

The situation of Polish citizens in the German social security system

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SUMMARY: *In this paper the author presents the situation of Polish citizens on the German labour market and in the German social security system. It is a legal and social analysis based on objective data on these issues. The development is a very important contribution to the study of the effects of exercising the right of free movement of workers or in the wider Polish citizens to Germany. It is a very important source to assess the situation and to further research in this area.*

KEY WORDS: *Polish citizens, German, social security system, labour migration.*

Labour migration from Poland to Germany

Labour migration from Poland to Germany is not a new phenomenon. It began in the 1880s,¹ had a particularly infamous peak in World War II with the deportation of Poles as slave labourers into the German Reich, and increased again on a voluntary and regular basis in recent years, in particular with Poland's accession to the European Union 10 years ago.² However, the pattern of transnational migration has changed very drastically over the course of the last century. At the beginning, one striking feature was the growth in the interest of host countries in low-skilled

workers. A popular argument in favour of that kind of immigration is that immigrants accept jobs that nationals would never take, i.e. the so-called "three D jobs": 'dirty', 'dangerous', and 'difficult'. Furthermore, immigrants are more likely than natives to work non-standard hours, for instance evening, night or Sunday shifts. For whereas "9 to 5" work organization was predominant in the 20th century, today and still more in the years to come more and more people work outside this regular working time. More flexibility as regards work organization is also necessary in order to get more people into the labour market and to make them work longer.³ According to data from

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¹ See Szurgacz H., *Historischer Überblick über die rechtliche Lage polnischer Arbeitnehmer in Deutschland (Historical overview on the legal situation of Polish workers in Germany)*, in: Becker U., von Maydell B., Szurgacz H. (eds.), *Die Realisierung der Arbeitnehmerfreizügigkeit im Verhältnis zwischen Deutschland und Polen aus arbeits- und sozialrechtlicher Sicht (The realization of the freedom of movement of workers between Germany and Poland from a labour and social law perspective)*, Baden-Baden 2011 (proceedings of a conference organized by the Max Planck Institute of social law and social policy, Munich, and the Faculty of law, administration and economy of the University Wrocław, held in Munich in November 2011).

² See the proceedings of the Polish-German trESS seminar of 17 June 2011 which dealt, amongst other issues, with mobility between Germany and Poland.

³ cf. Maselli I., *Technological change and its impact on sustainability of social security systems in Europe*. Paper presented at the conference „Technologischer Wandel. Zukunftsfähigkeit sozialer Sicherungssysteme in Deutschland und Europa“ (*Technological change. The future of social security systems in Germany and Europe*), organized by the Ministry for Labour, Integration and Social Affairs (Ministerium für Arbeit, Integration und Soziales) of North-Rhine Westphalia (Nordrhein-Westfalen), Düsseldorf, December 10, 2013 (documentation: Düsseldorf 2014, pp. 65 et seq.).

the German so-called *Socio-Economic Panel*, immigrants are more than twice as likely as Germans to work in blue-collar jobs and on average hold jobs characterized by higher physical intensity and which are at the same time known to have significant negative effects on health and ageing.⁴

In recent years, technological change deeply influences the demand for skills in the labour market. The percentage of workers with tertiary education increased by about 23% in Europe between 2000 and 2010 (and by 17% in Germany). Even for low-skilled tasks better cognitive and non-cognitive competences are needed. Furthermore, the development has an impact on labour demand insofar, as it may substitute or even destruct jobs and put pressure on wages because workers may be less productive than robots and may lose the “race against the machine”. There is a growing demand for high skilled jobs and a decrease of demand for medium skilled and low qualified jobs. In the future, there will, in particular, be a growing demand for services in healthcare, long-term care and education which means a higher share of workers in these fields of the service sector.

“Pull and push” – factors for migration: Germany and Poland compared

As regards their socio-economic models, Poland and Germany have a lot in common and the impact of the economic crisis on labour markets did in both countries not increase unemployment dramatically and therefore the social costs have been less severe than in most other EU Member States. Measured by the gross domestic product (GDP), economic performance Germany recovered comparatively speedy after the slump at the turn of 2008/2009 and regained its pre-(financial and economic) “crisis” level already in the course of 2011. Thanks to this favourable economic

development, employment remained stable. Gainful employment among women, older people and people with an immigrant background has even risen substantially. Youth unemployment is among the lowest in Europe and a significant progress was made in reducing long-term unemployment. At the same time, there is, however, a disproportionate high level in irregular employment and the ratio of low-wage employees is very high as well. The minimum wage legislation passed mid-2014, which will come into force on 1.1.2015 should lead to a rise in income in the lower earning brackets.

Whereas in the 18th and 19th centuries Germans talked about “*Polnische Wirtschaft*” (“Polish economy”), meaning bad economy, today everything has changed: From 1990 until 2011, Poland experienced the greatest economic growth in the former “Soviet bloc” in Europe, more than doubling its GDP in real terms (Germany and Poland compared: General Domestic Product (GDP) in PPS (Purchasing Power Standards) in 2010 Germany 118, Poland 63).⁵ Although the actual global economic crisis severely affected most countries in Central Eastern Europe, Poland enjoys the status of being the only Member State not to have undergone recession over the past few years.⁶ Of the European Union’s 28 Member States, Poland is reported to be the only one that did not experience a single year of recession during the critical period 2007–2011.⁷

Labour migration from Poland to Germany

The key determinants for labour migration decisions were and still are doubtless the situation of the labour market of home and host countries – labour market participation of the working age population (15 to 64) in 2010: Poland 65%, Germany 78%; rates of unemployment in 2010: Poland 9.6%, Germany 6.6% – and the wage differentials between the

⁴ See Giuntella O., *Immigration and job disamenities*, [in:] CESifo DICE Report 2/2014, pp. 20 et seq.

⁵ See Åslund A., *Poland: Combining growth and stability*, [in:] CESifo Forum 1/2013, pp. 3 et seq.

⁶ See Rae G., *Poland – The green island sinking into a sea of red*, [in:] CESifo Forum 1/2013, pp. 17 et seq.

⁷ See Tridico P., *The impact of the economic crisis on EU labour markets: A comparative perspective*, [in:] “International Labour Review” 152 (2013), pp. 175 et seq.

host and the source countries – minimum wage in Poland 2.31 EUR in 2014, 8.50 EUR in Germany from 1.1.2015 on – In particular, the phenomena of short-term migration and international commuting with frequent visits at home are influenced less by long-term income expectations than by current income differentials. Migration of labour can provide considerable welfare gains for both the sending and receiving countries since the migrants generally receive higher wages in the host country than in their home country. Guest workers and host country both profit if new jobs are created for the migrants. It is considered to be a win-win situation when well-educated, qualified employees who cannot find a job in their home countries take up work abroad and, at the same time, help to mitigate there the shortage of skilled labour.

In the EU accession negotiations at the turn of the last century, the free movement of workers was an issue of considerable political importance. The discussion in Germany was dominated by those who sought to postpone the EU accession of the central and eastern European (CEE) countries. Based on econometric models and building on data from the migration movements following EC enlargement to Greece, Portugal and Spain as well as from migration from Turkey, “horror scenarios” were simulated for a case of immediate and unlimited free movement of labour. In 2000, the *Ifo Institute for Economic Research* and the *Max Planck Institute for foreign and international social law* were commissioned by the Federal Ministry for Labour and Social Affairs to analyse the impact of an immediate opening of the German labour market to workers from the major accession countries. The goal of this study was to examine the consequences of EU enlargement and the free movement of labour from a German perspective and to make policy recommendations for the convergence of labour markets and the conditions of integration. The economic experts of the renowned Ifo Institute estimated that in the first 15 years

of EU membership net migration from the five EU candidates with the largest populations (Poland, Romania, Slovakia, Czech Republic and Hungary) would amount to about 200,000 to 250,000 migrants per year.⁸ In spite of many uncertainties, the estimated numbers were regarded by politicians even as the bottom levels of the possible spectrum of migratory movements, whereas migration experts played down the expected numbers of immigrants based on an evaluation of the experiences with past accession processes and the availability of legal restrictions imposed by European law. In the end, measures were taken to control immigration to Germany and to manage the inherent risks by the introduction of a transitional period whose total length was set to seven years (“2 + 3 + 2” – model). Temporary limitations in drawing social benefits such as social assistance and housing grants, restrictions in being assigned public housing, as well as rules excluding any exports of benefits for family members were considered, but not implemented as they would have been not in conformity with the freedom of movement of workers (Articles 39 to 42 EC, now Articles 45 to 48 TFEU) and EC co-ordination Regulations (Regulations 1408/71 and 574/72, now 883/04 and 987/09).

The *Act concerning the conditions of accession of Poland and other Central and Eastern European (CEE) States to the European Community* allowed Germany to derogate from the free movement of workers and – in parts – from the freedom to provide services involving temporary movement of workers.⁹ These transitional arrangements had insofar a negative effect on the German labour market as their limitations applied only to the free movement of workers and not to the free movement of self-employed people. As a result, “bogus” self-employment increased and labour was partly driven underground and accession workers were sometimes employed unlawfully and exploited.

⁸ See Sinn H.-W. et al., *EU-Erweiterung und Arbeitskräftemigration (EU-enlargement and migration of workers)*. (Study for the Federal Ministry of Labour and Social Affairs on the impact of the planned EU-8-enlargement on the labour markets and public finances in Germany, Munich 2001, pp. 5 et seq.).

⁹ See Chapter 2, para. 1, of Annex XII to the 2003 Act of Accession, OJ EC 2003 L 2036/33.

Since 1 May 2011 workers from those CEE Member States which joined the European Union – except Bulgarians and Romanians up to 31 December 2013 – can enjoy the right of freedom of movement in the European Union without any limitations. However, the afflux of third-country nationals is still much higher than that of Union citizens. It seems that “*the European citizen is not really a homo migrants; he is more of a stay-at-home type*”.¹⁰ In the second half of 2011 only about 55,000 migrant workers more came to Germany, “*much less than feared and not even enough as needed*”.¹¹ The immigration of workers to Germany in 2011 could even not fully compensate for the decrease of the national labour force.¹²

Total emigration from Poland amounted to more than 900,000 (estimated) persons (i. e. about 2.4% of the population in 2004) between 2004 to 2009. Advantages considered were higher incomes from work, transfers to the home country from abroad, vocational training and linguistic skills of the workers, pick-up of experience and know-how, mobility, “entrepreneurship” and reduction of unemployment in the home country (2003: 19.7% to 2008: 7.1%). Considered disadvantages were ageing of the population because of the emigration of younger people, less economic growth, “brain waste” as qualified persons took up unqualified jobs and were often employed well below their educational and vocational level in the receiving country, “brain drain” at home and separation from families.¹³

As regards Polish migration to Germany, most migrant workers were and are seasonal workers who find employment in agriculture, construction and tourism. Hence the amounts of seasonal work schedules are in line with the

characteristics of these activities, covering mostly the period from spring to autumn. In 2010 174,071 Polish seasonal workers were registered with the German Federal Employment Office (Bundesagentur für Arbeit), and 169,548 thereof were active in agriculture.¹⁴

Social security and migration: current problems

“Benefit tourism”

In recent months there has been a fervent debate in Germany on the issue of access to social benefits, specifically on the limits of such access for so-called “poverty immigrants”, i. e. Union citizens who are economically inactive, who are not in search of work at all or who have little or no likelihood of finding a job. However, some of the protagonists in this debate seem to ignore the legal and political instruments already today at the disposal of Member States to deal with the supposed threat of mass EU migration and the related problem of “social” or “benefit tourism” (declared in Germany as the “taboo” or “worst word of the year” – “*Unwort des Jahres*” – in 2012).

However, facts and figures tell another story, namely that of a large majority of Union citizens who are economically active or wish to be so and who avail of the opportunities which EU law offers them, for instance in Germany, which needs highly-skilled workers (“*Facharbeiter*”) as well as low-skilled ones and offers jobs which the German population cannot perform or no longer wishes to perform.¹⁵ According to both German and EU studies and statistics, EU migrants are, as a rule, net contributors in host Member States and have little impact on national social security benefits

¹⁰ See Giubboni S., Jorens Y., *Editorial*, [in:] “European Journal of Social Law” 2013, p. 2.

¹¹ “*Wesentlich weniger als befürchtet und es sind viel weniger, als wir brauchen*”. Statement of the then president of the German Federal Employment Agency (Bundesagentur für Arbeit) (quoted from von Maydell B., *Einführung zur deutsch-polnischen Tagung über die Arbeitnehmerfreizügigkeit (German-Polish seminar on free movement of workers – introduction)*, [in:] Becker et al. (eds.), op. cit., note 1, pp. 11 et seq.).

¹² See Baas T., *Die wirtschaftliche Bedeutung der Arbeitnehmerfreizügigkeit aus deutscher Sicht (The economic significance of the free movement of workers from a German perspective)*, [in:] Becker et al. (eds.), op. cit., note 1, pp. 97 et seq.

¹³ See Żukowski M., *Die wirtschaftliche Bedeutung der Freizügigkeit aus polnischer Sicht (The economic significance of the freedom of movement from a Polish perspective)*, [in:] Becker et al. (eds.), op. cit., note 1, pp. 113 et seq.

¹⁴ See Höffer E.-M., *Schaffung von grenzüberschreitenden Versorgungsstrukturen in der Unfallversicherung (Establishing cross-border provision in the field of accident-at-work insurance)*, [in:] Becker et al. (eds.), op. cit., note 1, pp. 269 et seq.

¹⁵ See above 1.

and only limited recourse to other public funds as well.

According to a study published most recently by the European Commission,¹⁶ in the great majority of EU countries Union citizens from other Member States do not use welfare benefits more intensively than the host country's nationals. EU migrant workers are less likely to receive disability and unemployment benefits, and economically non-active EU mobile citizens account only for a very small share of beneficiaries of pensions, disability allowances and non-contributory job seeker allowances financed by general taxation. The impact of their claims on national welfare budgets is, as a rule, low, representing between 1% and 5% in France, the Netherlands, Sweden and Germany and less than 1% in Austria. The study makes clear that the majority of mobile EU citizens move to another Member State to work, and it puts into perspective the dimension of "benefit tourism" which is neither widespread nor systematic, though there are local or regional problems created by an influx from people from other EU countries into particular geographical areas. In spite of the fact that there is no evidence of a particular high degree of misuse of social benefits by immigrants, the Federal Government presented on 28 August 2014 the draft of a bill which is intended to combat social security fraud by providing tighter administrative controls.¹⁷

The Citizens' Directive of 2004 provides that beneficiaries of a non-permanent right of residence should not become "*an unreasonable burden on the social assistance system of the host Member State*".¹⁸ Member States are not obliged to confer entitlement to social assistance for particular groups of Union citizens for a cer-

tain period of time or prior to the acquisition of certain more long-term rights to reside.¹⁹ Member States will also adopt "*the necessary measures to refuse, terminate or withdraw any right conferred in the case of abuse of rights or fraud.*"²⁰

In its Brey judgement²¹ the Court of Justice of the European Union (CJEU) held that the concept of "social assistance" used in the Directive 2004/38/EC cannot be confined to those social assistance benefits excluded from the scope of Regulation 883/04,²² but covers all assistance introduced by public authorities that can be claimed by an individual who does not have resources sufficient to meet his basic needs and who may therefore become a burden on the public finances of the host Member State. When determining whether a benefit applicant has sufficient resources to avoid becoming a financial burden on the host Member State, the competent authorities must carry out an overall assessment of the specific burden which granting that benefit would place on the national social assistance system as a whole, by reference to the personal circumstances characterizing the individual situation of the person concerned.

Posting

At the conference "*Current problems of the co-ordination of social security systems*" under the trESS-project held on 14 June 2013 at the Social Insurance Institution (ZUS) – Main Headquarters – in Warsaw, posting was a fervently discussed issue. Posting refers to a situation in which an employer sends his employee to another Member State in order to do temporary activities on that employer's behalf. The employer must normally carry out activities in the sending State. The *employee* can be

¹⁶ See European Commission/Employment, Social Affairs and Inclusion, Share: Impact of mobile EU citizens on national social security systems, Brussels 2014.

¹⁷ *Bundesregierung, Bundesregierung informiert: Fakten zur Regierungspolitik: Freizügigkeit in der EU: Freizügigkeit ja – Missbrauch nein (Federal Government: Federal Government informs: Facts on Government policies: Free movement in the EU: Free movement yes – abuse no)*, Berlin, 28 August 2014.

¹⁸ See recitals 10 and 16 and Articles 6 and 7 (1) (b) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ EC 2004, L 158/77.

¹⁹ Art. 24 (2) of Directive 2004/38/EC.

²⁰ Art. 35 of Directive 2004/38/EC.

²¹ Case C-140/12, *Brey*, judgment of 19 September 2013 – nyr (= not yet reported); see van der Mei A., [in:] "European Journal of Social Security" 16 (2014), pp. 73 et. seq.

²² See Art. 3 (5) of Regulation 883/04.

sent for a maximum period of 24 months and must not be sent to replace another person. *Self-employed* persons can post themselves, if they normally pursue an activity as self-employed in a Member State and go to perform similar activities in another Member State. The self-employed person must maintain an infrastructure in the sending State, for example the use of an office, the registration with a professional organisation or the payment of social security contributions and taxes. Furthermore, the person must pursue a similar activity. The conditions which have to be fulfilled for the rules on posting to be applied are laid down in Article 12 (1) of Regulation 883/2004.²³

Thus, a Polish self-employed construction worker or forester cannot be posted as a farmer for fruit-picking in Germany, whereas a farmer can do so. As a consequence, the Polish forester will be insured in Germany whereas the Polish farmer can be posted and in accordance be insured in his home country, for instance as far as accident at work insurance is concerned, which is of great importance in practice for seasonal workers in agriculture.

The Posting of Workers Directive (96/71 EC) is concerned with applying minimum protection to posted workers. However, a study on Polish workers showed that they had significantly lower wages and worth working conditions than individual Polish labour migrants.²⁴ Information from E 111 forms provided by the Polish Social Insurance Institution ZUS indicated the issuing of almost 230,000 certificates for employees with postings not exceeding 12 months, nearly half of these temporary workers posted abroad going to Germany.²⁵ The main objective of Directive 96/71/EC has to favour the free provision of services. As far as employment and working conditions are concerned, the Directive envisages laying down a nucleus of mandatory rules for minimum protection to be observed in the host countries by employers who post

workers to perform temporary work in the territory of a Member State where the services are provided. Rulings of the European Court of Justice²⁶ stated that a foreign undertaking should not be forced to adhere to collective agreements as long as they abide by the minimum requirements set out in the relevant national legislation on posted workers in the host country and have thus delimited the rules applicable to this category of workers. In the light of these decisions, EU law does not impede the extension of the application of national law to posted workers, even if the level of protection offered by the host Member State is higher than the minimum standard. As a consequence there is a case for monitoring and sanctioning practices, in particular illegal ones, in the domain of posting more effectively.

In Germany, the transposition of the Posting of Workers Directive has been used to enforce nationwide minimum wages in specific sectors of the economy, meant to regulate posted workers, in particular in the construction sector. On 1 January 2014, a general and nation-wide legal minimum wage will come into force (8.50 EUR).

Cross-border healthcare

As regards the possibility of acquiring sickness benefits in kind outside the competent Member State, three situations may be distinguished:

(1) person *residing outside the competent Member State* is entitled to medical benefits in her/his State of residence, according to the rules applicable there and at the expense of the Member State of insurance.

(2) A person *staying temporarily in another Member State* for non-medical reasons and whose health condition requires medical care is entitled to *necessary treatment* in his/her Member State of stay at the expense of the competent Member State.

²³ See for more details from a Polish perspective Florek L., *Die Lage entsandter Arbeitnehmer in Polen aus arbeitsrechtlicher Sicht*, [in:] Becker et al. (eds.), op. cit., note 1, pp. 161 et seq.

²⁴ See Friberg J., Tyldum G. (eds.), *Survey among Polish workers in Oslo. Fafo report 2007* (quoted from Eurofound, *Posted workers in the European Union*, Dublin 2010, p. 13).

²⁵ See Eurofound, op. cit. note 24, p. 10.

²⁶ See CJEU, Cases C-341/05 *Lavalle*, C-346/06 *Rijffert* and C-319/06 *Luxembourg*.

(3) Based on the jurisprudence of the CJEU and recently also on the *Directive 2011/24/EU on patients' rights to cross-border healthcare* ("Patients' Mobility-Directive") insured persons may also receive *planned medical treatment* in another Member State, i.e. not in her/his state of residence.²⁷ (Poland was one of 4 delegations which voted against this directive in the Council of the EU.) The Directive gives an alternative right in access to cross-border healthcare in addition to those existing under the regulations. If both regulations and the Directive are applicable, priority is given to the regulation, unless the patient concerned chooses otherwise. One of the most striking differences between both ways to accede to cross-welfare is that patients may access healthcare abroad provided by private providers when relying on the Directive. However, patients will have to foot the bill of the treatment they get whereas under the regulations the costs of treatment are met by the competent healthcare institution. Contrary to Regulations 883/04 and 987/09 Directive 2011/24/EU does not apply to long-term care benefits.

Both the jurisprudence of the European Court of Justice²⁸ and the Directive²⁹ facilitate access to planned cross-border healthcare. Costs will be reimbursed only up to the level of costs that would have been assumed by the Member State of affiliation, if such healthcare had been provided on its territory – an important restrictive condition with regard to Polish citizens choosing healthcare provision in Germany, which is, as a rule, much more expensive than in Poland. Furthermore, there is a prior

authorization required to certain expensive healthcare benefits, in particular to hospital care, though there are situations in which such authorization may not be refused, when the treatment envisaged appears on the list of treatments covered by the national scheme. There is a lot of legal uncertainty about the questions, which treatment is the same or equally effective for the patient and when it may not be obtained without undue delay, taking into account the patient's medical condition, in his Member State of residence. It seems that this prior authorization system does not yet offer adequate procedural guarantees in the Member States.

The directive obliges Member States to provide information on cross-border healthcare via special institutions, so-called national contact points which should provide information on the situation in the Member State of treatment as well as on the conditions for reimbursement of costs by the Member State of affiliation.³⁰

The *AOK Nordost* (covering the three regional states (*Länder*) Berlin, Brandenburg and Mecklenburg-Vorpommern) is the first German health insurance institution to have concluded a co-operation contract with a Polish healthcare provider, *Asklepios Poland*, Health Center in Szczecin. This co-operation allows about 20,000 Polish citizens who are insured with the AOK Nordost to take up medical benefits in Poland.³¹ Thus Polish citizens who work and are insured in Germany have access to benefits in kind (*Sachleistungen*), e. g. treatment by a medical doctor, and will not have to make any advance payments.

²⁷ See, for instance, *Straban*, G., Patient mobility in the European Union: Between social security coordination and free movement of services, in: *ERA Forum 2013 (online)*; Kingreen, T., §§ 13 SGB V, in: Becker, U./Kingreen, T. (eds.), *SGB V. Gesetzliche Krankenversicherung. Kommentar (Statutory sickness insurance. Commentary)*, 3. ed., Munich 2012

²⁸ See Cases C-120/95 *Decker* [1998], ECR I-1831, C-158/96 *Kohll* [1998], ECR I-1931, C-157/99 *Geraets-Smits & Perbooms* [2001], ECR I-5473, C-3727/04 *Watts* [2006], ECR I-4325 etc.

²⁹ Directive 2011/24/EU; see for more details Kaczanowska J. (DG Employment, Social Affairs and Inclusion), *Recent developments in EU social security coordination*, FreSso seminar, Warsaw, 5 September 2014.

³⁰ For Germany see www.eu-patienten.de.

³¹ See for this form of cross-border co-operation between German *Krankenkassen* and healthcare providers in other EU Member States § 140e SGB V (= Social Code – Statutory health insurance/*Sozialgesetzbuch – Gesetzliche Krankenversicherung*); for an outlook of German-Polish co-operation in the field of healthcare Ribbегge, H., *Das Gesundheitswesen als Chance für die deutsch-polnische Grenzregion (Healthcare as a chance for the German-Polish border region)*, in: *Gesundheits- und Sozialpolitik* 2004, pp. 31 et seq.

Long-term care

In Germany, more than 2.4 million people are in need of long-term care today, many of them suffering from dementia. In a few decades, the number of persons in need of nursing care will increase to about 4 million. Long-term care (LTC) comprises a wide range of services and support for people who are dependent over a long period of time on help with their daily living. Both in healthcare and long-term social care (LTC – nursing care) Germany needs to cope with the challenges posed by these impacts of demographic change and medical progress. With a growing ratio of older and elderly people, the healthcare system will have to meet an increasing demand for services. In order to secure the supply of skilled care personnel, measures must be taken to train and qualify care workers for the elderly. Furthermore, the attractiveness of this occupational field and related employment prospects, in general, should be highlighted.

The main focus of the second issue of the Journal of the Social Security Department, University of Warsaw, *Social Security. Theory. Law. Practice* was in 2013 on the topic of long-term care in its legal and social aspects inspired by initiatives and activities both in Poland and the European Union. Gertruda Uścińska referred on this behalf in particular to the research effectuated by a Think Tank of the trESS (= training and reporting on Social Security) project and the proceedings of the *Polish trESS Seminar “Current problems of the co-ordination of social security systems” held at the ZUS-Main Headquarters in Warsaw on 14 June 2013.*³²

Family care is still the predominant kind of care in Germany covering about two-third of those in need of care. However, the reservoir of potential family carers is limited and expected to shrink still more over the next decades. Recruitment and retention of sufficiently skil-

led persons is difficult and will remain to be difficult. The provision of health and social care will therefore be an important and growing source of jobs, particularly for women, into the future. Because of the difficulties in recruiting national LTC workers, migrant workers are used and will be needed to bridge this gap. Germany is therefore seeking to overcome the insufficient supply of domestic LTC workers through employment of migrant care workers. This is done through the official recruitment of migrant labour. However, many families informally employ migrants as live-in carers for their elderly relatives. Compared to other industries undeclared work is particular prevalent in the field of long-term care. (See for more details the results of a Peer Review organized in Berlin in October 2013³³ which discussed “the benefits, caveats and pitfalls of using migrant workforce to bridge this gap.”) In the Report “Adequate social protection for long-term care needs in ageing society” published by the Social Protection Committee and the European Commission services³⁴ the authors conclude that there is a case for assessing the potential opportunities and possible issues arising from increased mobility of carers and care recipients within the EU because more care is delivered by professionals and paid for by private households and public institutions and the provision of long-term care already depends to a high degree both on the cross-border provision of care and the recruitment of carers.

The German care insurance (*Pflegeversicherung*) provides both cash benefits and in-kind benefits. According to EU co-ordination law the care allowance (*Pflegegeld*) must be treated as a cash sickness benefit. German law provides that subject to certain exceptions concerning temporary stays, the right to receive such benefit is suspended for the period that the insured person is abroad. That legal provision

³² See Schulte B., *Long-term care – German experience and the experiences of other European countries* (Background paper for the Polish trESS seminar “Current problems of the co-ordination of social security systems”, Warsaw, Social Insurance Institution (ZUS), 14 June 2013 (published in: *Social Security. Theory. Law. Practice.* 2/2013, pp. 9 et seq.).

³³ <http://ec.europa.eu/social/main.jsp?langId=en&catId=1024&newsId=1889&furtherNews=yes>.

³⁴ See Social Protection Committee, *Adequate social protection for long-term care needs in an ageing society*. Report jointly prepared by the Social Protection Committee and the European Commission services (draft for adoption), Brussels 2014.

must, however, be read in the light of the jurisdiction (Cases “Molenaar”, “da Silva Martins” etc.) of the European Court of Justice in which the CJEU held that EU co-ordination law precludes entitlement to such benefit being made conditional upon the residence of the insured person in the competent Member State. As a consequence, the German care allowance must be exported to claimants residing in Poland as long as cash benefits relating to the specific risk of reliance on care do not exist. If cash benefits relating to long-term care were provided under the Polish legislation, but only at a lower level than that in Germany, any Polish claimant would be entitled at the expense of the German competent institution, to an additional benefit equal to the difference between the two amounts. As far as the “export” of benefits in kind is concerned, EU co-ordination law does not provide yet the necessary legal requirements. Obviously there is a case for a special chapter on long-term care benefits in Regulation 883/04.

Pensions

In 2009 about 123,000 Polish citizens registered with the German pension funds (*Gesetzliche Rentenversicherung*), mostly as temporary or seasonal workers. A total of 1,530,000 Polish citizens were registered with the German pension funds in 2010 and 4,900 pensions were paid to Polish citizens resident in their home country.

Though Article 8 of Regulation 883/2004 gives a general priority to the regulation itself by providing that it replaces any social security convention applicable between Member States falling under its scope, certain provisions of *German-Polish social security conventions* entered into before Poland’s accession to the EC continue to apply: Convention of 9 October 1975 on pension and accident at work-insurance

and Convention of 8 December 1990 on social security.

These two bilateral conventions are still relevant and do apply in particular to Polish citizens remigrating from Germany to their home country. Polish remigrants may face these disadvantages because the convention is based on the so-called integration principle, e. g. German insurance periods are transferred in Poland into Polish insurance periods which will yield lower pensions.³⁵ That means that under the German-Polish conventions German pensions were not exported as is the case under the EC regulations on social security.

Family benefits

Gertruda Uścińska was right in starting a paper presented at the international conference “Coordination of Social Security Schemes in Connection with the Accession of Central and Eastern European States” held in Riga (Latvia) in September 1998 with the statement that “family benefits do not generally attract great public interest – at least not today.”³⁶ “*Tempi passati!*” Meanwhile, times have changed.

Regulations 883/04 and 987/09 directly apply to the internal legal systems of the EU Member States. The principles and rules which these legal instruments encompass take precedence over national social security legislation.

However, these regulations are not intended to harmonize the national social security schemes, but coordinate them. In accordance, they do not in any way impinge on the liberty of Member States to impose their own social security rules and do not affect the distinctive characteristics of the different national schemes. As a result of the discrepancies among the systems of social security of the 28 Member States, citizens’ and workers’ rights vary with the legislation to which they are subject. As far as family benefits are concerned, each

³⁵ See for details Fasshauer S., *Praktische Fragen der Inanspruchnahme von Freizügigkeit*, [in:] Becker et al. (eds.), op. cit., note 1, pp. 235 et seq.; Borecki B., *Die Freizügigkeit und die Realisierung der Regelungen im Bereich des Sozialschutzes zwischen Polen und Deutschland aus der Sicht der Sozialversicherungsanstalt/Abteilung in Oppeln (Freedom of movement and the realisation of the rules in the field of social protection between Poland and Germany from the perspective of the social insurance institution in Opole)*, in: Becker et al. (eds.), op. cit., note 1, pp. 257 et seq.

³⁶ Uścińska G., *Family benefits. Viewpoint of the CEEC*, [in:] Jorens Y., Schulte B. (eds.), *Coordination of Social Security Schemes in Connection with the Accession of Central and Eastern European States (“The Riga Conference”)*, Brussels 1999, pp. 376 et seq.

Member State decides on the conditions for allowing or disallowing entitlement, the categories of children for whom benefits are awarded, the qualifications required by claimants, etc. However, national legislations must not, for instance, through clauses based on nationality or residence, discriminate against EU nationals with regard to the granting of benefits arising from these legislations.

Thus, the regulations allow the granting of family benefits also in favour of children resident in the territory of other Member States, even if the legislation of the competent State has imposed territorial limits on the establishment of the right to these benefits, such as, for instance, the condition that the child will be brought up on its territory.

In Cases C-611/10 (*Hudziński*) and C-612/10 (*Wawrzyniak*) the CJEU (Grand Chamber) held rightly that Polish seasonal workers who are taxable in Germany are entitled to receive child benefits in Germany even if they may claim such benefits in Poland as well. The competent German institutions must pay the differential amount between these benefits.³⁷ This judgment has been criticised in Germany, because child benefits are intended to per family expenses which are lower in Poland than in Germany with the consequence that migrant workers in Germany with children residing in Poland may be better off than Polish workers and their children. Politicians critic the practice regarding the regulations which exist between Germany and Turkey as well as with other third country nationals, i. e. payment of lower benefits for children residing in their home country than for those who live in Germany. These critics, however, do not pay fully attention to the principle of equal treatment of nationals and EU migrant workers which is a corner-stone of Union law.³⁸

Actually child benefits (*Kindergeld*) for about 41,000 children living in Poland are granted

by the German competent institutions (*Kindergeldkassen*).

The concept of family benefits in Poland is different from the German one insofar as care allowances for children are considered to be family benefits in Polish law, whereas they may be qualified as sickness benefits under the Regulations 883/2004 and 987/2009.³⁹

Cross-border co-operation

Regulations 883/04 and 987/09 modernized the EU co-ordination rules, improved significantly the administrative processes between the Member States, and made citizens' rights more effective.

One of the main innovations is the obligation to exchange data electronically between the social security institutions through the EESSI system. This electronic exchange does not only replace the paper E (= European) forms, but also strengthens the protection of citizens' rights by computerizing the application of Union law on social security co-ordination. EC-based exchanges facilitate and speed up decision-making for the calculation and payment of social security benefits, allow a more efficient verification of data, and provide both a more flexible and user-friendly interface between different social security systems and a more accurate collection of statistical data on European exchanges.

As a most recent development the Directive 2014/54/EU of the European Parliament and of the Council on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers should be mentioned. Better information at national level, assistance to EU workers and their families by independent national bodies and specific measures to ensure effective protection of rights conferred by Article 45 TFEU and Regulation

³⁷ CJEU, judgment of 12 June 2012 – nyr.

³⁸ See for the corresponding debate on child benefit in the United Kingdom Roberts S., *Polish workers in the UK 2004–2014*, FreSsco seminar, Warsaw, 5 September 2014 (PPP). Quoting the British Prime Minister saying that he would try to renegotiate the UK's membership of the European Union to allow it to withhold child benefits for children living in other EEA countries: "I think (...) it's wrong that someone from Poland, who comes here, who works hard (...) but I don't think (...) we should be paying child benefit, to their family back at home in Poland."

³⁹ See Babińska-Górecka R., Stopka K., *Familienleistungen bei grenzüberschreitenden Sachverhalten (Family benefits in cross-border situations)*, [in:] Becker et al. (eds.), op. cit., note 1, pp. 285 et seq.

492/2011 will be provided in order to provide equal treatment and non-discrimination on grounds of nationality as well as the removal of unjustified restrictions or obstacles

on the right of free movement for workers.⁴⁰ This new directive will have to be implemented by the Member States up to 21 May 2016.⁴¹

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Sytuacja obywateli polskich w niemieckim systemie zabezpieczenia społecznego

BERND SCHULTE

STRESZCZENIE: *W opracowaniu autor przedstawia sytuację polskich obywateli na niemieckim rynku pracy oraz w niemieckim systemie zabezpieczenia społecznego. Jest to analiza prawna i społeczna oparta na obiektywnych danych w zakresie omawianych spraw. Opracowanie stanowi istotny wkład w badaniach nad skutkami korzystania z prawa do swobodnego przemieszczania się pracowników polskich, czy szerzej obywateli polskich, do Niemiec. Jest bardzo ważnym źródłem wiedzy do oceny tej sytuacji, a także do dalszych badań w tym zakresie.*

SŁOWA KLUCZOWE: *polscy emigranci, Niemcy, system zabezpieczenia społecznego, migracje zarobkowe*