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Authors:
Yves Jorens
József Hajdú
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Contractor: Ghent University, Department of Social Law, Universiteitstraat 4, B-9000 Gent

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List of Project Participants:

### National Experts

<table>
<thead>
<tr>
<th>Name</th>
<th>Nationality</th>
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<tbody>
<tr>
<td>Walter Pfeil</td>
<td>Austria</td>
</tr>
<tr>
<td>Michael Coucheir</td>
<td>Belgium</td>
</tr>
<tr>
<td>Krassimira Sredkova</td>
<td>Bulgaria</td>
</tr>
<tr>
<td>Iliana Christodoulou-Varotsi</td>
<td>Cyprus</td>
</tr>
<tr>
<td>Kristina Koldinska</td>
<td>Czech Republic</td>
</tr>
<tr>
<td>Kirsten Ketscher</td>
<td>Denmark</td>
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<tr>
<td>Georg Männik</td>
<td>Estonia</td>
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<tr>
<td>Essi Rentola</td>
<td>Finland</td>
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<tr>
<td>Jean-Philippe Lhernould</td>
<td>France</td>
</tr>
<tr>
<td>Bernd Schulte</td>
<td>Germany</td>
</tr>
<tr>
<td>Konstantinos Kremalis</td>
<td>Greece</td>
</tr>
<tr>
<td>József Hajdú</td>
<td>Hungary</td>
</tr>
<tr>
<td>Mel Cousins</td>
<td>Ireland</td>
</tr>
<tr>
<td>Gianluca Contaldi</td>
<td>Italy</td>
</tr>
<tr>
<td>Daiga Ermsone</td>
<td>Latvia</td>
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<tr>
<td>Saulius Jakimcius</td>
<td>Lithuania</td>
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<tr>
<td>Teodoras Medaiskis</td>
<td>Lithuania</td>
</tr>
<tr>
<td>Nicole Kerschen</td>
<td>Luxembourg</td>
</tr>
<tr>
<td>Joseph B Camilleri</td>
<td>Malta</td>
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<tr>
<td>Saskia Klosse</td>
<td>Netherlands</td>
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<tr>
<td>Gertruda Uscinska</td>
<td>Poland</td>
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<tr>
<td>Artur Soares</td>
<td>Portugal</td>
</tr>
<tr>
<td>Razvan Cirica</td>
<td>Romania</td>
</tr>
<tr>
<td>Iveta Radicova</td>
<td>Slovak Republic</td>
</tr>
<tr>
<td>Grega Strban</td>
<td>Slovenia</td>
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<tr>
<td>Christina Sánchez-Rodas Navarro</td>
<td>Spain</td>
</tr>
<tr>
<td>Ann Numhauser-Henning</td>
<td>Sweden</td>
</tr>
<tr>
<td>Simon Roberts</td>
<td>United Kingdom</td>
</tr>
</tbody>
</table>

**Contact address:**
Ghent University, Department of Social Law, Universiteitstraat 4, B-9000 Ghent (Belgium)

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Executive Summary

I. Background

The trESS (Training and Reporting on European Social Security) network was set up by the European Commission to: increase the knowledge about the regulations that coordinate social security in the European Union (EU); build strong networks at national and European level; inform the European Commission about current problems and challenges at operational level in the Member States; and report perspectives and trends at national and Community level. trESS also plays an important role in gathering and distributing specialist knowledge on social security coordination through broadening the range of parties participating in the dialogue, including a wide range of experts, social partners and judges (Poland). High levels of synergy were demonstrated, as issues and ideas raised and discussed at each of the seminars were circulated throughout the member countries by detailed seminar reports, and the attendance at the seminars of visiting experts from the network and the European Commission itself.

The European Report presents an overview of the implementation of the EU Coordination Regulations in all 27 Member States. The issues highlighted in the European Report are those identified within the 27 national reports as (potentially) problematic in their respective Member States.

The second part of this report contains country sheets, highlighting the main issues of debate and discussion in the Member States concerned.

The European Report of 2009 is in some respects an ‘end of term’ report, as we are on the eve of a new era in coordination as in Spring 2010, for only the second time in 50 years, a new regulatory framework of Regulations 883/2004 and 987/2009 will enter in to force. One of the objectives of the new Regulations is to find solutions to common problems and to adapt some of the existing provisions that are considered to be less effective. In next year’s European Report, we will examine this new regulatory framework. However, as trESS reports are empirical and analytic and not speculative this year’s continues to focus on the problems encountered in the implementation of the Regulations 1408/71 and 574/72. This report does not speculate as to whether this will be successful but focuses on the actual problems encountered.

The overall conclusion of the European Report is that the coordination of social security is effective and plays an important role in realising the aim of free movement and contributing to the development of the concept and reality of European citizenship. However, it should not be surprising, given that social security is notoriously complex and coordination covers 27 countries, that a number of gaps, shortcomings and inconsistencies are identified in the national reports. (However, it should also be noted that some of the problems identified are those of non-compliance with the EU Regulations while others are the functions of the constraints – both political and practical – on a system of coordination. These gaps and inconsistencies are highlighted in the European Report in order to support the European Commission, national administrations and other actors in their task of continually improving coordination of social security in the interests of European citizens.

It is perhaps not surprising that only five years after accession the provisions of the Coordinating Regulations continue to present challenges to new Member States. Only just accustomed to the existing framework, they will now have to adapt themselves to the new framework. In order to prepare their administrations many new Member States trained their staff in advance (for example Estonia, Hungary), mostly under the umbrella of EU Twinning projects (for example Latvia, Lithuania), which identified the main problems they were likely to face, and many of the new member countries have prepared detailed instructions for the application of Regulation 1408/71 and 574/72 (the Regulation (s)). However, it should be noted that prior to joining, many new Member States had little experience of international social security coordination either through multilateral or bilateral agreements. Thus the national reports identify an unsurprising need for further information and guidance, with particular emphasis on managing the sometimes lengthy procedures involved in
gathering data from other member countries, the use of E-forms, and the extensive body of case law of the European Court of Justice (ECJ). In particular, problems continue to be caused by the official translations of the regulations, E-forms, and case law into the various languages. There is a danger of inadequate translation, which could be misleading for people accessing their rights (Slovenia). Similar comments have also be made with respect to the translation of Regulation 883/2004. Some of the smaller new Member States consider themselves to be still on a learning curve because of the very small number of claims they have had to deal with for certain types of benefits (Malta).

Some countries (Malta, Slovenia, Hungary) already had appropriate structures and experienced staff in place on accession as they had previously operated well-developed systems of bilateral agreements. Nevertheless, even in these countries, the concepts and underlying rationale of the coordinating regulations pose new challenges - not least due to the increasing number of cases their administrations are confronted with.

For most of the new accession countries, Regulations 1408/71 and 574/72 are now since more than five years applicable. An increasing number of cases have been brought before the national courts of these states and the national reports therefore contain increasing information on first national judgments on the implementation of these Regulations in these Member States (Slovenia, Poland) or were extensively discussed at the national trESS seminars (see eg. Poland).

This is not intended to imply that the Regulations are always fully implemented without difficulty in the ‘old’ Member States. Here too Regulation 1408/71 may on occasions be wrongly applied or even completely overlooked. Thus the need for good quality information is not confined to new Member States. The Danish report, for example, identifies particular needs for information for local municipalities about how to administer the most recent developments in EU law. Specific information needs are identified with reference to developments in social services and the administration of the European Health Insurance Card. Growing attention should be paid to dissemination of information, and also to good collaboration between the different administrative tiers involved in the application of social security legislation. The organisational structure of Member States might itself have an impact on the correct application of EU law. For example, in many countries the organisation, administration and financing of benefits and services, is the responsibility of regional states or even districts, provinces or cities, rather than the (Federal) State itself. Without proper coordination between these various tiers of government implementation of the Regulations could be adversely affected (Germany). There is not only a risk of more complicated forms of cooperation, but also a growing possibility of divergent, interpretations and procedures. In Estonia for example, Article 17 agreements are concluded at lower levels than the national State. In Germany, posting forms are issued by the many hundreds of sickness insurance funds.

It is not only national administrations that need a constant supply of information; national judiciaries must also have up to date knowledge of a plethora of new issues and the high volume of case law issued by the ECJ. The Bulgarian report, for example, notes that the capacity of the judiciary needs further enhancement - due in part to the fact that judicial capacity was not addressed in the three Phare Projects that preceded Bulgaria’s membership.

And once again the challenges are not confined to the new Member States. While tribunals and courts play an important role in the implementation of the Regulation, the national reports show that their role differs among old Member States, who have many years’ experience of coordination. For example, the highest courts in Italy and Spain are reluctant to engage in direct dialogue with the ECJ in the field of social law. It is clear therefore that there is scope for awareness of the Regulations to be raised throughout Europe amongst all those tasked with the effective coordination of social security on behalf of European citizens.

Therefore, there is a clear need for information for the administrations, the courts, and for the citizens on the contents and the application of the Regulations. This need is perhaps even greater given the imminent entry into force of the new Regulations. People would welcome a coordinated (consolidated?) version of the new Regulations as more than five years have now passed since the adoption of Regulation 883/2004 during which there have been several modifications.
II. Some general cross-cutting issues

In this section we identify - within the overarching theme of the changing environment and context of coordination - three inter-related cross-cutting issues: changes to national legislation; the extent to which the Regulations have adapted to the changing environment; and their relationship to other EU instruments.

As we celebrate 50 years since the adoption of the EU regulations on social security for migrant workers, the Regulations themselves are at a watershed. Fifty years since they were conceived it is clear that these regulations are among the most important EU instruments, providing for free movement of persons and contributing to the development of European citizenship and social justice. However, they are also one of the most complicated areas of EU law, which is reflected in the high number of cases brought before the ECJ.

In 1998, in order to make the Regulations “more efficient and user-friendly” and take account of changed circumstances the European Commission published its proposal for a new Regulation (COM(1998)0779) and following long discussions and negotiations, Regulation 883/2004 was adopted by The European Parliament and The Council on 29 April 2004. Very recently, on Friday 30 October, the new Implementing Regulation 987/2009 was published in the Official Journal. Several countries already indicate – although it is of course far too early to predict the outcome of these new Regulations - that not all of the problems encountered in coordination, will be completely resolved in the new texts. So there is continuing need for reflection and it will indeed be interesting to discover over the forthcoming years the extent to which problems have been adequately solved in the new Regulations.

It is appropriate to acknowledge the challenges facing policy makers tasked with rationalising and re-designing regulations to coordinate social security across 27 countries in a dynamic and constantly changing environment. The environment in which Regulation 1408/71 operates has changed in several ways since it was introduced in 1971. These include: expanding membership from six to 27 countries; new types of migration, with increasing use of posting; new patterns of work, including increasingly flexible labour markers; demographic and social changes, with people living longer and forming more varied families and partnerships; new social security arrangements, including new arrangements for early retirement and the care of the elderly; and the growing body of ECJ case law.

The personal scope of Regulation 1408/71 has itself expanded over time from coordinating social security for workers, refugees and stateless persons, and their families to include everyone; while the concept of European citizenship has opened up new routes to entitlement in addition to the traditional link to employment. The potential impact of the new Regulations 883/2004 and 987/2009 on non-active persons is anticipated with particular interest. An increasing number of reports have identified the significance of problems for third country nationals and emphasize that the importance of recognising the significance of the application of the Regulation to third country nationals.

Another growing area of interest is at the "extra-territorial" application of the Regulations outside the territory of the EU which gives rise to questions about to what extent could facts, events or situations outside the EU be taken into account or play a role in deciding entitlement to social security?

Changes in national legislation or circumstances

-The structure of social security schemes

One important issue concerns the way social protection systems are structured in the Member States and the impact this might have on coordination. Growing problems may be expected. We have already noted the potential challenges presented for the uniform implementation of the Regulations in countries where administration is devolved to local levels. In addition the further regionalisation of social protection is likely to present new challenges. While the Regulations currently coordinate national schemes, recent revolutionary trends in some Member States may lead to growing pressure for the application of EU law to intra-state contexts, in part through the growing influence of European citizenship. Should intra-state arrangements become subject to European coordination law, questions will follow about how to apply the principles and framework of coordination in this
context. A recent case concerning Flemish long-term care insurance has flagged up some of the issues that are likely to arise in the application of community law to Member States with a decentralised structure (Belgium). Notwithstanding the still valid rule that the Regulation is not applicable in internal situations, the by analogy application of the coordination principles in an internal national context, is a source of growing complexity and unsolvable issue. This may lead to the inclusion of concepts hitherto unknown to the Regulation (Belgium). The notable tendency in many Member States to devolve legislative competencies, including in matters of social security, to internal federal bodies does not, however, imply that these bodies can act independently of Community law. The commitments imposed by Community law cannot be escaped simply by transferring legislative powers to federal bodies. However, as the Court of Justice has so far found that differences in treatment between internal and cross-border cases are not dealt with by EC law, they must be tackled from a national, often constitutional, point of view. This leads to the fundamental question: to what extent could EC have an impact on purely internal cases. To the extent that reverse discrimination would run counter to national constitutional law, it might perhaps be argued that less favourable treatment of purely internal cases in relation to intra-community cases, would be unlawful.

-The Active Welfare State

A second important issue is the influence of the ‘active’ welfare state on coordination. Activation is a prominent paradigm to both labour market and social security policy, fitting as well in the policy of flexicurity. The cross-border provision of passive benefits and active measures has not been dealt with in EC coordination law and may require special measures. In an increasing number of Member States, active employment measures, including assistance for vocational training have been set up, not only for unemployed persons but also for those who are employed. Several Member States question to what extent these active employment measures should be seen as an unemployment benefit. The promotion of the active welfare state is leading a move away from social security schemes aimed at compensating losses consequent upon the realisation of specified risks and contingencies towards schemes concerned primarily with preventing the risk occurring in the first place. Many employment-related schemes require participation in work-related activities as a condition for entitlement to benefits. This increasingly includes not only employment allowances, but also, for example, invalidity benefits. These developments are likely to raise new issues around the classification of these types of benefits (UK), while cross border participation in work-related activities and rehabilitation measures will present policy makers and administrators with further challenges. The application of the principle that only one legislation is applicable in a situation where a person is performing part-time work in one Member State and receiving part-time sickness allowance or part-time rehabilitation allowance from another Member State, might not always be in the interest of the migrant worker (Finland). A problematic situation could occur where a person has resided in Member State A and worked in Member State B. In Member State B s/he receives a sickness or rehabilitation allowance and is also encouraged to take up part-time work, in order to promote her or his capacity to work and remain in the labour market for as long as possible. The person concerned is also considered to be insured under the pension insurance scheme. A problem might arise when the person is taking up a part-time job in Member State A where s/he resides. A conflict might arise between the interest of remaining insured in Member State B, where the last period of full-time work was performed, however, it is not likely that the employer for the part-time work in Member State A would want to pay contributions to Member State B. Neither is it possible that the institution paying the sickness or rehabilitation allowance would pay contributions for the employment pension insurance to Member State A.

-Classification of benefits

A third issue is the changing substance and context of national legislation. The material scope of the Regulation is structured around the nine traditional social security risks. Given that this is an exhaustive list, new types of benefits introduced in the Member States must be included under one of these nine categories if they are to fall within the Regulation. New types of benefits may present difficulties of definition and categorisation. One example is long-term care insurance. Introduced in some Member States during the 1990s, separate schemes for long-term care are becoming increasingly common. Although there is still a view expressed in some Member States that long-term care benefits are special non-contributory benefits, the ECJ has found that they are sickness benefits, thus to be coordinated in accordance with the sickness chapter. However, implementation problems
identified with respect to long-term care benefits suggest that the chapter on sickness may not be the appropriate framework for coordination. As the new Regulation, 883/2004, will provide only limited coordination for long-term care it is likely that further policy discussions, perhaps leading to a new separate chapter for long-term care benefits, will need to take place in the near future.

It is perhaps not surprising that the classification of, and distinction between, social security, social assistance and special non-contributory benefits continues to be contested. However, work undertaken within the Administrative Commission and the developing case law of the ECJ has further clarified the demarcation lines between these types of benefits with the content of ‘social security’ continuing to expand. However, the problem remains notwithstanding that the European Court of Justice in its judgment in Case C-299/05 that some benefits, which are still considered by some Member States to be special non-contributory benefits according to Annex IIA, are in fact social security benefits. Even in the countries directly concerned with this case, further discussions about the classification of these benefits are taking place. In the UK for example, the national tribunal expressed its view that difficult issues arise concerning the treatment of the mobility component of the disability living allowance in the light of the decision of the European Court of Justice and that new questions should be asked of the Court. In Sweden, the new classification of the child care allowance as a social security benefit has led to the withdrawal of this benefit for persons working in other Member States, while residing in Sweden, by reference to Article 13 (2) (a) of Regulation 1408/71. The question is raised what happens if the competent state does not have a similar benefit. Also in Sweden, diverse opinion exist, if, for example, the care allowance, granted to a person who cares for a relative who is seriously ill, falls under the Regulation. It is possible that a whole range of benefits and services belonging to the broad concept of social welfare will increasingly be brought within the remit of the Regulations. This may include, for example, social housing allowances, and advantages and services related to labour law. Defining the material scope of the Regulations will therefore remain an important and difficult task, not least because the concept of social security itself has a Community dimension.

However, it is not only the concept and definition of risk that will have to be examined, but also the boundaries of the legislation. As it becomes clear that a growing number of complementary and supplementary schemes, including second pillar pensions, will fall within the material scope of the Regulations questions about what falls under which Community instrument and to what extent will become more urgent.

Questions of scope are not confined to supplementary pensions, but also, for example, to health care, where an increasing number of private elements are being introduced into national systems. This makes these systems more open (and vulnerable) to the principles of the internal market, which will in turn influence the implementation of the Regulations. The application of Article 49 of the Treaty with reference to social protection and health care will be the subject of forthcoming discussions between the Member States and the European Commission.

-Changes in family law

Changes in family law in Member States, as well as definitions and arrangements, can also be expected to have an impact on the application of the Regulations. The impact of divorce and the rights of children and ex spouses raise issues for coordination with respect to family allowances, while questions of custody and the distribution of financial obligations can be complicated in a cross border context. Important questions concerning same sex marriage and partnerships are likely to move up the policy agenda. The risk of potential discrimination in the personal and derived rights of same sex couples, exercising their right to free movement, that may arise from the different civil statuses accorded to same sex couples in the Member States has been noted in several member countries. The existence or not of a marriage link can affect the exercise of some of the rights acknowledged under the national legislations. For example, the position of a migrant worker who is married under a country that accepts same sex marriage and whose surviving spouse claims a survivor pension, under Regulation 1408/71 in a country whose laws are restricted to heterosexual marriage and partnerships.

Discrimination against same sex couples across Europe could present serious barriers to free movement. The impact of the interface of the plethora of partnerships statuses and benefit entitlement conditions could imply that some same sex couples exercising their right of free movement may find their status and entitlement changing as they move between different rights
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regimes to the detriment of their social security contribution record and entitlement to benefit (UK, Slovenia, Luxembourg, etc.). Same sex partners may be confronted by loss of current or future cover, with respect to different areas of social security, including pension entitlements, health care benefits, family benefits and carers benefits; while frontier workers who live on one side of a border and work on another may straddle or move between countries that do and do not recognise same sex relationships with consequent complications and loss of social security rights. The recognition and status of transsexuals may also raise important questions for coordination. And there may also be issues for the pension entitlements of surviving spouses of polygamous marriages that are not recognised by the Member States' legislation (Spain).

Relevance of the Regulations’ provisions

The second, related, cross-cutting issue concerns the question: to what extent are the provisions of regulations first introduced over 50 years ago still relevant to today’s context and conditions. This question is often raised with reference to the application of the rules to determine applicable legislation.

-Flexible Migrant Worker

One key issue is the extent to which the Regulations are able to respond to increasingly flexible labour markets, with some workers developing highly fragmented and mobile working biographies, accentuated by the growing use of cross-border employment agencies and tele-working. Other examples that national reports suggest challenge the concepts underpinning applicable legislation include workers (for example artists) who frequently carry out successive periods of short-term work in different Member States for different employers, sometimes in different capacities. Other examples include air crew, work performed for companies hiring staff, remote workers who perform their work via the internet or who can perform their work anywhere, such as journalists, photographers, researchers, etc. It has been suggested that these ‘new’ groups of people challenge the existing rules on applicable legislation. Employers make increasing use of the freedom to provide services leading in turn to the application of the freedom to provide services rules. A connected problem is that ownership of equipment and employment of personnel increasingly rests with different undertakings, staff being typically employed by ‘global’ employment companies. Some national reports (Estonia, Latvia, Cyprus) question the rules for sea-farers (which some ‘sea-faring’ Member States suggest appear to have been drafted by non sea-faring countries). The general discussion extends to whether there is a fundamental conflict between the objectives of the rules determining applicable legislation – whether they are intended to support the market or to protect workers and other mobile individuals, and consequently, what should be the point of departure for revision – the mobile individual or the employer? In a broader sense, the discussion leads to questioning the fundamental principles of applicable legislation on which the Regulations have been built for the past half a century: in particular the rule of the single applicable legislation and the lex loci laboris. The question is perhaps not whether lex loci laboris should be replaced by another principle, but rather whether the fundamental principle of insurance under one legislation is still appropriate? Recent cases such as Bosmann – and the more recent case, Case C-208/07 von Chamier-Gliszczinski which appears to follow to some extent the reasoning in Bosmann that the national legislation, other than the competent state, might apply - have shown that, in certain circumstances, residence-based systems might act as a safety net where the outcome of lex loci laboris is not completely in line with the interests of the migrant worker. The door is open for further discussions on the fundamental principles of applicable legislation. The uncertainties and problems that highly mobile and flexible workers are confronted with raise a further debate - should additional special rules for specific categories of persons be introduced or are these groups not in practice all that different from other categories of workers? Perhaps one answer to the question: to what extent do the characteristics of these new forms of migration challenge the existing rules for the coordination of social security? - is that what is required to meet the challenge is not so much new rules, but rather better administrative cooperation and exchange of information concerning the existing rules as well clearer definitions of some of the existing concepts.

-Need for further clarification/definitions

Some of the concepts used in Regulation 1408/71 are unclear and/or controversial. For example it is likely that the concept of posting will remain a contested issue in the foreseeable future. Posting, initially introduced as an exception to the general rule, is now widely used, sometimes leading to the
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(incorrect) perception that it is itself the general rule. Even after the adoption of the ‘Practical Guide for the Posting of Workers’, Member States continue to interpret the concepts and practice of posting in a variety of ways. The new Decision A2, which has replaced Decision 181 under Regulation 883/2004, tackles some, but not all of these issues.

Different interpretations of the rules are not only encountered in the context of posting, but can be found throughout the provisions on applicable legislation such as, for example, simultaneous employment, rules concerning international transport workers – a separate conflict rule abolished under the new Regulation 883/2004, which of course does not imply that all problems are now solved - and sea-farers, and the application of Article 17. Different national reports raise the need for precise interpretation and guidelines as well as clear instructions. However, as the Regulation is an instrument to coordinate and not harmonise social security, responsibility for implementation remains with the Member States. This is not to say that incorrect application of the rules will not continue to be challenged before the ECJ. One example where challenges might be anticipated – perhaps on the grounds of discrimination - concerns the inconsistent application of Article 17. It may be difficult to explain to the Court why workers in identical circumstances fall under different legislations due to different views among the Member States about the application of the Article.

Questions about the appropriateness of the provisions of the Regulation are not confined to determining applicable legislation. There are also questions about the privileged position of some specific categories of persons. For example, is the special position of frontier workers still justified? Here, the Regulation takes different approaches depending on the risk - whether a frontier worker is covered by the State of work or the State of residence is different for the chapters on sickness and unemployment. Other questions include whether restricting export of unemployment benefits to three months is appropriate in a pan European labour market in which people are looking for job opportunities abroad? Regulation 883/2004 has extended in a limited way these possibilities.

The growing opportunities for patients to seek cross-border medical care also raises questions about the suitability of the EU provisions. Here the mix between private and public comes in to focus. Not only may patients opt for private treatment (which falls entirely within the framework of the freedom to provide services under Article 49) but they may be obliged to receive medical treatment under a ‘private regime’ at, for example, private rates in public hospitals or in private units within public hospitals. The growing influence of the free movement of health services and cross-border health care, under Article 49, is seen by some Member States to present a threat to their national health care systems. Specifically, it is felt by some member countries that equity could be endangered by giving, for example, a choice of access to practitioners in another Member State, when this is not permitted under national legislation (Slovenia). This issue of possible reverse discrimination when patients receive medical care in private hospitals is a growing concern in several Member States.

-Smooth functioning of the Regulation

Regardless of the substantive content of the Regulations, the smooth functioning of coordination depends on effective cooperation between national administrations. Administration - based on E-forms is sometimes a source of complication and delay and consequent difficulties for migrants in all Member States. It is of the upmost importance that further attention should be paid to the growing concerns about the administrative difficulties encountered when implementing the Regulations. An incorrectly completed E-form, missing data, delays in sending documents, the use of national forms annexed to E-forms, even on occasions non use of E-forms, can all inhibit and delay effective processing of a claim. Consequently there is considerable interest in the development of electronic exchange of information. The introduction of an electronic data exchange system under the new Regulations 883/2004 and 987/2009 is welcomed in all Member States and is indeed considered by many as the most important achievement of the new Regulations. However, it is noted that in several Member States important administrative improvements and investments still need to be introduced. This will not only speed up administration but could also avoid the practical problems identified above. However, effective electronic exchange of information depends on well organised and effective national administrations. Administrative decentralisation that is taking place in some Member States might introduce additional problems due to lack of knowledge of the Regulations at local level combined with lack of clarity about roles and responsibilities. Again these developments point to the continuing need for wide dissemination of up to date information about the application of the Regulations.
The considerable differences between Member States concerning rules for the protection of personal information also complicates further gathering of data. It is reported that requests for information are sometimes answered only after a long delay, leading to gaps in protection. Although the ECJ attaches considerable importance to good cooperation between the Member States and considers this is often the first way to solve problems, it is nevertheless felt that this cooperation cannot be enforced and cooperation in this field often falls far short of what is required. In addition to effective cooperation between administrations there is also a perceived need for the Administrative Commission – as also pointed out by the ECJ - to play a more active role in resolving specific issues and conflicts in addition to its current role clarifying more general issues. Thus in the new Regulations, the Administrative Commission is strengthened and given a more prominent role in solving outstanding issues. This will be welcomed by Member States to administrations which are looking for clear interpretative guidelines. On the other hand, it is generally felt that the necessary good cooperation between the different authorities and institutions in the Member States is an essential precondition for the good functioning of coordination. Good administrative cooperation is increasingly viewed as the fifth principle of European social security law. Further cooperation is also envisaged to combat fraud and protect revenue. Although it is generally felt that electronic exchange of information will be an important step in improving cooperation between Member States, it will not be sufficient in itself. It is, however, a source of frustration that the different national remedies against fraud, in particular in the areas of posting, cannot be applied in a European context, as they are not binding for companies, which operate from the territories of other Member States (Belgium). Adaptation of European instruments may be necessary in this respect.

**Interface with other aspects of EU law**

The third, related, cross-cutting issue concerns the relationship of the Regulations to other areas of EU law. Recent developments show that Regulation 1408/71 is no longer the only instrument dealing with social security for migrant workers as other areas of European Law encroach.

**Provisions of the Treaty**

People are increasingly relying directly on the Treaty provisions. For example, the influence of internal market rules on health care and ECJ case law on European citizenship are having an increasing impact on social security and consequently an indirect influence on the Regulations. There has been a view expressed by some that Article 18 of the Treaty provisions on European citizenship would only apply in cases that are not covered by the Regulations. This is not the case. However, as long as the provisions on European citizenship provide only additional protection to migrant workers the issue is less problematic than when the application of European citizenship comes into conflict with Regulation 1408/71. Recent cases before the ECJ suggest that the courts have tried to avoid giving more rights on the basis of Article 18 than derived from Regulation 1408/71. However, we can expect further developments in this area as the arguments made by the ECJ are likely to be tested in respect of Article 18 and further developments with reference to Article 18 can also be anticipated over the extent of coverage of non-contributory benefits. The opening up of rights through the jurisdiction of the Court of Justice on European Union citizenship is certainly to the benefit of the citizen, but has also led to critics, in particular in the policy making arena, who accuse the Court of creating a transnational welfare area, where Union citizens have to assume responsibility based on solidarity for non-national Union citizens who are residing or staying legally in the national territory. In addition, it also sheds a new light on the link between economic activity and entitlement to social rights. An important development taking place is the direct reliance on the general principles of free movement of persons (Art. 39) by European workers, in order to combat possible limitations to their fundamental rights, limitations that not only are the result of national rules, but also sometimes follow from the application of the EU Regulations themselves.

-Residence Directive 2004/38

A second issue concerns the relationship between the Regulation and Directive 2004/38. The national reports show that the concept of residence is the cause of a range of problems. On the one hand, the concept of residence as used in the Regulation and as interpreted by the ECJ, differs in many respects from the concept of residence under national law as well as different understandings again under tax law. An increasing number of questions arise in respect of the new residence directive, 2004/38. For example: Do the conditions under the Directive have to be fulfilled before
applying the coordination regulations? Can a Member State in determining right of residence, take into account benefits paid under the Regulations? Or, conversely, can social security benefits only be obtained under the Regulation once the right of residence has first been acquired? Are the rules for social security benefits and social assistance the same? And are residence clauses indirectly discriminatory? These questions bring into play the range of case law on European citizenship.

-Boundaries between EU-instruments

The third interface that we want to highlight is with supplementary pensions and the proposed portability directive. This raises important questions about the boundaries between benefits that fall within the Regulation and those that will come within the purview of the portability directive. The concept of legislation is important within the Regulation and it does not follow that a second pillar scheme in which social partners play a role would necessarily fall outside. Future developments in national pension systems will raise further questions about how to determine what falls under which Community instrument. Clear definitions and boundaries between the various EU instruments will need to be mapped in order to avoid confusion between the roles of different instruments, which in turn raises fundamental questions about the objectives of the different EU instruments. It is essential, whatever the characteristics of a national system, to avoid a situation where some schemes fall outside the protection of all EU instruments.

III. Preparations for the applicability of Regulations 883/2004 and 987/2009

In the national reports of 2009, some initial information was provided on the preparations being undertaken in the different countries for the application of the new Regulations. This topic will be extensively covered in the European Report of 2010. This chapter will give a brief overview of methods and targets in the preparation of this new framework.

Preparations for the application of the new Regulations are taking place in three areas:
(1) electronic data exchange;
(2) anticipated interpretation and application problems with the new provisions; and
(3) the dissemination of information on the new Regulations.

The electronic data exchange system (EESSI), one of the centrepieces of the new Regulation, is receiving a lot of attention in the various Member States. A number of technical challenges are anticipated. Steering committees have been set up, by branch or risk, or national action plans developed for preparing the electronic information exchange. In several Member States, competent social security institutions have made their own plans to prepare for the entering into force of the new Regulations. National working groups have been set up to coordinate the implementation of the EESSI project. In particular, the competences of the different institutions have to be decided, as well as the rights and obligations of the institutions involved in relation to the administration of the exchange of data and the access points. Different institutions are preparing the process of translating messages, defining prioritisation criteria (i.e. which message first), as well as seeking partners in other Member States to test the new processes. Further training will be needed for staff dealing with the new Structured Electronic Documents (SEDs), although the Member State’s institutions are in general waiting until the structure and content of the SED’s has been approved.

Some of the reports have already identified some areas where application problems are expected due to the modifications in the new Regulations. For countries with a residence-based and individualised social security system (Finland), the widening of the personal scope of the new Regulations to include non-active persons will be a significant change. Other national reports refer to the new provisions regarding access to healthcare services for family members of frontiers workers and healthcare insurance for pensioners and the very problematic issue of the administration of the reimbursement of costs between the competent state and the state of residence (Austria, Belgium). For Belgium, the absence of a specific conflict rule for international transport is expected to cause difficulties. In general, however, in particular at the time of writing, national reports point out that the various social security institutions in the Member States have not yet made a full assessment and do not yet have a clear picture of the precise impact of the new provisions within their sector. However, exercises are under way that are expected to be completed by the end of 2009.
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The dissemination of information is considered to be one of the most important challenges. The wider public, and also the administrations dealing with the implementation of the Regulation, must receive all the necessary information on the new developments and the associated guidance and instructions for national implementation of these new texts. Member States have developed plans to disseminate information. Publicity tools to inform citizens are in preparation, including, for example, updating the information published on websites as well as publishing and printing leaflets or brochures. A crucial issue is the training of staff in the various social security administrations. Some Member States have started with preparing internal manuals, while in several Member States training is given through the organisation of thematic seminars, workshops or forums, where the new rules are explained. Training is also being given through the thematic seminars organised by the European Commission; the organisation of regional seminars (for example, several Nordic meetings have been organised, as well as a Baltic seminar); twinning seminars or bilateral meetings (Bulgaria); or the organisation of national meetings often together with the social partners (Cyprus). In addition, several countries have set up structures to deliver internal training (Finland, Latvia, etc.). However, there is a perceived need for further training initiatives to be arranged for people who are involved in the day-to-day implementation of the Regulations in order to discuss practical cases. With this in mind a seminar on applicable legislation will be organised in Finland in June 2010 for all Member States.

IV. The implementation and application of the Regulations 1408/71 and 574/72 in the Member States of the European Union

A. Fundamental and general principles

1. Equality of Treatment

Equality of treatment is one of the four basic principles of coordination. This principle rules out both direct and indirect discrimination. There is little evidence in the national reports of direct discrimination on grounds of nationality. The very few examples include Belgian unemployment benefits and some benefits for family members in Slovenia. However, the reports present evidence of indirect discrimination, including, arguably, new residence conditions attached to some benefits in some Member States (Finland, Ireland, Sweden, UK). The introduction and, in particular, the conditions posed for this residence test have been extensively criticised in the Member States. Introduced to prevent ‘benefit tourism’ and to coordinate migration policies, it has been argued that it has turned into a requirement to demonstrate a necessary link with the country concerned, without investigating whether it is justified and whether the conditions are proportionate to the aims. Sometimes it is, however, difficult to assess if migrant workers have the same access to social security benefits as national workers. A particular difficulty lies in distinguishing between different treatment of national workers and migrant workers that results from differences between the social security legislations of the Member States that are acceptable under EC law on the one hand and criteria, which must be considered as discriminatory under EC law on the other hand.

2. Export of Benefits

Article 10 of Regulation 1408/71 provides for portability of long-term (and to a lesser extent short term) benefits. Apart from the uncertainties surrounding the application of provisions on special non-contributory benefits there were few problems reported with export of benefits. One exception concerns the high fees some banks charge to make transfers of benefits that are payable abroad (Czech Republic, Romania). The traditional non-exportability of certain benefits under the Regulation, such as special non-contributory benefits or unemployment benefits, could be increasingly questioned under the direct applicability of the general free movement principles of the EU Treaty. Recent ECJ case law, but also developments on the national level have made clear that even inclusion in Annex II a of the Regulation, exempting the national authorities from the obligation to export these benefits, is not necessarily the end of the story. Recent ECJ cases - De Cuyper or Peterson or Hendrix - have made clear that the non-exportability of certain benefits has to be looked at alongside the right of freedom of movement under Article 39 or the European citizenship under Article 18. Under these circumstances, conditions of residence can only be put forward if its object would be justified and proportionate to the objective pursued. This might end up in other results. Although, for example, in the Hendrix case the ECJ considered a benefit for young disabled people, listed in Annex
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Il a of the Regulation as non-exportable, it however questions its compatibility with freedom of movement under Article 39. It was up to the national courts to answer and after weighing the national legislation in the light of these principles, the national court declared the non-export clause not to be applicable. Examples such as these have made it clear that the Regulations are no longer the only route for coordination of social security for migrant workers.

3. Applicable legislation

3.1. General introduction

a. Legislation applicable

Rules which determine which national legislation is applicable are an essential part of social security coordination. In principle, the law of the place of work (lex loci laboris) regulates all aspects. It should be noted that these rules were originally conceived for the traditional migrant worker rather than new forms of mobility that have subsequently developed. The short term mobile worker and the pan-European migrant worker, to one extent or another, call into question the appropriateness of these provisions. Questions were raised whether a specific rule for intra-group mobility should be introduced (which is the subject of one of this year’s two Think Tank reports). The national reports raise questions with respect to the interpretation of some of the concepts of these provisions. Examples include: which rules apply to people who have ceased all activities or to a worker who performs professional activities in at least two Member States, one of which is the State where s/he resides. As noted above, some national reports suggest that the rules for sea-farers are inappropriate, leading to loss of competitiveness in the European shipping industry.

b. Posting

Posting is an increasingly important instrument in the context of the growing need of business for international mobility. This raises the question of whether posting, as an exception to the State of employment principle, might become the rule.

The national reports suggest that many of the conditions that have to be fulfilled for the application of the posting rule are unclear and difficult to interpret. Administrative Commission Decision No 181 (now replaced by Decision A2 under Regulation 883/2004) provides for supplementary criteria to simplify and speed up procedures. A ‘Practical Guide’ concerning posted workers has been adopted that has, according to some reports, introduced a greater degree of uniformity, which in turn leads to better application of the legislation. Notwithstanding the criteria in this guide however, Member States interpret these criteria in their own way and several national reports identify difficult issues.

One issue concerns the concept of ‘significant business activity’. Social insurance institutions should check if an employer posting her or his employees to another Member State habitually carries out ‘significant business activity’ in that country. However, it is not clearly defined what period of time and what number of employees in the posting and receiving States is considered to be sufficient to meet the criteria. The different criteria that have to be taken into account, the mutual relationship between these criteria and their lack of clarity as well as their relevance, make the application of the posting rules problematic.

The Practical Guide defines ‘significant activities’ as a turnover of approximately 25 per cent of total turnover in the posting State. Some national reports suggest that this indicator is difficult both to define and meet, while some suggest that social insurance institutions issuing form E101 should be competent not only in the area of social insurance but also tax law and accounting. This may call for closer collaboration between the social insurance institutions and the tax institutions in order to check turnover and better monitor ‘significant business activity’.

Another issue raised in the national reports concerning posting is the refusal to allow replacement. According to Art 14.1(a) of Regulation 1408/71 an employee can be regarded as posted if the anticipated duration of posting does not exceed twelve months and s/he is not sent to replace another person who has completed her or his term. The second requirement may create problems if the posting institution is not able to check whether or not a given posted employee is replacing another, which is precisely the case according to many reports. This issue has not been addressed in
either Decision No 181 or in the Practical Guide for Posting. The fact that there is no definition of ‘replacement’ in ECJ case law is unhelpful. One could in that respect question the appropriateness of this condition.

It is also not always clear whether the rules on posting or other provisions on applicable legislation apply. Questions in this respect have arisen with regard to the difference between successive postings (Article 14(1)(a) and normal employment in several Member States (Article 14(2)(b)).

Several questions are raised by the national reports with regard to the posting of self-employed persons. Not least the fact that self-employed people, by definition, do not have an employer who can post them, makes the application of the posting rules to the self employed appear anomalous. A particular problem has been encountered in Poland with respect to the posting of self-employed farmers to another Member State. It is believed that the concept of farming cannot be interpreted as broadly as other types of self-employment, due to its specific features.

The administrative formalities to be fulfilled for posting are sometimes considered to be complicated and raise a number of questions, including whether form E101 is superfluous and whether receiving Member States should look for evidence, when it is not given by the sending State. This also leads to discussion whether posting is a right and an obligation or an exception and a choice. If a worker is sent to another Member State and falls under the definition of posting, is s/he then, by definition, a posted worker according to the Regulation and is that the end of the matter?

Some national reports suggest that authorities appear to have become suspicious of the posting of workers, particularly when dealing with interim activities or in relation to posting under the free movement of services between the new and the old Member States. It is, however, suggested that administrations should treat this segment of the labour market with open-mindedness and flexibility.

Working in two countries

Some national reports suggest that the rules whereby if a person has their main job in one country and takes up activities in their State of residence - even if their activities are of a marginal nature - s/he is insured in the latter State (even if the State of residence gives less or no actual coverage), can be problematic. An additional problem is where marginal activities lead to a change in applicable legislation involving extra administrative work for both the employer and the worker.

3.2. Application of Article 17 of Regulation 1408/71

Article 17 can serve as an exception to the provisions of Article 14.1(a) concerning posted workers. Many of the reports show that Article 17 is mainly applied in cases when individual exceptions from posting rules are claimed. However, Article 17 can also be used in other circumstances. For example, Bulgaria had experience with similar provisions before accession in social security agreements with Germany and Austria. Bulgaria concluded special agreements containing transitional rules for converting decisions under these bilateral agreements into decisions under the Regulation. On the basis of the transitional agreements most of the posting certificates under the bilateral agreements were converted into agreements under Article 17 as they concerned periods that were often longer than prescribed in Article 14 and 14(a) of the Regulation. Many of the reports contain concrete examples of the application of Article 17. Denmark and Sweden have concluded an Article 17 agreement in order to make arrangements to accommodate the growing risks of working in two countries and the change of applicable legislation after the opening of the Oeresund bridge. France has concluded Article 17 agreements for major international companies or for very specific activities or situations.

The main problem identified, however, is that there is no uniform interpretation of when Article 17 should be applied. Member States appear to follow a different interpretation of what is in the employee’s best interest. Some national reports raise the question of what can be done if the competent institution is not willing to sign an Art 17 agreement.
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4. Aggregation of periods

Another of the fundamental principles of social security coordination is the aggregation of periods of insurance, residence or employment completed in one Member State to establish entitlement in another.

However, it is not clear the extent to which the assimilation expressly provided for under the Regulations enables the competent institution to ‘transform’ the nature and impact of another Member State’s periods into the way equivalent periods are classified and interpreted under its own legislation. For example, the new Social Security Act has simplified the application of coordination in Sweden. The residence based part of the social security system in particular may, however, still cause problems of interpretation regarding persons who have ceased all occupational activity in Sweden. Some countries mention that the transfer of information between the different institutions with respect to the insurance period, leads to uncertainties or wrong answers. This is, for example, the case when under the competent State, only particular insurance periods may be taken into consideration and other Member States communicate all periods in which the person was covered. The same applies when the other Member State, for example, does not have the benefit concerned (eg. unemployment benefits for self-employed) and as such cannot certify periods of insurance (Hungary). Differences between the systems with respect to what is understood as periods of insurance can cause problems.

Several reports also mention that it is unclear how the provisions concerning child rearing periods and periods of study or other non-active periods are to be implemented with reference to the Regulation.

The new Regulation 883/2004 introduces a provision on the assimilation of facts. In several countries, there is considerable misunderstanding about the relation between the assimilation of facts and aggregation of periods.

B. Scope of the coordination Regulations

1. Personal scope

The dichotomy between employed and self-employed persons and the difficulties also on a national level to make the distinction between who is employed and who is self-employed, not at least also as a result of the introduction of economic dependant persons, do lead to necessary problems. There is a increasing difficulty, not least through the introduction of para-subordination employment and various contractual arrangements under civil law, to draw a clear demarcation line between employed and self-employed persons. In addition, the fact that some activities might be considered to be activities as employed person in one State, but as self-employed in another, might induce companies to find ways to avoid payment of social security contributions by experimenting with different types of contracts. This, however, does not exclude the fact that the presumption that a certain activity is performed in the capacity of employed or self-employed person, is still quite often applied in an international situation, although this is contradictory to EU-law. In the past it has been questioned to what extent competent authorities have the right to challenge the classification given under the legislation of another Member State. An issue which has now been resolved following the Hervin and Hervillier cases. Many reports however identified the growing influence of European Citizenship and show that restrictions in secondary legislation are being challenged by this increasingly powerful concept. Future impacts of Citizenship are difficult to predict. Another question raised in some reports concerns the different new forms of living together including same sex partnerships and marriage.

2. Material scope

Several reports show how the classification of benefits plays an important role in the correct application of the Regulations and there is a lengthy list of benefits and schemes that cause problems in relation to definition. It will perhaps not be surprising that most problems occur in relation to non-contributory benefits, for example, long-term care benefits and special benefits for disabled people as well as rehabilitation measures.
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The introduction of a new benefit often raises questions about definitions and how to distinguish between social security, social assistance, mixed benefits and benefits which do not fall within the scope of the Regulation. Several of the national reports highlight that the distinction between social security, special non-contributory benefits and social assistance under the Regulation is not sufficiently clear. Social assistance benefits in the Member States are no longer discretionary and other traditional criteria to distinguish between social security and social assistance – for example, whether the benefit is means-tested or whether a non-contributory benefit provides only supplementary cover to contributory benefits - are no longer valid. Inclusion in Annex IIA of Regulation 1408/71 is not decisive as comparable benefits (even within the same country) may or may not be included in the Annex.

There is also the question of whether the exhaustive list of risks enumerated in Article 4(1) will be able to cover all future developments in national legislation as Member States identify new risks and benefits all of which, as things stand, must be accommodated within Article 4(1). One complicating factor in this respect is that the concepts and terminology of national law and European law are not completely aligned. Clearer criteria are needed to enable Member States to design and categorise their benefits with greater confidence.

The increasing privatisation of social security in a number of Member States adds further complications for coordination. The number of non-statutory benefits, in particular found in contractual collective bargaining arrangements, could lead to increasing conflicts, as non-statutory benefits do not fall within the material field of application of the Regulation.

C. Other issues

Recent and forthcoming reforms in various Member States’ pensions arrangements are identified in some national reports as a cause of concern. The greater prominence given in several Member States to the role of private insurance creates fundamental problems for coordination as the mechanism is designed for public first tier pension systems organised on a pay-as-you-go basis, whereas the pension accumulation system put in place in the majority of the former socialist Member States, is fully funded and privately managed. There is a great deal of uncertainty as to how to apply the Regulations’ principles to these schemes. This is discussed in the Estonian and Lithuanian reports where the view is expressed that the Coordination Regulations are not adapted to funded schemes.

The concept of residence in the Regulations, which differs in general form the concept of residence under national law, is a cause of difficulty while the relationship between Regulation 1408/71 and the residence directive 2004/38 is giving rise to questions that will require further careful analysis.

V. Detailed analysis of the application of benefits in title III of Regulation 1408/71

A. Sickness and maternity benefits

1. Cross-border medical care under the Regulation

The concept of ‘necessary medical treatment’ is interpreted differently by Member States. Several national reports identify problems of non-recognition of the new European Health Insurance Card by medical service providers in other Member States. Another set of problems identified in the national reports relates to the link between benefits that are considered to be medically necessary and the anticipated duration of a patient’s stay in a Member State. This is particularly the case for abortion. There is also variation between Member States in the criteria used for authorisation of treatment abroad under the Regulation. Some countries interpret the criteria narrowly, while others give it a broader interpretation.

2. The Treaty based method of cross-border medical care

There are considerable differences between Member States’ sickness and maternity benefit schemes. The raft of ECJ case law has generated different responses in the Member States. While
there was little reaction to the Kohli and Decker cases from Ireland, Spain, Sweden and Luxembourg, other countries such as Denmark (in a limited way) and France have changed their legislation to take the ECJ jurisprudence into account. The impact of the Watts case has so far been limited. In response to the Court’s criticism that the National Health Service lacked clear criteria for managing its prior authorisation procedures, the UK has developed detailed guidance for local healthcare commissioners on managing requests for treatment overseas.

Several outstanding issues remain as to where the distinction lies between hospital and non-hospital services?

In a broader context, the discussion within the proposal for a directive on cross-border health care and its relation to the Regulations, is being followed with interest.

Some national reports suggest that cooperation between competent institutions of the Member States has not yet been fully developed in the area of healthcare and concerns are expressed by several reports from the new Member States about the incorrect or non use of E-forms by the old Member States or the non-acceptance of the European Health Insurance Card (EHIC). Sometimes instead of sending E-forms, medical records or other national documents are sent.

One problem concerns reimbursement of benefits. Several reports point out that the issue of the financial settlement of health care costs between Member States is a very slow process. This appears to be due to lack of information and trained personnel in Member States to check the real costs and respond to administrative questions. Many countries, such as Latvia, Poland and Hungary, point out that the higher level of healthcare costs in the old Member States present potentially serious issues for the new Member States. Quite often questions are asked if certain benefits should be reimbursed as, for example, the cost of autopsies or travel expenses, when they are covered under the health insurance system of the competent State, but not in the States where treatment was obtained. The interpretation of the right to health care for pensioners leads to disagreements between Member States. A particular example could be found between Member States with a contributory employment based system versus Member States with a residence-based system. Problems relate to Member States where it is possible to terminate health insurance voluntarily. It is suggested pensioners coming from these types of countries to a residence-based system, have a tendency to terminate their health care insurance after they have moved to the latter country and been registered as residents. In circumstances where, for example, a pensioner could choose to pay health care contributions either in a residence-based system or in a contributory system, where the contributions are substantially higher, the person would be very likely to choose the system of the country of residence and not want to pay significantly higher contributions to the other Member State. In these circumstances it could be the case that all the costs of health care will fall upon the country of residence, although the pensioner might have contributed all his or her working life to other Member States’ system. The possible outcome and the problems relating to a fair distribution of health care costs between Member States remains a subject of debate. It might be useful to further examine the problem of health care costs of pensioners.

B. **Long-term care benefits**

Some national reports identify problems with regard to the categorisation of long-term care benefits, in particular whether they should be classified as a sickness benefit in cash or a sickness benefit in kind. Spain introduced long-term care benefits in the 39/2006 Act and the Spanish report suggests that in taking this route policy makers appear to want to exclude these benefits from the Spanish Social Security Act and by extension from the material scope of Regulation 1408/71. Entitlement to long-term care benefits requires a previous period of legal residence in Spain of at least five years.

There is debate in Spain about whether or not the new long-term care benefits are coordinated by Regulation 1408/71. As there is so far no jurisprudence it can only be argued theoretically that the Molenaar, Jauch, Hosse, and Gauman-Cerri cases should be applicable to the new Spanish long-term care benefits.

Further problems could be expected with respect to the possible accumulation of benefits within the long-term care insurance. Problems are encountered due to the fact that some countries consider their long-term care benefits as benefits in kind, while others as cash benefits. Some other Member
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States do not export their long-term care benefits as they consider them to be social assistance. The difference between health care benefits and social services is becoming increasingly blurred.

C. Maternity and paternity benefits

The main issue with respect to maternity and paternity benefits concerns categorisation of benefits in some Member States.

D. Invalidity

There are two types of invalidity schemes in the Member States: one (Type A) provides benefits based on the materialisation of the risk, while the other (Type B) provides benefits based on the length of insurance.

Coordination implies that Member States retain responsibility for the design of their social security systems. This is the case with regard to establishing the degree of invalidity with each Member State applying its own method of evaluation.

Some national reports identify problems with the aggregation of periods. In particular, some new Member States report problems with administrative cooperation, with administrations on occasions receiving national rather than E-forms. This is further complicated by the fact that the Administrative Commission has yet to approve the request of new Member States to extend the E-forms.

E. Old-age and death

The rules on old-age and survivors’ pensions are the most complex part of coordination. The national reports raise issues concerning aggregation, calculation of benefits, Member State cooperation and the implications of developments in Member State’s pension systems.

1. Aggregation of periods

Difficulties associated with the recognition of insurance periods are identified by several national reports. A particular problem concerns the various new rules on pension rights for child raising years under the different systems.

2. Calculation of benefits

Several national reports, in particular those of the new Member States, point to the complexity of rules and procedures for calculating pensions and the consequent length of time – sometimes several months – that processing a claim can take.

3. Member States’ co-operation

Some reports, for example the Netherlands and the UK, mention problems encountered gathering essential data. Gathering information about income or to confirm identity can be difficult and may be further complicated by different rules concerning data protection. Once again processing E-forms can be problematic. Several national reports complain that some institutions forward their own national forms instead of E-forms or interfere with the standard format of the E-form. Sometimes processing times are increased because the form is incomplete. Some new Member States contrasted their own competence and accuracy in completing E-forms with the lack of competence of several old Member States.

4. Modifications in pension systems

Changes to the way pension systems are organised in Member States – such as the introduction of fully funded and privately managed second pillar schemes - could raise important questions for coordination in the future. National reports from Hungary, Latvia, Slovak Republic and Estonia all identified problems that could arise for coordination concerning the calculation of second pillar pensions. Again the question is raised as to what is coordinated under Regulation 1408/71 and what
falls under other EU instruments, for example the forthcoming directive on portability of supplementary pensions.

Changes to pension age being introduced in several Member States also raise questions for coordination.

As a result of active ageing being high on the political agenda across the European Union, an increasing number of Member States will raise the statutory retirement age, which might give rise to problems in the future. For example, a frontier worker who lives in country A, but has a pensionable age of 65 and has been working in country B for many years, where pensionable age has been increased to 67 years, will not be entitled to an old age benefit in country B, whereas in country A he or she will not be able to claim an unemployment benefit, as workers are not entitled to these benefits after turning 65. Perhaps a provision could be introduced on the basis of which the pension insurer pays the remaining two years’ contributions for the old age benefit. It is also questionable how the Regulation can apply in situations where there either a flexible pension age or no fixed pensionable age (Sweden). The time when the pension is claimed influences the amount of pension according to actuarial principles. Does that imply that pensions from all other Member countries should, for example, be recalculated each time a pensioner changes the way s/he uses her or his pension capital?

F. Accidents at work and occupational diseases

The main problems identified in the national reports concern assimilation of facts with respect to occupational diseases and the lack of a Community definition of occupational disease, as well as the non-proratisation of benefits as provided under Article 57 of Regulation 1408/71.

G. Unemployment benefits

Article 69 of the Regulation provides an exception to the principle that unemployment benefits are not exportable so that under certain conditions they may be exported for up to three months. National reports raise questions about the application of this principle. For example, can frontier workers rely on Article 69 and, if so, how should the rules be applied? It is notable that knowledge about the possibility to export unemployment benefits is very limited in several Member States. It is not only the concept of frontier worker or a-typical frontier worker that can lead to problems of interpretation. There are also problems with the concepts of full unemployment and partial unemployment, not least because many Member States do not have a definition. Thus, is a worker who formerly worked on a full-time basis for her or his employer, but now continues to work in a part-time job, to be regarded as a partially unemployed person or as a fully unemployed person? Whether claimants are actively seeking work and do not refuse suitable job offers is a very difficult condition to control and requires cooperation between employment offices across Europe.

The Regulation contains special rules for unemployment benefits for frontier workers. A fully unemployed frontier worker receives unemployment benefits in accordance with and at the expense of the country of residence. A particular issue is the ‘a-typical’ frontier worker, as defined in the Miethe case, which allows such workers to receive their benefits in the State of last employment. It appears that this rule is already used in circumstances when the frontier worker does not possess the nationality of the State of residence. This is, for example, the case in the Netherlands where many German and Belgian frontier workers live. Some national reports question to what extent the Miethe rule is an exception to the general rule of the Regulation and in which circumstances this rule should apply? It is not always clear how administrations decide that someone is an a-typical frontier worker. Is it up to the benefit administration to decide on this issue or is it the a-typical frontier worker who has the right to choose? This is particularly important as in some countries a growing use of the Miethe rule has been reported.

The application of the aggregation rule with regard to unemployment benefits is dependent on having fulfilled the last period of insurance in the country where benefits are claimed. In many countries’ legislations there is no minimum waiting period, so the rule is triggered by only one day of employment liable to insurance under that scheme. Some reports suggest that this could lead to serious financial impacts on unemployment schemes.
H. Family benefits

Family benefits remain a difficult issue, in particular with reference to the distinction between family benefits, parental benefits and paternity benefits. The ECJ has followed a broad concept of family benefits. This issue is of particular concern in the Scandinavian countries, which had assumed that parental benefits would be regarded as a maternity benefit. However, the ECJ ruled in the Kuusijärvi case that parental benefits should be regarded as a family benefit. The consequences of this ruling largely concern exportability.

The fact that a benefit is not classified as a family benefit under national law, does not prevent its classification as such for the purposes of the coordination rules. Some reports suggest that it can be difficult to explain how a particular benefit is classified when an identical benefit is categorized differently in another Member State according to the Regulation. A growing issue is reported between family benefits conceived as a social security benefit or as a tax reduction. Tax income reductions are used in some member countries as a type of family benefit, applying only to those people who are liable to pay income tax in the country concerned (Spain, Luxembourg).

Changes of family composition and arrangements can cause difficulties, particularly where the couple has separated and are working in different Member States. Divorced or separated parents are, according to the Swedish competent institution, not family members and family benefits may in this situation not be granted to the parent residing abroad as a derived right from the parent in Sweden. It is arguable that the child is a family member to both of its parents, regardless of whether they are divorced or separated. Or another issue is the consequence of the fact that support is awarded to the parent, who contributes to bringing up the child financially, but does not actually raise the child (Hungary).

Many reports mention that overlapping of family benefits might occur as a result of failure to exchange information between Member States on the situation of the family members and whether or not, and where, they are working.

VI. The EU Regulation and international agreements

Most of the bilateral agreements concluded by the new Member States have been superseded by the EU Regulations.

In several Member States, issues arose on the application of bilateral treaties concluded between a Member State and a third state concerning nationals of other EU Member States. In several national cases, reference was made to the application of the Gottardo judgment of the European Court of Justice (C-55/00).

VII. The Coordination Regulation and other parts of Community Law

It has already been noted that increasingly the social security coordination regulations are no longer the only instruments that deal with cross-border social security situations. People are increasingly relying on the direct application of the Treaty articles, a tendency sometimes criticised within Member States on the grounds that it might open a ‘Pandora’s Box’. For example, Article 39, and also Article 18 on European citizenship. The relationship between Article 18 of the Treaty and Directive 2004/38 has gained particular attention. New issues are being discussed such as the relative priority of Directive 2004/38 and Regulation 1408; the impact of Directive 2004/38 on inactive citizens and the necessity for non-active persons to prove that they have sufficient resources to be legally resident according to the Directive.
Disclaimer: the following country sheets contain an overview of the main problems and issues discussed in the Member States concerned. The number of pages are not necessarily proportional to the number of problems in the country. The information is received from data obtained and reports written by the national experts.

Country Reports 2009

The Implementation of Regulations 1408/71 and 574/72
IMPLEMENTATION OF THE GENERAL PROVISIONS

Scope of the coordination Regulations

Personal scope

Family members and survivors

The Austrian Supreme Court was confronted with a problem in a series of cases with regard to the Unterhaltsvorschuss (advance maintenance payments) as provided for under the Unterhaltsvorschussgesetz/UVG. It was stated that Regulation may be applicable to both parents as long as the personal scope is fulfilled. This implies a departure from earlier case-law which ruled that the applicable legislation has to be determined with respect to the person who is obligated to make advance maintenance payments. This more restrictive approach of the Court resulted from the Effing case (C-302/02 Effing). Because of a new distribution of tasks within the Austrian Supreme Court the senate, which is now competent (No 10), gave a more extensive interpretation of the personal scope by reference to the Humer-case (C-255/99 Humer) which means that the Regulation may be applicable to each parent. As a result the Court has to deal with problems of conflicts of laws and the priority rules of the Re

Probably influenced by the jurisdiction of the ECJ in Unterhaltsvorschuss the Administrative Court has now asked for preliminary ruling (C-363/08 Slanina [2009]) regarding the consequences on Austrian Familienbeihilfe (family allowance) if an Austrian citizen and her child have left Austria and moved to Greece while the divorced husband has remained in Austria. According to Austrian legislation the claimant for Familienbeihilfe must have her/his centre of vital interest in Austria and must be the one who is taking care of the child, which basically means the parent who lives together with the child. But under certain conditions the other parent can also claim Familienbeihilfe if s/he has responsibility for the major part of the maintenance payments. In the pending case the mother who lives together with the child has moved to Greece, so she was no longer entitled to Familienbeihilfe. The Administrative Court, however, raised the question whether there is a violation of Regulation 1408/71 when a family member (the divorced father) is still residing and working in Austria and under certain conditions can also be entitled to Familienbeihilfe according to national legislation?

Material scope

Classification of social security benefits

The Pensionsvorschuss (pension advance payment), which is a cash benefit that can be drawn by all persons who on the one hand meet the conditions for the entitlement to Arbeitslosengeld (unemployment payment) except the requirement of willingness and fitness to work and on the other hand have claimed an invalidity pension temporally limited for the period until the latter is granted or denied. Hence it combines elements of unemployment and pension benefits. It is now categorised by the European Court of Justice as an unemployment benefit (Case 228/07, Petersen). In Austria the reaction with regard to the Petersen-ruling was critical not because of the outcome itself but because of the fact that the Court on the one hand made its classification on the basis of the Regulation but on the other hand examined the legal consequence of the requirement of residence on behalf of the EC itself.

Social security benefits, special non-contributory benefits and social assistance

A new discussion, however, developed with regard to the new Regulation 883/2004 and the intended exclusion of Unterhaltsvorschuss (advance maintenance payments) by Article 1(2) and Annex I. Serious concerns are expressed that this exclusion could be ignored by the ECJ because of the fact that the Unterhaltsvorschuss has been already been classified as a family benefit since the Offermanns-case (C-85/99 Offermanns) and so the exclusion itself could be considered to be a violation of Article 39 EC.
Benefits concerning ‘new risks’

The provisions of the In-Vitro-Fertilisations-Fonds-Gesetz which offers the legal framework for the ‘new social risk’ of infertility. According to Austrian law infertility is not considered a sickness in the sense of health care insurance and expenditure for in-vitro-fertilisation is not covered by that scheme. Considering the rulings with regards to long-term care benefits, it has to be presumed however that reimbursement of insemination costs has to be regarded as a health care cash benefit in terms of Regulation 1408/71.

Applicable legislation

Working in one Member State only

Lex loci laboris

Due to this fact problems with implementation of the principle that every person to whom Regulation 1408/71 applies is subject to only one national legislation can be examined with regard to a special family benefit: The Kinderbetreuungsgeld, which is a family benefit in cash, not means-tested and independent from income but subject to having the ‘centre of interest’ within Austria. In this context the question was raised which legislation is applicable if a person who fulfils the conditions to achieve Austrian Kinderbetreuungsgeld at the same time fulfils the requirements for an equivalent cash benefit in another Member State. Thus the ECJ was asked for a preliminary ruling in the Dodl and Oberhollenzer-case (C-543/03). With this ruling the ECJ introduced the ‘family perspective’ to identify the applicable legislation which means that in the field of family benefits not only the situation of the individual claimant must be taken into account but also that of her or his whole family (ECJ C-543/03 Dodl and Oberhollenzer [2005] ECR I-5049). That may lead to a suspension of the lex loci laboris in certain cases.

Working simultaneously in two or more Member States

Either as an employed or as a self-employed person

The legislation of the State of residence is also applicable by virtue of Article 14a Regulation 1408/71 if a self-employed person performs work in two States including the State of residence. Recently the Administrative Court had to deal with the question of what is considered to be ‘residence’ and ‘habitual residence’ in terms of Article 1 (h) of Regulation 1408/71. The VwGH referred to the jurisdiction in the Angenieux-case (13/73 Angenieux) where the ECJ identified habitual residence to be the centre of a person’s interests. The Austrian Administrative Court qualified such interests to be the existence of a labour contract before or after the period of self-employment and where the person intends to reside following the period of self-employment.

Other issues

National rules against overlapping

According to the leading academic opinion in Austria only benefits which are based on statutory entitlement are qualified as ‘equivalent benefits’ but not benefits, for example, that are granted under private sickness insurance. In the present case the mother of the claimant (Silvia Hosse) had received long-term care benefits under the German long-term care insurance-scheme as well as cash benefits under the Austrian scheme. The Supreme Court nevertheless pointed out that voluntary insurance incorporated within a compulsory scheme follows the same principles as the latter and therefore cannot be compared to Treaty based private insurance. Therefore, the Supreme Court stated that the export of Salzburger Landespflegegeld may be suspended according to the Salzburger Pflegegeldgesetz and Article 12 of Regulation 1408/71 for the period of time and to the same amount as German long-term care benefits are drawn by a voluntary insurance incorporated into to the compulsory German insurance scheme.
IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS

Sickness benefits

BENEFITS IN KIND

Persons staying outside the competent state

Austrian health care insurance bodies are confronted with severe practical problems regarding the concept of occasional health care. This is due to the fact that Austria has a notably high number of occasional health care treatments caused by the high number of ski accidents in the Alpine winter tourist areas. The main problem in this context is that the reimbursement of costs by the competent Member States is not processed or at least delayed.

Persons residing outside the competent state: Pensioners

The Regulations’ provisions with regard to medical care for pensioners are considered to be inadequate. The critical remarks apply essentially to former frontier workers. It is considered to be a problem that from the first day of payment of a pension the possibility to obtain benefits from the State of residence as well as from the State where the person had been employed during her or his active career no longer exists, even if the pensioner draws pensions from two or more States. This can indeed cause problems especially in the case of current treatment. In this case the new Regulation 883/2004 will introduce the possibility for former frontier workers to conclude current treatment also in the State of former employment.

Another disadvantage for pensioners with regard to Regulation 1408/71 results from the fact that a pensioner who has changed their State of residence is still obliged to pay health insurance contributions to the State paying out the pension under Article 33 even if s/he can only obtain sickness benefits from the (new) State of residence. Regulation 883/2004 will also improve this situation.

An inverse problem is caused by the Article 28 of the Regulation, which grants entitlement to sickness benefits to pensioners living in another Member State, although s/he does not fulfil the requirements of the legislation of the State of residence, even if only a small pension id granted under Austrian legislation. It is argued that application of the principle of residence (as laid down in (former) bilateral agreements) would be much more appropriate in these cases, at least from the institutions’ point of view.

Planned health care abroad: under the Regulation

A related question to sickness insurance covers the use of German E 112 forms in Austrian hospitals. As stated, they must not be used for redirecting patients to countries with cheaper treatment. The treatment is in principle cheaper in their own country. Nevertheless, there were cases in Austria where a hospital refused to provide the treatment in spite of the issue of a form E 112, in one case claiming that there is no capacity, while on the other hand being willing to provide the treatment if the person pays the full costs him or herself. Issues in that respect are linked to very long waiting lists and the fact that hospitals are working to capacity. In many cases, the patients provide direct co-payments and the balance is paid via insurance.

Planned health care abroad: under article 49 EC

The rulings in Kohll and Decker did not attract as much attention in Austria as in some other Member States, e. g. Germany. This is because Austrian health insurance before these judgments did (and still does) not distinguish between treatment abroad and those in Austria. In both cases the Austrian law provides for the reimbursement of 80 per cent of the costs that the competent health insurance institution would have had to pay for treatment by a Vertragsarzt (physician who has a permanent contract with that institution).

The ECJ ruled that the differences under national legislation between independent outpatient clinics and group practices cannot be justified and therefore infringes Articles 43 and 48 EC. Apart from the outcome, the statements of the Court are very interesting because of the fact that it approved the
necessity of organising medical care not only with regard to hospitals but also in the field of outpatient ("ambulant") health care.

**Accidents at work and occupational diseases**

**Accidents while travelling**

According to national legislation and case law only accidents while travelling in Austria and equivalent cases are covered by the provisions of accident insurance. One of these equated cases is life-saving, which is subject to an exception concerning the principle of territoriality. Nevertheless even in this case the protection under accident insurance applies only to the neighbouring states. The Supreme Court stated that this limitation has been introduced due to the fact that in the Alpine areas the border lines are not always evident for the individual which should not lead to the situation where insurance cover is withheld. However, in this context it was also clearly stated that this rule does not apply to all EU Member States. This case law nevertheless contains a violation of Article 56 Regulation 1408/71.

**Family benefits**

**Definition and scope**

Family benefits, on the one hand, aim to offer financial support and protection of families because of increasing expenditure, and on the other hand, to give the possibility to combine family and work. Due to this fact family benefits in Austria are mainly cash benefits: The most important are Familienbeihilfe, Kinderbetreuungsgeld and Unterhaltsvorschuss. During the period covered by this report most legal questions regarding the application of Regulation 1408/71 concerned family benefits. This is due to the fact that family benefits in Austria follow different principles to other social security benefits and, therefore, frequently do not fit into the Regulations’ framework.

**THE COORDINATION REGULATIONS AND OTHER PARTS OF COMMUNITY LAW**

**The Coordination Regulations and Article 39 EC - Regulation 1612/68**

It can be observed that the ECJ is increasingly basing its legal arguments directly on the EC Treaty, in particular on Article 39, even though Regulation 1408/71 applies. This ‘new’ approach has commented on critically by Austrian academics. On the one hand, because the Regulation is being undermined when the Court refers directly to the Treaty as soon as the Regulation’s provisions do not achieve the result apparently desired. In this context the Petersen-ruling (C-212/06) is an example of ‘bad practice’ in switching from the Regulation to the Treaty provisions simply because of the fact that otherwise the export of benefits would have had to be denied. This attitude does not strengthen legal certainty and provide confidence in the Courts’ jurisdiction.

On the other hand, the direct reference to the Treaty leads to the situation that EC law influences the national social security systems even at constitutional levels. Indeed, fundamental impacts for federal social security schemes (such as Austria’s) can be anticipated in the light of the ruling concerning the Flemish long-term care scheme (C-212/06, Gouvernement de la Communauté française et Gouvernement wallon).

**The Coordination Regulations and Article 18 EC**

Critical remarks have also been made concerning rulings of the ECJ, where restrictions of entitlement or export of benefits due to certain provisions of Regulation 1408/71 have been denied by referring directly to the general rule of Article 18 EC. Nevertheless it can be seen that Austrian courts are also increasingly basing their reasoning on Article 18 and Article 12 EC in the field of social security. Due to this new approach, for example, Unterhaltsvorschuss (advance maintenance payments) is granted when all family members live in Austria without proving whether the personal scope of Regulation 1408/71 is fulfilled to avoid direct discrimination under to Article 12 EC.
IMPLEMENTATION OF THE GENERAL PROVISIONS

Scope of the coordination Regulations

Personal scope

Employed and self-employed persons

Numerous problems have arisen with regard to the question as to whether the Belgian competent authorities have the right to challenge the classification given by the legislation and the competent authorities of other Member States. This was largely a result of the fact that the criteria for distinguishing between an employed and self-employed person for the purpose of Belgian social security law are the criteria used by Belgian labour law. The procedure for classifying an insured person for the purpose of determining the applicable law is therefore influenced considerably by labour law.

It is now accepted that the qualification of the activity as employed or self-employed is binding upon the authorities. This is so even considering the fact that in some Member States, the distinction between employed/self-employed is much less marked and the designation basically constitutes a choice for the person concerned to make. Accordingly, if a self-employed person from such a State posts him or herself to Belgium, the Belgian authorities are bound by the designation stated on the form E 101. Nevertheless, this does not apply to the qualification for the purposes of labour law. If the activities of the person concerned are designated as employed activities for the purposes of Belgian labour law, the Belgian authorities could theoretically take legal action for non-compliance with Belgian labour legislation, and even prosecute the person concerned. Even though this does not happen in practice, the fact remains that this situation might give rise to distortion of competition.

In this connection, and in accordance with the ECJ case law in De Jaecck (C-340/94), it might also be noted that successive postings as a self-employed persons could result in the application of Article 14c.

When Belgian legislation is designated as applicable in cases of simultaneous employment in more than one Member State, the policy of the RSZ-ONSS is not to re-designate, the activities pursued on the territory of the other Member State according to Belgian social security legislation. According to the authority’s spokesperson, this policy is followed for pragmatic reasons - a re-designation might have far-reaching consequences for the worker and, where applicable, his/her employer - rather than for reasons of legal pertinence. The question of a possible re-designation is significant in particular for members of the board of directors, whose activity is typically defined differently in the different Member States.

The question of whether or not to re-designate activities pursued in other Member States for which the ‘home’ legislation is applicable is expected to gain relevance with the new Regulation 883/2004, which ends the exception of the principle of unicity of legislation applicable that is presently set out in Article 14c of Regulation 1408/71.

Family members and survivors

Under the Flemish long-term care insurance scheme, the concept of “member of the family” is does not exist. Account is only taken of personal rights, not of derived rights.

In practical terms, this implies that persons who live outside Belgium and who are subject to Belgian social security legislation on the basis of a derived right, do not come within the personal scope of the care insurance scheme and, thus, cannot sign up to it. This situation is not tenable in the light of the ECJ ruling in Hosse.

This incompatibility will be finally corrected as of 1 January 2010, the date of entry into force of the Decree of 30 April 2009. The new Article 4(2)(7) extends the scope of the Decree to dependants of the persons having made use of their right of freedom of movement and residing outside Flanders or Brussels and to whom, on the basis of the rules governing the applicable law under Regulation 1408/71, the social security scheme in Belgium applies as of right because of employment in Flanders.
or Brussels, provided these dependants are not entitled to similar benefits in accordance with the legislation of the State on the territory of which they reside. The term “dependant” is defined by reference to the legislation on sickness and invalidity insurance. It should be noted that the legislature has – rightly, in our view – not opted to exempt from affiliation dependants, resident in Flanders, of frontier workers working in Member States other than Belgium.

The Decree of 30 April 2009 follows from the ruling of the Constitutional Court further to the ECJ judgement in Case C-212/06. The Flemish legislature has thus awaited judicial confirmation of the classification of care insurance benefits as sickness benefits within the meaning of Article 4 of Regulation 1408/71. To allow the Flemish executive some time to prepare the necessary implementing regulations, entry into force has been postponed to 1 January 2010. However, as the Flemish legislature rightly considered that ECJ rulings have effects ex tunc, a new Article was inserted in to the Decree of 30 March 1999, pursuant to which the dependants concerned can join the care insurance scheme on a voluntary basis until 30 June 2010, for the period from 1 October 2001 (date of entry into force of the care insurance scheme) to 31 December 2009. Thus, the rights of the persons concerned are safeguarded.

Material scope

Benefits concerning new risks

**Pre-retirement schemes**

The pre-retirement scheme comprises statutory unemployment benefit, and an additional benefit, which is granted by the former employer, or, in some cases, an industrial fund. The additional benefit is granted to frontier workers and migrant workers who have been employed in Belgium and who are entitled to unemployment benefits under the legislation of an EEA Member State. It is calculated as if it were granted in Belgium, i.e. as if it were paid in conjunction with a Belgian unemployment benefit. Problems are mostly caused, however, by anti-cumulation rules in other Member States and that other Member States do not provide for similar schemes. Problems have arisen as regards the condition of involuntary unemployment, which is one of the conditions for entitlement to Dutch unemployment benefit. Dutch authorities have been known to refuse to consider the worker’s unemployment to be involuntary, resulting in denial of unemployment benefits, particularly in cases where the job position continued to exist.

Frontier workers receiving Belgian additional pre-retirement benefit should take account of the fact that the duration of the Dutch unemployment benefit is limited to 38 months. For those frontier workers who start to receive pre-retirement benefit before the age of 62, it is impossible to bridge the period until their retirement. Their Dutch unemployment benefit and their additional pre-retirement benefit will cease before that date.

**Applicable legislation**

**General introduction**

The Minister of Social Affairs and Public Health recently pledged to put an end to an unfortunate situation that faced frontier workers who were residing in Belgium and receiving a Dutch invalidity pension. Since 2005, Belgian tax authorities have unintentionally levied a “special social security contribution” on these Dutch pensions. This was due to a mistake made when amending a National Act of 30 March 1994 which had introduced the special social security contribution effective from 1995. In accordance with the Act, both income from work and the social security income of frontier workers were exempted from this contribution (retroactively since 1995). This exemption was deleted by another Act, further to the entry into force of a bilateral tax agreement between Belgium and the Netherlands, pursuant to which professional income of frontier workers was henceforth subject to Dutch taxation. However, the legislature disregarded the fact that this exemption also applied to social security benefits. The Belgian Minister has now promised to amend the law in order to return to the pre-2005 position. The contributions inappropriately collected since 2005 will be reimbursed automatically, in collaboration with the Minister of Finance. To date, however, no such amendment has been proposed.
Specific issues

A significant problem concerns the determination of the legislation applicable to artists. In Belgium, artists are presumed to be employed persons (this presumption is rebuttable). In other countries (e.g. UK), artists are often self-employed. As a general remark, the rules of Title II are ill-adapted to the specific situation of artists, who frequently and successively perform short-term work in various Member States, for different employers and often in different capacities. In the course of their careers, artists may easily have had 10, 20 or even more employers established in different countries.

Partly as a result of recent ICT possibilities, telework is becoming increasingly common. Problems lie in the fact that employers often do not realise the implications of allowing their employees living in another Member State to work one day or so from home. A further problem is the proof of telework, notably if it is created in order for a “cheaper” social security legislation to apply.

Working in one Member State only

Posting: Conditions

In accordance with the case law of the ECJ, translated into CASSTM Decision No 181 (now A2) and the Practical Guide, posting of workers engaged to that effect is possible. The posting undertaking must habitually carry out significant activities in Belgium. The criteria laid down in the aforementioned documents are used, notably the criterion of 25 per cent of total turnover in Belgium. However, it is difficult to determine whether an undertaking actually meets that criterion. For this, the RSZ – ONSS needs fiscal data, which, it seems, is currently not possible.

An “active” labour contract with the posting undertaking should continue to exist and no labour contract should be concluded between the posted worker and the receiving undertaking. The RSZ – ONSS considers that the posting provisions cannot be applied if a labour contract is concluded between the posted worker and the undertaking to which s/he is posted. This is deemed absolutely contrary to the posting concept. It would appear, however, that not all Member States share this opinion.

Posting: Administrative formalities and cooperation

In its ruling dated 26 January 2006, the Court of Justice ruled that, as long as it has not been withdrawn or declared invalid by the authorities of the Member State which issued it, an E 101 certificate issued under Article 11(1)(a) of Regulation 574/72 binds the competent institution and the courts of the Member State in which the workers are posted. This ruling has sparked a lot of criticism, both among Belgian authorities and among academics. It is said that the ECJ has made the E101 certificate virtually inviolable and thus has rendered Belgian authorities nearly powerless to act against fraudulent postings to Belgium.

The following case illustrates the consequences of the Herbosch Kiere ruling of the ECJ. The RSZ – ONSS finds that a German worker is sent to work in Belgium by a company which manifestly does not fulfil the criterion relating to the habitual pursuit of significant activities. The RSZ – ONSS enters into contact with the Krankenkasse. In its answer, the latter institution confines itself to stating that it cannot verify whether the company has indeed substantial activities in Germany. And there is an end to the matter.

One of the problems encountered by the authorities in their fight against fraudulent postings is that certain remedies of national law cannot be applied, as they are not binding for companies which operate from the territories of other Member States.

The quality of forms E101 received by the Belgian authorities continues to pose problems. A large number of forms are incomplete or contain omissions, even with regard to essential information (i.e. identification of the person concerned, relevant provision of the Regulation, duration etc.). If provision is indicated but the duration is less than a year, the Belgian authorities consider the case to be a posting. Incidentally, the model form E101 is said to include some cases which are useless in the light of its purpose, i.e. to attest to the legislation applicable to a person.

Specific problems are encountered in relation to postings from the Netherlands and Luxembourg.
The former country has seen over the last years the creation of many posting agencies. Typical examples of abuse are cases where persons in receipt of Belgian unemployment benefit are hired by Dutch posting agencies. These agencies subsequently post them to Belgium. The Dutch authorities, unaware of the fact that the person receives unemployment benefit in Belgium, proceed to issue a form E 101. Such cases of benefit abuse are only revealed if, upon inspection, a Belgian inspector establishes that the person concerned enjoys benefits in Belgium.

When it comes to Luxembourg, the problem resides in the fact that, on account of the Creyl’s Interim ruling of the Conseil Supérieur des Assurances Sociales, Luxembourg authorities do not require a worker to be subject to Luxembourg legislation prior to being posted. Together with the comparatively low level of contributions in Luxembourg, this may explain the disproportionately high number of postings emanating from this country, as is shown in the above-mentioned GOTOT In statistics. Often, the workers thus posted to Belgium are Belgian citizens who reside in Belgian territory. Luxembourg authorities are probably unaware of this fact. It will be interesting to see whether the Luxembourg authorities will change this practice to conform to the requirement, contained in CA.SS.TM Decision A2, of one month prior insurance under the legislation of the posting country.

Limoso

Since 2007, the RSZ – ONSS has a new weapon at its disposal in the fight against fraudulent postings, i.e. LIMOSA. The LIMOSA project is aimed at improving the monitoring and control of foreign activities in Belgium, at providing the authorities with reliable statistical information as regards international employment, and at simplifying administrative procedures for all those involved in international employment. At the first stage, applicable from 1 April 2007, LIMOSA provides for a mandatory prior declaration system. Although the architects of the system have taken due account of the requirements of Community law and in particular of those of the internal market freedoms, doubts have been raised in principle as to the proportionality of certain aspects of the system, in particular the type of information to be declared as regards employed persons (e.g. time schedule) and the obligation on Belgian users to report failure to declare as well as the consequences attached to non-compliance with this obligation.

In January 2009, the European Commission sent a letter of formal notice to the Belgian government, arguing that the LIMOSA notification system runs counter to Article 49 EC. This communication follows a series of letters exchanged between the Commission and the Belgian government in 2006, 2007 and 2008. The Commission takes the view that the notification procedure is a restriction of the free provision of services, which cannot be justified by the reasons advanced by the Belgian government, i.e. administrative simplification, the creation of reliable statistics and the better supervision and monitoring of foreigners’ activities in Belgium. In substance, the Commission states that the two former reasons cannot be accepted as overriding reasons of general interest and, furthermore, that the restriction cannot be considered appropriate to achieve the latter aim stated. The Commission invited the Belgian government to submit its observations on the foregoing and to specify, inter alia, what precisely are the rules that the LIMOSA notification seeks respect for; how many LIMOSA notifications have been made to date; how many controls the data provided by LIMOSA have enabled to date; and how many of these controls have resulted in a violation being reported.

The Belgian government replied to the letter of formal notice in March 2009. At the time of writing (August 2009), the Commission had not yet responded to the Belgian observations.

Working simultaneously in two or more Member States

Either as an employed or as a self-employed person

One of the most problematic aspects of the rules determining the applicable legislation is to know at what point several periods of posting need to be considered under the provisions dealing with simultaneous employment in two or more Member States. For example is a person living in Belgium who is posted by her or his employer to another Member State several times a year for short periods. Where is the threshold? The policy of the RSZ – ONSS is to treat circumstances as falling under the scope of Article 14(2)(b) after approximately 6 assignments abroad a year.
It may also be noted in this regard that several periods of posting may also trigger the application of Article 14c.

*Specific rules for specific categories of persons: International transport workers*

International transport workers are generally subject to the legislation of the Member State in whose territory their employers have their registered offices. If they work for a branch of the undertaking engaged in international transport services, they may be subject to the legislation of the Member State in whose territory the branch is established. If they are employed principally in the Member State where they actually live, the legislation of that Member State may apply. The latter case in particular may give rise to discussion as is not always clear how to establish whether such employees exercise their main activities in the territory of a specific Member State. The RSZ-ONSS interprets the concept of “principally” employed, as 51 per cent of activity. However, once again, interpretation varies between the Member States.

Indeed it is becoming increasingly difficult to determine whether an undertaking comes within the scope of the above article, i.e. whether an undertaking is actually involved in international transport.

Does this qualification apply to interim agencies which post pilots to airline companies in case of workload peaks?

A connected problem relates to the fact that ownership of the equipment and employment of the personnel increasingly rest with different undertakings, staff being typically employed by global employment companies. These undertakings put the flying personnel at the disposal of the airline companies. As only the airline company is engaged in international transport services, the pilots and stewards are not subject to Article 14(2)(a). The following example illustrates this practice. As a result of the bankruptcy of SABENA, slots became available at Brussels Airport, which could legitimately be reserved to a Belgian airline company. In an attempt to avoid high Belgian social security contributions, in addition to a Belgian company, a Luxembourg company was set up, the latter actually employing the pilots. Both the Belgian and the Luxembourg authorities, however, are of the opinion that this Luxembourg company does not fall under the scope of the international transport Article.

The qualification of dredgers used to be a point of discussion between Belgian and Dutch authorities. Now, the issue has been clarified. Dredgers are vessels and the provision of Article 14b applies.

A related problem is the fact that ownership of the equipment and employment of the personnel increasingly rest with different undertakings, staff being typically employed by global employment companies. These undertakings put the aircraft personnel at the disposal of the airline companies. As it is only the airline company that is actually engaged in international transport services, the pilots and stewards are not subject to Article 14(2)(a).

**IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS**

*Sickness benefits*

**BENEFITS IN KIND**

*Persons residing out of the competent state*

It is not always easy to make a *distinction* between *residence* (permanent stay) and (temporary) *stay*. This is also true for the purposes of implementing the sickness chapter.

Problems have occurred in relation to Ireland, the UK and Spain. Belgian insured persons who go to work in these countries, while maintaining their domicile in Belgium (and remain in the national register), are often refused a form E106 by the institutions of the States concerned. According to the latter, these persons reside in the territory of the competent State, as a result of their working there. The Belgian insurance institutions report that recently the institutions of Ireland and France, in particular, have taken a tougher stance when it comes to delivering forms E104 and E106.

The following example is illustrative. A family lives in Belgium where the father is a pilot working for Ryanair. After an initial refusal, Ireland eventually delivers a form E106. However, when the family wants to go on holiday, Ireland refuses to issue an EHIC. According to the Irish institution, this is a
matter for the institution of the State of residence. Belgium does not agree, as reimbursement between Ireland and Belgium is dealt with on the basis of real costs (according to the Belgian authorities, reimbursement via lump-sums implies a transfer of competence).

**Workers: Special rules for frontier workers**

Questions have arisen with regard to family members of migrant workers residing in Belgium and outside the competent State. According to Article 19(2) of Regulation 1408/71, these family members are entitled to healthcare in Belgium, at the expense of the competent institution, insofar as they are not entitled to healthcare under Belgian legislation. The position of the RIZIV-INAMI is that, if these family members cannot be considered to be family members within the meaning of the Belgian legislation, they are not entitled to healthcare in the State where they reside, i.e. Belgium. Support for this position is found in Article 1 (f) of the Regulation, which for the definition of family members refers to the legislation of the State under which benefits are provided. This position seems to disregard the judgement in Delavant (C-415/93). The approach of the Belgian authorities will be good law in the future, considering the provision of Article 1(i)(i)(ii) of Regulation 883/2004.

A problem was reported with regard to Article 21 of Regulation 574/72. The problem concerns family members, residing in Belgium, of workers residing and working in Germany. The family members are registered with the Belgian sickness fund by means of a form E109. Pursuant to an agreement concluded between Belgium and Germany, the cost of the care provided to those family members is refunded to the Belgian institution on the basis of actual expenditure – rather than lump-sums, as provided in Article 94 of Regulation 574/72.

For this reason, the Belgian authorities argue that the responsibility for the persons concerned, notably when it comes to issuing EHICs and E112 forms, continues to rest with the German institution, which thus remains competent. The German authorities, on the other hand, are of the opinion that the method of refund has no bearing on the determination of the competent State. For them, responsibility is transferred to the Belgian institution, notwithstanding the fact that the latter is refunded on the basis of real costs.

**Pensioners: Levying of contributions**

The application of Article 33 of Regulation 1408/71, dealing with contributions payable by pensioners raises a lot of questions.

The National Pensions Office (RVP-ONP) takes account of foreign pensions only for the purposes of assessing whether the threshold is reached. The actual deduction of 3.55% is made only on the basis of the Belgian pension, to the exclusion of the foreign pension(s). This practice stems from a literal reading of Article 33 of Regulation 1408/71 (“deductions ... from the pension payable by such institution”). In accordance with the ECJ case law, it should be noted that Belgium could, if its legislation so provided, levy the contribution on the total income – including EU pension(s) (and on the condition that the amount of contributions would not exceed that of the EU pension(s). Upon application of Regulation 883/2004, Belgian policy will change and deductions will be made on the basis of the total (Belgian + EU) income. Detailed procedures to this effect are not yet established. It is expected that this change will pose some problems; currently, the Sil-contribution is withheld at source by the paying institution, i.e. the RVP-ONP. Evidently, this will not be possible as regards EU pensions. A levy through taxation is considered an option.

A longstanding implementation problem concerning Article 34(2) of Regulation 1408/71 has been decided. It concerns persons in receipt of a pension who, in addition, pursue a professional activity. The said Article provides that the Regulations’ provisions on sickness benefits for pensioners do not apply to pensioners who are entitled to benefits under the legislation of a Member State as a result of pursuing a professional or trade activity. For the purposes of implementing Chapter 1 of Title III of the Regulation, these pensioners shall be considered as employed or self-employed persons. The issue is to know when a pensioner is entitled to healthcare on account of their carrying on professional activities.

Two approaches are conceivable towards the determination of the basis of his/her entitlement to healthcare benefits under Belgian legislation. One could argue, firstly, that entitlement on the basis of the exercise of a professional activity always takes priority. However, it is quite possible that the contributions payable by the person concerned do not reach the minimum level required to acquire
the right to healthcare under the Belgian legislation. In that case, in order to be entitled to healthcare, the pensioner must pay a supplementary contribution. According to the second approach, which has now been approved and adopted by the Belgian authorities, the entitlement on the basis of work takes priority only when such entitlement exists without the person concerned having to pay a supplementary contribution. If not, entitlement based on the form E 121 takes precedence and the pensioner is subject to Articles 27 to 33 of the Regulation.

_Persons staying outside the competent state: Concept of occasional health care_

As in other Member States, Belgian healthcare providers (both hospitals and professionals) sometimes refuse to accept the EHIC. Unlike in some other States, however, there is no particular problem with the acceptance of the EHIC by private doctors. Under the Belgian system, all doctors (and hospitals) operate in the framework of the public social security system, even those who are not “contracted” (conventionnés). It comes as no surprise that Belgians have also seen their EHIC rejected during a stay abroad.

Belgian authorities are concerned about a recent phenomenon, commonly called “Grenshopping”, involving abuse of the EHIC by some Belgian insured persons. Persons insured in Belgium go and buy medicines at pharmacists established (immediately) across the border in the Netherlands. Upon presentation of their EHIC, they receive the medicines as if they were insured in the Netherlands, i.e. often free of charge. Even though it is clear that the procedure of Article 22(1)(a) is abused – the medicines do not become medically necessary during the “stay” in the Netherlands and, more fundamentally, the purchase of the drugs is precisely the reason why these persons travel to the Netherlands), the RIVIZ/INAMI has found it difficult to put an end to this situation. In particular, it seems very difficult to obtain conclusive evidence of the abuse. Elements such as the fact that pharmacists’ bills / forms E 125 only state medicaments and that these medicaments are bought periodically and in the same amounts, however, are indicators of misuse. The RIVIZ/INAMI has instructed the insurance institutions to be very careful when receiving such bills/forms and to ask AGIS for additional information. RIVIZ/INAMI has also discussed the issue with AGIS. The latter has sent a letter to Dutch pharmacists containing instructions on how to treat EHIC holders and informing them that they would not be reimbursed in case of illegitimate application.

The data contained on the EHIC appears insufficient in some cases. Unlike its predecessor, form E111, the EHIC does not provide information on the status of its holder (e.g. pensioner). This is important, however, for Belgian pensioners staying in Spain, as pensioners are entitled to pharmaceuticals free of charge in Spain. As a result, Belgian pensioners staying in Spain experience difficulties to be treated as if they were Spanish pensioners.

_Additional remarks_

A private health insurer, DKV, has brought forward an action for annulment against the Law of 2007 expanding the health insurance cover for self-employed persons, putting it on the same level as that of employees. As a result of the integration of the insurance for the self-employed in the employee scheme, only the entities mentioned in Article 2(i) of the Act on Compulsory Insurance for Medical Care and Allowances can act as insurance institutions, i.e. the sickness fund associations, the Auxiliary Fund for Sickness and Invalidity Insurance and the Medical Care Fund of the Belgian railway company. According to DKV, Belgian and foreign private health insurers are precluded from offering health insurance (the former “minor risks”), which is contrary to the principle of equality of treatment in the Belgian Constitution and to Articles 43 and 49 EC. The Constitutional Court, dismissed the action. It acknowledged the difference in treatment and the restriction of free movement introduced by the 2007 Act, but ruled that it was justified. For the Court, equalising the social protection of the employed and the self-employed is a legitimate aim, and integration into compulsory insurance is an appropriate means to achieve it. The Court goes on to note that the activities of sickness funds – based on the principles of mutuality, solidarity, not-for-profit – differ essentially from those of for-profit private insurance companies, which engage in risk selection and cherry-picking.
**Long-term care benefits**

**Aggregation of periods**

The Commission has been informed of a case involving a Romanian child who was denied benefits on the grounds that the 5-year residence requirement was not fulfilled. The Flemish care insurance administration disregarded periods completed in Romania before 1 January 2007. In the view of the Flemish administration, persons residing in a Member State can only rely on Article 18 of Regulation 1408/71 in respect of periods completed after that State’s membership of the EU. The authorities eventually conceded on the basis that the UN Convention on the Rights of the Child did not allow for such residence requirements to be imposed on children less than 18 years of age. The argument of the Flemish care insurance administration cannot be accepted from the perspective of European law either. Regulation 1408/71, including Article 18, applies to (and in the relations with) Romania since 2007, and not as of 2012.

The inapplicability of the coordination rules within and between the Belgian federation causes several problems and creates uncertainty.

For Flemish care insurance, the judgement of the ECJ has several very concrete implications. It will have to affiliate EU-citizens who live in the Walloon region and who are subject to Belgian legislation as a result of their employment in Flanders/Brussels-Capital. The same holds true for Belgian citizens resident in Wallonia and working in Flanders/Brussels-Capital who used to work or live in another Member State. For those who work in Flanders, affiliation will in principle be obligatory.

A less straightforward issue is whether the judgement will also have consequences for pensioners (EU-citizens / Belgian citizens with a history of free movement) residing in Wallonia. The judgement clearly is concerned with active people (see § 48). If it were to be accepted that the ECJ’s findings can be transposed to inactive persons, should then the region (FL/BXL/W) where the persons have worked be relevant? And, also if periods were completed in more than one Belgian region? The problem is that Articles 27 et.sec. of the Regulation are not applicable within the Belgian context. The FCIF seems to be of the opinion that these provisions should apply by analogy to the Belgian federated regions.

Finally, the confirmation by the ECJ that the benefits provided by the Flemish care insurance are sickness benefits, also implies, in accordance with the Hosse case law (C-286/03), that the amendments introduced by the 2004 Decree concerning regards migrant workers should be extended to the members of their families.

In its judgement of 21 January 2009, the Constitutional Court followed the ruling of the ECJ.

By a Decree of 30 April 2009, the Flemish legislature has extended the personal scope of the care insurance scheme to persons who have made use of their right of free movement, who are subject to Belgian social security law by virtue of their employment in Flanders or Brussels on the basis of Regulation 1408/71, and who reside in the Walloon region. Moreover, a new Article extends the scope of the Decree to the dependants of the persons who have made use of their right of freedom of movement and reside outside Flanders or Brussels and to whom, on the basis of the rules governing the applicable law under Regulation 1408/71, the social security scheme in Belgium applies as of right because of employment in Flanders or Brussels, provided these dependants are not entitled to similar benefits in accordance with the legislation of the State on the territory of which they reside.

It may be noted that the Flemish legislature has not taken a stance on the issue of the possible consequences of the ECJ judgement on the situation of pensioners.

**Invalidity**

**Assimilation of facts**

Some problems with regard to classification arise, especially when workers are entitled to benefits from Germany, Greece and Italy, in addition to Belgian benefits. With regard to the application of national anti-cumulation rules, the national courts have to rank benefits according to national law. Community law is irrelevant in this matter. This principle sometimes leads to surprising results.
Under Belgian law, the cumulation of invalidity benefits leads to the application of a national anti-cumulation rule (a foreign benefit is deducted from the Belgian benefit), whereas cumulation of an invalidity benefit with an old-age pension is permitted, provided a ceiling is not reached.

**Additional remarks**

Problems arise due to the different commencement dates of invalidity benefits in the national legislations. The *Leyman* case is illustrative of these problems. The first problem stems from the fact that the Regulations merely coordinate the national systems, and not harmonise them. Another example concerns the relations with France. Persons who become incapable of work shortly (for example, 3-4 years) after taking up work in France, after having completed a long career in Belgium, receive only a very low invalidity pension. This is due to French legislation, which provides that invalidity benefit is calculated on the basis of the average annual salary during the 10 best insurance years. This is only corrected when the person concerned reaches pensionable age. A second problem concerns the different benefit commencement dates across national legislations. Again *Leyman* can be mentioned. A third problem relates to the existence of concepts in other Member States’ legislation that are unknown in Belgium. An example is the German *Arbeitslosengeld II*, which has elements of unemployment benefit and social assistance and which is granted to persons in need of help who, as a result of sickness or infirmity, are not able to work for at least 3 hours a day during an indefinite period under the regular labour market conditions. As the German counterpart is unable to state which element is unemployment and which social assistance, the benefit is completely deducted by the RIZIV-INAMI further to Article 136(2) of the Coordinated Act.

**Unemployment benefits**

**Aggregation of periods**

Belgian legislation is, favourable to employment abroad. Under article 37(2), first paragraph of the Royal Decree of November 25 of 1991 on unemployment insurance, work carried out abroad is taken into account for the purposes of eligibility for unemployment benefits if, were the employment in Belgium, it would give rise to social security deductions, including those for unemployment.

However, the application of this rule to non-Belgian nationals has posed problems. In accordance with Article 43 of the same Royal Decree, Article 37(2) applies to foreigners and stateless persons “only insofar as provided in an international convention”.

Following the ruling of the ECJ in the *Chateignier* case, the government has amended the relevant provision of the Royal Decree on unemployment legislation to add the following paragraph to Article 37(2) by a further Royal Decree on 13 July 2007: “However, the first paragraph only applies if the employed person, after the work carried out abroad, has completed periods as an employee under Belgian legislation”. Thus, the discrimination identified by the ECJ has been tackled by making the provision more stringent for Belgian nationals.

**Concepts of full unemployment, partial unemployment, frontier worker, a-typical frontier worker and country of residence**

Problems arise with regard to the definitions of full and partial (temporary) unemployment as used in Article 71. These concepts are not clarified by the Regulation, whereas the concepts may be considerably different in the legislations of the Member States.

In Belgium, temporary unemployment is deemed to occur when an employee with a valid contract of employment becomes unemployed, whereas full unemployment results from the termination of the contract of employment. This sometimes leads to discussion, especially with the Netherlands, and more precisely whenever Dutch procedures pertaining to the termination of employment apply (in Belgium, employment may be terminated by an employer. In the Netherlands, prior authorisation of the local employment agency or a Court decision is required. Obtaining such authorisation obviously requires some time). If it is established that an employee has become medically unfit for her or his job, but Dutch termination procedures have not yet been completed, the employee will be considered to be temporarily unemployed by Belgian law. S/he cannot, therefore, obtain full unemployment benefits.
In practice, however, the Belgian authorities are not reluctant to grant full unemployment benefits if precise information as to the employee’s situation, and more precisely the status of termination proceedings in the Netherlands, is provided.

**Family benefits**

**Export of benefits**

Guaranteed family benefits were removed from Annex IIa to Regulation 1408/71 by Regulation 647/2005. Notwithstanding this fact, guaranteed family benefits are currently not exported. The authorities argue that it would be very difficult to check the entitlement conditions (in particular the means test) in respect of families outside Belgium. Moreover, they argue that the current coordination rules do not accommodate the situation of guaranteed family benefits, which is granted to persons who are not entitled to regular benefits on the basis employment or former employment/pension. It is reported that this policy will be re-evaluated on the entry into force of Regulation 883/2004, which deals with non-active persons.

**Overlapping of family benefits**

It is reported that, whereas the priority rules laid down in the Regulation are clear in theory, their practical application continues to pose problems in terms of administrative cooperation. In general, the inter-institutional exchange of information leaves much to be desired. The Belgian institutions have problems obtaining the information they require. At the same time, form E 411 is said to contain a lot of useless information. Incidentally, the practice of the Belgian institutions to send letters instead of using forms has been confirmed by one of these institutions. The situation gets really difficult if it turns out that benefits have been paid which were not due. Cross-border recovery (both administrative and judicial) is referred to by the Belgian institutions as very cumbersome, to such an extent that a cost-benefit analysis would often lead to the conclusion to forego recovery. The problem is aggravated by statutes of limitations (prescription).

The RKW-ONAFTS hopes that this situation will improve with the introduction of EESSI. At the same time, it puts the practical significance of the shift to electronic data exchange into perspective, as a good deal of the information processed stems from the insured persons themselves (income, school, etc).

Recently, problems have been reported in relation to new(er) types of benefits, categorised by the ECJ as family benefits, such as parental benefits. In Belgium, paid parental leave is paid out by the RVA-ONEM. The systems of the RVA-ONEM and of the authorities competent for child benefits do not always match. Incidentally, such internal cooperation problems are not an exclusively Belgian phenomenon; it is reported that the Dutch Social Insurance Bank (general child benefits) and tax authorities (child-related budget; child care supplement) have similar problems of internal collaboration. As a result, the Belgian authorities reportedly do not take account, for the purposes of the calculation of the total amount of family benefits to which the person is entitled, the Luxembourg parental benefit. Conversely, the Luxembourg counterparts do take into consideration the Belgian paid parental leave.

Similarly, from its introduction in 2005 until 2007, Belgium did not take into account the Dutch child care supplement for the calculation of the total amount of family benefits to which a person is entitled. When this tax-based benefit enters into the calculation, the amount of Dutch benefits exceeds Belgian benefits. As a result, Belgium has provided families residing in the Netherlands, one of which one parent works in Belgium, for a period of 2 years with benefits not due (in the form of differential supplements). The authorities will recover the payments not due from the families concerned.

The Belgian authorities have decided to take into consideration, when Luxembourg is competent by priority, the Luxembourg child bonus. The decision as to whether or not to do the same with the German child bonus is currently under consideration.

Problems arise if a person who is entitled to family benefits in the State which is competent by priority right fails to submit an application for family benefits. A case has arisen of a single mother in receipt of an invalidity pension who lives with her children in Belgium. The father – the mother’s former spouse – lives and works in the Netherlands. The Belgian institutions complain that they are
powerless when the father refuses the file an application in the Netherlands. Article 86 of Regulation 1408/71 does not provide a solution to this case.

If the father were to file an application, the Dutch institution would pay the benefit to him. In that case, the Belgian institution would try, most probably in vain, to make use of the possibility provided for in Article 75 of the Regulation. The Dutch institutions are reported to satisfy themselves that the person concerned at least makes maintenance payments. The Belgian authorities are critical of the lack of enforceability of this provision.

THE COORDINATION REGULATIONS AND INTERNATIONAL AGREEMENTS

Bilateral conventions on social security with third States

One court case is reported involving another Member State (France) in relation to the application of a bilateral agreement concluded by Belgium with a third country (in this case the USA). The case concerns a French person who affiliated in 1997 to a social insurance fund for self-employed persons in connection with his activity as managing director of a Belgian holding company. At that time, the person resided in Belgium. In 1999, he resigned from this position and went to live in the USA, where he pursued activities as an employed person. At the same time, however, he continued to fulfil management positions in Belgium. For this reason, the social insurance fund claimed payment of contributions for the period 1999-2002.

The Belgian company of which the person concerned is manager, contested the claim of the social insurance fund, thereby referring to the 1982 Convention regarding social security between Belgium and the United States of America, in particular to Article 6.2. This Article provides that an employed person who usually works on the territory of one contracting Party and who pursues a self-employed activity on the territory of the other party, is subject to the legislation of the former Party provided the duration of this activity does not exceed 5 years. The fund, on its part, denies the applicability of the Belgo-American convention, whose personal scope is confined to nationals of the two countries involved. In response to that argument, the company invoked the principle of non-discrimination in Article 39 EC and the ECI judgement in the Gottardo case. The Labour Court of Appeal of Brussels agreed with the company’s thesis. It acknowledged that the fact of not being subject to Belgian social security, and, accordingly, the absence of an obligation to pay contributions in Belgium, constitutes an advantage. According to the Labour Court of Appeal, it follows from Article 39(2) EC that this advantage has to be granted to Union citizens who are in the same situation, quod in casu.

It should be noted that the Labour Court of Appeal did not explicitly examine whether the application of the Belgo-American convention was such as to impose new obligations on the USA or to affect their rights.

It has been argued that granting a third state the possibility to collect contributions further to a convention with an EU Member State should not be considered as imposing an obligation. Nevertheless, it is highly questionable whether the same holds true if the ensuing right to benefits is also taken into account.
IMPLEMENTATION OF THE GENERAL PROVISIONS

Applicable legislation

Working in one Member State only

Posting: Conditions

Recently, there is a procedure at the NRA (National Revenue Agency) according to which, for the purposes of obtaining a form E101, a request has to be filed with the regional office; it was noted recently that some companies sending workers to Germany use the statement confirming that the request has been received as a document attesting to the imminent issuing of the form, when in actual fact, the E101 is not issued because the required conditions have not been fulfilled. The NRA has taken some steps to counter this abusive practice; in particular, the NRA has listed these companies and notified the German institutions. It is hoped that the EESSI will eradicate practices such as this.

Anti-abusive measures accepted under national law include work permits for foreigners, procedures for issuing E-forms for posted Bulgarians (E 101, E 102 and E 103) to EU Member State, consideration of the E forms issued by the designated bodies of another Member State, information, and cooperation with foreign institutions, etc. A treaty and an agreement on inter-ministerial procedure to manage the E 101 form and a Treaty to fight against abuses of contributions and benefits has been concluded with Germany. A draft is expected to be signed with Belgium in November this year, for anti-abusive measures related to social insurance contributions and undeclared work. These measures demonstrate good practice in Member State cooperation.

Application of Article 17

Bulgaria had experience with similar provisions even before the accession to the EU – for example, the social security agreements with Germany, Austria, etc. The transition from these provisions to Regulation 1408/71 had to be managed. This was the reason that the competent ministries concluded special agreements arranging “transitional rules” for converting the decisions on applicable legislation under the bilateral agreements into decisions under the Regulation. Based on the provisions of these agreements most of the posting certificates had been converted into agreements under Article 17 of Regulation 1408/71 as they often concerned periods that were longer than that prescribed in Articles 14 and 14a of the Regulation. Bulgaria has reached such agreements with Germany and Austria.

IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS

Sickness benefits

BENEFITS IN KIND

Reimbursement of benefits

Lack of procedure for reimbursement of costs between the competent institutions is a problem that has to be solved.

Another problem concerns Bulgarian students studying abroad. It turns out that their EHICs issued in Bulgaria are often not accepted by German institutions / universities, who instead ask for a form
E106 to be issued or alternatively for a monthly contribution to be paid by the student. This issue was raised by the Bulgarian authorities with their German counterparts, who said that they do not always manage to convince or even make contact with their institutions / universities.

**BENEFITS IN CASH**

**Aggregation of periods**

The most important action was the amendment of the Ordinance for Calculation and Payment of Cash Benefits of the State Social Insurance in order to comply with the provisions of Regulations 1408/71 and 574/72 related to the aggregation of periods, the assimilations of facts and the export of benefits.

**Old-age and death**

**Assimilation of facts**

Under Bulgarian legislation, it is allowed that a pensioner continues working after receiving a pension benefit. But the question is whether, if a pensioner works in another Member State, s/he accumulates new rights under Regulation 1408/71 and how they are then taken into account.

**Invalidity**

One has to take special attention to the fact that the benefits under the Integration of Disabled Persons Act and the Family Allowances for Children Act are treated as social security benefits for the purposes of the coordination. This is a new thinking of Bulgarian competent institutions that has to be developed.
IMPLEMENTATION OF THE GENERAL PROVISIONS

Scope of the coordination Regulations

Material scope

The main question is to know whether the Cypriot occupational pension scheme of teachers who have the status of civil servants falls into the scope of Regulation 1408/71.

The scheme provided by the Cypriot statute of 1997 should be considered as an occupational pension scheme. Cyprus did not proceed to the declaration provided for in Article 5 of the Regulation with reference to the said scheme.

Applicable legislation

General introduction

With regard to applicable legislation, a pending issue concerning seafarers once again deserves special mention.

Cyprus has a very strong maritime position.

In its capacity as a maritime (registration) country, Cyprus is confronted with conflicting interests from the application of Article 13(2)(c) of Regulation 1408/71, which is based on the competence of the “flag State”. Article 13(2)(c) provides for the competence of the flag State with regard to social insurance coverage of the seafarer (for example, a Polish seafarer engaged aboard a Cypriot vessel would in principle be subject to the Cypriot social insurance system), while Article 14(b)(4) provides that the seafarer may be subject to the social insurance regime of his place of residence if he is established in the same country as the employer who pays him (this is the case where a Polish seafarer engaged aboard a Cypriot ship would be paid by a undertaking established in Poland).

It is sometimes claimed that the application of Regulation 1408/71 results in a decrease of competitiveness of European fleets in general and of the Cypriot fleet in particular; in this context, there is a contention that it would have been preferable to legally provide for the social security affiliation of seafarers in their country of origin, which is generally considered as a maritime labour country of lower earnings, rather than the actual regime where, in principle, the seafarer is affiliated in the country of registration of the ship on which he is engaged.

In practice, however, it should be recalled that, according to Social Insurance Law, seafarers engaged aboard Cypriot ships who are insured in Cyprus are seafarers having their permanent residence in Cyprus. This aspect has given rise to a communication to the public administration from the European Commission, asking them to make changes in the Cypriot legislation.

At a certain stage, a conflicting interpretation was reported over the matter between the Social Insurance Department (Ministry of Labour and Social Insurance), and the Merchant Shipping Department (Ministry of Communications and Works). It was reported that the possibility of using Article 17 was brought forward by some stakeholders in the discussions, in the light of practices followed by other Member States or States which are part of the European Economic Area (EEA).

In actual fact, the issue could be perceived as an issue of a policy-related nature rather than strictly legal, since Regulation 1408/71 is clear in its position.

Another issue which is of interest with regard to Cypriot seafarers in the light of the smooth operation of the Regulation stems from the following context: while the bilateral convention between Cyprus and Greece concluded in 1979 excluded seafarers from its scope, Regulation 1408/71 provided a legal foundation for the pension rights of Cypriot seafarers with service in
Greece, which was extensively applied. Cypriot maritime labour having worked in Greece as well as their beneficiaries claiming an entitlement, were informed about their rights on the basis of the Regulation via appropriate campaigns, and 600 applications were reported to have been submitted.

Another challenge is related to short-term employment. Some workers are working for a short time in Cyprus, for instance in the tourist sector. They are seasonal workers or workers on a specific project. A frequently occurring problem with this short-term employment is that, within this short period, these people might change jobs to another employer without reporting this to the authorities, especially those engaged by private employment agencies. The problem is that there is a lack of correct information on their situation and sometimes this leads to a lack of insurance during their working period in Cyprus. It can be possible to retrieve the ID card numbers, but this is not the same as the social security number so they are unidentified persons for the social security system. When they leave Cyprus, they ask for E-forms. But as the employer has never declared that they were working in her or his company, the social security institutions have to approach the employer to get the correct information. In most of the cases, the workers are tracked in the end. If this tracking does not take place and the worker has never been registered, the institutions have to get the information from the employer afterwards and then there is a considerable risk of erroneous information, and the main witness – the worker – is no longer in Cyprus. This kind of investigative procedures are cumbersome and cause an increase of administrative costs. As this problem seems to recur every year, the tourist areas are frequently inspected by inspectors of the social security institutions.

Employment in two or more states often occurs in the sectors of audit, IT, law firms, leasing, construction, etc ... In the leasing sector, it has to be researched who is the employer: the Cypriot or the other employer abroad. For that purpose, the labour contract is requested by the competent institutions. This has to mention the different Member State in which the worker concerned is active. It is impossible to check on how many Member State a worker is going and therefore a form is sent to the different Member State where he is working. And Cyprus cannot know whether this is actually controlled in the other Member State.

With regard to mobility between Cyprus and Greece, it often occurs that a worker is a salaried worker in Cyprus and she or he becomes a shareholder of the company, giving him or her the status of a self-employed person in Greece. Annex VII of the Regulation provides for double insurance as a self-employed person in Greece and as a salaried worker in another Member State. Based on Article 17, agreements are concluded to create an exclusion from insurance in Greece. This means that a derogation (art. 17 agreement) to the derogation (annex) is constructed, creating, avoidable, red tape.

**Working simultaneously in two or more Member States**

With regard in particular to persons employed in the field of international transport services, it has been reported that in practice there was no possibility of conducting adequate controls by the competent Cypriot authorities to ascertain whether the professional activities of the persons involved do, in effect, take place in the States reported by their employers.

**Other issues**

**Fundamental reforms, initiatives and plans in national legislation with implications for the Regulations**

The introduction of a Universal Health Care System, planning of which is currently underway, is intended to reinforce the effective application of Regulation 1408/71. The project on this Universal Health Care System appears to be progressing.

More specifically, a Universal Health Care System would enhance the correct application of the Regulation in the sense that it would ensure the coverage of the entire population of Cyprus on the basis of a tripartite contribution from the employer, the employee, and the State. Upon completion of the said reform, Cypriot citizens would freely choose a hospital, from the private or public sector, in view of the services covered. EU citizens would also be able to freely choose an institution from the private or public sector, and claim reimbursement upon their return in their country of origin. It should be noted that since Cyprus has not yet introduced a Universal Health Care System, the public sector is contracted through procurement law with only a small number of private medical
institutions in Cyprus, and thus, competent authorities of other Member States do not recognize
the applicant’s claim for reimbursement of medical expenses arising from services provided by private
practitioners, hospitals and pharmacists.

Evasion of social security contributions is not specifically related to Regulation 1408/71 but it is likely
to have an impact on the proper application of coordination. It has been observed that in some cases
where migrant workers from other Member States are employed in Cyprus for “very short” periods,
they are not insured by their employers. This anomaly is revealed when the employees in question
return to their country of origin and are asked to transmit Community documents “E” with reference
to their social insurance in Cyprus. As a result, there is an additional workload and administrative
cost for each case involved, since there is an obvious need for investigation as to whether the
groups involved had been, in actual fact, employed or not. If the employer in Cyprus denies that
such employment has taken place, it is difficult to substantiate the case from a legal point of view,
moreover because the main witness resides outside Cyprus.

IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS

Sickness benefits

BENEFITS IN KIND

Persons residing outside the competent state: pensioners

A complaint was successfully addressed by the SOLVIT Center of Cyprus, following a request made by
a British national who was receiving a pension from the British army and was legally residing in
Cyprus.

The claimant had made an application for the renewal of his medical card. His application was
rejected by the competent Cypriot authority because the applicant was not working and was
considered as not being covered by Regulation 1408/71. The applicant’s claim was supported by the
Law Office of the Republic of Cyprus. The competent authority finally recognized the entitlement of
the applicant and renewed the medical card of the claimant and his wife.

Invalidity

Bilateral agreement between Cyprus and Greece

The forms for disability allowances that have to be filled out by medical doctors are very long and
complicated documents. This remains the same under the Regulation, but they are always properly
filled out. Specific problems are encountered with relation to teachers. In Cyprus, they are regarded
as civil servants under the general social security scheme, whereas in Greece there is a special civil
servants’ social security scheme. In 1994 the Ministry of Finance concluded an agreement on the
retirement of civil servants. In this, mutual recognition of periods was provided, resulting in the
payment by one Member State on the basis of the total period worked in both Member States. At
that time the Cypriot pension scheme was not under the Regulation. Since Regulation 1408 entered
into force, Greece has only applied the 1408 rules and started aggregating and stopped the
implementation of the BA ’79 and the Agreement of ’94. The payment of the pension was restricted
to the part of the working period in Greece. But according to Cypriot law, the periods in Cyprus and
in Greece still had to be mutually recognized and Cyprus paid the total pension. So teachers retiring
in Cyprus are better off than teachers retiring in Greece. But the provisions are correctly
implemented by Greece, it is specifically a matter of Cypriot domestic law. Greece does not
implement the BA, as it is not under 1408/71.

Unemployment benefits

Aggregation of periods

Two cases successfully addressed by the SOLVIT Center Cyprus deserve special mention.
The first complaint concerns a citizen of the Czech Republic with five-month’s work experience in Cyprus who applied to the competent Cypriot authority in respect of the issue of the form E 301 concerning an application for unemployment benefit in the Czech Republic. As a result of a material error on the E form provided by Cyprus, the applicant requested a rectification. Having suffered a delay on behalf of the Cypriot administration, the claimant submitted a complaint to SOLVIT. Following this the competent authority in Cyprus proceeded to issue the E form in question.

The second complaint concerns a citizen of the Czech Republic who, having worked in Cyprus as a waiter, was subject to Cypriot social security. The claimant asked for the form E 301 to be issued in order to request an unemployment benefit in the Czech Republic. As a result of the delay experienced in receiving the document, the applicant made a complaint to the SOLVIT Center in the Czech Republic. The SOLVIT Center Cyprus addressed the issue and the document in question was then issued correctly by the competent Cypriot authority.

**Family benefits**

**Definition and scope**

Some of the practical issues which leave room for further improvement concern the risk of delays in the handling of applications, which can be attributed to the use of postal services or fax for the dispatch of relevant documentation (E forms), instead of using the internet, the time required for appropriate translation of the documentation exchanged between the competent Member States, and the existence of a great number of competent authorities involved in some States (contrary to Cyprus, where the only competent authority in this field is the Grants and Benefits Service of the Ministry of Finance).

**THE COORDINATION REGULATIONS AND INTERNATIONAL AGREEMENTS**

**Bilateral conventions on social security with other EU Member States**

This point relates to the situation between Cyprus and Greece. In the year 1979 a bilateral agreement between Cyprus and Greece entered into force. The agreement in question provided for the beneficiaries falling into its scope of application a number of principles, namely equal treatment, *lex loci laboris*, exportability of benefits, and aggregation of insurance periods. Seafarers and civil servants were not, however, included into the scope of application of the said instrument. Since civil servants were not comprised in the above mentioned bilateral agreement, an additional agreement had to be concluded between the said countries in 1994 specifically addressing civil servants. In addition, and as a result of the above, the Cypriot Law on Pensions of 1997 was adopted, in virtue of which the service of public teachers, prior to the appointment of the latter at public schools in Cyprus, which had taken place in Greece, was considered pensionable.

An issue arises with regard to public teachers who were first employed as such on the territory of Greece or Cyprus, and then continued their pathway in the other country involved, where they retired. Upon entry into force of Regulation 1408/71 in Cyprus, a divergent interpretation of applicable rules has been reported between Cyprus and Greece, which results in a differentiated treatment of teachers/civil servants involved, depending on whose country’s territory they retire. Cyprus applies since 1.5.2004 Regulation 1408/71 concerning social insurance of civil servants who are subject to the Social Insurance Scheme; in addition to this, in virtue of the above-mentioned law of 1997, the service of public teachers provided in Greece, who retire in Cyprus, is considered pensionable by Cypriot authorities. In the equivalent situation in Greece, Greek legal order applies Regulation 1408/71 only, and does not apply the bilateral agreement of 1994. As a result, as of 1.5.2004 public school teachers who exercise their right of free movement between the countries involved, and retire in Greece, are subject to a differentiated treatment as compared to those who retire in Cyprus.
In Cyprus, civil servants are subject both to the Social Insurance Scheme (which is a general scheme, and to the scheme provided for by the above-mentioned law of 1997, which has the characteristics of an occupational pension scheme. In Greece, civil servants are subject to the special scheme of civil servants; it should also be recalled that the latter (Greek) scheme is not an occupational pension scheme. The bilateral convention between Greece and Cyprus on civil servants was not, however, declared in the Annex III of Regulation 1408/71 upon accession of Cyprus to the European Union. The scheme provided by the Cypriot statute of 1997 should be considered as an occupational pension scheme. The criteria relating to occupational pension schemes may be found in the relevant case-law of the European Court of Justice (ECJ) (notably see cases C-7/93 Beune [1994], C-366/99 Griesmar [2001] and C-351/00 Pirkko Niemi [2002]). Cyprus did not proceed to the declaration provided for in Article 5 of the Regulation with connection to the said scheme. It is evident that the bilateral convention on civil servants was addressing schemes of a different nature, i.e. an occupational pension scheme in Cyprus, a general scheme (the Cypriot Social Insurance Scheme), and a special regime (the Greek special scheme of civil servants). It has been reported that the application of both the Regulation and the bilateral agreement by Cyprus provides a more generous entitlement for the beneficiary, than the application of the Regulation alone, which is the practice followed by Greece. While it is understandable that special weight should be attributed to the fact that the bilateral convention between Cyprus and Greece on civil servants was not declared in Annex III of the Regulation, and that the Regulation prevails over contrary or conflicting situations, it is clear that the absence of the declaration in virtue of Article 5 of the Regulation referring to the Cypriot occupational pension scheme, leaves some room for different interpretations, including the interpretation according to which the said scheme, namely the Law on Pensions of 1997, would not be affected by the Regulation.
IMPLEMENTATION OF THE GENERAL PROVISIONS

Scope of the coordination Regulations

Personal scope

In the Czech Republic the category of “residence” used by the coordination regulations is not identical with the categories used in the Czech system, which is based, in the majority of cases, on “permanent residence”. In order to avoid any possible negative impact, the competent administrative bodies issued an internal questionnaire, in order to be able to define the place of residence in questionable cases and have agreed on a procedure of inter-institutional cooperation.

Additional remarks

The decision-making process is based on the same criteria as mentioned in the new Implementing Regulation 883/2004.

Material Scope

Additional remarks

As regards coordination, a small problem of the Czech institutions emerged with the registration of insured persons from another Member State. All insured persons must be registered under a number which is attributed to each child after it is born in the Czech Republic (the “birth number”). For foreigners who are insured in the Czech Republic an insurance number has been introduced. However, the Czech Social Administration started to require that foreigners also have the Czech “birth number”, which can be provided by the Czech Ministry of the Interior, but for a fee of 1000 CZK (some 35 EURO). The Ministry of the Interior has been asked to remove this fee for the purpose of coordination matters.

General principles

Export of benefits

In the Czech Republic payments abroad are subject to the same regime as payments within the country in a manner defined by the agreements between the Czech Social Security Administration and the Czech National Bank (Česká národní banka), and the agreement between the Czech Social Security Administration and the Czech Post Office (Česká pošta), in particular by transfer to the eligible person’s bank account. The export of benefits is very expensive and therefore the Czech Social Security Administration tries to minimise these costs. During the last year some extra requests from some of the countries which border the Czech Republic continued in this regard. These requests have not been positively answered by the Czech side, because of the above mentioned aim of reducing the costs of the export of benefits.

Applicable legislation

Working in one Member State only

Lex loci laboris

The lex loci laboris principle is incorporated into Czech legislation.

However, the issue of the period of protection in the sickness insurance system remains problematic. The problem emerged when a Slovak citizen employed in the Czech Republic terminated her employment in the Czech Republic and returned to the Slovak Republic. She did not register and
became ill within the protection period giving rise to the question of who should be competent state? The Slovak administration argues that it should be the Czech Republic, because of the protection period; however the Czech Republic argues that it should be the Slovak Republic, because the person is not any longer registered in the Czech Republic, nor does she still work there – she resides in Slovakia, is a citizen of Slovakia, and does not in fact work anywhere.

 Posting conditions

Special attention is paid to the assessment of “letter box” companies and labour agencies. Activities of such companies are checked closely detailed way.

 Application of Article 17

At the end of 2007, at the request of the Slovaks, the Czech and Slovak Republics agreed on a limited “general exception”, in applying Art. 17 of the Regulation, as a lot of employment agencies were posting their workers mainly from the Slovak Republic to the Czech Republic, and had insured them in Slovak Republic. This situation was not convenient for the posted workers as they became double-insured. Therefore, the Czech and Slovak Republic agreed on providing each other with the possibility of general exceptions to the rule on applicable legislation.

 Other issues

Fundamental reforms, initiatives and plans in national legislation with implications for the Regulations

Another question arises in connection with the regulatory fees (co-payment) that are to be paid by a patient every time when s/he makes a visit to a doctor, stays in hospital or where a doctor prescribes him/her medicine, the Constitutional Court in its decision stated that this is a political question, which should not be decided by the Court. From the point of view of coordination, these regulatory fees should be treated as co-payment for health care and citizens from another Member State who are treated on the territory of the Czech Republic will have to pay the regulatory fees as do Czech citizens. There is a ceiling of 5,000 CZK per year payable in regulatory fees and any excess is returned to the patient by the competent institution.

 IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS

 Sickness benefits

 BENEFITS IN KIND

Member States’ cooperation

There are some problems with the E104 form. Local offices of the Czech Social Security Administration request the confirmation of the period of insurance abroad on the E104 form. Foreign partners send the E104 form with great delay, sometimes only after reminder letters, and sometimes not at all. Czech health insurance institutions are facing the same problems.

There is a similar problem with the Certificates provisionally replacing the European health insurance card. Czech institutions (Centre for International Reimbursements, Czech health insurance funds) often ask their foreign partners to issue and send “replacement forms” for foreign insurees receiving treatment in the territory of the Czech Republic who were not able to prove their entitlement for benefits in kind by EHIC. It sometimes takes a long time, which causes problems when it comes to the reimbursement of the health care costs.

Reimbursement of benefits

One question that has not yet been solved, it is whether or not to reimburse autopsies. Within the Czech health insurance system, an autopsy is covered and therefore shall be also coordinated. Therefore, from the strict perspective of Czech legislation, it should be treated as healthcare and in the case of an autopsy provided on the body of a person who was not insured under Czech
legislation, the insurance companies should pay for it and have it reimbursed by the competent institution.

Other countries however do not cover autopsy costs from their health insurance system and argue that sickness benefits in kind are provided to persons who are alive and who need health care to improve their health situation. This condition is not fulfilled in the case of an autopsy. How to pay health care provided during international organ transplantations is still open to question. On the one hand, it could be viewed as a planned healthcare, but from the practical point of view, it is not possible to get prior authorization (E112 form) for transplantation, because these cases are always very urgent and providing health care cannot be postponed until the time when the administrative formalities are fulfilled. Very often the process of transplantation also runs in the territory of two states and recipient doesn’t travel in fact to the other one (organ donation in one state, surgery in other one) Legislation of particular member states quite differs as regards the reimbursement of such healthcare costs (in some of the member states costs are covered by recipient’s insurance, in some of them partly from recipient’s and partly from donor’s insurance, in several member states from different sources). It seems that the fairest solution would be if costs of such transplants were paid for by the institution of the recipient (person who received) of the organ (even if the donor (person who provides the organ) is insured in another Member State).

Assimilation of facts

A question has been raised recently regarding the assimilation of facts in the field of health insurance. In the Czech system, if a person is a registered unemployed person, the State pays contributions for such a person. It is necessary to point out that Czech unemployment benefits are not exported for the person concerned to another Member State when she or he is living there but claims that Czech legislation is still the relevant legislation. It is also questionable whether the state shall also pay contributions in the case where a person is registered as unemployed in another Member State. Czech institutions decided not to assimilate the facts in this case and for the purposes of health insurance decided to consider such a person as a person without a taxable income, who has the obligation to pay his/her contributions herself.

A problem also emerged in the situation where a baby is born to Czech parents in another Member State and it is necessary to cover health care costs incurred after the birth. For the purposes of putting such a baby into the Czech health insurance system it was decided that the baby will be considered as if it had been born in the Czech Republic and so it will immediately take part in the Czech health insurance system without completion of the usual administrative requirements.

BENEFITS IN CASH

Member States’ cooperation

The interpretation of art. 13, paragraph.2 (f) and art. 25, paragraph 2 of Regulation No.1408/71 remains a problem. The issue was the payment of sickness benefits to frontier workers and workers with residence in another state, especially in the case where a person becomes ill after the end of his/her previous employment relationship but during the “protection period”, where the illness however occurs in a different Member State to the Member State where the person had been employed. If sickness occurs during a certain period after employment, there is still a right to benefits according to Czech legislation, but what happens when the person resides in another Member State?

Discussions in the Administrative Commission and a tri-lateral meeting between the Czech and Slovak representations and the representation of the Commission did not bring any solution.

Further problem that needs to be addressed urgently is the situation of persons living in the Czech Republic, who receive only a foreign pension (in particular Slovak pensioners). The Slovak authorities have interpreted the Court’s decision on inclusion of care benefits under 1408/71- sickness chapter, and refuse to export care benefits to EU countries. Consequently, Slovak pensioners living in Czech Republic who need care are without benefits, as the Czech Republic is not competent, and the competent state refuses to pay. Despite many efforts and communication between both countries, this issue is still unsolved.
Experience indicates that the approaches of Member States to the European agenda differ substantially. Some Member States, for example Germany, Poland and the United Kingdom, do not employ E-forms and send their national incapacity-to-work certificates in place of form E116. Therefore, the Czech Social Security Administration agreed with the Polish ZUS on a special procedure to obtain the data necessary for entitlement to benefits from the Czech system. A special procedure has also been agreed with the Slovak social insurance company.

**Long-term care benefits**

**Classification as benefit in kind or in cash**

A new law on social services has been adopted and introduced a new benefit: the care allowance. Care allowance shall be provided to persons who need care from another person.

Care allowance is therefore a cash benefit; services provided are benefits in kind. The provision of the care allowance is being coordinated according to Regulation no. 1408/71 and recent ECJ case-law.

There are however some Member States that do not wish to export their own similar benefits to other Member States, using the argument that their national legislation does not allow it. Some of them are arguing that they will not export their long-term care benefits as their systems put them under the system of social assistance and therefore they are entitled to limit provision of the benefit to persons permanently residing on their territory.

Moreover, a problem emerged as regards people who are treated on a long-term basis in hospital (so called “social sick-bed”). According to Czech legislation, such care is no longer considered to be health care and becomes a social service, for which an extra-payment is necessary. A Czech citizen would be able to finance such treatment from a care allowance, but potentially foreign citizens do not have that option, which gives rise to the question whether to understand this for the purposes of coordination as a benefit in kind and to provide it as such. This however has been seen as discriminatory against Czech citizens and therefore a possible aid payment will not be provided to foreign citizens using the services of long-term care in Czech hospitals.

**Member States’ cooperation**

As there are many checks necessary to determine the entitlement to these benefits, it is complicated to get all necessary information if a person concerned lives in another Member State. Currently the municipal offices use E213 for basic information, however it is not sufficient in most cases as other than health tests are required.

The Czech Republic exports care allowance to other countries, but there are some Member States which do not do the same. Some of them argue that they will not export their long-term care benefits as their systems designate them social assistance and therefore they are entitled to limit provision of the benefit to persons permanently residing on their territory. This interpretation results in, for example, pensioners receiving only a pension from another Member State while living in the Czech Republic in a situation without any benefits (the Czech Republic is not competent for their sickness benefits), which is perceived very negatively by those concerned.

**Invalidity**

**Member States’ cooperation**

Experience shows that not all insurance carriers use E forms for medical assessment (E213). This increases the length of administrative procedure as well as costs especially with regard to translation. They also apply different procedural rules. Negotiations were launched by the Czech carrier with its partners in other Member States (Slovakia, Poland, Germany, Austria and others) with the aim of simplifying the procedures and facilitating clients in claiming and receiving pensions.

After the accession of the Czech Republic to the EU the problem of implementation of art. 20 of the convention between the Czech and Slovak Republic remained, although listed in Annex III of the EEC Regulation no.1408/71. In spite of an earlier agreement Slovakia also does not apply art. 26 of the
convention concerning the removal of hardship. This important issue is still open and there have already been some rulings of the Czech Highest Administrative Court, as well as of the Czech Constitutional Court on it. Both courts however are not of the same legal opinion on the issue. This dispute is of even higher importance as regards old age pensions.

**Old-age and death**

**Assimilation of facts**

There is a long-standing and so far unresolved problem with regard to Czech and Slovak pensions. There are two different legal opinions of the Supreme Administrative Court and the Constitutional Court. The issue is however rather a bilateral than a European one. The dispute is about the application of Art. 20 of the Agreement between the Czech and Slovak Republics on social security after the split of the two countries. This agreement introduced a rule on the aggregation of periods acquired during the existence of the Czechoslovak state. Due to different levels of economic development, the rule turned out not to be convenient to some people who worked in the Slovak Republic but who were Czech citizens and who then returned to the Czech Republic and continued to live there. As a result, such people have been receiving a lower pension than other pensioners who acquired a Czech pension based upon Czech periods only. Some of these people asked for compensation which the Czech Social Security Administration refused to concede. As already mentioned, the problem has not yet been resolved.

Moreover, during recent months, another issue connected with the separation of the former Czechoslovak State has emerged. This concerns large state companies, such as for example the Czechoslovak railway company, which were normally based in Prague, even though they employed people from the whole of Czechoslovakia. There were even national branches, but these (even if they were registered as autonomous legal entities) did not have the whole range of powers, which was attributed only to the centre of the state company (mostly residing in Prague). The question today is whether the insurance periods aggregated during employment with such an employer are international periods (according to the site of the centre of the company), or just normal domestic periods (according to the site of the branch, which was also empowered to establish an employment relationship). Even though there have already been some court decisions, the question has not yet been finally answered.

Both issues (and also some others) have become so complicated - and they are not possible to be solved unilaterally - so that a preliminary question to ECJ should now be put as soon as possible.

**THE COORDINATION REGULATIONS AND INTERNATIONAL AGREEMENTS**

**Bilateral conventions on social security with third States**

There was also a problematic situation which emerged in connection with the abolition of a bilateral agreement between the former Czechoslovak Socialist Republic and the former Soviet Union. The old agreement was denounced, but a new one has not yet been ratified (due to very complicated and long negotiations). There are, however, people who aggregated insurance periods during the time when the old agreement was in force, but who applied for their rights after it was abolished. The Czech Supreme Administrative Court decided that the rights should not be awarded according to a non-valid legal document. The Constitutional Court, on the other hand, stated that this is still possible, as long as the information on the abolition of the agreement is not published in the Collection of International Agreements (official source of law together with the Collection of Laws).
DENMARK

IMPLEMENTATION OF THE GENERAL PROVISIONS

Scope of the coordination Regulations

Personal scope

Third-country nationals

Regulation 859/2003 does not apply to Denmark, due the Danish opt-out clause from title IV of the Treaty. In relation to Denmark, third country nationals have therefore only the right to coordination of social security benefits, if they are the family member of an EEA citizen, who is insured by a social security scheme in a Member State, or if the third country national is a refugee or a stateless person. All other third country nationals travelling to Denmark from another Member State have no right to coordination of social security.

When regulation 859/2003 was adopted, it was a stated political aim to adopt a parallel agreement for Denmark. However, no formal steps have been taken.

Material scope

In 1986, Denmark published its last declaration about which of its social benefits and services are included in the material scope of Regulation 1408/71. The list remains the official list of 1408/71’s material scope in Denmark. The old declaration means that it has been disputed whether Denmark really has an updated list, in line with both EU and national developments. The current guidelines, which among others are consulted by the municipalities and citizens, are out of date, being from 1997, with the exception of healthcare which is from 2005. The guidelines list national legislation as part of the applicable scope which are no longer in force and in general lack clarity.

Social security benefits, special non-contributory benefits and social assistance

Social security

Since the Danish social security scheme in its general principle is residence-based and tax-financed, there is no general link between contributions and benefits. In order to distinguish social security from social assistance, Denmark defines social security as those benefits listed in article 4 of Regulation 1408/71 and social assistance are benefits that the State provides for its citizens who are not covered by a social security scheme. For social assistance, need is an essential criterion and constitutes a last resort social benefit.

Social Assistance

The act on active social policy is regarded as social assistance, which means that a) cash social assistance benefits and b) introductory benefits for persons who have resided less than seven years in Denmark, are outside the material scope of 1408/71.

Although outside the regulatory scope of 1408/71, it should be noted that the status of social assistance in relation to EU law has undergone a process of clarification. Danish social assistance benefit is divided into two main schemes; cash social assistance benefit and introductory benefit. Introductory benefit is paid to persons who have resided outside Denmark more than seven years of the last eight years and grants a considerably lower monthly amount than cash social assistance. The residence criterion of seven years is, however, waived for EU citizens provided EU law entitles them to cash social assistance benefit. The specific circumstances under which EU law waives the national residence criteria has, however, been unclear. The case has been brought before the Social Appeals Board which clarified that when the person qualifies as worker within the meaning of Regulation
1612/68, the national residence clause is overruled. This occurs when a person enters an employment relationship in Denmark although the employment is only for a brief period (of a minimum of 10 weeks). The person will be regarded as a worker from the first day of employment and then be entitled to the higher cash social assistance benefit without complying with the domestic seven years rule. This clarification substantiates that residence criteria for social benefits are contested, but used as entitlement conditions, although its relation to international law at times is intensively debated. The introductory benefit has been much debated in Denmark and criticised for its de facto discriminatory effects.

**Benefits concerning new risks**

Denmark now recognises that the act on social services is covered by Regulation 1408/71. The Danish competent institutions have gradually started to allow for the exportation of certain social services. Exportability applies to the cash benefits regarding: parental leave benefits, extra expenses benefit, compensation for the loss of income to care for a disabled child, sickness care contribution, compensation for additional expenditures by sickness and invalidity, compensation for the loss of income due to caring for a dying relative.

The relation between the national act on social services and Regulation 1408/71 has been examined by the Social Appeals Board. In one case, the local authority has refused compensation for the loss of income to a women who cared for her disabled son, because she was residing in Sweden although her place of employment was Denmark. The local authority based its decision on the residence criteria in national law and found that the woman was not included in the personal scope of the Danish act on social services. The Social Appeals Board, however, laid down that Article 73 in Regulation 1408/71 overruled the residence criteria in the act on social services. In another case, the local authority had declined to grant appliances for disabled persons to a person who resided habitually in Spain, but stayed for longer periods in his summerhouse in Denmark, because he didn’t have permanent residence in Denmark. The social board in the regional authority upheld the decision of the local authority. However, the national Social Appeals Board laid down that the person was entitled to appliances for disabled persons during his temporary stay in Denmark due to Article 31 of 1408/71.

These two decisions demonstrate that confusion can arise when local authorities have to decide on the conditions under which a person is entitled to benefits in kind under the act of social services although not habitually residing in Denmark. The entitlement criterion is ‘legal stay’ and not habitual residence. In principle even a very short term stay in Denmark would entitle those staying legally to Danish social services. Issues arise where local communities doubt their obligations to grant long-term care, in concrete by means of home help, to tourists on short term stays in Denmark. It was clarified that according to national and EC-law, the tourists were entitled to long-term care in the form of home help. In relation to Danish law, it is likely that there will be a future need to clarify the relationship between access to such non-contributory Danish social services and the rights and criteria contained in the EU residence directive and Union citizenship.

**Other issues**

**National rules against overlapping**

**Social pension**

In an early decision, the National Social Appeals Board interpreted the relationship between Danish pension rights and the anti-cumulation rules of Regulation 1408/71 in a more restrictive sense. It stated that a person who had earned pension rights both in Denmark and the United Kingdom, would have to chose between either a full Danish pension or a pro-rata pension from both Denmark and the United Kingdom. In two later decisions, the National Social Appeals Board, however, changed its restrictive view. The Social Appeal Board laid down that a pensioner maintained acquired pension rights from both Member States, even if both together amounted to more than a full pension.

However, the decisions from the National Appeals Board have now been overruled by Danish legislation. The Act on Social Pension now states that when the length of residence is calculated, periods in which social pension rights are also earned abroad are not taken into account.
**Fundamental reforms, initiatives and plans in national legislation with implications for the Regulations**

Furthermore, as of October 2007, the maximum waiting time period that a patient shall wait for treatment within the public health system was reduced from two to one month. When the public health sector cannot ‘deliver’ within one month, the patient is entitled to treatment in the private sector or at a hospital in another Member State. However, the government is proposing to abolish this extended free choice, until Summer 2009, because of a labour dispute. The conflict has caused renewed waiting lists in the health sector, and the regions and health administration have argued it is necessary to – temporarily – abolish the extended free choice and the guarantee to be treated before one month. Whether the right to be treated in another member state when treatment cannot be offered within the competent state without undue delay (according to the Decker/Kohll line of case-law) can be abolished by the same token, is a burning question.

As of 1 January 2007, the new Danish health law has entered into force. This means that the previous six weeks waiting time for eligibility to Danish healthcare is abolished. Registration in the CPR (central personal register) is now sufficient for acquiring rights to healthcare. Furthermore, all healthcare services are now covered by 1408/71; including municipal dental care, municipal home healthcare, preventive healthcare for children and young people, municipal rehabilitation and vaccination. Finally, the new health law makes it possible for the municipalities to be reimbursed for services to EU citizens.

**IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS**

**Sickness benefits**

**BENEFITS IN KIND**

*Concept of occasional health care*

During its first years, the spread of information on the European health insurance card has evidently encountered some difficulties in Denmark. One of the main reasons is that persons who are insured for healthcare in Denmark are covered throughout the first month of a stay abroad by the Danish tourist health insurance certificate.

During the past year, the demand for (issuing) of the card has increased dramatically.

As a result of this new level of demand, the European health insurance card is no longer only issued only for one year, but the validation period is differentiated between different groups.

Persons, with anticipated habitual residence in Denmark, can have the card issued for a period of up to a maximum of 5 years. For persons where Denmark is the competent state, but who are not residing in Denmark, for example frontier workers or posted workers, the card can be issued for up to a maximum of one year.

Regarding the right to free abortion during a temporary stay in Denmark, the Ministry of Health and Interior Affairs has clarified, that a woman who requests an abortion for social and not for medical reasons during a temporary stay in Denmark, cannot meet the criteria for necessary medical treatment. This means that the European health card does not give access to abortion in Denmark, except for medical reasons.

*Planned health care abroad, article 49*

Whether Denmark complies with the Article 49 procedure has recently been addressed nationally. In 2006, the Social Appeals Board noted that the Danish re-interpretation of services within the meaning of the Treaty (i. e. their activities where the person pays the main part of the services him/herself. Subsidies are now provided for the following services purchased abroad: General and specialist medical treatment for persons insured under group 2, dental assistance, physiotherapy and chiropractic treatment for persons insured in group 1 and 2) was too narrow since it did not cover
the right of all persons, including those insured under group 1 (those who have right to free medical care), to purchase specialist healthcare (and probably all non-hospital forms of healthcare) in another Member State.

However, the first time the Social Appeals Board considered the case was in 2003, where the Board confirmed the Danish re-interpretation. The question is nevertheless why the Social Appeals Board did not already in 2003 take the Smits-Peerbooms case-law into account, where the Court rejects that a ‘service’ within the meaning of the Treaty only covers those with a part that is privately financed. After not being supported by the Social Appeals Board in 2003, the appellant took the case to the Danish Ombudsman and against this background the Social Appeals Board re-trieved the case. A new consolidation act, based on the broader interpretation, has been drafted, but not yet adopted.
IMPLEMENTATION OF THE GENERAL PROVISIONS

Applicable legislation

General introduction

Some problems exist when the determination of the applicable legislation is dependent on the place where the individual resides. The only element taken into account when determining residence is the inscription or removal of the person in the Population Registry, which is in essence left up to the individual himself. The problem is important: in many cases, uncertainty about the current place of residence of an individual leads to administrative difficulties in the organization of social security coordination. This is an issue which the Ministry of Social Affairs tries to resolve in cooperation with the Ministry of Interior Affairs. The aim is to make the Population Registry a better reflection of reality by using the criterion of the “centre of interest” instead of mere registration. It remains to be seen whether this proposal will be followed in forthcoming legislation.

Working in one Member State only

Seamen remain an important issue. Many different interests have to be taken into account; those of the seamen themselves, of the ship-owners, of the public purse, of the social security system. Estonia has tried to secure the position of Estonian seamen with all possible tools. With a view to keeping them affiliated under the Estonian system, the Ministry has advised them to register themselves as self-employed persons.

It is pointed out that the provision of Article 13(2)(c), laying down the principle of the flag State’s legislation, makes the situation complicated. The flag may be that of a third country. When there is an Estonian employer, Article 14b(1) can be used. The problems arise in the absence of an Estonian employer, even when the ship flies the flag of a Member State. Since 2004, Norwegian authorities have started to suggest entering into an Article 17 agreement – as they did with Latvia. It was noticed that ship-owners started to hire nationals of the new Member States and to hire third country nationals. For some, such an agreement is not acceptable.

Application of Article 17

No agreements seem to have been concluded in Estonia at the level of the State or the competent authority.

Article 17 agreements tend to be concluded at lower levels. They are entered into exclusively in cases involving applicable legislation, and in 95 per cent of cases concern the posting period. Other cases involve members of boards of directors who are very mobile and for whom application of the lex loci laboris would be impractical. The process is quite informal, such as for instance with Finland. The Finnish administration prefers Article 17 over form E102 for the purposes of prolonging the posting period. Typically, they send a letter explaining the case and asking whether the Estonians accept to derogate from the Regulation’s provisions. The Estonian authorities carry out a check and send a letter back. On the basis of that letter (and if the reply is positive) Finland issues a form E101. Article 17 is used quite a lot. Estonia requests the application of this provision to other countries, such as Germany (which is known to carry out a thorough check).
IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS

Sickness benefits

BENEFITS IN KIND

Pensioners: levying of contributions

A problem was reported in relations with Germany, where E 101 forms are issued to pensioners, and then cancelled after a year on the grounds that the persons concerned are said to have lived in Germany during that year. Even though the Estonian health insurance fund possesses invoices concerning health care services issued to these persons and can therefore prove that they have received care, their per capita fees cannot be claimed on the basis of these documents alone.

Member States’ cooperation

Concerning the use of the European Health Insurance Card, problems persist in relation to Germany, whose health care providers do not recognize the Estonian-issued European Health Insurance Cards for lack of an electronically readable chip containing the necessary data. These cases have to be solved on an individual basis, via reimbursement to the patient by the Health Insurance Fund according to the E 126 procedure. This requires that invoices or receipts are produced, and that the competent institution in Germany is contacted. This problem, already signalled in previous reports, remains.

Another issue concerns retroactive acceptance of the health-insurance cards, which does not contain a start date of validity. The health care provider is required to ask for the form, in order to establish the date on which coverage has started.

Reimbursement of benefits

In previous reports, it was mentioned that reimbursements in relations between Estonia and Spain are problematic. As there is no price list of services in Spain, the Estonian Health Insurance Fund is unable to identify which services have been provided under the E 126 procedure on the basis of invoices received from Spain. Hence, the Fund is unable to establish the corresponding price of services under the Estonian price list. This problem will persist under the new Regulation 883/2004, as Spain has already indicated that it will not provide information on how much needs to be reimbursed by Estonia to a person who had care in Spain in the future. In practice, the problem is currently being resolved by asking the patient for the nature of services provided, and then reimbursing these services according to the Estonian price list.

Other issues

When it comes to determining residence, the EHIF (Estonian Health Insurance Fund) has resort to the population register. However, problems are encountered. Notably, some persons are unwilling to register their correct address. This poses problems, not least as some benefits are conditional upon residence. Another problem concerns pregnant women residing in Estonia; these persons can insure themselves and become entitled to a number of benefits in kind (e.g. kindergarten). If these women work in Latvia, and thus are insured there, there are discussions with the Latvian counterpart as regards the issue of the form E 106. Depending on the situation, the EHIF seeks clarification from the persons concerned or from the employer. The former usually reply that they reside in more than one place.

Cases have been reported where people are unintentionally insured in two countries at the same time. This problem is due to multiple electronic insurance registration, that is both by the employer and other reporting agents. It also happens that people try to get benefits from two Member States simultaneously.
Unemployment benefits

Member States’ cooperation

Problems in cooperation with Norway have been reported, where the competent institution follows a very strict procedure which requires the Unemployment Insurance Fund to send paper documents, mainly serving to prove certain elements. The issues arising from this have so far not been solved bilaterally, and as the required documentation concerns proof of facts, it is not expected that the electronic data exchange required through the implementation of Regulation 883/2004 will solve the problem.

Assimilation of facts

In a previous report it was mentioned that there is no relevant practice concerning the assimilation of facts. This comes in to play because the right to obtain Unemployment Benefit is limited to those who have their employment contract terminated involuntarily. The benefit is not granted if the last employment contract of the person was terminated due to violation of the contractual obligations from his or her part, breach of trust or dishonesty, or by a mutual agreement with the employer. When previous employment in another country is taken into account to determine the right to an Estonian Unemployment Benefit, the reasons for termination of this employment are equally important. The observation concluded that this reason is however not checked in practice where it concerns employment contracts not falling under the scope of the Estonian Employment Contract Act.

This conclusion was denied by the Estonian Unemployment Insurance Fund (Töötukassa) which said that the reason for termination is always checked, even if problems are experienced in getting the information from foreign employers. Indeed, the information given on the E 301 form is often not reliable. Ireland, for example, invariably indicates that the reason for termination is the expiry of the employment contract. The authorities in the UK, on the other hand, are said to acquire information from the beneficiary instead of from the employer. Thus, the Estonian authorities will always try to contact the authentic source of the information, which is the foreign employer. The information on the form E 301 is only taken into account when no other information can be obtained.

Family benefits

Modification of the family situation

The previously mentioned problem connected with the registration of a person in the Population Register is also at play when it comes to Family Benefits and Parental Benefits. Problems arise when the current place of residence is not clear. When it comes to proving the place of residence, only the registration in the Population Register is relevant – as long as the persons involved do not announce the fact that they have moved, the Estonian Social Insurance Board will continue to pay Family Benefits and Parental Benefits. Cases exist where both parents work in different countries and receive benefits in both Member States.
IMPLEMENTATION OF THE GENERAL PROVISIONS

Scope of the coordination Regulations

Personal scope

The insurance Court (VakO) has given a judgement concerning legislation applicable of a third country national X working in several Member States. This case was about a Japanese national working for a Japanese company in a Finnish company in Finland. X had previously worked and been insured in Belgium. Now X was posted from Japan by the Japanese company to work for two years in a Finnish company in Finland, Estonia, Lithuania, Latvia, Belgium and Spain. He resided in Finland during this two year period. The court stated that Regulation 859/2003 was applicable to X and that therefore according to article 14.2.b the Finnish legislation is applicable to X and that X would have to be insured in the Finnish statutory employment pension scheme.

Applicable legislation

Working in one Member State only

Lex loci laboris or work in several Member States

Finland currently has one of the largest construction projects in the whole EU. There are roughly 4000 employees working there for several different employers. The majority of workers are not Finnish and they work for employers that have their places of business in other Member States.

The majority of workers have come to Finland from a different Member States than where their employer has its seat. This means that they have not been affiliated in the social security of the Member State of the employer before their work period in Finland and therefore they cannot be posted workers from the Member State of their employer. Some of the foreign employers on this construction site have claimed in the Member State where they have their place of business that the employees normally perform work in different Member States. The employers have applied for E 101 certificates on the basis of article 14 (2) (b) ii. in order to be able to insure the employees in the Member State where the employer’s place of business is situated. The Member States where the E 101 certificates have been applied from have not been able to control that the employees actually work in different Member States. This has lead to the fact that a large number of certificates have been issued to employees according to article 14(2) (b) ii even though the employees have been working only in Finland for some years.

It is required in the Finnish policy of application of article 14 (2) (b) that the employee regularly works in two or more Member States. According to Finnish policy all the countries of work and the places of work are also written in the E 101 (in paragraphs 3.3. and 3.4.of the certificate). If the employee does not change their country of work during the period stated in the E 101, there are no legal grounds to apply article 14 (2) (b).

The main problems relate to situations where the person coming to Finland for a short period of time:  
- does not fulfil the minimum criteria (in sovetamisalaki) for being insured in Finland, or 
- fulfils all the criteria during work, but who after a short employment period is not considered to be residing in Finland either under national legislation or the community concept of "centre of interests" when applying article 13.2.f

The same problems relate to situations where a person who has been insured in Finland goes to work in another Member State for a short period of time, but does not fulfil the criteria set out in the legislation in the other Member State. The rules on legislation applicable clearly state that if the Member State where the person concerned is performing his/her economic activities that is the competent Member State, but the person concerned does not get any rights to benefits from that
Member State. In these situations people who have been covered under the Finnish residence based system often demand to continue to be covered under the residence based system. These persons may still be considered to be residing in Finland according to Finnish national legislation. The Social Insurance Institution has in these situations still considered these persons to be covered under the residence based system, if the person can show, that his/her intention is to stay abroad for a maximum of one year and where the person can state that he/she does not full fill the criteria for insurance in the Member State where the work or the activity as a self-employed person is performed. It could be considered to be against the principle of only one Member State legislation being applied at a time and it makes the residence based system a "safety net" for other types of systems. On the other hand persons in these situations will be considered to be still residing in Finland under our national legislation. This interpretation could be seen to have got some verification after the ECJ judgement Bosmann C-352/06.

**New forms of mobility create the necessary problems:**

*Artists and other persons with short term assignments in other Member States*

Artists form a problematic group of persons. This is due to the different legislative status of artists in Member States. Artists are considered to be self-employed in some Member States and employees in others. There are also different criteria for minimum coverage in different Member States. This means that it is often unclear whether the person in question will be covered in the Member State where the assignment is performed or not.

*Remote workers, who perform their work via the internet or who can perform their work anywhere (e.g. journalists, photographers, translators, researchers etc.)*

People who work in most cases with their PC for an employer who is situated in another Member State and it is not a case of posting. The work can also be performed for several employers who can be situated in different Member States. The *lex loci laboris* principle seems quite laborious in many of these situations. It can be difficult to get registered in a Member State’s system, when a remote worker does not have a permanent place of business. It is also difficult to supervise the collection of social insurance contributions in these kinds of situations.

Consider the example of a person employed by a telecommunication company in Finland. The person goes to live in Germany, where s/he continues the same work from home. Can this person remain insured under Finnish legislation, possibly via posting? In this connection, it was noted that the Finnish employer might not be willing to affiliate their employee in Germany. This could constitute a hindrance to mobility.

*A person performing part-time work in one Member State and receiving part-time sickness allowance or part-time rehabilitation allowance from another Member State.***

The most problematic situations occur where a person has resided in Member State A and worked in Member State B. The persons’ capacity to work is reduced and the person has started to receive sickness or rehabilitation allowance from Member State B. During the period the person receives sickness or rehabilitation allowance from Member State B s/he is considered to be insured under the statutory employment pension insurance scheme and contributions for the employment pension system are paid. According to the legislation in Member State B the person is encouraged to take up part-time work in order to promote his or her capacity to work and to stay in the labour market as long as possible. If the person in question takes up part-time work in Member State A, where s/he resides, there is however a problem of which legislation is applicable. There is a conflict between the interest of staying insured in Member State B, where the last full time work was performed, but it is not likely that the employer for the part-time work in Member State A will want to pay contributions to Member State B. Neither is it possible that the institution paying the sickness/rehabilitation allowance would pay contributions for the employment pension insurance to Member State A.

*Work performed for companies hiring staff.*

More and more employees are employed by companies that hire their work to other companies. The work contract with the hiring company can be for a long period of time, but there may be no proof of actual work that will be performed, or it seems that only a small amount of work will be done. It is
therefore difficult to establish whether the requirements for the insurance are satisfied or not. When a hiring company posts workers to other Member States, it can be unclear which is the actual employer and whether an organic link remains between the posting employer and the employee.

Centre of interests in one Member State work performed in another Member State

More and more employees come to work for relatively short periods of time in the Nordic countries and leave their families in their country of residence. These workers often work very intensively during their stay in the Member State of employment and return home to the country of residence during breaks. When the work stops and the person in question enrolls at the employment agency as a person seeking work, it is problematic whether this kind of employee should be considered as finishing working in the Member State of last employment according to article 13.2.f or not.

Special rules for specific categories of persons

Persons working on board a vessel flying the flag of a Member State are subjected under the legislation of that State (“flag State”). There are quite a lot of Finnish residents working on board a vessel flying the flag of another (usually Mediterranean) Member State which sail on the territorial waters of Finland e.g. between Finland and Estonia. It has been reported that it can be difficult to take out insurance in the “flag State”, and even more difficult to apply for social benefits in practice. Finland has tried to solve some of these cases with the use of article 17, but when these situations continue after five years the situation needs to be re-evaluated.

Finnish seamen who reside in Finland but who have worked on a vessel flying the Greek flag have faced large problems with the verification of their Social Security coverage in the Greek pension and sickness insurance systems. The problem has been under discussion since May 2002. The Finnish authorities have assisted these persons in question and have sent requests to the Greek authorities trying to verify their Social Security. The Commission has also looked at this problem. Although the authorities have tried to solve the situation, the problem appears to remain. However, a solution might be very close.

Working simultaneously two or more Member States

Artists and other such short-term workers who are employed in two or more Member States and have multiple labour contracts are a challenging group especially from the point of view of supervision.

Firstly, it is difficult to verify that the artists are insured in another Member State, especially when they have several employers and short-term contracts in two or more Member States. Secondly, when it is an Article 14.2(b) case, and an artist has been granted an E101 form from Finland, it can be challenging to receive the contributions to Finland. Supervision is also difficult in these situations.

Either as an employed or as a self-employed person

There are problems in relation to the collection of contributions. This particularly concerns cases of simultaneous work in two or more Member States according to Article 14.2.b of Regulation 1408/71. The lack of specific rules in Regulation 1408/71 concerning collection and recovery of contributions is problematic. Although an E101 form is issued from Finland it is common that the contributions are paid in the country where the work is performed or that no contributions are paid to any Member State. This problem especially affects artists. The person in question is in any case insured for the Finnish employment pension, although the contributions are not paid in Finland.
IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS

Sickness benefits

BENEFITS IN KIND

Workers

Incidents have been reported where workers with short time working contract have had difficulties in receiving medical care from the public health care system. By short time workers is meant persons who does not full fill the minimum criteria set in the Act concerning residence based social security, but who work for a employer in Finland and are insured by the Finnish employment pensions scheme and for Occupational diseases and work accidents and therefore also covered as employed persons within the meaning of Regulation 1408/71 by the public health care system in Finland.

Pensioners

There have been disagreements between some Member States on the interpretation of articles 27 and 28 of Regulation 1408/71. This concerns Member States with a contributory and employment based system versus Finland with a residence based system. These problems relate to Member States where it is possible to terminate your health insurance voluntarily. Pensioners coming from these type of countries to Finland have a tendency of terminating their health care insurance after they have moved to Finland and been registered as resident here, in particular as the premiums are much lower.

It seems somewhat contrary to the principles of coordination that an individual can choose the economically most advantageous system for her or him. In the case of a pensioner coming to Finland who chooses to be covered in the Finnish system all the costs of his/her health care falls to Finland although the Pensioner may have contributed all his/her economically active working life to the other Member States system.

Situations have also arisen where a person has a small pension from Finland and resides in e.g. Germany where s/he has worked all his/her working life. An extreme situation would be a case where an individual has only resided but not worked in Finland as a young person and then moved to e.g. Germany and worked there for her/his whole working life. That individual may get a very small National Pension from Finland on the bases of residence (the minimum payable amount for National Pension is 5,93 € per month) and then get a substantial employment pension from Germany.

In these situations is may be possible for the individual in question to terminate her or his health insurance in Germany. Here again Finland would be the only country paying a pension where s/he would have a right to benefits if s/he resided in Finland. Finland would be required to issue an E121 form and take responsibility for their health care costs in the EU.

This interpretation would however seem in be contrary to Finnish national legislation and the determination of the end of insurance in a residence based system as defined by the ECJ in Kuusijärvi (C-275/96). According to Finnish national legislation an individual who has moved from Finland for a period longer that one year is no longer considered to be insured by the Finnish residence based system. If the Community concept of residence is applied only in relation to residence based systems and the Member State has no right to decide over the actual insurance in the system it seems rather unequal in connection to the possibility of a contributions based system to decide rather freely of the criteria of insurance coverage.

According to this interpretation the situation would also apply where the same individual is receiving a very small national pension from Finland and a substantial employment pension from another Member State moves to a third Member State “where there is no right to benefits” and according to article 28 “or at least one of the countries competent in respect of pensions if he were resident in the territory of such State”. This would mean that when the sickness insurance would be terminated in the other Member State paying the higher pension it would be Finland who would be responsible for the health care costs as s/he would have a right to benefits in Finland is s/he resided here. This
outcome would be somewhat peculiar in the light of the idea of fair distribution of health care costs between Member States.

Here again we face the problem of the conflict between how the insurance coverage is defined in Finnish national legislation and the notion of residence in the Regulation.

**BENEFITS IN CASH**

**Export of benefits**

Following C-299/05 there are three new sickness cash benefits in Finland: the Disability allowance for persons under 16 years of age, Disability allowance for persons aged 16 years or over and the Pensioners’ Care allowance. The administration of these benefits seems quite difficult with the current wording of Regulation 1408/71. Finland has taken part in the work of the ad hoc group working with the problems of implementation of C-299/05.

One of the problems faced is that similar types of benefits which cover the risk of the extra cost of disability or illness may appear in different forms in each Member State. This is the case both in the national legislations, but also in how these benefits have been categorised under Regulation 1408/71. The benefits may be considered as family benefits, special non-contributory benefits, sickness benefits in cash/ kind or they may fall under social assistance or they are provided as social welfare services. This inconsistence with the classification bears the risk that the benefits are overlapping or there is no benefit.

The interpretation of Article 19.2 of Regulation 1408/71 seems to be unclear in relation to these benefits. How should the wording “family members who reside in the territory of a Member State other than the competent State in so far as they are not entitled to such benefits under the legislation of the State in whose territory they reside” be interpreted for these new type of cash sickness benefits. Does the wording “in so far as they are not entitled to such benefits under the legislation of the State in whose territory they reside” mean that if the State of residence provides for a similar type of benefit the competent Member State does not have to pay its benefit or does it mean that a “differential supplement” should be paid with the same thinking as in the family benefit chapter in Regulation 1408/71?

Article 12.2 of Regulation 1408/71 stipulates that provisions of national legislation governing reduction or withdrawal of benefits in cases of overlapping with other social security benefits or any other form of income may be invoked where such benefits or income were acquired under the legislation of another Member State. According to national legislation corresponding benefits from other Member States are deducted from the amount of Finnish disability benefits. It is not clear how Community legislation is to be applied here together with the national legislation. Application of the “Sickness-chapter” does not only bring export-problems, but creates a genuine overlapping problem.

A further problem comes from the fact that the benefits in question may be linked to other benefits, for instance entitlement to a disability benefit may be a precondition for rehabilitation. This gives rise to the question how these benefits are treated and which rules are to be applied.

One question is also how living expenses are evaluated when the person is residing in Member State other than the one providing for the benefit. There are no forms that could be used at the moment.

The implementation of these new benefits in relation to Article 27 to 29 in Regulation 1408/71 is also not clear. Regulation 1408/71 does not say anything about which Member State is responsible for cash benefits for pensioners if these are provided in the Member State of Residence. At least in the Nordic Countries it possible that a individual in receipt of a pension from one country may be entitled to a similar cash benefits from the Member State of residence.

**Invalidity**

**Medical examinations and administrative checks**

Some of the major problems for individuals who are claiming invalidity pension from a another Member State and residing in Finland is that in the course of the assessment process in the other
Member State Finland often pays sickness allowances or unemployment benefits to the person. When the invalidity pension is granted retroactively from the other Member State the benefits granted in Finland will have to be recovered from the individual in question. The current procedure in Article 111.1 of Regulation 574/72 can only be applied in situations where the benefits paid from the two Member States are both pensions. When the benefit from the other Member State is a different type of benefit than the benefit granted retroactively from a Member State only article 111.2 of Regulation 574/72 can be applied. This often means in practice that a recovery procedure between the institutions is not possible because it is not often possible according to the national legislation of the Member State paying the benefit retroactively. The national recovery procedure is much more burdensome for the individual because s/he may have to pay back benefits that s/he has received for a longer period and that have been vital for her/his income e.g. sickness allowance or unemployment benefits. If the arrears of benefits could have been reduced (e.g. the sickness allowance) from the arrears of invalidity pension the other Member State starts paying out to the individual, the individual would not have to pay back benefits that s/he may already have spent.

**Family benefits**

There have been some problems in implanting the definition of family members of article 1.f.i). According to the definition in the article “member of the family means any person defined or recognized as a member of the family or designated as a member of the household by the legislation under which the benefits are provided”. In Finnish social security legislation the family concept is based on the same household. Therefore a family member for social security benefits purposes may be a cohabiting partner who lives with the children but is not a parent in family law. A parent who does not live with the children because of divorce is in most cases not considered to be a family member within the meaning of social security law. This has caused some problems for the practical handling of benefits and for determining which country is primarily, and which country is secondarily, responsible for the grant of family benefits within the meaning of Regulation 1408/71.

For example, a child with the mother resides in Member State B, where the mother is not economically active. The mother and father are divorced and the father works and resides in Finland. Finland does not consider the father to be a family member in relation to child allowance and child home care allowance. According to the view of the Finnish Social Insurance Institution the concept/definition of family members is a matter of national discretion and should be in accordance with the concept in the law providing for the benefits.
**FRANCE**

**IMPLEMENTATION OF THE GENERAL PROVISIONS**

**Scope of the coordination Regulations**

**Personal scope**

**Employed and self-employed**

Employed persons and self-employed persons are subject to different French social security schemes. Except for some specific professional activities, the French Code de la sécurité sociale does not make a clear distinction between the categories of employed and self-employed workers. The Cour de cassation is more or less in charge of the determination of the concept of “employed” persons, using as criteria the existence of three elements: a labour contract, a remuneration and a link of authority. New patterns of work, some of which are called “para-subordination”, make it sometimes very difficult to draw clear lines between employed and self-employed workers.

**Material scope**

**Introduction**

Most problems occur with atypical new benefits such as the “allocation personnalisée d’autonomie” (long-term care benefits), the “prestation de compensation” (third person assistance and equipment benefit for disabled), or with schemes such as the Couverture maladie universelle, universal health care scheme based on residence in France. The new “Revenu de Solidarité Active”, which replaces the RMI (and the API – single parent allowance) and aims both at providing minimum income and at encouraging beneficiaries to find/keep a job (with a possibility of cumulating the allowance and part of the salary), may create problems in the field of coordination.

**Social security benefits, special non-contributory benefits and social assistance**

Does the new “Revenu de Solidarité Active” (RSA), which replaces the RMI fall within the material scope of Regulation 1408/71? The answer would require an in-depth study of the allowance and could receive various answers depending on the individual profile of the incumbent; it may at least be classified as a “social advantage” in the meaning of Article 7(2) of Regulation 1612/68.

Law 2007-290 of 5 March 2007 provided that, in order to claim the RMI, EU citizens must reside lawfully in France and must have set their residence in France for at least 3 months before their request. However, the residence requirement does not apply to EU citizens (and their dependants) who work in France and to EU citizens (and their dependants) who used to work in France and who are temporarily unable to work either for medical reasons or because they are currently in continuing education. The law added that EU citizens who arrived in France as jobseekers and who stay there as such cannot claim the RMI. Are these rules transposable to the RSA? According to Article L262-6 of the Code de l’action sociale et des familles, the RSA is provided to EU citizens if they have their residence in France for at least 3 months before their request, except if they exercise a professional activity. In addition, the same legal provision states that EU citizens who arrived in France as jobseekers and who stay there as such cannot claim the RSA.

The Couverture maladie universelle, a contributory universal health care scheme which covers all persons who lawfully reside in France and who are not subject to another statutory scheme, is included in the material scope of Regulation 1408/71. Among other consequences of this is that the condition of residence of 3 months which is required in some circumstances before being allowed to participate in the scheme might be considered as discrimination based upon nationality and thus prohibited by Article 3 of Regulation 1408/71.
Distinction between statutory and non-statutory social security schemes

Is the Couverture maladie universelle complémentaire, a means-tested and non-contributory public scheme which provides supplementary health care benefits in kind for persons who reside in France, covered by coordination rules? Some aspects, such as its status as a public scheme granting legally protected benefits in which basic health care institutions participate, suggest that it should be included in the material scope of Regulation 1408/71. To our knowledge, there is as yet no answer to this question. The condition of residence could be challenged before courts, perhaps on the grounds of coordination rules, or on the basis of Article 7§2 of Regulation 1612/68, or Articles 18/39 of the EC treaty.

The legislator stipulates that the nationals of EU Member States have to fulfil conditions required to benefit from a right of residence and reside in France for the three months preceding the request. Nevertheless, the condition of prior residence is not applicable to EU citizens who, in the framework of Directive 2004/38, are workers or who fulfil conditions to retain this status. In other words, the right to the RMI is not extended to inactive persons of another Member State except if, at the time of their arrival in France, they meet the conditions of right of residence, which is to say that they have sufficient resources and complete health care coverage.

The Couverture maladie universelle, a contributory universal health care scheme which covers all persons who lawfully reside in France and who are not subject to another statutory scheme, is included in the material scope of Regulation 1408/71. Among other consequences of this is that the condition of residence of three months, which is required in some circumstances before being allowed to participate in the scheme, might be considered as discrimination based upon nationality and thus prohibited by Article 3 of Regulation 1408/71.

General Principles

Equality of treatment

In general, French legislation complies with Regulation 1408/71 regarding equality of treatment on the grounds of nationality. For example, Article L. 311-2 of the Code de la sécurité sociale rules that persons are affiliated to general social insurance regardless of nationality while benefits must be granted notwithstanding nationality. These observations are also relevant for third-country citizens.

However, two remarks should be added: 1) French social security legislation applies to persons as long as they reside lawfully in French territory, which gives rise to the question of lawful residence when it applies to inactive EU citizens; 2) some benefits are granted to persons who can offer proof of a stable residence in France (for instance, the Couverture maladie universelle and the Revenu de Solidarité Active), implying a prior period of 3 months’ residence. Is this requirement a source of indirect discrimination based upon nationality?

Export of benefits

Gradually, in accordance with the jurisprudence of the Court of Justice (in particular, Pinna I and Maaheimo cases), all family benefits have become exportable. The only exceptions, based on Article 1(u) of Regulation 1408/71, are the “Prime à la naissance ou à l’adoption” (birth or adoption allowance) (annex II) and the “complément de libre choix de mode de garde” (supplementary open choice of child care allowance) (annex VI). For the latter allowance, the condition of residence may not be compatible with EU coordination rules and, in any case, will not be consistent with Regulation 883/2004. As regards the “Prime à la naissance ou à l’adoption” (birth or adoption allowance), it will remain subject to a condition of residence under Annex I of Regulation 883/2004 (which does not mean that the residence condition could not be challenged on the ground of Article 7(2) of Regulation 1612/68 or Article 18/39 EC).

The question of exportation still arises about the prestation de compensation (third person assistance and equipment benefit for disabled), a benefit for disabled people. This benefit can be compared to the Swedish disability allowance, which is granted to disabled people for whom a reduction in their mobility occurred between the ages of 19 and 65 and which is intended to finance the payment of a carer or to allow the disabled person to bear the costs caused by his or her disability and to improve that person’s state of health and quality of life, as a person reliant on care. The ECJ ruled that
“benefits granted objectively on the basis of a statutorily defined position and which are intended to improve the state of health and quality of life of persons reliant on care have as their essential purpose supplementing sickness insurance benefits and must be regarded as ‘sickness benefits’ for the purpose of Article 4(1)(a) of Regulation 1408/71” (Commission v. Parliament and Council, C-299/05). Even if, in French law, it is classified as a benefit in kind, it could be seen as a benefit in cash in the light of the coordination rules.

To our knowledge, no question has been raised so far concerning the export of the CMU and CMU complémentaire, the statutory and supplementary universal health care schemes based on residence. Problems may occur for insured people who set up their residence abroad or who stay abroad for a short period.

**Applicable legislation**

**Working in one Member State only**

**Posting: conditions**

As in other Member States, it is often difficult, in practical cases, to determine whether situations are related to posting of workers, to expatriation or to simultaneous application of national legislation. The Cour de cassation provides an interesting illustration about a professional football player who died during an international football match: when the death occurred, he was employed by a French club but had been “lent” to an English club. The French Supreme Court has considered that during the loan period, the player was not posted since his salary (and contributions) was paid in England by the English club which had authority over him. The work contract with the French club had been suspended (Cour de cassation, 20 December 2007, 2ème Division, case n°06-21089).

In particular, French companies seem to consider that Regulation 1408/71 allows for the choice between posting and expatriation. In other words, even if a worker meets the conditions to be posted, the employer may prefer to choose the application of the “lex loci laboris” if it happens to be more favourable.

**Posting: administrative formalities and cooperation**

Another interesting example concerns a Lithuanian company which had posted employees in France. The employer had paid contributions in France until May 2004, since coordination rules were not yet applicable and no social security bilateral convention would waive French contributions. He stopped paying the contributions after the date of the enlargement of the EU, which was contested by the URSSAF, the French institution in charge of collecting the contributions. For the Cour de cassation, since the employer had been issued an E101 by the competent Lithuanian institution, French contributions could not be collected. One might wonder why the URSSAF insisted on collecting contributions when it was obvious that conditions of posting under Regulation 1408/71 were met.

Finally, French Courts show that the E101 form can be contested in some circumstances. This was the case of a musician who was self-employed in Spain and who had been employed at the same time by a French Orchestra. He came to France with an E101 form. After the URSSAF challenged the status of posted worker, the French CLEISS and the competent Spanish institution agreed to have the E101 withdrawn. The consequence of this decision was to open the possibility of having contributions paid in France.

**Other issues**

**Financing of social security benefits**

After the ECI ruled that French authorities have failed to fulfil their obligations by requiring persons who reside in France and work in another EU member state to contribute to the CSG and CRDS [Case C-34/98 Commission des Communautés européennes v. République française [2000] ECR 995] ; Case C-169/98 Commission des Communautés européennes v. République française [2000] ECR 1049], the domestic legislation was amended.
Although the new legislation meets the requirements of the ECJ and puts French law in conformity with Regulation 1408/71, a doubt has arisen regarding the opposite situation: should CSG and CRDS be levied when the workers are residing in another Member State and employed in France? In a case regarding a French worker employed in France and residing in Belgium, the highest Court ruled that CSG had to be levied, as if French legislation is applicable under article 13 of Regulation 1408/71, which was obviously the case, the entire legislation must apply, notwithstanding domestic provisions applying a criterion of residence (Cour de cassation, 2nd Division, 8 March 2005, Société Dalle v. Urssaf Lille). Some commentators disagree with this case and consider that, if French law is applicable, the criteria which it sets should be respected and, therefore, CSG and CRDS should not be levied when persons reside abroad.

In addition, in the case of someone who works in France and resides in Belgium, the fiscal bilateral convention between the two countries would make levying the contributions impossible. The jurisprudence of the Cour de cassation of 8 March 2005 seems even less relevant after the Derouin case (C-103/06 – see below) in which the Court of justice ruled that “as Community law now stands, a Member State is entitled to forgo, unilaterally or in the context of tax treaty such as the Double Taxation Convention, the inclusion in the tax base for contributions such as the CSG and the CRDS of income earned in another Member State by a resident self-employed person in a situation such as that of the applicant in the main proceedings”.

A last illustration shows that French Court sometimes mix up treaty principles and coordination rules. Hence, the Cour de cassation ruled that a lawyer who was simultaneously registered at a French bar and a Spanish bar had to pay invalidity-death contributions to the French special compulsory scheme since he was entitled to its benefits (Cour de cassation, 2nd Division, 5 April 2007, n°06-10709). Still, in this case, it was not established that the lawyer was actually exercising some professional activity in France. In addition, it seems that the Spanish legislation was exclusively competent by application of rules of conflict of Regulation 1408/71. This case also illustrates the reactions that some courts may have when there is a discrepancy of social security rights between two Member States (which was the situation here since, under Spanish law, lawyers receive a small coverage).

**Remarks**

Frontier workers who reside in France and who work in another Member State assert that the “participation forfaitaire 1 euro” is a contribution and, therefore, should not be applicable to them since French law is not competent. Such reasoning cannot be approved: the “participation forfaitaire 1 euro” is a deductible which applies on each medical consultation; it is therefore not a contribution.

**IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS**

**Sickness benefits**

**BENEFITS IN KIND**

**Concept of occasional health care**

Healthcare institutions must reimburse care expenses for treatment provided in an EU or EEA Member State under the same conditions as treatment received in France. Nevertheless, the total amount of reimbursement must not exceed the actual amount of expenses (Article R332-3). Although treatment received abroad is not reimbursed by the local health care institution, it will be refunded by the French health care institution if the treatment is covered by the French scheme. Despite the positive aspects of this solution, it may sometimes be difficult for French health care institutions to compare treatment abroad with treatment in France and therefore to determine the level of reimbursement.
Under Article 49 EC

Transposition into French law of the Kohl & Decker cases

The distinction between hospital and non-hospital care is not clear-cut. For instance, it is unclear whether cross border spa treatments should follow the procedure of hospital care or non hospital care. The requirement of prior agreement already applicable to treatment that takes place within France should be transposed to cross-border treatment with possible adaptations ensuring that the rules of free movement of services are not violated.

Vanbraekel supplement

The French legislation does not specify whether the “Vanbraekel supplement” applies to occasional care. This uncertainty leads to varying decisions depending on the local competent healthcare institution. In the meantime, a circular has been issued which presents the impact of the Vanbraekel case on French law. The French administration chooses a broad interpretation: the supplement should apply to both unscheduled and planned care, to both hospital and non-hospital care and for any kind of medical service (medical consultations, sanitary products...). The French administration indicates that the supplement can be granted only if the insured person has to bear part of the cost of the medical service, either because the service is not covered by the local healthcare scheme or because it is only partially covered.

In particular the absence of a common reference frame to compare the cost of care, and the delays in obtaining information from foreign institutions, gives rise to many problems. The Circular goes on to say that the differential complement might in some cases seem impossible to implement – notably for small amounts – but nonetheless urges the funds, despite the difficulties, to do what is necessary to apply the relevant case law at the request of the insured person.

According to the Circular, the differential complement applies both to services and goods obtained abroad, to both hospital and non-hospital care, and to both planned and occasional care. The complement can be paid out if the insured persons have borne all or part of the cost themselves – either because the care was not covered by the scheme of the State of stay or because there was a degree of patient participation (co-payment, deductible etc.). The complement can only be paid if there is – and which will be paid up to the amount of – a positive difference between the sum which would be covered by the French sickness fund had the care been obtained in France, on the one hand, and the cost borne by the institution in the State of stay pursuant to Regulation 1408/71. Despite this broad interpretation of the ruling in question, France is currently being cited before the ECJ by the Commission for failure to implement the Vanbraekel complement (C-512/08).

Bio-medical analysis laboratories

In 2004, the French Republic was considered to have failed to fulfill its obligations under Article 49 EC by imposing a requirement on bio-medical analysis laboratories established in other Member States that they have a place of business in France in order to obtain the necessary operating authorisation, and by precluding any reimbursement of the costs of bio-medical analyses carried out by a biomedical analysis laboratory established in another Member State [Case C-496/01 Commission of the European Communities v French Republic [2004]]. Consequently, French legislation has been modified. A Decree October 2007 indicates that the list of EU countries in which conditions of authorization or agreement to practice are considered to be equivalent to the French ones will be established by an arrêté. This arrêté was issued on 11 July 2008, but instead of giving a list of Member States, it sets a list of criteria to be fulfilled in order to be added to the list. Criteria are divided into 3 categories: general organisation (quality process, qualification of staff, quality of equipment...), bio-analysis procedures and existence of external controls. In our view, French law still does not comply with EU law: as long as laboratories of all Member States authorized to perform activity in their own Member State are not presumed to offer the same level of quality of service and therefore to perform activity in France, Article 49 EC is violated.
Long-term care benefits

Export of benefits

Shall the “allocation personnalisée d’autonomie (APA)”, a French benefit granted to dependant persons, be exportable? According to Gaumain-Cerri (C-502/01), Molenaar (C-160/96) and Jauch (C-215/99), the French APA may be categorized as a sickness benefit in cash and therefore would be exportable. This is obviously not the interpretation of the French administration. Although Article L232-2 of Code de l’action sociale et des familles asserts that the APA has the character of a benefit in kind, the national classification has no influence on the application of Regulation 1408/71. Therefore, one may ask whether Article L232 of Code de l’action sociale et des familles, which stipulates that the APA is provided to persons who have a stable and lawful residence in France or its territories, complies with Regulation 1408/71 which prohibits clauses of residence.

The prestation de compensation (third person assistance and equipment benefit for disabled people), which aims to compensate persons affected by a disability of any sort, raises the same question as raised above regarding the APA, since it is allocated to persons who have a stable and lawful residence in France. If it were classified as a sickness benefit in cash despite the French classification of benefit in kind, could it be inserted in the list of special non-contributory benefits?

Unemployment benefits

Main issues

Situation of migrant unemployed workers who, when returning to France, cannot claim unemployment benefits because France is not their last place of work: With the world economic crisis, many French traders working in London have decided to return to France. However, in order to receive French unemployment benefits, they arrange to work in France for a short period immediately after their return. Is this fraudulent or simply a clever application of Articles 67 and 68 of Regulation 1408/71? In any case, this situation has been a source of tension in France.

Family benefits

Export of benefits

Gradually, most French family benefits have become exportable (see former French reports for an exhaustive presentation). The only exceptions concern birth, adoption and child-minder benefits. Based on article 1, u) of Regulation 1408/71 excluding the special childbirth allowances of the scope of family benefits, Annex II, point II refers to the prime à la naissance ou à l’adoption (child birth or adoption lump sum allowance). Also, according to Annex VI of Regulation 1408/71, the complément de libre choix du mode de garde (supplementary open choice of child care allowance) is only provided to persons whose residence is in France. This restriction may not be compatible with Regulation 1408/71 as interpreted by the ECJ in Maaheimo. In any case, with the introduction of Regulation 883/2004, this allowance should become exportable.
GERMANY

IMPLEMENTATION OF THE GENERAL PROVISIONS

Scope of the coordination Regulations

Good implementation and application of the EC Coordination Regulations requires good cooperation between the Member States and all institutions involved, including the social partners and civil society.

Such EU-wide cooperation between institutions does also depend on the organisational structure of the Member States.

In Germany such cooperation is more complicated than elsewhere due to the federal structure ("Federal Republic of Germany") which means that in many respects not the federal state (the ‘Bund’) but the 16 regional states (the ‘Länder’) or even the districts (‘Landkreise’) and cities (‘kreisfreie Städte’) are legally responsible for the organisation, administration and financing of benefits and services. Accordingly, practical solutions for problems must often be sought for and found on the regional or local level as well as on the level of legally autonomous institutions such as health insurance funds (‘Krankenkassen’) and pension funds (‘Rentenversicherungsträger’).

General Principles

Equality of treatment

It is quite difficult to draw the line between differences in treatment of national workers and migrant workers from Member States resulting from the – under EC law acceptable – differences between the social security legislations of the Member States, on the one hand, and criteria which must be considered as discriminatory under EC law, on the other hand, because quite often no distinction or breakdown in numbers is made between nationals and non-nationals, and particularly non-nationals from EU/EEA countries in social security statistics.

As a result it is difficult to assess if migrant workers have the same access to social security benefits as national workers or if they are under-represented among beneficiaries.

Material scope

There is a classification problem with respect to benefits granted according to the German Act on Demand-Oriented Basic Provision for Old-Age and in the Case of Reduction of Earning Capacity (bedürfnisorientierte Grundsicherung bei Alter und Minderung der Erwerbsfähigkeit) which could be brought under Annex II of Regulation 1408/71 and as such is not exportable.

IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS

Sickness benefits

BENEFITS IN KIND

In some countries problems have been encountered with the European Health Insurance Card (EHIC). In practice, there have been a number of cases, in particular in Austria, Italy and Spain, where medical service providers in the other EU Member States have not recognised the EHIC. In some cases the patient had to pay the full invoice for necessary care in another Member State her/himself, the costs are reimbursed by the Health Insurance Fund upon presentation of invoices. In Austria, medical doctors in Alpine ski resorts are notorious in this respect. The German health care institutions argue strongly for a better application and control of the existing mechanisms.
Main issues

The German General Administrative Provisions on assistance in the event of sickness (Allgemeine Verwaltungsvorschriften für Beihilfen in Krankheitsfällen) govern the granting of assistance to civil servants in the event of sickness. Such assistance is to supplement the private insurance coverage to be paid for out of current remuneration from work, as the persons covered are supposed to have taken out private sickness insurance. Reimbursement under private sickness insurance or by way of the assistance (Beihilfe) takes the form of reimbursement of the costs incurred by civil servants in the case of sickness.

Legal provisions which subject the reimbursement of expenditure incurred in respect of treatment undertaken in another Member State to conditions that are different from those applicable to treatment undertaken in Germany may deter patients entitled to Beihilfe benefits from approaching providers of medical services established in Member States other than that in which they are covered. This is because conditions governing reimbursement of expenditure in connection with treatment, such as board and lodging, which are an integral part of the health treatment (Kur) itself, by a scheme such as the assistance provisions (Beihilfevorschriften), are capable of having a direct influence on the choice of a healthcare centre capable of providing services of that type.

The Member States themselves must take the necessary steps to ensure that the E-forms and EHIC etc. are accepted by care and other service-providers and that Regulation 1408/71 is applied correctly. The European Commission should examine implementation.

The German social health insurance ‘umbrella organizations’ have proposed to affix a symbol (e. g. “EHIC”), in entrance areas of service-providers (similar to credit cards (for example, “Visa”) in shops and restaurants) showing patients that their E-form or EHIC will be accepted there in line with the Regulations. This would also commit medical doctors to accept the EHIC and not to invoice privately as it is frequently the case in some countries, for example in Austria.

Long-term care benefits

From a German perspective there is a case for introducing particular provisions for long-term benefits in to EC coordination law. The new Regulation (EC) 883/2004. Only Article 34 of Regulation (EC) 883/2004 refers to the new social risk of dependency.

Main issues

Rather than being calculated on the basis of income from work like contributions, premiums for private long-term care insurance are graded according to age. By German law, premiums must not exceed the maximum contribution for statutory long-term care insurance and are the same for men and women. The private long-term care insurance premium rate for married couples, where only one spouse works, may not be more than 150 per cent of the maximum rate for statutory long-term care insurance. Private care insurance which falls within the material scope of Regulation 1408/71 is covered by Regulation 1408/71, because its integration into the legal framework of the statutory scheme covers those persons who are privately insured against the risk of sickness and maternity, and is characterised by compulsory affiliation. This means that the private long-term insurance schemes are prevented by law from selecting among those who want to affiliate to this scheme, but are legally obliged instead to insure compulsorily all persons who have been insured privately against sickness and maternity.

Old-age and death

In Germany there is still a classification problem and there are still legal uncertainties with respect to the Act on Demand-Oriented Basic Provision for Old-Age and in the Case of Reduction of Earning Capacity (bedürfnisorientierte Grundsicherung bei Alter und Minderung der Erwerbsunfähigkeit) which can be brought under Annex II (a) of the Regulation 1408/71 and as such will not be exportable (see Articles 4 2 (a), 10 a Regulation 1408/71.

According to EC law the Member States retain the competence to shape their social security systems. At the same time, however, in the performance of their organisational competencies the Member
States must comply with the Community legal provisions on fundamental freedoms and on the free movement of workers.

Certain provisions in the German law constituted a disadvantage for those Community citizens who claimed the right on free movement in the Member States. Pursuant to German legislation a Community citizen who continued working in Germany automatically lost the advantage of aggregation of the insurance periods in the State of residence by moving to another Member State.

Following the recent reforms of German statutory pensions legislation, the adaptation of pensions follows an index which results from the difference between the average gross payment minus the full contribution to the statutory pension insurance and an additional amount, which corresponds to a co-financed maximum contribution to old-age insurance that increases in steps of 1 per cent between 2002 and 2008 to 4 per cent of an insured person’s gross income.

These future income losses of pensioners that will arise from the reduction of the benefit level in statutory old-age insurance may be balanced by State-supported occupational pension schemes or other private pension schemes. The support consists of either a bonus or a tax relief, for example, the deduction of expenses on such private pension schemes.

After a permanent move abroad, this State support ends, as moving abroad generally also constitutes the end of the unlimited liability to pay taxes. Bonuses granted will be reclaimed in a similar way to tax advantages that have arisen from the deduction of special expenses in order to take into account the fact that a person needs to pay tax on private insurance payments in old-age whereas upon moving away from Germany in old age, a person does no longer has to pay taxes.

The question arises whether this legal arrangement constitutes a violation of the principle of freedom of movement of the EC Treaty. There are good reasons to give a positive answer to this question.

**Unemployment benefits**

From 2002 on, Germany has introduced different measures for labour market activation and employment promotion (“Hartz-reforms”). Some of these are allowances which can be granted to workers and employees as well as employers, e. g. to compensate partly for loss of income during periods of part-time work or to stimulate employment in regions or industries with specific problems.

Since 2003, education vouchers (*Bildungsgutscheine*) have been issued to all entitled workers. Such vouchers are usually allocated for a specific education goal and is limited to a particular geographic area. They allow anyone interested in further training to choose an accredited training provider and recognised training measure. There is a case for discussion of training providers from other EU Member States that can be chosen as well. The same applies to the participation in other training activities.

Basic social security benefits for job-seekers (*Grundsicherung für Arbeitsuchende*) combine the former unemployment assistance (*Arbeitslosenhilfe*) and social assistance (*Sozialhilfe*) as far as employable persons (jobseekers) are concerned.

Under the new system of basic social security benefits for job-seekers, former recipients of social assistance and unemployment assistance who are capable of earning are given equal access to necessary advice, placement and integration services. Recipients of unemployment benefit II are entitled to the main integration services under Book III of the Social Code (*SGB III*).

There is an ongoing debate on the application of Regulations 1408 and 574/72 on these new benefits.

**Main issues**

*Activation* has become a prominent paradigm with regard to both labour market and social security policy in Germany, as it has become a crucial reference point for the reform of the Social state in its legal and administrative structures, its political programmes and its benefit systems.
The balance between incentives and sanctions enshrined both in unemployment benefit and social assistance schemes as well as placement and vocational training programmes has been altered. Flexicurity has become a political catch-word representing a political paradigm devoted to improving flexibility in the labour market while guaranteeing a sufficient level of income security to the individual at the same time.

More specifically, activation measures are linked to the idea of raising the employability of potential job-seekers as part of the policy of “rights and responsibilities” (“fordern und fördern”).

The cross-border provision of both “passive” cash benefits and “active” vocational training and placement measures is a subject which has not yet been dealt with appropriately in EC coordination law. There is a case for special rules dealing with the interplay between labour-market activation, on the one hand, and social security, on the other hand.

Book II of the Code of Social Law – Benefits in favour of job-seekers (Sozialgesetzbuch II – Grundsicherung für Arbeitsuchende – SGB II) provides that benefits shall be granted to persons who have attained working age, are capable of earning a living, are in need of assistance and reside in Germany. Excluded from these benefits are foreign nationals whose right of residence originates solely from the search for employment.

Article 24 (2) of Directive 2004/38/EC establishes a derogation from the principle of equal treatment enjoyed by Union citizens other than workers who reside within the territory of the host Member State. Under that provision, the latter State is not obliged to confer entitlement to social assistance on, among others, job-seekers for the period during which they have the right to reside there. Nationals of a Member State seeking employment in another Member State fall within the scope of Article 39 EC and therefore enjoy the right to equal treatment laid down in point 2 of that provision.

In view of the establishment of citizenship of the Union and the interpretation of the right to equal treatment enjoyed by Union citizens, it is no longer possible to exclude from the scope of Article 39 (2) EC a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State. It is, however, legitimate for a Member State to grant such an allowance only after it has been possible to establish a real link between the job-seeker and the labour market of that State, whereas nationals of the Member State seeking employment in another Member State who have established such links can rely on Article 39 (2) EC.

The coordination regulations and article 18 EC

Main issues

With respect to its jurisdiction on Union citizenship the ECJ has been accused by critics in Germany of policy-making by creating some sort of trans-national welfare area where Union citizens have to assume responsibility based on solidarity for non-national Union citizens residing or staying legally in the national territory.

Besides, there is criticism of the effect of this jurisdiction which has challenged the applicability and the material scope of EC secondary legislation. For one of the effects of the introduction of Union citizenship is to sever the link between economic activity and entitlement to social rights under EC law, in particular the provisions of the EC Treaty on free movement of workers. This is particularly important in relation to social welfare benefits, for instance maintenance grants, which were previously reserved for economically active migrants and their dependants whereas nowadays persons can be legally entitled to receive such benefits even when they did not and do not engage in work. The Directives (EEC) 90/364, 90/365 and 93/96 on the right of residence reserved this right to persons who were economically independent and would therefore not qualify for means-tested benefits, in particular social assistance benefits, and who had health insurance in their home country. These legal instruments made clear that economically independent migrants should not become an unreasonable burden on the system of social protection of the host State. The ECJ’s jurisdiction with respect to the “social dimension” of Union citizenship abolished, to a certain degree, those limitations.
IMPLEMENTATION OF THE GENERAL PROVISIONS

Applicable legislation

Working simultaneously in two or more Member States

Either as an employed or as a self-employed person

Researchers:
The researcher, who is moving to a Greek university (usually because of the European programme Marie Curie) for a few months research up to 2-3 years, could be characterized as an employee, while the university could be characterized as the employer. However, his or her affiliation with the social security of IKA-TEAM presupposes participation in competitive examination and is extremely problematic, if not impossible. Moreover, the fulfilment of the preconditions of the system above can lead to the hiring of another candidate. The solution to this problem is, in this respect, the affiliation of the researcher to the OAEE (old TEVE), as s/he has the status of self-employed person. Thus, what it constitutes a “solution” for the flexibility of the hiring (sector of employment) turns out to become a “problem” in the framework of the Community coordination.

Artists:
The movement of artists within the European Union is considered to be problematic, since their special social security status in the framework of the legislation of IKA-TEAM gives to the certain professional category the attribute of the working employee, despite the fact that, according to the spirit of the Greek legislator, their activity is similar to the status of the self-employed persons.

Common problems appear concerning the exceptional short-term employment e.g. of musicians (even smaller than one week intervals), provided that under the legislation of the other Member States they are considered as self-employed persons, because of the contract of work that was agreed there. Therefore Article 17 of Regulation 1408/71 is applied. Noteworthy, because such an agreement of exception is completed several months after the return of the musicians back to Greece, the employers of the host Member States often oblige the musicians to be insured and pay contributions as well, with the convenience of their return after the reception of the Community form E 101 by the competent social security institution, so as to be excluded from the obligation of affiliation with the legislation of the host countries.

However, with the application of Regulation 883/2004, such a problem would automatically be resolved. Of course, this category of workers (musician, artists) will continue to have a more general problem of work and insurance in IKA-TEAM, because of the frequent employment contracts with various employers and their short spells of work in the intermediate time periods of these conventions in other Member States. This situation leads to the affiliation with the legislation for only a few days, according to the general rule of lex loci laboris (Article 13, paragraph 3, element a), of the new Regulation 883/2004.

As an employed and as a self-employed person

In the case of journalists, who are distinguished by the intense mobility in more Member States of the EU (but at the same time to third countries as well), on behalf of the particular employer, and who regularly return back to Greece for instructions by their employer (syntax-publication-projection of articles, reportage etc), the interpretation (acceptance of the Greek scope and application) from the relevant social security institutions of other Member States of Article 14, paragraph 2, element b), section i), of Regulation 1408/71, is almost always problematic about the parallel exercise of salaried activity in two or more Member States with exercise of part of their activity in the territory of the Member State, in which they reside.

The other States’ social security pension funds always claim that, in those cases, no part of the activity takes place in our country, provided that the contract between the employer and the
journalist regulates the work of the last one on behalf of the first in one or more particular Member States. Therefore, either the general rule of lex loci laboris of Article 13, paragraph 2, element a) of the Regulation 1408/71, as for the territory of their own State, without any further activity in a third Member State, either the above mentioned Article 14 (2)(b)(i) should apply in such case. However, insurance should take place in their own legislation, provided that, according to their opinion, the journalists reside within the territory of their own country, practising there a part of their activity and, at the same time, practising activity in one or more third countries.

This issue is forecast to be a big issue with the application of the new Regulation 883/2004, provided that the equivalent Article 14 (2) (b)(i) new Article 13, paragraph 1, element a), fixes as a precondition for the determination of the Greek Legislation as applicable not just the exercise of simply a “part of” the activity but the “essential part of” this in Greece. This fact will be very difficult to prove in each individual case and, because of the reciprocal checks required between the Member States, will create time-consuming procedures, to arrive at a final determination of the applicable legislation.

In the construction field and specifically in the manufacturing sector (e.g. sector of packing foods) and in the sector of cleaning of boats (cleaning boats, especially their holds with sandblast and afterwards painting), those initially insured in IKA-ETAM face serious problems regarding the application of the general rule lex loci laboris of Article 13, paragraph 2, element b), according to the Decision no. 181 of the Administrative Committee, which integrated the interpretation of ECJ, concerning Article 14, paragraph 1, element a), of Regulation 1408/71, in the decision Fitzwilliam (C-202/97, 10.02.00). According to this specific decision, they are forced into exceptionally short successive periods of insurance in several Member States for periods of work up to one month in each, while the employer, residing in Greece, cannot complete their activities in Greece.

**Application of Article 17**

Many problems arise in certain, exceptional cases, where some Member States’ competent authorities assign the discretionary power for Article 17 agreements to decentralized “designated bodies” (local administration in Scandinavian countries and recently Italy). Taking into account problems (sometimes serious ones) already encountered in everyday practice, the question is inevitably raised of whether such a “national discretionary power” (uniquely provided by the Community legislator) could be exercised by any or every local institution designated by a Member State’s competent authority. The Greek competent authority continues to experience great difficulties with the implementation of Article 17, as a derogation from Article 14c (b) (for the exemption of self-employed persons from Greek legislation) in its relations with Scandinavian countries. The designated bodies of those Member States do not deem application of Article 17 in such cases being in conformity with the Greek entry under Annex VII, point 6. In principle, they consider that entry, thus double affiliation, as binding and always applicable. In many cases, where the Greek competent authority has intervened in writing, explaining that proposal for such an agreement is fully acceptable, in so far as it is in the interest of the person concerned, those designated bodies responded that derogation form Article 14c(b) is a case that should be solved by Greece unilaterally. Derogation from Article 14c(b) by virtue of Article 17 is also in conformity with the ECJ's case-law whenever double affiliation becomes a disproportionate burden for persons either not exercising a substantial or any activity in Greece but are falling under Greek legislation in their capacity as self-employed persons (social security criterion).

**IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS**

**Sickness benefits**

**BENEFITS IN KIND**

**Reimbursement of benefits**

When it comes to reimbursement of benefits between Greece and other Member States, the insured person has to submit all receipts of payment of treatment costs. Whenever E forms have not been obtained, the cost of treatment is significantly lower than the actual cost, even when the treatment
abroad was necessary. A constantly increasing number of complaints shows that there are several problems related to health benefits in kind, mainly concerning the application of the relevant provisions of Regulation 1408/1971. The problems occur when benefits in kind are granted to a person affiliated to a Greek health insurance scheme, who resides temporarily in another Member State. There are difficulties related to the correct procedure that must be followed and to applicable legislation. This confusion often results in an inevitable raising of the administrative costs and is detrimental to the interests of the insured people and other beneficiaries.

**BENEFITS IN CASH**

**Export of benefits**

An issue that has to be further discussed at Community level is coordination under Chapter 1 (Title III) of the Regulation of benefits for disabled persons mainly, which have been excluded from Annex Ila (Regulation 647/04). From now on, those benefits are considered as sickness benefits in cash and are exportable. Greece is particularly concerned about the practical problems that have to be solved since “exportation” of such allowances implies internal coordination between three competent authorities (Ministry of Employment and Social Protection, Ministry of Health and Solidarity, Ministry Finance and the Ministry of Interior and Public Administration), all competent institutions, concerned at a time and the municipalities (in Greece, these allowances are paid by the local authorities of the place of residence of the insured).

**Invalidity**

**Assimilation of facts**

A particular problem regarding the assimilation of facts occurs in cases where an individual right to an invalidity pension is established according to Greek legislation on the basis of insurance periods, before a person has moved to another Member State and is subject to another national legislation. In fact, the principle of assimilation of facts is not applied in such cases. Consequently, there is an infringement of the right of free movement. The rights of the beneficiaries are restricted in cases where an active insurance link with the Greek insurance scheme is required according to Greek legislation for entitlement to an autonomous invalidity pension. As a result of the wrong interpretation and implementation of Article 45(5), in all the cases where a person is affiliated to a social insurance scheme of another Member State at the time of materialisation of the risk, Greek insurance institutions apply the principle of proratisation, even in cases where the conditions requires for entitlement to pension according to the Greek legislation have been satisfied.

**Old-age and death**

**Aggregation of periods**

Smooth implementation of the aggregation principle is not guaranteed by all Greek competent institutions concerned pensioners who subsequently carry out an economic activity. Under Law 2084/1992, Article 47 provides for the “extension” of minimum qualifying periods in force under each scheme’s legislation for establishing entitlement to a (second) pension under another Greek scheme. According to the interpretative approach followed by the Greek competent authority and the Greek liaison body (IKA-ETAM), such a provision (grammatical and teleological interpretation) should not apply in “Community” cases, in other words, to beneficiaries of a pension (-s) under the legislation of another Member State. Otherwise, the general principle on aggregation, directly deriving from the Treaty, is not being respected (derogation also from the principle of proportionality) or, otherwise stated, that the Greek rule constitutes an indirect anti-overlapping provision, which is not in conformity with the general and special anti-overlapping rules by virtue of Articles 46a, 46b and 46c. Since periods of insurance having been completed under the legislation of each Member State should be taken into account as if they had been completed under the legislation of each competent institution involved, and, since national rules on reduction, suspension or withdrawal do not apply in the case of benefits of the same kind awarded under Chapter 3 of the Regulation, then the above-mentioned provision of Greek legislation is annulled (should produce any legal effects) in respect of situations falling under the scope of Community coordination. However, it is still proving hard for certain Greek institutions understand that interpretation, mainly to treat that provision as an indirect anti-overlapping rule or an infringement to the coordination mechanism. So,
reference is being made by the Greek competent authority to Article 46c(5) provisions, as an a contrario interpretation, where it is for the first time explicitly stated that, national legislation providing that the right to a benefit cannot be acquired in the case where the person concerned is in receipt of a benefit (of different kind), should be treated as a national anti-overlapping rule and, thus, be implemented under the conditions established by the respective overriding Community rules.

Unemployment benefits

Aggregation of periods

Implementation in practice of the special rule on totalisation of periods of insurance by virtue of Article 67 provisions is based on forms E 301, communicated to the competent institution of the Member State concerned. Under Greek legislation, entitlement to unemployment benefits is acquired where the person concerned has accomplished periods of insurance (under the said branch, i.e. has paid contributions for a given number of days of employment). For the completion of the periods of insurance required each time for the amount of unemployment benefit claimed, the Greek competent institution (OAED) takes into account periods of employment completed in another Member State, provided that the latter would have been defined as insurance periods under its own legislation. Since, on the other hand, no minimum waiting period is provided under the legislation administered by OAED, the accomplishment of even one day of employment, liable to insurance under the legislation of that scheme, immediately after the person moves to Greece, activate in practice the Community provisions on the totalisation of periods. The completion by virtue of totalisation of the qualifying periods required by Greek legislation on the basis of virtually one day of employment is often the case especially in the summer period during which Greece attracts many tourists and unemployed, the great majority of unemployed moving within the Community, who easily satisfy the conditions for entitlement to unemployment benefits. That phenomenon has a serious financial impact on the scheme; obviously, all unemployment contributions have been paid by the persons concerned to the corresponding insurance schemes of the Member States of origin – last employment, while for one day of contribution under the Greek scheme, the person has a right to benefits even for a period of 12 months, without any mechanism of distribution – sharing of costs between institutions involved being provided under the Regulation.
IMPLEMENTATION OF THE GENERAL PROVISIONS

Scope of the coordination Regulations

Personal scope

Introduction

In the field of family support scheme, those rare cases when the same person is in an legal employment relationship (employed) in one Member State and is self-employed in the territory of another Member State, the Member State in the territory of which the employment relationship exists shall be the competent State.

In order to apply the coordination rules, a closer cooperation is necessary between the authorities of the Member States with respect to the termination or modification of periods of insurance.

Several Hungarian citizens established companies registered in Slovakia. In the majority of the cases the families’ place of residence in Hungary did not change, and if the wife does not engage in gainful activities in Hungary, the competent Slovakian authority will be responsible for awarding and paying family support on the basis of the father’s self-employment in Slovakia. Pursuant to the Coordination Regulations no Hungarian benefit is awarded, which causes problems for the clients in many cases.

Employed and Self-employed persons

According to Hungarian legislation, company members are also deemed to be self-employed, even if the company treats them as if they were employees. A further problem is the status of the persons employed with a civil contract (assignment) under circumstances similar to employment.

In 2009 a new and special form of self-employed activity has been introduced into legislation: the single member company, which is to be considered as self-employment in the application of the Regulation.

There is also a growing tendency that workers, instead of through traditional employment relationships, are now performing work under various -and often, but not always precarious—contractual arrangements covered by civil law. This phenomenon is notable, since these new contractual arrangements covered by civil law may create a new dividing line between labour law and social security law. Workers performing work under civil contracts will no longer be protected by the rules of labour law, and their status in social security schemes will become largely independent of their working relationship. Although in cases of standard employment relationships labour law and social security law are organically interconnected (especially in “Bismarckian” countries like Hungary), in cases of para-subordinate contractual arrangements these two branches of law are distinct separated.

Family members and survivors

European Union regulations can be considered very lax in those cases when the family support is awarded to parents who are divorced or in the process of getting divorced. The practice followed in different Member States is not uniform in this respect, certain Member States also award support to the parent who contributes to bringing up the child financially (even if only in kind) but does not actually raise the child, and it is frequently uncertain whether this support reaches the other parent or the child. In this case, however, the single parent cannot simultaneously receive full support from another Member State for the same child. In other Member States the condition of eligibility for family support is to raise the child in one’s own household. It can be stated that the practice in different Member States is not in harmony in this field.
Material scope

Introduction

The Hungarian regulations pertaining to nursing fee (this is type of long-term care benefit, which is provided under the social assistance act) are usually not the same as similar benefits in other Member States insofar as in Hungary the benefit is paid to the person who is doing the nursing while in other Member States to the person being nursed, which can be a source of problems.

Benefits concerning on “new risks”

The Hungarian regulations pertaining to nursing fee are usually not the same as similar benefits in other Member States insofar as in Hungary the benefit is paid to the person who is doing the nursing while in other Member States it is paid to the person being nursed, which can be a source of problems.

General Principles

Equality of treatment

Health: There are still some slight problems concerning the payment of short term sickness and maternity benefits that are provided because of the birth or the sickness of a child living in another Member State. However, these problems are more of a technical rather than legal nature. There is no proper procedure (or form) foreseen by the Administrative Commission for this purpose.

When a pensioner moves to another country the problem arises how he or she can claim the benefits that are due to the pensioners living in the country of residence. Several proposals have been made to introduce an international pensioner certificate similar to the European Health Insurance Card, which would be accepted in other countries for certifying the pensioner’s status.

In the field of family support: According to the information we have received (predominantly from clients) the authorities of certain Member States require the client to have a registered place of residence in the given Member State in order to award family supports (családi ellátások), or they award supports of a smaller sum for the nationals of other Member States. In practice the current regulations on family support are interpreted differently by Member States (with special respect to awarding the main support, to the payment of supplements or to the case of single parents raising a child); the new Regulation (EC) 883/2004 is expected to solve these problems and to create greater harmony.

Aggregation of periods

The Hungarian health insurance institutions may take only those insurance periods into consideration that, give right to short-term cash benefits. Foreign institutions often don’t answer the quires in that sense and communicate all periods during which the person has been covered only for health care.

With the legislative amendment of 1st July 2009 the payment of flat-rate contributions in order to be entitled to health care is only possible for those who have been continuously resident in Hungary for one year before this entitlement (Para 3 of Art. 39 of the Act on Social Security Nr. LXXX of 1997). According to Art. 18 of Regulation EEC 1408/71 residence in another Member State should also be taken into account for this ‘waiting time’. However, there is a huge divergence in the views of respective authorities on the how to proceed.

In the field of pension insurance there is a problem relating to the interpretation and consideration of Romanian “bonus” periods of service.

In Hungary the job seeker’s benefits are connected to periods of employment, while in other Member States the extent and period of benefits are usually linked with periods of insurance. It is a problem when the Member States do not certify periods of employment because they do not qualify as periods of insurance there, while in Hungary they can serve as the basis for benefits. The unemployment benefit for the self-employed and entrepreneurs may also cause problems as not every Member State pays unemployment benefit for self-employed persons for the period of their
unemployment, thus they cannot certify periods of insurance, or they do not accept periods of insurance acquired in Hungary because in the given Member State these are not taken as the bases of benefits.

In the case of family support scheme, it is not necessary to examine the periods of insurance for awarding the family support paid by the Hungarian State Treasury (this is a universal type of scheme), but the data on periods of insurance received form health insurance bodies are forwarded to other Member States.

In the case of seasonal employment the periods of employment in different Member States cannot be monitored by administration in an up-to-date manner, which results in the subsequent determination of jurisdiction. The problem could be solved efficiently by concluding a separate agreement with individual Member States, but it would be better to introduce uniform regulation at Community level.

Export of benefits

The question of the bank charges still persist and it will even increase by entering the SEPA (Single Euro Payment Area), however, all cash benefits are paid in Hungarian national currency as if the person resided in Hungary (therefore all remaining costs are to be borne by the insured).

Applicable legislation

Working simultaneously two or more Member States

It is undefined which activities may be deemed as “simultaneous” and to what extent employers and employees suppose that a simple labour contract (without effective work) would be sufficient to constitute a simultaneous activity.

In case of family support scheme this question can be examined from two aspects: if the same person is in a legal employment relationship in one Member State and is self-employed in the territory of another Member State, the Member State in the territory of which the employment relationship exists shall be the competent State.

In the case when one family member is an employee in the territory of one Member State and the other family member is self-employed/employee in the territory of another Member State, the place of residence of the family members determines which Member State shall be the competent State.

The application of the above rules is not uniform, closer cooperation is needed between the authorities of the Member States (with special respect to more efficient and more precise information exchange) in order to implement them.

A further problem involved in determining jurisdiction is the change of the place of residence in the case of family members having employment relationships in two Member States, which can occasionally lead to the delayed payment of family supports. The newly formulated and not yet effective Regulation (EC) No 883/2004 tries to solve this problem.

Application of Article 17

Health: The procedure with some Member States is extremely slow, that induces a legal uncertainty among employers. An accelerated procedure should be put in place.

A good example of the accelerated procedure of ‘best practice’ value is the arrangement made with Switzerland, on the basis of which in certain cases the agreement on exception may take effect also without formal answer from the other Member State’s institution. Although Art. 17-agreements might serve for legalising retroactively unlawful situations, e.g. declarations in the wrong country; it is particularly difficult in the present state Hungarian legal environment to force employers based abroad to make the necessary declarations and to pay contributions.
IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS

Sickness benefits

BENEFITS IN KIND

Planned health care abroad

Determination of the extent and nature of necessary treatment (e.g. dental plaque removal); distinguishing necessary, urgent and scheduled treatments. Treatment during pregnancy and childbirth, as well as dialysis and oxygen therapy are often not regarded as necessary treatment.

Equality of treatment

Hungarian health care providers are bound to check on line the eligibility of persons seeking health care. Foreign (also EEC) nationals are treated in a slightly different way in the register of entitled persons. However, it is to be noted that this different treatment does not have an impact on the rights of the insured.

The implementation of a waiting time (introduced as of 1st July 2009) for residence-based health care entitlement on the basis of flat-rate contribution still remains uncertain in practice. However, the social security institutions’ view is to apply Art. 18 of Regulation EEC 1408/71 and, consequently, to take into account former residence in another Member State.

Additional remarks

The most important problem is that the medical examinations to be made in another Member State are ordered by the Hungarian pension institution but the subsequent fees are to be paid by health insurance. The reason of this split of competence is the fact that the disability pension expenditure used to be integrated into the health insurance budget. As this position was removed from health insurance, there is no reason any more for the health insurance to bear the costs of those examinations.

BENEFITS IN CASH

Most of the problems related to cash benefits concerned the distinction between sickness and family benefits and, as a consequence, the anti-cumulation rules of Art. 76 of Regulation EEC 1408/71. The child raising allowance is due until the child is 2 years old, and this benefit is paid by the health insurance. However, in line with the definitions of the regulation, it is deemed to be rather a family benefit than a sickness benefit. Yet, the child raising allowance founds an insurance relationship and it is not clear whether this insurance is still valid if the payment of the allowance is suspended because of a similar benefit of higher amount in another Member State.

Invalidity

The reform in the Hungarian disability benefit schemes could cause problem for coordination. The new system will be a quite complicated and mixed system. It consists of two sub-systems: a rehabilitation allowance and a disability pension.

National rules against overlapping

A problem ensuing from the different systems of invalidity in Member States is that in certain Member States the extent of the loss of working capacity while in others the extent of the remaining working capacity is expressed as a percentage. This makes the qualification of the degree of invalidity difficult in some cases.
Member States’ cooperation

New Hungarian legislation pertaining to benefits based on health injuries prescribes that the claimant shall participate in rehabilitation processes if working capacity can be restored. This applies to persons living abroad, too. The competent Hungarian and foreign institutions find it difficult to coordinate the execution, certification and checking thereof.

When the legal conditions of benefits based on health injury are examined, it is problematic to assess the earnings obtainable while receiving the benefit due to the different wage level in the countries. This is especially true for cases when the beneficiary moves to another Member State and, compared to the circumstances there, his/her earnings received for carrying out work with reduced earnings exceed the sum permitted for the continued payment of the benefit, as calculated in the currency of the other Member State.

It still happens frequently that the pension administrations of Member States send the medical expert opinion of their own institution or the personal medical documentation submitted by the client instead of form E 213. This often slows down the administration of the case and increases the costs of translation considerably.

Old-age and death

There is great uncertainty among the employees of EU and other international organisations (for example, UNO, NATO) whether their contributions are paid to the special system or to the insurance system of the state of work, or to what benefits they become entitled based on the contributions paid if they spend only a few years in the special system.

Survivor’s benefits

It is difficult to obtain the certificate of school attendance necessary for awarding orphan’s allowance. It is frequently not clear from the certificates sent by other Member States whether the orphan is a full-time student in spite of specifically requesting this piece of information as this is a condition of eligibility.

Family benefits

Regulation 1408/71 does not contain an itemized list of Hungarian family supports. Pursuant to the Regulation, to the Hungarian legislation, to the guideline of the ministry and to practice, family allowance (családi póté), child home care allowance (gyermekgondozási segély), child-raising support (gyermeknevelési támogatás) and child care fee (gyermekgondozási díj) belong to this category; while the birth grant (anyasági támogatás) does not belong to the group of family supports.

A problem has been identified in connection with the birth grant: a Hungarian father and a Ukrainian mother – who first had a residence permit, then from May 2007 a settlement permit in Hungary – could not receive a birth grant for their children born in 2005. Pursuant to the Hungarian regulations in effect at the time of submitting the claim, the mother did not fall within the personal scope of Act LXXXIV of 1998 on Family Support, and the father can become entitled to a birth grant only in the case of the mother’s death. According to the judgment of the European Court of Human Rights, the Hungarian regulations discriminated against the father and the children unjustifiably. Since then the legal framework has been changed by the extension of the scope of the Act on Family Support, which means that such families are also given entitlement, so the principle of equal treatment is not violated in this regard.

Aggregation of periods

There is no uniform practice (and regulation) as to the consideration of individual supports. Some Member States proceed (would proceed) by corresponding different family supports to each other according to type (and per child) both in the case of awarding the full support and the supplement. Other Member States hold the view that family supports payable to the family should be considered in their entirety. Hungary supports the latter view and the procedures are taken accordingly.
IRELAND

IMPLEMENTATION OF THE GENERAL PROVISIONS

Scope of the co-ordination Regulations

Material scope

Social security benefits, special non-contributory benefits and social assistance

The classification of the Irish benefits under the Regulation results in some similar benefits being classified differently, e.g. carer’s allowance (excluded) v. carer’s benefit (sickness), IDMA (sickness) v. DA (special). In the light of the judgements of the ECJ, there is a question as to whether the remaining Annex IIa benefits and the carer’s allowance are, in fact, social security as they are arguably paid on the basis of a legally defined position and cover one of the enumerated risks (Hosse). However, other judgements of the Court would suggest that ‘minimum income’ payments such as disability allowance and blind pension are SNCBs (e.g. Kersbergen). If this is the case, then IDMA is wrongly classified as a sickness benefit. Given the Court’s consistently inconsistent rulings in this area, it is rather difficult to come to conclusions on the issue. However, it is very difficult to identify a rationale for excluding carer’s allowance completely as it is either a sickness benefit (Commission v Council) or a SNCB.

General Principles

Equality of treatment

The most important issue that arises in relation to equality of treatment is the Habitual Residence Test.

Section 30 of the Social Welfare and Pensions Act 2007 directs that, apart from the presumption, the persons responsible for determining whether a person is habitually resident within the State shall take into account

‘all the circumstances of the case, including, in particular, the following:

(a) the length and continuity of residence in the State or in any other particular country;
(b) the length and purpose of any absence from the State;
(c) the nature and pattern of the person’s employment;
(d) the person’s main centre of interest, and
(e) the future intentions of the person concerned as they appear from all the circumstances.’

Despite this, ongoing inconsistencies in relation to the application of the HRC still exist. Indeed the recently published Social Welfare Appeals Office Annual Report 2008 (p. 16) reports an appeal case in which a foreign national (nationality not specified) who had been living and (intermittently) working in Ireland over a five year period with occasional visits to his ‘home’ country was found NOT to be habitually resident on the basis that he supported his wife and children in his ‘home’ country and visited them from time to time and therefore had not transferred his ‘centre of interest’ to Ireland. This is an interpretation of habitual residence which it would be difficult (if not impossible) to reconcile with the approach of the ECJ and indicates the very subjective nature of decisions in this area.

A new issue has arisen in the Guidelines recently adopted by DSFA in relation to the HRC (last updated 19 June 2009). These generally involve only a description of the legislation. However, one new section now states that residence for the purpose of this HRC factor implies a legal right to reside, not mere presence only. A non-EEA national must have permission to be present in the State in order to reside legally in Ireland.
The guidelines indicate that it is necessary for a person to have a right to reside in Ireland in order to be habitually resident. Assuming for the purposes of argument that this was correct, this would make the HRC a much more onerous condition than the HRC without this requirement. All Irish persons have a right to reside in Ireland whereas the majority of non-Irish people do not have such a right. Therefore it may be significantly more difficult to justify such a requirement under EU law given its more disproportionate impact (compared to the HRC simpliciter). The rationale for the right to reside requirement would appear to be broadly similar to that for the HRC simpliciter, i.e. to prevent benefit tourism, and to ensure a co-ordinated approach to immigration across Government departments and agencies. While such objectives are clearly legitimate, the main question would be whether the right to reside requirement is proportionate to those legitimate aims.

However, the guidelines involve a reading of the legislation unlikely to be upheld by the courts. No such ‘right to reside’ requirement is stated in the legislation itself and it is clearly the case that, in ordinary language, a person may be ‘resident’ in a country without necessarily having a legal right to reside there.

A related issue concerns increases for qualified adults (IQAs). The primary legislation concerning increases for qualified adults (IQAs) does not refer to residence (except as regards ‘absence from the state’). However, the recently revised IQA guidelines now contain a number of provisions concerning the entitlements of non-EU spouses and partners. In particular the guidelines state that entitlement to payment of an increase for a qualified adult in respect of a non-EU spouse of an Irish national is dependent on the qualified adult having a legal right to reside in the state. This appears to parallel the (also recently introduced) provisions concerning a ‘right to reside’ in the HRC guidelines (discussed above). In that case the ‘right to reside’ provision may not have a legal basis in the habitual residence requirement. In the case of the IQA guidelines the position is clearer as there is no legal basis whatsoever for the ‘right to reside’ provision in primary or secondary legislation.

Applicable legislation

Working in one Member State only

Administrative formalities and co-operation

Most of the issues that arise here will hopefully be addressed by Electronic data exchange. The posting certificates (E101), while not transferable, are often not cancelled (not returned to the Department) and given that there is no expiry date, problems of abuse can arise. Time limits are also difficult to adhere to. Some countries are not open to considering homeworkers to be working in places where they are resident if the employing organisation is outside jurisdiction.

IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS

Sickness benefits

BENEFITS IN KIND

A further issue concerns Czech persons working in Ireland but returning regularly (once a month) to their family in the Czech Republic. It is suggested that such workers may still be resident in the Czech Republic and that they should be able to have an E106 issued by the HSE (as Ireland is the competent state). However, it is stated that the HSE did not often issue an E106 in such cases. It appears that the HSE asks all applicants from other EEA countries or from Switzerland to prove to its satisfaction that they are ordinarily resident in their home country and that they visit it at least once a week. To do so it asks them to produce receipts or evidence of weekly travel over a period of six months. While people may travel back to the UK on a weekly and sometimes on a daily basis, it appears that there are very few cases further afield in which the HSE accepts that residence still exists. It is not clear that the requirement to show a weekly visit to the home country is consistent with the Regulation. However, if a person from the Czech Republic was able to prove weekly trips back home as mentioned above, the HSE would issue the E106. This is another example of the problems dealing with the interpretation of the concept of residence.
ITALY

IMPLEMENTATION OF THE GENERAL PROVISIONS

Scope of the coordination Regulations

Case law on matters of European coordination of national social security schemes under Regulation 1408/71 is not abundant in Italy, but its analysis seems to confirm the conclusions that have been reached in a broad context of investigation. This analysis confirms that the Supreme Court of Cassation has also been quite reluctant to engage in direct “dialogues” with the European Court of Justice (ECJ) when it comes to the crucial area of European social law. Also, the mechanism of reference for a preliminary ruling under article 234 of the Treaty seems to be an almost exclusive prerogative of lower courts in this field. While lower courts seem to be quite active to this effect, the Supreme Court of Cassation tends to maintain a firm control over the consistent application of EU coordination principles with just a few decisions on matters pertaining to Regulation no. 1408/71.

In addition, EU law – and the channel of direct dialogue provided by article 234 ECT in particular – is not applied consistently in the case law of courts of first and second instance. This results in a landscape with no clear-cut boundaries and in a tendency to apply Regulation 1408/71 in a way that is sometimes inconsistent, if not contradictory.

General Principles

Equality of treatment

When it comes to how EU coordination rules might affect national law, one of the most delicate and controversial areas is that of non-EU nationals (legally resident in the country) being “equally” entitled to the social security benefits – and welfare benefits in particular – that are provided by the Italian legal system. National courts had difficulties in looking at the EC principle of equal treatment in relation to national law.

Aggregation of periods

With reference to Case C-55/00, Gottardo v. INPS, the Tribunale di Roma referred a question to the ECI for a preliminary ruling, on whether the competent social security authorities of one Member State (in casu the Italian Republic) are required, pursuant to their obligations under Articles 12 and 39 ECT, to take into account, for the purpose of entitlement to old-age benefits, periods of contribution completed in a non-member country (in casu Switzerland) by a national of a second Member State (in casu France) in circumstances where, under identical conditions of contribution, those competent authorities will take into account such periods where they have been completed by their nationals of the first Member State (the so-called “multiple aggregation”) pursuant to a bilateral international convention concluded between that first Member State and the non-member country?

Luxembourg’s judges reversed a previously established interpretation trend and affirmed the principle whereby the social security authorities of a Member State are actually required, under Article 39 ECT, to take account, for purposes of the acquisition of rights to old-age benefits, of contribution periods completed in a non-member country by a national of a second Member State in circumstances where, under identical conditions of contribution, those authorities will take such periods into account where they have been completed by nationals of the first Member State, pursuant to a bilateral convention concluded between the first Member State and the non-member country. Without prejudice to the possibility of invoking objective justifications against it, the refusal to proceed to such a “multiple aggregation” in favour of nationals of a Member State not party to the bilateral international convention would violate the fundamental principle of equal treatment laid down in Article 39 of the Treaty. It is in fact self-evident that the notion of “legislation” contained in Article 1(j), of Regulation 1408/71 could not produce an effect that is contrary to this fundamental principle by denying the entitlement to a “social advantage” that would be reserved to nationals of the first Member State in the same contributory position.
Starting from the premise that “the totalisation principle has found application in our legal system only in the cases for which it is expressly provided for, in terms that are not always homogeneous”, and that, therefore, it is “not a general principle of our legal system” but represents “on the contrary, the exception”, the Supreme Court of Cassation concluded that, in this case, “the periods of insurance completed in non-Community countries cannot be aggregated - for the purposes of aggregation as provided for and regulated by the Community legal system - although they can be aggregated with other periods of insurance completed in Italy (or in any other Member State of the European Union) pursuant to an international convention, ratified and made enforceable”. To that effect, a decisive aspect in the grounds for the judgement was the adoption of a concept of applicable legislation referred to in Article 1(i), of Regulation 1408/71 that was patently in contrast with the notion that had meanwhile been adopted by the ECJ in Gottardo.

More than one issue therefore remains with regards to the correct compliance of the national case law (and indeed of INPS's administrative practice that, for instance, generally confines the effects of multiple aggregation to the pension sector only) with the legal principle established by the ECJ in Gottardo. This principle does not yet appear to have fully established itself and settled into the national application practice. An important example of the persistent difficulties and uncertainties in the correct interpretation of the Gottardo principle is most recently illustrated by the application of the cooperation agreement with San Marino concerning, in particular, issues relating to equal treatment and multiple totalisation. The Commission is indeed likely to start an infringement procedure on these grounds against Italy pursuant to Articles 12, 17 and 39 EC Treaty.

Another point is the calculation of the theoretical pension amount pursuant to Article 46 (2) (a) of Regulation 1408/71. Notwithstanding the clear vision by the ECJ (Stinco e Panfila) requiring the competent institution in determining the theoretical amount on which the calculation of the pro rata pension is based, to take into account a supplement intended to bring the pension to the level of the statutory minimum laid down in national legislation. In the recent Circular No. 10/2006 the INPS has re-introduced an argument that should be considered totally inadmissible in the light of ECJ case law, that is to say that the inclusion of the integrazione al minimo among the list of non-exportable non contributory benefits makes it irrelevant to determine the theoretical amount of the pension according to Article 46 of Regulation 1408/71. According to this Circular, Regulation No. 647/05 would indeed “confirm that the amount of the integrazione al minimo is not to be calculated in the theoretical amount of the pension”. Which is exactly the argument – and indeed the INPS’s main argument – that has been consistently and repeatedly rejected by the ECJ in its case law on this subject.
LATVIA

IMPLEMENTATION OF THE GENERAL PROVISIONS

Scope of the coordination Regulations

Material scope

Benefits concerning ‘new risks’

A new benefit for a disabled person in need of care can be considered as addressing a new social risk, which is not explicitly listed under branches of social security in Article 4 (1) (a)-(h). The benefit is granted to a person who according to the acknowledgement of the Health and Physicians-Experts Health and Capacity for Work Assessment Commission has the need for special care.

General Principles

Aggregation of periods

There are no general problems with regard to the application of the principle of aggregation. As a rule, the relevant periods completed in another Member State are aggregated to the relevant qualification periods within the Latvian system.

The main problems are related with the determination of the periods of employment gained in the former Soviet Union. In order to solve these problems bilateral agreements with Estonia and Lithuania will be concluded.

Applicable legislation

Working in one Member State only

Other issues

The main problem concerns companies that are established with an aim to send workers to work abroad. The State Social Insurance Agency checks whether the conditions set out in Decision No 181 of 13 December 2000 of the Administrative Commission are satisfied and decides if a form E101 can be issued. The officials of the State Social Insurance Agency consider that the conditions provided in the Decision are too general and that detailed national provisions are necessary in order to properly award form E 101.

IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS

Sickness benefits

BENEFITS IN KIND

Persons staying outside the competent State

Concept of occasional health care:
The definition of emergency medical assistance is provided in the Law on Medical Treatment. It is defined as assistance to victims (persons who have been taken ill) in a critical state of danger to life or health, provided by persons specially prepared (trained, equipped) for such cases with relevant qualifications in medicine who in accordance with such qualifications have a legal liability for their actions or omissions and the consequences of such actions or omissions.

The Health Compulsory Insurance State Agency issues a European Health Insurance Card to any person entitled to health care services financed by the state in Latvia. In practice, there have been a
number of cases, when medical service providers in other EU Member States (in particular in Germany and Spain) have not recognised the European health insurance card issued in Latvia.

Reimbursement of benefits

The main problem regarding reimbursement of benefits is the level of the costs for health care which are considerably higher in other Member States than in Latvia. In 2008, the Health Compulsory Insurance State Agency has received claims for the reimbursement for health care services provided to Latvian nationals in the amount of Ls 1 943 717,30.

Planned health care abroad

In order to be entitled to planned health care abroad a person must obtain E 112 form. The Regulations of the Cabinet of Ministers on the Procedure for Organization and Financing Medical Care provides detailed rules for obtaining E 112 form. It may be issued only for those services which are financed from the state budget if the particular service cannot be provided by service providers in Latvia as demonstrated by the justified refusal of the health care institution and this service is necessary for the patient in order to preclude irreversible deterioration of the state of health and probable course of disease.

Additional remarks

The important problem that Latvia has faced during the first years of application of Regulation 1408/71 was that large number of Latvians who are working abroad, but continue to use state financed health care services in Latvia. The main reason is a weak control mechanism of Latvian nationals who actually do not reside in Latvia.

The other important problem that the Latvian health care system currently faces is the significant reduction of finances to health care services. As a result the scope of health care services covered by the state budget has been diminished.

Invalidity

Member States’ cooperation

The State Social Insurance Agency cooperates actively with corresponding institutions of other Member States. There have been several cases when some Member States refused to provide form E 213, instead providing a pile of medical certificates and references.

Unemployment benefits

The main problem that Latvia has faced during the first years of application of Regulation 1408/71 was that large number of Latvians who after returning from the work abroad claimed unemployment benefits in Latvia according to Article 71 point 1 (b) (ii) of the Regulation. It seems that many people working abroad do not know about their rights to be covered by social insurance and to claim social insurance benefits in the country where they were working. The State Social Insurance Agency issued a leaflet on unemployment benefits in order to increase the awareness of people working abroad about their rights to social benefits.

Family benefits

The Latvian family benefits system is based on the principle of residence. However, many persons who have left Latvia and are working in other Member State have not informed the authorities about it. As a result there are a group of people who continue to receive family benefits although they are not entitled to them. One of the reasons for this situation is a lack of knowledge. In order to overcome this problem the Ministry of Welfare has disposed the relevant information about the rights of Latvian citizens to receive family benefits while staying abroad on the internet site of the Latvian Embassy in Ireland. The Ministry of Welfare has also invited the competent institution of Ireland to start closer cooperation. The Ministry is still waiting for the reply.
LITHUANIA

IMPLEMENTATION OF THE GENERAL PROVISIONS

General Principles

Equality of treatment

Some problems have been reported with the implementation of this principle. According to Article 54 part 1 and 2 of the Law on Social Insurance Pensions, the insurance periods acquired before June 1991 in the territory of the Soviet Union are taken into account when the pension is granted. This rule is applied only for people who are permanent residents of Lithuania when the pension is granted. For this reason persons who reside outside Lithuania, for example, in another Member State, are treated in another way than Lithuanian residents.

Additional Remarks

According to Lithuanian legislation, before 2009 farmers were not covered by social insurance (except health insurance). It may cause certain problems in the case of their migration due to the periods when they acquired only health insurance rights, but did not acquired other, especially pensions, social insurance rights in Lithuania.

Applicable legislation

Working in one Member State only

Lex loci laboris

Some problems with legislation applicable arise when it is not clear if a person concerned is employed or not. This is the case with child care benefit. The mother (or father) of the child who takes child care leave, according to Lithuanian legislation, remains formally in labour relations (employed), but does not perform the work (and does not receive the wage). If the father (or mother) of the child works in another Member State, the legislation of that state should be applicable. But that state may argue, that a child stays with mother (or father) in Lithuania, where she (he) formally remains in labour relations, so Lithuanian legislation should be applicable.

Posting

The posting enterprise must carry on significant activities in Lithuania. One of the conditions for qualifying an activity as significant is that 20 per cent of turnover should be in Lithuania. This requirement is questioned by some enterprises. They would like to decrease this percentage rate or at least differentiate it by branches.

Other problems dealt with: the evaluation of the existence of a direct relationship between the posted employee and the posting undertaking; workers posted to Poland who carry out self-employed activities there (posing difficulties for the SODRA to calculate the income generated from self-employed activities); the unclear conditions for entering into agreements pursuant to Article 17 and the lengthy procedure to that effect (up to 9 months); badly completed E 101 forms, causing delays (incomplete forms, forms filled in partially by the employer, no indication of the relevant Article etc.); the assessment of the requirement for the posting undertaking to carry out substantial activities (in case the employer does not fulfil the condition relating to turnover, additional criteria are reviewed, including balance statements, the nature of the production – long-run vs. just-in-time, the nature of the undertaking – interim agency or not, contracts concluded by the posting undertaking); the fact that there is no obligation for the institution of the State in which the undertaking requesting the form E 101 is established to inform its counterpart in the host country of the refusal of the form.
Working simultaneously two or more Member States

As an employed or as a self-employed

The possibility to pay low social insurance contribution rates in Lithuania encourages some businessmen and women to transfer social insurance contributions payment from other Member States to Lithuania. It works as follows: A Polish business person establishes a personal enterprise in Lithuania. Then she / he signs labour contracts with Polish nationals (who reside in Poland). These contracts foresee, for example, employees part-time activity in Lithuania two times in a quarter, or distance work activity via internet, etc. (with very low wages and social insurance contributions). At the same time, these employees have important activities as self-employed persons in Poland (owners of shops, various service providers, taxi drivers, hairdressers, construction workers, lawyers, etc.). Formally, these persons work in two Member States. Due to the fact that they are employed under labour contracts in Lithuania, according to Article 14c(a) of Regulation 1408/71, Lithuanian legislation is applicable. So these people do not pay social insurance contributions to Polish authorities, and pay very small amounts to Lithuanian authorities. The Foreign Benefits Office of State Social Insurance Fund Board issues E 101LT forms for these persons. Since March 2009 more than 650 forms E 101LT have been issued and an additional 286 applications are waiting. Despite the fact, that from a formal point of view everything looks fully legal, the misuse of Regulation rules is evident. In Poland this practise became a branch of business.

Other issues

Fundamental reforms, initiatives and plans in national legislation with implications for the Regulations

From 2004 insured persons may voluntarily choose to opt-out from the part of pay as you go pension system and enter into funded tier (second tier of the first pillar) and to direct a part of social insurance contributions to a personal account in a chosen privately managed pension fund. The contributions transferred into personal account will be accumulated and pensions will be paid when the participant reaches pensionable age. Then the participant of funded tier must buy an annuity. Those who accumulate less than it is needed to purchase an annuity that is worth at least half of the basic pension, are entitled to receive their savings as a lump sum or as a periodic benefit.

As a scheme of the first pillar, this system falls within the scope of the coordination Regulations.

The participant of the funded tier loses a part of Lithuanian payg-pension (but he/she earns annuity from funded tier). From the point of view of coordination, it means that Lithuanian part of pro rata pension will be smaller.

Some consequences for the free movement might be noticed. According to Lithuanian legislation, if a participant of funded tier stops paying contributions because he/she leaves the country (or due to another reasons), the accumulated assets will stay in the pension fund, and annuity or lump sum will be paid when that person reaches pensionable age. It is not possible for a person to transfer the accumulated assets to a pension fund in another Member State, if this fund is not registered and supervised in Lithuania. Therefore then worker moves to another Member State, he/she does not lose acquired rights (assets and insurance period in Lithuania), but he/she loses the possibility to increase his pension savings by directing the part of his social insurance contributions into personal account.

Additional remarks

From the point of view of coordination, the most important issue is coordination of « first pillar bis » funded schemes brought into European social protection practice by new Member States. Coordination Regulations are not adapted to the schemes of this kind. For example, it is not clear how to aggregate insurance periods when a person worked in the Member State where he/she had earned only certain real (or notional) savings, but not insurance period. It does not happen in the case of Lithuania where person earns insurance record despite the fact he/she had opted-out from the part of social insurance. But it may create problems for Lithuanian national who was for several years insured abroad and earned only notional savings there.
IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS

Sickness benefits

BENEFITS IN CASH

Maternity and paternity benefits

Additional remarks

Recent changes of Lithuanian legislation introduced two years paid maternity (paternity) leave, the longest and the best paid maternity leave in Europe. This encouraged many Lithuanian women to go back to Lithuania to raise children (mainly from Ireland, United Kingdom, where maternity leave is much shorter). The number of applications to Irish and British competent institutions to issue £104 forms increased considerably. Two years paid maternity (paternity) leave might look attractive for nationals of other Member States for whom Lithuanian legislation may be applicable.

Invalidity

According to Lithuanian law, when incapacity to work pension is calculated, the years missing to person’s retirement age are added to the insurance years factually earned by this person. Some other countries (like Germany, etc.) also apply the similar rule. If a person has insurance records in two states, then both states add missing to retirement age years, and overlapping of insurance periods arise. There is no way to avoid this effect because the information about added (granted) insurance years in other country is missing.

Old-age and death

Equality of treatment

Some problems with work in Soviet Union arise. For example, German resident have several years of work in Lithuania and Kazakhstan. Then Lithuania takes responsibility for Lithuanian period, but does not take into account Kazakh period. In the case of Lithuanian resident, Kazakh period before 1991 is taken into account. Years of compulsory service in Soviet Army are taken into account as years of pension insurance for Lithuanian residents ; this rule is not applied for other EU residents who might have years of service in Soviet Army.

Additional remarks

The widow(er)’s pensions is granted to a widow or widower if their deceased spouse had earned the required number of years of insurance for a disability or old-age pension. This pension is flat-rate. The years of insurance in other Member States are also taken into account to decide on the right to get a pension. On the other hand, a widow or widower may apply for a pension in another Member State, and may get a pension granted. However the Lithuanian pension will continue to be paid at a flat rate. Therefore, overlapping of benefits may arise.

Accidents at work and occupational diseases

Equality of treatment

Despite the declared equality of treatment, national legislation in certain cases fail to implement this principle. The following case is reported. When a person from another Member State worked in Lithuania, and had labour accident, he/she has a right to get benefit if certain percentage of capacity to work was lost. This percentage should be approved by special Commission. According to actual legislation, Commission deals with persons who present Lithuanian passport, ID card or permission to permanent stay in Lithuania. In a case of a person from Member State he/she does not have neither Lithuanian passport nor permission for permanent stay (not needed in EU), so incapacity to work is not evaluated, and a person is deprived of his/her right to get benefit. It is reported, that this problem is solved by special ministerial clarification.
Unemployment benefits

More Lithuanians use unemployment benefits from other Member States. Usually these benefits are bigger and are paid longer than in Lithuania. This encourage them to stay abroad, and look for job there. Not all of them come back home, despite the fact, that the benefit is exported. There are several cases when Lithuanian people who lost the job abroad were not aware, that in order to get benefit they must to register this fact in the competent institution of the country where they have worked before.
IMPLEMENTATION OF THE GENERAL PROVISIONS

Scope of the coordination Regulations

Personal scope

Members of the family

According to Article 1 f), “member of a family” means any person defined or recognised as a member of the family or designated as a member of the household by the legislation under which benefits are provided. Luxembourg legislation provides that natural children acknowledged by the worker under Luxembourg legislation (father or mother) are designated as family members only if they reside in his/her household. But there is one exception to this principle in Regulation: “this condition shall be satisfied if the person in question is mainly dependent on that person”.

In two cases, the right to family benefits was denied to natural children living alone with their mother, who got guardianship, abroad (in Belgium or in France), arguing that children were not “mainly dependent on their father working in Luxembourg”.

This notion has caused problems regarding family allowances. According to the Luxembourg regulation, to be considered as a member of the family, a natural child has to live in the household of the beneficiary. According to the coordination rules of Regulation 1408/71/EC, this condition is fulfilled if the child is “principally in custody” of the beneficiary. The CNPF (Caisse Nationale des Prestations Familiales) has refused child benefits for children, who are living abroad in the custody of their mother and the Luxembourg courts have developed a jurisprudence around the notion “principally in custody”, which has proved to be very unfavourable for mothers living alone with their children outside Luxembourg.

Luxembourg national law on family benefits has introduced a difference between legitimate children that means children born inside marriage and natural children recognised by their parents that means children born outside marriage. Both have the same right to family allowances. But the amount of the allowance is fixed according to the composition of the “family group”.

The family group is composed by the legitimate children. Natural children are assimilated to legitimate children under the condition that they live in the household of the person, which means that Regulation applies, considering that this condition is to be considered satisfied if the child in question is mainly dependent on that person. As a consequence, legitimate children residing with their mother in another Member State and natural children in the same situation are treated differently.

Material scope

New risks

(5) A ‘Règlement grand-ducal’ on 13 February 2009 created the ‘chèque-service accueil’, which is a financial help (a benefit?) for all children under the age of 13 (or still registered in a fundamental school), who reside in Luxembourg. It is also granted to children, who do not reside in Luxembourg, but who are registered by a social service that has signed a convention with the State in order to provide education measures.

‘Chèque-service accueil’ is granted, especially, but not only, to children, who are at risk of poverty or social exclusion, for example, children living in a household receiving guaranteed minimum income or a very low salary, or with a parent with health problems. The interest of the child may also justify the granting of a ‘chèque service accueil’. At the beginning, in March 2009, the remit of these social services was education only. In September 2009, an extension has been made: schools teaching music, academies of art and conservatoires, on the one hand, and sport clubs, on the other, may be paid by a ‘chèque service accueil’ under the condition, that they have signed a convention with the
State. What is the real nature of this ‘aid’? Is it a social assistance measure? To get a ‘chéque service accueil’, parents must only claim for an individual card for each child in the municipality of their residence and register the child in an institution. The ‘chéque’ may cover the costs of education in music up to 810 Euros per year or of sport clubs up to 405 Euros per year.

**Applicable legislation**

**General introduction**

A report mentions that creation of “potential employment” is not linked to affiliation rules, which are imposed by European law and which are the same in the different Member States. Affiliation rules are used by companies, which decide to establish themselves in Luxembourg especially because social contributions are lower than in other Member States, due to the fact that the Luxembourg State intervenes in the financing of the social security system.

After this report, the Executive Committee of the *Centre Commun de la Sécurité Sociale* decided, on a general basis that, in all cases where the “head office” of a company was the determining factor of applicable legislation, workers would only be affiliated to the Luxembourg social security system, if the statutory head office of the company in Luxembourg was the place of the actual direction and administration of the company, in other words when it was the place from where strategic and administrative impetus of the business firm was given. In consequence, an “ordinary head office” in Luxembourg would not on its own be sufficient, if an “effective head office”, where the activities and the management departments were concentrated, was located abroad.

It must also be mentioned that a natural person or a corporate body, who/which wants to settle in Luxembourg, must get an authorisation for settlement from the Ministry for Middle Classes. This authorisation is only given if he/she or it has his/her or its actual head office in Luxembourg. The law determines four criteria by which a registered office (siège) can be defined:
- existence of operational facilities
- actual exercise and permanent character of management
- keeping of all documents linked to the activities in this place
- continuous presence of a person authorised to commit the company towards a third party.

On this basis, the *Centre Commun de la Sécurité Sociale* led investigations and checked the existence of an actual permanent registered office. It put the emphasis on the criterion of the actual management of the activities. It took several decisions in consequence and refused to affiliate workers working abroad.

This has generated some case law.

**Working in one Member State only**

**Posting**

To determine if an undertaking has “usually significant activities” for the posting provisions in the State where it is established, the competent institution of this Member State must examine the whole body of criteria which characterises the activities of the company. A non exhaustive list of criteria has been indicated:
- the place of registered office and of management,
- the number of the administrative staff working respectively in the State of settlement and in the State of posting,
- the place where the posted workers were appointed
- the place where most of the contracts had been signed between the company and its clients
- turn-over realised during a significant period in the different States of activities.

But the choice of criteria has to be adapted to each case, as well as the actual nature of the activities, practiced by the undertaking in the State where it is established, has to be taken in account.

The following criteria were taken into account to judge that there was no proof of a “usually significant activities” in Luxembourg:
- a non significant activity in Luxembourg (one single site, where four persons are working only during weekends)
- a reduced administrative staff working in the State of settlement (only one person, who is residing in Belgium, where he has also another job)
- unoccupied offices (result of several investigations at the place of registered office).

**Working simultaneously two or more Member States**

*Either as an employed or as a self-employed person*

Two main arguments were used to refused to affiliate an executive director of an undertaking settled down in Luxembourg, arguing that he had to be affiliated in Belgium. First, no proof had been offered regarding an activity of the executive director neither in Luxembourg in general nor at the head office in special. Court drew as a conclusion that he was exclusively employed in Belgium. Secondly, no proof had been offered regarding a head office of the undertaking in Luxembourg, and “actual and permanent direction and coordination of activities of the company were not carried out in Luxembourg”

A person was not affiliated to the Luxembourg social security system as:
- the purpose of the undertaking was not to take stakes in other companies, but to design shops
- the clients are prospected in several countries, but essentially in Belgium
- the company had never had offices in Luxembourg,
- the job of the employee consisted in making a feasibility study in order to create a transport company in Luxembourg and to develop an international clientele,
- he prospected clients mainly in Belgium, where he was residing.

**IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS**

**Invalidity**

**Aggregation of periods**

*Problem of non-coordination for calculation of the ‘tide-over allowance’*

Problems raised with respect to the tide-over allowance. What is the legal nature of this allowance calculated like a pension and paid by the invalidity pension fund to registered jobseekers? The Invalidity pension fund does not apply Regulation 1408/71 and, in consequence, does not apply coordination rules. To calculate the amount of this tide-over allowance, Luxembourg’s fund takes exclusively in account periods worked in Luxembourg. Periods worked abroad are explicitly excluded. Is this not contradictory to the Regulation?

**Unemployment benefits**

**Equality of treatment**

Law on employment introduced a new residence condition:

“...to be entitled to a full unemployment benefit, a worker must fulfil following conditions:
(1....)
2. he/she must have his/her permanent residence (domicile légal) in Luxembourg at the moment of the notification of redundancy, in case of a permanent labour contract, or six month before the term of a fixed-term labour contract and he/she must have lost his/her job in Luxembourg, without prejudice to application of EU regulation or application of bilateral ou multilateral conventions”.

In the comment in the Bill in Parliament, it was said that this change was justified by the fact that numerous cross-border workers decide to transfer their permanent residence to Luxembourg during the dismissal notice, in order to get a better unemployment benefit in Luxembourg than in his/her State of origin.
Does this Article comply with the principle of equal treatment? It is possible for Luxembourg unemployment institutions to require from a European citizen a permanent residence at the moment of the notification of redundancy in case of a permanent labour contract or six months before the term in case of a fixed-term labour contract?

**Family benefits**

**Creation of a new family benefit, the “child boni”**

In December 2007, Luxembourg created a new family benefit, called “boni pour enfant”

‘Boni pour enfant’ is considered as being of double nature. On the one hand, it is a tax measure (as it was in the past) and, on the other hand, it is a family benefit.

From 2008 on, each family, who is liable to income tax and entitled to family benefits in Luxembourg, has a right to this new benefit. The moderation of income tax for children, which reduced the taxes paid by the family in the past, is now automatically granted as a family benefit. It is also granted to families, who did not take advantage of the tax moderation in the past.

It is immediately paid to the recipients of family benefits.

**Problems with application to frontier workers and other migrants:**

For the beneficiaries of the “additional amount”, child boni is paid from July 2008 onward, by a separate bank/postal transfer.

Until now, some frontier workers, entitled to the “additional amount”, did not yet get child boni. Problems would be solved in due course.
IMPLEMENTATION OF THE GENERAL PROVISIONS

Scope of the coordination Regulations

Personal scope

Employed and self-employed persons

Self-employed persons are defined as persons gainfully occupied other than those under a contract of service or apprenticeship. However, the Social Security Act also provides that persons who are neither employed nor gainfully occupied, shall also be considered as self-employed persons, and liable to pay social security contributions. Thus the concept of self-employment in Maltese legislation includes people who in other jurisdictions would be considered as “non-employed”. However the legislation exempts from liability a number of categories including non-occupied married persons or persons in full time education or training.

Applicable legislation

General introduction

One particular common case which continuously arises is that of companies (not employment agencies) who establish themselves in Malta and ‘try’ to recruit workers from one Member State and post them to a third Member State. The Maltese institution carries out a thorough investigation when there is the smallest doubt that such companies are trying to bypass the system. Most of the time it is discovered that, at that point in time, such companies do not “habitually carry out significant activities” in Malta and therefore, under the terms of Decision 181 the employment is not considered to be a “posting” under the terms of Article 14.1 of Regulation 1408/71.

The decisions issued by the competent institution have never been challenged in Court.

IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS

Sickness benefits

BENEFITS IN KIND

Persons residing outside the competent state

Workers:
When the Maltese Competent authority issues E106 for workers posted to another EU Member State, long delays often occur in receiving back the registered E106 or in some cases they are not returned at all. It is not clear whether this is a problem of people not going registering their E106 in the Member State where they take up residence or whether the competent authority delays returning registered E106s.

Pensioners:
Malta is encountering an increasing number of cases of pensioners who take up residence in Malta to benefit from Malta’s favourable climate. However, it was discovered that these pensioners actually only reside in Malta for just over six months, which is just long enough to qualify for a Maltese ordinary resident status. After this, the pensioners return to their country of origin to escape Malta’s hot summers and make use of their Maltese EHIC to access medical care. In many of these cases, Malta is having to take responsibility for their healthcare costs for the whole 12 months including those incurred in other Member States, which is usually the Member State of origin and where the pensioner has worked and paid the majority of their social security contributions during their
working life. This is placing an additional financial and administrative burden on the Maltese institutions which is exacerbated by the fact that Malta is a receiving country for pensioners from other Member States. The incidence of claims for emergency treatment through the EHIC is somewhat suspicious.

Planned health care

Under Article 49 EC:
Malta’s main concern with Article 49 is that many times this article has been interpreted too widely and citizens are using it to “shop around for care” and later expect reimbursement from the Maltese Health Authorities when prior authorisation for such treatment as per Regulation 1408/71 was not sought.

Reimbursement of benefits

Healthcare costs in certain Member States are very high and this is having a significant impact on amounts paid out by the Maltese authorities.

Malta has also encountered a number of cases where foreign nationals declare that they are residing in Malta through the registration of their form E 121 but in reality they have never resided in Malta. Malta is under the impression that this is being done to avoid the disbursement of co-payments for healthcare services in their Member State of actual residence.

BENEFITS IN CASH

Main issues

An issue that emerged this year concerned a Maltese national residing and working in Ireland. Whilst on holiday in Malta visiting relatives, this person fell ill and was hospitalised. During the period of sickness, the person did not file any sickness benefit claim to the Maltese institution, in order to be forwarded to the Irish competent institution, since he was not well-informed and neither did this person ask for information.

When enquiring about the benefit with the Irish competent institution, the client was requested to produce an E 115 and E 116 from Malta. However, the Maltese institution did not have any information about the period of sickness of the person concerned and therefore was not in a position to issue such certification.

Following liaison with the Irish institution it was agreed that the client would provide the medical records to the Maltese institution which certified the period of sickness through an E 115 and E 116 form and forwarded the claim to the Irish competent institution. The claim was accepted and the benefit was paid soon after. The Maltese institution was very satisfied with the professionalism and the cooperation offered by the Irish institution responsible for sickness benefits.

Maternity and paternity benefits

Main issues

Since accession, Malta received a number of maternity benefit claims from mothers resident outside of Malta but who were last insured in Malta. Malta asked for confirmation from the Member State of residence that the applicant was not insured in the latter state. Once received, the claims were processed according to the national provisions. This involves an element of cooperation with the Member State where the mother resides and obviously, the sometimes ‘long’ waiting time of communication led to Maternity Benefits being paid after a considerably delay. The Maltese institution hopes that with the introduction of the new Regulations, and specifically EESSI, communication between institutions will be faster and will lead to a quicker decision and payment of benefits.
Invalidity

Main issues

An issue with Invalidity Benefits that is worth mentioning concerns conflict between the legislation of Malta and that of other Member States. Whereas other Member States’ legislation allows the claimant to perform some gainful activity, Maltese legislation does not allow any form of employment if the person is in receipt of an Invalidity Pension. Although this is an issue which the Maltese institution is considering to review, currently the system does not allow a person to receive Invalidity pension and perform a gainful activity simultaneously.

This led to a conflict between the legislation of another Member State which pays an Invalidity Benefit and allows employment activity in Malta. Persons applying for a Maltese Invalidity Pension are automatically disqualified from receiving such benefit if engaged in a gainful activity.

Old-age and death

Main issues

One of the aspects that the Maltese authorities would like to improve relates to the coincidence of different retirement ages under different legislations. Because currently the Maltese retirement ages are set at 60 for women and 61 for men, in cases where the retirement age in the state of residence of the claimant is later, pensioners tend to assume that they can also claim the Maltese Retirement Pension in the state of residence once they retire. This has resulted mainly because the Government has recently changed national legislation whereby a pensioner may retire and get his or her pension, whilst opting to continue working. Prior to this amendment, a pensioner would not have been paid his/her Retirement Pension if he/she were still in gainful employment whose earnings were more than the Maltese national minimum wage. Also, prior to this amendment, a considerable amount of Maltese pensioners living in another Member State were not being paid their pensions at age 60/61 since in most of the cases they were still employed in the Member State of residence since the retirement age in that particular Member State would be higher than the Maltese retirement age.

Unemployment benefits

Main issues

A particular issue which Malta is finding difficulties with concerns Article 67(1) of Regulation 1408/71 on aggregation of periods of insurance completed in another Member State. Malta is of the opinion that there are different interpretations of this Article, in particular the last sentence which states ‘...provided, however, that the periods of employment would have been counted as periods of insurance had they been completed under that legislation.’

This article poses some difficulties to Malta particularly in relation to self employed persons, as under Maltese legislation - no Unemployment Benefit is paid to persons who are self-employed. Therefore, periods of self-employment in Malta cannot be considered as periods of insurance completed under Maltese legislation.

The fact that Article 67(1) provides that periods of self-employment completed in another Member State must be considered as periods of insurance for aggregation purposes is in clear contrast with Maltese legislation. As such, this could create a discriminatory situation between self-employed workers insured solely under Maltese legislation, and self-employed workers in another Member state who come to Malta and claim Maltese Unemployment Benefits following a period of employment.

So far, Malta has not encountered any such cases, however, following consultation with some of our colleagues from different Member States, it transpired that there are different interpretations on how this aggregation rule should apply.
IMPLEMENTATION OF THE GENERAL PROVISIONS

Scope of the coordination Regulations

Personal scope

Employed and self-employed persons

Specific problems may arise in border areas, particularly when a person performs activities as a self-employed person in Belgium while simultaneously being engaged in activities as an employed person in the Netherlands. In those cases, the legal system of both countries applies. In practice, this tends to encourage companies to find ways to avoid the payment of social security contributions by experimenting with different types of contracts.

Specific problems may also arise when a person lives in the Netherlands and accepts a ‘mini job’ in Germany (i.e. a job encompassing less than 15 working hours a week). In that case the person concerned is not regarded as an employed person in the sense of the Regulation. Germany has stipulated this in Annex I, part 1, under D (a).

Family members and survivors

Family members can play a role when it comes to family allowances or survivors benefits. The legislation of the State that provides the benefit determines who is to be regarded as a family member. According to the German and Belgian legislation, persons who have reached the age of 18 are regarded as family members. Under the legislation of these countries, family members do not have to pay contribution for health care insurance. In the Dutch legislation, children over 18 are not regarded as family members. Consequently, frontier workers who live in Belgium or Germany and work in the Netherlands are not free from the obligation to pay contribution for health care insurance for children over 18 when they are insured in their own right. Hence, frontier workers who live in Germany or in Belgium are worse off when they take up a job in the Netherlands. There is no simple solution to this problem: it is the effect of a lack of harmonisation of the national schemes.

As for survivors problems may arise when unmarried couples of the same sex live together. For example, Germany does not recognise this mode of cohabitation as a partnership which is to be put on the same footing as a marriage. Hence, if the couple lives in the Netherlands, while one of them worked in Germany, the survivor will not be entitled to a German survivor benefit.

Material scope

Introduction

In the Netherlands, there is a growing interest in modernising the social security system by seeking public-private solutions. As a result, the number of non statutory benefits, based on, for example, contractual (collective bargaining) arrangements, is increasing. This may cause problems, when a person works in two countries simultaneously or when a person works in one country and lives in another country. The coordination rules do not apply in that situation since non statutory benefits do not fall within the material scope of the Regulation.

Social security benefits, special non-contributory benefits and social assistance

The question was raised if the exportability of the “Additional Benefit” ("Toeslagenwet"), a benefit that is granted alongside a social security benefit if the family earnings of the beneficiaries are below what is deemed in the circumstances to be the social minimum, should be considered as a special non-contributory benefit.
General Principles

Export of benefits

In the Hendrix case (C- 287/05) the ECJ ruled that the Wajong-benefit is one of the special non-contributory benefits. The receipt of such a benefit can lawfully be reserved to persons who are resident of the Member State whose legislation provides for such a benefit. However, the condition of residence attached to the receipt of the Wajong-benefit should also be considered in the light of free movement (Art. 39 EC Treaty) can be put forward only if it is objectively justified and proportionate to the objective pursued. After weighing the national legislation in the light of these circumstances, the national court declared the non export clause not applicable.

In the regulation, residence is a Community concept and it is very important for the EU citizen to have legal security in this respect. The example was given of a Spanish woman residing in the Netherlands and receiving a very low invalidity pension from Spain. In theory, she is entitled to the Dutch “Toeslag” (“Additional Benefit”), but in practice it will not be so easy to get it in the Netherlands. Dutch authorities will probably question her residence status and refuse the benefit because she does not possess sufficient means and therefore resides illegally on Dutch territory. The visiting expert stressed that this is certainly contrary to EU law, as the Toeslag is an SNCB which must be granted in the country of residence. If it is not awarded because this endangers the residence status, this takes away the effet utile of this system.

Applicable legislation

Working in one Member State only

Lex loci laboris

In general, the lex loci laboris principle offers a clear standard for determining the applicable legislation. If the legislation to which a person had previously been subject, ceases to apply, the Dutch authorities follow the case law of the ECJ. In principle, the legislation of the state of residence becomes applicable in that case (ECJ in Commission v Belgium, C-349/98). However, continued insurance for one of the branches of the compulsory insurance system is still possible on an optional basis. (ECJ in Van Pommeren-Bourgondië case (C-227/03). The national court follows this line of reasoning. The possibility to continue insurance on an optional basis may be relevant for a person who ceases to be insured for the Dutch old-age benefit (AOW), for example, because he or she has terminated his or her work activities in the Netherlands. The Dutch court ruled that this option only applies to a person who was compulsory insured for the Dutch old-age benefit on the basis of the lex loci laboris principle. Consequently, his or her partner, who is not insured on the basis of this principle, can not apply for optional insurance. According to the Court, this would not be compatible with Annex VI of Regulation 1408/71.

For retired German civil servants, who live in the Netherlands and who receive both a Dutch and a German old-age benefit, it can be unclear under which legislation they are insured. In principle, they are insured under the German legislation, since they are still entitled to ‘Beihilfe’ in Germany. This is sufficient for the application of the legislation of the former country of employment (see the ECJ ruling in the Van Pommeren-case). However, this does not solve all problems, since the persons concerned may be entitled to health care benefits in the State of residence on the basis of Article 27 of the Regulation. Annex VI, part 22, offers a solution to this problem. Accordingly, the persons concerned remain insured for all branches of insurance in Germany, including the health care insurance. As a result, they are no longer insured for the Dutch health care insurance. The German authorities are of the opinion that this provision includes the family members of the persons concerned. It is still unclear whether family members are thus only included in the German health care insurance or covered for all branches of the German social insurance system.

Special rules for specific categories of persons

International drivers are insured in the country where the firm to which they belong has its seat or in the country where the driver lives (Article 14 (2) (a) or Article 14 (2) (a) ii). Taxes are levied on the basis of different rules. This may imply that a driver, for example, is subject to the Dutch social security legislation, which means that contributions will be levied in the Netherlands, whereas taxes
are levied in Germany. This may cause problems, since Germany is entitled to levy taxes in retrospect over a period of three years. Consequently, the person concerned may be confronted with a considerable retrospective tax demand. Obviously, this may place international drivers in serious financial difficulties. Often international drivers, and their employers, are not aware of the applicable legislation. Hence, it would seem to be necessary to improve the way to inform them about this.

**Working simultaneously two or more Member States**

*Either as an employed person or as a self-employed person*

If a person has his or her main job in one country and lives in another country where he or she takes up activities, then he or she is insured in the country of residence, even if the activities that he or she performs in that State are of a marginal nature and even if the State of residence offers less or no actual coverage. Obviously, this can cause problems for the person concerned and also lays an extra administrative burden on the employer of the main job. The Dutch authorities solved this problem by concluding an Article 17 Agreement with Belgium, on the basis of which persons who have their main activity in Belgium remain insured under the Belgium social security system when they take up certain marginal jobs in the Netherlands, such as taking part in the voluntary fire brigade or the voluntary army or becoming a member of the Municipality Council.

**Application of Article 17**

Article 17 can serve as a useful basis to solve problems related to the rules for determining the applicable legislation. If the partner State refuses to cooperate, the dispute however cannot be brought to the national court (CRvB 24-01-2004, RSV 2004/139).

**PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS**

**Sickness benefits**

**BENEFITS IN KIND**

In cases of reimbursement the insured person has more freedom: his/her costs are reimbursed in accordance with the rules of the insurance he or she has. This rule also applies if health care is received from a foreign care provider under the condition that the form of care to be received is included in the basic insurance (the package) and in accordance with the reimbursement rules as defined by the insurance company. It is important to note that this system does not require prior authorisation. The ZVW is more ‘liberal’ on this point than the system of the Regulation and the case law of the ECJ. There is some – informal – discussion on the question of whether this approach is compatible with the Regulation, since it is more generous.

**Special rules for frontier workers: Frontier workers who work in the Netherlands**

Frontier workers living abroad and working in the Netherlands are covered by the ZVW.

**Special rules for frontier workers: Frontier workers who work in Belgium or Germany**

Dutch frontier workers who live in the Netherlands and are employed in Belgium or in Germany are subject to the social insurance legislation of the State of employment. On the basis of the Regulation, they are entitled to claim benefits in the Netherlands. However, to exercise this right, they must join a particular care provider (CZ). Problems may arise when the frontier worker wishes to take out supplementary insurance, since the CZ is not inclined to offer frontier workers collective reductions for a supplementary insurance package. Consequently, the frontier workers may have to take out supplementary insurance on the basis of conditions which are less favourable than those for residents.
Special rules for frontier workers: Family members

The members of the family are no longer co-insured under the ZVW, but they are entitled to benefits in kind in accordance with Regulation 1408/71. In principle, they have the right to claim their benefits in the country of employment or the country of residence. However, they do not have the right to choose a particular insurance company as the insured persons can. Family member are obliged to take out benefits from a particular insurance company (Agis Zorgverzekeringen).

In addition, they must pay contributions to a specific institution (CVZ) as from the moment they turn 18. These additional requirements complicate the position of frontier workers. When it comes to the crunch, they may have to deal with four institutions, notably the care provider of the worker, Agis Zorgverzekeringen, CVZ and the insurance company in the State of residence.

The Dutch Commission for Frontier Workers suggested to solve this problem by allowing the family members of a frontier worker to join the insurance company to which the worker is connected. In January 2009, the Dutch government decided not to adopt this solution. According to the government, the frontier worker and his/her family members are not in the same position. Whereas the frontier worker is insured for the ZVW on the basis of the Dutch legislation, his or her family members are insured for the Dutch health care insurance on the basis of the Regulation. Consequently, there is no relationship between the insurance company of the worker and the insurance company that deals with the members of his or her family. Hence, there is no need for the family members to be affiliated with the same insurance company as the company with which the frontier worker is associated. According to the government, the family members are also better off when they have to deal with one, central institution which has specific expertise to handle matters in their best interest.

Pensioners: Dutch pensioners residing in another Member State

Dutch pensioners residing abroad, are entitled to receive benefits in the State of residence at the expense of the Netherlands. In exchange for this right, they are to pay contributions for the Dutch ZVW. This contribution is levied on their income. Usually this implies that the contribution is deducted from the Dutch old age benefit which most Dutch pensioners receive abroad. Pensioners do not have a choice in this respect. Pensioners claim that this is questionable in the light of Article 33 of the Regulation. Their line of reasoning is that, if they do not join a health care provider in the State of residence, they cannot exercise their right to claim benefits in the State of residence. Hence, this state cannot charge the Netherlands for the cost. For this reason, the Netherlands is not authorised to level a contribution either. The Dutch District Court has rejected this claim. The pensioners lodged an appeal against this judgement. At present, the Court of Appeal (CrVB) is considering whether to refer the case to the ECJ for a preliminary ruling on how Article 33 of the Regulation is to be interpreted in this respect.

Pensioners: Belgian and German pensioners residing in the Netherlands

Belgian and German pensioners residing in the Netherlands are subject to the Dutch ZVW. Hence, they must pay contributions on the basis of the ZVW. In comparison with the contribution they had to pay before the ZVW came into force in 2006, this contribution tends to be higher, in particular for those who did not meet the conditions for insurance under the former Dutch Health Care Law (ZFW) and therefore were previously insured in Belgium or Germany. As a result, this group is confronted with a drop in income which may amount to about 4000 to 5000 euro per year.

The European Commission and the Dutch Commission for Frontier Workers proposed to solve this problem by offering this group compensation tailored to their personal situation. According to this proposal, this compensation is to run over a period of ten years and is to be granted under the condition that the person concerned does not invoke the ECJ ruling in the Nikula-case (C-50/05) on the basis of which the contribution to the Dutch ZVW is be tuned to the level of the Dutch old-age benefit (AOW). In January 2009, the Dutch government decided that there is no ground for compensating the persons concerned. After all, they used to be in a privileged position which has been corrected. Consequently, this group is now in exactly the same position as every other person who is subject to the ZVW.
BENEFITS IN CASH

Export of benefits

Problems may arise when someone lives and works in Germany and takes up a job in the Netherlands, while he or she receives a financial care allowance on the basis of the German legislation (Pflegegeld). Under German legislation this benefit is regarded as a cash benefit which is exportable pursuant Article 19 (1) (b) of the Regulation. However, by accepting a job in the Netherlands, this person becomes subject to the Dutch legislation pursuant Article 13 (2) (a) of the Regulation. The Dutch version of the German Pflegegeld is to be classified as a benefit in kind (see the ECJ ruling in the Molenaar-case: C-160/96). These benefits are governed by Article 19 (1) (a) of the Regulation stipulating that family members are entitled to benefits in kind on the basis of the German legislation. However, this legislation is no longer applicable. Consequently, the persons concerned lose their entitlement to the German Pflegegeld, while at the same time not being able to claim the Dutch version of this benefit, since this benefit is regarded as a benefit in kind under the Dutch legislation.

In 2009, the Dutch government introduced financial compensation for chronically ill and disabled persons. It is quite possible that this compensation qualifies as a cash benefit in the sense of Article 28 (1) under b of Regulation 1408/71. If this is the case, the compensation is exportable to persons who reside in another Member State and are entitled to claim health care benefits at the expense of the Netherlands on the basis of the Regulation. The Dutch authorities are of the opinion that the compensation for chronically ill and disabled persons is not exportable. A decisive factor is this respect is, according to the Dutch authorities, that entitlement to this financial compensation requires the person concerned to be subject to the Dutch health care insurance legislation and to receive care on the basis of this legislation. Persons residing abroad do not meet these requirements. After all, they are to claim health care benefits in the country of residence on the basis of the Regulation. At present, it is unclear which is interpretation is the correct interpretation.

Additional remarks: applicable legislation

As for the right to continued payment of wages in the event of illness, problems may arise when employees work in the Netherlands but live in another Member State. If the employee is still involved in an employment relationship with an employer of that State, for example, in the case of posting, the Belgian social security scheme will continue to apply in accordance with the posting rules of Regulation 1408/71 (Article 14(1)(a). However, after the maximum period of posting has expired or if posting is not possible, this person is subject to Dutch social security law. Consequently, the Belgian social security legislation is, in principle, no longer applicable. This may be different when the person concerned and his or her Belgian employer use the possibility to choose the Belgian law as the applicable legislation on the basis of Article 3 of the Convention of the Law applicable to Contractual Obligations of 19 June 1980. In that case a ‘gap’ may arise. After all, in the case of sickness, the Belgian employer is, after four weeks of sickness, no longer liable to pay wages under Belgian labour law; Belgian social security is not applicable and the Dutch Sickness Benefits Act excludes the employee from entitlement to the Dutch sickness benefit since she or he is employed on the basis of a valid employment contract.

Invalidity

Medical examination and administrative checks

Entitlement to benefits under the Wet WIA requires that the incapacity for work is directly and objectively related to illness or impairments. The IVA benefit requires in addition that the person concerned is fully incapacitated on a permanent basis.

For migrant workers, the ruling of the ECJ in the Voeten and Beckers case (C-279/97) applies. Consequently, assessments to check whether the conditions for granting or continuing the benefit are fulfilled, are to take place in the State of residence. This is even true for frontier workers who worked in the Netherlands and might be living closer to a Dutch benefit office than to an office in the State of residence. If the office of the competent State wants to re-examine the beneficiary too, it can do so after the examination by the office of the State of residence. In that case, the benefit office in the State of residence determines her or his physical or mental limitations. However, the
assessment on the income that he or she is still able to earn, is performed in the Netherlands on the basis of a special database designed to match the remaining work capacity of the person concerned with possible work opportunities in the Dutch labour market. For the person concerned, this procedure may be quite burdensome. After all, it requires a visit of the beneficiary to the benefit agency’s office in the Netherlands. Moreover his or her situation will be assessed on the basis of Dutch criteria, which may cause problems when he or she wants to contest the results of the assessment. Furthermore, his or her employment possibilities will be assessed on the basis of the Dutch labour market which may be less suitable for persons who are more likely to find a job in the State of residence.

Additional remark

There is a waiting period of two years, before benefits under the Wet WIA can be claimed. This waiting period corresponds with the employers’ obligation to continue the payment of wages during the first two years of illness. This scheme may cause problems when persons are entitled to a sickness benefit in another Member State with a maximum duration of less than two years. For example, persons who live in the Netherlands and work in Germany are entitled to a German sickness benefit during the first 18 months of their illness. Subsequently, they may be entitled to a German invalidity benefit. For periods of insurance completed in the Netherlands, the person concerned may also be entitled to a Dutch invalidity benefit on the basis of the Regulation. However, entitlement to this benefit requires that a waiting period of 24 months has been fulfilled. Hence, there will be a gap of 6 months (‘the WIA-gap’).

Old-age and death

Difference in pensionable age

Now that active ageing is high on the political agenda across the EU, it is quite possible that some Member States will raise the statutory retirement age, whilst others don’t. Germany, for example, already decided to raise the statutory retirement age to 67 on a step-by-step basis. The Netherlands has decided to do this in the near future. This may give rise to problems in the future. For example, a frontier worker who lives in the Netherlands and who has been working in Germany for years, may be confronted with a loss of income when he becomes unemployed between the age of 65 and 67. In that case, he or she will not be entitled to an old-age benefit in Germany yet, whereas in the Netherlands, he or she will not be able to claim an unemployment benefit because workers are not entitled to these benefits after turning 65.

Member states cooperation

A factor which complicates the gathering of information, is that there are considerable differences between the Member States in the rules on the protection of personal information. Rules on the protection of personal information may inhibit to obtain information. It is also possible that the benefit administrations of the Member States do not have the required information and refuse to obtain it from other organisations, such as the tax offices.

Unemployment benefits

Concepts of full unemployment, partial unemployment, frontier worker, a-typical frontier worker and country of residence

This interpretation squares with the De Laat case, in which the ECJ, referred to in a preliminary ruling, considered that a worker who has no longer any link with the competent State should be seen as a fully unemployed person (Case C-444/98 [2001], ECR I-2229). Hence, the unemployment benefit should be paid by the State of residence. Unfortunately the benefit administrations of the Netherlands and Belgium tend to give a different interpretation to this ruling. In situations in which a worker, who used to work on a full-time basis, continues to work for his employer in a part-time job, the Dutch authorities take the view that the person concerned is to be regarded as a partially unemployed person, which implies that the State of employment is to pay the benefit. The Belgian benefit administration, on the other hand, depart from the fact that a person in that situation has lost the opportunity to be employed on a full-time basis and therefore should be regarded as a fully unemployed person, which means that the State of residence has to be pay the benefit.
Unemployment benefits for frontier workers

Nonetheless, the rules of the Regulation and the case law of the ECJ have made the administration of unemployment benefits a complicated matter. This can be ascribed to the fact that it is up to the benefit administration and, if necessary, up to the national court to decide whether an ‘atypical’ frontier worker has the best chances of finding another job in the State of employment.

It is not always clear how the benefit administration comes to its conclusion. There are policy guidelines, which include criteria for determining the professional and personal links that the person concerns has with the country of employment. Decisive for the decision that the person in question has strong links with this country can be found, for example, in the fact that he or she has lived in the country of employment much longer than in the country of residence, that the person concerned has the centre of his or her social life there and no or only weak personal and long-lasting ties with the country of residence. Also his work experience and qualifications play role. The benefit administration has to weigh all these circumstances in order to form an opinion on the question of whether the person concerned has the best chances of finding another job in the country of employment. The question is whether frontier workers are offered sufficient protection in this way. After all, on the basis of this evaluation, they may be sent to the benefit administration of another Member State which may refuse to award them a benefit because, in their opinion, the State of residence is competent party.

Is this compatible with EU law? Does the ‘atypical’ frontier worker not have the right to choose to apply for a benefit in either the State of employment or the State of residence?

Calculation of benefits

Unemployment benefits are, up to a certain ceiling, related to the last earned salary. If a person has worked in more than one Member State, the competent State has to calculate the benefit exclusively on the basis of the last salary earned in the competent State, that is, if the person concerned has performed her or his activities in that State for at least four weeks. If this conditions is not fulfilled, then the benefit is to be based on the salary that the worker would have received in the competent State for the activities that he or she performed in the Member State where he or she was working immediately prior to becoming unemployed. Practice shows that this rule is not always easy to apply. Difficulties may arise, for example, when the activities performed by the worker in the State where she or he worked prior to the unemployment do not exist in the competent State. The solution to this problem is in general to depart, in that case, from the salary that the person concerned actually received in the State of their last employment before becoming unemployed. This salary is then compared with the salary that can be earned for similar activities in the competent State. The benefit administration gathers the information needed to make this comparison. However, this can be complicated, since it requires an investigation as to the actual nature and content of the activities performed in another country. If this information is missing, the benefit administration runs the risk that its calculation is not accepted by the court.

Additional remarks

Specific problems may arise with regard to the Belgian part-time pre-retirement pension (halftijds brugpensioen). This benefit can be awarded to older workers who become unemployed. The question is how this benefit is to be classified. When it comes to the crunch, the benefit is based on contractual arrangements which obliges the employer to grant supplements to the unemployment benefit when workers become redundant. This presupposes that the worker is entitled to an unemployment benefit. However, it does not require the worker to be available for the labour market. Seen in this perspective, the benefit is closely related to an old-age benefit. Belgium considers this benefit as unemployment benefit, which is not to be paid to frontier workers living outside Belgium. This, however, would seem questionable in the light of Article 7 (4) of Regulation 1612/68. After all, if the benefit cannot be qualified as an unemployment benefit in the sense of Regulation 1408/71, it surely is to be seen as a social advantage in the sense of the latter Regulation. On this footing, Belgium is still responsible to be pay the benefit to persons who do not live in Belgium. For these persons, the benefit level is to be calculated on the basis of the benefit that would be awarded to workers who actually live in Belgium, even if the person concerned would qualify for a higher benefit under the legislation of the State of residence.
**Family benefits**

*The concept of family benefits and family allowances*

In addition to the child benefit, which can be awarded under the AKW, the Dutch legislation used to include a tax-based family allowance, which offered financial support to families with children in the form of a tax reduction (kinderkorting). This tax reduction was replaced in 2008 by another taxed-based family allowance, which was awarded per household, irrespective of the number of children. As from January 1st 2009 this taxed-based family allowance has been replaced by a budget per child (kind gebonden budget; child related budget).

*Tax reduction for families with children*

The taxed-based family allowance gave rise to certain problems. As entitlement to this allowance was linked to entitlement to the Dutch child benefit, the allowance could be qualified as a family benefit in the sense Article 4 (1) (h) of the Regulation. Contrary to the child benefit, the taxed-based family allowance depended on the income level of the family. If the income level exceeded a certain threshold, the allowance was not granted. This system may have certain advantages for those who live and work in the Netherlands. However, migrant workers may be worse off. After all, for a person who lives in the Netherlands and works in Belgium, this provision could imply that the allowance was not paid out, due to the fact that the child benefit to which this person was entitled under the Belgian legislation, was higher than the sum of the child benefit and the allowance which the person concerned would have received if the Dutch rules were applicable. In that case, migrant workers could whistle for their tax-based family allowance. The Dutch government has decided not to provide for any compensating measures, because only a small number of workers are confronted with this problem. Moreover, it depends on the circumstances of a particular case whether one can really speak of a disadvantage.
IMPLEMENTATION OF THE GENERAL PROVISIONS

Scope of the coordination Regulations

Personal scope

Third-country nationals

There are some problems with establishing the legal status of the third-country nationals when they are employed by Polish companies in order to be posted to work in Germany or other countries.

In this case, does such a person have to work in Poland and be covered by insurance for a defined period of time before he/she is posted? Similar questions are being raised because of the fact that there are more citizens of third countries seeking employment in Poland (and hoping to find employment in other Member States).

Material scope

Benefits concerning "new risks"

Academic writings address the issue of different approaches to the ‘social risk’ and list new kinds of social risks. The Polish legislation on maternity has changed in this respect by extending its personal scope to fathers. Maternity benefits are available to both parents. This concerns what are strictly maternity benefits, granted during the first months of life of a newborn baby but not family allowances, which are granted later on, when the child is older. Maternity benefits are granted to the father or mother of a child, or to another person who has been granted custody of a child. It should be stressed that this change in legislation does not establish a new type of risk (paternity) but rather it includes fathers in the personal scope of the pre-existing protection.

Applicable legislation

Working in one Member State only

Information received by competent institutions from persons working in different Member States show that in certain countries and for certain persons it is difficult to obtain Form 101 or certificate confirming coverage by social insurance.

Posting: Duration

It may be concluded from the practice of the Polish Social Insurance Institution that some enterprises abuse the provision of intervals in the period of posting. A posted worker returns to their home country for a period of two months during which he or she is granted unpaid leave or the job contract is terminated altogether. In some cases the worker is granted sick leave. After 2 months the worker is posted again. From the Community law perspective such intervals should not be abused. However, there are no specific provisions that would enable the Social Insurance Institution to take significant action. The problem of abuse of the provision on maximum intervals has been submitted to the Administrative Commission through the Ministry of Labour and Social Policy with proposals for to draw up a new Decision to replace Decision 181 and also in answer to the complaint submitted by the Chamber of Polish Employers.

Posting: Administrative Formalities and cooperation

The legislation regarding posting has brought to light the following problems:
1. Social insurance institution should check if a given employer posting his/her employees to other Member State habitually carries out in Poland the so called “significant business activity”. It includes: – information regarding total turnover in a typical time period in each of the considered Member States,
— number of employees staying in posting Member States compared to number of posted employees.

This Decision does not define in a precise way what period of time may be considered “typical” and what number of employees in posting and receiving states is sufficient for “significant business activity”.

Should these criteria be taken together into account? What decision should be made in cases of an undertaking which employs many employees in a Member State where its production is located but it sells its products in another Member State that provides the majority of its turnover.

Every Member State has its own interpretation of these criteria.

In addition, the social insurance institution issuing Form E 101 should be competent not only in the area of social insurance but also tax law and accounting in order to check a turnover in a given undertaking.

To give an example, a branch of Social Insurance Institution (ZUS) declined to grant an E 101 form to the workers of a company that had 10 per cent of its turnover from its activity on the territory of Poland, while Polish court stated that it is logical that the turnover from a contract within European Union is going to be higher than from contracts within Poland only. The ruling of the Polish court therefore obliged Social Insurance Institution to grant the E 101 form for Polish posted workers.

2. According to the Article 14.1 (a) of the EEC Regulation 1408/71 employee is to be regarded as posted if the anticipated duration of posting does not exceed 12 months and that he/she is not sent to replace another persons who have completed his/her term of posting. The second requirement creates many problems for posting employers and for social insurance institution granting E 101 Forms because this institution is not able to check whether or not a given posted employees is replacing another person.

In order to apply a uniform principles in this respect by all local ZUS units while confirming E 101 forms, Poland has decided to implement standardized procedures. According to some employers, however, the practice of the Polish Social Insurance Institution is more rigorous than Community law. The Chamber of Polish Employers issued a complaint in this matter to the European Commission in August 2008.

3. Posting self-employed farmers to another Member States within the framework of farming activity carried out in Poland cannot be interpreted as broadly as it is in case of other type of self-employment due to the specific features of farming, in particular its fixed connection with land. Land cannot be transferred to another country as it can be done in case of a seat on non-agricultural business activity.

The Agriculture Insurance Institution stated that relevant institutions of some states require information that does not fall within the scope of what is stated in Community regulations on coordination (e.g. the size of agricultural units, information on private agricultural activity). Another disputable issue concerned the application of provisions of Regulation 1408/71 to the self-employed persons including farmers, acting at the same time as seasonal workers in Germany. The KRUS can only accept temporary postings for agricultural activities in another Member State on agricultural undertakings owned by those farmers, by leasing these undertakings in another Member State. Or posting can also be allowed to perform specialised activities similar to those performed on his own farm (e.g. specialised tree cutting).

**Working simultaneously two or more Member States**

**As an employed and as a self-employed person**

The problem is that every Member State adopts its own policy and sometimes assumes that it is sufficient, if an employee works for at least one day in a month in the country where he/she lives.

Recently, Polish companies have been interested in using this article, in particular Art.14.2.(b),(ii). Namely, the company with its seat in Poland conducts business activity in the territory of Poland in a
very limited scope or does not conduct business activity in the territory of Poland at all. It employs employees on the basis of short-term employment contracts (4 months, with e.g. Germany or Austria being given as places of work) and sends them to work in these two Member States. These people do not work in Poland.

Pursuant to art. 14.2.(b).(ii) employees are subject to the legislation of the Member State in the territory of which the enterprise or the employer which employs them has its seat, if they do not live in the territory of one of the Member States where they work. Therefore, in our case they would be subject to the Polish legislation. However, we know that they first work for two months in Germany and then for the period of two months in Austria.

Working in such a system and applying 14.2.(b).[(ii)] leads to „circumventing” regulations concerning delegating and fulfilling conditions of Decision 181. In such cases we refuse to issue E 101 forms under 14.2.(b), assuming that these are periods of employment which follow each other and conditions for sending, such as conducting large-scale business activity, have to be fulfilled in order to enable employees to stay in the Polish social insurance system. However, our employers request the legal basis and believe that this regulation can be applied in such a situation.

Relevant institutions submit the following problems. Recently in Poland companies have been set up which offer employment in Lithuania or Great Britain to self-employed persons for a regular fee. These companies advertise themselves through the internet. Persons using this service become hired workers and, according to Article 14 (c) of Regulation 1408/71 are subject to social legislation of the country where they are hired, and, consequently, are not covered by social insurance in Poland. They receive from the relevant Lithuanian institution the E 101 form certified under Article 14 (c). The Polish Social Insurance Institution has doubts whether those people are in reality employed in Lithuania and carry out their work there or whether this employment is fictional, i.e. a given person works through the internet while still in Poland. This would constitute an infringement of Polish provisions since the fee paid to such companies is lower than the amount of contributions due to be paid to the Social Insurance Institution in Poland. It is also contrary to Article 14 (c) which is to be applied in cases when a person is a worker hired in one country and a self-employed person in another country. There has been an intervention addressed to the Lithuanian relevant institution on the part of the Polish Social Insurance Institution, although so far there has been no response.

Application of Article 17

The refusal on the part of competent institution regarding the conclusion of agreement on the basis of Article 17 of the Regulation 1408/71 may cause a return of the employee to the posting country. It may infringe the principle of freedom of services and freedom of movement. In particular there is a problem with its interpretation and material scope. What function does it have? The promotion of free labour market or social protection of employees? How to merge those two functions?

IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS

Sickness benefits

BENEFITS IN KIND

Aggregation of periods

Germany does not recognize insurance periods completed in Poland by self-employed persons to qualify them for German health insurance. According to German law for a person to be insured under the general scheme he or she has to be insured in Germany for at least one day. This condition is not fulfilled by the majority of Polish workers.

Concept of occasional health care

Polish relevant institution has also submitted some proposals for changes in the current procedures:
1. Legal provisions should be introduced that would enable the entitlement to benefits connected with giving birth in the ordinary period (two weeks before and two weeks after the due date of birth) on the basis of E 112 form. The procedure for obtaining such a form should be simplified. Relevant state could refuse the claim for reimbursement of the cost of medical service obtained during the birth in case when it took place in the prior established term (ordinary term). The birth in the ordinary term is a foreseeable event in medical context as opposed to premature (preterm) birth; 2. there should be an initial date introduced for the European Health Insurance Card (EHIC) since in case when it is obtained for four months it happens that a given person is using it to cover the cost of the prior medical treatments, i.e. medical treatments obtained before issuing the EHIC, even though this person had not yet been insured at that time.

**Planned health care abroad: Under the Regulation**

Polish relevant institutions presented the following problems:
– difficulties with receiving the reimbursement for the costs of planned medical treatment from claimants living abroad
– difficulties with obtaining the confirmation for financing the planned medical care according to coordination rules (form E 112)
– numerous cases of claiming the right to medical care under the form E 112 when treatment should be based on an EHIC card (necessary treatment in case of emergency, accidents).
Accepting Polish patients without the form E112 and than asking Polish institutions to send the form. A different matter is the verification of whether benefits granted based on EHIC card (European Health Insurance Card) were the right kinds of benefits or whether those were planned treatments. This is the case especially with giving birth to a child at a physiologically accurate time and the cost of care at that time.

There are usually two types of situation - when a mother goes to a different Member State in order to be closer to the family or when a mother simply wants better care and believes she can obtain it in this country. There is a continuous increase in a number of births of children with Polish citizenship outside Polish boarders.

The Polish Social Insurance Institution is offering to impose some limits with the access to health care benefits by using E 112 form as a necessary requirement.

Furthermore, in 2009 the relevant institution signalled the following problems:

1) the lack of possibility to issue E112 form with a date on it preceding the date of the decision by the president of National Health Fund even in cases when the application has been accepted due to the lack of possibility to treat the patient in Poland or due to long waiting periods for the treatment in Poland (and serious medical condition of the patient);
2) the lack of possibility to examine the medical condition before accepting/refusing the application for obtaining medical treatment abroad in cases when it is this examination that should determine the decision;
3) the demand on the part of foreign providers to issue E 112 form regardless of the national provisions in this area;
Polish law requires that the cost of treatment abroad is calculated in case when the Community law provides for such treatment, e.g. when there is no possibility to obtain required treatment in Poland. It is only in such cases that the application for obtaining treatment abroad is to be accepted. According to the Community law we are obliged to accept the foreign cost of treatment. Important tasks in this area to be undertaken in the immediate future are as follows:
– standardization of the Community provisions with national legislation, e.g. requirements of the prior acceptance of application. According to the relevant institution the provisions of the regulation make it possible to accept the application for an already obtained medical treatment only in cases of accidents or other unpredictable events;
– the lack of possibility to reimburse the cost of treatment obtained before the decision by the president of the Polish National Health Fund was issued in case when the treatment obtained was not available in Poland or waiting period was too long.
Reimbursement of benefits

Polish Insurance Institution (NFZ) reported in 2008, and then again in 2009, the following problems:
1) difficulties with the identification of relevant institution for bearing the cost when there are several institutions designed to deal with coordination, the lack of an annex to Regulation 574/72 with a list of the institutions according to their relevance and competence.
2) difficulties with differentiating between different types of social security schemes, especially sickness and work injury, this causes a need for further verifications, usually when there is an accident and the right for longer or higher benefits has to be verified.
3) difficulties with obtaining the documentation (medical and financial); there is no legal framework stating the requirements with the relation to the documentation. It is a case especially in those States were the cost of benefits is lower.

BENEFITS IN CASH

Medical examination and administrative checks

There is one problem which requires discussion – it is the interpretation in the Member States provisions of the Article 18, Items 1 and 2 of the EEC Regulation No. 574/72, defining rules of applying for cash benefits in case of residence in a Member State other than the competent State.

The problem concerns the type of certificate the insured persons should receive and the type of certificate, which should be sent by the institution of the place of residence (stay), to the competent institution.

There are cases when Member States institutions do not honour medical certificates confirming incapacity for work issued by Polish doctors. Those certificates are in accordance with the procedures of Regulation 574/72 article 14, send with E 115 forms to relevant institutions when a Polish doctor confirms incapacity for work in case of a patient working abroad. Still, however, relevant institutions ask in those cases for a E 116 form. This necessitates another medical examination and the cost of such examination also matters. Very often it is difficult to obtain the reimbursement for the cost of such an examination.

Member States’ cooperation

The provisions of article 84a of the Regulation 1408/71 oblige the institutions of Member States to cooperation in order to implement community law. There is, however, no explicit norm to execute such obligation. Sometimes, notwithstanding numerous reprimands, it takes more than a year for (Greek, Italian, British institutions) a decision in particular or it is impossible to obtain any answer.

In order to apply the rule of ‘good administration’, which is contained in article 84a of Regulation 1408/71, the institutions of Member States in cases when entitlement to benefit is refused, should issue a detailed decision that states the reasons for the refusal and explains what other entitlements or appeals might be available. It often happens that in order to obtain such a decision from an institution requires the intervention of the Polish institution on behalf of the claimant (e.g. in case of British institutions).

The problem of insufficient explanations given for the refusals issued by the institutions of Member States is common, especially decisions related to the E 118 forms. This may be due to the small space for such an explanation that is provided on the form. However, this, in turn, cannot be accepted as a justification for the lack of any explanation whatsoever or for explanations that do not, in fact, explain the actual reasons for the refusal. In some cases the relevant institution issues the decision to refuse the right to benefits accompanied solely by the simple formula: ‘no entitlement’.

Other problems relate to the proceedings incorporated in Regulation 574/72 and the lack of uniformity in action and of proceedings between the different institutions of the MS, which can lead to a long path of negotiations in individual cases. This problem certainly occurs with relation to Article 105 of Regulation 574/72, which holds that the costs entailed in administrative checks and in medical examinations observations, doctor’s visits and checks of all kinds necessary for the award provision or review of benefits shall be refunded by the institution on whose behalf they were made.
to the institution which has been responsible therefore on the basis of the charges applied by the latter institution. If the Polish institutions have to evaluate the incapacity to work of a person who has applied for a foreign benefit in case of incapacity or invalidity. Then the Polish institution performs this kind of medical evaluation. The full costs have to be refunded by the other MS. The actual problem is that some foreign institutions convert the amount in Zloty into Euro or their national currency and thus reimburse in their currency rather than in Zloty. Poland has to suffer these exchange rate differences. After conversion, Poland is always in the red on these transactions. But there is another aspect that causes problems where different institutions handle things differently. The ZUS always pays all the bank costs of money payable to another MS, but other MS only do that within the limits of the respective states and they do not reimburse for the full cost.

Medical examination and administrative checks: Additional remarks

There are many problems caused by the application of Article 13 (2) (f) of the Regulation 1408/71 in the decisions issued by relevant institutions that refuse, on the basis of this article, the right to benefits for persons residing in Poland who were covered by the legislation of another Member State.

The application of Article 13 (2) (f) of Regulation 1408/71 is interpreted by the claimants as meaning that it is the Polish Social Insurance Institution that should answer their legitimate claims for benefits in cash.

The persons that were refused the right to cash benefits under Article 13 do not undertake economic activity on the territory of Poland that could entitle them to benefits within the Polish scheme since they are, de jure, incapable for work. They have, therefore, no entitlements to benefits in cash within the framework of Polish legislation.

Some Member States do not agree with such an interpretation of Article 13 (2) (f) of Regulation 1408/71 and claim that the right to cash benefits issued from the fact of residence within the territory of a Member State even if the benefits are provided by the applicable legislation after the insurance ceased.

The Polish Social Insurance Institution most frequently faces the refusals by Czech institutions which claim that the persons who ceased to be covered by the Czech insurance and reside in Poland become entitled to cash benefits in Poland. This makes the claimants think that they are entitled to sickness cash benefits in Poland although they were never able, due to their sickness, to undertake economic activity in Poland that would entitle them to social security benefits, and, by the same token, sickness cash benefits, in Poland.

Invalidity

Member States’ cooperation

When applying Article 105 of Regulation 574/72 there might be some problems issuing from the differences in its interpretations. From the provisions of this Article it can be concluded that there is a necessity to conduct medical examinations in order to grant a pension and the cost of this examination is reimbursed for the institution that bore this cost, according to the amounts established by the institution which was burdened with the cost of the aforementioned examinations. This amounts to the fact that a relevant institution of one Member State that should reimburse the cost of the examination is supposed to reimburse the full cost to the relevant institution which paid for the examination in its own Member State.

The question can be raised in which currency the institution that requested the examination should reimburse the cost of the examination paid for by institution that carried out this examination. It seems that it should be the currency of a Member State of the institution that claims the reimbursement of the cost and not the currency of the Member State of an institution which reimburses the cost. This would ensure that there are no discrepancies between the actual cost and the amount reimbursed due to the fluctuations on currency markets.
Old-age and death

Aggregation of periods

Relevant institutions submitted the following problems: if the Polish periods of insurance (contributory periods, non-contributory periods, agricultural periods) established in the aforementioned way are not sufficient to become entitled to Polish old-age pension the foreign periods of insurance should be added. The foreign periods are, according to Article 45 (1) of the (EC) Regulation 1408/71, added to the total amount of Polish (contributory periods, non-contributory periods amounting to one third of the contributory period, agricultural periods) periods of insurance.

The relevant institution often disagrees with the interpretation of Article 45 (1) of the (EC) Regulation 1408/71 adopted by Polish social security courts examining the appeals from the decisions by the old-age pensions departments of Social Insurance Institution that would claim that, when adding together the Polish and foreign periods of insurance, the contributory periods, both Polish and foreign, should be counted first, and then the non-contributory Polish and foreign periods can be added in the one-third scale, and, finally, the agricultural periods can be added.

It should be noted that when applying the latter method of calculation of Polish and foreign periods of insurance it could turn out that a given person, who has the necessary Polish periods, including the agricultural periods) will be granted the Polish old-age pension on the basis of foreign periods of insurance since their obligatory calculation and inclusion before the agricultural periods would make it necessary to take the foreign periods into account. Such a person would be granted a Polish proportionate old-age pension, calculated according to Article 46 (2) of Regulation 1408/71 instead of a Polish national old-age (full) pension calculated according to Article 46 (1) (a) of this Regulation, since the pensions calculated on the basis of national and foreign periods of insurance are regulated by the provisions of Article 46 (2) of the (EC) Regulation 1408/71. These issues will require a detailed legal analysis.

Unemployment benefits

Voivodeship Work Offices, being the competent institutions, often complain about the difficulties with obtaining the E303 forms form competent institutions of another Member States. The period of waiting often exceeds 6 months, and the date of issuing the form is of essential meaning to persons applying for unemployment benefits in relation to working periods in another Member State. The person will receive a benefit only after the form is received by the competent institution. Because of the long waiting period many persons lose their status of an unemployed person when undertaking work and cannot receive his/her unemployment benefit.

Family benefits

A material issue related to the implementation of the family benefit coordination regulations refers to the aggregation of the family benefit rights.

Under the EU law the institution of the domicile of the family members entitled to family benefits in another Member State, is obliged to provide the competent institution with information about, among others, the number of family members, their age and current financial standing. Consequently any change of factual circumstances to this extent necessitates another examination of eligibility for the benefits in question.

Nevertheless some Member State institutions do not communicate to the institutions competent in Poland about granting entitlements to family benefits to the persons working in such Member State, do not reply to the inquires of the Polish competent institutions or reply with significant delay.

Another doubt refers to the question of correct interpretation of Art. 76 par. 2 of the Regulation 1408/71. the institution of the competent state may apply the suspension rule referred to in par. 1 Art. 76 even if in the state of residence no application for granting family benefits has been lodged.

In practice it happens that the institutions of the Member States apply Art. 76 par. 2 of the Regulation 1408/71 when the Polish institution – at the place of domicile of the family members – confirms in E411 form that the person specified in item 2 of the form, is not involved with
occupational activity at the place of domicile, nor it has lodged application for family benefits. In such cases it happened many times that the competent institution would suspend the amount of family benefit paid out, and reduce it to the level of benefit due to the interested parties at their place of domicile.

The Polish institutions believe that acting in this way is wrong, since such person has not filed an application due to the priority in the state where job is performed – Art. 73 of the Regulation 1408/71. At the same time at the place of domicile of the family no occupational activities have been performed and it is not a prerequisite to grant family benefits. Given the above the application of Art. 76 is wrong according to Polish institutions. In parallel due to the fact that in Poland no application has been lodged, it was not possible to suspend benefit payment and reduce it to the actual amount of benefits due in Poland. Polish institutions believe that in such cases Art. 10 of the Regulation 574/72 should apply.
IMPLEMENTATION OF THE GENERAL PROVISIONS

Scope of the coordination Regulations

Personal scope

Third-country nationals

The significance of enlargement’s application of the Regulations to national of third States must not be neglected, because a great part of them can have insurance careers in more than one Member State.

In Portugal, the national legislation is not restrictive and nationals of third States, in general, can beneficiate from national legislation without restrictions. However, the importance of Regulation 859/2003 is crucial when these persons have been insured in more than one Member State, in which case Regulation 1408/71 can be extremely useful, especially when aggregation of periods of insurance is necessary. Portugal has received a large number of migrant workers from third States. Those workers are often the core of the labour force of companies which render services in other Member States, and that fact engenders, later on, problems to these workers that will be subject to the law of the host country, in the cases where the countries of origin of those workers are not related to that Member State by a bilateral agreement on social security.

General Principles

Aggregation of periods

Several people who have accomplished periods of insurance in Portugal under the civil servants scheme and under the general scheme of insurance in other Member States have seen their claims of retirement (old age) pension refused by the Portuguese institution. These cases are now before the Administrative Commission.

Applicable legislation

General introduction

It is a problem that for the same situation, procedures or criteria followed by institutions of Member States can diverge according to the national institutions’ policies on the subject, especially in cases of posting.

The following problems occur:

- Can an undertaking of a Member State that is carrying out work in the territory of another Member State engage a worker residing in this Member State and register that worker within the social security system of the first Member State (where the undertaking is established) and ignore Article 13 – 2-a), considering that the worker is “posted” under Article 14-1-a?
- Difficulties in relationships with institutions or authorities of other Member States: it is necessary to say that some authorities of some Member States, in cases considered suspicious don’t consider themselves bound to the decisions of the ECJ under which E-form E-101 issued by a competent institution is binding for all institutions, until a resulting dispute is resolved under the supervision of the competent bodies. In such cases, undertakings cannot operate on the territory where services were carried out and also cannot receive from the local contractor payments corresponding to services already completed. In certain situations, Portuguese institutions are confronted with authorities that seem not to be institutions with competence in the field of social security and that are very demanding in questions related to the labour force.
Two particular situations called attention:
- The fact that in some Member States the companies that receive the posted workers of a sub-contractor, demand an E 101 form before the beginning of the work, which in some cases is not possible;
- Interim employment companies are posting workers to other Member States for long periods, often in several countries successively without returning after the conclusion of a contract; this may be because the sending company is only a vehicle and not a sub-contractor. We wonder whether or not this situation should be considered as being covered by article 14 – 1 – a); considering the nature of the activity of such companies, it could be questioned whether or not it could more acceptable to place this activity in the field of free movement of services with the application of the law of the place of work.

**Working in one Member State only**

**Posting: Conditions**

Can an undertaking of a Member State that is carrying out work in the territory of another Member State engage a worker residing in this Member State and register that worker within the social security system of the first Member State (where the undertaking is established) and ignore Article 13 – 2-a), designating that worker as “posted” under Article 14-1-a?

**Successive posting**

Cases of successive missions corresponding to different projects also raise problems. Portuguese social security officers reported that several institutions of other Member States don’t accept “successive postings” (when a worker is posted in one country for a certain work and at the end of that mission is “posted” – with another E 101 – to the same country but in another town for another job). This matter has already been discussed in informal meetings and there are opposite opinions on the subject. It seems to be acceptable that an undertaking can claim for a certain worker a posting of 11 months for a mission in a certain place of a country and at the end of that specific employment he claims another posting for a different project in a different place of the same country for the same contractor.

**Working simultaneously two or more Member States**

Portuguese institutions are often confronted with forms E101 that, in what concerns the period of submission to the legislation of another Member State (for instance, under Article 14(2)(b)), point 5 of the form mentions that the period of submission to the legislation of the other Member State is undetermined. Institutions consider this practice as inadequate, since there is no longer control whether the person in question remains insured or not insured in the other Member State. It would be appropriate to adapt the form in order to carry out periodical review.

**IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS**

**Sickness benefits**

**BENEFITS IN KIND**

**Equality of treatment**

Taking into consideration that under Directive 2004/38/CE, EU nationals requesting the condition of residence in another Member State must “have comprehensive sickness insurance cover “, officials rarely accept the fact that nationals of certain Member States, who are beneficiaries of social insurance pensions but are not entitled to health care insurance in their State of nationality, can access the Portuguese NHS, to overcome the fact that their own country didn’t allow them access to an insurance and therefore to the issue of form E121.
**Member States’ cooperation**

Mostly cooperation happens in a positive way. There are situations, for example with Spain, where Portuguese institutions can’t obtain information from the Spanish authorities, requested through form E126, about the amount to reimburse to Portuguese insured people who paid for medical care in Spain. In general, the response is that Spain does not have tables with the rates of reimbursement.

**Reimbursement of benefits**

Officials of Portuguese institutions receive frequent complaints from people who travelled and became sick and had great difficulties in obtaining health care. Those difficulties were experienced in France (where the “Centre de Paiement” ask for the “Carte Vitale” and doesn’t consider the EHIC as a valid document for reimbursement; the Netherlands, Germany, and above all in Switzerland (where the client has to pay – like in France – and is required to claim reimbursement exclusively in a centralised service in the city of Solothurn).

The result of these difficulties is that a large number of people return to Portugal and claim reimbursement under Article 34 of Reg. 574/72, which undermines the intentions of the legislator.

**BENEFITS IN CASH**

**Calculation of benefits**

According to Article 18, a qualifying period can be completed by aggregation of periods and calculation of benefits in cash is based on the terms defined in Portuguese legislation. The problem is the fact that calculation takes into consideration the reference earnings of the first 6 months prior to the second month preceding that of the beginning of incapacity. In the case of aggregation of periods of contributions, where the beneficiary has no registration of remunerations, the reference earnings are calculated under a formula. As Article 23 of 1408/71 (as well as Article 21 – 2 of Reg. 883/2004) regulates only earnings under the competent legislation will be taken into consideration, migrant workers who need to aggregate periods will be seriously affected as earnings in the other Member State will not be taken in consideration.

**Old-age and death**

French complementary schemes: it appears that French complementary pension schemes, are now subject to the material scope of Regulation 1408/71. Portuguese institutions reported that “ARRCO” pensions, that are granted on the basis of forms E 202 PT sent to the French institution of the general scheme, don’t take in consideration, as should be the case, the date of the presentation of the request of the pension in Portugal, which means that the beginning of the ARRCO pension is several months later than the Portuguese pension and also of the French pension of the general scheme. It seems that this a standard procedure and not an occasional lapse.

**Main issues**

Recalculation of old-age pension – Article 49 of Reg. 1408/71: complaints have been made by insured persons who, having reached 60 years of age, have received a reduced old-age pension, from the French scheme, (when the necessary condition of 160 trimesters of insurance is not fulfilled). When these persons reach the age of 65 years they can claim the Portuguese old-age pension. According to Article 49(1) of the Regulation, the French institution should recalculate the pension, reformulated at the full rate (of 50%).

However, it appears that the exercise of this right is not easy to achieve, because the institutions don’t fulfill their obligation to re-open and calculate the pension afresh.
Unemployment benefits

Additional remarks

Rules of calculation of unemployment benefits in Portugal take into consideration the average daily wages registered in a “reference period” (twelve months before the second month prior to unemployment).

In cases where persons become unemployed in Portugal after a short period of work several problems can occur when the person only fulfills the conditions through the aggregation of periods of insurance.

1st: The person entitled to benefit was unemployed in another Member State during two or three years before coming to Portugal with E303. Here, after receiving two weeks of unemployment benefits, the person accepts a job that was proposed by the Employment Services and works two months. S/he becomes unemployed at the end of “experimental period” (period during which the employer can put an end to the contract on the basis of unfitness for the job). This person cannot aggregate the periods accomplished in the previous State of occupation because Portuguese law doesn’t allow aggregation of periods of unemployment benefits with periods of insurance due to working remuneration. The job-seeker is penalised because he was obliged to accept a job and afterwards s/he loses the job and entitlement to benefits in both Member States;

2nd: When a recently employed person becomes unemployed in Portugal and doesn’t complete the qualifying period for benefits and aggregation of periods is necessary it may happen that no remunerations are registered in Portugal in the reference period established for the calculation of benefits (art. 68 of Reg. 1408/71 establishes that only the remunerations registered in the competent institution must be considered). This is a serious problem for the unemployed person because aggregation of periods can be useless as benefits can’t be calculated. Portugal in view to protect workers in such situation provided specific legislation on the subject (Decree-Law 46/93, of February 20th) in two perspectives:

2.1. – when there is no Portuguese remunerations in the period of reference; or
2.2. – when in the period of reference, the unemployed person had some months with remunerations in one Member State other than Portugal and lately in Portugal, and in both situations the legal solution provided by Decree-Law is to “use” the average of Portuguese wages to apply to the periods of work in the other Member State. Otherwise, the unemployed person would not beneficiate of benefits in the first case or would have a lower benefit in the second.

Family benefits

Main issues

The new legislation on family protection has caused a radical change in the perception of international agreements, including EU Regulations.

Entitlement to benefits based on residence causes persons who care for the children of migrant workers to consider that entitlement must be exclusively in terms of national legislation and disregard eventual rights under the legislation of other States to which Portugal is bound by international instruments.

On the other hand as residence is the condition for entitlement, workers subject to Portuguese law residing in another Member State or in a third State to which Portugal is bound by a bilateral convention, may consider their situation as an obstacle to entitlement.

These observations were taken into consideration and instructions have been given to national institutions to achieve a correct application of the law.
IMPLEMENTATION OF THE GENERAL PROVISIONS

Scope of the coordination Regulations

Material scope

Social security benefits, special non-contributory benefits and social assistance

Romania had a special non-contributory benefit, pension for disabled persons inscribed in the Annex II of Regulation 1408/71, but the legislation on disabled persons has been changed - as a consequence the new benefits are not fulfilling the conditions to be considered as special non-contributory benefits and Romania does not have any special non-contributory benefits inscribed in the Annex X of the Regulation 883/2004.

In March 2009 the social minimum guaranteed pension was introduced, effective from 1 April 2009. Only residents are eligible. The benefit is intended to be listed in Annex X of the Regulation 883/2004. Beneficiaries are pensioners in the public pension system residing in Romania, regardless of the date of retirement. The conditions of entitlement are that that the amount of pension is below the guaranteed minimum social pension.

General principles

Applicable legislation

Working in one Member State only

Lex loci laboris

There are several cases where persons working in Romania for an employer in another country, with no registered office in Romania, have complained about the payment of social security contributions in Romania. Romanian legislation clearly sets out the circumstances when a person may be insured in Romania, the local offices do not take into account the provisions of the Regulation, without being mentioned explicitly in the legislation. The Romanian authorities intend to adopt special legislation for these cases, and a draft law is currently under discussion.

Posting - Conditions

The posted employee is normally attached to the undertaking which posts him/her – the condition is considered as being fulfilled if the person proposed for posting works for the respective employer since at least 2 calendar months; Exception: the employee employed by the Romanian employer with the aim of being posted will be considered as being covered by the Regulation if (1) the employer runs significant activities in Romania, and (2) the subordination of the employee towards the employer continues during the posting, provided that the individual work contract is concluded either for an undetermined period or a determined period of at least 3 calendar months over the posting deadline, and the employee is not in the trial period when they apply for posting or during the posting;

The aim of posting is that the employee performs in the state of posting a determined work in the benefit of the employer – the activity must be clearly determined as regards the necessary actions and their duration;

During the posting, the subordination relations between the employee and the employer must be maintained – the individual work contract is concluded either for undetermined period or determined period of minimum 3 calendar months over the posting deadline, and the employee is not in the trial period when they apply for posting or during the posting;
The posted employee cannot be sent to replace in the same position another person whose posting duration has expired;

The sending employer performs significant activities in Romania – the following criteria are given as examples, by mentioning that they are not exhaustive nor cumulative: (a) the employer is registered under the National Office of the Commerce Register (Oficiul National al RegISTRului Comertului) in Romania and has unique registration number (CUI) and/ or VAT number (cod fiscal); (b) the employer performs in Romania activities specific for their professional field of activity and not only administration activities not specific to their own activity field (classified according to the Code of the National Economy Activities – CAEN); (c) the turnover of the employer from Romania represents 25% of the turnover of the last 2 years, both in Romania and in the state of work; (d) the percentage of the employees who remain to perform in Romania, reported to the total number of employees from both Romania and the state of work, is bigger than 50%, and the nature of their activity in Romania is specific to the professional field of the employer; (e) the individual work contracts between the employer and the posting employee are subject of the Romanian legislation; (f) the activity of the posted worker corresponds to the field of activity of the employer from Romania; (g) previous to the posting, the employer had run activities on Romania’s territory of at least 4 consecutive calendar months.

IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS

Sickness benefits

BENEFITS IN KIND

The biggest problems with the EHIC is the non-recognition of it by some providers in the EU (Germany, Austria, The Netherlands and Italy) for reasons that go beyond the understanding of the Romanian institutions. As they do not know the reason, they cannot solve the problem. The second problem was that the temporary replacement certificates were also not recognised by suppliers in the EU, just because they are temporary certificates. Apparently, the hospital had refused these certificates because they are in paper form and they claim that they do not have enough guarantees for reimbursement. A third problem relates to kidney dialysis, as some hospitals refused the EHIC and required an E112-form.

Another problem related to other Member State institutions, when registering a Romanian citizen in their system, e.g. the Italian system, is based on the fact that if that citizen works in Italy, Italy required a document from the Romanian institution declaring that the citizen is no longer covered by the insurance system in Romania. As far as the Romanian institutions know, the Regulation does not include any such provision. And sometimes, these certificates could not be issued, because the Romanian citizen was covered by the Romanian insurance system. Ro cannot exclude the citizen from their system as long as they do not know for sure that he is covered by the Italian system.

A Romanian insured student is abroad for studies, which is a temporary stay and he remains a resident of Romania. Presenting the EHIC to the doctor MS where he studies, he is asked for an E106. This is confirmed by the foreign institution.

Old-age and death

Main issues

The main issue remains the long duration of determining old age pensions claims. Cases in the courts have been taken against several counties’ pension administrations in order to issue a decision in due time.

Also, the specialised unit of the European Commission sent complaints to the Romanian institutions from Romanian citizens or citizens living in Hungary, Germany, Austria, Greece regarding the delays in determining their pension claims.
Unemployment benefits

The main provisions and forms dealt with are Article 67 on aggregation (E301) and Article 69 on looking for a job in another MS (E303). There were very few requests for forms E301, mainly due to the very low amount of the Unemployment Benefit (UB) in Romania. There were no big problems with the issuing of forms in Romania. The only difficulties that were met related to the sending of forms by mail and due to post problems the waiting times for the receipt of benefits were extended. As to Article 69, also very few E303’s were issued by the Romanian institutions. This is also due to the low UB in Romania, so it is very difficult to go to another MS with this amount of money. Some people came to look for a job from a MS with rather high UB. These people are not willing to give up the foreign UB for the much lower salaries in Romania. That is a big problem. But according to Romanian legislation, an unemployed person cannot refuse a job offer because his foreign UB is higher than the salary of the job he was offered. Can an unemployed person with good skills and qualifications refuse a job with a very low pay? The Regulation stipulates that a person may search for a job in another State and receive an UB during this time. The institutions in Romania implement the national legislation and in case someone finds and is offered a job but refuses that job, the unemployment benefit is suspended, regardless if the UB s/he gets is higher than the wage s/he could from that job in Romania. In addition it can be mentioned that as these foreigners do not speak the Romanian language, they are not in a position to follow the mediation and training services of the Romanian institution.
IMPLEMENTATION OF THE GENERAL PROVISIONS

Scope of the coordination Regulations

Personal scope

Most of the regulations in the Slovakian social protection system contain a territorial condition. In other words, an entitlement or participation in the system is under the condition of permanent stay, or respectively temporarily residence in the Slovak Republic. Nationality is not relevant. The administrative procedure for granting permanent stay for citizens of EU Member States is in comparison with other nationalities very easy. Citizens of EU Member States have a right to stay on the territory of any EU state for 90 days without registration. In fact, social protection institutions do not generally determine participation in the system only with reference to permanent stay or temporary residence. Institutions also require that a person is covered by the personal scope of Provision f. e. proving the performance of the work on the territory of the Slovak Republic.

Both Czech and Slovak legislation provide for the concept of “protected period”. This is a period starting at the end of an employment relationship during which a person has a claim for benefits in cash if he/she is sick during this time.

To date, the institutions have not solved this issue. As legal proceedings are pending in both the Czech and the Slovak Republic, it is possible that the matter will be referred to the ECJ. The argumentation of the Slovak Republic is that claims should be given effect once they are acquired. According to Czech legislation, persons completing such protected periods cannot be regarded as migrant workers due to the fact that their employment relationship has ended; hence, the Regulation is not applicable to them.

Applicable legislation

Application of Article 17

Slovak institutions have tried to solve a situation with employees residing in the Slovak Republic, employed in the Republic of Hungary but insured by Slovak institutions which was in contradiction with Regulations Principles. Reason of this situation was the wrong procedure of the employer. The problem was how to retroactively and harmlessly clarify this situation with respect to employees. A solution seems to be in the application of Article 17. Proposal for solution was to develop an agreement which should legalise previous incorrect insurance of the group of employees insured by Slovak institutions because retroactively insurance in Hungarian social security system was not possible. The ongoing insurance relationships should be dealt with respect to coordination rules. This specific problem has not been closed yet.

Material scope

Classification of social security benefits

New legislation in the field of long-term care came into force on 1 January 2009. Benefits intended for maintenance (long-term care) are provided within the social service system as benefits in kind. They are completely under the competence of local and regional governments. Social services could be provided by the municipality as well as by natural persons and legal entities. Its funding is multi-sourced (municipality, state, recipient). A second new act provides allowances for compensation of seriously health impaired persons as a benefit in cash. Both of this acts provide means-tested benefits.

Due to their character some benefits could also belong to other branches of benefits. It is necessary to point out that rehabilitation provided within the public healthcare insurance system and work rehabilitation are not part of health care rehabilitation. Also, treatments are not part of the public
healthcare insurance system. Lump-sum compensation and survivor’s injury annuity are benefits granted to survivors in case the deceased died as a consequence of an accident at work or an occupational disease. Funeral costs for insured persons who died as a result of professional contingencies are covered by death grants.

Benefits concerning ‘new risks’

There some one-off allowances, for example the new Christmas contribution for pensioners, payment of which was started by the new Government. Christmas contribution is designated for certain groups of retired persons with residence in the territory of the Slovak Republic and its amount is related to the amount of pension provided.

In the area of family benefits a new contribution is being prepared for persons who do not qualify for the child tax bonus (child tax credit) because they do not pay income tax. This concerns mainly pensioners who have no other income except pensions from social security.

In the area of family support a new contribution is being prepared to cover the costs of services connected with childcare for children up to 3 years old. The aim of this benefit should be to create better conditions for employment of parents taking care of children. It is an arrangement that would provide harmonisation of work and family life.

Additional remarks

A discussion is currently taking place on a revision of the Act on parental benefit. The main change proposed concerns parental allowance which could be also paid for a shorter period and in higher amount. Some of the other EU Member States have also applied this model of “multispeed” parental benefit but it is not clear how to provide overlapping provisions in the case of different durations of receipt of parental allowances. For example, the Czech Republic provides parental benefit for periods of several years and the total amount of these benefits may be paid out for one, two, three, or four years while the Slovak Republic provides parental benefit for a period of three years and the total amount of these benefits is paid out within 18 months or 36 months. How should these difference payments be calculated if information exchanged between institutions of two EU member states contains only the monthly amount of the benefit? Should the total amount of the benefit be calculated pro futuro on both sides?

The Regulation is not adapted to funded pillars of retirement pensions.

Applicable legislation

General introduction

The Slovak Republic still does not have a form to document the actions taken when defining the state of domicile (the centre of interests), especially in relation to the citizens of Slovakia who have decided to live in another Member State while they retain their permanent residence on the territory of the Slovak Republic, for example, at their parents’ permanent residence. As Member States, in which such persons permanently live and have their centre of interests, do not have a reason to contact institutions in the country of permanent residence, fraud or error may occur when a person fails to inform the institution of a material change of circumstance that might give rise to a change in or termination of the claim. These problems arise mainly in respect of family benefits because of the method of investigation the competent EU Member State.

Application of Article 17

Slovak institutions have tried to solve a situation with employees residing in the Slovak Republic, employed in the Republic of Hungary but insured by Slovak institutions which was in contradiction with Regulations’ principles. Reason of this situation was the wrong procedure of the employer. The problem was how to retroactively and harmlessly clarify this situation with respect to employees. A solution seems to be in the application of Article 17. Proposal for solution was to develop an agreement which should legalise previous incorrect insurance of the group of employees insured by Slovak institutions because retroactively insurance in Hungarian social security system was not possible. The ongoing insurance relationships should be dealt with respect to coordination rules. This specific problem has not been closed yet.
IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS

Sickness benefits

BENEFITS IN KIND

Member States’ cooperation

Very good cooperation as well as some administrative agreements on information exchange exist with Czech competent institutions. But the cooperation with some states is a bit difficult. Confirmation of some facts on E forms sometime takes several months. Cooperation with Romania and Bulgaria over reimbursement can be problematic. However, Romanian citizens are treated as being bona fide in the Slovak Republic. When the competent institution contacts the Romanian competent institution in order to claim reimbursement, the answer of the competent institution is usually that they are not insured in Romania. One reason may be that they do not pay contributions but this should not be a ground for such a response. Another reason may be a national provision which enables the institution to terminate insurance if the person goes abroad. Such a provision may be considered to be contradictory to article 13 (2) (f). The fact, however, is that number of these cases is rising.

Reimbursement of benefits

There was a one case concerning reimbursement of costs for assisted reproduction. The treatment was to be carried out in Austria. However, costs for this particular treatment are covered by the health insurance of the female insuree according to Slovak law and by the health insurance of the male insuree according to Austrian law. The problem appeared when the male insuree was insured in the Slovak Republic according to his economic activities and the female insuree was insured in Austria according to her economic activity. It was a negative conflict of competence. The competent institutions of both Member States solved this problem in a way by having the treatment carried out in a Slovakian medical centre and refunded by Austrian health insurance.

Long-term care benefits

Additional remarks

According to the legislation of the Slovak Republic, long term benefits belong in the category of social help, which is defined as a social prevention and solution to social exclusion; compensation to avoid social exclusion of a citizen with a serious health disability, financed out of the state budget and in the case of some services through reimbursements by people who are provided the service.

Social exclusion is when a citizen cannot on their own ensure care of themselves, care for his/her household, protect and exercise his/her rights and interests under the law or a interact with the social environment mainly concerning age, unfavourable state of health, social inadaptability or loss of work. Social distress is a state, when the citizen with a serious health condition or disability needs to improve the social consequences of that condition or to overcome them under the conditions provided by this law. A disability is defined by the Social Insurance Company, for the purposes of this law as a sickness, health disorder or health disability recognized by an attending physician which is considered to be unfavourable to health. Measures to address social distress are social counselling, social services, and financial contributions to compensate and financial contributions for nursing. Social services are domiciliary services, which provide public catering, transport services, care in social services institutions, and social loans.

Some measures to address social distress are subject to payment, however, if a person, or persons whose incomes are aggregated, do not have adequate incomes, they are not obligated to pay for these services. The provision of financial benefits as compensation and a financial contribution for nursing are dependent on the character of the disability and financial status of the applicant. Personal circumstances, the family environment, and the environment that influences his/her
integration into society are all taken into account for purpose of compensating serious health disabilities.

**Main issues**

As the benefits concerned are provided within the scope of social help, the facts are taken into consideration exclusively according to the legislation of the Slovak Republic.

**Old-age and death**

**Assimilation of facts**

For the purposes of granting pension benefits, insurance periods acquired pursuant to the legislation of another Member State are taken into account, if necessary.

For the purposes of establishing entitlement to a death grant, the death of an employed person, self-employed person, pensioner or a pension applicant or their family members, student and their family members which occurred in the territory of another Member State is considered to have taken place in the territory of the Slovak Republic.

The Social Insurance Agency as well as the Courts have solved the question of the sum of the Early Old-Age Pension. Most cases were between the Slovak and the Czech Republic. Both Czech and Slovak legislation regulate the conditions for early pension benefit before pensionable age. One of the conditions to claim the Early Old Age Pension is that its amount must be higher than 1.2-times the subsistence minimum. In most cases the sum of the pension benefit according to the Slovak Law is lower, which is a reason to refuse the claim, even if as a result of the receipt of a similar benefit from another Member State this threshold is reached. It is said that aggregation of benefit amounts is not provided for, only aggregation of periods and equal treatment of facts. The Court has decided that this practice of the Social Insurance Agency harms the interests of the insured person because the basis of this provision is to secure minimum income for the claimant. Therefore the Social Insurance Agency has to assimilate rights to similar benefits in other states.

**Maternity and paternity benefits**

**Export of benefits**

There is a case of the Slovak employee who fulfilled conditions for right to maternity benefits in other EU member state. After granting benefits, she decided to visit her family in the Slovak republic for two weeks. She also planned to get all necessary documentation for her child here. But the administrative processing has been taking longer. The competent institution of another Member state has stopped the payment of maternity benefits on the basis of changing her state of residence. In this case should be applied the provision 13(2)(f) of the Regulation No. 1408/71 because she is not subject to the social security legislation of another state except the competent one. This case has not been solved yet.
SLOVENIA

IMPLEMENTATION OF THE GENERAL PROVISIONS

Implementation of the Regulations in Slovenia is relatively smooth. However, some general problems may emerge due to the official translations of the Regulations and E forms into Slovenian language. In some cases the correct professional terminology or legal terminology is not used. Inadequate translations may be as well misleading for the entitled person.

Scope of the coordination Regulations

Personal scope

Additional remarks

The Same Sex Partnership Registration Act determines the right to maintenance between the same sex partners. They are assimilated with family members according to Labour Relations Act (since 2007), Patient’s Rights Act (since 2008) and Social Assistance Act.

However, they are not covered as family members or survivors in social insurance and family benefits schemes. The reverse discrimination can take place if same sex partners enjoy the status of family members under the legislation of another Member State. There are discussions, concerning how EC social security coordination law discriminates in favour of nationals (or insured persons) of certain Member State or, to express it more accurately, provides more favourable treatment to persons moving within the EU, for example, registered same sex partner may enjoy the status of insured family member in another Member State. When s/he moves to Slovenia, s/he may be entitled to health care as a family member, although registered same sex partners in Slovenia have no such right.

Main issues

Identification of persons performing self-employed activities on the territory of Slovenia, and establishing whether they are also self-employed or employed in the Member State where they reside or in other Member State. This is especially the case when determining whether Slovenia is primarily or secondarily responsible for providing family benefits. For example, it is difficult to establish, whether one of the partners is performing economic activity in another Member State (when another partner and a child reside in Slovenia), and how this economic activity should be assessed, according to the CASSTM Decision No 207 of 7 April 2006.

Material scope

Social security benefits, special non-contributory benefits and social assistance

In 2008 a special Supplementary Allowance Act was passed. Although, the Supplementary Allowance is regulated separately, it clearly remains a special non-contributory benefit within the meaning of Regulation 1408/71.

In 2008, as part of an anti-crisis package, the One Time Pension Supplement Act was passed. Pensioners, whose pensions were below a certain level were entitled to a supplement. Recipients of a State Pension and pro-rata pension (taking into account the entire theoretical amount of national pension) were also entitled, but pensioners receiving only a partial pension were not. This pension supplement could also be perceived as a special-non contributory benefit. Although related to traditional social risks, it was means-tested and financed from the State budget.

As part of anti-recession package a Special Supplement for Socially Endangered Act was passed in mid-July 2009. This supplement will be granted in September 2009 to general social assistance recipients, and also to very low pension, unemployment benefit, or parental benefit recipients. It is means-tested and budget financed. It could be argued that in part (when a supplement is provided to
general social assistance recipients) it is of a social assistance nature, and in part (when it is provided to very low social insurance benefit recipients) it is of a special-non contributory legal nature.

General social assistance is not covered by the Regulation 1408/71. In Slovenia it is regulated by the Social Assistance Act. Monetary social assistance is hence means-tested and financed from the State budged (non-contributory in nature). Monetary Social Assistance is outside the material scope of the Regulation 1408/71. However, classification of social services might be more difficult. The general question might be, do they fall within the ambit of the right to social security or not.

Benefits concerning new risks

There might be questions and discussions related to the social services of general interest and (family or social assistance) benefits guaranteed to the providers of such services. E.g. according to the Parental Care and Family Benefits Act, one of the parents is entitled to a Partial Payment for Lost Income, if s/he has terminated the employment contract or started to work part time in order to take care of the severely disabled child. Nationality (Slovenian or EU) and residence conditions are required. Further, according to the Social Assistance Act, a severely disabled adult person is entitled to a Family Assistant who provides care and help to the disabled person.

General Principles

Equality of treatment

There are still some nationality clauses stipulated in Slovenian social security law. However, nationality clauses are not applied to EU (and assimilated) nationals. The legislator itself expressly prohibits such discrimination. This is the case, for example, in unemployment insurance, parental care insurance and family benefits. The Pension and Invalidity Insurance Act expressly mentions Regulation 1408/71, hence all the principles of the EC social security coordination law have to be applied. Nationals of the Member States are fully assimilated with Slovenian nationals. Furthermore, instructions have been given in this regard by the Ministry of Labour, Family and Social Affairs.

Similar to nationality conditions, a permanent residence requirement may present an obstacle to accessing social insurance or in acquiring some benefits for non-nationals. It is applied mainly to benefits for family members (e.g. entitlement to health care, family benefits). The condition of permanent residence does not apply to the persons covered by Regulation 1408/71, but can have negative effects for non-EU nationals, mainly for nationals of the new states of former Yugoslavia, if there is no bilateral agreement on social security between Slovenia and the new state. A bilateral agreement between Slovenia and Serbia is currently being negociated.

As a principle, prohibition of discrimination on the ground of nationality is a two-way prohibition. Nationals of the home State and nationals of other (Member) States have to be treated equally. In the case of migrant workers from other Member States the prohibition appears to be only a one-way prohibition. Distinct from other international legal instruments, EC law promotes mobility (mainly of active persons). They should not be treated less favourably as the nationals of the host State, but they might be treated more favourably. For example, a migrant worker may enforce the right to out-patient (ambulant) treatment with the physician of her or his choice according to the ECJ case law. A person insured in the Slovenian mandatory health insurance scheme, who has not moved, may do so only to a contracted physician. The question remains, whether this is a purely internal matter and thus outside the reach of the EC law. ECJ decisions, for example in case Government of the French Community and Waloon Government (C-212/06) might be interesting in this respect.

Aggregation of periods

For entitlement to flat rate means-tested State Pension, financed from the budget, for persons not entitled to any other pension, a period of 30 years of registered permanent residence in Slovenia between the 15 and 65 years of age is required. The question may arise whether residence in other Member State should be taken into account as well. It is a categorical social assistance benefit (special non-contributory benefit), which is coordinated, although some special coordination rules apply (especially concerning the applicable legislation and export of benefits). However, taking into account residence in other Member State would not be an appropriate solution, as than almost every EU national would be entitled to a Slovenian State Pension.
Applicable legislation
Working in one Member State only

Lex loci laboris

The application of the of *lex loci laboris* principle presents no major difficulties, since the right to social security in Slovenia is mainly exercised through social insurance, covering in the first place the economically active population. Hence, the legislation of the place where work is being performed should also be applied according to Slovenian legislation. However, there are some specific rules in Slovenian legislation, for example, Slovenian nationals, who after being insured in Slovenia, start to work abroad, where they are not covered by a compulsory pension and invalidity insurance or national pension scheme, are obligatory insured in Slovenia. Persons employed in diplomatic services or international organisations may be exempt from social insurance schemes in Slovenia in accordance with international agreements. There are also some other exemptions defined by law.

Some problems may arise in respect of family benefits in a case where two Member States are (one primarily and the other secondary) determined as competent states. In addition, the officials implementing Regulation 1408/71 expressed a need to get relevant information on legislation, economic activities, and entitlement to family benefits in other Member States.

The majority of problems related to the implementation of the Regulation 1408/71 concerns the determination of the applicable legislation for persons who are or could be subject to legislation of two or more Member States (Articles 14 to 14f of the Regulation). Main problems are related to technical modes of collection of contributions from other Member States and individuals by the Slovenian tax authority. Amendments to social security legislation are prepared to provide legal basis for the tax authority.

Quite some problems mentioned in discussions were related to the question of defining main activity and marginal activity, and questions of registering the cessation of employment or self-employment in another Member State of a person who is simultaneously employed or self-employed in Slovenia.

IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS

Sickness benefits

BENEFITS IN KIND

Concept of occasional health care

Problems related to the EHIC were reported by insured persons. The card was not accepted by some providers in other Member States.

(Miss)use of EHIC to give birth in another Member State was quite a problem. In Slovenia there are sufficient obstetric facilities in gynaecological and maternity hospitals in all geographical regions of Slovenia. All women in Slovenia give birth in hospitals specialised for childbirth.

When e.g. students stay longer in another Member State, their EHIC is not accepted and E 109 form (or other form confirming permanent residence) is demanded.

The EHIC and its appropriate use should be more promoted.

In some cases the Higher Labour and Social Court ruled that Slovenian Health Insurance Carrier (HIIS) has to reimburse the costs of necessary medical treatment in the amount the carrier in the Member State of stay (Germany) would pay for its own insured persons, and not the amount the insured person actually paid as a private patient (he was not in possession of the EHIC). The amount German insurance carrier would pay for its insured persons, was confirmed in a form E 126. This case
revealed another quite important problem. The price for the same medical service may differ substantially, if it has to be paid by the private patient or by the health insurance carrier.

**Planned medical care**

**Under the Regulation**

Several cases were brought before the social courts, but normally, the claim was rejected, since the possibilities of treatment in Slovenia were not exhausted (case Ps 3390/2006, 9 December 2008, or Ps 2203/2007, 15 May 2009). In another case the first instance Social Court found that the same treatment was available also in Slovenia, and mistrust in Slovenian physician cannot be a reason for authorising health care abroad. The decision was confirmed also by the Higher Labour and Social Court (Psp 1052/2006, 22 November 2007), and the costs of treatment in another EU Member State (Great Britain) were not reimbursed. Also economic (less travel costs and time waste, if treated in a clinic near the border in Italy) and social reasons (travelling to the central University Clinic was more demanding for the claimant as she had to arrange the day-care for her children) cannot be decisive. The Higher Labour and Social Court (Psp 306/2006, 4 April 2007) emphasised that authorisation may not be refused only, if treatment cannot be provided in the State of residence within the time normally necessary, taking into account the patient’s current state of health and the probable course of the disease. In this case it was not argued, that the treatment was not available in time.

Problems related to planned health care were reported, since the E 112 form has not always been accepted in another Member State.

**Under article 49**

Slovenian public and competent institutions are aware of the ECJ rulings. However, very rarely planned health care is required in another EU Member State without prior authorisation and reimbursement demanded.

One of the reasons may be that owing to the large amount of co-payments required in Slovenian mandatory health insurance, the amount of reimbursement would consequently be small. It has to be provided in accordance with the legislation of the competent State, not the State where the health care was provided.

Requests for reimbursement of costs for planned medical treatment in another Member State were not granted by the mandatory health insurance carrier, since all of them were perceived to be unfounded.

A case is known before the national court with respect to the notion “without undue delay”. Waiting period for an MRI of 23 months after the knee injury (21 months after the referral) was according to the Court unreasonably long and could cause damage to the insured person’s health. However, the Higher Labour and Social Court annulled the decision of the first instance Court and returned the matter to the same Court for a new decision. It has argued, that it remained unclear, why the claimant insisted for an MRI in Ljubljana, where the waiting period was the longest.

The Higher Labour and Social Court has cited the ECJ decision in the case *Geraets-Smits/Peerbooms* (C-157/99) and argued that the treatment could be divided in three parts, i.e. MRI and two following operations. When the results of an MRI were known, the operations could be provided in Slovenia in a relatively short period of time. Additionally, the claimant has not asked for authorisation for planned health care abroad. All these issues remained to be analysed by the first instance Social Court. The new decision has not been taken yet (August 2009).

In another case, the claimant underwent surgery in Munich at the same time as it was scheduled in Ljubljana, and prior to the decision on authorisation for treatment abroad. Interestingly, he claimed reimbursement on the grounds of unjustifiable enrichment. In his view, HIIS was unjustifiably enriched, since he was not required to pay the surgery in Slovenia, he would otherwise be obliged to pay. The Court argued that civil law (law on obligations) could not be applied, because HIIS is a public institute, established with a purpose to ensure insured persons statutory specified medical benefits according to the solidarity principle.
Additional remarks

There is still a lot of scepticism concerning the free movement of health services and cross-border health care. There is a strong feeling that it could undermine the national health care system based on mandatory health insurance providing benefits in kind, especially considering the size of Slovenia and the fact that the whole country could be considered as a border region. One of the main concerns relates to the quality of health care provided abroad, the questions of continuity of treatment and the protection against medical faults.

It is argued that freedom of an insured person to choose his/her personal physician in another Member State would open up many questions and cause many problems. It could result in a breach of the basic principle of equal treatment of persons insured in the public health insurance in Slovenia and treated in Slovenia according to the national legislation, and rules and persons treated in other Member State, who have the same kind of health problems. The latter would probably be mainly younger, wealthier and more mobile persons. It would certainly not be an equal possibility for all insured persons.

BENEFITS IN CASH

Additional remarks

The maximum duration of Sickness Benefit in cash paid by the HIIS is as a rule limited to one year of absence. Problems may arise for a person employed part time and residing in Slovenia and employed or self-employed part time in another Member State where the duration of the sickness benefit is limited to a much shorter period. The insured person is according to the national legislation not entitled to sickness benefit, if during that time s/he performs paid work.

Maternity and paternity benefits

Definition and classification

Some problems of classification might arise, especially with Child Care Leave/Benefit for 260 days of leave immediately after the 105 days of Maternity Leave. The amount of benefit is equal for Maternity Benefit and for Child Care Benefit. Maternity Leave/Benefit has to be in principle used by the mother and Child Care Leave/Benefit can be used by the mother or the father. If it is not linked to a person, i.e. a mother or a father, but is intended to meet family expenses, it might be classified as a family benefit, rather than maternity benefit. Similar question might arise concerning the right to Work Part-time and Payment of Contributions.

Old-age and death

Some of main difficulties in the process of deciding on the rights of a migrant worker relate to lengthy procedures of gathering data on insurance and other data relevant for entitlement from other Member States.

Some forms are considered to be long and complicated.

Distinct retirement ages in various Member States may present a serious problem to persons who may retire relatively early according to Slovenian pension and invalidity insurance (i.e. 58 years, if relatively long insurance period - 40 years men or 38 years women-, can be established). Such a person might depend on social assistance until the age conditions in other Member State(s) are met.

Award of a supplement

Some problems were detected in practice, when an insured person has registered residence in Slovenia and at the same time in another Member State. For example, the beneficiary registers permanent residence in Slovenia and in Austria, and wants to receive supplemental allowance in both countries. In such case determining solely the registration of permanent residence does not suffice. It has to be determined where the centre of this person’s vital interest is, according to the rulings of the ECJ and the definition contained in Article 1(h) Regulation 1408/71.
Unemployment benefits

Main issues

Questions about the definition of “unemployment benefit” may arise. It is a benefit that replaces salaries lost by unemployment (providing an income for the costs of living, ECJ decision in e.g. Knoch, C-102/91). But, are active employment measures also “unemployment benefit” (assistance for vocational training to unemployed or even employed persons was regarded as an "unemployment benefit" by the ECJ, for example, Campana, C-375/85)? Or should active employment measures be perceived as social services of general interest (SSGI)?

The majority of problems regarding implementation of the Regulation 1408/71 relate to the legal position of unemployed frontier workers.

Problems related to the implementation of the Regulation 1408/71 and taking into account the case law, are as well related to the fact, that the national legislation does not define the intermittent unemployment and partial unemployment when entering it. In accordance with the national labour legislation, the employer has to cover the expenses of wages in case of partial or intermittent lack of work, if a full-time employment contract is concluded.

Family benefits

Definition and scope

There is no common definition of family benefits in Slovenian legislation. They are regulated in the Parental Care and Family Benefits Act and defined separately.

Some of the benefits from parental care insurance might be classified as family benefits, rather than maternity/paternity benefits, e.g. Child Care Leave/Benefit. On the other hand, Parental Allowance provided in the first 77 days after birth, as a rule to a mother, could be classified as a maternity benefit.

Overlapping of family benefits

Reportedly, it is not always easy to determine, which Member State is primarily responsible for providing family benefits and which has to pay the supplement (if that would be required).

The responsible institution for family benefits, has encountered problems relating to lack of information. They are not always aware that there is a cross-border element and the form E 411 does not solve the issue properly. E.g., if a mother is residing with a child in Slovenia, a Child Benefit may be claimed in Slovenia, and she might not be aware that also information on the father working in another Member State might be relevant.

Some problems were relating to the definition of economic activity in another Member State. It is not always clear, according to which criteria should be assessed, whether economic activity is being performed or not.

Problems were detected also when defining permanent and temporary residence. Both notions are regulated in Slovenian legal system, but not necessarily in the legal systems of other Member States. Difficulty may arise when the competent State has to be determined in a concrete case. E.g., a Slovenian family (mother, father, and son) with permanent residence in Slovenia has moved to Germany and obtained residence, according to German legislation. At the same time “permanent residence” in Slovenia was maintained. Father has claimed family benefits according to the Regulation 1408/71 on the ground of employment in Germany. The mother has moved with a child to Germany, but remained employed in Slovenia. The question of competent state was raised. According to the Slovenian translation of the Regulation 1408/71 the primary competent State was Slovenia, according to the German one it was Germany, since in Germany no distinction is made between temporary and permanent residence.

Problems of Slovenian mothers working in Austria, and residing during maternity leave in Slovenia were reported. Again the question of which Member State is primarily responsible was raised.
IMPLEMENTATION OF THE GENERAL PROVISIONS

Scope of the coordination Regulations

Personal scope

People living together in wedlock

A community concept for 'husband and wife' does not exist within Regulation 1408/71. Therefore, indirectly national civil law plays an important role in the application of Regulation 1408/71. Nowadays, however, the concept of 'husband and wife' does not on have a single meaning in Europe. But it is true that from the perspective of community Law the existence, or not, of a marriage link can affect entitlement to derived rights. For instance, the situation of a migrant worker who is married in a Member State that recognises same sex marriage and whose surviving spouse claims for a survivor pension under Regulation 1408/71 in a State whose regulations only recognise heterosexual marriage.

Polygamy and Community Law

Although polygamy is not permitted by the EU Member States it is not infrequent to find third-country nationals who have more than one wife. This practice has presented lots of problems to Spanish courts in order to resolve whether all the widows are entitled to survivors pensions or only the first wife. The national case law about this point is not uniform. To solve this problem international agreements play an important role.

This point connects with the question whether a plurality of widows would be entitled to invoke Regulation 1408/71 to get their pensions when their marriages are not recognised by the Member State’s legislation.

Third country nationals

The national concept of frontier worker is only applicable to third-country nationals. The Spanish national concept of frontier worker as it was defined in the first version of the 4/2000 Act, coincided with the definition of Regulation 1408/71. However, nowadays, after several legal reforms, the national concept is much narrower than the Community one: frontier workers are persons who work in Spain, reside in a bordering area and return to their place of residence daily. These workers must obtain the necessary administrative authorisation to perform their activity in Spain but they do not need a residence permit as their residence is located abroad. It is important to note that according to national legislation Spanish unemployment benefits and allowances are not exportable. As a result, from a legal point of view, these workers are not entitled to Spanish unemployment benefits or allowances because they do not reside in Spain.

Additional remarks

At the moment in Spain, a gipsy “marriage” has no legal effects. As a result, the survivor cannot claim for a pension as a window according Regulation 1408/71. The Spanish Constitutional Court has declared that Spanish legislation does not contravene the Constitution. Nevertheless, there is a Spanish case pending before the European Court of Human Right about this question. So, the ECHR must declare whether the lack of recognition of gipsy marriages in Spain violates the European Convention of Human Rights. This pending judgement may have an important effect in all EU Member States.
Material scope

Benefits concerning 'new risks'

The 39/1999 Act included a new risk in the social security system, the objective of which is to protect the health of female workers. It is called "risk during pregnancy". Long term-care benefits were introduced by the 39/2006 Act.

As authors have outlined, it seems that the Spanish legislator excludes long-term care benefits from the social security field and subsequently, from the material scope of Regulation 1408/71. This conclusion arises from the fact that the long-term care risk has not been included among social risks regulated by the Spanish Social Security Act.

Moreover, long-term care benefits have been excluded from the social security system and included in a new one, the "dependant social system" to outline that the new benefits are not social security benefits according national legislation. Long-term care benefits are not financed by social contributions. To be entitled to long-term care benefits it is necessary to have had legal residence in Spain for at least 5 years.

Temporal scope: transitional provisions

Related to this topic is the one of the retroactive effects of the EU case-law. In particular, what happens when the ECJ declares that a State has not applied a provision of Regulation 1408/71 correctly? In Spain, migrant associations argue that the Administration must re-calculate the total amount of the pension from the moment the error is recognised and pay it retrospectively with no time period limitation. Nevertheless, the Spanish Supreme Court applies the general provisions for the period of prescription to such situations. As a result, migrants lost a great deal of money as a result of the Administration supporting an erroneous interpretation of Regulation 1408/71.

General Principles

Equality of treatment

After the new regulation concerning partial retirement introduced by the 40/3007 Act came into force, pensioners who opt for this kind of retirement must, among other requirements, to have worked for at least six years in the firm. It is likely that this requirement not only contravenes the free movement of workers but also may be indirectly discriminatory as it will be more difficult to meet for EU workers than for Spanish workers.

Applicable legislation

Working in one Member State only

Posting

Conditions

It has been pointed out that many national companies have found it difficult to hire workers residing in other Member States. As it is not easy for national employers to know how to complete the formalities required in other States, they try to insure these workers under the Spanish social security system and use the posting E-forms subsequently. This solution is not allowed by Spanish authorities as it contravenes the lex loci laboris principle.

Other issues

Financing of social security benefits

There are authors that have criticized Article 92 Regulation 1408/71 because they consider that the mechanisms provided by the Regulation for EU Member States to collect debts are not sufficient. They consider that fraud and non-payment in the field of the social security systems are serious risks to the common market.
IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS

**Sickness benefits**

**BENEFITS IN KIND**

*Pensioners*

A great many EU pensioners moved to Spain to enjoy the climate. They receive the same documentation that is provided to nationals in order to receive health care. There are no reimbursement problems for this group. However, in several regions the administrative structures may not be prepared to deal with such high numbers of potential health care beneficiaries. The web site of the Ministry of Labour provides up-to-date information

*Levying of contributions*

No national case law has been reported about this topic. Spain has to bear an important economic cost because as the State of residence is the only one responsible for health care assistance when a migrant worker receives more than one pension. As a result, Spain must grant health care to migrant workers who paid contributions or worked abroad for most of their labour career and who returned to Spain where they only paid contributions for a short period of time.

*Unemployed persons*

The provisions contained in Regulation 1408/71 are applied by Spain. No national case law has been reported about this topic.

*Planned health care abroad*

Government and not to the Self-governing Communities.

The competent Health institution in Andalusia has reported a common practice used by patients (mostly EU citizens): they ask doctors for an E-112 form and doctors send the application to the health institution but stating that is the patient who wants to get health care abroad. The “Servicio Andaluz de Salud” (SAS) always gives the authorization. However, in such cases patients are not entitled to be reimbursed the full amount of the cost of travel and accommodation abroad. On the contrary, if patients are sent abroad following the recommendations of the doctors of the public health system because they cannot receive health care in Spain, the “Servicio Andaluz de Salud” will reimburse them only up to a certain amount of travel and accommodation expenses

There is a national debate that makes patient mobility difficult: the problem is that in Spain patients do not have to pay any percentage for the treatment received under the national health system. On the contrary, in most EU States patients are obliged to assume a percentage of the medical cost. According to national administrative circulars, when EU citizens abroad must pay a certain amount of the treatment (“canon”) the same solutions are applicable to Spanish E-112 holders as far as Regulation 1408/71 guarantees the principle of equal treatment.

However, the solutions given to this problem by the regional courts are not uniform: there are judgements that consider that patients must be fully reimbursed in any event, and other judgements that interpret that E-112 holders should be treated as national patients to all effects by the foreign health systems and if national patients have to assume a percentage of the medical costs, the same rule must be applied to Spanish E-112 holders.

**BENEFITS IN CASH**

*Long-term care benefits*

There is currently an interesting debate among commentators about this risk.
Commentators who interpret long-term care benefits as social security benefits argue that periods of legal residence in other EU-States should be taken into account when necessary. In such cases, EU-nationals will not be discriminated against at all. On the other hand, those commentators who consider that the new long-term care benefits are not social security benefits coordinated by Regulation 1408/71 argue that the principle of aggregation of periods of residence is not applicable to the Spanish benefits. Therefore, a situation of discrimination between national and EU nationals could exist.

Additional remarks

As several authors have outlined, it seems that the Spanish legislator pretends to exclude long-term care benefits from the social security field and subsequently, from the material scope of Regulation 1408/71.

This conclusion arises from the fact that the long-term care risk has not been included among the social risks regulated by the Spanish Social Security Act. Moreover, long-term care benefits have been excluded from the social security system and included in a new « dependant social system » to emphasize that the new benefits are not social security benefits according to national legislation. Long-term care benefits are not financed by social contributions.

To be entitled to long-term care benefits it is necessary to reside in Spain for at least 5 years. Legally speaking, this new risk is not bound to any typical social risk. Today, there is a national controversy about whether or not the new long-term care benefits are coordinated by Regulation 1408/71. As so far there is no case law, it can it only be asserted theoretically that the doctrine established in the cases Molenaar, Jauch, Hosse, Gauman-Cerri should be applicable to the Spanish long-term care cash benefits.

Old-age and death

Periods of insurance of less than one year

In the past, the application of Article 48 of Regulation 1408/71 has caused several conflicts: The Supreme Court used to invoke Article 48 to deny unemployment allowances to workers over 52 if they did not pay genuine contributions to the Spanish system before emigrating or when they had genuine contributions of less than one year. After the preliminary ruling in the Martinez Losada and Ferreiro Alvite cases, it was established that Article 48 was not applicable to unemployment benefits.

In exceptional cases, people who are not entitled to widow’s or widower’s pension may get a temporary benefit for widowhood.

Family benefits

Definition and scope

It is becoming increasingly complicated to distinguish between family benefits regulated by the Social legislation that are paid for child birth or adoption and the legislation that provides for lowering of taxes in the same cases.

In other words, when child birth or adoption takes place in Spain, their parents are entitled to a reduction of taxes. The amount is standard for all people (it is not means-tested). Only when the parents are not obliged to pay taxes, is this subsidiary amount paid as a non-contributory family benefits (economic one-off benefit). It should be pointed out that in both cases the entitlement criteria for the payment and amount are the same.
SWEDEN

IMPLEMENTATION OF THE GENERAL PROVISIONS

Scope of the coordination Regulations

Material scope

The question whether Care Allowance, which may be granted to a person who cares for a relative who is seriously ill, falls under the Regulation is currently pending before the Supreme Administrative Court. Care Allowance compensates loss of income and is similar to Sickness Benefit in Cash. The Swedish legislation concerning Care Allowance states that the health care treatment must take place in Sweden. The question arose whether this condition could be upheld. The Administrative Court of Appeal in one place found that Care Allowance was related to the provisions of free movement of services (Article 49 EC) and that this freedom could be restricted if the sick person could not bring his/her relative, as he/she could have done had the health care been performed in Sweden. The Administrative Court of Appeal in another place came to a different conclusion. Both cases are now pending before the Supreme Administrative Court.

Some Swedish benefits are located in the border area between exportable and non-exportable social benefits. However, these benefits have not been notified as hybrid benefits. The Swedish authorities have classified them, either as social advantages falling outside the scope of Regulation 1408/71 but within the scope of Regulation 1612/68 (for instance Municipal Attendance Allowance), or as sickness benefits in kind, which are not exportable according to the Regulation (for instance Attendance Allowance). General Swedish Income Support is not a social security benefit. It is administered by the municipalities and regarded as social assistance.

General Principles

Export of benefits

The Social Security Act contains a special chapter on the exportability of social security benefits. According to national rules, residence-related benefits are not exportable to a migrant worker or the members of his family who reside in another country, nor is the residence-based pension. Compliance with EC law is achieved through direct application of EC law.

Applicable legislation

Working in one Member State only

Lex loci laboris

A person who is resident in Sweden is affiliated to the residence-based part of the social security system. The residence-based insurance presupposes residence in Sweden, which is defined in the Social Security Act. A person who leaves Sweden for less than one year, is still considered resident in Sweden. A person who comes to Sweden to stay for more than one year, is considered resident in Sweden. Persons covered by the Regulation, however, are covered by the residence-based part of the social security system in accordance with article 13(2)(a) of Regulation 1408/71. The residence requirement for benefits within the scope of the Regulation can thus not be upheld.

Posting - Conditions

The decisive element is that wages are paid by the Swedish employer. The rules on posting are applicable even if the posted worker has been employed in order to work in the other country. However, the worker must be covered by the Swedish social insurance system when the posting takes place. If wages are paid by a subsidiary company in the country where the work is performed, there is no posting. If the wages are paid both by the holding company in Sweden and the subsidiary in the other country, the situation may be classified as a posting. In some cases, it may be difficult to
distinguish between a business journey and a posting. In order to qualify as posting, there must be a special agreement concerning the place of work, the wages during the work abroad, housing, etc.

**Other issues**

*Fundamental reforms, initiatives and plans in national legislation with implications for the Regulations*

Concerning health care abroad (Article 49 EC), there have been discussions for several years about inserting an authorisation system into national legislation. The legislators are now awaiting to see what will happen with the proposal for a Patient Mobility Directive.

**IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS**

**Sickness benefits**

**BENEFITS IN KIND**

*Reimbursement of benefits*

There have also been cases concerning costs for travel and hotels. According to national rules, travel costs are reimbursed within the country and may be reimbursed when a person has a referral to go to another county to receive health care. The Administrative Court of Appeal in Stockholm had a case which concerned a woman who had received health care in Germany and been reimbursed for the medical costs. She also wanted to be reimbursed for the costs for travel and her hotel during her stay in Germany, but this was denied by the National Insurance Board, since she had not been referred by Sweden to go to Germany. The court found that this was discriminatory in relation to health care providers abroad, since there are no clear rules in which cases it is actually possible to get a referral to go abroad. The Supreme Administrative Court did not grant leave to appeal. There are now two other cases pending before the Supreme Administrative Court concerning this issue.

**BENEFITS IN CASH**

*Aggregation of periods and calculation of benefits*

There is no qualifying period for Swedish Sickness Benefit in Cash. It is awarded from the first day of employment. Thus, Sickness Benefit in Cash is awarded to newly arrived migrant workers without application of the aggregation rules. However, difficulties of another kind arise, namely how the benefit should be calculated when it is based on a very short employment period. The national rules have the following content: the calculation is not based on historical earnings, but on the earnings the claimant can be expected to gain during the year to come. A short period of temporary employment cannot form the basis for such an estimation. The employment must be expected to last for at least six months in order to serve as the basis for estimating future income. This is a counterpart to the rule in other national systems where calculation is based on earnings and contributions during the qualification period. This method of calculating benefit has been regarded as unfavourable to migrant workers with only a short period of temporary work in Sweden. For that reason, Sickness Benefit in cash for a migrant worker is calculated as if their very short period of employment were intended to be permanent, a very generous principle, which favours migrant workers compared to other workers in temporary employment.

*Equality of treatment*

All persons employed in Sweden, irrespective of residence, are entitled to the Sickness Benefit in Cash. Once a person has qualified for Sickness Benefit in Cash there are protection rules meaning that a person will remain covered by the insurance during periods of pregnancy, child-rearing, studies and unemployment. It is unclear how these rules apply in relation to migrant workers, i.e. if such periods fulfilled in another Member State or in connection to moving/returning to Sweden may be taken into account. This has particularly been the case as regards entitlement to income-related Parental Benefit (which presupposes insurance for Sickness Benefits in Cash for a certain period prior
to the birth of the child) and benefits based on article 71 and 25 in Regulation 1408/71 (unemployed workers who have worked in another Member State while residing in Sweden).

Export of benefits

According to the Social Security Act Sweden will probably continue to be the competent state for persons who have transferred their residence to another Member State as long as the claimant is entitled to sickness benefit, i.e. during the ongoing sickness period. When the sickness period ends, the responsibility for social security benefits is transferred to the new residence state even if the person concerned has not taken up any gainful occupation in that state.

Long-term care benefits

Classification as benefit in kind or in cash

Attendance Allowance is a social security benefit financed by state revenue. Attendance allowance is classified as a sickness benefit in kind, not as an invalidity benefit. Disability Allowance and Child Care Allowance are intended to cover the costs for expenses (aid, special food etc.) and time consuming assistance due to disability. The benefits are granted at a certain percentage of the Swedish price index. These benefits were listed in Annex IIA to the Regulation, but are now classified as sickness benefits in accordance with the ECJ’s judgement in Commission v EP and Council of EU (C-299/05). These benefits ought to be classified as benefits in cash.

Export of benefits

Attendance Allowance has posed special problems in relation to the exportability rules. There is one case concerning Attendance Allowance decided by the Administrative Court of Appeal. It concerned a person, who had transferred his residence to Spain. The Administrative Court of Appeal decided the case in accordance with Article 13(2)(f) assuming the Attendance Allowance to be a benefit in kind. The Court argued that both the person and his wife had ceased to work in Sweden. Since he was no longer a Swedish resident and since the national legislation of the former work state (Sweden) had ceased to be applicable (as a result of the residence requirement), he was now subject to the legislation of the Member State in whose territory he resided (Spain). Had the benefit been regarded as a benefit in cash, he would have been entitled to export it according to Article22(1)(b) as compared with Article 22(2).

Invalidity

Evaluation of invalidity

The person’s work capacity shall be examined in relation to the labour market as a whole (not only in relation to previous employment). If the person still has the ability to perform some kind of work, such as a less physically demanding job, invalidity benefits are not granted. For persons residing abroad, it might be more difficult to examine the work capacity and also to perform the necessary rehabilitation measures. If a person is entitled to part time invalidity benefit and starts working in another country part time, the question of competent state might be problematic.

Old-age and death

Calculation of benefits

The coordination rules for pensions from different countries (especially Article 46 of the Regulation) more or less assume that a statutory pension is either a pension calculated in relation to the number of qualifying years, or a flat-rate pension independent of the duration of the periods completed. The earnings-based Swedish pension scheme does not fit into any of these two categories. The amount of benefit is not in any formal way related to the number of qualifying years. The crucial thing is the value of the aggregated pension rights at the time when the pension is claimed. Part of the pension is invested in a prefunded branch, where the amount of pension is calculated in the same way as under a private insurance scheme.
The Swedish pension system is extremely flexible. There is no fixed pensionable age. A person who goes on working after attaining the “normal” pensionable age, continues to accumulate new pension rights. A claimant can choose to take out a fraction of the accrued pension rights, i.e. ¼, ½ or ¾ of a full pension. He/she can also choose to claim a pension from only one of the two branches of the scheme (the PAYG-branch and the prefunded branch) and postpone payments from the other branch. A claimant can also stop a pension already in payment, for instance when he/she gets a new job. How should the Regulation’s rules be applied in such situations? Will pensions from all other member countries have to be recalculated each time a pensioner changes the way he uses his Swedish “pension capital”? Furthermore, the amount of pension from the prefunded branch will depend on the value of the fund when the pension is drawn. If the pension has not been recalculated into a pension with fixed annuities, the amount of pension will vary each month. The rules of the Regulation are simply not compatible with such pension schemes. However, there are no difficulties for calculating the Swedish earnings-based pension in accordance with the Regulation. Since the pension is based on life-long earnings with no “maximum qualification period”, calculation in accordance with national rules will result in the same amount of pension as the pro rata temporis calculation under Article 46(2) of the Regulation.

Additional remarks

The rules on pension rights for child-raising years under the Swedish pension scheme are very generous when compared internationally. However, these provisions were not designed to enable persons, who work in Sweden only for a short period of time and then move to another country, to accrue pension rights for child years under the Swedish system. For that reason there is a rule, which requires that both the parent and the child must reside in the country in order to be entitled to pension rights for “child years”. Obviously, this provision cannot be applied to persons within the scope of Regulation 1408/71. However, there is also another condition: the beneficiary must have been accredited a pensionable income of a certain level for at least five years before the age of 70. Aggregation may be used to fulfil this condition.

There is a possibility of transferring pension rights for child years to a spouse, as long as the conditions above are fulfilled. The construction of the child years can thus be said to lie in the border line between old age pensions and family benefits. This poses special problems in relation to Regulation 1408/71. May a spouse to a Swedish worker, residing in another country, rely on the Regulation to obtain pension rights for child years as a derived right from her husband?

Unemployment benefits

Aggregation of periods

There have been many cases concerning the question whether remaining as a member in a Swedish unemployment fund while working in another Member State means qualifying for Swedish Income-related Unemployment Benefit. The unemployment funds have argued that the membership in the Swedish unemployment fund ends when a person starts working in another Member State, irrespective of the fact that the person still pays the membership fee. A precondition for qualifying for Swedish Income-related Unemployment Benefit in these situations is, according to the unemployment funds, that the person applies in writing for a new membership when returning to Sweden.

The matter has now been decided by the Supreme Administrative Court. The case concerned a woman who remained a member in a Swedish unemployment fund and was paying membership fees while working in Spain. The Supreme Administrative Court found that the woman’s membership in the unemployment fund had not ended as a result of her work in Spain, since neither Swedish legislation nor Regulation 1408/71 contained such provisions. The unemployment fund could thus not refuse her Income-Related Unemployment Benefit on the ground that the membership condition was not fulfilled.
Unemployment benefits for frontier workers

According to the Regulation, persons who have previously been working in another Member State while residing in Sweden are entitled to Swedish unemployment benefits. They are then also entitled to sickness benefits (Article 71 and Article 25 in Regulation1408/71) There are several cases concerning unemployed persons who want entitlement for Sickness benefit in Cash, as this is also a condition for receiving Parental Benefit at income-related level. When there is a gap between the ending of the work period in the other Member State and the period of unemployment, such as periods of child rearing, the persons risk falling outside the scope of the articles. They are then not entitled to Sickness Benefit in Cash or Parental Benefit at income related level. This is questionable based on the equality of treatment principle, as the protection rules in the Swedish sickness insurance would have applied if they had worked in Sweden and become unemployed. According to the protection rules, persons who interrupt work due to pregnancy, child rearing, unemployment and studies remain covered by the insurance for Sickness Benefit in Cash.

Family benefits

Aggregation of periods

The principle of the aggregation of periods will play a significant role for migrant workers in this branch of social security. According to case law, the principle of aggregation applies provided that the claimant was insured in the Swedish system the last day before the child was born. According to a recent Guideline from the National Social Insurance Board, periods of work in other Member States before the birth of the child are now accepted in order to fulfil the 240-days condition. Transferring residence to another country may result in an interruption of the insurance period.

The abovementioned practice to require insurance in Sweden the last day before the birth of the child has been debated. The ECJ has ruled in two cases concerning the Swedish qualifying period for parental benefit (Rockler C-137/04 and Öberg C- 185/04) The ECJ found that it would constitute a barrier to the free movement of workers if aggregation was not allowed.

The judgements from the Supreme Administrative Court following the ECJ’s judgments meant that the persons in the cases were entitled to Income-related Parental Benefit, based on the general principle of free movement. The question of aggregation of periods in Regulation 1408/71; whether the last day of insurance before the birth of the child must be fulfilled in Sweden, was however not solved since the cases involved persons who had been working in the European Communities and who were not covered by Regulation 1408/71.

The abovementioned cases seem, however, to have been interpreted as meaning that Sweden may not uphold the condition of one day of insurance before the birth of the child or even that Sweden may not uphold a condition that a person must work in Sweden, even though Income-related parental Benefit is a work-based benefit!

This is illustrated by two cases, where The Supreme Administrative Court granted leave to appeal in the Administrative Court of Appeal.

The Supreme Administrative Court referred to the ECJ’s judgements in Öberg/Rockler as a reason for granting leave to appeal. It did however, not make any distinction between the cases, although one case concerned a person who had started to work in Sweden, but had not fulfilled the condition of one day of employment before the birth of the child, whereas the other case concerned a person who moved to Sweden and who did not work there at all. The Administrative Court of Appeal has delivered its judgment in the latter case (the former case is still pending). The case concerned a woman who had worked and lived in Switzerland, but who had moved to Sweden after the birth of her child. Her husband started working in Sweden, while she stayed at home with the child. The court found, by reference to the ECJ’s judgements in the Rockler and Öberg cases, that the demand for at least one day of insurance before the birth of the child could not be upheld. The claimant was thus entitled to Swedish Parental Benefit based on her income in Switzerland. The judgement is a bit surprising, since the claimant had not started to work in Sweden and was not covered by the work-based Swedish insurance, which is a precondition for receiving Income-related Parental Benefit. The reasoning in the case means that the demand for any time of qualification in Sweden may not be upheld and that even non-active persons may be entitled to a work-related benefit based on work in another Member State. This seems to be an application of the principle of assimilation of facts rather than the aggregation principle and seems to go further than what is required by EC-law. The case is now pending before the Supreme Administrative Court.
Export of benefits

According to the new Social Security Act, Income-related Parental Benefit is a work related benefit, no longer subject to residence in the country. The work-related part of the social security system continues to apply in a number of situations, for example as long as a person receives a benefit based on previous work in the country or as long as Parental Benefit can be derived from work in Sweden, even if the person is abroad. There is however, a residence condition with regard to the child. The child must reside in Sweden.

The new Regulation 883/2004 will however drastically change the Swedish practice. Article 11.2 means that Sweden will remain the Competent State when a person receives Income-related Parental Benefit, even if the person moves from Sweden and has ceased all occupational activity there. As Parental Benefit can be granted until the child is 8 years old, the question arises whether Sweden will remain the Competent State during the entire period or only as long as the person actually receives the benefit. Article 11.2 will probably lead to problems of interpretation in this respect.

These cases show that the individualized Swedish Income-related Parental Benefit is difficult to apply in relation to the right of family members to invoke Article 73. According to this Article, the spouse of a Swedish worker, who lives in another Member State and who has never worked in Sweden, may claim Parental Benefit from Sweden when staying at home to care for a child. The Swedish view is that only the Guaranteed Parental Benefit may be exported to the migrant worker’s spouse, since the Income-related Parental Benefit is an individual benefit for the worker.

Overlapping of family benefits

Some of the problems which may arise are connected with the fact that Swedish Parental Benefit is an individualised benefit, which is awarded to the parent, not to the family. From the Swedish point of view, there is no violation of the single state rule if one of the parents draws parental benefit based on previous work in Sweden, while the other parent draws another kind of parental benefit from another country for the same child. Each parent has her/his own Competent State. According to Regulations 1408/71 and 574/72, there are situations when a supplement shall be paid from the country with the highest family benefits. The fact that some countries have classified their parental benefits, similar to the Swedish, as maternity benefits instead of family benefits may lead to an unfair outcome of these rules. In this aspect, it is also a problem that the Swedish Parental Benefit is income related and that family benefits in some other states are to some extent means-tested.

Modification of the family situation

Problems of interpretation have arisen concerning parents who no longer live together. According to the National Insurance Board, divorced or separated parents are not family members and Parental Benefit (and other family benefits) may in this situation not be granted to the parent residing abroad as a derived right from the parent in Sweden. It is questionable whether this view is in compliance with EC-law. Regarding family benefits, the child could be regarded as the beneficiary.

Member States’ cooperation

The assimilation of facts presents great difficulties even if both parents are present in Sweden. Parents are free to choose the available benefit days until the child is eight years old, and the benefit days can be taken out in fractions of benefit days. Benefit is only granted if the insured person does not perform work (or works too many hours) or draws any other kind of benefit on a day for which Parental Benefit is awarded and provided that the other parent does not draw Swedish Parental Benefit for the same day. These facts must be assessed each day Parental Benefit is claimed. It is difficult enough if the parents are present in Sweden; it becomes almost impossible if they live abroad. The number of persons receiving Income-related Parental Benefit while living abroad ought to increase once Regulation 883/2004 enters into force, since Sweden will also remain the Competent State for persons who have ceased an occupational activity there but who are still entitled to work-related benefits, in accordance with Article 11.2.
IMPLEMENTATION OF THE GENERAL PROVISIONS

Scope of the coordination Regulations

Personal scope

Third country nationals

The UK has made clear in the Council that it will not opt in to the extension of the scope of Regulation 883/2004 to third country nationals because of the inclusion of non-actives under the Regulation. This will mean that the UK will continue to use Regulation 1408/71 for third country nationals.

Material scope

Social security benefits, special non-contributory benefits and social assistance.

However, in practice the boundaries between social assistance and social security in the UK are blurred. Income Support, income-based Jobseeker’s Allowance and the Pension Credit are non-contributory means-tested benefits that play two roles. In one role they act as social assistance. However, Income Support is also payable to disabled people and lone parents who are not required to be available for work; non-contributory means-tested Pension Credit is used to top up pensions for people whose contributory pension is not sufficient; and income-based Jobseeker’s Allowance is payable from the beginning of a claim to people who do not have entitlement to contributory Jobseeker’s Allowance (JSA) and replaces contributory Jobseeker’s Allowance when entitlement to that benefit expires after six months.

When Regulation 647/2005 amended Annex Ila to reflect a series of ECJ judgements, the UK continued to list Disability Living Allowance, Attendance Allowance and Carer’s Allowance (along with State Pension Credit, Income-based Jobseeker’s Allowance and Income Support) as special non-contributory benefits in Annex Ila. The Judgement in Case C-299/05 delivered on 18th October 2007 found that these benefits – with the exception of the mobility component of Disability Living Allowance - are sickness benefits within the meaning of Article 4 (1) (a) and are therefore exportable.

The position of Disability Living Allowance is complicated by the mobility component which the Court considers meets the criteria for inclusion in Annex Ila. However, Disability Living Allowance is listed as a whole, without mentioning the care and mobility components separately, so the Court stated that the entry can only be removed as a whole. The Court acknowledged that would mean removing, from Annex Ila, a benefit, parts of which satisfy the conditions for special benefits. However, it concluded that, in the interest of legal certainty, the entry as a whole cannot be maintained because it would be unclear to those Disability Living Allowance claimants who do not qualify for the mobility component, that the benefit is not in fact a special non-contributory benefit that can only be claimed in the place of residence.

General Principles

Equality of treatment

Pension Credit and Gender Discrimination

There are two components of the Pension Credit: A guaranteed level of income below which no pensioner should see her or his income fall; and a savings credit designed to ‘reward’ claimants who have modest levels of income from a state retirement pension or from occupational or personal pension schemes. The UK considers the Pension Credit to be a ‘special non-contributory benefit’ under Regulation 1408/71. There is an important gender dimension to the Pension Credit. Whereas 85 per cent of men reaching retirement age in 2005 had an entitlement to a full basic State Pension,
this compared with only 30 per cent of women. As a result of changes to the basic State Pension it is expected that around three-quarters of women reaching State Pension age in 2010 will be entitled to a full basic State Pension, compared with around half of women who would have been without the changes. It is estimated that over 90 per cent of women (and men) reaching State Pension age in 2025 will be entitled to a full basic State Pension. In the meantime the introduction of Pension Credit has improved the position of women, with two-thirds of recipients being female (White Paper, 2006). However, it could be argued that in making the Pension Credit non-exportable women are indirectly discriminated against as it is mainly women rather than men who cannot as a consequence take this component of their pension with them if they wish to retire abroad.

**Discrimination against same sex couples**

The Civil Partnership Act 2004 amended the charging Regulations to include the words “civil partner” after the word “spouse” wherever it occurs. These changes are taken into consideration in the 2007 amendment to the National Health Service (Charges to Overseas Visitors) so that civil partners are treated the same as spouses in charging for healthcare treatment. An exemption from charges will extend to a civil partner in all cases where it would do so to a spouse. Civil partners will have to show evidence of their legal partnership to be considered eligible for free treatment, in the same way as spouses do currently.

The Act also requires that unions comparable to civil partnerships authorised under the legislation of other countries must also be recognised.

Recognition of same sex couples’ civil status varies between Member States. Some countries accord same sex marriage; others have same sex civil union/partnership laws; while others do not allow registration of same sex relationships but provide some benefits for same sex partners. Some EU member countries do not recognise same sex relationships.

Social security entitlements mediated by the various civil statuses accorded to same sex couples within the EU Member States present serious barriers to free movement.

**Right to Reside**

On May 1st 2004 the Social Security (Habitual Residence) Amendment Regulations 2004 became effective. The amendment introduced a further test for receipt of the income-related benefits: Income Support, State Pension Credit, Jobseeker’s Allowance, Housing Benefit and Council Tax Benefit.

At the UK trESS seminar an NGO (The Child Poverty Action Group) argued that:

- The Right to Reside test is excluding large numbers of claimants from entitlement to any UK benefits;
- The Coordination rules are failing;
- Pregnant or sick EEA workers are often left with no work or benefit reliance on Red Cross for food.

Two main problems were identified:

- Lack of awareness by claimants of rights to aggregate benefits such as maternity/sickness benefits and DWP not proactive in notifying claimants of these rights
- Special non contributory benefits such as Income Support are not payable unless the person has right to reside or permanent residence. There is no acceptance in the UK that a person covered by 1408/71 can claim Income Support under Regulation 1408/71 and can therefore be self supporting to gain the right to reside (Pamela Fitzpatrick, CPAG presentation to UK trESS seminar London 19 June 2009).

An increasing number of cases concerning the Right to Reside test are coming before UK Tribunals/Courts.

The *Patmalniece* case concerns a Latvian citizen whose claim for asylum in the UK was turned down but she was not deported. Her subsequent claim for State Pension Credit was disallowed on the
grounds that she had no right of residence and therefore could not be treated as habitually resident in the UK. She appealed to the Appeal tribunal on the grounds that Article 3(1) of Regulation 1408/71 forbids discrimination on the grounds of nationality and that a residence test which all UK nationals can satisfy while some non nationals cannot, represents a direct and unjustifiable discrimination contrary to Article 3(1). The tribunal found in her favour citing Collins v Secretary of State for Work and Pensions (Case C-138/02) to reason that a residence clause may be justified only “on the basis of objective considerations that are independent of the nationality of the person concerned and proportionate to the legitimate aim of the national provisions and that while the aim might be legitimate, the Right to Reside test was certainly not independent of the nationality of the person concerned”. The tribunal said that it suspected that the same result could be achieved by reference to Article 12 of the EC Treaty. The Secretary of State appealed against the Appeal tribunal’s decision to the Social Security Commissioner. The appeal was stayed to await proceedings that culminated in the decision of the Court of Appeal in Abdirahman v. Secretary of State for Work and Pensions that a condition of a right of residence for entitlement to Income Support was legitimate notwithstanding Article 12 of the EC Treaty. In Abdirahman, the Secretary of State presented the argument to the Court of Appeal that the cases did not fall within the scope of the EC Treaty because EU law did not extend to cases where no right of residence exists under either the Treaty or the relevant domestic law and that therefore the question of indirect discrimination contrary to Article 12 does not arise. The Court of Appeal accepted this argument and added that if, as had previously been conceded before the Commissioners, there was indirect discrimination against non UK nationals, this was justified as a legitimate response to the manifest problem of ‘benefit tourism’.

In this Case Patmalniece, the Commissioner followed Abdirahman which he said “helpfully makes clear ... that the arguments fall to be raised under Article 18 first. Whether or not the claimant has a right of residence in the host Member State then determines whether or not he or she is entitled to be treated in the same way as nationals of the Member State in relation to social assistance.”

The Commissioner reasoned that the fact that, in many other contexts, the European Court of Justice has said that unequal treatment must be justified on grounds independent of nationality, does not lead to the conclusion that nationality must always be a totally irrelevant consideration where social assistance is concerned. This, the Commissioner reasoned, followed from the principle that Member States have greater obligations to their own citizens than to nationals of other Member States which is evidenced by the fact that persons who depend on social assistance will be taken care of in their own Member State. Therefore, while the Commissioner accepted that Article 3 of Regulation 1408/71 might preclude the imposition of a condition of a right of residence in the host member country in respect of a social security benefit within the scope of the Regulation, he did not accept that it precludes the imposition of such a condition in respect of a special non-contributory benefit, at least in the case of a benefit that is income-related and had particularly strong characteristics of social assistance. This case is heavily criticised.

Export of benefits

Following the Judgement of the Court of Justice that Attendance Allowance, Carer’s Allowance and Disability Living Allowance (care component) are sickness benefits within the meaning of Article 4 (1) (a) and are therefore exportable to other member countries (Case C-299/05) new eligibility criteria for payment of these benefits within the EEA and Switzerland were published.

On 24th February 2009 the Parliamentary Under-Secretary of State for Work and Pensions told the House of Commons that having now carefully considered the full terms of the Judgment and the provisions of European legislation which coordinates social security systems, details of the eligibility criteria for payments of the disability benefits have been posted on the Government’s website. The detailed guidance issued by the Department for Work and Pensions states in sum that a person claiming from abroad must still meet the usual entitlement conditions with the exception that they no longer have to be normally resident or present in the UK. In addition a person must have spent at least 26 of the previous 52 weeks in the UK at the date on which entitlement to the benefit can be established, unless they are: a posted or frontier worker; a family member of a worker in the UK, including posted or frontier workers; claiming Disability Living Allowance (care component) or Attendance Allowance, or under the special rules for terminally ill people.

A decision was also made on the effects of the decision for claimants with awards of Attendance Allowance, Disability Living Allowance (Care) or Carer’s Allowance moving to another EEA Member
State or Switzerland on or after 18 October 2007, or who had moved before that date but where a decision on continued entitlement was still outstanding.

The Memo guides the Decision Maker that where she receives a claim to, or a request to reconsider an earlier disallowance of, Attendance Allowance, Disability Living Allowance (Care) or Carer’s Allowance from someone living in another EEA member state, she should consider in the following order:

1. whether the UK is the competent state, and if so,
2. whether the past presence test is satisfied at the date that entitlement to benefit can first be established and if so,
3. whether disability conditions or caring conditions of entitlement are met.

The claimant will not be required to be ordinarily resident or present in Great Britain.

An NGO argues that the claim should end when another Member State becomes the competent institution. However, the Department for Work and Pensions’ position appears to be that the claimant will lose their Attendance Allowance, Disability Living Allowance (Care component) and Carer’s Allowance either at the point where the benefit comes up for renewal or when they are no longer insured from the contributions previously paid to the UK. It may be that the UK is taking the position that the person is no longer subject to the legislation of the UK and under Article 13(2)(f) of the Regulation has become the responsibility of the Member State in which they now reside. However, in respect of non UK EEA nationals in the UK, according to this NGO, the Department for Work and Pensions and HM Revenue and Customs appear to take the opposite view that non UK EEA nationals in the UK are not able to rely on Article 13(2)(f) as this applies to the place of residence and the right to reside of a person who are not economically active is subject to their not being a burden on public funds.

The NGO has questioned the validity of the past presence test. It stated that “The UK now appear to consider that the past presence test is not a residence test but is a justified way of establishing a necessary link with the UK. But this necessary link appears to be an additional condition to those allowed in 1408/71 for sickness benefits.”

It is understood that the European Commission has initiated Infringement Proceedings against the UK in respect of the past period of residence test.

Main issues

In national cases questions arise whether the Mobility component of Disability Living Allowance is a Sickness Benefit under Regulation 1408/71. A national judge eg. considers that “is also a question whether the ECI in that case was right, in the light of the specific terms of Regulation No 1408/71, to treat the care component and the mobility component as if they were separate benefits, rather than treating DLA as a single benefit, which would then have to be classified as a sickness benefit regardless of how mobility component would have been classified if it stood on its own.” Questions are asked to the European Court of Justice.

Applicable legislation

Standard de-minimis period for when to obtain an E101

Observations and comments from representatives of international business are that there is no standard de-minimis period for when to obtain an E101. A common question is: when does a business trip become a short term assignment and therefore an E101 is needed? Representatives of international business suggest that a standard period accepted and consistently applied in all countries would help.

Graduate recruitment

Many multinational companies recruit graduates from universities across the EU/EEA with part of their graduate ‘induction’ often being a requirement to work in several countries for short periods for, perhaps, the first 2 - 3 years of employment. Where graduate recruits enter a UK employment contract and the UK company ‘posts’ them to several countries for short periods, HM Revenue and
Customs (HMRC) is not, according to some business representatives, amenable to allowing Article 14.1(a) to apply unless the person works in the UK for many weeks/months first. According to some representatives of international companies this gives the employee a fragmented insurance record at the beginning of their career and significant administrative problems in paying the host country contributions where the host entity does not include the employee on the local payroll.

*People who normally work in two or more Member States*

There are sometimes compliance problems with people who normally work in two or more Member States and are no longer resident in the UK, but who wish to be UK insured because the UK is cheaper than the Member State they are in. HMRC suggests that “these people also sometimes seem to have difficulty accessing family benefits in other Member States.”

*People working on the Continental Shelves, especially in the North Sea.*

Representatives of international business suggest that there is an inconsistent approach to whether Regulation 1408/71 is applicable to each country’s ‘own shelf’ and how to treat employees moving regularly from one ‘shelf’ to another.

**Main issues**

*National Insurance Numbers*

HMRC carried out an extensive study using market research and external consultants that identified an issue with the issue of National Insurance Numbers - the process can, at times, be slower than employers would like. These are administrative issues and steps are being taken by the DWP to speed this process up. As a result of this study, foreign language provision in Community languages has also been improved.

*Graduate recruitment*

HM Revenue and Customs’ view is that the issue often involves people who have little or no connection with the UK and the posting would not comply with Article 14 (1) (a) of EC Regulation 1408/71 or Administrative Commission Decision 181 of 13 December 2000. In these cases, the worker is given a contract with a UK company but will not be living and working in the UK for any significant length of time and often has no prior insurance record to continue when “posted”. Sometimes, the worker is posted back to their home country expressly in breach of Administrative Commission Decision 181, or is recruited in Member State A by a business in Member State B (the UK) for immediate posting in Member State C – also in breach of Administrative Commission Decision 181. The UK business appears to have been chosen to hold the contract (as opposed to the companies in other Member States where the worker is actually working) in order to reduce compliance costs.

*Mariners*

Article 13 EC Regulation 1408/71 creates an issue for the UK around non-UK resident Mariners on UK flagged vessels where HM Revenue and Customs find they are often non-compliant. This view is supported by representatives of international business who identify problems with certain seafarers where:

(a) the vessel is not flagged to an EU/EEA country

(b) where the rule of the [EU/EEA] flag dictates an illogical liability and the special provisions in Article 14b do not apply.
IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS

**Sickness benefits**

**BENEFITS IN KIND**

*Concept of urgent health care*

There are still occasions when other member countries (for example Austria and Germany) do not accept a UK EHIC. The UK has raised this at the Audit Board at the European Commission to ensure that healthcare providers in all Member States understand the rules.

Since April 2008 the UK now requires people from another Member State who need urgent treatment in the UK to present an EHIC because without this the Department of Health cannot recover costs. An EU national who needs urgent treatment but does not have their EHIC will be treated in the same way but may have to pay the hospital and recover the costs from their own administration on their return.

*Reimbursement of benefits*

The UK has difficulty establishing accurate actual costs in order to make its claims on other Member States. It invariably seeks to apply the terms of Regulation 574/72 in accordance with Article 36 of the Regulation. The UK uses a mixture of cost waivers (Luxembourg and Denmark) actual costs, ‘constructed’ actual costs and lump sums. Agreements are concluded bilaterally and vary from country to country. Procedures vary from country to country and groups covered.

Recently the UK has put a procedure in place under which it pays each of the other 27 member countries at least once a year. This has the added value of strengthening links between the Department and the responsible institutions in the other countries.

**BENEFITS IN CASH**

*Assimilation of facts: Main issues*

Classification of Disability Living Allowance, Attendance Allowance and Carer’s Allowance. It could be argued that DLA, CA and AA do not fit comfortably into the Sickness Chapter as cash benefits for sickness under 1408/71 are short term income replacement benefits for people who are temporarily sick and are not generally exportable under EU law, while Attendance Allowance, Carer’s Allowance and Disability Living Allowance appear to have more in common with long term disability benefit. The Child Poverty Action Group reports having received numerous calls from advice workers working with people over pension age asking for clarification.

*Invalidity*

*Export of benefits*

The requirement to undertake work-related interviews, agree an action plan and participate in some form of work-related activity as a condition of entitlement to the Employment and Support Allowance is likely to present new administrative challenges - and perhaps some issues around the classification of the new benefit - in cases where the recipient has or wishes to export her or his allowance to another member country. If a similar scheme exists in the host country then one solution would be to require the person to engage with the requirements of that country’s scheme. However, as this type of scheme is not widespread in the EU, this is likely to provide a solution in some cases only. Where the country of residence does not have a similar scheme, it is not yet clear how the requirement to undertake a work-focused interview may be addressed. The UK is exploring options of bilateral arrangements and a pilot has been discussed with the relevant Dutch institutions on subjecting each other’s pensioners to labour market tests.

However, more difficult would be where the claimant is then required to participate in some form of work-related activity. Requiring someone in receipt of Employment and Support Allowance to
undertake that activity in the UK would restrict the exportability of the benefit. It is not clear yet how this conditionality will be satisfied where UK customers live abroad.

Employment and Support Allowance is a new integrated contributory and income-related allowance that from October 2008 will replace Incapacity Benefit and Income Support paid on the grounds of incapacity for all new claimants.

To date the Personal Capability Assessment, which, like the Work Capability Test, is also based on tests of functionality, has given rise to some difficulties. The standard form for reporting examination, the E 213 is considered by the UK to be incompatible with the ‘Personal Capability Assessment’ and requested in 1994 that the Commission introduce a non-standard E form for the UK. The Commission did not want to set this precedent but asked the other member countries to look favourably on the new UK format.

Many country’s administrations have agreed to complete the UK form instead of the E213 and in these circumstances the arrangement generally work well

In countries where agreement has not been reached the DWP is able to commission reports from doctors independently, although this is more costly and time consuming. In Spain where caseloads are relatively high, the DWP has identified specific English speaking doctors who have agreed to carry out these reports for a set fee, this limits the costs and makes administration easier.

Old-age and death

Main issues

Discrimination against women in listing the Pension Credit as a special non-contributory benefit in Annex 11a. The Pension Credit is considered by the UK to be a ‘special non-contributory benefit’. There is an important gender dimension to the Pension Credit. Whereas 85 per cent of men reaching retirement age in 2005 had an entitlement to a full basic State Pension, this compared with only 30 per cent of women. The introduction of Pension Credit has improved the position of women, with two-thirds of recipients being female (White Paper, 2006). However, it could be argued that in making the Pension Credit non-exportable women are disproportionately disadvantaged.

Family benefits

Additional remarks

Family benefits for family remaining in another member state

CPAG (Child Poverty Action Group) report a number of calls regarding people who would qualify for Child Benefit or Child Tax Credits for children living in other Member States. However CPAG say that the UK refuse to pay on the basis that the children are the responsibility of another person (usually a grandparent) and that the grandparent should make a claim in the other Member State. The benefit rates in the other Member State (often A8 states) are not as high as UK benefits so the parents feel they are losing out. They are paying tax in the UK but cannot access UK family benefits – although in point of fact, UK family benefit legislation does not link entitlement to such support to liability to tax. The children are usually staying with a grandparent until the parents get settled in the UK, or the parents may not intend to settle in the UK but return after a period of work.

HMRC has pointed out that if the claimant in the UK satisfies all of the relevant conditions of entitlement, then family benefits would be awarded. In principle, HMRC would not inform a claimant that they are ineligible for a family benefit because the children in another Member State are being looked after by a third party.

A lot of discussion arises in particular concerning the exportability of child benefit, when the child does not live in the UK. The question in particular is to what extent a claimant could benefit from Art. 73 of Regulation 1408/71, when he is not employed or self-employed at the time of the claim.