coordination*, in: Jorens, Y. (ed.), *50 years of social security coordination: past – present – future*, Report of the conference celebrating the 50th anniversary of the European coordination of social security, European Commission, 2010, p. 12.

<sup>30</sup> See in more detail the excellent contribution by Vonk, G., *Sailing the seven seas: A schematic overview of mechanisms that can be used to strengthen the social security protection of persons moving in and out of the EU*, European journal of social security, vol. 20, no. 2, 2018, pp. 204-216.

<sup>31</sup> Regulation (EC) No. 883/2004 on the coordination of social security systems, OJ L 166, 30. 4. 2004, and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No. 883/2004 on the coordination of social security systems, OJ L 284, 30. 10. 2009.

<sup>32</sup> For an overview see Rataj, P., *Izbrana vprašanja povezovanja sistemov socialne varnosti v luči zaposlovanja delavcev iz držav EU in tretjih držav*, Delavci in delodajalci, vol. 22, no. 2-3, 2022, pp. 261-262, and Verschuere, H., *Employment and social security rights of third-country labour migrants under EU law: an incomplete patchwork of legal protection*, European journal of migration and law, vol. 18, no. 4, 2016, pp. 385-397.

<sup>33</sup> Unilateral State measures are encouraged in Art. 12 para. 4 of the European Social Charter as “other means” besides bilateral and multilateral agreements. Strban, G., *The existing bi-and multilateral social security instruments binding EU States and non-EU States*, in: Pieters, D., Schoukens, P. (eds.), *The Social Security Co-Ordination Between the EU and Non-EU Countries*, Intersentia, Cambridge, Antwerp, 2009, p. 85.

<sup>34</sup> See Art. 2 of both Conventions.

<sup>35</sup> See Art. 4 of ILO Convention No. 118. A similar rule (with ordinary residence) is



allows for the loss of an unemployment benefit if an unemployed person resides abroad (on the territory of another State). Moreover, special rules for frontier workers may apply and these could be foreseen in bilateral agreements.<sup>36</sup> Conclusion of bilateral (or multilateral) agreements is, furthermore, envisioned in Art. 4 of ILO Convention No. 157.<sup>37</sup>

It is true that some Member States provide for unilateral measures to ensure protection in cross-border cases<sup>38</sup>, but more commonly this is done through bilateral agreements, adoption of which is encouraged.<sup>39</sup> This is relevant for cross-border cases where connecting factors exist between a Member State and a third-country.<sup>40</sup> Slovenia, for instance, has concluded several bilateral agreements that refer (also) to unemployment benefits.<sup>41</sup> These agreements typically relate to employees in their personal scope, the competent State is the state of (last) employment and periods of insurance are aggregated (if the insurance period in the State of last employment was of sufficient duration).<sup>42</sup> Rules concerning frontier workers, calculation of benefits or export of unemployment benefits can be found only exceptionally.<sup>43</sup>

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foreseen in Art. 2c of the European interim agreement on social security other than schemes relating to old-age, invalidity and survivors.

<sup>36</sup> Art. 15 of ILO Convention No. 44. See also Art. 17 of ILO Recommendation No. 44.

<sup>37</sup> Special rules exist also in the European Convention on Social Security from 1972 (Arts. 51-56), but these rules were based on Regulation (EEC) No. 1408/71.

<sup>38</sup> Mention can be made, for instance, of the possibility of voluntary insurance for persons that are residing abroad. Such an exemption exists in the Slovenian unemployment insurance scheme for several groups, including also Slovenian citizens in an employment relationship with an employer in another State, that cannot claim unemployment benefits when returning (to Slovenia) on any other legal grounds. See Art. 57 Zakona o urejanju trga dela (Slovenian Labour Market Act), Uradni list RS (Official Gazette of Republic of Slovenia), no. 80/10 with amendments up to 59/22 – odl. US.

<sup>39</sup> Strban, G., *Member States' approaches to bilateral social security agreements*, European journal of social security, vol. 20, no. 2, 2018, p. 129.

<sup>40</sup> For cross-border cases involving two or more EU Member States, EU coordination Regulations have replaced such bilateral social security agreements. For the CJEU case-law on this issue see cases C-227/89, Rönfeldt, C-475/93, Thévenon, C-75/99, Thelen, C-277/99, Kaske. The latter two relate to unemployment benefits.

<sup>41</sup> Agreements in this respect were concluded with Croatia, Austria, Italy, Macedonia, the Netherlands, Luxembourg, Bosna and Hercegovina, Serbia and Montenegro. See in detail Rataj, *op. cit* (fn. 3), pp. 80-89.

<sup>42</sup> Exceptionally, periods of employment or work periods are aggregated also in some agreements.

<sup>43</sup> For instance, agreements that Slovenia concluded with Italy (1999) and the Nether-

## 4.2. Coordination of unemployment benefits in the EU

When the cross-border cases are linked to two or more Member States (even if the person concerned is a third country national)<sup>44</sup>, social security coordination Regulations apply. Before delving further into coordination of unemployment benefits, it should be noted that the coordination Regulation contains no definition of unemployment benefits.<sup>45</sup> It is clear from the CJEU case-law that a benefit that is to fall under coordination rules must be a social security benefit, and this assessment rests on the factors relating to each benefit, in particular its purpose and the conditions for its grant (and not on whether the national legislation describes the benefit as a social security benefit or not).<sup>46</sup> A social security benefit is a benefit that is granted to recipients on the basis of a legally defined position, with no individual and discretionary assessment of personal needs, and relates to one of the social risks listed under material scope of coordination Regulation.<sup>47</sup>

In the last few decades, the CJEU was on several occasions faced with the question whether a benefit is an unemployment benefit or a benefit of a different kind. The CJEU had to delineate unemployment benefits from pre-retirement benefits<sup>48</sup>, disability<sup>49</sup> and sickness benefits, and even family benefits.<sup>50</sup> Moreover, it was faced with the questions whether national schemes granting owed wages to unemployed persons due to employer's insolvency are unemployed benefits<sup>51</sup>, whether cost reimbursement for vocational training was an unemployment benefit<sup>52</sup>, and how to assess whether the benefits are of the

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lands (2000).

<sup>44</sup> Regulation (EU) No. 1231/2010 extending Regulations (EC) No. 883/2004 and 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality, OJ L 344, 29. 12. 2010.

<sup>45</sup> This is in contrast, for instance, to family benefits, pre-retirement benefits and death grants that are defined in Art. 1 of Regulation (EC) 883/2004.

<sup>46</sup> See cases C-249/83, Hoeckx, para. 11; C-122/84, Scrivner, para. 18; C-406/04, de Cuyper, para. 22. In general it is also irrelevant in which manner the benefit is financed, as explained in C-78/91, Hughes, para. 14; C-177/12, Lachheb, para. 32.

<sup>47</sup> See C-286/03, Hosse, para. 37; C-228/07, Petersen, para. 19; C-388/09, da Silva Martins, para. 38; C-177/12, Lachheb, para. 30.

<sup>48</sup> C-25/95, Otte; C-406/04, de Cuyper.

<sup>49</sup> C-228/07, Petersen.

<sup>50</sup> See C-135/19, CW, paras. 36, 41 and operative part.

<sup>51</sup> C-39/76, Mouthaan, paras. 17-20.

<sup>52</sup> C-375/95, Campana. The case serves as grounds for discussion whether active policy measures also fall or could fall under the umbrella of unemployment benefits. In the CJEU case-law, the only such case was adopted nearly four decades ago. See in

same kind (as they should not overlap).<sup>53</sup>

It can be concluded from the CJEU case-law<sup>54</sup> that defining characteristic of unemployment benefits is that the purpose of the benefit is to compensate for an income loss with the intention of recipient's survival in the case of unemployment.<sup>55</sup> Moreover, an unemployed person should be available to employment services, actively seek work and be ready to take up suitable employment.<sup>56</sup> Furthermore, it is important if the benefit is of a short-term nature and the entitlement ceases if new employment is found.<sup>57</sup> It can be added that the CJEU always takes account of multiple factors that govern the regulation of each benefit, and these may swing the pendulum towards a different type of benefit, but the abovementioned ones are the most representative. When looking at the comparative unemployment schemes, the typical benefit is the income compensation benefit out of an unemployment insurance scheme. Nevertheless, in some Member States so called "atypical" unemployment benefits can be found.<sup>58</sup>

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this respect also Verschueren, H., *Do national activation measures stand the test of European law on the free movement of workers and jobseekers*, European journal of migration and law, vol. 12, no. 1, 2010, pp. 81-104.

<sup>53</sup> C-102/91, Knoch, paras. 8, 39.

<sup>54</sup> For more detailed information on unemployment benefits, their characteristics and delineation with other social security benefits in CJEU case-law see Rataj, *op. cit.* (fn. 3), pp. 251-261.

<sup>55</sup> See cases C-102/91, Knoch, paras. 44-45; C-57/96, Meints, para. 27; C-228/07, Petersen, para. 25; C-135/19, CW, para. 34. This is not always decisive, especially if taking into account other defining factors of a particular benefit, as was the case in C-57/96, Meints.

<sup>56</sup> C-66/92, Acciardi; C-25/95, Otte. Nevertheless, in C-406/04, de Cuyper, a benefit was seen as an unemployment benefit even with the lack of such an obligation. The question that is difficult to answer then is what is the difference between an unemployment and a pre-retirement benefit. The latter are defined in Art. 1 of Regulation (EC) 883/2004 as "cash benefits, other an unemployment benefit, ... the receipt of which is not conditional upon the person concerned being available to the employment services of the competent State". See also Fuchs, M., *The implementation of coordination Regulations in active labour market policy provisions at national level*, in: Jorens, Y. (ed.), *50 years of social security coordination: past – present – future*, Report of the conference celebrating the 50th anniversary of the European coordination of social security, European Commission. 2010, p. 95.

<sup>57</sup> See C-228/07, Petersen, para. 28; joined cases C-216/12 in C-217/12, Hliddal in Bornand, para. 52; C-135/19, CW, para. 34.

<sup>58</sup> For instance, in France (fr. *contrat de sécurisation professionnelle*), Austria (ger. *Weiterbildungsgeld*), Belgium (fr. *allocations d'insertion*), Luxembourg (fr. *indemnité d'attente*), Italy, Lithuania, Czech Republic, Spain and Slovenia. See de Cortázar, C. G. (ed.) *et al*, *Coordination of unemployment benefits*, Think tank report 2012, trESS, Ghent,

Rules on coordination of unemployment benefits in the EU can be found in the 6<sup>th</sup> chapter of coordination Regulation (EC) No. 883/2004.<sup>59</sup> In comparison with (some) bilateral agreements, the rules have a broader personal scope (also for the self-employed) and generally regulate the position of unemployed persons more favourably, i.e. export of benefits is possible, Member State of last employment is competent (even after one day of insurance), periods other than solely insurance periods are aggregated, rules on calculation of benefits.

Pennings<sup>60</sup> argues that unemployment benefits are a special phenomenon in coordination Regulations that reflect the connection present in all unemployment insurance schemes, that is the connection between income compensation benefit entitlement and the recipient's obligation to actively seek a job to get out of unemployment (the idea of a "reactivating welfare-state"). This is why the rules were designed with the idea that benefits should be paid in the Member State where the unemployed person would have the best opportunities to find new employment (i.e. special rules on partially or wholly unemployed frontier or other cross-border workers that have become unemployed). The coordination rules need to address this connection, and while trying to make the limitations to benefit entitlement as mild as possible (to respect the free movement of persons), they also have to make it possible for the competent State to control the activity of an unemployed person.

Despite some improvements, for instance, applying the rules also to the self-employed who become unemployed, the current rules are still very much in line with the coordination rules as constructed more than half a century ago, partially also due to procedural rules for changing the Regulations (required consensus and the special position of Luxembourg).<sup>61</sup> Furthermore, Cornelis-

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2012, pp. 65, 97–99.

<sup>59</sup> They concern special rules on aggregation of periods of insurance, employment or self-employment (Art. 61), calculation of unemployment benefits (Art. 62), special provisions for the waiving of residence rules (Art. 63), rules for unemployed persons going to another Member State (i.e. export of benefits, Art. 64), rules for unemployed persons who resided in a Member State other than the competent State (Art. 65) and special provisions for wholly unemployed self-employed frontier workers where no unemployment benefits system covering self-employed persons exists in the Member State of residence (Art. 65a). More detailed implementing rules are contained in Arts. 54-57 and Art. 70 of implementing Regulation (EC) No. 987/2009.

<sup>60</sup> Pennings, F., *Coordination of unemployment benefits under Regulation 883/2004*, European journal of social security, vol. 11, no. 1-2, 2009, p. 177.

<sup>61</sup> Luxembourg does not have an unemployment social insurance scheme (i.e. aggregation of periods of employment or self-employment) and has a large number of frontier workers. There is even a transitional provision in Art. 87 para. 10 in Re-

sen states that unemployment benefits chapter cannot be entirely understood without a good knowledge of CJEU case-law.<sup>62</sup>

On top of the many court cases, the EU has been enlarged with new Member States, each of them with their peculiar rules (also concerning unemployment benefits in their insurance schemes). Considering the fact that the current rules for the coordination of unemployment benefits contain exceptions to three fundamental coordination principles (special rules on aggregation of periods, limitations to the export of unemployment benefits, competence of the Member State of residence in some cases), they “stick out” and are always under scrutiny. With merely minor changes being adopted when regulations were consolidated, and in some cases those changes latter recognized as suboptimal (for instance, reimbursement mechanisms for wholly unemployed frontier workers), it is no wonder that *de lege ferenda* improvements are being pursued.

That is not to say that the rules already in place for several decades cannot be applied, the notion is more to achieve the best possible outcome when striving for several goals, i.e. coherence, simplification (also regarding the implementation aspect in practice), clarity, protecting the position of the unemployed by allowing them (higher) unemployment benefits, allowing them (more) freedom to seek employment in another Member State, adopting rules that fairly divide financial burden of Member States, while also seeking to allow control over the activities of the unemployed benefit recipients. It can be argued that no solution can ever suffice to all these goals, the question is how to design the rules that would have the best balance between the goals pursued.

### 4.3. Perspectives *de lege ferenda*

With this in mind, it is no wonder that when the European Commission presented its proposal to amend Regulation (EC) No. 883/2004 in December 2016<sup>63</sup>, the most changes related to coordination of unemployment benefits.<sup>64</sup> The reason for it was to modernise the coordination rules as a response to

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gulation (EC) No. 883/2004 for Luxembourg. For negotiations and the impact of Luxembourg with respect to required consensus also see Cornelissen, R., *The new EU coordination system for workers who become unemployed*, European journal of social security, vol. 9, no. 3, 2007, pp. 209.

<sup>62</sup> Cornelissen, *ibid.*, p. 187, 209.

<sup>63</sup> European Commission, COM (2016) 815 final.

<sup>64</sup> The proposal also concerned applicable legislation rules, the relation between coordination Regulation and citizenship Directive, and changes for long-term care and family benefits.

changing social and economic reality in the Member States. By comparing case-law and administrative practice, the idea was also to achieve less disparity in the application of rules, equal treatment in comparable situations and a balancing of financial obligations between Member States.

The proposed changes referred to several issues, more specifically to the question of which periods ought to be aggregated, how long of a time-period a person should be (self)employed in the Member State of last (self)employment before it would be responsible to grant unemployment benefits (also intertwined with the rules on calculation of unemployment benefits), whether the period for export of benefits should be extended, and how to modify the rules for frontier and other cross-border workers not residing in the Member State of (self)employment, especially in order to achieve systemic coherence and equal treatment.<sup>65</sup> The European Commission assessed several options for each issue, especially with an impact assessment of economic, social and other effects<sup>66</sup>, in the end opting for a compromise that also had the largest political support. This resulted in proposing that only those periods, that are relevant under national legislation to obtain unemployment benefits, should be aggregated, and that the period of export of unemployment benefits should be at least six months, with the option of a Member State extending it for the entire duration of benefit entitlement. Moreover, the Member State of last (self)employment would be competent to grant unemployment benefits after a period of three months (otherwise the Member State of previous (self)employment would be competent), and this would be complemented with the rules on the calculation of benefits, where income in the Member State of last (self)employment would not be taken into account if a person was insured for a period of less than three months. With respect to wholly unemployed persons, residing in a Member State other than the Member State of (self)employment, competence of the Member State of last (self)employment would be established after 12 months of (self)employment, otherwise the Member State of residence would be competent, while reimbursement rules, currently seen as problematic in practice, would be removed.<sup>67</sup> Procedurally, monthly reporting of the host Member State's institution concerning the follow-up of the unemployed person's situation would become mandatory and not merely upon the competent institution's request.

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<sup>65</sup> For an in-depth analysis of issues addressed see European Commission, SWD (2016) 460 final/2, pp. 39-103, 164-166.

<sup>66</sup> *Ibid.*

<sup>67</sup> For an overview see also Rataj, *op. cit.* (fn. 3), pp. 324-328.

Unfortunately, the proposal has not yet been accepted, as several alliances were formed in the legislative process, effectively blocking proposed changes, each with their own background interests. Pennings even went so far as to call it a battlefield between the East and West.<sup>68</sup> While the proposal from the Commission is welcomed, as many of the suggestions can be seen as improvements of the current rules, the discussion should not come to a stop at this point.

With *de lege ferenda* perspective in mind, the changes should provide for rules that theoretically improve the position of mobile unemployed persons, while also being clear and more systemically coherent. Leaving aside the political interests that co-led the Commission in sending out a proposal that was some sort of a political compromise, further improvements are possible.

There are mainly two suggestions, on how the proposed changes could be improved even further. Firstly, the export of unemployment benefits could be amended with no temporal restrictions, which is also the case generally with other social security benefits.<sup>69</sup> And secondly, it is questionable whether there really ought to be special provisions for wholly unemployed persons that reside in a Member State other than the State of (self)employment.<sup>70</sup> There are se-

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<sup>68</sup> Pennings, F., *The discussion on the revision of the coordination rules of unemployment benefits – a battlefield between East and West*, European journal of social security, vol. 22, no. 2, 2020, p. 161. The author describes “western States” as Member States that are interested in how much an amendment costs them and whether the risk of abuse is present. On the other hand, the “eastern States” typically state that free movement is a fundamental freedom, although these States are sometimes reserved in accepting tasks that refer to the control of activities of the unemployment persons with the intent to correctly implement the rules.

<sup>69</sup> The waiving of residence rules (i.e. export of benefits) is one of the general principles in Art. 7 of Regulation (EC) No. 883/2004. This option was also the second discussed option in the impact assessment phase of preparations that culminated in the European Commission’s proposal, however, the option did not receive political support.

<sup>70</sup> As currently constructed in Art. 65 of Regulation (EC) No. 883/2004. It needs to be stressed that unemployment benefit entitlement in national unemployment insurance schemes typically is not of a much longer duration than a period of six months anyway (and usually being decreased over time). And even if it is, a long insurance period beforehand is often required. Moreover, in cases of entitlements that are much longer, for instance, for older unemployed, the reasoning behind them is that they have a much more difficult time finding employment in comparison with younger or middle-aged unemployed anyway. Moreover, if one was to speak of a risk of abuse, would an unemployed person really move to another Member State, uproot their life, etc. because of unemployment benefits that are usually capped, sometimes in relatively modest amounts? Furthermore, if the fear was that an

veral reasons why Member State of residence is not that relevant anymore, as it was perhaps 50 or 60 years ago.<sup>71</sup> If the proposed change is to allow for the competence of Member State of last (self)employment after a period of three months, and otherwise the competent State is the State of previous (self)employment, why can't such a rule apply also to persons employed in a Member State and residing in another one. In such cases, the Member State of previous (self)employment would most commonly be the Member State of residence, achieving the same result, but with fewer rules and more coherence. Moreover, if the residence State would not be the Member State of last or even of previous (self)employment, how can it be concluded that the Member State of residence is the State where an unemployed person has the best opportunities to find employment. Because up until now, this has been the standard that the CJEU has repeatedly emphasized<sup>72</sup>, although there are doubts as to whether this is correct in practice<sup>73</sup> (or even theoretically). Unlimited temporal export of unemployment benefits also goes hand in hand with the removal of residence relevancy. The responsibility to grant benefits should lie with the Member

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unemployed person would conclude an employment contract in the host Member State and very soon after become unemployed, making the last state of employment competent, and then export the unemployment benefit to its State of origin, a huge compromise was already made in attempting to switch the current rules towards the Member State of last (self)employment becoming competent only after a period of three months. In this sense, unlimited export would be some sort of an intertwined *quid pro quo* measure.

<sup>71</sup> Verschuere, H., *Financing social security and Regulation (EEC) 1408/71*, European journal of social security, vol. 3, no. 1, 2001, p. 18, argues that the place of residence is not all that relevant for the inclusion on the labour market anymore. This depends more on the competences and work experience that have been gained in the Member State of last (self)employment. Moreover, many jobseekers go to another Member State, because they cannot find employment in their State of residence. Some of them reside in another Member State solely due to the fact that prices of the real estate there are cheaper. Furthermore, especially in border regions of Member States, commuting today is much easier than it was when coordination rules were first enacted, making long distance travel much faster.

<sup>72</sup> See C-39/76, Mouthaan, paras. 13, 16. C-444/98, de Laat, paras. 28, 32; C-58/87, Rebmann, paras. 13–15; C-102/91, Knoch, paras. 32–33. The connection is made due to reasons of practicality and efficiency.

<sup>73</sup> This was already clear in the CJEU case-law, for instance, in cases C-1/85, Miethe, C-443/11, Jeltens, Peeters, Arnold. Even the European Commission, *op. cit.* (fn. 65), pp. 80-81, confirms that the presumption that a wholly unemployed person has the best opportunities to find employment in the Member State of residence is incorrect in practice, especially after longer periods of employment in another Member State, where the persons have established a strong link with the labour market of the State of (self)employment.



State that received social security contributions, either it being the Member State of last or of previous (self)employment.<sup>74</sup>

The mentioned two improvements would improve the position of unemployed persons in cross-border cases, make the rules more streamlined and in line with the general coordination principles. If the risk of abuse is feared, it can be stated that not many cases were identified in practice<sup>75</sup>, and Vonk<sup>76</sup> (albeit on a more general note) criticizes the measures which can be described as the spiral of obligations and sanctions, often based on assumptions that simply are not based on empirical findings (of abuse).

#### 4.4. Non-coordination of social assistance for unemployed persons

Considering that the outlined research question relates to the question if unemployed persons enjoy proper protection in national, international (cross-border) and EU law, social assistance(s) should not be overlooked.<sup>77</sup> While unemployment benefits have been coordinated in cross-border cases (bilaterally and for many decades also through EU Regulations), this is not the case for social assistance.<sup>78</sup> Social assistance was historically an assistance out of piety (for those unable to work) that was provided only locally. With the passage of time, social assistance was somewhat transformed into legal entitlement, although the territorial view remained, not necessarily locally, but with the prohibition of exporting social assistance to another State. Moreover, it was not granted to foreigners with no subsistence means, unless it was determined that they belong or are part of the society of a certain State (for instance, through a sufficient period of (self)employment or through a residence period).

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<sup>74</sup> Obviously, a distinction should be made between granting unemployment benefits and controlling the activities of an unemployed person. The latter could be made by the institution in the Member State, where an unemployed person is available to employment services (and/or residing), done on behalf of the competent institution.

<sup>75</sup> See Jorens, Y.; Gillis, D.; de Potter, T., *Fraud and error in the field of EU social security coordination: Reference year 2016*, European Commission, Brussels, 2017, p. 9, and Jorens, Y. (ed.) et al., *Analytical report 2017 on mutual assistance and sincere cooperation: An inquiry into the cooperation to enforce the coordination Regulations and to combat fraud and error*, FreSsco, European Commission, 2017, p. 15, 25-26, 30-31, 46.

<sup>76</sup> Vonk, G., *Repressive welfare states: The spiral of obligations and sanctions in social security*, European journal of social security, vol. 16, no. 3, 2014, pp. 195-196. It can be emphasized that Vonk discusses the field of social assistance, but the risk of abuse as such is a horizontal issue also relevant for social security benefits and their coordination.

<sup>77</sup> For an in-depth analysis, see Rataj, *op. cit.* (fn. 3), pp. 370-468.

<sup>78</sup> Art. 3 of Regulation (EC) No. 883/2004.

The current rules of the Directive (EC) No. 2004/38<sup>79</sup> (Directive, also referred to as Free Movement, Citizenship or Residence Directive) reflect this notion, which is relevant also for unemployed persons. To be more specific, those (mobile) unemployed persons that, before becoming unemployed, were (self) employed in the host State, retain such a status, which allows them to reside there and to enjoy equal treatment in accessing social assistance in the host Member State.<sup>80</sup> This applies (with no temporal limit) to involuntary unemployed after having been employed for more than one year<sup>81</sup>, if they have registered as job seekers with the relevant employment office. On the other hand, this applies only for a period of six months, if involuntary unemployment took place after completion of a fix-term employment contract of a shorter duration than a period of one year, or after having become involuntarily unemployed during the first twelve months of employment or self-employment.<sup>82</sup> The CJEU has been somewhat strictly following the wording of directive's provisions and these periods were seen by the CJEU as a proportional system designed with the Directive.<sup>83</sup>

Conversely, those unemployed persons that were not employed or self-employed in the host State, do not retain such a status, even if they are coming from a different Member State where they were previously economically active (even if they are exporting an unemployment benefit from another Member State).<sup>84</sup> In the light of the Directive they are seen as first-time jobseekers.

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<sup>79</sup> Directive (EC) No. 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158, 30. 4. 2004.

<sup>80</sup> See Arts. 7 and 24 of Directive (EC) 2004/38. This is combined with Art. 7 para. 2 of Regulation (EU) No. 492/2011 on freedom of movement for workers within the Union, OJ L 141, 27. 5. 2011.

<sup>81</sup> Applicable also to the self-employed, see C-442/16, Gusa.

<sup>82</sup> C-483/17, Tarola. The status of a worker or of a self-employed person can be retained also in some other cases specified in Art. 7 para. 3 of Directive (EC) 2004/38. The cases listed are not final, as the CJEU has already explained with respect to giving up work due to physical constraints in late pregnancy and after childbirth, if the unemployment person returns to work in a reasonable period after giving birth. This applies for both workers (C-507/12, Saint-Prix) and self-employed (C-544/18, Daknevičiute).

<sup>83</sup> See C-67/14, Alimanovic, paras. 61-62. It can be highlighted that in the concrete case, the period of work in temporary jobs was of less than a year (11 months), just short of retaining the status for a longer period than a period of six months.

<sup>84</sup> The CJEU has already explained in C-292/89, Antonissen, paras. 19-21, that there is no necessary link between an unemployment benefit in the State of origin and the right of residence in the host Member State.

They can retain their unemployment benefit for a period of three months, the same period as residence is allowed under Directive and for which social assistance in the host Member State cannot be claimed. Even if they retain their unemployment benefit for a period of six months (i.e. longer than three months), Directive does not provide for equal treatment with respect to social assistance even for a longer period.<sup>85</sup> The connection can be evident from the fact that both the coordination Regulation and the citizenship Directive were adopted on the same day, i.e. the 29<sup>th</sup> of April 2004, just before 10 new Member States joined the EU.

It is (still) questionable whether this “longer period” can extend all the way up to a period of five years (until permanent residence can be claimed) as is the case for maintenance aid(s) for studies, or whether a real, genuine link can suffice in a concrete case.<sup>86</sup> There is a long line of CJEU cases and theoretical works that have taken up the discussion on this issue, especially with respect to the introduction of EU citizenship, its scope, and also special circumstances that have framed certain concrete cases.<sup>87</sup> The issue is that, if a first-time

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<sup>85</sup> See Arts. 24 para. 2 and 14 para. 4 (b). It is interesting that, apart from social assistance issues, the right of residence of unemployed persons was recently addressed by the CJEU in C-710/19, G.M.A, paras 44-47. If first time jobseekers entered the territory of the host Member State with the intention to seek employment, they have a right to reside for as long as they can prove that they are continuing to seek employment and that they have a genuine chance to find it. Moreover, the host Member State may only check the condition of seeking employment, while the burden of proving genuine chance of being employed can only be assessed after a reasonable period of time has elapsed (six months in the concrete case).

<sup>86</sup> The position of first time jobseekers has clearly lagged behind the status of (self) employment. While they were allowed to reside in the host Member State and seek employment for as long as they had genuine chances of finding it, they were not granted equal treatment with respect to social assistance. See also cases C-316/85, Lebon, and C-292/89, Antonissen.

<sup>87</sup> See, for instance, cases C-224/98, D’Hoop, C-138/02, Collins, C-258/04, Ioannidis, C-367/11, Prete, C-209/03, Bidar, C-158/07, Förster. Moreover, the issue was raised with regard to special non-contributory benefits that are regulated in coordination Regulation and whether they fall under the term of “social assistance” in the citizenship Directive. This was relevant also for special non-contributory cash benefits related to the risk of unemployment, as they exist in a few EU Member States and can be found in the Annex X to the coordination Regulation (EC) No. 883/2004. The case-law development referred mostly to the German special non-contributory benefit (ger. *Grundsicherung für Arbeitsuchende*). On the basis of the development through several cases, i.e. joined cases C-22/08 and C-23/08, Vatsouras and Koupatantze, C-140/12, Brey, C-333/13, Dano, C-67/14, Alimanovic, C-299/14, García-Nieto, the CJEU answered with confirmation, meaning that these special

jobseeker may reside in the host State, but cannot claim social assistance, the end result is the necessity to return to the State of origin or to face poverty, the result being heavily criticized in theory.<sup>88</sup> Renuy<sup>89</sup> points out that in this case, within the philosophical trilemma, continuous social protection is sacrificed for the betterment of pursuing a (genuine, real) link between granting social benefits and assessing the level of integration in the host Member State, and harmony.<sup>90</sup>

The question remains, if and how to improve the current state of affairs. Currently, there appears to be no political desire for improvements. Nevertheless, suggestions can be found in literature. A milder, slightly more proportional way than currently envisioned in EU law exists in the Netherlands with a sliding scale mechanism.<sup>91</sup> Another option would be to apply the coordination rules applicable to special non-contributory cash benefits in the coordination Regulation.<sup>92</sup> The issue of “social benefit tourism” would in such a case still remain, therefore, some mechanism to proportionally divide the financial

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non-contributory benefits can be understood as social assistance in the citizenship Directive even though this was not easy to do and often inconsistencies are pointed out in literature.

<sup>88</sup> For instance, see Verschueren, H., *The role and limits of European social security coordination in guaranteeing migrants social benefits*, *European journal of social security*, vol. 22, no. 4, 2020, pp. 394-395.

<sup>89</sup> Renuy, N., *The trilemma of EU social benefits law: Seeing the wood and the trees*, *Common market law review*, vol. 56, no. 6, 2019, pp. 1549–1590.

<sup>90</sup> *Ibid.* Renuy argues that in the trilemma, only two out of the three goals can be achieved, and the EU legislator and the CJEU have never fully neglected one of them, but always sought a balancing act, depending on the context, that indisputably matters.

<sup>91</sup> The idea is that gradually an individual can claim a larger amount of social assistance. For instance, it cannot be claimed in the first two years as it would mean that the individual does not have subsistence means to support him/herself. But in the third year, it is possible to claim it for a period of two months, in the fourth year for a period of four months in a reference period of six months, and in the fifth year for a period of six months in a nine-month reference period. In this manner, a formal and legally defined framework exists that takes account of proportionality between the condition of sufficient subsistence means and granting of social assistance that does not yet represent an unreasonable burden. See Mantu, S.; Minderhoud, P., *Exploring links between residence and social rights for economically inactive EU citizens*, *European journal of migration and law*, vol. 21, no. 3, 2019, pp. 321-322.

<sup>92</sup> See Vonk, G., *The EU (non) co-ordination of minimum subsistence benefits: What went wrong and what ways forward?*, *European journal of social security*, vol. 22, no. 2, 2020, pp. 145-146. He argues that the umbrella term of the benefit should then be classified as “minimum subsistence benefits”.

burden of costs between Member States is politically perhaps more feasible.<sup>93</sup> Such a mechanism already exists in some cases in the current rules on the coordination of social security systems.<sup>94</sup> The question is also, whether social assistance could be coordinated in a similar manner as family benefits, with whom they have some similarities.<sup>95</sup>

Rennuy argues that coordination “tools” are several and they are known. The provision of social assistance for persons moving between Member States could remain with the State of origin (perhaps passing gradually on the host State with time), it could be the obligation of the host State, there could be a sharing of the burden, or the risk can fall upon an individual and the Member States in question “wash their hands”.<sup>96</sup> The answer lies in the legally-philosophical comprehension of the issue and it is questionable, whether continuous social protection should really take a back seat to other values.

## 5. UNION-WIDE UNEMPLOYMENT INITIATIVES

### 5.1. European unemployment benefits scheme

The present article has so far dealt substantially with national unemployment insurance schemes and their coordination within the EU. Another initiative can be mentioned as relevant on a Union-wide level. This concerns the discussion on the introduction of an European unemployment benefits scheme (EUBS)<sup>97</sup>, one of the more interesting ideas that was sporadically given attention in the framework of social policy debates in the EU. Fundamentally, it was

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<sup>93</sup> For various options with their pros and cons, see Rataj, *op. cit.* (fn. 3), pp. 445-454.

<sup>94</sup> This is in some cases the case for sickness, unemployment and even family benefits.

<sup>95</sup> They are typically financed out of taxes (i.e. non-contributory) and they are understood as assistance or support to a family (household). They are universal in their nature and in some cases, family benefits are income dependent (lower for higher earning households and vice versa). See also Strban, G., *Social law 4.0 and the future of social security coordination*, in: Becker, U.; Chesalina, O. (eds.), *Social law 4.0, Studien aus dem Max-Planck-Institut für Sozialrecht und Sozialpolitik*, Nomos, Baden-Baden, vol. 74, 2021, p. 359.

<sup>96</sup> Rennuy, *op. cit.* (fn. 89), p. 1551, 1586. The State of origin claims that it is no longer responsible to grant social assistance, while the host Member State claims that the mobile individual has not yet established a genuine link there, also rejecting the notion of granting social assistance.

<sup>97</sup> The idea originated already in 1975 in the so called “Marjolin report”. For more details see Beblavý, M.; Marconi, G.; Maselli, I., *A European unemployment benefit scheme: The rationale and the challenges ahead*, Publications office of the European Union, Luxembourg, 2015, pp. 3-4, and Rataj, *op. cit.* (fn. 3), pp. 349-362.

about a potential measure that would seek the political goal of macroeconomic stabilization (perhaps even solidarity), while also striving for fiscal convergence (in European monetary union, EMU). The idea was discussed with more seriousness in 2013 and the following year, that is after the end of the last economic crisis that began already in 2008. Due to the high levels of unemployment (that was alarming in some Member States, for instance in Spain and Greece), Member States have first-hand experienced and were reminded how useful a wider network in providing unemployment protection would be. EUBS would be a measure to contain the negative effects of public financing and simultaneously safeguard the legal position of unemployed persons.<sup>98</sup> Fundamentally there should be a certain redistribution between regions with high structural and low structural unemployment, and in cases of recessions or economic stagnation (which typically results in unemployment) there would be an automatic transfer of funds from an EUBS to the Member State affected which would essentially reduce the “economic shock” (i.e. stabilization aspect).<sup>99</sup> When discussing the EUBS and its framework, many possible versions popped up<sup>100</sup>, but two different approaches need to be distinguished, the first being equivalent EUBS and the second genuine EUBS.

Equivalent EUBS was imagined as a scheme where financial means would be transferred to a Member State from a special institution dedicated to implement EUBS. This would happen in the case of a “trigger” (i.e. with a sudden rise of unemployment in a Member State), where these means would alleviate the burden of paying unemployment benefits and adopting measures of social

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<sup>98</sup> An EUBS is an attractive option due to the fact that unemployment benefits are a type of counter-cyclical payments, as unemployment surges when a State faces economic difficulties. In this manner, income compensation is (due to applications for the benefit) nearly simultaneous with the difficulties. Unemployment benefits also have a high “multiplication factor”, meaning that they enable sustainable consumption of benefit recipients, which is reflected in the income of other companies that can then use the receivables for paying the salaries of their employees etc. In other words, through granting benefits and subsequent sustainable consumption this contributes to the “circling of money”.

<sup>99</sup> The question was also whether to include all EU Member States or only Member States in European monetary union. Moreover, the question was whether such a scheme would be mandatory or optional. If the idea is a type of insurance from economic shocks, then a larger pool of Member States would be better to spread out the risk(s). On the other hand, voluntary inclusion is politically more feasible.

<sup>100</sup> Coucheir, M. (ed.); Strban, G.; Hauben, H., *Horizontal report on legal and operational feasibility of the EUBS at national level*, Publications Office of the European Union, Luxembourg, 2017, pp. 7-8, name 18 versions, four for equivalent EUBS and fourteen for genuine EUBS.

policy. Member States would have to contribute regularly to an equivalent EUBS and the delicate question is whether Member States are really solidary among themselves that they would all contribute, but only some of them would be likely to draw funds.<sup>101</sup> This version of EUBS does not relate directly to unemployed persons and serves as some sort of an additional level of insurance for Member States.

On the other hand, genuine EUBS, as the name already indicates, represents a system that includes direct payments between a special fund and unemployed citizens of EU Member States. It was imagined as Union-wide, i.e. broader than a national unemployment insurance scheme and would be based on paying contributions and providing benefits in cases of unemployment. Genuine EUBS also has several options, further distinction being made between a basic genuine EUBS, where an unemployment benefit is foreseen on an EU level as a base, but can be granted under more favourable national conditions (level and duration of benefit), and a top-up genuine EUBS that would come into play only when national rules of a particular Member State in granting an unemployment benefit would be stricter than the Union-wide EUBS. In essence, basic and top-up genuine EUBS represent some sort of a minimum standard from the perspective that every Member State might go further in providing benefits to insured persons, however, only in the top-up version everyone would contribute, but only those persons, who are insured in a (less generous) Member State, would be able to claim benefits from a top-up genuine EUBS scheme.<sup>102</sup>

The crucial question for a genuine EUBS is the standard that would be agreed upon, i.e. the level of security.<sup>103</sup> For a basic genuine EUBS, international standards could be taken as a starting point, for instance, the rules in ILO Convention No. 102 (minimum standards in social security) and/or No. 168 (employment promotion and protection against unemployment) or those in one of the European social codes of the Council of Europe (initial or revised). For the top-up genuine EUBS some sort of golden middle between comparative unemployment insurance schemes in EU Member States would likely be

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<sup>101</sup> That is why additional mechanisms were discussed, i.e. experience rating and claw-back, and mechanisms to prevent moral hazard. Essentially, a Member State should, in the long-term, return the received funds. The EUBS was not necessarily viewed as a solidarity instrument, but as an efficiency one. It is also questionable, whether efficiency can really be achieved by running two parallel systems at once (national insurance schemes and EUBS). The latter related more to genuine EUBS designs.

<sup>102</sup> Politically this is a less feasible solution.

<sup>103</sup> Various alternative combinations centred upon qualifying period, level and duration of unemployment benefit were analysed.

pursued. Either way, national unemployment insurance schemes ought to serve as a starting point. The issue with the last sentence is that unemployment insurance schemes seem similar at the outset, but vary in details.<sup>104</sup> They also reflect fundamentally different philosophical underpinning of each insurance scheme (with their lasting traditions), making some sort of a uniform EU wide EUBS extremely complex and politically non-feasible. An excellent illustrative article on the issue of non-compatibility of a national insurance with an EUBS scheme (due to different national insurance schemes) was written by McKeever and Simpson.<sup>105</sup> The question is also, how would an EUBS scheme influence the current rules coordinating social security systems.<sup>106</sup>

## 5.2. European instrument for temporary support to mitigate unemployment risks in an emergency

It is interesting that on a Union wide basis, another recent instrument can be mentioned. More specifically, it regards European instrument for temporary support to mitigate unemployment risks in an emergency (hereinafter SURE).<sup>107</sup> It concerns financial assistance to Member States that experienced or were seriously threatened with a severe economic disturbance caused by the Covid-19 outbreak for the financing, primarily, of short-time work schemes or similar measures aimed at protecting employees and the self-employed and thus reducing the incidence of unemployment and loss of income.<sup>108</sup> SURE was meant as a complementary instrument to national measures taken by affected Member States by providing financial assistance to help those Member States cope with the sudden and severe increase in actual and possibly also planned public expenditure intended to mitigate the direct economic, social and health-related effects of the exceptional occurrence caused by the Covid-19

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<sup>104</sup> Coucheir, Strban, Hauben, *op. cit.* (fn. 100), pp. 25-51, 67-72, name a plethora of circumstances that are relevant in a national unemployment insurance scheme.

<sup>105</sup> McKeever, G.; Simpson, M., *World of welfare collide: Implementing a European unemployment benefit scheme in the UK*, *European journal of social security*, vol. 19, no. 1, 2017, p. 21-44. Even though the article takes UK's legislation as a comparative standard, and UK is no longer in the EU, some of the issues can horizontally appear also in some other, still current EU Member States.

<sup>106</sup> It is difficult to answer this question considering that several EUBS versions were theoretically discussed. An attempt to answer it was made by Coucheir, Strban, Hauben, *op. cit.* (fn. 100), pp. 63-66.

<sup>107</sup> See Council Regulation (EU) No. 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the Covid-19 outbreak.

<sup>108</sup> *Ibid*, Art. 1.



outbreak.<sup>109</sup> The assistance was granted in the form of a loan granted by the EU to the Member State concerned, disbursed in instalments<sup>110</sup>, where the instrument was available up to the end of December 2022.<sup>111</sup>

The interesting thing is that in times of a pressing crisis, Member States found the consensus to adopt an EU-wide instrument, as the exceptional circumstances affected all Member States. The other remarkable point is that the SURE instrument is very much similar to an equivalent EUBS, as it relates to unemployment, it is EU-wide, it focuses on the relation between the EU and Member States and it takes the form of a loan that is to be repaid. Obviously, the difference was that an EUBS was meant as a transfer of financial means to cover the (surging) costs of unemployment benefits, whereas SURE focused not on unemployment (benefits), but on unemployment prevention. The results of the SURE instrument were remarkable.<sup>112</sup>

## 6. CONCLUDING THOUGHTS AND OUTLOOK

When writing this contribution, mixed feelings were felt due to various reasons. Firstly, concerning the outlined research question, it can be determined that Member States generally provide for proper unemployment benefit protection in national law, and in cross-border cases, at least between two or more Member States, when social security coordination Regulations are applicable, the social security coordination is adequate, albeit with potential for improvements. However, for mobile (unemployed) first-time jobseekers (in the host State), there is a gap in providing continuous social protection (due to inability to claim social assistance in the host Member State) that is criticized in theory.

Looking at the bigger picture, while the proposal from the European Commission is welcomed, it is astounding how problematic it is to agree on changes to coordination of unemployment benefits, despite the fact that cases on cross-border unemployment are not as common as is the case for some ot-

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<sup>109</sup> *Ibid*, Art. 2.

<sup>110</sup> *Ibid*, Arts. 4, 7.

<sup>111</sup> For the precise timeline, amounts loaned and reports under SURE see: [https://economy-finance.ec.europa.eu/eu-financial-assistance/sure\\_en](https://economy-finance.ec.europa.eu/eu-financial-assistance/sure_en) (January 2023). The SURE instrument was available only after sufficient contributions by Member States according to Arts. 11 and 12 of the Regulation (EU) No. 2020/672.

<sup>112</sup> *Ibid*. Approximately 31,5 million people and 2,5 million firms are estimated to have been covered by SURE in 2020. Moreover, 9 million people and over 800,000 firms were covered by SURE in 2021 in 13 Member States. In 2022, the phasing out was clearly evident when 220,000 people and 10,000 firms were covered in 3 Member States.

her coordination Regulation chapters.<sup>113</sup> It is remarkable that Member States give such a strong emphasis on financial aspects, i.e. debating “who drinks and who pays and with what purpose”<sup>114</sup>, not really putting an unemployed person to the forefront. The most important reference point should not be how high the receipt is and how to best split it among Member States, but to provide for rules that theoretically improve the position of the unemployed persons, while also being clear and more systemically coherent.<sup>115</sup>

Secondly, if the contribution started with the notion that unemployment as a societal phenomenon cannot be completely avoided, it is remarkable that some Member States are recording lowest levels of unemployment in decades<sup>116</sup> and facing serious shortages of workers. With so many job opportunities, the unemployment insurance schemes and their coordination, as the topic of this contribution, might have lower significance than in the past. Even though an increase in the number of unemployed persons was feared with the Covid-19 crisis and an ongoing war conflict on the European continent, the labour markets of Member States turned out (so far, at least) to be robust.

With the intent to provide a concluding thought on the outlook, perhaps one can look at the EUBS and the SURE relation as an example for future perspectives. While the former was meant as a response to the high levels of unemployment in the economic crisis that started in 2008, with many discussed versions (equivalent, genuine - basic or top-up), the latter was adopted in the times of another crisis, the Covid-19 pandemic. Very interestingly, instead of seeing the high levels of unemployment and the surging costs for unemployment benefits appear, the sought solution from Member States was to focus on unemployment prevention. In an ideal world, this will be achieved and the present article will become superfluous. Up until then, Member States, academics and also the unemployed will have to make do with the current state of (EU and national) law.

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<sup>113</sup> The most social security coordination cases (forms) concern the issue of applicable legislation, and pension and sickness benefits. There are much fewer, for instance, cross-border unemployment or family benefits cases.

<sup>114</sup> Mišič, L.; Bagari, S., *Koordinacija dajatev za brezposelnost v Evropski uniji: kdo pije, kdo plača?*, Podjetje in delo, vol. 47, no. 1, 2021, p. 103.

<sup>115</sup> It can be stated that some issues, such as legal lacunas in cross-border cases, that can also relate to unemployment, were not answered in the Commission’s proposal. See, for instance, Essers, G.; Pennings, F., *Gaps in social security protection of mobile persons: Options for filling these gaps*, European journal of social security, vol. 22, no. 2, pp. 163-179, and for Slovenia specifically Rataj, P., *Izbrana aktualna vprašanja koordinacije dajatev za brezposelnost v Sloveniji*, Delavci in delodajalci, vol. 22, no. 4, 2022, pp. 442-448.

<sup>116</sup> That being the case, for instance, for Slovenia.

Notably, there is still an abundance of issues to be discussed in the field of unemployment insurance law, also with a valuable contribution of the esteemed colleague Željko Potočnjak.

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Sažetak

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## OSIGURANJE ZA SLUČAJ NEZAPOSLENOSTI – USPOREDNA, PREKOGRANIČNA I EUROPSKA PERSPEKTIVA

*U radu autori polaze od sljedećeg istraživačkog pitanja: Imaju li nezaposlene osobe odgovarajuću zaštitu u nacionalnom, međunarodnom (prekograničnom) te europskom pravu? Nastojeći dati odgovore na postavljeno pitanje, autori prvo uspoređuju nacionalne sustave osiguranja za vrijeme nezaposlenosti te potom analiziraju koordinaciju davanja za vrijeme nezaposlenosti u prekograničnim situacijama. Nadalje, osvrću se na pitanje nepostojanja koordinacije u pogledu sustava socijalne skrbi. U kontekstu koordinacije davanja za vrijeme nezaposlenosti i prava iz sustava socijalne skrbi autori predlažu načine poboljšanja pravnog položaja mobilnih nezaposlenih osoba. Zaključno, u radu su istaknute određene inicijative koje se odnose na nezaposlenost u zemljama EU-a, i to Europski program naknada za nezaposlene (EUBS) te Europski instrument za privremenu potporu radi smanjenja rizika od nezaposlenosti u izvanrednoj situaciji (SURE), nastao nakon izbijanja pandemije bolesti COVID-19.*

*Ključne riječi: osiguranje za vrijeme nezaposlenosti, davanja za vrijeme nezaposlenosti, koordinacija sustava socijalne sigurnosti, socijalna skrb, EUBS, SURE*

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