The European social security coordination Regulations: 15 years after accession. Quo vadis?

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SUMMARY: *15 years after the introduction of EU Regulations on social security coordination – are they still relevant and ready for the coming decades? Will they stand the test of time, and have the past few years not taught us that additional reflections are needed? Is it perhaps not the time for a joint reflection about amending these important instruments of European integration? The purpose of the article is not to look back on over 60 years of history, but rather to make future projections based on past evolutions and identify challenges that may force the EU legislature to adapt, modify and further modernise the coordination Regulations. While some developments might lead to technical, cosmetic modifications, others will require brave decisions, as it cannot be excluded that certain challenges faced will question even some of the fundamental principles behind the current system of the coordination Regulations.*

KEY WORDS: *social fraud, social security coordination, EU law*

Introduction

In the 2004 European Union enlargement, several Central and Eastern European countries joined the EU. Every process of enlargement has changed the boundaries and the design of Europe. Every new Member State has to accept a complete framework of European Acquis Communautaire. Within the domain of social security the most important instruments are EU coordination Regulations (EC) No 883/2004 and (EC) No 987/2009. They are the basic texts of European social law and are among the oldest texts of European law (these Regulations' original predecessor being Regulation 3/58, which was the third ever European legislative document). These Regulations aim to contribute to the realisation of one of the fundamental principles within the European Union: the free movement of persons.

Within the past 60 years, these instruments had to be adapted at several intervals, not only to integrate new systems as part of the different enlargement phases of the European Union, but more essentially due to developments in the social security systems of the Member States themselves. Indeed, changing societal environments within which social security systems developed demanded that the Regulation's rules were from time to time modified to be able to respond better to the need to protect migrant persons. Law follows reality or should follow it and is therefore often forced to catch up with it. On the eve of the enlargement, a new Regulatory framework was adopted, thoroughly adapting the legislative instruments to prepare for the accession of the new Member States. This process started as early as 1992, with the idea to make the Regulation "more efficient and user-friendly" and take account of changed circumstances. In 1998 the European Commission published its proposal for the new Regulation (COM(1998)0779).

Admittedly, however, this new Regulation was not radically different from Regulation 1408/71, its predecessor. The Regulation's guiding principles and essential elements remained the same, and the modifications were mainly related to the following: extending the personal scope to all persons covered by

a scheme, including non-economically active persons; strengthening equal treatment, the cross-border recognition of facts, and more attention to health, paternity, and family; the introduction of a new chapter on pre-retirement benefits, some new rules regarding frontier workers and the principle of good administration and electronic data exchange.

However, can these texts still be considered ready for the coming decades, 15 years after these new Regulations were introduced? Will they stand the test of time, and have the past few years not taught us that additional reflections are needed? Is it perhaps not time for a joint reflection about amending these important instruments of European integration? The purpose of the present article is not to look back on over 60 years of history, but to make future projections based on past evolutions and identify challenges that may force the EU legislature to adapt, modify and further modernise the coordination Regulations. While some developments might lead to technical, cosmetic modifications, others will require brave decisions, as it cannot be excluded that certain challenges faced will question even some of the fundamental principles behind the current system of the coordination Regulations*.

In general the challenges the coordination Regulations encounter may appear at several levels.

At one level, the coordination Regulations will be confronted with endogenous developments, i.e. developments at Member State level. Apart from that, there are developments that take place at EU level, the so-called exogenous developments at EU level.

Endogenous developments at Member State level

At national level, the challenges identified range from those that stem from the differences between the national systems to those that stem from changes in society and technical developments. These all have an impact not only on the situation in the Member States concerned but also on coordination. Differences between national social security systems.

The long history of the Regulations is characterised by a long process of adapting to or accommodating the social security systems of all current Member States with their particularities, taking into account the big differences between them. Indeed the social security systems of the Member States differ considerably concerning the philosophy behind them (which persons are covered by the scheme, how the schemes are financed, or under what conditions benefits can be claimed). The first six founding members of the EU had quite homogenous schemes (as a rule based on the principle that only the active population could gain individual rights while the 'rest' of the population had to rely on derived rights (**'Bismarckian' schemes**). This changed dramatically with the entry of Denmark, Ireland and the UK, as these new Member States' social security schemes are much more focused on **residence-based coverage**.

Furthermore, with the entry of the Middle and South Eastern European states into the EU a new group of social security schemes joined. Whereas differences are already striking enough on the benefit side, on the financing side they are even much more noticeable. Tax-financed schemes are clearly distinguishable from contribution-based schemes. These differences are deepened by the **impact of the economic situation**. Especially since the last rounds of accession there are remarkable **gaps between the living standards** of some Member States. This is due to different wage levels, which also result in different benefit levels.

A comparison of the development of the Regulations with the changes in the national schemes covered clearly shows that the Regulations have not taken these differences between Member States and developments into

* For a more elaborate view on this topic, see the report written by the author together with colleagues: *Key challenges for the social security coordination Regulations in the perspective of 2020*, Think Tank report 2013; Yves JORENS (ed.), Bernhard SPIEGEL (ed.), Jean-Claude FILLON and Grega STRBAN, trESS, 2013. (trESS – later FreSsco, now MoveS – is a unique network of experts from across Europe which, inter alia, writes reports on the social security coordination Regulations and the free movement of workers, mandated by the European Commission (see http://ec.europa.eu/social/main.jsp?catId=1098&langId=en

account. The Regulations still considerably rely **on the Bismarckian concept**. As an example, reference could be made to the chapter on sickness benefits, which still makes the distinction between insured persons' own rights and family members' derived rights. In the event of conflicting rights, those based on residence (individual rights) are considered weaker than derived rights (Article 32 (1) and (2) of Regulation (EC) No 883/2004). Also the CJEU has to tackle situations where national rights are declared void or at least applicable only in a subsidiary way because of another Member State's competence to grant such benefits. The famous *Bosmann* case (C-352/06) is a result of this (which accepted the existence of rights in the Member State of residence even in situations in which under the Coordination Regulations this Member State is not the competent one).

This idea was confirmed and further developed in e.g. the ***Hudzinski*** case (C-611/10 and C-612/10), in which it became obvious that a new parallel system of coordination is emerging. It is applicable throughout all social security risks. Consequently, it could be said that today coverage and rights based on residence are not sufficiently dealt with in the Regulations.

However, also the still existing **differences in wage and benefit levels** could create tensions. Citizens of Member States with a lower level of benefits might envy citizens of Member States with much higher benefit levels and try to become entitled to these higher benefits there just by travelling to these countries. In the political debate this phenomenon is described as **benefit tourism**. On the one hand, the Regulations provide entitlements to these higher benefits sometimes at the expense of the Member States with lower benefit levels (e.g. with regard to sickness benefits, because the competent Member State has to grant authorisation for treatment abroad due to shortcomings of the local system or because the persons concerned simply move to a new Member State of residence and are entitled there to all the benefits provided).

On the other hand, in some cases the Member States which attract European citizens due to the interesting level of benefits have to subsidise this benefit tourism. For example, tax-financed benefits may have to be granted also to persons moving from another Member State who have never paid taxes or paid only an insufficient amount of taxes in the Member State which now has to grant the benefits. Another example of benefits being granted without a prior integration into a new Member State of residence is the CJEU ruling in the *Brey* case (C-140/12). The ECJ seems to draw a line which allows Member States to restrict minimum benefits for citizens of other EU Member States to those which do not become an unreasonable burden to the social assistance scheme of the Member State of residence.

Nevertheless, there will always be cases where in similar situations Member States with higher benefit levels will have to grant benefits to persons without prior and sufficiently close links to that Member State. The political reactions today show how sensitive this issue is. And although there are no reliable figures on social tourism today, public opinion considers social tourism as a real threat (irrespective of the numbers involved). It may, however, not be forgotten that this fear of social tourism should also be looked at against the background of the fundamental right to free movement. Therefore, it would be advisable to reflect on introducing a requirement of a closer link of the persons concerned to a Member State, before a State has to grant benefits, especially tax-financed benefits, which are not linked to income from previous gainful work. If Europe does not manage to fulfil this highly political task, the very fabric of Europe could be endangered.

Another example worth mentioning here is a high unemployment rate, which can add to flows of migration and lead to further imbalances between Member States, and also feed Euroscepticism. More importantly, it will become very difficult for those Member States with high unemployment rates to understand why they have to finance the export of the unemployment benefits of many unemployed workers under Article 64 of Regulation (EC) No 883/2004, knowing that this is the only way to get these workers back to work; work

which is, however, to the profit of the other Member States (not so much affected by the crisis) and not to theirs.

The current debate about the duration of the export of unemployment benefits demonstrates these sensitive issues. Another subject of current discussion is the introduction of a threshold for the aggregation of periods to grant unemployment benefits. Indeed, under the current provision, a single day of employment suffices to be subject to the social security system of the Member State of employment. This could increase the temptation/attraction for nationals of another Member State with a fraudulent intention to seek employment for a few days. It could thus act as a pull factor for "unemployment tourism", in particular in the direction of Member States with high wage and protection levels. For example, a person may induce or agree with an employer to establish an employment relationship in a way that in reality is a form of disguised employment.

After a dismissal, Article 61 will be applicable and the aggregation mechanism activated, with the possible consequence of many months of unemployment benefits. The call for some restrictions and limits on the aggregation (periods of one or three months completed in the Member State where the benefits are claimed) as currently under discussion, may not be neglected as such.

At the moment, solidarity between Member States in the field of social security is not a big issue under the Regulations. The whole concept is built on the principle that all benefits have to be paid by the Member State which is under an obligation to grant them (in principle the competent Member State). Thus, e.g. Articles 62 to 65 of Regulation (EC) No 987/2009 aim at the reimbursement of all the costs incurred in the Member State of stay or residence for persons covered by the legislation of another Member State.

As a consequence, treatments in Member States with expensive and highly developed benefit schemes usually have higher reimbursement rates than comparable treatments would have cost in the other Member States. Especially if these other Member States try to reform their national health care schemes because of budgetary reasons and thus reduce also the benefit levels, this could lead to an increase in situations where an authorisation under Article 20 of Regulation (EC) No 883/2004 has to be granted with higher reimbursement rates than theoretical costs for treatment in the State concerned. This could have very negative results for the overall cost minimising efforts of these Member States. It might furthermore be considered unfortunate that Article 61 lacks any cost-sharing mechanism and proportionality with respect to aggregation of unemployment benefits. With respect to integration, is it appropriate that one Member State is obliged to bear all the costs of the unemployment benefits when the person concerned only completed very short periods (one day is enough) of insurance or (self-) employment under the legislation of this Member State, because all periods completed in other Member States have to be taken into account as a result of the aggregation mechanism? It is also argued that unemployment benefits are intended to facilitate the search for a new job.

The current provisions follow the idea that the unemployed person has to make him or herself available in the Member State that offers the most favourable conditions to find new employment. This might be endangered if competence for benefits and job search were separated.

Changes in welfare systems

In principle Member States remain competent to shape and run their social security schemes. However, the challenges these schemes are confronted with are quite comparable, and so are the solutions found. These developments can most easily be detected when they are the response to the appearance of new risks. Especially because of demographic changes, in the past decades Member States introduced **benefits for persons in need of care (LTC schemes)**. The aim of all these benefits is very comparable but the systematic approach differs widely. Another example is the introduction and strengthening of **activation measures** in many fields of social policy. The most inte-

resting are new links between benefits, e.g. invalidity benefits, which should only be granted to persons who are willing to undergo rehabilitation measures which aim at a re-integration into the labour market.

These challenges pose risks for the coordination, as questions can raise whether or not such schemes do fall under the field of application and the classification (which branch of social security is concerned?). The rulings concerning **LTC benefits** are a very good example of this, especially the ruling in *Commission against Parliament and Council* (C-299/05), which states that benefits of various Member States of a totally different nature are to be regarded as LTC benefits for the purpose of coordination. The systems differ widely between the Member states. One of the problems of social security coordination might be that there is no common understaning (definition) about **which benefits should be treated as LTC benefits** and coordinated as such (question of classification) , and not as sickness benefits (*stricto sensu*), or pensions (or pension supplements) or family benefits (for children reliant on LTC).

Another example are the activation measures. What to be said of a Member State the legislation of which links entitlement to invalidity benefits with additional rehabilitation measures. If the person concerned was subject to the legislation of this Member State and now resides far away in another Member State which does not know a comparable concept of rehabilitation measures, rehabilitation measures cannot be applied there. Can the benefit be denied or does it have to be granted also without rehabilitation measures?

The lack of synchronisation between social security, taxation, and labour law

The fact that only contributions and not taxation are coordinated can lead to enormous differences in cross-border situations. Other EU instruments adopted to tackle some of these problems do, however, not take away all these disadvantages. The difference in financing methods is a typical example. Member States are free to decide how to finance their social security scheme(s). Some Member States finance their systems via taxes, while others focus more on contributions. Usually there is no problem as long as taxation and contributions are levied by one and the same Member State. The question how much a single person has to pay in total (contributions and tax) is a carefully balanced and sensitive issue in all the Member States. The moment the competence to levy taxes and contributions is split between two or more Member States this goal cannot be achieved anymore.

Depending on the way a Member State has chosen to finance its social security, this could have totally different results. We would like to demonstrate this using an extreme example based on two Member State's fictitious schemes. Member State A has a Bismarckian system with overall social security contributions that amount to 35% of the income; taxation amounts to 30% of the income. Member State B in principle has a residence-based scheme, where contributions are only to be paid for some benefits that have an income replacement function. These contributions amount to 15% of the income. Taxation covers the majority of the social security benefits and amounts to a total of 50%. Thus, in both Member States deduction from income amounts to 65%.

The moment a cross border situation is concerned, there could be some **shocking results**. Let us consider that the two Member States are bound by a double taxation agreement based on the OECD model, under which in case of posting the posting Member State remains competent to tax the income of the person posted only if the posting period does not exceed 183 days. Thus, if a person is posted from Member State A to Member State B for 20 months, Member State A applies its social security legislation while Member State B is already competent to tax the income. This leads to 35% of contributions plus 50% of taxes, which makes a total of 85% of levies, while in the opposite situation 15% of contributions are combined with 30% of taxes, a total of 45%.

At first glance the results shown in the example above seem to be a clear hindrance to free movement (the migrant is treated worse compared to the resident citizen) and it could be interesting to see how the CJEU would

decide such a clear-cut case. The same problem occurs in the relations between social security and **labour law**. For enterprises engaged in cross-border activities it could be important not only to apply social security and tax laws of the same Member State, but also this Member State's labour law. Although there are EU legal instruments for labour law aspects (e.g. Regulation (EC) No 593/2008 (Rome I) on the applicable labour law or Directive 96/71/EEC on posting), these instruments are not synchronised with the competences under Regulation (EC) No 883/2004. Several of these instruments furthermore considerably differ from some of the basic principles under the Coordination Regulations (e.g. the principle of free choice in labour law in connection with the principle of protection and the principle of favouritism towards the employee).

The changes in the way of living, family situation, aging population, dependency on LTC and demographic evolutions

The **way of living has undergone substantial changes** also in the EU. Non-marital relationships and lone parenting have become more widely accepted. In many Member States **special benefits are provided for carers**. These might also be in need of coordination. **New forms of partnerships** might also cause problems for social security coordination. Some Member States not only regard spouses as family members, but also **cohabiting partners or even same-sex partners**, whereas some do not. For instance, if a Member State of residence covers same-sex partners, they will be entitled to sickness benefits in kind as family members on the account of the competent Member State. The latter will have to provide sickness benefits in kind to same-sex partners in other Member States, even if it does not cover them in its own public health care system (statutory health insurance or national health service). This might also be a case of so-called **reverse discrimination**, where the legal position of a moving person (and his or her family members) is more beneficial than the legal position of persons whose legal situation is confined to one Member State only.

Also **demographic changes** influence how national social security systems are shaped and coordinated (internally and supranationally). As a result of these tendencies, there is a growing number of persons who require specific benefits in old age, including LTC services. As mentioned before the question might arise how these LTC benefits as well as the special benefits provided for carers, should be coordinated.

Endogenous developments at EU level

Having dealt with developments predominantly happening at Member State level, we now want to look closer at the developments and problems encountered at European level.

The parallelism of various legal acts all dealing with cross-border aspects of social security

Many pieces of legislation (EU Regulations and EU Directives, but also legal instruments concerning the relation with third countries) deal, to a different extent, with the cross-border application of the EU Member States' social security systems. This makes it difficult for someone to understand his or her rights, as well as for administrations to apply the most appropriate instrument within a particular situation. A prototype of this parallel action of secondary legislation is Directive 2011/24/EU on the application of **patients' rights in cross-border healthcare** insofar as its operates, with respect to cross-border health care, within the scope of the Coordination Regulations itself and insofar as it almost only deals with the responsibility for and the reimbursement of costs that resulted from the care which the beneficiaries of the national social security schemes received.

In very concrete terms, European legislation on the national schemes' responsibility for this care currently consists of the overlapping of the sickness chapters of Regulations (EC) Nos 883/2004 and 987/2009 and the stipulations of Directive 2011/24/EU. Another example is Directive 2004/38/EC on the **right of citizens of the Union and their family members to move and reside freely within the**

territory of the Member States that has a direct impact on coordination: e.g. for inactive people to be allowed to stay more than three months on another Member State's territory, the conditions are that they have *sufficient resources* (which may wholly or partially be composed of benefits) and *comprehensive health insurance*; also, these persons may *not become a burden on the social assistance system* of the host Member State thanks to sufficient resources.

This makes it difficult for someone to understand his or her rights, as well as for administrations to apply the most appropriate instrument within a particular situation. The way in which the same situations are treated may also differ from one piece of secondary legislation to another. This lack of coherence also manifests itself in **legal uncertainty**.

What happens in such circumstances? If two rules jointly apply, which one is given priority? Does the person has a choice? Is there a possibility for one rule to complement the other? It should in this respect not be forgotten that even under the Coordination Regulations, the concept or the notion of social security was as such not defined. The Regulation adopts a formalist approach by demarcating its scope, linking it to enumerating branches of social security and to the legal (statutory) base for the relevant schemes. The common concept of what should be understood as social security cannot be found throughout all different EU instruments, which leads to possible conflicts, overlaps or even possible gaps.

The decision-making process

There is a burdensome and complicated process to modify the Coordination Regulations, not allowing for quick reactions to societal developments.

If amendments to Regulation (EC) No 883/2004 are necessary, experience shows that **the process is becoming more and more burdensome**. First, the co-decision with the European Parliament slows down the process; second, inside the European Commission it also takes more time to prepare new Regulations than in the past due to the now necessary impact assessment.

A good example for the time-consuming step-by-step approach to achieve important amendments to the Regulation is **the coordination of LTC benefits**. The process started with the CJEU rulings in *Molenaar* (C-160/96) in 1998 or at the latest with the *Jauch case* (C-215/99) (in which it became clear that a new type of benefits really was to be dealt with which for all Member States should be coordinated as sickness benefits). In 2001 the process stretched into the decision on Regulation (EC) No 883/2004 in which – due to the reluctant attitude of some Member States – only minor adaptations were accomplished (Article 34). Later, it stretched into the impact assessment of the European Commission, which will finally lead to a proposal for a new coordination regime for LTC benefits. One is still working on it, 15 years after the cases by the ECJ. This makes it evident that an amendment to the Regulation under this procedure is no tool for quick reactions. Therefore, also in the future it is more likely that new developments are dealt with by the CJEU and not by the European legislators.

Migration

The **free movement of persons** is one of the fundamental rights and central pillars of the European structure. But the migrant worker of 50 years ago is no longer the migrant worker of today. The nature of migration and the new patterns of work within an increasing flexible labour market have led to **new forms of mobility** that will undoubtedly also challenge the principles of the current coordination framework. In the next years, the migration pattern will further develop from a situation where the permanent move is the most important trend towards an intra and inter-organisational move, where people plan their career through consecutive international assignments.

The freedom of workers has also become a basic principle. Initially designed to address shortages of labour, the freedom of workers not only contributed to the emergence of a new wide labour market, but has also become a **fundamental individual right**. An individual, rights-based perspective replaced the initial

labour market perspective. Europe has become an area where every citizen, regardless of his or her professional status, may use his or her right to move freely, and this also regardless of the objective, whether it is for better working conditions, for the climate or for one's self-satisfaction. The **migration of economically non-active persons** cannot exclude that situations might arise where free movement will be chiefly inspired by the wish to improve one's social security position by acquiring benefits.

The creation of European citizenship with its corollary of freedom of movement for citizens across the territory of the Member States represents a considerable qualitative step forward into separating this 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 fundamental status of the citizens of the European Union. The case law clearly further develops into the direction where the Treaty not only condemns discrimination, but also **non-discriminatory restrictions to the free movement of workers**. The CJEU has emphasised that the Coordination Regulations are no longer the only means for people to obtain social security benefits and rights.

The direct reliance of people on the general principles of EU primary law in order to combat the possible limitations to their fundamental rights, limitations that are not only the result of national rules, but sometimes also follow from the application of the EU Coordination Regulations, lead to a growing new floor of social security rights. Migrant persons are witnessing an opening up and extension of their welfare rights as the Coordination Regulations are constituting the floor of their European rights, and as direct reliance on EU primary law offers a new ceiling.

This new approach will challenge the Coordination Regulations and may have an impact that goes much further than a merely cosmetic adaptation. This new opening up of social security rights has led to new boundaries of European solidarity, based on the certainty that **the claimant has a sufficient link to the Member State's labour market, social security system or society as a whole**. The CJEU makes clear that the possible indicators are almost open-ended and that the threshold may not be that high. The real link is a theory of exclusion on the one hand, excluding those people whose links with the Member State concerned are too loose.

On the other hand, it also is an instrument of inclusion. Member States will be forced to welcome those persons who have a sufficient link. It is certainly not to be excluded that this theory of a real link will further percolate into the system of the Regulation and will question the current, long-existing basic parameters of the existing Coordination Regulations. The emphasis on this fundamentalisation of EU primary law has e.g. also led to a new important role to be played by the Member State which is not the competent State under Regulation (EC) No 883/2004 (cases *Bosmann* (C-352/06), and *Hudzinski and Wawrzyniak* (C-611/10 and C-612/10)). This non-competent state according to the Regulations may now under certain circumstances become obliged to grant social security benefits which adds as such an additional floor of social security protection for migrant citizens.

All these trends require the assessment of the balance of the interests of the employee, the employers as well as the institutions in the structure and the rules of coordination. Exactly as the Coordination Regulations are from all sides attacked by EC Treaty principles, like European citizenship, freedom of movement, free movement of services and goods, *etc*, the Coordination Regulations might risk looking too technical, outdated and therefore subject to being overruled by more fundamental principles.

Some Broad solutions

The above mentioned challenges demonstrate the need for certain solutions. We would like to propose here some remedies:

Examination of the personal scope

In line with the general understanding of the traditional concept of social security, which has considerably developed the past years, the philosophy of the personal scope of

Article 2 of Regulation (EC) No 883/2004 is still based on a very traditional concept based mainly on the breadwinner and the 'rest' of the family who derive rights from that person. It could be an interesting task to rethink this concept and thus modernise the Regulations considerably. This could also help to find a solution for the problems stemming from individualisation of rights. The focus could mainly be placed on a revision of the principle of priority between derived and own rights (which is of particular importance in the field of sickness). It could be considered that own rights (including those based on residence) should have priority over rights derived from another person. This could do away with some of the most challenging problems encountered today (e.g. excluding family members who are co-insured with a migrant worker who is subject to the legislation of another Member State than their Member State of residence from LTC benefits in cash of their Member State of residence).

However, it also has to be accepted that this revision could be regarded as not balanced, as Member States with residence-based systems would be much more burdened than the other Member States (as the former would have to bear the costs of all residents and in addition also of all family members of persons subject to their legislation who reside in Member States with schemes with derived rights). Therefore, a very careful evaluation of the financial impact and possible ways of redistributing the costs could be necessary. Anyhow, from the point of view of the persons concerned this seems to be a much more logical solution than today's coordination.

Another issue in that context could be to further strengthen individual rights. It could be considered to separate, for example, the rights which are clearly attributed only to the person taking care of a child from the coordination of family benefits as we know it today (where always the situation of the whole family is relevant). This would mean that if a family is resident in Member State A and the mother is working as a frontier worker in Member State B, this Member State B would be responsible to grant its child care benefits which are meant only for the person taking care of the child, while all other family benefits would have to be granted with priority by Member State A (if the father works there). This would be especially important for all child care benefits with an income-replacement function, but could also apply to lump-sum benefits meant for the whole resident population. This proposal could be regarded as contradictory to the previous one, stating that individual rights in the Member State of residence should have priority. Nevertheless, it should not be forgotten that in this case Member State B is competent for the mother (also during the period of suspended employment there) and not the Member State of residence A. Thus, especially problems concerning the calculation of benefits with an income-replacement function are avoided.

Today, great uncertainty exists as to how, in our example, Member State A, which is competent by priority, should calculate the child care benefit with an income-replacement function for the mother (taking into account the income which is subject to the legislation of another Member State, or only e.g. a lump-sum amount which is granted to all non-active citizens).

Examination of the material scope

A fundamental reform of the material scope of Article 3 of Regulation (EC) No 883/2004 could be a step towards a modern coordination that gets rid of systematic differences between Member States.

This could be very helpful for the coordination of **LTC benefits**. A clear definition and drawing the boundary between these benefits and other benefits of socials security could be the first step towards a better coordination. Another solution could be to re-examine the exclusion of **social assistance benefits** (Article 3 (5) of Regulation (EC) No 883/2004). Honestly, we really should answer the question how many real and traditional social assistance benefits still exist today in the Member States. Developments show that many Member States have also linked entitlement to benefits which under national system are regarded as social assistance to legal entitlements.

One of the greater gaps of today's coordination is the lack of provisions and certainty concerning **activation measures**. Many of them have to be regarded as benefits in kind. If they are not regarded as falling under the sickness or the accident at work and occupational diseases chapter, the Regulation does not explicitly provide for the granting of such benefits for persons residing outside the competent Member State. This creates many problems which should be analysed in more detail. Special provisions should be integrated which safeguard that e.g. a person receiving an invalidity benefit linked to the granting of activation measures has access to such measures also in other Member States wherever comparable activation measures exist. The Regulation should also deal with situations in which the Member State of residence does not know comparable activation measures (should there e.g. be no entitlement to benefits at all; should benefits be granted also without activation measures; should activation measures which are not comparable be accepted; is there an obligation to come back to the competent Member State; *etc*?).

Introducing a European solidarity mechanism into coordination

An idea could be to rethink the whole issue of reimbursement. Especially in that respect, differences between Member States with expensive and usually highly developed social security schemes and the other Member States (with lower-cost schemes) are usually evident. One way to enact measures of solidarity would be to **limit reimbursement to the rates which apply in the debtor Member State**. The difference with the higher tariffs in the Member States of treatment would thus be the solidarity element which has to be borne by these Member States. In principle this would make the reimbursement more complex, as both Member States would have to evaluate the comparability of the benefits and as it could lead to a greater number of disputes. However, from a theoretical point of view such a measure should be possible as every Member State has to have a transparent set of tariffs which also have to be used for the purposes of Directive 2011/24/EU on patient mobility.

Another way which could have very similar results but would not lead to such an administratively complex situation is to create a new **European solidarity fund for the reimbursement of health care costs**. This fund would reimburse the institutions of all Member States and would have to be financed by all Member States taking into account various parameters (e.g. the number of the insured persons, but also the overall economic situation of a certain Member State). Elements of solidarity could be easily introduced in reimbursement procedures. Finally, a type of solidarity could also be discussed in relation to non-active persons moving from one Member State to the other.

Under today's coordination mechanism in many cases such persons are entitled from the moment they reside (legally – as elaborated and further clarified by the CJEU in *Brey* (C-140/12) and *Dano* (C-333/13)) in another Member State. One act of solidarity could be that the **previously competent Member State continues granting some of its residence-based benefits** during an interim period.

Looking for a fairer burden sharing between Member States

Whatever type of benefits is concerned, the Coordination Regulations do not properly deal with burden sharing between the Member States concerned in a given situation. For each situation, the coordination rules to determine the applicable legislation and the legislation applied appoint the Member State which directly or indirectly (after reimbursement of the benefits in kind) bears the costs for the benefits given or which, conversely, collects the social security contributions provided for by its legislation.

Could we not think to look for a **more realistic and fair sharing of burden resulting from coordination**? Could it be considered, in general, that **two Member States are jointly competent** for one given situation? This could be the case for the allocation of benefits other than pension, in line with the *Bosmann* case law (C-352/06), according to which one State is

the prior State (competent State) and the other the complementary State (State of residence), in order to avoid every unjustified cumulation. Although inevitable because of case law and already being applied in the event of cumulation of family benefits of the same level for one or more children, extending this solution to family benefits and health care benefits is not necessarily fairer. The burden sharing depends on the relative values of the benefits provided and on the respective conditions for the entitlement to benefits. Above all, such a burden sharing method can only work if there is a legislation in the State of residence that grants benefits without conditions of insurance or activity.

This could also mean **resorting to a financial sharing of the costs that result from the benefits provided**, without changing the rules to grant benefits. For example, for sickness and maternity benefits granted to a pensioner and to his or her family members, the burden should not be borne by a single State, i.e. the State of residence if a pension is provided or another State if it is the debtor of a pension. This burden should be divided between the two States.

Nevertheless, bearing in mind the experience with the reimbursement of benefits in kind provided by a State on behalf of another State, it should be taken into account that any procedure of reimbursement or financial participation has its price and that it should be guaranteed that, if such a solution would be chosen, the administration costs do not call the value of such burden sharing into question, especially as a certain burden sharing has already been introduced by the new Regulation based on another way to determine the State, thereby considering the cost of the benefits received in a third Member State during a stay or due to a temporary return to the State that owes the pension.

However, other options that are administratively much easier to manage could be considered to deal with a situation that proves to be too disadvantageous for one of the States concerned: instead of determining every reimbursement individually, the amount that is to be reimbursed could be determined based on average costs and general statistics on persons concerned.

Replacing the existing rules to define the competent Member State with the 'closest link' principle

As it is necessary to combine the rules on the free movement of workers with the internal market principles and European citizenship in order to better balance the interests of the different stakeholders of the Coordination Regulations – employees, employers and national social security institutions – future amendments of the coordination rules and the rules of conflict of law should be looked at taking into account their conformity with these general principles of EU law. This approach might lead to a new understanding of the current fundamental principles behind the conflict rules (such as their compulsory and neutral character, as well as the principle of exclusivity and their strong character) and as such requires more than a mere cosmetic adaptation of these rules. It has to be recalled that under the most recent rulings of the CJEU granting various benefits (social security or others) depends on the question whether or not a person **has a sufficiently close link to the Member State** concerned.

In principle, based on these rulings a benefit can only be denied (e.g. by applying elements which constitute indirect discrimination) if a person has not yet achieved the necessary close link. An idea for a new way of coordination would be to take the element of the necessary close link (or in other words the necessary degree of integration into the society of a Member State) as the general principle for all questions of coordination, as this close link or integration could also have a negative aspect. If there is integration into the society of one Member State it could be assumed that there cannot be the same level of integration into the society of another Member State for the same period. Thus, the identification of the Member State with which at a given moment the closest link exists, and making this Member State the competent State under the Regulation excludes that any other Member State is also competent for the same period.

In theory, switching to the new guiding principle that only the Member State to which the closest link exists could **drastically reduce the number and complexity of provisions of the Regulations**. We would need only one central Article which states this principle, and some additional Articles to guide the decision-makers how to identify this Member State. Only some additional procedural provisions (e.g. concerning benefits in kind outside this Member State or concerning administrative assistance etc) would be needed. In this respect the 'closest link' principle could – without any doubt – be applied in the field of applicable legislation as well as in the field of provision of benefits (although these two fields are very much interrelated). Concerning **applicable legislation** it seems that today the solutions provided under Regulation (EC) No 883/2004 in the vast majority of cases already correspond to the closest link principle. Usually the Member State where a gainful activity is exercised is the one to which a person has the closest link. It is, for example, evident that Article 13 (3) of Regulation (EC) No 883/2004 does not respect this principle when self-employment is the main activity and the simultaneous employed activity is only very small and occasional one.

Nevertheless, under today's coordination the Member State in which the employed activity (a little bit above the limit of being marginal) is exercised is determined as the competent State, while the closest link would make the Member State in which the self-employed activity is exercised the competent State.

This brings us to the other part of coordination, the designation of the **Member State competent to grant benefits**. Very often this is the most important competence. This Member State could differ from the Member State competent under the provisions of applicable legislation already under today's Regulations. If we succeed in always giving the Member State to which the closest link exists the obligation to grant benefits would this make coordination immune against criticism by the CJEU? Again we have to be very careful! It could happen that **for the various benefits different Member States could be regarded as the one with the closest link**. This could also lead to different solutions for the same risk between Member States depending on the way the benefits are organised. We could assume that with regard to work-related benefits, e.g. with an income replacement function, the Member State competent for that gainful activity is the one to which the closest link exists (especially if the benefit is contribution-based).

On the other hand, for benefits which are granted to all residents it could be said that the Member State of residence is the one with the closest link. This immediately leads to different Member States being competent to grant e.g. child-raising benefits if one Member State grants it to the person taking care of the child and the benefit has an income-replacement function (percentage of previous earnings), while another Member State grants a lump sum to every resident taking care of a child irrespective of whether that person has been previously gainfully active or not. Under the uncontrolled application of the closest link principle in case of residence in the second Member State and gainful activity in the first, both Member States could be regarded as the one with the closest link with regard to the specific benefit, while in the opposite case neither would be competent.

Therefore, it would be advisable to examine all benefits from that angle and decide for all benefits covering the same risk which Member State is the one with the closest link (covering the majority of the benefits at stake?). Unfortunately this could lead to situations where a Member State would have to grant a benefit which is not the one with the closest link in the individual case (a situation we know already today). Anyhow, the closest link principle could be a remedy for those cases where benefits are more or less of the same type, e.g. unemployment benefits .

We must not forget that the closest link principle could also stretch to reimbursement questions.

To sum up, a switch to a closest link principle would mean a **parametric reform of coordination**. It would need further clarification how to decide on this closest link in all the different situations. Unfortunately, it cannot solve all

the various problems. It cannot be excluded that in some cases where a close link exists to more than one Member State, a simultaneous competence is applicable with a Member State competent by priority and another one competent to top up the benefits of the first Member State (e.g. for LTC benefits or child-raising benefits if entitlements based on a gainful activity meet benefits based on residence). Therefore, it could be considered doubtful whether coordination based purely on the closest link principle would meet the unconditional approval of the CJEU, which could take away a lot of the charm of this totally new way of coordination.

Institutional and legislative developments

Finally, we could propose some technical amendments which do not concern the content of the rules for coordination, but the way they are made and how they can be made more transparent and visible. It is clear that questions concerning fundamental changes (e.g. a new coordination for LTC benefits) cannot avoid the existing lengthy procedure (impact assessment by the European Commission and co-decision with European Parliament). All stakeholders involved have to be aware that quick reactions to newly evolved situations are not realistic. Therefore, it could be wise to **strengthen the position of the Administrative Commission** to solve as many interpretative issues as possible via Decisions with a new commitment of all Member States to act in accordance with these Decisions.

Another, more daring solution would be to drastically change the existing legal technique of coordination (which consists in many detailed and directly applicable provisions) into a more flexible text. It does not seem to be excluded that coordination is performed via a **European Directive** instead of a European Regulation. In such a case the European legislators would only have to focus on the general leading principles (which could be more sustainable) and the national legislation would then have to implement these principles into national legislation and also react to changes of the situation.

However, before taking such drastic steps, it would be recommended to carefully examine all possible effects which such a switch to Directives might have. One big disadvantage could be that the homogeneous application in all Member States is thus lost and that the situation of migrating citizens would depend much more on the Member States involved than today.

Summarising all the different legal acts in only one legal instrument

Our analyses have shown that more and more different legal instruments deal with aspects that are directly linked to the coordination of social security. We suggest to bring all these instruments together under one roof to safeguard transparent legislation that is also easy to find and to understand for the citizens.

To start with, the most ambitious *desideratum* would be to make such a comprehensive instrument that also no longer would there be room for the **direct application of the TFEU** itself. From a legal clarity point of view this direct application of the TFEU principles next to the clear rules of the Regulations (e.g. Petersen (C-228/07), concerning export of unemployment benefits, or *Hudzinski and Wawrzyniak* (C-611/10 and C-612/10), concerning applicable legislation) is not the best solution.

However, we have to be realistic and admit that we will never achieve such a perfect wording of the Regulations. Therefore, the CJEU will always examine any provision of secondary legislation in the light of the TFEU and there is always the danger that some provisions are declared invalid or that the CJEU directly applies the TFEU apart from the Regulations.

An important step towards more clarity would be to bring the reimbursement and treatment aspects of **Directive 2011/24/EU on the application of patients' rights in cross-border healthcare** under the roof of Regulation (EC) No 883/2004. Finally, a concentration of **all social security related fraud and error issues** in one legal act or at least in one platform with the additional legal framework is desirable.

I would especially be necessary to deal with the question which national authorities are allowed to use cross-border social security information under what circumstances. E.g. up until now EESSI is only meant for social security institutions, so it is not possible for authorities outside the framework of these institutions to access it. Nevertheless, such data exchange beyond social security could be a very useful tool for the overarching combat against fraud and error. It could be recommended to further examine the legal framework for such trans-social security issues.

Closing remark

The challenges described above not only result from developments at national level but clearly also at European level, not least because of a dynamic interpretation of EU law by the Court of Justice of the European Union (CJEU). Each of these challenges not only requires a cosmetic adaptation of the current provisions of the Regulations (by technical amendments such as extending the material field of application or strengthening the individual rights). They also call for the start of a process of reflection on some of the fundamental parameters behind 60 years of coordination. Whether this is politically feasible is far from clear, as demonstrated by the current difficult process of modification of the coordination Regulations. But one thing is sure. It is recommendable that additional out-of-the-box reflections should be made to prepare the coordination Regulations for the next decades and to guarantee free movement in the future.

Unijne rozporządzenia ws. koordynacji zabezpieczenia społecznego: 15 lat po rozszerzeniu UE. Dokąd zmierzamy?

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STRESZCZENIE: *15 lat po wprowadzeniu rozporządzeń UE w sprawie koordynacji zabezpieczenia społecznego – czy są one nadal odpowiednie i gotowe na nadchodzące dekady? Czy wytrzymają próbę czasu? Czy nie jest to może czas na wspólną refleksję na temat zmiany tych ważnych instrumentów integracji europejskiej? Celem tego artykułu jest nie tyle spojrzenie na ponad 60-letnią historię, ale raczej sformułowanie prognozy na przyszłość opartej na dotychczasowej ewolucji i zidentyfikowanie wyzwań, które mogą zmusić prawodawcę UE do dostosowania, modyfikacji i dalszej modernizacji rozporządzeń koordynacyjnych. Podczas gdy niektóre zmiany mogą prowadzić do technicznych, kosmetycznych modyfikacji, inne będą wymagać odważnych decyzji, ponieważ nie można wykluczyć, że niektóre napotkane wyzwania podważą również część z podstawowych zasad koordynacji systemów zabezpieczenia społecznego państw UE/EFTA.*

SŁOWA KLUCZOWE: *przestępczość socjalna, koordynacja systemów zabezpieczenia społecznego, prawo UE*